Neutral Citation Number: [2018] EWHC 1306 (Ch)

Case Nos: CR-2015-002084
CR-2015-006635

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

IN THE MATTER OF INFUND LLP
AND IN THE MATTER OF THE LIMITED LIABILITY PARTNERSHIPS ACT 2000

The Rolls Building, 7 Rolls Buildings
Fetter Lane, London, EC4A 1NL

Date: 25/05/2018

Before :
Mr Justice Henry Carr

- -

Between :

(1) GRUPO MÉXICO SAB DE CV
(2) GERMÁN LARREA MOTA VELASCO — **Claimants**

- and -

(1) THE REGISTRAR OF COMPANIES FOR ENGLAND AND WALES
(2) INFUND LLP
(3) HÉCTOR JUAN JOSÉ GARCÍA QUEVEDO TOPETE
(4) CORPLAW LIMITED
(5) PEARSE TRUST INTERNATIONAL LIMITED — **Defendants**

AND

(1) HÉCTOR JUAN JOSÉ GARCÍA QUEVEDO TOPETE
(2) GLOBAL TRUSTEES (NZ) LIMITED
(3) CORPLAW LIMITED
(4) CORPLAW MANAGEMENT LIMITED — **Claimants**

- and –

THE REGISTRAR OF COMPANIES FOR ENGLAND AND WALES — **Defendant**

- -
- -

John Wardell QC and Emily McKechnie (instructed by **SCA Ontier LLP**) for the **Claimants in claim CR-2015-002084**

John Machell QC and Dan McCourt Fritz (instructed by **Cooke, Young & Keidan**) for the **second to fifth Defendants in claim CR-2015-002084 and the Claimants in claim CR-2015-006635**

Hearing dates: 24 to 27 April 2018

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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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Mr Justice Henry Carr :

Introduction

1. These proceedings concern the restoration of Infund LLP ("Infund") to the Register. In claim no. CR-2015-002084 (the "Rectification Claim") the Claimants seek rectification of the Register (amongst other things) to reverse the administrative restoration of Infund to the Register, which took place on or around 14 November 2011. In claim no. CR-2015-006635 (the "Restoration Claim"), the Claimants seek the restoration of Infund to the Register, in the event that the Rectification Claim is successful and Infund is removed from the Register. The Registrar of Companies took no active part in the proceedings. For convenience, I shall call the Claimants in the Rectification Claim, "the Claimants" and the Second to Fifth Defendants in the Rectification Claim, who are Claimants in the Restoration Claim, "the Defendants".

The Parties and the witnesses

2. The First Claimant, Grupo Mexico ("GM"), is a substantial holding company incorporated in Mexico and listed on the Mexican stock exchange. It is involved principally in mining and metallurgy, transportation and infrastructure development. The Second Claimant ("Mr Larrea") is Chairman and Chief Executive Officer of GM. He is also a shareholder of GM.

3. Until a few days before the trial, it was thought that Mr Larrea was going to attend the trial to be cross-examined on his witness statement. However, on 12 April 2018 the Claimants disclosed that Mr Larrea was allegedly unable to attend the trial due to a series of GM meetings. A hearsay notice was then served setting out further information and purporting to explain why Mr Larrea was unable to attend court. The Defendants applied to adjourn the trial in the light of this development. In a judgment given on 20 April 2018 ([2018] EWHC 971 (Ch)) ("the 20 April Judgment") I dismissed that application. However, I stated that Mr Larrea's explanation for choosing not to give evidence at the trial was patently inadequate, and that I was likely to give vanishingly small weight to his hearsay evidence, given that he had not seen fit to attend the trial without any satisfactory explanation.

4. The First Defendant to the Rectification Claim is the Registrar of Companies for England and Wales and is joined in that capacity. Since no allegations have been made by any party against the Registrar, and substantive relief is not sought directly against the Registrar, by a letter dated 19 April 2018 the Treasury Solicitor indicated that the Registrar did not intend to be represented at the trial, but requested to be included in the process of drafting any order which the Court might make. The Registrar's understandable concern is to ensure that any order is sufficiently precise, so that whatever action should be taken by the Registrar is clear.

5. The Second Defendant, Infund, is a Limited Liability Partnership incorporated on 13 June 2003 under the law of England and Wales. Infund was incorporated by the Fifth Defendant ("Pearse"), acting on the instructions of the Third Defendant ("Mr Garcia").

6. Mr Garcia is a former employee of businesses in, or related to, GM's group of companies. He was employed from 1 October 1977, and by 2000 had been promoted

to General Manager for Special Affairs. On 16 November 2004 Mr Garcia's employment with GM was terminated. Mr Garcia purports to manage and control the affairs of Infund, relying upon documents entitled "Special Power of Attorney" dated 13 June 2003 and 11 August 2003. According to the Claimants, Mr Garcia dishonestly provided false information to enable Infund to be restored to the Register. It is alleged that his purpose in so doing was to use it as a vehicle of fraud to pursue vexatious and dishonest proceedings against GM and Mr Larrea in Mexico.

7. Mr Garcia, through Infund, has brought a claim in Mexico in respect of many millions of shares ("the Disputed Shares") issued by GM to Mr Larrea on 17 October 2003, together with cash and share dividends declared in respect of the Disputed Shares. The Disputed Shares and associated dividends are worth approximately $1.5 billion as valued in June 2016. The Claimants allege that the claim to the Disputed Shares by Mr Garcia, through Infund, is plainly dishonest and is supported by obvious forgery. The restoration of Infund was required by Mr Garcia to bring this claim in Mexico, as the Mexican courts have held that, personally, he has no standing to pursue it.

8. Shortly before the hearing on 20 April 2018 the Court was informed that a conditional hearsay notice had been served in respect of Mr Garcia's witness statements and that he had returned to Mexico. It was said that Mr Garcia was willing to attend the trial to be cross-examined, provided that Mr Larrea did likewise; in other words, Mr Garcia considered that his attendance was conditional upon Mr Larrea's attendance.

9. Mr Machell QC, for the Defendants, submitted that it would be unfair for Mr Larrea to refuse to be cross-examined in an attempt to secure a tactical advantage and obtain a collateral benefit in relation to the Mexican proceedings, but nevertheless for his legal team to be able to cross-examine Mr Garcia. I held that, as with Mr Larrea, it was Mr Garcia's choice whether to attend the trial. I rejected the submission that it would be unfair for him to be cross-examined if Mr Larrea did not attend the trial. That submission was based on the implied assumption that their evidence was of equal importance. I stated that Mr Garcia's evidence was self-evidently more important than the evidence of Mr Larrea.

10. Mr Garcia is accused of most serious allegations of fraud and forgery. Mr Larrea served a short statement giving an account of his recollection of events in 2003. He did not give any evidence about fraudulent misrepresentations because those matters are outside his personal knowledge. Only Mr Garcia is able to answer questions about those issues. At [16] of the 20 April Judgment I said:

> "Mr Wardell QC, on behalf of the claimants, submits that if, contrary to the submissions to be made on behalf of the defendants, I decide to consider the merits, then it is possible to prove the case of fraud and forgery based on the documents. If that is so, the overwhelming inference will be that if he chooses not to attend, Mr Garcia has done so because he is a fraudster and a forger and is not prepared to be cross-examined. It is still open to Mr Garcia, if he wishes, to attend the trial to be cross-examined."

11. Nonetheless, and in spite of the 20 April Judgment, Mr Garcia did not attend the trial for cross-examination. In the circumstances, as with the evidence of Mr Larrea, I have attached very little weight to Mr Garcia's hearsay evidence and have relied upon contemporaneous documents.

12. The Fourth Defendant ("Corplaw Ltd"), together with a related company, Corplaw Management Ltd (together the "Corplaw Entities"), is incorporated in Ireland. The Corplaw Entities were named as original members of Infund. The Corplaw Entities are affiliated to Pearse, which manages and controls their affairs. Pearse is a limited company registered in the UK which undertakes business as a trust and corporate service provider. On 21 March 2007 the Corplaw Entities filed Forms LLP288b (notice of termination of membership of a member of an LLP) at Companies House. The effect of those forms is in dispute. No allegations of dishonesty are made against Pearse or the Corplaw Entities.

13. Mr Garcia is the First Claimant in the Restoration Claim. The Second Claimant ("Global Trustees") is named as a trustee under a document entitled "Deed of Settlement" dated 13 June 2003. Mr Garcia is named in that document as settlor and beneficiary. The validity and scope of the Deed of Settlement is in dispute. The Corplaw Entities are the Third and Fourth Claimants in the Restoration Claim.

14. I heard evidence from Mr Gerard Rafferty, a director of Pearse and Mr Peter Chidgey, a Chartered Accountant who was a partner in BDO LLP until his retirement in 2013. Both witnesses gave fair answers during cross-examination but did not add materially to the picture that emerges from the documents.

The dissolution and restoration of Infund

15. On 9 May 2005 Companies House notified Infund that its accounts for the period ended 30 June 2004 were late. On 3 August 2005 Infund filed accounts on the basis that it was a dormant LLP. Thereafter, Infund failed to file further accounts.

16. On 8 January 2008 the Registrar struck Infund off the Register as a defunct entity under section 652 of the Companies Act 1985. Infund LLP was dissolved on 15 January 2008.

17. In 2011 Mr Garcia, with the assistance of Corplaw Ltd and Pearse, procured the administrative restoration of Infund to the Register for the purpose of pursuing proceedings in Mexico.

18. On 10 November 2011 the Registrar was sent a series of documents and Infund was restored on or around 14 November 2011. It is not in dispute that the documents sent to the Registrar contained false information. There is a dispute as to whether Mr Garcia dishonestly provided false information to the Registrar, and false information to Infund's accountants to enable accounts which were required for the restoration to be approved.

Related Proceedings in Mexico

19. Following the termination of his employment with the GM group of companies in 2004, Mr Garcia commenced four legal actions in the Mexican courts against GM (or its associated companies) and Mr Larrea. In summary:

The First Mexican Proceedings

20. Mr Garcia first commenced legal proceedings in Mexico on 24 April 2007 in the form of an employment claim (the "First Mexican Proceedings"). These proceedings were brought against Servicios de Apoyo Administrativo SA de CV (a company within the GM group), Grupo Mexico Servicios SA de CV (a company within the GM group) Mr Larrea, GM and Americas Mining Corporation ("AMC") (a subsidiary of GM).

21. The claim was comprised of two elements; first, that Mr Garcia was entitled to compensation for unfair termination of his employment with the GM group and secondly, that he was entitled to a US$5,000,000 "Special Bonus" for successfully undertaking a "Special Matter" at Mr Larrea's request.

22. It was Mr Garcia's pleaded case that:

    i) the "Special Matter" was conducted for the benefit of Mr Larrea, GM and AMC (Third Amendment to Mr Garcia's Particulars of Claim in the First Mexican Proceedings; E1/4/7);

    ii) the "Special Matter" entailed (inter alia):

        a) enabling AMC to finance the purchase of bonds [E1/4/27]. Those bonds had been issued by a subsidiary of AMC called Asarco LLC ("Asarco") to a third party company called Orient Star Holdings LLC ("Orient Star"). The bonds had a face value up to MXN $123,017,000.00 and were: (1) coupon 7 7/8 with a maturity date of 2013; and (2) coupon 8 ½ with a maturity date of 2025 ("the Asarco Bonds");

        b) the provision of funds to enable Mr Larrea and other shareholders in GM to subscribe to new shares issued by GM on 17 October 2003; [E1/4/28].

23. The court rejected Mr Garcia's claim to a "Special Bonus" on 28 August 2017, but he was awarded some compensation relating to the termination of his employment.

24. The first instance decision of the Mexican court with regards to the "Special Bonus" is not appealable. However, Mr Garcia has instead brought a constitutional challenge against the decision by way of an "Amparo", an independent action under statute. The court ruling on the Amparo is currently pending.

The Second Mexican Proceedings

25. On 7 October 2008, Mr Garcia commenced a second set of proceedings in Mexico (the "Second Mexican Proceedings"). He brought the claim in his own name, alternatively as an attorney for Infund, alternatively as a trustee of the alleged Infund

Trust, suing Mr Larrea for the delivery up of the Disputed Shares and associated dividends.

26. Mr Garcia's claim was based on the following propositions:

    i) Mr Larrea had purchased the Disputed Shares as agent for Mr Garcia [E1/8/118-121];

    ii) the Disputed Shares had been purchased using monies contributed by Mr Garcia from his own funds; [E1/8/120-121]; and

    iii) the funds provided by Mr Garcia were transferred to Mr Larrea via Infund; [E1/8/120-121].

27. The Mexican court dismissed the Second Mexican Proceedings on 22 September 2009 on the ground that Mr Garcia had no authority to represent Infund. Further, on 5 November 2009, the Mexican court rejected Mr Garcia's claim that he had standing to sue Mr Larrea for the Disputed Shares himself.

28. An appeal by Mr Garcia against the first instance decision was rejected on 20 June 2010. On 8 April 2014, a costs order was made against Mr Garcia in favour of Mr Larrea, which remained unpaid as at the time of the hearing of the present proceedings.

The Third Mexican Proceedings

29. On 12 June 2012, Mr Garcia brought a further claim against Mr Larrea to annul the judgment in the Second Mexican proceedings (the "Third Mexican Proceedings"). In this claim, Mr Garcia alleged that the local and federal courts handling the Second Mexican Proceedings had colluded in order to rule in favour of Mr Larrea. Mr Garcia withdrew his claim in the Third Mexican Proceedings before determination of the issues.

The Fourth Mexican Proceedings

30. On 21 May 2013, Infund, represented by Mr Garcia, purportedly acting under a Power of Attorney dated 19 April 2013, commenced proceedings against the Claimants for delivery up of the Disputed Shares and associated dividends (the "Fourth Mexican Proceedings").

31. In the Fourth Mexican Proceedings, Infund sought the same relief claimed in the Second Mexican Proceedings and claimed that:

    i) it had entered into a commercial agency agreement with Mr Larrea for the purchase of the Disputed Shares; [E3/16/738];

    ii) it had provided the funds for the purchase of the Disputed Shares [E3/16/740]; and

    iii) it had funded the purchase of the Disputed Shares through an advance payment of a promissory note executed in favour of Infund by AMC [E3/16/740].

32. On 10 October 2016, the Mexican court rejected Infund's claim to the Disputed Shares. Mr Garcia, acting through Infund, brought an appeal against the first instance decision on 25 October 2016. Shortly after, Mr Larrea brought a procedural appeal, which was successful. Subsequently, Mr Garcia brought a further appeal and the Fourth Mexican Proceedings are therefore ongoing.

The 2003 Restructuring

33. At the date Infund was incorporated, a financial restructuring of GM was taking place, which comprised a complex series of transactions. The facts are in dispute. However, the main events are clear from contemporaneous documents in the trial bundles.

34. It is common ground that, in 2003, following financial difficulties, GM undertook a group restructuring. GM sought to restructure its debt and that of its Mexican subsidiary mining companies, and to raise capital by increasing its share capital. Mr Garcia was entrusted with the mechanics required to achieve this restructuring.

35. The restructuring involved three main stages:

    i) June – August 2003: the purchase of the Asarco Bonds for a significant discount from their face value, using monies lent by Seguros Inbursa SA ("Seguros Inbursa") to Infund and secured against shares owned by Mr Larrea in GM.

    ii) September – October 2003: the recapitalisation of GM through the issue of new shares to its existing shareholders. Mr Larrea was an existing shareholder and purchased the new shares using a loan granted by Banco Inbursa SA ("Banco Inbursa") for this purpose.

    iii) December 2003: a loan from Seguros Inbursa to Bonuserv LLP, an English LLP of which Mr Larrea was the sole beneficiary and attorney. This loan was secured by shares owned by Mr Larrea in GM and was used to repay the loan originally granted by Seguros Inbursa to Infund.

36. Infund was incorporated as a shell company to be used as a vehicle to facilitate the 2003 restructuring. It subsequently emerged from the restructuring with no cash or securities and a net balance of zero.

Stage 1- The Purchase of the Asarco Bonds

37. At stage 1, Mr Garcia wrote to Seguros Inbursa on 20 June 2003 on Infund headed notepaper, requesting a credit facility of up to US$42.9 million [C1-2/70/338]. The requested credit facility was obtained by Infund on 23 June 2003 [C1-2/075/371] ("the Seguros Facility"). In return, Mr Larrea entered into a securities pledge agreement with Seguros Inbursa, pursuant to which he deposited 40,000,000 shares which he owned in GM into an account held by Seguros Inbursa [C1-2/076/389].

38. Infund requested full payment of the Seguros Facility on 24 June 2003 [C1-2/081/401]. It then paid the full sum of the facility into an account held by Infund and executed a promissory note which undertook to pay the full sum to Seguros Inbursa ("the Infund Promissory Note") [C1-2/094/426; C1-2/079/398].

39. On 16 July 2003, Infund purchased the Asarco Bonds from their owner, Orient Star, on the basis of a mandate provided by AMC dated 14 June 2003 [C1-2/124/481; C1-1/046/238]. Infund instructed UBS to transfer US$39,268,788.44 to an account held by Orient Star with Bank of America and in return, Orient Star delivered the Asarco Bonds to the account held by Infund with UBS [C1-2/119/476; C1-2/123/480].

40. In return for Infund carrying out the transaction, AMC paid fees to Infund calculated on the value of the Asarco Bonds. Once Infund had acquired the Asarco Bonds pursuant to this mandate, AMC had the right to purchase them from Infund. The Asarco Bonds were purchased at a discount of 30% of face value.

41. AMC resolved at a board of directors meeting on 19 August 2003 to ratify the mandate previously given to Infund to acquire the Asarco Bonds and also to acquire the Asarco Bonds from Infund in return for a promissory note of US$79,200,000, representing 64% of their face value (the "AMC Promissory Note") [C1-3/174/624]. Mr Larrea signed this resolution in his capacity as Chairman of AMC.

42. In consequence, on 21 August 2003:

    i) AMC entered into a purchase agreement with Infund to buy the Asarco Bonds. Instead of cash payment, AMC agreed to execute and deliver to Infund a promissory note [C1-3/185/658].

    ii) AMC executed the AMC Promissory Note in favour of Infund to pay US$79,200,000.00 by 21 August 2005 [C1-3/184/654].

    iii) AMC provided a letter to Infund confirming that it would execute all documents necessary to grant Infund a second priority security interest in a subsidiary of AMC [C1-3/182/650].

    iv) Infund instructed UBS to deliver the Asarco Bonds to an account held by AMC [C1-3/179/647].

43. Infund discharged the Infund Promissory Note in December 2003 following receipt of a payment from Bonuserv.

44. The overall purpose of this first stage was to enable AMC to improve the financial position of its subsidiary, Asarco and thus improve the financial standing of GM as a whole. This was recorded in minutes of an AMC board of director's meeting dated 19 August 2003 [C1-3/174/624].

Stage 2 – the recapitalisation of GM

45. GM held an extraordinary general meeting of its shareholders on 30 September 2003, which was chaired by Mr Larrea in his capacity as vice-president of the board of directors [C1-3/208/713]. It was decided at the meeting that GM would increase the fixed portion of its paid-up capital stock to an amount of MXN $2,773,593,680, by issuing 213,353,360 new series "B" shares Class I. These new shares were only to be issued to existing shareholders. The minutes indicate that Mr Larrea explained at the meeting that he hoped the issue of the new shares would improve the financial structure of GM, decrease its liabilities, increase the flexibility of its financial and

operative development and ensure that it would comply with commitments assumed during the recently concluded financial renegotiation of its subsidiaries [C1-3/208/715].

46. In order to facilitate the acquisition by Mr Larrea of the new shares, Banco Inbursa provided Infund with a credit facility of MXN $843,750,000. Infund then entered into a credit agreement with Mr Larrea to lend him this sum for his share purchase and Mr Larrea provided Infund with a promissory note for the repayment of this loan (the "Larrea Promissory Note") [C1-3/243/755].

47. There followed on 17 October 2003 a circular transfer of the money lent by Banco Inbursa within a nine-minute window. This sequence of transfers was determined by a series of letters of instruction sent to Banco Inbursa on the same day, as referred to in the reports of two experts in the Fourth Mexican Proceedings [E5/22/1084; E5/31/1250]. This resulted in the full repayment of the Banco Inbursa credit facility in that timeframe, with Banco Inbursa retaining control of the money at all times:

    i) Infund drew down MXN $843,750,000 from Banco Inbursa [C1-3/212/721];

    ii) Infund paid MXN $843,750,000 to Mr Larrea [C1-3/216/725];

    iii) Mr Larrea paid MXN $843,750,000 to GM [C1-3/222/732];

    iv) GM paid MXN $843,750,000 to AMC [C1-3/226/737];

    v) AMC paid MXN $843,750,000 to Infund [C1-3/228/739]; and

    vi) Infund paid MXN $843,750,000 back to Banco Inbursa [C1-3/232/743].

48. This circular method of transfer meant that Mr Larrea was able to purchase the Disputed Shares for US$75,000,000.00 and AMC was able to repay the majority of the AMC Promissory Note [C1-3/257/775]. The remainder of this note was paid on 20 October 2003 [C1-3/250/767].

49. On 27 October 2003, Mr Garcia requested the execution of the new share certificates for the GM shares, 8 of which were issued in the name of Mr Larrea, giving him a further 64,903,846 shares in GM [C1-3/257/775].

Stage 3 – the repayment by Mr Larrea of Infund's debt to Seguros Inbursa

50. Following stage 2, the only remaining liability was the original loan of US$42,900,000 granted by Seguros Inbursa to Infund on 24 June 2003.

51. On 9 December 2003, Mr Larrea instructed Pearse to incorporate Bonuserv [C1-3/267/794]. He named himself as beneficial owner, instructing party and attorney and the Corplaw Entities were appointed as nominee members [C1-3/271/806-807; C1-3/292/845]. Bonuserv was incorporated on 15 December 2003 and Mr Larrea was made attorney for Bonuserv under a power of attorney of the same date [C1-3/292/856].

52. On 23 December 2003, Bonuserv entered into a credit facility agreement with Seguros Inbursa [C1-3/286A/836.3]. This credit facility was on the same terms as that made available to Infund in June 2003.

53. Infund then entered into a Note Purchase Agreement with Bonuserv, where Infund agreed to sell Bonuserv the Larrea Promissory Note for a price of US$42,900,000 [C1-5/440/1154 at 1157; C1-5/444/1168 at 1179].

54. Mr Larrea wrote to Seguros Inbursa on 23 or 24 December confirming that once the credit facility granted by Seguros Inbursa to Infund had been discharged, the 40,000,000 Series 'B' shares in GM pledged by Mr Larrea as security for that facility would be available to guarantee the credit facility of US$42,900,000.00 granted to Bonuserv LLP. On the same day, Bonuserv LLP instructed Seguros Inbursa to pay this money into an account held by it [C1-3/286A/836.1].

55. On 24 December 2003, Bonuserv transferred these funds to Infund [C1-4/310/901]. Infund subsequently used this money to pay Seguros Inbursa and discharge the loan granted on 24 June 2003 and the Infund Promissory Note [C1-4/311/902-903; C1-5/440/1154 at 1157]. The Larrea Promissory Note was marked 'paid' and Mr Larrea's signature was crossed out [C1-3/243/755].

56. By conducting matters in this way, Infund made a "paper loss" of US$32,100,000.

The issues in these proceedings

57. The issues which remain in dispute are as follows:

i) Does the court have power to order rectification of the Register as sought by the Claimants in the Rectification Claim?

ii) The nature of factually inaccurate material provided by Mr Garcia on the forms required for administrative restoration

iii) The significance of legal advice provided to Mr Garcia

iv) Was this factually inaccurate material dishonestly provided by Mr Garcia?

v) Were the Corplaw Entities entitled to resign in 2006?

vi) Was the information provided by Mr Garcia that Infund was carrying on a business or in operation at the time of its dissolution factually inaccurate?

vii) Was this information dishonestly provided by Mr Garcia?

viii) Did Mr Garcia make false representations to BDO?

ix) The Defendants' answers in respect of the accounts

x) Did Mr Garcia and Mr Peralta forge a Mandate?

xi) Can this allegation be relied upon by the Claimants?

xii) The section 1096(3) considerations

xiii) Should a declaration be granted?

xiv) If the court orders rectification to reverse the administrative restoration, should the court order the restoration of Infund?

Relevant Legislation

58. Certain provisions of the Companies Act 2006 are applied to limited liability partnerships (with appropriate modifications) by the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 ("the LLP (CA) Regulations"). In particular rule 56 of the LLP (CA) Regulations applies sections 1024 to 1028, which concern administrative restoration to the Register, to LLPs. Infund was restored pursuant to rule 56. Material parts of those sections, as modified by rule 56, provide as follows:

> **"1024.— Application for administrative restoration to the register**
> (1) An application may be made to the registrar to restore to the register an LLP that has been struck off the register under section 1000 or 1001 (power of registrar to strike off defunct LLP).
> (2) An application under this section may be made whether or not the LLP has in consequence been dissolved.
> (3) An application under this section may only be made by a former member of the LLP.
>
> **1025.— Requirements for administrative restoration**
> (2) The first condition is that the LLP was carrying on business or in operation at the time of its striking off.
> …
>
> (5) The third condition is that the applicant has—
> (a) delivered to the registrar such documents relating to the LLP 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.
>
> **1026.— Application to be accompanied by statement of compliance**
> (1) An application under section 1024 (application for administrative restoration to the register) must be accompanied by a statement of compliance.
> (2) The statement of compliance required is a statement—
> (a) that the person making the application has standing to apply (see subsection (3) of that section), and

(b) that the requirements for administrative restoration (see section 1025) are met.

(3) The registrar may accept the statement of compliance as sufficient evidence of those matters.

1028.— Effect of administrative restoration

(1) The general effect of administrative restoration to the register is that the LLP is deemed to have continued in existence as if it had not been dissolved or struck off the register."

59. Rule 67 of the LLP (CA) Regulations concerns correction or removal of material on the Register and applies sections 1093 to 1098 of the Companies Act 2006 to LLPs, with appropriate modifications. Material parts of those sections, as modified by rule 67, provide as follows:

"1094.— Administrative removal of material from the register

(1) The registrar may remove from the register anything that there was power, but no duty, to include.

(2) This power is exercisable, in particular, so as to remove—

(a) unnecessary material within the meaning of section 1074, and

(b) material derived from a document that has been replaced under—

section 1076 (replacement of document not meeting requirements for proper delivery), or

section 1093 (notice to remedy inconsistency on the register).

(3) This section does not authorise the removal from the register of—

(a) anything whose registration has had legal consequences in relation to the LLP as regards—

(i) its formation,

(ii) a change of name,

(iii) a change of registered office,

(iv) a change in the situation of a registered office,

(v) the registration of a charge, or

(vi) its dissolution;

(b) an address that is a person's registered address for the purposes of section 1140 (service of documents on members and others).

1096.— 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 LLP, 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 LLP, and
>
> (b) that the LLP'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, or
>
> (b) section 859M (rectification of register).

Does the court have power to order rectification of the Register as sought by the Claimants in the Rectification Claim?

The case that the Court has no power

60. In his clear and careful submissions, Mr Machell QC argued that this question should be answered in the negative. The starting point of his argument was that it is essential to define what material is sought to be removed from the Register, as this must be specified in any court order, pursuant to section 1096(2). The Defendants' case was that such material was limited to substitution of the word *"dissolved"* for the word *"active"* on the Register, thereby rectifying the Register to remove the result of the administrative restoration.

61. Section 1096(1) requires the Registrar to remove from the Register (amongst other things) any material that the Court declares to be factually inaccurate, or to be derived from something that is factually inaccurate or forged. However the power of the Court to make an order pursuant to section 1096 is subject to an express limitation: section 1096(3) prohibits the Court from ordering the removal of *"anything the registration of which had legal consequences"* as set out in section 1094(3), unless it is satisfied (a) that the presence of the material on the Register has caused or may cause damage to the LLP and (b) that the LLP's interest in removing the material outweighs any interest of persons in the material continuing to appear on the Register.

62. The Defendants submitted that the Court must therefore apply a two-stage test under section 1096 before ordering removal of material that is contained on the Register:

    i) first the material must pass the section 1096(1) test (for example it must derive from material that is factually inaccurate); and

    ii) secondly, the court must consider whether the registration of the material has had one of the legal consequences set out in section 1094(3). The court may only order removal of material if the requirements of section 1096(3) are satisfied.

63. In the present case, the Defendants accept that some of the information contained in the application for administrative restoration of Infund was incorrect. Therefore, the section 1096(1) test is satisfied. However, section 1094(3) includes *"anything whose registration has had legal consequences in relation to the LLP as regards - … its dissolution."* The information on the Register recording Infund's restoration has had legal consequences in relation to the LLP as regards its dissolution: the effect of restoration is that *"the LLP is deemed to have continued in existence as if it had not been dissolved";* Companies Act 2006 section 1028(1) and LLP (CA) Regulations rule 56. As a result of the restoration, it is no longer dissolved and it exists as a legal entity.

64. The court can only order rectification of the Register if it is satisfied as to the criteria set out in section 1096(3). The Defendants submitted that these criteria are not, and could never be, satisfied, since:

    i) the record of Infund's restoration has not caused, and could not conceivably cause damage to Infund: Infund cannot be damaged by its own existence;

    ii) Infund has no interest in the removal of the material. The removal of the material would cause Infund to cease to exist, which is contrary to its interest. Therefore, there is no question of Infund having an interest that outweighs any interests of other persons in the material continuing to appear on the Register.

The material that is subject to section 1096(3)

65. I agree that the court must apply a two-stage test under section 1096 before ordering removal of material that is contained on the Register. There was a dispute as to whether section 1096(3) applies to the suite of documents submitted to the Registrar that appears on the Register, which produced the outcome of restoration, or only to the material on the Register which records the outcome.

66. The Defendants argued that the only material on the Register that had legal consequences in relation to its dissolution are the word *"active"* and the stamp on the form LL RT01 stating "*restored to the Register on 14/11/11"*. It was suggested that neither the registration of the form appointing Mr Garcia as a member, nor the accounts, had any consequence in relation to the dissolution of Infund.

67. If this interpretation were correct, it would not assist the Defendants' case. The result, for which Mr Wardell QC initially argued, would be that certain factually inaccurate material could be removed from the Register without considering the balancing

exercise required by section 1096(3). However, I do not accept the Defendants' interpretation. The balancing exercise applies to *"anything the registration of which had legal consequences as mentioned in section 1094(3)"*. In the present case, this applies to any material on the Register which had the consequence of overturning the dissolution of Infund. It applies not just to the change of status of the company from dissolved to active but also to all documents recorded on the Register which were required to be submitted to achieve this result.

The material that the Claimants seek to remove from the Register

68. On a related issue, the Defendants argued that the Claimants were only seeking in the Rectification Claim to substitute the word *"dissolved"* for the word *"active"*. I do not accept this. The record of the status of Infund as active is the result of the application for its administrative restoration. However, the enquiry by the Court under section 1096(1) is not limited to this result. It also includes material on the Register that is derived from something that is factually inaccurate or forged.

69. Sections 1024 - 1028, as modified to apply to LLPs by rule 56, contain a number of limitations on the power of the Registrar to restore an LLP to the Register. In particular, the application may only be made by a former member of the LLP; section 1024(3); the LLP must have been carrying on business or in operation at the time of its striking off; section 1025(2); the applicant must have delivered to the Registrar such documents relating to the LLP as are necessary to bring up to date the records kept by the Registrar; section 1025(5)(a); and the application must be accompanied by a statement of compliance that the person making the application has standing to apply; section 1026(1) – (2).

70. The result of the application for administrative restoration is derived from all of this material, records of which appear on the Register, and which are said to be factually inaccurate, and indeed fraudulent. The particulars of claim in the present case are not confined merely to rectification of the result of the application for restoration, but allege that documents for the administrative restoration application, records of which appear on the Register, were derived from untrue information provided by Mr Garcia. See paragraphs [5] - [7] of the Particulars of Claim and paragraphs [1] to [3] of the prayer for relief.

71. In particular, Mr Wardell QC identified that the Claimants seek the following by way of rectification of the Register, which includes, but is not limited to, a change of status of Infund:

    i) The status of Infund to be returned to 'dissolved';

    ii) Reference to Mr Garcia being a member to be deleted;

    iii) References to the false accounts to be deleted;

    iv) References to all annual returns after 2006 to be deleted; and

    v) All filings after the dissolution of Infund to be removed.

Damage within the meaning of section 1096(3)

72. On the Defendants' argument, where a dissolved LLP has been restored and rectification is sought, the balancing exercise between the interests of the LLP in removing the material and the interests of other persons in the material continuing to appear on the Register will not be required to be performed. As the LLP can never be damaged by the record of its existence, and as it will never be in the interests of the LLP to remove the record of its existence, the answer will always be that the material must remain on the Register.

73. I do not accept that this is a correct interpretation of the section. Where material on the Register is not merely factually inaccurate, but is fraudulent, it will be presumed by the court that its presence has caused, or may cause, damage to the LLP, and that the LLP has an interest in removing that material. Where a person who has never been a member of the LLP makes a false claim of former membership or causes fraudulent accounts to be submitted to the Registrar, this is inherently damaging to the LLP. If, for example, a fraudster restores a dissolved LLP in order to trade off its reputation and goodwill, damage to the LLP will be presumed by the court, as the fraudster will control its continuing activities.

Legislative purpose

74. Mr Machell QC submitted that the Defendants' interpretation was supported by the need for certainty in relation to the legal existence of a body corporate. Those engaging in commerce need to know whether an entity with which they are dealing or concerned exists. The balance struck by the section between the ability to correct errors and the need for certainty excludes the correction of errors in the cases of dissolution and formation, which are fundamental to its existence.

75. I accept that section 1096(3) strikes a balance between error correction and certainty. I do not accept that this leads to a conclusion that the court has no power under section 1096(1) in cases where a dissolved company has been restored as a result of inaccurate information, including fraudulent misrepresentation or forgery. The purpose of the section is to enable appropriate orders to be made in such cases, and the court will normally require rectification where restoration has been procured by dishonesty. Pursuant to section 1096(3), the court may nonetheless consider, in exceptional cases, that the interests of other persons in such material continuing to appear on the Register may outweigh the interest of the LLP in removing that material.

76. That conclusion is supported by Birds' Annotated Companies Legislation (3rd ed.), which explains at [35.1096.04] – [35.1096.05] that:

> "[35.1096.04] Subsection (3) is important in that it limits the circumstances in which the court can direct the removal of material which has had legal consequences in relation to those matters detailed at section 1094(3). A direction for the removal of such material may not be given unless it is established that the company has sustained or may sustain damage caused by the materials appearance on the register. Secondly, removal of the material may not be directed unless, after conducting a

> balancing exercise, the court concludes that the company's interest in removal outweighs the interest of other persons in the material's continued appearance on the register. Thus, where the interest of the company and third parties are equal, the material will remain on the register.
>
> [35.1096.05] These requirements survived a proposed amendment which would have removed them in respect of fraudulent filings. It was acknowledged that the court would often take the view that it was unlikely to be in the public interest that such filings should continue to appear on the register. However, since the registration of the material under consideration would necessarily have had a legal effect and may have been relied upon by third parties, the balancing exercise should still take place."

77. I should make it clear that I have not relied upon what was said during the House of Lords debate concerning a proposed amendment to section 1096 (referred to at [35.1096.05] *supra*), as I do not consider that the legislation is sufficiently ambiguous or obscure to require this; c.f. *Pepper v Hart* [1993] AC 493 per Lord Browne-Wilkinson at 634-635; *Christianuyi Ltd v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 10 (TCC) per Marcus Smith J at [25]-[29].

Conclusion

78. For these reasons, I conclude that the Court has the power under section 1096 to order rectification of the Register as sought by the claimants in the Rectification Claim.

The nature of factually inaccurate material provided by Mr Garcia on the forms required for administrative restoration

79. In November 2011 Mr Garcia applied for the administrative restoration of Infund to the Register. It is accepted that, in so doing, he provided factually inaccurate material. In particular, it is admitted in the Amended Defence that Mr Garcia back-dated restoration documents; provided inaccurate information that he was a former member of Infund when he was not; provided inaccurate information that he was a designated member of Infund when he was not; and signed an inaccurate Statement of Compliance in form LL RT01.

80. The Claimants allege that Mr Garcia made the following misrepresentations in forms submitted to the Registrar to achieve the administrative restoration of Infund, and that such misrepresentations were fraudulent. In short, it is said that Mr Garcia repeatedly lied to the Registrar about matters which were fundamental to the restoration application; see Particulars of Claim paragraphs [6.1] – [6.3]:

Mr Garcia represented that he was a former member of Infund when he was not:

81. Mr Garcia signed form LL RT01 entitled *"Application for administrative restoration of a Limited Liability Partnership (LLP) to the Register"*. The opening paragraphs of form LL RT01 said:

> "What this form is for
>
> You may use this form if you are a former member of an LLP to apply for restoration of the LLP to the Register.
>
> What this form is NOT for
>
> You cannot use this form for any other application for restoration to the Register"

82. Mr Garcia was not a former member of Infund. Despite this, and despite the warnings at the top of form LL RT01, Mr Garcia made the following declarations:

    i) At paragraph 2 of form LL RT01:

    > "I, being a former member of the above dissolved LLP, apply for the LLP to be administratively restored to the Register under section 1024 of the Companies Act 2006. (as applied by the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009. The following conditions required for restoration have been met:
    >
    > The application is being made by a former member of the LLP..."

    ii) At paragraph 3 of form LL RT01 [C-3/1/25/152]:

    > "Statement of compliance
    >
    > I confirm that I am a former member making this application and the requirements for administrative restoration under section 1025 of the Companies Act 2006 (as applied by the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009) have been met."

Mr Garcia back-dated form LLP288a appointing new members:

83. Mr Garcia signed two copies of LLP288a entitled *"Appointment of a Member to a Limited Liability Partnership"* one for the appointment of Mr Garcia and one for the appointment of Corplaw. Both forms were falsely dated, with the date of appointment given as 4 April 2007 and not August 2011 when the forms were in fact completed.

Mr Garcia signed form LLP288a as a "Designated Member" when he was not:

84. Mr Garcia signed form LLP288a appointing Corplaw as a "*Designated Member*" He also signed form LLP288a consenting to his appointment as a member of Infund as a *"Designated Member"*. Mr Garcia was not, and had never been, a Designated member of Infund.

Mr Garcia back-dated annual returns and signed as a "Designated Member":

85. Mr Garcia signed form LLP363: Annual Return of a Limited Liability Partnership for the years 2007 to 2009, and form LL AR01: Annual Return of a Limited Liability Partnership (LLP) for the years 2010 and 2011. In doing so, Mr Garcia declared that he was a Designated Member of Infund from 2007 to 2010; and back-dated his signature, knowing that this would give the appearance that he had signed each annual return as a member for the year to which the return corresponded, when he had not.

The significance of legal advice provided to Mr Garcia

86. Mr Machell QC submitted that there was no intention to mislead the Registrar and that the factually inaccurate statements referred to above were made on the basis of legal advice received from Mr Garcia's UK solicitors, Harris Cartier LLP ("Harris Cartier"). In particular:

i) In an email dated 24 May 2011 from Mr Gerard Rafferty, a director of Pearse, to Mr Garcia and Mr Enrique Rodriguez Peralta, Mr Garcia's Mexican attorney, said:

> "I am now liaising with the law firm who I mentioned in order to the set up the 'restoration' procedure to be followed in advance of receiving final, approved financial statements".

ii) On 27 May 2011, Harris Cartier advised Mr Rafferty by email that: (a) in the circumstances, administrative restoration was appropriate for Infund, (b) the lack of designated members at dissolution was unproblematic, (c) the mere fact of being in liquidation or administration meant that Infund satisfied the criterion of "*carrying on business or being in operation*" and (d) at least one designated member could be appointed when Infund was restored.

iii) In an email to Harris Cartier dated 11 August 2011, Mr Rafferty queried whether a new person could be appointed as sole designated member when Infund had been restored. Rosheana Olivelle of Harris Cartier responded the same day stating that:

> "the designated member does not have to be the same as before, and the member can also be a corporate member".

iv) On 22 August 2011, in an email from Mr Peralta to Mr Rafferty, copied to Mr Garcia, it was confirmed that Mr Garcia had agreed to be "*designated as the sole Designated Member for restoration purposes*". The following day, an email was sent to Harris Cartier by Mr Rafferty confirming this proposal and querying:

> "we wish to appoint someone who has never been a member before and on re-reading the above referenced form, this appears not possible?".

v) Mr Satdeep Sambhi, a trainee at Harris Cartier, confirmed in an email to Mr Rafferty on 23 August 2011:

> "I have spoken with Companies House and they have assured me that the application for administrative restoration of an LLP does not necessarily need to be signed by a former member and can indeed be signed by a prospective member".

vi) Following this advice, Mr Peralta questioned in an email to Mr Rafferty dated 23 August 2011 whether Mr Garcia could sign the restoration forms as a *"former member"* when he was not one. Based on the advice of Harris Cartier, Mr Rafferty confirmed the following day that Mr Garcia could sign on this basis.

vii) In an email dated 25 August 2011, Pearse asked Harris Cartier whether the words *"prospective member"* could be included under each signature on the forms in order to avoid any misrepresentation to Companies House. Harris Cartier responded the same day as follows:

> "As both members of the LLP resigned with effect from 23 October 2006, there is no member who is authorised to sign the outstanding annual returns as they are all dated after the resignation of both members. In order to resolve this problem the appointment of Mr Garcia Quevedo Topete must be dated prior to 13 June 2007 as this is the date of the earliest annual return. I hope this appointment date will not be a problem?"

viii) Pearse sent the backdated forms to Harris Cartier for approval on 25 August 2011, noting that Mr Garcia's appointment date was stated to be 4 June 2007. The date was confirmed by Mr Sambhi at Harris Cartier on the same day. Mr Rafferty sent the backdated forms to Mr Peralta and Mr Garcia for Mr Garcia's signature. Mr Rafferty explained during cross-examination that he had relied on the legal advice of Harris Cartier when drafting this email.

ix) On 25 August 2011 Mr Rafferty told Mr Peralta and Mr Garcia that:

> "It has been clarified that for restoration purposes, the relevant appointments must be back-dated hence the 2007 appointment date. Our nominee Company is also being appointed alongside Hector at that date and will countersign the form in the section marked, "Consent Signature". I have also attached a separate form for the appointment of our corporate nominee, Corplaw Limited - Hector is required to sign this form in the section marked "Consent Signature" only. There is in fact, under this slightly modified approach, no requirement to insert the wording "prospective member" anywhere in the forms and to do so would invalidate same."

x) On 20 September 2011, Mr Sambhi confirmed to Pearse that the forms were in order, requested further signatures from Mr Garcia on the LLP288a and offered to date the LLP363 forms next to the signatures with the same date as the appointments.

xi) Mr Garcia's first witness statement refers to Harris Cartier's advice that he was able to sign the restoration forms and that the forms should be back-dated. He states:

> "I was guided by legal advisers in all the steps of the restoration, being no expert in this process".

Was this factually inaccurate material dishonestly provided by Mr Garcia?

Legal principles

87. The law in relation to dishonesty in the context of civil proceedings was reviewed by the Supreme Court in *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2017] UKSC 67: [2017] 3 W.L.R. 1212. Lord Hughes JSC (with whom the other members of the Court agreed) said at [62] that:

> "62 Dishonesty is by no means confined to the criminal law. Civil actions may also frequently raise the question whether an action was honest or dishonest. The liability of an accessory to a breach of trust is, for example, not strict, as the liability of the trustee is, but (absent an exoneration clause) is fault-based. Negligence is not sufficient. Nothing less than dishonest assistance will suffice. Successive cases at the highest level have decided that the test of dishonesty is objective. After some hesitation in *Twinsectra Ltd v Yardley* [2002] 2 AC 164 , the law is settled on the objective test set out by Lord Nicholls of Birkenhead in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 : see *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476 , *Abou-Rahmah v Abacha* [2007] Bus LR 220 and *Starglade Properties Ltd v Nash* [2011] Lloyd's Rep FC 102 . The test now clearly established was explained thus in the *Barlow Clowes* case, para 10 by Lord Hoffmann, who had been a party also to the *Twinsectra* case:
>
> "Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree."

88. Lord Hughes said at [74]:

> "The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and by Lord Hoffmann in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476 , para 10: see para 62 above. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The

> reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

Application to the facts

89. In accordance with *Ivey v Genting Casinos*, the Court must first ascertain (subjectively) the actual state of Mr Garcia's knowledge or belief as to the facts. There is no doubt that Mr Garcia knew that he was not a former member of Infund. He does not suggest in his witness statements that he believed that he was a former member. Furthermore, the documents show that Mr Garcia did not believe this:

    i) On 23 August 2011 Mr Peralta emailed Mr Rafferty, copying in Mr Garcia, noting:

    > "1. Form LL RT01 Héctor must sign it as "former member" and as far as I remember he has never been member, we are appointing it for the restoration process only buy [sic] he is not a former member".

    ii) In response, on 24 August 2011 Mr Rafferty confirmed:

    > "You are correct, Hector is not a "former member". However, despite the clear wording on the form, a "prospective member" may also sign the form, this having been confirmed by UK UK [sic] Companies House restoration team".

    iii) Mr Rafferty's reference to Mr Garcia as a *"prospective member"* contradicted the express wording on the face of form LL RT01. It was clear that by signing the form as a *"former member"* Mr Garcia would be making false declarations.

    iv) Mr Garcia appreciated this, because on 24 August 2011 Mr Peralta emailed Mr Rafferty, copying in Mr Garcia, asking:

    > "Would it be possible to include under each signature page, where applicable, the title "prospective member" in order to avoid any misrepresentation with the Company House at the time of submitting the restoration process?..."

90. There is also no doubt that Mr Garcia knew that forms LLP288a were falsely dated. He does not deny this in his witness statements and the documents show that he did not believe that the date was correct: the reason for back-dating the forms was to claim that Mr Garcia had been appointed as a member of Infund prior to the date on

which the annual return for 2007 was due, so that Mr Garcia could sign the annual return as a Designated Member. This explanation was given by Satdeep Sambhi of Harris Cartier LLP to Mr Rafferty in an email dated 25 August 2011.

91. On 25 August 2011 Mr Rafferty told Mr Peralta and Mr Garcia that:

> "It has been clarified that for restoration purposes, the relevant appointments must be back-dated hence the 2007 appointment date. Our nominee Company is also being appointed alongside Hector at that date and will countersign the form in the section marked, "Consent Signature". I have also attached a separate form for the appointment of our corporate nominee, Corplaw Limited - Hector is required to sign this form in the section marked "Consent Signature" only. There is in fact, under this slightly modified approach, no requirement to insert the wording "prospective member" anywhere in the forms and to do so would invalidate same."

92. In following this approach Mr Garcia signed forms LLP288a knowing that they contained false dates and executed form LL RT01 without reference to his status as a *"prospective member"*.

93. Similarly, there is no evidence that Mr Garcia ever believed that he was a designated member of Infund, and he could not have done so. The only former members of Infund were the Corplaw Entities, who had both been designated members, and who had resigned on 23 October 2006. Mr Garcia signed forms LLP288a knowing that his stated capacity was false. In addition, he signed form LLP363 and form LL AR01, falsely declaring that he was a designated member of Infund from 2007 - 2010 when he knew that this was not the case; and he backdated his signature knowing that this would give the appearance that he had signed each annual return as a member for the year to which the return corresponded, when he had not done so.

94. Next, the Court must consider whether Mr Garcia's conduct was honest or dishonest by applying the (objective) standards of ordinary decent people. Mr Garcia was advised by Harris Cartier to fill in the forms in the way that he did. The question is whether an ordinary decent person would have signed forms falsely representing that he or she was a former member and designated member, and falsely back-dating such forms, knowing that none of this was true, in reliance upon this advice.

95. The issue may be tested by the following example. Would an ordinary decent person accept legal advice that a document should be forged? In my view, the answer is plainly no. In the present case, Mr Garcia was advised to tell lies on forms submitted to the Registrar to achieve administrative restoration. An honest person would not have done this, and applying an objective standard, Mr Garcia's conduct was dishonest.

Were the Corplaw Entities entitled to resign in 2006?

96. Whilst not at the forefront of Mr Machell QC's arguments, it was the Defendants' submission that, as a matter of law, the purported resignations of the Corplaw Entities on 23 October 2006 were ineffective. On that basis, it was suggested that Infund had members upon being restored to the Register, even if Mr Garcia was not among them. This contention was also said to be relevant to that part of the Rectification Claim which seeks to remove the material on the Register which records Mr Garcia as a member. It was argued that by operation of section 1028(1) of the Companies Act 2006 (rule 56 of the LLP (CA) Regulations) the appointment of Mr Garcia as a member of Infund was deemed valid and effect upon its restoration, and so there was no material misrepresentation to the Registrar. The Defendants relied upon the following arguments:

Clause 7.4

97. The Defendants pointed out that Infund was governed by an LLP Members Agreement dated 13 June 2003 (the "Members Agreement") and signed on behalf of the Corplaw Entities, which, it was alleged, did not include a provision permitting a member to resign. Therefore, the Corplaw Entities, who purported to resign, did not have the power to do so. The Members Agreement provides at Clause 7.4 that:

> "No Member shall be entitled to resign from the LLP and withdraw any part of its capital contribution or to receive any distribution from the LLP, except as specifically provided in this Agreement."

98. I do not accept this submission. Clause 7.4 only restricts the ability of a member to resign in circumstances where that member wishes either to withdraw part of its capital contribution or to receive distribution from the LLP. On the Defendants' argument, members might become liable for a criminal offence, where they could not obtain the information required by the Registrar, and yet be unable to resign. This would not be a commercially sensible interpretation of the Members Agreement. The Corplaw Entities sought the information needed to comply with Infund's obligations on several occasions, but, eventually, were given no choice but to resign when this information was not forthcoming. The Members Agreement did not prevent them from doing so.

No Contractual exclusion of the right to retire

99. S.4(3) of the Limited Liability Partnerships Act 2000 (the "LLP Act") provides that:

> "A person may cease to be a member of a limited liability partnership (as well as by death or dissolution) in accordance with an agreement with the other members or, in the absence of agreement with the other members as to cessation of membership, by giving reasonable notice to the other members."

100. Mr Machell QC contended that section 4.3 does not prohibit a contractual exclusion of the right to retire, an interpretation which is consistent with the views expressed in Blackett-Ord and Haren in *Partnership Law* (5th ed, 2015) at [25.77] and in Whittaker and Machell, *The Law of Limited Liability Partnerships* (4th ed, 2016) at [19.5]. I accept that section 4.3 does not prohibit a contractual exclusion of the right to retire. However, in the light of my interpretation of clause 7.4, there is no contractual exclusion which operated to prevent the Corplaw Entities from resigning as members of Infund.

Simultaneous resignation of all members

101. It was submitted by the Defendants that, on a proper interpretation of LLP Act s.4(3), members cannot agree to cease to be members of an LLP and cannot cease to be members by giving notices to that effect to each other, if, in either case, the LLP would be left with no members as a result. I disagree. Section 4(3) is unqualified, as there is nothing to prevent the resignation of a sole member, nor is there any practical difficulty with an LLP being left with no members. The Registrar has the power to strike off a defunct LLP pursuant to section 1000 of the Act.

102. In the present case, the Corplaw Entities were both managed by Pearse and resigned on the same day, with the relevant forms being signed by the same person. The Corplaw Entities therefore gave *"reasonable notice"* to each other.

No power/breach of fiduciary duty to resign without the consent of Global Trustees

103. The Defendants submitted that the Corplaw Entities held their rights as members on bare trust/as nominees for Global Trustees. They therefore had no power to resign as members of Infund without Global Trustees' consent, which was neither sought nor given.

104. I do not accept that the Corplaw Entities had no power to resign as members of Infund without Global Trustees' consent. The document entitled *"declaration of trust"* signed by the Corplaw Entities in favour of Global Trustees purports to hold *"all profits, losses or distributions allocated to us by virtue of our membership"* on behalf of Global Trustees, which does not extend to membership of Infund. The *"declaration of trust"* is silent on the question of whether the Corplaw Entities could resign as members of Infund without consent.

105. Therefore, it was not a breach of fiduciary duty for the Corplaw Entities to resign without Global Trustees' consent. In my view, the trust was not over Infund, but rather over its profits or proceeds.

Lack of reasonable notice

106. The Defendants contended that, even if the Members Agreement and LLP Act s.4(3) did permit the Corplaw Entities to resign by giving reasonable notice to each other, neither entity gave any, let alone reasonable, notice with the result that neither purported resignation was effective. I reject this contention. Since resignation was done by agreement between the members, reasonable notice was not required. In any event, for the reasons set out above, reasonable notice was given between the Corplaw Entities of their intended resignation.

Was the information provided by Mr Garcia that Infund was carrying on a business or in operation at the time of its dissolution factually inaccurate?

107. Under section 1025(2) of the Companies Act 2006, applied to LLPs by rule 56 of the LLP (CA) Regulations, in order for an LLP to be restored to the Register by the court, it must be *"carrying on business or in operation"* at the time of its striking off. Mr Garcia declared at paragraph 2 of form LL RT01 that:

> "the following conditions required for restoration have been met
>
> …
>
> - the LLP was carrying on business or was in operation at the time of strike off."

108. The Defendants submitted that this information was accurate, since Infund was "*in operation*" at the time of its dissolution.

Legal principles

109. The interpretation of this phrase was considered by the parties in relation to the Restoration Claim and with reference to sections 1029 to 1031 of the Companies Act, as applied to LLPs by regulation 57 of the LLP (CA) Regulations. Section 1031 provides three gateways, of which one must be satisfied before an LLP can be restored to the Register. One of the gateways is that the LLP was *"carrying on business or in operation"* at the time of striking off (section 1031(1)). It was not suggested that the phrase has a different meaning in section 1025(2) and I shall proceed on this basis that the same phrase has the same meaning throughout the LLP (CA) Regulations.

110. The meaning of this phrase in relation to section 1031(1) (s.653(2) of the Companies Act 1985) was discussed by Laddie J in *Re Priceland Ltd* [1997] BCC 207 at 211:

> "It seems to me that the purpose of this 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 at 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".

111. Laddie J considered that an attempt by a company to assign a lease would have qualified as being in operation (at p.211). In the light of this authority, I accept the Defendants' submission that *"carrying on business or in operation"* should be construed widely, and that it presents a low threshold to satisfy. However, as *Re Priceland* illustrates, the question is dependent on an analysis of the facts. In *Re Priceland*, Laddie J was not satisfied that the company was anything other than dormant when it was struck off.

Application to the facts

112. The Defendants relied on the fact that, as at 8 January 2008, Infund held an account with Lehman Brothers which was in credit and had accrued causes of action in respect of claims which it subsequently pursued in the Mexican Proceedings. It was not suggested that Infund was carrying on business at the relevant date, but it was argued that these activities showed that Infund was *"in operation"* at the relevant date.

113. As against this, Mr Wardell QC pointed to the following, which, he submitted, showed that Infund was not *"carrying on business or in operation"* at the time of its dissolution:

i) Infund had no members, as the Corplaw Entities had resigned by 21 March 2007;

ii) once the 2003 restructuring of GM had been undertaken in 2003, Infund's purpose had been fulfilled;

iii) Pearse filed dormant accounts for Infund for the year ended 30 June 2004;

iv) Infund did not file any accounts for the years ended 30 June 2005, 2006 and 2007, despite repeated requests for information by Pearse and despite repeated reminders from Companies House;

v) in an email dated 6 March 2006, Pearse noted that Infund had not carried on any activity from 1 January 2005 to the year ended 30 June 2005;

vi) in an email dated 16 October 2006, Pearse asked Mr Peralta for evidence of Infund's trading activity during the period 1 July 2004 to 20 June 2005. Neither Mr Peralta nor Mr Garcia responded to confirm that Infund was carrying on business or in operation;

vii) when informed by Pearse that Companies House was considering removing Infund from the Register as it was no longer trading, Mr Garcia provided Pearse with: (1) an Annual Report for Infund which made no reference to Infund carrying on business or being in operation (2) an income statement for the years ended 30 June 2004, 2005 and 2006, where no continuing operations or revenue were recorded in the accounts for the financial year 2006 and (3) a cash flow statement for the years ended 30 June 2004, 2005 and 2006, where no cash flow from operating activities was recorded for the financial year 2006;

viii) audited financial statements prepared for Infund for the years ended 30 June 2004, 2005 and 2006 recorded for the 2006 financial year that the only revenue was by way of interest, no bonds were purchased, there was no income from continued operations and there was no cash flow from operating activities;

ix) Mr Garcia made no response to a formal notification from Companies House in September 2007 that Infund was to be struck off the Register; and

x) audited accounts prepared by Mr Chidgey for Infund for the years ended 30 June 2004 to 30 June 2010 recorded that the only turnover was attributable to

> dividends declared by GM in respect of the Disputed Shares (the entitlement to which is, of course, strongly contested).

114. I accept the Claimants' case on this issue. In my judgment Infund was dormant at the date when it was dissolved and had been dormant for some years before then. This was the clear understanding of all relevant parties and is confirmed by the documents referred to above. Infund was not carrying on business nor was it in operation. Simply holding a bank account does not, in the circumstances of this case, amount to being in operation. Furthermore, the account relied on by the Defendants was used by Mr Garcia for his own purposes and was treated by him as his own. This does not evidence any operation by Infund. Misconceived claims which have subsequently been pursued in Mexico do not mean that Infund was in operation at the date of its dissolution.

Conclusion

115. The information provided by Mr Garcia for the purposes of the administrative restoration that Infund was carrying on business or in operation at the time of its dissolution was factually inaccurate.

Was the information that Infund was carrying on business or in operation at the time of its dissolution dishonestly provided by Mr Garcia?

116. The Claimants allege that Mr Garcia was lying in his declaration on form LL RT01 that this condition for restoration had been met. They rely on the documents to which I have referred, including those provided by Mr Garcia to Pearse on 22 June 2007, to show that Mr Garcia knew that his declaration was false.

117. As against this, in an email dated 24 May 2011, Mr Rafferty raised a query with Ms Olivelle of Harris Cartier regarding Infund's status:

> "Whilst I am conscious that the administrative restoration procedure is likely to be the most cost efficient route, one of the criteria listed in the stat form LL RT01 is that "the LLP was carrying on business or was in operation at the time of strike off". I'm not sure what the threshold is for satisfying this requirement but have the concern that as the there were no members at the time of dissolution, it may be difficult to make such a declaration."

118. In her response, Ms Olivelle reassured Mr Rafferty that, having confirmed with Companies House, the mere fact of not being in liquidation or administration meant that Infund satisfied the criterion of *"carrying on business or being in operation"*.

119. If there were reliable evidence that Mr Garcia had received and relied on this advice, I would have concluded that his declaration in this regard was inaccurate, but not dishonest. The issue of whether the statutory criterion is satisfied is partly a question of law; c.f. falsely dating a document, which is not. However, there is no evidence that this response from Harris Cartier, or indeed the question from Mr Rafferty, was ever communicated to Mr Garcia, and he was not copied in on the emails. Neither Mr

Rafferty nor Mr Garcia suggests that he was told about this exchange in their witness statements, and Mr Rafferty did not suggest this during his oral evidence.

120. The position, therefore, is that Mr Garcia provided documents to Pearse in 2007, including an income statement for the years ended 30 June 2004, 2005 and 2006, where no continuing operations or revenue were recorded in the accounts for the financial year 2006, and a cash flow statement for the years ended 30 June 2004, 2005 and 2006, where no cash flow from operating activities was recorded for the financial year 2006. In my judgment, he knew that Infund was not carrying on business or in operation at the time of its dissolution in 2008. His declaration to the contrary which was submitted to the Registrar in 2011 was dishonest.

Did Mr Garcia make false representations to BDO?

121. In October 2010, Mr Garcia instructed the accountancy group BDO International Ltd to prepare audited accounts for Infund for the years ended 30 June 2004 to 30 June 2010. These were prepared by BDO (UK) and BDO (Mexico) (together "BDO"). The Claimants' case is that Mr Garcia dishonestly procured BDO to prepare these accounts, which were required for the administrative restoration, by making a series of fraudulent representations to BDO. It is further alleged Mr Garcia falsely confirmed that the accounts were accurate and that the auditors had been provided with all the relevant audit information. I shall make findings as to the relevant facts and then consider the Defendants' answers to these allegations.

False representations as to members

122. The Report of the members for the year ended 30 June 2004 prepared by BDO listed Mr Garcia as a member who was appointed on 4 April 2007. It also stated that Corplaw Ltd was reappointed as a member on 4 April 2007. Both of these statements were false. Mr Garcia had never been a member of Infund and Corplaw Ltd was not reappointed in April 2007. The second page records, amongst other things, that *"the members are responsible for keeping proper accounting records which disclose with reasonable accuracy at any time the financial position of the partnership…"*. Mr Garcia purported to approve the members' Report as a designated member (which he was not) and signed this document on 25 October 2011. This information was dishonestly provided by Mr Garcia to BDO.

False representations as to assets of Infund

123. The independent auditors' report prepared by BDO recorded fixed assets by way of investments valued at US$74,602,122, reflecting the value of the Disputed Shares at the time. Note 6 to the accounts recorded:

> "The fixed assets investments consist of a strategic holding in Grupo Mexico SA de CV of 64,903,864 shares (series B coupon 5) which are listed in Mexico. There is currently a legal dispute surrounding these shares and they have not been transferred and delivered to the LLP. The LLP will take all steps necessary to secure this transfer."

124. Mr Chidgey of BDO (UK) signed the independent auditors' report confirming that there were no matters on which BDO were required to report by way of exception, which meant that, in his opinion, adequate accounting records had been kept, that returns adequate for the audit had been received, that the financial statements were in agreement with the accounting records and returns and that BDO had received all the information and explanations that they required for their audit.

125. The accounts also recorded creditors amounts falling due within one year of over $39.9 million, and loans and other debts to members of over $42.9 million, which is a sum recorded at note 11 as having been *"introduced by Members"*. These statements were carried through to the audited accounts for the years ended 30 June 2005 to 30 June 2010 and subsequent years' accounts also recorded that there was a receivable for Infund of GM dividends of more than US $200 million.

126. The Claimants' case was that these statements were based on a series of lies told by Mr Garcia to BDO. Mr Wardell QC began by comparing the annual report for Infund for the years 2003-2006 sent on 22 June 2007 by Mr Garcia (which he did not show to BDO) with the accounts prepared by BDO on Mr Garcia's instructions in 2011.

127. In particular, in 2007 Taylor Boone of Pearse was pressing Mr Peralta for the information necessary to file financial statements for Infund at Companies House. Mr Peralta forwarded to Mr Boone an annual report for Infund which he had received directly from Mr Garcia. In his email enclosing the annual report, Mr Garcia said the following (sic):

> "After review by a Certify Public Accountant enclose herewith the Annual Report for Infund LLP. by which explain in a very detail way all the transactions made during the first three years. This is the best way to provide the information for the House of companies and comply with the information requested."

128. The financial statement for 2004 which was enclosed with Mr Garcia's email indicated that Infund's investments comprised *"Cash, Banks and Investments $28,743"* and *"Permanent Investments"* totalling US $1,874,269. Furthermore, the document showed that Infund's total assets of US$12,821,767 were matched almost exactly by its debts of US$12,821,764. The financial statements for 2005 and 2006 are consistent with the 2004 Statement.

129. These financial statements, which were asserted by Mr Garcia in 2007 to provide a very detailed explanation of Infund's financial position, following review by a certified accountant, are quite different from, and irreconcilable with, the financial information about those same years which was provided to BDO by Mr Garcia in 2011. In 2007, there is no record of any claim of $74.6 million to the Disputed Shares.

130. The Income Statement for the year ended 30 June 2004 refers to *"Sale of Note Bonuserv $42,900,000*" and *"Cost of Note Bonuserv $75,000,000"*. These entries are explained in the Notes to the Financial Statement which state that: *"Proper books of account are kept by Hector Garcia in Mexico City, giving it a true and fair view of the business, and was conducted in accordance with Generally Accepted Accounting Standards."* The Notes state that:

i) Infund had received from AMC a mandate to allocate and acquire Asarco Bonds, in order to sell and finance such bonds to AMC;

ii) In order to finance this operation, Infund had received financing support from Seguros Inbursa in the amount of $42.9 million which was repayable over a period of 5 years with interest;

iii) Mr Larrea had requested from Infund a credit facility of $75 million in order for him to pay the capital infusion required by GM; and

iv) Infund had entered into a *"Note Purchase Agreement"* with Bonuserv LLP, whereby Bonuserv LLP acquired a Note issued by Mr Larrea with a value of $75 million under the following conditions:

a) Infund would sell to Bonuserv LLP the Larrea Promissory Note for a price of $42.9 million;

b) Bonuserv LLP would repay the price of $42.9 million for the Larrea Promissory Note and Infund would repay its debt to Seguros Inbursa;

c) Seguros Inbursa would receive payment from Infund in the amount of $42.9 million plus interest;

d) Seguros Inbursa would release the guarantee in favour of the person who bought such support (Mr Larrea); and

e) Bonuserv LLP would pay, through Infund, a success fee for the benefit of a third party (Mr Garcia) in the amount of $5 million.

131. The financial statements sent by Mr Garcia in 2007 were designed to support his claim in the First Mexican Proceedings that he was owed a success fee of $5 million for his work on the restructuring of GM. That claim was rejected by the Mexican Courts. Otherwise, they are consistent with the findings that I have made in respect of the GM restructuring. They are wholly inconsistent with the information provided by Mr Garcia to BDO in 2011. There was no suggestion in that Annual Report or the financial statements sent by Mr Garcia in 2007 that Infund enjoyed a beneficial entitlement to the Disputed Shares. On the contrary, those documents confirm that, on 17 October 2003, Infund provided Mr Larrea with a loan so that Mr Larrea himself could purchase the Disputed Shares; that Mr Larrea had executed a loan note in favour of Infund in the sum of US$75,000,000 (the Larrea Promissory Note); and that on 24 December 2003 Bonuserv LLP had purchased the Larrea Promissory Note from Infund for US$42,900,000.

132. In my judgment, the information given to BDO by Mr Garcia in 2011 was designed to support a false claim that Infund was entitled to the Disputed Shares. The statement in the accounts prepared in 2011 that loans and other debts were owed by Infund to members of over $42.9 million, which is a sum recorded at note 11 as having been *"introduced by Members"* (i.e. Mr Garcia) is plainly untrue and is refuted by the financial statements sent in 2007. The information that he provided, which was relied upon by BDO in preparing accounts required for the restoration, was based on false representations, dishonestly made by Mr Garcia.

133. I also find that BDO's confirmation of the accuracy of Infund's financial statements was dependent on a certification by Mr Garcia that Infund was entitled to receive money either from Mr Garcia or from entities that he controls. By an email dated 21 September 2011, Mr Chidgey of BDO said that he needed *"certification in respect of certain receivables due to Infund from [HG] or entities he controls"*. Further, on 11 October 2011, Mr Garcia sent BDO a *"confirmation letter"* making representations as to the accuracy of the financial statements.

The Defendants' answers in respect of the accounts

134. The Defendants deny that the restoration of Infund was procured by fraudulent and dishonest representations. Mr Machell QC submitted that:

i) the complaint that the accounts falsely indicate that the GM shares are an asset of Infund is an issue for the Mexican courts and does not need to be decided in the present proceedings. Furthermore, it is noted in the accounts that Infund's claim to the shares and dividends is in dispute;

ii) the content of the accounts has nothing to do with the administrative restoration application, as the Registrar is not concerned with the content of the accounts;

iii) rectification of filed accounts does not fall within section 1096, as there are separate provisions in the legislation dealing with defective accounts;

iv) the Claimants have no interest in the accuracy or otherwise of the accounts and they are not relying on them;

v) many of the allegations now relied on by the Claimants in relation to the alleged false accounts are not pleaded; and

vi) even if the accounts were inaccurate, other accounts could have been filed for the purposes of the administrative restoration.

Issue for the Mexican courts

135. Whether Infund is entitled to the Disputed Shares is in issue in the Fourth Mexican Proceedings. However, whether Mr Garcia provided false information to BDO to enable preparation of accounts required for the administrative restoration of Infund is in issue on this application for rectification. The allegedly false information includes the claimed entitlement to the Disputed Shares, which, in that context, is a matter for the English Court to decide.

Content of the accounts

136. On an application for administrative restoration, the Registrar is not concerned with, and does not evaluate, the content of the accounts. He does not conduct an evaluative process, and therefore the question of whether he was misled by inaccurate material does not arise. However, the filing of accounts was a prerequisite for the administrative restoration of Infund, pursuant to section 1025(5) and they are referred to on the Register. On the rectification application, the court is concerned with whether material on the Register is factually inaccurate, or is derived from something

that is factually inaccurate, or forged. Therefore, the accuracy of the information contained in the accounts, and from which the accounts were derived, arises for decision on this application.

Section 1096(6)

137. Section 1096 does not apply where:

> "(6) … 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 …"

138. Mr Machell QC submitted that defects in accounts were outside the scope of a section 1096 enquiry and were subject to different statutory provisions. In particular, he relied upon the specific powers of the court under part 15 in relation to the revision of defective accounts contained in sections 455 and 456 of the Companies Act 2006, applied to LLPs by regulation 23 of the Limited Liability Partnerships (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008.

139. The relevant parts of sections 455 and 456 are as follows:

> **455.— Secretary of State's notice in respect of accounts**
> (1) This section applies where copies of an LLP's annual accounts have been delivered to the registrar, and it appears to the Secretary of State that there is, or may be, a question whether the accounts comply with the requirements of this Act.
>
> (2) The Secretary of State may give notice to the members of the LLP indicating the respects in which it appears that such a question arises or may arise.
>
> (3) The notice must specify a period of not less than one month for the members to give an explanation of the accounts or prepare revised accounts.
>
> (4) If at the end of the specified period, or such longer period as the Secretary of State may allow, it appears to the Secretary of State that the members have not—
> (a) given a satisfactory explanation of the accounts, or
> (b) revised the accounts so as to comply with the requirements of this Act,
> the Secretary of State may apply to the court.
>
> **456.— Application to court in respect of defective accounts**
> (1) An application may be made to the court—
> (a) by the Secretary of State, after having complied with section 455, or
> (b) [the Conduct Committee],
> for a declaration (in Scotland, a declarator) that the annual accounts of an LLP do not comply with the requirements of this

> Act and for an order requiring the members of the LLP to prepare revised accounts.
>
> (2) Notice of the application, together with a general statement of the matters at issue in the proceedings, shall be given by the applicant to the registrar for registration.
>
> (3) If the court orders the preparation of revised accounts, it may give directions as to—
> (a) the auditing of the accounts, and
> (b) the taking of steps by the members to bring the making of the order to the notice of persons likely to rely on the previous accounts, and such other matters as the court thinks fit.

140. I do not accept the Defendant's submission, for the following reasons: first, in my judgment, *"defective accounts"* in section 1096(6) refers to accounts which in some respect do not comply with the Act, rather than a case where the accounts are fraudulent or are derived from fraudulent misrepresentations. Similarly, the powers of the Secretary of State in sections 455 - 456 are concerned with cases where there is, or may be, a question whether accounts comply with the requirements of the Act, rather than cases where the accounts are fraudulent in nature. The latter cases fall within the scope of section 1096, and are not excluded by sub-section (6).

141. Secondly, section 456 is directed at the members of an LLP, as the members are required to file revised accounts and any remedy is only enforceable against them. The section does not contemplate a situation where there are no ongoing members of the LLP and false accounts have been filed by an individual who has falsely claimed to be a member.

142. Thirdly, section 456 only provides a remedy for defective accounts in respect of an active LLP and I have concluded that Infund was not active when the accounts were filed.

143. Fourthly, the remedy in section 456 is only available upon application by the Secretary of State, and there is no reason why the Secretary of State would be aware of the filing of fraudulent accounts in individual cases.

The Claimants have no interest in the accuracy or otherwise of the accounts and do not rely on them

144. I do not accept this. The Claimants rely upon false information dishonestly provided to BDO by Mr Garcia which appears in the accounts and from which they are derived, in support for their application under section 1096 for rectification of the Register.

Many of the allegations now relied on by the Claimants in relation to the alleged false accounts are not pleaded

145. I do not accept this. The allegations concerning the accounts which I have so far considered are pleaded at [6.4] (the particulars of which incorporate [4.6]); and [6.5] of the particulars of claim.

Even if the accounts were inaccurate, other accounts could have been filed for the purposes of the administrative restoration

146. I reject this submission for two reasons. First, Mr Garcia needed accounts which supported Infund's claim in the Fourth Mexican Proceedings, which was the purpose of restoring Infund. This is why it was necessary to lie to BDO about Infund's assets. Secondly, even if different accounts could have been filed, this is no answer to a claim for rectification under section 1096, where inaccurate accounts were in fact filed for the purposes of restoration.

Did Mr Garcia and Mr Peralta forge a Mandate?

147. I now turn to a very serious matter, which I have not yet considered. On 28 February 2011 Mr Chidgey emailed Mr Cámara Puerto and Mr Martinez Solano noting:

> "4. You are showing $84m due to HGQ [Mr Garcia] which includes the original $39.2m used to purchase the bond. However your notes say that this was borrowed from Seguros and that the $42m (the other part of the amount outstanding) was introduced to repay this initial borrowing? This seems to be double counting. Can you explain?"

148. On 3 March 2011 Mr Chidgey sought further clarification in the following terms:

> "…I am still not sure why the profit for the bond transaction belongs to HGC as the documentation refers to Infund acquiring the bonds. Can you tell me how this happens?"

149. Mr Martinez Solano then forwarded Mr Chidgey's query to Mr Garcia, as on 4 March 2011 Mr Peralta emailed Mr Garcia with a copy of a Mandate signed by both Mr Peralta and Mr Garcia and dated 15 June 2003 ("the June 2003 Mandate"). Mr Garcia forwarded the June 2003 Mandate to Mr Martinez Solano, who in turn provided it to Mr Chidgey, with the following explanation:

> "In answer at your question, attached the document where the company is supporting that the record of this document".

150. It is the Claimants' case that Mr Garcia forged the June 2003 Mandate with the help of Mr Peralta in about March 2011. The purpose of this forgery was to persuade BDO that, following the sale of the Asarco Bonds by Infund to AMC, Mr Garcia was beneficially entitled to tens of millions of dollars in fictitious *"profits"* from that sale. The forgery was required to induce Mr Chidgey to produce the Infund accounts necessary for its restoration, which would support the claim that Mr Garcia, through Infund, wished to pursue in Mexico.

151. On 23 February 2018 the Claimants served a notice to prove the June 2003 Mandate under CPR rule 32.19. On 5 April 2018, the Defendants' solicitors wrote a letter which did not attempt to assert that the June 2003 Mandate was genuine. They said:

> "Our clients do not rely on the mandate letter dated 15 June 2003 (which we are instructed was prepared and signed at some

point in the period 2004 – 2006) and so do not intend to prove its at authenticity at trial".

152. The decision by Mr Garcia not to rely upon the June 2003 Mandate in these proceedings is understandable, although not excusable. In my judgment, the June 2003 Mandate is a forgery. In particular:

i) it is falsely dated. Of itself, this is a very serious matter. It is a point conceded by Mr Garcia (albeit that he falsely suggested to his solicitors that it was signed in 2004-2006);

ii) the document is signed by Mr Peralta as *"Attorney in fact"*. However, Mr Peralta had no authority to act on behalf of Infund. The only persons with authority were: the Corplaw Entities as members of Infund, who were represented by Mr Michael Dunne; and Mr Garcia, who had the benefit of the 13 June 2003 special power of attorney;

iii) Mr Garcia did not require a separate mandate from Infund to purchase the Asarco Bonds, given his status as an attorney for Infund pursuant to the terms of the special power of attorney dated 13 June 2003. The only reason he would need such a document was to persuade Mr Chidgey that he had a claim to the fictitious *"profit"* emanating from the Asarco Bonds sale;

iv) The June 2003 Mandate did not form part of the explanation or documentation provided by Mr Garcia to Pearse or Manuel Ruiz y Cia S.C. between 2005 and 2007;

v) the June 2003 Mandate was not initially provided to BDO as part of the documents relevant to Infund's financial affairs. It was only provided in response to a direct enquiry from Mr Chidgey as to why Infund's accounts recorded a liability to Mr Garcia;

vi) the June 2003 Mandate was written in broken English and not Spanish, despite purporting to be a letter from Mr Peralta, a Spanish-speaking attorney from Mexico, to Mr Garcia, whose first language is also Spanish, in connection with a transaction to be undertaken in Mexico. The June 2003 Mandate was clearly written for the benefit of Mr Chidgey, a native English-speaker;

vii) the June 2003 Mandate failed to reflect the fact that the purchase price payable by AMC for the Asarco Bonds was purely a paper-based transaction, such that there was no genuine *"margin"* between the purchase price and sale price which could be credited to Mr Garcia and invested by Infund.

Can this allegation be relied upon by the Claimants?

153. Mr Machell QC pointed out, correctly, that the allegation that the June 2003 Mandate is a forgery is not pleaded by the Claimants. He drew attention to the well-known dictum of Lord Millet in *Three Rivers District Council v Governor and Company of the Bank of England* [2001] UKHL 16, to the effect that allegations of fraud or dishonesty must be distinctly pleaded and particularised. It is of fundamental importance that a party against whom such allegations are made has sufficient notice

of the case made against him, and that the case is sufficiently particularised. Lord Millett said at [186] that it was a requirement that:

> "…an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

154. It should also be noted that in *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 72 BLR 26 at 33-34, Saville LJ said, in a passage endorsed by Lord Hope in *Three Rivers District Council* at [49]:

> "The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularization even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows perfectly well what case is made by the other and is able properly to prepare and deal with it…"

155. If the Claimants had attempted to introduce an unpleaded and unparticularised allegation of forgery without notice, I would not have allowed them to rely upon it. However, in my judgment, sufficient notice was provided by the notice to prove the June 2003 Mandate under CPR rule 32.19, which was served months in advance of this hearing. From February 2018, Mr Garcia could have been in no doubt that the Claimants were challenging the authenticity of June 2003 Mandate. Furthermore, in the unusual circumstances of this case, further particularisation was unnecessary. Mr Garcia knew that the June 2003 Mandate was forged, which is why he did not attempt to defend its authenticity. Rather, he gave false instructions to solicitors that it had been signed between 2004 - 2006, when in fact it had been created by Mr Garcia and Mr Peralta in 2011.

156. In these circumstances, I have concluded that the Claimants are entitled to rely upon the forgery of the June 2003 Mandate in support of their rectification case. However, I

should make it clear that, even if I had not taken this into account, my decision would have been the same in respect of the Rectification and Restoration Claims.

The section 1096(3) considerations

157. I am satisfied that the presence of inaccurate material on the Register has caused, or may cause, damage to Infund and that it is in Infund's interest to remove the material. The false claims by Mr Garcia to have been a member and a designated member of Infund were a pre-requisite for the exercise of the Registrar's power to order administrative restoration. Those false claims were damaging to the LLP as it was restored on the basis of fraudulent misrepresentations by a stranger to the LLP. However, Mr Garcia's dishonesty in procuring the restoration of Infund goes much further and is of a most serious nature. Material appearing on the Register is derived from fraudulent misrepresentations to BDO and a forgery sent to BDO to procure preparation of the accounts required for restoration. The presence of this material on the Register is, or may be, damaging to the LLP.

158. Furthermore, I am satisfied that the LLP's interest in removing the material outweighs the interest of other persons in the material continuing to appear on the Register. Mr Garcia has no legitimate interest in the material continuing to appear on the Register. It was contended that an unidentified third party, who has invested in the litigation in Mexico, has such an interest. There is no evidence as to the circumstances of this investment, nor whether the third party was aware of Mr Garcia's dishonesty. I take this into account but consider that Infund's interest in removing the material outweighs this.

Should a declaration be granted?

159. It is necessary to consider whether the discretion to grant a declaration in the circumstances of this case should be exercised. The court must consider whether it is appropriate to grant declaratory relief and must consider: justice to the claimant; justice to the defendant; whether the declaration would serve a useful purpose; and whether there are any special reasons pointing towards or against a declaration; *Financial Services Authority v Rourke* [2002] CP Rep. 14 per Neuberger J.

160. The Defendants claim that a declaration should not be granted, for the following reasons: First, it is said that Infund is entitled to a cause of action that is being pursued for its benefit in the Fourth Mexican Proceeding. It is alleged to be just and appropriate for the English court to permit the underlying claim to be continued and determined on its merits by the Mexican courts. The Defendants argue that the Claimants are bringing the rectification claim for a collateral purpose: namely to stifle the Fourth Mexican Proceedings. That collateral purpose should not be sanctioned by granting the Claimants any relief.

161. I reject this submission. The declaration is sought pursuant to the jurisdiction given to the English court under section 1096 to declare that the Registrar should remove material on the Register which is inaccurate, or is derived from material which is inaccurate, or forged. In my judgment this is a particularly serious case, where the restoration of Infund was procured by fraudulent misrepresentations and forgery. It is just to make a declaration in these circumstances.

162. Secondly, it is said that is now too late to be appropriate to make a declaration because the Claimants have been guilty of inordinate, inexcusable and unexplained delay. In particular, Infund was restored on 14 November 2011; the Fourth Mexican Proceedings were issued on 21 May 2013; the Claimants did not issue the Rectification Claim until 16 February 2015; during the intervening period Infund has pursued the Fourth Mexican Proceedings and, for that purpose, has entered into dealings with advisers; and in the circumstances it would be inequitable or inappropriate for the court to grant the rectification order.

163. I accept that there has been some delay on the part of the Claimants in commencing the Rectification Claim. I do not accept that this delay is as long as suggested by the Defendants. Many of the documents referred to in this judgment, which were of great importance to the claim, were obtained as a result of a Norwich Pharmacal order made against Pearse and the Corplaw entities on 4 September 2014. Until that disclosure was provided, and the documents fully considered, it was reasonable not to commence proceedings. Furthermore, such delay as has occurred does not mean that it is inequitable or inappropriate to grant relief. Mr Garcia has dishonestly procured the restoration of Infund, for the purpose of pursuing a dishonest claim in Mexico. He is not entitled to complain of prejudice arising from any delay.

164. Thirdly, it is said that if the court intends to grant the relief sought in the Restoration Claim, no useful purpose will be served by making an order in the Rectification Claim. However, I do not intend to grant the relief sought in the Restoration Claim and this point does not arise.

165. In all the circumstances, I will grant declaratory relief in the Rectification Claim. Notice must be given to the Registrar of the hearing consequent on this judgment, to enable submissions to be made on his behalf as to the appropriate form of Order. Subject to Counsel's submissions, I intend to declare that:

i) The status of Infund be returned to 'dissolved';

ii) Reference to Mr Garcia being a member be deleted;

iii) References to the false accounts be deleted;

iv) References to all annual returns after 2006 be deleted;

v) All filings after the dissolution of Infund be removed; and

vi) Reference to Corplaw Ltd being appointed as a member of Infund on 4 April 2007 to be deleted.

The Restoration Claim

166. The Defendants seek to have Infund restored pursuant to s.1029 of the Companies Act (modified and applied by regulation 57 of the LLP (CA) Regulations).

167. Section 1029(1)(c)(i) provides that an application can be made to the court to restore to the Register an LLP that has been struck off the Register under section 1000 or 1001 (power of Registrar to strike off a defunct LLP). Schedule 1 paragraph 24 of the LLP (CA) Regulations confirms that s.1029 applies whether the LLP was dissolved or

struck off the Register before or after 1 October 2009. Paragraph 25 provides that, in the case of LLPs dissolved or struck off before 1 October 2009, as is the case for Infund, the reference in s.1029 (1)(c) to s.1000 of the Companies Act 2006 should be read as a reference to s.652 of the Companies Act 1985. An application for restoration can therefore be made under s.1029.

168. As set out in s.1029(2), an application to restore an LLP may be made by, among others, (1) any former member of the LLP, (2) any person having an interest in the land or property that was subject to the rights vested in the LLP or (3) any other person appearing to the court to have an interest in the matter. Mr Machell QC argued, and it was not disputed, that these criteria were fulfilled, as the application is made by (1) Mr Garcia, a beneficiary of the trust that holds the membership rights and obligations of Infund and therefore is interested in its restoration (2) Global Trustees, a trustee of Infund who is interested in its restoration and (3) The Corplaw Entities, who are both former members of Infund.

169. Though the time limit for bringing a claim for restoration is six years from the date of dissolution (s.1030(4) Companies Act applied by r. 57 of LLP (CA) Regulations), Schedule 1, paragraph 24(5) of LLP (CA) Regulations does not prevent an application being made any time before 1 October 2015 for any LLP struck off under s.652 of the Companies Act 1985, as is the case for Infund. The application in the present case was made on 20 July 2015, so is within the time limit.

170. In order to bring a claim for restoration, one of the jurisdictional gateways under s.1031 must be satisfied. These are set out in s.1031(1) and in the present case, gateways (a) and (c) were relied upon:

> (a) If the LLP was struck off the Register under s.1000 or s.1001 (power of the registrar to strike off defunct LLPs) and the LLP was, at the time of the striking off, carrying on business or in operation.
> …
> (c) If in any other case the court considers it just to do so.

Gateway (a)

171. I have already rejected the Defendants' submissions that Infund was "*carrying on business or in operation"* at the time that it was struck off, and therefore this gateway cannot be relied upon

Gateway (c)

Legal principles

172. The principles governing the exercise of this discretion on an application to restore a company that has been voluntarily struck off were considered by Neuberger J in *Re Blenheim Leisure (Restaurants) Ltd (No 1)* [2000] BCC 554 (CA) and in *Re Blenheim Leisure (Restaurants) Ltd (No.2)* [2000] BCC 821. The Defendants submitted, and I agree, that the same principles apply to cases where the company has been struck off through the Registrar's own motion. In summary:

i) If one or more of the gateways is satisfied *"absent special circumstances, restoration should follow. Exercising the discretion against restoration should be exception, not the rule" Re Blenheim (No.2)* p.830, citing with approval *Priceland* at p.213H.

ii) Usually, the application should be made by members who can establish an interest in the company. However, there can be circumstances where members can satisfy the court that restoration is just even if they have no interest in it (*Re Blenheim (No.2)* p.830, citing with approval *Priceland* at p.213H).

iii) If the applicant seeks restoration in order to pursue a claim, he must prove that the claim has a real prospect of success (*Re Blenheim (No.1)* at 572). The merits of the claim must be more than *"merely shadowy"* (*Re Blenheim (No.2)*, p. 831).

iv) Refusing to restore a company on the grounds that it was its own fault that it was struck off will be a too great a penalty to impose *"in the overwhelming majority of circumstances"* (*Re Blenheim (No.2)*, p. 830).

v) The court must consider the interests of third parties who may be affected by the restoration but should only take into account prejudice that is directly attributable to the restoration, rather than to any other circumstances (*Re Blenheim (No.1)* citing *Priceland* at p.215).

vi) In deciding whether it is just to restore a company to the Register, the court must have regard to all of the circumstances of the case and it is not limited to considering the position at a particular date (*Re Priceland Ltd* at 211). Relevant circumstances can include the basis of removal of the LLP from the Register, the reasons for restoration and all other intervening events. The weight to be given to any fact or matter is for the judge to decide (*Re Blenheim (No.1)* at 571).

173. The Claimants relied upon *Witherdale v Registrar of Companies* [2005] EWHC 2964 (Ch) where Evans-Lombe J dismissed an application to restore based on (1) the lack of purpose in restoring the company's name to the Register (2) the fact that the applicant had relied on the evidence of a misleading witness and (3) the fact that there was a history of forgery by the applicant on separate proceedings. Neuberger J also considered the inaccuracies and inconsistencies in the evidence put forward by the applicant in *Re Blenheim* but decided on the facts that there had been no bad faith. These cases illustrate the obvious – that each case depends on its own facts.

Discussion

174. In my view, this is an exceptional case. The administrative restoration of Infund was procured by fraudulent misrepresentations and forgery. I consider it just to declare that the Registrar should rectify the Register, amongst other things, to reverse the restoration of Infund to the Register. I do not consider that it would be just, in all of the circumstances, to allow Infund to be restored to the Register.

175. Furthermore, the only purpose of the Restoration is to enable Infund to pursue the Fourth Mexican Proceedings, and I am satisfied that the claim is shadowy, and does

not have a real prospect of success. The Defendants alleged that I should not reach this conclusion in the absence of evidence of Mexican law. I bear in mind that: the claim has not been struck out in Mexico; an interim injunction freezing the Disputed Shares has been granted and remains in place; and when the court in Mexico dismissed the Fourth Mexican Proceedings, it found that none of the parties had acted recklessly or in bad faith such that no special provisions applied in relation to costs.

176. However, this is a case where it is clear on the documents which I have been shown that the Fourth Mexican Proceedings are based upon dishonest assertions of fact, rather than disputed issues of law. I find that the claim in the Fourth Mexican Proceedings is shadowy for the following reasons.

177. First, when this claim was considered on the merits by the Mexican Court in the Fourth Mexican Proceedings, it was comprehensively rejected.

178. Secondly, the claims in the Fourth Mexican Proceedings are inconsistent with the claims made by Mr Garcia in the First and Second Mexican Proceedings:

    i) In the First Mexican Proceedings, Mr Garcia claimed a bonus for arranging the mechanics of the finance to enable AMC to purchase the Asarco bonds, and to enable Mr Larrea and others to subscribe to new shares issued by GM, including the Disputed Shares. There was no suggestion in those proceedings that Mr Garcia or Infund had actually provided any of the finance.

    ii) Mr Garcia's story changed in the Second Mexican Proceedings, where he claimed that Mr Larrea had purchased the Disputed Shares as agent for Mr Garcia, using monies contributed by Mr Garcia from his own funds.

    iii) Mr Garcia's story changed again in the Fourth Mexican Proceedings where he claimed that Infund had entered into a commercial agency agreement with Mr Garcia for the purchase of the Disputed Shares. This is contradicted by evidence given by Mr Garcia in the Second Mexican Proceedings that there was no contractual agreement between Infund and Mr Larrea [E6/33/1412-1413].

    iv) In the Fourth Mexican Proceedings it is asserted that Infund provided funds for the purchase of the Disputed Shares, whereas in the Second Mexican Proceedings Mr Garcia claimed that he had contributed the purchase money from his own funds.

179. Thirdly, Infund's claim in the Fourth Mexican Proceedings to the Disputed Shares is inconsistent with the contemporaneous documents concerning the GM restructure, which I have considered earlier in this judgment. From these documents, it is apparent that Mr Larrea purchased the Disputed Shares; that the Larrea Promissory Note was sold by Infund to Bonuserv LLP in December 2003; that Mr Garcia did not make any contribution of $42,900,000 to Infund; and that Infund is not entitled to the Disputed Shares.

180. Fourthly, the Fourth Mexican Proceedings are based on the proposition that the Larrea Promissory Note is a forgery, which is also pleaded in the Defence to the Rectification Claim. This allegation is false. The Larrea Promissory Note is referred

to in the annual report and financial statements which were forwarded by Mr Garcia to Pearse in 2007, which I have considered above.

181. Finally, the order of bank transfers on 17 October 2003, which I have set out above, has been deliberately reversed in the Fourth Mexican Proceedings, to give the false impression that the AMC Promissory Note was paid before the Disputed Shares were purchased [E6/16/746-750]. Otherwise, there is no explanation as to how Infund had the funds to purchase the Disputed Shares. In fact, the AMC Promissory Note was paid after the Disputed Shares had been purchased.

182. In all the circumstances I do not consider that it would be just to restore Infund to the Register. Therefore, gateway (c) is not satisfied and I reject the Restoration Claim.

Overall conclusion

183. I conclude as follows:

i) The court has power to order rectification of the Register as sought by the Claimants in the Rectification Claim;

ii) Mr Garcia provided inaccurate material on the forms required for administrative restoration;

iii) this factually inaccurate material was dishonestly provided by Mr Garcia;

iv) the Corplaw Entities were entitled to resign as members of Infund in 2006;

v) the information provided by Mr Garcia that Infund was carrying on a business or in operation at the time of its dissolution was factually inaccurate;

vi) this information was dishonestly provided by Mr Garcia;

vii) Mr Garcia made false representations to BDO in order to procure the accounts necessary for the restoration of Infund;

viii) Mr Garcia and Mr Peralta forged the June 2003 Mandate and the Claimants are entitled to rely upon this forgery;

ix) the section 1096(3) considerations favour rectification of the Register;

x) the court should exercise its discretion to grant a declaration;

xi) the court should not order the restoration of Infund.

184. For the reasons set out above the Rectification Claim succeeds and the Restoration Claim is dismissed.