

Companies Act 2006

In the matter of application No 508 by Agility UK Limited for a change to the company name of Agility Group (GB) Limited, registered in England and Wales under No. 06596216.

1) Agility Group (GB) Limited (“the respondent”) was incorporated under a different name on 19 May 2008 and following several changes of name changed its name to the current name on 16 September 2011.

2) On 26 October 2012, Agility UK Limited (“the applicant”) applied for an Order under section 69 of the Companies Act 2006 (“the Act”) for the company name of Agility Group (GB) Limited to be changed. The applicant is a division of Agility Group, that claims it has traded since 2007 and is in the field of training and consultancy relating to human resources and health and safety and has built up a significant goodwill and reputation. The grounds of the application are that:

- Its goodwill and reputation is in consultancy and training services in the field of HR and health and safety and a registration of the respondent’s name would, and is calculated to, take unfair advantage of that goodwill and intended to cause confusion;
- In registering its name, the respondent acted in bad faith;
- The respondent’s offer to sell its IP and brand is an indication of bad faith.

3) The respondent filed a counterstatement denying the grounds and claiming that:

- It acted in good faith in registering the name as the name of the parent company of two other business units which operate under the trading styles of the respondent;
- No other companies, at the time, were trading as a group under the brand “Agility” and it believed it would not cause any other company duress;
- Unlike its first choice name, it was not required to contact the applicant by Companies House in order to obtain permission. It therefore considered that its choice of name was acceptable;
- The respondent currently operates under the name as it is the parent company of two revenue companies and has been able to realise modest growth profiles;
- It did offer to transfer its IP and brand for £100,000 that it believes is a fair price and is, in fact a demonstration of good faith and not bad faith as claimed.

Evidence and factual background

4) Evidence has been provided in the form of witness statements by Mark Hughes, director of the applicant; Simon Scotchbrook, managing director of the respondent, and; Robert Alexander Cobley, solicitor with Harrison Clark Rickerbys Ltd and instructed by the applicant to reply to Mr Scotchbrook evidence.

5) Based on the information provided in the statement of grounds, counterstatements and the evidence, it is common ground that:

- The respondent, when it was called Qdel Limited, applied to Companies House to register a change of name to “Agility Group Limited”. At the behest of Companies House, the respondent was required to write to the applicant seeking permission for such a change because it was considered to be too close to the applicant’s company name. It did so on 11 August 2011;
- On 17 August 2011, the applicant replied stating that it did not consent and provided information that it claimed illustrated that it operated under the names “Agility Group” and “Agility UK”;
- The respondent subsequently proceeded to register the amended name “Agility Group (GB) Limited” on 16 September 2011 i.e. as per its original intended name but with the addition of “(GB)”. Companies House did not require the respondent to write to any company regarding this amended name;
- The applicant wrote to the respondent setting out its concerns on 5 October 2012 (a copy of the letter is provided at Appendix 1 to Mr Scotchbrook’s witness statement). It states that it was also in the process of registering this company name and has already been developing the trading style for some months;
- The respondent replied, dismissing its concerns, and offering to transfer the intellectual property for £100,000;
- The applicant subsequently commenced these proceedings on 26 October 2012;
- The respondent was developing an “Agility Group Limited” trading style but it is disputed whether, at the time, the group members were operating under an “Agility” banner;
- Customers/potential customers of the respondent have contacted the applicant in the mistaken belief that they were the same company;

6) The parties disagree on a number of issues with both sides providing some evidence on these issues. We will not summarise this evidence further here, but we will refer to it, as appropriate in our decision. The issues that we consider determinative of these proceedings are discussed below.

DECISION

7) Section 69 of the Act states:

“(1) A person (“the applicant”) may object to a company’s registered name on the ground—

(a) that it is the same as a name associated with the applicant in which he has goodwill, or

(b) that it is sufficiently similar to such a name that its use in the United Kingdom would be likely to mislead by suggesting a connection between the company and the applicant.

(2) The objection must be made by application to a company names adjudicator (see section 70).

(3) The company concerned shall be the primary respondent to the application.

Any of its members or directors may be joined as respondents.

(4) If the ground specified in subsection (1)(a) or (b) is established, it is for the respondents to show—

(a) that the name was registered before the commencement of the activities on which the applicant relies to show goodwill; or

(b) that the company—

(i) is operating under the name, or

(ii) is proposing to do so and has incurred substantial start-up costs in preparation, or

(iii) was formerly operating under the name and is no dormant; or

(c) that the name was registered in the ordinary course of a company formation business and the company is available for sale to the applicant on the standard terms of that business; or

(d) that the name was adopted in good faith; or

(e) that the interests of the applicant are not adversely affected to any significant extent.

If none of these is shown, the objection shall be upheld.

(5) If the facts mentioned in subsection 4(a), (b) or (c) are established, the objection shall nevertheless be upheld if the applicant shows that the main purpose of the respondents (or any of them) in registering the name was to obtain money (or other consideration) from the applicant or prevent him from registering the name.

(6) If the objection is not upheld under subsection (4) or (5), it shall be dismissed.

(7) In this section “goodwill” includes reputation of any description.”

Does the applicant have the requisite goodwill?

8) The applicant must first establish that it has goodwill or reputation in relation to a name that is the same, or sufficiently similar, to that of the respondent company and use of that name in the UK would be likely to mislead by suggesting a connection between the respondent and the applicant. If this burden is fulfilled it is necessary to consider whether the respondent can rely on any of the defences under section 69(4) of the Act.

9) The name in question is AGILITY UK LIMITED (see the answer to question 9 of the Form CN1). The applicant must show that it had goodwill under this name at the date of the applications before us, namely 26 October 2012: see *MB Inspection Ltd v Hi-Rope Ltd* at paragraph 43.

10) In response to question 10 of the Form CNA1, the applicant provides details of the claimed goodwill and reputation stating that it is a division of Agility Group, providing its services “under the name Agility in the UK since 2007”. In support of this claim, Mr Hughes provides turnover figures (paragraph 8 of his witness statement) illustrating that the “Agility Group” had an annual turnover in the region of £5.8 million to £7 million between 2007 and 26 October 2012. It is not clear what proportion of this relates to the applicant company alone, nor is it clear that turnover generated by other members of the group related to a name featuring the word AGILITY. There are some claims and counterclaims on this point, but no corroborative evidence either way. It is known that the name AGILITY GROUP was used internally since 2004 but not publicly until May 2012 (see Mr Mr Cobley’s witness statement, paragraph 8).

11) At Exhibit MH2, Mr Hughes provides an undated screen shot of the applicant’s website illustrating the use of the mark shown below. Much of the text content is illegible and there is no obvious other reference to a name incorporating the word AGILITY other than the email address info@agilityuk.com that appears at the top of the page.



12) At Exhibit MH3, Mr Hughes also provides screen shots from the portal website for the AGILITY GROUP. Rather misleadingly he states that its address www.agilitygroup.com was registered on 25 July 2004 but, as we know from Mr Cobley, it could not have been used externally of the group of companies until May 2012. Again, much of the smaller text is illegible and the pages are undated. Therefore it cannot be ascertained if they were in existence on or before 26 October 2012. However, the same exhibit also contains a print out of the website www.agilityukgroup.com obtained from the archive.org, an Internet archive. Again, due to the poor print quality of the exhibit it is not possible to ascertain the precise date, but it can be seen that it is sometime in 2011. We reproduce the relevant extract below:



13) Internal company documents are not evidence of goodwill, but we note that Mr Hughes provides, at Exhibit MH4, a copy of an agenda for a board meeting of the applicant, dated July 2011. The front cover carries a logo featuring the words AGILITY UK.

14) At Mr Hughes' Exhibit MH6 is a copy of the applicant's reply letter to the respondent, dated 17 August 2011 (referred to at the second bullet point of paragraph 5, above). In it, the writer states that the applicant "already owns and operates a series of domain names agilitygroup.com and agilityukgroup.com and use these sites in our trading operations" and that the applicant "have invested considerable time and money on development of this trading title." The implication is that the applicant has goodwill identified by names that incorporate the word AGILITY.

15) The requirement of section 69(1)(a) of the Act is that the company name is the same as a name associated with the applicant in which it has goodwill.

In this case the names associated with the applicant include “Agility UK” and “agility uk”, the company name to which it objects is “Agility Group (GB) Limited”. Nothing turns upon whether the names are part of a logo or written in upper case or title case as the Act relates to the name and not a particular graphical form of a name. A company name must be identified by a reference to the designation of the nature of the company (with certain exceptions), in this case, “limited” or “ltd”. An undertaking cannot trade by reference to a company name under which it is not incorporated and, under section 66 of the Act, identical company names cannot be registered. Taking this into account, Section 69(1)(a) of the Act would be virtually redundant if it requires the name upon which the applicant relies to include the designation of the nature of the company. For the purposes of Section 69(1)(a) a company name and the name associated with an applicant are the same if the only difference arises is from the designation of the nature of the company. Consequently, the name upon which MB relies and the company name are the same.

16) Taking all of the applicant’s evidence together, whilst it is far from overwhelming, we find that it is sufficient for us to conclude that the applicant has the requisite goodwill to bring a claim under Section 69 of the Act.

Is the respondent operating or proposing to do so?

17) Section 69(4)(b)(i) and (ii) provides for a defence if the respondent is operating under the name or is proposing to do so and has incurred substantial start-up costs in preparation.

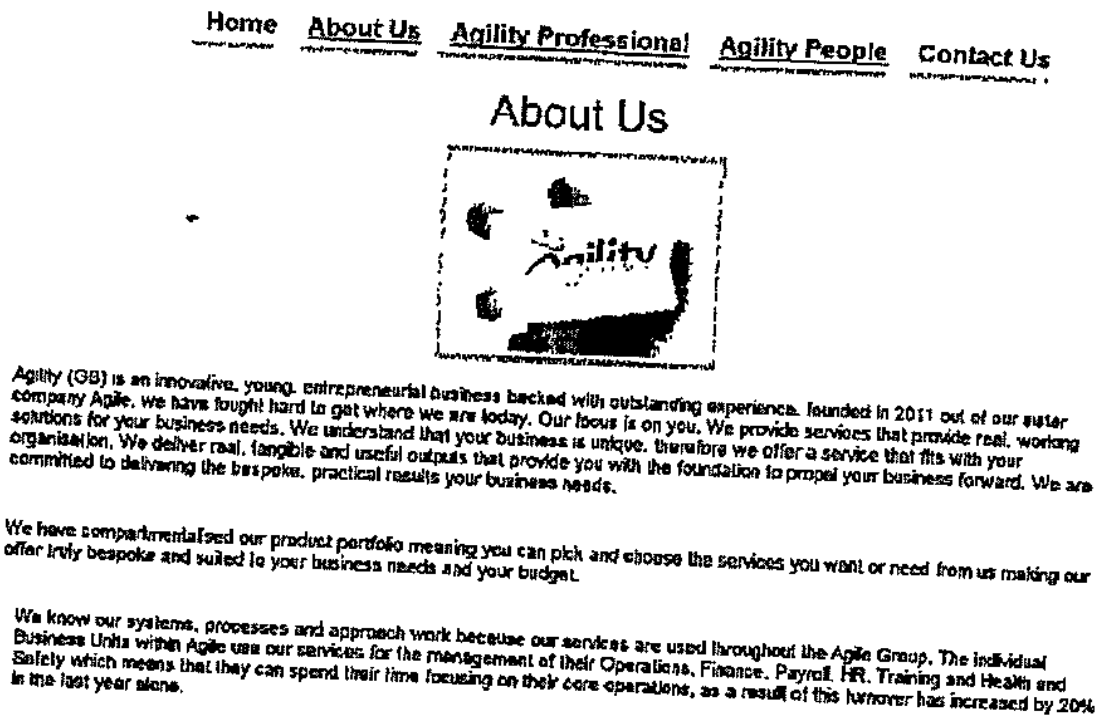
18) Therefore, the applicant’s case must fail (unless it can establish that the main purpose of the respondent in registering its name was to obtain money) if the respondent is operating or has invested substantially in preparing to start operating.

19) In the respondent’s counterstatement and in his witness statement, Mr Scotchbrook states that the respondent is the parent company of two other companies which operate under the trading styles of the respondent. These companies are Agility People Services Ltd and Agility Professional Services LLP. He states that the brand has been developed over the year (the form is dated 18 December 2012, therefore it is reasonable to interpret the reference to “over the year” as relating to the year 2012) and it has developed “significant value” via its marketing activities, website development and direct lead generation. Further, he states that the companies have realised “a modest growth profile” and “generating a few hundred thousand pounds”. He states that about twenty staff are employed and the group is sustainable and profitable. The respondent’s letter of 11 August 2011 (referred to at the first bullet point of paragraph 5 above, a copy of which is provided at Mr Hughes’ Exhibit MH1) stated that the respondent company would “be the parent company for [its two other companies] but will not be conducting any external trade directly with the public and therefore should not have any direct impact on [the applicant’s] business activities”.

20) We consider that the activities of the respondent as a parent company of two actively trading companies using the parent company’s trading style constitutes the parent company as “operating” within the meaning of Section 69(4)(b)(i) of the Act.

21) Taking account of this together with the other points discussed above suggests that the respondent, through its two companies, is operating under a style that incorporates the name Agility. Further, it is common ground that some customers of the respondent have been contacting the applicant by mistake (see Mr Hughes' witness statement, paragraph 13). This is a further indication that the respondent is actually operating and that, as part of its operating style, it uses the name Agility.

22) However, Mr Cobley, in his witness statement challenges whether the respondent's two companies operate under the style of Agility Group (GB) Ltd. To support this he provides the following two extracts from the respondent's website:



and

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23) Mr Cobley's states that the "website clearly refers to the trading style of Agility Group ..." Whilst he does not develop his comment further, we assume that the point he is attempting to make is that the respondent does not use "Agility Group (GB) Ltd" as part of the trading style. The first of the above website extracts illustrates the

respondent using a logo that includes the word “Agility” as well as “Agility Professional”, “Agility People” and “Agility (GB)”. Mr Cobley points out that the second extract refers to not only “Agility Group (GB) Ltd” but also to “Agility Group Ltd” and that this seeks to confuse the visitor to the website as to the correct identity of the business. We see little in these arguments. The key point is that, whilst the respondent’s companies use various trading styles, they all incorporate the name “Agility”, being the element common to both parties’ names.

24) Taking all of the above into account, we conclude that the respondent may rely upon the defence provided by Section 69(4)(b)(i) because it is operating under the name “Agility” in various forms including “Agility Group (GB) Ltd” and “Agility Group (GB)”.

25) Even if we are wrong regarding whether the activities of the respondent in controlling its two companies’ trading styles amounts to it “operating” within the meaning of Section 69(4)(b)(i), it is clear from the circumstances surrounding its activities that the registration was made in good faith. The onus is on the respondent to establish that the company name was registered in good faith; it is not upon the applicant to establish that it was registered in bad faith.

26) In *(1) Adnan Shaaban Abou-Rahmah (2) Khalid Al-Fulaij & Sons General Trading & Contracting Co v (1) Al-Haji Abdul Kadir Abacha (2) Qumar Bello (3) Aboubakar Mohammed Maiga (4) City Express Bank of Lagos (5) Profile Chemical Limited* [2006] EWCA Civ 1492, the court noted that “good faith” is a broad concept and is capable of embracing a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty its.

27) An application to the Company Names Tribunal is not an alternative to an action for infringement or passing off. Taking account of the circumstances identified in paragraphs 3, 18 to 20, above, we are of the view that the respondent has shown evidence of good faith and the registration of its name does not, in context, prove bad faith and is not evidence of sharp practice. It’s registration of the mark was not to prevent the applicant from registering the name, but rather, it was motivated by a wish to protect and reflect its new trading style.

28) Consequently, the respondent can rely on the defence provided by Section 69(4)(d) of the Act.

Section 69(5) - main purpose to obtain money?

29) Having made such findings, the applicant may only succeed if it can demonstrate that the main purpose of the respondent, in registering the name, was to obtain money (or other consideration) from the applicant or prevent him from registering the name.

30) It is common ground that the respondent offered the applicant an opportunity to purchase “the brand” for the sum of £100,000. The applicant claims that this sum is disproportionate and is “clearly evidence of bad faith”. We note this claim, but the issue here is whether the *main purpose* of the respondent when incorporating its

name was to obtain money, not whether any offer was disproportionate. This is the only “bad faith” that this part of the Act is concerned with. The mere fact that at some stage in the communications between the parties, an offer of an opportunity to purchase “the brand” was made, does not necessarily mean that the main purpose for incorporating the name was to obtain money.

31) The respondent submits that it believed £100,000 was a fair price and may, in fact, have been undervalued. It states further that the fact that it was willing to discuss a sale demonstrates good faith. It points out that if the applicant wished to purchase the trading style of the respondent’s business, it would seek at least that price, but has a preference to continue trading without the need to change its trading style.

32) As we have already stated, whether the amount was fair or not, is not the issue we have to decide, but rather whether the main purpose of registering the name was to obtain money. The applicant does not assert this and the actions of the applicant do not suggest this is so. The evidence paints a picture of the respondent attempting to change its name and trading style, but found itself moving closer to the name and style of another business, namely that of the applicant. It went ahead with this (following a slight amendment to the name) in the mistaken belief that it would not elicit a negative response from the applicant, rather than with the intention to obtain money from it. The evidence suggests that the respondent adopted the name in good faith and that it wishes to retain its new trading style rather than sell it.

33) Taking all of the above into account, we are satisfied that the respondent’s aim, when registering the name, was not to obtain money from the applicant.

34) As a consequence of this finding, the respondent is able to rely upon a defence that it is operating under its name.

Outcome

35) The application fails because the respondent has established one of the defences under section 69(4) of the Act.

Costs

36) The respondent has been successful and is entitled to a contribution to its costs, according to the published scale in the Practice Direction. Both parties were content for costs to be awarded from the scale. Costs are awarded to the respondent as follows:

Considering the application and preparing a defence and counterstatement	£400
Preparing evidence and considering and commenting on the other side’s evidence	£900

Expenses

Official fee for filing a defence (CNA2)	£150
Official fees for filing evidence (CNA3)	£150
Total	£1600

37) In relation to the above stated award, Agility UK Limited is ordered to pay to Agility Group (GB) Limited the sum of £1600 within seven days of the expiry of the appeal period, or within seven days of the final determination of this case if any appeal against this decision is unsuccessful. Under section 74(1) of the Act, an appeal can only be made in relation to the decision to dismiss the application; there is no right of appeal in relation to costs.

38) Any notice of appeal must be given within one month of the date of this decision. Appeal is to the High Court in England Wales and Northern Ireland and to the Court of Session in Scotland. The Tribunal must be advised if an appeal is lodged.

Dated this 30th day of September 2014

Mark Bryant

Judi Pike

Beverley Hedley

Company Names
Adjudicator

Company Names
Adjudicator

Company Names
Adjudicator