HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL AND GAGELER JJ

AMIRAM DAVID WEINSTOCK & ANOR APPELLANTS

AND

TAMAR RIVQA BECK & ANOR RESPONDENTS

Weinstock v Beck
[2013] HCA 14
1 May 2013
S266/2012

ORDER

1. *Appeal allowed with costs.*

2. *Set aside orders 3 and 5 of the Court of Appeal of the Supreme Court of New South Wales made on 5 April 2012 and, in their place, order that:*

   (a) *the matter be remitted to the primary judge, or such other judge as the Chief Judge in Equity might decide, to determine:*

      (i) *whether an order should be made under s 1322(4)(a) of the* Corporations Act *2001 (Cth) validating the purported appointment of Helen Weinstock as a director of LW Furniture Consolidated (Aust) Pty Ltd ("the Company") by Amiram Weinstock on 30 July 2003; and*

      (ii) *whether the Company should be wound up; and*

   (b) *the appellants pay 80 per cent of the costs of the appeal and cross-appeal to the Court of Appeal.*

On appeal from the Supreme Court of New South Wales

Representation

D F Jackson QC with J O Hmelnitsky for the appellants (instructed by Baker & McKenzie Solicitors)

R G McHugh SC with D J Barnett for the first respondent (instructed by McCabes Lawyers Pty Limited)

No appearance for the second respondent

CATCHWORDS

Weinstock v Beck

Corporations law – Management and administration – Directors and other officers – Appointment, removal and retirement of directors – Whether director validly appointed – Whether invalid appointment was "contravention" of company's constitution under s 1322(4) of the *Corporations Act* 2001 (Cth).

Words and phrases – "appointment of director", "contravention of the constitution", "invalid appointment".

Corporations Act 2001 (Cth), ss 1322(4), 1322(6).

FRENCH CJ.

Introduction

1 There are decisions made and actions taken by directors, officers and members of corporations that depend for their legal effect upon powers conferred by the *Corporations Act* 2001 (Cth) ("the Corporations Act") or by the constitutions of the corporations or both. Sometimes, by reason of error or circumstance, a condition for the validity of such a decision or action is not met. Australian courts have long been empowered by companies legislation to make orders to overcome some of the inconvenient invalidities which can arise in such cases.

2 The present appeal concerns the appointment, on 30 July 2003, of Mrs Helen Weinstock ("Helen") as an additional director of LW Furniture Consolidated (Aust) Pty Ltd ("LWC"). The appointment was made pursuant to Art 87 of the articles of the company. It was made by Helen's husband, Amiram Weinstock ("Amiram"), acting as the sole director of the company. As it turned out, although he had acted as a director for some thirty years, his appointment as a director had lapsed by operation of the articles at the annual general meeting on 31 December 1973.

3 In proceedings in the Supreme Court of New South Wales, Tamar Beck ("Tamar"), Amiram's sister, who had been appointed a director at the same time as Amiram, sought an order for the winding up of the company on the basis that it was just and equitable to do so because it had no directors and no means of validly appointing directors. Barrett J held that because Amiram was not a director validly in office when he had purported to appoint Helen as a director, Helen's appointment was ineffective. His Honour, however, used the power conferred upon the Court by s 1322(4) of the Corporations Act to, in effect, declare that Helen's appointment as a director was not invalid by reason of the fact that Amiram did not hold office as a director at the time of appointment[1]. Tamar appealed to the New South Wales Court of Appeal against the decision of Barrett J. The Court by majority (Young JA and Sackville AJA, Campbell JA dissenting) allowed that appeal, set aside the declaration made by the primary judge and remitted the matter to the Equity Division to determine whether the company should be wound up[2].

4 On 7 September 2012, Amiram and Helen were granted special leave to appeal to this Court from the judgment and orders of the New South Wales Court of Appeal which had been made on 5 April 2012.

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1 *Beck v LW Furniture Consolidated (Aust) Pty Ltd* [2011] NSWSC 235 at [175].

2 *Beck v LW Furniture Consolidated (Aust) Pty Ltd* (2012) 265 FLR 60.

5 For the reasons that follow their appeal should be allowed.

Section 1322(4)—history and construction

6 The declaration made by the primary judge was made under s 1322(4) of the Corporations Act. That provision appears in Pt 9.5 of that Act, which is entitled "Powers of Courts". There is a range of disparate powers created by the provisions of that Part. Section 1322 is entitled "Irregularities". It applies, inter alia, to proceedings answering the description "a proceeding under this Act", a term which is defined in s 1322(1)(a) as "a reference to any proceeding whether a legal proceeding or not"[3]. The term "procedural irregularity", which also appears in the section, is defined non-exhaustively and includes the absence of a quorum at a meeting of a corporation or of its directors[4] as well as a defect, irregularity or deficiency of notice or time[5].

7 Section 1322(2) provides:

> "A proceeding under this Act is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid."

The effect of the sub-section is automatic validation subject to a court order to the contrary. In that respect, the sub-section is modelled on precursors which date back to s 3 of the *Companies Act* 1893 (Q) and the Companies Acts of the States after federation[6]. Similar saving mechanisms are found in other sub-sections of s 1322 with respect to meetings held for the purposes of the Act where there have been deficiencies in notice or access to notice of the meeting[7] or where a member has not had a reasonable opportunity to participate in multi-

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3 Early validating provisions in State companies legislation, including s 366 of the *Uniform Companies Acts* 1961, were limited to the validation of proceedings in a court: *Re Liege Investments Pty Ltd* [1940] VLR 448 at 454 per O'Bryan J. See also *Companies Act* 1936 (NSW), s 357(1).

4 Corporations Act, s 1322(1)(b)(i).

5 Corporations Act, s 1322(1)(b)(ii).

6 For example, *Companies Act* 1910 (Vic), s 293; *Companies Act* 1920 (Tas), s 284; *Companies Act* 1931 (Q), s 374; *Companies Act* 1934 (SA), s 380; *Companies Act* 1936 (NSW), s 357; *Companies Act* 1943 (WA), s 415; see also *Companies Act* 1896 (Vic), s 165.

7 Corporations Act, s 1322(3).

venue meetings[8]. Meetings or resolutions based on the exercise of voting rights in contravention of s 259D(3), where a company controls the entity that holds shares in it, are also validated subject to court order[9].

8 Provisions validating the decisions of persons acting as directors whose appointments were defective or who were disqualified from office date back to the first half of the nineteenth century in the United Kingdom[10]. Such a provision appeared in the *Companies Act* 1862 (UK)[11]. It also appeared in Australian colonial statutes modelled on that Act[12] and, in later statutes, survived the introduction of more general provisions of the nature of s 1322[13].

9 Section 1322(4) provides:

> "Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:
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> (a) 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 a provision of this Act or a provision of the constitution of a corporation;
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> (b) an order directing the rectification of any register kept by ASIC under this Act;

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8 Corporations Act, s 1322(3A).

9 Corporations Act, s 1322(3B).

10 *Companies Clauses Consolidation Act* 1845 (UK), s 99; *Companies Clauses Consolidation (Scotland) Act* 1845 (UK), s 102.

11 *Companies Act* 1862 (UK), s 67; see also *Companies (Consolidation) Act* 1908 (UK), First Schedule, Table A, reg 94.

12 *Companies Act* 1863 (Q), s 67; *Companies Act* 1864 (SA), s 66; *Companies Act* 1864 (Vic), s 64; *Companies Act* 1869 (Tas), s 73; *Companies Act* 1874 (NSW), s 98; *Companies Act* 1893 (WA), s 62.

13 *Companies Act* 1920 (Tas), s 81; *Companies Act* 1931 (Q), s 153; *Companies Act* 1934 (SA), s 164; *Companies Act* 1936 (NSW), s 124; *Companies Act* 1938 (Vic), s 143; *Companies Act* 1943 (WA), s 149.

(c) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a);

(d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding;

and may make such consequential or ancillary orders as the Court thinks fit."

Orders may be made under s 1322(4)(a) or (c) notwithstanding that the contravention or failure referred to in the paragraph concerned resulted in the commission of an offence[14].

10 Section 1322(6) imposes constraints on the power conferred by s 1322(4) in the following terms:

"The Court must not make an order under this section unless it is satisfied:

(a) in the case of an order referred to in paragraph (4)(a):

(i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;

(ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or

(iii) that it is just and equitable that the order be made; and

…

(c) in every case—that no substantial injustice has been or is likely to be caused to any person."

It is not in dispute that the satisfaction of any one of the conditions set out in par (a)(i)–(iii) will meet the requirements of par (a), a proposition now well

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14 Corporations Act, s 1322(5).

supported by authority. In particular, the power under s 1322(4)(a) is not limited to cases of procedural irregularity[15].

11 Section 1322(4) is descended from s 366(3) of the *Uniform Companies Acts* 1961[16]. Section 366 was the successor to validating provisions which had appeared in more or less common form in various State Companies Acts before 1961[17]. Section 366(3) introduced a mechanism for judicial validation which could be invoked in a wider range of circumstances than those covered by the automatic validation mechanisms of its predecessors. It empowered the court to make such order as it thought fit to rectify, negative or modify the consequences in law of any omission, defect, error or irregularity in the management or administration of the company whereby:

- any breach of any of the provisions of the Act had occurred;
- there had been default in the observance of the memorandum or articles of the company; or
- any proceedings at or in connection with any meeting of the company or of the directors thereof or any assemblage purporting to be such a meeting had been rendered ineffective.

The power conferred on the court was constrained by the requirement that a court order would not do injustice to the company or a member or creditor thereof[18]. Early in the life of s 366(3) it was held, by Else-Mitchell J in *Omega Estates Pty Ltd v Ganke*, to apply to "much more than mere irregularities or defects of a

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15 *Jordan v Avram* (1997) 141 FLR 275 at 279 per Gillard J; *Re Westpac Banking Corporation* (2004) 53 ACSR 288 at 293 [26]–[27] per Emmett J; *Cordiant Communications (Australia) Pty Ltd v Communications Group Holdings Pty Ltd* (2005) 194 FLR 322 at 345 [97], 350 [134] per Palmer J; *Re MLC Ltd* (2006) 60 ACSR 187 at 189 [10] per Gyles J; *Re Golden Gate Petroleum Ltd* (2010) 77 ACSR 17 at 29 [40] per McKerracher J; *Re Elemental Minerals Ltd* (2010) 79 ACSR 277 at 281 [30] per Gilmour J.

16 Adopted by the States as a uniform law, a mechanism first recommended in the *Report of the Royal Commission on the Constitution* (1929) at 208 and revisited in the *Report from the Joint Committee on Constitutional Review* (1959) at 110–113 albeit that Committee recommended a single federal companies law.

17 For example, *Companies Act* 1931 (Q), s 374; *Companies Act* 1934 (SA), s 380; *Companies Act* 1936 (NSW), s 357; *Companies Act* 1943 (WA), s 415; *Companies Act* 1958 (Vic), s 256; *Companies Act* 1959 (Tas), s 310.

18 *Uniform Companies Acts* 1961, s 366(3)(b).

procedural character."[19] It covered cases in which non-compliance with company articles had resulted in doubts as to the constitution of the board of directors and the validity of the appointment of persons who had purported to act as directors[20]. Although Else-Mitchell J said that the section would not authorise the court to override articles of association[21], that proposition did not survive subsequent interpretations of s 366 and its successors. A contrary and wider construction was adopted by Bowen CJ in Eq in *Re Compaction Systems Pty Ltd*[22], holding that s 366(3) conferred power to disregard the articles even to the extent of disregarding prohibitions in the articles[23]. As to the constraint that an order under s 366(3) not do injustice to the company or any members or creditors thereof, Bowen CJ in Eq observed in terms relevant to the application of s 1322(6)(c)[24]:

> "the word 'injustice' in this provision requires the Court to consider any real, and not merely insubstantial or theoretical, prejudice ... it is insufficient to show that there may be some prejudice to a member if, on a consideration of the whole matter, the overwhelming weight of justice, as it were, is in favour of making the order".

Unlike s 366(3), s 1322(6)(c) requires consideration of substantial injustice to "any person" but the general approach enunciated in *Re Compaction Systems* remains valid. The remedial scope of s 1322(4) is no less than that of s 366(3) insofar as the latter authorised orders which would override the effects of provisions of a company's constitution.

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19 *Omega Estates Pty Ltd v Ganke* [1963] NSWR 1416 at 1424.

20 *Omega Estates Pty Ltd v Ganke* [1963] NSWR 1416 at 1424 per Else-Mitchell J.

21 *Omega Estates Pty Ltd v Ganke* [1963] NSWR 1416 at 1423.

22 [1976] 2 NSWLR 477.

23 [1976] 2 NSWLR 477 at 492; cf *Re Australian Continental Resources Ltd* (1975) 10 ACTR 19 at 31 per Blackburn J; *Jordan v Avram* (1997) 141 FLR 275 at 279 per Gillard J.

24 [1976] 2 NSWLR 477 at 493, citing *Re Castlereagh Securities Ltd* [1973] 1 NSWLR 624; see also *Brown v Health Services Union* (2012) 205 FCR 548 at 591 [133] per Flick J; *Chalet Nominees (1999) Pty Ltd v Murray* (2012) 30 ACLC ¶12-017 at 254 [27] per Le Miere J.

12 Section 539(4)(a) of the *Companies Code* 1981[25], adopted by each of the States and Territories, conferred a remedial power in terms which were to be replicated in s 1322(4)(a) of the *Corporations Act* 1989 (Cth). The provision retained its numbering, and its text remained unchanged, in the Corporations Law enacted in 1991[26] following the decision of this Court in the *Incorporation Case*[27]. The provision was replicated in the *Corporations Act* 2001 (Cth). The word "contravention" both in s 539(4)(a) of the *Companies Code* and in s 1322(4)(a) of the Corporations Act and its immediate predecessors has been interpreted broadly and as encompassing a failure to comply with a condition precedent to the exercise of a power[28]. In *NRMA Ltd v Gould*[29], Young J said that "'contravention' … had to be read in a very wide sense."[30] His Honour, in that case, declared valid the nomination of a person for election as a director of a company notwithstanding that the person lacked the requisite qualification of membership of the company at the time of nomination. That approach was expressly adopted by Gillard J in *Jordan v Avram*[31]. In *Nece Pty Ltd v Ritek Incorporation*[32], Lehane J also gave a broad meaning to "contravention". His Honour acknowledged that earlier cases had proceeded on the basis that if

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25 Adopted by the States and Territories pursuant to an intergovernmental Commonwealth–State agreement made in December 1978 for a co-operative scheme for uniform companies and securities laws.

26 *Corporations Act* 1989 (Cth) as amended by the *Corporations Legislation Amendment Act* 1990 (Cth) and applied by the *Corporations (New South Wales) Act* 1990 (NSW), *Corporations (Victoria) Act* 1990 (Vic), *Corporations (South Australia) Act* 1990 (SA), *Corporations (Queensland) Act* 1990 (Q), *Corporations (Western Australia) Act* 1990 (WA), *Corporations (Tasmania) Act* 1990 (Tas) and *Corporations (Northern Territory) Act* 1990 (NT).

27 *New South Wales v The Commonwealth* (1990) 169 CLR 482; [1990] HCA 2.

28 *North Sydney Brick & Tile Co Ltd v Darvall* (1989) 17 NSWLR 327 at 341 per Clarke JA, Samuels AP and Mahoney JA agreeing at 328; *Winpar Holdings Ltd v Goldfields Kalgoorlie Ltd* (2001) 166 FLR 144 at 164 [65] per Giles JA, Beazley JA agreeing at 145 [1], cf at 177–178 [120] per Davies AJA; *Re Westpac Banking Corporation* (2004) 53 ACSR 288 at 292–293 [23]–[24] per Emmett J; *Re Centennial Coal Co Ltd* (2006) 226 ALR 341 at 346 [15] per Barrett J.

29 (1995) 18 ACSR 290.

30 (1995) 18 ACSR 290 at 293.

31 (1997) 141 FLR 275 at 276, 279.

32 (1997) 24 ACSR 38.

something was done which had not been properly authorised because, for example, appropriate resolutions had not been passed, or because there was in office no validly elected board of directors, the doing of that thing without authority could be regarded as a "contravention" of the articles of association. That situation did not arise on the facts in *Nece*. The problem in that case was one of a deadlock preventing authority being given to enable solicitors to be validly instructed by the company[33]. In *Sheahan v Londish*[34], Young JA, with whom Lindgren AJA agreed in this respect[35], reiterated the approach he had taken in *NRMA v Gould* to be the meaning of "contravention"[36].

13 Section 1322(4)(a) applies to acts done in contravention of a company's constitution. That is the application principally in issue in this appeal. It directs attention to the provisions of LWC's constitution.

The constitution of the company

14 LWC was incorporated on 30 April 1971 under the provisions of the *Companies Act* 1961 (NSW). Its founding directors were Leo Weinstock ("Leo") and his wife, Hedy Weinstock ("Hedy"). The constitution of LWC consists of its memorandum of association and its articles of association, which have to be read in light of the relevant corporations legislation.

15 The share capital of the company when it was incorporated was $20,000.00 divided into twenty thousand shares of one dollar each in fourteen classes designated by the letters "A" to "N"[37]. Classes "A" to "D" were expressed not to confer "any right to vote at any general meeting of the Company" but entitled their holders to receive notice of and to attend such meetings[38]. The voting disability did not attach to classes "E" to "N". The specific voting disabilities attached to share classes "A" to "D" displaced a

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33 (1997) 24 ACSR 38 at 41–44.

34 (2010) 244 FLR 64.

35 (2010) 244 FLR 64 at 95 [233].

36 (2010) 244 FLR 64 at 84 [162].

37 Section 1427(1) of the Corporations Law, inserted by *Company Law Review Act* 1998 (Cth), Sched 1, item 11, repealed provisions of company constitutions setting out share capital and dividing it into shares of a fixed amount. Its application to the constitution of LWC was considered by Campbell JA in the Court of Appeal as outlined at [36] of these reasons and is not in issue in this appeal.

38 Articles 3(2)(a), 3(3)(b), 3(4)(a) and 3(5)(a).

general voting right conferred by Art 56 on any shareholder present at a general meeting of the company to have one vote on a show of hands and one vote per share on a poll.

16 The articles, as construed by Barrett J, provided for the company to hold annual general meetings in accordance with the provisions of the *Companies Act* 1961. That construction was not in dispute[39]. Barrett J held that after 1 July 1982, when the *Companies (New South Wales) Code* came into effect to the exclusion of the *Companies Act* 1961[40], annual general meetings held pursuant to the requirements of the *Code* and its successor, the Corporations Law of New South Wales, were not annual general meetings for the purposes of the articles[41]. That construction is not in question in this appeal. In any event, the *First Corporate Law Simplification Act* 1995 (Cth), which commenced on 9 December 1995, removed any statutory obligation on proprietary companies to hold an annual general meeting[42].

17 Article 46 empowers a director whenever he or she thinks fit to convene an extraordinary general meeting. Under Art 49 a quorum for a general meeting is two members of the company. The appointment of a director is covered by Arts 65 to 74 inclusive. Article 66 requires that:

> "At every annual general meeting each director shall retire from office and be eligible for re-election. Retiring directors shall act as directors throughout the meeting at which they retire."

18 Article 67 provides:

> "The Company at the meeting at which a director so retires may fill the vacated office by electing a person thereto, and in default the retiring director shall if offering himself for re-election and not being disqualified under the Act from holding office as a director be deemed to have been re-elected, unless at that meeting it is expressly resolved not to fill the

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39 A requirement imposed by Art 45 read with Art 1, requiring that words or expressions in the articles be interpreted in accordance with the *Interpretation Act* 1897 (NSW) and the *Companies Act* 1961.

40 *Companies (Application of Laws) Act* 1981 (NSW), ss 2, 18(1); *New South Wales Government Gazette*, No 90, 30 June 1982 at 2959.

41 [2011] NSWSC 235 at [83].

42 Section 245(2A) of the Corporations Law, inserted by *First Corporate Law Simplification Act* 1995 (Cth), Sched 4, item 35.

> vacated office or unless a resolution for the re-election of that director is put to the meeting and lost."

19 Article 69 confers power on the directors at any time to appoint any person to be a director either to fill a casual vacancy or as an addition to the existing directors. It provides:

> "Any director so appointed shall hold office only until the next following annual general meeting and shall then be eligible for re-election but shall not be taken into account in determining the directors who are to retire by rotation at that meeting."

As construed by Barrett J the qualification "only until the next following annual general meeting" has the effect that a director appointed under Art 69 ceases to be a director at the commencement of the next annual general meeting[43]. That construction was not in issue in this appeal.

20 Article 86 provides that the quorum necessary for the transaction of the business of the directors may be fixed by the directors and unless so fixed shall be two. No quorum was ever fixed by the directors for LWC directors' meetings, so the default quorum was two. In appointing Helen, however, Amiram purported to act under Art 87, which provides:

> "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."

The factual background

21 It was common ground that upon LWC's incorporation on 30 April 1971, its issued share capital consisted of five "A" class shares, four of which were held by Leo and one by Mr Nagel, a solicitor who held it in trust for Leo. It was also common ground that on or about 1 April 1972 three "C" class shares were issued, one of them to Hedy, one to Tamar and one to Amiram[44].

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43 [2011] NSWSC 235 at [96]–[103].

44 The share register showed eight "C" class shares allotted to Hedy in 1992. There was no minuted record of an allotment resolution. The precise number of "C" class shares allotted to Hedy was not in issue in this appeal. The cognate appeal in *Beck v Weinstock* [2013] HCA 15 proceeded on the basis that eight "C" class shares were held by Hedy at the time of her death.

22 Leo and Hedy continued in office beyond the first annual general meeting, which was held on 30 October 1972, and were in office as directors on 29 June 1973. The minutes of LWC record a meeting, held on that date, designated as an "extraordinary general meeting of shareholders", at which Leo and Hedy were present. The minutes record the passing of a special resolution:

> "That Tamar Beck and Amiram David Weinstock be appointed Directors and they shall hold office until the holding of the next Annual General Meeting of the Company."

23 In the winding-up application Tamar challenged the competency of the meeting of 29 June 1973 on the basis that the only relevant power of appointment rested with the directors under Art 69. Barrett J held, and it is not now in dispute, that although Leo and Hedy chose, perhaps on the basis of wrong advice, to depict their decision as effected by a special resolution at an extraordinary general meeting, it was effective under Art 69 as a decision made by them as directors[45]. Tamar and Amiram thereby became directors on the basis stated in that Article—that is to say that they were to hold office "only until the next following annual general meeting". The next annual general meeting was on 31 December 1973. As Barrett J found, Art 69 had the effect that neither Tamar nor Amiram continued as a director beyond the time at which that annual general meeting commenced[46].

24 According to the minutes of the meeting of 31 December 1973 all five shareholders of LWC—Leo, Hedy, Mr Nagel, Tamar and Amiram—were present. They purported to pass a resolution that:

> "any director retiring in accordance with the provisions of the Company's Articles of Association be re-appointed."

None of the shareholders held shares which conferred a right to vote. The resolution was therefore ineffective. So too were resolutions passed at subsequent annual general meetings reappointing Tamar and Amiram as directors.

25 Tamar purportedly resigned as a director on 8 January 1982. Amiram continued to act as a director. On 29 July 2003 Leo died. Hedy, who had contracted Alzheimer's disease, was incapable of performing the duties of a director of the company. It was not in dispute that she had ceased to be a director

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45 [2011] NSWSC 235 at [51]–[54].

46 [2011] NSWSC 235 at [103].

by operation of the articles[47]. On 30 July 2003 Amiram decided to appoint Helen "as an additional director" pursuant to Art 87. His "resolution", said to have been passed at a "meeting of director" consisting of himself, was in the following terms:

> "It was RESOLVED in accordance with clause 87 of the Articles of Association of the company which states;
>
> > 'if and so long as their number is reduced below the number fixed by or pursuant to the Articles of the Company as 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.'
>
> that Amiram David Weinstock being the sole remaining director of the company appoint Helen Weinstock as an additional director."

26 In the Originating Process filed on 30 September 2010, Tamar sought orders, pursuant to s 461(1)(k) and alternatively s 233 of the Corporations Act, that LWC be wound up and a liquidator appointed to it. She sought a declaration that there were no validly appointed directors of LWC and that none of the issued shares carried voting rights. She also sought interlocutory and final injunctive orders which are not material for present purposes. In Points of Claim filed in support of the Originating Process she asserted that it was just and equitable that the company be wound up on the basis that it had no directors, that Amiram and Helen had purported to act as directors despite not being directors, that there was no mechanism for directors to be appointed to the company, that members of the company had no voting entitlements at a general meeting and that the power to remove directors at an annual general meeting could not be exercised.

27 On 10 December 2010 LWC, Amiram and Helen filed an application in the proceedings commenced by Tamar seeking, inter alia, an order declaring that Amiram's purported resolution of 30 July 2003 appointing Helen as a director was not invalid by reason of any contravention of any provision of the Corporations Act or the constitution of LWC[48]. It was that aspect of the application by LWC, Amiram and Helen that was successful before Barrett J and in respect of which they were unsuccessful in the Court of Appeal.

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47 Article 73(d) provides: "The office of director shall become vacant if the director … becomes of unsound mind".

48 The resolution was identified in the application by reference to par 20 of the Points of Claim filed by Tamar on 28 October 2010.

28 The appeal to this Court was heard immediately before an appeal arising out of earlier but related proceedings in the Supreme Court of New South Wales[49]. In 2007 Tamar had commenced proceedings in that Court challenging the purported redemption by the "directors" of LWC of the "C" class shares held by Hedy at the time of her death. Hamilton AJ[50] held that the shares were not preference shares and therefore not redeemable preference shares and not amenable to redemption. His Honour made declarations accordingly. An appeal to the Court of Appeal by Amiram, Helen and LWC succeeded[51]. Special leave to appeal to this Court was granted on 10 February 2012 by Gummow and Heydon JJ. That appeal is the subject of a separate judgment.

The decision of the primary judge

29 The reasons of Barrett J involved the following steps:

- Amiram, who purported to appoint Helen as a director of LWC, did not hold the office of director when he did so. It was necessary that he hold that office in order that the appointment be valid. The situation was equivalent to one in which the company did not have a validly elected board of directors[52].

- Amiram was a member of the company and a former director, and had acted as a de facto director for 30 years[53].

- The appointment of Helen involved a "contravention" in accordance with the construction of that term adopted by Lehane J in *Nece*[54].

- To do something in relation to a company which is not authorised for want of a requisite resolution or a validly elected board of directors may be regarded as a contravention of the articles[55].

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49 *Beck v Weinstock* [2013] HCA 15.

50 (2010) 241 FLR 235.

51 (2011) 252 FLR 462.

52 [2011] NSWSC 235 at [150]–[152].

53 [2011] NSWSC 235 at [150].

54 [2011] NSWSC 235 at [151].

55 [2011] NSWSC 235 at [152].

- The contravention in this case was a matter of substance rather than one of form or procedure[56].

- Section 1322(6)(a) did not preclude the making of an order under s 1322(4)(a) as it was just and equitable that such an order be made. The condition in s 1322(6)(a)(iii) was therefore satisfied[57].

- There was no substantial injustice, within the meaning of s 1322(6)(c), to any person arising from the appointment of Helen as a director[58].

30 His Honour observed that as a validly appointed director Helen could appoint an additional director under Arts 87 and 69 to bring the number of directors up to two to meet the quorum requirements for a functioning board. The board so constituted could issue shares in any of the classes "E" to "N" with voting rights attached so that members could vote at a general meeting. The existence of those mechanisms for returning LWC to a functioning corporation was sufficient to dispose of the winding-up application.

31 His Honour made a declaration that:

> "the proceeding purporting to have been taken on 30 July 2003 by which Amiram David Weinstock purported to act as a director of LW Furniture Consolidated (Aust) Pty Ltd and in that capacity to appoint Helen Weinstock to be a director of that company is 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 virtue of valid appointment or election as such."

The decision of the Court of Appeal

32 The majority judgments in the Court of Appeal concerning the application of s 1322(4)(a) were delivered by Young JA and Sackville AJA.

33 Young JA held that in order for s 1322(4)(a) to apply there must be a contravention of the constitution of the company done either by infringing or failing to take advantage of one of its provisions[59]. Section 1322(4)(a) could

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56 [2011] NSWSC 235 at [153].

57 [2011] NSWSC 235 at [165]–[168].

58 [2011] NSWSC 235 at [169]–[171].

59 (2012) 265 FLR 60 at 110 [222].

only apply to validate an impugned action which could be done validly under the Corporations Act or under the constitution of the company[60].

34 Sackville AJA accepted that the term "contravention" was not limited to its orthodox meaning of "infringement"[61]. A failure to comply with the articles in taking steps that the company was not obliged to take could constitute a contravention[62]. However, Amiram's appointment of Helen as a director was not such a contravention[63]. There was no provision in the articles of LWC of which Amiram could have taken advantage in order to appoint Helen as a director[64]. Section 1322(4)(a) could not be applied to the purported act of someone who had never been validly appointed as a director and could not be so appointed[65]. His Honour said that none of the reported cases to which reference had been made involved an act by a person who, although a de facto director, could not be appointed as a director because there was no mechanism available to the company to achieve that result[66].

35 Campbell JA in dissent observed that s 1322(4)(a) was wider than the preceding sub-sections of s 1322[67]. All that was required for there to be a contravention of the constitution was "that something ha[d] happened that is different to what the constitution of the corporation requires."[68] His Honour held that the appointment of Helen was an act purported to have been done in relation to the company[69]. That characterisation was supported by the fact that Amiram had been a de facto director of the company within the meaning of s 9 of the Corporations Act[70]. As explained below, his Honour's approach was correct.

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60 (2012) 265 FLR 60 at 110 [223].

61 (2012) 265 FLR 60 at 111–112 [232].

62 (2012) 265 FLR 60 at 112 [232].

63 (2012) 265 FLR 60 at 112 [233].

64 (2012) 265 FLR 60 at 112 [236].

65 (2012) 265 FLR 60 at 113 [239].

66 (2012) 265 FLR 60 at 115 [249].

67 (2012) 265 FLR 60 at 92 [139].

68 (2012) 265 FLR 60 at 92 [139].

69 (2012) 265 FLR 60 at 93–94 [147]–[148].

70 (2012) 265 FLR 60 at 94 [150].

36 Campbell JA also dealt with a submission by Tamar that Art 3, which created the various share classes, had been repealed by operation of s 1427(1) of the Corporations Law, inserted by item 11 of Sched 1 to the *Company Law Review Act* 1998 (Cth)[71]. That provision abolished the concepts of the share capital of a company and par value by repealing the provisions of company constitutions setting out the amount of their share capital and dividing it into shares of a fixed amount. Campbell JA held that s 1427(1) had the effect of rewriting Art 3 to delete the reference to the capital of the company and the value of the shares as a money sum[72]. Article 4, the mechanism for issuing ordinary shares in the classes "E" to "N", therefore survived the 1998 legislation[73]. That finding is not in issue in this appeal.

The ground of appeal

37 The single ground of appeal was:

> "The Court below erred in holding that the power under section 1322(4) of the *Corporations Act 2001* (Cth) was not exercisable in relation to the purported appointment of the second appellant as a director of LW Furniture Consolidated (Aust) Pty Limited … on 30 July 2003 by the first appellant".

Consideration

38 The outcome of this appeal is dictated by the construction of s 1322(4)(a), discussed earlier in these reasons, the constitution of LWC including its articles of association, also discussed earlier, and the basis of the invalidity attaching to Amiram's appointment of Helen as a director of LWC.

39 Corporations, in contemporary Australian society, serve the purposes of enterprises, large and small, owned and operated by men and women, some of whom are sophisticated, knowledgeable and well-advised on matters of corporate governance and some, perhaps many, of whom are not. Section 1322(4) and related provisions reflect a long-standing legislative recognition that mistakes will happen in corporate governance and that it is not in the public interest that the validity of decisions made in relation to corporations be unduly vulnerable to innocent errors which may be corrected without substantial injustice to third parties. In accordance with its evident purpose, s 1322(4)(a) is to be construed

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71 (2012) 265 FLR 60 at 96–97 [161].

72 (2012) 265 FLR 60 at 100 [174].

73 (2012) 265 FLR 60 at 100 [175].

broadly and applied pragmatically, principally by reference to considerations of substance rather than those of form.

40 The dispensing power conferred on the Court by s 1322(4)(a) is not in the nature of a general absolution for all past errors. It does not authorise the making of an order declaring that an impugned act, matter or thing is valid. It allows a determination by the Court that the act, matter or thing done "is not invalid" by reason of a provision of the Corporations Act or a provision of the constitution of a corporation. The remedy may be sought by a party fearing or suspecting invalidity on such a ground or, as in the present case, to meet a contention of invalidity advanced by another party in adversarial proceedings. The effect of a declaration under the provision is limited to overcoming invalidity flowing from a particular contravention or contraventions. It could not be otherwise. It is only with respect to particular contraventions that the Court can reach the state of satisfaction required by s 1322(6).

41 The term "contravention" is defined in the *Macquarie Dictionary* as[74]:

> "the act of contravening; action counter to something".

It defines "contravene" as[75]:

> "1. to come or be in conflict with; go or act counter to; oppose. 2. to violate, infringe, or transgress".

The notions of "conflict", "counter to" and "oppose" are broad. It is not only the evident purpose of s 1322(4)(a) but its field of operation which requires the broadest available construction of "contravention". It applies not only to contraventions of the Corporations Act but also to contraventions of company constitutions. Constitutions—including the "replaceable rules"[76] in the Corporations Act, which may be or form part of a company constitution—are typically concerned with membership rights, the establishment, operation, powers and procedures of governance structures, particularly general meetings and board of directors, and the qualifications, appointment, retirement and removal of directors. These are not generally provisions expressed in terms of obligation or prohibition. That is not to say that a company constitution may not impose obligations upon company officers to do certain things or require that they do not do other things. But the requirement that a contravention of a

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74 Federation ed (2001), vol 1 at 421.

75 Federation ed (2001), vol 1 at 421.

76 Contained in a number of provisions of the Corporations Act set out in s 141 of that Act.

company constitution involve disobedience of a prohibition or non-compliance with an obligation would amount to an inexplicable limitation of the evident purpose of s 1322(4)(a).

42 It was submitted on behalf of Tamar that the ordinary meaning of contravention is an "infringement", "violation" or "transgression" of some negative prohibition or positive requirement. Section 1322(4)(c) was said to reinforce that construction. That proposition should not be accepted. Section 1322(4)(c) empowers the Court to relieve a person from civil liability by reason of a contravention or failure of a kind referred to in s 1322(4)(a). There is no reason to limit the construction of the term "contravention" by reference to a subset of contraventions which attract civil liability nor by reference to that subset which can be characterised as a "failure" to do something. Somewhat in tension with the preceding submission, Tamar accepted that "contravention" in s 1322(4)(a) encompasses a failure to comply with a condition of a power. That much was common ground and accorded with judicial decisions which have been referred to earlier in these reasons. However, Tamar sought to distinguish non-compliance with a necessary condition for the exercise of a power from the case in which a person purported to "exercise a power which he simply does not have". She contended that Amiram, purporting to appoint Helen as a director, was in that category. That submission should not be accepted. The proffered distinction, which is at best difficult, would require finegrained analysis quite at odds with the remedial and practical purpose of the provision. It is also at odds with the legislative history. The nineteenth century precursors of s 1322 in the United Kingdom and the Australian colonies, and State companies legislation after federation, provided for the validation of acts done by persons acting as directors notwithstanding that their appointments were defective or that they were disqualified.

43 It is not appropriate to torture a limit out of the language of s 1322(4)(a) against the extreme case of a stranger to the company purporting to make a decision appointing another stranger as a director. Extreme cases are amply covered by the discretionary nature of the power and the constraints upon its exercise imposed by s 1322(6). The present case was not an extreme case. Amiram was not a stranger to the company. He had discharged the functions of a director for thirty years owing, as an officer of the company, the obligations that were imposed upon him notwithstanding the cessation in December 1973 of his appointment as a director, a cessation of which he was evidently unaware. This was a case falling within the scope and purpose of s 1322(4)(a).

Conclusion

44 Amiram's appointment of Helen as a director was within the scope of the remedial power conferred by s 1322(4)(a). The appeal should be allowed. I agree with the orders proposed in the joint judgment.

45 HAYNE, CRENNAN AND KIEFEL JJ. A company[77], incorporated in 1971 under the *Companies Act* 1961 (NSW), had two directors, who were husband and wife: Leo and Hedy Weinstock. All the issued shares in the company were held by or on behalf of the husband. In 1972, three further shares were issued: one each to the wife, the first appellant (Mr A D Weinstock) and the first respondent (Mrs T R Beck). (Mr A D Weinstock and Mrs Beck are children of Leo and Hedy Weinstock.)

46 In 1973, Mr A D Weinstock and Mrs Beck were appointed as additional directors of the company to hold office until the next annual general meeting of the company. At subsequent annual general meetings, resolutions were passed resolving to reappoint directors retiring in accordance with the provisions of the company's articles of association. It is now accepted that none of those resolutions had the effect of appointing either Mr A D Weinstock or Mrs Beck as a director because, under the company's articles, the initial appointment of each as a director came to an end at the start of the next annual general meeting. It followed that neither was a director who retired *at* that meeting or at any subsequent meeting. In fact, however, each acted as if he or she had been validly appointed as a director until Mrs Beck gave notice of resignation from office in 1982. Mr A D Weinstock continued to act as a director of the company.

47 On 29 July 2003, Mr Leo Weinstock died. His wife, Hedy, had become mentally incompetent. There was, therefore, only one person (Mr A D Weinstock) who claimed to be a director of the company. The company's articles required that there be no fewer than two directors unless otherwise determined by a general meeting and that the quorum for a meeting of directors be, unless otherwise fixed by the directors, two. The articles provided that, if the number of directors was reduced below the number fixed 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". In purported exercise of that power, Mr A D Weinstock appointed the second appellant, his wife, Helen, as a director of the company.

48 It is not disputed that the purported appointment of Mrs Helen Weinstock was invalid.

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77 The company was named as second respondent to the appeal to this Court but it took no part in the proceedings.

49 At first instance, Barrett J made[78] an order under s 1322(4)(a) of the *Corporations Act* 2001 (Cth) ("the Act") declaring the appointment of Mrs Helen Weinstock not invalid. The Court of Appeal (Young JA and Sackville AJA, Campbell JA dissenting) set aside[79] this order. By special leave, Mr A D Weinstock and Mrs Helen Weinstock appeal to this Court.

50 There is only one issue in the appeal. Section 1322(4)(a) of the Act gave the "Court"[80], "on application by any interested person", power to make, "either unconditionally or subject to such conditions as the Court imposes", "an order declaring that any act, matter or thing purporting to have been done ... under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation". The appointment of Mrs Helen Weinstock as a director was invalid because Mr A D Weinstock was not authorised to appoint her. Could an order be made under s 1322(4)(a)[81] declaring the appointment to be not invalid?

51 In the Court of Appeal, and again in this Court, Mrs Beck submitted that Mr A D Weinstock's purported appointment of Mrs Helen Weinstock was not a "contravention of ... a provision of the constitution" of the company. Mrs Beck's argument proceeded by three steps. First, she submitted that "contravention" in s 1322(4)(a) means "an 'infringement', 'violation' or 'transgression' of some negative prohibition or positive requirement" of the Act or of the constitution of the company. Second, she submitted that to determine whether there was an infringement, violation or transgression of the constitution of the company, it was

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78 *Beck v L W Furniture Consolidated (Aust) Pty Ltd* [2011] NSWSC 235; *Beck v L W Furniture Consolidated (NSW) Pty Ltd* [2011] NSWSC 405.

79 *Beck v LW Furniture Consolidated (Aust) Pty Ltd* (2012) 265 FLR 60.

80 Defined in s 58AA(1) as any of (a) the Federal Court of Australia; (b) the Supreme Court of a State or Territory; (c) the Family Court of Australia; and (d) "a court to which section 41 of the *Family Law Act 1975* applies because of a Proclamation made under subsection 41(2) of that Act".

81 There was no dispute that the company, incorporated under the *Companies Act* 1961 (NSW), was a "corporation" to which s 1322(4)(a) of the Act applied. See ss 20-21 of the *Companies (Application of Laws) Act* 1981 (NSW), s 126 of the Corporations Law of New South Wales (being s 82 of the *Corporations Act* 1989 (Cth) as given effect by the *Corporations (New South Wales) Act* 1990 (NSW)) and, following the amendments made by the *Company Law Review Act* 1998 (Cth), ss 1362CA-1362CB of the Corporations Law of New South Wales together with ss 57A(1), 1378(1) and 1408 of the Act.

necessary to ask why the appointment of Mrs Helen Weinstock was invalid. Third, she submitted that the purported appointment of Mrs Helen Weinstock was invalid because Mr A D Weinstock had no power to make the appointment. He had no power to make the appointment because he had not been, and at the time of the purported appointment could not have been, appointed to the office of director of the company. It followed, so Mrs Beck submitted, and as a majority of the Court of Appeal accepted[82], that the appointment was not made in contravention of the constitution of the company.

52 In the Court of Appeal, it was said[83] to be "stretching language to breaking point to suggest that [Mr A D Weinstock's] act was ineffective (or invalid) because he contravened or failed to take advantage of a provision in the Articles or the Act". This conclusion was evidently founded in the observation[84] that Mr A D Weinstock had no power to appoint Mrs Helen Weinstock as a director of the company. A distinction was drawn[85] between invalid actions "able to be achieved under the Act or constitution" and actions which "it is not possible to attain ... under the Act or constitution". But how or why the observation that the appointor had, and could have had, no power to make the purported appointment bears upon whether the appointment was made in contravention of the company's constitution was not further spelled out in the reasons of the majority in the Court of Appeal or in argument in this Court. Contrary to Mrs Beck's central submission in this Court, the words "by reason of any contravention" provide no basis for drawing a distinction between what cannot be done at all under the Act or under the constitution of a company and what can be done but has not been done validly. In both cases the action taken was invalid. The supposed distinction cannot be drawn when the very premise for the application of s 1322(4)(a) was that what has been done was invalid.

53 Section 1322(4)(a) of the Act was cast in very broad terms. It dealt with "any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken", whether done, instituted or taken under the Act or in relation to a corporation. The power given to the Court was to declare the act, matter or thing, or the proceeding, not invalid. The Court could do that either unconditionally or subject to such conditions as the Court

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82 (2012) 265 FLR 60 at 110 [223] per Young JA, 113 [239] per Sackville AJA.

83 (2012) 265 FLR 60 at 113 [236] per Sackville AJA.

84 (2012) 265 FLR 60 at 112 [235] per Sackville AJA.

85 (2012) 265 FLR 60 at 110 [223] per Young JA, 113 [239] per Sackville AJA.

imposed. The Court was given[86] power to "make such consequential or ancillary orders as the Court thinks fit". Section 1322(6) prescribed pre-conditions to making an order under s 1322(4)(a) but the detail of those pre-conditions need not be examined.

54 Mr A D Weinstock purported to appoint Mrs Helen Weinstock as a director. That appointment was not made by a continuing director for the purpose of increasing the number of directors to the number fixed as the quorum for a meeting of directors. It was, therefore, not made in accordance with the requirements of the company's articles. Because the appointment was not made in accordance with those requirements, it was made in contravention of the company's constitution. Observing that Mr A D Weinstock did not have power to make the appointment reveals how the contravention came about. That Mr A D Weinstock not only did not have power but could not have validly been given the power to make the appointment neither adds to nor subtracts from the conclusion that Mrs Helen Weinstock's appointment was not made in accordance with the company's constitution. The appointment was invalid and it was invalid by reason of a contravention of the company's constitution.

55 Only if s 1322(4)(a) is to be read otherwise than according to its terms could it be said that the Court did not have power in these proceedings to make an order under that provision. But the power given to the Court by s 1322(4)(a) is not to be hedged about by any implied limitation. As this Court said in *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc*[87], "[i]t is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words[88]".

56 The construction urged by Mrs Beck and adopted by the Court of Appeal necessarily depended upon implying some limitation on the power given to the Court by s 1322(4)(a). No basis for making any such implication was identified

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86 s 1322(4).

87 (1994) 181 CLR 404 at 421; [1994] HCA 54. See also, for example, *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 301 [26]; [1998] HCA 20; *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at 279 [17]; [2000] HCA 30; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 361 [178]; [2009] HCA 25.

88 See *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283-284, 290; [1988] HCA 13. See also *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 185, 202-203, 205; [1992] HCA 28.

and that is reason enough to reject it[89]. Section 1322 conferred jurisdiction on and granted powers to a court. The provision is not to be read "by making implications or imposing limitations which are not found in the express words"[90].

Conclusion and orders

57 The appeal to this Court should be allowed with costs. The appellants submitted that orders 3 and 5 made by the Court of Appeal of the Supreme Court of New South Wales on 5 April 2012 should be set aside and in their place there should be an order remitting to the Equity Division of the Supreme Court of New South Wales the determination of whether an order should be made under s 1322(4)(a) in addition to the question whether the company should be wound up, which order 3 of the Court of Appeal's orders already provided should be remitted to the Equity Division for further consideration. The appellants accepted that it was appropriate that, for the reasons given[91] by Campbell JA, they should pay 80 per cent of the costs of the appeal and cross-appeal to the Court of Appeal. The consequential orders proposed by the appellants should be made.

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89 cf *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 275-276; [1995] HCA 43.

90 *Owners of "Shin Kobe Maru"* (1994) 181 CLR 404 at 421.

91 (2012) 265 FLR 60 at 108 [209]-[210].

58 GAGELER J. This appeal from the Court of Appeal of the Supreme Court of New South Wales (Young JA and Sackville AJA, Campbell JA dissenting)[92] concerns the scope of the power conferred by s 1322(4)(a) of the *Corporations Act* 2001 (Cth). The facts and procedural history are set out by French CJ, whose abbreviations I adopt, and by Hayne, Crennan and Kiefel JJ, with whose proposed orders I agree.

59 Section 1322 provides in part:

> "(4) Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:
>
> (a) 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 a provision of this Act or a provision of the constitution of a corporation;
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> …
>
> (c) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a);
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> …
>
> and may make such consequential or ancillary orders as the Court thinks fit.
>
> (5) An order may be made under paragraph (4)(a) or (c) notwithstanding that the contravention or failure referred to in the paragraph concerned resulted in the commission of an offence.
>
> (6) The Court must not make an order under this section unless it is satisfied:
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> (a) in the case of an order referred to in paragraph (4)(a):

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92 *Beck v LW Furniture Consolidated (Aust) Pty Ltd* (2012) 265 FLR 60.

(i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;

(ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or

(iii) that it is just and equitable that the order be made; and

(b) in the case of an order referred to in paragraph (4)(c)—that the person subject to the civil liability concerned acted honestly; and

(c) in every case—that no substantial injustice has been or is likely to be caused to any person."

The "Court" in this context means the Federal Court of Australia, the Supreme Court of a State or Territory, the Family Court of Australia or the Family Court of Western Australia[93].

60 Section 1322(4)(a) confers a remedial power on a superior court the exercise of which is conditioned always on satisfaction by that court that no substantial injustice has been or is likely to be caused to any person. The Court of Appeal was agreed that it is therefore to be construed with all the liberality that its language permits[94]. The difference between Young JA and Sackville AJA in the majority and Campbell JA in dissent turned on how far a liberal construction of the word "contravention" could be taken.

61 Was the purported appointment by Amiram of Helen as a director invalid "by reason of [a] contravention of … a provision of the constitution of a corporation" in circumstances where Amiram purported to act under a provision of the constitution of LWC that allowed an existing director to appoint a new director but where Amiram did not and could not have power to act under that provision because Amiram was not an existing director and could not be appointed as a director by any procedure available under the constitution of LWC?

62 The negative answer of Young JA and Sackville AJA was on the basis, as summarised by Young JA, that, while "action … performed in [an] invalid way … may be validated under the section", "if it is not possible to attain the result

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93 Section 58AA(1) of the Corporations Act.

94 (2012) 265 FLR 60 at 90 [130]-[131], 111 [232], 113 [240].

under the … constitution, the section cannot assist"[95]. The positive answer of Campbell JA was on the basis that "[a]ll that is required for there to be a 'contravention' of the constitution is that something have happened that is different to what the constitution of the corporation requires": "[f]or [Amiram] to appoint Helen as director, when he had no power to do so, is a contravention in this sense"[96].

63 The answer of Campbell JA is, in my view, to be preferred. The answer adopts an available construction of the word "contravention" that fulfils the remedial purpose of s 1322(4)(a), that fits with the text of s 1322 and that conforms to the preferred construction of the same word in its relevantly identical predecessor, s 1322(4)(a) of the Corporations Law.

64 The specification in s 1322(6)(a) of s 1322(6)(a)(i) as one of three alternative means of fulfilling a precondition to the making of an order under s 1322(4)(a) shows that an act, matter, thing or proceeding declared not invalid by reason of a contravention need not be "essentially of a procedural nature". The repeated references (in ss 1322(4)(c), 1322(5) and 1322(6)(a)(ii)) to a "contravention or failure" referred to in s 1322(4)(a) also show that "contravention" is used in s 1322(4)(a) in a sense interchangeable with "failure": as connoting an absence of compliance with a requirement necessary for validity.

65 An order under s 1322(4)(a) goes no further than to declare an act, matter, thing or proceeding not invalid by reason of a relevant contravention. The order does no more than to remove the invalidating effect of contravention so as to make valid what would have been valid without contravention. It is therefore true that s 1322(4)(a) cannot assist to achieve a result that could never be attained under the constitution of a corporation. However, s 1322(4)(a) can assist in achieving a result that could in some circumstances be attained under the constitution of a corporation by removing the invalidating effect of *any* absence of compliance with a requirement necessary for validity in the circumstances that in fact occurred.

66 Campbell JA said[97] that Lehane J "was, as usual, right" when he had said of s 1322(4)(a) of the Corporations Law[98]:

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95 (2012) 265 FLR 60 at 110 [223].

96 (2012) 265 FLR 60 at 92 [139].

97 (2012) 265 FLR 60 at 91 [137].

98 *Nece Pty Ltd v Ritek Incorporation* (1997) 24 ACSR 38 at 46.

> "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".

In my view, Campbell JA was right, as Lehane J was right.

67 The provision of the constitution of LWC under which Amiram purported to act allowed for the appointment of a new director by an existing director. The purported act of Amiram, when he was not an existing director, was a contravention in the sense in which that term is used in s 1322(4)(a). The fact that Amiram could not then be appointed as a director by any procedure available under the constitution of LWC makes no difference to that conclusion.

68 For these reasons, I agree with the orders proposed by Hayne, Crennan and Kiefel JJ.