

O-029-17

Companies Act 2006

In the matter of application No 1121 by Jonathan Millmore (Westcountry Batteries) for a change to the company name of WESTCOUNTRY BATTERIES LTD, registered under No. 09312059.

Background and pleadings

1. WESTCOUNTRY BATTERIES LTD (“the primary respondent”) was incorporated on 14 November 2014.
2. On 15 March 2016, Mr Jonathan Millmore (“the applicant”¹) applied for an Order under section 69 of the Companies Act 2006 (“the Act”) for the company name of WESTCOUNTRY BATTERIES 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).

¹ Mr Millmore also gives the name Westcountry Batteries as the name of the applicant – this appears to be a trading name.

(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 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. Mr Millmore completed the application form himself. He claims that the name associated with his business is: **WESTCOUNTRY BATTERIES**. We note the following statements and claims made by Mr Millmore:

- That he started his “company” in August 2014 and that he has traded exclusively under that name since. So as to not confuse matters, and because Mr Millmore does not appear to have registered a company through which he operates, we will refer from this point on to Mr Millmore’s “business” as opposed to “company”.
- As part of operating his business, Mr Millmore has “the domain named website”, signs, vehicles, stationery and has advertised (including on the radio).
- That he purchased thousands of pounds worth of product from “Plymouth Battery Centre (Westcountry Batteries Ltd), so they are aware of his business and are trying to prevent him from registering the name”.
- That the respondent has traded for over 30 years as PLYMOUTH BATTERY CENTRE and they only registered the name Westcountry Batteries Ltd well after the date he began trading. We bear in mind, of course, that the respondent itself has not traded for over 30 years because it did not exist as a legal entity until it was incorporated in November 2014.

- That the directors of the respondent claimed that they registered the company name as “protection”. When answering the question whether he had contacted the respondent before making his application, Mr Millmore states that they stated that they used the name “to prevent me from doing so”.
- That Plymouth Battery Centre have no intention of trading under the name Westcountry Batteries Ltd as they seek only to exert control.

5. The primary respondent filed a defence and counterstatement, which was written by Mr William Daly. We note the following statements and claims:

- It is accepted that “we” have been trading for over 30 years as Plymouth Battery Centre. However, it is claimed that the names Westcountry Battery Specialist and South West Batteries have been used as trading styles. It is claimed that “the Westcountry logo” has been used on t-shirts during that time. It is claimed that a website is needed to service its customers in the Westcountry.
- That Mr Millmore’s business was initially a partnership. Mr Millmore’s business partner was a Mr S Bodley. In August 2015 Mr Bodley ceased to be a partner so the business was subsequently operated by Mr Millmore as a sole trader. The respondent notes that there was no objection from the partnership when the respondent’s company name was registered.
- The respondent registered its company name after the partnership began trading so as to protect its trading style.
- A business unit has been obtained and fitted out to run the Westcountry website. Rates are also being paid in connection with this.
- The claim that the respondent’s company name was registered to stop him trading is “ridiculous”.

6. In relation to possible defences, the respondent refers to start-up costs, that it was formed in the ordinary course of a company formation business and that it was

formed before Mr Millmore started trading as a sole trader. A number of documents were provided with the counterstatement as follows:

- 'To whom it may concern' letters, one of which is from Mr Millmore, supporting that the applicant's business moved from a partnership (with Mr Bodley) to a sole trader business in August 2015.
- An invoice from Plymouth Council for business rates issued on 1 March 2016 in relation to the business unit mentioned above. The invoice is addressed to Plymouth Battery Centre.
- An invoice dated 27 April 2016 relating to website design services. It is addressed to Mr Bill Daly, Westcountry Batteries.
- An advertisement from Sunday Motoring dated 1 May 2016 for Plymouth Battery Centre. Text below this trading name reads "West Country Battery Specialist".
- Another advertisement from an unspecified source for "Plym Batt – The Leading West country Battery Specialists".
- A small (undated) flyer of a similar nature advertising Plymouth Battery Centre. A handwritten note appears on this advertisement highlighting that a logo surrounded by the words PLYMOUTH BATTERY CENTRE is its "Westcountry Logo". The logo is a stylised outline of certain parts of the south western counties of England together with the letters PBC. This logo also appears in the Sunday Motoring advertisement.

7. Both sides filed evidence. Neither side requested a hearing or filed written submissions in lieu.

Evidence

The applicant's evidence

8. The applicant's evidence is given by Mr Millmore. He states that the respondent's claimed use of Westcountry Batteries is nothing more than the use of the words "West Country Battery Specialist" to denote their geographic area. He adds that they only started to do this at, or shortly after, he started his business and in the full knowledge of his use of the name. Even though he accepts that Mr Daly has been trading for a long time, and that he has highlighted that his business operates in the Westcountry and used the Westcountry logo, the trading name used by that business is Plymouth Battery Centre. Reference is made to Mr Daly doing "something similar" in 2010 in respect of another battery supplier called South West Batteries – it is claimed that Plymouth Battery Centre started using Southwest Battery or South West Battery in one form or another alongside Plymouth Battery Centre.

9. Mr Millmore states that his plans to use the name Westcountry Batteries stem from August 2013. He provides two domain name prints in his name (domains which include Westcountry batteries in one form or another) which date to August 2013. In contrast, he provides prints from some of Mr Daly's domain names (which include Westcountry batteries/battery in one form or another) the earliest of which is from November 2014. The various domain name prints are provided in Exhibits JNM1-6.

10. It is stated that all of Mr Daly's domain name registrations were made after the respondent became aware of Mr Millmore's business. Exhibit JNM7 is an invoice issued by Plymouth Battery Centre (it makes use of the logo described earlier) to WESTCOUNTRY BATTERIES. It is dated 2 September 2014 and is in respect of two batteries. These are said to be the first purchases made from Plymouth Battery Centre. Exhibit JNM8 contains a statement of the account of Westcountry Batteries held with "Plymouth Battery Centre Ltd". It is in the region of £3000. A further statement dated 31 October 2014 is provided in JNM9 for a sum in the region of £5000 and a further one from January 2016 for around £400. Mr Millmore states that this shows significant ongoing trade between him and Plymouth Battery Centre

which also demonstrates the latter's knowledge of his trading name. Mr Millmore states that Mr Daly may have believed that he was to merge with a larger supplier (which constituted a threat to him) but there was no such intention.

11. Mr Millmore states that in November 2015 he visited Mr Daly to ask him to relinquish the respondent's name as he wished to register the company name for his growing business. No agreement was reached, but Mr Daly agreed to consult his father. Mr Millmore returned in January 2016 to request the same; again, no agreement was reached. Mr Millmore has, since then, refused to do business with Plymouth Battery Centre. Exhibit JNM11 contains details of all the transactions between West Country Batteries and Plymouth Battery Centre between 1 September 2014 and January 2016. It amounts to over £14,000. He adds that he did not know that Mr Daly had even registered the name (let alone used it) until he wanted to register the name as a company.

12. Exhibit JNM12 contains an invoice from November 2015 in relation to radio advertising. It is for a sum of just under £6.5k for seventh months' worth of advertising (the earliest month being November 2015) and was, Mr Millmore states, used to promote the Westcountry Batteries' business. Exhibits JNM13 and JNM14 contain two photographs taken in June 2016 showing two of the vans used by Mr Millmore, one of which is outside his business premises. On the vans and the business premises are the words WESTCOUNTRY BATTERIES, to the left of which is a geometric logo. He contrasts his use with that of Mr Daly by providing, at Exhibits JNM15 and 16, photographs of the latter's business premises, Plymouth Battery Centre, from which Mr Millmore notes that there is no use of Westcountry Batteries on the signage.

13. Exhibit JNM17 contains an extract from the 2016/17 Yellow Pages Directory. It shows the business of Mr Millmore (under the name Westcountry Batteries & geometric device) and the business of Mr Daly (under Plymouth Battery Centre, with no use of the words Westcountry Batteries).

14. Mr Millmore states that the registration of the company name was deliberate and abusive to prevent him from registering it. He adds that in terms of the Westcountry

logo (mentioned earlier) this is just an outline of part of England and they have no exclusive right to it (the shape). In any event, he has no intention of using anything similar. He states that he intentionally avoids using the words PLYMOUTH and BATTERY together to avoid confusion with Mr Daly's business.

15. Mr Millmore states that Mr Daly had not shown any sign of wanting to use Westcountry Batteries until after he began using it. He states that he has received around 10 calls asking if he is a representative of the respondent. He has also had a credit application returned to him seeking clarification on his relationship with Plymouth Battery Centre.

16. In relation to the business unit claimed to have been set up to run the respondent's Westcountry Batteries Ltd website, Mr Millmore states that this is not true. He states that it was obtained more than three years ago as a warehouse expansion and to this day is just a general storage facility. He is not aware of any website called Westcountry Batteries being operated by Mr Daly and his domain name registrations are intended to cause confusion. Mr Millmore states that he did not object to the registration earlier because he was not aware of it.

The respondent's evidence

17. This comes from Mr Daly. He states that he has operated his business as "Plymouth Battery Centre Ltd with trading styles of Westcountry Battery Specialist and South West Battery Specialist with a logo of the Westcountry for over 34 years". He states that the former trading style was used in the Westcountry as long ago as 1984. He adds that South West Batteries was used before it was registered by South West Batteries as a company.

18. Mr Daly states that before registering the company he contacted the Intellectual Property Office ("IPO") and was informed that the company Westcountry Batteries had not been registered as a trade mark. Therefore, he states that to protect their trading style the company name was registered; Companies House had no objection so Mr Daly feels that he has done nothing wrong.

19. Mr Daly states that Mr Millmore may not be aware of all the facts concerning his use because it was mainly used in Devon and Cornwall in newspapers etc. He adds that “the company, Westcountry Batteries Ltd, will be used as a website in Devon, Cornwall and Somerset but not in the Plymouth area, this would conflict with our other business Plymouth Battery Centre”.

20. Mr Daly states that the company name was registered before Mr Millmore became a sole trader, although he accepts that he helped supply Mr Millmore and his original business partner when they started their business. He states that he only became concerned because Mr Millmore’s business might have used Mr Daly’s goodwill to promote his business so action was taken to protect this goodwill.

21. It is stated that if the only reason why Mr Millmore wished to register a company was in order to gain limited liability, he could have registered something like Westcountry Batteries 2016 Ltd.

22. Mr Daly states that as a battery specialist in the Westcountry they only wanted to protect their trading style and logo. Furthermore, he adds that “Westcountry Batteries and West Country Batteries Ltd are completely separate names and Mr Millmore has no claim over it as it is not his intellectual property”. A number of exhibits are also provided as follows:

- Exhibit BD1 – This shows an advertisement, said to date from 1984, for Plymouth Battery Centre which contains what I have described earlier as the Westcountry logo. There is no use of the words Westcountry Batteries/Battery in the advertisement.
- Exhibit BD2 – This shows a similar advertisement (although no date is claimed) said to show the Westcountry logo on a vehicle. I cannot actually see it on the vehicle. Neither is there any use of the words Westcountry Batteries/Battery. The advertisement is, again, for Plymouth Battery Centre.

- An advertisement said to be from before Mr Millmore was trading. It is for Plym Batt. Alongside are the words “The Leading Westcountry Battery Specialist”.
- An advertisement from Sunday Motoring (which Mr Daly explains is from the Independent) which he says has run for the last 10 years. It is for Plymouth Battery Centre, but features the additional descriptive words mentioned above.
- An invoice dated 27 April 2016 for web design services addressed to “Mr Bill Daly – Westcountry Batteries”. The invoice is for just over £2k.
- A reminder for the payment of corporation tax dated 2 August 2016. Mr Daly states that this shows that the company (Westcountry Batteries Ltd) is not dormant.

Decision

23. If the respondent defends the application, as here, the applicant must establish that he has goodwill or reputation in relation to a name that is the same, or sufficiently similar, to that of the respondent’s company name suggesting a connection between the company and the applicant. Only if this burden is fulfilled is it then necessary to consider if the respondent can rely upon defences under section 69(4) of the Act. The relevant date is the date of application which, in this case, is 15 March 2016. The applicant must show that he had a goodwill or reputation at this date.

Goodwill

24. Section 69(7) of the Act defines goodwill as a “reputation of any description”. Consequently, in the terms of the Act, it is not limited to Lord Macnaghten’s classic definition of goodwill in *IRC v Muller & Co’s Margerine Ltd* [1901] AC 217:

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start.”

25. We note that Mr Millmore does not provide evidence of any outward sales. However, he has provided evidence showing purchases made from Plymouth Battery Centre in relation to stock to use in his business. It is important to observe that this was not a one off. One does not buy stock for the fun of it. Therefore, the ongoing purchase of stock strongly suggests the operation of a business selling/supplying batteries etc as part of a business. Mr Millmore’s commentary is clear in that the business’ trading name is WESTCOUNTRY BATTERIES. This is supported by the photographs he has provided, irrespective of the fact that they may have been taken after the relevant date. Evidence of goodwill/reputation is also apparent from the radio advertising for which Mr Millmore was invoiced. It would have been better to have been provided with an audio file of the advertisement, but Mr Millmore confirms that it was to promote the WESTCOUNTRY BATTERIES business and based on the other evidence provided there is no reason to doubt this. Finally, we also note that the respondent has not really challenged the trading activities of the applicant. Indeed, Mr Daly accepts that he helped start the applicant’s business (by providing stock) albeit this was when the business was operated as a partnership. Taking everything in the round, we consider that Mr Millmore has established that his business had a goodwill or reputation associated with the name WESTCOUNTRY BATTERIES at the relevant date.

26. We add for sake of clarity that our finding is based not only on Mr Millmore’s activity as a sole trader, but that he is also entitled to rely on any goodwill/reputation as a result of the activities of the business when it was operated as a partnership between Mr Millmore and Mr Bodley. This is because i) Mr Millmore would have been entitled to make a claim in his position as a partner, relying on the goodwill/reputation of the partnership business and ii) it appears that when the business moved from being a partnership to a sole trader business, it was on the

basis of a continuation of the existing business as per the evidence provided by Mr Daly himself (the 'to whom it may concern' letter).

Are the names the same, or, alternatively, does the respondent's company name suggest a connection between it and the applicant?

27. The respondent's name is **Westcountry Batteries Ltd**. The name associated with the applicant is **Westcountry Batteries**. Consequently, the only difference between the names is the absence/presence of the word Ltd. In terms of this difference, this can hardly be considered significant as LTD simply indicates the corporate status of the company, something which is necessary in most company names. We consider that this difference is to be ignored and the names should be considered the same (see, for example, *MB Inspection Ltd v Hi-Rope Ltd* at paragraph 48). Even if we are wrong on that then the names are self-evidently very close, so close that it is inevitable, notwithstanding that Westcountry is a descriptive phrase indicating geographical location, that the use of the company name in the UK would likely mislead by suggesting a connection between the company and the applicant.

Defences

28. The only defences that are mentioned in the counterstatement (some only partially) are:

i) Start-up costs – we assume this to be a reference to section 69(4)(b)(ii) which reads:

“...is proposing to do so [operate under the name] and has incurred substantial start-up costs in preparation...”

ii) That the company was formed in the ordinary course of a company formation business which is a clear reference to section 69(4)(c) which reads:

“..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..”

iii) That it was formed before Mr Millmore started trading as a sole trader, a reference to section 69(4)(a) which reads:

“...that the name was registered before the commencement of the activities on which the applicant relies to show goodwill...”

Section 69(4)(a)

29. Taking the pleaded defences in reverse order, iii) must fail because even though it is true that the respondent's company name was registered after Mr Millmore became a sole trader, Mr Millmore nevertheless still had a share of the goodwill of the business when it was operated as a partnership and, as stated earlier, he was entitled to bring a claim. Thus, the activities relied upon commenced before the respondent's name was registered. In any event, and also as stated earlier, to all intents and purposes Mr Millmore has taken on and continued the business as a going concern so any doubts about this are overcome.

Section 69(4)(c)

30. In terms of ii), this must also fail, for two reasons. First, there is no evidence to show that the company was registered in the ordinary course of a company formation business. Second, there is no evidence to show that the company is available for sale to Mr Millmore on the standard terms of that business.

Section 69(4)(b)(ii)

31. Finally, we turn to i), that the respondent is proposing to operate under the name and has incurred substantial start-up costs in preparation to do so. We have to say that the explanations put forward by Mr Daly are not the most persuasive. Very little information about the proposed business operation is provided. Mr Daly states that a

business unit was obtained for the new company to operate a website. It is not altogether clear why a business unit of this type is needed for the operation of a website. Further, the evidence of rates on this business unit is addressed to Plymouth Battery Centre not the respondent. This is consistent with Mr Millmore's statement that the business unit was acquired for an expansion (for the purposes of holding stock) of the Plymouth Battery Centre business.

32. Much of Mr Daly's evidence focuses on the company being set up to protect its existing trading style. However, we agree with Mr Millmore that what is claimed as a trading style is nothing more than the use of descriptive terminology indicating the geographical location in which the services are offered. This impacts on the plausibility of the respondent actually wishing to operate under the name. The plausibility is not helped by the fact that the only other evidence which could potentially assist is the invoice for web design which was not issued until after the application was made. Taking everything in the round, we are not persuaded that the respondent was proposing to operate under the name.

33. In any event, the respondent proposing to operate is just the first limb of the defence. The second limb is that substantial start-up costs have been incurred. We have already commented on the business unit and its rates being payable by Plymouth Battery Centre and, therefore, we do not consider that these are start-up costs that are attributable to the respondent, indeed, we do not consider them start-up costs at all. The only other cost is for web design. However, we do not consider that these costs assist the respondent for two reasons. First, we do not consider that a sum of around £2000 is what most people would consider as "substantial". Second, the costs were incurred after the application was made and we do not consider it appropriate that they should be taken into account. They were generated after the application was brought to the attention of the respondent which may have influenced the work being commissioned and also influenced in whose name the invoice was to be issued. We also add that a bill for the payment of corporation tax is not a start-up cost.

34. That deals with the defences which were specifically highlighted in the appropriate part of the respondent's counterstatement. However, we consider it

useful to comment also upon the good faith defence contained in section 69(4)(d) given that much of the respondent's counterstatement and evidence focuses on the claim that it was protecting its own trading style and goodwill.

Section 69(4)(d)

35. The onus is on the respondent to establish that the registration of the company name was in good faith. Even if this defence had been properly pleaded, we feel that we can deal with it briefly. Our comments made earlier in relation to the unpersuasive evidence about the respondent's proposals to operate under the name are telling. Likewise, the claim that the company name was registered to protect an existing trading style (and goodwill) is incongruous given that the claimed trading name was nothing more than a descriptor – this begs the question - what is there to protect? In short, we do not consider that the respondent has established that the registration of the company name was in good faith.

36. The result of all this is that the respondent is unable to avail itself of a defence which, in turn, means that the application for a change of name succeeds.

Outcome

37. The application is successful. In accordance with section 73(1) of the Act, the following order is made:

- (a) WESTCOUNTRY BATTERIES LTD shall change its name **within one month** of the date of this order to one that is not an offending nameⁱ;
- (b) WESTCOUNTRY BATTERIES LTD shall:
 - (i) take such steps as are within their power to make, or facilitate the making, of that change;

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

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

Costs

39. The applicant has been successful and is entitled to a contribution towards costs. Mr Millmore has represented himself and, therefore, will not have had to pay additional legal fees on top of his own time. The Company Names Tribunal Practice Direction indicates that costs (save in relation to expenses such as official fees) should be reduced by 50%; this is reflected in what we award below:

Fee for filing application: £400

Fee for filing evidence: £150

Preparing a statement and considering the counterstatement: £150

Preparing evidence: £250

Total: £950

40. WESTCOUNTRY BATTERIES LTD is ordered to pay Mr Jonathan Millmore the sum of £950 within fourteen days of the expiry of the appeal period, or within fourteen 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 uphold the application; there is no right of appeal in relation to costs.

41. 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 25th day of January 2017

Oliver Morris

Judi Pike

Beverley Hedley

Company Names

Company Names

Company Names

Adjudicator

Adjudicator

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.