IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S266 of 2012

BETWEEN:

AMIRAM DAVID WEINSTOCK
First Appellant

HELEN WEINSTOCK
Second Appellant

and

TAMAR RIVQA BECK
First Respondent

10 **L W FURNITURE CONSOLIDATED (AUST) PTY LIMITED**
Second Respondent

APPELLANTS' REPLY

Part I

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

Part II

2. For reasons previously submitted, the appellants contend that the approach taken by the majority in Court of Appeal unduly restricts the ambit of the court's power under s 1322(4)(a) to those things which "could otherwise have been achieved" under the
20 Act or the constitution of the corporation. That approach appears in the reasons of Young JA particularly at CA[223] (AB194[1]) and of Sackville AJA particularly at CA[239] (AB201).

3. The first respondent appears to make no particular attempt to defend that construction of s 1322(4)(a). Rather, she advances a construction of the section by reference to what is said to be the ordinary meaning of the word "contravention", namely something which infringes or violates some requirement: see especially RS15, 25, 32.

Filed on behalf of the Appellants

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[1] AB References are to the application book: see footnote 1 to the appellants' submissions filed on 21 September 2012.

4. There are several reasons why that approach should be rejected.

5. *First*, even considered in isolation and without regard to the scope object and purpose of s 1322(4), the word "contravention" has a wider ordinary meaning than that for which the first respondent contends. It also means something which contradicts or is counter to something else: *New Shorter Oxford English Dictionary*; *Macquarie Dictionary*. In that sense, a thing done other than in the manner provided by a corporation's constitution may be said to be done in contravention of the constitution. *See e.g. Charles v. Grierson* (1998) 7 CLR 18 where "contravention" was held to mean "in prosecution of a purpose inconsistent with observance of the provisions" of the enactment in question (per Griffith C.J. at 23.3) even though no breach of a specific provision had occurred (see at 22.6).

6. *Secondly*, the first respondent's construction fails to have regard to the whole of the language of the provision. Section 1322(4)(a) is concerned with invalidity which flows from "things purporting to have been done" (ie, things which were not done) and "proceedings purporting to have been taken" (ie, proceedings which were not taken) in conformity with the Act or a provision of the constitution of the company. Here, the purported appointment of Helen was just that: something that purported to be done under the constitution, but which was not.

7. *Thirdly*, it is necessary to have regard to the language of s 1322 as a whole. It is clear from s 1322(4)(c), (5) and (6)(a)(ii) that subs 4(a) is sufficiently broad to include a "failure" to do something. The first respondent's criticism of the appellants' submission in this regard misses the point: see RS23 and in RS51. The point is not that subs (4)(c) is coterminous with subs (4)(a). It is simply that subs (4)(a) must at the very least be construed in a way that includes "failures" to do things. In other words, "contravention" in subs 4(a) has a wider sense than a mere violation or transgression of a provision. It includes a failure to take advantage of a provision.

8. Furthermore, if it matters, it is not correct to say that a person cannot incur liability by purporting to do a thing or take a proceeding which he or she has no authority or power to do or take: cf RS23, 51. It is common for people to incur a liability because they purport to do things which they have no authority or power to do: such liability may be criminal or civil, or both.

9. *Fourthly*, the first respondent's construction fails to have regard to the scope, object and purpose of s 1322. The section is remedial in nature and is drafted in broad terms. The first respondent offers no reason why her narrow construction of subs 4(a) should be adopted in the face of the clear purpose of the section as a whole.

10. To construe the section as applying only where there has been some "violation" or "infringement" of a requirement would be to give it a very uncertain field of operation. As appears from the example at RS33, the first respondent's construction makes the court's power dependent on the manner of expression of particular provisions of the

Act or of a company's constitution. So, for example, a provision of a constitution which says that only directors may do a particular act will not be "contravened" if that act is purported to be done by the company secretary; but the same act by the company secretary would "contravene" a provision which said that "no person other than a director" may do that act. The statutory purpose of s 1322, considered in its widest sense, is to grant jurisdiction to remedy the consequences of invalidity. The first respondent's construction cannot be reconciled with that purpose.

11. The first respondent's particular criticisms of the appellants' submissions should carry no weight. The appellants do not invite the Court to ignore any words in the provision: cf. RS14. The appellants rely on the whole of the words of the provision. The issue is as to the meaning of those words.

12. Nor is the appellants' case as wide as the first respondent seeks to characterise it at RS28 and following. It is important to remember that there are other clear words of limitation on the power, namely that the act, matter, thing or proceeding must purport to be done "in relation to a corporation." The "universe" of the court's power is confined to things having that character. The court's power is further confined by subs (6). In any event, it is equally important to remember that the section is remedial in nature and is intended to have a wide "universe" of operation. It is no criticism of the appellants' construction to say that it is wider than that adopted in the court below.

13. It is wrong to submit (RS31) that the appellants' construction ignores the relationship between the purported actor and the corporation. That relationship will ordinarily be relevant, at the very least, to showing that the purported act or thing is done in relation to a corporation. So, for example, Ami's purported appointment of Helen was a proceeding purporting to have been taken in relation to the Company because of his relationship with the Company: he was at the time and had been for some 30 years a *de facto* director. However, it is not necessary to demonstrate that the relevant actor had the power to do the purported thing. On the contrary, the section is concerned with things purportedly done by people with no power to do them.

14. The point at RS30 takes the first respondent's argument no further. The proposition there is that the section does not authorise the court to confer a power which is not given by the Act or constitution. That proposition confuses, with respect, the operation of the section with the circumstances that brought about the invalidity in the first place. The section is concerned with the consequences of invalidity. Where it applies, the court makes a declaration that a thing which was not done pursuant to a provision of the Act or of a constitution is taken to be valid. The effect of the section is not to retrospectively grant a power to do the purported thing in the first place.

15. The example at RS37 illustrates nothing other than the fundamental instability in first respondent's case. Person A in the first respondent's example has no power, on any view, to appoint administrators to company X. Yet on the first respondent's approach, an application to cure the appointment of the administrators under s 1322(4)(a) would

depend upon whether the prior invalid appointment of person A could itself be cured. That is not what the section requires.

16. The submissions in relation to *Sheahan v Londish* (2010) 80 ACSR 337 (RS39-45) should be rejected. The first respondent's disagreement with the outcome on the facts of that case (RS43) is neither here nor there. It is not a reason to reject the construction of the section on which their Honours proceeded.

17. The attempt by the first respondent at RS44 to explain the conclusion in *Sheahan v Londish* as being consistent with her current argument about the "ordinary" meaning of "contravention" exposes the same flaws as were apparent in RS37 (as to which, see paragraph 15 above). As appears at paragraph [158] of *Sheahan v Londish*, the trial judge had found that the "notice was not an act, matter or thing or proceeding 'under this Act' or in relation to a corporation in contravention of a provision of the *Corporations Act* or the corporate constitution; it was something entirely unauthorised and uncontemplated by the Articles or the Act. It was an act which proceeded with irrelevance to the Constitution, the Act, and without any effect." Young JA nevertheless held that it was invalid by reason of a contravention of the constitution because it failed to take advantage of a provision: paragraph [161].[2] Lindgren AJA endorsed that conclusion at [233]-[236], noting that the power under s 1322(4)(a) was "of the widest kind": at [233].

18. Their Honours did not approach the section in the manner of the majority in the Court of Appeal in this case, namely by embarking on an enquiry into how the impugned purported notice could otherwise effectively have been given. Nor did their Honours apply the section because the giving of the notice was seen to violate or contravene an express requirement. *Sheahan v Londish* does not support the approach taken by the majority in the Court of Appeal, nor does it support the approach now advocated by the first respondent.

19. The first respondent's argument in relation to *Nece v Ritek* (1997) 24 ACS 38 (RS54-55) is equally unavailing. In that case, Lehane J expressed the view that a thing done by directors who were not validly in office was, for these purposes, done in contravention of the articles: see the passage cited by Campbell JA at CA[133], AB139. His Honour reached that conclusion having regard to certain earlier authority, also cited by Campbell JA: CA[132], AB138-139. However, it is not possible to dismiss the comments of Lehane J as mere obiter, as was sought to be done below: see CA[136], AB140. Nor is it possible to read the those comments as being subject to the unexpressed qualification that the conclusion only holds good for those things which could otherwise have been done effectively by those who purported to do them in the first place: cf RS55. That is not what Lehane J said, nor was it said in any of the

[2] In this respect his Honour's conclusion was consistent with his earlier decision in *Sydney Aussie Rules Social Club Ltd v Superintendent of Licences* (1989) 15 ACLR 662. In that case Young J said that s 539 of the *Companies (NSW) Code 1981*, which was in similar terms to s 1322(4), was a power to "validate something which otherwise would be completely and utterly void."

earlier authorities on which his Honour relied, nor is it the only basis on which those authorities may be understood. Campbell JA was right to conclude that Lehane J "was, as usual, right": CA[137], AB140.

20. In relation to RS6, it is there submitted that Article 87 is not a grant of power. The difficulty with that contention is that the very words of Article 87 – the power to act "for the purpose of increasing the number of directors to that number" - inherently involve a grant, albeit a limited grant, of power.

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