

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **FINANCIAL SERVICES DIVISION**

3 **Cause No.: FSD 185 of 2016 (RMJ)**
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6 **IN THE MATTER OF SECTION 46 OF THE COMPANIES LAW (2016 REVISION)**

7 **AND IN THE MATTER OF DUTCHESS PRIVATE EQUITIES CAYMAN FUND LTD**

8 **BETWEEN: CANNONBALL PLUS FUND LTD**

9 **AND: DUTCHESS PRIVATE EQUITIES CAYMAN FUND LTD**

10 **IN OPEN COURT**

11 **Appearances: Mr. Tom Lowe QC instructed by Ms. Laura Hatfield and Mr. Tom**
12 **Wright of Solomon Harris for the Plaintiff**
13 **Mr. Fraser Hughes of Conyers, Dill & Pearman for the Defendant**
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16 **Before: The Hon. Justice Robin McMillan**
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18 **Heard: 22 and 23 March 2018**
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21 **Draft Judgment**

22 **Circulated: 31 May 2018**
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25 **Judgment**

26 **Delivered: 12 June 2018**
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30 **HEADNOTE**
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33 *Rectification and the scope of Section 46 of the Companies Law (2016 Revision) – The distinction*
34 *between a prospective claim and a right to registration by virtue of a valid transfer of legal title*
35 *– The need for the Court to be satisfied of the justice of the case.*
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3 **REASONS FOR JUDGMENT**
4

5 **Introduction**
6

7 1. On 12 April 2018 the Court gave Judgment in relation to an Originating Summons dated 3
8 November 2016, granting to the Plaintiff in these proceedings the rectification relief
9 sought.

10 2. The Originating Summons sought the following Orders that:

11 “1. Pursuant to Section 46 of the Companies Law (2016 Revision) (the ‘Law’), the
12 Register of Members of Dutchess be rectified by entering the name of Cannonball
13 Plus Fund Ltd as holder of 1,855,9022 Base Series 7 shares on the basis of a
14 transfer dated 15 April 2016 of such shares from ABN Amro Global Custody
15 Services N.V to the Plaintiff.

16 2. The cost of this Originating Summons be paid by Dutchess.

17 3. There be such further or alternative relief granted as the Court shall think fit.”
18

19 3. Cannonball Plus Fund Ltd. (“the Plaintiff”) is an open-ended investment fund incorporated
20 under the laws of the British Virgin Islands and with its registered offices at Circle Trust
21 Services (BVI Limited, Rodus Building, 4th Floor, PO Box 4064, Road Town, Tortola.

22 4. Dutchess Private Equities Cayman Fund Ltd. (“the Defendant”) is an exempted limited
23 company incorporated under the laws of the Cayman Islands on 17 November 2006, with
24 its registered offices at Codan Trust Company (Cayman) Limited, Cricket Square, Hutchins
25 Drive, PO Box 2681, Grand Cayman KY1-1111, Cayman Islands.

26 **The Background**



- 1 5. In early 2007, the Plaintiff invested US\$ 2,500,000 in Dutchess Ltd., in exchange for the
2 Shares referred to in Paragraph 1 of the Originating Summons (the “shares”). The Plaintiff
3 made this investment through ABN Amro Global Custody Services N.V. (“ABN Amro”)
4 (formerly Fortis Bank (Nederland) N.V.). ABN Amro entered into a subscription
5 agreement (the “Subscription Agreement”) with Dutchess Ltd., on behalf of Cannonball
6 Plus. As a result, the Shares are registered in the name of ABN Amro for the benefit of
7 Cannonball Plus.
- 8 6. The Defendant is the feeder fund in a Master/Feeder structure. The master fund is Dutchess
9 Private Equities Fund Ltd. (the “Master Fund”), also an exempted limited company
10 incorporated under the laws of the Cayman Islands. The Defendant invested into the Master
11 Fund, as did Dutchess Private Equities Fund LP, a Delaware partnership (the “Onshore
12 Feeder”).
- 13 7. On 21 June 2011, the Plaintiff and others, including Cannonball Fund, Ltd., another
14 beneficial owner of shares in Dutchess Ltd. (collectively, with Cannonball Plus, the “U.S.
15 Cannonball Plaintiffs”), filed a derivative lawsuit in the Massachusetts Superior Court
16 (“the U.S. Proceedings”), for and on behalf of Dutchess Ltd., against, among others:
- 17 7.1 Dutchess Capital Management LLC (“Dutchess Capital Management” or “DCM”),
18 the Investment Manager to Dutchess Ltd., with full discretion over the investment
19 of Dutchess Ltd.’s assets;
- 20 7.2 Dutchess Advisors LLC (“Dutchess Advisors”), a consultant to companies in which
21 Dutchess Ltd. invested;
- 22 7.3 Michael Novielli and Douglas Leighton, citizens of New York and Massachusetts,
23 respectively, and the only two Directors of Dutchess Ltd. and the principals in
24 Dutchess Capital Management and Dutchess Advisors; and
- 25 7.4 Theodore Smith, citizen of Massachusetts, and Chief Operating Officer and
26 member of the Investment Committee of Dutchess Capital Management and Vice
27 President of Business Development for Dutchess Advisors (collectively, Novielli,



1 Leighton, and Smith are referred to herein as the “Individual Defendants” and,
2 collectively, Dutchess Capital Management, Dutchess Advisors, and the Individual
3 Defendants are referred to herein as the “Dutchess Defendants”).

4 7.5 Dutchess Ltd., the Master Fund and the Onshore Feeder were named as nominal
5 Defendants.

6 8. In the Complaint in the U.S. Proceedings (the “Complaint”), the U.S. Cannonball Plaintiffs
7 alleged that Dutchess Capital Management and the Individual Defendants breached their
8 fiduciary duties to the Defendant by causing the Defendant to invest in failing companies
9 in violation of Dutchess Ltd.’s stated investment strategy and conflict of interest policies
10 for the purpose of the Individual Defendants gaining control of those companies (the
11 “Portfolio Companies”) and using such Portfolio Companies to line their pockets at the
12 expense of Dutchess Ltd. Specifically, the Complaint alleges that the Individual
13 Defendants extracted value from the Portfolio Companies through compensation for
14 serving as board members, through causing the Portfolio Companies through compensation
15 for serving as board members, through causing the Portfolio Companies to engage in
16 lucrative transactions with companies in which the Individual Defendants had a financial
17 interest, including Dutchess Advisors, and through inflating the value of the Portfolio
18 Companies for the purpose of increasing the amount of management fees paid to Dutchess
19 Capital Management and the Individual Defendants did not disclose their conflicts of
20 interest or the compensation they were receiving and that, eventually, as a result of these
21 breaches of fiduciary duty, Dutchess Ltd.’s returns began to suffer and Dutchess Capital
22 Management had to write down millions of dollars in losses. The shareholders of Dutchess
23 Ltd., including Cannonball Plus, are said to have lost nearly all of their investments in
24 Dutchess Ltd. The Complaint also alleges unjust enrichment against the Dutchess
25 Defendants.

26 9. It is unnecessary to set out the procedural details of the U.S. Proceedings other than to state
27 that on 9 March 2016, almost five years after they were served with the Complaint, the
28 Dutchess Defendants filed a Motion to Dismiss (the “Motion to Dismiss”) raising for the
29 first time a new defence that, because the U.S. Cannonball Plaintiffs are beneficial



1 shareholders in the Defendant but not registered shareholders, they do not have standing
2 under Cayman law to assert a derivative claim against the Defendant (the “Standing
3 Defence”).

4 10. Upon learning of the Standing Defence, Cannonball Plus decided to request that ABN
5 Amro transfer to Cannonball Plus the Shares that ABN Amro was holding as a nominee on
6 behalf of Cannonball Plus. On 14 April 2016, ABN Amro executed the stock transfer form
7 which, when fully executed, was sent to the Administrator of Dutchess Ltd., Opus Fund
8 Services (the “Administrator”). On 9 June 2016, the Administrator confirmed, by email
9 that it had completed the requested transfer, effective as of 1 April 2016.

10 11. On 4 April 2016, in its Reply Brief (the “Reply Brief”) in support of the Motion to
11 Dismiss the Dutchess Defendants stated that the Board of Dutchess Ltd., which
12 consists solely of Novielli and Leighton, would block any attempt to have the legal
13 title in the Shares transferred to the Cannonball Plaintiffs because the Board had
14 determined on its own that the U.S. Proceedings are “*frivolous*”. The Dutchess
15 Defendants asserted they had the power to block the transfer under what they
16 asserted was Article 12.5 of Dutchess Ltd.’s Articles of Association. That Article
17 provides:-

18 *“12.5 The Board may in its absolute discretion and without assigning any*
19 *reason therefor refuse to register the transfer of a share. If the Board*
20 *refuses to register a transfer of any share the Secretary shall, within*
21 *three months after the date on which the transfer was lodged with the*
22 *Company, send to the transferor and transferee notice of the*
23 *refusal.”*

24 12. At a 20 June 2016 hearing in the U.S. Proceedings, U.S. Counsel for the Dutchess
25 Defendants provided the U.S. Court and U.S. Counsel for Cannonball Plus with an email
26 that had been sent by the Administrator to Dutchess Capital Management confirming that,
27 pursuant to a conversation between the Administrator and Dutchess Capital Management,
28 the transfer had been rejected.



1 13. Thus, the Plaintiff alleged that the facts show that Leighton and Novielli, two individuals
2 who are Defendants in their personal capacities and who are financially interested in co-
3 Defendants Dutchess Capital Management and Dutchess Advisors, rejected the transfer- .

4 14. On 29 September 2016, the Judge presiding over the U.S. Proceedings, Judge Mitchell H.
5 Kaplan, issued a ruling on the Motion to Dismiss. Judge Kaplan found that, under Cayman
6 law, only a registered shareholder has standing to bring a derivative suit and that only the
7 Cayman Islands Court has the power to decide whether the Shares should be ordered
8 registered in the name of Cannonball Plus. Judge Kaplan, however, did not hide his
9 displeasure with the tactics being used by Dutchess Defendants [pages 144 to 153 of Tab
10 20, Bundle B1]:

11 *“Novielli and Leighton have stated that they will use their control over Dutchess*
12 *Ltd. to deny the Cannonball Plaintiffs the opportunity to become the registered*
13 *shareholders of the shares that they beneficially own, an act which would cure the*
14 *jurisdictional issue and allow the case to be adjudicated on its merits...The Court*
15 *is not pleased by the posture of this case or its apparent inability to itself resolve*
16 *this jurisdictional issue. Were it empowered to do so, it would have no problem*
17 *finding that it was an abuse of discretion for the defendant Board members to*
18 *decide for themselves that the claims brought against them individually are*
19 *‘frivolous’ and, therefore that it is Dutchess Ltd.’s best interest that they refuse to*
20 *register the shares in order to prevent those claims from being decided on the*
21 *merits. That is a far cry from the independent review by disinterested parties of the*
22 *value of a derivative claim that can result in its dismissal when brought on behalf*
23 *of a Massachusetts corporation under G.L c. 156D, & 7.44.*

24 *However, the Cayman Islands Companies Law (2013 Revision) provides for a*
25 *proceeding under section 46 to rectify the register. It was described in Canada Inc.*
26 *v. Socia International Ltd., supra, as a summary proceeding. In a footnote to their*
27 *motion, the Dutchess Defendants suggest that the Cannonball Plaintiffs would be*
28 *unlikely to succeed in a proceeding to rectify the registry, and cite a decision from*
29 *an English Court of Appeals in support of their suggestion. See Re Smith & Fawcett*



1 *Ltd. [1942] 1 All ER 542, 543. Having read that decision and considered it in the*
2 *circumstances of this case, including the timing of the Dutchess Defendants' second*
3 *standing motion, the court is not persuaded that it supports their contention. In any*
4 *event, the Court will stay entry of a judgment dismissing the derivative claims for*
5 *a reasonable period in which the Cannonball Plaintiffs may pursue a motion under*
6 *Section 46 of the Cayman Islands Companies Law before the Grand Cayman*
7 *Islands. As noted above, registration of shares in a Cayman Island Company before*
8 *the case is decided on the merits has been held to cure the jurisdictional problem.*
9 *See Stena BV, supra."*

10 15. It must be carefully noted at this juncture that in its written submissions to the learned
11 Judge dated 4 April 2016, exhibit JH1 to the First Affidavit of John F. Hagan Jr., it is
12 categorically stated on behalf of the Defendant by its attorneys that the applicable and
13 relevant provision was section 12.5 of the Articles of the Defendant Company.

14 16. It has subsequently been conceded by the Defendant in the present proceedings before the
15 Court that this representation was entirely wrong, and in effect that the learned Judge had
16 been misled.

17 17. In fact, the applicable and relevant provisions are to be found in Article 10 of the Amended
18 and Restated Articles of Association of the Defendant, amended and restated by way of a
19 shareholders' Special Resolution dated 28 December 2006 (the "Amended Articles").

20 18. Article 10 in its entirety states:

21 "10. TRANSFER OF SHARES

22 10.1 *Subject to such of the restrictions of these Articles as may be applicable, any*
23 *Member with the prior written consent of the Board of Directors, which consent*
24 *may be given or withheld in its sole discretion, may sell, transfer, assign, convey or*
25 *dispose of (hereinafter "transfer") all or any of his shares by instrument in writing*
26 *in a usual common form or in any other form which the Directors may approve.*
27 *The transferor shall be deemed to remain the holder of such shares until the name*



1 of the transferee is entered in the Register in respect thereof. An instrument of
2 transfer need not be signed by or on behalf of the transferee.

3 10.2 No transfer of shares may be made if (i) as a result of such transfer either the
4 transferor or the transferee of such shares would hold less than the minimum
5 number of shares as the Directors may from time to time specify or (ii) such transfer
6 would in the opinion of Directors result in a breach of any restrictions imposed by
7 the Directors under these Articles.

8 10.3 The Directors may decline to recognize any transfer, unless the instrument of
9 transfer is deposited at the Office or such other place as the Directors may appoint,
10 accompanied by the certificate, if any, for the shares to which it relates, and such
11 other evidence as the Directors may reasonably require to show right of the
12 transferor to make the transfer.

13 10.4 The registration of transfers may be suspended at such times and for such periods
14 as the Directors may from time to time determine provided always that such
15 registration shall not be suspended for more than thirty days in any year.

16 10.5 All instruments of transfer which shall be registered shall be retained by the
17 Company, but any instrument of transfer which the Directors may decline to
18 register shall (except in the case of fraud) be returned to the person depositing the
19 same.

20 10.6 Any attempt to transfer Shares other than in accordance with the provisions of these
21 Articles may subject such Shares to a compulsory redemption.”

22 19. This was a most unfortunate omission, especially given that amongst the matters upon
23 which the Plaintiff seeks to rely is that both the Defendant and Mr. Novielli and Mr.
24 Leighton, the only two Directors at the relevant time, are in effect seeking to render
25 themselves “*judgment-proof*” by recourse to procedural tactics and strategy.

26 20. The Plaintiff’s Originating Summons has been mentioned before this Court on several
27 occasions, and during the course of those hearing the Court has made enquiry of the parties



1 as to whether there was any scope for resolution of the Cayman Islands proceedings.
2 Ultimately, however, it is fair to state that those enquiries have not resulted in such an
3 outcome.

4 21. Accordingly on this occasion the Plaintiff invited the Court to determine this immediate
5 matter by reliance upon the course of events which transpired in relation to a Stock Power
6 form dated 15 April 2016 whereby it claims ABN Amro for value received irrevocably
7 authorised the Defendant to transfer certain capital stock of the Defendant to the Plaintiff
8 as transferee.

9 22. On 12 April 2016 Mr. Dennis Niezen of ABN Amro sent the following email message to
10 Opus Fund Services (“Opus”) acting on behalf of the Defendant:

11 *“Dear all,*

12 *We would like to transfer our holding in Dutchess to the underlying client. Please*
13 *find attached the holding involved. Please note this transfer would not involve a*
14 *change in beneficial ownership as the securities would be transferred to*
15 *Cannonball Plus Fund Ltd, we would only remove the custodial company. Can you*
16 *please send the related documents that are required to process this transfer?”*

17 *Thanks in advance,*

18 *Dennis Niezen”*

19 23. This appears to have been acknowledged in an email response from Ms. Amelia Vacik of
20 Opus, addressed to ABN Amro and copied to the Plaintiff. The message, headed “*Dutchess*
21 *Private Equity Cayman Fund Ltd,*” simply states:

22 *“Good morning,*

23 *Please see the attached. Thank you!*

24 *Sincerely,*

25 *Amalia Vacik*



1 *Investor Relations Supervisor”.*

2 24. Then on 26 April 2016, Mr. Andrew Hoffman of the Plaintiff sent an email to Ms. Vacik
3 as follows:

4 *“Hi Amelia,*

5 *Here is the signed stock transfer form. The updated sub docs and signature page. The*
6 *version of adobe I have does not allows me to merge documents so please let me know if*
7 *you need the signature page merged with the rest of the sub docs or if separately as above*
8 *is ok.*

9 *Please confirm receipt and that everything is in good order.*

10 *Many thanks for your help.*

11 *Andrew*

12 *Andrew Hoffman*

13 *Director”.*

14 25. It would appear that the signed stock transfer form to which reference is made was at least
15 a copy of the Stock Power form dated 15 April 2016.

16 26. Then also on 26 April 2016 Ms. Vacik emailed ABN Amro, copied to the Plaintiff, in these
17 terms:

18 *“Good morning,*

19 *I can confirm receipt – we will process and follow up if we have questions. Thank you!*

20 *Sincerely,*

21 *Amelia Vacik*

22 *Investor Relations Supervisor”.*

23 27. There then followed a short series of email messages in June 2016.



1 28. On 9 June 2016 Ms Vacik wrote to Mr. Hoffman of the Plaintiff:

2 *“Hi Andrew,*

3 *I confirm that we have processed the transaction. Thank you!*

4 *Sincerely,*

5 *Amelia Vacik*

6 *Investor Relations Assistant Manager”.*

7 29. Mr. Hoffman replied accordingly also on 9 June 2016:

8 *“Hi Amelia,*

9 *One final question. Is there any contract note or paperwork that we could have that would*
10 *document the assignment?*

11 *Andrew*

12 *Andrew Hoffman*

13 *Director”.*

14 30. Ms. Vacik in turn responded on 9 June 2016 as follows:

15 *“Hi Andrew,*

16 *As the transaction was processed for 4/1 and the fund’s reporting is quarterly, you should*
17 *expect confirmation during the third quarter. I do not have an estimate at this time. Thank*
18 *you!*

19 *Sincerely,*

20 *Amelia Vacik*

21 *Investor Relations Assistant Manager”*



1 31. Up to this point every aspect of the transaction appears to have proceeded in a
2 straightforward manner.

3

4 32. However, a difficulty then arose in that on 20 June 2016 Mr. Mike Canni, described as
5 COO of Opus, wrote to Mr. Ted Smith of the Defendant, copied to Ms. Vacik and Mr.
6 Matthew Iverson in these terms:

7 *"Dutchess Cayman_2016.04.01_Cannonball Plus -Full Transfer.pdf*

8 *Hi Ted,*

9 *Per our conversation, we are rejecting the attached transfer request and will remove it*
10 *from our pending transaction list.*

11 *If there are any changes please let Amelia know.*

12 *Thank you,*

13 *Mike*

14 *Mike Canni*

15 *COO".*

16 33. Mr. Iverson is an attorney for the Dutchess Defendants.

17

18 34. In an Affidavit dated 13 January 2017 Mr. Theodore Smith, stated at paragraph 7:

19

20 *"On June 20, 2016, DCM learned that a registered owner of some of the Company's non-*
21 *voting shares had requested to transfer ownership of its shares to the Cannonball Funds.*
22 *The share owner had not sought the Directors' prior consent to the transfer. At the*
23 *instruction of Michael Novielli, a Director of the Company, I directed the Company's*
24 *administrator to reject that transfer request."*

25

1 35. DCM was Dutchess Capital Management, the investment manager for the Defendant.

2

3 36. What is perhaps surprising is that Mr. Smith attributed the reason for rejection to be that
4 the share owner had not sought the Directors' prior consent to the transfer.

5

6 37. This characterization clearly borrows from the wording of Article 10.1 of the Amended
7 Articles, even though at the relevant time the Defendant and its Directors were unaware of
8 the existence of Article 10.

9

10 38. In fact, the Dutchess Defendants had indicated to His Honour Judge Kaplan that, the
11 Dutchess Defendants were relying in the U.S. Proceedings completely on a form of the
12 Articles which it is now clear, no longer existed. Under that obsolete provision, the
13 Defendant Board of Directors wrongly believed and asserted that it may in its absolute
14 discretion and without assigning any reason refuse to register the transfer of a share.

15

16 39. The right to refuse registration as such has now gone and it has been replaced by a right of
17 refusal to consent to any assignment prior to that assignment resulting in a formal transfer
18 of shares.

19

20 40. This distinction is factually important and the failure of Mr. Smith to make that distinction
21 clear is a matter of some disappointment and even dismay.

22

23 41. It is in these circumstances that Mr. Tom Lowe Q.C. on behalf of the Plaintiff makes this
24 submission at paragraphs 8 and 9 of the Plaintiff's Skeleton Argument:

25

26 "8 *Cannonball Plus' primary position is that is too late for the directors/board to*
27 *refuse the assignment. The assignment already occurred when they did not take this*



1 *point and encouraged Cannonball Plus to bring proceedings before this Court*
2 *under Sect. 46 to have the transfer that had already taken place be registered.*

3
4 9 *The Company has now waived its right to refuse a transfer or is estopped from*
5 *refusing to consent to a transfer of title. Under its present Articles produced in these*
6 *proceedings there is no longer any basis on which Cannonball Plus' transfer of*
7 *registered title can be refused."*

8 **The Governing Law**

9
10 42. The relevant governing provisions of the Companies Law (2016 Revision) are set out at
11 section 46 in this manner:

12
13 "46. *If the name of any person is, without sufficient cause, entered in or omitted from*
14 *the register of members of any company, or if default is made or unnecessary delay*
15 *takes place in entering on the register the fact of any person having ceased to be a*
16 *member of the company, the person or member aggrieved or any member of the*
17 *company or the company itself may, by motion to the Court, apply for an order that*
18 *the register be rectified; and the Court may either refuse such application with or*
19 *without costs to be paid by the applicant or it may, if satisfied of the justice of the*
20 *case, make an order for the rectification of the register, and may direct the company*
21 *to pay all the costs of such motion, application or petition, and any damages the*
22 *party aggrieved may have sustained. The Court may, in any proceeding under this*
23 *section, decide any question relating to the title of any person who is a party to*
24 *such proceeding to have his name entered in or omitted from the register, whether*
25 *such question arises between two or more members or alleged members, or between*
26 *any members or alleged members and the company, and generally, the Court may,*
27 *in any such proceeding, decide any question that it may be necessary or expedient*
28 *to decide for the rectification of the register:*
29 *Provided that the Court may direct an issue to be tried, on which any question of*
30 *law may be raised. "*

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43. This is a complex section and it appears to this Court that it forms what is essentially a self-contained code for the determination of disputes as to the narrow issue of improper entry, or omission of entry, in the company register.

44. By way of amplification, the Plaintiff has drawn to the attention of the Court the equitable nature of the remedy of rectification, stating that in *Trevor v. Whitworth* [1887] 2 App Case 409 at page 440 the House of Lords held that the words “*if satisfied by the justice of the case*” are “*not mere idle words*”. Instead, the House of Lords said, these words show “*that the Court is bound to go into all the circumstances and to consider what equity the applicant has to call for its inter-position.*”

45. In the Defendant’s Fourth Skeleton Argument dated 21 March 2018 (misstated as 2017) Mr. Fraser Hughes emphasised at paragraph 15 that the Articles operate as a statutory contract between a company and its registered shareholders, and as such ABN Amro was (and remains) bound by the terms of Article 10. This position is maintained notwithstanding the fact that at the relevant time neither of the Directors even knew that Article 10 existed.

46. It also was pointed out by Mr. Fraser Hughes that none of the material correspondence was copied to the Defendant or its Directors although in light of the responsibilities exercised by Opus as administrator it is hard to see the logical relevance or necessity to do so.

47. The contention that the administrator’s “*processing*” had any legal implications is repudiated by Mr. Fraser Hughes.

48. The Defendant submits at paragraphs 43-44:



1 “43. *The present issue is whether Cannonball has an entitlement to have the legal*
2 *shareholding transferred in its name. If it did have such a right, notwithstanding*
3 *that the directors have refused the share transfer, Article 10.1 (requiring directors’*
4 *prior consent) would be meaningless as ABN Amro could transfer its legal rights*
5 *without first obtaining director consent.*

6 44. *The facts and relevance of the Nilon Limited and another v Royal Westminster*
7 *Investments S-A 2, UKPC [2015] (“Nilon”) decision are discussed at length in*
8 *paragraphs 36 to 42 of Dutchess’ 19 April 2017 Skeleton.”*

9
10 49. The following passages from the *Nilon* case were cited in the Skeleton Argument:

11 “37 *There are two points which emerge from the cases. The first is that from the earliest*
12 *days of the legislation, the courts have made it clear that the summary nature of the*
13 *jurisdiction makes it an unsuitable vehicle if there is a substantial factual question*
14 *in dispute: eg Re Russian (Vyksounsky) Iron Works Company, Stewart’s Case*
15 *(18866) LR 1 Ch App 574, 585-586; Re Heaton Steel and Iron Company, Simpson’s*
16 *Case (1869) LR 9 Eq 91. In such a case an issue may be directed to be tried (Re*
17 *Diamond Rock Boring Co Ltd, Ex p Shaw (1877) 2 QBD 463, at 484) or the*
18 *application may be adjourned or stayed (Re South Kensington Hotel Company*
19 *Limited, Braginton’s Case (1865) 12 LT (NS) 259), but it may also be dismissed*
20 *or struck out: Re Hoicrest Ltd [2000] 1 WLR 414, at 420, citing Re Greater Britain*
21 *Products Development Corporation Ltd (1924) 40 TLR 488, where it was said (at*
22 *489):*

23 *“Where it was clear that there was something to be answered and*
24 *something to be investigated, the ordinary course, as far back as the court*
25 *had been able to trace, had been for the judge to dismiss the summons or*
26 *motion, but to leave it open to the party to bring his action.”*

27 38 *The second point is that Re Hoicrest Ltd appears to be alone in deciding that it is*
28 *sufficient for the applicant to have a prospective right against the company, and*
29 *not an immediate right, to be entered on, or removed from, the register.*



1 48 *Re Hoicrest Ltd stands alone in being an actual decision which turned on the*
2 *question whether proceedings for rectification are a permissible vehicle for*
3 *determining a dispute about beneficial ownership, and whether they can be used*
4 *not only by a person seeking registration of a share transfer, but also by a person*
5 *claiming an order for transfer of shares.*

6 51 *In the view of the Board, proceedings for rectification can only be brought where*
7 *the applicant has a right to registration by virtue of a valid transfer of legal title,*
8 *and not merely a prospective claim against the company dependant on the*
9 *conversion of a contract. It follows that Re Hoicrest Ltd was wrong as a matter of*
10 *principle, however sensible it might have been as a matter of case management.*

11 52 *The claim form seeks an order that the register be rectified forthwith to give effect*
12 *to what is described as the true and proper state of affairs pertaining to it, in*
13 *accordance with the terms of the Joint Venture Agreement, by entering the names*
14 *of the Mahtani parties as the legal owners of the relevant numbers of shares in*
15 *Nilon. The Mahtani parties have no such present right, which could only arise after*
16 *they had been successful in their principal claim against Mr. Varma, and only after*
17 *he had been ordered to procure the issue and allotment of the shares to them. In*
18 *these proceedings the Mahtani parties have no arguable case to a present right to*
19 *rectification, and there is therefore no claim against Nilon to which Mr. Varma can*
20 *be a necessary and proper party.”*

21 50. Mr. Lowe’s response, however, is an extremely narrow one, stated concisely at paragraph
22 10 of the Plaintiff’s Skeleton Argument of 20 March 2018:

23 “10 *The Company reliance on Nilon v Royal Westminster Investments SA [2015] UKPC*
24 *2 is wholly misconceived. What the Privy Council clearly stated was that a*
25 *summons under Sect 46 is not an appropriate proceeding for determining the*
26 *beneficial interest in shares. Once that interest has been transferred the dispute is*
27 *between the Company and the person who has the beneficial interest in shares and*
28 *is entitled subject to registration to the legal interest.”*
29



1 51. In terms of paragraph 51 of the *Nilon* decision, Mr. Lowe is in effect saying that in light of
2 the administrator's action a valid transfer of title has already taken place, and that the
3 Plaintiff has not merely a prospective claim against the Defendant on the conversion of an
4 equitable right to a legal title, but a great deal more than a prospective claim: the transfer
5 had been completed.

6
7 52. In other words, upon the facts of this case the *Nilon* principle operates to the benefit of the
8 Plaintiff and not to the benefit of the Defendant.

9
10 53. In addition to the logic of Mr. Lowe's submission, which the Court upon the facts accepts
11 to be correct, there are additional factors which serve to satisfy the justice of the case in
12 any event.

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14 54. First, the Defendant seeks at this juncture to rely upon Article 10 when at the relevant and
15 critical time this was a provision of which the Defendant and its administrator were entirely
16 unaware.

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18 55. Secondly, the Plaintiff was fully justified in accepting the assurance of Opus that
19 everything was in good order and, at a later stage on 9 June 2016, that Opus had "*processed*
20 *the transaction*".

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22 56. Thirdly, it was made clear by Mr. Hughes in response to a direct enquiry from the Court
23 that no facility existed whereby in addition to appropriately contacting the administrator
24 an interested party could directly contact the Board of Directors to seek the prior written
25 consent of the Board.

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27 57. Fourthly, the Plaintiff was fully entitled to conclude from its correspondence with Opus
28 that all necessary formalities and requirements had been properly complied with.

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58. With regard to the last point, the Court notes that it has been provided with a Second Affidavit of Mr. Novielli, dated 23 March 2018, which exhibits a copy of the administrative agreement between the Defendant and Opus Fund Services (Bermuda) Ltd. The services in question are set out in Schedule III and they include the following:

*“Investor Subscriptions, Redemptions and Transfers:
The Administrator will process all approved investor subscription, redemption and transfer activity.”*

59. Quite separate from that, Article 1.1 (c) of Schedule 1 states that no agency relationship is formed hereby or exists between the parties except as specifically set forth herein. In addition, in Article 1.1 the Defendant appoints the Administrator to provide the services set forth on Schedule III (the” *Services*”).

60. Mr. Hughes has sought to counter the inevitable implications of that arrangement by contending that prior written consent of the Board of Directors is somehow distinct and separate from prior written consent of the Defendant per se, but with great respect that proposition stands at variance with accepted principles of corporate responsibility.

61. Finally, it is peculiarly self-serving to contend that the Plaintiff, or ABN Amro for that matter, should be barred by provisions of which they had never been made aware and of which the processing administrator explicitly failed to notify them.



1 **Conclusion**

2 62. For the Reasons which have been identified and analysed above, the Court is bound to
3 conclude in accordance with Section 46 of the Companies Law that the Plaintiff's name
4 has been omitted from the company register without sufficient cause or indeed any cause,
5 and that in accordance with the justice of the case there should be an order for the
6 rectification of the register.

7 63. Finally, the Court further states that in the event that this decision may be incorrect, the
8 Court remains conscious of the concerns raised by His Honour Judge Kaplan as stated
9 above. Those concerns relate to the purported disinterestedness of Mr. Novielli and Mr.
10 Leighton as Directors and whether there may be on their part "*an abuse of discretion*" as
11 Directors. In those circumstances, the Court would be further minded to consider whether
12 in the context of Section 46 the Court should direct an issue to be tried, and if so to consider
13 what issue or issues it or they should be.

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THE HON. JUSTICE McMILLAN
JUDGE OF THE GRAND COURT

