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ORDER under the Companies Act 2006

In the matter of application No. 1401

By Aldi Stores Limited

for a change of company name of registration

No. 10513472

BACKGROUND

1. The company name ALDI GROUP LIMITED (“the primary respondent”) has been registered since 6 December 2016 under number 10513472.

2. By an application filed on 28 March 2017, Aldi Stores Limited (“the applicant”) applied for a change of name of this registration under the provisions of section 69(1)(b) of the Companies Act 2006 (“the Act”). The applicant explains that the names associated with it which caused it to make the application are ALDI and Aldi Stores Limited, adding that:

“12. Aldi is a recognised name in the field of retail and in particular supermarkets selling a wide range of goods including but not limited to groceries, household goods, electronics and clothing...”

3. It further explains that it objects to the primary respondent’s name because:

“ALDI is the dominant and distinctive element in the company name complained of. This is visually and phonetically identical to “Aldi”...such that it is likely to mislead by suggesting a connection between the company complained of and the applicant. The addition of the word GROUP in the company name complained of only enhances confusion, as it is non-distinctive as a company name and merely implies that it is a related company in the same group of the applicant.”

4. The applicant asks the Tribunal to order the primary respondent “to change its name...to a name that is not an offending name... and requiring [the primary

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respondent] to take all such steps as are within its power to make, or facilitate the making of, that change and 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”.

5. A copy of the application was sent to the primary respondent’s registered office on 12 April 2017, in accordance with rule 3(2) of the Company Names Adjudicator Rules 2008 (“the rules”). The copy of the application was sent by Royal Mail Recorded delivery. That letter was returned to the Tribunal by the Royal Mail marked “not called for”; it was then re-issued by ordinary post on 9 May 2017.

6. The substance of the letter from the Tribunal, dated 12 April 2017, was as follows:

“If you wish to file a defence, you should complete the enclosed form CNA 2 (notice of defence) and return it within **two months** of the date of this letter, that is on, or before, **12 June 2017**. This is in accordance with rules 3(3) and 3(4) of the Company Names Adjudicator Rules 2008. A fee of £150 must accompany form CNA 2 or paid before the expiry of the deadline for the filing of form CNA 2.

Before you decide whether to file a defence, you may wish to refer to The Company Names Tribunal Practice Direction (copy enclosed).

If you choose not to file a form CNA 2 and the £150 fee the adjudicator may treat the application as not being opposed and may make an order under section 73(1) of the Companies Act 2006.

If you decide not to defend your company name, the application will normally succeed. A decision in favour of the applicant will normally include an award of costs in favour of the applicant.

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If you inform the tribunal that you did not receive adequate notice that an application would be made before it was filed, the tribunal will normally not award costs to the applicant. If you are not defending the application and you consider that you did not receive adequate notification from the applicant before the filing of the application, you should inform the tribunal on or before the date for the filing of the defence.

Once an order is issued by the tribunal the adjudicator cannot revisit any costs issues.”

7. In an official letter of 19 June 2017, the primary respondent and applicant were advised that no defence had been received to the application and so the adjudicator may treat the application as not being opposed. The parties were granted a period of 14 days i.e. until 3 July 2017 to request a hearing in relation to this matter.

8. The official file records that on 19 June 2017, one of the primary respondent's directors, Paul Knighton, contacted the Tribunal by telephone. The fact this telephone call was received on 19 June 2017 is a coincidence, as the primary respondent would not have received the official letter mentioned above at that point in time. The relevant part of the official file note states Mr Knighton indicated that: "he only received our letter dated 12/4/17 on 9/5/17"; I shall return to this point below.

9. On 3 July 2017, the primary respondent requested a hearing, filing Form CNA4 (accompanied by the official fee of £100) for this purpose. The Form CNA4 was completed by Dr Paul Knighton. Although the front of the Form indicates that it consisted of three pages, it only consists of two. Dr Knighton states (reproduced below verbatim):

“Aldi Group Limited company number 10513472 started trading in December 2012 as One Man's Trash, doing home clearances then saw a need for free furniture etc. Due to new financial crisis decided to give

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stuff away for free. Name changed to forming a limited company and the previous name didn't mark it too well. Incorporated Aldi Group Limited (all largely discounted interiors) on the 6/12/16. A more applicable name still the same business model none profit.

We have more than one outfit therefore we are a group, but collectively we are the same. It is purely coincidental that our initials of our name are similar to that of a supermarket, that's where the similarity ends. Our primary colours are red, white and blue with our logo being a union jack with "Aldi" written through it.

We primarily deal in unwanted furniture as the previous owner are either downsizing or has sadly passed away. Since opening we have had no customers that have mistaken us for a supermarket we are a totally British company. Aldi food stores limited had years of time and opportunity to register the company name Aldi Group but for whatever reason shows not to, thus why it was available on companies health, a reasonable amount of money has been spent on advertising and marketing, we pose no threat to a billion pound chain and will be keeping our name. It isn't for sale and I have got no intention of selling it in the foreseeable future."

10. A hearing to discuss the matter took place before me on 17 August 2017, by telephone conference. At the hearing, Dr Paul Knighton represented the primary respondent with Mr Lloyd Lane of Freeths LLP representing the applicant.

11. Although the request for a hearing was made in the correct manner i.e. on the appropriate Form, was accompanied by the correct fee and contained some information on the primary respondent, it did not explicitly state what action the primary respondent was asking the tribunal to take as a consequence of the information it had provided. At the hearing, Dr Knighton confirmed that it was a request to file a late defence.

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12. At the hearing, I explained to the parties that as far as I was aware, there was no case law specific to this Tribunal as to how the issue before me should be approached i.e. a request to file a late defence (when the period in which to file a retrospective extension of time i.e. two months had passed). In those circumstances, I have, as this Tribunal has done on other occasions, looked to guidance provided in the context of trade mark proceedings i.e. where a party has failed to file a defence in the timeframe allowed. Although in trade mark proceedings such periods are non-extendable and the discretion afforded to that Tribunal narrow, they nonetheless provide useful guidance on the type of issues one ought to have in mind when reaching a conclusion as to whether a late filed defence should or should not be admitted into proceedings.

13. In this regard, the decisions I had in mind were those of the Appointed Persons (“AP”) in *Kickz AG and Wicked Vision Limited* (BL-O-035-11) and *Mark James Holland and Mercury Wealth Management Limited* (BL-O-050-12). I explored the potential relevance of these decisions with the parties at the hearing. Having done so, I allowed them 14 days from the date of my letter following the hearing i.e. 18 August 2017 to provide any written submissions upon them they considered appropriate before I reached a decision.

14. Dr Knighton responded in an e-mail dated 23 August 2017 and the applicant in a letter dated 29 August 2017; I will bear the applicant’s submissions in mind in reaching my decision. In his submissions, Dr Knighton stated (again reproduced verbatim):

“In the first instance, the first time the CM2 [this should read CNA1] was attempted to be delivered it was by Recorded Delivery, it wasn’t signed for, so was sent back to the office and two weeks later returned to yourselves. You then sent it by Royal Mail and it was deemed delivered when it left Royal Mail possession on 9th June, 2017 so the two month time limit should have started from then, but only by the discretion of the adjudicator who has the power to extend the limits even after they have passed.

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When I telephoned, I was informed to submit my defence on the CNA4 paperwork and include the fee of £100, which I did. Had I been served the correct way in the first instance from Aldi Stores Limited directly – then I would have been expecting correspondence from yourselves. As they didn't follow procedure they effectively cut my response time, which you have the power to increase.

The cases you refer to in your e-mail, indicated that the paperwork was delivered and signed for, but not read. In this case paperwork wasn't delivered until it was delivered by Royal Mail and not signed for. Had I been informed to submit the CN2 [this should read CNA2] asking for an extension of time I would have done that. I am not legally qualified which technically goes against the Human Rights Article 6 which says I'm entitled to free legal help in civil cases as well as criminal cases, but I can find no company to represent me so, I am doing my best."

DECISION

15. The relevant rules are as follows:

"3 (4) The primary respondent, before the end of that period, shall file a counter-statement on the appropriate form, otherwise the adjudicator may treat it as not opposing the application and may make an order under section 73(1).

7 (1) The adjudicator may extend (or further extend) any period which has been specified under any provision of these Rules even if the period has expired.

(2) Any party can request an extension of any time period specified under any provision of these Rules.

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(3) Any request for a retrospective extension must be filed before the end of the period of 2 months beginning with the date the time period in question expired.

(4) Any request made under paragraph (2) shall be made on the appropriate form and shall include reasons why the extra time is required. A request for a retrospective extension shall also include reasons why the request is being made out of time.

10 (1) Any irregularity in procedure may be rectified on such terms as the adjudicator may direct.

(2) Where rectification includes the amendment of a document by the adjudicator the parties will be given notice of this amendment.”

16. Having confirmed that the official letters sent by the Tribunal to the primary respondent on 12 April and 9 May 2017 had been correctly addressed and the official letter of 12 April 2017 had not been “called for”, at the hearing, Dr Knighton explained that the official letter of 9 May 2017 had actually been received by him on 9 June 2017 (and not 9 May 2017 as recorded on the official file). He further explained that the letter was passed to him by the occupant of a nearby flat on that date, having been incorrectly delivered by the Royal Mail.

17. Dr Knighton’s submissions at the hearing confirm that by 9 June 2017 (i.e. three days prior to the expiry of the deadline) he was in possession of the second copy of the official letter of 12 April 2017 which was reissued by the Tribunal by ordinary post on 9 May 2017. When I asked him why he then waited until 19 June 2017 to contact the Tribunal, he explained that he was distracted by other more serious court proceedings.

18. When Dr Knighton finally contacted the Tribunal by telephone on 19 June 2017, he ought to have been advised that the deadline had expired and if he

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wanted to file a late defence it would be necessary for him to request an extension of time (by filing Form CNA5 accompanied by the fee of £100) explaining why additional time was required and why the request was late, together with a copy of the Form CNA 2 (accompanied by the official fee of £150). Instead, the Tribunal advised Dr Knighton that he would be sent a further letter which would explain what happens next; that was a reference to the official letter of 19 June 2017 and was an error in procedure on the Tribunal's part.

19. However, even if Dr Knighton had been given the correct advice by the Tribunal and filed the appropriate Forms accompanied by the relevant fees in a timely manner, as the reasons upon which he would have had to rely would have been the same as those he relied upon at the hearing, it would not have assisted the primary respondent for reasons which I will now explain.

20. Dr Knighton admits that the official letter of 12 April 2017 which was sent by Royal Mail Recorded delivery was correctly addressed. At the hearing, he explained that it did not come to his attention as the primary respondent's business was new and the premises were not being monitored for incoming mail. In his submissions filed after the hearing, he attempts to lay some of the blame for his failure on the fact that the applicant did not send the primary respondent a copy of its application. However, even if the applicant had sent the primary respondent a copy of its application, given Dr Knighton's indication that the primary respondent's registered office was unmonitored, there is nothing to suggest it would have come to his attention in any case.

21. Regardless, having become aware of the application on 9 June 2017 and the impending deadline of 12 June 2017, one would have expected Dr Knighton to act promptly to meet the deadline; he did not. Rather, he waited for ten days to contact the Tribunal. He explains that delay was because he was occupied with other more serious court proceedings, although no further details in this regard are provided in his submissions.

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22. The *Mercury* case mentioned above provides helpful guidance as to the factors that one needs to bear in mind when deciding whether a late defence in trade mark proceedings should be admitted; I shall return to these factors below. At paragraph 31 of that decision, the AP contrasts how discretion should be exercised when a deadline is inextensible with how it should be exercised when a deadline is extendable (albeit in these proceedings, retrospectively), which would have been the position had Dr Knighton been correctly advised when he contacted the Tribunal on 19 June 2017. In that regard, reference is made to the guidance provided by the AP in another trade mark case i.e. *Siddiqui's application* (BL-O-481/00) in which the AP stated:

“4. Accordingly, it must be incumbent on the application for the extension to show that the facts do merit it. In a normal case this will require the applicant to show clearly what he has done, what he wants to do and why it is that he has not been able to do it. This does not mean that in an appropriate case where he fails to show that he has acted diligently but that special circumstances exist an extension cannot be granted. However, in the normal case it is by showing what he has done and what he wants to do and why he has not done it that the registrar can be satisfied that granting an indulgence is in accordance with the overriding objective and that the delay is not being used so as to allow the system to be abused.”

23. The answers to the questions posed above (adapted for these proceedings) would, on Dr Knighton's own submissions, have been as follows:

What did the primary respondent do from the date the original letter was sent by Recorded delivery on 12 April 2017?

It appears nothing until 9 June 2017, when Dr Knighton first became aware that an application had been filed.

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What does the primary respondent want to do?

Defend the application by filing Form CNA2.

Why was the primary respondent unable to file its defence by the deadline set?

Because the primary respondent's registered office was not being monitored for incoming mail. This meant that it was not aware of the delivery of the original letter sent by the Tribunal by Recorded delivery on 12 April 2017 or the reissued letter sent by the Tribunal on 9 May 2017; the latter of which was it appears, despite being correctly addressed, delivered to the wrong address.

24. Although the AP goes on to explain that: "this does not mean that in an appropriate case where [the primary respondent] fails to show that [it] has acted diligently but that special circumstances exist an extension cannot be granted", there are, in my view, no special circumstances which excuse the primary respondent's lack of diligence in monitoring its registered office. In the *Kix* case mentioned above, the AP stated:

"15...However, it was plain on the facts that the applicant has been the author of its own misfortune. There had been no adherence to any system or procedure for dealing with registered letters. The official notification has been mislaid because the minimum degree of vigilance required to prevent that from happening was not exercised..."

25. As Dr Knighton correctly points out in his submissions, in that case the "paperwork was delivered and signed for, but not read". Nonetheless, the fact remains that the primary respondent in these proceedings did not become aware of the official letters of 12 April and 9 May 2017 until 9 June 2017, because it had not (to use the words of the AP in *Kix*), exercised "the minimum degree of vigilance required" to monitor mail being delivered to its registered

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office. It was, as the AP put it, “the author of its own misfortune.” That being the case, even if Dr Knighton had filed a request for additional time, I would have refused that request for the reasons I have provided.

26. Having concluded that on the basis of Dr Knighton’s submissions I would have refused a timely filed request for additional time, I will now go on and look at the factors identified by the AP in the *Mercury* case to see whether notwithstanding that conclusion, I should exercise the power available to me under rules 3(4) or 7(1) to allow the primary respondent to file a late defence.

27. The factors identified by the AP (adapted for the purposes of these proceedings) are as follows:

The circumstances relating to the missing of the deadline including the reasons why it missed and the extent to which it was missed.

I have explained the position in this regard above.

The nature of the applicant’s allegations in its Form CNA1

These appear in paragraphs 2 and 3 above.

The consequences of treating the primary respondent as defending or not defending the application

If the primary respondent is allowed to defend its company name, the proceedings will continue; if they do not, the application will succeed and if the primary respondent does not change its name to a non-offending name in the period allowed, I will determine a new company name.

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Any prejudice caused to the applicant by the delay

In its submissions, the applicant stated:

“...to grant the respondent’s request would be highly prejudicial to the applicant, as the longer the offending company name is allowed to remain on the register the greater the damage to the applicant’s goodwill in its own company name and the dilution of its trade marks. The damage and dilution is enhanced by the high level of similarity between the company name in question and the clear use of the applicant’s trade mark ALDI in the respondent’s company name.”

Any other relevant considerations, such as the existence of related proceedings between the same parties

Although at the hearing Dr Knighton referred to other more serious court proceedings (which I understood may involve the applicant), as no further information has been provided by him in this regard, I am simply not in a position to judge whether this is a factor that weighs in the primary respondent’s favour.

28. Although the primary respondent will have to change its name (or have it changed for it) if I do not allow it to file a late defence, that alone is not enough, in my view, to justify me exercising the power available to me in its favour. As I mentioned above, in my view, the primary respondent was “the author of its own misfortune”. Having already concluded that I would have refused a timely request for additional time to file a late defence, the answers to the questions posed above do not (either individually or collectively) point to a different outcome.

Conclusion

29. **I have concluded that in the circumstances of this case, it is not appropriate for me to exercise the power available under either rule 3(4)**

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or 7(1) in the primary respondent's favour. The consequence of which, is that subject to any successful appeal, the application succeeds.

What happens now?

30. The primary respondent did not file a defence within the two month period specified by the adjudicator under rule 3(3). Although I have the discretion under rule 3(4) to treat the primary respondent as opposing the application, as I indicated above, I can see no reason to exercise such discretion and, therefore, decline to do so.

31. Therefore, in accordance with Section 73(1) of the Act I make the following order:

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

(b) ALDI GROUP LIMITED shall:

(i) take such steps as are within its power to make, or facilitate the making, of that change;

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

32. In accordance with Section 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.

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

Costs

34. At the hearing, Mr Lloyd accepted that as the applicant did not contact the primary respondent prior to making its application and had not made a claim for costs in its Form CNA1, it was not entitled to any costs in this regard. However, in its written submissions, the applicant asks for a costs award to be made in respect of it having to deal with the primary respondent's request for a hearing.

35. As the applicant has been successful following the hearing instigated at the primary respondent's request and as it also provided written submissions following the hearing, I agree it is entitled to a contribution towards its costs in this regard. Bearing in mind the guidance provided in the Tribunal's Practice Direction, the duration of the hearing (fifty minutes) and the nature and extent of the submissions filed, I order Aldi Group Limited to pay Aldi Stores Limited £400 as a contribution towards the costs incurred by it in respect of the activities mentioned.

36. 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.

Appeal

37. 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.

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

Dated this 5th day of September 2017

Christopher Bowen
Company Names Adjudicator

ⁱAn “offending name” means a name that, by reason of its similarity to the name associated with the applicant in which he claims goodwill, would be likely— to be the subject of a direction under section 67 (power of Secretary of State to direct change of name), or to give rise to a further application under section 69.