

BECK v WEINSTOCK & ORS (S56/2012)

Court appealed from: New South Wales Court of Appeal
[2011] NSWCA 228

Date of judgment: 17 August 2011

Special leave granted: 10 February 2012

LW Furniture Consolidated (Aust) Pty Ltd ("the company") was incorporated in 1971 under the *Companies Act* 1961 (NSW) ("the Act"). Its Articles of Association ("Articles") described four classes of preference shares, "A" to "D", and ten classes of ordinary shares. The only shares ever issued were of classes "A", "C" and "D", none of which had voting rights attached. Class "A" shares had priority over all others upon a winding up of the company. Shares of classes "C" and "D" were of an equal, lesser, rank and the company could redeem them upon the death of their holder(s). Class "A" shares were issued to Mr Leo Weinstock when the company was incorporated. Eight class "C" shares were later issued to Mr Weinstock's wife, Mrs Hedy Weinstock. On 6 July 2004 Mrs Weinstock died. The company's directors then resolved to redeem her shares for \$1 each. If the shares were not redeemable, they would have been valued at millions of dollars upon a winding up of the company. Ms Tamar Beck, who was one of Mrs Weinstock's executors (and her daughter), claimed that the shares could not be redeemed because they were not "preference shares" within the meaning of the Act.

On 17 September 2010 Justice Hamilton held that the shares could not be redeemed by the company because they were not in fact preference shares. His Honour held that in order for them to be preference shares, other shares with inferior rights must exist. He held that it did not matter that the company's Articles provided for inferior shares. Such shares must be on issue and thus in existence.

On 17 August 2011 the Court of Appeal (Giles JA & Handley AJA, Young JA dissenting) upheld an appeal by the company and members of the Weinstock family. The majority held that the class "C" shares had been validly issued and that they carried the rights described in the Articles. This was because the company's Articles defined the types of shares and gave the directors power to issue them. Their Honours found that a court could not hold that the shares had been issued with rights different from those set out in the Articles. To do so would require an amendment to the Articles, which neither the directors nor a court had power to do. The majority held that the non-existence of ordinary shares merely prevented the *enjoyment* of the full rights of class "C" shares as preference shares. They found therefore that the company could redeem the shares that had been held by Mrs Weinstock. Justice Young however held that the company could not redeem the shares. His Honour found that those shares would have been preference shares only if other shares with inferior rights had existed at the time when the class "C" shares were issued.

The ground of appeal is:

- The Court below erred in holding that eight “C” class shares in the company were redeemable preference shares for the purposes of the *Corporations Act 2001* (Cth) notwithstanding that there was never any other shares on issue in the company by reference to which the “C” class shares conferred a preference.