

## RE: NOMINET UK

### OPINION

1. I have been asked to advise Nominet UK (“Nominet”) whether the weighted voting rights contained in its constitution breach section 285A 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”). The IMKC Opinion was sought by Dulwich Storage Company Limited (“Dulwich”), a member of Nominet. In his opinion, IMKC expresses the view that Nominet has adopted different voting rights for votes conducted by way of poll and for the passing of a written resolution and that, accordingly, the poll weighted voting rights are void (see section 285A(a) CA 2006).
3. For the reasons set out below, I disagree with that view. In my opinion, the weighted voting rights adopted by the Company are the same for both poll votes and the passing of written resolutions and are consistent with section 285A and enforceable. Furthermore, and in any event, the argument on which IMKC relies has been rejected by the court.
4. As a starting point, the conclusion reached by IMKC might come as a surprise to someone reading Nominet’s constitutional arrangements. Article 52 of Nominet’s articles of association (“the Articles”) provides as follows:

*“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.”*

5. The current version of the bye-law adopted by Nominet pursuant to Article 52 (“the Bye-Law”) have been provided to me. Part 3 of the Bye-law sets out how the voting rights on a poll are to be conducted and Part 5 sets out how the voting rights shall apply where the vote is not by poll or show of hands (accordingly, including on a written resolution). Part 5.2 confirms that, in that situation, the formula set out in the Bye-Law shall apply. The relevant formula is the (same) formula setting out how poll voting operates.
6. Accordingly, on the face of Nominet’s Articles and Bye-Law, it has adopted the same approach for calculating voting rights for voting by poll and by written resolution.
7. The reasoning for IMKC’s conclusion is set out on the sixth page of his opinion. In short, IMKC concludes that Article 19 takes precedence over Article 52 and that, accordingly, the Bye-Law can only be read as relevant to voting by poll, not in relation to a written resolution. As a consequence, Bye-Law 5 is to be ignored insofar as it relates to a written resolution and the default position under section 284 CA 2006 (one member, one vote) prevails. As a result, as the poll voting formula is not one member, one vote, it is unlawful and unenforceable.
8. The two reasons IMKC gives for reaching his conclusion are (a) that giving effect to the voting rights set out in the Bye-Law amounts to the ‘tail wagging the dog’ and (b) that the Articles were adopted at a time when section 285A CA was not in effect. I do not find either of those arguments compelling.
9. However, it is unnecessary to get into that debate. In *Puzitskaya v St Paul’s Mews (Islington) Ltd [2017] EWHC 905 (Ch)*, a decision of Andrew Hockhauser KC (sitting as a deputy High Court judge), the Court rejected the argument upon which IMKC relies.
10. In *Puzitskaya*, the court considered a company’s articles which provided for the number of votes on a poll at a general meeting but did not mention the number of votes on a written resolution.<sup>1</sup> The judge held that “*in the absence of any express provision relating to written resolution within the articles, [section 285A] does not come into play*”. He accepted the submission that section 285A CA 2006 does not apply where

---

<sup>1</sup> This is the same approach that IMKC states applies under Nominet’s constitutional arrangements.



the articles do not make different provisions for written resolutions and meetings (i.e. where reliance is placed on the default voting regime set out in section 284 CA 2006).

11. In short, the argument upon which IMKC depends has been rejected by the Court. IMKC has not referred to the Puzitskaya authority in his opinion.
12. There is a further point I wanted to make. On the sixth page of his opinion, IMKC states that, in construing Nominet's Articles and Bye-Laws, the Court will adopt the approach to construction envisaged in Kookmin Bank SA v Rainy Sky [2011] 1 WLR 2900. In my opinion, that is not quite right.
13. Although, in construing articles of association the court will generally apply the standard principles of contractual construction, given the special nature of articles of association, there are limits to what the court will consider in applying these principles. In short, as articles of association are a public document which bind parties other than those who drafted them (subsequent members and creditors), extrinsic evidence is not admissible as an aid to construction. Only those matters which would be apparent to a third-party reader can be considered (for example, other documents available at Companies House) (see, for example, the Court of Appeal's decision in Cosmetic Warriors [2017] EWCA Civ 324).
14. The established approach was usefully summed up by Snowden J (now Snowden LJ) (at para 34) in Re Euro Accessories Ltd [2021] EWHC 47 (Ch):  

*"The result is that the process of interpretation to arrive at the true meaning of a provision in a company's articles of association must concentrate on the natural and ordinary meaning of the words used, when viewed in light of the scheme and purpose of the articles in general, any extrinsic facts about the company or its membership that would reasonably be ascertainable by any reader of the company's constitution and public filings at Companies House, and commercial common sense."*
15. Applying the natural and ordinary meaning of the words used in the Articles and the Bye-law and applying commercial common sense, it is clear in my view that the same weighted voting rights apply to both written resolutions and voting on a poll. That position is quite consistent with section 285A CA 2006.

16. For all those reasons, I respectfully disagree with the opinion of IMKC insofar as it alleges that Nominet's weighted voting rights are contrary to section 285A CA 2006 and void. In my view, they are entirely lawful and enforceable.
17. This opinion is provided to Nominet and should not be relied on by any other person.

  
**Andrew Thornton KC**

**Erskine Chambers**

**29 September 2022**