

DISPUTE RESOLUTION SERVICE

D00015584

Decision of Independent Expert

Moulton Ltd

and

The Achiltibuie Garden Ltd

1. The Parties:

Lead Complainant: Moulton Ltd
Castle Hill
Victoria Road
Douglas
Isle of Man
IM2 4RB
United Kingdom

Respondent: The Achiltibuie Garden Ltd
103 Achiltibuie
Ullapool
Ross-shire
IV26 2YG
United Kingdom

2. The Domain Name(s):

thehydroponicum.co.uk

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

04 March 2015 10:56 Dispute received
04 March 2015 10:58 Complaint validated
04 March 2015 11:58 Notification of complaint sent to parties
23 March 2015 01:30 Response reminder sent
24 March 2015 08:44 Response received
24 March 2015 10:23 Notification of response sent to parties
27 March 2015 10:50 Reply received
27 March 2015 10:54 Notification of reply sent to parties
27 March 2015 10:54 Mediator appointed
01 April 2015 16:19 Mediation started
17 April 2015 15:32 Mediation failed
17 April 2015 15:33 Close of mediation documents sent
30 April 2015 02:30 Complainant full fee reminder sent
05 May 2015 10:02 Expert decision payment received
06 May 2015 Keith Gymer appointed as Expert w.e.f. 11 May 2015

4. Factual Background

The history of the various legal entities involved in this case is complicated and has evidently involved a number of business with the same or similar names, on both sides. Following inspection of the relevant Company registers to clarify his understanding, the Expert has identified the various entities by their registration numbers as an aid to interpreting the chain of events, and summarises the principal points here.

In early 2007, the Achiltibuie Hydroponicum was a hydroponic garden centre and visitor attraction located in Achiltibuie in the north-western Scottish Highlands. At that time, the business was operated by The Achiltibuie Hydroponicum Limited (SC135259), which was the original registrant of the disputed domain name as of 10 February 2003, and which subsequently changed its name (as of 04/10/2007) to The Hydroponic Shell Company Limited, and was then eventually dissolved as of 19/10/2010. The business was run on land and using premises then owned by Barwell plc (SC142927).

The land and premises and physical assets were put on sale, with The Hydroponicum business advertised ~~as~~ a going concern+by Barwell plc in early 2007.

Moulton Limited (then apparently incorporated as IoM Company 112328C) purchased the land and premises, along with ~~all~~ current stock, fittings, fixtures and augur+in May 2007. Moulton Limited expressly did not purchase the existing hydroponics operating company, The Achiltibuie Hydroponicum

Limited (SC135259), apparently owing to a lack of clean title. However, it was then expected that a hydroponics garden centre business would continue to operate from the same premises after the change of landlords, under the auspices of a new company, Seamont Limited (SC316291, incorporated 09/02/2007). This expectation did not materialise and apparently no lease was ever signed with Seamont Limited, which was eventually dissolved as of 06/05/2011.

In the meantime, the previous operators of the hydroponics business established a new company as The Achiltibuie Hydroponicum Limited (SC332594, incorporated on 18/10/2007). Although the accounts of that entity have since always been stated to be for a dormant company and followed that by setting up The Achiltibuie Garden Ltd (SC339195, incorporated 08/03/2008), which is the Respondent in this dispute, under which name they have operated another hydroponics business from a different location and premises since that time. They have operated a website for this business at www.thehydroponicum.com.

The original Moulton Limited (IoM Co. 112328C) was itself dissolved as of 11/09/2007, and evidently immediately succeeded by a new entity with the identical name as Moulton Limited (IoM Co. 001540V), incorporated 11/09/2007, which is evidently the Complainant in the present dispute.

The Complainant's directors themselves also set up another Scottish company, The Achiltibuie Hydroponicum & Visitor Centre Ltd. (SC337400, incorporated 07/02/2008), presumably with the intention of re-establishing their own hydroponics centre on the premises they had acquired from Barwell plc. However, that company was itself dissolved as of 28/05/2010.

The disputed domain name, thehydroponicum.co.uk, first registered 10 February 2003, was the subject of a previous Complaint, DRS 15470, naming The Achiltibuie Hydroponicum Limited as Respondent. Nominet noted that the original company of that name, which had been the original registrant of the domain name, had been dissolved. Nominet then followed its dissolved registrant processes, which resulted in the registration of the disputed domain name passing to The Achiltibuie Garden Ltd. The present Complaint DRS 15584 is therefore a re-filing with the new registrant as Respondent.

The disputed domain name does not appear to be in active use.

5. Parties' Contentions

Complainant

The Complaint includes a somewhat confusing history of events, which the Expert has sought to clarify and put into context in the factual chronology above.

The Complainant makes a number of wide-ranging assertions and allegations about the conduct of the Respondent (or its directors), the Highlands and Islands Enterprise (HIE) development agency, Seamont Ltd and Calico UK (the internet service provider for The Hydroponicum website).

The nub of the Complainant's case is that, in its view, the original Moulton Limited purchased all land & property, stock and all assets including the website and Company name, when it purchased The Achiltibuie Hydroponicum as advertised by Barwell plc.

The Complainant then asserts that, subsequently, the previous operators of the hydroponicum business went on to manipulate Seamont Ltd to the detriment of Moulton Limited, resulting in the removal of Moulton's representative as a director of Seamont Ltd. A statement from the Complainant's accountant is provided as evidence of the questionable activities within Seamont Ltd. The hydroponicum business intended to be run using the original business assets . including the disputed domain name . then got diverted on to the independent, new operating business . The Achiltibuie Garden Ltd . when it should have properly been passed to Moulton Limited.

Respondent

The Respondent acknowledges that the original Moulton Limited bought the land and buildings owned by Barwell plc and used originally for the business which was then trading as The Achiltibuie Hydroponicum (SC135259). They admit that Seamont Ltd was incorporated to take over the running of the business using the trading name The Achiltibuie Hydroponicum, and recognise that the website and domain names were transferred into Seamont's responsibility when it started trading itself under the name in April 2007. Copies of an email and a letter addressed to Calico in March 2007 demonstrate that this was indeed the expressed intention. (However, from Nominet's records, it is clear that Calico did not take any action at that time to implement the transfer of the domain name on the register, which is why the domain name was still held in the name of the [original, now dissolved] The Achiltibuie Hydroponicum Ltd (SC135259) as registrant until recently.)

The Seamont Ltd directors then re-registered The Achiltibuie Hydroponicum Ltd (SC332594) when it was released by Barwell plc, as the name was obviously directly relevant to their trading business.

The Respondent says that it retains the disputed domain name thehydroponicum.co.uk, even though it actively uses thehydroponicum.com, because it might confuse visitors looking for our site were it to be owned by another party.

Complainant's Reply

The Complainant filed a reply essentially repeating most of the allegations made in the Complaint. The Complainant re-asserts that the ownership of the company name & website were all part of the original purchase from Barwell plc and that they have correspondence to & from Barwells [sic] confirming ownership. (However, the Complainant has not presented any such correspondence in evidence.)

Remedy

The Complainant maintains its request for transfer of the disputed domain name to the Complainant.

6. Discussions and Findings

General

Paragraph 2 of the Policy requires that, for the Complainant to succeed, it must prove to the Expert, on the balance of probabilities, both that it has Rights in respect of a name or mark which is identical or similar to the Domain Name; and that the Domain Name, in the hands of the Respondent, is an Abusive Registration as defined in Paragraph 1 of the Policy.

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 was unfairly detrimental to the Complainant's Rights.

Complainant's Rights

In this case, unusually, the Complainant's claim to Rights appears to reside exclusively in an assertion of Rights allegedly acquired under contract.

As is noted in the Expert's Overview in relation to the application of the DRS, a contractual right may certainly be recognised as constituting a right within the definition of Rights (as Rights enforceable by the Complainant, whether under English law or otherwise). However, as the Overview goes on to caution, where the right is disputed and/or the surrounding circumstances are particularly complex, the complaint may nevertheless be rejected as not being appropriate for adjudication under the Policy.

The Complainant has notably omitted to present any of the potentially most pertinent evidence which would be expected to be available to support its contentions - to wit, a copy of the actual contract of sale itself, and such related correspondence as might verify its statements of the respective parties' intentions. There is no indication of the law applicable to the contract. Presumably this would be Scots Law for the real property transfer but, as the original purchaser was a Manx entity, this may not apply to all aspects.

The Complainant also failed to disclose that the present Moulton Limited cannot be the same Moulton Limited which entered the original contract, and has not explained how the present Complainant may have assumed rights under the contract entered into by a separate legal entity.

For its part, the Respondent has also not provided any explanation of the alleged irregularities in relation to the management of Seamont Ltd, nor addressed the Complainant's claims relating to the transfer of rights in the original company name of The Achiltibuie Hydroponicum Limited, the website and domain name, and how these came to be passed on from Seamont Ltd.

The situation is also further complicated because the principal contract was between a predecessor Moulton Limited (i.e. not the present Complainant itself) and Barwell plc, which is not a party to the Complaint on either side. The extent to which other parties, including the original operating business, The Achiltibuie Hydroponicum Limited (SC135259), Seamont Ltd and their various directors may also have been subject to any contractual obligations is unclear.

Having regard to all these circumstances, the Expert has no doubt that this is a case which raises questions which are beyond the intended scope of the DRS Policy.

In the Expert's view this is analogous with the situation in DRS 04632 (Ireland.co.uk). Although there is evidence of a contract, which may or may not have included transfer of rights in the domain name, and allegations of misappropriation of the domain name, it is not possible or appropriate for the Expert to make any determination on the complicated questions of fact and law in this case. The Expert is unable to satisfy himself as to whether the Complainant itself even has any Rights. The claims of contractual breaches and abuses would need to be properly examined in a Court of Law in the relevant jurisdiction, where all the evidence can be presented and tested in accordance with the applicable law.

Accordingly, the Expert considers that the issues raised in this dispute are outwith the scope of the Policy. Consequently, the Expert declines to take any decision in relation to the merits of this Complaint.

7. Decision

The Expert directs that no action be taken in relation to the domain name thehydroponicum.co.uk.

Signed
Keith Gymer

Dated 26 May 2015