Appellate Division, First Department Appellate Case No. 2022-04657
New York County Clerk's Index No. 656400/2020

Court of Appeals

of the

State of New York

EZRASONS, INC., a shareholder of BARCLAYS PLC derivatively on behalf of BARCLAYS PLC,

Plaintiff-Appellant,

– against –

SIR NIGEL RUDD et al.,

Defendants-Respondents,

– and –

BARCLAYS PLC,

Nominal-Defendant.

DEFENDANTS-RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF-APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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Date Completed: July 14, 2023

Corporate Disclosure Statement

Pursuant to Rule 500.1(f) of the Rules of Practice for the Court of Appeals of the State of New York, Defendant-Respondent Barclays Capital Inc. states as follows with respect to its corporate parents, subsidiaries and affiliates: Barclays Capital Inc.'s corporate parents or publicly held corporations that own 10% or more of any class of its equity interests include Barclays Group US Inc., Barclays US LLC, Barclays US Holdings Limited, Barclays Bank PLC and Barclays PLC.

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Defendants-Respondents Barclays Capital Inc., Dambisa Moyo, Robert Diamond Jr., Mary Anne Citrino, C.S. Venkatakrishnan, Stephen Thieke, and John Carroll respectfully submit this memorandum of law in opposition to Plaintiff-Appellant Ezrasons, Inc.'s motion for leave to appeal ("Mot.") from the unanimous June 1, 2023, Decision and Order of the Appellate Division, First Department (Kapnick, J.P., Oing, Gesmer, Singh, Shulman, JJ.) ("Decision and Order"), affirming the decision and order of the Supreme Court, Commercial Division (New York County) which dismissed plaintiff's Amended Complaint in its entirety, with prejudice, for lack of standing.

PRELIMINARY STATEMENT

In this purported shareholder derivative action, plaintiff seeks to bring English law claims on behalf of Barclays PLC—a U.K. organized corporation—related to purported misconduct that occurred and caused injury in the U.K., with minimal, if any connection, to New York. Faithfully following long-standing New York law, the Supreme Court correctly and properly invoked the internal-affairs doctrine to determine that English substantive law governed, including as to the issue of standing, and dismissed plaintiff's claims for lack of standing. The First Department unanimously affirmed. Now, plaintiff seeks the extraordinary relief of appeal to this Court. But plaintiff fails to identify any legal question that is novel or of public importance, and the Decision and Order does not conflict with decisions among

other departments of the Appellate Division or with prior decisions of this Court. This Court should deny the motion.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

A. Relevant Factual Background

Nominal defendant Barclays PLC is a foreign bank holding company under Section 8(a) of the International Banking Act of 1978, 12 U.S.C. § 3106(a). (Record on Appeal ("R") 718, ¶4.) Barclays PLC is incorporated and headquartered in England, where it has its principal place of business and sole office. (*Id.* ¶¶5, 9.)

B. Procedural History

1. Defendants' Motion to Dismiss

On May 14, 2021, BCI and certain individual defendants moved to dismiss plaintiff's amended complaint. (R50-51.) One of defendants' five independent bases for dismissal was that plaintiff lacked standing because it was not a registered member of Barclays PLC as required by substantive English law. (R60-61; R67-71.)

In support of the motion, defendants submitted an affirmation from Martin Moore KC, an English law expert, testifying to the requirements of English law governing shareholder derivative actions under both the U.K. Companies Act ("Companies Act" or "ECA") and English common law. (R83-716.) Specifically, the Moore Affirmation explained that both the Companies Act and English common law include a substantive requirement that a derivative plaintiff must be a registered member of the corporation to have standing. (R91-92, ¶¶31-32.)

Plaintiff opposed defendants' motion on July 27, 2021. (R919.) Plaintiff did not submit any affirmation rebutting the English law principles set forth in the Moore Affirmation. Nor did plaintiff challenge defendants' express argument that the Companies Act's membership requirement was a substantive standing provision applicable under the internal-affairs doctrine pursuant to this Court's decision in *Davis v. Scottish Re Grp. Ltd.*, 30 N.Y.3d 247, 252-53 (2017). (R931-35; R939-42.) Instead, plaintiff only asserted that Business Corporation Law ("BCL") § 1319 displaced the internal-affairs doctrine such that only New York's standing requirements govern foreign derivative actions brought in New York. (R931-35.)

2. The Supreme Court's Dismissal of Plaintiff's Action

On May 5, 2022, following oral argument, the Supreme Court (Reed, J.) dismissed plaintiff's action with prejudice after stating its reasoning on the record. (R44-48.) Relying on the analysis from two opinions dismissing purported shareholder derivative actions brought on behalf of English companies—*City of Aventura Police Officers' Retirement Fund v. Arison*, 70 Misc. 3d 234 (Sup. Ct. N.Y. Cnty. 2020), and *City of Philadelphia Board of Pensions & Retirement v. Winters*, No. 601438/2020, slip op. (N.Y. Sup. Ct. Nassau Cnty. Feb. 3, 2022), NYSCEF No. 200 (R1240-52)—the Supreme Court held that BCL § 1319 "does not override the internal affairs doctrine on the issue of standing to bring a derivative claim because it is a mere statutory predicate to jurisdiction." (R45.) The Supreme Court further

rejected plaintiff's argument that the First Department's decision in *Culligan Soft Water Co. v. Clayton Dubilier & Rice LLC*, 118 A.D.3d 422 (1st Dep't 2014) "dictates a different outcome," because, as explained in *Arison*, "*Culligan* concerned regulation of conduct within New York and did not purport to alter settled New York law on the application of the internal affairs doctrine." (R46.) Indeed, the Supreme Court noted the First Department's precedents "from *Hart* [*v. General Motors Corp.*, 129 A.D.2d 179, 182-83 (1st Dep't 1987)] to *Lerner* [*v. Prince*, 119 A.D.3d 122, 127-28 (1st Dep't 2014)]," and this Court's decision in *Davis*—all of which applied the internal-affairs doctrine to foreign derivative actions. (R46-47.)

Having determined that substantive English standing law applies, the Supreme Court held that "the membership requirement of the United Kingdom's Companies Act is a substantive provision that . . . had to be met here" (R45), and that "Plaintiff lacks standing to sue" because it "is not a registered member of Barclays." (R44.) Not only was there "an admission by attorneys in the course of their opposition that they could become a member which speaks plainly that they are not members" but there was "an affidavit . . . searching the record of documents that would show who are or who are not members." (R44-45.) Additionally, the Supreme Court concluded that, even if English common law applied instead of the Companies Act, as in *Winters*, none of the exceptions to the bar on derivative actions set forth

in the seminal case of *Foss v. Harbottle*, 2 Hare 461 (1843), applied. (R46.) Thus, the Supreme Court dismissed the action with prejudice.

3. The First Department's Unanimous Affirmance

Plaintiff subsequently appealed, and, after full briefing and oral argument on May 10, 2023, the First Department issued the unanimous Decision and Order affirming the dismissal of the action for lack of standing. *See Ezrasons, Inc. v. Rudd*, No. 2022-04657, 2023 WL 3742964 (1st Dep't June 1, 2023).

Citing *Hart* and *Lerner*, the First Department explained that the internal-affairs doctrine "has been consistently invoked by this Court in derivative actions to apply foreign law on substantive issues, including those affecting a party's right to sue." *Id.* at *1. The First Department expressly rejected plaintiff's argument that BCL § 1319 displaced the internal-affairs doctrine. Instead, it "adopt[ed] the rationale" set forth in *Arison*, "which ruled that Business Corporation Law § 1319 merely confers jurisdiction upon New York courts over derivative suits on behalf of a foreign corporation" and held that the Companies Act's "requirement that suit be brought by a 'member of the company' is an applicable substantive rule in a New York derivative suit." *Id.*

Additionally, the First Department rejected plaintiff's argument that its decision in *Culligan* "silently overruled the longstanding principle regarding the applicability of the internal affairs doctrine in derivative actions." *Id.* To the

contrary. Instead, the panel noted that "in many decisions since" *Culligan*, "the internal affairs doctrine continues to apply to derivative actions" in both the First and Second Departments. *Id.* (citing *In re Renren, Inc.*, 192 A.D.3d 539, 539 (1st Dep't 2021); *Davis v. Scottish Re Grp., Ltd.*, 138 A.D.3d 230, 233-34 (1st Dep't 2016); *Mason-Mahon v. Flint*, 166 A.D.3d 754 (2d Dep't 2018)). Finally, citing the Ellwood Affirmation and "plaintiff's counsel's clear acknowledgement in its opposition brief to defendants' dismissal motion that plaintiff was not a member" of Barclays PLC, the First Department held that the Supreme Court "correctly ruled that defendants made the showing necessary for dismissal for lack of standing." *Id.*

ARGUMENT

I. NEITHER OF THE LEGAL QUESTIONS PRESENTED BY PLAINTIFF ARE APPROPRIATE FOR REVIEW BY THIS COURT

Leave to appeal should be denied because neither of the two questions that plaintiff proposes to this Court "are novel or of public importance, present a conflict with prior decisions of [the Court], or involve a conflict among the departments of the Appellate Division." 22 N.Y.C.R.R. § 500.22(b)(4). As this Court expressly advises litigants, simply "[a]rguing error below is not enough" to satisfy the strict *certiorari* standard as "[t]he primary function of the Court of Appeals is to decide legal issues of State-wide significance." Clerk's Office, N.Y. Court of Appeals, *The New York Court of Appeals Civil Jurisdiction and Practice Outline*, § II(E)(5),

https://www.nycourts.gov/ctapps/forms/civiloutline.pdf (last visited July 14, 2023) ("*CoA Outline*").

First, plaintiff asserts that the Companies Act's membership requirement is a procedural rule that applies only to derivative actions brought in English courts. (Mot. at 14.) According to plaintiff, the First Department's decision to the contrary is inconsistent with this Court's decision in *Davis* and in conflict with the Second Department's decision in *Mason-Mahon v. Flint*, 166 A.D.3d 754 (2d Dep't 2018). (*Id.*) But plaintiff has not preserved this question for review by this Court, and, in any event, the Decision and Order does not conflict with *Davis* or *Mason-Mahon*.

Second, plaintiff claims that the First Department erred when it applied the internal-affairs doctrine because the plain language of BCL § 1319 supposedly mandates the application of BCL § 626 and displaces the common-law internal-affairs doctrine. (*Id.*) But this question does not present any novel issue of public importance; instead it reflects only plaintiff's disagreement with the First Department's application of long-standing law.

A. This Court Should Not Grant Leave to Appeal On the Issue of Whether the Companies Act's Membership Requirement is Procedural Rather Than Substantive

Plaintiff's first purported question for review—whether the Companies Act's membership requirement is procedural and applies only to derivative actions brought in English courts—does not meet any of this Court's criteria for review.

First, Plaintiff failed to preserve for review any argument that the membership requirement is procedural rather than substantive. This failure effectively ends plaintiff's quest because the Court of Appeals "has no power to review . . . unpreserved error," *Elezaj v. P.J. Carlin Constr. Co.*, 89 N.Y.2d 992, 994-95 (1997) (citation omitted), and does not consider issues and arguments unless they were first raised before the trial court, *see, e.g.*, *Gaines v. City of New York*, 29 N.Y.3d 1003, 1005 (2017) (argument was "unpreserved for our review" because party "did not argue [it] before [the] Supreme Court"); *JF Cap. Advisors, LLC v. Lightstone Grp., LLC*, 25 N.Y.3d 759, 767 (2015) (refusing to consider issue "raised for the first time . . . at the Appellate Division"). In the motion to dismiss, defendants expressly set forth that the membership requirement was substantive under both the Companies Act and English common law. (R67-69.) In opposition, plaintiff failed to argue to the contrary; instead, it argued only that BCL § 1319 displaced the internal-affairs doctrine. (R941.)[1] For good reason: the Complaint itself admitted that the Companies Act's membership provision is substantive. (R776-78, ¶91 ("Section 260 Derivative claims," which states that the chapter "applies to proceedings in England and Wales or Northern Ireland by a member of the

[1] In fact, the only "procedural requirement" plaintiff referenced was the Companies Act's requirement "to seek judicial permission from a court in England." (R941.)

company," is one of the "substantive provisions of that Act" that "apply to this litigation." (emphasis added)).)

Plaintiff's Statement of Preservation of Issues Presented—which purports to identify four record citations where plaintiff supposedly raised and preserved this issue for review with the trial court (Mot. at 38)—reinforces plaintiff's failure to preserve the issue. Appellants must "identify the particular portions of the record where the questions sought to be reviewed are raised and preserved." 22 N.Y.C.R.R. § 500.22(b)(4). Here, plaintiff's record citations are to instances in which it cited *Davis* and *Mason-Mahon* for propositions entirely distinct from plaintiff's waived argument. (*See, e.g.*, R934 ("NY courts have in recent years been notably ***receptive to shareholder derivative actions involving non-U.S. corporations***") (emphasis in original); R942 ("Moore's all-or-nothing theory not only lacks support in English law, it is plainly an improper attempt to circumvent the [*Davis*] and *[Mason-Mahon*] decisions *via* back-door enforcement of the judicial-permission procedure.") (emphasis in original).) Plaintiff's record citations do not—and cannot—point to plaintiff's specific question presented because plaintiff never raised it.

Instead, at the First Department, plaintiff argued—for the first time—that the membership requirement is procedural. "However, because this argument was raised for the first time at the Appellate Division, it is unpreserved for [Court of Appeals] review." *McMillan v. State*, 72 N.Y.2d 871, 872 (1988); *see also Henry v. New*

Jersey Transit Corp., 39 N.Y.3d 361, 367 (2023) ("To demonstrate that a question of law is preserved for this Court's review, a party must show that it 'raise[d] the specific argument in Supreme Court and ask[ed] the court to conduct that analysis in the first instance.'" (alterations in original) (quoting *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Cap., Inc.*, 33 N.Y.3d 84, 89 (2019))). Granting leave to appeal on this issue is thus not appropriate.

Second, even if plaintiff had properly preserved the issue, plaintiff has not identified any actual conflict between the First Department's Decision and Order and this Court's decision in *Davis*. Plaintiff attempts to manufacture a conflict by mischaracterizing *Davis*, claiming that this Court "rejected the application of the internal-affairs doctrine on the issue of a shareholder's standing to bring derivative claims." (Mot. at 16.) Not so. In *Davis*, the First Department applied the internal-affairs doctrine in a shareholder derivative action brought on behalf of a Cayman Islands-organized entity and determined that Rule 12A of the Grand Court Rules of the Cayman Islands was a substantive, rather than procedural, requirement. *See Davis v. Scottish Re Grp. Ltd.*, 138 A.D.3d 230, 238 (1st Dep't 2016). This Court did not take issue with the First Department's invocation of the internal-affairs doctrine. *Davis*, 30 N.Y.3d at 250. Rather, this Court considered only the narrow issue of whether Cayman Islands Rule 12A was substantive under the internal-affairs doctrine or procedural such that it did not apply to derivative claims brought in New

York. *Id.* In making that assessment, the Court (1) reviewed the plain language of the rule, (2) considered whether the rule impacted a right or a remedy, and (3) assessed any applicable policy considerations. *Id*. at 254-57.

The First Department's Decision and Order directly follows this Court's analysis in *Davis*. The First Department noted that the internal-affairs doctrine is a "conflicts of laws" principle that the First Department has consistently invoked in derivative actions on substantive issues, including those affecting a party's right to sue. *Ezrasons, Inc.*, 2023 WL 3742964, at *1. Next, the First Department adopted the reasoning from *Arison*, which assessed the three factors articulated by this Court in *Davis* and "held that the ECA's requirement that suit be brought by a 'member of the company' is an applicable substantive rule in a New York derivative suit." *Id.* Thus, plaintiff's contention that the First Department "defied this Court's instruction in *Davis*" and "disregarded" the "substance-versus-procedure argument" is simply wrong. (Mot. at 17.) To the contrary, the First Department followed this Court's precedent.

Finally, plaintiff has not identified a conflict between the First Department's decision and the Second Department's decision in *Mason-Mahon*. Plaintiff again mischaracterizes the facts and holding of that case. This time, plaintiff asserts that the Second Department in *Mason-Mahon* "held that the same ECA procedural provisions at issue . . . are inapplicable in a New York court." (Mot. at 21.) Not so.

The Second Department was not asked to consider the Companies Act's membership requirement at all, much less whether it was a substantive limitation on the right to bring a derivative action or a procedural rule. Rather, the Second Department considered whether the judicial permission requirement set forth in § 261(1) of the Companies Act—which is a separate provision not at issue here—was procedural or substantive. *See Mason-Mahon*, 166 A.D.3d at 756 ("In determining whether the subject judicial-permission rule is procedural or substantive, we must first look at its plain language." (emphasis added)). Plaintiff's mischaracterization of *Mason-Mahon* cannot create a conflict where none exists.

Plaintiff does not assert any other grounds for granting leave to appeal this issue. Nor could it. Interpreting whether the Companies Act's membership requirement is procedural or substantive lacks statewide importance in New York. And this issue is not novel. It concerns a straightforward application of *Davis*, and "where the only issue is the application of well-established principles to the facts of the particular case," this Court "in almost no cases" has granted permission to appeal. *Plowden v. Manganiello*, 143 Misc. 2d 446, 451 (N.Y. Sup. Ct. Bronx Cnty. 1989).

B. This Court Should Not Grant Leave to Appeal Whether BCL § 1319 Displaced the Internal-Affairs Doctrine

Plaintiff's second purported question of law for review—whether BCL § 1319 overrides the internal-affairs doctrine on the issue of standing to bring a shareholder

derivative claim on behalf of a foreign corporation—fails to meet this Court's high standard for granting review.

As an initial matter, this question does not present a proper basis for this Court's review. Plaintiff repeatedly states that "[r]eview by this Court is necessary to correct [the First Department's] *erroneous interpretation* of BCL § 1319." (Mot. at 23, 27) (emphasis added); *see also id.* at 8 ("[T]he [First Department] decision violates basic rules of *stare decisis* and statutory interpretation. Leave to review is necessary on these grounds alone.").) But it is well-established that "[a]rguing error below is not enough." *CoA Outline*, § II(E)(5).

In any event, plaintiff's question is neither novel enough nor of sufficient public importance to merit review.

The applicability of the internal-affairs doctrine is not novel—despite plaintiff's attempt to make it so by invoking BCL § 1319. For over 60 years since the enactment of BCL § 1319, the First Department has "consistently invoked the internal affairs doctrine in derivative actions to apply foreign law on substantive issues, including those affecting a party's right to sue." *Haussmann v. Baumann*, Nos. 2022-02491, 2022-04806, 2023 WL 4110493, at *2 (1st Dep't June 22, 2023); *see also Hart*, 129 A.D.2d at 183; *CPF Acq. Co. ex rel. Kagan. v. CPF Acq. Co.*, 255 A.D.2d 200, 200 (1st Dep't 1998); *David Shaev Profit Sharing Acct. v. Cayne*, 24 A.D.3d 154, 154 (1st Dep't 2005); *Sec. Police & Fire Pros. of Am. Ret. Fund v.*

Mack, 93 A.D.3d 562, 562-63 (1st Dep't 2012); *Siegel v. J.P. Morgan Chase & Co.*, 103 A.D.3d 598, 598-99 (1st Dep't 2013); *Cent. Laborers' Pension Fund v. Blankfein*, 111 A.D.3d 40, 45 n.8 (1st Dep't 2013); *Lerner*, 119 A.D.3d at 127-28; *Davis*, 138 A.D.3d at 233-34; *Renren*, 192 A.D.3d at 539. As the First Department recognized here, the other Departments have unanimously done the same. *See Ezrasons*, *Inc.*, 2023 WL 3742964, at *1 (citing *Mason-Mahon*, 166 A.D.3d 754); *see also O'Donnell v. Ferro*, 303 A.D.2d 567, 568 (2d Dep't 2003); *Graczykowski v. Ramppen*, 101 A.D.2d 978, 979 (3d Dep't 1984); *Ahlers v. Ecovation, Inc.*, 74 A.D.3d 1889, 1890 (4th Dep't 2010). So, too, has this Court. *See Greenspun v. Lindley*, 36 N.Y.2d 473, 478 (1975); *Davis*, 30 N.Y.3d at 252-53.

Rather than raising a novel issue, plaintiff's purported question of law quibbles with the First Department's routine application of decades-old precedent. Over 40 years ago, the argument that BCL § 1319 displaced the internal-affairs doctrine was rejected when it was first asserted by a plaintiff in a foreign derivative suit. *See Lewis v. Dicker*, 118 Misc. 2d 28, 30 (N.Y. Sup. Ct. Kings Cnty. 1982) (Section 1319 "is not a conflict of laws rule, and does not compel the application of New York domestic law."). Over the subsequent decades, New York and federal courts have repeatedly rejected the very same argument. *See Potter v. Arrington*, 11 Misc. 3d 962, 966 (N.Y. Sup. Ct. Monroe Cnty. 2006) (Section 1319 "is not a conflict of laws rule and does not compel the application of New York law, rather it

must be viewed as the statutory predicate allowing New York to follow its conflict rules in determining the applicable law."); *Stephen Blau MD Money Purchase Pension Plan Tr. v. Dimon*, No. 650654/2014, 2015 N.Y. Slip Op. 32909(U), at *4-7 n.1 (Sup. Ct. N.Y. Cnty. May 6, 2015); *Arison*, 70 Misc. 3d at 244; *Locals 302 and 612 of Intern. Union of Operating Engineers - Employers Const. Indus. Ret. Tr. v. Blanchard*, No. 04-cv-5954, 2005 WL 2063852, at *4 (S.D.N.Y. Aug. 25, 2005). Indeed, another unanimous First Department panel recently rejected this same argument in a similar shareholder derivative action brought by plaintiff's counsel.[2] In *Haussmann*, as here, the Supreme Court applied the internal-affairs doctrine and dismissed the derivative action for lack of standing—expressly rejecting the argument that BCL § 1319 displaced the internal-affairs doctrine. 2023 WL 4110493, at *1. Once again, the First Department affirmed, "agree[ing] with Supreme Court that the internal affairs doctrine applies to this shareholder derivative action on behalf of a foreign corporation to make applicable relevant substantive German laws." *Id.* at *2.

[2] Plaintiff's contention that the First Department's Decision and Order "conflicts with the First Department's own precedent" in *Culligan* borders on nonsensical. (Mot. at 31-32.) Decades of First Department precedent is clear that BCL § 1319 is not a choice-of-law provision that overrode the internal-affairs doctrine, and the First Department appropriately recognized that "*Culligan* addressed only the rare situation in which a foreign entity nevertheless had 'such "presence" . . . in our state as would, irrespective of other considerations, call for the application of New York law.'" *Ezrasons, Inc.*, 2023 WL 3742964, at *2 (alterations in original) (quoting *Greenspun*, 36 N.Y.2d at 477).

Nor does this issue raise widespread public importance. As plaintiff's counsel admitted, plaintiff "could" have become a registered member of Barclays PLC, which simply requires "procedural steps." (R940 & n.9.) But plaintiff failed to do so, and this Court should not use its scarce judicial resources to weigh in on a matter of settled law lacking statewide significance.

CONCLUSION

For the foregoing reasons, defendants respectfully request that this Court deny the motion for leave to appeal.

Dated: July 14, 2023
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-and-	
BARCLAYS PLC,	
Nominal Defendant.	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Thomas Pirraglia, being duly sworn, deposes and says:

1. That deponent is over eighteen years of age, not a party to the action and employed by Skadden, Arps, Slate, Meagher & Flom LLP, One Manhattan West, New York, NY 10001.

2. That on the 14th day of July 2023, deponent served a true copy of the following:

- ***Defendants-Respondents' Memorandum of Law in Opposition to Plaintiff-Appellant's Motion for Leave to Appeal to the Court of Appeals***

by Federal Express, overnight delivery upon:

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Sworn to before me this
14th day of July 2023.

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