Neutral Citation Number: [2023] EWHC 1373 (Ch)

Case No: CR-2021-001443 and CR-2021-001658

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Royal Courts of Justice
The Rolls Building London, EC4A 2NL

Date: 07/06/2023

Before :

INSOLVENCY AND COMPANIES COURT JUDGE BURTON

- -

Between :

(1) PETER RAYMOND HENRIKSON
(2) TRUTH DATA INSIGHTS LLC
(3) PETER RAYMOND HENRIKSON
(as trustee of the Henrikson Family Trust)

- and - **Claimants**

(1) CHARLES RILEY CONSTANT
(2) DAVID PAUL CARLSON
(3) CHRISTOPHER R HYLAND
(4) KENDALL DEAN POTTER
(5) TRUTH DATA INSIGHTS (HOLDINGS) LIMITED
(6) RACHEL WEBSTER
(as trustee of the Snake River Trust)
(7) THE REGISTRAR OF COMPANIES

Defendants

and between:

(1) CHARLES RILEY CONSTANT

Claimant

and
(1) PETER RAYMOND HENRIKSON
(5) TRUTH DATA INSIGHTS (HOLDINGS) LIMITED
(7) THE REGISTRAR OF COMPANIES

Defendants

- -

Roger Laville (instructed by **Kelly Owen Limited**) for the **Henrikson Parties**
Ben Shaw KC (instructed by **Capital Law Limited**) for the **Constant Parties**

Hearing date: 11 November 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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INSOLVENCY AND COMPANIES COURT JUDGE BURTON

ICC Judge Burton :

1. The applications before the court all concern Truth Data Insights (Holdings) Limited (the "Company"). Their background lies in a dispute between Mr Henrikson and Mr Constant as to whether Mr Constant's family trust has an indirect equity interest in a limited liability company incorporated in Texas, USA, known as Truth Data Insights LLC ("TDI LLC").

2. The Company was incorporated on 10 May 2016 together with Truth Data Insights (Group) Limited ("TDI Group"). TDI Group held the Company's sole issued share (the "Share").

3. In 2015, Mr Henrikson agreed with Mr Constant to set up TDI LLC as a new business venture involved in analysing helicopter flight data. It is said that the Company and TDI Group were incorporated in order to provide a tax-efficient structure for the ownership by (i) Mr Henrikson or his family trust (the "HF Trust") and (ii) Mr Constant, or his family trust (the "SR Trust") of TDI LLC. Mr Henrikson acquired 800 shares and Mr Constant the remaining 200 shares in TDI Group and they were each appointed directors of both the Company and TDI Group. Shortly after incorporation, their shares in TDI Group were transferred to their respective family trusts. They also incorporated an Australian subsidiary, TDI Australia PTY Ltd ("TDI Australia"), the entire share capital of which was held by the Company.

4. On the same date that the Company was incorporated, 10 May 2016, the Company and TDI LLC entered into a share subscription agreement governed by Texan law (the "Subscription Agreement") pursuant to which TDI LLC agreed to issue to the Company a Series B Preferred Share of US$0.01 in TDI LLC. As consideration for that share, the Company issued a promissory note to TDI LLC in the sum of US$10. Mr Henrikson has said that there is no provision in TDI LLC's constitution for Series B Preferred Shares to be issued and my understanding is that the Series B Preferred Share which formed the basis of the Subscription Agreement has not been issued.

5. There is a factual dispute between the parties regarding events taking place in late 2017 and 2018. Mr Constant claims that in January 2018, Mr Henrikson proposed that the shares held by the Company in TDI Australia should be transferred to TDI LLC and that he agreed to this relatively straightforward reorganisation as he understood it would not affect his indirect 20% interest in TDI LLC and TDI Australia. In February 2018, Mr Henrikson proposed to rationalise the group structure further by dissolving the English companies. Mr Constant claims that he was amenable to this, provided that he would retain his/his family trust's 20% interest in TDI LLC.

6. On 21 June 2018, Mr Constant signed forms for the English companies to be voluntarily struck off the register under section 1003 of the Companies Act 2006 (the "Act"). He states that he believed that they would only be filed with the Registrar of Companies after the proposed corporate restructuring, which would preserve his interest in TDI LLC, had taken place.

7. Mr Henrikson's case is that it was Mr Constant, a former banker and investment professional, who recommended establishing the English companies to hold TDI LLC's shares to enable TDI LLC to operate in a tax-efficient manner and that Mr

Constant received a 20% interest to compensate him for managing the tax scheme. However, as the intended tax savings were not realised, in December 2017, he and Mr Constant agreed to bring an end to their business relationship by dissolving the English companies and letting the Subscription Agreement fall away at the same time. Board resolutions to dissolve the Company were signed on 4 January 2018 and also on 23 May 2018. He claims that it was during an exchange of emails in July 2018 that Mr Constant started to assert that he was entitled to a share in TDI LLC in exchange for his interest in TDI Group.

8. The dispute led, in June 2019, to Mr Henrikson causing TDI LLC to commence proceedings in Texas seeking a declaration that neither Mr Constant nor the SR Trust holds any membership interest in the LLC.

9. The signed forms to dissolve the Company were never filed. Instead, on 16 October 2018 and 6 November 2018 respectively, TDI Group and the Company were struck off the register by the Registrar of Companies pursuant to section 1000 of the Act. This resulted in the Share vesting *bona vacantia* in the Crown.

10. In June 2020, Mr Constant filed a form RT01 (the "Restoration Form") in order, pursuant to section 1024(1) of the Act, to restore the Company to the register. He signed the Restoration Form in his capacity as a former director of the Company and among other things, stated (together, the "Restoration Statements") that:

    a) the Company "was carrying on business or was in operation at the time of strike off"; and

    b) "Documents relating to the company to bring up to date the company record have been properly delivered to the Registrar".

11. The Company was restored to the register and in September 2020, Mr Constant filed forms AP01 purporting to show that Mr Henrikson had resigned as a director of the Company and that the Second to Fourth Defendants, David Carlson, Christopher Hyland and Kendall Potter had been appointed as directors of the Company.

12. Although the Company had been restored to the register, as a result of the striking off of TDI Group, its Share remained vested *bona vacantia*. On 27 May 2021, the Crown transferred the Share to the SR Trust and the HF Trust as joint owners.

13. On 21 June 2021, Mr Constant wrote to Mr Henrikson purportedly on behalf of the Company, referring to the Subscription Agreement and seeking an account of TDI LLC's revenue. On 24 September 2021, the Company commenced proceedings in Texas against TDI LLC seeking to enforce its contractual rights as holder of the Series B Preferred Share under the Subscription Agreement.

14. Both sets of proceedings in Texas (the "Texas Litigation") have been consolidated. On 20 July 2022, TDI LLC filed a voluntary petition under Chapter 11 of the US Bankruptcy Code resulting in the consolidated proceedings being transferred to the Bankruptcy Court.

15. Meanwhile, in England, the following applications have been issued and are now before the court (although as explained below, the injunction application may no longer be live):

    i) an application by Mr Henrikson and the other claimants in case number CR-2021-001443 (the "Henrikson Parties") by Part 8 claim form dated 9 August 2021, for, among other things, an order under section 1096 of the Act to rectify the register of companies by marking the Company as dissolved (the "Henrikson Dissolution Application");

    ii) a cross-application by Mr Constant, by Part 8 claim form dated 10 September 2021, for an order:

        a) under section 1031 of the Act to restore the Company to the register of companies (the "Constant Restoration Application"); and

        b) an order under section 125 of the Act rectifying the Company's register of members (the "Constant Rectification Application"); and

    iii) an application for injunctive relief (the "Henrikson Injunction Application") against Mr Constant and associated parties (the "Constant Parties"). Following a consent order made on 26 August 2022 which includes undertakings by the Constant Parties, I understand that urgent interim relief is no longer considered to be necessary.

The Henrikson Dissolution Application

16. The Henrikson Dissolution Application seeks declarations that:

    i) the Restoration Form was "void, invalid and factually inaccurate because, at the time that [the Company] was struck off the register, it was neither carrying on business nor in operation, and the Crown representative had not signified to the [Registrar of Companies] consent to the restoration";

    ii) the consequent entry of the Company on the register as active as opposed to dissolved was, or was derived from, something that was similarly "void, invalid and factually inaccurate"; and

    iii) [all] subsequent filings were void, invalid and done without the authority of the Company and were factually inaccurate.

17. The claim form further seeks orders removing the Restoration Form and subsequent filings from the register, removing Messrs Carlson, Hyland and Potter as directors from the register of directors, reinstating Mr Henrikson as an active director in the register of directors, deleting any reference to his resignation, and marking the Company as dissolved.

18. In his amended witness statement dated 9 August 2021, Mr Henrikson states that the continued existence of the Company under the control of Mr Constant and the SR Trust is likely to result in loss or liability to the Company by, among other things, causing it to incur its own and adverse legal costs "by being drawn into legal

proceedings against him and by falsely claiming entitlement to the Truth Data Insights brand name".

Statutory provisions

19. Section 1025 of the Act sets out the conditions which must be satisfied for the administrative restoration of a company:

> "*Requirements for administrative restoration*
>
> (1) On an application under section 1024 the registrar shall restore the company to the register if, and only if, the following conditions are met.
>
> (2) The first condition is that the company was carrying on business or in operation at the time of its striking off.
>
> (3) The second condition is that, if any property or right previously vested in or held on trust for the company has vested as bona vacantia, the Crown representative has signified to the registrar in writing consent to the company's restoration to the register.
>
> (4) It is the applicant's responsibility to obtain that consent and to pay any costs (in Scotland, expenses) of the Crown representative—
>
> (a) in dealing with the property during the period of dissolution, or
>
> (b) in connection with the proceedings on the application, that may be demanded as a condition of giving consent.
>
> (5) The third condition is that the applicant has—
>
> (a) delivered to the registrar such documents relating to the company as are necessary to bring up to date the records kept by the registrar, and
>
> (b) paid any penalties under section 453 or corresponding earlier provisions (civil penalty for failure to deliver accounts) that were outstanding at the date of dissolution or striking off.
>
> (6) In this section the "Crown representative" means …
>
> …(d) in relation to other property, the Treasury Solicitor."

20. Section 1096 provides:

> "*Rectification of the register under court order*

> (1) The registrar shall remove from the register any material—
>
> > (a) that derives from anything that the court has declared to be invalid or ineffective, or to have been done without the authority of the company, or
> >
> > (b) that a court declares to be factually inaccurate, or to be derived from something that is factually inaccurate, or forged, and that the court directs should be removed from the register.
>
> (2) The court order must specify what is to be removed from the register and indicate where on the register it is.
>
> (3) The court must not make an order for the removal from the register of anything the registration of which had legal consequences as mentioned in section 1094(3) unless satisfied —
>
> > (a) that the presence of the material on the register has caused, or may cause, damage to the company, and
> >
> > (b) that the company's interest in removing the material outweighs any interest of other persons in the material continuing to appear on the register.
>
> (4) Where in such a case the court does make an order for removal, it may make such consequential orders as appear just with respect to the legal effect (if any) to be accorded to the material by virtue of its having appeared on the register.
>
> (5) A copy of the court's order must be sent to the registrar for registration.
>
> (6) This section does not apply where the court has other, specific, powers to deal with the matter, for example under—
>
> > (a) the provisions of Part 15 relating to the revision of defective accounts and reports, or
> >
> > (b) section 859M (rectification of register)."

21. Section 1094(3) of the Act (referred to in subsection (3) of section 1096 above) includes, at sub-paragraph 1094(3)(a)(i), a company's formation and at 1094(3)(a)(viii) its dissolution. Section 859M of the Act referred to in subsection (6)(b) above concerns rectification of the register in relation to company charges.

22. Section 1169 of the Act defines the circumstances under which a company is "dormant":

> "*Dormant companies*
>
> (1) For the purposes of the Companies Acts a company is "dormant" during any period in which it has no significant accounting transaction.
>
> (2) A "significant accounting transaction" means a transaction that is required by section 386 to be entered in the company's accounting records.
>
> (3) In determining whether or when a company is dormant, there shall be disregarded—
>
> (a) any transaction arising from the taking of shares in the company by a subscriber to the memorandum as a result of an undertaking of his in connection with the formation of the company;
>
> (b) any transaction consisting of the payment of—
>
> (i) a fee to the registrar on a change of the company's name,
>
> (ii) a fee to the registrar on the re-registration of the company,
>
> (iii) a penalty under section 453 (penalty for failure to file accounts), or
>
> (iv) a fee to the registrar for the registration of a confirmation statement.
>
> (4) Any reference in the Companies Acts to a body corporate other than a company being dormant has a corresponding meaning."

23. Section 386 of the Act requires, among other things, accounting records to show entries from day to day of all sums of money received and expended by a company and the matters in respect of which the receipt and expenditure takes place. Where a company's business involves dealing in goods, it requires statements of all goods sold and purchased outside those sold in the ordinary course of ordinary retail trade, showing the goods and the buyers and sellers in sufficient detail to enable them to be identified.

Authorities relied upon

24. In *Re Infund LLP* [2020] Bus. L.R. 567 Mr Garcia obtained the administrative restoration of a limited liability partnership ("LLP") to the register. The claimants sought, pursuant to section 1096(1) of the Act, to reverse the LLP's restoration, contending that Mr Garcia had made false and dishonest statements when applying to restore it and that he was using the LLP to pursue vexatious proceedings against them.

25. When applying to restore the LLP to the register, Mr Garcia claimed to be entitled to do so as a former member of the LLP. He provided forms showing his appointment as a designated member of the LLP, backdated and, it transpired, that were entirely false as he had never been so appointed. Mr Garcia also signed and submitted to the Registrar, annual returns for the LLP, each backdated and each stating that he was a designated member and showing, contrary to its earlier accounts, that the LLP's assets included the value of certain shares which were the subject of litigation in Mexico. Having restored the LLP to the register, Mr Garcia then sought to bring proceedings in Mexico in the name of the LLP on similar grounds to those relied upon in earlier proceedings which were dismissed on the basis that he had no right to represent the LLP.

26. At first instance, Henry Carr J found that the LLP was neither carrying on business nor in operation at the time of its restoration to the register. Its only alleged activity was the holding of monies in a bank account and the pursuit of litigation in Mexico. Against this: (i) the LLP had no members; (ii) the purpose for which it had been established had been fulfilled; (iii) it had filed dormant accounts one year, followed by no accounts for the following three years and correspondence noted that within a six-month period during the time when it failed to file accounts, the LLP had not carried on any business; and (iv) Mr Garcia failed to respond to an invitation to provide evidence of its trading activity with anything showing continuing operations. Henry Carr J found that the LLP was dormant at the time of its dissolution: that was the clear understanding of all relevant parties. Simply holding a bank account was not, in the circumstances of the case before him, enough to lead the court to conclude that the LLP was in operation. Furthermore, "misconceived claims" being pursued by litigation in Mexico similarly did not mean that the LLP was in operation at the date of its dissolution.

27. He found that: (a) Mr Garcia had acted dishonestly, providing factually inaccurate documents; (b) the reference in section 1096(1) to "any material" appearing on the register encompassed not only the statement that the LLP was active but also the restoration documents that were fraudulently submitted to the Registrar and subsequently filed on the register; (c) it could be presumed that the presence of fraudulent material on the register had caused or might cause the LLP damage, and (d) since the LLP's interest in removing the material outweighed that of other persons in the material continuing to appear on the register, the court had power to order that the register be rectified.

28. In the Court of Appeal, Patten LJ noted that there was no appeal against the Judge's finding that the Mexican proceedings involved the making of a dishonest claim. At paragraph 46 of his judgment, Patten LJ considered the balancing test in section 1096(3) and the identity of "other persons" referred to in that section:

> "46. The purpose of the balancing test which the court must perform under section 1096(3) is to ensure that any damage which has been or may be caused to the company by the presence of the material on the register outweighs the harm to third parties that would be caused by its removal. The focus on both sides of the equation is on the presence of the material on the register and the interests which that either serves or damages. The assumption in section 1096(3)(b) is that any

> contest between competing interests in this respect will lie between the interests of the company or LLP in removing the damaging material and the interest of "other persons" in keeping the material on the register. Those other persons (as the minister made clear in his statement during the committee stage of the bill) would ordinarily and most likely be third parties who had relied on the registered details of the company's formation, registered office, charges or status in their dealings with it and would be adversely affected by their removal or alteration. But in the present case Infund takes no independent position in relation to the application for rectification. The dispute is entirely between "other persons" as to whether it should remain restored to the register and so be able to continue to pursue its claim in the Mexican proceedings.
>
> "47. It is obviously possible to construct an argument based on policy for ensuring that any forged or unauthorised material should be removed from the register regardless of the impact which that might have on those who have, for example, dealt with a company or LLP in the meantime on the assumption that its registered details and status were correct. This was the purpose of the amendment I referred to earlier but that was rejected. Instead the balance of harm test will apply even when a company or LLP is restored to the register on the basis of a false or unauthorised application. In every case it must be shown that the presence of the disputed material on the register has caused or will cause damage to the company or LLP because it is the harm caused to the other persons by the removal of that material from the register which must be weighed in the balance against the company's own interests. "

29. He continued at paragraph 48:

> "… It would, as Mr Machell has submitted, have been possible, as I have said, to make unauthorised, forged or fraudulent material a special case and to confine the need to show a balance of harm in favour of the company to cases of mistake. But the application of the balance of harm test to all cases of rectification which relate to the registration of material having legal consequences means that damage must be shown either to have been caused to the company or to be a real future possibility. It is therefore necessary to identify what damage has been or might be caused and not merely to presume it.
>
> 49. … Provided that it can reasonably be said that the restoration of Infund to the register and its registration as an active LLP has caused or may cause it damage, there seems to me to be no discernible policy reason for not giving to the language of section 1096(3) its ordinary meaning and effect.

> 50. … it seems unlikely that Parliament would have wished to exclude from the scope of the balancing exercise a proper consideration of all the possible consequences for the LLP itself of the material remaining on the register. The defendants' argument involves reading section 1096(3) as limiting the scope of any causal inquiry to damage that is in some way inherent to the relevant material remaining on the register and which excludes any consideration of the wider consequences. But that is a difficult distinction to maintain in the light of the categories of material to which section 1094(3) applies.
>
> …
>
> 51. It seems to me that damage caused by the presence of the material on the register does therefore extend to damage which may be caused to the LLP or company in the future as a result (as in this case) of its continuing existence as an active legal entity. That can include losses caused to the LLP by its use for illicit purposes or simply in a way which will expose it to liabilities that cause it loss. In the present case, that includes the liabilities for costs to which Infund has been exposed by pursuing what the judge has found to be a dishonest claim."

30. In *Re Priceland Ltd* [1997] BCC 207 Laddie J considered a landlord's application pursuant to section 653(2) of the Companies Act 1985 to restore a company to the register in order that it could implement a rent review for which the third respondent, as original tenant, would ultimately be liable. Section 653(2) provided that the court may order the company's name to be restored, if satisfied that the company was at the time of the striking off, carrying on business or in operation, or otherwise that it was just that the company be restored to the register. Before Priceland was dissolved, its solicitors were in correspondence with lawyers acting for a proposed assignee of the lease. The correspondence tailed off, leading the court to conclude that at the time of its dissolution, Priceland was dormant. However, the court was empowered to restore Priceland if it considered it otherwise just to do so. It held that restoration should not be refused because the prejudice that would be suffered by the third respondent in liability for arrears of the increased rent would not be caused by the striking off followed by restoration, but because such a consequence simply flowed from the terms of the lease.

31. When considering the scope of section 653(2) of the Companies Act 1985 at E on page 210, Laddie J said:

> "Precisely what is covered by the words 'in operation' is unclear. This has been commented upon by Harman J in *Re Portrafram Ltd* (1986) 2 BCC 99,160. However both Mr Morgan and Mr Davis gave examples of activities which might be carried on by the company which are short of carrying on business yet still count as being in operation. For example a company may have ceased trading but still be engaged in trying to secure a tax refund for the benefit of its creditors. It seems to me that purpose of the section is to give the court the widest possible powers to

> restore. The words 'carrying on business or in operation' in s.653(2) should be read together and in the light of that purpose. What the section is directing the court to do is to look back to the time of dissolution. If, at that time, the company was completely dormant, this particular avenue for giving jurisdiction to the court is not made out. On the other hand if the company was carrying on any activity at all, then the court's power to restore is brought into play."

32. He concluded that if he had been satisfied that the company was still trying to assign the lease at the time of its dissolution, he would have held that it was in operation at that time. However, its solicitors' last letter was sent a month earlier, noting that they had sought instructions from the company "quite some time ago" but received no reply. Consequently, the applicant had failed to satisfy him that the company "was anything other than dormant in March 1989".

Was the Restoration Form "void, invalid and factually inaccurate"?

Carrying on business or in operation

33. It falls to the Henrikson Parties to prove, on the balance of probabilities, that the Company was not carrying on business or in operation on 6 November 2018 when it was struck off. They contend, relying upon the court's decision in *Re Priceland,* that it was not enough, as the Constant Parties contend, for the Company to be a holding company, holding its interest, or claim to an interest, in TDI LLC; something active was required.

34. They rely on the following evidence to support their contention that the Company was not carrying on business or in operation at the relevant time:

    i) the Company's purpose to create a tax efficient structure was not realised;

    ii) it held no bank account and undertook no financial transactions;

    iii) the only accounts filed before dissolution reveal that it was dormant;

    iv) its failure to file subsequent accounts further reveals that it was dormant;

    v) Mr Constant signed resolutions to dissolve the Company;

    vi) Mr Constant completed a form DS01 for it to be dissolved;

    vii) the Company's accounts, signed and approved by Mr Constant when filing them in support of the Restoration Form, demonstrate that it was not carrying on business: its micro-entity balance sheet as at 31 May 2018 showed net current assets of £10, liabilities falling due within one year of £10 and total assets less current liabilities of £0. The picture is exactly the same in its micro-entity balance sheet as at 31 May 2019. There are no profits and no suggestion of the Company paying dividends, which, the Henrikson Parties submit, would usually be expected of a holding company. There is no mention, even, of the Company asserting its right to the Series B Preferred Share in TDI LLC; and

viii) it was not in operation as a holding company: it did not own a Series B Preferred Share in the LLC. It had, at most, a claim to such a share and at the time of dissolution, it was taking no active steps to advance such a claim.

Decision regarding the Restoration Form

35. The Company's sole purpose was to act as a holding company for an interest in TDI Australia and TDI LLC.

36. Mr Constant signed:

i) a document described as "Resolutions in writing of the board of directors passed in accordance with Article 10 of the articles of association of the Company while meeting in Dallas, Texas on Jan 4th, 2018" (the "January 2018 Resolutions"). Mr Constant's signature appears above the date, "January 4th, 2018" but in his witness statement, he states that he did not sign the January 2018 Resolutions and the DS01 form until they were sent to him in June 2018. The resolutions provide:

> "COMPANY DISSOLUTION RESOLUTIONS
>
> 2.1 That Mat and Co. Accounting Services be notified of the intent to close the Company.
>
> 2.2 That Mat and Co. Accounting Services confirm no tax liability for the Company prior to closure.
>
> 2.3 That the Regus Virtual Office subscription be cancelled upon confirmation of the closing of the business with the Companies House.";

ii) a document described as "Minutes of the Meeting of the Board of Directors of [the Company] held on 23 May 2018 at 5808 Elderwood Drive, Dallas, Texas, 75230-3452. USA" (the "May 2018 Meeting"). The minutes record:

> "REPORT AND ACCOUNTS
>
> The company's dormant accounts for the period from 10 May 2016 to 31 May 2017 were presented to the meeting. It was resolved that the dormant accounts be and were hereby adopted.
>
> DISSOLUTION
>
> It was resolved that the company be dissolved as soon as possible and the relevant forms be filed at Companies House"; and

iii) a DS01 for each of the Company and TDI Group, each dated 21 June 2018.

37. In my judgment, the January 2018 Resolutions record a conditional intention to dissolve the Company: it was to be closed once the accountants confirmed that there

would be no tax liability. I was not taken to any evidence of that confirmation having been given.

38. The DS01 form is an application to the Registrar of Companies to dissolve the Company. The fact that it has been signed, indicates an intention to make such an application, but the fact that it was not delivered to the Registrar demonstrates that the intention was not pursued. In isolation, neither the January 2018 Resolutions nor the DS01 form are sufficient to satisfy me to the relevant standard of proof that at the time the Company was struck off by the Registrar, it was neither carrying on business, nor in operation as a holding company.

39. Whilst Mr Constant states that he was only prepared to implement the reorganisation proposed by Mr Henrikson involving the dissolution of TDI Group and the Company on the understanding that it would be conditional on the SR Trust retaining "an ownership in the company group" and further states (at paragraph 42 of his witness statement) that he was entitled to certify that the Company was carrying on business or in operation at the time of the strike off because it continued to function as a holding company, he does not expressly refer to the minutes of the May 2018 Meeting which he signed. Those minutes record: (i) a clear, unconditional intention to dissolve the Company as soon as possible; and (ii) that the directors adopted the Company's dormant accounts for the period to 31 May 2017.

40. Those accounts not only describe the Company as dormant but also show, as at 31 May 2017, that it had no assets and no liabilities. No reference is made to the value of whatever rights it might hold in TDI LLC as a result of the Subscription Agreement, nor the shares that it held in TDI Australia. There is no evidence of Mr Constant seeking to convene a subsequent meeting to reverse or alter either resolution.

41. Taking into account:

    i) that the Company's purpose was only ever intended to be to hold interests in TDI Australia and TDI LLC;

    ii) the resolution passed at the May 2018 Meeting to dissolve the Company as soon as possible;

    iii) that there has been no cross-examination of witnesses;

    iv) the absence of any explanation from Mr Constant in his written evidence as to why, notwithstanding his understanding that the Company would not be dissolved without the ST Trust's indirect 20% interest in TDI LLC being preserved, he signed the minutes of the May 2018 Meeting, nor any evidence of when he signed them;

    v) the express recognition in the minutes of the May 2018 Meeting that the accounts being adopted for the Company by its directors were in respect of a dormant company;

    vi) the absence of any reference in those accounts that covered the period between the date of its incorporation (10 May 2016) and 31 May 2017 to the

> Company's interest in TDI Australia nor the rights granted on the same date as it was incorporated, by the Subscription Agreement;

there is a cogent body of evidence that persuades me to the standard required that in November 2018, when the Company was struck off the register, neither party considered that it was "carrying on business" whether as a holding company or otherwise.

42. As noted by Laddie LJ in *Re Priceland*, the question of whether a company was "in operation" at the time it was struck off or dissolved is harder to determine. He noted by way of example, a company having ceased business but nevertheless being "in operation" whilst it was engaged in trying to secure a tax refund, and stated that if the company was carrying on any activity at all, then the court's power to restore would be brought into play.

43. I recognise that the company in *Re Priceland* was not a holding company. I am nevertheless influenced by the Court of Appeal's conclusion that there must be some element of activity or active steps being taken by the relevant company. The Company was struck off the register some 11 months after a cheque was sent to Mr Constant for the transfer of his trust's shareholding in TDI Australia. At the time it was struck off, no active steps appear to have been in progress in relation to the Company's rights under the Subscription Agreement. If the court in Texas finds in favour of the Constant parties, then it could potentially be said, as Mr Shaw submitted, that the steps being taken to enable those rights to just "fall away", in law amount to an unlawful distribution or return of capital and consequently that some active steps were taken by the Company. But if it accepts Mr Henrikson's case, that the Company's rights in the Subscription Agreement had no value, then it is difficult to see that letting them lapse would be sufficient for the Company to be said to have been in operation.

However I cannot pre-judge the Texas Litigation. The Company's only filed accounts appear to show that at the relevant time it held no assets whatsoever. On balance, taking that and the factors noted at paragraph 41 above into account, together with the fact that no steps were being actively taken at the time the Company was struck off the register to determine the nature of the rights, if any, that it held in TDI LLC, I consider that the Henrikson Parties have met the burden of proof, to the relevant standard, to persuade me that the Company was not "in operation" when it was struck off the register in November 2018

Were the documents required to bring the Company's records up to date properly delivered to the Registrar?

44. The Henrikson Parties claim that the accounts delivered by Mr Constant when applying to restore the register were not "properly delivered" to the Registrar because they had not been approved by the Company's board of directors, as required by section 414 of the Act. They contend, thus, that "properly delivered" should be interpreted to refer not to the form in which, or the method by which they reached the Registrar, but rather that the documents must properly accord and comply with the requirements of statute and the relevant company's constitution.

45. Mr Shaw submitted that the Henrikson Parties were "making the words 'properly delivered' do a lot of work". I agree. The natural meaning of "properly delivered" is that the documents, on their face, meet the Registrar's requirements. This is also the meaning set out in the Act:

    i) Section 1059A of the Act provides:

    > "*Scheme of this Part*
    >
    > (1) The scheme of this Part is as follows.
    >
    > (2) The following provisions apply generally (to the registrar, to any functions of the registrar, or to documents delivered to or issued by the registrar under any enactment, as the case may be) -
    >
    > …
    >
    > sections 1068 to 1071 (delivery of documents to the registrar),
    >
    > sections 1072 to 1076 (requirements for proper delivery)".

    ii) Section 1068 of the Act provides that the Registrar may impose requirements as to the form, authentication and manner of delivery of documents required or authorised to be delivered to him under any enactment.

    iii) As to delivery, section 1068(4) provides that the Registrar may specify requirements as to the physical form of the document (for example, hard copy or electronic form); the means by which it may be delivered (for example, by post or electronic means and if by electronic means, the hardware and software to be used), and the address to which documents are to be sent.

    iv) Section 1072, "*Requirements for proper delivery*" provides that a document is not properly delivered unless the requirements set out in that section are met concerning the document's contents, form, authentication, manner of delivery, and any requirements as to the language it must be in or the provision of a certified translation into English.

46. I reject the Henrikson Parties' contention that the accounts were not "properly delivered" to the Registrar.

The section 1096(3) balancing exercise

47. I have found that the statement in the Restoration Form was factually incorrect, that at the time the Company was struck off it was "carrying on business or in operation". The effect of section 1096(3) is that even where the court concludes that material on the register is factually inaccurate or derives from anything that the court declares to be factually inaccurate, the court must not direct that it be removed from the register unless satisfied that its presence has caused or may cause damage to the company and

that the company's interest in removing the material outweighs any interest of any other persons in the material continuing to appear on the register.

48. The Henrikson parties submit that the continued presence of the Restoration Forms on the register may cause damage to the Company because Mr Constant has:

    i) caused the Company to engage in litigation in Texas, thereby potentially incurring liability to pay lawyers to represent it and potentially exposing it to an adverse costs order; and

    ii) caused the Company to breach TDI LLC's intellectual property rights, thereby exposing the Company to the risk of a passing-off claim in the United States.

49. The court must balance the potential damage to the Company against the interests of other persons in the material continuing to appear on the register. In *Re Infund*, the Court of Appeal found such "other persons" would ordinarily and most likely be third parties who had relied on the registered details of the company. Mr Laville highlights that Mr Constant is a director of the Company and submits that he should have known that there was a risk that the restoration of the Company to the register might be reversed and that Mr Constant is not among the third parties whose interests the section requires the court to weigh in the balance.

50. Following its restoration to the register, the Company has commenced proceedings in Texas. It is neither possible, nor appropriate for this court to assess the merits of those proceedings, nor to make any determination of the likelihood of adverse costs orders being made against the Company.

51. Mr Shaw referred the court to the principle to be applied when an application is made to restore a company to the register under section 1031 of the Act to enable it to bring claims against third parties. As noted by the Court of Appeal in *Re Forte's (Manufacturing) Ltd. Stanhope Pension Trust Ltd & Anor v Registrar of Companies & Anor* [1994] BCC 84 (which concerned a question of whether a company's dissolution following members' voluntary liquidation should be declared void under section 651 of the Companies Act 1985), it was not for the Court to express any concluded view on the likelihood of the company in that case being entitled to recover sums under an indemnity. The applicant's interest in restoration does not have to be firmly established or highly likely to prevail. It must be more than "merely shadowy". Mr Shaw submits, and I accept, that these considerations apply with equal force to the consideration by this court of the proceedings in Texas.

52. In *Re Infund* there was no appeal against Henry Carr J's finding that the proceedings to be commenced in Mexico were vexatious and abusive. In this case, there has been no such finding. The court has seen the Subscription Agreement and emails passing between Messrs Henrikson and Constant in July 2018 when Mr Constant referred to "TDI UK" owning TDI LLC, but I have not seen any explanation of how that interest was brought to an end other than Mr Henrikson's witness statement in these proceedings in which he states that the validity of the Subscription Agreement is disputed, because it was not authorised under the articles of organisation of TDI LLC.

53. In my judgment, these issues go beyond being merely shadowy. As it is not for this court to assess the merits of the litigation in Texas, the choice is stark: permit the

Company to remain on the register and retain its chance of trying to recover what one of its directors claims to be a valuable asset, or reverse the restoration and let that chance die, without the court in Texas ever having an opportunity to consider the merits.

54. When viewed in these stark terms, I am not satisfied for the purposes of section 1096(3) of the Act, that the presence of material on the register showing that the Company is an active company has or will cause damage to the Company nor, to the extent that it may potentially cause such damage (due to the risk of adverse costs order being made against it) that the Company's interest in removing that material outweighs the interests of any relevant third parties. It is clear to me, in circumstances where I cannot pre-judge the outcome of the Texas Litigation, and for the reasons set out in paragraph 53 above that the Company's interests are best served by it remaining on the register as active. I do not consider the Court of Appeal's finding in *Re Infund* that "other persons" would ordinarily and most likely be third parties who had relied on the registered details of the company, being so stringent as to prevent Mr Constant seeking to invoke the section in the circumstances of this particular case. In my judgment, the court's discretion extends to allowing him his interest to fall within the term "other persons".

55. The same principles apply in relation to the risk of the Company, by remaining on the register, being subject to potential claims in the US for claiming to be entitled to the "Truth Data Insights" brand name. It is not for this court to wrap the Company up in cotton wool to protect it from the risk of litigation that may or may not be brought against it in the United States, the merits of which I cannot and should not seek to assess.

56. For these reasons, I dismiss the Henrikson Dissolution Application. As a result, the Constant Restoration Application falls away.

The Constant Rectification Application

57. Mr Constant's claim form seeks an order pursuant to section 125 of the Act that the Company's register of members be rectified to show the SR Trust and HF Trust as joint holders of the Share.

58. The Henrikson parties' claim form seeks:

> "Relief, to be determined, concerning the purported transfer of the shares in the [Company] to the [trustee of the SR Trust] and others, including if necessary rectification of the register of shareholders of the [Company]."

Statutory provisions

59. In circumstances, as in this case, where there has been no election by a company to maintain its register via the central register, section 112 of the Act provides:

> "*The members of a company*
>
> (1) The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its

> registration become members and must be entered as such in its register of members.
>
> (2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company."

60. Section 125 of the Act provides:

> "(1) If—
>
> (a) the name of any person is, without sufficient cause, entered in or omitted from a company's register of members … the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register.
>
> (2) 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 such an application the court may decide any question relating to the title of a 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."

61. The Company appears never to have had a register of members. The court confirmed in *Re Data Express Ltd* The Times, 27 April 1987 that the court's power of rectification extends, where necessary, to the creation of a register.

62. Section 286 of the Act provides so far as is of relevance:

> "*Votes of joint holders of shares*
>
> (1) In the case of joint holders of shares of a company, only the vote of the senior holder who votes (and any proxies duly authorised by him) may be counted by the company.
>
> (2) For the purpose of this section, the senior holder of a share is determined by the order in which the names of the joint holders appear in the register of members … .
>
> (3) Subsections (1) and (2) have effect subject to any provision of the company's articles."

Each party's position

63. The significance of the Constant Rectification application is that if the court determines the SR Trust to be the first-named and thus senior holder of the Share, that will give Mr Constant the right, via his family trust, to control the Company's board, in particular to ensure that it continues to participate in the Texas Litigation.

64. As Mr Constant's case is that the SR Trust should be entered as the senior holder of the Share, as opposed to him personally, he seeks permission to substitute the SR Trust as the claimant in the Part 8 claim form seeking this relief, sealed by the court on 10 September 2021. I consider it appropriate for the court to permit such an amendment to be made as the substance of the application remains the same as appears to have been understood by both parties.

65. In his second witness statement dated 17 September 2021, Mr Henrikson claims that:

> "It was not until more than a year and half after the commencement of the litigation in the United States did Mr Constant surreptitiously attempt to negate the closure of [the Company] without authority or my consent."

66. He alleges that Mr Constant made material misrepresentations to the Crown in order to restore the Company to the register. I have already addressed that issue. However in the same paragraph of his second witness statement (55) he refers to Mr Constant's communications with the Government's Bona Vacantia Division ("BVD") to purchase the Share and states that Mr Constant "actively misled" the BVD:

> "about his intentions concerning purchase of [the Share], falsely implying that Mr Constant's and my family trusts, as the joint shareholders, were planning to re-open [the Company] to start trading in the UK"

67. He also alleges that Mr Constant:

> "falsely certified to the Crown that the purchase of [the Share] was made from distributable profits of the Company."

68. Mr Laville submits that:

i) the BVD's offer on behalf of the Crown to sell the Share was made jointly to both the SR Trust and HF Trust. As Mr Constant had no authority to represent the HF Trust in his dealings with the BVD or to purchase the Share in its name, the Crown's offer was not accepted by the parties to whom it had been made, and was consequently void *ab initio*; alternatively

ii) if the transfer was valid, then the Share is held on trust for both of the family trusts, in the same proportions as they formerly owned shares in TDI Group, i.e. 80% being beneficially owned by the HF Trust and the remaining 20% by the SR Trust.

Correspondence leading to the transfer of the Share

69. It appears that Mr Constant first approached the BVD at the end of 2019. By his letter dated 5 December 2019, he informed the BVD that he was the secretary and a director of TDI Group and that the SRT was a member of TDI Group. He explained that at the time it was struck off, TDI Group held one share in the Company, of which he was also secretary and a director. He explained that the SR Trust wished to purchase the Share and that he was secretary and a director of TDI Group and did not intend to restore it to the register.

70. The BVD replied on 27 February 2020, noting that both companies had been dissolved and saying that the Treasury Solicitor would not sell shares in a dissolved company, which have no value. Mr Constant was informed that it was open to him to apply to restore the companies to the register and then deal with the shareholding.

71. In May 2020, Mr Constant submitted a form to apply for the Treasury Solicitors' consent to the administrative restoration of the Company, which he obtained by letter dated 3 June 2020. He then applied, in the manner already noted, for the Company to be restored.

72. On 24 June 2020, Mr Constant wrote to the BVD, attaching his previous correspondence and documents previously submitted, saying:

> "We have restored [the Company] and would like to continue with consideration to purchase the BVD Unquoted share of the company."

73. A reply was sent to him on 27 July 2020 explaining that the Treasury Solicitor seeks to sell shares vested bona vacantia for full open market value, either to the issuing company or the former shareholders of the dissolved company jointly. The BVD said that in order that they could value the Share, they would require the Company's share register, copies of its last three years' audited accounts and details of any dividends that were declared by the Company in the preceding three years. It asked Mr Constant to confirm that the Company wished to purchase its own share (for which it would require a warranty that the requirements of Part 18 of the Act had been complied with) and that the Share would be purchased using the Company's distributable profits.

74. Mr Constant replied on 3 August 2020, explaining that TDI Group was the sole shareholder, that SR Trust was one of two shareholders in TDI Group and that SR Trust was the shareholder interested in purchasing the Share, the funds for which would be from the SR Trust's own resources. He stated that:

> "…the other shareholder (i.e. the HF Trust) "would not be contributing to the purchase. [SR Trust] would request the purchase just in their name.
>
> The Articles of Association were replaced by the Shareholder Agreement, which does not allow for any actions without a vote by the Shareholder. The Directors do not have any voting

> rights. Thus, the Company would not be able to conduct business if the company purchased the share or it was held jointly. I've attached a copy of the Shareholder Agreement and the other documents requested for valuation."

75. On 13 August 2020 he provided the documents requested plus a copy of the shareholder agreement. He sent chaser emails on 3, 13 and 22 September 2020, the last, signed by Mr Constant as Director/Secretary of the Company saying:

> "We submitted the information requested by your previous letter on 8/13. I wanted to make sure you received it and all was in order. By chance, is there any update on the status or expected timeline that I can relay to our Board?"

76. The BVD replied on 2 November 2020 saying:

> "I have reviewed this matter and, in order to consider a sale of the share in Truth Data Insights (Holdings) Limited to Snake River Trust, we will require a letter signed by an authorised signatory of Henrikson Family Trust that:-
>
> 1) the Henrikson Family Trust do not wish to buy the share;
>
> 2) the Henrikson Family Trust have no objection to the share being sold to Snake River Trust; and
>
> 3) the Henrikson Family Trust do not intend to restore Truth Data Insights (Group) Limited to the register.
>
> On receipt of a PDF copy of the signed letter as set out above, I shall request from HM Revenue & Customs a valuation of the holding."

77. Mr Constant replied on the same date:

> "So, as I understand, there are two options. The purchase of the share jointly by Henrikson Family Trust and Snake River Trust or sole purchase by Snake River Trust. In order for Snake River Trust to solely purchase the share you will require a letter signed by an authorised signatory of Henrikson Family Trust that:-
>
> 1) the Henrikson Family Trust do not wish to buy the share;
>
> 2) the Henrikson Family Trust have no objection to the share being sold to Snake River Trust; and
>
> 3) the Henrikson Family Trust do not intend to restore Truth Data Insights (Group) Limited to the register
>
> Is that correct?"

78. The BVD replied:

> "Yes, that's right. Once we have received a PDF copy of a letter signed by an authorised signatory of Henrikson Family Trust that:-
>
> 1) the Henrikson Family Trust do not wish to buy the share;
>
> 2) the Henrikson Family Trust have no objection to the share being sold to Snake River Trust; and
>
> 3) the Henrikson Family Trust do not intend to restore Truth Data Insights (Group) Limited to the register
>
> I shall request from HM Revenue & Customs a valuation of the holding."

79. Mr Constant's next email does not appear to have been until 12 January 2021 when, writing again as Director/Secretary of the Company, he simply stated:

> "We'll proceed with jointly purchasing the share, as we do not have any indications from the Henrikson Family Trust and we need to move forward with resolving the share.
>
> Thanks".

80. Having not heard anything in response to his subsequent chaser emails, on 19 March 2021, Mr Constant wrote an email in the following terms and also, it appears, sent a letter dated 18 March 2021 saying largely the same thing:

> "We haven't heard much on the status of the purchase. Attached is our latest correspondence and request to purchase the share. In order to improve efficiency, Truth Data Insights (Holdings) Limited (the issuer) is willing and able to purchase the share. Please see the attached requested documents from your letter 27 July 2020.
>
> - Truth Data Insights Request Letter
> - Written Confirmation to purchase by Truth Data Insights (Holdings) Limited
> - Replacement Stock Certificate
> - Stock Power
>
> Please let me know if this was received and if we're able to proceed. Thanks".

81. The attached letter concluded with an additional paragraph:

> "In addition, and per the request on 27 July 2020:
>
> • Attached is the replacement share certificate issued to (Group) for its 1 share

> • Written confirmation from Truth Data Insights (Holdings) Limited regarding compliance
>
> • Stock Power/Transfer paperwork."

82. The written confirmation of compliance dated 18 March 2021 states that all the requirements of Part 18 of the Act relating to an off-market purchase by a company of its own shares had been complied with and that the purchase is made out of distributable profits of the issuing company, also in accordance with Part 18.

83. On 8 April 2021, the BVD wrote to say it was waiting for a valuation of the Share which would be sold to the SR Trust and HR Trust, unless the Company wished to buy it. Mr Constant replied on 13 April 2021, as Director/Secretary of the Company saying:

> "We look forward to getting this resolved so we can file taxes/open bank accounts and ensure ongoing operations.
>
> Do you know about how long it might take for HMRC to value the shares? At this time, Truth Data Insights (Holdings) Limited, the issuing company, will plan to purchase the shares back."

84. He followed this with a chaser email on 22 April 2021 and sent: (i) written confirmation that the Company "complies with" the requirements of Part 18 of the Act and that the purchase is made out of distributable profits; (ii) a "replacement stock certificate" certifying that TDI Group held one ordinary share of £0.0001, fully paid in the Company, written confirmation to purchase; and (iii) a blank document entitled Stock/Bond Power for the sale of the Share to the Company.

85. The BVD replied on 5 May 2021 attaching a blank transfer form, directions to complete it with TDI Group (dissolved) as the party whose interest in the security has vested in the Crown as registered owner, and the Company as transferee, and stating that a payment in respect of the consideration fee of £1000 plus £360 for costs and VAT should be transmitted by BACS.

86. Mr Constant's response was sent by email dated 10 May 2021. He said:

> "We have had further consultations with Baker McKenzie law firm in the UK and they have recommended we proceed with having the Share purchased jointly by Snake River Trust and Henrikson Family Trust.
>
> We have completed the Draft Stock Transfer Form accordingly and just wanted to confirm it looks complete. Please see attached.
>
> We are also having Snake River Trust send £1,360.00 per your instructions to pay for the Share on behalf of the parties and should arrive Wednesday UK.
>
> Please have the Final Signed and Sealed Transfer forwarded to:

> Truth Data Insights (Holdings) Ltd
> Kemp House
> 152-160 City Rd
> London EC1V 2NX
>
> We look forward to completing the transfer and appreciate your assistance in the matter.
>
> Thanks
> Chuck Constant
> Director/Secretary
> Truth Data Insights (Holdings) Ltd"

87. The BVD subsequently confirmed receipt of the payment and on 28 May sent to the Company, the signed, sealed and dated stock transfer form.

Was the sale of the Share void?

88. Mr Laville submits that the only document before the court that is admissible to determine the BVD's intention when selling the Share, is the stock transfer form. As it provides for the Share to be transferred to both trusts, it is clear that the Crown understood that it was contracting with both parties. That, he says, is consistent with the choice presented in correspondence by the BVD and reflects the comments in the BVD guidance notes: it would sell either to the Company (provided it was given adequate assurance that the price was being paid from distributable profits) or to the relevant company's members. However, as the HF Trust was not a party to the transaction and did not authorise Mr Constant or the SR Trust to act on its behalf, the contract is void. Mr Laville refers to paragraph 5-039 of *Chitty on Contracts* which addresses the principle that an offer may only be accepted by the person to whom it was made. The paragraph states, citing in the footnotes *Shogun Finance Ltd v Hudson* [2003] 3 W.L.R. 1371:

> "If A makes an offer to B, but C purports to accept it, there will be no contract."

89. Mr Laville recognises that the Crown is not a party to these proceedings. In this regard, he referred to paragraph 5-046 of *Chitty* which states:

> "It is not clear whether a person can intervene and allege a contract is void for mistake as to the person when the contracting parties themselves are unwilling to assert its invalidity. In *Fawcett v Saint Merat (Star Car Sales Ltd, Claimant)* Hardie Boys J in the Supreme Court of New Zealand held that a third party (an execution creditor of the original owner of the goods) could not raise "in the name of one of the contracting parties" the question of mistake as to the person; but his view did not form part of the reasoning of the decision on appeal. At first sight it might seem that a third party should be allowed to rely on the invalidity of the transaction for the contract is not voidable at the parties' option but void ab initio. But in practice some strange consequences would follow from

> permitting such intervention. If the buyer in *Boulton v Jones* had waived his objections to the identity of the seller and paid for the goods could it really be contended by a third party that the property did not thereby pass to the buyer?"

90. He invites me to make authority on the point.

91. Having reviewed the correspondence leading up to the entering into of the contract to transfer the Share, I have seen no statement in which Mr Constant stated that he was authorised to negotiate or represent the interests of the HF Trust. On the contrary, in January 2021, when replying to say that they would "proceed with jointly purchasing the share", he expressly informed the BVD that "we do not have any indications from the Henrikson Family Trust and we need to move forward with resolving the share".

92. The only statements made by Mr Constant to the BVD that I consider to be potentially misleading (and I emphasise my use of the word "potentially" because neither Mr Constant, nor the relevant case worker(s) at the BVD, have been cross-examined to ascertain Mr Constant's intended meaning or the case worker's understanding of each representation and understanding and intention regarding the overall arrangement) are:

    i) his decision always to write in terms of "we", signing the correspondence as Director/Secretary of the Company, thus arguably creating the impression that he was authorised by the Company's board of directors to write in those terms;

    ii) on 13 August 2020, when Mr Constant chased the BVD, saying that he required an update to "relay to our Board" when, it appears that he had no intention of relaying any of his discussions to his fellow director, Mr Henrikson;

    iii) on 13 April 2021, when Mr Constant chased a reply from the BVD so that "we can file taxes/open bank accounts and ensure ongoing operations". The reference to "ongoing operations" in respect of a Company that had only ever operated as a holding company, may perhaps have given the impression that the Company was doing more. The Henrikson Parties suggest that the reference in the same email to opening a bank account is similarly misleading when the Company never operated such an account in the UK. I do not accept this. The statement refers only to a future intention and a bank account would be likely to be required by the Company to facilitate its participation in the Texas Litigation; and

    iv) Mr Constant's statement that the consideration for the Share was to come from the Company's distributable profits, was clearly false. However, this is of little relevance as the contract was not ultimately concluded with the Company.

93. Without any evidence from the relevant official(s) from the BVD of their understanding of the proposed contract, it is not possible for me to conclude whether it was, as claimed, mistaken or misled about the capacity in which Mr Constant was acting.

94. The Crown is not a party to these proceedings and, in light of what follows regarding my understanding of the contract and to the extent relevant beyond that, in the light of the potential identified by the authors of *Chitty* for "strange consequences" to arise, I see no reason, in the circumstances of the case before me, to create new authority, declaring void a contract which the Crown appears content to have concluded. I also note here that the circumstances of this case also differ significantly from those cited as authorities in *Chitty*. In *Lumley v Foster & Co Group Ltd* [2022] EWHC 54 (TCC), there was no written contract. In *Shogun* one of the parties was a fraudster.

95. The key point, however, in the context of the proceedings between the parties that *are* before me, in my judgment, renders the question of what the BVD understood or was allegedly led to believe to be irrelevant. That is because the Henrikson Parties' argument that the contract was void conflates:

    i) the contract entered into by Mr Constant on behalf of the SRT with the Crown for the Share to be purchased in the joint names of the two trusts; and

    ii) the Crown's execution of the stock transfer form required to effect that contract.

96. When Mr Constant learned that the BVD would not sell the Share to just one former shareholder, in January 2021, he elected for it to be put into both names, clearly stating that he did not have "any indications" from the HF Trust. The fact that the Share was transferred to two parties does not, in my judgment, require the offer to have been made to those two parties. Nor did any response from the BVD suggest that they would consider it to be necessary. Whilst the correspondence then moved briefly to a proposed purchase by the Company, Mr Constant's letter following, he said, advice from Baker & McKenzie, reverted to the earlier proposal. The contract was concluded by payment of the agreed price and the HF Trust, like a volunteer in equity, gave no consideration for the interest it received, namely being named in the stock transfer form as a joint shareholder.

97. For these reasons, in my judgment, the contract between the SR Trust and the Crown for the SR Trust to pay £1,360 in return for the Crown providing a stock transfer form in the names of both trusts was not void.

Rectification of the register of members

98. Mr Laville submits that in the event that the court regards the contract as valid, in the light of the court's very wide discretion under section 125 of the Act, it would be just and equitable for the court to direct that the HF Trust be entered as the senior holder of the Share to reflect the fact that it held 80% of the shareholding in TDI Group. This, he submits, is consistent with the Crown's intention for the beneficial interests in the single share in the Company to reflect the shareholding in TDI Group. He refers to *Re TH Saunders & Co Ltd* [1908] 1 Ch 415 as authority for the proposition that the order of entry in the register of members is a matter between the joint holders of a share and that the Company had no right to dictate the order of entry.

99. The claim before the court today does not include an application for a declaration in respect of the beneficial entitlement(s) to the Share. Any such claim would need to be pleaded and supported by the relevant evidence.

100. In my judgment, and notwithstanding the court's wide discretion under section 125 of the Act, it would not be appropriate for the court to make any such declaration as part of the claims that are now before me.

101. I also note that Mr Constant's communications with the BVD whilst sent with a signature referring to the Company, when addressing the proposed transfer of the Share, made clear that he was representing not the Company but the SR Trust. It was consequently the purchasing trust that purported to "dictate the order of priorities".

102. Mr Shaw submits that the SR Trust should be registered as the sole or alternatively, senior holder of the Share as it is clear from Mr Henrikson's evidence and claim that he considers the transfer was void. Consequently, Mr Shaw says, Mr Henrikson did not and does not consent to his entry in the register of members as trustee for the HF Trust. The SR Trust alone paid for the Share and, Mr Shaw submits, it would make no sense at all for Mr Constant to have negotiated that purchase in order to hand over control of the Company to Mr Henrikson as senior holder. He relies on *Re Diamond Rock Boring Co Ltd, ex part Shaw* (1877) 2 QBD and *Re Piccadilly Radio plc* [1989] BCLC 683 as authority for the proposition that in deciding whether to order rectification, the court will consider all relevant circumstances and the justice of the case. In this light, he urges the court not to direct that the HF Trust be entered in the register as Mr Henrikson will not, as required, exercise his voting power in the interests of the joint holders of the Share (see *Dee Valley Group plc* [2018] Ch 55) but rather, will prefer his personal interests and cause the Company to discontinue its claim against TDI LLC in the Texas Litigation.

103. Mr Shaw submits, in the alternative, that the Share should be registered as held jointly by the SR Trust and HF Trust, in that order.

104. It is clear that at the time the BVD completed the stock transfer form, the HF Trust had not consented to be named as joint member. However, I reject Mr Shaw's submission that the court should consider this to be a wholesale rejection by the Henrikson Parties of any desire to retain membership in the Company. I have concluded that their interest is akin to a volunteer in equity and in my judgment, they should be allowed to consider their position in the light of this judgment. Furthermore, Mr Constant's claim form sought a declaration that they both be entered as joint holders of the Share.

105. In my judgment, the appropriate order for the court to make in the exercise of its discretion under section 125, is to direct that the register of members be updated to reflect the contract entered into, as recorded in the ensuing stock transfer form, namely for the Share to be registered as held jointly by the SR Trust and the HF Trust in that order. I am influenced in reaching this decision by:

    i) the same factors that I took into account when, at paragraph 53 of this judgment, I recognised that the HF Trust would be more likely than not to exercise its voting power to ensure that the Company no longer pursues the Texas Litigation, and determined that the Company's interests would be best served by preserving the ability to pursue its claim to the Class B Preference Share;

ii) the SR Trust having paid all of the consideration and being named first on the stock transfer form; and

iii) the absence of any claim before me for a declaration in respect of the beneficial entitlement(s) to the Share.

106. If, however, on the handing down of this judgment, Mr Henrikson as trustee of the HF Trust declines for the purposes of section 112(2) of the Act to agree to become a member by entry in the register, then having paid for the Share on behalf of the SR Trust, the trustee of the SR Trust should be registered as sole legal owner.

107. Mr Constant's claim form did not specify a date from which the declaration he sought, rectifying the Company's register of members should apply.

108. Articles 47(4) to (6) of the Company's articles of association provide:

> "(4) The transferor remains the holder of a share until the transferee's name is entered in the register of members as holder of it.
>
> (5) The directors shall register a transfer of shares which is:
>
> (a) lodged at the office or such other place as the directors have appointed;
>
> (b) accompanied by the certificate for the shares to which it relates, or such other evidence as the directors may reasonably require to show the transferor's right to make the transfer, or evidence of the right of someone other than the transferor to make the transfer on the transferor's behalf; and
>
> (c) presented for registration duly stamped or is an exempt transfer within the Stock Transfer Act 1982, and may, in their absolute discretion, refuse to register any other transfer of shares.
>
> (6) If the directors refuse to register the transfer of a share, the instrument of transfer must be returned to the transferee with the notice of refusal unless they suspect that the proposed transfer may be fraudulent."

109. Noting the court's power to order rectification with retrospective effect (see *Sussex Brick Co* [1904] 1 Ch 598 and *Re Starlight Developers Ltd* [2007] EWHC 1660 (Ch)), in my judgment, the declaration in this case should take effect retrospectively from 27 May 2021. That was the date on which the Crown's transfer of the share, effected via the BVD, satisfied the requirements of the Company's articles of association, being the date on which the stamped transfer form executed on the part of the party then legally entitled to it, was delivered to the Company's registered office.

110. On the handing down of the judgment, I shall make a declaration that the Company's register of members shall show that the Share was transferred to the SR Trust and HF Trust on 27 May 2021.

Directors' appointments and material registered between 24 June 2020 and 11 November 2020

111. On 14 September 2020, Mr Henrikson filed forms at Companies House dated 13 September 2020 purporting, without Mr Constant's knowledge or consent, to record a change in the Company's registered office and the termination of Mr Constant's appointment as a director and secretary of the Company. Mr Constant states in his written evidence that he then decided to place Mr Henrikson on "administrative leave". On the same date, he filed a notice purporting to record Mr Henrikson's termination of appointment with effect from the much earlier date of 3 June 2020. He also filed, without Mr Henrikson's consent, forms AP01 purporting to notify the Registrar of the appointment of Messrs Carlson, Hyland and Potter as additional directors of the Company.

112. Each of these filings was undertaken at a time when, in the absence of a register of members, the Company's sole shareholder was its initial subscriber, namely TDI Group and consequently, following its dissolution, the Crown.

113. Articles 21 and 22 of the Company's articles of association (which exclude the Model Articles in their entirety) prescribe the procedure to be followed for the appointment and removal of directors. That procedure was not followed. Until my intended declaration rectifying the register takes effect, it has not been open to any other party to ratify the appointments and removals.

114. I was referred to the decision of Newey J in *Re Tulsesense Ltd* [2010] EWHC 244 (Ch) where one person, R, held two shares, one on his own behalf and one as executor of his late brother W's estate. The court held, in circumstances where it was apparent that W's children were entitled to W's share and to make decisions in respect of it, that for the purposes of assent pursuant to the *Duomatic* principle, R's assent alone would not suffice. In the course of his judgment, Newey J recognised that in recent years, several authorities had touched on the question whether the approval of a share's beneficial owners can satisfy *Duomatic* requirements, but had decided that it should not be determined in the context of summary proceedings. He recognised that even if the assent of all the beneficial owners of a share will suffice, he would not consider the assent of just one of a number of such owners would do so. In light of the conclusions I have reached, this appears to me to be so far from the circumstances of the case before me, that I can derive no assistance from it.

115. At the relevant time, the Share was held by the Crown. The two trusts beneficially entitled to it as a result of the contract concluded between the SR Trust and the Crown (assuming the HF Trust does not disclaim its equitable interest) at no stage agreed to the various purported appointments and terminations. The register should be rectified accordingly.

116. The Henrikson Parties' claim form seeks orders not only in relations to the appointment and removal of company officers but also in respect of the filing of confirmation statements, micro company accounts and the changes of the Company's registered office. Counsels' submissions focussed, in the limited time of a one-day hearing, not surprisingly on the purported appointments and removal of directors of the Company. In the absence of an agreed order consequent upon this

judgment, I shall invite further submissions when handing it down as to the appropriate order to make:

i) in relation to the other filings, defined, for the purposes of the claim form as the "Subsequent Filings"; and

ii) in relation to the Henrikson Injunction Application.

Conclusion

117. The Company shall remain restored to the register. The Henrikson Dissolution Application is dismissed. Consequently, no order is required in relation to the Constant Restoration Application. Pursuant to section 125 of the Act, the Company shall establish a register of members and register the SR Trust and the HF Trust, in that order, as joint holders of the Share, with retrospective effect from 27 May 2021. Pursuant to section 1096 of the Act, I shall declare the various making and termination of directors' appointments in September 2020 invalid and of no effect and direct the Registrar to remove them from the register.