

DISPUTE RESOLUTION SERVICE

D00010693

Decision of Independent Expert

High Peak Borough Council

and

Neil M Scowcroft

1. The Parties:

Complainant: High Peak Borough Council
Town Hall
Market Street
Buxton
Derbyshire
SK17 6EL
United Kingdom

Respondent: Neil M Scowcroft
21 Bath Road
Buxton, High Peak
Derbyshire
SK17 6HH
United Kingdom

2. The Domain Name:

buxtonspa.co.uk (the "Disputed Domain Name")

3. Procedural History:

22 December 2011 14:40 Dispute received
22 December 2011 16:22 Complaint validated
22 December 2011 16:25 Notification of complaint sent to parties
13 January 2012 01:30 Response reminder sent

18 January 2012 10:31 Response received
 18 January 2012 10:31 Notification of response sent to parties
 23 January 2012 01:33 Reply reminder sent
 25 January 2012 15:55 Reply received
 25 January 2012 15:57 Notification of reply sent to parties
 25 January 2012 16:01 Mediator appointed
 30 January 2012 12:00 Mediation started
 15 February 2012 12:48 Mediation failed
 15 February 2012 12:57 Close of mediation documents sent
 01 March 2012 08:48 No expert decision payment received
 01 March 2012 09:11 Expert decision payment received
 01 March 2012 Michael Silverleaf appointed as Expert
 29 March 2012 decision issued

4. Factual Background

4.1 The Complainant is the local council for the district of High Peak in the north of Derbyshire. High Peak covers the towns of Glossop, New Mills, Whaley Bridge, Chapel-en-le-Frith and Buxton. The Complainant was formed in 1974 under the Local Government Act 1972 and carries on the local government activities for the district of High Peak allocated to it under that Act. It is the successor to previous local government administrations. The town of Buxton is a well-known spa town and water coming from the Buxton area is at least equally well-known as I shall discuss in more detail below.

4.2 The Complainant has helpfully set out some history of the Buxton name. It is of considerable antiquity and can be dated back to about 1100 when the words “Bucstones” or “Buckstones” were first recorded in relation to the site. There are records of a “holy well” from 1536 and in the Elizabethan era Buxton enjoyed fame as a spa. In the 18th and 19th centuries Buxton grew in importance and there is now the Buxton Crescent Hotel and Thermal Spa, built as the centrepiece of the Fifth Duke of Devonshire’s plans to establish a fashionable Georgian spa town in Buxton in the late 18th century. The building is Grade 1 listed and considered to be of significant architectural importance. The evidence also discloses that it has recently been the subject of a substantial renovation and improvement project.

4.3 The Complainant has three UK trade mark registrations for or including the word “Buxton”. They are as follows:

Number	Mark (all word only)	Specification (Class)	Filing date
1132697	BUXTON	natural mineral water	25.04.80

		(32)	
2000038	BUXTON SPA	towels (24) bath robes and bathing suits (25) provision of catering and restaurant services and crèche services (43) provision of baths, massage services and solarium services (44)	31.10.94
2029655	BUXTON PEAK	natural mineral water (32)	04.08.95

The registration particulars of all the marks indicate that they were registered only on evidence of use. Given the obvious geographical signification of the name Buxton, this is hardly surprising.

4.4 The Complainant has made use of these registrations. The principal use is by its licensee Nestlé on its widely sold and recognised “Buxton” mineral water. The Complainant has provided data showing that sales of Buxton mineral water have risen from £46 million in 2006 to £61 million in 2010. It is consequently clear that Buxton mineral water is a well known brand. Indeed, the Complainant has put forward evidence that it appears in a list of consumer “Superbrands”. This is of relatively limited significance for a number of reasons: Buxton appears at number 450 out of the top 500; has a recognition index of 25 %; it appears well below Perrier (another Nestlé brand), Evian and Volvic; and Superbrands is a listing service for which the entrants pay. Whilst, therefore, there can be no dispute that it is a well-known mineral water, its branding is not at the level of recognition that would take it out of the ordinary.

4.5 Other use of the trade marks appears to be on a much less substantial scale. The Complainant has submitted 55 pages of local press coverage dating from 1995 (one item followed by material in 2002) up to late last year. The vast bulk of this material is concerned with two topics, bottled water and the redevelopment of the Buxton Crescent Hotel and Spa. The latter appears from the press coverage to have been a substantial project undertaken as a joint venture between the Complainant and commercial developers (Trevor Osborne Property Group and CP Holdings Limited). The Hotel appears to have opened in

about 2007. The Complainant and its partners have registered both a company (Buxton Crescent Hotel and Thermal Spa Company Limited) and a domain name (buxtonspahotel.co.uk) which are used for this business. The Complainant points out that the company name was registered before the Disputed Domain Name.

4.6 The Respondent says that the domain name buxtonspahotel.co.uk was registered only in April 2011, after this dispute arose. This claim is not challenged in the Reply so I assume that it is correct. The registration of that domain name cannot therefore assist the Complainant. Indeed, the Complainant itself says that this registration is irrelevant in its Reply.

4.7 The Complainant gives a lengthy list of goods and services on which it claims that it has used the Buxton Spa brand. These include the services identified in the previous paragraph as well as massage services, solarium services, hotel and spa services, catering, restaurant and crèche services, museum services, information services, souvenir shop services and souvenirs. These all appear to be in substance use of the Buxton Spa name to identify the geographical location of the services provided. In other words, they are uses of the name Buxton to identify the place from which the goods or services emanate and Spa to identify either the goods or services as being spa or spa-related or to identify the town of Buxton as a spa. As I have noted above, the existence and reknown of Buxton as a spa is long-established.

4.8 In addition the Complainant says that it trades in towels, bathing suits, bath robes and “merchandise including lip balms, bubble bath, hand creams, soaps, candles and bath salts”. No sales figures or advertising have been submitted in relation to any of these goods.

4.9 The Complainant says that its activities under the marks have given it unregistered rights since before the date of registration of the Disputed Domain Name in all three brands which it has registered as trade marks. With the exception of the use on mineral water by the Complainant’s licensee, no real evidence has been supplied in support of this contention. As I have noted above, there are no sales or turnover figures. Much of the material which has been supplied is highly suggestive of use of the names as indicators of geographical location rather than branding.

4.10 The Respondent is an individual. He lives in and trades from Buxton. He registered the Disputed Domain Name on 24 February 2005 when he was employed as a Senior ICT Technician at

Tytherington High School and Science College in Macclesfield. He explains that he has been making hand-made oil-based organic perfumes for family and friends for the last 8 years and that he had an interest in developing a business in producing and selling hand-made organic/nature products including soaps and perfumes. He registered the Disputed Domain Name as part of his preparations for commencing that business. He has since developed that business, his interest and activity in doing so increasing in October 2008 when he had to leave full-time employment as a result of illness.

4.11 The Respondent has submitted considerable documentary evidence of his genuine interest in both the perfumery business and development of his website through which to market his products.

4.12 Between 2005 and 2007 he attended trade fairs in the UK and one in Italy, Cosmopack 2007, held in Bologna. In February 2006 he attended a perfumery course. In 2008 he travelled as far as Singapore in search of ingredients for his products. As he points out, some of the correspondence with potential suppliers during this period is addressed to him under his trading name, Buxton Spa Aromatics. He has also produced business cards bearing that name and the Disputed Domain Name both as a website (www.buxtonspa.co.uk) and as an e-mail address used by Respondent (neil@buxtonspa.co.uk). Whilst these are not dated, the existence of no less than four different designs of card indicates that they are likely to have been produced over an extended period of time.

4.13 In a Rule 13b submission the Respondent has put forward materials from the initial development of his website showing that this began as early as 2004. He has explained that these documents were stored on an Iomega Zip disk which he had to obtain the hardware to read so that he was unable to present them with his other submissions. In the circumstances I have taken account of the additional material, particularly as it does no more than reinforce the impression generated by the material originally submitted.

4.14 The Respondent has also produced evidence of purchasing ingredients and packaging for his products, both samples and larger quantities.

4.15 The Respondent has produced material showing use of the Buxton name at the local swimming and fitness centre, a local tourist centre leaflet produced by the Complainant promoting walks around the town (named as Buxton Spa) and into the local countryside, a

description of Buxton Spa by the British Geological Survey and references to Buxton and Buxton Spa on the rightmove website. These are obvious uses of the Buxton and Buxton Spa names as identification of the geographical location of the activities and services under discussion. It is clear from these materials that large parts of the Complainant's own activities are carried on using the names Buxton or Buxton Spa to indicate the location of the services provided. Given the nature of the Complainant and the services in question, this is hardly surprising.

4.16 There is no dispute between the parties that the Respondent has in the last year taken stands at local bazaars and markets run by the Complainant at which he has sold his products under the name Buxton Spa Aromatics. That, indeed, is how the Complainant became aware of his activities. It is following this discovery that the parties entered into dispute. In its Reply the Complainant has produced an e-mail (a copy of which is annexed to this decision) from Terry Crawford to Nicola de Bruin. This appears to record the point in time at which the Complainant became aware of the Respondent's activities under the name Buxton Spa Aromatics, his registration of the Disputed Domain Name and when the Respondent was told by Mr Crawford that the Complainant had trade mark rights in the name Buxton Spa. The e-mail is Mr Crawford's report of this event. Mr Crawford records the following:

"He's a nice guy and did genuinely look shocked at my comments, but I said we would be in touch."

I regard this contemporary record of Mr Crawford's impressions as having considerably more value and likely accuracy than the complaints now advanced which I address below.

4.17 The parties' encounter was reported in the Buxton Advertiser on 7 April 2011. It is apparent from this report that the Respondent had expressed genuine surprise to the reporter that the Complainant had registered its trade marks or that what he was doing could fall within the scope of their registrations.

4.18 Following this encounter, the Respondent applied to register his business name as a company (registration number 07581503), Buxton Spa Aromatics Limited and that name as a trade mark in Class 3.

4.19 The parties also agree that between March and July 2011 the Respondent had an active website using the Disputed Domain Name

offering his products for sale. The Respondent says that his website has been active for longer. The Complainant in its Reply says that the Wayback machine has only one cached page for the domain, a holding page dating from 2008, indicating that the domain was not hosting an active website at that time. That is correct but tells one nothing about when use of the Disputed Domain Name to host a website began. The records on the Wayback machine are not definitive. As noted above, the Respondent has produced evidence showing that he began to design his website as early as 2004. It is apparent that his approach to the business using the Disputed Domain Name changed towards the end of 2008 when he left full-time employment. It would therefore seem likely that he began to use the domain to host a website after that and before 2011.

5. Parties' Contentions

5.1 The Complainant's arguments are extremely long and detailed. In order not to burden this decision too greatly I do not propose to set them out in full but rather to try and extract and summarise the key points. The arguments are divided into two distinct sections. In the first section the Complainant sets out what it says are the basic reasons why it objects to the registration of the Disputed Domain Name. In the second section it seeks to fit those objections into the various sub-paragraphs of section 3 of the DRS Policy which sets out the grounds on which a domain name may be found to be an Abusive Registration.

5.2 The Complainant's reasons for objection are three:

5.2.1 The Disputed Domain name is identical to the Complainant's Buxton Spa brand and confusingly similar to its Buxton brand;

5.2.2 The Respondent has no rights or legitimate interest in the Disputed Domain Name;

5.2.3 The Disputed Domain Name was registered and is being used in bad faith.

These grounds are of course the bases provided for complaint under the ICANN UDRP which are different from those under the DRS. It seems that the Complainant has taken its standard UDRP complaint format and added to it a section seeking to apply the Nominet DRS rules. This makes the argument both over-complicated and difficult to follow and has consequentially extended this decision.

5.3 There can be no dispute that the Disputed Domain Name is identical to the Buxton Spa brand. Whether it is confusingly similar to

the Buxton brand in any relevant sense is a matter I discuss in the next section of this decision.

5.4 The Complainant's case that the Respondent has no rights or legitimate interest in the Disputed Domain Name is based upon the fact that the Complainant has not licensed the Respondent's activities. That fact is undoubtedly correct. In support of its argument the Complainant refers to a National Arbitration Forum decision in relation to the domain altaivsta.com. This is a decision under the ICANN UDRP. As I have noted above, the rules of the UDRP are different from those of Nominet's DRS and the decision is consequently of little assistance. I note here that the Complainant has referred to a number of other decisions under the UDRP. For the same reason those decisions are of little direct assistance in resolving the issues in the present dispute.

5.5 The Complainant goes on to say that the Respondent's use of the Disputed Domain Name trades on the Complainant's fame and reputation. This is an allegation which I will address in the discussion in the next section of this decision.

5.5 Finally, the Complainant argues that the Disputed Domain Name was registered and is being used in bad faith. In support of this allegation the Complainant points out that the date of registration of the Disputed Domain Name is later than the Complainant's trade marks. It says that there has been no good faith use of the Disputed Domain Name. It does not explain what it means by this. It says that the use of the Disputed Domain Name to host a website ceased shortly after its solicitors complained to the Respondent. It says that when the website was active, the Respondent offered goods which compete with the goods and services offered by the Complainant. It identifies its competing goods and services as baths services, spa services, massage services and solarium services, restaurant and catering services, crèche services, towels, bath robes, bathing suits, mineral water, tourist souvenirs, merchandise including lip balms, bubble bath, hand creams, soaps, candles and bath salts, hotel services, tourism services, museum services and information services.

5.6 The Respondent's goods are aromatic soaps and perfumes. Whilst these may compete with some of the goods listed above, they can only be complementary to some of the others and are in my view unrelated to restaurant, catering, hotel, tourism, museum and information services.

5.7 I interpose here that later in its arguments the Complainant sets out in a lengthy passage further “circumstances evidencing bad faith”. These can be shortly summarised. They amount to an allegation that the Respondent must have been aware of the Complainant’s rights and therefore could not have registered the Disputed Domain Name with the intention of using it legitimately. The Complainant relies heavily on WIPO cases decided under the UDRP in which bad faith is a specific objection to a registration. Because this is not an objection under the DRS Policy, such an approach is not particularly helpful. I will address the argument in the next section of this decision.

5.8 Based on the allegations summarised above, the Complainant sets out the grounds on which it alleges that the Disputed Domain Name is an Abusive Registration. It relies on all the grounds in paragraph 3(a)(i) and (ii) of the DRS Policy.

5.9 First the Complainant asserts as a matter of generality that the registration and use of the Disputed Domain Name have been undertaken so as to take unfair advantage of or be unfairly detrimental to the Complainant’s Rights. It then explains why this is said to be so with reference to the provisions of paragraph 3 of the DRS Policy.

5.10 It asserts that the absence of any evidence of actual or contemplated good faith use of the Disputed Domain Name means that it can only be assumed that the Disputed Domain Name has been registered for the purpose of selling, renting or otherwise transferring it to the Complainant for consideration in excess of the Respondent’s out of pocket expenses. Consequently, the Complainant says that there is a breach of paragraph 3(a)(i)(A) of the DRS Policy.

5.11 The Complainant says that the Disputed Domain Name acts as a blocking registration because it prevents the Complainant from registering it. Consequently there is a breach of paragraph 3(a)(i)(B) of the DRS Policy.

5.12 The Complainant says that the Disputed Domain Name is registered for the purpose of unfairly disrupting the Complainant’s business because the name is identical to the Complainant’s Buxton Spa brand and when the Disputed Domain Name was an active website Internet users who used the Disputed Domain name will have been taken to the Respondent’s website and have been confused into believing that that site was connected with the Complainant. Accordingly, the Complainant’s business will inevitably have been

unfairly disrupted. Consequently, there is a breach of paragraph 3(a)(i)(C) of the DRS Policy.

5.13 Finally, the Complainant says that the Disputed Domain Name has been used in a way which has confused or is likely to confuse people or businesses into believing that it is registered to, operated or authorised by, or otherwise connected with the Complainant. I take this to be an allegation that the Disputed Domain Name is an Abusive Registration under paragraph (ii) of the definition of an Abusive Registration (see below). The complaint expressly asserts a breach of paragraph 3(a)(ii) of the DRS Policy.

5.14 In support of the allegation of confusion the Complainant repeats that the Disputed Domain Name is similar to those used by the Complainant and that the goods are similar to and compete with the Complainant's goods and services and that people are likely to be confused into believing that the Respondent's goods emanate from or are associated with the Complainant. No actual evidence of confusion is relied upon so the issue of likelihood of confusion is one which I am left to determine based upon my own assessment of the facts.

5.15 In response to the Complainant's arguments the Respondent says that he did not know of the Complainant's trade mark registrations when he registered the Disputed Domain Name and was only aware of the sale of "Buxton" mineral water by Nestlé. He says that the names Buxton and Buxton Spa are in common usage as descriptive of a geographical location by business, government organisations, local ratepayers and visitors.

5.16 The Respondent says that he first became aware of the Complainant's claims during the occasion when he attended the Pavilion Gardens Tourist Information Centre Office in Buxton (which is owned and operated by the Complainant) to offer to sell his hand made organic soap products through their shop and at trade fairs and markets operated by the Complainant. He says he was very concerned to hear of the Complainant's claims and took immediate steps to register a company and a trade mark for the name Buxton Spa Aromatics, which had hitherto been his unregistered trading name and brand.

5.17 The Respondent says that the UKIPO did not treat the Complainant's trade mark registrations as conflicting with his trade mark application. He points out that the Complainant's response to the conflict which has arisen between the parties has been to register

the domain name buxtonspahotel.co.uk and to enter into an arrangement with a soap manufacturer to make a range of soaps, candles and other aromatic products under the name Buxton Spa to be sold through the Complainant's outlets. The Respondent produces a press release from the Complainant's website dated 5 December 2011 in support of this claim. That press release does indeed indicate that a limited range of products was launched in time for the Christmas market and was intended to be followed by a larger range in February this year. He complains that this is passing off by the Complainant. The Complainant in its Reply says that that allegation is unsubstantiable.

5.18 The Respondent says that the Complainant has never traded in many of the goods for which it has trade mark registrations. There is no response to this point in the Reply. I can only conclude that the Respondent's allegation is correct. It would seem to be so because the goods in question are ones which the Complainant would be very unlikely to sell under its own brand. At most, it might hire them out to persons visiting the leisure and fitness centre.

5.19 The Respondent says that he has never had anyone who is confused into thinking that he was the Complainant approach him either personally or through his website. He points out that the Complainant has produced no evidence of damage to its business and says that it could not as it was not in competition with him before discovering his existence. He denies that he has acted in bad faith or so as to cause disruption to the Complainant's legitimate exercise of its rights. He denies that he registered the Disputed Domain Name in order to prevent the Complainant from registering it. He says he has never sought to sell the Disputed Domain Name and that it has never been his intention to do so. He says that he has never gained unfair advantage from the use of the Disputed Domain Name and that this is not his intention. He complains that the Complainant's recent business venture in relation to the Crescent and the development of the hotel put it into a position where it has a direct interest in pursuing and removing competing legitimate claims to use of the Buxton Spa name. The implication is that this is the true purpose of the Complainant's complaint.

6. Discussions and Findings

6.1 The version of the DRS Policy relevant to the present dispute is version 3 which relates to complaints lodged after 29 July 2008. Paragraph 1 of that policy defines an 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 has taken unfair advantage of or has been unfairly detrimental to the Complainant's Rights”

6.2 Paragraph 1 of the DRS Policy also defines “Rights” for the purposes of this procedure as including but not limited to those enforceable under English law. Under Paragraph 2 of the DRS Policy a complainant must show on the balance of probabilities

- (a) that it has Rights in a name or mark identical or similar to the Domain Name; and
- (b) that the Domain Name in the hands of the Respondent is an Abusive Registration.

6.3 Paragraph 3 of the DRS Policy identifies a non-exhaustive list of factors which may be evidence that the Domain Name is an Abusive Registration. The relevant factors for the purposes of the present case are

- “(a)i. Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily:
- A. for the purposes of selling, renting or otherwise transferring the Domain Name to the Complainant or to a competitor of the Complainant, for valuable consideration in excess of the Respondent’s documented out-of-pocket costs directly associated with acquiring or using the Domain Name;
 - B. as a blocking registration against a name or mark in which the Complainant has Rights;
 - C. for the purpose of unfairly disrupting the Business of the Complainant;
- ii. Circumstances 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.”

The remaining factors are not relevant in the present case. I have accordingly taken the above factors into account in reaching my conclusions.

6.4 Clause 4 of the DRS Policy sets out a non-exhaustive list of factors which may be evidence that the Domain Name is not an Abusive Registration. These include the following which are relevant to the present case:

“(a)i. Before being aware of the Complainant’s cause for complaint (not necessarily the ‘complaint’ under the DRS) the Respondent has:

A. used or made demonstrable preparations to use the Domain Name or a domain name which is similar to the Domain Name in connection with a genuine offering of goods or services;

B. been commercially known by the name or legitimately connected with a mark which is identical or similar to the Domain Name;

...

6.5 According to the Appeal Panel decision in the *Seiko* case (DRS 00248) whether a registration is an abusive registration under the DRS Policy is independent of whether a domain registration is an infringement of trade mark and should be decided under the terms of the DRS Policy alone. The same decision also makes clear, however, that the relevant principles of English law should be applied in determining whether the Complainant has Rights under the Policy and that the Policy is founded on the principle of intellectual property rights which should be taken into account.

6.6 The first question in any DRS complaint is whether the complainant has Rights. This, as has been said in many cases, is a low threshold test and there is no doubt that in the present case the Complainant passes this test. It has three trade mark registrations for marks containing the word Buxton, one of which is for the mark Buxton Spa, a mark identical to the Disputed Domain Name.

6.7 This decision raises a central and difficult issue. Whilst there is no doubt that the Complainant has Rights, the real question here is the nature and extent of those rights. The rights subsist in a trade mark whose primary signification is geographical. Indeed, in many cases it would be misleading to apply the mark Buxton or the mark Buxton Spa to goods or services not originating in the Buxton area. Thus, to apply the mark Buxton to mineral water not drawn from the

Buxton spring would clearly be a misleading use of the mark. Equally, however, a trader who is located in Buxton and provides goods or services from there may wish to use the name Buxton or Buxton Spa to characterise his goods. Can the Complainant say that it is entitled to prevent any trader operating in Buxton from using the name Buxton for his goods because to do so would cause the public to believe that those goods were in some way connected or associated with the Complainant? That, in essence, is the substance of the Complainant's case.

6.8 The Complainant's arguments are not made more attractive by its apparent response to discovering the existence of the Respondent's activities in seeking to bring out a range of competing goods to be sold through its outlets under the mark Buxton Spa. I shall, however, ignore this factor as it is strictly irrelevant to the questions I have to decide. If the Respondent has a valid complaint of passing off, then it is one that he must pursue elsewhere. Before turning to the core issue, I will deal with the subsidiary allegations made by the Complainant.

6.9 The first question for me to determine is whether there is substance in the allegation that the Respondent registered the Disputed Domain Name with the intention of selling it for profit. I have no hesitation in concluding that such an allegation is entirely without merit. The Complainant has produced nothing to support the claim and the Respondent has denied it. The Respondent's explanation of the history of his business makes it plain that he registered the Disputed Domain Name with the intention of using it for his business. It is also clear from the evidence and the history that the Respondent was not aware that the Complainant had rights which might conflict with what he was doing before March 2011. He was aware of the existence of Buxton mineral water but (in my view correctly) did not regard that as conflicting with his use of the Buxton Spa name as a brand for aromatic soaps and perfumes. It cannot therefore be said that he registered the Disputed Domain Name in the knowledge of the Complainant's rights or consequently with the intention of exploiting the Disputed Domain Name by interfering with those rights.

6.10 The Complainant points to the fact that the Respondent admits being aware of the sale of Buxton mineral water by Nestlé. That may be so but being aware of Buxton mineral water is a far cry from being aware that the Complainant has rights which might conflict with his use of the Buxton Spa name as a trade mark on aromatic soaps and perfumes. In this context it is important that the name Buxton is an

indication of geographical location. Buxton mineral water may only legitimately be so called because it emanates from a spring in Buxton. The branding may signify a particular trade source but it is a trade source which has a geographical link. Equally, the Respondent's goods are made in Buxton. The dual signification of Buxton branding means that it is inherently less likely than it would be for a mark having no other connotation that consumers will assume that two Buxton or Buxton Spa brands are necessarily commercially linked. They are more likely to think that both goods or services originate from traders who operate in Buxton.

6.11 Should the Respondent, being aware of Buxton mineral water, have realised that there might be trade mark rights conflicting with his proposed use of the Disputed Domain Name? This is not a question which the parties have raised directly: the Complainant has simply asserted that the Respondent must have known of its rights. For the reasons set out above, I do not accept that contention. Nor does it seem to me that a reasonable trader, being aware of Buxton mineral water, would necessarily think that the use of the Disputed Domain Name for a website selling aromatic soaps and perfumes under the name Buxton Spa Aromatics would give rise to a conflict.

6.12 I therefore accept that the Respondent was not aware of the Complainant's rights insofar as they should reasonably have been expected to give rise to a conflict. Domain registration is a first come first served system. Prospective registrants are not required to do trade mark searches before they register a domain. The Respondent cannot be faulted in these proceedings for not having done a trade mark search. There was nothing of which he was aware that should have alerted him to the likelihood that the Complainant might have relevant trade mark registrations. The complaint under paragraph 3(a)(i)(A) is therefore dismissed.

6.13 The conclusions I have reached also lead to the result that the complaints under paragraphs 3(a)(i)(B) and (C) should be dismissed as all depend upon the Respondent having knowledge of the Complainant's relevant rights at the time of registration or acquisition of the Disputed Domain.

6.14 I turn therefore to the real issue in this complaint: is the Respondent's use of the Disputed Domain Name has taken unfair advantage of the Complainant's Rights. The alleged basis for this is that the Respondent's use 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. Has this allegation been substantiated?

6.15 The starting point must be that the Respondent appears to have been in some way of business for some time. He has been selling his goods in Buxton, the location of the Complainant. Yet the only occasion on which there has been any evident conflict was when the Complainant was presented directly with the Respondent's goods. Until then the Respondent says that he had encountered no-one who thought he was connected to the Complainant and the Complainant has not suggested that there was any actual confusion.

6.16 It is often said that the confusion found in trade mark and passing off cases is only the tip of the iceberg and that the absence of actual confusion does not necessarily mean that confusion is not likely. It seems to me, however, that, in a case where the parties operate cheek by jowl and, if there is anything in the Complainant's arguments at all, one would expect someone to have noticed the apparent connection between the parties, the complete absence of any evidence of confusion is telling. As Jacob J (as he then was) put it in *Neutrogena v Golden* ([1996] RPC 473 at 482:

“The proper approach of the court to the question was not in dispute. The judge must consider the evidence adduced and use his own common sense and his own opinion as to the likelihood of confusion. It is an overall ‘jury’ assessment involving a combination of all these factors, see *GE Trade Mark* [1973] RPC 297 at 321. Ultimately the question is one for the court, not for the witnesses. It follows that if the judge's own opinion is that the case is marginal, one where he cannot be sure whether there is a likelihood of sufficient deception, the case will fail in the absence of enough evidence of the likelihood of deception. But if that opinion of the judge is supplemented by such evidence, then it will succeed. And even if one's own opinion is that deception is unlikely though possible, convincing evidence of deception will carry the day. The *Jif lemon case* (*Reckitt & Colman v Borden* [1990] RPC 341) is a recent example where overwhelming evidence of deception had that effect. It was certainly my experience in practice that my own view as to the likelihood of deception was not always reliable. As I grew more experienced I said more and more ‘it depends on the evidence’”.

6.17 Thus, in a borderline case such as the present, where the adjudicator cannot rely on his own perception, he has to turn to the evidence. That seems to me to be all the more so where the mark in issue is one with a strong geographical connotation. There is every possibility that real consumers looking at products bearing the name Buxton Spa recognise that unless they are of precisely the same kind

the connection between them is their geographical rather than their trade origin.

6.18 In this instance, whilst the Disputed Domain Name is identical to one of the Complainant's registered marks, the goods being supplied under the mark are not particularly close to any of the goods or services covered by that registration. They are goods that one might expect to find in a similar context, the geographical location of Buxton, but not necessarily having the same trade source.

6.19 In these circumstances is the use which the Respondent has made of the Disputed Domain Name likely to confuse people into believing that there is a connection with the Complainant? In the absence of any evidence to this effect, I conclude that the answer is no. Accordingly, the Complainant's complaint under paragraph 3(a)(ii) also fails.

7. Decision

7.1 Having concluded that all the complaints made by the Complainant are unfounded I direct that no action is taken on this complaint.

Signed Michael Silverleaf

Dated 29 March 2012

ANNEX

From: Terry Crawford
Sent: 21 March 2011 13:17
To: Nicola de Bruin
Cc: Dai Lerner; Christine Marrison; Rachel Hoodith
Subject: Trademark

Hi Nicola

The party below has just been into Pavilion Gardens to register for our Spring Bonanza. Having been made aware by my team that he is using our 'Buxton Spa' trademark I immediately approached Mr Scowcroft to politely challenge the fact he is using the council's intellectual property. He responded by saying he owns the 'domain' rights which obviously relates to his website and I stated that it wouldn't make any difference.

Name:	Mr Neil M Scowcroft
Business / Trade Name:	Buxton Spa Aromatics
Website:	www.buxtonspa.co.uk
Product:	Handmade Organic Perfume
Tel:	07944 632184
Email:	neil@buxtonspa.co.uk
Address:	21 Bath Road, Buxton Spa, High Peak, Derbyshire, SK17 6HH

He's a nice guy and did genuinely look shocked at my comments, but I said we would be in touch. Is this something you will pursue from this juncture forward? My view is that we shouldn't allow him to trade at our events unless he uses a different business name. Do you agree?

I look forward to hearing back from you.

Best regards

Terry Crawford

22/03/2011