

DISPUTE RESOLUTION SERVICE

D00020656

Decision of Independent Expert

Ilsleys Wholesale Supplies Ltd

and

Mr David Ilsley

1. The Parties:

Complainant: Ilsleys Wholesale Supplies Ltd
Address: 500 Stone Close
West Drayton
Middlesex
UB7 8JU
United Kingdom

Respondent: Mr David Ilsley
Address: 3 Somerset Grove
Warfield
Bracknell
Berkshire
RG42 3TN
United Kingdom

2. The Domain Name:

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

3. Procedural History:

I can confirm that I am independent of each of the parties. To the best of my knowledge and belief, there are no facts or circumstances, past or present, or that could arise in the foreseeable future, that need be disclosed as they might be of such a nature as to call in to question my independence in the eyes of one or both of the parties.

Definitions used in this decision have the same meaning as set out in the Nominet UK Dispute Resolution Service Policy Version 4, October 2016 (the “Policy”) unless the context or use indicates otherwise.

4 October 2018	Dispute received
4 October 2018	Complaint validated and notification of complaint sent to the parties
23 October 2018	Response reminder sent
24 October 2018	Response received and notification of response sent to the parties
29 October 2018	Reply reminder sent
30 October 2018	Reply received and notification of reply sent to the parties
5 November 2018	Mediator appointed
5 November 2018	Mediation started
9 November 2018	Mediation failed
9 November 2018	Close of mediation documents sent
15 November 2018	Expert decision payment received

4. Factual Background

The Complainant was incorporated on 1 December 2017 but has traded since at least 2013 as Ilsley’s Wholesale Supplies providing wholesale supplies to the hotel and food service industries.

The Respondent was involved in some capacity with Ilsley’s Wholesale Supplies pre-incorporation. The parties disagree on the Respondent’s status: the Complainant says he was an employee, the Respondent says that he was a partner.

The Domain Name was registered by the Respondent on 22 January 2013.

5. Parties’ Contentions

The Complaint

For the purposes of this complaint, the term Complainant is used to refer to the business operating since 2013, or earlier, and incorporated on 1 December 2017.

Complainant’s Rights

The Complainant’s assertion of rights in the name ILSLEYS is that the Complainant has used the Domain Name since 2013:

1. For the purposes of email addresses such as sales@ilsleys.co.uk and goods-in@ilsleys.co.uk;
2. On invoices;

3. On business cards, advertising and company branded workwear and price lists;
4. On the Complainant's vans and the sign outside of its warehouse;
5. On food products branded with the name "Ilsley's" or "Ilsleys".

Abusive Registration

The Complainant's assertions of Abusive Registration are:

1. The Complainant instructed the Respondent, who held a position of responsibility and trust within the Complainant's organisation, to register the Domain Name and to open a website for use by the Complainant; the Complainant paid for the registration for 10 years;
2. When the Respondent left the Complainant's business on 4 August 2017 he took the Domain Name log on details with him and closed the website associated with the Domain Name on 19 August 2017;
3. The website at ilsleys.co.uk has remained closed and the Domain Name has not been used for any other purpose;
4. The Respondent is trying to make money from the sale of the Domain Name as evidenced by a screen shot showing that "ilsley.co.uk" is for sale;
5. The Respondent is not an owner of the Complainant's business and never has been;
6. The name ILSLEYS is how the Complainant is recognised by its clients, suppliers and the public;
7. By taking down the website at the Domain Name the Respondent has deprived the Complainant of its use and blocked the registration; it has also caused clients to believe that the Complainant's business was closing down;
8. The Respondent's action has knowingly and unfairly disrupted the Complainant's business including clients' ability to make orders and suppliers' ability to update delivery details.

The Response

The Respondent says that the complaint should not succeed because:

1. The evidence submitted by the Complainant is false, misleading and outdated;
2. He was not an employee but a partner in the business, and presents a redacted self-assessment tax return prepared by an accountant for the year 2016-2017 which includes Ilsleys Wholesale Suppliers under "partnership details";
3. He owns the Domain Name and it was purchased for private use not as the Complainant's domain name; it was originally meant as a downhill mountain bike site;

4. The Domain Name has never been paid for by the Complainant;
5. An internet search on "Ilsleys" brings up nothing related to the Domain Name and to obtain any information on the Complainant's business "Ilsleys Wholesale Supplies" must be entered as the search terms;
6. The recent incorporation of the business is disputed and the inclusion of the Domain Name in the assets that passed as part of that incorporation was not possible;
7. The name and logo is a standard font and common surname and cannot be claimed as recognisable to customers and the public;
8. The parties have each instructed solicitors and they are in the pre-action protocol stage; the Complainant is thus disingenuously using the DRS to circumnavigate that process.

The Reply

The Complainant re-iterates that the documents provided in the complaint, especially the invoices, are authentic documents and that the Respondent has failed to take the time to read them. Further that the Respondent has offered no evidence to refute those documents.

The Complainant asserts that Allan Ilsley was a sole trader as evidence by bank details showing "Mr A G Ilsley t/as Ilsley Wholesaler Supplies". Further that the tax return presented by the Respondent is redacted and therefore not all details can be read.

The Complainant says that the Respondent presents no evidence of a downhill website as the purpose of the registration of the Domain Name. The Respondent has never claimed that the Domain Name is his and helped to set up the Complainant's website associated with it.

The Complainant disputes the Respondent's search engine claim but only offers a search on "Ilsleys Wholesale Supplies" in evidence.

The Complainant disputes the Respondent's claim that the Domain Name could not be included in the asset transfer on incorporation of the limited company as this claim assumes that the Respondent owns the Domain Name.

The Complainant says that Ilsley is not a common surname as it is held by only 3151 people in the UK (by reference to a website of the most common UK surnames).

Finally, the Complainant says that the pre-action dispute between the parties relates to funds that have gone missing from the Complainant's accounts. The Domain Name is not the main part of that dispute and the Respondent is trying to use the Domain Name as leverage in those discussions. Further, the Complainant is the owner of the Domain Name and the complaint is not circumnavigating the dispute but is intended to resolve the Domain Name dispute by the proper means.

6. Discussions and Findings

General

To succeed in this Complaint, the Complainant has to prove to the Expert on the balance of probabilities, pursuant to §2.1 and 2.2 of the Policy, both limbs of the test that:

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

Complainant's Rights

Rights is defined in §1 of the Policy as *“rights enforceable by the Complainant, whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning”*.

The wholly generic suffix “.co.uk” may be discounted for the purposes of establishing whether a complainant has Rights in a name or mark which is identical or similar to a domain name.

The Complainant has to my satisfaction evidenced unregistered rights in the name ILSLEYS by its use by the Complainant since at least 2013 and such rights are sufficient for the purposes of the low threshold of the first limb of the test in §2.1.1 of the Policy. I have discounted the apostrophe in the Complainant’s use of the term “Ilsley’s” in its trading name and materials.

Accordingly, I find that the Complainant has Rights in the name ILSLEYS which is identical to the Domain Name.

Abusive Registration

Abusive Registration is defined in §1 of the Policy 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. *is being or has been used in a manner which has taken unfair advantage of or has been unfairly detrimental to the Complainant’s Rights.*

A non-exhaustive list of factors which may be evidence that a domain name is an Abusive Registration is set out in §5.1 of the Policy of which §5.1.5 is of particular relevance to this dispute:

5.1.5 The Domain Name was registered as a result of a relationship between the Complainant and the Respondent, and the Complainant:

5.1.5.1 has been using the Domain Name registration exclusively; and

5.1.5.2 paid for the registration and/or renewal of the Domain Name registration;

A non-exhaustive list of factors which may be evidence that a domain name is not an Abusive Registration is set out in §8.1 of the Policy and in particular:

8.1.3 In relation to paragraph 5.1.5; that the Respondent's holding of the Domain Name is consistent with an express term of a written agreement entered into by the Parties;

The Complainant says that in 2013 he, as “the executive director and owner”, instructed the Respondent, who “held a position of responsibility and trust”, to open a website at the Domain Name. The Complainant does not present any evidence to support this assertion. The Domain Name was registered in the Respondent’s name.

The Complainant presents evidence that the Domain Name has been used for the Complainant’s business since 2013 on invoices, business cards, advertising, delivery vans, signage outside the warehouse, products, emails and customer ordering. Neither party presents evidence of preparation for the use of, or the use of, the Domain Name for any other purpose.

The Complainant presents no evidence of having paid for the registration and/or renewal of the Domain Name registration.

The Respondent says that he was a partner in the Complainant’s business and that he owns the Domain Name as it was acquired for his private use. He says that the Domain Name was originally intended for a downhill mountain bike site but does not explain how or why it came to be used by the Complainant’s business. Furthermore, he says, the Domain Name has never been paid for by the Complainant. The Respondent offers no evidence to support his assertions save for letter from an accountant enclosing his redacted tax return for 2016/2017 which includes a section on “partnership details” with reference to Ilsleys Wholesale Suppliers.

The Complainant rejects the tax return on the basis that it is redacted so not all details can be read and evidences a bank account in the name of “Mr A G Ilsley t/as Ilsley Wholesaler Supplies”.

The Respondent’s actions in changing the log in details and closing the website at the Domain Name strikes me as a deliberate attempt to affect the Complainant’s business, and I sympathise with the Complainant if his version of events is true as such actions will have knowingly and unfairly disrupted the Complainant’s business. However, there is

crucial evidence lacking in each party's submissions to establish whether the Domain Name was registered for the Complainant's business and paid for by the business, or whether the Domain Name is a partnership asset to be dealt with in accordance with an undisclosed partnership agreement, or whether the Domain Name was registered by the Respondent for personal use and he allowed it to be used by the Complainant's business by way of some undisclosed agreement.

The parties are in dispute concerning other matters which would appear to impact upon the ownership of the Domain Name, and solicitors have been instructed in that dispute.

It is not for the Expert to resolve any aspect of that dispute within the framework provided by the DRS. The DRS provides a low cost, informal and quick procedure for resolving straight forward cases in a fair manner. The DRS is not a forum for presenting evidence that requires cross examination by holding a quasi-trial to test the arguments and evidence and assesses the credibility of the witnesses, which is what appears to be needed in this case to get to the truth of events at registration and subsequent use of the Domain Name.

Accordingly, as is the norm in DRS cases, I will reach my decision on the basis of the written arguments and evidence in the papers before me and which the parties have elected to make available to me. On that basis, I am unable to reach a decision on the papers before me as to which side's explanation of the arrangements with regard to the Domain Name is correct and I thus conclude that the Complainant has not discharged the burden of proving, on the balance of probabilities, that the Domain Name is an Abusive Registration.

7. Decision

In light of the foregoing findings, namely that the Complainant has Rights in a name which is identical to the Domain Name, but that the Complainant has not discharged the burden of proving, on the balance of probabilities, that the Domain Name is an Abusive Registration, I direct that no action is taken.

Signed

Dated: 7th December 2018

Steve Ormand