

DISPUTE RESOLUTION SERVICE

D00009286

Decision of Independent Expert

Mark Cowill and Shelley Cowill t/a Bathroom Trading
Company

and

Wolseley UK Limited

1. The Parties:

Complainant: Mark Cowill and Shelley Cowill t/a Bathroom Trading
Company
Beechwood
Knowle Hill
Virginia Water
SURREY
GU25 4HZ
United Kingdom

Respondent: Wolseley UK Limited
c/o Demys Limited
33 Melville Street
Edinburgh
EH3 7JF
United Kingdom

2. The Domain Name:

bathstore.co.uk

3. Procedural History:

15 December 2010 11:20 Dispute received
15 December 2010 12:15 Complaint validated
15 December 2010 12:19 Notification of complaint sent to parties
10 January 2011 09:59 Response received
10 January 2011 10:00 Notification of response sent to parties
11 January 2011 09:37 Reply received
11 January 2011 09:37 Notification of reply sent to parties
11 January 2011 09:38 Mediator appointed
14 January 2011 12:47 Mediation started
31 January 2011 13:19 Mediation failed
31 January 2011 13:23 Close of mediation documents sent
10 February 2011 01:30 Complainant full fee reminder sent
10 February 2011 11:12 Expert decision payment received
11 February 2011 James Bridgeman appointed as Expert

4. Factual Background

The Complainant was the owner of a company Bathroom Distribution Group Limited now in liquidation.

The disputed domain name was registered in the name of Bathroom Distribution Group Limited.

The Complainant claims to have acquired the right to ownership of the disputed domain name pursuant to a contract of assignment that he and his wife entered into with Price Waterhouse, who were acting as the receiver or liquidator of Bathroom Distribution Group Limited.

The Respondent claims to have lawfully and legitimately acquired the disputed domain name as successor in title of the assignee of the domain name that was acquired by assignor in an arms length agreement with the liquidator of Bathroom Distribution Group Limited.

According to the Nominet UK records the disputed domain name was registered on 13 January 1998. The registration was transferred from The Bathroom Distribution Group Limited to Bathstore.com Plc in December 2002. Bathstore.com Plc re-registered as a private limited company (Bathstore.com Limited) and transferred the registration to the Respondent on 26 March 2004.

5. Parties' Contentions

Complaint

The Complainant claims to be the creator of the Bathstore concept and the

original registrant of the disputed domain name on 13 January 1998. While he personally paid for the registration and upkeep *via* his technical support company, A Plus Computer Services, the disputed domain name was paid for and registered by Complainant; however it was recorded in the name of one of his companies, Bathroom Distribution Group Limited, which was later put into voluntary liquidation, a process which was out of his control and part of a larger commercial deal with Patrick Riley of Bathrooms Direct. The Complainant claims that the original contract was then superseded by a settlement deed which voided all of the previous contracts.

The Complainant submits that it is important to note that there was no agreement or consideration paid for the BATHSTORE name, good will or the disputed domain name at any time.

The Complainant submits that he and his wife purchased all of the assets, good will and IP from the debenture holders of Bathroom Distribution Group Limited by a contract dated 22nd February 2000. The agreement was handled by the company's receiver Price Waterhouse. The consideration for the assignment included the repayment of all liabilities to Nat West Bank together with a sum of £2500 to Price Waterhouse.

The Complainant and one of his companies that provides technical computer services, A Plus Computer Services, tried several times to re-register correctly the disputed domain name without success.

The Complainant submits that he was offered £10,000.00 for the disputed domain name by said Mr Patrick Riley. Complainant is informed that Mr Riley made a direct approach to the "official receiver" of the company and purchased the disputed domain name for £1000. Complainant states that neither himself nor his agent A Plus Computer Services were either contacted or gave any authorisation for this transfer and the "liquidator" had no right to sanction such a transfer and it is a fact that Price Waterhouse did not and could not transfer the disputed domain name to the "official receiver" after the mentioned asset sale.

The Complainant submits that he has no knowledge of, and has not seen the information Mr Riley gave to obtain the disputed domain name but in all events as the original registrant and the purchaser of all of the IP and assets of Bathroom Distribution Group Limited Complainant claims to be and to have always been the rightful owner of the disputed domain name.

The Complainant submits that Mr Riley was at all material times fully aware of Complainant's rightful ownership of the disputed domain name and that this is evidenced by his offer made to the Complainant *via* his solicitors dated 15 May 2002. The offer was not accepted. The Complainant submits that it must also be noted that Bathrooms Direct, Bathstore.com Limited and Walseley Group are connected parties.

The Complainant submits that Nat West, Price Waterhouse and A Plus Computer Services attempted to ensure that the disputed domain name was transferred from Bathroom Distribution Group back into Complainant's personal name and has attached documentation that Complainant submits supports this allegation.

The Complainant submits that the disputed domain name is an Abusive Registration because the disputed domain was transferred to the Respondent with no reference either to the Complainant or his technical service company A Plus Computer Services. The reasons given for this or the representations made to obtain this transfer were never given despite several requests.

The Complainant further submits that the disputed domain name was registered or otherwise acquired in a manner which, at the time when the registration took place, took unfair advantage of or was unfairly detrimental to the Complainant's rights

Response

The Respondent denies the Complainant's submissions insofar as material to this dispute and requests that the Expert deny the Complaint on the grounds that the Complainant does not have Rights in a name or mark identical or similar to the disputed domain name and that the disputed domain name, in the hands of the Respondent, is not an Abusive Registration. The Respondent has neither acquired nor used the disputed domain name in a manner which has taken unfair advantage of or has been unfairly detrimental to the Complainant's Rights. The Respondent acquired its rights in the disputed domain name in good faith from a third party which in turn acquired its rights in good faith as more particularly described below and there can be no question of abusiveness under the Policy.

The Respondent asks this Expert to note that a DRS Complaint was brought by the Complainant against the Respondent regarding the same domain name and in similar terms to the present case in May 2007 under case reference 04691. The Complainant omits to mention this in the present Complaint. Respondent refers to the case papers, insofar as the Respondent has retained these, that have been furnished to this Expert as an annex to the Response. Respondent submits that the Complainant withdrew that Complaint on or before 22 June 2007 in the face of the Respondent's Response to that case which, again, was in broadly similar terms to the undernoted. Due to the Complainant's withdrawal of the Complaint, DRS case 04691 did not proceed to a decision. However, the Expert is nevertheless invited to consider whether the present Complaint is a resubmission of an earlier Complaint in terms of paragraph 10(f) of the Policy and in any event, whether it is reasonable for the Complainant, having withdrawn his earlier Complaint, to resubmit it in broadly the same terms and relating to the same circumstances and subject matter (rather than to acts prior or subsequent to the close of submissions

in the earlier case) after the passage of three and a half years from the date of filing of the original Complaint.

The Respondent submits that the Complainant has failed to demonstrate in the present Complaint that he has Rights in a name or mark that is identical or similar to the Domain Name. The Complainant makes various unsupported assertions regarding the involvement of himself and his wife with what he terms "the Bathstore concept" and the Respondent neither knows nor admits any of these. In particular, the Respondent points out that although the Complainant asserts that he was the original registrant of the disputed domain name this is not borne out by the evidence as outlined below.

As far as the Respondent understands the Complainant's contentions, the Complainant appears to be asserting that Complainant's wife allegedly purchased company assets said to have included the disputed domain name. The Respondent's case, is that Respondent acquired the disputed domain name from its predecessor in title, which in turn had acquired it from the Liquidator of a company which was the then legal registrant thereof, in a good faith and arms length transaction for valuable consideration. The dispute between the parties regarding the disputed domain name thus raises issues of a complex contractual nature involving alleged competing interests and rights. Even if there were a demonstrable competing interest in the disputed domain name in respect of the Complainant, or should any allegation be made that a wrongful transfer has taken place (both of which are strenuously denied by the Respondent) the appropriate forum for investigation and determination of these matters would be a court of competent jurisdiction and not the DRS. As such, the DRS is not the appropriate forum for the dispute relating to the disputed domain name and the Expert is invited to declare that the dispute is not within the scope of paragraph 2 of the Policy, in accordance with paragraph 16(d) of the Procedure.

On the foregoing subject, the Respondent respectfully refers the Expert to the wording of the DRS Expert Overview, paragraph 1.6 . This paragraph states:-

"1.6 Can a contractual right constitute a right within the definition of Rights?

Yes it can. A specific example of this is given in the Policy at paragraph 3(a)(v). However where the right is disputed and/or the surrounding circumstances are particularly complex, the complaint may nevertheless be rejected as not being appropriate for adjudication under the Policy. See the Appeal decision in DRS 04632 (ireland.co.uk), which was just such a case. This decision reviews all the previous DRS cases involving contractual rights."

The Respondent refers to the following general statements of the Appeal Panel in said decision :-

"The fundamental issue in this case, however, is the suitability of the DRS to determine contractual disputes. The Panel supports the view expressed by several Experts (including the Expert in this case) that as a general proposition contractual disputes are best left to the courts to resolve. [...]

Had Nominet contemplated that pure, possibly complex, contractual disputes would fall to be resolved under the Policy, its system for selecting and appointing Experts to cases would have been very different and the procedure for dealing with the disputes more comprehensive than the simple paper-based system it is."

Should the Expert nevertheless consider that the issues raised by the Complaint relative to the history of the acquisition of the disputed domain name by the Respondent are appropriate for and require to be resolved under paragraph 2 of the Policy, the Respondent makes the following further submissions.

The Respondent is Wolseley UK Limited, a company incorporated under the Companies Acts of the United Kingdom with its registered office at The Wolseley Center, Harrison Way, Spa Park, Royal Leamington Spa, CV31 3HH. The Respondent is the UK operating company of Wolseley plc, the world's number one distributor of heating and plumbing products and a leading supplier of builders' products to the professional market. The Respondent is the legal registrant of the disputed domain name. The 'care of' address on the WHOIS of the disputed domain name is the postal address of the Respondent's representatives who are the managers of the Respondent's domain name portfolio.

The Respondent is wholly engaged in the distribution of construction products and materials through a nationwide network of branches. The Respondent is organised into trading brands, which service distinct customer groups. Many of these brands are market leaders with outstanding reputations for supplying professionals in the construction market. Names such as Plumb Center, Build Center and Parts Center are widely recognised throughout the industry.

Bathstore.com Limited trading as Bathstore is one of the Respondent's principal subsidiary companies and is the UK's leading specialist bathroom retailer with over 160 stores across the UK. The disputed domain name is used by the Respondent to point traffic to Bathstore.com Limited's website by redirecting visitors to the Respondent's primary domain for the Bathstore brand, namely bathstore.com. The Bathstore.com Limited website at the URL <http://www.bathstore.com> is a fully transactional website providing customers with a wide range of bathroom suites, fittings, accessories and related products. The Respondent asserts that it has used the disputed domain name in connection with a genuine offering of goods and services before being aware of the Complainant's cause for complaint (Policy, paragraph 4(a)(i)(A)). The Respondent refers to a screenshot of the homepage taken on 22 December 2010 to support this claim.

The Respondent is legitimately connected with a mark which is identical to the disputed domain name (Policy, paragraph 4(a)(i)(B)). Bathstore.com Limited is the proprietor of a variety of UK national registered trade marks for the word or device and word mark BATHSTORE/BATH STORE. The Respondent has listed and provided details of the trademark registrations on which it relies in an annex to the Response.

The Respondent acquired the disputed domain name from Bathstore.com Limited (formerly Bathstore.com PLC) on 26 March 2004 and in this regard refers to an email from Nominet UK to Respondent's representatives dated 23 May 2007 that provides a history of the disputed domain name's ownership and has been furnished in an annex to the Response. The Respondent states that Bathstore.com Limited acquired the disputed domain name from the original registrant in the manner set out below.

The Respondent submits that the disputed domain name was registered in the name of (The) Bathroom Distribution Group Limited on 13 January 1998. The earliest WHOIS record that the Respondent has been able to find for the disputed domain name is 2 August 2002. A copy has been furnished in an annex to the Response. Respondent submits that this WHOIS record confirms that (The) Bathroom Distribution Group Limited was indeed the legal registrant at that date. The Respondent submits that the Complainant is not correct in stating that he himself was the original registrant of the disputed domain name; the then registrant was a limited company and as such is a separate legal person from the Complainant.

The Respondent submits that Bathroom Distribution Group Limited (company number 02341941) was incorporated on 1 February 1989 and is now dissolved. A petition for liquidation was filed in the High Court of Justice in respect of Bathroom Distribution Group Limited on 25 November 1999. A Winding-up Order was granted in respect of the petition on 23 February 2000. The Liquidator was the Official Receiver (London) and his appointment was notified on 3 March 2000. The Respondent refers to a notice dated 3 March 2000 in the London Gazette in respect of Bathroom Distribution Group Limited obtained from official website of the London Gazette on 22 December 2010 and furnished in an annex to the Response.

The Respondent submits that the disputed domain name was transferred from Bathroom Distribution Group Limited to Bathstore.com Limited trading as Bathstore on or about 16 December 2002. The transferor was in liquidation by that date. The only party entitled to make such a transfer and to provide authority for and on behalf of the legal registrant of the disputed domain name was the Liquidator of Bathstore.com Limited and not the Complainant or any other party formerly connected to the transferor.

The Respondent submits that between August and October 2002, Bathstore.com Limited trading as Bathstore (then named Bathstore.com PLC), negotiated with the Official Receiver in his capacity as Liquidator of BDGL in order to secure a transfer of the disputed domain name. The Official Receiver agreed to transfer the disputed domain name in return for a consideration of £1,000 plus VAT together with a contribution to the Official Receiver's legal costs of £500. In this regard the Respondent refers to a copy of a letter from Assistant Official Receiver to Eversheds Solicitors dated 5 September 2002 that has been furnished in an annex to the Response.

The Respondent submits that between about 17 and 29 October 2002, Bathstore.com PLC and the Official Receiver entered into an Assignment in respect of the disputed domain name, together with transfer paperwork in accordance with Nominet UK's transfer procedures. The Respondent refers to a copy of an Assignment between Bathroom Distribution Group Limited and Bathstore.com PLC and a copy of the Nominet UK Transfer of Domain Name Registration form dated 17 and 29 October 2002 that have been furnished in an annex to the Response.

The Respondent submits that Nominet UK is meticulous in their checking of transfer requests, particularly in the case of corporate legal registrants. The transfer between that Bathroom Distribution Group Limited (in liquidation) and Bathstore.com Limited took place prior to 25 October 2004 when Nominet is believed to have changed its Terms and Conditions of Domain Name Registration such that domain names are now cancelled upon the liquidation of the registrant. At the time of the transfer in question, Nominet permitted transfers of domain names by a company in liquidation provided that the Liquidator executed the appropriate transfer paperwork. Nominet's practice in the case of such transfers was to verify that the Liquidator was indeed the signatory before implementing the transfer request. Should the Expert be in any doubt as to Nominet UK's transfer procedures and the exacting nature of these, or of the date on which Nominet changed its practice regarding registrants in liquidation, the Expert is invited to corroborate the Respondent's submissions on this point directly with Nominet UK personnel.

In conclusion, it may be seen that from Bathroom Distribution Group Limited's acquisition of the disputed domain name from the original registrant was entirely proper and followed the correct procedures. It was a negotiated arms length commercial transaction for value between the transferee and the legal registrant of the disputed domain name. It is incorrect, as the Complainant has contended, that there was no agreement or consideration paid for the disputed domain name at any time. On the contrary, there was a fully documented Agreement, produced in an annex to the Response which involved the payment of consideration by the transferee to the then legal registrant of the disputed domain name. Furthermore, the Respondent has been aware of this fact since on or about 5 June 2007 when the Respondent filed its response in DRS 04691 which also contained copies of the

said Assignment and prior correspondence. Following the said transfer, the Respondent's acquisition of the disputed domain name in 2004 was also an entirely proper transaction. This transfer took place as part of a consolidation of the domain name portfolios of various group companies of the Respondent into the legal registrant name of the Respondent.

In the Complaint, the Complainant appears to describe a transaction between Bathroom Distribution Group Limited and the Complainant's wife allegedly involving the purchase of all assets, goodwill and intellectual property of Bathroom Distribution Group Limited dated 22 February 2000. The nature of this transaction is not known and not admitted by the Respondent. In any event, the disputed domain name was not transferred by Bathroom Distribution Group Limited to the Complainant's wife.

The Respondent refers to a letter submitted by the Complainant, dated 15 May 2002 from Solicitors, then apparently acting on behalf of Bathrooms Direct plc. The Complainant appears to allege, on the basis of this document, that either Bathrooms Direct plc or one of its officers must have been aware of the fact that the Complainant had rights in the disputed domain name at that date. The Respondent submits that, on the contrary, it appears from the letter that it relates to a claim intimated by Bathrooms Direct plc against the Complainant after the Complainant had made references to an entity named Bathroom Trading Company on the website to which the disputed domain name was pointing. The Respondent notes that the Complainant would have been able to make changes to this website if the Complainant had technical control over the disputed domain name notwithstanding the fact that the legal registrant was and had always been Bathroom Distribution Group Limited, by then in liquidation.

The Respondent further observes that it is reasonable to infer from the content of the letter that the offer communicated to the Complainant therein was predicated upon the (then reasonable) assumption that the Complainant was the legal registrant of the disputed domain name since he appeared to have technical control thereof. The letter does not demonstrate that either Bathrooms Direct plc. or its solicitors knew that the Complainant had any rights in and to the disputed domain name by virtue of the transaction now asserted by the Complainant (the details of which are in any event not known and not admitted by the Respondent). It is clear from events after the date of this letter, as more particularly described above, that Bathrooms Direct plc. and/or its solicitors Eversheds subsequently became aware that the legal registrant of the disputed domain name was Bathroom Distribution Group Limited (in liquidation) and arranged to purchase the disputed domain name directly from the Liquidator thereof.

Reply

In a Reply the Complainant re-asserts that he was the creator of the bathstore concept and the registrant of the disputed domain name <bathstore.co.uk> which

was linked to his then business Bathroom Distribution Group Limited.

Any delay on the part of the Complainant has been due to the assembly of documentation in connection with his Complaint and he has suffered a serious illness. The delay has not prejudiced the Respondent in any way.

The Complainant's registration of the disputed domain name < bathstore.co.uk > in 1998 demonstrates the Complainant's rights to the BATHSTORE brand prior to Respondent's use of the name and it is not relevant whether he traded using the BATHSTORE brand his personal capacity or through his wholly owned company. The Complainant re-asserted that all IP assets of his wholly owned company Bathroom Distribution Group Limited were legitimately purchased by the Complainant from the receiver who was acting on behalf of the debenture holders and this is documented in fact.

The Complainant denies that there is a complicated legal dispute in relation to the Complainant's right to the disputed domain name.

6. Discussions and Findings

The Complainant's case is based on his claim to rights in the name and mark BATHSTORE which he claims to jointly own with his wife pursuant to a contract with the liquidator of the company Bathroom Distribution Group Limited a contractual right to the goodwill and intellectual property including the disputed domain name.

The Respondent on the other hand has claimed to be entitled to be the rightful owner of the disputed domain name as the successor in title to the same Bathroom Distribution Group Limited.

The Respondent has referred to the DRS Expert Overview, paragraph 1.6 f which states that where a right is disputed and/or the surrounding circumstances are particularly complex, the complaint may nevertheless be rejected as not being appropriate for adjudication under the Policy,

In the present case, the outcome of the dispute turns on the question: which of the parties are the successors in title of Bathroom Distribution Group Limited? Thus, this is a contract dispute.

In the circumstances this Expert finds that the present dispute cannot be fairly determined by the DRS and is a case that can only be properly determined in another forum. The purpose and limitations of the DRS were addressed by the panel in the Appeal decision in DRS 04632 (ireland.co.uk).

This Expert finds that the dispute is not within the scope of paragraph 2 of the Policy, in accordance with paragraph 16(d) of the Procedure.

7 Decision

In light of the above finding, this case is dismissed.

**Signed: James Bridgeman
Expert**

Dated: 2 March 2011