

DISPUTE RESOLUTION SERVICE

D00015543

Decision of Independent Expert

Aqua Pacific UK Limited (Kongs UK Limited)

and

Tania Barton

1. The Parties:

Complainant: Aqua Pacific UK Limited (Kongs UK Limited)
10 Oriana Way, Nursling Industrial Estate,
Southampton
Hampshire
SO16 0YU
United Kingdom

Respondent: Mrs Tania Barton
The Lodge, Manor Farm
Sutton Hill, Eyeworth
Beds
SG19 2HL
United Kingdom

2. The Domain Name:

aqua-one.co.uk

3. Procedural History

The Complaint was submitted to Nominet on 23 February 2015. On the same date, Nominet validated the Complaint and notified it to the Respondent. The

Respondent was informed in the notification that she had 15 working days, that is, until 16 March 2015 to file a response to the Complaint.

The Respondent did not file a response and the case did not proceed to the mediation stage. On 17 March 2015, the Complainant paid the fee for referral of the matter for an expert decision pursuant to paragraph 8 of Nominet's Dispute Resolution Service Procedure Version 3 ("the Procedure") and paragraph 7 of the corresponding Dispute Resolution Service Policy Version 3 ("the Policy").

On 18 March 2015, Andrew D S Lothian, the undersigned, ("the Expert") confirmed to Nominet that he was not aware of any reason why he could not act as an independent expert in this case. Nominet duly appointed the Expert with effect from 27 March 2015.

4. Outstanding Formal/Procedural Issues

First, the Expert notes that the Respondent has failed to submit a response to Nominet in time in accordance with paragraph 5(a) of the Procedure.

Paragraph 15(b) of the Procedure provides *inter alia* that "If in the absence of exceptional circumstances, a Party does not comply with any time period laid down in the Policy or this Procedure, the Expert will proceed to a Decision on the complaint."

Paragraph 15(c) of the Procedure provides that "If in the absence of exceptional circumstances, a Party does not comply with any provision in the Policy or this Procedure or any request by us or the Expert, the Expert will draw such inferences from the Party's non compliance as he or she considers appropriate."

In the view of the Expert, if a respondent does not submit a response, the principal inference that can be drawn is that it has not availed itself of the opportunity to attempt to demonstrate that the domain name at issue is not an Abusive Registration. This does not affect the primary requirement upon a complainant, on whom the burden of proof rests, to demonstrate Abusive Registration, nor does it in the Expert's view entitle an expert to accept as fact all uncontradicted assertions of a complainant, irrespective of their merit.

Secondly, the Expert notes that Aqua Pacific UK Limited (hereinafter described as "the Complainant") has listed itself and Kongs (UK) Limited as joint complainants in this case. The Complainant has provided no explanation as to why the latter company has been included. The Expert presumes that it is in some way related to the Australian company described by the Complainant as its parent company, as it shares the "Kongs" name, although Kongs (UK) Limited appears to be dormant. Accordingly, in the absence of a suitable explanation for its inclusion, the Expert will ignore Kongs (UK) Limited

and in the event of the Complainant's success in this proceeding will order transfer of the Domain Name to the Complainant.

5. Factual Background

The Complainant is a UK limited company founded in 2004. The Complainant says that its parent company is an Australian based group named Kongs (Australia) Pty. Limited. The Complainant has also listed another UK company as the complainant in this case, namely Kongs (UK) Limited. That company appears to be dormant.

The Complainant distributes a range of aquarium products branded "Aqua One" throughout the UK to the independent specialist aquatic trade. Kongs (Australia) Pty. Limited is the proprietor of international registered trade mark no. 909802 for the stylized word mark AQUA ONE, registered on 30 March 2006 and with protection in the United Kingdom from 24 February 2008.

The Respondent appears to be connected with a company named either ALF Limited or ALF (Aquatic Distributors) Limited (hereinafter "ALF"). She shares the same surname as the person said to have founded ALF, per ALF's website. She also uses an email address employing the same domain name as used for ALF's website, namely <alf ltd.co.uk>. According to that website, ALF was founded in 1988, is based in Bedford and supplies aquatic and pet goods to the trade.

The Domain Name was registered on 25 January 2008 and currently points to ALF's website.

6. Parties' Contentions

Complainant

The Complaint itself is in extremely short compass and may be repeated *verbatim*:-

"The trade Mark 'Aqua One' is a registered mark of Kongs Australia our parent company. We have marketed the brand Aqua One in the UK since 2004 and are a market leading brand.

Mark no in the UK WO0000000909802. We also own the domains [sic] www.aquaone.co.uk

Why is the domain name an Abusive Registration?

Aquatic Live Foods Ltd (ALF Ltd) is a competitor of ours in our industry. Aqua-One.co.uk is a clear attempt to use our well known brand name to attract our trade customers to their website."

The Complainant lists two further websites which are said to support the dispute, namely the UK Intellectual Property Office (link to the international trade mark registration referred to in the Complaint provided) and the website associated with the Domain Name.

Respondent

The Respondent did not file a Response and has not replied to the Complainant's contentions.

7. Discussions and Findings

General

In terms of paragraph 2(b) of the Policy the onus is on the Complainant to prove to the Expert on the balance of probabilities each of the two elements set out in paragraph 2(a) of the Policy, namely that:

- (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.

As noted above, the Complaint is in extremely short compass and was provided without any supporting evidence. However, paragraph 16 of the Procedure allows the Expert to look at any websites referred to in the Parties' submissions. The Expert therefore looked at the website associated with the Domain Name, the Complainant's website and the website of the UK Intellectual Property Office, all of which were referred to in the Complaint.

While the Expert found evidence supportive of the Complainant's contentions on those websites, as discussed below, it should be noted that in terms of paragraph 16 of the Procedure an expert has no obligation to look at any such websites. In these circumstances, a different expert might well have looked no further than the Complaint in this case, and it is therefore unwise in general for a party to a DRS proceeding to rely exclusively on listing website URLs as its only supportive evidence.

Complainant's Rights

Paragraph 1 of the Policy provides that 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". In the present case, the Complainant has produced evidence via the link to the UK Intellectual Property Office that an entity named Kong's (Aust.) Pty. Limited is the proprietor of a registered trade mark having effect in the United Kingdom in respect of the stylized word mark AQUA ONE. The Complainant is not itself the proprietor of that trade mark but instead states that the owner is its parent company.

The question whether rights which are owned by a different company in the same corporate group as the complainant may be sufficient to entitle that complainant to assert 'Rights' in terms of paragraph 2(a)(i) of the Policy has been considered in various DRS cases. For example, the Appeal Panel in *Seiko UK Limited -v- Designer Time/Wanderweb*, DRS 00248 held that: "The requirement to demonstrate 'rights' is not a particularly high threshold test. It is satisfied in our view by the assertion of Seiko UK Limited that it is duly authorised by the trade mark owner to use the mark and to bring the Complaint. Where a complainant is a subsidiary or associated company of the trade mark proprietor, such an assertion will in our view generally be sufficient to demonstrate 'rights' in the absence of any good reason to doubt the veracity of that assertion".

While *Seiko* was decided under a previous version of the Policy, the Rights element of the latest version has not changed to any extent which would affect or alter this general proposition. Furthermore, the Expert has adopted the *Seiko* approach in at least two previous cases under the current version of the Policy (see *EMI Records Limited v. Mr Philip Gahan*, DRS 9931 and *The Procter & Gamble Company v. Wang Degui*, DRS 12442) and in these circumstances will adopt it in the present case. As the Expert has previously noted in those cases, complainants would do well to remember that the more reliable course of action is that set out in paragraph 1.1 of the DRS Experts' Overview Version 2 which deals with the question as follows:

"1.1 (a) Who should the Complainant be? (b) When is it necessary or appropriate for there to be more than one Complainant?"

(a) The Complainant should be the owner/licensee of the Rights in the name or mark, which the Complainant contends is identical or similar to the domain name in dispute. Surprisingly often, complaints under the DRS Policy ("the Policy") are lodged in the names of persons and entities not demonstrably the proprietor of the relevant Rights.

(b) For example, when the Rights relied upon are owned or shared by one entity but used by a group or associate company whose business is disrupted or confusingly connected with the Respondent. Another example could be in circumstances where the Rights relied on have been licensed and, depending on the facts, it may be desirable for both the Licensor and Licensee to be Complainants. If more than one Complainant is named, it is important that the Complaint nominates one of them as the transferee of the domain name in the event that the Complaint succeeds."

In the present case, the Complainant does not provide any evidence that it has been authorised by Kong's (Aust.) Pty. Limited to bring the Complaint. Nor in fact does it provide any evidence that the latter is its parent company. The Expert is however mindful that the Complainant does not appear to be legally represented and it appears that the issue outlined in paragraph 1.1 of the Expert Overview is likely to have been overlooked by it. The Expert is prepared to accept that the statement in the Complaint effectively constitutes an implied assertion (in the manner of the *Seiko* case, *supra*) of the Complainant's right and authorisation to rely upon the AQUA ONE registered trade mark for present purposes. To do otherwise would leave the Complainant's statement entirely devoid of meaning. Furthermore, with regard to the question of whether the trade mark owner is indeed the Complainant's parent company, the Expert finds some further, albeit limited, support on this from the Complainant's website, on which the company's history is set out.

The Expert notes that there is no good reason to doubt either that the Complainant is a subsidiary of the owner of the trade mark on which it relies or that it is duly authorised by the mark owner. In particular, the Respondent has chosen not to challenge either of those assertions. Even if any substantive doubt existed, the Expert notes that there is some support to be found on the Complainant's website for its further assertion that it has marketed the Aqua One brand in the UK since 2004 and that it is a market leading brand, such that it would be able to establish rights in a corresponding unregistered mark.

In these circumstances, the Expert turns to a comparison between the AQUA ONE registered trade mark and/or Aqua One unregistered mark and the Domain Name. The first (.uk) and second (.co) levels of the Domain Name are disregarded as being wholly generic. It may then be noted that the mark is alphanumerically identical to the Domain Name with the exception of an additional hyphen in the latter, replacing the space in the former. This difference is of no consequence, given that spaces are not permitted in domain names for technical reasons and a hyphen is a relatively common substitution.

Accordingly, the Expert finds that the Complainant has proved to the satisfaction of the Expert that it has Rights in a name or mark which is identical to the Domain Name.

Abusive Registration

Paragraph 1 of the Policy defines "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;

This general definition is supplemented by paragraph 3 of the Policy which provides a non-exhaustive list of factors which may be evidence that the Domain Name is an Abusive Registration. Paragraph 4 of the Policy provides a similar non-exhaustive list of factors which may be evidence that the Domain Name is not an Abusive Registration.

In its very short Complaint, the Complainant does not address itself to the general definition of Abusive Registration or indeed to any of the non-exhaustive factors. It merely states, without providing supportive evidence, that the Respondent is a competitor of the Complainant and that the Domain Name is being used in an attempt to attract the Complainant's trade customers to the Respondent's website by way of the Complainant's well-known brand name. This is not much for the Expert to go on and many an expert under the Policy might have decided to look no further, being perfectly entitled to review the Complaint alone and ultimately refuse it for want of evidence. However, as noted above, the Expert has chosen to review the websites relied upon by the Complainant in its submissions. Having done so, the Expert has found reasonable evidence to support the Complainant's assertion of Abusive Registration, as will be outlined below.

First, the Expert must consider whether there is support for the submission that the Complainant's brand name is well-known. The Expert notes that the Complainant's website states that its UK arm began trading in 2004. This is also supported by the Complainant's incorporation date. The Complainant's website features a golden seal image indicating that it is celebrating "10 years of Aqua One in the UK". The Expert is therefore prepared to accept that the Complainant has been distributing its "Aqua One" branded products for more than a decade, being sufficient time for a degree of goodwill and reputation to have developed among the aquatic trade, who are its intended customers.

As noted in the Factual Background section above, it is clear to the Expert that although the Respondent is a private individual, she is closely connected to ALF, the company represented on the website to which the Domain Name is currently pointing. From a comparison with the Complainant's website it is also clear to the Expert that ALF is a direct competitor of the Complainant. The intended customers of both companies are substantially the same. Accordingly, the Respondent's registration of the Domain Name some four years after the Complainant entered the UK market does not appear to the Expert to be an unrelated coincidence.

The Expert notes that the Domain Name is being used as a forwarding domain; in other words, it is not ALF's primary business domain name, which the links on ALF's site show to be <alf ltd.co.uk>. Nor does the Domain Name

appear to correspond to any business or trading name used by the Respondent or ALF. In fact, there does not appear to be any reference whatsoever on ALF's site to the term "Aqua One", such that the impression left with the Expert is that it is merely intended for the purpose of funnelling additional traffic to the site. There is therefore no reason apparent to the Expert for the Respondent's selection and use of this name other than that contended by the Complainant.

The circumstances identified by the Expert are broadly consistent with those outlined in paragraph 3(a)(ii) of the Policy, given that the Domain Name appears to be being used in a way which is likely to confuse businesses into believing that it is registered to or otherwise connected with the Complainant.

The Respondent has not filed a response to the Complainant's contentions and has not therefore provided any alternative explanation as to why she registered the Domain Name or, more importantly, why she is using it to point to ALF's website. The inference to be drawn is that there is no reasonable explanation available to her. The Expert notes in passing that Nominet not only notified the Complaint to the Respondent's address in the WHOIS but also to ALF's address, and that it was delivered successfully to both.

There is no evidence before the Expert that the Respondent could rely upon any of the factors in paragraph 4 of the Policy to demonstrate that the Domain Name is not an Abusive Registration. In these circumstances, the Expert finds on the balance of probabilities that the Domain Name, in the hands of the Respondent, is an Abusive Registration.

8. Decision

The Expert finds that the Complainant has proved that it has Rights in a name or mark which is identical to the Domain Name and that the Domain Name, in the hands of the Respondent, is an Abusive Registration. The Expert therefore directs that the Domain Name be transferred to the Complainant.

Signed

Dated 27 March, 2015

Andrew D S Lothian