

DISPUTE RESOLUTION SERVICE

D00020278

Decision of Independent Expert

Aston Barclay

and

Ms Hazel Barrett

1. The Parties:

Complainant: Aston Barclay
Aston Barclay
Drovers Way
Chelmsford
Essex
CM2 5PP
United Kingdom

Respondent: Ms Hazel Barrett
Aston Barclay UK Limited
Northampton
Northamptonshire
United Kingdom

2. The Domain Name:

astonbarclay.co.uk

3. Procedural History and Procedural Matters:

3.1 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 a such a nature as to call in to question my independence in the eyes of one or both of the Parties.

3.2 Timeline

On 5 June 2018, the dispute was received. The Complaint was

validated on 11 June 2018 and notification of the Complaint was sent to the Parties. On 28 June 2018, a Response reminder was sent to the Respondent.

The Respondent failed to submit a Response within the prescribed timeframe under the Policy and so on 3 July 2018, a notification of no Response was sent to the Parties. On 13 July 2018, payment for an Expert decision was received and on 18 July 2018 the Expert, Ravi Mohindra, was appointed.

4. Factual Background

4.1 The Complainant is a car auction business, with centres in Chelmsford (Essex), Leeds (Yorkshire), Prees Heath (Shropshire) and Westbury (Wiltshire) and a megacentre at Donington Park (East Midlands).

4.2 The Domain Name was registered on 17 May 2007.

5. Parties' Contentions

Expert's Introductory Comments

5.1 The Complaint in this case is extremely brief and is one of the shortest complaints I have seen in a DRS case. Whilst brevity and simplicity are to be encouraged, the only submissions in front of the Expert in order to decide a case brought under the DRS Policy are those made by the parties. All parties should therefore set out their case in sufficient detail and merit in order to give them the best possible chance of success.

5.2 Nominet has helpfully set out guidance notes for parties considering making a complaint under the DRS and also for those who have received a complaint against them under the DRS. In the event that a party wishes to make a complaint under the DRS, it does so by filing a complaint with Nominet using Nominet's online system. In circumstances where that system detects that a complaint is very short or is unaccompanied by evidence, the system will, before accepting a complaint, generate a warning and invite a prospective complainant to reconsider whether it has properly explained its case, and allow the draft complaint to be amended. That warning is in the form of a notice from the Chair of Nominet's Appeal Panel of Experts. It is referred to in this decision as a "Chair's Warning". It states as follows:

"Warning from Nick Gardner, the Chairman of our Independent Experts, in relation to short or unsupported complaints:

You are receiving this warning as the complaint that you are submitting contains less than 500 words and/or has no evidence attached to it.

One of the challenges that the Independent Experts face is deciding cases where they have been provided very little information to go on

and/or no evidence to back up what is being alleged. Surprisingly many cases fall into this category.

It does not mean that your complaint will fail, it simply means that it is less likely to contain the detail or evidence required to enable the Independent Expert to give full weight to the case you are seeking to make.

Remember that in the DRS we do not check your complaint or decide how to deal with it. The way that this system works is that it is your duty (as the Complainant) to prove your case on the “balance of probabilities”. This means that, if your case does come before one of the Experts, you have to prove to them that it is more likely than not that:

you have rights in respect of a name or mark which is identical or similar to the Domain Name; and

the Domain Name, in the hands of the Respondent, is an Abusive Registration.

The meaning of “Rights” and “Abusive Registration” is given in the DRS Policy.

The Expert will only see your written submissions and supporting evidence. You do not have the chance to talk to the Expert, and they are not required to research the case. Anything you want the Expert to consider should be provided in the Complaint and its supporting evidence.

We would encourage you to look at your complaint to see if it sets out the required information and is adequately supported by documentary evidence.”

The Complainant proceeded to file the Complaint in the form set out below after receiving this warning.

- 5.3 With all of this material available to the Complainant, I am surprised that, having gone to the effort to bring a complaint under the DRS, and having been issued with a Chair’s Warning prior to final submission of its Complaint, it has submitted such a short Complaint with no evidence to support its assertions. In any event, I am required to decide the complaint on the basis of the parties’ submissions and the Policy.
- 5.4 Considering all of this, and in light of the fact that the Respondent has not filed a Response, I set out the Complaint in full below:

The Complaint

What rights are you asserting?

Aston Barclay is a car auction business that has been running since 1984. We operate from five strategically located auction centres in Chelmsford (Essex), Leeds (Yorkshire), Prees Heath (Shropshire) and Westbury (Wiltshire) and our Mega Centre at Donington Park (East Midlands).

Prior to myself the business had no IT director and consequently did not realise the importance of correct domain names and rights of businesses to obtain these.

Why is the domain name an Abusive Registration?

I'm raising this complaint as www.astonbarclay.co.uk is clearly not an established business and appears to have registered this domain for non-business purposes. This domain is impacting AstonBarclays (*sic*) web presence and search optimization.

How would you like this complaint to be resolved?

Transfer

Additional Complainants:

[no additional complainants]

As far as you are aware have any legal proceedings been issued or terminated in connection with the domain name?

[answered no]

Are there any web pages that support this dispute?

- www.astonbarclay.net

[end of submission]

The Respondent

5.5 As noted above, the Respondent did not file a Response in this case.

6. Discussions and Findings

General

6.1 For the Complainant to succeed with its Complaint it is required under paragraph 2.2 of the Policy to prove to me, the Expert, on the balance of probabilities, 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.

Complainants' Rights

- 6.2 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*". Rights may be established in a name or mark by way of a trade mark registered in an appropriate territory, or by a demonstration of unregistered so-called 'common law rights'.
- 6.3 Further, it is well accepted that the question of whether the Complainant has Rights falls to be considered at the time that the Complainant makes its Complaint and is a test with a low threshold to overcome.
- 6.4 The Complainant has made no assertion that it holds any registered trade mark rights in relation to its trading name "Aston Barclay", or indeed any other term. In addition, the legal status of the Complainant is unclear (i.e. whether it is operating as a limited company, a sole trader, a partnership, an individual or some other kind of entity) and there is nothing in the Complaint to show that the Complainant holds a company name registration incorporating the term "Aston Barclay".
- 6.5 The only assertion the Complainant has made in relation to Rights is that Aston Barclay, a car auction business, has been running since 1984. I assume, therefore, that in order to prove its case in respect of Rights, the Complainant is claiming that it has some kind of enforceable unregistered or common law rights in respect of the name "Aston Barclay" through use of the term by it since that date.
- 6.6 On this point I have referred to Paragraph 2.2 of the Expert's Overview¹ which observes:

"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

¹ The Experts' Overview is a document which sets out, discusses and provides guidance on common issues that come up in DRS proceedings. It is readily found on Nominet's website under the heading "UK Domain Name Disputes" at <https://s3-eu-west-1.amazonaws.com/nominet-prod/wp-content/uploads/2017/09/20161122/expert-overview.pdf>

promotional expenditure, correspondence/orders/invoices from third Parties and third party editorial matter such as press cuttings and search engine results).”

- 6.7 The Complainant has failed to submit any such evidence in support of its Complaint and the assertions made in it with respect to Rights. No information is given about the size or scale of the Complainant’s business other than it operates in 5 different locations. Were it not for the reference to the website operated under the domain name <astonbarclay.net> the Complaint would have failed at this hurdle.
- 6.8 Paragraph 18 of the Policy makes it clear that it is the Parties’ responsibility to explain all the relevant background facts and other circumstances applicable to the dispute in their submissions, and to support those submissions with appropriate evidence. However, paragraph 18.1 affords me, as the Expert, the option (in my entire discretion) to check any material which is in the public domain, in the context of making a decision under the Policy.
- 6.9 I have exercised this discretion in relation to the website under the <astonbarclay.net> domain name. That website displays content relating to a car auction business which is operated under the name “Aston Barclay” and the home page displays an address which matches the address provided by the Complainant in this case. Whilst the WHOIS information for this domain does not publish the registrant’s name or address, it does show that the domain name was registered on 27 November 2008.
- 6.10 I am therefore prepared to find a link, albeit a marginal one based on the Complaint, between the name “Aston Barclay” and the Complainant. On the basis that the establishment of “Rights” for the purposes of the Policy is a low threshold test, I am prepared to accept that the Complainant has Rights in the term “Aston Barclay” and that this term is identical to the Domain Name (excluding the generic .co.uk suffix).
- 6.11 Overall, however, the Complainant’s case on Rights as set out in its Complaint is extremely weak given the lack of detail provided in the submissions and the lack of supporting evidence. This has a bearing on the outcome of this case as the weaker the rights, the less well-known a complainant’s name is likely to be and the less likely it is that any respondent would have had actual or at least constructive knowledge of those rights enjoyed by that complainant at the time that the respondent registered the domain name in dispute. Had the Complainant followed the guidance available to it prior to submitting its Complaint and taken the time to set out its case in more detail, it may have been able to make out stronger and more compelling arguments relating to Rights.

Abusive Registration

- 6.12 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 took unfair advantage of or has been unfairly detrimental to the Complainant’s Rights.*
- 6.13 Paragraph 5 of the Policy sets out a non-exhaustive list of factors which may be evidence that the Domain Name is an Abusive Registration. Paragraph 8 of the Policy sets out a non-exhaustive list of factors which may be evidence that a Domain Name is not an Abusive Registration.
- 6.14 With regard to Abusive Registration, the Complainant simply asserts that there is no established business operated under the Domain Name and that the Respondent appears to have registered the Domain Name for non-business purposes. There is no evidence to support any of these allegations, although I note that the website to which the Domain Name resolves simply states “Unknown URL”. In any event, it is not automatically unfair or abusive to register domain names for non-business purposes, nor is it automatically unfair or abusive to register a domain name and then not operate an active website under it.
- 6.15 Further, I note that the Respondent is listed as an individual with an address which incorporates a limited company with a name of “Aston Barclay UK Limited” and which is based in Northampton, UK. The name of this company includes the term “Aston Barclay”, which is also the term incorporated in the disputed Domain Name.
- 6.16 In light of this fact, I have again exercised my discretion under paragraph 18.1 to check publicly available information relating to this company. A free search of the UK Companies House database shows that Aston Barclay UK Ltd was incorporated on 16 March 2007 and its nature of business is given as “Other human health activities”. Its registered office address is in Northampton and the current sole director of the company is listed as Hazel Barrett, this being the same name as the Respondent in this case. The company has filed various documents at Companies House since its incorporation, including sets of accounts which show some trading history.
- 6.17 Whilst a Google search of the words “Aston Barclay UK Ltd Northampton” reveals results for the Complainant’s business, it also lists some business directory results for an alternative medicine and laser clinic business in Northampton under that name.

- 6.18 It is therefore clear to me that there is some kind of active business, not relating to the Complainant, that has been operating under a UK limited company since 2007 and which includes the term “Aston Barclay”. The Complainant has failed to deal with any of these issues relating to the link between the Respondent and this business, whose director has the same name as the Respondent.
- 6.19 Whilst this business has a name which incorporates the same term “Aston Barclay” that the Complainant uses for its own business, the Complainant’s Rights in relation to this name as I note above are weak and therefore, based on the submissions made in the Complaint, the name is certainly not well-known as being exclusively related to the Complainant. Where the name in which a complainant has Rights is less well known and/or where there are other uses being made of the name, including by a respondent, this will require substantial evidence from such complainant to prove that the domain name is dispute is abusive. The Complainant in this case has failed to provide any such evidence. Indeed, in light of the searches I have made, the Complainant’s assertion that there is no established business operated under the Domain Name is unsubstantiated and most likely false.
- 6.20 The Complainant also asserts that the Domain Name is impacting its web presence and search optimisation. In this regard, the Complainant appears to rely on the factor set out in paragraph 5.1.1.2 of the Policy which states:
- “5.1.1 Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily:*
- 5.1.1.2 for the purpose of unfairly disrupting the business of the Complainant”*
- 6.21 Without any supporting evidence or submissions beyond those made by the Complainant in its very brief Complaint, I cannot make a finding of Abusive Registration based solely on this assertion. The domain name system operates on a first-come first-served basis and with nothing which shows (i) how in practice the Complainant and its business is suffering as a result of the Respondent’s registration of the Domain Name, and (ii) that the Respondent would have been aware of the Complainant and its Aston Barclay name at the time of its registration of the Domain Name, the Complainant has not satisfied the elements required to prove Abusive Registration.
- 6.22 It may well be that if the Complainant had followed the guidance available to it as a party to a DRS proceeding and more fully explained its case together with providing evidence to support its submissions, it could have prevailed. As the Appeal Panel stated in the case of <fastbracesisleofman.co.uk> (DRS 17552):

“It is incumbent upon a complainant to make out its case properly and with a clear explanation as to the nature of the case, and with appropriate supporting evidence. A complainant that fails to do so should not be surprised if its complaint fails. All of this is clearly explained on Nominet’s website.”

The Appeal Panel in that case goes further to state:

“It is not for an expert or the Appeal Panel to infer or guess what case a complainant may have been able to make had it explained matters more clearly, nor is it for an expert or the Appeal Panel to carry out further research to make good any deficiencies in a complaint.”

- 6.23 Unfortunately for the Complainant, its Complaint is deficient in many aspects. As a result, it has failed to make out its case in relation to Abusive Registration as it is required to do so under the Policy in order for it to be successful with the remedy that it seeks, namely transfer of the Domain Name.

7. Decision

- 7.1 The Complainant has established that it has Rights in respect of a name or mark which is identical to the Domain Name. However, I do not find that the Domain Name in the hands of the Respondent is an Abusive Registration.
- 7.2 Accordingly, the Complaint fails and I direct that no action be taken with respect to the registration of the Domain Name <astonbarclay.co.uk>.

Signed

Ravi Mohindra

Dated

8 August 2018