

DISPUTE RESOLUTION SERVICE

D00021248

Decision of Independent Expert

Kaviari SAS

and

Shah Caviar Limited

1. The Parties:

Complainant: Kaviari SAS
Paris
France

Respondent: Shah Caviar Limited
London
United Kingdom

2. The Domain Name(s):

kaviari.co.uk

3. Procedural History:

The Expert has confirmed (1) he is independent of each of the parties; and (2) to the best of his knowledge and belief, there are no facts or circumstances, past or present, or that could arise in the foreseeable future, which need to be disclosed because they might be of such a nature as to call into question his independence in the eyes of one or both of the parties.

21 March 2019 13:33 Dispute received
21 March 2019 16:16 Complaint validated
25 March 2019 16:16 Complaint validated
25 March 2019 16:17 Notification of complaint sent to parties
11 April 2019 02:30 Response reminder sent

11 April 2019 11:38 Response received
11 April 2019 11:39 Notification of response sent to parties
18 April 2019 02:30 Reply reminder sent
23 April 2019 10:25 No reply received
23 April 2019 10:28 Mediator appointed
29 April 2019 11:55 Mediation started
15 May 2019 14:21 Mediation failed
15 May 2019 14:22 Close of mediation documents sent
17 May 2019 11:09 Expert decision payment received

Note: Although the Complainant refers in its Complaint to a second domain name, kaviari.uk, which it assumes is also owned by the Respondent, the Complaint is only brought against the Domain Name, kaviari.co.uk. This decision is therefore confined to that Domain Name.

4. Factual Background

The Complainant is a company apparently registered in France, and based in Paris, which sells caviar and other premium seafood. The current Respondent is a company apparently registered in England and Wales, with an address in Battersea, SW London.

The Domain Name was registered on 12 February 2013. At the date of this decision it points to a contact web page for “Kaviari Consulting Limited”, giving the options of calling a landline number, or sending an email.

5. Parties’ Contentions

The Complainant

Rights

The Complainant says that it is a leading producer and retailer of caviar and other premium seafood. It relies upon three registered trademarks:

- a) International trademark registration no 776452 designating the UK; KAVIARI in class 29, filed on 20 September 2002;
- b) EU trademark registration no 10869634; KAVIARI in classes 29, 30 and 31, filed on 9 May 2012;
- c) EU trademark registration no 14404156; KAVIARI PARIS in classes 29, 30 and 31, filed on 23 July 2015.

It says the Domain Name is identical to its registered trademarks.

Abusive Registration

The Complainant says it did not know the identity of the Respondent when it filed the Complaint, as it was not available from the Nominet whois search.

It points out that trademarks a) and b) above pre-date the registration of the Domain Name, on 12 February 2013. It says that the Respondent is not licensed or permitted to use the trademarks of the Complainant for the registration of domain names, and there is no relationship between the Respondent and the Complainant.

As of 21 March 2019, the Domain Name (and kaviari.uk) resolved to parking pages “with no further information”.

The Complainant submits that the use of a parking page does not constitute legitimate and non-commercial or fair use of the Domain Name and that such use constitutes use as a blocking registration against the marks in which the Complainant has rights contrary to paragraph 5.1.1.2 of the DRS Policy (“the Policy”).

The Complainant says that the Domain Name is an exact match to the Complainant’s marks in which it has rights, and which have a reputation. The Respondent has no reasonable justification for having registered the Domain Name, contrary to paragraph 5.1.6 of the Policy.

The Complainant therefore seeks transfer to itself.

The Respondent

In full, the Response from a Mr Benning, representing the Respondent, is as follows:

“This is a domain name is now representative of a consulting business 'Kaviari Consulting Limited'. It was actually bought several years ago and at the time the complainant knew that I owned this domain.

Therefore there is no reason that they should now lay claim several years later.

Furthermore I also owned another domain name 'enkdecaviar.co.uk' which I have let expire.

If the complaint wished to purchase the domain from me, I would consider selling it.”

Reply

The Complainant did not file a Reply.

Discussions and Findings

In order to succeed in its Complaint, in accordance with the Policy, the Complainant needs to establish:

- “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.”*

The Complainant needs to establish both elements on the balance of probabilities.

The definition of Abusive Registration under the Policy is as follows:

“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. is being or has been used in a manner which has taken unfair advantage of or has been unfairly detrimental to the Complainant's Rights”.*

The definition of Rights under the Policy is as follows:

“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

The Complaint provides minimal information about the Complainant itself, its reputation and the extent of its trading activity, describing it only as “a leading producer and retailer of caviar and other premium seafood”. It mentions its English language website www.kaviari.fr/en in its Complaint, “for reference”. The content of that website suggests that the Complainant may have unregistered trademark rights alongside its registered rights. However, the Complainant does not expressly rely upon any web pages to support its dispute, and has not explained what relevance the website has to its case. The only evidence it provides are copies of the certificates of registration of the three trademarks upon which it relies. The three trademark registrations are sufficient to give it Rights within the meaning of the Policy. The earlier two marks (for KAVIARI) are identical to the Domain Name, so the Complainant succeeds in establishing that it has Rights in a name or mark which is identical to the Domain Name.

The Respondent does not in any event appear to dispute the ownership of Rights.

Abusive Registration

On Abusive Registration, however, the Complainant’s lack of detail in its Complaint makes its task much more difficult. It needs to establish Abusive Registration on the balance of probabilities. It is not for the Expert to conduct investigations on the

Complainant's behalf, nor to make assumptions which are not supported by evidence of some kind.

The Complaint was filed at a time when the Complainant says that it did not know who the Respondent was. It could have contacted Nominet as a potential Complainant to ask for details of the Respondent, but apparently did not do so. The only evidence it had by way of use of the Domain Name was the parking page it pointed to at that time. The Complainant does not provide a screenshot of that page either. The screenshot obtained by Nominet when the Complaint was filed shows an advertisement from the Registrar 123.Reg for its Website Builder service. At the time of this decision the Domain Name now points to a contact page for "Kaviari Consulting Limited". Although the Expert cannot verify what the page originally said when the Complainant drafted its Complaint, it seems a reasonable assumption that it was the same as the screenshot taken by Nominet (the Complainant says the page had "no further information"). Therefore, the parking page did not provide links to (for example) competing websites.

The definition of "Abusive Registration" in the Policy requires the Complainant to show some unfair advantage or unfair detriment either at the time of registration or from subsequent use of the Domain Name. The Expert cannot see that the Complainant gets close to establishing either in this case. The Expert does not know what motive the Complainant is attributing to the Respondent. It would in any event be very difficult for the Complainant to establish a motive for the Respondent, if it did not know who the Respondent was. Use of a parking page per se, which does not take a potential customer of the Complainant to anywhere else, cannot be abusive. This seems to be the only "evidence" put forward by the Complainant as to the Respondent's actions (other than, of course, the act of registration itself). The Complainant therefore relies on either its argument as to Blocking Registration (paragraph 5.1.1.2), or its claim that its reputation is sufficiently well-established and that the Respondent had no reasonable justification for registering the Domain Name (paragraph 5.1.6). It is implicit in both those arguments that the Respondent acted in a way which was knowingly unfair to the Complainant at the time it registered the Domain Name.

As to the former, this must imply that the Respondent knew of the Complainant at the time it registered the Domain Name, but set out to deprive the Complainant of the use of the Domain Name. The Complaint does not begin to set out a case to support that argument (again, this would be difficult in the first place, if the identity of the Respondent is unknown). Why does the Complainant suggest that the Respondent wanted to block it from registering the Domain Name itself? Did the Complainant in fact have plans to use the Domain Name itself? If so, why has it waited until now (5 years later) to bring a Complaint? Delay is a relevant issue if the Complainant wants to argue that this is a Blocking Registration, and the Response refers to the Complainant laying claim to the Domain Name "several years later". However, the Complainant fails to address this issue at all.

As to the latter, much the same problems arise for the Complainant. Where is the evidence of the Complainant's reputation? Without it, the Expert cannot begin to assess whether it did have the reputation upon which it relies at the time of registration of the Domain Name. Why must the Respondent have known of the Complainant at the time it registered the Domain Name? As it happens, in its Response, the Respondent admits that it knew of the Complainant, but in the context of saying that the Complainant knew that he (Mr Benning) owned the Domain several years ago. He does not elaborate on that comment, and the Complainant has not sought to dispute it by way of reply. The onus is on the Complainant to establish a positive case on Abusive Registration, even where (as here) the Response is itself less than revealing. It is not for the Expert to speculate as to what circumstances led to the registration of the Domain Name. The Respondent has at least raised the suggestion that the Complainant either approved of or in some way acquiesced in the registration (which might have given it a "justification" for the registration), and the Complainant has not disputed this.

The Complainant has therefore failed to establish a case of Abusive Registration on the balance of probabilities based on either paragraphs 5.1.1.2 or 5.1.6 of the Policy, and the Complaint fails.

6. Decision

The Expert finds that the Complainant has Rights in the name or mark KAVIARI which is identical to the Domain Name. However, it has failed to establish that the Domain Name, in the hands of the Respondent, is an Abusive Registration. The Complaint therefore fails.

Signed Bob Elliott

Dated 15 June 2019