

DISPUTE RESOLUTION SERVICE

D00012592

Decision of Independent Expert

Marks and Spencer plc

and

Mr Graham Kenny

1. The Parties:

Complainant: Marks and Spencer plc
Waterside House
35 North Wharf Road
London
W2 1NW
United Kingdom

Respondent: Mr Graham Kenny
8 St. Pauls Road
Torquay
Devon
TQ1 3QF
United Kingdom

2. The Domain Name(s):

marksandspencer-ppi-reclaim.co.uk

3. Procedural History:

The procedural timeline in this case is as follows:

12 March 2013 13:22 Dispute received
12 March 2013 13:26 Complaint validated
12 March 2013 13:38 Notification of complaint sent to parties

02 April 2013 02:30 Response reminder sent
03 April 2013 15:07 Response received
03 April 2013 15:07 Notification of response sent to parties
08 April 2013 02:30 Reply reminder sent
10 April 2013 08:29 Reply received
10 April 2013 08:30 Notification of reply sent to parties
12 April 2013 12:44 Mediator appointed
15 April 2013 12:43 Mediation started
17 April 2013 15:00 Mediation failed
17 April 2013 15:00 Close of mediation documents sent
26 April 2013 15:05 Expert decision payment received
7 May 2013 Paragraph 13(b) submission received from the Respondent

I was appointed as Expert in this matter on 3 May 2013. 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, which need be disclosed as being of such a nature as to call in to question my independence in the eyes of one or both of the parties.

4. Factual Background

The Complainant is a well known and successful retailer operating from a large number of stores in the UK and elsewhere. It owns, among other trade marks, a UK trade mark No 1252067 MARKS & SPENCER in respect of goods in Class 25 but trades extensively under such names as “Marks & Spencer”, “M&S” and “Your M&S”.

The Respondent is running a business assisting people in bringing claims in respect of the mis-selling of financial products, including payment protection insurance, commonly referred to as “ppi”. The Respondent registered the Domain Name on 11 January 2012.

5. Parties’ Contentions

The Complaint

The Complainant makes the following points:

1. The Complainant provides evidence of a UK trade mark registration in respect of MARKS & SPENCER and refers to other dealings and trade marks in the UK and around the world.
2. The Domain Name has replaced the ampersand with an “and” but this is insufficient to distinguish the Domain Name from the Complainant’s Rights. The .co.uk suffix can similarly be disregarded.
3. The Respondent has registered the Domain Name to disrupt the Complainant’s business as per paragraph 3(a)(i)(B) of the DRS Policy. The webpage to which the Domain Name resolves encourages the public to make claims for mis-sold PPI compensation claims against

the Complainant. This is legitimate of itself but not if the Respondent uses the Complainant's trade mark.

4. The Respondent, contrary to paragraph 3(a)(i)(C)(ii) of the DRS Policy, is using the Complainant's trade mark so as to create an affiliation, association or relationship with the Complainant which does not in fact exist and which leads to the public's confusion.
5. The Respondent's actions in removing the logo and placement of a disclaimer are insufficient.
6. The Respondent cannot claim any justification under paragraph 4 of the DRS Policy. The Respondent is making unauthorised use of the Complainant's trade mark. The Domain Name is not generic or descriptive. The Domain Name is not suggestive of a criticism site.
7. There are two previous decisions under the DRS Policy against the Respondent: D00011478 and D0001286.
8. The Domain Name is part of a pattern of registrations within the meaning of paragraph 3(a)(iii) of the DRS Policy. The Complainant provides details of 26 such registrations. The webpages to which these domain names resolve are similar in most cases in that they use logos and colouring to create an impression of affiliation with the respective organisations.
9. There is no conceivable *bona fide* good faith reason for the Domain Name.

The Reply

The Respondent makes the following points:

1. The trade mark relied on by the Complainant is in respect of Class 25 goods and has nothing to do with the Respondent's trade viz. recovering compensation for the mis-selling of financial products such as payment protection insurance. No rights are being infringed.
2. The two previous decisions are not precedents and should not raise a presumption or inference. There are distinguishing features in this case: a disclaimer, exclusion of a logo, use of colouring and different fonts and case.
3. The Respondent's service is legitimate and regulated by the Ministry of Justice.
4. There is no evidence of confusion and the Complainant has not shown any likelihood of confusion.
5. Following correspondence there is a disclaimer on the webpage to which the Domain Name resolves. The other domain names referred to by the Complainant have nothing to do with trade marks in the category of clothing, boots, shoes and slippers. Other than the three other complaints, none of the other organisations has complained.
6. The Complainant does not offer a similar or competing service to that of the Respondent.

The Response

The Complainant makes the following points:

1. The Rights disclosed by the trade mark included as Annex 1 to the Complaint are sufficient for the purposes of the DRS Policy. The Complainant has trade marks in respect of financial services in Class 36.
2. While there is a disclaimer and the Complainant's logo has been removed, this is insufficient to create distinctiveness. The Respondent is still using a shade of green similar to the Complainant's branding. The use of the Complainant's trade mark in the Domain Name is not legitimate.
3. The Respondent's business might well be legitimate, but it is not legitimate to include the Complainant's trade mark in the Domain Name.
4. There is a likelihood of confusion.
5. The Respondent is wrong to emphasise the class of goods or services.
6. The Respondent has not produced evidence to justify its assertion of good faith use.

Paragraph 13(b) submission

On 3 May 2013, I allowed the Respondent to submit a further submission pursuant to paragraph 13(b) of the DRS Procedure. In that submission, the Respondent makes the following points:

1. The Respondent has made three changes: firstly, there is no logo; secondly, there is a uniform colour on each site which is not similar to the Complainant's trade marks and marketing materials and thirdly, there is a prominent disclaimer.
2. The changes made go beyond those considered in decision D00012328 and are intended to make it clear that there is no express or implied connection with the Complainant.
3. The only similarity now is to be found in the opening words of the Domain Name, which are there simply to prevent confusion.

6. Discussions and Findings

General introduction

I admitted a further submission from the Respondent under paragraph 13(b). In fact, it only describes the webpage to which the Domain Name resolves, which is something I am empowered to view in the course of coming to my decision (see paragraph 16(a) of the DRS Policy). In actual fact, I would have looked at the webpage to which the Domain Name resolved, and so the paragraph 13(b) submissions have not of themselves made any difference.

The Complainant must prove two matters in order to succeed in this Complaint: firstly, that it has Rights in respect of a name or mark that is identical or similar to the Domain Name (see paragraph 2(a)(i) of the DRS

Policy) and, secondly, that the Domain Name is an Abusive Registration in the Respondent's hands (see paragraph 2(a)(ii) of the DRS Policy).

"Rights" are defined by 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".

"Abusive Registration" is defined by the DRS Policy 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".

These elements must be proved on the balance of probabilities (see paragraph 2(c) of the DRS Policy).

Rights

The Complainant relies on its UK trade mark in respect of MARKS & SPENCER which appears as Annex 1 to the Complaint.

It also provides a list of similar trade marks registered in various countries around the world. It also describes itself as having a number of stores in the UK and elsewhere, without having provided any actual evidence of these assertions in the form of copy trade mark registrations or evidence of use.

The Respondent makes the point that the UK trade mark is in respect of Class 25 goods, namely "clothing, boots, shoes and slippers", whereas the Respondent's service is the business of recovering premiums and compensation consequent on the mis-selling of financial products. This is not a forum for dealing with trade mark infringement. The DRS Policy does not require such precision in identifying Rights which are identical with the business conducted under the Domain Name such as might be required in a trade mark infringement action.

Indeed, the threshold for establishing Rights, as established in most decisions under the DRS Policy, is relatively low, and I accept that the Complainant has proved on the balance of probabilities that it has Rights for the purposes of the DRS Policy.

Abusive registration

At the outset, it is worth emphasising that the DRS Policy defines Abusive Registration in two very different ways: either the original act of registration or acquisition took unfair advantage or was unfairly detrimental to the Complainant's Rights or the subsequent use made of it has taken unfair advantage of or has been unfairly detrimental to the Complainant's Rights.

In this way, it is possible for a domain name, legitimately registered or acquired, to become abusive in a respondent's hands by the way it is actually used or threatened to be used. On the other hand, a registration of a domain name may be abusive in and of itself even though it is intended to be used in a perfectly lawful manner.

It is this dichotomy which is illustrated by the facts of this case. The Complainant concedes, as it must, that the Respondent is perfectly entitled to conduct a business which advises members of the public on the conduct of claims relating to the mis-selling of financial products including payment protection insurance. This can include claims against the Complainant or indeed any other organisation. However, the Complainant's objection is to the use of its trade mark in the Domain Name.

The Respondent's case is to stress that there is no real likelihood of confusion and it points to the changes it has made to the webpage to which the Domain Name resolves. To illustrate this, I attach as Annex 1 to this Decision a copy of the relevant webpage printed to pdf format as at 6.45pm on 20 May 2013 ("Webpage"). As the Respondent observes in its paragraph 13(b) submissions, there is no Marks & Spencer logo, it has put the Complainant's name in lower case each time it is used¹ and there is a disclaimer. The disclaimer is not in small print, as so many disclaimers are, but appears in the same font and uses the same point size as the surrounding text.

The Respondent points to the decision of the Expert in D00012328. In that decision, the Expert (from paragraphs 6.29 to 6.32 of his Decision) makes a number of factual findings on which he based his decision. Firstly, he finds that the logo of the complainant in that case is prominently displayed giving the impression that the webpage is authorised or controlled by that complainant. Secondly, he says that the real operator of the website, My Claim Solved Ltd, is only mentioned at the very bottom of the page in tiny text and in a less than easy to read grey font. The impression found by the Expert is that, "the overall impression one gets, is that the operator of the site has deliberately designed the site to maximise the reference the Complainant's marks and to minimise any reference to who is actually operating the web page". Finally, the Expert observes the recent introduction of a disclaimer but goes on to state that it is still not that prominent in comparison to the rest of the page.

It can be seen immediately that the Webpage has sought to address the problems raised by the Expert in D00012328. The impression now given is quite to the contrary in my view. The topmost line asks whether the visitor to the Webpage has ever had a loan or credit card from the Complainant and the line below it, albeit in smaller and greyer text, announces that, "[y]ou could be owed £1,000's in compensation if marks & spencer mis-sold you PPI".

¹ I expect the Respondent is confused: it is a convention to put trade marks in capital letters when registering or describing them simply as a means of identifying the words comprised in the trade mark.

The left-hand side of the Webpage asks a series of questions leading to the assertion that “We offer” a no win no fee claims service and settlement within 60 days. Underneath is a box with a disclaimer in a similar font and size to the above text, stating, “My Claim Solved Ltd are an independent claims service and not a marks & spencer site or service, nor are they in any way connected to marks & spencer”.

On the right-hand side of the Webpage is a box with various fields stating at the top, “[r]egister your claim for Mis-sold PPI against marks & spencer”. Just beneath that box is a logo with two distinctive overlapping bubbles of red and green including the words “my claim solved.com” running through the middle.

Whatever may have been the case with Decision D00012328, it is abundantly clear to my mind that no-one could seriously be confused by this Webpage into thinking that the Complainant in some way was authorising it or that there was some sort of connection between the Complainant and the Respondent. On the contrary, it is clear that the purpose of the Webpage is to facilitate the bringing of claims against the Complainant using services offered by the Respondent.

I have described in some detail the features of the Webpage as these are the factors on which I am relying in coming to my decision in this case.

Contrary to what the Complainant appears to state, there are three adverse decisions against the Respondent. I will briefly consider them.

In D00011286, the Expert found that the domain name in that case, identical with the Domain Name except that it substitutes “natwest” for “marksandspencer”, was “suggestive of a service that the Complainant may well feasibly offer (even if in actual fact it does not) as it is so closely related to the Complainant’s business”. In the following paragraph, the Expert says that he is swayed towards this view by the look and feel of the respondent’s site in that case – the prominent use of the complainant’s logo and the virtual concealment of the respondent’s real identity. As I have said, the Webpage has remedied these criticisms.

The Expert in that case tried to identify three different types of case, which is a useful categorisation: firstly, where the respondent is using the trade mark itself or with the addition of some fairly descriptive words with relate to the complainant’s business; secondly, reseller cases where the respondent resells the complainant’s genuine goods and thirdly so-called tribute or criticism sites. In a sense, this case is a combination of all three of these categories although it does not quite fit into any of them perfectly. Like the first category, it uses the Complainant’s trade mark with the addition of some descriptive words describing a process for making a claim. It is like a reseller case in that the Respondent is offering a service by which it facilitates the making of a genuine claim against the Complainant. Finally, it is like a criticism site in that the Domain Name is for attracting customers who have had an adverse experience with the Complainant.

In D00011478, where the Domain Name is replaced by “barclays-ppi-reclaim”, the Expert found that the domain name in that case contained no distinguishing features and so amounted to an impersonation of the complainant by the respondent at least at the stage of initial interest. However, the Expert went on to observe that there was “nothing posted on the home-page of the website to which the disputed domain name resolved to inform the casual visitor, or the visitor actively seeking the Complainant that the website is not associated with the Complainant”. I again observe that the current Webpage has remedied these criticisms.

In D00012328, where the Domain Name is replaced by “barclaycard-ppi-reclaim”, the Expert quoted extensively from the decision in D00011286. As the Expert said at paragraph 6.27, the real problem is the case “where the domain name incorporate the trade mark and some other text, particularly where the domain name is said to be descriptive of the goods or services on offer”. He goes on to mention the decision of the Appeal Panel in DRS07991 <toshiba-laptop-battery.co.uk>.

The decision of the Appeal Panel in that case is useful in setting out a number of guiding principles as an approach, although it is strictly a decision on the reseller category of cases described above. The Experts in decisions D00011286 and D00012328 both adopted the approach of the Appeal Panel in that case. The real difference between those two cases and the present case is that the webpages to which the domain names resolved had the offending characteristics described above (use of the complainant’s logo, concealment of the respondent’s identity) which this case does not have.

The Appeal Panel said in DRS07991:

“In looking at relevant decisions under the UDRP, care must be taken because the tests under the UDRP are different from those under the Policy. However, in *Ok! Data America -v- ASD* [WIPO] D2001-0903 the Panel attempted to lay down criteria for the incorporation by a reseller of the trade mark owner’s mark, which have been followed in numerous other cases. The criteria are that:

- a) the respondent must actually be offering the goods or services at issue;
- b) the respondent must use the site only to sell the trade marked goods, otherwise it could be using the trade mark to “bait” customers and then offer them other goods;
- c) the site must accurately disclose the respondent’s relationship with the trade mark owner (i.e. must not falsely claim to be an official site);
- d) the respondent must not try to corner the market in relevant domain names, thus depriving the trade mark owner of the opportunity of reflecting its own mark in a domain name.

Broadly speaking, these four criteria are consistent with the principles of the two DRS appeal decisions discussed², which can be summarised as follows:

1. It is not automatically unfair for a reseller to incorporate a trade mark into a domain name and the question of abusive registration will depend on the facts of each particular case.
2. A registration will be abusive if the effect of the respondent's use of the domain name is falsely to imply a commercial connection with the complainant.
3. Such an implication may be the result of "initial interest confusion" and is not dictated only by the content of the website.
4. Whether or not a commercial connection is implied, there may be other reasons why the reseller's incorporation of the domain name is unfair. One such reason is the offering of competitive goods on the respondent's website."

As in that case, there is no evidence actually before me of confused members of the public. As the Appeal Panel said, "[t]he only remaining possibility of confusion, therefore, would appear to involve "initial interest confusion", i.e. circumstances where Internet users will visit the Respondent's site in the first place because they have been led to believe it is a site operated or authorised by or otherwise connected with the Complainant."

The Appeal Panel went on to say,

"The Panel does not believe that any reasonable Internet user who was looking to find an official Toshiba UK website in order to buy a genuine toshiba battery would actually type the address www.toshiba-laptop-battery.co.uk. However, "initial interest confusion" could arise where, as is much more likely, a user types the terms "toshiba laptop battery" into a search engine and is then presented with a range of results including the Respondent's website address incorporating the Domain Name. The question is whether the Internet user would, at that point, be confused into believing that the Respondent's site was operated or authorised by the Complainant or was otherwise connected with the Complainant.

The view of the majority of the Panel is that the Complainant has not demonstrated, on the balance of probabilities, that the Respondent's use of the Domain Name would be likely to give rise to any such confusion. The majority panellists do not consider that either the Domain Name itself or the results of a search of the terms in question would be likely to result in any such confusion in the mind of the average Internet user, bearing in mind that a typical search page includes a short description of each "hit" as well as the actual domain name. So far as the name itself is

² DRS03027 <Epson-inkjet-cartridge.co.uk> and DRS00248 <Seiko-shop.co.uk>

concerned, the majority Panel believes that the Domain Name in this case falls into a very different category from cases involving the “unadorned” use of a trade mark (e.g. <toshiba.co.uk>), where Internet users may be presumed to believe that the name belongs to or is authorised by the complainant. In this case, two extra hyphenated words turn the domain name as a whole into a rather clear description of the main goods on offer at the website (replacement batteries for Toshiba laptop computers). In addition, this lengthy “adornment” may reasonably be seen as atypical of the usage of major rights owners, who are free to use much shorter unadorned names.

In the view of the remaining panellist, it is not necessary to pass such a severe test in order to demonstrate “initial interest confusion”. As the DRS Expert Overview (available on the Nominet website at http://www.nic.uk/digitalAssets/39192_DRS_Expert_Overview.pdf) states at section 3.3, “Findings of Abusive Registration in this context are most likely to be made where the domain name in issue is identical to the name or mark of the Complainant and without any adornment (other than the generic domain suffix).” Nevertheless, “the activities of typosquatters are generally condemned...as are those people who attach as appendages to the Complainant’s name or mark a word appropriate to the Complainant’s field of activity. See for example the Appeal decision in DRS 00248 (seiko-shop.co.uk).”

According to this passage, a reasonable internet user seeking an official webpage run by the Complainant by which to register a claim for compensation from the Complainant for mis-selling of one of its financial products, would be very unlikely to type in the Domain Name. What is much more likely is that such a user would enter a search query such as “Marks & Spencer ppi reclaim” and the search engine might well disclose the Domain Name as one of the results. As the majority of the Appeal Panel pointed out, such results are frequently accompanied by a brief description of each search result.

A similarity between this case and DRS07991 is that this is not a case where there is “unadorned use” of the Complainant’s trade mark. A further similarity is that the addition of two hyphenated words transforms the Domain Name from a mere copying of the Complainant’s trade mark into something more descriptive. Users typically these days would expect to find a page dealing with how to make a compensation claim as a sub-page from the main website – such pages are frequently separated by a “\” rather than being found on a completely separate site using hyphens as part of the spelling. It is important to take account of the fact that internet users are increasingly knowledgeable about the internet and how to use it. This is a continuing trend and I have to take it into account in deciding whether people would be “likely” to be confused.

In this case, I am following the views of the majority of the Appeal Panel. Unlike the other cases involving this Respondent, there is nothing to sway me by looking at the Webpage – indeed, looking at the Webpage, I am swayed in the opposite direction.

As the Complainant has made various submissions based on the DRS Policy, it behoves me to consider them. Paragraph 3 sets out various factors which are said to be a non-exhaustive list of factors that a domain name is an Abusive Registration. It is important to note that the factors “may” be indicative of an Abusive Registration, they are not conclusive and each case must be considered on its own facts.

Paragraph 3(a)(i)(C) of the DRS Policy

The Complainant mistakenly refers to this as paragraph 3(a)(i)(B), but from the context the description is clearly to the paragraph given above.

This paragraph refers to circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name “for the purpose of unfairly disrupting the business of the Complainant”.

The Complainant has not shown any actual evidence of disruption, whether fair or unfair. Of course, given that the Respondent’s business is in assisting members of the public to make claims against businesses such as the Complainant, there is bound, in one sense, to be some disruption to the Complainant. However, this is fair, not unfair, and the Complainant rightly concedes that the Respondent’s business is legitimate.

Given the specific facts I have given above, I am not convinced that the Domain Name, taken together with the Webpage, is an unfair disruption of the Complainant’s business.

Paragraph 3(a)(ii) of the DRS Policy

The Complainant mistakenly refers to this as paragraph as paragraph 3(a)(i)(C)(ii), but from the context it is clear that the intended reference is to the paragraph given above.

This paragraph refers to “[c]ircumstances indicating that the Respondent is using or threatening to use the Domain Name in a way which has confused or is likely to confuse people or businesses into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant”.

I observe that the Complainant has not provided any actual evidence of confusion by any members of the public. However, that is not decisive, as the paragraph also looks to the future and I have to decide whether the Respondent “is using or threatening to use the Domain Name in a way which is likely to confuse people or businesses”. The word used is “likely”, not “possibly” or “speculatively”, but “likely”. Is it really likely that the use now made of the Domain Name is “likely” to confuse people or businesses?

I have already indicated above that the Webpage is far from having that effect. It is clear to my mind that no reasonable person would arrive at the Webpage and conclude even for an instant that he or she had arrived at a

website “registered to, operated or authorised by, or otherwise connected with the Complainant”.

There is no evidence before me to suggest that the Respondent is going to change this usage or that he is threatening to do so. Indeed, it is clear from the submissions made by his solicitor that he is attempting to achieve compliance with the DRS Policy by having made the changes which he has.

Since writing this Decision, I have been made aware of another case which has been decided against the Respondent: D00012477 <lloyds-ppi-reclaim>. The Expert in that case ordered transfer – so coming to the opposite conclusion that I have in this Decision.

An important distinction between my Decision and the decision of the Expert in that case is that the Expert did not admit any further evidence under paragraph 13(b) of the DRS Procedure. Having read the Decision, the Expert takes the view that any such submission would be irrelevant as the case falls into the category of what have become known as “initial interest confusion” cases. As I said above, the matters disclosed by the paragraph 13(b) submission only amount to my seeing the Webpage, which I am entitled to do in any case.

With respect to that other Expert, I think there is an important distinction to be made between this case and the Decision of the Appeal Panel in D07991. Towards the end of paragraph 9 of the Appeal Panel’s Decision, it says, “... the evidence submitted by the Complainant shows that some of the goods offered by the Respondent are replacement batteries for laptops made by other manufacturers. ...the Panel finds on the balance of probabilities that this aspect of the Respondent’s conduct constitutes the taking of unfair advantage of the Complainant’s rights and therefore renders the Domain Name in the hands of the Respondent an Abusive Registration”. It therefore appears that it was this feature which united the majority of the Appeal Panel with the dissenting Panellist in coming to a finding of Abusive Registration.

This distinction is, to my mind, central to this case and distinguishes this case from D07991. The purpose behind the Webpage is to attract business from members of the public who wish to make a claim against the Complainant in respect of mis-sold payment protection insurance– nothing more, and nothing else. There is nothing that I can see on the Webpage whereby the Respondent is seeking to encourage those members of the public to visit other retailers selling goods or services in competition with the Complainant, and there is not even any click-per-view advertising placed by other such retailers. It is a webpage set up purely and simply for the purpose of attracting custom for the Respondent and allowing members of the public to register their details with him. No-one visiting that website would remotely consider that in future they should do their shopping with another retailer simply in consequence of clicking to go to the Domain Name and viewing the Webpage. Quite unlike, therefore, the case of D07991, there is no question to my mind of the Complainant’s rights being unfairly used by people following a

link containing the Complainant's trade mark and being presented with goods or services of a competing retailer.

I am therefore following the views of the majority of the Appeal Panel in D07991: this is not an "unadorned" use of the Complainant's trade mark such that members of the public would automatically assume that it belonged to, or was in some way authorised by, the Complainant. Just as in D07991, there are two hyphenated elements added to the Complainant's trade mark which, taken together, are a clear description of the sort of service which the Respondent is proposing to offer at that website. I accept the views of the majority that this "adornment" renders the Domain Name atypical of major rights owners, who are free to use much shorter, unadorned names.

With respect to the Expert in D00012477, my decision is still that the Complainant has failed to show that users are "likely" to be confused into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant when it is abundantly clear from the Webpage that this is not the case.

Referring to the Expert Overview (which is up to date to October 2009 i.e. before the date of the Appeal Panel's Decision in D07791), it is stated that "[f]indings of Abusive Registration ... are most likely to be made where the domain name in issue is identical to the name or mark of the Complainant **and without any adornment** ..." [emphasis added]. Again, I would refer to my reasoning above with regard to the fact that the adornment in this case taken together with the Webpage are sufficient to avoid this being an Abusive Registration.

There have been other cases to do with PPI. In D011829 <rbsspclaimsuk.co.uk> the Expert there relied built on his own Decision in D011286 <natwest-ppi-reclaim.co.uk> as there was "the added factor that the website which the Domain Name ultimately resolves to offers service in relation to PPI claims against a range of financial organisations and not just the Complainant". As I have been at pains to point out, this is not so in this case. I am not convinced that the line of Decisions to do with reseller cases is directly applicable here: after all the Complainant is hardly going to complain if members of the public are enabled to bring PPI claims against its competitors. The point is that when arriving at the webpage, and probably before that when seeing the result of a search query, it is immediately apparent that the point of the Webpage is to attract custom to the Respondent's claims handling business, not to divert custom away from the Complainant to its competitors.

In D012035 <barclaycardppicclaim.co.uk>, the Expert again referred to his own Decision in D011478 <Barclays-ppi-reclaim> to justify a finding of Abusive Registration. Again, for the reasons given above with regard to the specific nature of the Webpage, and with respect to the Expert in that case, I am unable to follow his reasoning.

Based on the facts and following the reasoning I have given in this Decision, this ground is not made out.

Paragraph 3(a)(iii) of the DRS Policy

This paragraph states that there may be an Abusive Registration where “[t]he Complainant can demonstrate that the Respondent is engaged in a pattern of registrations where the Respondent is the registrant of domain names (under .uk or otherwise) which correspond to well known names or trademarks in which the Respondent has no apparent rights, and the Domain Name is part of that pattern”.

The Complainant gives details of some 26 similar registrations which follow the pattern of the Domain Name, namely “[name of business]-ppi-reclaim”. There can be no doubt that there is a pattern here.

Making out this ground relies on the Respondent’s having no apparent right. I have already set out the apparent right relied on by the Respondent, namely, that there is no Abusive Registration and what the Respondent is doing is simply using the Domain Name as a pure description. For that reason, I do not see that this ground is made out.

I should stress that this Decision is made on its own facts, which I have taken care to recite. If any other case came up dealing with any of the other domain names provided by the Complainant where the complainant could show a webpage more akin to the other Decisions which have gone against the Respondent, then the outcome could be quite different.

Paragraph 3(c) of the DRS Policy

The Complainant mistakenly refers to this as paragraph 3(a)(v)(c) but it is clear from the context that the intended reference is to the paragraph given above.

This paragraph states that “[t]here shall be a presumption of Abusive Registration if the Complainant proves that the Respondent has been found to have made an Abusive Registration in three (3) or more DRS cases in the two (2) years before the Complaint was filed. This presumption can be rebutted (see paragraphs 4(a)(iv) and 4 (c))”

The Complainant proves two such cases, and says only that a finding of an Abusive Registration in this case would lead to the consequences of this particular paragraph. As I mentioned above, in fact there are already 3 such finding within the relevant period of two years. Technically, the Complainant has not proved the case, although the facts would appear to support this paragraph of the DRS Policy.

In any case, it is a presumption, not a firm consequence.

The reference to paragraph 4(a)(iv) does not apply, since I accept that the Domain Name is part of a series of registrations which are of an essentially similar nature.

The reference to paragraph 4(c) provides that “the Respondent must rebut the presumption by proving in the Response that the registration of the Domain Name is not an Abusive Registration”. Paragraph 4, like paragraph 3, is a non-exhaustive list of factors, not a precise code as such. While the Respondent did not prove that the Domain Name was not an Abusive Registration in the Response, I have accepted the evidence provided as part of a paragraph 13(b) submission and in any case I have the independent power to look at any website referred to by the parties³.

I have already found that this Domain Name on the facts of this case is not an Abusive Registration and so the presumption is rebutted.

Other factors

I have carefully considered the other factors given in paragraph 3 and given some thought to whether other factors come into play here such as to make the Domain Name an Abusive Registration.

I have concluded that they do not.

Paragraph 4 of the DRS Policy

I have mentioned above some parts of paragraph 4 of the DRS Policy.

I have carefully considered the factors listed in these paragraphs as well as considering the matter more generally.

The following factors are potentially applicable in this case.

Paragraph 4(a)(i)(A)

I am satisfied that the Respondent is offering a genuine service which the Complainant accepts he is lawfully able to conduct.

Paragraph 4(ii)

I am satisfied that the Domain Name is of a descriptive nature and, for the reasons indicated above, I am satisfied that the Respondent is making fair use of it.

Paragraph 4(b)

While the Respondent is not operating a site for criticism of the Complainant’s business, it is operating a site which has some similarities to a criticism site. It does not seem to be to be unfair to use a descriptive term such as the

³ See paragraph 16(a) of the DRS Procedure.

Domain Name, taking into account the features of the Webpage which I have described.

Paragraph 4(d)

I have already explained that the Respondent holds a number of registrations of an identical pattern. However, for the reasons given above, on the specific facts of this case I do not hold that this is indicative that the Domain Name is an Abusive Registration.

Final comments

I have been at pains to make it clear that this Decision is based on the very specific facts that I have found, and which distinguish it from the earlier Decisions of other Experts which have gone the other way.

7. Decision

For all the reasons given above, I decide that the Domain Name is not an Abusive Registration.

I therefore order that there should be no transfer.

Signed Richard Stephens

Dated 29 May 2013

Annex 1

5/2013

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