

DISPUTE RESOLUTION SERVICE

DRS 9056

Decision of Independent Expert

Luijben Trading

Complainant

and

(1) Steve Scott

(2) Ellen Scott

Respondents

1 The Parties

Complainant:	Luijben Trading
Address:	Z.A. sud du Rosenmeer 1 rue Jean-Marie Lehn Rosheim
Postcode:	67560
Country:	France

Respondents:	Steve Scott & Ellen Scott
Address:	12 Comber Road Hillsborough Belfast N. Ireland
Postcode:	BT26 6LN
Country:	United Kingdom

2 The Domain Names

<dimensionespas.co.uk> and <d1spas.co.uk> (the "Domain Names").

3 Procedural History

- 3.1 The Complaint was filed on 16 September 2010. It was validated on 20 September and a copy was sent to the Respondents on 24 September.
- 3.2 A Response was filed on 4 October. A copy was sent to the Complainant on the same date. However, Nominet subsequently ascertained that the party which had submitted a Response, Omnisoft Services Limited, was not the registrant of either of the Domain Names and was not authorised to represent the Respondents in this DRS proceeding.
- 3.3 This DRS proceeding is therefore to be treated as a 'no Response' case.
- 3.4 On 15 October Nominet wrote to the Complainant informing it that the Respondents had not responded to the Complaint by the deadline, which meant that there could be no mediation. It gave the Complainant the option of paying a fee for the appointment of an independent expert to provide a summary or a full decision. On 15 October Nominet also wrote to the Respondents in similar terms. The Complainant opted for a full decision.
- 3.5 The Independent Expert was appointed on 8 November 2010.

4 Factual Background

- 4.1 The domain name <dimensiononespas.co.uk> was registered by the Respondents, trading as Xscape Distribution, on 13 February 2005. The domain name <d1spas.co.uk> was likewise registered a little later on 11 April 2005.
- 4.2 The Expert has ascertained that Dimension One Spas of 2611 Business Park Drive, Vista, California 92081, United States of America ("DOS") owns an international Madrid (UK) trade mark in DIMENSION ONE SPAS which was registered on 27 August 2005 with number M868567, and was designated in the UK on 16 April 2009.
- 4.3 The Complainant has applied to register the words DIMENSION ONE SPAS as a CTM. The application was filed on 30 August 2010, but unsurprisingly the mark has not yet been registered.
- 4.4 The Expert has ascertained that the domain name <dimensiononespas.co.uk> is currently pointing to an error page and that the domain name <d1spas.co.uk> is pointing to the website of a business named A5 Spas & Landscapes of Watling Street, Grendon, Warwickshire CV9 2PZ, which appears to sell spas and hot tubs made by, amongst others, DOS. Whether this concern has anything to do with the Respondents is unclear. A5 Spas also uses the domain name <A5spas.co.uk>, which is registered to "Mark Anthony – A5 Spas" of the same address.
- 4.5 The Respondents appear to trade as Xscape Distribution, which describes itself on its website at www.xscapedistribution.com as "the exclusive UK distributors of the Dimension One Spas". On that website, Xscape Distribution gives its address as: "Park View Farm, 12 Comber Road, Hillsborough, County Down, Northern Ireland BD26 6LN", i.e. the address of the Respondents.

5 Parties' Contentions

Complaint

- 5.1 The Complaint is extremely short.
- 5.2 The Complainant asserts that it is the official representative of DOS which owns the rights to the name Dimension One Spas in Europe. However, the commercial and/or legal relationship between DOS and the Complainant is unclear.
- 5.3 It says that the First Respondent, trading as Xscape Distribution, "*used to be the distributor of our products in the UK*", but that "*his distribution agreement is legally terminated*" and that in any event there was no provision in the distribution agreement which would have entitled him to register any domain name containing the words Dimension One Spas.
- 5.4 It is said that a distribution agreement was in place between DOS and the First Respondent, but a copy of that agreement has not been provided. The Complainant exhibits a letter of 1 September 2010 from Dolores Ordas, Vice President, Human Resources and Legal, at DOS, addressed "To whom it may concern". That letter asserts that DOS had an agreement with Xscape Distribution which contained certain provisions, including that:
- "We agreed that when the agreement was terminated for any reason, Distributor will discontinue the use of such trademarks and logos in any manner, including websites, domains, brochures, etc."*
- and that:
- "Upon termination or expiration of the agreement, Distributor will immediately cease selling, marketing or advertising the Dimension One Products and will return all sales and proprietary materials in its possession or under its control to Dimension One Spas."*
- 5.5 According to that letter, "*we have ended the relationship with Xscape Distribution on August 2009*".
- 5.6 DOS also asserts in that letter that:
- "Luijben Trading, LLC is officially representing our trademark Dimension One Spas in getting the domain name **d1spas.co.uk** on behalf of Dimension One Spas, Inc."*
- 5.7 No mention is made of the other Domain Name. Nor is it said, let alone evidenced, either by the Complainant or by DOS, that the Complainant is a licensee of DOS.
- 5.8 So far as the question of abuse of registration is concerned, the Complainant relies on its status "*as the official representative of the trademark Dimension One Spas in Europe*". It cites trade marks numbers 868567 and 886634. No evidence of registration of either of those marks is provided.
- 5.9 A search on the UKIPO website for trade mark number 868567 produces a result to the effect that there is no mark registered with that number. Entering the other trade mark number relied upon by the Complainant, 886634, has the same result.
- 5.10 The Complainant says that it trades from its website at *www.d1spas.com* and provides a list demonstrating that it uses the second level domain *d1spas* in a number of European territories. However, this is simply a document generated on Word or Excel and there is no evidence that the Complainant is the registrant of any of the domain names cited.
- 5.11 Finally, the Complainant relies on the fact that the domain name *d1spas.co.uk* is, as noted above, pointing to the website of a company named A5 Spas & Landscape. The Complainant

asserts that this is "*not logical at all*" in that "*one of our dealer[s] has his website appearing under our corporate domain name*".

Response

5.12 As recorded in paragraph 3.2 above, the Respondents have filed no Response.

Reply

5.13 Accordingly, no Reply was filed.

6 Discussions and Findings

General

6.1 To succeed under the Policy, the Complainant must prove on the balance of probabilities, first, that it has Rights (as defined in the Policy) in respect of a name or mark that is identical or similar to the Domain Name (paragraph 2(a)(i) of the Policy), and secondly, that the Domain Name is an Abusive Registration in the hands of the Respondent (paragraph 2(a)(ii) of the Policy).

6.2 Abusive Registration is defined in paragraph 1 of the Policy in the following terms:

"Abusive Registration means a Domain Name which either:

(i) was registered or otherwise acquired in a manner which, at the time when the registration or acquisition took place, took unfair advantage of or was unfairly detrimental to the Complainant's Rights; OR

(ii) has been used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's Rights."

Complainant's rights

6.3 The Complainant asserts that the First Respondent has no rights to register either of the Domain Names. However, it advances no positive case as to its own rights in respect of a name or mark that is identical or similar to either of the Domain Names, nor has it provided any evidence of any such rights (see section 5 above).

6.4 The Expert ascertained that the Complainant has applied for a Community Trade Mark in DIMENSION ONE SPAS, but in and of itself an application for a trade mark will not constitute Rights under the Policy (see DRS Experts' Overview, paragraph 1.9).

6.5 In those circumstances, the Complainant has plainly failed to prove on the balance of probabilities that it has Rights (as defined in the Policy) in respect of a name or mark that is identical or similar to either Domain Name, pursuant to paragraph 2(a)(i) of the Policy.

Abusive registration

6.6 Given that the Complainant has failed to establish that it has the requisite Rights, it is not necessary to consider whether the Domain Names, or either of them, is or are an Abusive Registration in the hands of the Respondents.

7 Decision

7.1 It is therefore determined that no action be taken in relation to either Domain Name.

Signed: David Engel

Date: 24 November 2010