

DISPUTE RESOLUTION SERVICE

D00018759

Decision of Independent Expert

Ski Rossendale Limited

and

Classic Tastes Limited

1. The Parties:

Lead Complainant: Ski Rossendale Limited
Haslingden Old Road,
Rawtenstall,
Rossendale
Lancs
BB4 8RR
United Kingdom

Respondent: Classic Tastes Limited
121 Burnley Road
Padiham
Lancashire
BB12 8BA
United Kingdom

2. The Domain Name(s):

skirosendale.co.uk (the “disputed domain”)

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 either or both of the parties.

19 April 2017 10:52 Dispute received
20 April 2017 09:09 Complaint validated
20 April 2017 09:16 Notification of complaint sent to parties
10 May 2017 02:30 Response reminder sent
12 May 2017 11:15 Response received
12 May 2017 11:15 Notification of response sent to parties
17 May 2017 02:30 Reply reminder sent
19 May 2017 10:55 Reply received
19 May 2017 10:56 Notification of reply sent to parties
23 May 2017 11:40 Mediator appointed
24 May 2017 16:45 Mediation started
14 June 2017 11:09 Mediation failed
14 June 2017 11:09 Close of mediation documents sent
26 June 2017 02:30 Complainant full fee reminder sent
27 June 2017 10:05 Expert decision payment received

4. Factual Background

4.1 This is an unfortunate dispute which has arisen between the organisation which operates the dry ski slope at Rossendale in Lancashire and one of the individuals, Ms Kerry Driver, who has until recently been closely involved in the enterprise. I have not found this an easy case in which to determine the relevant facts and my task has been made more difficult by the idiosyncratic way in which the parties have presented their submissions. In particular, some of the key contemporaneous material was produced by the complainant in reply and the respondent, rather than making her submissions conventionally in a separate document, has presented them as point by point responses inserted into a copy of the complaint. I have done my best to distil the facts from these materials but I should make clear at the outset that a degree of interpolation and interpretation has been required so there may be points at which the parties consider that I have not fully encapsulated the relevant materials. For this I apologise but I do not consider that the difficulties I have encountered have had any impact on my conclusions or my decision.

4.2 The dry ski slope in Rossendale opened in about 1973. As I understand it, it was owned and operated by a trust acting on behalf of the local authority. It operated until early 2011 at which point cuts in local authority funding resulting from the government's austerity programme meant that the authority could no longer afford to continue its operation. Various interested parties became aware of the impending closure of the slope at some point in 2010 and a number of groups began efforts to save the slope and keep it going after local authority funds ran out. Amongst the organisations which came into being was Ski Rossendale Social Enterprise. Four key individuals were the driving force of this organisation, David Fuller, Karon Driver and Steve and Sue Foulkes. All had considerable experience of running leisure activity centres. Mr Fuller had been with the slope since its inception and Ms Karon Driver since 1988 as an instructor. Mr and Mrs Foulkes were more recent additions to

the ski instructing staff at this particular slope. Together they set out to raise funds to continue the slope's operation and were clearly successful as the organisation they formed continues to operate the slope now. They are the directors of the complainant and I shall refer to them collectively as the directors in this decision.

4.3 It seems that a number of other organisations with the objective of saving the slope were formed by other individuals. These included Save Ski Rossendale and Save our Slope. Ms Kerry Driver, Ms Karon Driver's daughter, was one of the founders of Save our Slope. Kerry Driver appears to have worked with a further individual called Anthony Hill. Mr Hill seems to have had expertise in domain registration and website design. Along with many other interested locals, Kerry Driver and Anthony Hill attended a public meeting organised by the directors in January 2011 to announce their intention to acquire the Ski Rossendale slope, keep it in operation and improve its facilities to place it on a sounder financial footing. The projected improvements included the creation of a restaurant at the top of the slope which was to be extended upwards to increase its length. There was already a café at the existing top of the slope.

4.4 As the project to raise funds and set up an organisation to operate the Ski Rossendale slope gathered pace, it appears that Kerry Driver became increasingly closely involved. She appears to have been involved in setting up a Facebook page and a Twitter account for the project. I have been supplied with a number of documents from the initial effort to gain support for the slope including a corporate promotional package which explains the complainant's mission very clearly and presents potential sponsors with a variety of ways of obtaining commercial benefits.

4.5 Whilst the slope was being operated by the trust it had a website at ski-rossendale.co.uk. It seems that the trust required a significant price to hand over that domain. In addition, the complainant wanted to distance itself from the previous operator of the slope. A decision appears to have been made to set up a new website at the disputed domain. It is unclear to me precisely what Kerry Driver's involvement in this was. The registration of the disputed domain seems to have been done by Anthony Hill, apparently at Kerry Driver's request, following a discussion with her mother. I have seen the minutes of a subsequent meeting discussing the development of the slope's online presence attended by Mr Hill, Rob Ainslow and Peter Linsley on 16 July 2011. Kerry Driver was not present at this meeting and does not appear to have been involved in the activities discussed. It is clear from these minutes that the disputed domain was considered to be the "official" site of the enterprise and that it was also to be used for email addresses of the employees and volunteers working at or with the slope.

4.6 The complainant says that the disputed domain was registered to promote it and its products in preparation for the opening of Ski Rossendale in September 2011. Kerry Driver has produced invoices totalling £350 in 2011 from Hill & Associates addressed to her at Classic Tastes for "Design" (there are two separate charges for design) and "6 months web hosting and email accounts". It is unclear whether Hill & Associates is Mr Andrew Hill but that would seem probable. It is unclear whether these invoices were paid as there are no receipted copies or other evidence of payment in the materials I have seen. The complainant says that it has met all subsequent web hosting charges and has produced two sample invoices one from 2011 and one recent

one to show this. Kerry Driver has produced no evidence that she ever asked the complainant for payment of the invoices from 2011.

4.7 Kerry Driver says that the disputed domain and Save our Slopes domains were registered by Mr Hill at her request in 2010 and websites designed for them as sites for the purpose of the campaign to save the Ski Rossendale slope. She says she paid Mr Hill to design two sites, one for each domain and that these are the charges for which she has produced invoices (but no evidence of payment). She specifically denies that the disputed domain was registered for the purpose of being used by the complainant even though all the evidence indicates that it has been so used since before the slope was reopened. It is not clear to which of the two domains the charge for web and email hosting relates.

4.8 Classic Tastes is the name of the business (which may be a limited company) run by Kerry Driver providing catering services. It is unclear whether this is simply the name of the business which ran the café at the ski slope or has a wider sphere of operations. In any event it seems to be the vehicle Kerry Driver uses for the business of the café. I note in passing that the WHOIS search for the disputed domain from December 2012 which I have been given shows the registrant as “Classic Tastes” (without any reference to Limited) and notes that the registrant is a non-trading individual who has opted to keep their address off the WHOIS service. That is clearly a mis-statement as Classic Tastes is not an individual and is clearly a trading entity of some kind. Kerry Driver has not explained how this came to be. Kerry Driver has produced a screen shot of Classic Tastes’ website promoting the café on the slope which contains a link to the website hosted on the disputed domain as the website of the complainant.

4.9 After the initial successful relaunch of the slope in late 2011, it appears that Kerry Driver through Classic Tastes rented the café on the slope and provided a range of catering and party services from it. I have no information about how well this business performed but I have been shown various documents which indicate that a rent of £500 per month was to be paid for the café premises. Some of this has been paid but part of the present dispute appears to arise from Kerry Driver’s dissatisfaction with the quality of the premises provided, works to which disrupted the business from time to time and a dispute about whether Classic Tastes was given rent abatements at certain points. For present purposes it is sufficient to note that the complainant asserted to her that there were by the end of 2016, when Classic Tastes relinquished the operation of the café, rent arrears of approximately £10,000. Kerry Driver denies this claiming that the difference arises from abatements or allowances that were given. No documentation relating to this has been produced by either side although in the course of the debate between the parties Kerry Driver has asserted that she has such material. I cannot and do not need to resolve this dispute.

4.10 It seems that the complainant knew that Kerry Driver and Mr Hill had been involved in registering the disputed domain and setting up the website hosted on it and assumed that this had been done on behalf of the complainant. It is unclear when it became known to the complainant that the registrant of the disputed domain was not the complainant but Classic Tastes. The parties agree that a request was made more than 12 months ago for the disputed domain to be transferred to the complainant. The complainant says that Karon Driver (presumably after speaking to Kerry Driver) said

that this would present no difficulties but it has not been done. Kerry Driver says that she never refused to transfer the domain but has always sought an agreement of the terms on which this should be done. It seems likely that it is her demand for money in return for the transfer which is the key event leading to the present dispute about the transfer. Kerry Driver seems to suggest that she is entitled to payment because it was through her efforts that the website on the disputed domain built up a following and a high Google ranking. She has produced no evidence to support this assertion and it is notable that the money she is demanding is not for such services but for “rental” of the disputed domain at £7.50 per week from its inception to the present date. I have been provided with an invoice dated in 2017 from “Classic Tastes trading as Craft” for rental at this rate from 3 September 2011 to 11 March 2017 totalling £2588.00 including VAT. Kerry Driver says that this invoice was produced on advice that she should put her claim in writing. She does not give the source of the advice.

4.11 In 2013 the complainant applied for and obtained a trade mark registration for the mark “Ski Rossendale” in Class 41 for “ski schools, ski-ing facilities (provision of), ski-ing instruction”. That registration is in force and Kerry Driver has not challenged its validity.

4.12 The parties’ relationship seems to have broken down at some point. Classic Tastes relinquished operation of the café on the slope at the end of 2016 and the parties have been bickering about the transfer of the disputed domain and their competing claims of unpaid debts since then. The dispute came to a head when Kerry Driver threatened to and subsequently did arrange for the suspension of the disputed domain unless her financial demands were met. As a result the complainant’s website and emails on the disputed domain were rendered non-functional and the complainant has been forced to set up an alternative service on skirossendale.org, no doubt, it hopes, temporarily. The complainant says that it is clear from telephone communications it has received that members of the public have tried to contact it using its email addresses on the disputed domain and do not understand why those emails have gone unanswered. This it says has caused damage and disruption to its business.

5. Parties’ Contentions

5.1 The parties have presented their cases without the benefit of professional advice. I am therefore left to deduce what their contentions are by reference to their allegations about the facts and circumstances.

5.2 It seems to me that the complainant’s contentions are that the disputed domain was originally registered for it and should have been registered in its name or held on its behalf. Consequently, when it requested that the disputed domain be transferred into its name, that should have followed without demur. The complainant says that it has used the disputed domain exclusively to host its website and email service and paid for the upkeep of those services. The complainant further says that by causing the respondent to suspend the disputed domain when her financial demands for its transfer to the complainant were not met, Kerry Driver has used the disputed domain to disrupt and damage the complainant’s business.

5.3 The complainant asserts that it has rights arising both from its trade mark registration for the name Ski Rossendale and that it has become well known under and by reference to that name as a result of trading since the autumn of 2011.

5.4 The respondent's contentions as advanced in the response, which clearly comes from Kerry Driver personally, are that the disputed domain was not registered for the benefit of the complainant and, presumably, that the respondent is entitled to retain the disputed domain until a suitable financial settlement is reached. It is in effect being said that the disputed domain was registered as a campaigning domain and that it has been used by the complainant since the business started only with the permission of the respondent which can be withdrawn if the respondent chooses. The suspension of the disputed domain was done only after a warning that this would follow if agreement was not reached. It is presumably asserted that this conduct is justified by reason of the fact that the financial demands are reasonable.

6. Discussions and Findings

Introduction

6.1 An Abusive Registration is defined by paragraph 1 of the current version of the DRS Policy as being one which

- “(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 took unfair advantage of or is unfairly detrimental to the Complainant's Rights.”

Rights are defined under paragraph 1 of the DRS Policy as meaning “rights enforceable by the Complainant, whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning.”

6.2 Paragraph 5 of the DRS Policy sets out a non-exhaustive list of matters which may constitute evidence of Abusive Registration. This is an unusual case in which it seems to me that none of those matters applies directly to the facts of the present case. The Expert Overview makes clear that the matters set out in paragraph 5 (formerly 3) of the Policy are a guide only: see paragraph 3.1 of the Overview. The limiting factor is the definition of an Abusive Registration in paragraph 1, quoted above. It seems to me to follow that circumstances which are prima facie within the scope of the definition and are analogous to those specifically covered by the guidance in paragraph 5 are sufficient to justify the conclusion that a registration is an Abusive Registration.

6.3 Thus, Paragraph 5.1.1 identifies three circumstances relating to the registration or acquisition of a domain which indicate that that registration or acquisition is Abusive. The activities identified, however, are ones which are capable of being carried out subsequently to the act of registration or acquisition by a party who has previously co-operated in relation to use of a disputed domain but has subsequently fallen out with the complainant. Thus, one circumstance is the registration of a

domain for the purposes of selling it to the complainant for a price exceeding out of pocket expenses (paragraph 5.1.1.1). Another is registration for the purposes of unfairly disrupting the complainant's business (paragraph 5.1.1.3). The circumstances of the present case are ones where those intentions could readily have been formed after registration and where putting them into effect has a very damaging effect on the complainant's business.

6.4 In my view it is sufficient for a registration to be an Abusive Registration that it is currently being used in a way which takes unfair advantage of the complainant's rights or is unfairly detrimental to those rights where the parties (complainant and registrant) were co-operating in the use of the domain but have fallen out leading the registrant to act in those ways. The registration may not originally have been Abusive within the DRS Policy definition but has become so as a result of the registrant's use (or more accurately abuse) of it.

6.5 Paragraph 5.1.5 of the DRS Policy identifies a further indicator of an Abusive Registration. It is that the domain was registered as a result of a relationship between the complainant and respondent and the complainant has used the domain exclusively and paid for its registration and/or renewal. Again, it seems to me that by analogy this should apply to circumstances in which the complainant has used the domain exclusively and paid for the upkeep of the services hosted on it. That the respondent may, without telling the complainant, have paid for a registration renewal ought not to be the determining factor. The payment of upkeep fees for services hosted on a domain used exclusively by the respondent is equally an indication that the parties intended the domain to be that of the complainant.

The complainant's rights

6.6 It has repeatedly been stated in DRS appeal decisions and is recorded in the Expert Overview that the establishment of Rights sufficient to satisfy the requirement of the DRS is a low threshold test. In the present case there can be no doubt that the complainant has established that it has rights. It has a trade mark registration for a mark corresponding to the disputed domain and has clearly traded and acquired goodwill under and by reference to that name and mark. Indeed, so far as I can see the respondent does not dispute this, simply asserting, incorrectly, that the existence of the trade mark registration is irrelevant to the present dispute.

6.7 A feature of this case is that, if the complainant's allegations are correct, the disputed domain was originally registered for the benefit of and use by the complainant. That seems to me to raise a prima facie case that the respondent holds the registration of the disputed domain on an implied or constructive trust for the complainant and is under an obligation to permit the complainant to be entered on the register as the registrant of the disputed domain if and when the respondent requests it to do so. The only possible restriction on that right is an obligation to meet the respondent's out of pocket expenses in obtaining the registration. But that obligation must itself fall to be offset against any expenditure the complainant is forced to make in order to recover the registration of the disputed domain should the respondent refuse to transfer it on demand. It seems to me that a right to call for the transfer of a disputed domain in such circumstances is a right enforceable in English law and thus capable of constituting rights for the purposes of the DRS Policy.

Abusive Registration

6.8 As I noted at the outset, this is an unfortunate dispute. It ought to have been capable of resolution between the parties and it is unclear to me why this has not happened. Be that as it may, I cannot and do not need to determine why the parties are in dispute. I need only to determine whether the disputed domain is an Abusive Registration within the definition in paragraph 1 of the DRS Policy.

6.9 Having reviewed the materials I cannot accept the respondent's contention that the disputed domain was registered as a campaigning site and not for the complainant to use as the home for its website and emails. There are two primary reasons for my conclusion. The first is that the respondent's assertions make no sense. Why register two separate domains for the purposes of promoting a campaign to save the Rossendale Ski slope? Common sense suggests that one wants a single point of contact or reference for potential and actual supporters. Having more than one can only confuse them and dilute the effectiveness of the promotional activities. Indeed, one of the striking features of the materials I have been given is that the initial existence of more than one campaign to save the slope had precisely this effect and one of the things that the directors had to do was to bring the campaigns together into a single, coherent whole. Much of the minutes of the Communications meeting in July 2011 were directed to producing a coherent and effective public online and offline presence for the campaign to support and re-open the ski slope. It makes no sense for two separate domains to have been registered as campaigning domains. It seems to me that the more likely reasoning behind the registration of two domains was that the complainant needed a domain for its name to use as its "official" website and email location and that Kerry Driver wanted to have a separate campaigning site called Save Our Slope. That would explain why there are two sets of design fees for two separate websites, only one of which was that of the complainant itself.

6.10 The second reason for my conclusion is that it is clear beyond reasonable argument on the materials that I have been shown that the complainant has used the disputed domain as the location of its website and emails since it began its operations. Further, Kerry Driver and Classic Tastes have actively supported and promoted that presentation. It is notable that the minutes of the meeting in July 2011 record that the disputed domain was to be used as the official email address for the activities of the business. That is clearly what was intended when the domain was originally registered and what has happened ever since. The respondent has produced examples of what Kerry Driver claims are uses of the disputed domain as a campaigning domain and thus not the home of the complainant. I have reviewed these. They seem to me to be uses of the disputed domain to provide a link for people interested in supporting the campaign to save the slope to sign up and pledge their support, whether in terms of activity or finance. That usage is at least as consistent with the view that the disputed domain was to be the official home of the complainant as with the proposition advanced by the respondent. Accordingly, these examples do not in my view support the respondent's case.

6.11 It therefore seems to me to be clear that the disputed domain was originally registered to be used by the complainant as its home domain and that it has been used for that purpose ever since. That must therefore have been the respondent's intention

when the registration was made, whatever Kerry Driver now says (or indeed believes). It follows in my view that the Respondent either holds the registration of the disputed domain on trust for the complainant or should be treated as doing so.

6.12 It is possible that Kerry Driver arranged for the disputed domain to be registered or transferred to Classic Tastes for the purposes of holding the complainant to ransom in due course if she chose but I do not think that this is likely to have been the case. It seems to me to be far more likely that she arranged for this simply as a matter of personal convenience, probably because her campaigning domain was also registered in that name. Again, however, I cannot determine this and do not need to do so.

6.13 The question I have to determine is whether the way in which the respondent through the person of Kerry Driver has acted since the dispute between the parties arose has made the disputed domain an Abusive Registration.

6.14 In my view it clearly has. The respondent has presented a substantial invoice for “rental” of the domain since it was first registered as the price of transferring it to the complainant. This has no apparent justification (it certainly bears no relationship to any costs incurred by the complainant) and seems to have been a demand made by an angry or embittered disputant in the hope of getting some money in return for transferring the disputed domain when the complainant requested it. Further, if I am correct in my conclusion that the registration of the disputed domain is held on trust for the complainant, the refusal to transfer the domain without payment was a breach of trust. That renders the registration Abusive because it is a direct attack on the complainant’s right to be recorded as the registrant of the disputed domain.

6.15 The respondent’s further act of threatening to and then suspending the disputed domain to apply pressure to the complainant to meet its financial demands seems to me to be close to an act of blackmail. It is certainly an act which is unfairly detrimental to the complainant’s rights. That this is so is demonstrated by the loss of emails and business which the complainant must have suffered as a result. It is also self-evidently damaging to the complainant’s reputation and goodwill under the name Ski Rossendale.

6.16 Finally, it seems to me that the requirements of paragraph 5.1.5 of the DRS Policy are applicable either directly or by analogy to the present case. The evidence presented to me clearly shows that the disputed domain was registered for the complainant to use, that it has used it exclusively and that it has paid for the upkeep of the services provided on it. Accordingly, in the respondent’s hands, it is Abusive. This is the effect of the registration of the disputed domain being held on trust for the complainant. Any obligation that the complainant might have had to meet the respondent’s out of pocket expenses before being entitled to the transfer has been over-reached by the payment of the expert decision fee which has been required to obtain my decision.

6.17 I have accordingly concluded that, whatever the position when the respondent originally registered or acquired the disputed domain, it has become as a result of the respondent’s activities in relation to it, an Abusive Registration within the meaning of that term in the DRS Policy.

7. Decision

7.1 I direct that the disputed domain, skirossendale.co.uk, be transferred to the complainant, Ski Rossendale Limited.

Signed: Michael Silverleaf

Dated: 23 July 2017