# HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL AND GAGELER JJ

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TAMAR RIVQA BECK APPELLANT

AND

AMIRAM DAVID WEINSTOCK & ORS RESPONDENTS

*Beck v Weinstock*
[2013] HCA 15
*1 May 2013*
S56/2012

**ORDER**

*Appeal dismissed with costs.*

On appeal from the Supreme Court of New South Wales

**Representation**

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

D F Jackson QC with J O Hmelnitsky for the first and second respondents (instructed by Baker & McKenzie Solicitors)

No appearance for the third respondent

## CATCHWORDS

**Beck v Weinstock**

Corporations law – Shares – Redeemable preference shares – Shares issued as "redeemable preference shares" – No shares over which redeemable preference shares took preference then or later issued – Whether preference shares required ordinary shares to be issued – Whether redemption of shares effective.

Words and phrases – "issued share", "ordinary share", "preference share", "redeemable".

*Companies Act* 1961 (NSW), ss 61, 66.
*Corporations Act* 2001 (Cth), ss 254A, 254J.

## Introduction

1 Companies raise capital by the issue of shares and in a variety of other ways. The shares in a company may be divided into different classes with different rights attaching to them. Preference shares confer priorities on their holders, over ordinary shareholders, with respect to dividends or repayment of capital or voting rights or combinations of those things. They can be used to raise additional capital for a company or to raise original capital or for other purposes.

2 In this appeal, which represents a particular aspect of a wide-ranging and complex family dispute, it is said that preference shares in a company cannot validly be issued unless there are ordinary shares already issued. The issue of redeemable preference shares to the appellant's mother was said to have been invalid for that reason. The right to redeem the shares in the absence of issued ordinary shares was also said to offend against the principle of the maintenance of capital. The arguments are based largely upon historical grounds relating to the original purpose of preference shares, which was to raise additional capital for companies, and implications derived from longstanding legislative restrictions on the reduction of capital.

3 The arguments of the appellant rest upon an unduly narrow view of the legitimate purposes for which preference shares can be used. They also seek to draw an unwarranted implication limiting the powers of companies with respect to the issue and redemption of such shares by reference to a generalised conception of the statutory policy in favour of the maintenance of capital. For the reasons that follow the appeal should be dismissed with costs.

## Facts and procedural background

4 LW Furniture Consolidated (Aust) Pty Ltd ("LWC") was incorporated on 30 April 1971. Article 3 of the articles of association ("the Articles") stated that its capital was $20,000.00, divided into twenty thousand shares of one dollar each. Its shares included fourteen classes designated "A" to "N". Classes "A" to "D" were described as "preference shares" comprising[1]:

> "5 'A' 5% Convertible Preference Shares, 5 'B' Redeemable Preference Shares, 10 'C' Redeemable Preference Shares, 10 'D' Redeemable Preference Shares".

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**1** Articles, Art 3(1).

Article 3 also provided for 1,997 of each of the remaining ten classes designated "E" to "N" and described as "ordinary shares".

5 None of the shares in classes "A" to "D" carried voting rights[2]. The founding directors of the company were Leo and Hedy Weinstock. Leo, as one of the subscribers to the memorandum of association ("the Memorandum"), held four of the "A" class shares and the other subscriber, a solicitor, Brian Nagel, held the remaining "A" class share on trust for Leo. Leo had the right during his life and while he held at least four of the "A" class shares to convert them to five per cent preference shares carrying voting rights at general meetings of the company. At some time or times Hedy was issued with a total of eight "C" class shares[3]. Leo and Hedy's children, Amiram Weinstock and Tamar Beck, were each issued a single "C" class share. Two "D" class shares were issued to a company associated with Amiram. The arrangements were designed to reduce death and estate duties payable on the death of Leo[4].

6 Leo died in 2003 and Hedy on 6 July 2004. At the time of Hedy's death the issued shares in the company were:

- Five "A" 5% convertible preference shares, of which four were held by Leo's estate and one by Mr Nagel.
- Ten "C" redeemable preference shares, of which eight were held by Hedy and one each by Amiram and Tamar.
- Two "D" redeemable preference shares held by a company connected with Amiram.

No ordinary shares were ever issued.

7 Amiram and Tamar were appointed as directors of LWC in June 1973. As appears from the judgment in the related appeal[5], both Amiram and Tamar had

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**2** Articles, Art 3(2)(a), (3)(b), (4)(a), (5)(a).

**3** At trial, Hamilton AJ noted that the parties proceeded on the basis that the subject shares were issued in 1971, but that it was not clear on the evidence when the other issued shares were issued: *Beck v Weinstock* (2010) 241 FLR 235 at 237 [13].

**4** The arrangements may have been inspired by *Robertson v Federal Commissioner of Taxation* (1952) 86 CLR 463; [1952] HCA 71, which concerned a scheme to alter a shareholder's rights upon his death so that the value of his shares was significantly reduced for estate duty purposes.

**5** *Weinstock v Beck* [2013] HCA 14 at [23].

ceased to be directors at the commencement of the annual general meeting of LWC in December 1973, a consequence of the provisions of the Articles of which they were evidently unaware. They continued to act as directors until 1982 when Tamar resigned. Amiram continued thereafter and purported to appoint his wife, Helen, as a director in 2003. Amiram's status as a director of the company was not in issue in these proceedings.

8 At some time after Hedy's death, Amiram, acting as a director of LWC, purported to pass a resolution redeeming, for one dollar each, the eight "C" class shares which his mother had held at her death. Although there was no company minute to that effect, the primary judge, Hamilton AJ, found a clear statement in a letter written by Amiram to be "sufficient evidence of the requisite resolution."[6]

9 In 2007, Tamar commenced proceedings in the Equity Division of the Supreme Court of New South Wales making a large number of claims against Amiram, Helen and LWC, among others. Those proceedings have led to this appeal. Most of the claims were resolved by agreement and consent orders were made by Hamilton AJ. The issues remaining for determination by his Honour related to the eight "C" class shares in LWC that were held by Hedy at her death on 6 July 2004.

10 On Tamar's application, Hamilton AJ made a declaration that the eight "C" class shares held by Hedy at her death were not preference shares within the meaning of the *Companies Act* 1961 (NSW) ("the 1961 Act") at the times they were issued, nor within the meaning of the *Corporations Act* 2001 (Cth) ("the 2001 Act"), and that they were not able to be redeemed under the 2001 Act. His Honour declared the resolution purporting to redeem the shares and their purported redemption to be void and of no effect. He made orders for the rectification of the register of LWC to record Hedy as continuing to be the holder of the shares on and from the date of the purported redemption. Amiram, Helen and LWC were ordered to pay Tamar's costs.

11 Amiram, Helen and LWC appealed to the Court of Appeal. By majority (Handley AJA, Giles JA concurring, Young JA dissenting) the Court allowed the appeal, set aside the orders made by Hamilton AJ, and substituted a declaration that the eight "C" class shares held by Hedy were redeemable preference shares which were validly redeemed by the company on or about 29 July 2004[7]. Tamar was ordered to pay the costs of the appeal and also the costs of Amiram, Helen and LWC in the hearing in the Equity Division.

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**6** (2010) 241 FLR 235 at 241 [33].

**7** *Weinstock v Beck* (2011) 252 FLR 462.

12 On 10 February 2012, this Court (Gummow and Heydon JJ) granted Tamar special leave to appeal from the whole of the judgment and order of the New South Wales Court of Appeal[8].

The decisions at first instance and on appeal

13 The primary judge held that it was an essential quality of a preference share that it confer an advantage over another class of share[9]. Neither the 1961 Act nor the 2001 Act contemplated that preference shares could validly be issued on the basis that they conferred a preference over unissued ordinary shares[10]. If the only issued shares were redeemable preference shares which could at appropriate times be redeemed, the company could be left without issued shares and the basic rule against the reduction of capital thereby circumvented. His Honour concluded that preference shares could not be created unless there had been issued, at the time of their creation, shares over which they had preference, as to capital or as to dividend or as to both[11]. His Honour appears to have relied upon implications limiting the powers conferred by the 1961 and 2001 Acts for provision to be made in company constitutions relating to the issue and redemption of preference shares.

14 In the Court of Appeal, Handley AJA, with whom Giles JA agreed, held that the power conferred on the directors by Art 4 of the Articles to issue new shares from available nominal capital could be exercised at all times. It was not affected by the state of the company's share register[12]. The directors validly in office could have issued ordinary shares at all times and could still do so, subject to the equitable constraints derived from the fiduciary nature of their power[13].

15 Handley AJA held that it must follow that the "C" and "D" class shares were validly issued and conferred on their holders the preferential rights defined in the Articles. Those rights would remain potential only, without effective content, unless and until the directors issued ordinary shares[14]. His Honour held

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**8** [2012] HCATrans 034.

**9** (2010) 241 FLR 235 at 239–240 [23]–[28]. His Honour followed the reasoning of Barrett J in *Re Capel Finance Ltd* (2005) 52 ACSR 601.

**10** (2010) 241 FLR 235 at 239 [23]–[24].

**11** (2010) 241 FLR 235 at 240 [29].

**12** (2011) 252 FLR 462 at 478 [146].

**13** (2011) 252 FLR 462 at 478 [147].

**14** (2011) 252 FLR 462 at 478 [148].

there was nothing unusual about that situation. The preferential right to a dividend was dependent on the company earning divisible profits and the decision of the directors to declare a dividend. Until then the right was potential only[15].

16 Young JA in dissent said that although the history of the concept of the preference share in Australia and other jurisdictions provided little assistance, it pointed in one direction, namely that a preference share is one which has preferred rights over another class of share. If there is no other class of share, there cannot be a preference share[16]. Unissued shares have no existence[17]. If preference shares confer preferred rights over something else, that something else must exist[18]. In the event, his Honour came to the same conclusion as the primary judge[19].

The grounds of appeal

17 The sole ground of appeal to this Court is that:

> "The Court below erred in holding that eight C class shares in [LWC] were redeemable preference shares for the purposes of the *Corporations Act* 2001 (Cth) notwithstanding that there were never any other shares on issue in [LWC] by reference to which the C class shares conferred a preference."

Consideration of this appeal begins with the company's constitution, specifically the Articles.

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**15** (2011) 252 FLR 462 at 478 [149].

**16** (2011) 252 FLR 462 at 471 [75].

**17** (2011) 252 FLR 462 at 472 [82]. An observation not always strictly accurate: see *Central Piggery Co Ltd v McNicoll and Hurst* (1949) 78 CLR 594 especially at 599–600 per Dixon J in relation to the distinction between allotment and issue; [1949] HCA 19. Lindley in *A Treatise on the Law of Companies*, 5th ed (1889) at 394 said that unissued shares "belong to the company", citing *York and North-Midland Railway Co v Hudson* (1845) 16 Beav 485 [52 ER 866].

**18** (2011) 252 FLR 462 at 472 [83].

**19** (2011) 252 FLR 462 at 473 [96].

The Memorandum and the Articles

18 The objects of LWC, set out in the Memorandum, included "[t]o raise money by the issue of shares in the capital of the Company and/or otherwise"[20]. That the object encompassed the issue of preference shares in advance of the issue of ordinary shares was suggested by the subscription clause, which showed that Leo and Mr Nagel had subscribed for "A" class convertible preference shares.

19 Articles 3(2) to 3(5) of the Articles defined the "rights privileges and conditions" attached to each of the share classes "A" to "D". The rights, privileges and conditions attached to the ten "C" class redeemable preference shares were set out in Art 3(4). They were to rank, with respect to return of capital in a winding up and in a reduction of capital, next after the "A" class convertible preference shares and the "B" class redeemable preference shares. Otherwise, but *pari passu* with any "D" class redeemable preference shares, they would also rank in priority to all other shares in the capital of the company[21]. They conferred on their holders[22]:

> "the right to receive such dividends as may be declared thereon pursuant to Article 101 hereof and subject to the provisions of sub-clause (3) of that Article shall rank as regards such dividends pari passu with the Ordinary Shares in the Company. Such dividends (if any) shall be non-cumulative."

They did not carry the right to any further participation in surplus profits or assets[23]. They were liable to be redeemed at par value on or before 30 June 2016[24]. They were also to be redeemed upon the death of their holder, with payment to be made to the holder's personal representatives[25].

20 Article 4 provided for the issue and allotment of unissued shares on such terms and conditions and at such times as the directors thought fit. Article 5 provided for the issue of preference shares:

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**20** Memorandum, cl 2(c).

**21** Articles, Art 3(4)(b).

**22** Articles, Art 3(4)(e).

**23** Articles, Art 3(4)(f).

**24** Articles, Art 3(4)(c).

**25** Articles, Art 3(4)(d).

> "Subject to the provisions of section 61 of the [1961] Act the Company may issue preference shares which are or at the option of the Company are to be liable to be redeemed and such power may be exercised by the directors."

21 Article 101 empowered the directors to declare dividends. It conferred upon the directors, subject to the provisions of Art 3, and until the death of Leo and Hedy, an absolute discretion in the determination from time to time of the rate of dividend, if any, to be paid in respect of shares in the classes "B" to "N" inclusive.

22 The preference which the "C" class shares conferred was a priority over ordinary shares with respect to the return of capital in a winding up or upon a reduction of capital. There was nothing express in the Memorandum or the Articles to prevent the issue of preference shares in the absence of issued ordinary shares. The power to issue preference shares was widely expressed, as was the power to issue shares generally. The limitation propounded by Tamar depended upon the meaning of the term "preference share" as used in the 1961 Act and in the Articles by reference to the history of such shares. The further propounded limitation was that such shares could not be issued as redeemable preference shares or redeemed absent the existence of issued ordinary shares. That limitation was based upon the principle of the maintenance of capital. The questions raised are in part questions of the construction of the relevant companies legislation. It is necessary first to consider the history of the preference share, which was said by Tamar to be relevant to the construction question.

<u>The evolving character of the preference share</u>

23 The preference share emerged in the United Kingdom in the 18th and 19th centuries out of the need for private infrastructure corporations to raise capital to fund the completion of projects for which inadequate initial capital had been subscribed. To induce investors to provide that additional capital, shares were issued which attracted preferential dividend rights[26]. The term "preference share" was not always used. Designations such as "active", "county", "profitable", "new" and "privileged" were also used to describe such shares[27].

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**26** Evans, *British Corporation Finance 1775–1850: A Study of Preference Shares*, (1936) at 150.

**27** Evans, *British Corporation Finance 1775–1850: A Study of Preference Shares*, (1936) at 75.

24 Although initially "a device for emergency finance" directed to raising additional capital, over time the preference share was put to wider uses including the retirement of debt. It came to confer priorities in relation to dividends, capital and voting rights in different combinations. The variety of its uses and the priority rights it conferred made a narrow legal definition elusive[28]. What all preference shares had in common, however, was that they conferred upon their holders one or more entitlements in priority to the holders of ordinary shares.

25 In the first half of the 19th century in the United Kingdom, the authority to issue preference shares and to create the priorities they conferred was to be found in specific purpose statutes[29]. Later, the source of that authority was to be found in the constitutions of the companies creating such shares, read with general companies legislation[30]. That general proposition was reflected in the observation of Lord Simonds in *Scottish Insurance Corporation Ltd v Wilsons & Clyde Coal Co Ltd*[31]:

> "subject to any relevant provision of the general law, the rights inter se of preference and ordinary shareholders must depend on the terms of the instrument which contains the bargain that they have made with the company and each other."

26 Authority to issue preference shares did not have to be spelt out in a company's constitution. A provision authorising an increase in capital by the issue of new shares "with such rights and privileges, or with such restrictions and on such terms and conditions as the company in general meeting directs" was sufficient to support the issue of shares giving priorities over other shareholders[32]. The nature of the priority authorised by the articles might be

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**28** Evans, *British Corporation Finance 1775–1850: A Study of Preference Shares*, (1936) at 152–154.

**29** A number of early 19th century examples are cited in Evans, *British Corporation Finance 1775–1850: A Study of Preference Shares*, (1936) at 74–75.

**30** The first general provision which provided for the issue of redeemable preference shares was s 46 of the *Companies Act* 1929 (UK). Sections 13 and 14 of the *Companies Clauses Act* 1863 (UK) provided for the issue of preference shares for companies where such issues were authorised by special Acts of Parliament.

**31** [1949] AC 462 at 488.

**32** *Webb v Earle* (1875) LR 20 Eq 556.

limited to priority in dividends or extend to a priority in repayment of capital out of the assets[33]. It might also be a priority in voting rights[34].

27 Consistently with the original and predominant purpose of the preference share, its consideration in textbooks and judicial decisions, particularly in the 19th century and early 20th century, was linked to its use as a means of increasing capital. That was a use which occurred when there were already in existence ordinary shares representing the ordinary capital of the company. That may have been implicit in Palmer's reference, in the first edition of his book on company precedents published in 1877, to "creating shares having a preference over those already issued" when distinguishing preference shares from shares with deferred rights[35]. In any event, as pointed out by the respondents, even in its first edition, Palmer's book supported the proposition that preference shares of various kinds were in use at the time of its publication[36].

28 Tamar referred, in written submissions, to s 14 of the *Companies Clauses Act* 1863 (UK), which conferred an entitlement on preference shareholders to a preferential dividend out of profits in priority to "the ordinary shares and ordinary stock of the company". The latter term was said to relate to the issued capital of the company. That is not surprising given that s 14 complemented s 13, which was concerned with the issue of preference shares to raise additional capital. Moreover, as the respondents pointed out, ss 13 and 14 of the *Companies Clauses Act* 1863 applied only to companies whose authority to raise preference shares was expressly conferred by private Acts of Parliament passed for that purpose. Tamar also relied upon the observation by Cotton LJ in *In re Brighton and Dyke Railway Co*[37] that preference shares were "defined" by s 14[38]. That observation was made in the context of the particular statute. It did not purport to be of general application.

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**33** *In re Eclipse Gold Mining Co* (1874) LR 17 Eq 490, cited in Palmer, *Conveyancing and Other Forms and Precedents Relating to Companies*, (1877) at 267.

**34** Lindley, *A Treatise on the Law of Companies*, 5th ed (1889) at 396–397.

**35** Palmer, *Conveyancing and Other Forms and Precedents Relating to Companies*, (1877) at 267.

**36** Palmer, *Conveyancing and Other Forms and Precedents Relating to Companies*, (1877) at 252–259.

**37** (1890) 44 Ch D 28.

**38** (1890) 44 Ch D 28 at 36.

29 A broadening of the purpose of the preference share was its use to raise ordinary capital. In Palmer's first edition there is a precedent for a clause dividing the original capital of a company into several classes of shares, including preference shares and deferred shares[39]. Further, in *British and American Trustee and Finance Corporation v Couper*[40], Lord Macnaghten held that there was nothing in the *Companies Act* 1862 (UK) or in any other Act requiring the memorandum of a company to contain any reference to the rights of shareholders in the capital of the company inter se[41]. On that basis he said[42]:

> "The division of the capital into shares of a certain fixed amount which must appear in the memorandum would not be altered or affected by issuing some of the shares as preference shares."

The respondents also pointed to the decision of Chitty J in *In re Floating Dock Company of St Thomas Ltd*[43], which was decided shortly after *British and American Trustee and Finance Corporation.* Chitty J approved a capital reduction resulting in the cancellation of ordinary and second preference shares and leaving in place only first preference shares.

30 The proposition that there was an implied condition in a company memorandum that all shareholders were to have equal rights unless the memorandum itself showed the contrary was also rejected by Lindley LJ, in delivering the judgment of the Court of Appeal in *Andrews v Gas Meter Co*[44]. *Andrews* concerned the validity of preference shares issued in order to raise new capital, which was to be treated under the articles as part of the original capital. That decision was relied upon by the Supreme Court of New Zealand in 1913 for the extended proposition that part of the original capital of the company could be

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**39** Palmer, *Conveyancing and Other Forms and Precedents Relating to Companies*, (1877) at 252.

**40** [1894] AC 399.

**41** [1894] AC 399 at 416.

**42** [1894] AC 399 at 416–417, overruling *Hutton v Scarborough Cliff Hotel Co* (1865) 2 Dr & Sm 521 [62 ER 717].

**43** [1895] 1 Ch 691.

**44** [1897] 1 Ch 361 at 370. Lindley LJ followed Lord Macnaghten's observation in *British and American Trustee and Finance Corporation v Couper* [1894] AC 399 at 416–417.

raised by the issue of preference shares[45]. The New Zealand decision in turn was applied by this Court in *Rofe v Campbell*[46], in which the plurality said[47]:

> "An express power contained in the articles is enough to enable the directors to issue capital as preference shares … but the power must be given to them by the articles expressly or by necessary intendment."

The Privy Council reversed that decision, primarily on the construction of the relevant memorandum and articles. In so doing, however, and consistently with the decision of this Court, their Lordships summarised the relevant law[48]:

> "If nothing is said in the memorandum, the articles of association may provide for the issue of the authorized capital in the form of preference shares; if the articles do not so provide, or do provide for equality *inter socios*, the power to issue preference shares may be obtained by alteration of the articles."

In that case there was no express provision in the articles of the company for preference shares as part of the original capital, but there was express provision for the future issue of such shares[49].

31 Once it is accepted that preference shares were able to be issued, long before the enactment of the 1961 Act and the formation of LWC, to raise part of the original capital of a company, the historical rationale for the proposition that a share issued, absent the issue of ordinary shares, could not be designated as a "preference share" within the meaning of the 1961 Act and the 2001 Act, is weakened to the point of extinguishment. The variety of purposes for which preference shares could be used, the variety of rights which could attach to them, and their availability as a means of raising original capital, lead to the rejection of the historical argument advanced by Tamar in support of the proposition that the "C" class shares held by Hedy prior to her death were not preference shares when issued.

32 Against that background it is necessary to have regard to the companies legislation relevant to the issue and redemption of preference shares in LWC.

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**45** *Turnbull & Jones Ltd v Turnbull* (1913) 32 NZLR 670 at 672 per Sim J.

**46** (1931) 45 CLR 82; [1931] HCA 16.

**47** (1931) 45 CLR 82 at 90.

**48** *Campbell v Rofe* (1932) 48 CLR 258 at 264; [1933] AC 91 at 98.

**49** (1932) 48 CLR 258 at 264; [1933] AC 91 at 98–99.

The statutory framework

33 At the time that LWC was incorporated, the 1961 Act was in force. Section 61 of that Act provided that, subject to that section, a company having a share capital could, if so authorised by its articles, issue preference shares liable to be redeemed at the option of the company, the redemption to be effected only on such terms and in such a manner as provided by the articles[50]. Redemption would not be taken as reducing the amount of authorised share capital of the company[51]. Section 61(3) provided that the shares were not to be redeemed except out of profits which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption, nor could such shares be redeemed unless fully paid up.

34 Where redeemable preference shares were redeemed otherwise than out of the proceeds of a fresh issue, s 61(5) required that, out of the profits which would otherwise have been available for dividend, a sum equal to the nominal amount of the shares redeemed be transferred to a reserve called the "capital redemption reserve". The provisions of the 1961 Act relating to the reduction of the share capital of a company applied, except as provided in s 61, as if the capital redemption reserve were paid up share capital of the company[52]. That being said, the redemption of redeemable preference shares out of profits otherwise available for dividends was a reduction of capital, albeit offset by the crediting of the nominal value of the shares redeemed to the capital redemption reserve[53]. The ancestry of s 61 can be traced back to s 46 of the *Companies Act* 1929 (UK), which was the first general companies legislation in the United Kingdom to provide for the issue of redeemable preference shares. Similar but not identical provision was made by s 149 of the *Companies Act* 1936 (NSW).

35 Tamar submitted that the requirements in s 149 of the 1936 Act for a special resolution for the issue of redeemable preference shares and that the company balance sheets set out what part of the issued capital consisted of such shares assumed the prior issue of ordinary shares. However, as the respondents pointed out, there was no limit expressed in the 1936 Act as to what might be

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**50** 1961 Act, s 61(1).

**51** 1961 Act, s 61(2).

**52** 1961 Act, s 61(5).

**53** *Comptroller of Stamps (Vict) v Ashwick (Vic) No 4 Pty Ltd* (1987) 163 CLR 640 at 649; [1987] HCA 60 (a case concerning the similarly worded s 120 of the *Companies (Victoria) Code* and the question whether redemption was a "reduction of capital" for the purposes of an exemption provision in the *Stamps Act* 1958 (Vic)).

agreed by a special resolution under s 149 nor any constraint on a company's ability to determine what part of its capital was to be redeemed. Neither the 1936 Act, the 1961 Act, nor its successors up to and including the 2001 Act, proscribed the issue of redeemable preference shares in the absence of issued ordinary shares. The *Companies Act* 1981 (UK) included a specific provision that prohibited the issue of redeemable shares at any time when there were no issued shares of the company which were not redeemable[54]. That provision has not been replicated in Australia.

36 Section 66 of the 1961 Act required specification in the company constitution of the rights attaching to preference shares with respect to repayment of capital, participation in surplus assets and profits, cumulative or non-cumulative dividends, voting and priority of payment of capital and dividend in relation to other shares or other classes of preference shares[55]. The 1961 Act did not contain any definition of preference share or redeemable preference share. Nevertheless, the Act indicated the generic character of the "preference share", encompassing shares defined by a variety of priority rights and issued for a variety of purposes. Nothing in the Act excluded from the concept of preference share, shares issued in the absence of issued ordinary shares. And as already observed, nothing in the history of the preference share supports such an exclusion.

37 The *Companies (Application of Laws) Act* 1981 (NSW) applied the provisions of the *Companies Act* 1981 (Cth) as a law of New South Wales known as the *Companies (New South Wales) Code* from 1 July 1982 to the exclusion of the *Companies Act* 1961[56]. The *Companies Code* was superseded by the *Corporations Act* 1989 (Cth), found to be invalid in *New South Wales v The Commonwealth*[57]. The 1989 Act was succeeded by the Uniform Legislation Scheme which came into effect in New South Wales in 1991 as the Corporations Law[58]. The 1961 Act was eventually repealed by the *Statute Law (Miscellaneous Provisions) Act* 2008 (NSW)[59]. Even assuming that some of the "C" class shares issued to Hedy were issued when the *Companies Code* or the Corporations Law were in effect in New South Wales, it has not been suggested that there was any material difference in the provisions of those statutory regimes or in any

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**54** *Companies Act* 1981 (UK), s 45(2).

**55** 1961 Act, s 66(1).

**56** *Companies (Application of Laws) Act* 1981 (NSW), ss 6, 10(2)(d).

**57** (1990) 169 CLR 482; [1990] HCA 2.

**58** *Corporations (New South Wales) Act* 1990 (NSW).

**59** Section 4 read with Sched 4, Pt 1.

transitional provisions which would differentiate the power to issue preference shares or redeemable preference shares under those regimes from the power to issue shares under the 1961 Act.

38 Before turning to the 2001 Act it should be noted that the Articles were affected by legislative change in 1998. In 1998 the requirement that company constitutions define an authorised share capital was removed by the *Company Law Review Act* 1998 (Cth)[60]. That requirement was removed because it no longer served the purpose of allowing the creditors of a company to assess the size of its business undertaking[61]. The concept of par value was also abolished[62] as an "arbitrary monetary denomination attributed to the shares", not representing their true value, and potentially "misleading to an unsophisticated investor."[63] Section 1427(1) of the Corporations Law, inserted by item 11 of Sched 1 to the *Company Law Review Act* 1998 (Cth), repealed any provision of a company constitution stating the amount of the company's share capital and dividing it into shares of a fixed amount. There was no submission that that provision made any difference to the outcome of this appeal[64].

39 At the time of Hedy's death, the 2001 Act was in force. Section 124 of that Act sets out the legal capacity and powers of a company, including the power to "issue and cancel shares in the company"[65]. Section 254A(1) provides that a company's power under s 124 to issue shares includes the power to issue[66]:

> "preference shares (including redeemable preference shares)".

As with s 66 of the 1961 Act, s 254A(2) of the 2001 Act provides that a company can issue preference shares only if the rights attached to them with respect to repayment of capital, participation in surplus assets and profits, cumulative and

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**60** Schedule 1, item 11, inserting s 1427 into the Corporations Law.

**61** Explanatory Memorandum to the Company Law Review Bill 1997 (Cth) at [11.6].

**62** Schedule 5, item 10, inserting s 254C into the Corporations Law.

**63** Explanatory Memorandum to the Company Law Review Bill 1997 (Cth) at [11.22]–[11.23].

**64** See the reference in *Weinstock v Beck* [2013] HCA 14 at [36] to the consideration of the 1998 amendment by Campbell JA in *Beck v LW Furniture Consolidated (Aust) Pty Ltd* (2012) 265 FLR 60 at 96–100 [159]–[174].

**65** 2001 Act, s 124(1)(a).

**66** 2001 Act, s 254A(1)(b).

non-cumulative dividends, voting and priority of payment of capital and dividends in relation to other shares or classes of preference shares are set out in the company's constitution or have been otherwise approved by special resolution of the company. As with s 66 of the 1961 Act, s 254A(1) of the 2001 Act uses the term "preference share" in a generic sense. The term itself is not defined.

40 Section 254A(3), which defines redeemable preference shares, provides:

> "Redeemable preference shares are preference shares that are issued on the terms that they are liable to be redeemed. They may be redeemable:
>
> (a) at a fixed time or on the happening of a particular event; or
>
> (b) at the company's option; or
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> (c) at the shareholder's option."

41 Part 2H.2 of the 2001 Act is entitled "Redemption of redeemable preference shares". Section 254J requires that a company redeem redeemable preference shares only on the terms on which they are issued[67]. On redemption the shares are cancelled[68]. By s 254K a company can only redeem such shares if they are fully paid up and out of profits or the proceeds of a new issue of shares made for the purpose of the redemption.

42 The 2001 Act, like its predecessors, provides mechanisms for the protection of the capital of a company in the event of the redemption of redeemable preference shares. There is nothing in the Act which would exclude from the concept of "preference share" a preference share issued in the absence of issued ordinary shares. Nor is there anything in the Act to proscribe the redemption of redeemable preference shares in the absence of issued ordinary shares.

Redemption and the maintenance of capital

43 Tamar submitted, in effect, that the concept of a redeemable preference share issued in advance of the issue of ordinary shares was inconsistent with the principle that the share capital of a company should be maintained unless the court sanctioned its reduction. The prohibition on the reduction of a company's capital appeared in the *Companies Act* 1862 (UK)[69]. It was relaxed by the

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**67** 2001 Act, s 254J(1).

**68** 2001 Act, s 254J(2).

**69** See Simonson, *The Law Relating to the Reduction of the Share Capital of Joint Stock Companies*, 2nd ed (1924).

*Companies Act* 1867 (UK), which allowed for reduction of capital to be approved by the court[70]. The rationale of the restriction as explained in the House of Lords in *Trevor v Whitworth*[71] was that persons dealing with a company were entitled to assume that no part of the capital put into the company had later been paid out except in the legitimate course of business[72]. Consistently with the restrictions on the reduction of capital, the provisions of the *Companies Act* 1929 (UK) and its Australian descendants required that redemption of redeemable preference shares be out of profits or the proceeds of a fresh issue of shares. Those requirements and that of a capital redemption reserve fund being applicable only to preference shares, it was submitted for Tamar that there was an implication that the holders of ordinary shares would continue to exist and continue to hold the capital of the company.

44 The specific protections of company capital which attach to the redemption of redeemable preference shares do not logically require that such shares only be brought into existence after ordinary shares have been issued and only redeemed while there are ordinary shares in existence. It is a bridge too far to infer from the statutory scheme under either or both of the 1961 Act and the 2001 Act that there is some implied limitation of the kind propounded on behalf of Tamar affecting the issue and redemption of redeemable preference shares but not stated in the respective statutes and not to be found expressly or by implication in the constitution of the company. It may be accepted, as was submitted by the respondents, that the prospect of capital being returned to shareholders other than in accordance with the 2001 Act is not created or heightened by the circumstance that a company has only preference shares on issue at a particular point in time.

45 The submissions on behalf of Tamar as to the issue and redemption of the redeemable preference shares should not be accepted.

<u>Conclusion</u>

46 For the preceding reasons the appeal should be dismissed with costs.

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**70** *Companies Act* 1867 (UK), ss 9–20.

**71** (1887) 12 App Cas 409.

**72** (1887) 12 App Cas 409 at 423–424 per Lord Watson. See also *Davis Investments Pty Ltd v Commissioner of Stamp Duties (NSW)* (1958) 100 CLR 392 at 413 per Kitto J; [1958] HCA 22; *Australasian Oil Exploration Ltd v Lachberg* (1958) 101 CLR 119 at 132; [1958] HCA 51.

47 HAYNE, CRENNAN AND KIEFEL JJ. A company incorporated under the *Companies Act* 1961 (NSW) ("the 1961 Act") had five subscriber shares, described as "'A' 5% Convertible Preference Shares". It later issued further shares described as "'C' Redeemable Preference Shares". The company issued other preference shares having the same rights as the "C" class shares, but never issued any ordinary shares, whether before or after the issue of the "C" class shares.

48 The only issue in this appeal is whether the company's purported redemption of certain "C" class shares was valid. The "C" class shares could be redeemed validly only if they were "preference shares" liable to be redeemed. There were no other *issued* shares over which the "C" class shares had preferential rights. Were the "C" class shares preference shares?

49 These reasons will show that the "C" class shares were preference shares. The redemption of the shares was valid.

<u>The facts and proceedings</u>

50 LW Furniture Consolidated (Aust) Pty Limited ("the Company") was incorporated under the 1961 Act. It was formed[73] as a proprietary company, limited by shares, by two persons (Mr Leo Weinstock and a solicitor) subscribing their names to a memorandum of association and complying with the 1961 Act's requirements as to registration.

51 In accordance with s 18 of the 1961 Act, the memorandum of association of the Company stated, among other things, the amount of share capital with which the Company proposed to be registered ($20,000) "and the division thereof into shares of a fixed amount"[74] (20,000 shares of $1 each). In accordance with the same section, the memorandum of association also stated that the liability of the members was limited and that the subscribers were "desirous of being formed into a company in pursuance of the memorandum and ... respectively agree[d] to take the number of shares in the capital of the company set out opposite their respective names"[75].

52 The Company's articles of association provided for several different classes of shares: "5 'A' 5% Convertible Preference Shares, 5 'B' Redeemable

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**73** *Companies Act* 1961 (NSW), s 14(1).

**74** s 18(1)(c).

**75** s 18(1)(i).

Preference Shares, 10 'C' Redeemable Preference Shares, 10 'D' Redeemable Preference Shares"[76] and a balance of 19,970 ordinary shares divided into 10 classes. The two subscribers to the memorandum of association each agreed to take "A" class shares. Mr Leo Weinstock agreed to take (and took) four; the solicitor agreed to take (and took) the remaining share of that class. Eight "C" class shares were later issued to Mr Leo Weinstock's wife, Mrs Hedy Weinstock. Argument proceeded on the basis that these shares were issued to Mrs Weinstock in 1971. Two further "C" class shares and two "D" class shares were also issued, but the details of those issues need not be considered.

53 The Company's articles of association set out the rights attaching to the several classes of shares. The "A" class shares: carried the right to a fixed cumulative preferential dividend at the rate of five per cent per annum on the amount paid up on the shares; gave no right to vote at any general meeting of the Company; and had priority in a winding up "both as regards return of capital and dividend accrued up to the commencement of the winding up and not declared" or on a reduction of capital as regards return of capital. Until his death, or until he ceased to hold at least four of the "A" class shares (whichever was the earlier), Mr Leo Weinstock could convert the "A" class shares into the only shares carrying a right to vote at a general meeting. The "C" class shares: did not carry any right to vote at any general meeting; ranked as regards return of capital *after* the "A" class shares but *equally* with the "D" class shares in priority to ordinary shares; ranked as regards dividends *equally* with both the "D" class shares and ordinary shares; and were liable to be redeemed on the death of the holder. The "C" class shares thus gave their holder preference to the return of capital over the holder of any ordinary shares but otherwise had no preferential rights. And no ordinary shares were ever issued.

54 Mr Leo Weinstock predeceased his wife. On the death of Mrs Hedy Weinstock, the Company purported to redeem, at their nominal value of $1 per share, the eight "C" class shares she had held. Mrs T R Beck, daughter of Mr and Mrs Weinstock and an executor of the estate of Mrs Weinstock, alleged that the "C" class shares her mother had held ("the disputed shares") were not redeemable because they were not preference shares.

55 At first instance in the Supreme Court of New South Wales, Hamilton AJ concluded[77] that "preference shares cannot be created unless there are on issue at the time shares over which they have preference". On appeal to the Court of

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**76** Articles of association, Art 3(1).

**77** *Beck v Weinstock* (2010) 241 FLR 235 at 240 [29].

Appeal, that Court (Giles JA and Handley AJA, Young JA dissenting) held[78] that the disputed shares were preference shares and had been validly redeemed. By special leave, Mrs Beck appealed to this Court. The appeal should be dismissed.

The appellant's arguments

56 The appellant framed the issue in the appeal to this Court as whether a share can be a "preference share" for the purposes of the *Corporations Act* 2001 (Cth) ("the 2001 Act") when the rights attaching to the share do not confer any preference or priority over the rights attaching to any other share actually on issue in the company.

57 The appellant referred to the 2001 Act on the footing that it was the provisions of that Act (in particular, s 254J) which governed the purported redemption of the disputed shares. The appellant submitted that, if the disputed shares were not "preference shares", they could not be "redeemable preference shares" as that term was used in either s 254A of the 2001 Act (dealing with a company's power "to issue bonus, partly-paid, preference and redeemable preference shares") or s 254J(1) (providing that "[a] company may redeem redeemable preference shares only on the terms on which they are on issue").

58 Because the Company had not exercised the power to issue ordinary shares, the existence of that power was treated by the appellant as irrelevant to whether the disputed shares were "preference shares". The appellant submitted that the disputed shares were not "preference shares" because they conferred no preference or priority over the only other classes of shares ever issued by the Company: the "A" and "D" classes.

Which Act?

59 There was no dispute that the provisions of the 2001 Act relating to redemption of redeemable preference shares applied to the Company. In particular, there was no dispute that the Company was a company registered under the 2001 Act[79] and thus a "company", both as defined in s 9 and as referred

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**78** *Weinstock v Beck* (2011) 252 FLR 462.

**79** 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 2001 Act.

to in ss 254A and 254J of the 2001 Act. But the appellant did not submit that if the disputed shares were validly issued as redeemable preference shares they had ceased to be redeemable preference shares when the Company purported to redeem them. It was not suggested that any provision of any of the several intervening forms of corporations legislation which applied to the Company after it issued the disputed shares in 1971 (when the 1961 Act applied) bore upon whether the shares were properly described, *when issued*, as preference shares liable to be redeemed.

60 It is necessary, therefore, to consider the 1961 Act's provisions about redeemable preference shares.

<u>Redeemable preference shares under the 1961 Act</u>

61 Section 61(1) of the 1961 Act provided that "if so authorised by its articles" a company having a share capital might "issue preference shares which are, or at the option of the company are to be liable to be redeemed" and that the redemption was to be effected "only on such terms and in such manner as ... provided by the articles". Sub-section (2) provided that "[t]he redemption shall not be taken as reducing the amount of authorised share capital of the company".

62 Consistent with the principle of maintenance of capital, firmly established as a cardinal principle of company law by the end of the nineteenth century[80], s 61 prevented redemption of the shares by using the company's capital and provided for the maintenance of an amount equal to the nominal amount of the shares redeemed as part of the company's capital. Thus, s 61(3) prohibited redemption of redeemable preference shares except out of profits otherwise available for dividend or out of the proceeds of a fresh issue of shares made for the purpose of the redemption and unless the shares were fully paid up. If redeemable preference shares were redeemed otherwise than out of the proceeds of a fresh issue of shares, s 61(5) required that a sum equal to the nominal amount of the shares redeemed be transferred out of profits otherwise available for dividend "to a reserve called the 'capital redemption reserve'" and provided that, subject to other provisions of s 61[81], the provisions of the 1961 Act relating

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**80** See, for example, *In re Dronfield Silkstone Coal Co* (1880) 17 Ch D 76; *Trevor v Whitworth* (1887) 12 App Cas 409; *In re Almada and Tirito Co* (1888) 38 Ch D 415; *Ooregum Gold Mining Co of India v Roper* [1892] AC 125; *Welton v Saffery* [1897] AC 299.

**81** Notably s 61(7), which permitted application of the capital redemption reserve "in paying up un-issued shares of the company to be issued to members of the company as fully paid bonus shares".

to reduction of capital applied to the capital redemption reserve as if it were paid up share capital of the company.

Preference shares

63 Section 66(1) of the 1961 Act provided that:

> "No company shall allot any preference shares or convert any issued shares into preference shares unless there is set out in its memorandum or articles the rights of the holders of those shares with respect to repayment of capital, participation in surplus assets and profits, cumulative or non-cumulative dividends, voting, and priority of payment of capital and dividend in relation to other shares or other classes of preference shares."

64 Section 66(1) gave some indication of the respects in which the rights attaching to one class of shares might be preferred over the rights attaching to another[82]. But the 1961 Act contained no definition of "preference share" and no provision of the 1961 Act set out any essential characteristics of a preference share[83]. As was remarked in one leading text of the time[84], "[t]hat this should be so is not surprising any more than that there is no definition of 'ordinary' shares". The absence of legislative definition of a "preference share" is unsurprising because "[t]he rights of ... preference shareholders are, of course, ordinarily to be ascertained from the memorandum and articles of the company and the terms upon which the issue of preference shares was made, and their rights are to be ascertained from those documents or terms as a matter of construction"[85]. What was a "preference share" was not a matter regulated by some rule of positive law. Section 66 provided that a company could not issue preference shares *except* in accordance with its memorandum and articles of association. Otherwise, however, the issue of preference shares was treated as a matter not regulated by

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**82** cf s 254A(2) of the 2001 Act.

**83** Subsequent forms of Australian corporations legislation have not contained any definition of preference share or any statement of the essential characteristics of a preference share.

**84** Wallace and Young, *Australian Company Law and Practice*, (1965) at 252.

**85** *Re Sheffield Manufacturing and Plating Co Ltd* (1951) 52 SR (NSW) 34 at 35 per Roper CJ in Eq.

the 1961 Act but by whatever were the provisions actually made in the company's constituent documents[86].

65 This treatment of the issue of preference shares was consistent with other provisions of the 1961 Act regulating the capital structure of a company limited by shares. The 1961 Act required[87] that the amount of a company's authorised share capital and its division into shares of a fixed amount be stated in the company's memorandum of association. It required that certain steps not be taken in relation to a company's share capital unless authorised by its memorandum or articles of association. Those steps included altering its share capital[88], reducing its share capital[89], varying or abrogating the rights attaching to any class of share[90] and allotting preference shares or converting issued shares into preference shares[91]. But subject to these statutory limits, the rights of the members of a company limited by shares were fixed by the company's memorandum and articles of association.

Preference over issued shares?

66 The appellant's central submission in this appeal was that a share could not be a "preference share" unless the rights attaching to it gave some preference or priority over some other *issued* share. The appellant submitted that this construction accorded with "the development of the 'preference share' as a practical means of encouraging additional investment in companies in financial difficulty and with the terms and the legislative history of the relevant provisions" of the 2001 Act.

67 It is important, however, to begin by recognising that nothing in the 1961 Act provided any textual footing for the submission that a share was not a "preference share" unless the rights attaching to it gave some preference or priority over some other issued share. The emphasis given by the 1961 Act to

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**86** cf *Tongkah Compound NL v Meagher* (1951) 83 CLR 489 at 493 per Dixon J; [1951] HCA 41.

**87** s 18(1)(c).

**88** s 62(1).

**89** s 64(1).

**90** s 65.

**91** s 66(1).

the definition of the rights of shareholders in the memorandum and articles of association points very firmly against accepting the appellant's submission. What was a "preference share" for the purposes of the 1961 Act was to be determined by reference to the relevant company's memorandum and articles of association, not by reference to the state of the issued capital of that company at any time. That is, whether a share was a "preference share" did not depend upon what shares the company had issued. If a company's memorandum and articles of association provided that shares of an identified class carried some right with respect to repayment of capital, participation in surplus assets or profits, cumulative or non-cumulative dividends, voting, or priority of payment of capital or dividend which preferred the holder of a share of that class over the holder of some other class of share for which the memorandum and articles of association provided, those shares were preference shares.

68 In this case, the Company's articles of association described the rights which attached to each of the classes of shares. In that regard it may be noted that the subscriber shares in the Company taken by Mr Leo Weinstock and the solicitor were described as preference shares even though, of course, no other shares had been issued. The appellant acknowledged that acceptance of her central argument entailed that those shares were not preference shares, at least when they were first taken by the subscribers.

69 Whether, *at the time of issue* of any particular share, the rights attaching to that share then afforded any commercial advantage to the holder would no doubt depend upon the content of those rights and what other shares had then been issued. As Handley AJA rightly pointed out[92], however, it is necessary to distinguish between the rights attached to a share and the enjoyment of those rights. The holder of a share has whatever rights the memorandum and articles of association attached to that share. If, after the share was issued and allotted, there were to arise some question about the order in which shareholders would be repaid capital, participate in surplus assets or profits, receive or accumulate an entitlement to dividends, vote, or obtain payment of capital or dividend, that question would be resolved according to the rights attaching to the respective shares. A share which had one or more preferential rights was properly described as a "preference share" not only at the time the immediate question about employment or exercise of rights fell for consideration but also at the time of issue.

70 Further support for the conclusion that what was a preference share required consideration only of what was provided by the constituent documents

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**92** (2011) 252 FLR 462 at 477 [134]-[135].

of the company is found in the text of s 61(1) itself. That sub-section provided that a company, "*if so authorised by its articles*", might "issue preference shares which are, or at the option of the company are to be liable to be redeemed" (emphasis added). Section 61(1) thus required that the company concerned have authority under its articles of association to issue the shares in question. But the effect of the appellant's argument was to add a further requirement to s 61(1): that the company concerned should have already issued some shares having rights inferior to those which were to be issued under the power given by s 61(1) and the company's articles of association. There is no basis for implying any additional requirement of that kind in s 61(1).

71 The appellant submitted that if what is a preference share was determined by reference to what shares *could* be issued rather than what shares *had been* issued a company could be left without any members. This would follow, so it was submitted, if a company issued only redeemable preference shares and those shares were all redeemed.

72 The result to which the appellant pointed may be theoretically possible. It may be doubted, however, that the directors of the company would, or consistently with their duties could, permit the result described in argument to come to pass. But regardless of whether those doubts are well-founded, the point made by the appellant is wholly met by the provisions of both the 1961 Act and the 2001 Act governing winding up by the Court. The 2001 Act provided[93] that it was a ground for winding up by the Court that the company had no members. The 1961 Act provided[94] that, subject to an exception that is not presently relevant, it was a ground for winding up by the Court that the number of members of a proprietary company was reduced below two.

73 Statute having dealt with the issue in this way, the possibility that a company issuing only redeemable preference shares may be left without members does not point, as the appellant submitted, to concluding that a share is a preference share only if it has rights which prefer the holder over the holders of other shares that have actually been issued.

74 It may be accepted that, as the appellant submitted, preference shares were often issued in England during the nineteenth century to raise capital additional to what had been subscribed for the issue of ordinary shares. This observation about commercial practice is, however, not to the point. Likewise, and contrary to the appellant's submissions, it is not useful to consider what issues arose or

**93** s 461(1)(d).

**94** s 222(1)(d).

what orders were made in approving a reduction of capital by cancellation of preference shares[95]. Neither the legislative history concerning statutory provisions for redeemable preference shares nor any wider historical examination of the commercial use of preference shares as a means of raising capital sheds any light on the central issue in this appeal. That issue is what was meant in the 1961 Act by "preference share". The 1961 Act required that what was a preference share be answered by reference to the rights that the company's memorandum and articles of association attached to that share and whether those rights preferred the holder of the share in question over the holder of any other class of share which the company could issue.

75 The disputed shares had rights which preferred the holder of those shares over the holder of any ordinary share in the Company. That no ordinary shares were ever issued does not deny that the disputed shares were preference shares. The Company's articles of association provided that the disputed shares were liable to be redeemed. They were redeemable preference shares.

Conclusion and orders

76 For these reasons the appeal should be dismissed with costs.

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**95** *In re Dicido Pier Co* [1891] 2 Ch 354.

77 GAGELER J. French CJ has set out the facts and procedural history. I adopt his abbreviations and agree that the appeal should be dismissed.

78 The appeal is to be determined by reference to the 2001 Act as at the date of putative redemption of the C class shares in LWC on or about 29 July 2004. The question is whether those shares were on that date "redeemable preference shares" liable to redemption and cancellation by LWC under s 254J(1) of the 2001 Act.

79 Tamar's argument that the C class shares in LWC were not then "redeemable preference shares" is founded on the proposition that a share is a "preference share" within the meaning of the 2001 Act only where it has preference or priority over another share that is on issue. That argument, as French CJ has demonstrated, lacks the historical foundation Tamar claimed for it.

80 Questions of contemporary corporate finance are not readily determined by implications drawn from practices of past centuries. Tamar's argument is to be rejected because it finds no toe-hold in the text of the 2001 Act or in any policy that can be discerned to be reflected in the 2001 Act.

81 The provisions of the 2001 Act governing shares in companies and transactions affecting the share capital of companies are in large measure the product of amendments made by the *Company Law Review Act* 1998 (Cth) to the Corporations Law. Their application, through transitional provisions, to companies registered under earlier legislation, such as the 1961 Act, provides no basis for reading references to preference shares in the 2001 Act more restrictively than is warranted by the proper construction of the 2001 Act in its application to companies brought into existence by registration under the 2001 Act itself.

82 Under the 2001 Act, a company must have at least one member, but need only have one member[96]. A company comes into existence on the day on which it is registered[97], at which time shares to be taken up by members as specified in the application for registration are taken to be issued to members[98]. For a company limited by shares, the application for registration must state "the number and class of shares each member agrees in writing to take up"[99]. At the

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**96** Section 114.

**97** Section 119.

**98** Section 120(2).

**99** Section 117(2)(k)(i).

time of registration, a company limited by shares must therefore have at least one share of at least one class but need only have one share of one class.

83 Amongst other circumstances in which a company may adopt a constitution, a company adopts a constitution on registration if each person specified in the application for registration as consenting to become a member agrees in writing to the terms of the constitution before the application is lodged[100]. A constitution has effect as a contract between the company and each member, between the company and each director and company secretary, and between each member and each other member from time to time[101].

84 The 2001 Act provides that a company has power to issue and cancel shares[102], and to determine the terms on which its shares are issued as well as the rights and restrictions attaching to those shares[103]. A variation or cancellation of rights attached to shares in a class can occur only in accordance with such procedure for variation or cancellation (if any) as is set out in the company's constitution or otherwise by special resolution of the company and either a special resolution of the relevant class or the written consent of members with at least 75 per cent of the votes in the class[104]. However, a company having one class of shares that issues new shares to which different rights attach is not thereby taken to vary the rights attached to the shares already on issue if the rights attaching to the new shares are provided for in the company's constitution[105].

85 The power of a company to issue shares is expressed to include the power to issue "preference shares (including redeemable preference shares)"[106]. In relation to the issue of preference shares, s 254A(2) provides:

> "A company can issue preference shares only if the rights attached to the preference shares with respect to the following matters are set out in the

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**100** Section 136(1)(a).

**101** Section 140(1).

**102** Section 124(1)(a).

**103** Section 254B(1).

**104** Section 246B.

**105** Section 246C(5).

**106** Section 254A(1)(b).

> company's constitution (if any) or have been otherwise approved by special resolution of the company:
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> (a) repayment of capital;
>
> (b) participation in surplus assets and profits;
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> (c) cumulative and non-cumulative dividends;
>
> (d) voting;
>
> (e) priority of payment of capital and dividends in relation to other shares or classes of preference shares."

86 The expression "redeemable preference share" is defined to mean "a preference share in a body corporate that is, or at the body's option is to be, liable to be redeemed"[107]. Reflecting that definition, s 254A(3) provides:

> "Redeemable preference shares are preference shares that are issued on the terms that they are liable to be redeemed. They may be redeemable:
>
> (a) at a fixed time or on the happening of a particular event; or
>
> (b) at the company's option; or
>
> (c) at the shareholder's option."

87 Section 254J(1) provides that a company "may redeem redeemable preference shares only on the terms on which they are on issue" and that, "[o]n redemption, the shares are cancelled". Section 254K further limits redemption under s 254J(1) to circumstances where the shares are fully paid-up and where the redemption is out of profits or the proceeds of a new issue of shares made for the purpose of the redemption. Section 254J(2) makes clear that redeemable preference shares may also be cancelled under a reduction of capital or a share buy-back under Pt 2J.1.

88 Subject always to compliance with the general requirements of the 2001 Act concerning the variation of rights attached to shares in a class, a company can convert a preference share into an "ordinary share"[108]. It can also convert an ordinary share into a preference share[109] provided the holders' rights

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**107** Section 9.

**108** Section 254G(1)(b).

**109** Section 254G(1)(a).

with respect to the matters referred to in s 254G(2)(a) to (e) are set out in the company's constitution (if any) or have been otherwise approved by special resolution of the company[110].

89 The 2001 Act defines neither the expression "preference share" nor the expression "ordinary share". The Explanatory Memorandum for the *Company Law Review Act* 1998 (Cth) explained a "preference share" to be "a share that gives its holder some right or preference (for example, a guaranteed minimum dividend entitlement) not enjoyed by the holder of a share of another type"[111].

90 The underlying concept of a preference share, as distinct from an ordinary share, was explained by Barrett J in *Re Capel Finance Ltd*[112] by reference to "the basic rule applicable to all forms of shareholder participation and entitlement in the absence of contrary provision", being "that members of a company participate and enjoy entitlements according to the numbers of the shares they hold". Barrett J explained:

> "Any departure from that rule of proportionate equality according to shares held must arise from the company's constitution or from terms of issue capable of displacing or modifying the general rule. Provisions of that kind affording some priority or superior position to the holders of particular shares are the thing that causes those shares to be 'preference shares'. It is not possible for 'preference shares' to exist except as a result of a process of differentiation from shares which are not 'preference shares' which sees the 'preference shares' entitled to some comparative advantage, commonly with respect to one or more of the matters referred to in s 254A(2)".

91 The scheme of the 2001 Act neither requires nor assumes that a share cannot be a preference share, or a redeemable preference share, unless or until an ordinary share is on issue. It is inherent in the concept of a preference share that the rights attaching to it are differentiated from the rights attaching to an ordinary share. But it is not intrinsic to that differentiation of rights that there be ordinary shares on issue. It is sufficient that the share be of a class of shares in respect of which the constitution of the company provides that rights with respect to matters referred to in s 254A(2)(a) to (e) attach in addition or in priority to such rights as would attach to ordinary shares if and when issued. There is no reason why a company having a constitution registered under the 2001 Act cannot have, on

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**110** Section 254G(2).

**111** Australia, House of Representatives, Company Law Review Bill 1997, Explanatory Memorandum at [11.12].

**112** (2005) 52 ACSR 601 at 605 [11].

registration, only members who hold preference shares of one or more classes or even a single member holding a single preference share.

92 Shares of a class to which additional or preferential rights attach with respect to matters referred to in s 254A(2)(a) to (e) of the 2001 Act are, by reason of those rights being set out in the company's constitution, preference shares at the time of their issue. They are and remain preference shares, unless converted or redeemed, irrespective of whether or not ordinary shares are on issue. The rights attaching to preference shares under the company's constitution take effect in contract between the company and the holders of those preference shares immediately on issue. Those rights take effect in contract between the holders of those preference shares and the holders of ordinary shares if and when ordinary shares are issued.

93 There is, as Tamar points out, potential for a company which has no ordinary shares on issue to be left without members by the redemption of redeemable preference shares. The solution is that the absence of members is a ground for winding up a company[113].

94 Tamar's more general argument is that redemption of redeemable preference shares in the absence of ordinary shares contradicts the scheme of the 2001 Act for the protection of creditors in so far as that scheme limits the circumstances in which there can be a reduction in a company's capital. The argument pays insufficient attention to a critical element of that scheme, s 254K. That section applies in every case of redemption under s 254J(1) to ensure that only fully paid-up redeemable preference shares can be redeemed and that their redemption can only be out of profits or the proceeds of a new issue of shares made for the purpose of the redemption. The net capital of the company therefore cannot be reduced by the redemption of redeemable preference shares. That is so irrespective of the existence or non-existence of ordinary shares at the time of redemption.

95 Tamar's proposition that a share is only a preference share within the meaning of the 2001 Act where it has preference or priority over another share that is on issue is therefore to be rejected. Tamar has in consequence failed to demonstrate that the C class shares in LWC were not preference shares capable of redemption under s 254J(1).

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**113** Section 461(1)(d).