

Companies Act 2006

In the matter of consolidated applications Nos 644, 645 and 646 by Lituanica UK Limited for a change to the company names of Lituanika Limited, Lituanica (London) Limited and Lituanica Direct Limited registered in England and Wales under Nos. 07895053, 08258369 and 08589532.

1. Lituanika Limited (“the first respondent”) was incorporated under that name on 3 January 2012.
2. Lituanica (London) Limited (“the second respondent”) was incorporated under that name on 18 October 2012.
3. Lituanica Direct Limited (“the third respondent”) was incorporated under that name on 28 June 2013.
4. On 7 October 2013, Lituanica UK Limited (“the applicant”) applied for orders under section 69 of the Companies Act 2006 (“the Act”) for all three company names to be changed.
5. Section 69 of the Act states:

“(1) A person (“the applicant”) may object to a company’s registered name on the ground—

(a) that it is the same as a name associated with the applicant in which he has goodwill, or

(b) that it is sufficiently similar to such a name that its use in the United Kingdom would be likely to mislead by suggesting a connection between the company and the applicant.

(2) The objection must be made by application to a company names adjudicator (see section 70).

(3) The company concerned shall be the primary respondent to the application.

Any of its members or directors may be joined as respondents.

(4) If the ground specified in subsection (1)(a) or (b) is established, it is for the respondents to show—

(a) that the name was registered before the commencement of the activities on which the applicant relies to show goodwill; or

(b) that the company—

(i) is operating under the name, or

(ii) is proposing to do so and has incurred substantial start-up costs in preparation, or

(iii) was formerly operating under the name and is no dormant; or

(c) that the name was registered in the ordinary course of a company formation business and the company is available for sale to the applicant on the standard terms of that business; or

(d) that the name was adopted in good faith; or

(e) that the interests of the applicant are not adversely affected to any significant extent.

If none of these is shown, the objection shall be upheld.

(5) If the facts mentioned in subsection 4(a), (b) or (c) are established, the objection shall nevertheless be upheld if the applicant shows that the main purpose of the respondents (or any of them) in registering the name was to obtain money (or other consideration) from the applicant or prevent him from registering the name.

(6) If the objection is not upheld under subsection (4) or (5), it shall be dismissed.

(7) In this section “goodwill” includes reputation of any description.”

6. The applicant states that the name which has caused it to make the applications is Lituanica. It states that it has been incorporated in the UK for over ten years, specialising in Eastern European food and drink import and distribution. The applicant claims that it has several hundred clients across the UK. The applicant states that the inclusion in the company names of words which are very similar or identical to Lituanica will cause confusion and is capitalising on the applicant’s good name. In addition, the first respondent is registered as ‘retail sale in non-specialised stores with food, beverages or tobacco predominating.’ The applications against the first and third respondents requested that Mr David Povilonis be joined to the proceedings, as a director of those companies. The application against the second respondent requested that a Mr Deividas Povilonis be joined to the proceedings, as a director of the company.

7. The respondents filed notices of defence and counterstatements for all three company names. The defences were written by the respondents’ representative, Mr David Povilonis. The respective defences begin (reproduced verbatim):

“We deny all the alligations of the applicant because the name of our company is Lituanika Limited and the name of the company of the applicant is Lituanica UK Limited. The name ‘Lithuanika Limited’ differs from the name ‘LitunanicaUK Limited’ in three symbols: U, K and C. As a consequence, the

name Lituanika Limited is not similar to the name Lituanika UK Limited. In addition, the applicant did not inform us that the application will be made against us.”

“We deny all of the allegations of the application because the name of our company Lituanika (London) Limited is too similar to the name of the company of the applicant Lituanika UK Limited. The name ‘Lituanika (London) Limited’ differs from the name ‘Lituanika UK Limited’ in many symbols. As a consequence, the name Lituanika (London) Limited is not similar to the name Lituanika UK Limited. In addition, the applicant did not inform us that the application will be made against us.”

“We deny all the allegations of the applicant because the name of our company Lituanika Direct Limited is too similar to the name of the company of the applicant Lituanika UK Limited. The name ‘Lituanika Direct Limited’ differs from the name ‘Lituanika UK Limited’ in many symbols. As a consequence, the name Lituanika Direct Limited is not similar to the name Lituanika UK Limited. In addition, the applicant did not inform us that the application will be made against us.”

8. The remainder of the counterstatements are identical:

“In their application, the applicant refers to the name of their company as ‘Lituanika’. In fact, the name of the company of the applicant is Lituanika UK Limited. We require the applicant to prove that they have a goodwill in the name ‘Lituanika’. Our records show that Lituanika is a registered trade mark of our sister company Lituanika (UK) Limited.”

9. According to the applicant, Mr David Povilonis is listed as a director of the first and third respondents, whilst Mr Deividas Povilonis is listed as a director of the second respondent. As Mr David Povilonis has filed the defences in all three cases, we consider that it Deividas is a variant spelling of David and that it is Mr David Povilonis who is director for all three companies. Mr Povilonis was informed of the request that he be joined as a co-respondent in all three cases by the Company Names Tribunal on 27 November 2013, and was invited to comment upon the request by 27 January 2014. No comments were received by the Tribunal. The Tribunal wrote to Mr Povilonis on 18 March 2014 to inform him that he was formally joined to all three proceedings and was jointly and severally liable, with the three primary respondents, for costs. Mr Povilonis was allowed until 1 April 2014 to request a hearing if he objected. No hearing request was received.

10. The three sets of proceedings were consolidated prior to the evidence rounds. Only the applicant filed evidence. The applicant is professionally represented, whilst the respondents are self-represented (by Mr Povilonis). The parties were given a choice as to whether they wished to be heard prior to a decision being taken on the merits of the case or whether they wished for a decision to be made from the papers filed. The applicant filed written submissions in lieu of a hearing. Neither the respondents nor Mr Povilonis replied. We therefore make this decision following a careful study of all the papers filed in these proceedings.

Applicant's evidence

11. The applicant's evidence comes from Ms Abigail Mitchell, who is the applicant's Human Resources Manager, a position she has held since July 2011. She states that the applicant has, since at least 2003, established a significant reputation in LITUANICA in the UK food and drink industry. Ms Mitchell refers to the applicant's UK registered trade mark number 2492967, for various foodstuffs, drinks and retail thereof:



12. Ms Mitchell states that for LITUANICA, and the logo shown above, the UK sales and promotion figures are as follows:

Year	UK turnover (£)
2006-7	7,214,862
2007-8	10,696,033
2008-9	13,989,519
2009-10	15,644,452
2010-11	22,298,656
2011-12	25,691,687
2012-14 (16 months)	40,107,309

Year	UK advertising spend (£)
2006-7	14,800
2007-8	15,520
2008-9	21,900
2009-10	37,640
2010-11	50,000
2011-12	75,280
2012-14 (16 months)	350,835

13. There are nine LITUANICA stores in the UK, which also supply goods wholesale to other retailers. Ms Mitchell does not state where the nine stores are located, although she does refer to a restaurant and take-away in Beckton (east London) which opened in 2010 and another in Barking (also in east London) in 2011. Exhibit AM1 includes prints from the Internet Archive's 'Wayback Machine' from the applicant's website and Facebook pages. These show that, as of 3 July 2007, there were four Lituanica stores in the UK, located in London, Ipswich, Gravesend, and Birmingham. The printouts show that Lituanica stores specialise in Lithuanian goods. By May 2008, the evidence shows that there were nine UK stores, located in London, Gravesend, Ipswich and Bedford. A print from October 2013 refers to a Lituanica loyalty card.

14. An article in the *Polish Observer* in 2011 says that the applicant brings together Eastern European food (not just from Lithuania). An article in *Lynn News* (King's Lynn, Norfolk) dated 1 August 2014, which is after the relevant date (7 October 2013), refers to the opening of a Lituanica store creating thirty jobs. The article states that the applicant imports over 9,000 products. This number is also referred to in the 2011 article from the *Polish Observer*. The article states that the King's Lynn store is the ninth national Lituanica store.

15. Page 25 of exhibit AM1 is from the website of Savills, a commercial property agent. The article is dated June 2012 and concerns the UK retail warehouse market. It refers to "Lituanica beating Lidl and Aldi to the discount food space."

16. Advertising has been by way of promotional booklets (several of these are shown from 2010 and 2011) and a presence at a Taste of London event in June 2013 (photographs are shown) (all in exhibit AM1). The applicant also sponsors or has sponsored the following (the evidence includes photographs showing the name Lituanica in connection with the sponsored events):

- The London Lituanica Basketball team, who play in the England Basketball League.
- The Lithuanian Olympic team and the London 2012 Olympic Games.
- A concert held in Birmingham, Leeds and the O2 Arena in London during September and October 2012.

Decision

The applicant's goodwill

17. Under the provisions of section 69(1) of the Act, if the respondents defend the applications, as here, the applicant must establish that it has goodwill or reputation in relation to a name that is the same, or sufficiently similar, to that of the respondents' company names, suggesting a connection between the companies and the applicant. If this burden is fulfilled, it is necessary to consider if the respondents can rely upon defences under section 69(4) of the Act. The applicant must firstly show that it had a goodwill or reputation associated with the Lituanica name. Section 60(7) provides that goodwill includes reputation of any description. The relevant date for the assessment of goodwill is the date of the applications which, in all three cases, is 7 October 2013.

18. In *IRC v Muller & Co's Margerine Ltd* [1901] AC 217, Lord Macnaghten defined goodwill thus:

"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.

19. It is clear from the evidence that the word LITUANICA is the key name or sign that the applicant uses to identify itself. It is also clear to us, from the evidence, that the applicant enjoyed a significant level of goodwill and reputation at the relevant date, owing to the size of turnover figures, promotional figures, public exposure through shops, unsolicited press reports, promotional literature, and sponsorship. We conclude that, as of 7 October 2013, the applicant had goodwill in the UK associated with the name LITUANICA.

Whether the names are the same or similar

20. The next part of section 69(1) of the Act requires that the names be the same (69(1)(a)) or, alternatively, that there is sufficient similarity so that the respondents' company names suggest a connection between the respondents and the applicant (69(1)(b)). There are three company names to consider:

- i) Lituanika Limited
- ii) Lituanica (London) Limited
- iii) Lituanica Direct Limited

19. The comparison to be made is between the above three names, with the name associated with the applicant's goodwill, LITUANICA. However, the presence of the word "Limited" in each of respondents' names is to be excluded from the comparison as a company designation is required for a company incorporated in the UK (other than in certain excepted circumstances).

21. None of the names are identical owing either to the presence of the additional words, "UK", "Direct" and "(London)", or a difference in spelling, LITUANIKA. Section 69(1)(a) of the Act is, therefore, inapplicable.

22. In terms of section 69(1)(b) (sufficient similarity), all the parties' company names begin either with the word LITUANICA, the name associated with the applicant's goodwill, or a word highly similar visually and identical aurally, LITUANIKA. The differences described in the preceding paragraph are wholly descriptive. The respondents' names are sufficiently similar to the applicant's name (associated with its goodwill) so that their use in the UK would be likely to mislead by suggesting a connection between the respondents and the applicant.

23. As the ground specified in subsection 69(1)(b) is established, the onus switches to each respondent to establish whether they can rely on any of the defences pleaded in the counterstatements. We have set out at paragraphs 7 and 8 of this decision the contents of the counterstatements. The contents cover two issues only:

- (i) The respondents do not agree that the names are similar.
- (ii) The respondents do not agree that the applicant has goodwill in LITUANICA.

24. Firstly, neither of these issues constitutes a defence within the parameters set out in section 69(4) of the Act, reproduced in paragraph 5 of this decision. Secondly, we have already found in favour of the applicant in respect of both issues: the

names are similar and the opponent has goodwill in the name LITUANICA. Finally, even if the counterstatements had contained one or more defences, as per section 69(4) of the Act, the onus is on the respondents to prove, by filing evidence, that they can rely on one or more defences. The respondents have not filed any evidence. The only documents the respondents have filed are the counterstatements.

25. Accordingly, all three applications succeed. Therefore, in accordance with section 73(1) of the Act, we make the following order against each respondent and Mr Povilonis:

- (a) Lituanika Limited, Lituanica (London) Limited and Lituanica Direct Limited shall change their names **within one month** of the date of this order to one that is not an offending name. 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 (power of Secretary of State to direct change of name), or to give rise to a further application under section 69;
- (b) Lituanika Limited, Lituanica (London) Limited, and Lituanica Direct Limited and David Povilonis each 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.

26. 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.

27. In any event, if no such change is made within one month of the date of these orders, we will determine new company names as per section 73(4) of the Act and will give notice of those changes under section 73(5) of the Act.

28. All the respondents, including Mr Povilonis, 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 companies. *Non-compliance may result in an action being brought for contempt of court and may result in a custodial sentence.*

29. Lituanica UK Limited, having been successful, is entitled to a contribution towards its costs, which are assessed on the scale of costs published in the Company Names Tribunal Practice Direction. I bear in mind that these proceedings were consolidated following the filing of the defences.

30. We order Lituanika Limited, Lituanica (London) Limited, and Lituanica Direct Limited and Mr David Povilonis to pay Lituanica UK Limited the sum of £2850. The

respondents and Mr Povilonis shall be jointly and severally liable for these costs. The costs are calculated as follows:

Preparing statements and considering the respondents' statements	£600
Preparing evidence	£600
Filing written submissions in lieu of a hearing	£300
Expenses (official fees for three Forms CNA1 and one CNA3)	£1350
Total	£2850

31. 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.

32. 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.

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

Dated this 27th day of January 2015

Judi Pike
Company Names
Adjudicator

Mark Bryant
Company Names
Adjudicator

Al Skilton
Company Names
Adjudicator