IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S266
No. ~~S111~~ of 2012

BETWEEN:

AMIRAM DAVID WEINSTOCK
First Appellant

HELEN WEINSTOCK
Second Appellant

-and-

TAMAR RIVQA BECK
First Respondent

LW FURNITURE CONSOLIDATED (AUST) PTY LIMITED
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

PART I: Internet publication

10 1 These submissions are in a form suitable for publication on the Internet.

PART II: Issue

2 The legal issue on the appeal is the proper construction of s1322(4)(a) of the *Corporations Act* 2001 (Cth) (**Act**) and in particular the words "invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation".

3 On the facts, the issue is whether on the proper construction of s1322(4)(a) an attempt by a person to exercise a power to appoint another person a director of a corporation is "invalid by reason of any contravention of … a provision of the constitution…" in circumstances where (1) the constitution confers the power only on persons holding
20 office as directors and (2) the person who purported to exercise the power does not hold that office and there has been no purported, but invalid, appointment of that person to that office.

Filed on behalf of the first respondent
C/- McCabe Terrill Lawyers
Level 14, 130 Elizabeth Street
Sydney NSW 2000

Telephone: (02) 9261 1211
Fax: (02) 9261 2336
Ref: Mr Andrew Lacey

PART III: Section 78B of the *Judiciary Act* 1903 (Cth)

4 The first respondent (**Tami**) has considered whether notices should be given pursuant to s78B of the Judiciary Act. No such notices are required.

PART IV: Factual issues

5 Subject to what follows, Tami generally agrees with the statement of facts set out in the appellants' submissions (**AS**).

6 The appellants submit that Ami purported to exercise power under Article 87 to appoint Helen as a director of the Company (AS [28]). However, Article 87 is not a grant of power. Rather, Article 86 prohibited directors from exercising powers elsewhere conferred on them in the absence of a quorum. Article 87 then operated as an exception to that prohibition. It did so by permitting the directors to continue to exercise their powers notwithstanding that the number of directors had fallen below the number fixed as the necessary quorum, provided those powers were only exercised for a particular purpose. Thus, Article 87 provided (AB 192[1]):

> "The continuing directors may act notwithstanding any vacancy in their body, but if and so long as their number is reduced below the number fixed by or pursuant to the Articles of the Company as the necessary quorum of directors, the continuing directors or director may act for the purpose of increasing the number of directors to that number or of summoning a general meeting of the Company, but for no other purpose."

7 The general powers of the directors are conferred by Article 75, which provided (AB 191):

> "The business of the Company shall be managed by the directors, who may... exercise all such powers of the Company as are not, by the Act or by these Articles, required to be exercised by the Company in general meeting, subject nevertheless, to any of these articles..."

8 Article 67 deals with the election of directors (AB 189). In terms of Article 75, the power to elect directors is required to be exercised by the Company in general meeting, such that it is not given to, and cannot be exercised by, the directors.

9 Article 69 provided (AB 190):

> "The directors shall have power at any time and from time to time to appoint any person to be a director either to fill a casual vacancy or as an addition to the existing directors but so that the total number of directors

[1] "AB" references are to the application book prepared for the special leave application which, by directions made by the Court on 7 September 2012, stands in place of an appeal book: [2012] HCATrans 218 at lines 422-424.

> shall not at any time exceed the number fixed in accordance with these Articles. Any director so appointed shall hold office only until the next following annual general meeting and shall then be eligible for re-election..."

10 Article 69 conferred power on a person holding office as a director of the Company to appoint another person as a director on the terms there set out. Notwithstanding the terms of the resolution purportedly passed by Ami (AB 18), the relevant question in this appeal is whether the attempt by Ami to appoint Helen as a director can be characterised as a purported act which is invalid "by reason of a contravention of" Article 69.

11 The consequence of the matters found in the courts below against the appellants, and noted at AS [19] and [24], is to be emphasised. Ami had been appointed as an "additional" director under Article 69. The primary judge and the Court of Appeal concluded that Ami's term as an "additional" director of the Company expired on 31 December 1973 *in accordance with* the Articles. There was no purported but invalid re-appointment or further appointment of Ami at any stage thereafter. Their Honours therefore held that the circumstances in which Ami ceased to hold office as a director of the Company involved no "contravention" of the Act or Articles. The position simply was that his term of office naturally expired and he was never re-elected or re-appointed. The appellants do not challenge those conclusions in this Court. It follows that the question in this appeal (whether the attempt by Ami to appoint Helen as a director was "invalid by reason of" a relevant "contravention") falls to be determined in circumstances where (1) Ami has not held office as a director of the Company since 31 December 1973 and (2) s1322(4)(a) of the Act cannot be applied to produce a result whereby Ami validly held office as a director at any time since that date.

PART V: Legislation

12 Corporations Act 2001 (Cth), s1322.

PART VI: Argument

Summary

13 The essential flaw in the appellants' submissions emerges at AS [34]. The appellants there identify the circumstance which s1322(4)(a) is intended to remedy against as "the invalidity of acts or things purporting to have been done in relation to a company". That statement is incomplete in a critical respect. It omits the qualification that the invalidity

must come about "by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation". The only power which the paragraph gives is the power to declare certain purported acts "not invalid by reason of" a relevant "contravention". Contrary to the submission at AS [34], it is only those purported acts which are "invalid by reason of" a relevant "contravention" that are the proper subject matter of the grant of power. Put another way, in applying a "purposive approach" to statutory construction, it is the purpose revealed by the words used which is of the first importance.

14 The problem is not one of reading in limitations not revealed by the ordinary meaning of the words of the paragraph: cf AS [29]. Nor is the problem cured by applying the provision "with liberality" (AS [33]). The appellants have inverted the proper order of inquiry. The necessary first step is to construe *all* the words of the paragraph in accordance with their ordinary meaning and, so far as possible, to give effect to *all* of the words of the paragraph, including the critical words "invalid by reason of any contravention...". However, the appellants' construction would involve construing the paragraph as if those words were not there (see paragraphs 28 to 29 below).

15 As a matter of ordinary English language, the word "contravention" connotes an "infringement", "violation" or "transgression" of some positive or negative rule or restriction[2]. That is to say, a "contravention" is the doing of something which is prohibited or the failure to do something which is required to be done. Tami relies on the ordinary meaning of the words of the paragraph; she does not seek to create a limitation not revealed by the ordinary meaning. It is the appellants who seek to attribute to "contravention" something other than its ordinary meaning.

16 Ami's purported appointment of Helen as a director involved no "infringement", "violation" or "transgression" of Article 69. The Article conferred power on a class of persons which did not include Ami. His attempt to exercise a power which he simply did not have was not an "infringement" of Article 69.

17 The point is emphasised by the form of the order made by the primary judge. His Honour made an order that the "proceeding" by which Ami purported to appoint Helen as a director of the Company was not invalid by reason of "the contravention of the provision of the constitution of that company *consisting of non-observance of the requirement that such proceeding be taken only by a person in office as a director by*

[2] Oxford English Dictionary, online edition, Oxford University Press, accessed on 17 September 2012.

virtue of valid appointment or election as such" (emphasis added). There was and is no such "*requirement*" in the Company's Articles.

18 The appellant's criticisms (at AS [35]-[39]) of the reasoning of the majority of the Court of Appeal (Young JA and Sackville AJA) are unfounded. The majority did not read in a limitation not revealed by the ordinary meaning of the words used. Rather, they applied a meaning of "contravention" which was wider than its ordinary meaning, and therefore too wide, but which still was not wide enough to enable Ami's purported appointment to be characterised as a "contravention" (see paragraphs 39 to 45 below). As Sackville AJA put it, "the full width is still not wide enough": CA [240].

10 *Language and structure of s1322*

19 Before turning to the substance of Tami's argument, it is appropriate to make some observations respecting the text and structure of s1322. That section is headed "Irregularities". Subsection (2) relates to "procedural irregularities". It provides that a proceeding under the Act is "not invalidated because of any procedural irregularity" unless the Court, upon forming the requisite opinion, declares the proceeding invalid. Subsections (3), (3AA), (3A) and (3B) are similarly concerned with what might be characterised as "irregularities" in relation to meetings. In respect of all five subsections, the starting position is that the relevant matter is not invalid by reason of the identified irregularity and will only be invalid if the court makes an order to that
20 effect.

20 Subsection (4) provides that the court may, on application by any interested person, make certain orders either conditionally or unconditionally. The provision is to be understood as providing the double function of creating legal rights and giving jurisdiction with reference to them: *R v Commonwealth Court of Conciliation and Arbitration; ex parte Barrett* (1945) 70 CLR 141 at 165 (see also at 155); *Hooper v Hooper* (1955) 91 CLR 529 at 535; *Ruhani v Director of Police (Nauru)* (2006) 222 CLR 489 at 528-529 [111].

21 Paragraph (4)(a) relevantly empowers a court to make an order declaring that any act, matter or thing purporting to have been done in relation to a corporation "is not invalid
30 by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation". As Sackville AJA noted in the court below, "invalid" is used in the sense of "ineffective" (CA [236]).

22 Paragraph (4)(a) starts from the position that there is a state of invalidity which has come about by reason of a relevant "contravention". The paragraph does not confer a power at large on the court to "validate" purported acts which are invalid regardless of the reason for the invalidity. Rather, the paragraph operates to permit the court to remove by order what otherwise would be invalidity flowing from (ie "by reason of") a contravention of the requisite kind. The words "not invalid by reason of any contravention" must be given effect; Parliament has conferred power on the courts only to make an order of the kind specified.

23 Paragraph (4)(c) empowers the court to relieve a person from any civil liability "in respect of a contravention or failure of a kind referred to in paragraph (a)". Civil liability may flow from doing something which is prohibited from being done or from failing to do something which is required to be done. Civil liability cannot, however, flow from a person's not doing of something which that person had neither the power nor the obligation to do. In that situation, there is no "failure" of any kind. Contrary to the appellants' submissions (AS [40]-[41]), paragraph (4)(c) supports Tami's construction of paragraph (a) (see paragraphs 46 to 51 below).

24 Subsection (6) qualifies the circumstances in which a court can make any order under any of the provisions of s1322. Given the terms of subparagraph (6)(a)(i), it is apparent that paragraph (4)(a) potentially applies to what might be described as "substantive" and "procedural" contraventions.

Paragraph (4)(a) and the ordinary meaning of "contravention"

25 As indicated above, as a matter of ordinary English language, the word "contravention" connotes an "infringement", "violation" or "transgression" of some positive or negative rule or requirement.

26 The appellants seek to construe the word "contravention" as meaning the occurrence of something otherwise than "in the manner provided for by the constitution of the Company" (AS [37]). Paragraph (4)(a) does not use those words; they are a gloss on the statute. Further, there is an elision in that formulation constituted by the words "provided for". If by those words the appellants mean "required to be done", then the construction would find resonance with the ordinary meaning of the word "contravention". However, Article 69 did not require anything to be done. It did not impose an obligation on Ami to appoint a person as director. It conferred a power

(which by its very nature is not required to be exercise) on a limited class of persons, which did not include Ami.

27 The same observations apply with equal force to the formulations of "contravention" put forward by Campbell JA in the court below, namely something which is "not in accordance with" the constitution or "different to what the constitution of the corporation requires" (CA [138]-[139]).

28 The appellants' case is that a relevant "contravention" occurs whenever there is a purported act which is not authorised by the terms of the Articles. However, that formulation identifies, without limitation, the whole universe of ineffective purported acts. On that formulation, all purported acts are ineffective if they are not authorised by the Articles and all purported acts that are not authorised by the Articles are, "by reason of" that fact alone, ineffective. Thus, the appellants' case involves reading paragraph (4)(a) as if it stopped at the word "invalid". On the appellants' case, the concluding words "by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation" are to be ignored and given no work. Such a construction should not be adopted where there is an available construction which gives effect to the ordinary meaning of all of the words of the provision: *Commonwealth v Baume* (1905) 2 CLR 405 at 414; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71].

29 That principle of statutory construction applies with added force where, as emphasised above, the concluding words limit the subject matter of the court's power, and the orders which the court is able to make, to a subset of ineffective purported acts. It is not enough that the purported act was not authorised by the Articles. The words of limitation cannot be ignored; they must be given effect.

30 There is a further point here. The consequence of the appellants' construction of paragraph 4(a) is that it authorises the court effectively to confer a power on a person to whom neither the Act nor the company constitution has given power. However, the concluding words "by reason of any contravention..." make it clear that paragraph (4)(a) does not authorise the court to confer a power which is not given by the Act or constitution.

31 On the appellants' case, provided there is an act purportedly done in relation to a corporation, nothing turns on the nature of the relationship, if any, between the

purported actor and the corporation. On the facts in this case, as the appellants emphasise, Ami had been acting as a de facto director. But that is an accident of the facts, not an element which, even on the appellants' construction, goes to the engagement of the court's power in paragraph (4)(a). Thus, on the appellants' case, it would make no difference to the existence of the court's power if Ami had been a complete stranger to the Company. To characterise that situation as involving a "contravention" does not accord with the ordinary meaning of that word. Such a construction would result in outcomes that are properly characterised as anomalous.

Application of the ordinary meaning of "contravention"

32 The purported exercise of a power, by a person to whom it is undoubtedly given, but without complying with some condition imposed by the constitution upon its exercise, is easily understood as an "infringement", "violation" or "contravention" of that condition and therefore of the constitution. On the other hand, where the power is only conferred on a particular person, or a particular class of persons, an attempt by someone else (on whom the power is not conferred) to exercise that power is not in any sense an "infringement", "violation" or "contravention" of the provision conferring the power. It is no more than a non-exercise or non-engagement of the power.

33 The distinction is usefully illustrated by Article 69 itself, which contains both a conferral of power on a limited class of persons and a condition on the exercise of that power. The limited conferral of power is contained in the words "The directors shall have power to…". That is, the Article confers power on persons who hold office as directors. It does not confer power on the world at large and then impose a condition subsequent that the power can only be exercised by persons who are directors. The language of the Article cannot be given that construction.

34 The Article also contains a condition or restraint on the exercise of power (by those persons on whom it is conferred), which is provided by the words "but so that the total number of directors shall not at any time exceed the number fixed in accordance with these Articles".

35 An attempt by a person who is not a director to appoint another person as a director under the Article does not involve an "infringement" or "contravention" of the opening words of the Article; rather, it is a failure to enliven the limited grant of power. Such an attempt stands outside paragraph (4)(a) of the Act. On the other hand, suppose there are

five directors and the maximum number of directors is fixed at five (Article 65) (AB 189). The five existing directors purport to exercise the power to appoint an additional director. There is no doubt that the power is conferred on the directors. However, in the particular circumstances, its exercise would infringe, or contravene, the condition subsequent that the power is not to be exercised so that the total number of directors exceeds five. The same analysis may be applied to an attempt by directors to act otherwise than for the permitted purpose in the circumstances set out in Article 87.

36 It follows that paragraph (4)(a) confers power to "validate" acts purportedly done by an invalidly or improperly constituted board of directors where the invalidity comes about by reason of a relevant "infringement" or "contravention" of the Act or constitution. In a case where a person purports to exercise a power attaching to an office (whether of director or some other office) which he or she does not hold, the correct approach is to identify whether there was a purported appointment of that person to the office which was "invalid by reason of" a relevant contravention. If there was a purported appointment of that kind, then paragraph (4)(a) can be applied at that level to produce the result that the person validly holds office, such that the acts purportedly done by that person are themselves valid acts. If there was no purported appointment of that kind then, for the reasons given, there is no "contravention"; there is simply an attempt by a person who does not hold an office to exercise a power which attaches to that office.

37 That approach conforms to the ordinary meaning of the language of paragraph (4)(a) and produces sensible results. For example, consider the following. The members of company X purport to appoint person A as a director of X. The constitution of X requires directors to hold a prescribed minimum number of shares, which A does not hold. Person A subsequently purports to appoint administrators to company X and a question arises whether the administrators are validly appointed. In that situation, the appointment of A as director is ineffective by reason of a "contravention" of the constitution, such that paragraph (4)(a) may be applied to the appointment of A as director. There is a "contravention" because the members of company X had power to appoint person A as a director, but infringed a condition attaching to the exercise of that power. If paragraph (4)(a) is applied to A's appointment, it will remove what otherwise is the only source of "invalidity" of that appointment, such that A's subsequent act in

placing X into administration will itself be valid as an act of a director validly holding office.

38 However, that is precisely what cannot be done in this case. Ami was appointed a director of the Company for a limited term in 1973. Upon the expiry of that term, there was no further appointment (valid or otherwise) of Ami as a director. It cannot be said that the reason why Ami did not hold office as a director was a "contravention" of the Company's Articles; that consequence was entirely *in accordance with* the Articles and the terms of the appointment. As noted above, the appellants accept that position in this Court.

10 *A "wide" meaning of contravention?*

39 In *Sheahan v Londish* (2010) 80 ACSR 337 at [161], Young JA stated that "contravention" should be given a "wide meaning" which would include circumstances where there is no infringement of the Act (or constitution), but "merely" a failure to take advantage of a provision of the Act (or constitution). Similarly, Lindgren AJA held that the word "contravention" has not been confined to its orthodox meaning of "infringement": at [234].

40 In the court below, Young JA and Sackville AJA applied that "wide meaning", but held that there still was no "contravention" because there was no provision of the Articles of which Ami could have taken advantage of: CA [222]-[223] and [236].

20 41 The ultimate question for the Court in *Sheahan v Londish* was whether the act of a person (A) in appointing administrators to a single member company (Z) was valid. The appointment was challenged on the basis that A did not validly hold office as a director of Z. Company X held all the shares in company Y which in turn held all the shares in company Z. Company X had executed a notice advising of its decision to replace the existing director of company Y with A. In turn, company Y had executed a notice advising of its decision to replace the existing director of company Z with A. Section 249B of the Act provided (and still provides) that a company with only one member may pass a resolution by recording the resolution and signing the record. The New South Wales Court of Appeal (Young JA and Lindgren AJA, Hodgson JA dissenting on
30 this point) held that in each case s249B of the Act had not been engaged because the notices executed by companies X and Y did not purport to be resolutions of the relevant single member companies Y and Z respectively. Rather, the notices were a purported

exercise of a non-existent power (being apparently a power which had been included in the constitution of company X, but not of companies Y and Z, empowering a majority shareholder to remove and appoint directors at any time): at [90] and [115].

42 The Court of Appeal thus characterised the situation as involving ineffective removals and appointments of directors by persons (companies X and Y) who had power to effect such removals and appointments (under s249B as sole shareholders of companies Y and Z respectively), but who, by mistake, had failed to avail themselves of that power.

43 Two observations should be made. First, it is, with respect, difficult to see how there was a relevant "contravention" of the Act or constitution in *Sheahan v Londish*. On the approach taken by the majority in that case, there was no purported exercise of any power conferred by the Act or constitution. No purported exercise of power failed for want of compliance with the conditions attaching to its exercise. It is respectfully submitted that this Court should reject the "wide" meaning of "contravention" adopted in *Shehan v Londish* in favour of the ordinary meaning of that expression discussed above.

44 Secondly, if contrary to that submission the "wide" meaning of "contravention" is to be adopted, such that a "*failure to take advantage of*" a provision (as opposed to a failure to comply with a requirement) is a "contravention", it is axiomatic that the provision of the Act or constitution must be a provision which was available to be taken advantage of. Otherwise, there is no *failure* in any sense. In *Sheahan v Londish* itself, company X (as the single member of company Y) and company Y (as the single member of company Z) could have utilised the mechanism in s249B of the Act but did not do so. Each single member had been given power, but had not exercised it. Undoubtedly, each single member could have achieved the desired result of replacing the director.

45 If the *Sheahan v Londish* "wide" meaning is applied to the present case, the result still is that there is no relevant contravention, as the majority of the Court of Appeal held. This is because there was no provision of the Act or Articles of which Ami (or any other person) could have taken advantage of in order to appoint Helen as a director. Ami was not a director. There were no other directors. And, finally, there were no shareholders with entitlements to vote at a general meeting who could elect new directors.

Relevant legislative history

46 The ordinary and natural meaning of the current paragraph (4)(a) is further supported by brief reference to its legislative antecedents. The ultimate ancestor to paragraph (4)(a) appears to have been s392(3) of the *Companies Act* 1938 (Vict), which was continued in materially the same form into s256(3) of the *Companies Act* 1958 (Vict) and s366(3) of the *Uniform Companies Acts* of 1961. As Campbell JA observed in the Court below, that form of provision was very different from the current paragraph (4)(a), such that decisions under that form of provision are of limited help in deciding the scope of power under the current paragraph (CA [125]).

47 The current form of paragraph (4)(a) first appeared as s539(4)(a) of the *Companies Act* 1981 (Cth) (**1981 Code**) (the text of which was adopted as a uniform code by the states). The secondary materials for the *Companies Bill* 1980, including Parliamentary debates and explanatory memoranda, do not shed any light on the intended meaning of the provision.

48 Section 539(4)(a) of the 1981 Code provided that the Court could make an order:

> "declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of, or failure to comply with, a provision of this Act or a provision of any of the constituent documents of a corporation."

49 The underlined words "or failure to comply with" no longer appear in the current paragraph (4)(a). The expression "contravention of, or failure to comply with" is a composite expression which is commonly used in legislation to identify the act (ie the "contravention") or the omission (ie the "failure to comply") which constitutes, or forms an element of, an offence. Where legislation provides that a person shall not do Y, the act of doing Y is naturally described as a contravention. Where legislation provides that a person shall do Y, not doing Y is naturally described as a failure to comply. The composite expression was used with this meaning elsewhere in the 1981 Code itself[3]. For example, s170 of the 1981 Act provided (i) that a company or agent "shall not" issue to the public any prescribed interest unless the issue is by means of a written statement and (ii) that the written statement shall set out the prescribed matters.

[3] The exact expression, and its cognate "contravene or fail to comply with", appeared on nine other occasions in the 1981 Act: ss 12(b)(i), 12(b)(ii), 174(1)(a), 174(2), 285(10)(a), 562(4), 572(1), 573(4) and 575(4).

Section 174 of the 1981 Act then made it an offence to contravene or fail to comply with a provision of s170.

50 The composite expression is no longer to be found in the Act. It has been replaced with the expression "contravention of". It is apparent that no change in meaning was intended. Rather, the word "contravention" encompasses both the doing of something prohibited and the failure to do something which is required to be done. That the word "contravention" has that meaning in paragraph (4)(a) is demonstrated by the reference to "or failure" in paragraph (4)(c) as well as subsection (5) and subparagraph (6)(a)(ii). The evident explanation is that whilst the exact composite phrase "contravention of, or failure to comply with" was replaced wherever it occurred in the Act, cognate phrases such as "contravention or failure" were not replaced.

51 The legislative history establishes that, contrary to the appellants' submissions (AS [40]), the word "failure" in the current paragraph (4)(c) does not include a mere "failure to take advantage of" a provision of the Act or constitution, as opposed to a failure to comply with a requirement. Contrary to the appellants' submissions (AS [40]-[41]), it is Tami's construction that harmonises paragraphs (4)(a) and (c) and gives both paragraphs their natural and ordinary meaning. Paragraph (4)(c) is manifestly concerned with the ordinary situation of civil liability arising from the doing of something which was prohibited or the failure to do something which was required to be done. That is to say, it is concerned with the ordinary meaning of "contravention". An attempt by a person to exercise a power which he or she has not been given does not result in civil liability. The law does not impose upon a person a duty to do something which that person has no power to do. Nor does the law classify the non-doing of an act by a person who neither has the power nor the duty to do it as a "failure" to which civil liability attaches.

The appellants' other arguments

52 In relation to AS [42], it is not correct that if there happened to be a person who was a validly appointed director, then an attempt by a non-director to exercise the powers of the directors would be "invalid by reason of any contravention…". There still would be no "contravention". Neither the Act nor the Articles had conferred any power on the person who purported to act, namely Ami.

53 In relation to AS [43], it is, with respect, fallacious to submit that the result in the Court of Appeal entrenches a "procedural distinction" between a "retiring" director and a "rotating" director. The result in the Court of Appeal is that an attempt by a person who was not a director, and who could not be made a director, to exercise a power conferred on directors did not constitute a "contravention". The reason why Ami was not a director and could not be made a director was because he had been appointed for a term which naturally expired on 31 December 1973 and he had never been re-appointed. That is not a "procedural distinction". But even if it were, it is one which the appellants (1) accept must be drawn and (2) accept has the consequence that Ami is not a director and cannot be made a director. It is that state of affairs which is decisive, not the factual circumstances in which that state of affairs came about. If anything is "entrenched", it is the substantive distinction between, on the one hand, a purported exercise of power by a person to whom the power is given which is ineffective because of a contravention of some condition or restriction attached to its exercise and, on the other hand, an attempt by a person to exercise a power which he or she simply does not have.

54 The appellants point (at AS [46] and [48]) to the reliance of the primary judge and Campbell JA on observations of Lehane J in *Nece Pty Ltd v Ritek Incorporation* (1997) 24 ACSR 38. For the reasons that follow, that reliance was misplaced. *Nece* involved a challenge to a solicitor's retainer for Ritek on the basis that the managing director of the company had no authority to commence certain litigation. Justice Lehane refused to make any order under s1322 because the lack of authority to commence the litigation stemmed not from any "contravention" of the constitution but from the deadlock of the board (at 46). His Honour observed (in an obiter passage) that certain previous decisions had proceeded:

> "on the basis that if something is done which has not been properly authorised because, for example, appropriate resolutions have not been passed or because there is in office *no validly elected board of directors*, the doing of it without authority may be regarded as a contravention, for these purposes, of the articles of association." (emphasis added)

55 The facts of *Nece* were very different from the present case. In *Nece*, there were validly appointed directors and the difficulty was that they were in deadlock. Further, the language used by Lehane J suggests that his Honour did not intend the construction which Campbell JA adopted. His Honour did not stop after the words "has not been properly authorised", but recognised the need to look at the reason why the thing was

not authorised ("because, for example, ..."). Nor did his Honour refer to something which was not authorised because it was done by a person who was not a director. Rather, his Honour referred to there being "no validly elected board of directors". That suggests that in making those obiter comments, his Honour had in mind an election of directors by members (being the persons on whom the power was conferred) which was "invalid" because of non-compliance with some requirement of the Act or constitution. That suggestion is further reinforced because one of the cases to which his Honour referred, namely *Omega Estates Pty Ltd v Ganke* [1963] NSWR 1416, was exactly that kind of case.

10 *Conclusion*

56 The appeal should be dismissed with costs.

PART VII: Sequence of oral argument of appeals

57 The appellants "suggest" at AS [52], without offering a reason, that argument in this appeal should take place before the argument in proceedings S56 of 2012. Tami is not aware of any reason why the appeals should be heard in an order other than the order in which special leave to appeal was granted.

Dated 10 October 2012

20

R.G. McHugh
Tel: (02) 8239 0268
Fax: (02) 9210 0647
Email: richard.mchugh @banco.net.au

Darrell Barnett
Tel: (02) 9376 0673
Fax: (02) 9101 9492
Email: darrell.barnett@banco.net.au

Counsel for the first respondent