O-205-17

Companies Act 2006

In the matter of application No 920 by Capita Plc for a change to the company name of DCAPITA EUROPE LIMITED, company registration 08790481.

1. Company 08790481 ("the primary respondent") was incorporated on 26 November 2013 with the name DCAPITA EUROPE LIMITED. This name has caused Capita Plc ("the applicant") to make an application to this tribunal, on 17 March 2015, under section 69 of the Companies Act 2006 ("the Act").

2. 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 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.”

3. At the request of the applicant, the primary respondent's two directors, Matias Egonzo and Henrik Valentin, were joined to the proceedings under the provisions of section 69(3) of the Act. Mr Egonzo and Mr Valentin were given notice of this request and an opportunity to comment or to object. The Tribunal received no comments or objections from Mr Egonzo or from Mr Valentin and they were joined to the proceedings as co-respondents on 4 November 2015.

4. The applicant claims that the name associated with it is CAPITA. It is the parent group for 116 entities which use the name CAPITA as part of their company name. It claims that it has a vast reputation and goodwill in this name which has been used extensively in relation to business process outsourcing and professional services across a range of sectors, including central and local government, insurance, financial services, transport, education, health, ICT, HR and property. The applicant is the UK's leading outsourcing company, employing over 68,000 people. In 2013, turnover amounted to £3.851 billion, with a pre-tax profit of £475 million. Over 98% of turnover is generated by companies and operations which use the CAPITA name. The applicant is listed on the London Stock Exchange and is a FTSE 100 company.

5. The applicant objects to the company name DCAPITA EUROPE LIMITED because it claims that it is sufficiently similar to CAPITA that its use in the UK would be likely to mislead by suggesting a connection between the company and the applicant. This is a pleading under section 69(1)(b) of the Act. The applicant requests the Tribunal to make an order under section 73 of the Act for the name to be changed to a name which does not offend[1].

6. The primary respondent filed a notice of defence and a counterstatement, which were completed by Matias Egonzo. The primary respondent states (reproduced here verbatim):

[1] Section 73(2) of the Act provides that 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.

"1. Dcapita Europe Limited was fully available when we registered.

2. Dcapita Europe Limited looks nothing like Capita PLC.

3. Our email address and website is not the same as the applicants.

4. From our website it is clear we do not do the same business [sic] the applicant.

5. From the applicants website it is very clear its business is not the same as ours we are a discounter.

6. At no stage did we ever consider our name being similar to the applicants. It would be of no benefit to us.

7. From our website it can be seen we are reconstructing our site and brand image this has involved considerable expense – relative to our resources. To reconstruct our site and image it has taken a very considerable number of man-hours.

…we would request that the applicant be may to prove how the name Dcapita Europe limited is effecting it reputation and goodwill."

7. The applicant is professionally represented. The respondents are not represented. Both parties filed evidence. They were asked if they wished for a decision to be made following a hearing or from the papers. Neither side chose to be heard. Only the applicant filed written submissions in lieu of a hearing. We make this decision after having carefully read all the papers filed by both parties.

Evidence

8. The applicant's evidence in chief is given by Francesca Todd, who is the applicant's Group Company Secretary. Her witness statement is dated 23 September 2015. Ms Todd confirms the information given about the applicant in its application (form CNA1). Points from her evidence include:

- Half of the applicant's business comes from the private sector and half from the public sector.

- 2014 turnover was £4.3 billion; pre-tax profits were £576 million[2].

- Over 90% of the applicant's turnover is generated by its companies and operations which use CAPITA in their names[3].

- The applicant provides professional outsourcing across a broad spectrum of private industry and public services sectors.

- The applicant has built expertise in common operational processes, including customer services (e.g. managing call centres), back office processes, HR, ICT, property consultancy, finance and treasury services.

- The applicant is an established market leader in the provision of specialist financial services, and also services in the life and pensions market. The financial services division generates over 7% of the applicant's turnover.

- The applicant provides share registration services to more than 45% of listed companies in the UK and Ireland, 22 of which are FTSE 100 companies. Brochures advertising these services are regularly included with the Institute of Chartered Secretaries and Administrators' monthly professional magazine.

- Exhibit 9 comprises a list of some 38 industry/professional body awards made to the applicant since 2011.

- Press coverage of the applicant and its businesses takes place on a daily basis, such as in national and regional newspapers. Three press articles are shown in Exhibit 10. One relates to Ireland, so is not relevant to these proceedings. The other two (Insider Media and Mortgage Financing Gazette) report that, in 2015, hundreds of staff at the Plymouth-HQ Western Mortgage Services and its parent, the Co-operative Bank, transferred to the applicant,

[2] Exhibit 1.
[3] Exhibit 3.

described as “a listed outsourcing giant”. Press coverage relating to the applicant’s strategic expansion into Germany is shown in Exhibit 11.

9. Ms Todd states that the respondent’s website is located at www.dcapita.com, as per Exhibit 15:

23/09/2015 Welcome to dCapita

dCapita kinetic financial structuring

Follow Us:

Email ID: info@dcapita.com

Welcome to
dCapita.com

we are currently in the process of redesigning & upgrading our website to better reflect on our company and our brand image.

MORE

dCapita Limited ("dCapita") is a specialist purchaser of receivables such as invoices, promissory notes, bills of exchange, bank and corporate guarantees, deferred payment letters of credit, (together herein after referred to as Receivables)

dCapita also purchases payables by providing companies with cash with which they can pay on delivery, or even prepay their suppliers. In doing so, rather than taking credit, companies can negotiate significant discounts with their suppliers on their purchases. dCapita believes that the discount obtainable from a supplier in return for prepaying or making full payment for supplies on delivery is nearly always greater than the cost of its funding.

dCapita, a financial trading group operates worldwide from associate bases and representatives in Europe, Asia and Australasia. dCapita focuses on providing structured financial products to companies. Companies seeking greater cash flow or risk mitigation in their trading activities willing to use their worldwide trade receivables and payables can significantly benefit from a business relationship with dCapita.

The shareholders of dCapita are its management. dCapita acts as a principal in all its purchases of Receivables and payables and not as a broker or intermediary. dCapita is financed via its shareholders, hedge funds and banks.

dCapita is able to purchase Receivables or fund payables from and to any country worldwide. dCapita has no limits as regards the amount of each Receivable or payable. dCapita is willing to purchase Receivables that are due for payment after a number of days or up to 7 or even 10 years.

One of dCapita specialities is in purchasing Receivables issued from those so called 'more risky' countries that many banks and bankers try to avoid.

If you would like to know more about how dCapita can work with you to free up your cash flow, reduce or eliminate the risk of your buyer delaying or even defaulting on its payments to you, or how to achieve a discount on your purchases from your suppliers, please do contact us.

You may contact dCapita by sending an email to newbusiness@dCapita.com

dCapita looks forward to working together with you in the future.

Ms Todd points out that the website does not refer to the company as DCAPITA EUROPE (it refers to dCapita) and that the two email addresses given on the website are info@dcapita.com and newbusiness@dCapita.com. Ms Todd states that she has been unable to find any other websites linked to the respondent despite entering the search terms 'dcapita europe' into various search engines; nor has she been able to find any evidence of the respondent trading under its company name. Ms Todd states that the website www.dcapita.com is almost identical to the applicant's website www.capita.com (we presume Ms Todd means the website addresses rather than the respective website appearances), as are the respondent's email addresses. She gives three examples of the applicant's many email addresses: sales@capita.com, service@capita.com and contact center@capita.com.

10. Ms Todd notes that the respondent's website states that "dCapita Limited ("dCapita") is a specialist purchaser of receivables such as invoices, promissory notes, bills of exchange, bank and corporate guarantees, deferred payment letters of credit" and refers to dCapita as a financial trading group. Ms Todd states that financial trading and services, including advice on the handling, purchase and accounting of receivables forms a large part of the financial services part of the applicant's business, which earned the applicant over £260 million revenue in 2014.

11. At the time of making her witness statement, Ms Todd states that no accounts had been filed for the respondent company.

12. The primary respondent's evidence is given in the form of a witness statement, dated 3 February 2016, by Matias Egonzo, one of the co-respondents. Mr Egonzo states that he is a company director and partner at the primary respondent and has been employed by Dcapita associated companies since 2008.

13. Mr Egonzo considers the size of the applicant, its turnover and awards to be irrelevant. With regard to the primary respondent being under construction and development, Mr Egonzo makes the following points:

- the company originates from Dcapita Limited which was established in the British Virgin Islands in 2010. The respondent was established to develop business in Europe.

- Although the respondent was recently established in the UK, it has been working hard to establish its reputation, working with some of the UK's and world's leading banks and financial institutions.

- The respondent "is the Key part of a revolutionary new Asset backed financing platform which will allow investment companies, family offices as well as private individuals [sic] invest and trade secondary debt obligations 100% capital guaranteed nothing like the market has seen before." The platform will include the acquisition of a German listed financing house.

- When the said platform is in place, the respondent will, within a short period of time, turn over millions of pounds and be a household name within the financial industry.

14. Mr Egonzo gives a list of companies registered in the UK with CAPITA and CAPITAL in their names and asks if the applicant has also approached these companies. Mr Egonzo states that Capita is Latin meaning 'head' and is commonly used, such as in 'per capita'.

Decision

15. If the primary respondent defends the application, 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 company name suggesting a connection between the company and the applicant. If this burden is fulfilled, it is 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 17 March 2015. The applicant must show that it had a goodwill or reputation at this date associated with the name CAPITA.

The applicant's goodwill

16. 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 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."

17. We have no doubt that the applicant's evidence proves that it not only has goodwill but also a substantial reputation in business and financial services. The applicant easily meets the initial burden of proving goodwill/reputation in the UK at the relevant date.

Similarity of names

18. The other initial burden facing the applicant is that the company name is sufficiently similar to CAPITA to suggest a connection between the company and the applicant.

19. The presence of the word "LIMITED" in the primary respondent's name is to be ignored from the comparison as a company designation is required for a company incorporated in the UK (other than in certain excepted circumstances). The comparison is, therefore, between CAPITA and DCAPITA EUROPE. EUROPE is a descriptor of the location of a company and/or of its business activities. In order both to read and pronounce DCAPITA, the D must be separated because, in English, it is impossible to pronounce DC other than by reference to the two separate letters. Aside from EUROPE, which we have already found to be a descriptive word, the only difference between the names is the presence of the letter D, which despite its conjunction with CAPITA, will be read and spoken as a separate element. CAPITA, a Latin word meaning 'by heads' (as in 'per capita'), is the common and dominant

element in both names. The primary respondent's name is sufficiently similar to CAPITA that its use in the UK would be likely to mislead by suggesting a connection between the primary respondent and the applicant. As the ground specified in subsection 69(1)(b) is established, the onus switches to the primary respondent to establish whether it can rely on any of the defences pleaded in the counterstatement.

Defences

20. The counterstatement states:

> "1. Dcapita Europe Limited was fully available when we registered.
> 2. Dcapita Europe Limited looks nothing like Capita PLC.
> 3. Our email address and website is not the same as the applicants.
> 4. From our website it is clear we do not do the same business [sic] the applicant.
> 5. From the applicants website it is very clear its business is not the same as ours we are a discounter.
> 6. At no stage did we ever consider our name being similar to the applicants. It would be of no benefit to us.
> 7. From our website it can be seen we are reconstructing our site and brand image this has involved considerable expense – relative to our resources. To reconstruct our site and image it has taken a very considerable number of man-hours.
>
> …we would request that the applicant be may to prove how the name Dcapita Europe limited is effecting it reputation and goodwill."

21. The statutory defences under section 69(4) are set out at the beginning of this decision. The points made by the primary respondent in its counterstatement would seem to fall under the following statutory defences:

- Section 69(4)(b)(i): that the company is operating under the name

- Section 69(4)(b)(ii): that the company is proposing to operate and has incurred substantial start-up costs in preparation
- Section 69(4)(d): that the name was adopted in good faith
- Section 69(4)(e): that the interests of the applicant are not adversely affected to any significant extent.

Section 69(4)(b)(i): that the company is operating under the name

22. The primary respondent has filed no evidence that it is operating under the name. There is no documentary evidence to support Mr Egonzo's statement that the primary respondent has been working with leading banks and financial institutions. The tone of Mr Egonzo's evidence is that the company has not yet begun trading. This is borne out by the company's details on the register of companies at Companies House, showing that the primary respondent has been dormant since incorporation. The primary respondent cannot rely upon this defence.

Section 69(4)(b)(ii): that the company is proposing to operate and has incurred substantial start-up costs in preparation

23. There is no evidence which shows any level of expenditure towards preparations for trading. The counterstatement refers to the reconstruction of the company's website and brand image, but there are no details given. The primary respondent cannot rely upon this defence.

Section 69(4)(d) – good faith

24. This defence has not specifically been pleaded. However, the collective impact of the points made in the counterstatement may be taken that it is implied. The burden of proving that the company name was registered in good faith falls upon the primary respondent. The onus is not on the applicant to prove bad faith. This means that it is the primary respondent's evidence which is crucial in establishing how the company name came to be registered.

25. In *1) Adnan Shaaban Abou-Rahmah (2) Khalid Al-Fulaij & Sons General Trading & Contracting Co v (1) Al-Haji Abdul Kadir Abacha (2) Qumar Bello (3) Aboubakar Mohammed Maiga (4) City Express Bank of Lagos (5) Profile Chemical Limited* [2006] EWCA Civ 1492, Rix LJ commented upon the concept of good faith:

> "48 The content of this requirement of good faith, or what Lord Goff in *Lipkin Gorman* had expressed by reference to it being "inequitable" for the defendant to be made to repay, was considered further in *Niru Battery*. There the defendant bank relied on change of position where its manager had authorised payment out in questionable circumstances, where he had good reason to believe that the inwards payment had been made under a mistake. The trial judge had (a) acquitted the manager of dishonesty in the *Twinsectra* or *Barlow Clowes* sense on a claim of knowing assistance in breach of trust, but (b) concluded that the defence of change of position had failed. On appeal the defendant bank said that, in the absence of dishonesty, its change of position defence should have succeeded. After a consideration of numerous authorities, this court disagreed and adopted the trial judge's broader test, cited above. Clarke LJ quoted with approval (at paras 164/5) the following passages in Moore-Bick J's judgment:
>
> > "I do not think that it is desirable to attempt to define the limits of good faith; it is a broad concept, the definition of which, in so far as it is capable of definition at all, will have to be worked out through the cases. In my view it is capable of embracing a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty itself."

26. In *(1) Barlow Clowes International Ltd. (in liquidation) (2) Nigel James Hamilton and (3) Michael Anthony Jordon v (1) Eurotrust International Limited (2) Peter Stephen William Henwood and (3) Andrew George Sebastian* [2005] UKPC 37, the Privy Council considered the ambiguity in the *Twinsectra Ltd v Yardley* [2002] 2 AC 164 judgment. The former case clarified that there was a combined test for considering the behaviour of a party: what the party knew at the time of a transaction

and how that party's action would be viewed by applying normally acceptable standards of honest conduct.

27. It is not a defence that the name was available: Companies House registers names which are similar, provided that they do not contravene the 'too like' provisions, which are narrow. As the applicant correctly submits, merely being available would immunise all potential company names against complaint.

28. As Mr Egonzo is a director of the primary respondent (and is a co-respondent), he is well-placed to give evidence about the motive behind the choice of name for the company. He refers to the company originating from Dcapita Limtied, established in the British Virgin Islands in 2010. However, no supporting documents are filed to support this assertion; if it were so, one would expect to see business plans for expansion into Europe. Mr Egonzo's evidence also runs contrary to the statements made in the counterstatement. The counterstatement states that the company's business is not the same as the applicant's business and that the company is a "discounter". However, Mr Egonzo's evidence, and the information given by the applicant in relation to the company's website, is that the primary respondent is a financial services business. This is borne out by the company's details on the register of companies at Companies House, which says the nature of the business is:

> "64303 – Activities of venture and development capital companies
> 64304 – Activities of open-ended investment companies
> 64992 – Factoring
> 64999 – Financial intermediation not elsewhere classified"

29. This lack of cogency between counterstatement and evidence, both filed by Mr Egonzo, puts the reliability of the defence in doubt as regards good faith. Since the defence has not been specifically pleaded and all the evidence points away from the statements made in the counterstatement, we are not prepared to find that the name was registered in good faith. The primary respondent cannot rely upon this defence.

Section 69(4)(e): that the interests of the applicant are not adversely affected to any significant extent

30. The primary respondent says in its counterstatement:

> "…we would request that the applicant be may to prove how the name Dcapita Europe limited is effecting it reputation and goodwill."

Firstly, the onus is on the primary respondent to show why its company name does not adversely affect the applicant's interests to any significant extent. The onus is not on the applicant. Secondly, it is clear from paragraph 28 of this decision that the business fields of the parties are identical. The names are sufficiently similar that the use in the UK of the company name would be likely to mislead by suggesting a connection between the company and the applicant. We find that the interests of the applicant are adversely affected to a significant extent. The primary respondent cannot rely upon this defence.

Outcome

31. As we have dismissed the defences, the application succeeds.

32. Therefore, in accordance with section 73(1) of the Act, we make the following order:

(a) DCAPITA EUROPE LIMITED shall change its name **within one month** of the date of this order to one that is not an offending name[i];

(b) DCAPITA EUROPE LIMITED, Matias Egonzo and Henrik Valentin 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.

33. 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.

34. In any event, if no such change is made within one month of the date of this order, we 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.

35. All respondents, including Mr Egonzo and Mr Valentin, 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

36. The applicant has been successful and is entitled to a contribution towards its costs, based upon the scale of costs published in the Practice Direction, on the following basis:

Fee for application:	£400
Statement of case and considering counterstatement	£400
Preparing evidence and considering the respondent's evidence	£800
Fee for filing evidence:	£150
Written submissions	£500
Total:	**£2250**

37. We order DCAPITA EUROPE LIMITED, Matias Egonzo and Henrik Valentin, being jointly and severally liable, to pay Capita Plc the sum of **£2250** 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.

38. 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.

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

Dated this 28TH day of April 2017

Judi Pike	Mark Bryant	Christopher Bowen
Company Names Adjudicator	Company Names Adjudicator	Company Names Adjudicator

[i]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.