

DISPUTE RESOLUTION SERVICE

DRS 20905

Decision of Independent Expert

Folkestone Harbour Limited Partnership

Complainant

and

Eric Perry

Respondent

1 The Parties

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| Complainant: | Folkestone Harbour Limited Partnership |
| Address: | Strand House Pilgrims Way Monks Horton Ashford Kent TN25 6DR United Kingdom |

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| Respondent: | Eric Perry |
| Address: | Room 701A, Building A Haiwei Science and Technology Park Han Erqi District Zhengzhou Henan Province 450000 China |

2 The Domain Name

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

3 Procedural History

I 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, which need be disclosed as being of such a nature as to call into question my independence in the eyes of one or both of the parties.

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| 11 December 2018 | Dispute received |
| 11 December 2018 | Complaint validated |
| 11 December 2018 | Notification of complaint sent to parties |
| 2 January 2019 | Response reminder sent |
| 7 January 2019 | No response received |
| 7 January 2019 | Notification of no response sent to parties |
| 17 January 2019 | Summary/full fee reminder sent |
| 18 January 2019 | Expert decision payment received |

4 Factual Background

- 4.1 The Domain Name was registered by the Respondent at 19:51 (the timing is relevant) on 28 June 2018.
- 4.2 The Complainant is part of a group of trading entities, trading as The Folkestone Harbour Company, which is engaged in the redevelopment of Folkestone harbour.
- 4.3 The status of the Respondent is unclear.
- 4.4 The Domain name currently points to a domain parking page operated by Dynadot.

5 Parties' Contentions

Complaint

- 5.1 The Complainant is a limited partnership registered in England and Wales in 2007 whose business comprises the acquisition, redevelopment and management of property. It is part of a group of trading entities which trade by reference to the name The Folkestone Harbour Company, which is engaged in the redevelopment of Folkestone harbour and its environs.
- 5.2 The Complainant's case on Rights (as defined in the Policy) is confined to its UK registered trade mark FOLKELIFE filed on 28 June 2018 and registered on 12 October 2018 in numerous classes. It argues that it is "sufficient" that it had the requisite rights at the time the Complaint was filed.
- 5.3 The Complainant submits that the Domain Name is identical to the mark in which it has Rights.
- 5.4 The Complainant contends that the Domain Name is, in the hands of the Respondent, an Abusive Registration on a number of grounds, both by reference to the factors set out in paragraph 5.1 of the Policy and more generally by reference to other facts and matters which it submits are evidence that the Domain Name was registered and/or is being or has been used in a manner which took or takes unfair advantage of or was or is unfairly detrimental to its Rights, as follows.
- 5.5 First, it says that it is "highly likely" that the Domain Name was registered primarily for the purposes of selling, renting or otherwise transferring the Domain Name to it or to a competitor

for valuable consideration in excess of the Respondent's expenses, as envisaged by paragraph 5.1.1.1 of the Policy. In support of that assertion, it demonstrates that the Domain Name is currently being offered for sale on the Sedo website at a price of GBP 895. It also prays in aid the fact that the equivalent .com domain name, *folkelifelife.com*, also apparently registered by the Respondent in these proceedings, is currently listed for sale at USD 2988. However, there is no evidence submitted demonstrating that the Domain Name has specifically been offered for sale either to the Complainant or to one of its competitors.

- 5.6 Secondly, the Respondent relies on paragraph 5.1.1.2 of the Policy and asserts that the Domain Name has been registered as a blocking registration against a name or mark in which the Complainant has Rights. The Complainant's case in this regard is a little unclear, but essentially it appears to be contending that there can have been no bona fide reason for a person based in China to have registered the Domain Name except as a blocking registration.
- 5.7 Thirdly, the Complainant contends that the Domain Name was registered for the purpose of unfairly disrupting its business as envisaged in paragraph 5.1.1.3 of the Policy. In support of this contention and/or in support of its first and second contentions above (the submissions are unclear), the Complainant relies on the facts that:
- 5.7.1 the Domain Name was registered on the same date as the Complainant filed its trade mark application on 28 June 2018;
 - 5.7.2 neither the Domain Name nor its .com equivalent have previously been registered;
 - 5.7.3 the Domain Name is identical to an invented word and has been registered by a wholly unconnected third party not authorised to use the Complainant's trade mark; and
 - 5.7.4 there is no other reasonable justification for the Respondent having registered the Domain Name.
- 5.8 Fourthly, the Complainant contends that the Respondent has, or may have, registered the Domain Name for use in an email address and that the IP address linked with the Domain Name, according to an MX look up, is associated with two "blacklisted" email services associated with spam email and phishing.
- 5.9 Further, the Complainant submits that the Respondent has no defence under section 8 of the Policy because:
- 5.9.1 he had no legitimate reason for registering the Domain Name because he does not have any rights in the FOLKELIFE name;
 - 5.9.2 he is not affiliated with the Complainant in any way and never has been;
 - 5.9.3 he is not using the Domain Name for legitimate non-commercial or "fair use" purposes.
- 5.10 Finally, the Complainant contends, on a general basis, that the Respondent's use of the Domain Name "can tarnish and/or dilute the value of the Complainant's FOLKELIFE mark, is detrimental to the Complainant's business and must constitute an abusive domain name registration in accordance with the Policy". It also says that "the use of the Domain Name is detrimental to the Complainant's business in that the Complainant has no control over any outgoing communications sent by way of email correspondence through the Domain Name. As the Complainant is unable to ascertain the exact use by the Respondent, this could be detrimental to the Complainant's Rights, as the Complainant has no control over what the public at large may associate with its FOLKELIFE mark as a result of Respondent's activity;"

Response

5.11 No Response was filed.

6 Discussions and Findings

General

6.1 To succeed under the DRS 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 2.1.1 of the Policy), and secondly, that the Domain Name is an Abusive Registration in the hands of the Respondent (paragraph 2.1.2).

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) 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."

Complainant's rights

6.3 Paragraph 2.1.1 of the Policy requires the Complainant to prove that it *"has Rights in respect of a name or mark which is identical or similar to the Domain Name"*. "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"* (paragraph 1).

6.4 The Complainant has demonstrated that it has Rights by reason of its registered UK trade mark FOLKELIFE. The Complainant appears to be troubled by the fact that its trade mark was not registered until 12 October 2018. It seeks to cure that perceived lacuna by asserting that "under the wording of the Policy, it is sufficient that the Complainant has Rights at the time of the filing of the Complaint". The Complainant may well be right about this, but the point is in any event moot.

6.5 The Complainant has evidently overlooked the fact that, once the trade mark was registered, its rights accrued as of the date on which the application was filed. Accordingly, the point does not arise. While the DRS does not require an Expert to cure defects in the submissions of either party, it would in the view of this Expert be unconscionable to proceed on the Complainant's mistaken footing that its Rights accrued only as from 12 October 2018, i.e. some months after the date on which the Domain Name was registered on 28 June 2018.

6.6 The Expert accepts the Complainant's contention that, as is well established under the DRS, the ccTLD may be ignored for the purposes of similarity and that accordingly the Domain Name is identical to the name or mark in which it has Rights.

6.7 The Complainant has therefore satisfied paragraph 2.1.1 of the Policy and demonstrated that it has Rights in a name or mark which is identical or similar to the Domain Name.

Abusive registration

- 6.8 Paragraph 5.1.1.1 of the Policy includes as a factor which may be evidence that the Domain Name is an Abusive Registration circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily for the purposes of selling, renting or otherwise transferring the Domain Name to the Complainant or to a competitor of the Complainant, for valuable consideration in excess of the Respondent's documented out-of-pocket costs directly associated with acquiring or using the Domain Name. While the Complainant contends that the Respondent falls foul of this provision, all it offers by way of support for that contention is that the Domain Name is currently being offered for sale at a price of £895. However, it is not said by the Complainant that the Domain Name has specifically been offered for sale either to it or to a competitor (if indeed it has any competitors for the redevelopment of Folkestone Harbour).
- 6.9 Given that all the factors set out at paragraph 5.1.1 of the Policy relate to the Respondent's motivation in registering the Domain Name, the Complainant has not demonstrated on the balance of probabilities, which is the required standard of proof, that that was the primary purpose for which the Respondent registered the Domain Name, as opposed, for instance, to simply wishing to offer it for sale to the world at large.
- 6.10 The Complainant contends that "it is not improbable that the Respondent conducted a quick search over the internet about the Complainant and decided to register the Domain Name and *Folkelife.com* on the basis of Complainant's reputation and connection with Sir Roger De Haan.". However, that is little more than pure speculation. This is not a case where, as often happens, the Respondent has approached the Complainant, or responded to a complaint from it, with an offer to sell the Domain Name to it.
- 6.11 Accordingly, notwithstanding the absence of any Response, the Complainant has failed to demonstrate to the requisite standard that the Respondent falls foul of paragraph 5.1.1 of the Policy.
- 6.12 Paragraph 5.1.1.2 of the Policy includes as a factor which may be evidence that the Domain Name may be an Abusive Registration circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily as a blocking registration against a name or mark in which the Complainant has Rights.
- 6.13 Again, the Complainant's case in this regard is a little unclear, but appears to be based on an argument that there can have been no bona fide reason for a person based in China to have registered the Domain Name, except as a blocking registration. Again, however, no explanation is given or evidence provided as to why this might have been the Respondent's primary purpose in registering Domain Name. The fact that the Domain Name was registered shortly after the Complainant filed its trade mark application may well be an indicator of bad faith, but whether he did so specifically and primarily as a blocking registration it is difficult to say.
- 6.14 Paragraph 5.1.1.3 of the policy includes as a factor which may be evidence that the Domain Name is an Abusive Registration circumstances indicating that the Respondent has registered the Domain Name primarily for the purposes of unfairly disrupting the Complainant's business. Again, it is barely argued and certainly not evidenced that this was the primary purpose for which the Domain Name was registered by the Respondent.
- 6.15 Accordingly, the Complainant has not demonstrated on the balance of probabilities that the Respondent registered the Domain Name primarily for any of the purposes set out in paragraph 5.1.1. of the Policy.

- 6.16 Perhaps surprisingly, the Complainant does not expressly rely on paragraph 5.1.2 of the Policy, i.e. that the Respondent is using the Domain Name in a way which has confused or is likely to confuse people into believing that the Domain Name is registered to, operated or authorised by or otherwise connected with the Complainant.
- 6.17 However, taking a broad brush approach, and notwithstanding that the Complainant has failed to make out any of the specific circumstances set out in section 5 of the Policy, there are a number of circumstances from which it may reasonably be inferred that, on the balance of probabilities, the registration and/or use of the Domain Name has taken unfair advantage of and/or is unfairly detrimental to the Complainant's Rights.
- 6.18 In the first place, there are the circumstances, and in particular the timing, of the registration itself. The Complainant's evidence, unchallenged in the absence of any Response, is that its trade mark was filed on the afternoon of 28 June 2018, generating an automated response from the UK IPO at 13:25 and a further automated response at 14:11 saying that the payment for the application had cleared. It is apparent from information provided to the Complainant by Nominet that the Domain Name was registered at 19:51 on the same day. Given, as the Complainant points out, that the name in question is invented, it is highly improbable that this was mere coincidence. There was plainly a causal link.
- 6.19 Secondly, the Complainant uses evidence from a search using the MX Toolbox which demonstrates that the IP address linked with the Domain Name is associated with two email services known to send, or at least suspected of sending, spam email as a result of virus or malware infections.
- 6.20 In the absence of any explanations from the Respondent, the Complainant has therefore, on the balance of probabilities, demonstrated Abusive Registration pursuant to paragraph 2.1.2 of the Policy.

7 Decision

- 7.1 The Expert finds that the Complainant has Rights in a name or mark which is identical or similar to the Domain Name and that the Domain Name is, in the hands of the Respondent, an Abusive Registration.
- 7.2 It is therefore determined that the Domain Name be transferred to the Complainant.

David Engel

Signed

Dated 8 February 2019