

DISPUTE RESOLUTION SERVICE

D00016525 and D00016526

Decision of Appeal Panel

In the conjoined cases:

D00016525

Bayerische Motoren Werke Aktiengesellschaft

and

Toby Russel

D00016526

Bayerische Motoren Werke Aktiengesellschaft

and

E DRIVE Ltd

1. The Parties:

Complainant: Bayerische Motoren Werke Aktiengesellschaft
BMW-Haus, Petuelring 130,
80809 Munich
Germany

Respondent in D00016525: Mr Toby Russel
Caldecote Mill, London Road
Newport Pagnell
Milton Keynes
Bucks
MK16 OHA
United Kingdom

Respondent in D00016526: E DRIVE Limited
Caldecote Mill, London Road
Newport Pagnell
Milton Keynes
Bucks
MK16 OHA
United Kingdom

2. The Domain Names:

The domain names at issue in these proceedings (referred to in this decision as the “Domain Names”), together with their dates of registration, are as follows:

edrive.co.uk	12 January 2013
edrivecarbonfiber.co.uk	23 September 2014
edrivecarbonfibre.co.uk	23 September 2014
edriveformulae.co.uk	23 September 2014
edriveltd.co.uk	23 September 2014
edriver.co.uk	24 September 2006 ¹
edriveracing.co.uk	23 September 2014
edriveplc.co.uk	5 August 2014

3. Procedural History

This Appeal relates to two separate complaints under Nominet's Dispute Resolution Service. These are disputes D00016525 and D00016526. Nominet agreed to combine or merge them given that the parties in both disputes are either the same or closely linked. The Respondent in DRS 00016525 is a Mr Toby Russel. Mr Russel is also the company secretary, sole director and sole shareholder in the Respondent in DRS 00016526 which is a company called E DRIVE Limited. This company was incorporated on 20 August 2014. In practice nothing turns on the distinction between the Respondents and, save where it is necessary to distinguish between them, this decision simply refers to the “Respondents”

This is an Appeal by the Complainant against the decision of Mr Nick Philips (the “Expert”) issued on 14 December 2015 (the “Expert’s Decision”) in favour of the Respondents. Definitions used in this decision have the same meaning as set out in the Nominet UK Dispute Resolution Service Policy Version 3, July 2008 (the “Policy”) and/or the Nominet UK Dispute Resolution Service Procedure Version 3, July 2008 (the “Procedure”) unless the context or use indicates otherwise.

The Complaints were filed on 17 September 2015. The further procedural history of these Complaints prior to this Appeal is set out in the Expert’s Decision which is available on Nominet’s website. The Appeal Notice was filed on 22 December 2015 and an Appeal Response was filed on 7 January 2016.

¹ According to the Appeal Response this Domain Name was purchased by the Respondents from a third party. The Panel does not know at what date this took place.

Nick Gardner, Anna Carboni and Ian Lowe (together, “the Panel”) were appointed by Nominet as the Panel on 7 January 2016 and have each made a statement to the Nominet Dispute Resolution Service in the following terms:

“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 one or both of the parties.”

4. The Nature of This Appeal

Paragraph 10.a. of the Policy provides that: “The appeal panel will consider appeals on the basis of a full review of the matter and may review procedural matters”. The Panel concludes that insofar as an appeal involves matters other than purely procedural complaints the appeal should proceed as a re-determination on the merits. Therefore it is not necessary to analyse the Expert’s Decision in any detail. In summary the Expert found that the Complainant had Rights in a name or mark which is identical or similar to each of the Domain Names but that the Complainant had not established that the Domain Names, or any of them, were an Abusive Registration.

For convenience the Panel will continue to refer to the parties as the “Complainant” and the “Respondents”.

5. Formal and Procedural Issues

The only further formal or procedural issue is whether the Respondents’ Appeal Response introduces new evidence and if so whether it should be allowed. This is discussed below.

6. The Facts

The Complainant in both disputes is the well-known manufacturer and supplier of motor vehicles, Bayerische Motoren Werke Aktiengesellschaft, known widely as BMW.

The Complainant is the registered proprietor of a trade mark for the word mark eDrive. This is an International Registration (no. 940980), which designates *inter alia* the European Union, and is registered with effect from 11 September 2007. It is registered in Class 12 for motor vehicles and parts thereof (excluding tyres and inner tubes for tyres) and in Class 28 for miniatures of motor vehicles and parts.

The Complainant uses the mark eDrive in relation to certain of its vehicles. The nature and extent of this use is described and considered further below.

Between them, the Respondents have registered the Domain Names.

None of the Domain Names has been used to point to an active or live website although some of them do point to a holding or parking page. The Domain Name edriver.co.uk at one stage pointed to a page which displayed the question, "Interested in this Domain Name? Make an offer?".²

Mr Russel is the registered proprietor of UK trade mark number 3090315 for the word mark eDrive in Class 35. The specification expressly excludes services related to motor vehicles (which includes hybrid and electrical vehicles) or parts thereof following a request by the Complainant. This trade mark is registered as of 20 January 2015.

Mr Russel also has a pending UK trade mark application number 3086131 for eDrive in Classes 35 and 41. The specification for this application also expressly excludes services relating to motor vehicles (which includes hybrid and electrical vehicles) or parts thereof. This application has been opposed by a third party, Enterprise Holdings Inc., which is not related to this dispute. In addition, Mr Russel has a further UK trade mark registration for ELECTRIC DRIVE in respect of "Advertising services via the internet; auctioneering".³

There has been correspondence between the Complainant and its advisers and the Respondents and their advisers. In the course of this correspondence the Respondents have provided an undertaking not to use the trade mark eDrive in relation to the class 12 goods for which the Complainant has a registration (namely motor vehicles and parts thereof (excluding tyres and inner tubes for tyres)) and the Respondents have also offered to sell the Domain Names to the Complainant for either £500,000 or £2,000,000 depending on which combination of the Domain Names, the company name, eDrive Limited and the registered trade mark the Complainant wanted to buy.

7. The Parties' Contentions

The Complainant

Rights

The Complainant contends that it has rights in a name or mark which is similar or identical to the Domain Names for the following reasons:

- The Complainant is the owner of a registered trade mark for the word mark eDrive. This is an International Registration registered with effect from 11 September 2007.

² The Respondents say this was a consequence of when this domain name was offered for sale by its previous owner. As this does not appear to be disputed and as this domain name currently does not point to any active page, the Panel proposes to discount this issue.

³ The Panel notes that the Decision refers to this as a trade mark application for ELECTRONIC DRIVE, rather than a registration (granted before the start of these proceedings) for ELECTRIC DRIVE, but nothing turns on this.

- The Complainant has used the eDrive trade mark on its vehicles, including on vehicles sold in the UK. The precise information that the Complainant has provided in this regard is set out in the Complaint in the form of the following statement:

“To date the Complainant has sold 3,768 vehicles which displayed the Complainant’s Trade Mark on the back of each vehicle. See Annex 3. Revenues derived from such sales £169,837,500.00 in the UK alone”.

The Annex 3 referred to is a photograph of a BMW car bearing German registration plates. The photograph is taken from the rear and shows a BMW roundel logo in the centre rear of the car, a badge reading “eDrive” towards the left of the rear of the vehicle and another badge reading “i8” towards the right of the rear of the vehicle.

- The Complainant says that because of the very extensive use of this trade mark in the UK, it enjoys a substantial reputation in relation to the manufacture and supply of motor cars, and services relating to the same.
- It also says the Domain Names are identical or similar to the Complainant's trade mark because the Domain Names consist of the Complainant's trade mark alongside generic wording which does not serve to distinguish these Domain Names from the Complainant's trade mark. The Complainant says that, for example, the suffixes "limited" and "plc" are generic and the other Domain Names contain generic wordings relating to cars therefore increasing the possibility of confusion.

Abusive Registration

The Complainant contends that the Domain Names are Abusive Registrations for the following reasons.

The Respondents are using or threatening to use the Domain Names in a way which has confused or is likely to confuse people or businesses into believing that the Domain Names are registered to, operated or authorised by, or otherwise connected with the Complainant (see the Policy paragraph 3a(ii)). The main points the Complainant makes in regard to this reason are as follows:

- The Respondent's intention in registering the Domain Names was to use or to sell them for the purposes of advertising or selling vehicles. In doing so the Respondent's sole purpose was to use and/or sell the Domain Names for the purpose of attracting customers to the Domain Names and to promote business which was unconnected to the Complainant;
- In relation to the Respondent's opposed trade mark application for the mark eDrive, the Complainant says the fact that the Respondent's application previously included, "retail services connected with the sale of electrical vehicles" in class 35 shows an intention by the Respondents to use the Domain Names to advertise and sell cars on the internet, i.e. the same products and industry areas as the Complainant. While the Complainant notes that the

Respondent has since amended the specification under class 35 to remove reference to, "retail services connected with the sale of electrical vehicles" at the request of the Complainant, importantly, in the Complainant's submission, the Respondents have refused to give undertakings not to use the mark in trade in relation to such services evidencing, in the Complainant's submission, a continuing intention to use the mark in trade for those services.

- In this regard the Complainant says that such is the reputation and goodwill associated with the Complainant's trade mark that a substantial portion of consumers in the UK would assume that the use of the Complainant's trade mark in a domain name would signify that the domain name, and any website attached to it, would be connected or associated in the course of trade with the Complainant, especially if it is in a field of activity closely connected with that with which the Complainant is engaged.
- The Complainant also says that use of the Complainant's trade mark and wording relating to cars in the Domain Names by the Respondents is confusing.

The Domain Names were registered primarily as blocking registrations (see the Policy paragraph 3a(i)B). The Complainant says in this regard that the Respondent's registration of the Domain Names serves, in effect, to block the proper registration and use of the Domain Names by the Complainant. Due to this the Complainant is denied the right to register them for their own legitimate use.

The Domain Names were registered for the purpose of unfairly disrupting the business of the Complainant (see the Policy paragraph 3a(i)C). The main points made here are as follows:

- The use of the Domain Names in connection with services not authorised by the Complainant dilutes the strength of the Complainant's trade mark and is disruptive to the Complainant's business by preventing prospective customers from obtaining information on the Complainant's goods and services through the Complainant's authorised websites and diverting customers for the Respondent's advantage.
- Any future use of the Domain Names is calculated to infringe the Complainant's rights as the value in the names consists only in their resemblance to the Complainant's trade mark and the reputation and goodwill associated with the Complainant.
- It is not a necessity for the Respondent's business to use the Complainant's trade mark in the Domain Names. The Complainant's trade mark is used in the Domain Names to "free-ride" off the reputation associated with the Complainant's mark.
- The only reason why anyone who is not licensed, authorised or approved by the Complainant would use the Domain Names is to pass himself off as so authorised by the Complainant and to use such an impression for financial

gain by promoting/selling services linked with and/or owned by entities unconnected with the Complainant.

The Complainant says the Domain Names were registered in circumstances indicating that the Respondents have registered or otherwise acquired the Domain Names primarily for the purposes of selling, renting or otherwise transferring the Domain Names (Policy paragraph 3a(i)A). The Domain Names do not lead to active websites. Only one Domain Name, <edriver.co.uk>, resolves to a web page that mentions making an offer to purchase the Domain Name. Such registration and lack of use suggests that the Respondents registered the Domain Names with a view to selling them to the Complainant and/or other interested parties for valuable consideration in excess of the documented out-of-pocket costs. In this regard, the Respondent's offer to sell some or all of the Domain Names (together with the Respondent's various UK trade mark registrations and applications and company name) for either £500,000 or £2,000,000 according to which combination the Complainant wanted, represents a value far in excess of the Respondents' documented out-of-pocket costs directly associated with acquiring or using the Domain Names. The Complainant also relies upon correspondence from the Respondents' advisers in which mention is made of the Respondents being in discussions to sell all of the Respondents' trade mark rights and associated domain names to another international company. In the Complainant's submission this must be designed to pressurise the Complainant in order to make it pay the extortionate prices demanded by the Respondents.

Respondents' Submissions

The Respondents submit that the Domain Names are not Abusive Registrations for the following reasons.

The Domain Names are distinguished from the Complainant's trade mark by the addition of other words.

They also say the Domain Names are identical or similar to the Respondents' own trade marks, namely its UK trade mark registration for the word mark eDrive and its UK trade mark applications for eDrive and Electric Drive.

In relation to the question of whether the Complainant has Rights in a name or mark which is similar or identical to the Domain Names, the Respondents say as follows:

- The Complainant's International Registration for the mark eDrive should not be assumed to be valid given that it is now more than five years old. The Respondents also submit that this International Registration is registered in respect of goods and does not cover services.
- The mark eDrive is always used in conjunction with the Complainant's trade mark BMW and the Complainant has provided no evidence of its use of the mark eDrive alone or submitted any evidence of goodwill subsisting in that mark alone. It cannot therefore be held that the Complainant is the owner of, "considerable goodwill and reputation" in respect of the mark eDrive.

- It should not be assumed that the mark eDrive would be considered by the relevant trade and public to signify only goods/services offered by the Complainant. They say the letter prefix “e” is well-known as referring to electrical or electronic, some examples of its use include e-business, e-commerce, e-book, and e-mail and its combination with the ordinary word drive is not unique to the Complainant and in any event is descriptive simply referring to electric vehicles.
- The Respondents say others use the term edrive and point to www.edrivegroup.com, www.edriveuk.co.uk and www.e-drivetech.com as examples.
- The Respondents set out considerable detail as to the trade mark proceedings that have taken place. It is not necessary to repeat that detail here. The Respondents say the figures they suggested for the sale of the Domain Names were part of a legitimate offer to settle proceedings and in response to a request from the Complainant’s advisers to specify a figure. They also give examples of other domain names which have sold for substantial amounts.

The Respondents deny all of the Complainant’s allegations as to their reasons for registering the Domain Names. They say they were registered “in good faith with the intention of using these to support our own business” and refer to various Annexes to the Response. These Annexes in fact show the following:

- an invoice for just over £1,000, for brand design and webhosting services.
- email correspondence dated 29 September 2014 with Virgin Racing Formula E team about arranging a meeting to “progress things”. No information is apparent as to what these “things” are.
- email correspondence in October 2014 with a Virgin Business “start up adviser” about arranging an initial meeting. It would appear from this email that Mr Russel sent to the adviser concerned some information including a plan but this has not been provided to the Panel.

Reply material

In its Reply the Complainant denies that the eDrive badge is always used with its “BMW” badge. It says it is visually separate on the rear of its cars and also exhibits photographs of the eDrive badge on its own on the sill plate of a car, and adjacent to the transmission lever and says this is how it is used on its electric or hybrid vehicles. The Complainant then takes issue with much of what the Respondents have said and says the fact that the Respondents have never used the Domain Names and have not explained how they intend to use them shows that they have no bona fide use for them.

The Complainant criticises the Respondents for failing to provide evidence of any other offers for the Domain Names and failing to show that the sums requested were market prices. It also asserts that any value attributed to the Domain Names would be solely as a result of the goodwill built up by the Complainant in its trade mark.

Appeal Materials

The Complainant's Appeal Notice contends that the Expert made a number of errors in reaching his decision to reject the Complaint. As explained at section 4 above, this appeal involves a full re-determination on the merits, which means that the Panel considers all of the submissions by the parties at first instance, and so it is not strictly necessary to find errors in the Decision. However, the Panel has considered the alleged errors particularly carefully, as part of its re-determination. These are, in summary, that:

- the Expert wrongly concluded that the Complainant had not proved that the Respondents knew of the Complainant's Rights at the date of registration/acquisition of the Domain Names; and
- he erred in failing to consider the Respondents' behaviour after the Complainant wrote to them setting out the Complainant's Rights.

The Complainant puts particular reliance on the following points:

- If (as the Expert was ready to infer) the Respondents intended to trade in the field of electric vehicles or a connected field when it registered the Domain Names, then it was highly likely that they would have researched the market and searched the Trade Marks Registry or at least the Internet. Had they done so, they would have become aware of the Complainant's Rights.
- The Respondents' statements about their knowledge and intentions are not credible.
- Further, in the first instance proceedings, the Respondents did not deny that they knew about the Complainant's Rights, even though some of the claims made against them contained an implicit allegation that they did know about them. The reasonable inference from the Respondents' failure to explain their intentions was that they had not adopted the eDrive sign innocently.
- Even if the Respondents had been innocent/ignorant of the Complainant's Rights when they registered the Domain Names, they were on notice from receipt of the Complainant's letters on 27 March and 5 March 2015, and therefore the Expert should have given particular consideration to the period after those letters. Had he done so, particularly in the light of the offer to sell the Domain Names to the Complainant for £2 million, he would/should have concluded that the Respondents have used the Domain Names in a manner which unfairly took advantage of or was unfairly detrimental to the Complainant's Rights.

For their part, the Respondents inevitably say the Expert's Decision was correct. In their Appeal Response they provide some additional information about their intention in registering the Domain Names. They say as follows:

“The Respondents planned to launch a company specialising in “eco friendly” services. Prior to registering the company and securing the domains, the Respondents undertook an on-line search at Companies House. This search showed E Drive Limited was available. The search also showed approximately 20 company names including eDrive/driver with other words e.g. “automation”. E Drive Limited was available due to the previous E Drive Ltd company being dissolved 15/10/2013. At no point during this searching were the Respondents aware of any rights the Complainant may have in eDrive/EDRIVE.”

No information is provided by the Respondents as to what this “eco friendly” company was intending to do.

The Response to the Appeal Notice goes on to state that, before filing a trade mark application for eDrive, the Respondents conducted a search of the UK IPO on-line trade mark register, which returned the message that *“Your search returned over 1000 results, please refine your criteria”*. So they narrowed the search down to the service classes 35 to 45, which did not reveal the Complainant’s trade mark registration. Further, their registration was not cited as a conflicting mark when the Respondents’ eDrive application was examined by the Registry, and so the Respondents did not become aware of it. They say that the first they knew of it was when the Complainant’s representative contacted them following publication of the Respondents’ trade mark application.

Turning to the Complainant’s focus on the period after receipt of the letters of complaint, the Respondents state that, since none of the Domain Names has been used during that period, there cannot be an abuse. They also reiterate that the refusal to give the undertaking requested by the Complainant was because the undertaking requested was far broader than the scope of the Complainant’s rights, and that the offer to sell the Domain Names was in response to a strongly worded demand from the Complainant that they be transferred. Further, the Respondents’ discussions with third parties concerning possible uses of the Domain Names showed that they cannot have acquired the Domain Names for the purpose of selling them to the Complainants.

Arguably, the Response to the Appeal Notice introduces new evidence into the case as to the Respondents’ state of knowledge and actions before registering or acquiring the Domain Names.

Under paragraph 18h of the Procedure, the appeal panel should not normally take into consideration any new evidence presented in an appeal notice or appeal notice response unless they believe that it is in the interests of justice to do so. However, in this case, the Respondents have introduced this evidence in response to specific points made in the Appeal Notice about their credibility and state of knowledge, which were not made in such a targeted way in the original Complaint, and so it is reasonable for them to have done so and the Panel believes that it is in the interests of justice for the new evidence to be admitted. The Panel has not invited the Complainant to reply to or comment on this additional evidence, since it is limited to matters which could not be known to the Complainant (or indeed anyone other than the Respondents themselves), and the Complainant has already put forward its views on the matter (which is what

led to the additional evidence being put in). So the question for the Panel is whether the new evidence has any impact on the Complainant's case.

In the circumstances of the case, the Panel has concluded that the new material simply confirms the decision that it would have reached without it, as discussed further below.

8. Discussion and Findings

General

In order to succeed the Complainant must prove, on the balance of probabilities, in relation to each of the Domain Names, two matters, namely 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.

First Element – Rights

“Rights” are defined in the Nominet DRS Policy 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.”

The Complainant has a subsisting International Registration (EU) in respect of the trade mark “eDrive” which is, therefore, protected in the UK. The International registration date was 11 September 2007 and protection was granted in the EU on 22 September 2008. Although the Respondent has suggested that the validity of the trade mark registration should not be taken for granted because the registration is over five years old, the Panel regards that as spurious. The fact that a registered trade mark may be susceptible to a cancellation action on the grounds of non-use, if the registered proprietor were unable to prove use over a relevant five-year period, does not, in the Panel's view, detract from the current status of the trade mark registration. In any event the evidence filed by the Complainant establishes that it has used the eDrive trade mark. The Panel is therefore satisfied that the Complainant does have Rights in respect of the Mark “eDrive”.

The Domain Name <edrive.co.uk> is identical to the Complainant's mark, ignoring the ccTLD suffix “.co.uk” for this purpose.

Two of the other Domain Names are similarly identical save only for the addition of the corporate indicators “Ltd” and “plc”. The remaining Domain Names all comprise “edrive” together with generic words such as “carbonfibre”, “formulae” and “racing” or simply the addition of the letter “r”. The Panel considers that the addition of these

elements does not detract from the similarity of the Domain Names to the Complainant's mark

Accordingly, the Panel finds that Complainant has established that it has Rights in a name or mark which is similar or identical to each of the Domain Names.

Second Element – Abusive Registration

Abusive Registration is defined in the Nominet DRS Policy 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. has been used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's Rights”

The difficulty that the Complainant faces is that it has provided very little evidence to support its case. It has simply stated: *“To date the Complainant has sold 3,768 vehicles which displayed the Complainant’s Trade Mark on the back of each vehicle... Revenues derived from such sales £169,837,500.00 in the UK alone”*. The Complainant has not provided any documentary evidence or other material to corroborate this figure or explain how it is derived. The Panel will nevertheless assume it is an accurate statement. The statement is unclear as to whether the number of vehicles quoted (as opposed to the revenue figure) is a figure for sales in the UK. The Panel will infer that this figure is also for the quantity sold in the UK. The Panel does so because, as a matter of arithmetic, if this is the case it indicates an average price per vehicle of approximately £45,000 - which appears to be a price of the right order of magnitude for a range of luxury cars and leads the Panel to conclude its inference is not unreasonable.

The figures quoted are however for sales “to date”. No further breakdown of sales by date is given. The Complaint was filed in September 2015. The Respondents registered <edrive.co.uk> in January 2013. Accordingly the information available to the Panel is that by September 2015, 3,768 cars bearing an eDrive badge had been sold in the UK. The Panel does not know how many of these sales were made before January 2013 – but clearly it will be a number less than the total number quoted, and could possibly be very significantly less – indeed, for all the Panel knows, it could be zero.

Apart from these sales figures the Panel has been provided with no further material supporting the Complainant’s contention that its eDrive trade mark is or was well known as at any particular date. The Complainant has not explained to the Panel any detail as to how its eDrive trade mark is used, and to what vehicles it is applied, although its Appeal Notice indicates that it is used on electric and hybrid vehicles. Apart from information of this nature, further information the Panel would have thought might have been available in support of the Complainant’s case that its eDrive trade mark was well known at the relevant date could have included:

- examples of advertisements and brochures
- details of relevant web site or social media material
- details of motor show launches and promotions
- examples of press or TV coverage in either the specialist motoring press or the national press
- details of the Complainant's dealers' activity
- direct evidence from third parties

No material of this nature has been provided and as a result the Panel is left in the dark. It is for the Complainant to establish its case, on a balance of probabilities. Taking the Complainant's evidence as a whole the Panel is not satisfied that it establishes that the Complainant's eDrive trade mark was well known as at the date the Respondent applied for the first of the Domain Names. The Panel considers that the evidence establishes, at best, that as at September 2015 its eDrive trade mark would have been known to members of the public who had purchased or contemplated purchasing or had otherwise come across BMW's electric motorised cars. Whilst the exact number of people this comprises is unknown, based on the evidence presented by the Complainant, showing sales of 3,768 vehicles, the number must be relatively small and certainly amounts to only a very small minority of the population of the UK. It may well be that this assessment by the Panel significantly underestimates the strength of the Complainant's eDrive trade mark and how well known it was at any given date – but, if so, that is a direct consequence of the evidence (or rather the lack of evidence) that the Complainant has provided.

The Panel is conscious that whilst the Respondents have disavowed any knowledge of the Complainant's registered trade mark rights at the time they registered the Domain Names, at no point have they said "we did not know of BMW's use of eDrive on its motor cars when we registered the Domain Names". In many cases a statement of this type, if credible and believable is likely to be an important factor for an expert or an appeal panel to take into account. The absence of such a statement is also a factor the Panel can properly take into account and if appropriate draw inferences from, but is not in itself determinative in establishing that a registration took unfair advantage of or was unfairly detrimental to the Complainant's Rights.

In the present case the Panel regards the Respondents' position as somewhat evasive. Not only have they not explained whether they were aware of the Complainant's use of the term eDrive but they have also failed to provide any real information about what their proposed business is, or how they intend to use the Domain Names. However there is no absolute obligation upon a respondent to provide such information and in some cases there may be good reason (for example commercial confidentiality) for a respondent not doing so. Whether that is the case here the Panel does not know. The Panel has to decide this case taking into account, on the one side, the Complainant's very limited evidence as to the reputation of its eDrive trade mark, and on the other side the Respondents' lack of information as to their awareness of any use by the Complainant of the term eDrive, and their lack of detail as to their business plans.

Proceedings under the Policy are limited in nature and do not involve disclosure of documents or the provision of evidence under oath with cross examination. An expert

or an appeal panel has to decide a case on the basis of the written material that is provided, and it is only in clear cases that an expert or a panel can reach a conclusion based on inference. In some cases a complainant may adduce sufficient evidence to raise a presumption that there is an Abusive Registration. In such cases it may be that a respondent can rebut that presumption by itself adducing credible evidence as to why the registration is not abusive. Conversely in such cases if a respondent fails to adduce credible evidence, or is silent, or evasive, then a Panel may properly conclude that the respondent has failed to rebut the presumption raised by the complainant, and hence the complaint succeeds.

The Panel does not consider the present case is in this latter category. The Panel does not consider that the Complainant has adduced sufficient evidence to raise a presumption in its favour, and hence any evasiveness by the Respondents is not, on its own, sufficient to enable the Panel to find for the Complainant. To put it another way, even if the Respondents have been evasive, the Panel is not satisfied that this establishes that the Respondents had the Complainant's trade mark in mind when they set about the venture they are engaged in (whatever it may be). There are other possible reasons they may have had in mind when registering the Domain Names, for example, involving third parties with interests in the term "edrive", and it may well be that it is for reasons unconnected with the Complainant that they chose not to make full disclosure of their plans.

The Complainant also submits that the Respondents are engaged in classic cybersquatting in that the Domain Names were registered with a view to extracting sums in excess of out of pocket expenses from the Complainant or a competitor of the Complainant. It relies on alternative offers by the Respondents either 1) to sell three of the Domain Names (and two other ".com" domain names not the subject of these Complaints) for £500,000; or 2) to sell all domain names in its possession incorporating "edrive" and the company E Drive Ltd and the Respondents' trade mark registrations and applications for marks comprising "edrive" for £2 million.

However, those offers were made in the course of correspondence between the parties in connection with the Complainant's opposition to the Respondents' trade mark applications and in response to a request by the Complainant's representative to indicate the price at which the Respondents would be prepared to transfer some of the Domain Names.

As with other elements of the Complainant's case, the difficulty is that there is no evidence that the Respondents registered the Domain Names with a view to selling the Domain Names to the Complainant or a competitor. Rather the offers the Respondents made were opportunistic offers in the context of the negotiations between the parties. An offer to sell a domain name for a substantial sum does not of itself automatically establish an abusive registration.

Accordingly the Panel concludes, based upon the evidence before it, that the Complainant has failed to establish that the Domain Names are Abusive Registrations.

9. Decision

The Appeal is dismissed. The Panel finds that the Complainant has Rights in respect of a name or mark which is identical or similar to each of the Domain Names but declines to find that the Domain Names are Abusive Registrations.

Signed: Nick Gardner Ian Lowe Anna Carboni

Dated: 22 February 2016