

Companies Act 2006

In the matter of application No 355 by (i) Michael Timon and (ii) Redcroft Fire Ltd (formerly Redcroft Fire Maintenance Ltd) for a change to the company name of Timon Fire Protection Limited, registered in England and Wales under No. 07349664.

1. Timon Fire Protection Limited (“the respondent”) was incorporated under that name on 18 August 2010.

2. On 12 September 2011, Michael Timon¹ and Redcroft Fire Maintenance Ltd² (“the applicants”) applied for an Order under section 69 of the Companies Act 2006 (“the Act”) for the company name of Timon Fire Protection Ltd to be changed.

3. 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

¹ The first applicant.

² The second applicant is now called Redcroft Fire Ltd. Nothing in this decision turns upon the alteration to the second applicant’s name.

(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.”

4. This case turns upon section 69(5) of the Act. The applicants accept that the respondent has been operating, which gives the respondent a statutory defence under section 69(4)(b)(i) of the Act. The applicants can only succeed if they can show that section 69(5) applies. The applicants claim that the name associated with them is TIMON. As per section 69(1)(b), this is similar to the respondent’s name, the other elements of the name describing the nature of the company’s business.

5. Even if the applicants satisfy us that either or both of them have a goodwill/reputation of any description in TIMON, in the face of the accepted defence that the respondent company was operating at the date on which the application to the Tribunal was made, the application will fail unless the applicants can succeed under section 69(5). Since the focus of this case is whether the applicants can succeed under section 69(5), we do not propose to dwell on whether the applicants have met the burden of proving goodwill/reputation of any description. In any event, during cross-examination, Peter Timon, who is the *de facto* director of the respondent and one of its two controlling minds, accepted that the first applicant, Michael Timon, had (and has) a personal reputation within the fire protection business.

6. We record here that the notice of defence and counterstatement³ relies upon the defence of section 69(4)(d) (“good faith”) in addition to section 69(4)(b)(i) of the Act.

7. We heard oral argument from the parties’ representatives at a hearing held on 26 March 2014, during which the witnesses from each side were cross-examined. These were Michael Timon (the first applicant) and Peter Timon (for the respondent). Michael Timon and Peter Timon are the only witnesses who have given evidence in these proceedings. We found them both to be straightforward witnesses who answered the questions without evasiveness. Although, on occasion, the answers given appeared not directly to answer the questions, we feel that this was because the questions were simply not understood or not posed as clearly as they might have been. We do not put lack of clarity in answers by either witness down to evasiveness. For convenience, rather than calling both of them ‘Mr Timon’ in this decision, we will refer to them as Michael and Peter.

8. The applicants were represented at the hearing by Miss Denise McFarland of Counsel, instructed by Silverman Sherliker LLP. The respondent was represented by Mr Caley Wright of Counsel, instructed by Drukker Solicitors.

Evidence

9. Michael (the first applicant) is the co-owner and director of the second applicant (“Redcroft”), which is a fire protection systems business in South East London. Michael states that he set up business in 2001 and for “several years” operated as a sole trader under MICHAEL TIMON or MICHAEL TIMON SERVICES. Michael provides, in exhibit MT1, tax returns for 2003, 2004 & 2005, which show the business name as M.Timon Services; invoices and purchase orders for 2002-2003 to M Timon/Mike Timon/Mick Timon; and a bank statement from 2007, with the account name M Timon t/a M Timon Services. This account appeared at this date to be dormant because the balance was £36.65, there were no withdrawals and only a £0.02 deposit (presumably the annual interest on the balance). Michael provides a letter from the applicants’ accountants, Henry Reeves & Son, dated 8 August 2011, to Silverman Sherliker LLP, stating that the accountants first acted for Michael Timon Services in October 2002; that Michael Timon was a sole trader in fire protection systems; that Michael Timon Services ceased to trade on 30 September 2004; that apart from minimal trading in October 2002, December 2002 and January 2003, Redcroft started to trade in February 2003; and, during the period from February 2003 to 30 September 2004, the trade of Michael Timon Services was gradually transferred to Redcroft.

10. Michael states that, on 6 September 2002, he incorporated Redcroft, which is the name of his family house. During oral evidence, Michael explained that, in order to expand the business, he felt that he needed to trade as a limited company rather than as a sole trader, and that the Redcroft name had a more professional ring to it. He states that, in approximately 2004-2005, his business as a sole trader was merged with the second applicant into one commercial entity and that the goodwill in the “MICHAEL TIMON” brand was transferred to the second applicant:

³ Signed by the respondent’s sole *de jure* director, Sophie Timon.

“However it is a common knowledge among my clients that the Second Applicant is associated with myself and the “MICHAEL TIMON” brand...”

11. Michael states that he has worked in the industry for 30 years during which he has established goodwill and reputation in the TIMON name. Neither he nor the second applicant needs to advertise as most of the work comes from referrals from longstanding clients, who know of Michael. In 2003-4, Michael employed his nephew Peter Timon as a sub-contractor. Peter was, at that time, working in the field of air conditioning ducting. Michael states that in 2008 he stopped referring work to Peter because of complaints about Peter’s work. Michael felt that the goodwill and reputation in the TIMON name was being compromised. At that time, Peter’s business (as a sub-contractor to Redcroft) was called OKR First Limited, incorporated in 2006. Michael states that, on 18 August 2010, Peter and his wife Sophie Timon set up the respondent company providing the same services in the same locality as Redcroft.

12. Michael was asked, under cross-examination, whether the respondent had ever sought money from either applicant or offered to sell the respondent’s company name to either applicant:

“Q. And do you accept that he^[4] is trading under Timon Fire Protection?

A. Oh, yes. He is trading under it.

Q. And he is trading reasonably substantially, from my calculations, it is about £400,000 between November 2010 and September 2011?

A. Yes; he has done great.

Q. And Mr. Timon^[5] has never come to you and tried to sell you the name of his company, has he?

A. No.

Q. He has never tried to get money out of you in any way, has he?

A. No.”

13. It is clear to us from Peter’s written and oral testimony that, although officially his status is that of an employee of the respondent, he is, in fact (*de facto*), equal in status to his wife in terms of controlling the respondent. He is a *de facto* director of the respondent. In 2003, Peter started working for Redcroft, installing sprinklers and fire systems. From 2005, Peter was subcontracted to Redcroft, providing this work through his company called OKR First Limited. Peter stated at the hearing that clients would have been aware of him, but not that he worked for a company called OKR First Limited. Peter explained that he had originally planned to move into property development. He called his company OKR First Limited as OKR are the initial letters of Old Kent Road, which is the first item of property on the Monopoly game board.

14. The parties do not dispute that, from 2008, Peter was obtaining work as a subcontractor from other businesses. Michael stated at the hearing that the work was falling in quality and that, in any case, the law does not permit a company to subcontract only to one company. Peter’s explanation for working for other

⁴ Peter Timon, treated by Michael as synonymous with the respondent.

⁵ Peter.

customers is that he wished to expand OKR First Limited's business. In his first witness statement⁶, he explains:

"The name of OKR First gives no indication of what it does.

...

In mid-2010 I decided to incorporate Timon Fire, which reflected my name the industry in which I traded and described the type of services I provided. The company formed on 18 August 2010; Timon Fire commenced trading on about November 2010. Since commencing trading, it has accrued its own goodwill, independent of that of any residual goodwill which Redcroft may have in the [sic] TIMON."

15. Exhibit PT1 shows some 250 invoices in the name of Timon Fire Protection Limited ranging from 9 November 2010 to 2 September 2011. It is accepted by the applicants that the respondent was operating under the name at the date on which the application was made to the Company Names Tribunal, as shown by Michael's replies under cross-examination, reproduced at paragraph 11, above. This was also accepted by Miss McFarland at the start of her oral submissions.

16. Peter states, in his written evidence:

"I see no reason why my wife and I should not be able to (1) form a company (2) choose to adopt our own name for the company, which (3) describes the services which the company provides, which (4) I had been providing for some years."

17. Michael states, in his second witness statement dated 21 August 2012, that:

"The Respondent previously operated for many years under the name OKR First Limited and as far as I am aware there was no actual need for the Respondent to change his name other than to create association with my brand TIMON. By choosing a new company name incorporating my Trade Mark TIMON in relation to similar services the Respondent has acted in bad faith to take unfair advantage of my reputation in the business and to rely deliberately on goodwill accrued in the name TIMON."

18. Under cross-examination, Michael was asked why he had not chosen to incorporate his limited company (Redcroft) with the name TIMON; for example, M. Timon Services Limited or Michael Timon Services Limited, or any other similar name involving Timon and Services, rather than 'ditching', as Mr Wright put it, the Timon name. Michael said that he didn't need to use the TIMON name in the company name but that if he knew then what he now knows, he certainly would have included TIMON in the new company name. Likewise, under cross-examination, Peter was asked why he had changed from using the OKR First Limited company name and incorporated the respondent company, TIMON FIRE PROTECTION LIMITED. He was asked why he could not have used OKR First (or anything else)

⁶ 6 June 2012.

and descriptive words. His answer, as set out above, was that he wished customers to know the nature of the business and he saw no reason why he could not also use his and his wife's surname, when he had been essentially operating as Peter Timon, the OKR First Limited name not being visible to end customers, because he was subcontracted. Nobody else had registered TIMON in conjunction with a description of the fire protection business as a company name. Miss McFarland characterised this as jumping in before anybody else could register the name:

"Q. When you set up your company name -- I think we have established already that it was you and your wife who approached the accountants to do that -- I suggest to you that you had any and all options to choose from but you chose to adopt the company name that your uncle, Michael, had already established a good reputation in this particular industry in?

A. My uncle did not have a company name in this particular industry that was similar. My uncle's company, which was the only one that I was aware of my uncle running, and was the only one that I had ever been paid from, was Redcroft Fire. So in answer to your question, no, I was not aware of that.

...

MS. McFARLAND: Let's break it down. I think that you are absolutely right that your uncle had not adopted a limited company name using Timon prior to 2010. That is one of the points that you were making, Mr. Timon.

A. Yes; that is correct.

Q. I suggest, therefore, that you thought you would jump in and adopt a company name which included Timon to, effectively, take as a registered company that name which your uncle had already traded under for some considerable time prior to 2010. Do you or do you not agree?

A. No; I don't agree.

Q. I am going to be suggesting to the Tribunal that, clearly, you were aware, because of your previous trading history with your uncle, that he had that reputation. Do you understand that?

A. I was aware that my uncle, personally, had a good reputation; yes.

Q. And that that reputation was in the name Timon and it was in the fire-protection industry; correct?

A. That my uncle had a good reputation in the industry, yes, that is correct."

19. Michael states:

"As many of my clients are long-standing clients of M.Timon Services who continue to refer work to me after my business had been transferred to Redcroft, I submit that they will be able to recognise that M.Timon Services and Redcroft are associated entities and that Timon is not only my name but also the trade mark under which I continue to provide my services. Invoices issued to my clients clearly stipulate that Redcroft and M.Timon Services are the same entity."

Michael provided invoices in exhibit MT1 to his witness statement of 21 August 2012 which show, in small letters at the bottom, "M.Timon Services":

<p>Redcroft Fire Limited Redcroft House 108 Halfway Street Sidcup Kent DA15 8DB T: 020 8308 0232 F: 020 8300 1106 E: Info@redcroftfire.co.uk</p>												
<p><u>INVOICE NMS821</u></p>		<p>Date of Invoice: 15.08.2012 Payment Terms: 30 Days from invoice date Date Invoice Due: 15.09.12 Purchase Ord No. City-City / 00790693 Job No.</p>										
<p>Invoice Submitted To: Norland Managed Services Ltd City Bridge House 57 Southwark Street London SE1 1RU</p>		<p>Contract/Project Details: Bank of America 5 Canada Square London E14 5AQ</p>										
Item:	Description of Goods / or Services	Unit Price:	Quantity:	Net Price:								
Labour	Called to site due to cover cap dropping from sprinkler head			0.00 164.00 0.00 0.00 0.00 0.00 0.00 0.00 0.00 0.00								
Materials				0.00 0.00 0.00 0.00 0.00 0.00								
<p>All Payments To Be Made To: Redcroft Fire Maintenance Limited</p>				<table style="width: 100%; border-collapse: collapse;"> <tr> <td>Total Cost</td> <td style="text-align: right;">164.00</td> </tr> <tr> <td>CIS @ 20%</td> <td style="text-align: right;">32.80</td> </tr> <tr> <td>VAT @ 20%</td> <td style="text-align: right;">32.80</td> </tr> <tr> <td>Total Cost</td> <td style="text-align: right;">164.00</td> </tr> </table>	Total Cost	164.00	CIS @ 20%	32.80	VAT @ 20%	32.80	Total Cost	164.00
Total Cost	164.00											
CIS @ 20%	32.80											
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Total Cost	164.00											
<p>Registered Limited Company: 4528185 Registered Address: Redcroft House 108 Halfway Street Sidcup Kent DA15 8DN VAT Registered Number: 803 3992 30 <small>Incorporated within Redcroft fire Ltd is M.Timon Services</small></p>												

The invoices date from August 2012, after the respondent's evidence in which goodwill/reputation in TIMON was challenged. Mr Wright put it to Michael that the words at the very bottom of the invoices had been added as a result of this challenge. Michael confirmed that they had been added because of the necessity of bringing these proceedings, as was the filing of a trade mark application the month after the respondent was incorporated. Mr Wright also asked Michael about his

domain name registrations, which the respondent had also challenged in its evidence as being mere holding pages. Written evidence subsequently produced by Michael had included prints from a website which he said was operational. In the witness stand, Michael stated that the domain names were indeed all holding pages, apart from the website which, again had recently been designed in response to the respondent's trading, so after the date on which the application to the Tribunal was made.

Section 69(5) of the Act

20. The applicants accept that the respondent was operating at the time that they made the application to the Tribunal. This is a defence under section 69(4)(b)(i) which puts the burden upon the applicants to show that, notwithstanding this defence, the application should succeed by virtue of section 69(5) of the Act, which is repeated here, for convenience:

“(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.”

21. Miss McFarland submitted that:

- Although there was no request for money, the fact that the legislators included the words “or other consideration” means that the benefit to the respondent does not have to be just monetary;
- Benefits in kind can represent valuable consideration for money's worth;
- In this case, “other consideration” is represented by:
 - (i) the respondent has put itself in the position of a *de facto* licensee of TIMON as a trade mark, whether the trade mark is registered or not;
 - (ii) the ability of the respondent to approach and deal with the applicants' customers because of the established reputation of the TIMON name, in the sense of having an advantage not normally available to a new company without a reputation of its own;
- registration of “TIMON” as a company name by the respondent is, effectively, blocking the applicants should they wish to register a company name incorporating TIMON⁷, and that this was the intention behind registering the name.

22. There are two limbs to section 69(5): the first is that the main purpose of the respondent in registering the name was to obtain money (or other consideration).

⁷ It would have to be the same as, or 'too like' the respondent's name.

The second, alternative, limb is that the main purpose of the respondent in registering the name was to prevent the applicant from registering the name.

23. We feel that it is important to emphasise that the wording of section 69(5) refers to the main purpose of the respondent in registering the name. This has to be the actual or primary motive behind the decision to register the company name, not a by-product or effect of registration. The effect of any company name registration is that it blocks the registration of a name the same as or too like the company name. The effect of blocking does not mean that blocking was the main purpose. Peter's explanation for the genesis and intention behind the choice of name is that the name included a description of the business together with the surname of the controlling minds, Peter and Sophie Timon. Peter also refers to his own reputation as an individual with the name TIMON:

- “Q. Finally, Mr. Timon, we have already established that at the time you struck out on your own you had OKR First Limited trading ---
- A. That is correct.
- Q. --- and you chose to adopt, in addition, the new company, Timon Fire Protection Limited. I suggest that the only reason why you did that was to gain the commercial advantage associated with the pre-existing reputation in the name Timon that your uncle had previously built up in that name, and that you have no other good reason to adopt it. How do you answer that proposition?
- A. I say that that is not correct at all.
- Q. Can I just ask you this. Was there no reason at all that you could have continued using OKR First? It was a perfectly legitimate business, was it not?
- A. Because, when we were approaching customers, it did not state the industry that we were in.
- Q. Oh, I see. So if it had been OKR First For Fire or OKR Fire Protection Limited, that would have done the job, would it not?
- A. It could have been one of many permutations with the name Fire Protection that could have been done. However, I've got a personal reputation and it made sense to me to use Timon Fire Protection.
- Q. You are saying that in August 2010 you had already built up at that time a personal reputation in the fire-protection industry yourself. Is that your evidence?
- A. Yes; I would suggest so. That could be seen by the amount of customers who continually use me and the fact that I have been in that industry since I was 18 or 19.”

24. Michael stopped using TIMON in his (unregistered) company name in 2004; he states that he did not need to use the name in his company name. He chose to incorporate under an entirely different name (Redcroft). The respondent did not incorporate TIMON FIRE PROTECTION LIMITED until six years later and started using the name to trade, more or less immediately. This immediate commencement of trade does not sit well with an allegation that the main purpose of the registration was to prevent the applicant(s) from registering the name; one would expect that if that was the main purpose, it would remain unused by the respondent. There is no evidence of such an intention. Moreover, the gap of six years between the cessation

of use of Timon as a trading style and Redcroft starting to trade, and the respondent incorporating and starting to trade, does not strike us as a case of 'jumping in ahead' of anyone, let alone showing that the main purpose was to prevent registration of the name. The applicants agree that the respondent has never sought to sell the company name to the applicant(s). The applicants have failed to make out their case in relation to the second limb of section 69(5); namely, that the main purpose of registering the name was to prevent the applicant(s) from registering the name.

25. In relation to the first limb, that the main purpose of the respondent in registering the name was to obtain money (or other consideration) from the applicants (either of them), it is accepted by the applicants that neither the respondent, nor Peter or Sophie Timon, have ever sought money from them. In reply to Miss McFarland's submissions about the meaning of "other consideration", Mr Wright submitted:

"In my submission, the meaning of the Act is quite clear. It is a circumstance -- I think the Tribunal referred to it earlier -- where you know a company is going to want to register a name, you register it first and then you seek to charge an extortionate or inflated price for it. The only reason "(or other consideration)" is included in the Act -- this is in the wording of the Act in sub-section (5) -- is to cover someone not going to the company and saying, "I have registered this name" and not demanding money but wanting something else, be it goods or whatever. There are all sorts of things that one might demand rather than money, and that is the mischief that the Act is intending to cover, not incidental benefits or indirect benefits that might be achieved by registering the name.

...

...even if the only reason that Peter Timon and his business, Timon Fire, had managed to build up the amount of orders they have is because thought that they were going to Michael Timon, that would not be enough to satisfy this part of the Act. It is quite clear that through the wording the registering of the name was to obtain money from the applicant, so it has to be something that you get directly from the applicant. That cannot be something that affects the goodwill or an infringement of the trade mark, which is what my learned friend is relying on."

26. We agree with this submission. Section 69 of the Act is intended to provide redress against opportunistic company name registrations, or in simpler language, company name squatting, i.e. holding a company name in order to extract consideration from a party with a trading interest in that name or to prevent registration. It was not intended to replace, or provide an alternative to, passing-off or trade mark infringement proceedings, where the alleged benefits to a defendant accord more closely with Miss McFarland's interpretation of "other consideration". Section 69 refers to the obtaining of money, with other consideration following in brackets. The brackets indicate that 'other consideration' is something similar to money, as submitted by Mr Wright: for example goods, or property. It does not cover placing oneself in the position of a licensee, obtaining unfair advantage, or passing off one's goods or services as those of another trader.

27. The application fails because the respondent can rely on the defence provided by section 69(4)(b)(i) of the Act.

28. The respondent also relies on s.69(4)(d): that the company name was adopted in good faith. However, as we have found that the respondent has a defence under section 69(4)(b)(i), there is no need to examine whether this provides a further defence.

Outcome

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

Costs

30. 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	£1000
Preparing for and attending the hearing	£1000
<u>Expenses</u> ⁸	
Official fee for filing a defence (CNA2)	£150
Official fees for filing evidence (CNA3) £150 x 2	£300
<u>Total</u>	<u>£2850</u>

31. In addition to these expenses, the respondent is entitled to request the reasonable travel and accommodation expenses for its witness, Peter Timon. If the respondent wishes to claim such expenses, it must send submissions to that effect, with a breakdown of expenses supported by receipts, to the Tribunal within ten days of the date of this decision. The applicant will have ten days from receipt of the respondent's submissions to file any submissions in reply concerning the claimed expenses in relation to the respondent's witness. The Adjudicators will then issue a supplementary decision covering this aspect of expenses, unless there are no submissions from the respondent.

⁸ The CNA4 to request a hearing was filed by the applicants.

32. In relation to the above stated award of £2850, Michael Timon and Redcroft Fire Ltd, being jointly and severally liable, are ordered to pay to Timon Fire Protection Limited the sum of £2850 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.

33. 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 2nd day of May 2014

Judi Pike

Oliver Morris

Mark Bryant

Company Names
Adjudicator

Company Names
Adjudicator

Company Names
Adjudicator