

WEINSTOCK & ANOR v BECK & ANOR (S266/2012)

Court appealed from: New South Wales Court of Appeal
[2012] NSWCA 76

Date of judgment: 5 April 2012

Special leave granted: 7 September 2012

LW Furniture Consolidated (Aust) Pty Ltd ("the company") is a family company incorporated in 1971. The founding directors were Mr Leo Weinstock ("Leo") and his wife, Mrs Hedy Weinstock ("Hedy"). Leo was, in effect, the company's sole shareholder (as one share was also held in trust for him). Article 66 of the company's Articles of Association ("the Articles") provided that retiring directors act as directors throughout the meeting at which they retire, and that they be eligible for re-election. Article 67 provided that the company (at a meeting) could elect a person to fill the office of a retiring director and, in default, the retiring director be deemed re-elected. Article 69 provided for the appointment of additional directors, who were to hold office until the next annual general meeting ("AGM") but not be taken into account in determining the directors who were to retire by rotation at that meeting.

In 1972 shares in the company were issued to Hedy and to her and Leo's children, Mr Amiram Weinstock ("Amiram") and Ms Tamar Beck ("Tamar"). None of the shares on issue however had voting rights attached. In June 1973 Leo and Hedy resolved that both Amiram and Tamar be appointed directors of the company. The minutes of an AGM of the company held in December 1973 record a resolution that any director retiring in accordance with the provisions of the Articles be re-appointed. Similar resolutions were passed at subsequent AGMs and both Amiram and Tamar continued to act as directors each year. (Tamar however resigned in 1982.) In later years Hedy ceased to be a director due to loss of capacity (from Alzheimer's disease), while Leo died on 29 July 2003. The next day, Amiram appointed his wife, Mrs Helen Weinstock ("Helen"), as a second director of the company ("the Purported Appointment") to enable a quorum under the Articles. In 2010 Tamar commenced proceedings to wind up the company on the basis that it had no directors who had been validly appointed (and no members with voting rights to elect directors).

On 11 May 2011 Justice Barrett both validated the Purported Appointment and declined to wind up the company. His Honour found that Amiram and Tamar had been appointed (in June 1973) under Article 69 and that their appointments had then expired at the commencement of the AGM in December 1973. The resolution at that AGM to re-appoint them was ineffective, as Articles 66 and 67 were held to apply only to directors who retired during a meeting. Therefore Amiram and Tamar were *de facto* directors from that time. Justice Barrett validated the Purported Appointment (but not the earlier purported re-appointments of Amiram) pursuant to s 1322(4)(a) of the *Corporations Act* 2001 (Cth) ("the Act"). His Honour also held that Helen's directorship was continuing and that she could appoint another director, thereby restoring a functioning board of directors to the company (with the ability to issue shares that would carry voting rights).

On 5 April 2012 the Court of Appeal (Campbell & Young JJA, Sackville AJA) unanimously allowed Tamar's appeal and dismissed Amiram and Helen's cross-appeal. Their Honours held that Barrett J had correctly concluded that Amiram ceased to be a director in December 1973 and that the company could not (without voting shares on issue) validly appoint him thereafter. Justices Young and Sackville held that s 1322(4)(a) of the Act could not support an order validating the Purported Appointment. That provision could only be used to rectify an appointment made under Article 69 by directors who had been, or could be, validly appointed. Amiram could never be validly appointed by the company (in its circumstances). Justice Campbell (dissenting on this issue) found that an order under s 1322(4)(a) could extend to multiple invalid steps regardless of whether those steps (such as the appointment of Amiram from December 1973) could be validated by the company. The Court of Appeal then remitted the matter for determination of whether the company should be wound up.

The ground of appeal is:

- The Court below erred in holding that the power under s 1322(4) of the Act was not exercisable in relation to the purported appointment of Helen as a director of the company on 30 July 2003 by Amiram (para [223] per Young JA, [239]-[240] per Sackville AJA).