O-333-15

COMPANIES ACT 2006

In the matter of applications

Nos. 722 by Friends of Devonport Park (charity No. 1155177)

for a change to the company name of Friends Of Devonport Park Limited,

registered in England and Wales under No. 8708190

Background, Claims and Defences

1. FRIENDS OF DEVONPORT PARK LIMITED ("the company") was incorporated on 26th September 2013. It is the primary respondent in these proceedings. Mr Rob Carroll and Ms Priscilla Carroll are directors of the company. They are co-respondents in these proceedings.

2. On 7th April 2014, a registered charity also called 'Friends of Devonport Park' ("the charity") applied for Orders under section 69 of the Companies Act 2006 for the name of the respondent company to be changed. The grounds for the application are that:

i) A voluntary association called 'Friends of Devonport Park' was established in 2005 to help Plymouth City Council to obtain funding from the Heritage Lottery Fund for the park of that name in Plymouth.

ii) Between then and 2013 the association also undertook various fund raising activities which enabled it to contribute to the maintenance and improvement of the park and its facilities. In 2012, the association received the Queen's award for voluntary service.

iii) In January 2014, the association became a registered charity.

iv) The Charity Commission and Plymouth City Council have drawn the charity's attention to the existence of the company and the potential for confusion between the two.

v) The persons responsible for the incorporation of the company were active members of the association at the time of incorporation of the company and therefore knew of its reputation and goodwill.

vi) The primary respondent's name is identical to the name in which the applicant has a qualifying reputation.

3. The primary respondent filed a notice of defence. The primary respondent:

- Does not deny that the primary respondent's name is identical to the name of the company.

- Admits that the 'Friends of Devonport Park' was constituted in 2006 to fundraise for, and promote, the conservation and improvement of the park, to be a vehicle through which local residents could get involved in the management and development of the park, and to ensure that a restored Devonport park is sustained for the local community and future generations.

- Accepts that the co-respondents became members of the association in 2007 and remained members up until around November 2013.

- Claims that any goodwill established by the association belongs to the local residents and members who contributed to this voluntary community group since its inception.

- Denies that members of the association adopted the constitution for the charity which was proposed at an extraordinary general meeting held on 15th October 2013, but abandoned by the Chair because the required quorum had not been reached.

- Denies that the declared purpose, referred to in the evidence as the objects, of the charity is the same as the purpose of the association, partly because Devonport Park is not mentioned.

- Denies that the charity owns any goodwill in its name from earlier than January 2014.

- Denies that the interests of the charity are adversely affected by the company's name and urges the charity to change its name to better reflect its charitable purpose and because this would *"cause less confusion".*

The evidence

4. The applicant's evidence takes the form of three witness statements from Michael Gallagher, Christopher Coldwell and Arthur Luxmore. Mr Gallagher describes himself as the Chairman of Friends of Devonport Park. Mr Luxmore describes himself as the former honorary secretary. Mr Coldwell describes himself as a member. It appears that Mr Gallagher and Mr Luxmore are two of the four trustees of the charity.

5. The co-respondents filed one joint witness statement.

6. There is no real dispute that the 'Friends of Devonport Park' was a voluntary community association that raised funds that were used to restore and improve Devonport Park in Plymouth between 2006 and 2013 for the benefit of the local community. The group worked closely with local residents and Plymouth City Council. There are newsletters from 2007 to 2012 in evidence[1] which show the various activities and events organised by the association in order to raise funds for improvements at the park. It also organised a voluntary gardening team. The newsletters also show that the association operated publically under the above name.

7. It is clear from the evidence of both parties that the association had ordinary members and was run by a committee. Mr Gallagher was the Chair. Mr Luxmore was the Secretary. Ms Carroll was the bandstand co-ordinator. Exhibit 4 to the witness statement of Mr and Mrs Carroll consists of the constitution of the Friends of Devonport Park from 2006. It is signed by Mr Gallagher. We note from this that:

- The committee had power to raise funds and receive donations, but not to engage in permanent trading activities.

- The constitution could be changed at extraordinary general meeting ("EGM"), at which a quorum of one third of the registered members was required.

- The EGM could take decisions on a show of hands, unless it was decided to have a secret ballot.

- In the event of dissolution, all assets were to be distributed amongst similar voluntary groups in Plymouth.

8. Exhibits 8 and 10 to Mr Gallagher's statement show that the association had bank accounts called 'bandstand' and 'event', and a third bank account in its name. A combined balance of around £12-13k was typically held in these accounts. The accounts were used for paying the association's outgoings. The bank statements show that the same bank accounts were used by the association as later used by the registered charity.

9. In 2012, the association won the Queen's Award for Voluntary Service. According to Mr and Mrs Carroll, later that same year the Chair, Mr Gallagher, informed members at the AGM that the restoration of the park was effectively complete and that they would have to take on new projects or ventures in order to sustain their members and their interest.

[1] See the exhibits to CNA1

10. The idea of becoming a registered charity appears to have first surfaced in 2009[2]. The minutes of the committee meeting held on 18th February 2009 show that not all of the members thought that this was the right option.

11. It is clear from the evidence of both sides that by 2013 relations within the committee had become strained. The proposed move to charitable status appears to have been a catalyst for some of the ill feeling, but much of it seems to have been caused by personal disagreements and resentment.

12. Mr Gallagher states that the decision to become a charity was taken by *"the majority of the Committee and, the membership, as decided by several ballots"* after Mrs Carroll *"succeeded in thwarting this move on several occasions".* This is the key factual disagreement between the parties. Mr and Mrs Carroll say that no constitutional decision was taken by the membership to become a charity. They accept that an EGM was called for this purpose on 15 October 2013, but they say that it was abandoned because the required quorum was not present. They note that in an email sent on 3rd December 2012, Mr Gallagher had stated that an amendment to the constitution to permit postal voting was not necessary because of the provisions of the Equality Act 2010.

13. It appears that on 12th September 2013 (i.e. prior to the EGM) the committee received the results of an earlier postal ballot of the members which had gauged their support for the application for charitable status. The minutes of that meeting[3] indicate that 78 of the 111 members responded to the postal ballot. 64 were in favour. 12 were against. There were 2 spoilt papers. The committee then voted on a show of hands to make an application for charitable status. We note that this meeting occurred two weeks before the incorporation of the company.

14. According to Mr and Mrs Carroll, at the AGM held later that year, on 6th November 2013, Mr Gallagher resigned as Chair, and at a further committee meeting held on 16 November, Mr Luxmore resigned as Secretary. This is not consistent with an email sent by Mr Gallagher on 16th November calling an emergency committee meeting to consider the conduct of Mrs Carroll and three other committee members who had apparently taken the account books without the permission of the Treasurer. This resulted in Mr Luxmore writing to the members concerned on 18 November informing them that the committee had voted to suspend their membership[4]. At a further committee meeting on 4th December 2013, the committee (including Mr Gallagher and Mr Luxmore as Chair and Secretary, respectively) decided to ask three of the four committee concerned members to

[2] See the minutes of the committee meeting held on 18 February 2009 in the exhibits to CNA1
[3] See the exhibits to CNA1
[4] See exhibit PCRC32

resign. That meeting also purported to agree a change to the objects stated in the constitution so as to comply with the requirements of the Charity Commission. The revised objects were:

> "To provide or assist in the provision of facilities in the interests of social welfare for recreation or other leisure time occupation of individuals who have need of such facilities by reason of their youth, age infirmity or disability, financial hardship or social circumstances with the object of improving their conditions of life"

15. Mrs Carroll states that she informed the Parks Manager of Plymouth City Council that she and other members of the original voluntary group had agreed to retain the original constitution and would become active in 2014 under the name 'the real Friends of Devonport Park'. The relationship between the parties had plainly broken down completely by this time.

Decision

16. Section 69 of the Act states:

> "(1) A person ("the applicant") may object to a company's registered name on the ground—
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> (a) that it is the same as a name associated with the applicant in which he has goodwill, or
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> (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
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> (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."

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

18. The name in question is FRIENDS OF DEVONPORT PARK ("the name"). The applicant must show that it had goodwill under the name at the date of the application before us, namely 7th April 2014: see *MB Inspection Ltd v Hi-Rope Ltd*[5] at paragraph 43.

19. The applicant's evidence establishes that the association known by the name had provided voluntary services to the community in Plymouth for at least 8 years prior to the date of the application. That service had been recognised by a Queen's award. The respondents argue that as the association did not trade as such, it had no relevant goodwill. We do not accept this. It is well established that charities and other voluntary organisations can have sufficient goodwill to sue for passing off in

[5] BL O/106/10, [2010] RPC 18

appropriate circumstances[6]. Further, s.69 of the Act defines *"goodwill"* for present purposes as including *"reputation of any description".* We therefore find that the nature of the activities provided under the name do not prevent an application of this kind from succeeding.

20. For the purposes of the law of passing off, a line is drawn between those businesses with a small goodwill and those with only a trivial goodwill.[7] Given that s.69 defines *"goodwill"* as including *"reputation of any description"*, it is unlikely that the level of goodwill required under s.69 is greater than the level of goodwill required for protection under the law of passing-off. Although the level of activities carried out under the name was small judged by commercial standards, in our judgment it was not trivial. Consequently, we find that the activities carried out under the name were sufficient to imbue the name with a relevant reputation for the purposes of s.69.

21. The addition of the word 'Limited' in the names of the respondent companies does not prevent those names from being considered the same as the applicant's name for the purposes of s.69(1)(a)[8]. We therefore find that the name of the company is the same as the name in which the applicant claims goodwill.

22. The key issue, in our judgment, is whether the applicant is entitled to claim the goodwill in question. Mr and Mrs Carroll say not. According to them the goodwill belongs to *"a large collection of volunteers, local residents, and park users who subscribed to and contributed in one way or another as FDP members towards the Terms of Reference[9], the reason the community group was set up".*

23. It is contended on behalf of the applicant that the committee and the membership of Friends of Devonport Park voted to become a registered charity and therefore the applicant owns the goodwill generated since 2006.

24. Both sides appear to agree that the goodwill and reputation was owned collectively by the members of the association. We have no doubt that this is correct. According to the evidence, those members voted in a ballot to establish the charity. Mr and Mrs Carroll say that no effective change was made to the constitution of the original association because no EGM was held with the necessary quorum of members present.

25. In point of fact the applicant appears to have continued the activities previously undertaken by the original association, including use of the funds and the bank accounts of that association. The following is an extract from 'The Law of Passing-Off: Unfair Competition by Misrepresentation 4th Ed. Wadlow'.

[6] See *British Diabetic Association v Diabetic Society Ltd* [1996] FSR 1
[7] See *Hart v Relentless Records Ltd* [2002] EWHC1984
[8] See *MB Inspection Ltd v Hi-Rope Ltd* at paragraph 48
[9] Summarised at paragraph 3 above (second indent)

“De facto assumption: “adverse possession”

3-217

It may happen that what appears to the public to be one continuous business has in fact been carried on by two or more unconnected persons in succession. This may happen by agreement, by coincidence, or as a result of passing-off going unrestrained. If the succession is by consent, then it may be reasonable to infer an assignment of the goodwill in the old business. If not, then although there appears to be no express authority, there is no reason to believe that any surviving goodwill of the old business accrues to the new one. The new business may generate goodwill of its own, but the goodwill of the old business is simply extinguished.”

26. In our view, the decision of the majority of the members of the association to establish a charity effectively gave the membership’s consent for the charity to succeed the original association. In these circumstances, we find that it is appropriate to infer an assignment of the goodwill of the association to the charity, i.e. to the applicant[10].

27. Mr and Mrs Carroll submit that this cannot be so because the constitution of the original association was not amended in accordance with the requirements of the constitution. Even if that is so, we do not consider that it undermines our finding that the members effectively assigned the goodwill of the original association to the applicant when they agreed through the postal ballot to the establishment of the charity to continue the work of the association. Mrs Carroll is strongly of the view that the objects of the charity are different to those of the original association. The words may be different but the object of the charity is plainly closely related to that of the association. In our view, the recasting of the object of the charity in different language to the previous constitution is not so significant that it can reasonably be said that the charity that was established was not the one that the members agreed should be set up. Indeed given the highly specific nature of the name of the association and of the charity, it would be highly surprising if their purposes could be very different. Indeed in paragraph 12 of the application the applicant says that the charity holds fundraising events to enable it to provide plants and maintenance to the park.

28. Therefore to the extent that the original association still exists, it does so without the established goodwill in the name Friends of Devonport Park. By calling the *“new voluntary group”* ‘the real Friends of Devonport Park’, the respondents effectively

[10] Therefore the issue of the constitution requiring the distribution of the assets of the association upon its dissolution to similar organisations does not arise.

acknowledge that they have no right to represent themselves as the Friends of Devonport Park as such.

29. The application must therefore succeed unless the respondents have a defence under s.69(4). The burden is on the respondents to persuade us that they are entitled to one or more of the statutory defences.

30. The respondents contend that the defence under s.69(4)(e) applies because:

> "the interests of the applicant are not adversely affected to any significant extent."

31. According to the respondents, the charity can pick a new name which, in their view, better reflects its stated objective. This would also have the benefit of reducing confusion between the parties. However, the applicant is the owner of the goodwill under the name. In these circumstances, the Charity Commission's request for it to change its name to avoid confusion with the company name is, of itself, an adverse affect on the applicant. We therefore reject the respondent's claimed defence under s.69(4)(e).

32. The respondents believe that they adopted the company name in good faith. If so, they have a defence under s.69(4)(d). However, we do not consider that such a defence is made out on the evidence. In particular, we note that the company was incorporated whilst Mrs Carroll was a member of the committee of the association and at a time at which she acknowledges that the association continued to exist and function. She does not appear to have informed her fellow committee members of the incorporation of the company, which was plainly established to acquire some sort of legal right to the name in response to a proposal from other committee members to establish a charity to succeed the association. As a matter of law Mrs Carroll's intention could not have succeeded because mere registration of a company name provides no legal right to use it or (in contrast with a trade mark registration) to prevent others from doing so. Nevertheless, the respondent's motives in registering the company are clear and they do not qualify for the adopted-the-name-in-good-faith defence.

33. As none of the defences apply, the application succeeds.

34. In accordance with section 73(1) of the Act, we order that:

> (a) FRIENDS OF DEVONPORT PARK LIMITED shall within one month of the date of this order change its name to one that is not an offending name[11].

[11] An "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

(b) FRIENDS OF DEVONPORT PARK LIMITED, Mr Rob Carroll and Mrs Priscilla Carroll shall:

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

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

35. In accordance with s.73(3) of the Act, this order may be enforced in the same way as an order of the High Court or, in Scotland, the Court of Session.

36. In any event, if no changes of name are made within one month of the date of this order, a new company name will be determined by this tribunal as per section 73(4) of the Act. Notice will be given of the change under section 73(5) of the Act.

37. All respondents, including individual co-respondents, have a legal duty under Section 73(1)(b)(ii) of the Companies Act 2006 not to cause or permit any steps to be taken calculated to result in another company being registered with an offending name; this includes the current company. *Non-compliance may result in an action being brought for contempt of court and may result in a custodial sentence.*

Costs

38. We note that the applicant proposed mediation prior to filing this application, but the respondents appear to have rejected this proposal. The applicant has been successful and is now entitled to a contribution towards its costs.

39. The applicant has not been legally represented, but it had to pay the official fees for filing forms CNA1 and CNA3. This amounts to £550. Further, the applicant is entitled to a contribution towards the cost of the time taken to conduct these proceedings. We consider that it is likely to be disproportionate to the amount involved to ask for a formal breakdown of these costs. We will therefore assess this aspect of the costs on a nominal basis.

40. We order Friends Of Devonport Park Limited, Mr Rob Carroll and Mrs Priscilla Carroll, to pay Friends of Devonport Park (charity No. 1155177) the sum of £850. The respondent and co-respondent shall be jointly and severally liable for these costs. The costs are calculated as follows:

(power of Secretary of State to direct change of name), or to give rise to a further application under section 69. This includes 'the real Friends of Devonport Park'.

Preparing a statement and considering the other side's statement
£150

Preparing evidence and considering the respondents' evidence
£150

Expenses (official fees for Forms CNA1 and CNA3)
£550

41. The above sum is to be paid within fourteen days of the expiry of the appeal period or, if there is an appeal, within fourteen days of the final determination of this matter.

42. Any notice of appeal against this decision 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. The tribunal must be advised if an appeal is lodged.

Dated this 20th day of July 2015

Allan James **Al Skilton** **Judi Pike**
Company Names Adjudicators