# In The Supreme Court of Bermuda

## COMMERCIAL COURT

**2016: No. 101**

BETWEEN:

**CAPITAL PARTNERS SECURITIES CO. LTD**

**Plaintiff**

-v-

**STURGEON CENTRAL ASIA BALANCED FUND LTD**

**Defendant**

## JUDGMENT

(in Court)

*Application for rectification of register-Companies Act 1981 section 67-nominee shareholder-refusal by company to register change of legal ownership-relevance of need to investigate identity of beneficial owners as grounds of refusal-consequences of failure to give notice of refusal to register transfer within statutory time period- Companies Act 1981 section 50*

Date of hearing: June 6, 2016
Date of Judgment: June 27, 2016

Mr Mark Diel and Ms Katie Tornari, Marshall Diel & Myers Limited, for the Plaintiff
Mr Steven White, Cox Hallett Wilkinson Limited, for the Defendant

**Introductory**

1. By an Originating Summons dated March 24, 2016, the Plaintiff seeks the following substantive relief:

> "*1.1 A declaration that the transfer of 7,561,000 participating shares in Sturgeon Central Balanced Fund Ltd. (the '**Fund**') (the '**Participating Shares**') to Capital Partners Securities Co. Ltd. ('**CPS**'), by way of the following instruments of transfer, is a valid transfer of the Participating Shares:*
>
> *(a) Stock Transfer form signed and dated by Citivic Nominees Limited ('**Citivic'**) on 30 December 2015, with corresponding Investor Transfer Form…transferring 319,000 shares in the Fund to CPS; and*
>
> *(b) Stock Transfer form signed and dated by Citivic on 30 December 2015, with corresponding Investor Transfer Form…transferring 7,242,000 shares in the Fund to CPS; (together the '**Share Transfers**');*
>
> *1.2 An Order that the current directors of the Fund must procure the rectification of the share register(s) of the Fund within seven (7) days of this Order to reflect the Share Transfers, including an Order that the current directors must provide all necessary 'approval' of the Share Transfers as required by the transfer agent or otherwise in order to perfect the Share Transfers , all necessary consents to rectify the share register(s), and pass all necessary resolutions in this respect at a validly constituted meeting of the board of directors of the Fund…*"[1]

2. It is no secret that the Plaintiff seeks to register the Share Transfers with a view to petitioning as a contributory to wind up the Defendant. The Plaintiff and two other co-petitioners presented a winding-up petition against the Defendant on August 17, 2015 (the "Petition"). The Plaintiff's standing was challenged on the grounds that it was not a registered shareholder, a position which it eventually ascertained was correct. The Defendant applied to dismiss the Petition, I made an unless order contingently dismissing the Petition on November 20, 2015, and the Plaintiff took steps to transfer legal title to shares it initially legally held on behalf of its Japanese clients back into

[1] Paragraph 1.3 of the prayer sought ancillary relief in the event that an Order in terms of paragraph 1.2 was not complied with.

its own name. Citivic, the registered nominee shareholder, executed the Share Transfers in December and original documents were forwarded by courier to the Defendant on or about January 6, 2016 and received on or about January 10, 2016. The Defendant took the position that it needed time to consider whether the transfers could be registered.

3. By the date of the hearing of the Originating Summons, the Defendant's position was that further investigation into the beneficial ownership of the shares sought to be legally transferred was still required in light of stringent anti-money laundering requirements, some of which had only recently taken legislative effect. The central dispute turned on whether or not these regulatory concerns constituted sufficient grounds to refuse to register the transfer, having regard to the fact that:

    (a) no change in beneficial ownership was apparently involved in a transfer between one nominee and another; and

    (b) the primary function of the transfer appeared to be to facilitate access by the Plaintiff to the winding-up jurisdiction of the Court in circumstances where the Defendant had the ability to block any attempt by the Plaintiff to re-transfer the shares in circumstances which might commercially harm the Fund.

**Legal findings: can the Defendant refuse to register the transfer after the expiration of the time prescribed by section 50 of the Companies Act 1981 (the "Act") for giving notice of refusal has expired?**

4. Section 50 of the Act provides as follows:

> "***Notice of refusal to register transfer***
> *50. (1) If a company refuses to register a transfer of any shares or debentures, the company shall, within three months after the date on which the transfer was lodged with the company, send to the transferor and transferee notice of the refusal.*
>
> *(2)If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine.*"

5. Bye-Law 16 of the Fund's Amended and Restated Bye-Laws confers a general right for shareholders to transfer shares. Bye-Law 18 specifies grounds on which a transfer request may be refused and Bye-Law 18.2.5 obliges the Secretary to give notice of refusal to register a transfer within three months of when the transfer instrument was lodged, consistently with section 50(1) of the Act.

6. Mr Diel submitted that once a company failed to send a notice of refusal pursuant to subsection (1) of section 50 within the three month period, no jurisdiction existed to refuse to register the transfer after that date. This was consistent with the fact an offence was committed by a company which gave notice of refusal after the statutory period had expired. Mr White submitted that the position was more nuanced than this. Where there was good cause for the failure to make and communicate the refusal decision within the statutory period, the company retained the right to decide after that period had expired. Authorities were cited which potentially supported both positions.

7. The earliest case relied upon by Mr Diel supported his contention in a somewhat oblique and/or ambiguous manner. *In re Swaledale Cleaners Ltd* [1968] 1 W.L.R. 1710 (Court of Appeal) actually decided that the directors lost the right to refuse by reason of unreasonable delay. The crucial facts in that case were that no refusal decision had been taken within the statutory period (there two months) and the board only purported to pass a refusal resolution after the transferee had applied to court for an order rectifying the register. The interval was some four months. Harman LJ (delivering the leading judgment, at page 1715) defined the question before the Court as follows:

> "*The question here to-day is, first of all, had there been unreasonable delay in refusing such a registration, and secondly, if there had been such an unreasonable delay had that delay destroyed the right to refuse?*"

8. The Court of Appeal agreed with the trial judge's view that there was no authority on this point and seemingly defined the question in this way because Pennycuick J had centrally found that the right to refuse to register a transfer would be lost if the right was not exercised within a reasonable time. Accordingly, Harman LJ (at 1715-1716) recorded the following findings:

> "*Now as to unreasonable delay, I take the view of the judge (and it seems to me merely, if I may say so, common sense), that as there is an obligation on directors who refuse to register a transfer to inform the persons who are aggrieved within two months of such a refusal, the Act quite clearly indicates that a reasonable time, other things being equal, within which directors must make up their minds either to accept the transfer or to refuse it must be the two months within which they have got to make an answer. Therefore it does seem to me that waiting four months without any decision at all was an unreasonable delay….*
>
> *The learned judge firmly took the view that if you delay too long you lose your rights, and that seems to me to be consonant with good sense. A shareholder prima facie has a transferable right of property in his shares and that can only be taken away from him by an express prohibition in the Articles of Association. Perhaps the best authority for that proposition is the case of Re Copal Varnish Company, decided by Mr. Justice Eve, in 1917 2 Chancery.*

> *So here these administrators have in their hands two bundles of rights which consist of transferable shares, subject only to the limitation imposed by the articles. Those limitations, in my judgment, only give the directors a right to refuse if they exercise that right with reasonable promptitude - other things being equal, within the two months which the Act now gives them in which to decide the question. They did not make any such decision here. At the time when the motion was launched there had been no refusal, and by that time, in my judgment, the right to register the transfer had become absolute and the subsequent meeting and refusal after the motion was launched was ineffective.*"

9. Dankwerts LJ agreed with this reasoning. However, it was only Sachs LJ (at 1717) who gave consideration to the possibility that after the statutory time period for refusing had expired, the right to refuse would automatically be lost. Mr White rightly submitted that the following observations of Sachs LJ did not form part of the Court of Appeal's actual decision:

> "*There is only one other point to which I would advert and which has given me considerable trouble, as indeed it appears to have troubled Mr. Justice Pennycuick when he said that he was not concerned with exceptional cases. Section 78 of the Companies Act, 1948, makes it a criminal offence if a transferee is not sent notice of a refusal to register within two months after the date when the transfer was lodged with the company. There is in that section no escape proviso such as 'unless some reasonable cause be shown'. The point which gives me difficulty is how it can be said that there are exceptional cases when it would be reasonable for the time for the exercising of powers such as those under article 8 to exceed those two months, when it would yet be a criminal offence if the notice to be given pursuant to such an exercise has not been given in less than those two months. That, however, is a problem which I am glad to say does not arise in the present case.*"

10. I am unsure if it was strictly correct to describe section 78 of the 1948 Act as creating a "criminal offence"; section 50(2) of the Bermudian Act merely imposes a civil, regulatory penalty. Be that as it may, Mr Diel found direct support for his proposition in a subsequent English High Court decision where the applicant for rectification did not complain of unreasonable delay. Instead the application was based on the explicit premise that after the period for refusing mandated by section 183(5) the Companies Act 1985 expired, the right to refuse was lost. There was no need to scrutinize the reasons for the delay, and the applicant was entitled to a summary rectification order. The court in *Re Inverdeck Ltd* [1988] B.C.C. 256 found that *Swaledale* supported this conclusion. Carnwath J (as he then was) stated (at 258):

> "*At one time, I must confess, I thought that the confused picture left by the correspondence was a reason why this matter could not be decided properly under this summary procedure…However, it seems to me that the matter is relatively straightforward, because the assertions made by Mr Hahn do not really affect the basic case. What I am concerned with here is not Mr*

> *Hahn's personal interest in these shares, but his position as a director of the company exercising powers which have to be exercised bona fide in the interests of the company. As a director he had a duty, enforceable by penal sanctions, to register within two months or give notice of refusal. He failed to do that and on the authority of Swaledale, it seems to me that as a director he has lost the right to do so.*"

11. This decision fully grasps the nettle which Sachs LJ only touched upon in *Swaledale* by focussing on the impact of the UK equivalent of our own section 50 on the right of directors to refuse to register a transfer. Carnwath J construed that penal provision as creating an obligation to either refuse to register the transfer within the statutory period or face penal consequences and, as a matter of civil law, a loss of the right to thereafter belatedly refuse. Rather than applying a very nebulous concept of unreasonable delay, the judge appears to have interpreted the first instance decision in *Re Swaledale* as preserving the possibility that exceptional circumstances alone might justify a delay. Reference was made earlier on in the judgment (at 256) to the headnote in the earlier case which described Pennycuick J's decision in the following terms:

> "'*In the case of private companies not holding meetings at regular intervals, while no precise time can be laid down for bringing transfers before the board, the period of two months specified in section 78 of the Act of 1948 is the outside limit after which there is unnecessary delay, apart from exceptional cases where it is impossible for any reason to constitute a board.*"'

12. I find it impossible to accept a construction of section 50 of the Act which imposes a penalty (even if not by way of criminal conviction but merely in the form of a default fine) which makes liability subject to the vagaries of what facts the regulatory authorities may or may not view as constituting a reasonable excuse in any particular case. Such an interpretation would be inconsistent with the presumption against doubtful penalisation. It is also inconsistent with the drafting scheme of the Act as a whole. The legislative scheme reflects the following approach:

    (a) where criminal liability is created, the availability of a defence based on an excuse such as lack of intent or knowledge is generally spelt out in the provision creating the offence: see e.g. section 30 (offences in relation to a prospectus), section 66A (offences in relation to registers), section 84(4) (financial statements to be laid before general meeting), section 116(4) (penalty for improper exercise of voting rights), section 132(12) (requirements for officers or representatives in Bermuda), section 243 (offences by officers of companies in liquidation);

    (b) as far as provisions in the Act creating a civil liability to pay a default fine are concerned, section 280 requires proof of specific intent and/or actual knowledge without creating a defence of 'reasonable excuse':

"280(1), *where in this Act it is provided that any person who is in default shall be liable to a default fine, such person shall, for every day during which the default, refusal or contravention continues, be liable to a fine of twenty dollars.*

*(2) Notwithstanding subsection (1) an individual who is in default shall only be liable to a fine if he knowingly is guilty of the default or knowingly and wilfully authorizes or permits the default.*

*(3)It shall be lawful for the Registrar, in any case where a person fails to comply with a provision of this Act which is subject to a default fine and the failure is not due to wilful neglect or default, to accept payment of a penalty of two hundred and fifty dollars, and in such case subsection (1) shall not apply….*" [emphasis added]

13. Accordingly, the only grounds on which liability to pay a default fine can be escaped is by demonstrating that the human actors concerned either (a) were unaware of the default which they caused, or (b) did not knowingly or wilfully authorise the default which occurred. It is entirely consistent with this legislative scheme to find that the directors do not lose the right to refuse to register a transfer after the three months' period mandated by section 50 has expired in circumstances where, *inter alia*:

    (a) the directors had no actual knowledge of the transfer request; or

    (b) the refusal occurred within the required time-frame but due to an administrative oversight notice was not timely given;

    (c) for exceptional logistical reasons it was impossible to convene the board to make the refusal decision in time.

14. The obvious intent of section 50 as read with section 67 is as follows. Share transfers should ordinarily be given effect to in a prompt manner because any delays interfere with the shareholder's fundamental right to enjoy and freely dispose of his property. The Act does not regulate the grounds on which a transfer request may be refused. Section 48 provides that this is a matter for the bye-laws or, where applicable, the rules of any stock exchange. Section 48 in particular provides:

    "*(1) Subject to any other enactment the shares or other interest of any member in a company shall be personal estate, transferable in manner provided by the bye-laws of the company.*"

15. Section 50 imposes a time period within which a transfer registration decision must be made and section 67 provides a remedy for a shareholder or other person (either a transferor or transferee) who is aggrieved by a refusal. These two provisions, in my judgment, envisage that routine transfers must be registered within the time period mandated by Parliament and, save in exceptional circumstances, the company will lose the right to refuse to register the transfer if it does not do so within the statutory period. A shareholder can seek summary relief under section 67 if neither registration

nor refusal occurs within the 3 months' period. A shareholder who cannot afford to seek relief under section 67 can report the default to the Registrar of Companies who can levy a default fine.

16. The question of "*unnecessary delay*" only strictly arises under section 67 (b) where complaint is made by a transferor, or any other shareholder, about a failure to remove a name from the register promptly.

17. The position should in principle be no different in non-routine cases where, as here, the company is unwilling to register a transfer because it has regulatory concerns. Either those concerns are resolved within the statutory period and the transfer is registered or those concerns are not resolved. If concerns about whether or not a transfer should be registered in accordance with the applicable bye- law rules are not resolved within the minimum statutory period, the company can simply serve a notice under section 50(1) of the Act communicating the refusal decision. The decision may be either:

    (a) a 'final' refusal based on complete information supplied by the applicant; or

    (b) an 'interim' refusal based on the fact that the applicant has supplied incomplete information to satisfy the company that the applicant is entitled to have the transfer registered.

18. Section 67, so far as is relevant for present purposes, provides as follows:

> "*(1) If—*
>
> *(a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or*
>
> *(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,*
>
> *the person aggrieved, or any member of the company, may apply to the Court for rectification of the register.*"

19. Section 67 itself does not require the rectification applicant to establish any unreasonable delay if they are complaining under section 67(1) (a) that their name is omitted from the register. In many cases it may be possible for a transferee to complain about a refusal to register them as a shareholder before the three months period has expired. For example, where share transfers are routinely registered within a very short time and there is no excuse for the delay which the transferee complains amounts to an unlawful refusal, a company may not be able to rely upon the full statutory period unless there is good cause for doing so.

20. Bearing in mind that it is a fundamental principle of general company law that the management of a company is appointed by and ultimately controlled by its

shareholders, the share transfer statutory scheme must surely be read as designed to prevent the share transfer process being manipulated by a company's management with a view to denying a disgruntled shareholder access to the court or, as more frequently occurs, denying a new shareholder an opportunity to exercise shareholder rights in relation to general meetings. This, in addition to the important fact that penal consequences are created for non-compliance, is a further broad policy consideration which weighs in favour of construing the time limit requirements of section 50 as substantive rather than merely procedural in character. Or, to put it another way, these policy concerns justify the presumption that Parliament intended non-compliance with the time limit to deprive a company which fails to comply with the section in circumstances which trigger liability for a default penalty of the ability to thereafter validly make a late refusal decision. The time limit in section 50 of the Act serves a far more dominant and substantive function than the purely facilitative and procedural time limits considered by the House of Lords in *R-v-Soneji* [2005] UKHL 49[2], to which I referred in the course of argument.

21. In reaching this conclusion as to the terms and effect of section 50 of the Act, it is important to avoid being distracted by the unusual features of the Bye-Laws in the present case. Participating Shares are non-voting shares and do not carry the usual right to vote in a general meeting to appoint directors and approve major transactions. The time limit imposed for approving and/or refusing share transfers by section 50(1) of the Act is not capable of being diluted by a company's bye-laws. This statutory provision is one of general application, and must be given effect to in a manner which makes commercial sense for the widest variety of Bermudian companies.

22. To conclude, I find that as a matter of law, a company may not ordinarily refuse to register a transfer of shares after the time for giving notice of refusal has expired. This is not an inflexible rule, but exceptional circumstances (broadly corresponding to the grounds on which liability for a default fine under section 50(2) could be challenged) are required to justify departing from the general rule.

**Findings: do exceptional circumstances justifying a late refusal on the Defendant's part exist in the present case?**

23. As already noted, the share transfer registration request was made against a background of ongoing litigation before this Court and the Plaintiff's attempts to wind up the Defendant. The Plaintiff's attorneys and its representative on the Board urged haste in processing what they viewed as a routine transfer from one nominee to another in mid-January 2016. On January 14, 2016 director Michael Carter first indicated that the Board would have to carry out AML/KYC enquiries. The Board met on January 28, 2016 and resolved to make these enquiries. Defendant's Japanese lawyer confirmed that no concerns arose under Japanese law on or about February 22, 2016. On March 8, 2016, the Board resolved to obtain Bermudian advice on AML/KYC matters. Despite the fact that the Plaintiff issued and served the Originating Summons herein on or about March 21, 2016, the Board allowed the 3 months deadline to pass on April 10, 2016 and did not meet again until April 28, 2016

[2] Approved by the Court of Appeal for Bermuda in *Roberts-v-DPP* [2008] Bda LR 37 at paragraph 18 (per Stuart-Smith JA).

after the final report prepared by Henry Komansky of Oyster Consulting ("the Oyster Report") had been circulated to Board members.

24. In the event the Oyster Report was finalised on April 21, 2016 and on April 26, 2016 the Defendant's Board refused to the register the transfer. The Plaintiff's position was that the Defendant should rely on the Plaintiff to carry out its own due diligence in accordance with Japanese law as had been the position when the Plaintiff initially became a shareholder. Moreover, because no change in beneficial ownership was involved, no practical AML/KYC issues even arose. The Defendant's position was that this did not absolve the Plaintiff from the obligation to respond to any AML/KYC queries the Board might have, a position which was supported by the Oyster Report.

25. The Defendant's evidence suggests that the Board must have formed the view that it was legally entitled to take a reasonable time (implicitly, unfettered by the time limit imposed by section 50(1) of the Act) to complete its investigations. Reasonableness was to be measured by reference to the time required to reach a 'final' decision on the registration issue. There is no evidence that the Board was impeded in any way from meeting and refusing to register the transfer on an interim basis before the three months' time limit expired on April 10, 2016. There are strong grounds for suspicion that just as the primary motivation of the Plaintiff was to force the Defendant to make a quick decision in advance of the Plaintiff's litigation strategy, so the Defendant's own litigation strategy was advanced by delaying the transfer process. Moreover, the construction of section 50(1) as creating a time limit which was not an inflexible one was supported, potentially at least, by respectable persuasive authority.

26. What was the practical effect of the failure to adhere to the statutory time limit in the present case? The delay past the 3 months' time period was prejudicial to the Plaintiff as a share transferee at two levels. Most substantively, the delay interfered with the Plaintiff's attempts to exercise its rights of access to this Court's winding-up jurisdiction. But once the Company decided it was unwilling to process the change of legal ownership as routine administrative matter, a refusal decision was then required to enable the Plaintiff to effectively access this Court's rectification jurisdiction under section 67 of the Act.

27. Until the three months' period expired, it was always open to the Defendant to argue that:

    (a) the jurisdiction to seek rectification under section 67 could not be invoked because, until a refusal decision had been made, the Plaintiff could not complain that its name was "omitted form the register" within section 67(1)(a); and

    (b) since no complaint was being made about the failure to record that a person had ceased to be a member, the Plaintiff had no standing to complain (as either a former member transferor or a present

member) that there had been "unnecessary delay" within section 67(1) (b).

28. On the evidence before this Court, once April 10, 2016 approached and the Oyster Report was clearly not forthcoming, the Board could simply have convened and made an 'interim' refusal decision and issued a notice of refusal rather than simply ignoring the statutory time limit altogether. In these circumstances I find that the consequence of the failure to comply with the mandatory provisions of section 50 of the Act to which penal sanctions are attached was that the Defendant lost the right to refuse to register the transfer.

**Alternative Findings: has the Defendant unlawfully refused to register the Share Transfers?**

29. In case I am wrong in finding that the Defendant lost the ability to validly refuse to register the transfer after the three months' time limit prescribed by section 50(1) of the Act expired on or about April 10, 2016, I now consider the Plaintiff's application on the alternative basis that a refusal decision which was *prima facie* valid was in fact made. Section 67 of the Act defines the Court's powers on an application under subsection (1) in the following way:

> "*(2) Where an application is made under this section, the Court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.*
>
> *(3) On an application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register.*"

30. I accept Mr White's submission that the Court should apply the following principles in determining the merits of the application:

(a) In *Smith-v-Fawcett, Limited* [1942] 1Ch 304 at 306, 308, Lord Greene MR stated:

> "*The principles to be applied in cases where the articles of a company confer a discretion on directors with regard to the acceptance of transfers of shares are, for present purposes, free from doubt. They must exercise their discretion bona fide in what they consider-not what a court may consider is in the interests of, and not for any collateral purpose. They must have*

> *regard to those considerations, and those considerations only, which the articles in on their true construction permit them to take into consideration, and in construing the relevant provisions in the articles it is to be borne in mind that one of the normal rights of the shareholder is the right to deal freely with his property and transfer it to whomsoever he pleases…The right if it is to be cut down, must be cut down with satisfactory clarity…*
>
> *In the present case the article is drafted in the widest possible terms, and I decline to write that into that clear language any limitation other than a limitation which is implicit by law, that a fiduciary power of this kind must be exercised bona fide in the interests of the company…*";

(b) The last quoted paragraph from Lord Greene's judgment in *Smith-v-Fawcett* was approved by the Privy Council in *Village Cay Marina-v-Acland* [1998] 2 BCLC 327 at 335. The Judicial Committee restored the decision of Ephraim Georges J in the British Virgin Islands High Court, which heard oral evidence, that the company was entitled to refuse to register the relevant share transfer. The Court of Appeal was held to have wrongly found the witness' evidence to be incredible on the basis of matters not put to him in cross-examination. Lord Hoffman stated (at 335-336):

> "*The directors are prima facie assumed to have been acting in good faith and the onus of proving the contrary is upon the person who challenges their decision…*"

31. Applying these principles to the present case where relief has been sought on a summary basis without cross-examination of the Defendant's directors, I accept Mr White's further submission that it is not open to this Court to find that the Plaintiff has displaced the assumption that the refusal decision has been made in good faith. However, in *Village Cay Marina Ltd.*, as in *Smith-v- Fawcett*, the articles gave an unfettered discretion to the directors to refuse to register. As Lord Hoffman observed (at 335) before approving the principles enunciated in *Smith-v-Fawcett*: "*It must however be borne in mind that not all articles are in precisely the same terms. Some are more restrictive of the matters which the directors may take into account than others.*"

32. The starting point for assessing whether the Defendant has acted lawfully in making the refusal decision therefore is the terms of the Bye-Laws themselves. The Fund's Bye-laws in the present case clearly articulate a *prima facie* right to transfer shares subject to specific restrictions, consistent with the status of the Company as what I would characterise as reflecting more a quasi-public company than a quasi-partnership private company. The governing Bye-law ("***TRANSFER OF SHARES***") provides as follows:

"*16. Subject to the Act, to any applicable restrictions in these Bye-Laws and with the prior consent of the Board, any Shareholder may transfer all or any of his shares by an instrument of transfer in the usual common form or in any other form which the Board may approve. Any transferee of such shares is required to furnish the same information and execute similar documentation to that which would be required of a direct subscription of the shares in order for a transfer application to be considered by the Board. No such instrument shall be required on the redemption or repurchase of a share by the Company.*"

33. The evidence clearly shows that when the Plaintiff transferred its shareholding to Citivic in or about 2012 with no change of beneficial ownership involved, the transfer was processed without the transferee being requested to "*furnish the same information and execute similar documentation to that which would be required of a direct subscription of the shares in order for a transfer application to be considered by the Board*". Apparently, no formal Board approval was even required. Central to the Plaintiff's case was Mr Diel's submission that where no change of beneficial ownership was involved, Bye-Law 16's implied requirement for the AML/KYC enquiries now being insisted upon by the Board was simply not engaged. Bye-Law 16 must be read in conjunction with Bye-Law 18 ("***RESTRICTIONS ON TRANSFER***"). The first paragraph provides as follows:

"*18.1 The Board may refuse to register the transfer of a share where the proposed transferee is a Non-Qualified Person. The Board shall refuse to register any transfer unless all applicable consents, authorisations and permissions of any governmental agency or body in Bermuda have been obtained.*"

34. The Board places no reliance on this limb of Bye-Law 18. Reliance is placed on the second sub-paragraph of the next paragraph of Bye-Law 18:

"*18.2 No transfer of Participating Shares may be made if:*

*18.2.1 as a result of such transfer either the transferor or the transferee of such Participating Shares would hold less than the minimum number of Participating Shares as the Board may from time to time specify; or*

*18.2.2 <u>such transfer would in the opinion of the Board</u> result in a breach of any restrictions imposed by the Board under these Bye-Laws or <u>would, or is likely to, cause a</u> pecuniary, tax, <u>legal, regulatory</u> or material administrative <u>disadvantage to the Company or its Shareholders as a whole</u>…*" [emphasis added]

35. Although the unique character of Participating Shares and the limited exit rights contemplated by the Prospectus may have some relevance in the context of a petition to wind-up the Fund, in my judgment these factors have no impact on the construction

of Bye-Law 18. The right to transfer shares is expressed in broad terms while the right of the Board to refuse to register a transfer is expressed in narrow restrictive terms.

36. The Fifth Affirmation of Mitsugu Saito filed on behalf of the Plaintiff as petitioner in the winding-up proceedings described the concerns initially raised by the Board as follows:

    (1) concerns about whether the Plaintiff holding 319,000 Participating Shares for its own benefit directly as a Japanese investor would, *inter alia*, adversely affect the secondary market in the shares; and

    (2) concerns about the need to carry out AML/KYC due diligence reviews on the underlying beneficial owners of the 7,240,000 Participating Shares to be held by the Plaintiff (as Citivic before it) as nominee.

37. The First Affidavit of Taco Sieburgh Sjoerdsma ("First Sjoerdsma") was sworn in opposition to the Plaintiff's initial rectification application issued on January 2, 2016 in the winding-up proceedings. That Affidavit primarily dealt with the background to the commercial dispute and essentially indicated that the Company needed more time to consider whether to register the transfer having regard to the requirements of Bye-Law 18. The deponent was the AML officer for the Defendant and deposed that he had carried out a similar role for another firm for over two decades. It was insufficient for the Board to rely upon a 'comfort letter' with which it was not comfortable, he effectively stated. In response to the assertion that the Plaintiff had been the registered nominee) shareholder for the same underlying investors in 2012, it was asserted (at paragraph 30):

    "*…it is not clear to me whether proper consideration was given to this at the time…The Fund has never had any visibility of who these investors were, despite multiple attempts from the Board members and the investment managers to even meet one investor*…"

38. To my mind this was an admission that the AML concerns were not in any practical or substantial sense connected with the transfer. Mr Diel asked, rhetorically, why had Citivic not been asked to provide the information now sought from the Plaintiff? Whether or not the Plaintiff became a nominee in place of Citivic, the position appeared to be that the Defendant had decided not to rely on whatever information it had relied upon either:

    (a) when the Plaintiff initially became a nominee shareholder; and/or

    (b) when the Plaintiff transferred its nominee shareholding to Citivic in or about 2012.

39. In the event the draft Minutes of the April 26, 2016 Board meeting at which the refusal decision was made reveal that the decision was based on the following principal grounds:

(1) as regards the transfer to the Plaintiff as nominee, the Oyster Report indicated that AML investigations needed to be carried out on the underlying investors;

(2) as regards the transfer to the Plaintiff in its own right, there were potential adverse effects for the secondary market in the Participating shares in Japan if the Plaintiff were to sell its shares. In addition, there were AML concerns about the Plaintiff flowing from its refusal to comply with information requests in respect of its underlying investors.

40. The Plaintiff resolved the concerns about the impact of a sale of its own proposed shareholding on the secondary market by offering an undertaking during the hearing not to sell the shares until further order of the Court. This left the AML concerns and the Oyster Report as the front and centre justifications for refusing to register the Share Transfers. The Oyster Report does not address the AML concerns in relation to the share transfer issue at all, but rather in terms of broad regulatory principle. The Report's conclusion states as follows:

> "*It is therefore our opinion, that under the circumstances, the comfort letter provided by CPS is insufficient and cannot be relied upon. The refusal of CPS to provide CDD*[3] *also makes it inappropriate to continue any reliance relationship. Further, the reasons raised by CPS to support their refusal to provide CDD provides no actual comfort and generates more suspicion and may support the filing of a SAR…*
>
> *Today FATF (and FATF compliant jurisdictions) recommend a 'trust but verify' approach in all areas of reliance which is clearly followed by Bermuda, the UK, Malta, Japan and Ireland. In our opinion it would be unwise for the Fund to rely on the comfort letter or CDD conducted by CPS and therefore expose itself unnecessarily to the risks of violating AML/ATF*[4] *law, regulations or guidance of Bermuda, Ireland, Malta and/or Japan and the Sanctions regime of the UK and Bermuda.*"

41. It is clear beyond serious argument that the legal and regulatory concerns identified by the Defendant and supported by the Oyster Report are freestanding concerns which may have been first focussed on in the context of a share transfer request, but which are in substance wholly independent of the question of who the nominee shareholder is. If the Share Transfers are not registered, and Citivic remains the registered shareholder as nominee for the Plaintiff and its clients, the Defendant will still be required to undertake the same enquiries which Citivic will be dependent on the Plaintiff to assist. It might be suggested that the Plaintiff's obstructiveness makes it an 'unfit' shareholder. In my judgment it is entirely understandable that the Plaintiff has viewed the *bona fides* of the Defendant's AML/ATF concerns with extreme scepticism having regard to the commercial context in which they have been raised. Not only do the requests seem highly technical in the share transfer registration

[3] Client Due Diligence.
[4] Anti-Terrorist Financing.

context. They have been raised at a time when the transferee is involved in litigation with the Fund and the due diligence requests have the obvious consequence of impeding the Plaintiff's ability to pursue that litigation.

42. However, objectively viewed, there is no basis for finding (based on documentary evidence alone) that the AML/KYC enquiries being made are not matters of substance and *bona fide* required (or at least appropriate) in a general sense, independently of the question of whether or not the Share Transfers ought to be registered. Bermudian AML law and practice has become increasingly rigorous in recent years. The Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008 were amended with effect from January 1, 2016 so that although reliance may be placed on third parties such as the Plaintiff to carry out CDD, such reliance is nevertheless subject to an obligation to "*immediately obtain information sufficient to identify customers*" (regulation 14(1)(b)). My strong provisional view is that the Plaintiff is indeed obliged by Bermudian law to provide information about the identity of its customers who beneficially own the shares it seeks to become the registered owner of.

43. The Plaintiff's refusal to comply with the Defendant's CDD information request in my judgment does not, in the unusual factual matrix of the present case, amount to sufficient grounds for refusing to register the Share Transfers within Bye-Law 18.2. I reach this conclusion for three main reasons:

(1) there is no credible evidence of a sufficient causative connection between the legal and regulatory concerns relied upon by the Company and registration of the Plaintiff as shareholder, construing Bye-Law 18 in a way which gives due deference to the *prima facie* rights of transferors and transferees to have share transfers registered;

(2) there are no grounds for believing that the Plaintiff if registered would not comply with the Defendant's information requests in light of this Court's provisional finding that Bermuda's current regulatory regime requires such compliance on the Plaintiff's part. Moreover, I would (if deciding the present application on this hypothetical alternative basis that it is still open to the Defendant to refuse to register the Share Transfers) have been minded to give the Defendant liberty to apply for ancillary relief to compel the Plaintiff to comply with the Defendant's reasonable requests. Such ancillary relief would fall within the ambit of this Court's jurisdiction under section 67(3) of the Act, which provides that this Court "*generally may decide any question necessary or expedient to be decided for rectification of the register*";

(3) the demonstrable object of the Plaintiff in seeking rectification of the register is to petition to wind up the Defendant. The Plaintiff will not be able to establish its standing to seek such relief without disclosing the identity of the beneficial owners and demonstrating their support for such proceedings.

**Conclusion**

44. Subject to hearing counsel, if necessary, as to the precise terms of the final Order, the Plaintiff is entitled to an Order in terms of paragraphs (1) and (2) of the Originating Summons and to rectification of the register as prayed, with liberty to apply for such ancillary relief as may be required to implement the Order. The Order is granted subject to the Plaintiff's undertaking not to dispose of its own beneficial shareholding until further Order of the Court; this resolves the market-related concerns of the Plaintiff damaging the secondary market in the Company's shares.

45. The primary basis for this conclusion is that by failing to give notice of refusal to register the Share Transfers within the 3 months' period mandated by section 50(1) of the Act, the Defendant lost the right to refuse altogether. The time limit is accompanied by civil liability for a default fine. It cannot be extended at the whim of a company and is intended to be complied with (if necessary by a refusal decision which might be subject to subsequent reconsideration) absent supervening impossibility.

46. Further and alternatively, if the Defendant did not lose the right to refuse to register the Share Transfers by deciding after the statutory time limit expired, I would in any event find that no valid grounds for the refusal existed. On a proper construction of the Bye-Laws which restricted the grounds of refusal, the AML/KYC concerns relied upon by the Defendant were not sufficiently connected with the Share Transfers to justify the refusal decision. The relevant concerns related to the identity of existing beneficial owners whose status was unaffected by a change in the identity of the nominee shareholder.

47. My strong provisional view nevertheless is that the Plaintiff is obliged to comply with the Defendant's information requests in any event. There is no basis for believing that the Defendant will as a practical matter going forward have difficulty in procuring compliance with the relevant requests.

48. Unless either party applies by letter to the Registrar within 21 days to be heard as to costs, the costs of the present application shall be payable by the Defendant, to be taxed if not agreed.

Dated this 27th day of June, 2016 _____

IAN RC KAWALEY CJ