SUPPLEMENTARY OPINION OF COUNSEL

for

DULWICH STORAGE COMPANY LIMITED

in the matter of

NOMINET UK

Introduction

I previously advised Dulwich Storage Company Ltd. ("Dulwich Storage"), a member of Nominet UK, as to the proper interpretation of the Articles of Nominet UK with respect to voting rights and related matters. I refer to my Opinion of 24th August, 2022.

It has now been drawn to my attention that there may be a question as to possible irregularities in the setting of the annual subscriptions and I am asked to provide guidance on this matter.

The provisions of the Articles:

Article 19 of the Articles provides as follows:

> "The Board will establish the subscriptions and poll voting rights of Members for the period to 31 August 1997. Thereafter, the subscriptions and poll voting rights will be related to the Member's relative commercial involvement in the .UK domain name service, and will be set by means of bye-laws established in accordance with Article 52.1."

Article 52.1 provides:

> "52. In consultation with the Members, the Board will establish bye-laws for the following purposes:
>
> 52.1 To determine the subscriptions payable by Members (after 31 August 1997) and the voting rights to which they will be entitled;"

Further, article 19A (which came into effect on 6th July 1998) provides:

> "19A Except as required by law, before making any change to the level of

Membership subscriptions, the Board must consult with the Members by conducting a ballot. The ballot, which may be carried out by electronic communication or in writing must seek votes for and against each proposed change; and the Board shall only implement the proposed change if at least seventy-five percent of the votes cast in the ballot are in favour of the proposed change."

The factual background:

I am informed that the Board did, indeed, set subscription rates for the period to 29th August, 1997, as envisaged in Article 19. However, no Bye-laws have ever been promulgated to set subscription levels for any period following 31st August, 1997, nor (since 6th July, 1998) have any ballots ever been held to approve any such proposed bye-laws. Notwithstanding this, the Board has collected purported subscriptions, which have been paid by members.

Analysis:

The provisions of the articles are both mandatory and clear in their terms. Without the promulgation of bye-laws and (after 6th July, 1998) confirmatory ballots achieving a 75% majority, there is no authority given to the Board to set subscriptions, and the purported subscription demands are clearly void, as being *ultra vires.* It is not possible to argue that the 1997 subscriptions (which were lawfully set) simply continue as a default, because Article 19 is perfectly clear that those rates are to apply only up to, but not beyond, 31st August, 1997.

I note also that article 19 clearly intended to make weighted voting interdependent with unequal subscriptions (putting it crudely: a member might pay more to get more voting power). It is difficult to see how these two issues can be disentangled, and a bye-law which gives weighted voting without addressing subscription levels is arguably *ultra vires* on that account. However, this may be a largely academic observation, given the advice which I gave in my previous Opinion.

Conclusion:

In these circumstances, there has been no basis within the terms of the articles for subscriptions to be set and collected from and after 31st August, 1997. It follows, therefore, that the subscriptions which were collected ought not to have been paid.

Consequences:

To understand the practical consequences, it is necessary to understand the legal basis of any claim for repayment of the subscriptions paid.

In essence, those members who have paid the subscription demands may be likely to

have done so in error, believing that the payments were truly due. Accordingly, the principles which will apply are those of unjust enrichment: specifically, the unjust enrichment of Nominet UK through payments made by the members in error.

It is beyond the scope of the present Opinion to provide a detailed discursus on the law of unjustified enrichment, but it may be helpful if I were to quote a few words from Goff & Jones, *The Law of Unjust Enrichment* (9th Ed) at paragraph 9-40:

> "An appropriate way forward may be the following. First, the concept of a "mistake" requires, as a threshold matter, that a claimant believed that it was more likely than not that the true facts or true state of the law were otherwise than they actually were. Secondly, this belief must cause the claimant to confer the benefit on the defendant, in the required sense. Thirdly, even if a causative mistake can be shown, a claimant may sometimes be denied relief on the basis that he responded unreasonably to his doubts, and so unreasonably ran the risk of error. Fourthly, beyond this, a claimant who had doubts may be denied relief on the distinct grounds that he has compromised or settled with the defendant, or on the basis that he is estopped from pleading his mistake. There is no need for any independent "assumption of risk" bar in this context, and the language of assumption of risk is a redundant way of expressing the conclusion that a claimant's claim must fail on one or more of the foregoing grounds."

In the case of Dulwich Storage, which has been a member only since 2020, it is unlikely that it paid the subscriptions in the face of doubts as to the Board's entitlement to set such subscriptions; indeed it may be that it had no such doubts; but in respect of other members who may seek reimbursement of subscriptions, this would be a question to be determined on a case by case basis, depending on the state of mind of each of such members when making such payments.

Another factor (which, however, will not affect Dulwich Storage) is Limitation. The wording of the Limitation Act 1980 is not felicitous (largely because the law of unjust enrichment has developed somewhat since 1980, with the consequence that the legislation failed to make specific provision for claims for restitution), but it is largely accepted that a common law claim for restitution for money paid erroneously falls under the six-year limitation period under section 5 of the 1980 Act (see *Kleinwort Benson Ltd v Sandwell BC* [1994] 4 All E.R. 890 per Hobhouse J at pages 942-943).

The position, however, is not free from doubt, not least because the basis of the payment in this case is not really contractual. However, even if Limitation does apply in relation to a particular claim, that will affect only individual payments and not the Claim as a whole.

Another complication is that the members did receive some benefit in return for their (invalidly collected) subscriptions, and that raises the spectre of a possible defence or counterclaim by the company.

A detailed analysis of these matters would require a much better understanding of the circumstances of each member; so the purpose of the present advice needs must be restricted to flagging the possible issues.

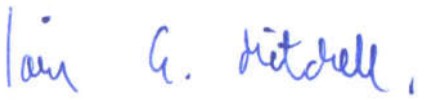
Envoie

As the above analysis discloses, the company finds itself in a difficult position, and, on the basis of the facts as understood by me, Dulwich Storage has a colourable claim for the return of its subscriptions paid since it joined as member. However, the wider picture looks like it may be a recipe for litigation, with each case depending on its own unique facts, and with the legal issues raised by the possible arguments outlined above.

Such an internal dispute may not be in the interests of Nominet UK, or, ultimately, of its members, and could provide an unwelcome distraction from the achievement of its Objects by Nominet UK.

It may be that wiser counsels would suggest that the members come together to see if it is possible to find a consensual way out of the mess which has undoubtedly been created.

THE OPINION OF



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21st September, 2022.