

DISPUTE RESOLUTION SERVICE**Decision of Appeal Panel****D00022793**

Upfield Europe B.V.

and

Black Dog Upholstery Limited

D00022794

Upfield Europe B.V.

and

Ian Swinburn

1. The Parties:

Complainant: Upfield Europe B.V.
Nassaukade 3
Rotterdam 3071 JL
Netherlands

Respondent (DRS22793): Black Dog Upholstery Limited
Dierden Street Works
Dierden Street
Winsford
Cheshire
CW7 3DL
United Kingdom

Respondent (DRS22794): Mr Ian Swinburn
United Kingdom

2. The Domain Names:

The domain names at issue are <flora.co.uk> and <flora.uk>. These are referred to together as the "Domain Names" in this decision and individually as <flora.co.uk> and <flora.uk>.

3. Appeal Panel Declaration

Nick Gardner, Ian Lowe and Anna Carboni (the "Appeal Panel") have each made a statement in the following terms:

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

4. Procedural History

These are conjoined appeals against two decisions of Sallie Spilsbury (the "Expert") both issued on 18 December 2020 in favour of the Complainant, the original Complaints having both been filed with Nominet on 3 July 2020. The Respondent filed the Appeal Notice on 16 March 2021 and has paid the appeal fee. The Complainant filed its Appeal Response on 31 March 2021. Definitions used in this decision have the same meaning as set out in the Nominet UK Dispute Resolution Service Policy (as in effect from 1 October 2016) (the "Policy") unless the context or use indicates otherwise.

For convenience the Panel will continue to refer to the parties as the "Complainant" and "Respondent".

In both cases, the Response to the Complaint was filed by one Steve Hamblett. He is named as the Contact in Nominet's records in respect of the Domain Name <flora.co.uk>. In its Complaint in respect of <flora.uk>, the Complainant alleged that both Domain Names were under common ownership. The Appeal Notice also asserted that the Domain Names were under the common ownership of Steve Hamblett. However, the Appeal Panel found it difficult to understand what the inter-relationship was between Steve Hamblett and the various companies and individuals concerned in the history of the Domain Names (see further below). It also considered that understanding this issue might be of relevance to the substantive issues it has to determine. On 13 May 2021 it therefore issued the following direction to the parties:

"Pursuant to paragraph 20.9 of the DRS Policy the Appeal Panel requests that the Respondent files a brief further statement on or before Friday 21 May limited to the following.

Please explain the basis on which Steve Hamblett claims to be the owner of the two domain names in issue, whereas one is registered to Black Dog Upholstery Ltd and the other to Mr Ian Swinburn, giving details of the relationship (whether by way of shareholding, directorship, employment, family connection, business association or otherwise) between the following persons and companies:-

- Black Dog Upholstery Ltd
- Ian Swinburn
- Steve Hamblett
- Stephen Paul Hamblett (if he is not the same person as Steve Hamblett)
- Jonathon Hamblett (the sole director of Black Dog Upholstery Ltd)
- Flora Products International Limited
- Bullfinch Group Ltd.
- Churchfield Sofa Bed Company Limited (see annex 27 to Complaint in respect of flora.co.uk).

The Complainant may if it wishes file a further statement within 7 days of receiving the Respondent's further statement, such further statement being limited to replying to matters detailed in the Respondent's further statement."

On 21 May 2021 the Respondent's representative filed the following statement:-

“1. The following are the connections between Steve Hamblett (“SH”) and the various persons and entities listed.

a) Black Dog Upholstery Limited: Jonathon Hamblett, the sole director, and shareholder, is SH's brother. SH has been managing director since the company's incorporation in 2016. See at Annex 1 SH's business card and a letter from Jonathon Hamblett confirming his understanding that SH is the underlying owner of flora.co.uk.

b) Ian Swinburn: Employee of Churchfield Sofa Bed Company Limited from around 2005 and manager from around 2009 to 2017. Manager of Black Dog Upholstery Limited from 2017 to 2018. See LinkedIn profile at Annex 2 (although SH believes that some of the dates shown there are incorrect).

c) Stephen Paul Hamblett: The same person as SH.

d) Jonathon Hamblett: SH's brother.

e) Flora Products International Limited: SH was a director of this company from its incorporation in 1995 until its dissolution in 2011. The shares were owned by SH (99%) and his wife, Karen Hamblett (1%).

f) Bullfinch Group Ltd: SH was a director of this company from its incorporation in 1995 until its dissolution in 2016. The shares were owned by SH (50%) and his wife, Karen Hamblett (50%).

g) Churchfield Sofa Bed Company Limited: SH was a director of this company from its incorporation in 1996 until its liquidation in 2017. SH owned 100% of the shares.

1.2 The following additional background information may be helpful to the Appeal Panel.

1.3 The flora.co.uk and flora.uk domain names were registered through a single 123Reg account (along with various other domains). While SH considered himself as the ultimate owner/controller of the flora domain names, he never paid much attention to the 123Reg account and was generally unaware of who was shown as the Whois registrant of any particular domain name at any particular time. Different employees - including Ian Swinburn who effectively ran SH's Churchfield business when SH lived in New Zealand from around 2009 to 2016 - have had access to this account at various times over the years. SH believes that those employees made various changes to the 123Reg account contact details for administrative reasons, most likely not fully understanding what they were doing and probably unaware that those changes might/would also be reflected in the Whois registrant record. SH thinks that this is the most likely explanation as to why the names of employees / connected companies appeared on the Whois records for the domain names at various times.”

On 28 May 2021 the Complainant lodged a further statement in response to that of the Respondent, the gist of which was to say that there was inadequate evidence to show that Stephen Hamblett was the owner of both of the Domain Names, and complaining that there was no witness statement verified by a statement of truth to this effect. It also pointed out that on the Respondent's own case Black Dog Upholstery Limited is not owned by Stephen Hamblett but by his brother and saying all the companies are unconnected and in different lines of business. It also said that the stated position was in breach of various of Nominet's

terms and conditions essentially requiring accurate details of ownership of domain names to be maintained.

It is not clear to the Appeal Panel what the Complainant wishes the Appeal Panel to do about this. In the original Complaints the Complainant assumed that both Domain Names were under common ownership and did not appear concerned at the conflicting information on record. Having been provided with confirmation that this was correct it now wishes to take issue with what is said. It does not however suggest any alternative theory of ownership nor (beyond asking that the Appeals be dismissed) does it suggest how the Appeal Panel should analyse the issues before it on the available evidence.

The Appeal Panel notes that the Policy defines “Respondent” as “ the person ... in whose name **or on whose behalf** a Domain Name is registered” (emphasis added), which recognises that the underlying ‘owner’ of the registration may not be the same as the actual registrant. As to the points the Complainant makes, there is no provision in the Policy requiring evidence to be given by formal witness statement verified by a statement of truth. Mr Jonathan Hamblett has provided a signed letter confirming his understanding that his brother owns the Domain Names. There does not seem to be any other immediately obvious alternative explanation as to ownership and what Stephen Hamblett says about how the 123Reg account was operated does not seem inherently unlikely. If the Respondent were in breach of Nominet’s terms and conditions, that would be unfortunate (though the Appeal Panel suspects this may not be uncommon), but it does not follow that the consequences are that the appeals should fail. Ultimately however it seems to the Appeal Panel it really does not matter. Even if one or other of the Domain Names was not owned by Stephen Hamblett but by one of the other identified participants (Ian Swinburn, for example) the Appeal Panel’s analysis (below) would be substantially the same and the outcome would be the same. The Appeal Panel therefore accepts the Respondent’s explanation and proceeds on the basis that Stephen (aka Steve) Hamblett is the proper Respondent in both cases and will determine these appeals as consolidated. The Appeal Panel will also assume the factual position with regard to the various entities and persons identified above is as stated by the Respondent.

Save where the context otherwise requires, references in this decision to the Complaint, Response and Reply are to the document filed in relation to the Domain Name in question (a single Response was filed covering both Domain Names).

5. The Nature of This Appeal

Paragraph 20.8. 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 appeal panel should not normally take into consideration any new evidence presented in an appeal notice or appeal response, unless they believe that it is in the interests of justice to do so”.

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.

6. Formal and Procedural Issues

The Respondent asserted in his Response that “we traded as flora products international”, followed by a one-sentence summary of the activities of that business (set out in Section 8 below). He also asserted that he was currently designing a new website for its “flora branded products”. Neither of these assertions was supported by separate documentary evidence.

The Respondent seeks in his Appeal Notice to adduce four new exhibits as further evidence about his business, arguing that these should be admitted because:

- 1) exhibits 1 and 2 clarify the identity of the corporate entity behind the Respondent's Flora business, in response to an incorrect assumption made by both the Expert and the Complainant;
- 2) exhibit 3 shows that the Respondent's business was associated with the term "Flora" until at least 2017, in response to the Expert's finding that a gap of nine years since the Respondent had last used the term would have extinguished any goodwill; and
- 3) exhibit 4 supports the Respondent's claim that he had genuine plans to resurrect the Flora brand via a new website at flora.co.uk, in the light of the scepticism expressed by the Expert about the existence of such plans.

The Respondent (now with the assistance of a professional representative) argues that he was unrepresented at first instance and did not appreciate the relevance of providing evidence in support of his case. He also indicates that he does not regard the facts illustrated by exhibits 3 and 4 as being relevant to the case, but nevertheless submits them because the Expert indicated that they were.

In its Appeal Response, the Complainant objects to the admission of any of the new evidence, on the basis that it all pre-dates the Response, so the Respondent could have filed it at first instance but chose not to. Further, the Complainant points out that paragraph 5.11 of the Nominet DRS Experts' Overview (v.3) (the "Overview") states that parties are to be treated equally whether or not they are represented. Finally, the Complainant asserts that the admission of the new evidence would prejudice its position and would undermine the finality of the Decision.

The Appeal Panel has considered whether it would be in the interests of justice to admit the new evidence, taking account of both parties' submissions. As a starting point, the Panel agrees with the Complainant's position that all of the evidence could have been submitted with the Response at first instance, and that the Respondent should not be treated more leniently than a party that was represented at first instance. As the Overview points out at paragraph 5.11, Nominet has gone to considerable trouble to publish on its website a very high level of information and guidance to persons wishing to launch, or defend against, a complaint under the Policy. The guidance includes advice that factual claims should be supported by documentary evidence.

Exhibits 1 and 2 and the covering explanation are aimed at clarifying facts concerning the Respondent's business in which he used one of the Domain Names, which facts were misunderstood by the Complainant at first instance and (through no fault of her own) mis-summarised by the Expert. The Respondent's new evidence on this point is essentially a response to a submission made by the Complainant in its Reply (to which the Respondent had no right to respond before the decisions were issued) and to an inaccurate factual finding in the decisions. The Panel considers that the outcome of this Appeal would be the same whether or not the new evidence is admitted. However, the new evidence does clarify the underlying facts in a way that is helpful to ensure that the Panel records them correctly. Further, the Complainant has responded substantively to the evidence in its Appeal Response, notwithstanding its primary contention that it should not be admitted. In the circumstances, the Panel considers that no prejudice will be caused to the Complainant if this new evidence is admitted and that it is (fairly marginally) in the interests of justice to do so. The contents of exhibits 1 and 2 and the related explanation are more fully summarised in Section 8 below.

In contrast, the Panel has decided not to admit exhibits 3 and 4. As explained in Section 9 (Discussion and Findings) below, the Respondent does not need to establish any ongoing recognition of or goodwill in his former Flora brand for him to succeed, and so exhibit 3 is (as the Respondent himself suggests) superfluous. Similarly, in the circumstances of the case, whether or not the Respondent plans to create a new website at <flora.co.uk> in the future is not a matter on which the Panel has to make a finding in order to decide the case, so exhibit 4 will be excluded.

7. The Facts

FLORA margarine was launched in the United Kingdom in 1964 by its then manufacturers Unilever. The business was sold to the Complainant in 2018. FLORA has been marketed extensively since the 1960s. It was referred to as part of the “elite Top 10 in the UK grocery brand list” in 1991, and in 2012 was listed as the largest brand in the Butter and Spreads Market. An estimated 8.4 million people in the UK used FLORA products in 2018.

The Complainant owns a portfolio of some 120 domain names incorporating the FLORA mark, including <flora.com>. The Complainant and its UK subsidiary Upfield Spreads UK Limited are the proprietors of a number of registered trade marks (both word marks and device marks) comprising or containing FLORA, including United Kingdom trade mark number 1469037 FLORA registered as of 29 June 1991 and European Union trade mark number 4374575 FLORA registered on 14 August 2006.

The Domain Name <flora.co.uk> was registered on 27 November 1996. It does not currently resolve to an active website. Between at least December 2006 and January 2007 it resolved to a holding page stating:

“FLORA.CO.UK

WELCOME TO FLORA.CO.UK WHOLESALE SUPPLIERS
TO FLORISTS.

OUR FULL SITE IS UNDER DEVELOPMENT

IF YOU REQUIRE ANY FURTHER INFORMATION
PLEASE CONTACT US ON [xxxxx xxxxxx]¹”

The country code top level domain “.uk” was launch by Nominet in July 2014. The Domain Name <flora.uk> was registered on 23 October 2017 pursuant to the priority rights granted to existing registrants of the equivalent “.co.uk” domain name. It does not resolve to an active website.

8. The Parties’ Contentions

Complaint

In support of its claim to Rights for the purposes of the Policy, the Complainant relies on its extensive portfolio of trade mark registrations comprising or containing the term FLORA, as

¹ This telephone number has been redacted in this decision for privacy reasons but the evidence shows it is (or was) a genuine operative telephone number – see discussion below.

well as the very substantial goodwill established in the FLORA brand through use in the UK for more than 30 years.

As to Abusive Registration, the Complainant relies principally on the terms of paragraph 5.1.6 of the Policy, which sets out one of the factors that may be evidence that a domain name is an Abusive Registration. It argues that the Domain Names are an exact match for FLORA, a mark in which it has Rights, and that the Respondent has no reasonable justification for acquiring or using the Domain Names. Although the Complainant acknowledges that the Domain Name <flora.co.uk> resolved to the holding page referred to above in 2006/2007, it contends that there is no evidence that it has ever been used for anything other than an inactive website. The Complainant further notes that the contact number on the holding page was linked to a now dissolved furniture store (Churchfield Sofa Bed Company Limited) and there is no logical reason for such a company to offer florist related services.

The Complainant also relies on “initial interest confusion” (paragraph 5.1.2 of the Policy): the fact that Internet users attempting to visit a website at the Domain Names would expect to land on a webpage operated by the Complainant but would be confused by what they found.

Finally, the Complainant states that the Respondent must have been aware of the Complainant’s predecessor and its rights in FLORA at the time of registration of the Domain Names and could not have reasonably believed that FLORA was simply a generic or descriptive term.

Response

The Response is extremely short and asserts a number of factual matters without providing any corroborating documentary evidence. The DRS is intended to be a relatively simple and fast means for resolving complaints that are covered by the Policy at a relatively low cost. It does not require the detailed formality that applies to traditional litigation. It is however important that parties explain clearly the case that they wish to make and that where documentary evidence exists, especially in relation to important or controversial matters, that this material is provided as part of the complaint or response. Nominet provides a large amount of material on its website giving guidance as to these matters, but if parties using the DRS are in doubt as to what is required they may wish to seek appropriate professional advice. A large measure of the difficulty in the present cases is a direct consequence of the Response being less detailed than would have been desirable and having no supporting documentation.

The Respondent points out that he has owned the <flora.co.uk> Domain Name for over 20 years. He claims that his business traded as “flora products international”, supplying “flower food flora bloom and many other flora branded products” to floristry wholesalers in the UK, Holland, France, Belgium and the USA. However, he does not produce any evidence of such business, or of when it was carried out, or of the extent of its sales or marketing. He goes on to state that the business is designing a new website for its flora branded products, and that it has no intention of being involved in the food market.

Again, without producing any contemporaneous evidence, the Respondent says that he was approached by a broker acting on behalf of Flora margarine in around 2011 who offered to buy the <flora.co.uk> Domain Name for, initially, £40,000 and subsequently £60,000, but these offers were rejected by the Respondent.

The Respondent relies on the generic meaning of FLORA and its connection to flowers, floristry and horticulture and its lack of any dictionary connection with food. He suggests that the Complaint is a cynical attempt by a large multinational company to acquire the Domain Names without payment.

Reply

The Complainant notes that a company called Flora Products International Limited (no. 03037527) was dissolved in September 2011, and that it does not appear to have traded in the year to 30 April 2010. The Complainant points out that the Respondent has produced no evidence of any business having been carried on under the name FLORA or use in relation to flowers, floristry or horticulture. Even if the Respondent was at one time known by the name FLORA, the Complainant does not accept that this prevents the Complaint succeeding. It contends that the Domain Names are acting as blocking registrations and are unfairly disrupting its business because of the likely confusion on the part of Internet users.

The Complainant submits that the term FLORA has acquired a secondary meaning associated with the Complainant and that the Respondent cannot therefore rely on any argument as to its generic nature.

The Complainant denies any knowledge of offers on behalf of its predecessor to purchase the <flora.co.uk> Domain Name from the Respondent.

Appeal Notice

The Respondent explains in his appeal that the corporate entity through which trade under the “Flora” name was conducted was an English company called Bullfinch Group Ltd, of which Steve Hamblett is listed as a director. The Appeal Notice annexes a company search print-out for that company at exhibit 1. Also annexed, at exhibit 2, is a copy of a bank statement from August 2003, showing the identity of the account holder as “Bullfinch Group Ltd t/a Flora Products International”, as well as an extract from the company’s accounts for the year ended 30 April 2000. The Respondent says that this entity ceased active trading around 2011.

The Respondent states that the company called Flora Products International Limited (mentioned in the Complainant’s Reply) was also set up but was for the defensive purpose of preventing a third party from registering a company under that name, rather than being the main trading entity.

Accordingly, the Respondent argues that he had every “reasonable justification” to register the Domain Names and that he did so in good faith. He says he is mystified as to how his good faith registration and use could be found to have turned into abusive use simply by stopping using it when his business ceased trading around 2011, and contends that he has not taken unfair advantage of the Complainant’s Rights in the mark FLORA in any way.

In further support of his contention that there is nothing abusive about his use of the Domain Names, the Respondent points out that, in addition to being a generic term and a name of the Complainant’s margarine, FLORA is the name of a famous perfume by Gucci. He argues that Internet users will often guess at the domain name of a chosen entity and will be disappointed or surprised or confused to find a different – or no – website, but that does not in itself render the registration abusive; it may simply mean that another legitimate user got there first.

In relation to delay, the Respondent argues that the passage of time hampered his ability to defend the case given that his relevant business stopped trading a decade ago, and that the Complainant has not explained why it has taken so long to bring the Complaint. The Respondent infers that the delay indicates that the Complainant lacks confidence in the merits of the case.

Appeal Response

Save for arguing against admission of the further evidence put forward by the Respondent in its Appeal Notice (as noted above), the Complainant repeats submissions made in its contentions in the original proceedings and argues that the Expert's first instance decision is correct. It denies delay in bringing its Complaint, given its completion of the purchase of the margarine and spreads business in 2018.

9. Discussion and Findings

Delay

The Appeal Panel does not consider that there is any need to address issues of possible delay in the Complaints being brought, particularly given the fact the Complainant only acquired the FLORA margarine business in 2018. The length of time the Respondent has owned the <flora.co.uk> Domain Name and what he has, and has not, done with it in that period is however a relevant factor – see further below.

Rights

There is no dispute that the Complainant has Rights in the trade mark FLORA for the purpose of the Policy. The Appeal Panel has accordingly not found it necessary to analyse this issue in any more detail. The Appeal Panel is satisfied that the Complainant has Rights in a name or mark that is identical to the operative part of the Domain Names.

Abusive Registration generally

In order to establish that the Domain Names in the hands of the Respondent are each an Abusive Registration, the Complainant must show that the Domain Name in question either:

- i) was registered or otherwise acquired in a manner which, at the time when the registration took place, took unfair advantage of or was unfairly detrimental to the Complainants' Rights; or
- ii) is being or has been used in a manner which has taken unfair advantage of or has been unfairly detrimental to the Complainants' Rights.

Establishing either or both of these requirements on the balance of probabilities will result in a finding of Abusive Registration.

Abusive Registration – the registration of <flora.co.uk>

It is important to bear in mind that the system of registration of domain names is a “first come first served system”. As a general rule (subject to exceptions that are not material for present purposes) any person is entitled to register any available domain name. In order to show that a domain name amounts to an Abusive Registration under (i) above, a complainant generally needs to show on the balance of probabilities that the respondent was aware of the complainant and/or its rights in a name or mark identical or similar to the domain name at the time it was registered and that it intended in some way to target the complainant or its trade mark. In the Appeal Decision in DRS 4331 (<verbatim.co.uk>) the Appeal Panel set out its views on the approach to be taken in relation to ‘knowledge’ and ‘intent’ in DRS complaints. It stated:

“knowledge and intention are pre-requisites for a successful complaint under all heads of paragraph 3(a)(i) of the Policy. The wording of that paragraph expressly calls for the relevant intent, which cannot exist without the relevant knowledge.”

The present Appeal Panel agrees with that statement at least in relation to circumstances such as the present case where there is a one-off registration of a specific domain name (different considerations may apply in relation to automated transfers and bulk acquisitions of domain name portfolios). The <flora.co.uk> domain name was registered in 1996 - some 25 years ago. This was at a time when, in the Panel’s experience, the commercial exploitation of the Internet was at an early stage. The Panel infers that at that time the Respondent will have been aware of the Flora margarine brand. This is because (a) the filed evidence establishes the brand was very widely sold and well known at that date, and (b) the Respondent says nothing about any lack of awareness. Accordingly, the Appeal Panel is satisfied on the balance of probabilities that relevant knowledge existed.

The question of whether the relevant intent existed is however less straightforward in circumstances where the domain name comprises an ordinary English word. In the present case “flora” is such a word – according to dictionary.com its meaning is as follows:-

- “1) the plants of a particular region or period, listed by species and considered as a whole.
- 2) a work systematically describing such plants.
- 3) plants, as distinguished from fauna.
- 4) the aggregate of bacteria, fungi, and other microorganisms normally occurring on or in the bodies of humans and other animals.”

The Appeal Panel does not consider that knowledge of a trade mark corresponding to an ordinary English word and owned by another party is necessarily sufficient on its own to establish the relevant intent that would lead to a finding of Abusive Registration. Generally speaking, a trade mark which comprises an ordinary English word does not give the trade mark owner a complete monopoly in usage of that word. A person who finds that a domain name comprising an ordinary English word is available, and who is aware of an identical trade mark owned by a third party, is generally not precluded from registering that domain name if his intended use of it is for legitimate purposes of his own which are unconnected with the third party or its trade mark. That is likely to be so particularly if the intended usage relates to or derives from the ordinary English meaning of the word.

This issue was considered by the Appeal Panel in DRS 06365 (<oasis.co.uk>) which stated: -

“The Panel is not able to resolve this dispute, but absent any evidence that the Respondent was purchasing the Domain Name as part of some sort of deliberate scheme to take advantage of the Complainant’s established name and business (and there is no such evidence), even had the Respondent known of the Complainant’s business that does not itself make the purchase of a Domain Name, which comprises an ordinary English word, objectionable. This is not a case where the word is a made up word which, if contained within a domain name, inevitably raises at least an inference that it will be associated with the party most commonly associated with the word. In such cases an Expert can infer that the purpose of the purchase was to take advantage of that connection. It would for example be relatively easy to infer (at least absent any credible explanation) that a third party registering, say, <kodak.co.uk> intended to take advantage of the name and reputation enjoyed by the well known Kodak company. The

same is not true where the name comprises a common English word where any number of uses may be perfectly unobjectionable – particularly where, as here, the evidence shows a large number of trade marks for that word co-exist.”

In the present case the word flora is an ordinary English word (see above) and - unlike the <oasis.co.uk> case (above) - there is no evidence before the Appeal Panel as to how many trade marks for that term owned by third parties may exist. Irrespective of that issue, it is the Appeal Panel’s view that in a “first come, first served” system the registration of the word “flora” as a domain name which is intended to be used by a *bona fide* business dealing in floristry related products is not taking unfair advantage of, nor is it unfairly detrimental to, the Complainant’s Rights arising out of the well-known Flora margarine brand and the trade marks associated with that brand.

Against this background the Appeal Panel turns to the evidence (such as it is) as to what the Respondent’s intention was at the time. The Appeal Panel considers the following to be relevant.

The Respondent says he registered the <flora.co.uk> Domain Name for use in a *bona fide* business trading in floristry products and goes on to say that this business actually traded. The evidence on this issue in the Response was, however, limited and in substance amounts to the following statement in the Response: “...we traded as flora products international. This business supplied our own brand of flower food flora bloom and many other flora branded products, such as floratac a floristry butyl adhesive, florabond glue sticks and a myriad of other flora branded products which we sold into floristry wholesalers in the UK, Holland, France, Belgium and the USA”. The Respondent provided no corroborative evidence to support what he says.

The Complainant placed in evidence annexed to its Reply details of a company called Flora Products International Limited. It does so to show that the company has been dissolved since 2011, which it argues assists its case as to how the <flora.co.uk> Domain Name has been used. However, it also shows that the company was incorporated on 26 January 1995. The Respondent now says he did so in order to protect the name, although this company itself did not trade – the trading activity was to be carried out by Bullfinch Group Limited which had been in existence since 1995.

The material contained at Exhibit 2 to the Appeal notice includes a bank statement from the National Westminster Bank dated August 2003 in the name of “Bullfinch Group Ltd t/a Flora Products International” The copy provided has been cut off at the edge, but it appears to show amongst other things payments received from “Impulse Flowers” and Flower Wholesale L Suppliers” (the amounts in question are cut off and hence not visible). The material also includes accounts which show Bullfinch Group Limited had a sales turnover of £572,211 in 1999 and £534,985 in 2000 but the accounts do not identify what types of items made up these sales.

There is no evidence that the <flora.co.uk> Domain Name has been used apart from a period between at least December 2006 and January 2007 when it was linked to a rudimentary holding page (see above) indicating that a website relating to a business offering wholesale supplies to florists would be coming soon. That holding page included a telephone number which the Complainant identifies as relating to a furniture business called Churchfield Sofa Bed Company Limited with a registered address in Walsall, West Midlands. This company was dissolved in February 2020. The Appeal Panel notes that as a matter of public record the area code comprised in the telephone number - 01606 - is an area code which covers Winsford in Cheshire. As appears from the further information provided by the Respondent following the Appeal Panel’s request (above), this company was another company controlled by the Respondent.

In seeking to assess this evidence the Panel also has in mind a number of factors where no evidence has been presented, specifically as follows:

- There is no evidence of the Respondent having registered any other third-party trade marks as domain names.
- There is no evidence of the Respondent being a “domainer” or trader in domain names – whilst there is nothing wrong *per se* with such a business, in some circumstances the registering by a trader of a domain name corresponding to a well-known trade mark may lead to adverse inferences being drawn. No such inferences can be drawn here.
- There is no evidence of the Respondent ever having approached the Complainant (or the previous owners of the Flora margarine business) with a view to selling the Domain Names. Indeed, the Respondent says that he was approached by brokers acting for the previous owners of the Flora margarine business and offered £40,000, subsequently increased to £60,000, for the <flora.co.uk> Domain Name. Whilst this evidence is again uncorroborated and rather unsatisfactory, it is clear there is no evidence before the Appeal Panel of any attempts by the Respondent to sell the Domain Names.
- There is no evidence before the Appeal Panel that the Domain Names have ever been used in any manner which targets the Complainant or the Flora margarine brand in any way.

The Complainant says that the Respondent’s motive when registering the Domain Names was to obtain blocking registrations against the FLORA margarine brand. It puts this in the following terms: “However, when considered in the round, the activities of the Respondent, including the veracity of the Page (*sic*)², are indicative of behaviour aimed at masking the Respondent’s true intent behind the registration and use of the Domain – an evident blocking registration against the Complainant’s rights in FLORA. Indeed, this is further illustrated and compounded by the registration of the domain name flora.uk on 23 October 2017 (“Second Domain”) within the .uk grace period, which constitutes domain stockpiling....”.

The Respondent, however, says he registered the <flora.co.uk> Domain Name to use in the *bona fide* business venture he was proposing. The Appeal Panel sees no reason not to accept this account as true. Proceedings under the DRS are not well suited to dealing with contested allegations of truthfulness. They lack mandatory documentary discovery, oral evidence and cross-examination. Nevertheless, when such issues arise the Expert or the Appeal Panel have to deal with them as best they can with the material available. In the present case the Respondent has (belatedly) produced a contemporaneous document (the bank statement discussed above) which corroborates his account. More generally, however, the difficulty the Appeal Panel has with the Complainant’s case is that there simply is not any evidence supporting the theory that the Respondent was intent upon effecting blocking registrations directed at the FLORA margarine brand. The Respondent is not in the same area of business as the Complainant (or its predecessor) and (absent using a blocking registration as a tactic with a view to financial gain - as to which see below) he has no obvious reason to wish to block any registration of the FLORA brand as a domain name. It is inevitably the case that, where there is a pre-existing earlier identical trade mark, then the effect of registration of a word the same as the trade mark will be to block the trade mark owner from subsequently registering that word as the operative part of a domain name. That on its own does not

² The Appeal Panel does not know what the Complainant has in mind when it refers to the “veracity of the Page” The Appeal Panel has not seen anything which suggest anything in the contents of the webpage described above was untrue.

however amount to a blocking registration as contemplated by the Policy section 5.1.1.2. As discussed above, the Appeal Panel considers it is necessary for the Complainant to show that the Respondent intended the registration to be a blocking registration, and not merely that it (inevitably) had the effect of being a blocking registration. The Appeal Panel is not persuaded that there is any evidence supporting a finding that this was the Respondent's intention at the time of registration. Furthermore, if the Respondent's intention was to effect a blocking registration why had he gone to the trouble and expense of forming a company called Flora Products International Limited some 18 months earlier? No obvious answer can be found.

If the broader question of motive is considered then the obvious motive for registering a third party trade mark in a manner which takes unfair advantage of or is unfairly detrimental to the trade mark owner's rights is to achieve some form of financial gain – typically either by seeking to attract traffic to a website as a result of customer confusion or hoping for some form of financial payment from the third party trade mark owner who wishes to gain control of the domain name - commonly to overcome the effect of a blocking registration. In the present case there is no evidence of any conduct on the part of the Respondent which suggests this was his motive. The Respondent has been in possession of the <flora.co.uk> Domain Name for 25 years and (apart from linking it at one stage to the rudimentary holding page discussed above) has simply done nothing with it. Furthermore, according to the Respondent he has rejected offers from the Complainant's predecessors to purchase the <flora.co.uk> Domain Name. Although this evidence is unsubstantiated, it appears inconsistent with the suggestion that the Respondent's motive was a financial gain deriving from a transfer of the <flora.co.uk> Domain Name. The Appeal Panel finds it very difficult to reconcile the factual position based on the limited evidence available with the inference it is asked to draw that the Respondent registered <flora.co.uk> in order to target the Complainant's predecessors or the FLORA margarine brand.

Overall, the evidence (though incomplete and unsatisfactory) would appear to suggest that with effect from 1995 the Respondent had some form of intention of commencing a business dealing in floristry products, and he incorporated in 1995 a company called Flora Products International Limited to protect that name and then in 1996 registered the <flora.co.uk> domain name as part of this planned venture. The extent (if at all) that the business actually traded is unclear, although the bank statement discussed above would appear to corroborate the Respondent's case that at least some trade did occur. Ultimately, however, the business ceased any trading, with the company being dissolved in 2011. The available evidence suggests that after the floristry products business came to an end, the <flora.co.uk> Domain Name has been retained but not used. Looked at as a whole the Appeal Panel does not consider that there is any evidence before the Panel to suggest the Respondent's planned floristry products business was a sham or that the Respondent's account of his activities is manifestly unlikely or untrue. Conversely there is no evidence before the Appeal Panel supporting any sort of inference that the Respondent has sought to derive any type of financial benefit from the <flora.co.uk> Domain Name because of any perceived connection it may have with the Complainant or the Flora margarine brand.

Accordingly, in all the circumstances the Panel considers that on the balance of probabilities the available evidence does not support a finding that the Respondent's original registration of <flora.co.uk> took unfair advantage of or was unfairly detrimental to the Complainants' Rights.

Abusive registration - use of <flora.co.uk>

As appears from the analysis above, the Respondent has been in possession of the <flora.co.uk> Domain Name for 25 years and (apart from linking it for a period to the rudimentary holding page discussed above) has not used it.

As a general rule, failure to use a domain name is not evidence that the domain name is an abusive registration – see Policy 5.2: “Failure on the Respondent's part to use the Domain Name for the purposes of email or a web site is not in itself evidence that the Domain Name is an Abusive Registration”. The Complainant appears to rely upon the fact that the <flora.co.uk> Domain Name has continued to act as a blocking registration as evidence that it is being used in a manner that amounts to an Abusive Registration. However, the relevant provision in the Policy directed at a blocking registration as evidence of an Abusive Registration concerns the position when the domain name was registered – see Policy 5.1.1. That issue has been dealt with above.

If the Respondent’s original registration of <flora.co.uk> was not abusive and then he simply stopped using the Domain Name, the Appeal Panel does not consider that on its own amounts to the Domain Name being used in a manner which has taken unfair advantage of or has been unfairly detrimental to the Complainant's Rights. Of course, if the use of a domain name changes, the position may be different – if here the Respondent had subsequently used the <flora.co.uk> Domain Name in a way which related to the Complainant’s well known Flora brand – for example by linking it to a website which sought to attract traffic because of confusion with that brand – the analysis would be different. However, that has not happened here. A domain name which has been legitimately acquired in connection with a proposed business venture does not become an Abusive Registration if that business comes to an end, but the domain owner retains the domain name and does nothing with it.

The Appeal Panel therefore declines to find that the <flora.co.uk> Domain Name is being or has been used in a manner which has taken unfair advantage of or has been unfairly detrimental to the Complainants’ Rights.

Abusive Registration – the registration of <flora.uk>

The Respondent registered <flora.uk> on 23 October 2017.

It has only been possible to register domain names directly under the “.uk” ccTLD since 10 June 2014. When this new option was established by Nominet, it provided for registrants of “.co.uk” domain names who had registered the domain name on or before 28 October 2013, and who still held the domain name on 10 June 2014, to have the reserved right to register the equivalent “.uk” domain name until 10 June 2019. Since the Respondent has held <flora.co.uk> since 1996, he was so entitled and exercised that right on 23 October 2017.

The Respondent’s reserved right to obtain <flora.uk> depended on his existing registration of <flora.co.uk>. In the opinion of the Appeal Panel, if the <flora.co.uk> registration is not abusive there is nothing objectionable in the Respondent taking advantage of the priority right Nominet afforded him, provided he was not doing so with any intent to use the <flora.uk> Domain Name to target the Complainant or its Flora margarine brand. At the time of registration, the Panel again infers that the Respondent knew of the Flora margarine brand. However, for the same reasons as discussed above such knowledge on its own does not amount to intent.

In these circumstances the Appeal Panel does not consider that the Respondent’s registration of <flora.uk> could be said to have taken unfair advantage of the Complainant’s Rights in the FLORA trade mark.

Abusive Registration – the subsequent use made of <flora.uk>

The <flora.uk> domain name has never been used. For the same reasons as set out above in relation to <flora.co.uk> the Appeal Panel declines to find this non use provides grounds for a finding of Abusive Registration.

Factors under the Policy

In finding against the Complainant in this case, the Panel does not discount the Complainant's contention under paragraph 5.1.2 of the Policy that Internet users who come across the Domain Names might initially expect them to be associated with the Complainant, or even that someone who visits <flora.co.uk> or <flora.uk> and finds nothing there might initially think that the Complainant's website is down. But while the Expert stated in the first instance decisions that this would create an unprofessional impression that could damage the Complainant's reputation, the Appeal Panel is not persuaded that this would follow. In the first place, if someone really is looking for the Complainant's website about Flora margarine, and finds an inactive website where they first look, they would no doubt do a quick Internet search to check if they were in the right place and would very easily find that they were not; thus, the adverse inference would never arise (or would only do so fleetingly). Secondly, this is not a case where such 'initial interest confusion' is inevitable, given that – as explained above – the term FLORA has a descriptive meaning (and is also associated with a luxury perfume brand). And thirdly, the Respondent has done nothing to encourage or exacerbate any such confusion but has merely registered the Domain Names and briefly used one of them for a business. Accordingly, the Panel finds that paragraph 5.1.2 is not satisfied.

So far as the Policy, Paragraph 5.1.6 is concerned, the Panel accepts that the <flora.co.uk> Domain Name is an exact match for the Complainant's trade mark, but it is not persuaded that the Respondent has no reasonable justification for having acquired this domain name.

For completeness, in weighing up the parties' respective cases, the Panel has taken account of paragraph 8.1 of the Policy, which contains a non-exhaustive list of factors that are recognised as being potential evidence that a domain name is not an Abusive Registration. These factors include instances where:

- before being aware of the Complainant's cause for complaint, the Respondent has used or made demonstrable preparations to use the Domain Name (or a similar domain name) in connection with a genuine offering of goods or services (paragraph 8.1.1.1), or been legitimately connected with a mark which is similar to the Domain Name (paragraph 8.1.1.2); and/or
- the Domain Name is generic or descriptive and the Respondent is making fair use of it (paragraph 8.1.2).

For the reasons already set out above, the Panel considers that each of these factors applies on the facts of this case.

10. Decision

The Appeal Panel concludes that the Complainant has Rights in a mark (FLORA) which is identical to each of the Domain Names but has failed to establish that either of the Domain Names is an Abusive Registration. Accordingly, the Appeal Panel upholds both appeals and rules that the Domain Names should not be transferred.

Signed
Nick Gardner

Dated 3 June 2021

Signed
Ian Lowe

Dated 3 June 2021

Signed
Anna Carboni

Dated 3 June 2021