

Companies Act 2006

In the matter of application No 833 by Kentucky Fried Chicken International Holdings Inc & Kentucky Fried Chicken (Great Britain) Limited for a change to the company name of KFC (GB) Ltd, registered under No. 8847637.

Background and pleadings

1. KFC (GB) LTD (“the respondent”) was incorporated on 16 January 2014.
2. On 25 November 2014, Kentucky Fried Chicken International Holdings Inc. & Kentucky Fried Chicken (Great Britain) Limited (“the applicants”) applied for an Order under section 69 of the Companies Act 2006 (“the Act”) for the company name of KFC (GB) 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).

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

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

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(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.

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(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. The applicants claim that the name associated with their business is: **KFC**. It also relies on the following names: **KFC GB, KFC UKI, KFC UK and Ireland, and KFC Advertising Limited**. The applicants state that they operate in the restaurant business and do so around the world. There are claimed to be more than 800 KFC restaurants in the UK. It is claimed that the respondent was established under its name with the intent of obtaining payment for changing its name. Reference is made to a telephone conversation with the sole director of the respondent (Mr Alan Leng) in September 2014 where he apparently stated that the applicants had three options: “leave things alone, go to court, or make an offer”.

5. The respondent filed a defence. The defence is not easy to follow. A common thread is that the applicants are, in some way, using fake company names and that they are under investigation by law enforcement bodies in the UK. Other points we note are that:

- The respondent does not wish to change its name, it is, instead, the applicants who should stop using fake names.
- There are other companies whose names begin with “Kentucky Fried Chicken” with whom the applicants should be more concerned.
- There are other UK companies which begin with KFC.
- The respondent was set up to promote a new chemical purification technology, so there is no conflict in business.
- “KFC (GB)”, in the context of the respondent’s name, stands for “KEY FACTOR CHEMICALS, Green and Better”.

6. Both sides filed evidence. The applicants were content for a decision to be made from the papers on file, although it did file written submissions in lieu of a hearing. We note that the respondent did indicate in writing that a hearing may/would be required. However, rule 5(3) of the Company Names Adjudicator Rules 2008 (“the Rules”) states that a request to be heard is to be made “by filing the appropriate form”. The Chief Adjudicator has the power (under rule 2(1)) to determine the form and content of any form required under the Rules and that the form is to be accompanied by the appropriate fee, which, in the case of rule 5(3), is £100 (as set out in the schedule to the Rules). The form specified by the Chief Adjudicator is Form CNA 4. On three separate occasions, firstly at the end of the evidence rounds, and secondly and thirdly following communications from Mr Leng and the applicants respectively, periods of time were set for the request of a hearing via Form CNA 4 (with appropriate fee). Mr Leng did not file any form of response within any of these set periods. Even when he did reply (after the set periods), no forms or fees were provided. We acknowledge that when Mr Leng replied (late) to the first opportunity availed to him, he asked whether a previously filed¹ Form CNA 4 (and fee) could be used, but he was advised that this was not appropriate and that a fresh form and fee was needed. This led to the second period availed to Mr Leng which, again, he did not respond to. A third period was availed to him on 23 March 2017 setting a date of 5 April 2017 for the request of a hearing by filing form CNA 4 (and fee), again, no response was received so we proceeded to draft this written decision from the papers before us. We note that on 7 July 2017, shortly before issuing this decision, Mr Leng responded (some two months late) asking for a hearing in this case. Not only was his request two months out of time, but it was not made on Form CNA 4, nor was the appropriate fee provided. The respondent has failed to comply with the rules relating to requesting a hearing. There is, therefore, no proper request before us. Neither do we consider it appropriate to give Mr Leng/the respondent yet another opportunity to file the appropriate form and fee – ample opportunity has been afforded thus far. Continued and further delay in determining these proceedings is not acceptable. We will, therefore, make a decision based on the papers before us,

¹ The previous form/fee had been filed to request a procedural hearing, although it was subsequently vacated.

but we stress that we have fully taken into account the comments and arguments made by Mr Leng in the various documents he has provided.

The evidence

7. We summarise below the evidence with regard to the various issues it covers.

The applicants' goodwill/reputation

8. The primary evidence on this comes from Ms Paula MacKenzie, Chief Finance and Development Officer at Kentucky Fried Chicken (Great Britain) Limited. We do not consider it necessary to summarise this aspect of the evidence in great detail. This is because it is abundantly clear from the evidence that the restaurant chain referred to in the pleaded case is an extremely well-known and successful business. Its revenue is in the £100s of millions and its promotional spend in the £10s of millions. The primary public facing sign is KFC. The restaurant chain appears to specialise in the sale of chicken based products of a fast food nature, although it also sells, as one would image, a wider range of products than that. The respondent does not really dispute the business activities itself (although it is argued that the business used fake company names and is engaged in various forms of criminal activity). Indeed, it would be difficult for it to do so given that the controlling mind of the respondent, its sole director Mr Alan Leng, worked for a KFC restaurant and was, in fact, still in its employ when the respondent was incorporated (more on this below).

9. In terms of ownership of the goodwill associated with the business, Ms MacKenzie refers to various companies (including the applicants) who are said to be subsidiaries of a US company called Yum! Brands Inc. The sense one gets from the evidence is that the UK arm of the business is operated by one of the joint applicants, namely Kentucky Fried Chicken (Great Britain) Limited. Usually that company files its UK trade marks, but sometimes marks are filed in the name of Kentucky Fried Chicken International Holdings, Inc. Exhibit PMK 1 contains some prints of trade marks registrations, one UK registration and two European Union Trade Mark registrations, showing the two names in question.

Mr Leng's relationship with the applicants

10. It is not disputed that Mr Leng worked for a KFC restaurant, indeed, he was still employed at the restaurant when the respondent was incorporated. His employment came to end via dismissal. In her first witness statement Ms Mackenzie stated that his dismissal was unconnected with these proceedings. However, she now states, after gaining further information (and setting this out in her second witness statement), that the two issues are related. Some of the pertinent evidence relating to this is as follows:

- Various documents in Exhibits PMK14-16 show that Mr Leng's employment began in June 2009. His contract of employment was with Kentucky Fried Chicken (GB) Limited². Ms MacKenzie highlights that paragraph 13 of the contract contains a clause which indicates that the employee must always act in the best interests of the employer.
- Ms MacKenzie states that Mr Leng's dismissal was connected to his incorporation of the respondent [under its name], activities (both before and after incorporation of the company) where serious (criminal) allegations were being made about the applicants and, also, that Mr Leng objected to planning applications made by the applicants whilst still an employee.
- Exhibits PMK17 and 18 contain documents that Ms MacKenzie says Mr Leng would have been aware of from his employment, where Kentucky Fried Chicken (Great Britain) Limited has been abbreviated to KFC (GB) Ltd or KFC (GB). One of the documents relates to the grievance policy that employees can use.
- Exhibit PMK19 contains a report of a grievance hearing that took place with Mr Leng in October 2013. The report is redacted so the nature of the grievance is not clear. The report gives an address where appeals may be sent; the address is headed KFC (GB) Ltd.

² Note that GB is used in the company name, not Great Britain – a point we return to below.

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- Ms MacKenzie states that Mr Leng raised concerns about the use of what he calls “fake company names” by his employers before he registered the respondent. Essentially, this stems from the use of abbreviated versions of full corporate titles. She states that he initially ignored letters if they were from the so-called fake companies. She adds that Mr Leng sent an email to the Chief Operations Officer (Russell Smith) of Kentucky Fried Chicken (Great Britain) Limited about documents from the fake companies. Mr Smith replied on 6 November 2013 explaining that the documents were not fake and had been raised appropriately. The letter also refers to other issues that Mr Leng had raised concerning “more serious illegal issues/activities”. He was invited to a meeting on 20 November 2013 (eventually rescheduled to 18 December 2013) to discuss these matters.
- Prior to the meeting on 18 December, Mr Leng sent an agenda in which he set out eight items, including the use of fake company names and, also, fraud. Ms MacKenzie states that the fake name issue was focused on the use of the abbreviated name KFC (GB) Ltd. Exhibit PMK21 contains a letter sent to Mr Leng explaining the outcome of the meeting. It is redacted in terms of most of the issues. In terms of the fake name, it states that the business in the UK is registered under the name Kentucky Fried Chicken (Great Britain) Ltd but it trades (as it is permitted) under KFC; it is added that “[i]t is recommended that we use Kentucky Fried Chicken (Great Britain) Ltd or KFC (GB) Ltd”. Separate reference is made to fraud within the organisation, the response being that measures are in place to prevent this.
- Mr Leng apparently replied to the above on 14 January 2014, maintaining his objection to the use of the “fake” company name, but unfortunately a copy of this email is not available. A reply was sent to Mr Leng on 17 January 2014, essentially indicating that Mr Leng’s concerns have been taken into account (and some changes made as a result) but that the matter was now closed. He was reminded of his obligation not to disclose to anyone information obtained during the course of his employment. There is nothing in this letter about the fake name issue. Ms MacKenzie states that Mr Leng must have been dissatisfied with the letter

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received on 14 January 2016 because it was only two days later that he incorporated KFC (GB) Ltd.

- Mr Leng was dismissed on 18 December 2014 after, apparently, many further exchanges. None of these exchanges are in evidence, nor anything about the dismissal itself.

Offer to sell the company name to the applicants

11. A witness statement was provided by Ms Clare Hutchinson, the applicants' trade mark attorney. She states that in a telephone conversation with Mr Leng following a letter sent to him to request a change of company name, he said "...if they love the company name they can buy it from us or bring criminal proceedings". Ms MacKenzie also refers to this in her witness statement.

12. Mr Leng denies the above and states that Ms Hutchinson twisted his original words and meaning. He states that he will not sell KFC (GB) Ltd to the applicants and will not accept investment from them. He says that this is in line with earlier statements he has made.

The respondent's business activities

13. At section 4 of Mr Leng's witness statement he refers to the business activities of the respondent. He states that the respondent was incorporated "in the ordinary course" with Companies House adding that it specialises in the development, promotion and commercialisation of "the technology" (which he earlier defines as "non-distillation technology for the purification of glycerine"), "has clear business intentions and plans to continue the desired business", "operates truly and legally with the registered company name", "has invested and incurred significant start-up costs, equipment and operational costs and staff time" and "has proven up to date records of continuous business activities in technological development within the desired business sectors". The documents he exhibits to support these claims are as follows:

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i) Certificate of incorporation from Companies House showing the incorporation of the respondent on 16 January 2014.

ii) What is said to be the homepage of the respondent's website. It is headed KFC (within a logo), underneath which are the words KEY FACTOR CHEMICALS. There is a reference to KFC (GB) LTD as a "UK technology company" with numerous references to the purification of glycerine which, the website says, is from "waste streams". The company name is also used on the footer of the website. There is a copyright date of "2014-2015" on the footer. There is no evidence showing when the website went live. On the left hand side of the webpage are the names/logos of various third party companies, some are well-known including DOW, Shell, Siemens. It is not clear why those names are there.

iii) Extracts from a business plan headed KFC (in logo form) and which also contains the company name. The executive summary provides information on the non-distillation process for glycerine purification. The business plan is not dated.

iv) Extracts from business agreements, in the nature of non-disclosure agreements ("NDAs"). There are four in total, dated, 4 April 2014, 2 June 2014, 18 December 2014 and 7 January 2015. The respondents are one party, but the names of the other parties to the NDAs have been redacted by Mr Leng. Whilst the NDAs relate to potential collaborations, it is not clear what, if anything, they led to.

v) An invoice said to be for "for the purchase of equipment for commercialisation of the technology". The invoice provided is dated 9 February 2015 from what appears to be a shipping company. There is a cost of £278 in respect of sea freight and £246 in respect of local handling charges in China. The second page of the invoice adds customs duty and an admin fee. The goods are identified as a "water purification system", although, it does not appear that the cost of the actual system is contained within the invoiced amounts.

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vi) Business communications in the form of various emails:

- An email dated 13 December 2015 from my Leng to an unknown recipient. It is mainly in Chinese, but the English words “non-distillation technology for Glycerine Purification” are used. A domain name and email address use “kfc-gb.co.uk”.
- An email dated 30 November 2015 to Mr Leng from an unnamed sender (this email, and all of the others we mention, were addressed to kfc-gb.co.uk). It appears to have followed Mr Leng’s visit to the sender’s Materials Processing Institute stand at an exhibition called Advanced Engineering 2015. Mr Leng was, apparently, interested in developing a powder based material used to form lightweight “nano” composite materials.
- An email to Mr Leng from ‘Richard’ (his surname is redacted) dated 11 November 2015, again following a visit to an exhibition stand at the NEC. Given the timing, this could be the same exhibition referred to above. Apparently, a colleague of ‘Richard’ discussed with Mr Leng the use of nano filters within thermoplastics.
- An email exchange between Mr Leng and ‘Ian’ (surname redacted) between 6 and 18 August 2015. Mr Leng informs Ian that he has managed to agree with an unnamed entity that they will supply him with 100L of crude glycerine. Ian responds stating that this is great news and that Mr Leng must be pleased to be able to use his kit on real glycerine. He thanks Mr Leng for keeping him in the loop.
- A series of emails between Mr Leng and the company that is supplying him with the crude glycerine. The company that Mr Leng is communicating with has been redacted. The emails are from the end of July/early August 2015.
- An email dated 2 April 2015 to Mr Leng from Paul Eccleshall who works for Merseyside EPR Waste Team, part of the Environment

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Agency. It is a response to a query (not provided) from Mr Leng. In short, the email gives Mr Leng permission to import 100L of crude glycerol.

- An email exchange between Mr Leng and Ian from the end of March/early April 2015. Mr Leng informed Ian of his testing of a dryer and the production of distilled water. He adds that the next step would be to fully test the filters to check that the filtration process was suitable for glycerine.
- An email exchange (headed "Notes resulting from Meeting") between Mr Leng and Ian. There are references to potential licensees. There are references to the cost of obtaining crude glycerine. The emails are from January 2015.
- An email exchange (headed "Revised cost of process") between Mr Leng and Ian. Mr Leng advised Ian about further costs in the process.
- An email exchange (headed "Our meeting on 15 January 2015") between Mr Leng and Ian. There are references to Mr Leng's investors (although, who they are is not clear). There are references to the meeting between Mr Leng and Ian (and Ian's colleagues) where they were working towards a JDLA (which we assume means joint development and licensing agreement). There are references to a "shared effort".
- A further series of emails between the same people relating to an agenda for the above meeting. One of the agenda items was "KFC rig start-up – suggestions & pointers".
- A further series of emails between the same people from early January 2015 about arranging the above meeting. I note that the email subject is "Investor agreed to invest in glycerine refining technology".

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- An email to Mr Leng from 'Tony' (his surname is redacted) dated 23 December 2014. The email gives Mr Leng estimates on the rental price of a building with car parking. The estimate is over £20k per year including service charges.
- An email to Mr Leng from 'Charles' (surname redacted) dated 17 December 2014. It was about an upcoming meeting, the purpose of which was to discuss Mr Leng's project with investors (or at least those who represent investors). An earlier email from Charles is provided which, again, is about investment. There are references to large sums of money (£4.5million for the glycerine project). Charles states that "you want investment money and he [it is not clear who this is] has investors desperate to provide funds so they do not have to pay HMRC."

Mr Leng's other evidence/comments

14. For reasons that will become apparent, we summarise Mr Leng's other evidence/comments more briefly. We note the following:

- Extracts from the Companies Act 2006, specifically those sections which relate to the use of LTD/LIMITED by limited companies. This is connected with the arguments Mr Leng has made about fake names being used by the applicants.
- Extracts from the Fraud Act 2006 connected to various claims Mr Leng has made against the applicants.
- Extracts from EU Directive 2008/95/EC, upon which the Trade Marks Act 1994 is based. This is connected with claims Mr Leng has made about breaches of these provisions by the applicants.
- Reference is made to the Money Laundering Regulations which, again, Mr Leng considers the applicants to have breached.

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- Copies of EU trade mark details, showing some owned by companies related to the applicants, but, also, other third party marks (in different fields) which consist of, or contain, KFC. The point Mr Leng appears to be making is that the claim by the applicants that they have exclusive rights in the KFC mark is false. He adds that his use is in a different field and there cannot be any confusion.
- Extracts from Companies House records showing other company names which contain the letters KFC. The point, again, appears to be that the applicants have no exclusive right on the use of the letters in company names. Mr Leng questions why the applicants have not taken action against these companies and considers the applicants' application to the tribunal to be an "instrument to safeguard their ongoing crimes".
- There are further references to the applicants not using their actual names in trade and using, instead, fake and false names. It is claimed that this is done for various criminal activities including money laundering, tax evasion etc.
- Various suggestions are made that the applicants' evidence has been fabricated. This is based, primarily, on the use of KFC (GB) in some of the documents provided by the applicants which Mr Leng considers to have been doctored by the removal of the word Limited, so as to hide the use of the fake company name.

15. We will deal with the last of these points now. As was pointed out by the applicants in their submissions, they have admitted using the trading name KFC (GB) with the word LIMITED (and they have also accepted that they ought not to have done so). Therefore, there was no need for them to go to the trouble of doctoring evidence. We do not consider that there is any evidence of the applicants having fabricated their evidence.

The applicants' statement regarding the use of a fake name

16. We note that in her witness statement Ms MacKenzie accepts that use has been made of the abbreviated name KFC (GB) along with the word Limited. However, they have now been advised that whilst it is able to use designations such as KFC (GB) they should not have used Limited without the full corporate title of the company (Kentucky Fried Chicken (Great Britain) Limited) so as to avoid any confusion. Nevertheless, she adds that Mr Leng registered the company name opportunistically in full knowledge that the applicants' used KFC GB as shorthand for the business and that they might, in fact, wish to register KFC GB Limited or KFC (GB) Limited.

DECISION

17. If the primary respondent defends the application, as here, the applicants must establish that they have goodwill or reputation in relation to a name that is the same, or sufficiently similar, to that of the respondent's company name so as to mislead by suggesting that there is a connection between the company and the applicant. The relevant date for this purpose is the date of application to register the company which, in this case, is 16 January 2014. The applicants must show that they had a goodwill or reputation at this date. 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.

Goodwill/reputation

18. Section 69(7) of the Act defines goodwill as "reputation of any description". Consequently, although it plainly covers it, 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."

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19. We noted earlier (paragraph 8) that the KFC restaurant business is an extremely well-known and successful one with revenue in the £100s of millions. The primary public facing trading name of the business is KFC. There is a clear goodwill (and reputation) in this regard. The applicants also rely on goodwill associated with various other signs (including KFC (GB)). The degree to which the use of such signs contributes to the applicants' goodwill/reputation is less clear. This is because although used on business documentation, they are not signs which are immediately apparent to the public. We will, therefore, focus on the goodwill/reputation associated with the sign KFC. We bear in mind that the goodwill must be owned by the applicants. In this regard, and despite what Mr Leng says about the use of fake names by the applicants and their other claimed fraudulent activities, there is nothing that we can see which seriously calls into question the fact that the KFC restaurant business is operated in the UK by Kentucky Fried Chicken (Great Britain) Limited, or that it is the owner of the goodwill associated with the name KFC in the UK.

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

20. The respondent's name is **KFC (GB) LTD**. The name associated with the applicants is **KFC**. Consequently, the only difference between the names is the absence/presence of "(GB) LTD". In terms of "LTD", this 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 for the purpose of the comparison (see, for example, *MB Inspection Ltd v Hi-Rope Ltd* at paragraph 48). However, the additional difference "(GB)" prevents the names from being the same.

21. The next question is whether the names KFC (GB) and KFC are sufficiently similar to mislead by suggesting that the use of the respondent is connected to the applicants? In our view, the names are sufficiently similar to suggest such a connection. The use of "(GB)" as part of the company name will likely be perceived as a reference to Great Britain; further, such use is likely to be perceived as an indication that the company is the GB arm of an international business. This is so irrespective of Mr Leng's suggestion that GB is meant to stand for "Greener and Better" in the context of the respondent's company name.

22. Reference is made in the notice of defence and in Mr Leng's evidence to the fact that the respondent is engaged (or is to engage) in a different field of activity to that of the applicant. The claimed activity relates to the purification of chemicals, specifically in respect of a process for the refinement of glycerine. However, the Act refers to the connection under section 69(1)(b) being made upon the basis of the names themselves. Thus, the field of activity is not strictly pertinent (although it may have relevance when it comes to establishing defences). In any event, fields of activities may change.

23. Given our findings in respect of goodwill and the connection point, the applicants have cleared the first two burdens placed upon them. That is the end of the matter unless the respondent can avail itself of one or more of the defences. This is a matter to which we now turn.

Defences

24. The defences set out in section 69(4) of the Act are as follows:

“(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

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(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.”

25. The respondent’s case is, at times, difficult to follow. Following receipt of its notice of defence on Form CNA2, it was asked to clarify which, if any, of the defences it intended to rely on. From its response, it appears that the respondent relies upon all of the defences, save for section 69(4)(b)(iii). However, it is our view that some of the defences can be quickly ruled out.

26. Section 69(4)(a) provides a defence if the company name at issue was registered before the commencement of the activities on which the applicants rely to show goodwill. That is clearly not the case. The KFC restaurant business has been operating for many years. Indeed, Mr Leng worked for the business before the respondent’s name was registered. This defence is not applicable. Mr Leng’s arguments in relation to this defence are based on the respondent “truly and legally operat[ing]” after being set up. This is a misconceived understanding of the defence.

27. We can also rule out the applicability of section 69(4)(c), which relates to companies that were registered in the ordinary course of a company formation business and being available for sale to the applicants on the standard terms of that business. We note that in his evidence that Mr Leng states that the respondent was “incorporated in the ordinary course with the Companies House”. However, this is not the same as the registration of the company as part of a company formation business. We consider that the defence relates, as submitted by the applicants, to off-the-shelf companies which have been registered by company formation agents. There is no suggestion (or evidence) that this is the case here, nor is there any evidence that the company is available for sale to the applicants on the standard terms of a company formation business. This defence is not applicable.

28. Section 69(4)(e) relates to the interests of the applicants not being adversely affected to any significant extent. Mr Leng relies, essentially, on the differences in the fields of activity. The applicants say that business communications (and

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payments) could be sent to the primary respondent instead of to them. Further, despite the contested company name suggesting a connection with them, they would have no control over the use of the name and any adverse publicity could impact upon them. These are reasonable points. Further, what we said earlier, that companies are not limited in what they do, means, to us, that the defence should fail.

29. The three remaining defences are:

- i) That the company is operating under the name;
- ii) That the company is proposing to operate and has incurred substantial start-up costs in preparation to so;
- iii) That the company name was adopted in good faith.

30. It is worth highlighting at this stage that if either of the first two of the remaining defences were established, the applicants' objection to the company name shall nevertheless be upheld if they are able to show (as per section 69(5) of the Act) that the main purpose of the respondent in registering the name was to obtain money (or other consideration) from the applicants, or to prevent them from registering the name. Although the third of the remaining defences is not subject to section 69(5) of the Act, it is likely to be the case that if the main purpose of the respondents in registering the name was to obtain money (or other consideration) from the applicants, or to prevent them from registering the name, it would follow that the company name was not adopted in good faith. Therefore, that defence would fail in any event.

The good faith defence – section 69(4)(d)

31. The defence relates to the adoption of the name which has been registered, KFC (GB) LTD. Even if the company is operating, or is proposing to do so (which we discuss below), it does not necessarily follow that the adoption of the name of the company was in good faith. The relevant date for assessing good faith is the date of incorporation of the respondent, 16 January 2014. It is for the respondent to show

that it adopted its name in good faith, it is not for the applicants to show an absence of good faith (or presence of bad faith).

32. In *1) Adnan Shaaban Abou-Rahmah (2) Khalid Al-Fulaij & Sons General Trading & Contracting Co v (1) Al-Haji Abdul Kadir Abacha (2) Kumar 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."

33. 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

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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.

34. The key facts are as follows:

- Mr Leng was the controlling mind of the respondent, it must have been he who decided to adopt the name KFC (GB) LTD as the company name (there is no evidence to the contrary).
- Mr Leng worked for Kentucky Fried Chicken (Great Britain) Limited when the company name was registered and had done so for a number of years.
- Mr Leng would have been aware that his employer's trading name was KFC.
- Mr Leng knew that his employers would often abbreviate its company name to KFC (GB) Ltd. Indeed, one of the issues he had raised with his employers was their use of that abbreviated name; what he calls a "fake name".
- Mr Leng had raised a number of grievances with his employers, resulting in personal hearings. He appears to have been dissatisfied with some of the responses.

35. It is hard to believe that the grievances Mr Leng had with his employers had nothing to do with the choice of name. It can be no co-incidence that Mr Leng adopted a name which included the key trading name of his then current employer (KFC) and, further, that the name was identical to the "fake name" about which he had raised concerns.

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36. In his notice of defence, Mr Leng refers to the letters KFC as standing for KEY FACTOR CHEMICALS and the letters GB for GREENER AND BETTER. We also note that in some of his evidence the words KEY FACTOR CHEMICALS are presented below the letters KFC. However, there is no evidence or commentary as to the thought process involved in the creation of the contested company name, nor as to when this supposed abbreviation was first coined. There is no evidence that KFC is a recognised abbreviation for KEY FACTOR CHEMICALS, or that KEY FACTOR CHEMICALS is a relevant description for a business based around the purification of glycerine. It is our view that Mr Leng's grievances and issues with his employer (including about the "fake name") significantly contributed to the coining of the contested company name. This is further supported by the timing of incorporation, which took place just 2 days after a particular response was sent to Mr Leng by his employer. The suggestion that the contested name stands for KEY FACTOR CHEMICALS/GREENER AND BETTER strikes us as retrospective shoe-horning – i.e. the straplines were made to fit the letters rather than the other way around.

37. In terms of why Mr Leng did this, his conduct strikes us, at the very least, as behaviour intended to cock-a-snoop at his employers, whilst also having the capacity to interfere with their business. Thus, regardless of the truth of the respondent's business intentions, the adoption of the contested company name itself was not, in our view, an act of good faith. Mr Leng could have come up with any name he wanted, yet he choose KFC (GB) LTD – there is no legitimate and plausible explanation for that decision. The good faith defence fails.

The operating defence – section 69(4)(b)(i)

38. This defence relates to the respondent operating under the company name. The relevant date for this purpose is the date on which the applicants' application for a change of name was made, namely 25 November 2014. We have already summarised the evidence, but for convenience, we briefly map out the evidence in relation to the respondent's claimed business activities and identify its chronological position with reference to the relevant date:

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- The print of the web-site: there is no evidence showing that it was live prior to the relevant date.
- Extracts from a (undated) business plan.
- Four NDAs, two of which were dated before the relevant date (on 4 April 2014 and 2 June 2014 respectively) and two dated after the relevant date (on 18 December 2014 and 7 January 2015 respectively).
- The invoice for the shipping of a water purification system: dated after the relevant date (9 February 2015).
- The various emails: all are after the relevant date. The ones closest to the relevant date appear to relate to investment.

39. Given the above, the only evidence of commercial activity prior to the relevant date is the two NDAs with entities whose names have been redacted in the evidence. In its submissions, the applicants submit that i) this is insufficient to show that the company was operating under the contested name, and ii) the veracity of the documents cannot be determined because of the redactions.

40. In terms of the veracity point, whilst we accept that it would have been better for Mr Leng not to have redacted the parties' names (and instead requested a confidentiality order in respect of the document), the applicants could, nevertheless, have sought disclosure of the redacted information or otherwise sought to challenge Mr Leng's evidence (including via cross-examination). Further, although the other material is, as the applicants point out, after the relevant date, it nevertheless casts some light on the matter, supporting the probability that the respondent was looking for investment/collaboration. Entering into NDAs would be a logical first step in that process. We therefore accept that the respondent entered into two NDAs prior to the relevant date.

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41. But is entering into two NDAs sufficient to engage the operating defence? At this point, it is worthwhile recalling the purpose of the tribunal and the provisions it administers. Put simply, the tribunal provides a mechanism to deal with company names which have been registered for opportunistic purposes. The sections of the Act provide a mechanism to deal with such complaints, one in which the burden switches from applicant(s) to respondent, and possibly back to applicant(s) again. The purpose of this is to ensure parties only have to make their case to the extent required by the other side's case. Hence, the initial burden is on the applicants to demonstrate goodwill and similarity of names sufficient to lead to people making a false connection, and only then does the respondent need to show that it has a defence. If it has one, because the respondent is operating under the name (suggesting, *prima facie*, that the name was not registered opportunistically), the burden then switches back to the applicants (under section 69(5)) to show that despite the *prima facie* defence, the registration of the company name was nevertheless opportunistic.

42. The operating defence, in our view, does not represent a high hurdle. There is no requirement for any form of commercial success. There is no requirement that the company be well-known. It simply requires that the respondent has, before the relevant date, engaged in some form of external commercial activity which shows that the company is operating under the name. This, in itself, does not require actual trade. We consider it enough that the company (as opposed to the individual behind the company acting alone) is, for example, seeking investment, collaboration or undertaking other forms of early stage activity. It is clear that at the relevant date the respondent was a fledgling company. Nevertheless, it had gone out and sought potential investment/collaboration with at least two entities. This was done under the company name and, thus, constitutes the company operating under its name.

43. In view of the above, the operating defence appears to be available to the respondent unless the applicants have shown that the main purpose in registering the name was nevertheless to obtain money (or other consideration) from the applicants, or to prevent them from registering the name. However, before we consider that, we briefly comment on the "proposing to operate" defence in case we are found to be wrong on our assessment of the operating defence. In brief, the

proposing to operate defence would fail. Whilst we would have found that the respondent was proposing to operate, the second limb of that test requires that substantial start-up costs have been incurred. The second limb fails because: i) the relevant date is still 25 November 2014 and there is no evidence of any costs being incurred before this date, and ii) the only evidence (albeit after the relevant date) of costs relates to a shipping invoice, which in our view are not substantial.

Section 69(5) of the Act

44. The section of the Act reads as follows:

“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.”

45. We have already found that the adoption of the company name in question was not in good faith and was, at the very least, “intended to cock-a-snoop at his employers, whilst also having the capacity to interfere with their business”. The question we must now answer is whether the main purpose of registering the name was to either: i) obtain money (or other consideration) from the applicants, or ii) prevent them from registering the name.

46. We will first consider whether the main purpose of registering the name was to obtain money (or other consideration) from the applicants. The applicants’ submissions focus on the alleged statement made by Mr Leng to Ms Hutchinson. Mr Leng states that his words were twisted and adds that he will not sell the name to the applicants (something which the applicants states Mr Leng is now bound to say). The problem with Ms Hutchinson’s evidence (beyond Mr Leng not accepting it) is that the full (of fuller) conversation with Mr Leng is not recounted. In context, that single line that Mr Leng is alleged to have stated may not have represented a real desire to sell the company name sufficient to support a finding that the main purpose

of registering the company name was to obtain money or some other form of consideration. We therefore reject this claim.

47. We next consider whether the main purpose of registering the name was to prevent the applicants from registering it. The applicants' submissions focus on Mr Leng's knowledge of the applicants' use of KFC (GB)/KFC (GB) Limited, the issues he had with regard to such use (the "fake names" issue) and his intention to obstruct the applicants' business (for example, with his objection to planning applications).

48. Our findings on good faith mean that we accept that Mr Leng registered the contested company name to score points and to interfere with the applicants' business interests. It is noteworthy that, consistently throughout all of the documents provided by Mr Leng in these proceedings, he makes great play of the "fake name" issue. The "fake name" (which corresponds with the name he subsequently registered) strikes us as the thing that Mr Leng has taken most issue with. He feels that the applicants could not, and should not, have been using the name. It therefore seems to us probable that Mr Leng's motivation went beyond points scoring. The registering of the company gave him an opportunity to name it in a manner which would prevent the applicants from registering the "fake name" themselves. He must have known that the applicants would have an interest in registering the name as they had already been using it as an unofficial name on business documentation etc. Whilst the business he intended may not have been a sham, we consider that the main reason for registering the respondent's name as KFC (GB) LTD was to prevent the applicants from registering it. The applicants, therefore, succeed, and their objection must be upheld.

Other issues

49. Mr Leng, throughout the proceedings, has made various comments about the applicants. Beyond those we have already touched upon, we see no relevance in terms of their capacity to influence this decision. However, for sake of completeness, we make the following brief comments:

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- Other KFC trade marks/company names – the point here is that there are other trade marks and company names which the applicants have taken no issue with. The reason this lacks pertinence is because the focus of this tribunal is not about confusion, but whether a company names has been registered for opportunistic purposes. Thus, a claim can only be brought in particular circumstances, such as the one before us here.
- Accusations of fraud and money laundering – put simply, this is a wild accusation and also irrelevant to the matters at hand.
- Use of fake company names – we have taken this into account when reaching our decision. The applicants appear to accept that they ought not to have used the company designation they did, however, it does not follow that because of this they are somehow disentitled to bring these proceedings.

Outcome

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

(a) KFC (GB) LTD shall change its name **within one month** of the date of this order to one that is not an offending nameⁱ;

(b) KFC (GB) 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.

51. 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

52. The applicants have been successful and are entitled to a contribution towards costs. Our assessment is as follows:

Fee for filing application: £400

Fee for filing evidence: £150

Preparing a statement and considering the counterstatement: £400

Preparing evidence: £800

Total: £1750

53. KFC (GB) LTD is ordered to pay Kentucky Fried Chicken International Holdings Inc & Kentucky Fried Chicken (Great Britain) Limited the sum of £1750 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.

54. 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 8th day of June 2017



Oliver Morris
Company Names
Adjudicator



Allan James
Company Names
Adjudicator



Al Skilton
Company Names
Adjudicator

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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.