

DISPUTE RESOLUTION SERVICE

D00014191

Decision of Independent Expert

A Bolt From The Blue Ltd

and

Mrs Corrine Millward

The Parties

Complainant: A Bolt From The Blue Ltd
Unit 34
Sandwell Business Development Centre
Oldbury Road
Smethwick
West Midlands
B66 1NN
United Kingdom

Respondent: Mrs Corrine Millward
246 Titford
Oldbury
Birmingham
West Mids
B69 4QP
United Kingdom

The Domain Name

abolt-fromtheblue.co.uk

Procedural History

On 20 May 2014 the dispute was received and on 21 May the complaint was validated by Nominet and notification of the complaint was sent to both parties. On 10 June a response reminder was sent by Nominet and on 12 June a response was received. Notification of the same was sent to both parties on the same day. On 17 June a reply reminder was sent and a reply received on 19 June. Again, notification of the same was sent to both parties on the same day. On 24 June Nominet appointed a mediator and mediation started. By 08 September mediation failed and close of mediation documents were sent to both parties. On 15 September an Expert decision payment was received and the Expert - Tim Brown - was formally appointed on 19 September.

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.

On 18 September both parties asked to add further supplemental statements in terms of paragraph 13b of the Procedure. On the 19th September I agreed to accept these supplemental statements and they were passed to me by Nominet on the same day.

Factual Background

The Complainant is a limited company registered in the United Kingdom called "A Bolt From The Blue Limited". The company sells fixings and fastenings for trade and DIY projects and appears to be a relatively small entity operated by an individual named Stephen Penn. As Mr Penn appears to be synonymous with this company for convenience I shall refer to them both as the Complainant, and as 'him' rather than 'it'.

The Respondent is an individual named Corrine Millward. The Respondent is the Complainant's sister. The Respondent applied for a trade mark for the term "A Bolt From The Blue" or on about 18 March 2014.

It is clear from the submissions before me that there is a long-standing and acrimonious dispute between the parties. This matter encompasses many issues including who founded the company "A Bolt From the Blue"; who put money into the business and how that business has been operated and by whom. The parties have previously corresponded via their respective solicitors and there has been legal action between the parties in the Dudley County Court. Most of the parties' submissions relate to these issues rather than matters pertaining directly to the Domain Name.

The Domain Name was registered on 08 March 2012 and currently resolves to a website operated by the Complainant.

Parties' Contentions

Complaint - Rights

The Complainant avers that he runs a company called "A Bolt From The Blue Limited" and, although it is not expressed, presumably contends that the Domain Name is identical or similar to his company name.

Complaint - Abusive Registration

The Complainant contends that the Respondent purchased the Domain Name on his behalf in March 2012. The Complainant says that he reimbursed the Respondent for the purchase of the Domain Name and for web hosting in August 2012.

The Complainant avers that the Respondent has registered another twelve domain names relating to his company, namely aboltfromtheblue.uk.com; abolt-fromtheblue.com; aboltfromtheblue.co; aboltfromtheblue.org; aboltfromtheblue.biz; abolt.co.uk; aboltftb.com; aboltftb.co.uk; aboltftb.co; aboltftb.info and aboltftb.biz.

The Complainant contends that at some point the Respondent reconfigured the Domain Name so that it did not resolve to his website for a period of seven weeks, during which the Complainant could not receive orders to his online shop.

The Complainant says that the Respondent attempted to hack his website in order to blackmail him.

Response - Rights

The Respondent contends that she started a business called "A Bolt From The Blue" in February 2012 in which she invested her life savings. The Respondent notes that she registered the Domain Name as one of the first things she did after founding her business.

Response - Abusive Registration

The Respondent contends that the Domain Name is not Abusive as she founded "A Bolt From The Blue" in February 2012 having observed a business selling bolts operated by an associate. The Respondent contends therefore that the business was hers to start with. The Respondent says that the Complainant did not put any money into the business but did give some initial support with the view of entering into a business partnership with the Respondent.

The Respondent avers that she spent many hours putting together an eBay store for the business. The Respondent contends that the eBay shop was registered in the Complainant's name to comply with eBay's policy requirements and for some degree of administrative convenience.

The Respondent says that a partnership agreement was being prepared but the parties had disagreed about whether the partnership should include the Complainant's girlfriend amongst other matters.

The Respondent notes that she applied for a trade mark for "A Bolt From The Blue" in March 2012 after receiving third party advice about her business. The Respondent avers that she applied for the trade mark both before the Complainant incorporated his limited company and commencement of these proceedings.

The Respondent says that she registered the other domain names referred to in the Complainant's contentions above in order to protect her business and notes that the Complainant was free to register his own domain names at the same time.

The Respondent refutes the Complainant's claims that she attempted to hack the Complainant's website.

Complainant's Reply

The Complainant notes that his girlfriend worked in the fastener industry for five years for a company called Icon Fasteners. During her employment the Complainant's girlfriend gained a wealth of experience in the fastening industry and an in-depth knowledge of fastener and fixing specifications.

The Complainant contends that because of his girlfriend's experience in the fastening industry, he and his girlfriend set up an online retail business in October 2011. The Complainant says that the Respondent agreed to help with the initial company start up and specifically to assist with the company's accounts.

The Complainant says that he is the rightful owner of the business and notes that the company was initially operated from his home address and used his eBay account, PayPal account, VAT registration and personal bank account.

The Complainant avers that as he is the owner of the company he expected the Domain Name to be registered by the Respondent in his own name and, indeed, asked the Respondent to do so. The Complainant says that he later found out the Domain Name had instead been registered in the name of the Respondent.

The Complainant has exhibited an agreement signed by both parties which states that the Respondent has no interest in the "A Bolt From The Blue" business.

Parties' 13b submissions

As noted in the in Procedural History above, both parties asked to add further submissions in terms of paragraph 13b of the Procedure and I agreed to see these. The Complainant's further submissions consisted of exhibits which, in my view, should correctly have been submitted with the Complainant's original complaint.

The Respondent's further submissions cover much of the same ground as those made in her initial submissions. The Respondent, however, now contends that she started the "A Bolt From The Blue" business in 2011 having come up with the name and paid a design company to create a logo. The Respondent avers that she set up the business on eBay and created an account on PayPal. The Respondent says that it was only after her initial investment money ran low that she began discussions with the Complainant to form a partnership.

Discussions and Findings

Introduction

It is clear from the submissions that there is an acrimonious and emotive dispute between the parties, who are brother and sister. As a result, the parties' submissions are chiefly concerned with the minutiae of their disagreement. It is not clear at times whether the parties are referring to different parts of the same business or different businesses entirely. Equally, both parties have made a number of submissions concerning each other's conduct

which are not relevant to the current matter and I have largely excluded these from the factual matrix above.

It is important that both parties understand that the DRS is designed to be a simple, efficient and low cost system for resolving domain name disputes. It is not a forum suitable for weighing up the merits, or otherwise, of non-domain name conflicts between parties. There are other forums better suited to resolving such issues. My decision is therefore not a judgement on the wider dispute between the Complainant and Respondent; it only concerns the Domain Name.

It is therefore worthwhile at this stage to revisit what the DRS Policy requires a complainant to prove on the balance of probabilities. Paragraph 2(a) of the Policy says that:

- (i) The Complainant [must show it] 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.

Rights are defined by Paragraph 1 of the 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."

What in turn constitutes an Abusive Registration is defined by Paragraph 1 of the Policy:

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) has been used in a manner which has taken unfair advantage of or has been unfairly detrimental to the Complainant's Rights;

It is clear that I must make my decision based on the objective elements set down in the DRS Policy and Procedure as they relate to the Domain Name, not on the basis of the wider dispute between the parties.

Discussion

Rights

The Complainant has said that it is, or operates, a limited company called "A Bolt From The Blue Limited". There is little evidence put forward by the Complainant to show that this company exists. However, among the evidence exhibited by the Complainant are documents and letters addressed to this company. Equally the Respondent does not dispute that the Complainant has incorporated such a company. I am therefore prepared to accept that the Complainant operates a limited company called "A Bolt From The Blue Limited".

Having established that the Complainant does have a company of this name, I must consider whether this is enough to show that he has Rights that are identical or similar to the Domain Name.

In considering this point I have referred to Version 2 of the Expert's Overview. The Expert's Overview is a document put together by Nominet's panel of Experts which deals with a range

of issues that come up in DRS disputes. It is published on Nominet's website at http://www.nominet.org.uk/sites/default/files/drs_expert_overview.pdf.

Paragraph 1.7 of the Overview asks "Can a company name registration (per se) give rise to a right within the definition of Rights?" and notes:

There are decisions going both ways (qv DRS 00228 (activewebsolution.co.uk) and DRS 04001 (generaldynamics.co.uk)). The issue is this: does the mere fact that under the Companies Acts (section 28(2) of the Companies Act 1985 and sections 66 and 67 of the Companies Act 2006) the Version 2 – Published November 2013 7 Secretary of State can direct NewCo to change its name because it is the same as, or 'too like', OldCo's name mean that OldCo enjoys 'rights enforceable under English law' and/or 'Rights' within the full meaning of the Policy?

The consensus view of recent Experts' meetings has been that mere registration of a company name at the Companies Registry does not of itself give rise to any rights for this purpose.

I respectfully agree with the consensus of the Experts' group and consider that the mere incorporation of a limited company is not enough to show that the Complainant has Rights under the Policy.

I have also considered whether the Complainant has established a "common law" or "unregistered" right in the term "A Bolt From The Blue". Again, I have referred to the Expert's Overview, which at Paragraph 2.2 asks "What is required for a Complainant to prove that he/she/it "has rights" in paragraph 2(a)(i) of the Policy?" and notes:

As indicated above, the relevant right has to be an enforceable right (i.e. a legally enforceable right). Bare assertions will rarely suffice. The Expert needs to be persuaded on the balance of probabilities that relevant rights exist. The Expert will not expect the same volume of evidence as might be required by a court to establish goodwill or reputation, but the less straightforward the claim, the more evidence the better (within reason – this is not an invitation to throw in the 'kitchen sink').

If the right arises out of a trade mark or service mark registration, a copy of the registration certificate or print out from the registry database will suffice together with, in the case of a licensee, evidence of the licence. If the Complainant can demonstrate that it is a subsidiary or associated company of the registered proprietor, the relevant licence, if asserted, will ordinarily be assumed. [Appeal decision in DRS 00248 (seiko-shop.co.uk)].

If the right is an unregistered trade mark right, evidence needs to be put before the Expert to demonstrate the existence of the right. This will ordinarily include evidence to show that (a) the Complainant has used the name or mark in question for a not insignificant period and to a not insignificant degree (e.g. by way of sales figures, company accounts etc) and (b) the name or mark in question is recognised by the purchasing trade/public as indicating the goods or services of the Complainant (e.g. by way of advertisements and advertising and promotional expenditure, correspondence/orders/invoices from third parties and third party editorial matter such as press cuttings and search engine results).

If the right is a contractual right, the Expert will need to see evidence of the contract.

The Complainant has not shown to my satisfaction that he has used the name for a not insignificant period to a not insignificant degree. Virtually no evidence has been put before me to show that the name is recognised by the purchasing trade or public as indicating the services of the Complainant.

Proving that it has Rights identical or similar to the domain name is an important step for any DRS complainant. This is especially so in the present matter. Both parties claim to have come up with the name and to have founded the related business; both parties express that they are its rightful owners; both parties claim to have expended considerable effort in setting up the business; both parties contend they have taken steps to protect their rights - the Complainant by incorporating a limited company and the Respondent by applying for a trade mark among other things.

With such a complicated and contentious history I would expect the Complainant to set out how he has Rights in terms of the Policy very clearly and provide extensive objective evidence. He has failed to do this. I therefore find that that the Complainant has not made out a case in terms of the first test under the Policy and therefore his complaint must fail.

Abusive Registration

The DRS is a two part test and a complainant must prove its case on the balance of probabilities on both elements. As the Complainant has failed to make out his case on Rights, strictly I do not have to make a decision about whether the Domain Name is an Abusive Registration in the hands of the Complainant in terms of the Policy.

However, for the sake of completeness and for the benefit of the parties, I will briefly consider the Complainant's primary argument that he instructed the Respondent to register the Domain Name on his behalf and that he subsequently refunded her expenses. This appears to be a submission under paragraph 3(v) of the Policy, which says that a domain name may be abusive if:

...the Domain Name was registered as a result of a relationship between the Complainant and the Respondent, and the Complainant:

- A. has been using the Domain Name registration exclusively; and
- B. paid for the registration and/or renewal of the Domain Name registration.

To support his contentions, the Complainant has exhibited a number of invoices from his web hosting provider. These invoices include one relating to the registration of the Domain Name. Copies of bank statements showing payments to the Respondent have also been put before me. In turn, the Respondent has also exhibited a bank statement showing a payment to the hosting provider from her personal account. It is therefore not clear who paid for the Domain Name.

As noted, the DRS is a simple, efficient and low cost system for resolving domain name disputes. In person hearings can only happen in exceptional circumstances (and such circumstances have not presented themselves in the DRS's thirteen year history). Experts cannot cross-examine parties or further test the evidence put in front of them. With this in mind I do not consider that with regard to his primary submission that the Complainant has on the balance of probabilities made out his case in terms of Abusive Registration. I have also considered the parties' other submissions regarding Abusive Registration and do not consider that they make any material difference to my decision.

It is clear that the Domain Name forms merely a part of a broader and more extensive dispute between the parties. Many of the parties' submissions simply do not relate to whether the Domain Name is Abusive, or not, in terms of the Policy. I reiterate that my decision regarding the Domain Name is not a reflection on the merits, or otherwise, of this wider dispute. I suggest that other forums might be better suited to resolving the parties' issues.

Decision

Having determined that the Complainant has not demonstrated that he has Rights in the Domain Name in terms of the Policy, I order that no action be taken regarding its registration.

Signed Tim Brown

Dated 25 September 2014