

ORDER under the Companies Act 2006

In the matter of application No 588

By Virgin Enterprises Limited

for a change of company name of registration

No 08262371

DECISION

1. Section 69 of the Companies Act 2006 (“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 now 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 those 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.”

2. The company name VIRGIN AFRICA LIMITED (“VAL”) has been registered since 22 October 2012.

3. By an application filed on 26 June 2013, Virgin Enterprises Limited (“VEL”) applied for a change of name of this registration under the provisions of section 69(1) of the Act. Rule 3 of The Company Names Adjudicator Rules 2008 (“the rules”) reads:

“3.—(1) An application under section 69(2) shall—

(a) be made on the appropriate form;

(b) include a concise statement of the grounds on which the application is made;

(c) include an address for service in the United Kingdom; and

(d) be filed at the Office.

(2) The adjudicator shall send a copy of the appropriate form to the primary respondent.

(3) The adjudicator shall specify a period within which the primary respondent must file its defence.

(4) The primary respondent, before the end of that period, shall file a counter-statement on the appropriate form, otherwise the adjudicator may treat it as not opposing the application and may make an order under section 73(1).

(5) In its counter-statement the primary respondent shall—

- (a) include an address for service in the United Kingdom;
 - (b) include a concise statement of the grounds on which it relies;
 - (c) state which of the allegations in the statement of grounds of the applicant it admits and which it denies; and
 - (d) state which of the allegations it is unable to admit or deny, but which it requires the applicant to prove.
- (6) Any member or director of the primary respondent who is joined as a respondent to the application must be joined before the end of a period specified by the adjudicator.
- (7) The adjudicator shall send a copy of the appropriate form referred to in paragraph (4) to the applicant.”

4. A copy of the application was sent to VAL at its registered office on 5 August 2013, in accordance with rule 3(2) and a period expiring on 5 September 2013 was allowed for a defence to be filed. The copy of the application was sent by Royal Mail special delivery. On 29 August 2013, the application was returned to the Tribunal by the Royal Mail with the envelope annotated “not called for”. The application was reserved on VAL by ordinary post; the deadline for the filing of a defence remained the same. No response was received from VAL in the period allowed.

5. On 26 September 2013, the Tribunal wrote to the parties. That letter indicated that as no defence to the application had been received, the adjudicator may, in accordance with rule 3(4), treat the application as not being opposed and make an order under section 73(1) of the Act. However, in accordance with rule 5(3) which reads:

“Any party may, by filing the appropriate form, request to be heard in person before a decision is made by the adjudicator under the Act or these Rules”,

the parties were given an opportunity to be heard and a period expiring on 10 October 2013 was allowed for this purpose. Neither party responded to that letter.

6. On 5 November 2013, an adjudicator wrote to the parties. In that letter he said:

“I have reviewed this case, and I have become aware of the email exchange exhibited with the application form, between Emily Roberts of Burges Salmon [VEL’s professional representatives] and Steve Elliot of [VAL]. In particular, Mr Elliot’s email dated 25 March 2013, he states “...we will continue to operate under our name Virgin Africa Limited.” There is also a reference by you at point b) of your answer to question 12 of the application form when you state “in light of the purported

business activities (the broadcasting of news and movies of African origin)..."

Under section 69(4)(b)(i) of [the Act], a company has a defence to an application under section 69 if it is operating under the name. Section 69(5) of the Act states...

There is nothing to suggest in your application 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".

Applications to the Company Names Adjudicator are neither an alternative nor an equivalent to an action for passing off...

As you have referred to the fact that the respondents name is causing confusion, this would imply that the respondent company is using its name. Therefore, your application has no reasonable prospect of success and is misconceived, unless you can show that section 69(5) of the Act applies. Consequently, under rule 5(2) of the rules I am minded to strike out the application."

Rule 5(2) reads:

"The adjudicator may strike out the application or any defence in whole or in part if it is vexatious, has no reasonable prospect of success or is otherwise misconceived."

7. VEL was allowed until 19 November 2013 to request a hearing to challenge the adjudicator's preliminary view. VEL filed Form CNA 4 (together with the appropriate fee) and requested a hearing. In a letter that accompanied that Form, inter alia, VEL stated:

"The Adjudicator reached this decision on the basis that, in his view [VAL] is operating under the name pursuant to section 69(4)(b)(i) of [the Act]. The Adjudicator appears to have based his decision on two statements made by Mr Elliot, a representative of [VAL]. These two statements were [see above].

These statements were made prior to [VEL] making its application. However, [VAL] has provided no further information or evidence to substantiate these statements, and it did not respond to the application. It is therefore our position that there is no evidence to show that [VAL] is currently operating under the name Virgin Africa Limited pursuant to section 69(4)(b)(i).

Further, no company accounts have been filed at Companies House by [VAL] and [VEL] can find no evidence of current trading. Without such accounts, or other documentary evidence, it is our belief that [VAL] has

failed to show any trading performance that would meet the definition of “operating” under section 69(4)(b)(i).

For completeness, we also consider that the Adjudicator reached an erroneous conclusion when making reference to the submissions of [VEL]. First, the phrase “in light of the purported business activities” is not adequate proof that [VAL] is operating under its name. In fact, the opposite is true. [VEL] could only purport the activities of [VAL] because no evidence has been provided.

Second, we consider the observation of the Adjudicator, that reference by [VEL] to the fact that [VAL’s] name is causing confusion thereby implies that [VAL] is using its name. It is our position that this is an incorrect conclusion to reach. The confusion that arises from [VAL’s] name is as a direct result of the registration of the name “Virgin Africa” in and of itself. This is unrelated to any issues of confusion...”

8. A joint hearing was arranged for 6 February 2014. On 4 February 2014, VEL filed a skeleton argument accompanied by a witness statement of the same date from Ms Victoria Wisener, a trade mark attorney at VEL. The purpose of Ms Wisener’s statement was to confirm that the facts stated in the application Form CNA1 (primarily relating to VEL’s goodwill and reputation in the name VIRGIN) were true. The main points emerging from VEL’s skeleton argument are, in my view, as follows:

Under the heading “Further findings since the Applicant’s hearing request dated 19 November 2013”, VEL state:

“1.12 (a) [VAL] was due to file its annual return on 19 November 2013. No return has been filed and therefore that return is now overdue. [VEL] understands that failure to file an annual return within 28 days from the return date is a criminal offence which can result in directors incurring personal fines and/or the registrar may also take steps to strike the company off the register.

(b) [VEL] found a website www.virginafriecatv.com, Facebook page: www.facebook.com/VirginAfricaTV and Twitter account: <https://twitter.com/VirginAfricaTV> operating under the name: “Virgin Africa TV”...

(c) The contact us page of the website quotes the following contact details: Virgin Africa TV, The Manor, Chapman’s Lane, BR5 3JA, UK. It should be noted that the registered office of [VAL] is Pilgrim Manor, Chapman’s Lane, Orpington, Kent, United Kingdom BR5 3JA.

(d) The domain name virginafriecatv.com is owned by Stephen Edetanlen of the Manor, Chapman’s Lane, Orpington, Kent BR5 3JA.

(e) The website describes Virgin Africa TV's business as "The New Frontier of films and movies of African origin. Promoting and Making African films and movies globally accessible."

(f) The website is basic and does not provide any information as to whether the business "Virgin Africa TV" is currently operating. The Facebook page does not have any recent posts on it (the last post was 17 December 2012). The most recent three posts on the Twitter page are dated 30 January 2014, 15 December 2013 and 24 October 2013.

...

5.2 It was made clear by the Tribunal in Power Tool World Limited [BL-O/040/14] that "The burden is on the respondent to persuade us that it is entitled to one or more of the statutory defences".

5.3 In this present case, no attempt has been made by [VAL] to persuade the Tribunal that it is entitled to rely on one or more of the defences under section 69(4) of the Act. [VAL] did not file a response to the application and has not engaged with this process at all..."

9. In relation to the points raised by the adjudicator in his letter of 5 November 2013 in relation to confusion, VEL repeats the comments made in its letter of 19 November 2013, and adds:

"6.4...For the avoidance of doubt [VEL] is not aware of any instances of actual confusion in relation to the company name; it simply makes the submission that due to the clear similarity between the company name and the VIRGIN name, use of the company name in the UK would be likely to mislead the public by suggesting a connection between the company and [VEL] and/or [VEL's] group."

6.5 [VEL's] submissions goes no further as regards confusion and it certainly does not imply that [VAL] is using the company name..."

10. In relation to the points raised by the adjudicator in his letter of 5 November 2013 in relation to VAL operating under its name, VEL repeats the comments made in its letter of 19 November 2013, and adds:

"7.2 In the absence of Parliamentary clarification on the meaning of operating, [VEL] has reviewed previous decisions of the Tribunal which have considered the meaning of "operating". [In BL-O/040/14], the Tribunal stated that operating under the company means "that there was public facing use of the company name."

7.3 Further, the Tribunal [in the same case mentioned above] also commented that "the use of a trading name does not mean that the company wasn't operating under the company name". However the footnote to that paragraph clarifies "The position would have been

different if the company name had not been used in public facing communications.”

7.4 Therefore it can be inferred from the Tribunal’s statements in that case that operating under a company name means public facing use of the company name and further, that use of a trading name by a company does not lead to the conclusion that it is not operating under the company name per se. However, the company name must still be used in public facing communications...

7.5 Examples of evidence that has satisfied the Tribunal that a company is “operating” include:

- (a) The issuing of invoices by the respondent company [BL-O/040/14 and BL-O/141/12]
- (b) Copies of bank statements bearing the company name [BL-O/301/10] where the bank statements showed entries including wages, receipts and payments made to suppliers;
- (c) A letter from HMRC regarding tax returns made by the respondent company [BL-O/301/10];
- (d) A press advert published by the respondent company advertising the goods and services offered by the company [BL-O/186/09].

8.1. There is no evidence in the present case that [VAL] is “operating” within the meaning of the term under the Act, as set out above, or at all. In particular, [VEL] cannot find any evidence that [VAL] is using the company name in public facing communications. To draw on the examples set out above, there is no evidence of any invoices, bank statements, communications with HMRC, nor press adverts advertising [VAL’s] goods and services.

8.2 Further there has been no activity in relation to the company at Companies House since its incorporation on 22 October 2012. In particular, the company’s annual return was due to be filed on 19 November 2013 and is now overdue. [VAL] has not filed any accounts either, which would evidence trade under the company name (save that it is accepted the company accounts are not due to be filed until 22 July 2014).

8.3 Although [VEL] has found evidence of a website, Facebook and Twitter page functioning under the name “Virgin Africa TV”, there is no evidence that these are owned and operated by [VAL] since:

- (a) The domain name virginafricatv.com is not owned by [VAL];
- (b) The website does not display a disclaimer stating that “this website is owned and operated by Virgin Africa Limited t/a Virgin Africa TV” or

Virgin Africa TV is a trading name of Virgin Africa Limited, company no. 08262371” or similar words to that effect. This form of wording is what one commonly expects to see on websites that are operated by a limited company, particularly where the business is using a trading name;

- (c) The contact us page of the website does not quote [VAL] as the relevant contact;
- (d) Neither the Facebook nor Twitter pages contain any reference to [VAL’s] company name. They only refer to “Virgin Africa TV”...
- (e) [VAL’s] name is clearly different to the name “Virgin Africa TV”, and further there is no evidence of actual trade as a result of the website and social media pages in any event.

8.4 It is important to remember the Tribunal is concerned solely with the operation (or not) of [VAL]. The activities of “Virgin Africa TV” are not relevant unless there is evidence that it is a trading name of [VAL]. However, there is no evidence of a definite connection between “Virgin Africa TV” and [VAL], nor that it is a trading name of [VAL]. Even if it is a trading name, neither the website nor the social media pages make any reference to [VAL] and therefore there is no public facing communication of the company name.

8.6...there is no evidence that [VAL] could rely on any of the other defences under section 69 of the Act.”

11. On the same day i.e. 4 February 2014, the Tribunal received a number of documents from VAL. The first document is from Mrs Peace Edetanlen, VAL’s Director. The document is headed: “Respondent’s Defence”. It reads as follows:

“My Apology

As the Director of [VAL], I sincerely apologise for the lack of activity in or overt response in this process before now. I have mainly relied on the goodwill of volunteers in responding to this process and the running of VAL. Also, it has been emotionally disturbing for me, as I least expected that anyone would come at me for using the word “Virgin” or for what we are doing at VAL. It still feels so unnatural.

I am grateful for the understanding and patience of this Tribunal and the Applicants...”

12. The second document, also entitled: “Respondent’s Defence” is from Steve Elliot, who describes himself as an “Adviser”. The main points arising from this document are, in my view, as follows:

“1.1 The Director of VAL is of African descent and a Christian. This is the backdrop of the choice of name, which ties in with the services provided by the VAL;

1.2 “Virgin” connotes freshness, unadulterated, pure, clean, original and authentic. As an African descent, the Director strives to provide movies of African origin to predominantly African descendants like herself who struggle to access such contents;

1.3 As a Christian, the service provided is not in the mainstream of services provided by everyday media...

2.3 We rely on section 69(4)(b)(i) and (ii), (d) and (e) of [the Act].

2.4.1 We rely on section 69(4)(d) as we actually adopted the name in good faith...

2.4.2 We rely on section 69(4)(e), as our name has not adversely affected [VEL] to any significant extent. Further, in all of its submissions, [VEL] has not established how our use of the word “virgin” adversely affected its interests to any significant extent;

2.5 With reference to sub-paragraphs (i) and (ii) of section 69(4)(b) of the Act:

2.5.1 We have been operating under the name [VAL] and Virgin Africa TV is part of it...

2.5.2 Assuming we were not operating, which is clearly the not the case, the documentary evidence of [VEL] clearly shows that we propose to as [VAL] (by tying up loose ends like fulfilling our HMRC obligations, amending details to establish that [VAL] is one and the same as Virgin Africa TV). Furthermore, we have incurred substantial start-up (human and financial) cost...

2.5.3 It is interesting to note [VEL’s] diligent observations that we are behind on our HMRC accounts, that the website www.virginafriecatv.com is registered to Mr Stephen Edetanlen and the difference of “The Manor” and “Pilgrim Manor” in the address details of Virgin Africa TV and [VAL], respectively. However, [VEL] failed or deliberately avoided to draw a connection between:

2.5.3.1 Mr Stephen Edetanlen and Mrs Peace Edetanlen;

2.5.3.2 The Manor, Chapmans Lane, Orpington, Kent, BR5 3JA and Pilgrim Manor, Chapmans Lane, Orpington, Kent, BR5 3JA.

2.5.3.3. Perhaps the failure to conclude that the above and Virgin Africa TV and [VAL] are all one and the same is not a convenient oversight on the part of [VEL]. We submit that a reasonable man on the

street, without the recourse or higher knowledge of [VEL], would have made the conclusion that it was all one and the same company – [VAL].

2.5.4.1 The lapses observed by [VAL] in our operation and errors in names and addresses are minor errors which may have been corrected by the date of this hearing. This will clearly show that we are the same company shown in the findings of [VEL's] investigations and that [VEL's] process and application was an unforeseen and unexpected distraction to our operation.”

13. At the conclusion of the hearing, I reserved my decision. I reported my conclusions to the parties in a letter dated 7 February 2014. That letter read as follows:

“Background

I refer to the joint hearing which took place before me yesterday, by telephone conference. The hearing was arranged at the applicant's request to consider the preliminary view expressed by the Adjudicator in his letter of 5 November 2013, i.e. that the application should be struck out as it had no reasonable prospect of success.

Representation and documents filed prior to the hearing

At the hearing, you represented VEL. Attached to your skeleton argument were pages downloaded on 4 February 2014 from: www.virginafricatv.com, [facebook.com/virginafricatv](https://www.facebook.com/virginafricatv) and twitter.com/virginafricatv. Also included was a witness statement from Ms Victoria Wisener of VEL dated 4 February 2014, in which she confirms that various facts stated in the application form CNA1 are true.

On 4 February 2014, VAL filed a one page letter from its director, Mrs Peace Edetanlen, and a three page document headed “Respondent's Defence” (from Mr Elliott). On 5 February, Mrs Edetanlen, confirmed in a telephone conversation with the Hearings Clerk, that VAL would not be represented at the hearing.

The hearing

At the hearing, it was agreed that two issues required determination. The first, is the preliminary view mentioned above to strike out the application. If that preliminary view did not survive and the application was allowed to stand, the second issue was consideration of what appears to be VAL's request to defend its company name registration.

Insofar as the first issue is concerned, as your submissions at the hearing remained within the scope of your skeleton argument (a copy of which had been sent to VAL and with which it will be familiar), it is

not necessary for me to record the submissions here. In the event that you were successful in your application to have the preliminary view reversed, we then went on to discuss what appears to be VAL's belated request to file a defence. Having heard submissions on both issues, I reserved my decision.

The preliminary view to strike out the application

I have now considered the matter further. Having done so, I am satisfied that on the basis of your written arguments and submissions at the hearing, that the preliminary view of 5 November 2013 to strike out the application was, in the light of the information available to the Tribunal at that time, inappropriate. **The consequence of that decision is that VEL's application will continue.**

VAL's apparent request to file a belated defence

Having reached that conclusion, I must now consider what appears to be VAL's belated request to defend its company name registration. In this regard, you argued that as VAL had been given more than ample opportunity (by both VEL and the Tribunal) to make its position known, the request, if indeed it is one, was simply too late and should be refused. In addition, you pointed out that the "Respondent's Defence" currently before the Tribunal did not "show" that the company was operating under the name. In response to that submission, I asked you what the position would be if VAL had operated under the name prior to the date of the application, or was able to rely upon any of the other defences mentioned by it in the above document. In response, you very fairly accepted that in those circumstances and in the interests of justice, VAL should, (subject to a strict timetable), be given a final opportunity to make its position known.

Next steps and directions

In view of that final submission, I give the following directions:

If VAL wishes to defend its company name registration, an officer of VAL (presumably Mrs Edetanlen and/or Mr Elliott) shall, within **14 days of the date of this letter**, provide a witness statement explaining why it did not respond to the official letters of 5 August and 26 September 2013, and why, in its view, I should in those circumstances allow it to file a belated defence. Guidance on how to complete a witness statement can be found at: <http://www.ipo.gov.uk/tmmanual-chap7-law.pdf> at paragraph 4.8.3.1;

Assuming VAL does wish to defend its company name registration and files a statement as indicated above, it shall also **within 14 days of the date of this letter**, file form CNA2 and the appropriate fee (£150) and provide full details of the basis of its defence to the application. The form CNA2 can be found at: <http://www.ipo.gov.uk/cna-cna2.pdf>

If VAL files a witness statement or statements and I am satisfied with the reasons provided, I will scrutinise the form CNA2 to determine if it discloses a viable defence. If it does, it will be admitted into the proceedings and a period will be set for the filing of evidence.

Consequences of VAL not filing a witness statement and form CNA2 within 14 days

However, if nothing is heard from VAL by the conclusion of the period specified above, I will treat VEL's application as not being opposed and will issue an order directing VAL to change its name.

A copy of this letter will be sent by post to you and to VAL at its registered office. The letters have, however, been initially sent by e-mail to you and, as per his request, to Mr Elliot at s.elliott@live.co.uk."

14. As indicated above, VAL did "not call" for the original application when it was sent to them by the Tribunal on 5 August 2013, nor did it respond to the application when it was reserved by ordinary post. Similarly, it did not respond to the official letter of 26 September 2013, indicating that in the absence of a defence being filed, the adjudicator may treat the application as not being opposed.

15. Notwithstanding VAL's inactivity, in a preliminary view dated 5 November 2013, the adjudicator indicated that, on the basis of documents provided by VEL and comments contained in the application Form CNA1, in his view, the application had no reasonable prospect of success and should be struck out. However, having had the benefit of VEL's skeleton argument and submissions at the hearing, I concluded that on the basis of the information available to the adjudicator at the time the preliminary view to strike out the application was issued, the preliminary view was inappropriate. As a consequence of that conclusion, VEL's application was allowed to continue.

16. As it appeared that at the time of the hearing VAL was intent on defending its company name registration on a number of bases, in the official letter of 7 February 2014, I put in place steps to give VAL the opportunity to make its position known and allowed a period of 14 days for this purpose. However, despite the official letter of 7 February 2014 being sent to VAL by post at its registered office and, as Mr Elliot requested, to him at s.elliott@live.co.uk, no response from VAL or Mr Elliot has been received. As VAL has not responded to the directions contained in the above letter, I am left to conclude that it no longer wishes to defend its company name registration. In those circumstances, the consequences outlined in my letter of 7 February come into play. As VAL has not filed a defence within any of the periods specified under rule 3(3), and despite the provisions of rule 3(4) which states:

"The primary respondent, before the end of that period, shall file a counter-statement on the appropriate form, otherwise the adjudicator

may treat it as not opposing the application and may make an order under section 73(1)",

I can, in the circumstances described above in which VAL has been given more than ample opportunity to defend its company name registration but has chosen not to do so, see no reason to exercise such discretion and, therefore, decline to do so.

17. As VAL has chosen not to file a defence within the period allowed in my letter of 7 February 2014, it is treated as not opposing the application. Therefore, in accordance with section 73(1) of the Act, I make the following order:

(a) VIRGIN AFRICA LIMITED shall change its name **within one month** of the date of this order to one that is not an offending nameⁱ;

(b) VIRGIN AFRICA LIMITED shall:

(i) take such steps as are within its power to make, or facilitate the making, of that change;

(ii) not cause or permit any steps to be taken calculated to result in another company being registered with a name that is an offending name.

18. If no such change is made within one month of the date of this order, I will determine a new company name as per section 73(4) of the Act and will give notice of that change under section 73(5) of the Act.

19. VEL having been successful is entitled to a contribution towards its costs. I order Virgin Africa Limited to pay Virgin Enterprises Limited costs on the following basis:

Fee for application: £400

Statement of case: £400

Total: £800

20. This sum is to be paid 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.

21. Any notice of appeal against this decision to order a change of name must be given within one month of the date of this order. Appeal is to the High Court in England, Wales and Northern Ireland and to the Court of Session in Scotland.

22. The company adjudicator must be advised if an appeal is lodged, so that implementation of the order is suspended.

Dated this 13th day of March 2014

Christopher Bowen
Company Names Adjudicator

ⁱAn “offending name” means a name that, by reason of its similarity to the name associated with the applicant in which he claims goodwill, would be likely— to be the subject of a direction under section 67 (power of Secretary of State to direct change of name), or to give rise to a further application under section 69.