

DISPUTE RESOLUTION SERVICE

D00013566

Decision of Independent Expert

Eyecare Optical Ltd

and

Mr Haroon Ahmed M.Optom (Hons)

1. The Parties:

Complainant: Eyecare Optical Ltd
Eyecare Optical Ltd
183 - 185 North Road Preston
Preston
Lancashire
PR1 1YQ
United Kingdom

Respondent: Mr Haroon Ahmed M.Optom (Hons)
12 Ottawa Close
Blackburn
Lancashire
BB2 7EB
United Kingdom

2. The Domain Name(s):

eyecareoptical.co.uk

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.

26 November 2013 14:03 Dispute received
27 November 2013 09:53 Complaint validated
27 November 2013 14:23 Notification of complaint sent to parties
16 December 2013 01:30 Response reminder sent
17 December 2013 13:33 Response received
17 December 2013 13:34 Notification of response sent to parties
20 December 2013 08:52 Reply received
20 December 2013 08:52 Notification of reply sent to parties
20 December 2013 08:53 Mediator appointed
27 December 2013 11:52 Mediation started
07 January 2014 16:03 Mediation failed
07 January 2014 16:03 Close of mediation documents sent
08 January 2014 14:10 Expert decision payment received

4. Factual Background

From the submissions and evidence submitted by the parties, I find the following facts for the purposes of this decision:

- i. The Complainant company was established by Mr Imtiaz Ahmed in 2000 under the name Eyecare Optical Limited (sometimes in the documents submitted to me spelt “Eye Care Optical”).
- ii. Mr Imtiaz Ahmed was not alone in setting up and running the Complainant company, which also used the services of the Respondent’s father, Mr Abdul Gafur Ahmed: the exact nature and extent of those services is disputed, but it is not necessary to come to a conclusion on this point.
- iii. The Complainant company has been known as and has traded under that name ever since although there is a dispute between the parties as to who first thought of the name.
- iv. The Complainant company prospered and grew to have 4 outlets, although the evidence is disputed regarding whether one outlet is a franchise: it is not necessary to come to a conclusion on this point.
- v. I accept that over the period since 2000 the Complainant company has been active and has steadily grown over the entire period, although it is unclear exactly how and when the Complainant company grew.
- vi. The Complainant company has adopted advertising and marketing by using its name, and published materials, so as to come to the attention not only of individual patients in the locality of its various outlets but also of others working in the NHS.
- vii. The Respondent is a nephew of Mr Imtiaz Ahmed, the original founder of the Complainant company and the son of Mr Abdul Gafur Ahmed.
- viii. The Respondent became a director of the Complainant company in 2009.
- ix. As part of his duties, he agreed with Mr Imtiaz Ahmed, an existing director of the Complainant company, that he would create a website

and for that purpose would make proper investigations, and acquire a domain name.

- x. The Respondent did so, and secured the Domain Name in his own name, paying for it out of his own funds, as well as sub-contracting the work of creating a website to a company called Pureii Limited, which was paid for by the Complainant company.
- xi. The parties have since fallen out and there is a continuing family disagreement between the Respondent and Mr Imtiaz Ahmed, involving other members of the family
- xii. When the Domain Name came up for renewal, the Respondent renewed it in his own name, again using his own funds.

5. Important preliminary remarks

The parties may well have noticed from my recital above of the facts that much is missing from what they themselves have told me in their respective submissions.

This is because this complaint takes place against a background of what is obviously a fierce family dispute ranging over a large number of areas, some involving the criminal law. The parties have in fact spent much of their submissions airing their grievances over a range of family matters.

However, as an Expert appointed by Nominet, it is not my function to adjudicate on family or other disputes, or to express any opinion or come to any finding concerning them or future criminal prosecutions. Apart from providing some background to the current complaint, they are irrelevant to the decision I must come to. I expressly make no findings or express any opinion with regard to them.

Another confusion the parties seem to have is that the ownership of the Complainant company is somehow relevant: in fact, a limited liability company such as the Complainant company is a distinct legal entity, and it makes no difference whether there have been acts of forgery regarding the Respondent's resignation, or regarding the ownership of the shares in the Complainant company. The fact remains that the Complainant company remains a separate legal entity with its own rights to own property, and potentially its own rights to the Domain Name. This last entitlement exists entirely separately from any rights as between the shareholders or directors of the Complainant company. Even though there is obviously a dispute between the shareholders as to the precise ownership of the shares in the Complainant company, this makes absolutely no difference to the Complainant company's rights, including its rights (if any) to the Domain Name.

To make this clear, I have referred in this Decision to the "Complainant company", so as to make it clear that I am referring to Eyecare Optical Limited, and not to Mr Imtiaz Ahmed personally. This is to avoid any possible confusion in the parties' minds.

6. Parties' Contentions

The Complainant company makes the following submissions and provides the following information:

- i. It was established by Mr Imtiaz Ahmed in 2000 under the name of Eyecare Optical Limited with registration number 03919894.
- ii. Under the management of Mr Imtiaz Ahmed, it has grown to comprise 4 outlets in the Northwest all trading under the name of "Eyecare Optical".
- iii. The company deals with many patients and suppliers as well as other organisations such as nursing and residential homes.
- iv. The name "Eyecare Optical Limited" is registered with the UKCS registration service.
- v. The Complainant has had much success not only with patients, but also with GP's, care workers, nurses, hospitals and NHS commissioning groups.
- vi. The Complainant uses the Domain Name in advertising and publicity, and its name appears on shops' fascia boards and letter heads and compliment slips as well as on appointment cards, at the cost of some thousands of pounds.
- vii. The name has also been advertised to local GP's in local surgery books and appointment cards, and the Domain Name appears in these publications.
- viii. The Respondent is the nephew of Mr Imtiaz Ahmed, who has supported his education.
- ix. The Respondent became a director of the Complainant in August 2009, and he was given the task of creating a website.
- x. The Respondent researched a website and found the Domain Name and company to create it, Pureii UK Limited.
- xi. Pureii UK Limited created the website and it rendered invoices to the Complainant, which paid them by the Complainant's bank account.
- xii. The Respondent had purchased the Domain Name so as to secure it quickly, and registered it in his own name; he was in fact acting as the Complainant's agent.
- xiii. This was not discovered until 19 November 2013.
- xiv. The Respondent had resigned as a director of the Complainant on 2 September 2013, but he re-registered the Domain Name in his own name on 14 November 2013, without authority to do so.
- xv. This is against a deteriorating family situation because the Respondent's father has been charged with indecent assault on a child under 16, in which Mr Imtiaz Ahmed is a key witness.
- xvi. For this reason, the Respondent is taking action with regard to the Domain Name in order to exert pressure on Mr Imtiaz Ahmed.
- xvii. The Respondent has set up his own company called Haroon Ahmed Limited, and so has no reason to retain the Domain Name.
- xviii. The Respondent has acted unfairly and dishonestly and failing to return the Domain Name will cause the company expense and disruption.

- xix. There is a risk that the Respondent will use the Domain Name following his father's conviction to cause harm to the Complainant.

The Respondent makes the following submissions and provides the following information:

- i. The Complainant company was founded in 2000 and the Respondent's father, Mr Abdul Gafur Ahmed, has been a co-owner and the driving force behind its success.
- ii. From one branch in Rochdale, it grew to 3 branches with an additional operation by way of franchise.
- iii. The Respondent has been under family pressure to become an optometrist so as to continue the family business.
- iv. It was agreed that, upon qualification, the Respondent would receive shares in the Complainant company, while Mr Imtiaz Ahmed and the Respondent's father would continue to receive an annual remuneration.
- v. There was a major family disagreement in November 2010, with the result that Mr Imtiaz Ahmed became estranged from the rest of the family.
- vi. Mr Imtiaz Ahmed without authority transferred ownership of shares in the Complainant company by forging the Respondent's signature.
- vii. Mr Imtiaz Ahmed has falsified documents showing that the Respondent has resigned as director of the Complainant company: the Respondent has not in fact done so.
- viii. The Complainant company owes the Respondent £2,250 in unpaid salary.
- ix. The name of the Complainant company was invented by the Respondent's mother and is special to the Respondent.
- x. If he is not allowed to use the Domain Name, the Respondent will use a derivative which contains the original name.
- xi. The Respondent does not wish to harm the Complainant company.
- xii. The Respondent paid for the Domain Name from his private funds and has never been reimbursed, with Mr Imtiaz Ahmed being dismissive of buying a Domain Name.
- xiii. It is Mr Imtiaz Ahmed who has made allegations of sexual abuse against the Respondent's father, which allegations have no factual basis.
- xiv. The wording and images on the webpages to which the Domain Name resolves belong to the Respondent and were put together by Pureii Limited.
- xv. This is a matter which should be resolved by the courts, as there are many unresolved issues between the Respondent, Mr Imtiaz Ahmed and the Complainant company.

The Complainant company in reply makes the following submissions and provides the following information:

- i. Mr Imtiaz Ahmed founded the Complainant company and introduced the Respondent's father and the Respondent himself to the business, with the input from the Respondent's father being limited.
- ii. It was Mr Imtiaz Ahmed who secured that the Respondent should have the necessary qualifications to become an optometrist.
- iii. The family dispute to which the Respondent refers was that the Respondent's mother wished to commit adultery with Mr Imtiaz Ahmed.
- iv. The Respondent is incorrect in his allegations regarding forgery of documents regarding the Complainant company.
- v. No-one on behalf of the Respondent has made contact regarding anything done wrong by the Complainant company.
- vi. The Respondent was acting as agent for the Complainant company when he bought the Domain Name and set up the website.
- vii. The Crown Prosecution Service is proceeding with the prosecution of the Respondent's father on sexual abuse charges.

7. Discussions and Findings

The question I have to decide is a relatively simple one: which party as between the Complainant company and the Respondent is entitled to the Domain Name. Mr Imtiaz Ahmed is a director and therefore an officer and representative of the company – but he is not the company itself. Any family or other legal matters affecting a shareholder, director or other officer of Eyecare Optical Limited are irrelevant when it comes to assessing the rights or liabilities of the company itself.

The only question I have to determine is whether, according to the DRS Policy, the Complainant company is entitled as against the Respondent to the Domain Name. In doing this, I am neither required nor entitled under the DRS Policy to have regard to the moral probity of the Complainant company's directors or shareholders, or of the Respondent, or of any member of their family. It is a straightforward question regarding the Complainant company itself, and taking in nothing else affecting the other protagonists named in the documents submitted by the parties in this case.

Rights

“Rights” are defined in the DRS 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”.

Under paragraph 2(a) of the DRS Policy, a complainant must show that it *“has Rights in respect of a name or mark which is identical or similar to the Domain Name”*.

A trading name can thus become “Rights”. It is established that it is not necessary to have a registered trade mark, but a complainant must point to evidence sufficient to establish that it is entitled to some sort of legal protection. For this purpose, it is established by decisions under the DRS

Policy that unregistered rights, such as right to bring an action in passing off, will suffice to establish Rights.

Having looked at the evidence provided by the Complainant company, I accept that it has been trading under the name “Eyecare Optical”, and for this purpose has produced promotional literature. It is apparent that this name is actually identical with the Domain Name (after removing the .co.uk suffix, which is normal in these proceedings, and ignoring the breaks between the words).

Other decisions under the DRS Policy have established that the threshold for establishing “Rights” is a relatively low one and, after looking at the evidence provided by the Complainant company, I have no doubt that it has Rights as required by the DRS Policy. Moreover, it had acquired such Rights at some time significantly prior to the registration of the Domain Name.

I should observe that, for these purposes, it makes no difference whether the name was in fact devised by Mr Imtiaz Ahmed or the Respondent’s mother: the use of the name was made by the Complainant company and any goodwill or rights to the trading name and style vested in the Complainant company and not in Mr Imtiaz Ahmed or, for that matter, in the Respondent’s mother.

Abusive Registration

Paragraph 3(a) of the DRS Policy sets out what it describes as a non-exhaustive list of factors which may be evidence that the registration or holding of the Domain Name by the Respondent was an “Abusive Registration”.

The DRS Policy defines an Abusive Registration 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. has been used in a manner which has taken unfair advantage of or has been unfairly detrimental to the Complainant’s Rights;”*

As regards the latter point, there is no evidence that the Respondent has actually used the Domain Name in a way inconsistent with the DRS Policy. Indeed, the Respondent himself expressly states that he will not do anything to harm the Complainant company, although he reserves the right to acquire other domain names incorporating the Complainant company’s name. However, I am not adjudicating on other domain names to be acquired in the future, I am only adjudicating on this particular Domain Name.

Turning then to the first element of the definition, the question I have to ask is whether, when the Domain Name was first registered, it took unfair advantage of or was unfairly detrimental to the Complainant company's Rights.

The Rights in the name, "Eyecare Optical" had vested in the Complainant company by the time of the registration of the Domain Name. The Respondent registered the Domain Name as part of his duties as a director of the Complainant company. While there is an evidential dispute as to the exact degree of enthusiasm of Mr Imtiaz Ahmed for the idea of a website, I accept that the Respondent was acting on the Complainant company's business when he acquired the Domain Name. I accept the evidence that Pureii Limited has provided website services for the Complainant company. While the Complainant company has not included all the details of the invoices from Pureii Limited, I accept that they are in the possession of the Complainant company, and were received by it, and paid by it. I note from the VAT elements that the invoices increased from 17.5% to 20%, thereby indicating that these invoices were rendered over a period and were therefore acceptable to the Complainant company. This inclines me on the balance of probabilities to find that the Respondent's work with regard to the acquisition of the Domain Name was approved by the Complainant company and in the course of his work for the Complainant company. I therefore find that work done on acquiring the Domain Name and maintaining a website using the Domain Name was something done with the approval of the Complainant company.

It is therefore clear from the evidence that the Domain Name was to be used for the purposes of the Complainant company's business. I accept the parties' evidence that in fact it has been. There is a dispute as to the contribution made by the Respondent to the website which uses the Domain Name: however, my function is to adjudicate on the Domain Name, not the materials uploaded to the website to be found at the Domain Name.

It follows that the Respondent was simply the wrong person to have acquired the Domain Name, and that he should have done it in the name of the Complainant company. Moreover, a director has fiduciary duties which he owes to a company of which he is a director, which means that he cannot assert rights as against the company of which he is a director with regard to property which is properly the company's.

Paragraph 3(a) of the DRS Policy sets out a number of factors which may be evidence of an Abusive Registration; however, the introductory words show that this is a non-exhaustive list. Being non-exhaustive, there may well be other factors which form the grounds for a transfer. The principal test is set out in the definition of "Abusive Registration" itself which I have set out above.

In truth, none of the grounds in paragraph 3(a) applies in this case if one reads them strictly. Paragraph 3(a)(i)(B) and (C) are close, but I am not convinced that the Respondent registered the Domain Name primarily for the purpose of blocking the Complainant company's registration (ground B) or for

the purpose of unfairly disrupting the Complainant company's business (ground C). The fact that the parties have used the Domain Name for the purposes of providing a website to promote the Complainant company's business gainsays any suggestion that the Respondent's initial purposes were opposed to those of the Complainant company.

Rather closer is paragraph 3(a)(v) of the DRS Policy. I find that the Respondent acquired the Domain Name pursuant to some sort of relationship with the Complainant company and in his capacity as a director of the Complainant company. However, ground B (that the complainant paid the Respondent for the registration) is not here made out.

There have been previous cases where directors have acquired a domain name in their personal names while acting as a director of or with some other contractual relationship with a company. Here are two examples:

- In D00004247 <ductworkukltd.co.uk> the respondent, an employee and director of the complainant, acquired the domain name, which was identical with the complainant's trading name. The parties subsequently fell out. There was no evidence that the complainant had paid for the costs of acquiring the domain name. In that case, the Expert found that the acquisition by the respondent was not initially an Abusive Registration, but became so as a result of the respondent's seeking to retain the domain name following the use made of it by the complainant. Transfer ordered.
- In D00004447 <dragon-hotel.co.uk> the complainant was the Dragon Hotel in a town in Devon and the respondent was in the course of negotiating a service agreement with the complainant when he registered the domain name. The respondent anticipated receiving shares in the complainant and acting as its manager and subsequently negotiated a consultancy contract in addition. The parties then fell out. The respondent attempted to sell the domain name to the complainant for some thousands of pounds. The Expert observed that demanding excessive sums for a domain name is considered an Abusive Registration under paragraph 3(a) only where that was the original intention; however, the Expert still found that the holding by the respondent had become an Abusive Registration.

These decisions show that the real question is to go back to the words of the definition of Abusive Registration and ask whether the Respondent, in acquiring or failing to agree to transfer the Domain Name to the Complainant company is acting in a way which "has taken unfair advantage of or has been unfairly detrimental to the Complainant's rights". Going back to the definition of Abusive Registration, this can take place at the time of registration or subsequently by a respondent's use of the Domain Name. A Respondent's personal intentions at the time are irrelevant: in this case, the Respondent's acquisition of the Domain Name could only have been with a view to furthering the Complainant company's business, not for any personal gain. As a director, he owed fiduciary duties to the Complainant company and should

either have transferred it voluntarily or on request by the Complainant company.

I conclude, in line with the two Decisions given above, that the Respondent's continued holding of the Domain Name is an Abusive Registration. It was potentially so at the time he personally acquired it, as he owed fiduciary duties as a director to the Complainant company and should have acquired it for the Complainant company. His duty as a director was to transfer it to the Complainant company. His declining to transfer it to the Complainant company when requested to do so is an Abusive Registration. I appreciate that his holding it is part of a much wider dispute between him and Mr Imtiaz Ahmed, however, that is nothing to the point as the Complainant company is at law separate from Mr Imtiaz Ahmed and the duties owed to the Complainant company cannot be abrogated because of a disagreement over other issues.

I realise that there is a dispute in the evidence about whether the Respondent in fact resigned from the Complainant company, which the form TM01 provided in the documents submitted by the Complainant company suggests that he did. It is not necessary to decide this point: the act of Abusive Registration happened at the latest when the Respondent declined to transfer the Domain Name to the company, regardless of whether he had resigned or not. It also makes no difference whether Mr Imtiaz Ahmed had forged share transfers so denying the Respondent any entitlement to shares in the Complainant company: the Respondent's duties to the Complainant company remained.

For completeness, I should add that all the other disputes regarding Mr Imtiaz Ahmed, the Respondent and various members of their family do not affect this conclusion. There may well be other disputes between the Respondent and the Complainant company, such as the allegations of outstanding salary owed to the Respondent, but Nominet's DRS Policy is not the right forum to decide such matters, they are questions for other legal proceedings (if the parties wish to go down that route).

8. Decision

I find that the Complainant company has Rights identical to the Domain Name and that the holding of the Domain Name by the Respondent is an Abusive Registration.

I direct that the Domain Name be transferred to the Complainant company which, for the avoidance of doubt, is the company named as the complainant at the head of this Decision.

Signed: Richard Stephens

Dated: 5 February 2014