O-421-16

COMPANIES ACT 2006

Application No. 841 by AXA of Paris, France, for a change to the name of AXALS CORP LLP, registered in England and Wales under OC395776

Background, Claims and Defences

1. Axals Corp LLP ("the respondent") was incorporated on 8th October 2014.

2. On 11th December 2014 ("the relevant date"), AXA ("the applicant") applied for an Order under section 69 of the Companies Act 2006 for the name of the respondent to be changed. The grounds for the application are that:

i) The applicant is part of the AXA Group, one of the world's largest insurance, finance and asset management companies. AXA has been continuously trading in the UK since 1985. It has acquired a substantial reputation in the field of asset management, insurance, including medical insurance, finance and wealth management, and real estate investment management.

ii) The words AXALS is highly similar to AXA. The similarity between AXA and the name of the respondent is such that the latter will take advantage of the reputation of the former and cause confusion.

3. The applicant stated that it had given the respondent notice of its intention to apply for an order of this kind on 22nd October 2014, but despite this the respondent had not changed its name.

4. The respondent filed a notice of defence. The respondent:

- Does not deny that the applicant has the reputation claimed in the application.

- Denies that Axals Corp LLP is similar to AXA, or that the use of the respondent's name will cause confusion with the applicant's name.

- Claims that the main business activities of the respondent are real estate development and retailing of homeware, kitchenware and other home supplies.

- Claims that there is no risk of confusion because the applicant operates in Western Europe, North America and the Asia Pacific region whereas its primary clientele are located in Ukraine and in the Russian Federation.

The evidence and submissions

4. The applicant's evidence takes the form of a witness statement by Rosemary Cardas who is a trade mark attorney and partner at Keltie LLP, which represents the applicant in these proceedings.

5. Ms Cardas's evidence comes from the Internet. She exhibits pages from the applicant's UK website. These pages indicate that the company commenced trading in the UK in the 1980s and currently has over 10 million UK customers and 10,500 employees in the UK[1]. In 2015, the applicant announced underlying earnings of £150m from the UK business, an increase of 27% over the year before[2].

6. In 2013, Interbrand ranked AXA 53rd in a rating of Best Global Brands[3].

7. The respondent filed a witness statement dated 22nd June 2015 by Maksym Zaplatynskyi. Mr Zaplatynskyi describes himself as attorney of the respondent. He says that the respondent uses its name in business; namely, real estate development and real estate speculative deals. He also says that the respondent's primary clientele are based in Ukraine and the Russian Federation. In support of these claims he exhibits:

[1] See exhibitsRAC1 and 2
[2] See exhibit RAC5
[3] See exhibit RAC4

- A copy of an Agreement of Intent dated 28th November 2014 between the respondent and a Ukrainian company called PCC Gorlitsa. The agreement commits the respondent to a long term partnership with the Ukrainian company to provide real estate development services at a location in Ukraine.

- An undated two page flyer advertising construction, renovation and demolition services under the respondent's name. The flyer is in English and identifies a website at axalcorp.com.

8. Mr Zaplatynskyi accepts that the applicant has the reputation claimed in the application. He claims that prior to incorporation, the respondent conducted research to identify pre-existing trade marks with the same name, but none were found.

9. The applicant's attorneys responded to this evidence with written submissions making these points:

- The Agreement of Intention to provide services does not constitute evidence that the respondent was operating under the name at the relevant date, particularly as it is dated after the respondent received notice that this application may be filed.

- In its response to the applicant's letter before action, the respondent's legal representatives replied on 15th November 2014 stating that the respondent's main business activity was retailing of home appliances, kitchenware, cars, car parts, motorcycles, computers and various other goods, yet none of this is mentioned in the respondent's subsequent evidence.

- The website mentioned in the respondent's evidence is very basic and appears to be a holding page with no details of when it was created or first went live.

10. Neither side requested a hearing. We therefore give this decision after a careful examination of the evidence and written arguments.

Decision

11. Section 69 of the Act[4] states:

> "(1) A person ("the applicant") may object to an LLP'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 LLP and the applicant.
>
> (2) The objection must be made by application to a company names adjudicator (see section 70).
>
> (3) The LLP concerned shall be the primary respondent to the application.
>
> Any of its members 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 LLP—

[4] As modified by Regulation 12 of The Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009.

(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 an LLP formation business and the LLP 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."

12. There is no dispute that the applicant had goodwill in the UK under the name AXA at the relevant date. The goodwill was in a substantial business trading in asset management, insurance, including medical insurance, finance and wealth management, and real estate investment management.

13. The next question is whether the respondent's name is sufficiently similar to AXA that use of the respondent's 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.

14. In comparing the respective names, the inclusion of the legal designation 'LLP' in the respondent's name must be disregarded because it is not part of the chosen name[5].

15. The applicant's representative submits that the names AXA and AXALS CORP are similar and will indicate a connection between the parties. This is said to be because:

- AXA is included in, and forms the beginning of, AXALS;
- The letter S is AXALS simply indicates the plural form of AXAL;
- Aurally, AXA is so strong in AXALS that the LS sound is lost.

16. It is true that AXALS includes AXA, but this does not, of itself, mean that anyone would expect the users of the names to be connected. There is a little more force in the point that AXA forms the beginning of AXALS and therefore catches the eye first. However, the public will consider the names as wholes. The difference in length of between AXA and AXALS is quite noticeable in this respect. A difference of two letters is more noticeable between words consisting of 3 and 5 letters than might be the case with longer words. We do not consider it likely that anyone will directly mistake these words, at least when they have both names in front of them. It is also necessary to consider the possibility that the names may be seen at different times, which means that there could be a risk of imperfect recollection of one or other of the names. However, even if an average member of the public might not be able to remember the spelling of (say) the respondent's name, we find it unlikely that he or she would misremember it as the three letters AXA.

[5] See *MB Inspection Ltd v Hi-Rope Ltd,* BL O/106/10, [2010] RPC 18, at paragraph 48

17. It is true that both AXA and AXALS are comprised of two syllables. The applicant's name is likely to be verbalised as AX-AH. The word AXALS in the respondent's name is likely to be verbalised as AX-ALS, and is therefore similar in sound to 'axles'. Although the first syllable of both words is the same, the second syllable will sound quite different. In our view, this is sufficient to avoid a likelihood of aural confusion between these words.

18. The applicant's submissions tend to overlook the presence of the second word CORP in the respondent's name. This may be because CORP is an obvious contraction of 'Corporation', which is hardly any more distinctive than 'company' or 'LLP'. Nevertheless, unlike the legal designation LLP, the word CORP is clearly part of the chosen name of the respondent. It therefore represents a further point of visual and aural distinction from the applicant's name, albeit one of only minor weight in the overall comparison.

19. We accept that it is possible for two names to be recognised as being different, but nevertheless mislead the public into thinking that the users of the names are connected. For example, if the respondent's name was (say) AXA MAXA or AXA UKRAINE the public might well believe that the AXA element indicated a connection with the applicant. However, we find it difficult to see why the public would expect the user of AXALS to be connected to AXA. We see little merit in the applicant's submission that the S in AXALS should be effectively discounted as merely indicating the plural of AXAL. Firstly, in the case of names of legal persons, one does not usually talk about the legal entity in the plural. Secondly, even if one considers the S as indicating a possessive form of AXAL, i.e. AXAL'S, the key part of the name remains AXAL not AXA. We do not therefore consider it likely that the presence of AXA in AXALS CORP will indicate a connection between the parties.

20. In reaching this view, we have attached no weight to the respondent's claims that it currently trades in different geographical locations to the applicant, or in respect of different services. Firstly, the respondent's current trading location is irrelevant because it could start trading in the UK in future. Secondly, even if we were to accept that the respondent currently trades in different services, there is nothing to prevent the respondent from trading in the same field as the applicant in the future. Indeed,

we do not consider that there is a huge distance between AXA's *real estate investment management services* and the *real estate development services* which the respondent claims to trade in at present (albeit mainly in Ukraine).

21. However, for the reasons given above we find that the names are not sufficiently similar to engage s.69(1)(a) or (b). Therefore, the application must be rejected.

Defences

22. In the light of our primary finding there is strictly no need for us to deal with possible defences. Indeed, so far as we can see the respondent has not expressly pleaded any specific defence. However, for the sake of completeness we will deal with the main factual issue which might have engaged one or more of the possible defences, i.e. the respondent's claim to have operated under the name.

23. As with the likelihood of the names misleading the public, this possible defence must be assessed as at the relevant date.

24. The respondent initially claimed to be operating under the name in relation to certain retail services, but the only evidence it has provided relates to its claim to have been providing *real estate development* services. The applicant's representative points out that the only document relating to these services was drawn up after the respondent had been warned that the applicant intended to file this application, and only represents an *intention* to provide services in Ukraine.

25. Although s.69(1)(b) uses the test of the names being similar enough as to be "*likely to mislead"*[6]*,* it is apparent from the existence of the defence set out in s.69(4)(b) – that the LLP is operating under the name - that the main purpose of s.69 is not to prevent confusion or deception from occurring. Rather, as is apparent from the wording of s.69(5), the main purpose of the provision is to provide a remedy for dealing with the incorporation of companies and LLPs with abusive or opportunistic names. The test of the names being similar enough as to be "*likely to mislead"* is the

[6] In the context of an LLP incorporated in the UK, this means *likely to mislead* in the UK

measure used to determine – possible defences apart – whether the contested name is *prima facie* abusive or opportunistic. The incorporation of a UK company or LLP that is operating abroad says just as much about the motive for the incorporation of that company or LLP as a company or LLP operating in the UK. Therefore, in principle, there is nothing to prevent a defence under s.69(4)(b) from succeeding based on the respondent operating under the contested name abroad.

26. However, we agree with the applicant that an Agreement of Intention to provide services is a preparatory act rather than actually operating under the name. Steps such as this might help to support a defence based on the respondent having incurred substantial start-up costs in preparation to operate under the name, but the respondent has not pleaded any such defence, or provided any information as to the amount spent on start-up. Therefore, if we had decided that the parties' names were similar enough to engage s.69(1)(b), we would not have rejected the application on the basis of the evidence purporting to show that the respondent was preparing to operate under the name at the relevant date.

27. The applicant's point about the respondent having signed the Agreement of Intention only after receiving notice that this application would be made, and the further point about the discrepancy between the respondent's initial claim that it was providing retail services under the name and different services mentioned in the respondent's evidence, appear to be intended to counter the respondent's implied case that the contested name was incorporated in good faith.

28. We note that the respondent was only incorporated on 8th October 2014, so there is nothing inherently suspicious about the respondent signing an Agreement of Intention to provide services on 28th November 2014. However, we note that there is nothing in the witness statement of Maksym Zaplatynskyi dated 22nd June 2015 to indicate that the respondent had gone on to provide the services mentioned in the Agreement. Further, the difference between the respondent's initial description of the nature of its business – as a retailer – and the business subsequently described in Mr Zaplatynskyi's statement - *real estate development* – has not been explained.

29. If we had decided that the name of the respondent *prima facie* engaged s.69(1)(b), we would have found that the facts set out above are equally consistent with the respondent having acted in good faith as having acted in bad faith. Consequently, as the onus to establish a defence rests on the respondent, the good faith defence would not have been available to the respondent.

30. However, given our finding that the parties' names are not similar for the purposes of s.69(1)(b), the availability of potential defences only arises if our primary finding is wrong. If we are right that the names are not similar enough to mislead, then it is inherently very unlikely that the contested name was chosen in bad faith.

Outcome

31. The application fails.

Costs

32. The respondent has been successful and is entitled to a contribution towards its expenses on the basis of the scale of costs which applied at the date these proceedings were commenced. Costs are awarded to the respondent as follows:

Official fee for filing notice of defence: £150
Official Fee for filing evidence: £150
Preparing a statement and considering the application: £150
Preparing evidence and considering the applicant's evidence: £200
Total: £650

33. AXA is ordered to pay Axals Corp LLP the sum of £650 within fourteen days of the expiry of the appeal period, or within fourteen days of the final outcome of any appeal. 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.

34. 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 September 2016

Allan James **Al Skilton** **Mark Bryant**
Company Names Adjudicators