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No share register? No problem. Inferring the existence of the non-existent

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The share register required by s 87 of the Companies Act 1993 (the Act) is a fundamental document for a company. Maintaining one is not optional, like having a constitution, and there are heavy penalties for non-compliance. If a company has no share register then, *prima facie*, the company and each director have committed offences and could be liable for fines of up to $10,000 (s 87(4)); no shares have been issued (s 51), which could give grounds for the Court to put a company into liquidation (s 241(4)(c)); directors have breached their duties (s 90); and an application to court for rectification is required (s 91). Or so you might have thought — now, as a result of Justice Brewer's decision in *Tyrion Holdings v Claydon* [2015] NZHC 428, it seems possible for a court to infer the existence of a share register. This article discusses his Honour's reasoning, and some of the potential issues with it.

The plaintiff (Tyrion) sought the return of assets belonging to Infrastructure NZ Ltd (INZL) that Tyrion alleged had been misappropriated by the first defendant, director and 50% shareholder of INZL (Mr Claydon), and subsequently transferred to Infrastructure & Civilworks Ltd (the second defendant). Tyrion applied for orders under s 174 of the Act on the basis it owned 50 per cent of INZL's shares, but a preliminary issue arose. The parties disagreed as to whether Tyrion was a 'shareholder' under the Act. Justice Brewer was called upon to determine that preliminary issue of standing.

The main problem for the Court was that "there is no share register known to the parties, and there is no direct evidence that a share register ever existed" (at [8]). Here is how his Honour resolved that problem (at [11], [13], and [14]):

> I have decided, on the balance of probabilities, that INZL did originally have a share register … It is a standard document and I infer that it would have been prepared …
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> I infer that a company which was incorporated professionally, and had changes of shareholdings which were notified to the Companies Office by professional advisers, more likely than not had an operating share register. Therefore, in 2008, I infer that Tyrion's shareholding of 50,000 shares was entered into the share register which, either because of changes of professional advisers or because of confusion caused by Mr Blomfield's actions, has gone missing.
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> I acknowledge that there is no evidence of INZL records showing the receipt of share transfer forms for the transfers to Tyrion and which would have prompted registration in the share register. But, I infer that, on the balance of probabilities, this occurred … a professional adviser notified the Companies Office of the changes in shareholding which resulted in Tyrion holding 50,000 shares. It is inherently unlikely that he did that without INZL's records showing that to be the case.

So, no share register? No problem. Based on *Tyrion* its existence may be inferred, provided a professional firm incorporates the company and notifies changes in shareholding to the Companies Office. The court may also infer that all the transactions noted in the Companies Office's records were entered in that share register. Evidence of industry practice regarding the keeping of share registers is not required. For the reasons that follow, making such inferences in the context of an application under s 174 is neither desirable nor necessary.

The Companies Office records are a good place to start. *Tyrion* suggests that by virtue of a professional adviser notifying changes in shareholding to the Companies Office, it is reasonable to infer that a share register exists and that those changes were entered in it. The authors respectfully disagree. Our experience is that most companies do not have a proper share register, even when professionally advised and despite the Companies Office records being up-to-date. Some directors and professionals even think the Companies Office website *is* the share register. This may be because they have never personally used the site, thus would not have seen the following warning:

> This online service allows you to update Companies Office records at any time to reflect the current shareholding of the company. You must ensure that the company's own share register is also updated.
> I am aware of the requirements of [s] 87 of the Companies Act 1993 that requires every company to maintain a share register that records the company's share and shareholder details.

To be fair, Justice Brewer does acknowledge that the Companies Register cannot be an alternative or *de facto* share register (at [17]). This is surely correct, and in line with the above warning reinforcing the requirements of s 87 of Act. However, his Honour goes on to say that it is legitimate to use the Companies Office records as "evidence of the contents of a missing share register" (at [17]). That is where we diverge.

In our opinion, a missing share register ought to mean there is no share register at all, even if one may have existed in the past. The requirement in s 87 of the Act is to *maintain* a share register - clearly a continuing obligation. This means the share register of a company is a live document. It must always reflect the current details of the company's shares and

shareholders. Failure to have a share register now should, therefore, be seen as a failure to have share register *per se*. In *Tyrion*, there may well have been a share register in 2008. We struggle to see how that could assist the Court in determining a question of standing in 2015, when the share register clearly no longer existed.

The involvement of a professional firm in the company's incorporation is as irrelevant as the Companies Office records. The company and its directors are still primarily responsible for maintaining the share register, and liable for the consequences of not doing so. It is difficult to see how a firm's actions could have any bearing on the existence of a share register unless that firm was appointed agent under s 84(3) of the Act. Agency ought to be a minimum requirement for inferring the actions of a third party. Even then, the Court should have the benefit of expert evidence regarding industry practice before assuming how a professional agent would behave. There was no such evidence in *Tyrion*, nor any finding of agency.

The lack of a share register in *Tyrion* is perplexing considering Mr Claydon's position. As director he would have been responsible for maintaining the share register. By arguing that there was no share register, he was risking criminal and civil liability. Mr Claydon also claimed to own 50 per cent of INZL's shares. While he, unlike Tyrion, could claim to be a shareholder by virtue of being named in the application for INZL's registration (s 96(b)), there would be no evidence his shares were ever issued without a share register recording the issue (s 51). This, in turn, would affect Mr Claydon's ability to exercise rights attached to his shares, because a company is entitled to treat the registered holders of shares as the only persons entitled to exercise those rights (s 89(2)). Mr Claydon's argument that there was no share register thus went against his own interests, in that it could have meant his own shareholding was uncertain. None of these issues are mentioned in the judgment.

So how should situations like the one in *Tyrion* be resolved in the future? Needless to say, the best advice is to avoid such situations altogether by maintaining a proper share register.

Rectification is a good option. Section 91 of the Act provides that if the name of a person is wrongly omitted from the share register, the person aggrieved, or a shareholder, may apply to the Court for rectification. If a company has been registered but a share register does not exist then, by definition, a person's name has been wrongly omitted. This is because a company must have at least one share and one shareholder (s 10), and only the share register records the issue of shares (s 51). While this would still require Tyrion to establish standing, this time as a "person aggrieved", in our opinion it makes much more sense than finding standing by inferring the existence of a missing document.

We acknowledge that the concept of rectifying a document that does not exist seems strange. However, the definition of share register in s 2(1) of the Act suggests that a non-existent share register may still be rectified under s 91. The definition refers to the "share register required to be kept under [s] 87," not the document that is actually kept (or not kept) by the company. Accordingly, rectification of a 'share register' ought to be allowed even when the requirement to prepare the document has not been satisfied.

Justice Brewer discussed rectification, as it was the alternative relief sought in Tyrion's application. He went so far as to say that he would have granted rectification had he needed to (at [20]). In our view, that was the preferable order to inferring the existence of a document as fundamental as a share register. Furthermore, only rectification would have assisted INZL in resolving future issues associated with it having no share register.

A good preliminary step for a plaintiff in Tyrion's situation would have been to seek disclosure of the share register from the company. A share register is a public document. It can be inspected by anyone under s 215 of the Act, provided adequate notice is served. The company has three working days from the date of notice to make disclosure. Failure to comply is an offence for the company and its directors. If Tyrion sought compulsory disclosure of INZL's share register using this method, Mr Claydon would have been obliged to provide it or risk committing further offences under the Act. If he responded saying there was no share register, Tyrion would have immediate grounds to apply for rectification.

The expanded definition of "shareholder" in s 163 could have also assisted the Court. That defines "shareholder" to include persons who have had shares transferred to them by operation of law. Tyrion is arguably such a "person", having received its shares by way of transfer from former shareholders — persons apparently accepted by Mr Claydon to have been former shareholders. This argument is possible despite any restrictions or limitations in the company's constitution regarding transfer (s 86).

There was one further avenue available for his Honour. In seeking to answer the question of whether Tyrion was a 'shareholder' under the Act, he could have begun at s 2(1), rather than s 96 to which it refers. The opening proviso to s 2(1) reads "[i]n this Act, unless the context otherwise requires". Arguably, the facts of *Tyrion* provided the appropriate context in which to apply a different meaning of shareholder for the purposes of s 174 of the Act.

As is clear from the above, our overall criticism of *Tyrion* is not so much about the result, but the lack of importance it places on maintaining a share register. If its existence can be inferred, why bother maintaining one at all? Why bother maintaining an interests register for that matter, or any other document or register required by the Act? A company can simply use professional advisers and keep its Companies Office records up-to-date. Parliament cannot have intended this approach in enacting the share register provisions of the Act. It is clearly not the right message to send to New Zealand companies who, in our experience, are already struggling to comply with the Act. The message should be precisely the opposite; that a share register is a very important document and the consequences of not having one can be significant.

While the result in *Tyrion* may be entirely correct, the authors respectfully consider the reasoning used was flawed. There were many other ways to find that Tyrion was a shareholder despite there being no share register, including rectification, compulsory disclosure, and a contextual interpretation of s 174. We also believe the standard of compliance with s 87 of the Act by New Zealand companies, including those that are professionally advised, is not high enough to justify inferring the existence of a share register. Having accurate records with the Companies Office is no answer. At the very least, the Court should have the benefit of expert evidence of industry practice before making such an inference. ❐