

## DISPUTE RESOLUTION SERVICE

D00014568

### Decision of Independent Expert

Keolis Amey Docklands Limited

and

Mr Ash Bansal

#### 1. The Parties:

Complainant: Keolis Amey Docklands Limited  
Evergreen Building North  
160 Euston Road  
London  
NW1 2DX  
United Kingdom

Respondent: Mr Ash Bansal  
10 Leigham Drive  
Isleworth  
Middlesex  
TW7 5LU  
United Kingdom

#### 2. The Domain Name(s):

keolisameydocklands.co.uk  
keolisameydocklands.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.

28 July 2014 12:13 Dispute received  
28 July 2014 12:24 Complaint validated  
28 July 2014 12:29 Notification of complaint sent to parties  
14 August 2014 02:30 Response reminder sent  
19 August 2014 09:37 No Response Received  
19 August 2014 09:38 Notification of no response sent to parties  
27 August 2014 08:38 Expert decision payment received

#### **4. Factual Background**

The following are the facts appearing from the Complainant's submissions which I find to be proven and which are the basis for my decision:

- i. Since 1997, Serco had been the incumbent supplier for outsourced services to the London Docklands Light Railway.
- ii. The Complainant was registered as a company on 2 July 2014 with the name "Keam Limited", being renamed to its current name, "Keolis Amey Docklands Limited" on 9 July 2014.
- iii. This is a jointly owned company created from the members of a consortium which successfully tendered for and won the contract to take over those outsourced services from the London Docklands Light Railway for the next seven years.
- iv. The Complainant is a jointly owned entity, owned by Keolis UK Limited, part of a French group of companies involved in the transport sector, and Amey Plc, which is involved in a range of sectors, including rail and facilities management.
- v. The general announcement of the Complainant's success in the tender was announced on 4 July 2014.
- vi. The Complainant set up a physical office at its registered address on 22 July 2014.

#### **5. Parties' Contentions**

The Respondent has not made any submissions.

The Complainant has submitted as follows:

- i. The Complainant sought to register the Domain Names in its own name.
- ii. The Respondent had already registered them on 11 July 2014, only 7 days after the announcement to the City.
- iii. The Complainant contacted the Respondent, who requested an offer for the Domain Names and stated that he would sell to the highest bidder.
- iv. The Complainant declined to do so.

## 6. Discussions and Findings

Any complainant in the Nominet DRS procedure must prove, on the balance of probabilities, that he has Rights and that the respondent's registration or continued registration of a domain name, is an "Abusive Registration". I shall look at both of these concepts in order.

### **Rights**

"Rights" are defined in the DRS Policy as "*rights enforceable by the Complainant, whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning*".

Under paragraph 2(a) of the DRS Policy, a complainant must show that it "*has Rights in respect of a name or mark which is identical or similar to the Domain Name*".

The Complainant has not submitted any evidence of formal entitlement to trade mark rights, such as certificates demonstrating the ownership of a trade mark in a name or mark similar to or identical with the Domain Names.

The Complainant points to its company name registration. However, looking at the Experts Overview at paragraph 1.7<sup>1</sup>, it states as follows:

*"There are decisions going both ways (qv DRS 00228 (activewebsolution.co.uk) and DRS 04001 (generaldynamics.co.uk)). The issue is this: does the mere fact that under the Companies Acts (section 28(2) of the Companies Act 1985 and sections 66 and 67 of the Companies Act 2006) the Secretary of State can direct NewCo to change its name because it is the same as, or 'too like', OldCo's name mean that OldCo enjoys 'rights enforceable under English law' and/or 'Rights' within the full meaning of the Policy?"*

*The consensus view of recent Experts' meetings has been that mere registration of a company name at the Companies Registry does not of itself give rise to any rights for this purpose."*

I adopt the consensus view as here stated in the Experts Overview. The company name registration submitted by the Complainant is therefore insufficient of itself to constitute Rights for the purposes of the DRS Policy.

However, the words I have quoted from the DRS Policy show that use of a trading name can give rise to goodwill which can give rise to unregistered

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<sup>1</sup> The Experts Overview is a document put together by Nominet's panel of Experts which deals with a range of issues which frequently come up for decision in DRS Policy disputes. It can be found on Nominet's website in its current version, from which I have quoted, at [http://www.nominet.org.uk/sites/default/files/drs\\_expert\\_overview.pdf](http://www.nominet.org.uk/sites/default/files/drs_expert_overview.pdf)

rights, such as the right to bring an action in passing off. These unregistered rights can themselves be sufficient to be “Rights” under the DRS Policy.

However, turning again to the Experts Overview at paragraph 2.2, it states as follows:

*“As indicated above, the relevant right has to be an enforceable right (i.e. a legally enforceable right). Bare assertions will rarely suffice. The Expert needs to be persuaded on the balance of probabilities that relevant rights exist. The Expert will not expect the same volume of evidence as might be required by a court to establish goodwill or reputation, but the less straightforward the claim, the more evidence the better (within reason – this is not an invitation to throw in the ‘kitchen sink’).*

...

*If the right is an unregistered trade mark right, evidence needs to be put before the Expert to demonstrate the existence of the right. This will ordinarily include evidence to show that (a) the Complainant has used the name or mark in question for a not insignificant period and to a not insignificant degree (e.g. by way of sales figures, company accounts etc) and (b) the name or mark in question is recognised by the purchasing trade/public as indicating the goods or services of the Complainant (e.g. by way of advertisements and advertising and promotional expenditure, correspondence/orders/invoices from third parties and third party editorial matter such as press cuttings and search engine results).”*

In other words, there has to be some substantial evidence pointing to the existence of these unregistered rights. I accept all the Complainant has said about the establishment of the Complainant and the success of its promoters in winning the tender to provide outsourced services to the London Docklands Light Railway. However, that is of very recent history. It appears from the Complainant’s submissions that the Complainant was only legally formed on 2 July 2014, and it only acquired its current name on 9 July 2014. The Complainant would have to show unregistered rights inhering in the Complainant since that date.

The Complainant has included some references to websites where the announcement of its success in the tender to London Docklands Light Railway was made. However, apart from one reference to the Complainant’s name (minus the “Limited”) in the report in the Evening Standard, these announcements do not refer to the Complainant by name, but only by reference to the unnamed joint venture established by the owners of the Complainant. In any case, there is nothing to show that the goodwill in any name actually attached to the Complainant as opposed to its owners, Keolis and Amey: the Complainant had not as at that stage changed its name to its current one and the announcements and reports appear to be written from the perspective of the Complainant’s owners rather than from the Complainant’s.

In other words, while there may be some goodwill shown by these announcements attaching to Keolis and Amey separately, or perhaps to some as yet unidentified joint venture consisting of both Keolis and Amey, there is nothing which points specifically to the Complainant.

Rights constituted by goodwill can come into existence very quickly. However, as shown by the quotation above from the Experts Overview, I have to see some evidence of actual usage of the name or mark for a not insignificant period of time. From the material submitted by the Complainant, I have no such evidence at all (save perhaps for the one reference in the Evening Standard of 4 July 2014). In any case, I am not convinced that the period of usage here since July has gone beyond the “*not insignificant*” as referred to in the Experts Overview.

When it comes to the further material indicated in the Experts Overview in paragraph (b), I have simply no idea whether there have been advertisements, promotional expenditure, correspondence, orders, invoices from third parties, press cuttings (other than the one in the Evening Standard) or search engine results. There may well be such material: it would be easy to imagine such a substantial joint venture with such well-known owners as the Complainant has all of this material in abundance. However, my role as Expert is not to assume or make even educated guesses as to what exists: I have to be shown it by the Complainant and I have to be able to conclude on the balance of probabilities that it makes up sufficient goodwill to constitute Rights for the purposes of the DRS Policy.

I am reluctant to go into the detail of trade mark law and to go to the level of examining the law of passing off. As the Expert stated in *Petmeds Limited v Amdega Brands Limited* (D00009189),

*“It is often remarked that the Nominet Dispute Resolution Service (DRS) is intended to be a fast, simple procedure designed predominantly for clear cut cases of Abusive Registration under the Policy (often referred to as “cybersquatting”). It is not intended to deal with complex points of law, which are better left to a court of competent jurisdiction. However, brief consideration of the law of passing off is somewhat unavoidable in these circumstances, as it is inextricably linked to the concept of unregistered trade mark rights. Under the law of England and Wales, it is generally accepted that three elements must be satisfied for a successful action in passing off, as follows:*

*(i) First, the claimant has to prove that he has goodwill or reputation attached to the goods or services supplied, so that the identifying 'get-up' (whether brand name or trade description or the individual features of labelling or packaging) is recognised by the public as distinctive of those goods and services.*

*(ii) Secondly, the claimant must demonstrate a misrepresentation by the defendant to the public, leading or*

*likely to lead the public to believe that the goods or services offered by him are the goods or services of the claimant.*

*(iii) Finally, the clamant must prove that he has suffered damage by reason of the public's belief that the source of the defendant's goods or services is the same as the source of those offered by the claimant.*

*For the purposes of considering whether the Complainant has Rights under the Policy, the Expert is of the opinion that it is not necessary to come to a view on all three points listed, only point (i)".*

I agree with that approach. Given the almost complete absence of such material as would prove on the balance or probabilities the existence of goodwill or reputation making up Rights under the DRS Policy, I have come to the conclusion that I cannot make such a finding.

The Complainant has not shown to my satisfaction that it has Rights under the DRS Policy.

### ***Abusive Registration***

Having found that there are no Rights, it is not strictly necessary (or indeed possible) for me to consider whether the Respondent's registration or holding of the Domain Names is an Abusive Registration. I will for completeness consider the point.

The DRS 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;"*

Paragraph 3(a) of the DRS Policy sets out what it describes as a non-exhaustive list of factors which may be evidence of an Abusive Registration. The ones which may be relevant are as follows:

- 1. 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; or*
- 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;*

*...”*

From the little material provided by the Complainant, there is no evidence to suggest that paragraph II is engaged: there is no evidence of usage or threatened usage by the Respondent at all.

With regard to paragraph I, it is possible to guess that the Respondent's motive is to sell the Domain Names for more than his costs, but the Complainant has not provided that evidence. Indeed, the Complainant's evidence falls short of actually stating what the Respondent's actual request was. The Respondent seemed more concerned to open the bidding rather than state exactly the sum he required.

As I say, it is easy to surmise that the Respondent has registered the Domain Names for one of the purposes set out in paragraph I, as the Domain Names are otherwise complex and very specific to the Complainant's owners' names and business. On balance, given the statement that the Respondent was prepared to sell to the highest bidder, I would find that paragraph I(A), and possibly I(B) and I(C), were applicable.

It is a difficult question: I cannot see any valid reason why anyone other than the Complainant would want to register the Domain Names. Paragraph 4 sets out what it describes as a non-exhaustive list of factors which may be evidence that the Domain Name is not an Abusive Registration. Without any submissions from the Respondent, there is no evidence that any of them applies.

On balance, and given the very limited material before me, if there had been Rights, I would have found an Abusive Registration under paragraph 3(a)(I) of the DRS Policy.

## **7. Decision**

My decision is as follows:

1. The Complainant has not shown that it has Rights in respect of a name or mark which is identical with or similar to the Domain Names;
2. The Complaint in respect of the Domain Names therefore fails and I direct that no action be taken in relation to the Domain Names.

**Signed     Richard Stephens     Dated 15 September 2014**