

## **DISPUTE RESOLUTION SERVICE**

**D00012442**

### **Decision of Independent Expert**

The Procter & Gamble Company

and

Wang Degui

#### **1. The Parties:**

Complainant: The Procter & Gamble Company  
One Procter and Gamble Plaza  
Cincinnati  
OHIO  
45202  
United States

Respondent: Wang Degui  
Pukou District Xingdian Town Longzhong Village Tandong No.6  
Jiangsu Province Nanjing City  
China

#### **2. The Domain Name(s):**

wellaton.co.uk (the "Domain Name").

#### **3. Procedural History:**

The Complaint was submitted to Nominet on 7 February 2013. On 8 February 2013, Nominet validated the Complaint and notified it to the Respondent.

The Respondent was informed in the notification that it had 15 working days, that is, until 1 March 2013 to file a response to the Complaint.

The Respondent did not file a response and the case did not proceed to the mediation stage. On 18 March 2013, the Complainant paid the fee for referral of the matter for an expert decision pursuant to paragraph 8 of Nominet's Dispute Resolution Service Procedure Version 3 ("the Procedure") and paragraph 7 of the corresponding Dispute Resolution Service Policy Version 3 ("the Policy").

On 26 March 2013, Andrew D S Lothian, the undersigned, ("the Expert") confirmed to Nominet that he was not aware of any reason why he could not act as an independent expert in this case. Nominet duly appointed the Expert with effect from 28 March 2013.

#### **4. Outstanding Formal/Procedural Issues**

The Respondent has failed to submit a response to Nominet in time in accordance with paragraph 5(a) of the Procedure.

Paragraph 15(b) of the Procedure provides *inter alia* that "If in the absence of exceptional circumstances, a Party does not comply with any time period laid down in the Policy or this Procedure, the Expert will proceed to a Decision on the complaint."

Paragraph 15(c) of the Procedure provides that "If in the absence of exceptional circumstances, a Party does not comply with any provision in the Policy or this Procedure or any request by us or the Expert, the Expert will draw such inferences from the Party's non compliance as he or she considers appropriate."

In the view of the Expert, if the Respondent does not submit a response, the principal inference that can be drawn is that the Respondent has simply not availed itself of the opportunity to attempt to demonstrate that the Domain Name is not an Abusive Registration. This does not affect the primary requirement upon the Complainant, on whom the burden of proof rests, to demonstrate Abusive Registration, nor does it in the Expert's view entitle an expert to accept as fact all uncontradicted assertions of the Complainant, irrespective of their merit.

#### **5. Factual Background**

The Complainant is one of the largest companies in the world, manufacturing a wide range of consumer goods in diverse areas from hair care to pet nutrition. The Complainant is the parent company of multiple subsidiary

companies including Procter & Gamble Service GmbH, Wella Aktiengesellschaft, and Wella GmbH, having acquired these along with their intellectual property in 2003. Each of these subsidiaries, among others, are the proprietors of registered trade marks for the word mark WELLATON. For example, Wella GmbH is the proprietor of United Kingdom registered trade mark no. 778292 for the word mark WELLATON, filed on 3 June 1958 for goods in use class 3 (perfumes, non-medicated toilet preparations, essential oils, cosmetics and hair lotions). The Complainant has also registered multiple domain names consisting of or comprising the word WELLATON including <wellaton.info>, <wellaton.jp>, <wellaton.cl>, <wellaton.co>, <wellaton.com.bo>, <wellaton.cz>, <wellaton.pl>, <wellaton.ro>, <wellaton.eu>, <wellaton.it>, <wellaton.fr>, and <wellaton.us>

The WELLATON hair care brand dates back to the 1950s and is an extension of the WELLA professional hair care brand which itself dates back to the 19<sup>th</sup> century. Today, the Complainant's subsidiaries' WELLA and WELLATON branded products are available in over 150 countries worldwide. Sales of such branded products to the salon professional market in the Asia/Pacific region amounted to more than US\$200 million for the year ended 2011.

The Complainant supports the WELLA and WELLATON trade marks with intensive advertising on television and in other media, including social media such as the Facebook page of WELLA International, which presently benefits from 80,000 fans. The Complainant organises an influential hairdressing industry competition each year named "The Wella TrendVision Awards," which features on its YouTube channel, and also runs a dedicated YouTube channel for its consumers. The Complainant also engages in social events such as the "WELLA-UNICEF MAKING WAVES" event, which is a long-term programme between Wella, hair stylists, their clients and UNICEF.

The Respondent registered the Domain Name on 25 July 2011. On the same date, the Respondent also registered a variety of other domain names incorporating the name WELLATON including <wellaton.es>, <wellaton.eu>, <wellaton.it> and <wellaton.us>. The Respondent placed these domain names and the Domain Name with the Sedo parking service and made them available for sale. On 23 December 2011 agents acting on behalf of the Complainant offered to purchase the Domain Name via the Sedo online platform for US\$150. On the same date the Respondent countered with an offer of EUR€3,000 and applied the comment "This is my final offer".

The websites associated with the Domain Name and other related WELLATON domain names registered by the Respondent featured various sponsored advertising hyperlinks along with a notice stating that the said domain names were available for sale. The hyperlinks concerned promoted the websites of the Complainant's competitors including L'Oréal, and featured similar categories of products to those offered by the Complainant.

Following correspondence from the Complainant's legal representatives, the Respondent did not renew the majority of domain names identical to WELLATON and the Complainant registered these in its own name. The Respondent however retained the Domain Name.

## **6. Parties' Contentions**

### **Complainant**

The Complainant asserts that the Domain Name is identical to trade marks in which the Complainant has rights.

The Complainant states that it is inconceivable that the Respondent did not have actual notice of the Complainant's trade marks at the time of registration of the Domain Name, due to the global fame of such trade marks. The Complainant submits that such actual knowledge is demonstrated by the Respondent's registration of seven domain names consisting of the Complainant's trade marks. The Complainant asserts that the Respondent registered the said domain names, including the Domain Name, to capitalise on the reputation of Complainant's mark by offering the domain names for sale and, in the meantime, by diverting Internet users to websites publishing sponsored links.

The Complainant states that the Respondent is not a licensee, authorised agent of the Complainant or in any other way permitted to use the Complainant's trade marks, nor is the Respondent commonly known by the Domain Name as an individual, business or other organisation. The Complainant adds that the Respondent has not provided the Complainant with any evidence of its use of or demonstrable preparations to use the Domain Name in connection with a *bona fide* offering of goods or services before notice of the dispute. The Complainant submits that WELLATON is a word with no meaning in foreign languages and is not one that a trader would choose unless seeking to create an impression of an association with the Complainant.

The Complainant asserts that, in light of the identity of the Domain Name with the Complainant's trade mark, there is a clear likelihood that Internet users could be confused into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant. The Complainant notes that such 'initial interest confusion' has been held to provide a basis for a finding of Abusive Registration. The Complainant submits that its trade mark is well-known and that it has been held in previous DRS cases that the unauthorised use of such a mark in a domain name will almost always be an abuse of the rights held by the proprietor of that mark.

The Complainant states that the use of the Domain Name for the purposes of publication of sponsored advertising links should not be considered a legitimate non-commercial or fair use of the Domain Name and notes that the Respondent is gaining from click-through commissions arising from such links, referencing the terms of the Sedo Domain Parking Program. The Complainant notes that such wilful conduct of the Respondent, along with the offer for sale of the Domain Name, clearly demonstrates that the Respondent did not intend to use the Domain Name in connection with any legitimate purpose. The Complainant therefore contends that the Domain Name is being used by the Respondent in a manner which takes unfair advantage of and is unfairly detrimental to the Complainant's rights.

The Complainant asserts that the purchase price requested by the Respondent for the Domain Name clearly demonstrates that the Respondent attempted to profit from the sale of a domain name identical to the Complainant's trade mark therefore the Complainant contends that paragraph 3(a)(i)(A) of the Policy is applicable to the present case. The Complainant submits that the other domain names registered by the Respondent, including <windowsphone.asia> as well as those identical to the Complainant's trade mark, demonstrate that the Respondent is engaged in a pattern of registrations which correspond to well known names or trade marks in which the Respondent has no apparent rights, and the Domain Name is part of that pattern, pursuant to paragraph 3(a)(iii) of the Policy.

The Complainant asserts that the postal address provided by the Respondent is incomplete and *prima facie* incorrect, such that the Respondent has given false contact details to Nominet, this being evidence of Abusive Registration pursuant to paragraph 3(a)(iv) of the Policy. The Complainant also notes that the Respondent did not reply to correspondence from the Complainant and made no attempt to explain its adoption of an identical Domain Name to the Complainant's trade mark and that this is further evidence of Abusive Registration.

## **Respondent**

The Respondent did not file a Response and has not replied to the Complainant's contentions.

## **7. Discussions and Findings**

### **General**

In terms of paragraph 2(b) of the Policy the onus is on the Complainant to prove to the Expert on the balance of probabilities each of the two elements set out in paragraph 2(a) of the Policy, namely that:

- (i) The Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name; and
- (ii) The Domain Name, in the hands of the Respondent, is an Abusive Registration.

### **Complainant's Rights**

Paragraph 1 of the Policy provides that Rights means "rights enforceable by the Complainant, whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning". In the present case, the Complainant has produced evidence that its subsidiaries are the proprietors of various registered trade marks for the word mark WELLATON. However, the Complainant is not itself the proprietor of the trade marks upon which it relies, although it states that it is the owner "through its subsidiary companies".

The question of whether rights which are owned by a different company in the same corporate group as the complainant may be sufficient to entitle that complainant to assert 'Rights' in terms of paragraph 2(a)(i) of the Policy has been considered in various DRS cases. For example, the Appeal Panel in *Seiko UK Limited -v- Designer Time/Wanderweb*, DRS 00248 held that: "The requirement to demonstrate 'rights' is not a particularly high threshold test. It is satisfied in our view by the assertion of Seiko UK Limited that it is duly authorised by the trade mark owner to use the mark and to bring the Complaint. Where a complainant is a subsidiary or associated company of the trade mark proprietor, such an assertion will in our view generally be sufficient to demonstrate 'rights' in the absence of any good reason to doubt the veracity of that assertion".

While *Seiko* was decided under a previous version of the Policy, the Rights element of the latest version has not changed to any extent which would affect or alter this general proposition. Furthermore, the Expert has adopted the *Seiko* approach in another case under the current version of the Policy (see *EMI Records Limited v. Mr Philip Gahan*, DRS 9931) and in these circumstances will adopt it in the present case. However, complainants would do well to remember that the more reliable course of action is that set out in paragraph 1.1 of the DRS Experts' Overview which deals with the question as follows:

#### **"(a) Who should the Complainant be? (b) When is it necessary or appropriate for there to be more than one Complainant?"**

(a) The Complainant should be the owner/licensee of the Rights in the name or mark, which the Complainant contends is identical or similar to the domain name in dispute. Surprisingly often, complaints under the DRS Policy ("the

Policy”) are lodged in the names of persons and entities not demonstrably the proprietor of the relevant Rights.

(b) For example, when the Rights relied upon are owned or shared by one entity but used by a group or associate company whose business is disrupted or confusingly connected with the Respondent. Another example could be in circumstances where the Rights relied on have been licensed and, depending on the facts, it may be desirable for both the Licensor and Licensee to be Complainants. If more than one Complainant is named, it is important that the Complaint nominates one of them as the transferee of the domain name in the event that the Complaint succeeds.”

In the present case, the Complainant states that it is the parent company of the various proprietors of the trade marks cited and has included with the Complaint a notarised certificate from the Complainant’s Assistant Secretary listing its active subsidiaries as at 10 February 2009. The Expert is satisfied, on the basis of the Complainant’s submissions and the notarised certificate, that it is reasonable to infer that the Complainant is duly authorised by its subsidiaries to rely upon the trade marks cited and likewise to bring the present Complaint. It is clear that the Complainant’s subsidiaries have extensive rights in multiple registered trade marks for or incorporating the mark WELLATON and in all of these circumstances the Expert finds that the Complainant has Rights in this name.

In comparing the WELLATON mark to the Domain Name, the first (.uk) and second (.co) levels of the Domain Name are disregarded as being wholly generic. It can then be seen that the WELLATON mark is identical to the Domain Name, given that domain names are not case sensitive for technical reasons.

Accordingly, the Expert finds that the Complainant has proved to the satisfaction of the Expert that it has Rights in a name or mark which is identical to the Domain Name.

### **Abusive Registration**

Paragraph 1 of the Policy defines “Abusive Registration” as 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 has taken unfair advantage of or has been unfairly detrimental to the Complainant’s Rights;*

This general definition is supplemented by paragraph 3 of the Policy which provides a non-exhaustive list of factors which may be evidence that the Domain Name is an Abusive Registration. Paragraph 4 of the Policy provides a similar non-exhaustive list of factors which may be evidence that the Domain Name is not an Abusive Registration.

In the present case, the Complainant asserts that the Domain Name is being used by the Respondent in a manner which takes unfair advantage of and is unfairly detrimental to the Complainant's Rights. The Complainant's submissions focus on the fact that (1) the Respondent has placed the Domain Name with a parking service such that the home page of the associated website publishes various sponsored links including those promoting the websites of the Complainant's competitors; and (2) the Respondent has offered the Domain Name for sale at a price in excess of the Respondent's out of pocket costs. The Complainant also notes that the Respondent registered various domain names identical to the WELLATON trade mark in several other top level domain spaces together with other domain names corresponding to third party registered trade marks.

The Expert notes that the Domain Name is identical to the WELLATON trade mark and brand name without any adornment, other than the generic domain suffix, and there is no evidence before the Expert that this name can sensibly refer to anyone other than the Complainant, its corporate group or their respective branded products. In these circumstances it may be inferred that a visitor to the website associated with the Domain Name would have the reasonable expectation that it is a website operated or authorised by, or otherwise connected with the Complainant. In the wording of paragraph 3.3 of the Expert Overview, any such visitor will have been "sucked in/deceived by the domain name". Indeed, this appears to be the Respondent's intention given that, on arrival to the site, the visitor is met by advertisements, from which the Respondent seeks to earn revenue, for goods or services similar to those produced by the Complainant. The Expert Overview goes on to note that a finding of Abusive Registration in this context is most likely to be made where the Domain Name is identical to the name or mark of the Complainant, which is the case here.

In these circumstances the Complainant succeeds in its argument that the Domain Name is an Abusive Registration based upon the circumstances described in paragraph 3(a)(ii) of the Policy. For completeness, the Expert notes that he agrees with the Complainant that the offer of sale of the Domain Name at an inflated price and the Respondent's registration of other domain names containing third party trade marks are further indicators of Abusive Registration in the present case.


As noted above, the Respondent has chosen not to file any response to the Complainant's contentions and has not therefore provided any statement to the Expert as to why it registered the Domain Name and/or its reasons for its present use thereof. It does not appear to the Expert in any event that the



Respondent could have availed itself of the factors in paragraph 4 of the Policy, or pointed to any other circumstances, to demonstrate that the Domain Name is not an Abusive Registration.

## 8. Decision

The Expert finds that the Complainant has proved that it has Rights in a name or mark which is identical to the Domain Name and that the Domain Name, in the hands of the Respondent, is an Abusive Registration. The Expert therefore directs that the Domain Name be transferred to the Complainant.

**Signed**  .....

**Dated** 17 April, 2013 .....

Andrew D S Lothian