IHC Pte Ltd v Mustafa Ali Jumabhoy
[2000] SGCA 10

Case Number : CA 101/1999

Decision Date : 28 February 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; L P Thean JA

Counsel Name(s) : Chong Boon Leong and Chong Teck Yion (Rajah & Tann) for the appellants; Harish Kumar (Chor Pee & Partners) for the respondent

Parties : IHC Pte Ltd — Mustafa Ali Jumabhoy

Contract – Formation – Proposed capitalisation exercise involving injection of funds into appellant – Whether agreement that respondent will contribute certain shares to appellant exists – Gleaning Agreement from all relevant facts and surrounding circumstances including admissions by respondent and signing of blank transfer

Contract – Formation – Proposed capitalisation exercise involving injection of funds into appellant – Whether agreement that respondent will contribute certain shares to appellant exists – Documentary evidence – Blank transfer – Objective test of agreement

Equity – Defences – Shares held by appellant on constructive trust – Whether recovery of shares constitutes breach by respondent of agreement made with other parties

(delivering the judgment of the court): This appeal relates to a dispute over 2,167,000 shares in Scotts Holdings Ltd (`Scotts Holdings`), which is a public company listed on the Singapore Exchange. These shares were transferred to the appellant in October 1993 and are presently still registered in its name. On 15 April 1997, the respondent commenced proceedings against the appellant to recover these shares and for an account of all the dividends therefrom. The High Court allowed the claim and against that decision this appeal is now brought.

The background facts

In this appeal, it is necessary to set out at some length the relevant background facts, as the claim and the defences raised can only be properly considered in the context of these facts. The respondent is one of the four children of the late Mr Rajabali Jumabhoy (`Rajabali`) and Madam Fatimabai (`Madam Fatimabai`) and is one of the beneficiaries under the two settlements created by Rajabali and Madam Fatimabai respectively (hereinafter referred to as the `Rajabali settlement` and the `Fatimabai settlement`). The other beneficiaries are his siblings: his older brothers Ameerali Rajabali Jumabhoy (`Ameerali`) and Yusuf Rajabali Jumabhoy (`Yusuf`) and his younger sister Perin Jumabhoy Mooraj (`Perin`). The Fatimabai settlement was made in November 1956 and the Rajabali settlement in January 1957 and were made in respect of the two properties, No 6 and No 8 Scotts Road (`the properties`) owned by Madam Fatimabai and Rajabali respectively.

The Fatimabai settlement terminated on 25 November 1976 and No 6 Scotts Road thereafter vested in the respondent and his siblings in equal shares. However, the Rajabali settlement remained in effect. The beneficiaries, in particular Ameerali, Yusuf and the respondent were seriously considering what should be done in relation to the two trust properties. These properties are centrally located in Singapore`s prime shopping and hotel district, and the beneficiaries saw great potentials in them. With the consent of Rajabali, they decided to develop the properties, and having regard to the terms of the settlements in relation to the powers of the trustees it was decided that a limited company should be formed to carry out the development. Accordingly, Scotts Holdings was incorporated on 29

March 1979 as a private company and was to be the vehicle through which the properties were to be developed. Ameerali, Yusuf, the respondent and Rafiq became the directors of Scotts Holdings with Ameerali being the chairman and managing director. In April 1979, Scotts Holdings purchased from the trustees of the two settlements the two properties at the price of $625 per sq ft, and based on this rate the purchase price of No 8 Scotts Road was $25,039,375 and that of No 6 Scotts Road was $25,103,750. The first sum was satisfied by Scotts Holdings issuing 25,039,375 redeemable non-cumulative 5% preference shares of $1 each, and the second sum by the company issuing 5,000,000 redeemable non-cumulative 5% preference shares of $1 each and 20,103,750 ordinary shares of $1 each.

In addition to those shares issued, Ameerali, Yusuf and the respondent each subscribed and paid for in cash 5,000 ordinary shares in Scotts Holdings. About a year later, in March 1980, they each increased their investments by subscribing for an additional 30,000 ordinary shares in the company.

In 1982 or thereabouts, Scotts Holdings came to an agreement with a Japanese company, Orient Leasing Ltd (`Orient Leasing`), whereby the latter through its wholly owned subsidiary, Croissant Investment Pte Ltd (`Croissant`), invested in Scotts Holdings by taking up shares in Scotts Holdings to the extent of 20% of the increased share capital of Scotts Holdings. One of the terms of such investment was that Scotts Holdings would be listed within five years so that Croissant could realise a return on its investment.

Since the Fatimabai settlement had terminated, the trustees of the settlement, in 1985, proceeded to distribute the assets to the four beneficiaries, Ameerali, Yusuf, the respondent and Perin. In that connection, at the suggestion of Rajabali and with the agreement of all the beneficiaries, all the shares of Scotts Holdings held by the trustees were distributed to Ameerali, Yusuf and the respondent equally, and Perin received a cash payment in the sum $5m instead of the shares.

From 1985 to 1990, the three Jumabhoy brothers created various trusts in respect of their holdings of shares in Scotts Holdings. First, on 5 July 1985, Ameerali, Yusuf and the respondent each created personal trusts over the shares from their respective entitlements under the Fatimbai`s trust. These trusts were in all respects similar and were each for a period commencing from the date of creation until 15 years thereafter or until the death of the settlor, whichever was the earlier. Secondly, in 1986 a new trust was created by Ameerali, Yusuf and the respondent in which they purported to make a settlement in respect of 49,844,035 ordinary shares and 6,269,688 preference shares in the capital of Scotts Holdings. Then, sometime in 1990 yet another family trust was created with Yusuf as the trustee under which the property settled comprised the same shares as settled in the 1986 trust. A detailed account of these trusts (`Jumabhoy trusts`) was given in the judgment of Judith Prakash J in **Rajabali Jumabhoy & Ors v Ameerali R Jumabhoy & Ors** [1997] 3 SLR 802 at [para] 16-23.

The properties, Nos 8 and 6 Scotts Road, were in due course developed, and a commercial cum residential complex was built thereon. The commercial portion consists mainly of a shopping centre known as Scotts Shopping Centre, whilst the residential portion consists of service apartments known as the Ascotts Service Apartments. By the late 1980s, the business of Scotts Holdings was doing well, and the directors and those involved in the management of Scotts Holdings felt that the time was ripe for the shares of Scotts Holdings to be listed on the stock exchange, then known as the Stock Exchange of Singapore Ltd. All the shareholders of Scotts Holdings, including Rajabali and the respondent, agreed to the proposed listing. At that time, the shares in Scotts Holdings, save for the 20% held by Croissant, were held by the trustees of the Rajabali settlement, the trustees of the Jumabhoy trusts and by Ameerali, Yusuf and the respondent themselves individually.

There were then two major concerns confronting the Jumabhoy family in relation to the proposed listing of Scotts Holdings. The first was the ease of disposal of the shares in the company (when listed) by the various shareholders, and the second was that the Jumabhoy family might not continue to control the management of the company. The solution arrived at was to create a holding company between, on the one hand, the Rajabali settlement and the Jumabhoy trusts and, on the other, the listed vehicle, and all the Scotts Holdings shares held by the trustees of these trusts would be transferred to and be held by the holding company which in turn would issue its shares to the trustees with the result that the holding company would then be the largest single shareholder of the listed company. Effectively, it was a `share swap` exercise: the trustees would exchange the shares held by them in Scotts Holdings for the shares in the holding company. Accordingly, sometime on 27 May 1991, a company Scotts Investments (S) Pte Ltd (`SIS`) was incorporated for this purpose. Following that, on 12 July 1991 Scotts Holdings was converted into a public company.

At about this time, the parties concerned proceeded to carry out the share swap exercise. The shares in Scotts Holdings held by the trustees of the Rajabali settlement and the Jumabhoy trusts were transferred to SIS in exchange for the issue by SIS of a proportionate number of its shares, thus making SIS the largest single shareholder of Scotts Holdings. The respondent in his capacity as trustee of several trusts is a shareholder of SIS and also a director of that company.

One of the problems encountered in the course of preparing the listing of Scotts Holdings was that it had two subsidiaries, A&W Restaurants (S) Pte Ltd (`A&W`) and Scotts Weitnauer Retailing Pte Ltd (`SWR`), which were then operating at a loss. Scotts Holdings was advised by its consultants and merchant bankers that the listing could not be achieved unless these two companies were taken out of Scotts Holdings as its subsidiaries. For this purpose, a shelf company was purchased and its name were changed to Intermediate Holdings Co Pte Ltd on 16 July 1991. That company is the appellant. In accordance with the plan for listing, the appellant acquired all the shares of A&W and SWR from Scotts Holdings and subsequently became a subsidiary of SIS, which holds 57% of the shares of the appellant. The respondent is one of the directors of the appellant and holds 9% of its shares; the other shareholders are the respondent`s brothers, Ameerali and Yusuf, and Croissant. The shareholding structure of the appellant as established was such that it replicated the shareholding structure of Scotts Holdings prior to its listing, that is, SIS, which represents the various family trusts, Ameerali, Yusuf, the respondent and Croissant, all hold shares in the capital of the appellant in proportion to their respective shareholdings in Scotts Holdings prior to the listing.

In taking over A&W and SWR the appellant had to assume and take over all the liabilities assumed by Scotts Holdings as the holding company of these subsidiaries. However, the appellant did not have the assets or funds to take care of these liabilities, and without the umbrella of Scotts Holdings, the banks of A&W and SWR wanted securities for facilities extended to A&W and SWR respectively. These facilities were necessary to keep A&W and SWR afloat. Thus, SIS had no choice but to provide securities to the banks in the form of guarantees and charges over the shares it held in Scotts Holdings. If these steps were not taken and the securities not provided, the listing exercise could not proceed and A&W and SWR could not carry on their respective operations.

Eventually, Scotts Holdings was listed on the then Stock Exchange of Singapore Ltd sometime in November 1991. Its board of directors consisted of Ameerali as chairman, Yusuf and the respondent as non-executive directors, a representative of Orient Leasing as a non-executive director, two independent directors, and Rafiq Jumabhoy (`Rafiq`) and Iqbal Jumabhoy (`Iqbal`) as the executive directors. In addition, Rafiq and Iqbal were also executive directors of SIS, and Ameerali, Yusuf and the respondent made up its other directors.

While SWR were then becoming profitable, A&W continued to operate at a loss and accumulated

sizeable losses. At a family meeting held on 21 September 1992, among other things, the question of discharge of the debts of A&W was raised and discussed. A resolution to the effect that the shareholders of the appellant, with the exception of Croissant, should provide funds to pay off A&W`s bank loans was passed at the meeting. We shall revert to this meeting and the resolution passed in some detail in a moment.

At this stage, it is also necessary to refer to a family incident which obviously had a bearing on the relationship between the respondent and the other members of the Jumabhoy family. On 19 September 1992, the respondent who was then in Penang spoke on the telephone to his eldest son, Anwar, who was then working in A&W, at the latter`s office in Singapore. Subsequently, Faez, his second son, joined in the conversation. In the course of the conversation, the respondent made some references to Rajabali dropping dead. Unbeknown to any of the three, the conversation was being taped. Shortly afterwards, the tape recording of the conversation was brought to Rafiq`s attention. He in turn told Rajabali about it who became upset, and an urgent family meeting was called by Rafiq on 26 September 1992. Present there were Rajabali and his three sons, the respondent`s three sons and Rafiq and his brothers. The tape, or a part of it, was played and members of the family were very upset. The view taken was that the respondent wanted his father to die. For sometime thereafter, as a result of this incident, the respondent and his family became estranged from his father and the other members of the Jumabhoy family.

In January 1993 or thereabouts, presumably on the instructions of Rafiq and/or Iqbal, the company secretary of the appellant, Ms Elizabeth Chelliah (`Ms Chelliah`), prepared a draft capitalisation agreement for the injection of funds into the appellant. The parties to the agreement were the existing shareholders of the appellant. The agreement contemplated a two-stage process. The first was the sale by Croissant of its 20% shareholding in the appellant to the other shareholders, and in respect of this sale, a valuation of the shares of the appellant by the auditors would be required. The second stage was the issue and allotment of 13,000,000 ordinary shares of $1 each which was to be effected by `renounceable letters of allotment` to the remaining shareholders and were to be paid by the transfer of their shares in Scotts Holdings. The value attributed to each share in Scotts Holdings for the purpose of this exercise was calculated and fixed at $0.72. On this basis, the number of Scotts Holdings shares to be transferred by the remaining shareholders to the appellant would be as follows:

(a)		SIS	:	12,820,000	;	
(b)		Ameerali	:	1,264,000	;	
(c)		Yusuf	:	1,806,000	;	and
(d)		the respondent	:	2,167,000	;	

The draft capitalisation agreement provided, inter alia, for an adjustment of the number of Scotts Holdings shares to be transferred by the shareholders in the event that the trading price of the Scotts Holdings shares, as at the close of the seven-day period after the transfer of Croissant`s shares in the appellant, was higher or lower than $0.72 per share. The draft capitalisation agreement was forwarded to Rafiq and Iqbal by Ms Chelliah on 30 January 1993 with her comments. It did not appear that a copy of such agreement was sent to Ameerali, Yusuf and the respondent for consideration.

On 12 February 1993, notices of the meeting of the boards of SIS and the appellant respectively were given. The first item of the agenda for the board meeting of SIS was as follows:

> *1 Approval for the entry into the agreement pertaining to the capitalization program of IHC Pte Ltd with regard to:*
>
> *(a) purchase of the shares in IHC Private Ltd as offered to the company by Croissant Investments Pte Ltd;*
>
> *(b) the sale and transfer of part of the company`s interest in Scotts Holdings Limited; and*
>
> *(c) application for the shares as allotted to the company pursuant to the said capitalization program.*

As for the agenda for the board meeting of the appellant, the first two items were as follows:

> *1 Capitalization of the company*
>
> *1.1 Capitalization Agreement for submission to shareholders of the company for approval.*
>
> *2 Sale of shares in company by Croissant Investments Pte Ltd*
>
> *2.1 Approval of transfer of shares in the company from Croissant Investments Pte Ltd.*

Presumably the capitalisation agreement referred to in the agenda was the draft prepared by Ms Chelliah. But no copy of the draft was annexed to or enclosed in the agenda sent to the board members. Having sent off the notice, it was then realized that such an agreement involved an issue of shares by the appellant, and as such, approval of the appellant`s shareholders was required. Notice was then given on 17 February 1993 of the annual general meeting of the appellant to be held on 20 February 1993 in place of the board meeting.

Accordingly, on 20 February 1993 the two meetings were held. The first was the board meeting of SIS, which was followed immediately by the annual general meeting of the appellant. We shall refer to the minutes of these meetings in detail in a moment.

Following the SIS board meeting and the annual general meeting of the appellant on 20 February 1993, the respondent signed and handed over a share transfer form intended for the transfer of his Scotts Holdings shares to the appellant. However, no action was taken by anyone on behalf of the appellant in relation to this transfer until some six months later.

On 21 September 1993, the secretary of Scotts Holdings, Ms Susie Tan (`Ms Tan`) wrote to Ameerali, Yusuf and the respondent each a memorandum on the letterhead of Scotts Holdings, inviting them to submit their applications to the Central Depository Pte Ltd (`CDP`) for conversion of their respective shares in Scotts Holdings into `scripless` shares and lodge such shares with CDP for such

conversion. She also offered to do it for them on their behalf. Enclosed in the memorandum is a completed transfer form in favour of the CDP. Apparently not having received any reply from any of them, Ms Tan on 28 September 1993, sent a reminder to Ameerali, Yusuf and the respondent respectively, and in that reminder again a transfer form was enclosed. Ameerali and Yusuf must have responded to Ms Tan`s second memorandum, because the transfers of their shareholdings in Scotts Holdings were lodged with the CDP on 4 and 6 October 1993 respectively. On 8 October 1993, the respondent replied to Ms Tan`s memorandum of 28 September and forwarded to her the signed transfer form and his share certificates Nos 3, 11 and 12 for a total of 16,857,419 shares in Scotts Holdings.

Upon receipt of the respondent`s letter of 8 October 1993 with its enclosures, Ms Tan acting on the instructions of Rafiq and Iqbal took the following steps. First, she applied to Lim Associates (Pte) Ltd, the registrar of Scotts Holdings, to combine and split the share certificates for the 16,856,419 shares into two certificates: one for 14,689,419 and the other for 2,167,000 shares. In due course, she received the two certificates: one for 14,689,419 and the other for 2,167,000 shares. She then proceeded to effect the transfer of 2,167,000 shares to the appellant and in so doing, she made use of the transfer form signed by the respondent on 20 February 1993.

On 30 December 1993, Ms Tan wrote a memorandum to the respondent informing him, inter alia, that in accordance with the minutes of the board meetings of SIS held on 20 February 1993 and 26 June 1993 and the shareholders` meeting of the appellant held on 20 February 1993, 2,167,000 of the respondent`s Scotts Holdings shares had been transferred to the appellant, and she enclosed a fresh transfer form for the remaining 14,689,419 shares in Scotts Holdings for execution and return so that these shares could be lodged with CDP to be credited to his account. The respondent did not see Ms Tan`s memorandum when it arrived as he was away in Pakistan. On 16 February 1994, presumably after seeing Ms Tan`s letter and noticing that his 16,857,419 Scotts Holdings shares had not been credited to his CDP account, he wrote to Ms Tan on 16 February 1994 as follows:

> *...*
>
> *I am alarmed to find that the transfer to CDP has not been effected. Your memo of 28 September 1993 states that you are arranging for the same and this I would take to mean pre-paying the nominal stamping and administration fees.*
>
> *Please therefore either [effect] the transfer of my shares to CDP or return the same via registered mail to me within 14 working days of receipt of this letter.*
>
> *...*

On 1 March 1994, the respondent wrote to the executive director of the appellant stating, inter alia, that he had not authorised the transfer of any of his Scotts Holdings shares to the appellant, and that Ms Tan`s transfer of 2,167,000 of the shares would amount to a `breach of her trust as company secretary`. The respondent went on to demand the return of all his Scotts Holdings shares for lodgment with the CDP.

On 22 March 1994, the appellant in a letter signed by Iqbal as a director of the appellant replied to the respondent stating that there was an agreement that the 2,167,000 shares were to be transferred to the appellant and that the secretary acted in accordance with the instructions of the

board, and that there was no question of any breach of trust or duties on her part.

Meanwhile, pressure was mounting for Scotts Holdings, now a public listed company, to clear the debts owing to it by the Jumabhoy family companies. Accordingly, Ameerali`s and Yusuf`s contributions totalling 3,070,000 Scotts Holdings shares along with 3,700,000 Scotts Holdings shares contributed by SIS were sold and the proceeds were used to discharge the debts of A&W and two other family companies, Connoisiers Pte Ltd and Lion City Holdings Pte Ltd, owing to Scotts Holdings and Citibank, NA. Apart from transferring the 3,700,000 shares, SIS did not transfer the balance of the 12,820,000 shares in Scotts Holdings which it had agreed to transfer. Apparently all the Scotts Holdings shares of SIS were then the subject of an option granted by SIS to Rafiq in September 1992, which later became the subject of legal proceedings between various members of the Jumabhoy family: see Rajabali Jumabhoy (supra). On 6 December 1995 the following board resolution of SIS was passed:

> *That the company directs its directors not to effect the transfer of any of its SHL shares to IHC [the appellant].*

The respondent was one of the parties who voted in favour of this resolution.

On 30 April 1997, the appellant succeeded in selling the entire issued share capital in A&W to a purchaser, and it was a term of the sale that all the liabilities of A&W owed to appellant and SIS be capitialised and converted into fully paid shares and such shares be transferred to the purchaser. After the completion of the sale there was a resulting shortfall to the appellant to the extent of about $30m.

The respondent`s 2,167,000 Scotts Holdings shares transferred to the appellant have not been sold and are still being held by the appellant, and the respondent demanded for the return of these shares.

The claim

On 15 April 1997, the respondent instituted an action against the appellant seeking the return of 2,167,000 shares in Scotts Holdings. The basis of his claim was that the certificates for his 16,857,419 shares were requested by Ms Tan on behalf of Scotts Holdings and were sent by him to Scotts Holdings for a specific purpose, namely, for conversion to `scripless` shares to be credited to his CDP account. Scotts Holdings was thus a trustee for the respondent in respect of these shares, and in breach of trust, Scotts Holdings transferred 2,167,000 out of the 16,857,419 shares to the appellant by using the respondent`s signed transfer form handed by him to the appellant on 20 February 1993, pending finalisation of the capitalisation agreement. The appellant at the time of receipt of these shares was fully aware of the breach of trust on the part of Scotts Holdings and was therefore a constructive trustee of the respondent in respect of the shares and was liable to return the shares and account for the dividends it received.

The defence

The defence of the appellant was twofold. First, there was an agreement arrived at on or about 20 February 1993 between SIS, Ameerali, Yusuf and the respondent, whereby (i) they each agreed to transfer to the appellant an agreed number of shares in Scotts Holdings as their respective contributions to the appellant; (ii) the appellant would be at liberty to sell and dispose of such number

of shares as necessary and apply the proceeds therefrom to discharge all its debts and liabilities; (iii) upon the discharge of such debts and liabilities the appellants would allot to each of them additional shares in its capital as consideration for such of the Scotts Holdings shares that had been sold and disposed of; and (iv) the balance of any Scotts Holdings shares remaining with appellant would then be returned to them in proportion to their contributions to the appellant. Therefore, the appellant was not a constructive trustee of the 2,167,000 Scotts Holdings shares transferred to it. The second defence is an equitable one and it is this. The respondent`s claim for the recovery of the shares should be disallowed, on the ground that the return of the shares to the respondent would be a breach by the respondent of the agreement made between SIS, Ameerali, Yusuf and the respondent, which predated the existence of the alleged constructive trust.

The trial judge found that there was no agreement reached between the parties with reference to the transfer of shares in Scotts Holdings to the appellant, and that the shares were sent by the respondent to Scotts Holdings for conversion into `scripless` shares and for lodgment with the CDP to be credited to his account, that the transfer of the 2,167,000 shares to the appellant was in breach of trust on the part of Scotts Holdings, and that the appellant received the shares with knowledge of the breach of trust. Accordingly, the learned judge found that the appellant was a constructive trustee of these shares and gave judgment in favour of the respondent. The equitable defence raised by the appellant was not dealt with by the trial judge; presumably it was not necessary for him to do so.

The appeal

Before us the appellant is not appealing against the finding of the learned judge that Scotts Holdings in transferring the 2,167,000 shares to the appellant was in breach of trust and that the appellant received the shares with knowledge of the breach. The appellant raises the equitable defence as was raised below. It is this: that the court should not exercise its equitable jurisdiction to assist the respondent in his recovery of the shares on the ground that the return of the shares to the respondent would constitute a breach of the agreement made between SIS, Ameerali, Yusuf and the respondent. This defence is premised on the existence of the agreement made between those parties. If there was no such agreement, the equitable defence does not fall for consideration. It is therefore necessary to consider first whether there was this agreement made between the parties as claimed by the appellant.

The agreement

It is argued by counsel for the appellant that the learned judge did not make a finding or determination as to whether there was an agreement between those parties and we are invited to make a finding on this issue. Turning to the judgment, we find that the learned judge has made a finding. He referred to the minutes of the board meeting of SIS and the annual general meeting of the appellant held on 20 February 1993, and said at [para] 59 of his grounds of judgment:

> *These minutes do not reflect an agreement by the plaintiff to inject 2,167,000 SHL shares into the capital of the defendant. It was Rafiq`s exposition of the formula for the capitalisation scheme predicated on Croissant divesting its shareholding to the remaining shareholders. This is confirmed by cll 1, 2, 6 and 7 of the draft capitalisation agreement.*

The learned judge then referred to the resolution passed at the annual general meeting of the appellant, which authorised the directors to enter into an agreement with the shareholders of the company that set out the pre-emption of the shares held by Croissant Investments Pte Ltd and the offer and acceptance of additional shares in the company to the remaining shareholders, and said at [para] 61:

> *This resolution only authorised the directors to enter into a capitalisation agreement based on Croissant divesting its shares in the company and the offer to and acceptance by the remaining shareholders of additional shares. It does not constitute or evidence an agreement on the part of the plaintiff to inject 2,167,000 SHL shares into the company.*

It is next submitted by counsel for the appellant that the learned judge had in mind the draft capitalisation agreement prepared by Ms Chelliah, because the learned judge at [para] 59 (quoted above) and 62 referred to the draft agreement and various matters present therein. At [para] 62 he said:

> *If there was an enforceable agreement giving rise to an obligation on the part of plaintiff to inject additional capital into the defendant by way of transfer of SHL shares, the conditions precedent have not taken place, that is, no valuation of the company has been carried out to determine the value of Croissant`s shares. Croissant has not divested its shares. Accordingly, the seven-day period envisaged in cl 7 of the draft capitalisation agreement for determining the trading price of SHL shares has not come to pass. Without the price of SHL shares being determined, the number of such shares to be injected by each shareholder cannot be arrived at.*

In counsel`s submission, that was not the agreement relied upon by the appellant, and it is not the appellant`s case that the agreement in question was the draft capitalisation agreement. That draft is not relevant, and nothing turns on it. We think that counsel`s submission on this point is correct. That was not the agreement which the appellant says was made between the parties. The agreement that was made was an oral agreement made on or about 20 February 1993, and the primary terms of this agreement were set out in [para ] 30 of Iqbal`s affidavit of evidence-in-chief:

> *By the Recapitalization Agreement, it was agreed, inter alia, that:*
>
> *i SIS, ARJ, YRJ and the plaintiff would each transfer the aforesaid agreed number of their own SHL shares to the defendant as consideration for the allotment of additional shares in the capital of the defendant;*
>
> *ii the defendant would hold the SHL shares received from its shareholders pending the proposed sale of A&W;*
>
> *iii upon the sale of A&W by the defendant, the defendant would sell such amounts of the SHL shares received from SIS, ARJ, YRJ and the plaintiff to discharge any shortfall resulting from the said sale;*
>
> *iv after discharging the said shortfall, the defendant shall allot to each of SIS, ARJ, YRJ and the plaintiff additional shares in its own capital for such SHL shares which have been actually sold by the defendant to discharge the said shortfall;*

and

v the balance of any SHL shares remaining will then be returned to SIS, ARJ, YRJ and the plaintiff.

It seems to us that, stripped of the verbiage, the essence of this agreement which the appellant says was made by the relevant parties, namely, SIS, Ameerali, Yusuf and the respondent, was that they would each contribute to the funds of the appellant by transferring to the appellant an agreed number of their shares in Scotts Holdings, which the appellant would then realise and use the proceeds to pay off the debts owed by A&W to its bank. It seems to us also that this agreement in principle was hatched at the family meeting held on 21 September 1992, to which we now revert.

Family meeting

The parties present at that meeting were Rajabali, Ameerali, Yusuf, the respondent, Rafiq and Iqbal. Various matters were raised and discussed at the meeting and one of the matters was the question as to how to clear the debts of A&W. Rafiq presented the amounts due to clear the debts of A&W and suggested that the shareholders of the appellant sell their shares in Scotts Holdings to raise funds to discharge the debts of A&W. He proposed that the appellant`s shareholders, except Croissant, namely, SIS, Ameerali, Yusuf and the respondent, should provide funds to pay off A&W`s bank loans. That proposal was approved or endorsed by all the parties present. It was there resolved that the funds would be made available by the shareholders of the appellant, namely, Ameerali, Yusuf, the respondent and SIS, in order to enable the appellant to clear the bank loans owed by A&W. The minutes of the meeting, so far as material, were as follows:

IHC

Rafiq Jumabhoy presented the amounts due to clear the debts of A&W. Shares would have to be sold by the shareholders of IHC to pay the shortfall.

Rafiq Jumabhoy also informed the meeting that the companies under IHC could then be retained or sold, this decision to be taken in association with Orix [referring to Croissant] who are also shareholders. (It was to be noted that SWR is in substantial profit but not A&W.)

YR Jumabhoy [Yusuf] expressed that the funds must be made available and that of course they would.

It was resolved: that funds would be made available by all shareholders (ie. ARJ, YRJ, MRJ, Scotts Investments) in the proportion of shares held to IHC in order to clear A&W`s bank loans.

There was no objection raised to what Rafiq proposed and to the resolution that was passed. On the contrary, Yusuf expressly declared that funds must be made available to the appellant. This proposal was fully in conformity with the plan for the public listing of Scotts Holdings to which the members of the Jumabhoy family, and in particular, Ameerali, Yusuf and the respondent, were privy. There was

also no dispute as to the accuracy of these minutes in any respect. In our opinion, there was undoubtedly a commitment by the following shareholders of the appellant, namely, SIS, Ameerali, Yusuf and the respondent, that they would each make available funds to the appellant to enable it to clear the loans owed by its wholly subsidiary, A&W, to the bank.

The respondent in his affidavit said that the minutes were prepared at the behest of Ameerali, Rafiq and Iqbal, that the resolution had `more the character of an edict`, that he was never asked to agree to the course of action, that he remained silent since his consent was not sought, and that he gave no consent to the resolution. We have the following observations on this evidence of the respondent. First, Ameerali, Yusuf and the respondent, were the major beneficiaries of the Rajabali and Fatimabai settlements, and they were the main beneficiaries in the listing of Scotts Holdings, and all of them were the parties to that listing exercise. In securing the listing of Scotts Holdings, it was necessary that, among others, A&W then a subsidiary of Scotts Holdings was to be taken out as its subsidiary, and unless this, among other things, was carried out, the listing would not be possible. It was therefore part of the plan for the listing of Scotts Holdings that A&W was to be taken out of Scotts Holdings and hived off to the appellant (which was acquired specifically for the purpose) and that A&W`s liabilities, which were quite sizeable, would be taken care of by the shareholders of the appellant. There can be no denying on the part of the respondent that he was fully aware of and was a party to this plan. The resolution passed at the family meeting was wholly in accordance with this plan. Secondly, it may be true that, by reason of Rajabali`s presence at the meeting, the resolution had `more the character of an edict`, as it is a well known fact that Rajabali, the patriarch of the Jumabhoy family, was profoundly respected by all the members of the family. It may be that the respondent agreed to the resolution out of respect for his father. In that sense the resolution had more the character of an edict. However, that `edict` did not come from Rafiq; if at all, it could only have come from Rajabali. Edict or not, the respondent must have agreed to it at the time. Thirdly, even if it could be said that he agreed to it in deference to Rajabali or `under pressure` from Rajabali and/or others present at the meeting, that was, nonetheless, a valid agreement emanating from him. Lastly, until the commencement of these proceedings, he had never voiced his disagreement to or dissent from the resolution or any matters stated in the minutes of the meeting. We therefore cannot accept the explanation given by him.

In our opinion, there was certainly an agreement reached at that meeting that the four shareholders of the appellant, namely, SIS, Ameerali, Yusuf and the respondent, would each make available to the appellant funds in proportion to their shareholdings in the appellant to enable it to pay off the loans owed by A&W to the bank. It is true that it is not the case of the appellant that the agreement between the shareholders for the transfer of the agreed numbers of shares in Scotts Holdings was made at this family meeting. On the evidence, clearly at that time, there was no agreement reached, as yet, as to how much funds each of these shareholders would contribute to the appellant, as the precise amount required was not discussed and agreed upon.

The appellant relied on a letter dated 20 October 1992 written by the respondent to Ameerali and Yusuf with a copy to Rajabali, and suggested that he had agreed to the injection of fresh capital into the appellant. Under the heading of `IHC` the respondent wrote, inter alia, the following:

> *If [Croissant] wishes to terminate their position, we have no option but accept the bottom line as at 31 October 92 from them and* ***recapitalisation has only to be made up to a certain level.***
>
> *We have to see the accounts and forecast of the Group as to the most advantageous time to sell, particularly for me as I must see the net overall result forecast as capital is required to start off afresh. [Emphasis is added]*

This particular portion of the letter was relied upon by the appellant in support. To a certain extent, this portion impliedly suggests that the respondent agreed in principle to the proposal for injecting funds into the company, ie the appellant.

Board meeting of SIS

We now come to the board meeting of SIS held on 20 February 1993. The parties present were Ameerali, Yusuf, the respondent, Rafiq and Iqbal as directors and Ms Susie Tan as the secretary. The minutes of the meeting as recorded, in so far as material, read as follows:

> *Mr Rafiq Jumabhoy (`RJ`) began with some information on the proposed agreement pertaining to the capitalisation program of IHC Pte Ltd (`IHC`). RJ explained that in order to have sufficient collateral to pay off the bank loans in the event that if IHC sells A&W (Singapore) Pte Ltd (`A&W`) and there is a shortfall, this capitalisation will off-set most of the shortfall.*
>
> *One of IHC`s shareholders, Orix Leasing Singapore Ltd, owns shares in IHC via Croissant Investment Pte Ltd (`Croissant`). Croissant desires to be released from IHC as a shareholder and has offered its shares in IHC amounting to 4,724,800 ordinary shares of $1 to the other members of IHC. An auditor`s valuation of IHC will be carried out to certify the fair value of a share of IHC and the shares will be offered to the remaining shareholders of IHC in their proportion to the number of shares held by them respectively.*
>
> *At the same time, the authorised capital of IHC is to be increased and allotted to the shareholders in proportion to their existing shareholding in IHC. It is proposed that the consideration for these shares to be allotted is to be obtained from the sale and purchase of shares held by the shareholders in Scotts Holdings Ltd (`Scotts`).*
>
> *Scotts Investments (Singapore) Pte Ltd (`SIS`), being one of the shareholders and owning 71% of the shares in IHC, will subscribe in its proportion by transferring 12,820,000 of its shares in Scotts to IHC. SIS will sell some of Scotts` shares held by SIS either by sale or transfer and use the proceeds to purchase shares in IHC for the purpose of re-capitalising. The number of shares to be transferred as provided for above is based on the trading price of $0.72 per share.*
>
> *There was tabled and produced to the meeting and workings of the percentages of each shareholder`s holding (Appendix A) as follows:*

Shareholding in IHC	-	SIS	-	57%
Croissant	-	20%		
ARJ	-	6%		
YRJ	-	8%		
MRJ	-	9%		

When shares are re-allocated, the workings will work out in accordance to the fact that Croissant will no longer be a shareholder as follows:

	SIS	-	71%
Croissant	-	0%	
ARJ	-	7%	
YRJ	-	10%	
MRJ	-	12%	

RJ went on to explain that actually ARJ, YRJ and MRJ`s (Ameerali, Yusuf and the respondent respectively) shareholdings hide the actual shareholding which is still 1/3, 1/3, 1/3 because SIS has a higher proportion of ARJ`s family trust. At $0.72 per share, SIS will sell 12,800,000 ordinary shares. YRJ sells 1,806,000 ordinary shares, ***MRJ sells 2,167,000 ordinary shares*** *and ARJ sells 1,264,000 ordinary shares. [Emphasis added.]*

Pausing here, we note that the parties present were informed of their proportionate shareholdings in the appellant and the numbers of Scotts Holdings shares they each had to contribute in order to make available the funds required by the appellant. It is true that this part of the minutes contained, what the trial judge termed, `Rafiq`s exposition of the formula for the capitalisation scheme`, and did not contain or refer to any agreement by any of the parties present that he or they had agreed to make the contributions suggested by Rafiq. But it must be remembered that this was a sequel to what had been agreed upon at the family meeting held on 21 September 1992. Not surprisingly, none of the parties present expressed any dissent from or objection to the proportions or the numbers of shares in Scotts Holdings suggested to be transferred. Clearly what was discussed and agreed here must be looked at in the context of what had been agreed at the family meeting, namely, that the four shareholders of the appellant, SIS, Ameerali, Yusuf and the respondent, would each contribute available funds in proportion to their shareholdings in the appellant to enable the appellant to discharge the amounts owed by A&W to the bank. In our opinion, this meeting, though held as a board meeting of SIS, in view of the subject matter discussed and the parties present, was more in the nature of an extension or a continuation of the family meeting held on 21 September 1992. Except for the absence of Rajabali and the presence of Ms Susie Tan (who was there as the company secretary), the parties present there were the same as those present at the family meeting.

It is significant that following the statements made by Rafiq, the following material board resolutions of SIS were passed:

1 That the company do consent to take up the offer of shares in IHC Pte Ltd as offered by Croissant Investment Pte Ltd at a price to be determined after valuation of IHC Pte Ltd.

2 That the company do agree to the transfer of Twelve Million Eight Hundred and Twenty Thousand (12,820,000) ordinary shares of S$1 each in Scotts Holdings Ltd to IHC Pte Ltd as consideration for the allotment of additional shares in IHC Pte Ltd.

By these board resolutions, certainly SIS agreed to transfer 12,820,000 Scotts Holdings shares to the appellant. This, of course, concerned only SIS. But, all the same, it implied that there was similarly an agreement by Ameerali, Yusuf and the respondent to the numbers of Scotts Holdings shares (referred to in the statements of Rafiq) which were to be transferred by them respectively to the appellant. They were personally present and with reference to the matters raised and discussed they participated in the deliberation thereof, whether they articulated any views or not, in their personal capacity and as directors of SIS. They could not possibly have agreed to the resolutions without realising and appreciating that they each also had to contribute their proportions of Scotts Holding`s shares, as the agreement involved not only SIS itself but each of them also, and it would not be in accord with the agreement reached at the family meeting to cause the company alone to agree to and be bound by it without the implicit understanding that each of them was equally bound by it. Here again, there was no dissent from or objection to the passing of the board resolutions.

Annual general meeting of the appellant

Immediately following the board meeting of SIS was the annual general meeting of the appellant. The following resolutions were passed authorising the increase in the capital of the appellant and the directors to issue shares. These resolutions read as follows:

2 Increase in Authorized Capital

Mr Iqbal Jumabhoy (`IJ`) explained that the necessity for the capital increase was to generate funds for the company through the allotment of additional shares.

It was resolved:

1 That the authorized share capital be increased to $40,000,000 by the creation of 10,000,000 additional ordinary shares of $1 each.

2 That pursuant to s 161 of the Companies Act (Cap 50) the directors be and are hereby authorized subject to the articles of association of the company, to allot and issue such shares of $1 each in the company to such persons or corporations, in such proportion and for such consideration as they determine to be fit and proper and that this authority shall continue in force until the next annual general meeting.

Apart from these resolutions, we do not find that anything of materiality was discussed or referred to at this meeting. Under the caption `Capitalization Agreement` the following resolution was passed:

3 Capitalization Agreement

It was resolved:

That the directors of the company be and are hereby authorized to enter into an agreement with the shareholders of the company setting out the pre-emption of the shares of Croissant Investments Pte Ltd and the offer and acceptance of additional shares in the company to the remaining shareholders.

The purpose or relevance of this resolution is rather unclear. The matter of the pre-emption of the shares was a matter between the shareholders themselves with which the company was not concerned. As for the `offer and acceptance of additional shares`, this resolution is not necessary, as prior to that a resolution had been passed authorising the directors to issue shares of the company. Lastly, having regard to what was discussed and agreed at the board meeting of SIS held earlier, it is doubtful that `Capitalization Agreement` or the `agreement` in this resolution referred to the draft capitalisation agreement prepared by Ms Chelliah. There were other resolutions passed at the meeting, but they are not material for our purpose.

At the end of the minutes, there was recorded an indication by the respondent that he too would like to dispose of his shares in the appellant. That part of the minutes said:

MRJ [the respondent] advised the shareholders that he too wanted to sell his shares in the company to the other shareholders ...

This is relied upon by the respondent to show that he could not have agreed to contribute any of the Scotts Holdings shares to the appellant, as he intended to dispose of his shares in the appellant or at least, at that time he contemplated of so doing. However, we do not think that this statement is inconsistent with the agreement by him to contribute the agreed number of his Scotts Holdings shares to the appellant to enable the latter to pay off the loans owed by A&W to the bank. This agreement was part of the plan for the public listing of Scotts Holdings to which he was a party and which pre-dated any intention of his to sell or dispose of his shares in the appellant.

Looking purely at the minutes of the board meeting of SIS and the minutes of the annual general meeting of the appellant, we would agree with the trial judge that these minutes did not provide any evidence that SIS, Ameerali, Yusuf and the respondent agreed to transfer the respective numbers of shares in Scotts Holdings to the appellant. But, in our opinion, these minutes must be read and understood in the context of the agreement the Jumabhoy brothers reached at the family meeting on 21 September 1992. In this connection, it is also important to bear in mind the relevant circumstances relating to the public listing of Scotts Holdings, which we have related.

Transfer of shares

What is very telling is that after the board meeting of SIS and the annual general meeting of the appellant, the respondent executed and handed over a transfer of his shares in Scotts Holdings. There was some dispute as to whether he signed a blank transfer or a transfer of the specified number of shares, ie 2,167,000 shares, in Scotts Holdings. The trial judge found that what was signed

was a blank transfer. We agree with this finding. However, the clear inference from the execution and delivery of this instrument, viewed in the context of the relevant circumstances, particularly the agreement reached at the family meeting on 21 September 1992, is that the respondent had agreed to transfer 2,167,000 of his shares in Scotts Holdings to the appellant and in pursuance of this agreement he executed the transfer and delivered it to the appellant with the implicit authority to insert the name of the appellant and the agreed number of shares. Clearly at that time, the precise number of Scotts Holdings shares to be transferred had, with reference to each shareholder of the appellant then present, been worked out and made known to each of them. If there were no such agreement, as the respondent claimed that there was not, it would be difficult to understand why the respondent should so willingly execute and deliver a transfer of his shares in Scotts Holdings, albeit a blank transfer. We can see no other reason.

The respondent in his affidavit of evidence in chief gave the following reasons for signing and delivering the blank transfer:

> *12 I was then required to sign and hand over a transfer form for 2,167,000 ordinary shares in SHL belonging to me, to the defendant. The purported consideration for this was the allotment of additional new shares in the defendants, which were to be issued to me when an agreement as to the actual amount of subscription to be paid for these shares was reached with the defendant. All the other directors, and also SIS, were similarly required to sign and hand over transfer forms for some portion of their ordinary shares in SHL to the defendant ...*
>
> *13 ....*
>
> *14 I would add that when I signed the transfer form for 2,167,000 shares of my SHL shares, I was informed by the Executive Director, Finance, IJ [Iqbal] that there were letters of guarantee that I had given. These guarantees were in favour of various banks to which the defendant was indebted. IJ said that the guarantees were not to hand but assured me that they existed. He suggested that I really had no choice but to agree to the capitalisation exercise that had been proposed if I did not want to risk being called on by the banks. Thereafter, on 15 March 1993, I wrote to the defendant asking for copies of any guarantees that I had given on the defendant`s behalf. The defendant`s secretary informed me in a letter dated 25 June 1993 that there were in fact no such guarantees. In a further letter dated 12 May 1993 I put the defendant on notice that I was not interested in the proposed capitalisation exercise of the defendant.*

It would be stretching our credulity to accept what the respondent said. The appellant was originally a shelf company. It was acquired in July 1991 specifically to be used as a holding company for the loss making subsidiaries of Scotts Holdings, in particular A&W and SWR, so that Scotts Holdings could proceed with the listing, without being burdened with the liabilities of these subsidiaries. The respondent was fully aware of this and was a party to the plan. As we have related, the shareholding structure of the appellant replicated that of Scotts Holdings prior to its listing. The period from July 1991 to 20 February 1993 was a short one, and if the respondent had signed any guarantee for the account of the appellant, he would not and could not have forgotten it. Even if Iqbal had said what the respondent alleged, we still find it inconceivable that the respondent could, in the circumstances,

be so credulous and gullible as to accept merely what Iqbal had told him, and on the basis of what Iqbal had said he signed the blank transfer. More so at that time, the relationship between him and the other members of the Jumabhoy family was far from cordial - that was the respondent`s evidence. This strained relationship is understandable in view of what he and his family had been accused of at the family meeting on 26 September 1992 based on the taped conversation on 19 September. Indeed, in view of that incident, it is again inconceivable that the respondent could have so much faith and trust in Iqbal, Rafiq or Ameerali as to accept any statement from them or any of them. The respondent is no babe in the woods and is a businessman with years of experience behind him. We just cannot imagine that he would not know whether he had signed any guarantee on account of the appellant and would just accept Iqbal`s words to that effect, and on the faith of what Iqbal had said he signed a blank transfer intending to transfer his shares in Scotts Holdings. It is true that on 15 March 1993 he wrote to Ms Chelliah asking for copies of `the guarantees` and `letters of undertaking` signed by him. But he made the same request with reference to SIS and the appellant. It does not follow, however, that by reason of this Iqbal must have made a representation to him that he had signed guarantees for or on account of the appellant, and further that he must have acted on Iqbal`s representation and signed the blank transfer.

Admissions of the respondent

There were admissions made by the respondent that he signed the blank transfer for the transfer of 2,617,000 shares in Scotts Holdings. He said this twice in his affidavit of evidence in chief which we have quoted verbatim. He sought to amend or correct these paragraphs at the trial. It was his evidence also that that the other directors, namely, Ameerali and Yusuf, were required to sign and hand over transfers of their portions of Scotts Holdings shares. So it was not merely he alone who had to sign the transfer of Scotts Holdings shares on 20 February 1999; his two brothers were required to do likewise. There was nothing to suggest that they did not do so.

The respondent also made a similar admission in his earlier affidavit filed in Suit 1801/95, which was an action brought by the respondent and other parties against the trustees of the Rajabali and Fatimabai settlements for breach of trust. In his affidavit filed in that suit, the respondent said:

> *55 When I still appeared reluctant to sign the subscription, Ameerali, Yusuf, Rafiq and Iqbal stated that Rajabali was feeling cold and unwell and refused to eat until I subscribed to the additional shares. I asked to speak to my father but was informed that he did not want to see me. Due to my fear of being the cause of my father`s possible death, I felt that I had no choice but to approve the subscription of further shares in IHC and signed the form to transfer 2,167,000 SHL shares to IHC. The minutes of the IHC annual general meeting and IHC Board meeting on 8 March 1994 ratifying the transfer are now produced and shown to me marked exh `MR-6`.*

The respondent, having made the admission, went on further in the same affidavit to say that he was deceived into signing the transfer by Iqbal and that he signed the transfer because `Iqbal had falsely advised` him that he had given personal guarantees on account of the appellant. He said:

> *56 Shortly after my return to Penang, I received the IHC accounts for approval and noted from the dates that they had in fact been available for the IHC annual general meeting and SIS Board meeting on 20 February 1993. Iqbal had*

purposely withheld this critical information. I asked for the convening of fresh meetings of IHC and SIS to consider the accounts and proposal to no avail. I also later discovered that Iqbal had falsely advised me that I had personal guarantees outstanding to IHC to compel me to agree to the additional share subscription. Thus, I had been deceived into agreeing to the transfer of my 2,167,000 SHL shares as consideration for the share subscription.

Iqbal might well have withheld the accounts from him. But his statement that he signed the transfer because Iqbal had falsely advised he that he had given `personal guarantees outstanding to IHC` is, as we have held, incredible. We are unable to accept such an explanation.

There were thus clear admissions by him that he agreed to transfer 2,167,000 shares in Scotts Holdings to the appellant. The fact that he signed the instrument out of fear that his refusal to sign it might cause his father`s death does not vitiate his agreement. Counsel for the appellant submits that his statements in the affidavits were a clear indication of an agreement by him to transfer those shares to the appellant. We agree.

It is significant that in his evidence in court the respondent admitted that he agreed to have `the shares sold to pay the debts of A&W`. In the cross-examination, he was referred to that part of the minutes of the family meeting on 21 September 1992 where Rafiq suggested that shares would have to be sold by the shareholders of appellant to pay off the debts of A&W, and his evidence was as follows:

Q: See item 3, did you agree later to have the shares sold to pay debts of A&W?

A: Yes. On 20 February 1993 when I said `No`, Iqbal and Rafiq said I had given personal guarantee for the companies. This is not true except for `Connoisiers Pte Ltd`.

Q: You agreed at that meeting to the capitalisation at the 20 February 1993 meeting?

A: Yes. Because I was told I had given bank guarantees for these companies. This was untrue except for `Connoisiers` where I gave guarantee to UOB.

He was then questioned at length on his agreement to the capitalisation of the appellant and his evidence was as follows:

Q: You are saying you agreed to the capitalisation because you were told of your having guarantees; these letters objecting to the capitalisation was because of no accounts of IHC given, not on guarantees?

A: Both.

Q: Taking your letter at 1AB/123-124 at face value, 1AB/124, para 3, as of 12 March 1993, you had the accounts of IHC?

A: Yes.

Q: Because of what you saw in the accounts, you took the position that you were not interested in the capitalisation?

A: That`s what it says.

Q: See 4DB/tab 3, audited accounts of IHC, what is in it that caused you to change your mind on capitalisation?

A: See p 25, IHC lost $24.7m.

Q: That`s on IHC, how did it impact your decision on A&W?

A: I don`t know.

Q: You agreed to capitalisation of IHC on 20 February 1993 to sell your shares to pay off debts due of A&W. See 1AB/124, you said you saw something in the accounts of IHC which made you change your mind, you saw it was the $24m loss by IHC that made you change your mind, how?

A: You are throwing pouring money into the drain.

Q: If your agreement was to pour money to pay off A&W`s debts, what had it to do with IHC`s losses?

A: I wanted to get out of my guarantees.

From this evidence, it is clear that he agreed to the capitalisation and to have his Scotts Holdings shares sold to pay off A&W`s debts. His alleged reason for the agreement was that he wanted to get out of the guarantees he had signed. That we find is incredible. Further, the respondent was plainly disingenuous in his assertion that he was not agreeable to the capitalisation, because `IHC lost $24.7m`. That amount of loss was present in the appellant`s accounts after it had been set up to hold A&W and SWR as its subsidiaries.

There was clear evidence that the respondent, at the board meeting of SIS held on 20 February 1993, agreed to transfer 2,167,000 of his shares in Scotts Holdings to the appellant to be used by the latter for payment of debts of A&W. In our judgment, there was an agreement between SIS, Ameerali, Yusuf and the respondent reached on 20 February 1993 that they would each contribute an agreed number of shares in Scotts Holdings to the appellant to enable the appellant to pay off the amounts owed by A&W to the bank, and so far as the respondent is concerned he had agreed to transfer to the appellant 2,167,000 Scotts Holdings shares as his contribution to the funds of the appellant. This agreement was made pursuant to the earlier agreement reached at the family meeting held on 21 September 1992.

Equitable defence

We now turn to the second defence to the respondent`s claim. Counsel for the appellant submits

that the return of the 2,167,000 shares in Scotts Holdings to the respondent would constitute a breach of the agreement he had made with the parties, namely, SIS, Ameerali and Yusuf. The trial judge held (at [para] 63) that if there was such an agreement, as in our opinion there was, the appellant was not a party. With respect, this is technically correct. However, this agreement concerned the appellant and the obligation to discharge the debts of its subsidiary, A&W. Since the agreement reached at the family meeting, the intention all along had been that the four shareholders of the appellant, namely, SIS, Ameerali, Yusuf and the respondent, would contribute available funds to the appellant in proportion to their respective shareholdings in that company so as to enable it to settle the outstanding loans owed by A&W to the bank. This intention was clearly evinced in the family meeting on 21 September 1992 and the amount and manner of their contributions were crystallised at the board meeting of SIS on 20 February 1993. As and when the appellant received the Scotts Holdings shares, it was under an obligation to realise them and use the proceeds to pay off the amounts owed by A&W to the bank. In return for these shares, the appellant would have to issue to the shareholders its own shares credited as fully paid. In practical terms, the appellant was as much a party to the agreement as SIS, Ameerali, Yusuf and the respondent.

The appellant therefore holds the 2,167,000 shares in Scotts Holdings in pursuance of the agreement and for the purpose contemplated in the agreement. Assuming that it holds these shares on a constructive trust, it holds them on trust for the specific purpose, and the respondent is not entitled to the return of these shares. To order that these shares be returned to the respondent would be to enable the respondent to commit a breach of the agreement which he had made with the other parties, namely, SIS, Ameerali and Yusuf. Both Ameerali and Yusuf had made their respective contributions by transferring or making available to the appellant the agreed number of shares in Scotts Holdings totalling 3,070,000 shares and these shares were sold and the proceeds were used to pay the debts owed by the Jumabhoy companies, principally A&W. The respondent, however, has not. As for SIS, it took over all or substantially all the liabilities of the appellant, after the latter had sold the entire issued share capital of A&W.

In ***Maythorn v Palme*** r (1864) 11 LT 261, the plaintiff sought an injunction against his ex-employee restraining him from working with a third party in breach of an undertaking given by him previously. His claim for an injunction was refused partly on the ground of injury that would be caused to a third party by the grant of the injunction. The Master of the Rolls in delivering the judgment said at p 262:

> *I am bound, when granting an injunction, to consider the extent of injury which may be thereby occasioned to strangers to the suit and the third parties. I remember a case before Lord Cottenham in which I was counsel (**Rigby v The Great Western Rly Co** 2 Phil 44), in which the company had entered into an agreement that certain of their trains should stop for about ten minutes at Swindon for refreshment. The plt was the lessee of the refreshment-rooms. The VC had granted an injunction to restrain the company from a breach of their contract; but Lord Cottenham dissolved the injunction. He did so without hearing a reply. He said he could not conceive how he could, or how a jury could, ascertain the damage which the company might sustain by being compelled to stop at certain stations. He also thought that the public were to be considered, and ought to have a voice in the matter. So here I think the same principles apply, and I cannot grant the injunction.*

In **Warmington & Anor v Miller** [1973] QB 877, the defendant landlord by an oral agreement granted an underlease of a part of the demised premises to the plaintiffs. Under the terms of the lease, the defendant was prohibited from assigning, under-letting or parting with possession of part only of the demised premises. The plaintiffs were let into possession of that part of the premises under the terms

of the oral underlease pending the execution of the underlease. Despite repeated requests, the defendant failed to execute an underlease to the plaintiffs who then instituted proceedings for specific performance. At first instance, the claim was allowed but on appeal the claim was dismissed. The court refused to grant specific performance, as to do so would result in the defendant committing a breach of the covenant contained in the lease. Stamp LJ said at p 886:

> *I can see nothing in this case to take it outside the practice of the court, in determining whether to exercise its discretionary power to grant the equitable remedy of specific performance, not to do so where the result would necessitate a breach by the defendant of a contract with a third party or would compel the defendant to do that which he is not lawfully competent to do: see* ***Fry`s Specific Performance*** *(6th Ed, 1921), p 194 and* ***Willmott v Barber*** *[1880] 15 Ch D 96, per Fry J at p 107.*

In conclusion, we need only to quote the following passage from the judgment of Cumming-Bruce LJ in **Miller & Anor v Jackson & Ors** [1977] 1 QB 966, 988:

> *Courts of equity will not ordinarily and without special necessity interfere by injunction where the injunction will have the effect of very materially injuring the rights of third persons not before the court. The principle has recently been accurately stated in a textbook:*
>
> *`Regard must be had "not only to the dry strict rights of the plaintiff and the defendant, but also the surrounding circumstances, to the rights or interests of other persons which may be more or less involved." So it is that where the plaintiff has prima facie a right to specific relief, a court of equity will, if occasion should arise, weigh the disadvantage or hardship which he will suffer if relief were refused against any hardship or disadvantage which would be caused to third persons or to the public generally if relief were granted`.*
>
> *See* ***Spry on Equitable Remedies*** *(1971), at p 365, and the cases referred to in the footnote. Putting it in a slightly different way, Lord Wright said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society:* ***Sedleigh-Denfield v O`Callaghan*** *[1940] AC 880, 903.*

Conclusion

In the result, we allow this appeal with costs here and below and dismiss the claim of the respondent. The deposit in court as security for costs is to be refunded to the appellant or its solicitors.

Outcome:

Appeal allowed.