



Nominet Board of Directors

4 October 2022

Dear Nominet Director

**Opinion of Andrew Thornton KC
Weighted Voting and Members Subscription Fees**

We refer to the Opinion of Andrew Thornton KC of 29 September 2022 and David Buckle's Statement on behalf of Nominet of the same day.

David Buckle's Statement

David Buckle on behalf of Nominet published a statement on 29 September 2022 which said:

"We have reviewed the legal opinions recently published by a member querying the validity of our voting arrangements and our process regarding membership fees. We obtained legal advice on these matters, from a specialist corporate KC, which we have now shared with the member's representative. That advice identifies significant flaws in the advice that has been published. We remain confident in the legality of Nominet's long-standing voting and membership arrangements."

That statement is false. The advice shared by Nominet does not deal with Member Subscription Fees at all. Nor does it deal with two of the three issues regarding Weighted Voting raised by Iain Mitchell KC in his two opinions.

Mr Thornton's Opinion is expressly limited to consider whether the Nominet's articles breached s285A of the Companies Act. That is made plain in the first two paragraphs of the Opinion, which set out the limits of its scope:

1. *"I have been asked to advise Nominet UK ("Nominet") whether the weighted voting rights contained in its constitution breach s285A of the Companies Act 2006 ("the CA 2006").*
2. *Nominet has been provided with a copy of an opinion of Iain Mitchell KC ("IMKC") dated 24 August 2022 ("the IMKC Opinion"). ..."*

So Nominet's Statement claiming that Mr Thornton KC reviewed "*the legal opinions*" (plural) and "*We obtained legal advice on these matters* (plural), *from a specialist corporate KC, which we have now shared with the member's representative.*" is untrue.

We don't believe that David Buckle is a liar. We believe it more likely that he relied in good faith on false information given to him by other executives or officers at Nominet. We would ask the independent NEDs to investigate this as a matter of urgency. Then report it openly to the members, the owners of the company. We would urge you to demonstrate in practice the increased transparency that has often been spoken of.

Membership Subscription Fees

Andrew Thornton KC's Opinion does not deal with the question of Nominet's Member Subscription Fees.

Iain Mitchell KC's Opinion of 21 September 2022 concluded that:

***"...the purported subscription demands are clearly void, as being ultra vires...
and
...the subscriptions which were collected ought not to have been paid."***

Nominet has failed to respond to this question, other than to falsely claim that it is addressed in Andrew Thornton's opinion. Nominet has not provided one iota of legal advice or fact to rebut the conclusion that Membership Subscriptions have been unlawfully collected since 1997. That could result in a refund to members amounting to millions of pounds. We reached out to you in good faith to try to deal with this together. Not hearing anything back from any independent NEDs is very disappointing.

Weighted Voting and Level of Member Subscriptions Are Interdependent

In his Opinion of 21 September 2022, Iain Mitchell KC said:

"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..."

Having heard nothing back from you on it for a week, we published the Supplementary Opinion. A concerned member, who is not part of the WeightedVoting.uk group, sent us some research that they had done on archive.org. They sent us a link to this page in archive.org -

[NOMINET UK \(archive.org\) nic.uk/nominet/backg.html](http://NOMINET UK (archive.org) nic.uk/nominet/backg.html) We attach a PDF copy for your ease of reference.

The earliest version of that page is 12 November 1996. Nominet was founded on 24 May 1996. It seems likely the document was written for the company's foundation. It is titled **Nominet UK - An Introduction**. Relevantly it says:

“Nominet UK's structure

Nominet UK is a company limited by guarantee, which means it has no shareholders and pays no dividend. Any individual or organisation is eligible to become a member of the company, and can do so by taking out a subscription. At present, the cost of subscription varies according to the number of Internet registrations the member has made in a qualifying period (currently 1 April 1995 and 31 March 1996). Voting rights are weighted similarly, as the table below indicates:

Registrations Votes Subscriptions

<50	1	£500
50-99	2	£1000
100-199	4	£2000
200-299	6	£3000
300-399	8	£4000
>400	10	£5000

The membership of Nominet UK constitutes its Steering Committee [Membership]. This in turn elects non-executive directors to a Council of Management (Board of Directors), which runs the company. There are two executive directors, Dr William Black, who is managing director, and John Carey, Technical Director. A small executive staff will also be employed in due course.”

That shows that the founding documents of Nominet had voting rights and membership subscriptions interlinked at the outset, precisely as Iain Mitchell KC indicated they should be in his Opinion of 21 September 2022.

s285A Companies Act 2006

We have shown Andrew Thornton KC's Opinion of 29 September 2022 to Iain Mitchell KC.

Mr Mitchell was already aware of the unreported case of *Puzitskaya* that Mr Thornton's Opinion depends on.

The reason that Mr Mitchell did not refer to the case in his Opinions was that he had discounted it as being relevant or binding on the Nominet situation. However, since Mr Thornton depends almost entirely on it to support his Opinion, Mr Mitchell has reviewed the judgement alongside Mr Thornton's Opinion.

Mr Mitchell says:

This is a single judge decision at first instance and proceeded upon a concession by the Respondent that entailed acceptance of a submission by the Claimant which, on a proper analysis was deeply flawed.

In these circumstances, were the matter to be fully argued before a court in a future case, there is a strong probability that Puzitskaya would not be followed.

When I expressed my view in my original Opinion, I did so in terms of assessing probabilities of outcome. Consideration of the judgement in Puzitskaya and Mr Thornton's Opinion does not cause me materially to alter that assessment.

Section 285A was not a significant issue in *Puzitskaya*. It was not even disputed between the parties to that case as to how it should be applied in relation to the articles of that company. It was a point that was agreed and so not challenged or, we would say, properly reasoned.

Aside from an analysis of the law, we would point out that in *Puzitskaya*, the company formation (and so articles) predated the provision for written resolutions in the Companies Act 1989. That is not the case for Nominet.

In *Puzitskaya*, there was no suggestion that the company's articles were amended to accommodate changes in the law, unlike Nominet.

In *Puzitskaya*, there is no provision for written resolutions in the company's articles. That is not the case for Nominet, where Articles 19A and 50 both provide for written resolutions. They do not provide for weighted voting in either case.

Even if one accepts the deeply flawed legal reasoning in *Puzitskaya*, these are key factual distinctions that mean the reasoning in that case cannot be applied to Nominet.

We would add that we are not alone in criticising the analysis of s285A in *Puzitskaya*. In *Company Meetings and Resolutions, Law, Practice, and Procedure, Third Edition* (OUP) Leslie Kosmin KC and Catherine Roberts say:

"Unfortunately, in the only reported decision on s 285A it has proved to be of only limited assistance in preventing abuse and ensuring fairness in voting...."

The court next considered the effect of s 285A and in particular whether it avoided the article. Somewhat surprisingly, the claimants argued that s285A did not apply because Article 10 did not make different provisions for voting on a written resolution and on a poll taken at a meeting, in that it was silent on the subject of written resolutions. The claimants' arguments were supported by the first defendant. The court held that it was clear that in the absence of any express provision relating to written resolutions within the company's articles, s 285A did not come into play. Accordingly, Article 10 continued to govern the voting weight and procedure at general meetings. Section 285A therefore had no impact on this situation. It may be doubted that this was the intention of the draftsman of s 285A."

One of the authors of that book, Leslie Kosmin KC, is a former member of Andrew Thornton's chambers and a former Deputy High Court Judge. His coauthor, Catherine Roberts, is also a member of Mr Thornton's chambers and specialises in the law of company meetings.

There are a number of similar published criticisms of the court's finding on s285A in *Puzitskaya*.

The main issue in dispute in *Puzitskaya* was whether the articles could be rewritten by the court to add words to give effect to the weighted voting on written resolutions. Less controversially, and with considerably more argument and reasoning, the court held that the words could not be read in where they did not appear. That is our position on Article 19 in Nominet's articles. They must be read as they were written.

Consequently, Mr Mitchell KC confirmed to us that he respectfully rejects the reasoning behind Mr Thornton's Opinion. As he said above, it does not change his assessment of the situation.

Conclusion

Nominet's public statement on 29 October 2022 regarding Andrew Thornton KC's Opinion was manifestly false.

We would again ask the independent Non Executive Directors to carry out their duties to act independently of the Executive and to show us that you are doing so. Find out how that misleading statement came to be made and disclose it to the members.

We respectfully remind you that your duties are to the company and not to the executive. We would remind you of a number of your duties as directors - including the duty to act within your powers, to promote the success of the company, to exercise independent judgement and to use reasonable skill care and judgement. These are obligations that each of you must independently exercise. Breaches of duties to act independently and otherwise can give rise to personal liability.

We implore you to seek independent legal advice and to ask to see any previous advice received by Nominet on the issues that we have raised. We are providing you with what we can from outside the company. You have far greater powers to seek documents from within. You also have the right (we would say duty) to engage in dialogue with us directly.

Finally, and urgently, we again ask you to adjourn the AGM, so that there is more time to work through this "mess".

Yours faithfully

Angus Hanton (Dulwich Storage Company Limited)

Jim Davies (Former Nominet Director)

Mr C Davies (Nominet Member)

Michael Toth (Lively Limited)

