

Companies Act 2006

In the matter of application No 39

by Barloworld Handling Ltd

For a change of company name registration

No. 06456246

BACKGROUND

1. The company name Unilift South Wales Ltd (hereafter USW) has been registered since 18 December 2007 under number 06456246.

2. By an application filed on 24 March 2009, Barloworld Handling Ltd (hereafter BHL) applied for a change of name of this registration under the provisions of section 69(1) of the Companies Act 2006 (the Act). BHL states in its application that the name associated with it is Unilift Ltd, which it had acquired in November 2002 (company registration number 01416823), and that it has accrued considerable goodwill and reputation in the past six years through its marketing, hiring and servicing of fork lift trucks in the Swansea and Cardiff areas under the Unilift name.

3. BHL further states that USW is marketing similar products to those of BHL using the Unilift name and that BHL has received invoices for USW, clearly demonstrating confusion between the two companies. BHL states that USW is guilty of passing off and misuse of the Unilift name. It requests the Company Names Tribunal to order USW “to change its name so that it no longer contains the name ‘Unilift’ or any colourable imitation thereof and to ensure that the Company cease using the trading name ‘Unilift’ so as to avoid confusion.”

4. On 6 April 2009, the Company Names Adjudicator wrote to BHL in the following terms:

“Under section 69(4)(b)(i) of the Companies Act 2006 (the Act), a company has a defence to an application under section 69 if it is operating under the name. Section 69(5) of the Act states:

‘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.’

There is nothing to suggest in your application that the main purpose of the respondent in registering the name was ‘to obtain money (or other consideration) from the applicant or prevent him from registering the name.’

You refer in your grounds to passing-off. Applications to the Company Names Adjudicator are neither an alternative nor an equivalent to an action for passing-off.

As you have stated that the respondent is using the company name, your application has no reasonable prospect of success and is misconceived, unless you can show that section 69(5) of the Act applies. Consequently, under rule 5(2) of the Company Names Adjudicator Rules 2008 I am minded to strike out the application.

If you consider that my preliminary view is erroneous you can request a hearing in relation to this matter. If you want a hearing in relation to this matter you will need to submit form CNA4, with the fee of £100, within two weeks of the date of this letter; that is on or by 20 April 2009.”

5. No response to this letter was received by the Company Names Tribunal.

DECISION

6. Section 69 of the Companies 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 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)

(3)

(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 those 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)

7. BHL has stated in its application that “this new company is marketing similar products to us using the Unilift name”. This is a statement that USW was operating under the name at the time of the application, which is a defence to the application under section 69(4)(b)(i) of the Act. Under the provisions of section 69(5), however, even if it is shown that the company is operating under the name, this defence may be insufficient to defeat the application if the applicant shows that the main purpose of the respondent in registering the name was to obtain money (or other consideration) from the applicant or prevent him from registering the name.

8. BHL has provided no indication either in its application or in any response to the adjudicator’s letter of 6 April 2009 that it has grounds under section 69(5) to thwart USW’s defence under section 69(4)(b)(i). It has made no request to be heard in relation to the preliminary view to strike out the application. Furthermore, it has made reference to passing-off. As stated in the adjudicator’s letter, applications to the Company Names Adjudicator are neither an alternative nor an equivalent to an action for passing-off. ‘Passing-off’ indicates a trading activity and thereby constitutes a defence to the application under section 69(4)(b)(i) which has not been countered by any indication under section 69(5) that the registration was opportunistic on the part of USW.

9. Rule 5(2) of the Company Names Adjudicator Rules provides:

“The adjudicator may strike out the application or any defence in whole or in part if it is vexatious, has no reasonable prospect of success or is otherwise misconceived.”

The presence of the word 'may' indicates that the adjudicator has a discretion in this matter. BHL has provided no indication that section 69(5) may come into play in these proceedings. It has given no indication that it disagrees with the adjudicator's preliminary view of 6 April 2009; that is, that the application has no reasonable prospect of success and is misconceived. In this case I can see no reason to allow the application to continue and, therefore, decline to do so.

10. I hereby strike out the application made on 24 March 2009 by Barloworld Handling Ltd for a change of company name registration number 06456546 because the application has no reasonable prospect of success and is misconceived.

11. Any notice of appeal against this decision 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.

Dated this 13th day of May 2009

Judi Pike
Company Names Adjudicator