

DISPUTE RESOLUTION SERVICE

D00021149

Decision of Independent Expert

Frontline Healthcare Ltd

and

Steven Terence Jackson

1. The Parties

Complainant: Frontline Healthcare Ltd
Unit G2-G4 Royal Pennine Trading Estate
Lynroyle Way
Rochdale
OL11 3EX
United Kingdom

Respondent: Steven Terence Jackson
PO Box 911
Longton
Preston
Lancashire
PR4 5PS
United Kingdom

2. The Domain Name

<chemist.uk> (“the Disputed Domain Name”)

3. Procedural History

25 February 2019 23:17 Dispute received
26 February 2019 11:08 Complaint validated
26 February 2019 11:20 Notification of complaint sent to parties
13 March 2019 16:51 Response received
13 March 2019 16:58 Notification of response sent to parties
18 March 2019 01:30 Reply reminder sent
18 March 2019 17:50 Reply received
18 March 2019 17:51 Notification of reply sent to parties
21 March 2019 12:18 Mediator appointed
21 March 2019 14:13 Mediation started
30 April 2019 14:06 Mediation failed
30 April 2019 14:06 Close of mediation documents sent
30 April 2019 16:30 Expert decision payment received

The Expert has confirmed that he is independent of each of the parties and that, to the best of his 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 a such a nature as to call in to question his independence in the eyes of one or both of the parties.

4. Factual Background

The Complainant operates an online pharmacy.

The Complainant purchased the domain name <chemist.co.uk> from the Respondent in or around July 2014 for the sum of £40,000.

The Complainant has traded from a website at “www.chemist.co.uk” since a date which is unknown.

The Disputed Domain Name was registered on 11 June 2014.

The Disputed Domain Name currently resolves to a website at “www.domains.co.uk” where it is being offered for sale or lease.

5. Parties’ Contentions

The Complaint

The Claimant states that it “first registered an interest” in the Disputed Domain Name in 2013. However, it does not specify how or with whom any such interest was registered.

The Complainant contends that, during negotiations in May 2014 for the purchase of the domain name <chemist.co.uk>, it was assured by the Respondent's agent in a telephone call that the Disputed Domain Name would be included in the sale.

The Complainant states that the Respondent then moved swiftly to register the Disputed Domain Name and refused to offer it to the Complainant. It states that the Respondent did, however, confirm it would offer the Disputed Domain Name to the Complainant before placing it on general sale, which it then failed to do.

The Complainant submits that the registration of the Disputed Domain Name is abusive because the Respondent registered it only after the Complainant had expressed an interest in it, whereas the Respondent could have registered it at an earlier time.

The Complainant also submits that its domain name <chemist.co.uk> is now an established brand and that the Disputed Domain Name could therefore be used to impersonate the Complainant.

The Complainant requests the transfer of the Disputed Domain Name.

The Response

The Respondent states that he registered the Disputed Domain Name before making any agreement with the Complainant to sell the domain name <chemist.co.uk>.

The Respondent states that he registered the Disputed Domain Name among numerous other names as they became available after 10 June 2014 (although he does not provide particulars of these other registrations).

The Respondent submits that there was no commitment by either party for the sale of the domain name <chemist.co.uk> until July 2014. He further submits that it was made entirely clear to the Complainant, before entering into any such commitment, that the Disputed Domain Name was not included in that sale.

The Respondent acknowledges that, as "an oversight," he did not offer the Disputed Domain Name to the Complainant before placing it on general sale (where it currently remains). He submits, however, that it is clear from the Complainant's contention in this regard that it knew it had not already purchased the Disputed Domain Name.

The Respondent submits that the Disputed Domain Name is generic in nature and that it is "absurd" to assume that a potential buyer would purchase it in order to impersonate the Complainant.

The Respondent submits that the Complainant is attempting to "hijack" the Disputed Domain Name, having purchased the domain name <chemist.co.uk> after the Disputed Domain Name had been registered.

The Reply

The Complainant reiterates that it was told by the Respondent's agent at the outset of negotiations for <chemist.co.uk> that the Disputed Domain Name would be included in the sale. However, prior to an escrow agreement being entered into, the same agent subsequently stated that the Disputed Domain Name would not be included.

The Complainant contends that the Respondent can not have acted in good faith by registering the Disputed Domain Name when he was aware of the Complainant's interest in it as part of the negotiations for <chemist.co.uk> and in view of the sum of £40,000 paid for that name.

The Complainant states that the supposed "oversight" in failing to offer the Complainant the Disputed Domain Name before placing it on general sale is a further indication of the Respondent's lack of integrity.

6. Discussions and Findings

Based on the Expert's review of email communications exhibited by both parties, the Expert finds as follows:

- (a) On or about 23 June 2014 the parties agreed a price of £40,000 for the domain name <chemist.co.uk>
- (b) On 27 June 2014 the Complainant emailed the Respondent's agent to ask "before we agree" whether the Disputed Domain Name would also be transferred to the Complainant. The agent replied as follows:

"Chemist.uk will not be transferred as well. This domain exists as a separate registration and is not included in the sale agreement for chemist.co.uk."
- (c) On 2 July 2014 the Complainant emailed the Respondent's agent to ask whether the deal was now dead. The agent replied that, since the Disputed Domain Name was not included in the deal, it was accepted that the sale might not proceed.
- (d) On 10 July 2014 the Complainant emailed the Respondent's agent stating that it would now be concluding the deal. An agreement was signed on 17 July 2014.

This matter falls to be determined under the terms of the Nominet Dispute Resolution Service Policy ("the Policy").

Under paragraph 2 of the Policy:

“2.1 A Respondent must submit to proceedings under the DRS if a Complainant asserts to us, according to the Policy, 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

2.2 The Complainant is required to prove to the Expert that both elements are present on the balance of probabilities.”

Under paragraph 1 of the Policy the term “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.”

Also under paragraph 1 of the Policy, the term “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 took unfair advantage of or was unfairly detrimental to the Complainant's Rights.”*

Paragraph 5 of the Policy sets out a non-exhaustive list of factors that may be evidence that a domain name is an Abusive Registration. Paragraph 8 of the Policy sets out a non-exhaustive list of factors that may be evidence that it is not an Abusive Registration. However, all such matters are subsidiary to the overriding test for an Abusive Registration as set out as in paragraph 1 of the Policy.

Rights

In this case, it appears to be the Complainant’s contention that it has Rights in the Disputed Domain Name which derive from its contractual negotiations with the Respondent.

More commonly, a complaint under the Policy will be based on a trademark or service mark in which the Complainant claims to have registered or unregistered rights. In this case, however, the Complainant can make no credible claim to have obtained trademark rights in the generic term “chemist”. Despite the Complainant having operated an online pharmacy at the URL “www.chemist.co.uk,” there is no evidence that the term “chemist” has thereby gained a secondary meaning that is distinctive of the Complainant as a provider of pharmacy services and the Expert rejects any implied submission to that effect.

While the courts are the more natural forum for the determination of disputes centring around an alleged breach of contract, it is nonetheless possible under the Policy for a complainant to establish Rights in a domain name as a matter of contractual entitlement. This is confirmed in paragraph 1.6 of the Nominet Dispute Resolution Service – Experts’ Overview v.2 (2013). It is however made clear in the Overview that the Policy is not a suitable forum for adjudicating disputed or complex contractual cases. The matter was also considered by a Nominet Appeal Panel in the case of *David Munro v. Celtic.com, Inc.* DRS Case No. 04632 [2007], concerning the domain name <ireland.co.uk>, in which the Panel indicated that Rights based on an alleged contractual right should only be found in clear and unequivocal cases.

In the view of the Expert, the Complainant has failed in this case to establish on the balance of probabilities any contractual Rights in respect of the Disputed Domain Name. Indeed, far from establishing that the Respondent agreed to sell the Complainant the Disputed Domain Name, the evidence is overwhelmingly to the contrary: as is clear from the correspondence submitted by the parties, and indeed the Complainant’s own Reply, the Complainant sought clarification of whether the Disputed Domain Name was included in the purchase of <chemist.co.uk>, was told unequivocally that it was not, and proceeded with the purchase in any event.

While the Respondent acknowledges an “oversight” in failing subsequently to offer the Complainant a first opportunity to purchase the Disputed Domain Name, the Expert does not consider that this has any material impact upon the analysis. Leaving aside the question of whether the alleged right of first refusal amounted to a binding contractual commitment, there is no suggestion that the Disputed Domain Name was to be offered to the Complainant at any particular price or for less than its market value. Since the Disputed Domain Name has been on general sale and the Complainant has apparently not purchased it, the Expert finds it difficult to see how the Complainant has suffered any detriment in that regard (or any detriment which it could not mitigate simply by purchasing the domain name on the open market).

In the view of the Expert, therefore, the Complainant has failed to establish that it has any contractual rights, or any other Rights, in a name or mark that it similar to the Disputed Domain Name. The Complainant is unable the refore to show that it has Rights for the purposes of paragraph 2 of the Policy and the Complaint must consequently fail.

Abusive Registration

In the light of the Expert’s findings in respect of Rights, it is unnecessary to proceed to consider the issue of Abusive Registration. The Expert would comment, however, that he does not consider the Respondent’s registration of the Disputed Domain Name on 11 June 2014 to constitute evidence of bad faith on the part of the Respondent. The “.uk” domain names were introduced by Nominet on 10 June 2014 with a priority registration period for the owners of corresponding “.co.uk” domain names and it would have been surprising if the Respondent had not sought to take advantage of this opportunity in relation to a generic domain name of such potential

value. The Respondent could not have registered the Disputed Domain Name prior to May 2014 as the Complainant alleges and, in the view of the Expert, was under no obligation to refrain from registering the Disputed Domain Name in view of the interest the Complainant had previously expressed in it. Indeed, it is difficult to understand how the Respondent could potentially have sold the Disputed Domain Name to the Complainant without first having registered it.

7. Decision

The Complainant has failed to establish for the purposes of paragraph 2 of the Policy that it has Rights in respect of a name or mark which is identical or similar to the Domain Name and the Complaint is therefore denied.

8. Reverse Domain Name Hijacking

Under the definitions set out in paragraph 1 of the Policy:

“Reverse Domain Name Hijacking means using the DRS in bad faith in an attempt to deprive a Respondent of a Domain Name.”

Under paragraph 18.7 of the Policy:

“If, after considering the submissions, the Expert finds that the complaint was Reverse Domain Name Hijacking, the Expert shall state this finding in the Decision.”

In this case, the Expert is unable to identify any basis upon which it was reasonable for the Complainant to contend that it had obtained a contractual entitlement to, or any other Rights in, the Disputed Domain Name or that it had any proper grounds to use the Policy to deprive the Respondent of the Disputed Domain Name. In particular, it is clear from the available evidence that, while the Complainant had hoped to purchase the Disputed Domain Name from the Respondent along with the domain name <chemist.co.uk>, it was well aware that the Disputed Domain Name was excluded from that deal but proceeded with the purchase anyway.

In the circumstances, the Expert finds that the Complainant has used the Policy in an attempt at Reverse Domain Name Hijacking.

[Signed]

Steven A. Maier
Independent Expert

9 May 2019