



**WIPO Arbitration and Mediation Center**

**ADMINISTRATIVE PANEL DECISION**

Fall Nummer: D2003-0645

Entscheidung vom 27. Oktober 2003

**1. The Parties**

The Complainant is the Meat and Livestock Commission of Milton Keynes, ...("UK"), ....

The Respondent is David P., also known as OTC and The Recipe for BSE, of Brighton, East Sussex, UK.

**2. The Domain Names and Registrar**

The disputed domain names <britishmeat.com> and <britishmeat.org> (the "Domain Names") are registered with Tucows (the "Registrar").

**3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") by email on August 15, 2003, and in hard copy on August 18, 2003. The Center transmitted its request for registrar verification to the Registrar by email on August 15, 2003. The Registrar confirmed by email of August 18, 2003, that it was the Registrar for the Domain Names, that the current registrants of the Domain Names were "OTC" and "The Recipe for BSE" respectively, that the Uniform Domain Name Dispute Resolution Policy (the "Policy") applied to the registrations, that the Domain Names would remain locked during this proceeding subject to any scheduled expiry, and that the registration agreement was in English and included a submission to the jurisdiction of the courts at the location of its principal office. The Registrar also provided the registrants' contact details and confirmed by a subsequent email of the same date that it had received a copy of the Complaint.

The Center verified on August 19, 2003, that the Complaint satisfied the formal requirements of the Policy, the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules"), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the "Supplemental Rules").

In accordance with the Rules, paragraphs 2(a) and 4(a), the Center formally notified the Respondent of the Complaint, and the proceeding commenced on August 19, 2003. In accordance with the Rules, paragraph 5(a), the due date for Response was September 8, 2003. On the application of the Respondent and having considered the comments of the Complainant, the Center extended this time limit to September 15, 2003, under the Rules, paragraph 5(d). The Response was filed with the Center on September 15, 2003.

The Center appointed Jonathan Turner as the sole panelist in this matter on September 22, 2003. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

Under the Rules, paragraph 4(c), a complaint may relate to more than one domain name, provided the domain names are registered by the same domain-name holder. In this case, the registrants of the Domain Names are named as "OTC" and "The Recipe for BSE" respectively. However, the Domain Names are pointed to websites with the same content, and in both registrations David Pearce is identified as the Administrative and Technical Contact with the same street address in Brighton, England, and the same telephone and fax numbers. David Pearce has responded to the Complaint in respect of both Domain Names identifying the Respondent as "OTC" and referring to it as "our organization".

Under English law, the adoption of a name for a particular activity does not constitute a separate legal person, and the Response does not dispute the contention in the Complaint that neither "OTC" nor "The Recipe for BSE" are legal entities. The Panel accordingly concludes that the Domain Names are registered by the same domain-name holder, namely David Pearce operating under the names "OTC" and "The Recipe for BSE", and that the Complaint complied with the Rules, paragraph 4(c).

Having reviewed the file, the Panel concludes that the Complaint complied with applicable formal requirements, was duly notified to the Respondent and has been submitted to a properly constituted Panel under the Policy, the Rules and the Supplemental Rules.

#### 4. F a c t u a l B a c k g r o u n d

The Complainant is a British public body primarily funded by statutory levies on British livestock farmers and meat processors. It has a general duty of promoting greater efficiency in the livestock and livestock products industries, and specific duties which include promoting and advertising the merits of livestock and livestock products produced in Great Britain. In carrying out its functions it is required to have regard to the interests of consumers as well as of the various sections of these industries. The Complainant carries out research and development, disseminates information, advises public authorities, and advertises British meat.

The Complainant has used a logo comprising the words "British Meat" in white capital letters over red and blue bands since 1991. It has registered this logo as a trademark in the UK with effect from September 6, 1999, in respect of the provision of information and of educating services, in each case relating to agriculture, food and nutrition. In the registration the colours red and blue are claimed as an element of the mark.

One major advertising campaign of the Complainant has used the slogan "The Recipe for Love" and this phrase has also been registered by the Complainant as a trademark in the UK with effect from April 17, 1996, in respect of meat, meat products and prepared foods containing meat.

The Complainant operates various websites, including "www.britishmeat.org.uk", "www.britishmeat.co.uk", "www.britishmeatretail.com", "www.meatandhealth.com", "www.britishmeat-export.com", "www.britishmeatfoodservice.com", "www.britishmeatfoodservice.com/product", "www.mlc.org.uk", "www.meatmatters.com" and "www.bmesonline.org.uk". The website at "www.britishmeat.org.uk" has been operated for about six years. The domain name <britishmeat.co.uk> was originally registered by the Respondent but was obtained by the Complainant in November 2002, after the Respondent allowed his registration to lapse.

The Respondent registered the Domain Names <britishmeat.com> and <britishmeat.org> in March 1997 and July 1998 respectively. He has used the Domain Names for a website containing materials and links to materials critical of the meat industry, particularly in Britain, and of meat as a source of nutrition. These include links using the phrases "British Meat: the recipe for BSE", "British Meat: the recipe for cancer", "British Meat: the recipe for prostate cancer" and "British Meat: the recipe for food poisoning". There is also a link to the Complainant's website using the phrase "The Meat Industry Online" under the heading "WHITEWASHING BUTCHERY".

David Pearce had also registered the domain names <countryside-alliance.com> and <countrysidealliance.net> and used them for websites critical of hunting and of the Countryside Alliance, a well-known organization representing those seeking to preserve rural traditions such as hunting. A WIPO Panel upheld a complaint by the Countryside Alliance against David Pearce under the Policy in WIPO Case No. D2001-0862 and ordered that these names be transferred.

## 5. Parties' Contentions

### A. Complainant

The Complainant contends that it has rights in BRITISH MEAT as an unregistered trademark by virtue of use since at least 1977 and as a registered trademark as of September 6, 1997. It also claims rights by virtue of its registration of the domain name <britishmeat.org.uk> in mid/late 1996 and its use since a date shortly thereafter. The Complainant argues that the Domain Names are confusingly similar to its marks, since they are phonetically identical. The Complainant also points out that the Respondent must have been aware of its rights in its trademarks, since the Respondent's website is evidently intended to refer to and mimic the Complainant in its use of the terms "British Meat" and phrases such as "British Meat: the recipe for BSE".

The Complainant maintains that the Respondent does not have any rights or legitimate interests in respect of the Domain Names. Referring to the decisions of WIPO Panels under the Policy in WIPO Case No. D2000-0505, <barcelona.com> and WIPO Case No. D2000-0020, <saint-gobain.net>, the Complainant points out that freedom of expression does not confer rights in other people's trademarks. The Complainant also

argues that the Respondent is not making legitimate or fair use of the Domain Names since he is diverting internet users from the Complainant by misleading them and tarnishing the Complainant's marks by inaccurate and unfair content. The Complainant further relies on the lapse of the Respondent's registration of <britishmeat.co.uk> as an indication that it does not have rights or legitimate interests in the Domain Names.

Referring to the decisions of WIPO Panels in WIPO Case No. D2000-0279, <kwasizabantu.com> and WIPO Case No. D2000-0869, <estelauder.com>, the Complainant argues that the Respondent is a "competitor" of the Complainant, that the Respondent registered the Domain Names primarily for the purpose of disrupting the Complainant's business, and hence that the circumstances are of the kind expressly identified in the Policy, paragraph 4(b)(iii), as evidence of bad faith.

The Complainant contends that the Domain Names were registered with the intention of diverting internet users seeking information of the kind provided by the Complainant, particularly as the Respondent's websites are likely to be identified by search engines in response to searches on the phrase "British Meat". The Complainant notes in this regard that the Respondent's metatags include "British Meat" as well as the Complainant's full name. The Complainant alleges that there have been numerous instances of confusion which it describes in general terms but without providing specific evidence.

The Complainant further contends that the content of the Respondent's website and linked material is misleading and unfair. The Complainant objects in particular to: the heading "WHITEWASHING BUTCHERY" for the link to its own website; the presence of articles relating to practices not carried out and/or prohibited in the UK; an unsubstantiated allegation of a link between animal fat and cancer; and a reference in an article by Professor Richard Lacey to the possibility that scrapie in sheep, BSE in cattle and CJD in humans may be one and the same disease.

Finally, the Complainant contends that the Respondent registered the Domain Names in order to prevent the Complainant from reflecting its trademark BRITISH MEAT in a corresponding domain name and that the Countryside Alliance case, WIPO Case No. D2001-0862, (see paragraph 4 above) shows that the Respondent has engaged in a pattern of such conduct. The Complainant therefore argues that the circumstances are of the kind expressly identified in the Policy, paragraph 4(b)(ii), as evidence of bad faith.

The Complainant requests transfer of the Domain Names.

## B. Respondent

The Respondent states that his organization has campaigned against alleged cruelty in British meat production for over twenty years and has provided information on British meat at its website at the Domain Names for six years. He points out that "British meat" has been in widespread use as a generic and descriptive term for over two centuries. He says that his organisation's website was established following a succession of scandals in the British meat industry and that the Domain Names represented the most logical choice for websites about British meat aiming at a domestic and international audience.

The Respondent claims that the Complainant cannot acquire exclusive rights in the term "British meat" by its registration of a logo incorporating these words. He points out that the logo on the Respondent's website containing the words "BRITISH MEAT" is different from the Complainant's logo in all other respects and submits that no one is likely to be confused by it.

The Respondent goes on to contend that his organisation has a legitimate interest in using the generic and descriptive term "British meat" to discuss the ethics of British meat production, and that the Complainant is not entitled to buy up relevant parts of the English language from the namespace in a bid to preempt criticism. The Respondent insists that his provision of information about British meat is bona fide even if his campaigning is ineffectual.

Finally, the Respondent denies that he has acted in bad faith. He comments that the fact that his organisation's website is identified by search engines in searches using the term "British meat" emphasises the value of the term "British meat" to describe its subject.

The Respondent requests that the Complaint be rejected and invites the Panel to find that the Complainant is guilty of attempted reverse domain name hijacking.

## 6. Discussion and Findings

In accordance with the Policy, paragraph 4, to establish a valid complaint in relation to a domain name, the Complainant must prove (A) that the domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights; (B) that the Respondent has no rights or legitimate interests in respect of the domain name; and (C) that the domain name has been registered and is being used in bad faith. These requirements are considered in turn below.

In accordance with the Rules, paragraph 15(a), the Panel must decide the Complaint on the basis of the statements and documents submitted and in accordance with the Policy, the Rules and any rules and principles of law that it deems applicable. In the circumstances of this case, the only relevant law is that of the UK.

### A. Identical or Confusingly Similar to Trademark in which Complainant has Rights

The Panel is satisfied that the Complainant has registered rights in the logo comprising the words BRITISH MEAT in white capital letters over red and blue bands. Although the phrase BRITISH MEAT is obviously descriptive, the Panel considers that the whole combination of features comprising the logo is capable of being distinctive. The evidence does not establish that the logo is devoid of distinctive character or that the registration is invalid for any other reason. In accordance with the Rules, paragraph 15(a), it is appropriate to apply the presumption of UK trademark law that a registered trademark is valid unless shown otherwise.

The registration has effect from September 6, 1999, which is after the Respondent registered the Domain Names and apparently started using them for a website containing information critical of the British meat industry. However, in the Panel's view, the Policy does not require that the Complainant's right predate the original registration or the use of which complaint is made. This view accords with previous decisions under the Policy in cases WIPO Case No. D2001-0509, <audiopoint.com>, and WIPO Case No. D2000-0270, <htmllease.com>, and with the function of its first requirement in the context of the Policy as a whole, namely to ensure that a complainant has a sufficient interest in the disputed domain name. Whether the respondent has a legitimate interest in respect of the domain name by virtue of earlier use falls to be considered under the second requirement.

In any case, the Panel is also satisfied that the Complainant had acquired unregistered rights in the logo by 1997 when the first of the Domain Names was registered, by virtue of its use since 1991. The Complainant may also have rights under UK common law in the various domain names used for its websites.

However, the Panel considers that the Complainant's rights exist only in the whole combinations which constitute its marks. The Panel is not satisfied by the evidence that the term BRITISH MEAT has itself become distinctive of the Complainant. As Jacob J. pointed in the Treat case, *British Sugar v Robinson* [1996] RPC 281, even extensive use of a common English word or phrase does not of itself show that the word or phrase has acquired a secondary meaning distinctive of the user, in the absence of evidence that this has in fact led to its being regarded as a trademark by the relevant public.

In this respect, the Panel considers that this case is somewhat different from WIPO Case No. D2001-0862, <countryside-alliance.com>, concerning the same Respondent. Although the phrase "Countryside Alliance" has a descriptive connotation, it was not in normal use as a descriptive term prior to its adoption as the name of a particular organization. By contrast, BRITISH MEAT was and is a normal and natural description of meat produced in Britain.

This leads to the next question, whether the Domain Names are confusingly similar to the marks in which the Complainant has rights. In considering this issue, it is appropriate to bear in mind the observations of Lord Simonds in *Office Cleaning Services v Westminster Window and General Cleaners* (1946) 63 RPC 39, that where names consist of descriptive elements, small differences suffice to distinguish.

It is also notable that the Respondent has apparently had active websites at the Domain Names for some six and five years respectively without overt objection from the Complainant. Although laches is not a defence in itself under the Policy (see WIPO Case No. D2003-0447, <commercialappeal.com>), the absence of any complaint over a long period of time in which domain names are in active use can suggest that such use does not give rise to a serious problem.

In discussing the issue of bad faith, the Complainant alleges that it is aware of numerous instances of confusion and identifies several types of situation in which confusion has allegedly occurred. However, the

Complaint does not contain specific details or evidence of these incidents, and the descriptions of the situations are all consistent with the Respondent's website being identified in response to searches using the descriptive term "British Meat" in search engines. The Panel can attach little weight to this evidence.

The Panel is not satisfied on the evidence as a whole that the Domain Names are confusingly similar to any marks in which the Complainant has rights. Given that the term "British meat" is the normal and natural term to describe meat produced in Britain, the Panel is not satisfied that the Domain Names would be regarded by Internet users as indicating a website of the Complainant.

Although each case turns on its particular facts, it may be noted that similar views have been reached in a number of decisions under the Policy where the SLD of the disputed domain name is a descriptive term which forms part of the Complainant's logo or device mark: see WIPO Case No. D2000-1816, <maha.com>, WIPO Case No. D2001-0047, <brisbanecity.com>, WIPO Case No. D2001-0565, <bakerblanket.com> and WIPO Case No. D2001-0964, <cream.com>.

The Panel concludes that the first requirement of the Policy has not been established.

In view of this finding, it is not strictly necessary to discuss the further requirements of the Policy in this case. However, as set out below, the Panel's findings on the other requirements reinforce its conclusion.

## B. Rights or Legitimate Interests

The Complainant rightly points out that freedom of speech does not in itself confer rights or legitimate interests in domain names in relation to which other people have rights. However, in accordance with the Policy, paragraph 4(c)(iii), a respondent may demonstrate rights or legitimate interests in a domain name by (inter alia) making legitimate non-commercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark in issue.

The use of a domain name containing a distinctive mark ostensibly for the purpose of criticising the owner of the mark has been considered in many cases under the Policy. In most of these cases, it has been held that this use did not give rise to any right or legitimate interest in the domain name. On the other hand, in some cases, such as WIPO Case No. D2000-0190, <bridgestone-firestone.net>, WIPO Case No. D2000-0536, <tmpworldwide.net>, WIPO Case No. D2000-0858, <ahmanson.org> and WIPO Case No. D2000-1647, <bosleymedical.com>, Panels have accepted that genuine use for the purpose of criticism did give rise to legitimate interests protected by this provision of the Policy.

This Panel considers that the cases relating to domain names containing distinctive marks are not directly relevant where a domain name consists essentially of a descriptive term and is used for the purposes of criticism of the subject which that term describes. Such use is more likely to be fair and legitimate than in the case of a domain name comprising a distinctive trademark.

In this case, the Panel is satisfied that the Respondent is making non-commercial use of the Domain Names without intent for commercial gain. It remains to consider whether the Respondent's use of the Domain Names is legitimate or fair.

The Complainant contends that the Respondent's use of the Domain Names is not legitimate or fair because it is tarnishing the Complainant's marks by inaccurate and unfair content. The Panel accepts that the malicious dissemination of deliberately misleading material would not constitute legitimate or fair use. However, it is not the function of a Panel under the Policy to evaluate the merits of rival contentions on matters of public controversy. Unless it is clearly shown that the content is deliberately false and malicious, the principle of free speech must prevail.

The Panel has carefully considered the Complainant's criticisms of the content of the Respondent's website on this basis. The Panel is not satisfied that the content is deliberately false and malicious so as to warrant a finding that the Respondent's use of the Domain Names is illegitimate and unfair on this account.

The Complainant also contends that the Respondent's use of the Domain Names is illegitimate and unfair because it is diverting users from the Complainant's website by misleading them. As to this, the Panel has concluded above that the Domain Names are not likely to cause significant confusion with any mark in which the Complainant has rights.

The Panel considers that the Respondent's longstanding use of the Domain Names for a website criticising the subject ordinarily described by their SLD is such as to give rise to a legitimate interest of the kind envisaged by the Policy, paragraph 4(c)(iii).

The Panel does not regard the lapse of the domain name <britishmeat.co.uk> as detracting from this conclusion.

Accordingly, the Panel finds that the second requirement of the Policy is not established.

### C. Registered and Used in Bad Faith

The Complainant appears to accept that the examples of evidence of bad faith in the Policy, paragraphs 4(b)(i) and (iv), do not apply since there is no evidence that the Respondent registered the Domain Names for the purpose of selling them to the Complainant, or that he is using them for commercial gain.

The Complainant contends that the other examples of evidence of bad faith in the Policy, paragraphs 4(b)(ii) and (iii), do apply.

As regards paragraph 4(b)(ii), the Panel is not satisfied that the Respondent registered either of the Domain Names in order to prevent the Complainant from reflecting its mark in a corresponding Domain Name. It seems that the Complainant had already registered <britisheat.org.uk>, and the Respondent had no reason to suppose that the Complainant would want to use the Domain Names as well.

As regards paragraph 4(b)(iii), the Panel does not accept the Complainant's contention that it is a "competitor" of the Respondent within the meaning of this provision. The situation here is different from that in WIPO Case No. D2000-0279, <kwasizabantu.com>, where the parties were rival religious groups, and this Panel does not agree with the application of this provision in WIPO Case No. D2000-0869, <estelauder.com>. In this case the parties are not "competitors" in any reasonable sense of the word.

However, the categories set out in the Policy, paragraph 4(b), are only examples of matters which may be evidence of bad faith. To reach a finding on the third requirement of the Policy, it is necessary to consider in the round whether the Domain Names have been registered and are being used in bad faith.

Contrary to the Complainant's contention, the Panel does not regard the Respondent's use of the phrase "British meat" in the Domain Names and in metatags as evidence of bad faith. The Panel considers that the Respondent was and is entitled to use this phrase to identify his site as containing information about British meat. Nor is the inclusion of a metatag comprising the full name of the Complainant inappropriate in relation to a page whose text makes specific criticisms of the Complainant's conduct in relation to BSE.

The Complainant is right in a sense to accuse the Respondent of seeking to disrupt some of the Complainant's activities, in particular its promotion of British meat. However, the Panel considers that the Respondent is, in principle, entitled to express views critical of the British meat industry, and this cannot in itself be regarded as evidence of bad faith.

The Complainant's criticisms of the content of the Respondent's website have been discussed above in considering whether the Respondent has a legitimate interest in respect of the Domain Names. For the reasons set out above, the Panel does not consider that these criticisms support a finding of bad faith.

The Complainant's contention that the Domain Names are being used to divert Internet users seeking the Complainant's website by creating a likelihood of confusion has also been discussed above. The Panel has concluded that this contention is not made out.

The Panel finds that the third requirement of the Policy is not satisfied.

## 7. R e v e r s e Domain Name Hijacking

Reverse domain name hijacking is defined in the Rules, paragraph 1, as using the Policy in bad faith to attempt to deprive the domain-name holder of a domain name. Although the Panel has dismissed the Complaint, the Panel is not satisfied that the Complainant invoked the Policy in bad faith.

## 8. D e c i s i o n

For all the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel denies the Complaint and rejects the allegation of reverse domain name hijacking.

(Sole Panelist)