IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S56 of 2012

BETWEEN:

TAMAR RIVQA BECK
Appellant

-and-

AMIRAM DAVID WEINSTOCK
First Respondent

HELEN WEINSTOCK
Second Respondent

LW FURNITURE CONSOLIDATED (AUST) PTY LIMITED (ACN 000 894 557)
Third Respondent

APPELLANT'S REPLY

PART I: Internet publication

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

PART II: Reply

2 *RS [5]*: The Court of Appeal has now allowed the appeal from the decision of Barrett J and ordered that the matter be remitted: [2012] NSWCA 76.

3 *RS [6], [7]*: The financial benefit to the appellant if the appeal is successful is in the order of several millions of dollars, as referred to by Young JA (CA [9]).

4 *RS [14]*: The respondents' construction of the statutory expression "preference share" hinges on the phrase "carrying a right to a preference". The Corporations Act does not use that phrase. Nor did Roxburgh J use that or any cognate expression in *Re Powell-Cotton's Resettlement* [1957] Ch 159 at 161. And that phrase only elides the critical question. The real difference between the parties is whether the character of an issued share as a preference share is to be determined by reference:

(a) Solely to those "rights" said in the constitution to be "attached" to shares in the nominal or unissued capital of the company (the respondents' case); or

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(b) Those rights which in fact and law exist and operate from time to time, by reason of the operation of the constitution under s 140 as a statutory contract between those persons who actually hold issued shares (the appellant's case).

That is, for the respondents to succeed, "carrying a right to a preference" must embrace not just an actual right of preference of one issued share over another, but also the mere potentiality that such a situation might arise in the future. On this view, a share could have the character of a preference share, even though during the entire period of its existence the right of preference remains entirely theoretical or potential. The mere possibility that the company might, at some future date, issue shares of a class presently anticipated in the constitution to be subordinate is said to make the share a "preference share" at all times in its life.

6 *RS [20], [26] and [64]*: A distinction between the "existence" of rights and their "exercise or enjoyment" does not assist the respondents. Assume a preference share which confers a right to a preferential dividend over ordinary issued shares. That right exists, but the exercise or enjoyment of that right of preference will depend on the contingency whether the company has sufficient profits at a point in time to make the payment of the preferential dividend lawful. From the company's perspective, it has a contingent obligation to pay the dividend in preference to any dividends paid to subordinate ranking shares. (See *Community Development Pty Ltd v Engwirda Construction Co* (1969) 120 CLR 455: a contingent debt is one where there is an existing obligation out of which a debt could arise in a future event, including an event which may or may not occur.)

7 The present facts raise an issue of quite a different dimension. The "C" class shares are stated in the constitution to have their preference in the area of return of capital; the preference said to be over all shares (other than "A", "B" and "D"). Under the constitution's description of the nominal capital, this is a preference over each of the "E" to "N" ordinary classes of shares. Yet no "E" to "N" class shares have ever been issued. This "right" of preference has at all times been a mere possibility. The right has never relevantly "existed". Put differently, the absence at all times of other issued shares over which a right of preference could be asserted in relevant factual situations which might arise denies to the shares the character of "preference shares".

8 *RS [14] –[30] generally*: Even if, as the respondents urge, one confines attention primarily to the text of the current statute, the appellant's construction of "preference

share" should be preferred. The purpose of s 254A is to confirm that the power under s 124 to issue shares is sufficiently broad to extend to three situations which might otherwise be thought to be problematic (for example because of the departure they involve from any broad underlying notion of "equality" of contribution and treatment between persons holding issued shares). Subsection (1) refers to "bonus shares", "preference shares" and "partly paid shares". In respect of "bonus shares" and "partly paid shares" one would look to the factual circumstances at the point of issue to determine their character (ie whether the share was in fact issued for no consideration or on a partly paid basis). Yet the respondents say that "preference shares" are different in that one determines their statutory character solely by reference to provisions in the constitution respecting the unissued capital, provisions which, at the date of issue, have no application, and may never have any application in the actual life of the company.

9 Similarly, s 254A(2) has as its premise that the company seeks to issue shares which, on issue, will have the character of preference (as understood from s 254A(1)(b) meaning a preference over other shares on issue), and then establishes a pre-condition before such issue can occur. And s 254A(3) then identifies from within that class of preference shares, so understood, that sub-set where the issue includes a liability to redemption in any of three ways. Undoubtedly, to be preference shares within s 254A, the shares must have the character of preference at the time of issue (or immediately upon their conversion to such shares under s254G). The appellant contends that such character depends on there being a relationship in fact, at that time, to other shares on issue which meets the description of preference.

10 This attention to actual relationships between issued shares is also evident in the other provisions referred to by the Respondent. Thus, s 246C(6) deems there to be a variation of rights requiring a class meeting where the company issues new preference shares ranking equally with existing (i.e. issued) preference shares unless the new issue has been appropriately pre-authorised. Likewise, the power to convert ordinary to preference share and vice versa under s 254G, speaks to conversions that occur in relation to issued shares.

11 Finally on this point, s 254G(3) is important. The ability to convert issued shares into shares of a different issued character is limited when it comes to redemption. Unless a share meets the description of a redeemable preference share on issue, it cannot later have a liability to redemption attached to it. Parliament has ensured that the class of

share where redemption can occur without the general protections for reductions of capital now found in Part 2J.1 is confined to those shares which have the character of preference on issue and where the liability to redemption is stamped on them at issue. This is not done idly, nor is it explained by the Respondent's suggestion that they are just a form of debt (RS [55]). It is because, at the date of issue, the capital contributed for these shares can be seen as additional to the primary capital contributed by the holders of the shares over which they have preference, and that the liability to redemption is attached at that time so persons dealing with the company thereafter know that they may not be able to look to that part of the capital for payment of debts (because the reduction of capital inherent in redemption can occur without the general protections of Part 2J.1).

12 *RS [29]:* The matters at RS [29(a) and (b)] would also apply if the legislature permitted redemption of any shares expressed to be redeemable. They do not engage with the fact that the legislature has confined the ability (or liability) to redeem shares to those shares which are "preference shares" (nor does the respondent do so elsewhere, save for mere speculation at RS [55]). As to RS [29(c)], the appellant does not start at the position suggested by the respondents. She adopts the orthodox approach of examining the historical antecedents of the expression "preference shares" to assist in ascertaining the meaning of that phrase when adopted in 1929. As to RS [29(d)], the factual position in the present case cannot affect the proper construction of the statutory expression.

13 At various points, the respondents suggest that the only protections for creditors were to be found in the requirements that redemptions occur only in respect of fully paid shares and only out of profits or the proceeds of a fresh share issue (RS [29(a)], 56 and 59). However, this is incomplete. A more fulsome description of the scope of protections afforded to creditors by the 1929 UK Act is set out at AS [40]-[41].

14 *RS [31]*: The respondents are able to point to no case or instance in which shares characterised as "preference shares" have been on issue without there also being on issue a base class of "ordinary shares". That is why no case has expressly addressed the "feature of the term for which the appellant contends". Further, the appellant's point is that that feature has been and is subject to enactments in Australia and elsewhere; it is inherent in the statutory concept of "preference share".

15 *RS [32]-[34]*: The respondents wrongly invoke the principle identified in *Aid/Watch Incorporated v Federal Commissioner of Taxation* (2010) 241 CLR 549 at 548-549

[20]. That principle applies where a statute operates by reference to a particular common law or equitable doctrine or "body of the general law". Examples include the expression "charitable institution" as considered in *Aid/Watch* itself and s6 of the Statute of Monopolies 1623 considered in *National Research Development Corporation v Commissioner of Patents* (1959) 102 CLR 252 at 269. Here, as the appellant has sought to demonstrate, successive iterations of corporations legislation in the United Kingdom and in Australia have adopted as the criterion for operation of the provisions permitting redemption of shares an expression which had a particular historical and commercial meaning. Any construction of the statutory expression in the current legislation must proceed from a properly informed understanding of its historical antecedents. See also *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346 at [7], [15], [23]-[31] (in relation to the expression "any attachment" in s500(1) of the Corporations Act).

16 *RS [48], [51], [66]*: These paragraphs beg the question – has the "modern conception" of "preference shares" changed over the years such that a share may now be a "preference share" for the purposes of the Corporations Act even though there are no issued "ordinary shares"? Nothing in the respondents' submissions establishes that change. Indeed, as emphasised above, the respondents can point to no instance of there being on issue shares characterised as "preference shares" in the absence of any issued "ordinary" shares. One is left in the position where there was an established historical commercial conception of a "preference share", that conception was adopted in successive iterations of corporations legislation, there is no evidence of a relevantly different "modern conception" and there is no indication that any relevant change of meaning was intended by the Corporations Act.

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