

DISPUTE RESOLUTION SERVICE

D00022509

Decision of Independent Expert

Tummy2Mummy Ltd

and

Professional Antenatal Services Ltd t/a MeetYourMiracle

1. The Parties:

Complainant: Tummy2Mummy Ltd
Tummy2Mummy Ltd
25-29 New Street
Hinckley
Leicestershire
LE10 1QY
United Kingdom

Respondent: Professional Antenatal Services Ltd t/a MeetYourMiracle
Hermitage Lane
Polesworth
Tamworth
West Midlands
B78 1HS
United Kingdom

2. The Domain Name(s):

tummy2mummy.co.uk

3. Procedural History:

The Expert has confirmed (1) he is independent of each of the parties; and (2) 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, which need to be disclosed because they might be of such a nature as to call into question his independence in the eyes of one or both of the parties.

01 May 2020 18:24 Dispute received
04 May 2020 16:15 Complaint validated
04 May 2020 16:21 Notification of complaint sent to parties
25 May 2020 02:30 Response reminder sent
27 May 2020 08:56 Response received
27 May 2020 08:56 Notification of response sent to parties
01 June 2020 02:30 Reply reminder sent
02 June 2020 10:49 Reply received
02 June 2020 10:49 Notification of reply sent to parties
05 June 2020 12:09 Mediator appointed
08 June 2020 10:54 Mediation started
30 June 2020 12:30 Mediation failed
30 June 2020 12:31 Close of mediation documents sent
10 July 2020 02:30 Complainant full fee reminder sent
13 July 2020 11:41 Expert decision payment received

4. Factual Background

The Complainant is a limited company registered in England and Wales. It was incorporated on 29 November 2012. It offers a range of midwifery and ultrasound services across the Midlands (England). It owns the domain name tummy2mummymidwiferyservices.co.uk, and operates a website at that address.

The Respondent is also a limited company, trading as Meet Your Miracle. It also operates in the Midlands. Its main website is at www.meetyourmiracle.co.uk.

The Domain Name was first registered by the Respondent on 8th March 2017. It was redirected to the Respondent's main website. Following an email from the Complainant to the Respondent on 20th March 2018 that redirection was disabled. In January 2020 the Domain Name pointed to another website controlled by the Respondent, www.miraclememories.co.uk. Following further email contact from the Complainant on 16th January 2020, that redirection also ceased the following day. A subsequent contact from the Complainant's solicitors in April 2020 asking the Respondent to ring with a view to discussing transfer of the Domain Name to the Complainant and the agreement of some basic undertakings went unanswered, and these proceedings commenced on 1 May 2020.

As at the date of this decision, the Domain Name points to a holding page of the Domain Name's registrar, 123 Reg Ltd.

5. Parties' Contentions

The Complainant

Rights

The Complainant explains that it initially began trading through its director, Donna Grant, as an unincorporated sole trader in June 2009. She offered private antenatal, postnatal and obstetric scanning services from a clinic in Hinkley, Leicestershire. Ms Grant launched a website at www.tummy2mummymidwiferyservices.co.uk in March 2009, and the Complainant says that the business has used the TUMMY2MUMMY name continuously since March 2010. From November 2012 when the Complainant was incorporated, trading has been through the limited company. The business has expanded to offer a range of midwifery and ultrasound services across the Midlands. It has had a Facebook page since October 2013 with 6122 followers, an Instagram page since October 2018 with 440 followers, and a Twitter page since January 2014 with 85 followers. Its most recent annual turnover is in the region of between £250,000 and £300,000.

As a result of its extensive and consistent use of the name TUMMY2MUMMY, the Complainant claims to have built up a reputation and goodwill in that name. In support of that contention the Complainant exhibits NHS leaflets which name it as a provider of antenatal/parentcraft classes, third party websites which refer to it, testimonials, editorial and press clippings and Google search results.

Abusive registration

The Complainant says that the Respondent is a direct competitor of the Complainant, in the same geographical area. The Respondent offers a range of services which are either the same as its own, or overlap to a very high degree. These include ultrasound scans. A Google search for "pregnancy scan Coventry" returns results for both the Complainant and Respondent. Both parties are advertised by the website Custard and Crumble in the "Scanning Clinics" section of that website.

After registering the Domain Name in March 2017, the Respondent or someone associated with it pointed the Domain Name to its website www.meetyourmiracle.co.uk. On 20th March 2018 the Complainant sent the Respondent an email complaining about the potential confusion, asking the Respondent both to stop using the Domain Name in this way and to relinquish control of it. The Respondent replied the following day, disputing the Complainant's contentions, making a number of complaints about the Complainant's own behaviour, but suggesting that they would consider the Complainant's requests if the Complainant agreed not to report the Respondent's business to the industry regulator. However, the redirection of the Domain Name ceased shortly after that,

which was noted by the Complainant in a further email on 22 March 2018, also looking forward to the Respondent confirming cancellation of the Domain Name.

A second incident involved the Respondent redirecting the Domain Name to another website, www.miraclememories.co.uk, at some time prior to 16 January 2020. The Complainant says that this appears to be an associated business of the Respondent (described on the Respondent's main website as a "sister site"), offering "pregnancy keepsake" services such as castings. The Complainant sent emails on 17 January 2020 to both the Respondent and the registrar, 123-Reg. On 16 or 17 January 2020 the Respondent ceased this redirection.

On 14 April 2020 the Complainant's solicitors rang and wrote to the Respondent asking for a call back to discuss transfer of the Domain Name and "some basic undertakings". There has been no substantive response to either.

The Complainant contends that the Respondent's registration and use of the Domain Name in this way is an abusive registration:

"The Respondent took unfair advantage of, or was unfairly detrimental to, the Complainant's rights at the time of registration or acquisition. Neither the Respondent nor any business or person associated with it has ever traded under the name Tummy2mummy or any similar name. It can only have registered or procured the registration of the Domain Name to cause confusion and/or to divert business from the Complainant to itself.

Further, the Domain Name has been used in a manner which took unfair advantage of, or was unfairly detrimental to, the Complainant's rights. The Respondent simply hijacked a name belonging to its competitor and redirected it to two of its own competing website (sic). Customers searching for the Complainant were deliberately misled by being redirected to a competitor's sites. The Respondent is not currently redirecting the domain name and the page is down, but has still given no explanation for its conduct which it could resume for a third time at any moment: indeed the non-use itself is a threatened abuse hanging over the head of the Complainant."

The Complainant seeks transfer of the Domain Name to itself.

The Respondent

Rights

The Respondent says that, at the time it acquired the Domain Name in March 2017, the Complainant was known as "tummy2mummy midwifery services", and that it is only over the last 3 years that the Complainant has shortened its business name to Tummy2mummy, applying for a trademark registration in March 2020.

Abusive registration

The Respondent explains its purchase of the Domain Name in 2017 as follows:

“The purchase of a number of website domains were made in 2017 as a business decision as we had plans to change our company name, begin blog writing and potentially sell pregnancy related domains in the future. As we own a number of companies this seemed perfectly reasonable.

Tummy2mummy.co.uk was purchased by us in March 2017 at a time when the complainant owned a business called 'tummy2mummy midwifery services' and the web address to go with this so clearly had no interest in owning the domain name.”

As to its subsequent use of the Domain Name, the Respondent’s explanation is set out below in full:

“In response to their complaints about us pointing the website inappropriately, this was done in error. Over the past years we have had a number of web developers in our employment and they point our domain names to our main business when they build the website. They have pointed a number of domain names that we own at our site, but in error pointed the domain in question also. Tummy2mummy brought this to our attention by sending an unpleasant email demanding we cease ownership of the domain (attached). We did reply but received no response to our email. We immediately turned off the redirection but did not feel it appropriate to just hand over a legitimately purchased product. No request was made to purchase the domain name.

This year once again on web development of another business (Miracle memories) which is nothing to do with antenatal, pregnancy or birth the web developer inadvertently pointed the domain to Miracle Memories. This was then slanderously posted all over social media in a campaign to bully the sale of our legitimately owned domain to Tummy2mummy. Once this was brought to our attention we removed the redirect so as not to cause any confusion. We have not been approached to sell the domain name.

We are currently in talks with a blog writer who is potentially interested in the domain, her business is also called Tummy2mummy, not to mention the facebook groups and other businesses in the UK who use this name.

At no point other than the last 4 weeks have Tummy2mummy contacted us in a professional manner to purchase the domain, they have just intermittently slander (sic) on social media and more recently made contact with us via an email from a solicitor. This solicitor asked to 'to speak with you so that we can arrange for you to transfer over the domain name www.tummy2mummy.co.uk to my client.

As the domain was not pointed to an active website at this point we have yet to respond. You may note that the most recent contact was made during the period covering Covid19 lockdown and our reduced services and working hours. We are happy to instruct a solicitor to negotiate the sale of the domain if necessary once we are able to do so.”

In summary, we are not opposed to selling the domain but this would need to be in a professional manner without threats and bullying. We are open to offers for the sale of the domain name, which we have not, to this date received”.

Reply

The majority of the Reply is argument, rather than a direct answer to new matters raised in the Response. The Complainant does, however, offer £20 if the Respondent wants to sell the Domain Name, as it doubts that it would have cost more than that to obtain the Domain Name registration in the first place.

6. Discussions and Findings

In order to succeed in its Complaint, in accordance with the DRS Policy, the Complainant needs to establish:

- “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.”*

The Complainant needs to establish both elements on the balance of probabilities.

The definition of Abusive Registration under the Policy is as follows:

“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”.*

The definition of Rights under the DRS Policy is as follows:

“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.”

Rights

The Complainant has produced some evidence of its reputation in and use of the TUMMY2MUMMY name over a period of some 10 years. The material suggests a localised reputation in an area of the Midlands, rather than a wider reputation. That, however, is potentially sufficient to give rise to enforceable Rights within the meaning of the DRS Policy. Although the Respondent contests whether the Complainant has been known by the abbreviated form of its trading name, it is implicit in the Response that the Respondent accepts (a) that the Complainant has used the name TUMMY2MUMMY MIDWIFERY SERVICES since before it registered

the Domain Name, and (b) that the Complainant has used the abbreviated form of TUMMY2MUMMY since 2018 at the latest. The Respondent does not produce any evidence to support its contention that the name was only used by the Complainant in its abbreviated form before 2018. Given the unwieldy nature of the full business title and the evidence produced by the Complainant of use of the abbreviated name within its website, on balance, the Expert accepts that it is likely that the Complainant was known by its abbreviated name prior to the registration of the Domain Name, which would mean that the Complainant has established that in 2017 it had Rights in the name or mark TUMMY2MUMMY which is identical to the Domain Name. It is not disputed that it currently has those Rights (which is what it is required to show under the DRS Policy). In any event, the addition of the words “midwifery services” to the longer version of the trading name is clearly descriptive of the services being supplied, and therefore largely to be disregarded in comparing similarity (see, for example, DRS 06973 veluxblind.co.uk). The Complainant therefore also has Rights in the name or mark TUMMY2MUMMY MIDWIFERY SERVICES, which is similar to the Domain Name.

Abusive Registration

The Complainant’s position on Abusive Registration is fairly straightforward. Firstly, it says that the Respondent is a direct competitor, in the same geographical region. It must have known of the Complainant and its use of the TUMMY2MUMMY mark when it registered the Domain Name in 2017. It can only have registered the Domain Name intending to take advantage or to be unfairly detrimental to the Complainant’s Rights. Secondly, the subsequent pointing of the Domain Name to the Respondent’s main website in 2017 and to a sister website in 2020 must have been use intended to take advantage of or be unfairly detrimental to the Complainant’s Rights, by confusing potential customers looking for the Complainant’s website.

How has the Respondent dealt with these apparently fairly straightforward issues? The Expert has set out the Response above almost in its entirety as it important to have regard to both what the Response says, and what it does not say.

The Respondent does not dispute that it knew of the Complainant when it registered the Domain Name in 2017. It does not dispute that it and the Complainant are competitors in the same geographic area. Its explanation that it bought a few domain names in 2017 as a business decision because it had plans to change its company name, begin blog writing and sell pregnancy-related domains is not supported by any evidence or particulars. This might possibly be a more convincing explanation, if, for example, the other domain names were named. The Respondent also suggests that this was a reasonable course of action as it owned a number of companies. Again, no particulars are provided. As to its suggestion that the Complainant did not have any interest in the Domain Name because it was using its full name and already had the domain name to match (tummy2mummymidwiferyservices.co.uk), it seems implicit that the Respondent had spotted a “gap” which its competitor had left it free to exploit (and therefore had the Complainant in mind when it registered the Domain Name).

Paragraph 4.3 of the Nominet Experts' Overview (2017) outlines the approach which Experts are to take when faced with bare assertions about plans:

“Most abusive registrants do not respond to complaints, but those who do will commonly assert the existence of plans, which are designed to defeat the complaint. Experts will generally view purported ‘plans’ which are totally unsupported by any contemporaneous evidence with a heavy measure of scepticism. Accordingly, if the registrant has genuine plans for the domain name, arrived at wholly without reference to the rights of the Complainant, it makes sense for the registrant to produce evidence to show that they are genuine and were not dreamt up simply to defeat the complaint.”

The Expert in this case is not prepared to accept the Respondent's assertions as to its plans in 2017 without any supporting evidence. On balance, they seem to be in the category of plans “dreamt up simply to defeat the complaint”. Given that the parties are in competition in the same geographical area, it seems much more likely that the Respondent intended to take unfair advantage of or be unfairly detrimental to the Complainant's Rights in some way. Therefore, the Complaint succeeds as to the registration of the Domain Name itself being abusive.

As to the Respondent's subsequent use of the Domain Name, the Respondent's explanation for the redirections of the Domain Name in 2017 and 2020 respectively is that they were both errors. A “number of web developers” in its employment have, over the years, pointed a “number of domain names that we own” at the Respondent's website. In error, they did this with the Domain Name in 2017. The same happened in 2020, although this time it was in relation to “web development of another business”, Miracle Memories. On both occasions the redirect was cancelled when the Complainant made contact.

The Respondent mentions that on neither occasion was it asked to sell the Domain Name to the Complainant. Indeed, it says that it is currently in talks with a blog writer who is potentially interested in the Domain Name, whose business is also called Tummy2mummy, as apparently are Facebook groups and other businesses in the UK who use this name.

Again, the lack of supporting evidence is strikingly apparent. Maybe it is difficult to get an ex-employee or contractor to admit having made a mistake, but at the very least the Expert would have expected to see some form of substantiation of what are very general assertions, such as names of the individuals involved, examples of other legitimate redirections, or instructions to employees/contractors to treat this Domain Name differently from the others (and if so, why?). Who is the blog writer whose business apparently has the same name, what is the evidence for that, and who else is using the TUMMY2MUMMY name? It would not necessarily defeat the Complainant's case if there were such businesses, as its reputation appears to be local rather than national, but if the Respondent is going to make these assertions it

should be prepared to substantiate them, or risk having them treated with a “heavy measure of scepticism”.

Ultimately, whether or not there have been mistakes as the Respondent suggests, the Respondent is responsible for the actions of what it suggests were its employees. In redirecting the Domain Name firstly to its own main website, and secondly to one which is clearly associated with the Respondent, the Respondent has created the risk of confusion for potential customers looking for the Complainant’s website. Was such use intentional? Even if the Expert were prepared to accept that there were mistakes involved (which he is not, without further substantiation), the Respondent’s choice of a Domain Name consisting solely of the Complainant’s name or mark has itself made that confusion possible, and any confusion is not merely accidental. The Respondent may be in something of a cleft stick here – if it had given clear instructions not to point the Domain Name to its own website, in order to avoid any possible confusion, it would have considerable difficulty arguing that its registration of the Domain Name was legitimate in the first place.

In summary, on balance the Expert is not persuaded by the Respondent’s explanation of either its registration or its use of the Domain Name, and both amount to Abusive Registration within the meaning of the DRS Policy.

7. Decision

The Expert finds that the Complainant has Rights in the name or mark TUMMY2MUMMY which is identical to the Domain Name, and in the name or mark TUMMY2MUMMY MIDWIFERY SERVICES which is similar to the Domain Name. It has also established that the Domain Name, in the hands of the Respondent, is an Abusive Registration. The Complaint therefore succeeds and the Domain Name should be transferred to the Complainant.

Signed Bob Elliott.....

Dated 28th July 2020