

Pankajkumar Patel v Allos Therapeutics Inc

Claim No: HC07C01730

High Court of Justice Chancery Division

13 June 2008

2008 WL 2442985

Before: Miss Sonia Proudman QC Sitting as a Deputy Judge of the Chancery Division

Judgment 13th June 2008

Hearing date 12th May 2008

Representation

- Mr Pankajkumar Patel , the Applicant, in person.
- Miss Kathryn Pickard (instructed by Mishcon de Reya , Solicitors) for the Defendant.

Approved Judgment

Miss Sonia Proudman QC

1 This is an application by the defendant, Allos Therapeutics Inc (“ Allos”) for an Order that the claim of the claimant, Pankajkumar Patel, be struck out pursuant to [CPR Rule 3.4\(2\)\(a\)](#) on the ground that the claim form as amended discloses no reasonable grounds for bringing a claim. Alternatively, for an order that summary judgment be granted to Allos on the claim pursuant to the separate powers conferred by [CPR Rule 24.2](#) on the ground that Mr Patel has no real prospect of succeeding on the claim and there is no other compelling reason why the matter should go to trial. In brief, Allos alleges that the case is fanciful and not fit for trial at all.

The history

2 At the heart of these proceedings is a dispute between Mr Patel and Allos over Mr Patel's registration of the domain name “ allostherapeutics.com” .

3 Allos is a global biopharmaceutical company which has been trading under the name “ Allos Therapeutics Inc” since July 1996. It is listed on the NASDAQ stock exchange. It is the proprietor of the US trade marks for “ Allos” and “ Allostherapeutics, Inc” and has registered the domain name “ allos.com” . It has a website at www.allos.com on which it uses its trading name “ Allos Therapeutics Inc” . It has used its stylised Allos Therapeutics Inc US trademark since at least February 2003.

4 What Mr Patel has persistently done is to register companies' names (I say companies in the plural because he has done this with the names of many pharmaceutical companies, not just Allos) as Internet domain names. The domain names do not denote the sites as criticism sites; typically they comprise the name of the company followed by.com. Mr Patel himself says that he deliberately uses “ trademark.tld” , tld standing for top-level domain.

5 Mr Patel is a horticulturalist by trade and has no business interest in the pharmaceutical industry. He does not allege that he carries on business under the trading name “ Allos Therapeutics” , nor does he claim any intellectual property in the name. His purpose is to wage an ideological war against what he sees as the evils of the pharmaceuticals industry. His particulars of claim show that his hatred of the industry started with his belief that his mother died as a result of inappropriate drug treatment. His grievance now extends to the lawyers acting for pharmaceutical companies, whom he says will “ lie harass steal and defraud in order to crush anyone who rightfully wishes to oppose the immoral activities of the industry” . He also regards the judiciary as inherently biased in the industry's favour.

6 It is common ground that in registering these domain names Mr Patel's actions are not undertaken to steal the companies' business for his own financial gain but, as he sees it, to expose the immorality of the industry and its lawyers. He uses the domain sites, which contain the relevant company's logo and trademarks, as crudely constructed protest or “ gripe” sites. They are acquired with the intention of directing Internet users searching for the company in question to a website in the name of the company (“ trademark.tld”) on which the company's

logo is displayed. The home page will then be fully viewed before a disclaimer is seen or the user can otherwise realise that the site is not affiliated with the company. In the present case at least, the domain did not resolve to an active criticism website. Mr Patel has also turned his attention to law firms which have acted for pharmaceuticals companies against him, registering domain names and setting up so-called “ spoof” or “ parody” websites for them. Indeed Mr Patel has taken such action against Allos's American lawyers, Swanson & Bratschun LLP.

7 In June 2005 Mr Patel registered the domain name *allostherapeutics.com* with the Internet domain Registrar OVH. Although the contract between the Registrar and Mr Patel has not been produced, it is central to the dispute on both sides that the contract incorporated the Internet Corporation for Assigned Names and Numbers (“ ICANN”) Uniform Dispute Resolution Procedure (UDRP) Rules and Policy.

8 UDRP constitutes what is now the universal international system of dot-com domain name governance, initiated by the World Intellectual Property Organisation (“ WIPO”), a treaty-based agency of the United Nations. UDRP is incorporated into registration contracts worldwide. The UDRP Policy and Rules are not co-extensive with the intellectual property law of any particular jurisdiction, but they establish, contractually, a mandatory administrative procedure to govern disputes between trade mark owners and domain name registrants: see paragraph 1 of the UDRP Policy. The enforcement of the UDRP process is based entirely on private contract governing the circumstances in which a domain name registration may be maintained. Thus the terms of the contract (to which a complainant is not a party) between registrant and Registrar concerning domain name registration are distinct as a matter of law from the question whether there has been an infringement of the complainant's intellectual property rights under the law of any particular country.

9 Paragraph 4 of the UDRP Policy requires a registrant to submit to a mandatory administrative arbitration procedure (with an approved dispute resolution provider and presided over by an approved neutral Panel) in the event that a third party makes a complaint about the registrant's use of the domain name. The complaint will be upheld if the complainant can prove three matters:—

- • that the domain name is identical or confusingly similar to a trade or service mark in which the complainant has rights;
- • that the registrant does not have any rights or legitimate interests in respect of the domain name; and
- • that the domain name was registered and is being used in bad faith.

10 Paragraph 4b of the UDRP Policy contains a list of what may constitute bad faith for this purpose, as follows:

- (i) acquisition of the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant or a competitor;
- (ii) registration in order to prevent the owner of the trademark from reflecting the mark in a corresponding domain name, provided that the registrant has engaged in “ a pattern of such conduct” ;
- (iii) registration primarily for the purpose of disrupting a competitor's business; or
- (iv) an attempt intentionally to attract Internet users to the website for commercial gain by creating a likelihood of confusion with the complainant's mark.

With the exception of paragraph 4b(ii), it can be seen that all these paragraphs involve an intention on the part of the registrant to obtain some commercial advantage from the registration, typically by deflecting the business of a competitor or by holding the complainant to ransom in order to buy the domain name. However, paragraph 4b is expressed to be non-exhaustive and the Panel is not therefore constrained by the given examples in deciding what is bad faith in any given case. Panel decisions are published and a large body of cases has grown up in relation to the issue of bad faith for the purposes of paragraph 4 of the Policy. Indeed there have been several other cases (not involving Allos) brought against Mr Patel under the Policy in some of which bad faith has been found for reasons outside the examples listed in paragraph 4b. In one case, the complaint was denied and Mr Patel was therefore permitted to retain the domain name.

11 The UDRP proceeding does not however oust the jurisdiction of the court. Paragraph 4k of the UDRP provides:—

“ The mandatory administrative proceeding requirements ... shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution ... If an Administrative Panel decides that your domain name registration should be canceled or transferred, we will wait ten (10) business days ... before implementing that decision. We will then implement the decision unless we have

received from you during that ... period official documentation ... that you have commenced a lawsuit against the complainant in a jurisdiction [determined under the UDRP Rules.] ... If we receive such documentation within the ten (10) day business period, we will not implement the Administrative Panel's decision, and we will take no further action, until we receive (i) evidence satisfactory to us of a resolution between the parties; (ii) evidence satisfactory to us that your lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from such court dismissing your lawsuit or ordering that you do not have the right to continue to use your domain name."

Paragraph 5 provides:

" All other disputes between you and any party other than us regarding your domain name registration that are not brought pursuant to the mandatory administrative proceeding provisions of paragraph 4 shall be resolved between you and such other party through any court, arbitration or other proceeding that may be available."

12 On 10th January 2007 a bankruptcy order was made against Mr Patel. On 22nd May 2007 his trustee in bankruptcy disclaimed all interest in the domain names he had registered, including *allostherapeutics.com* . He cannot therefore rely on any property rights in the domain name. However Allos concedes that this did not for present purposes determine the matter because domain name registration confers personal as well as property rights.

13 On 4th April 2007 Allos in accordance with the UDRP rules submitted a complaint, stating that the domain name *allostherapeutics.com* had been registered contrary to Allos's legitimate interests as trademark proprietor. Allos (who had the choice under the Rules) selected the neutral dispute resolution provider WIPO. Mr Alastair Payne, a partner of Matheson Ormsby Prentice, solicitors in the Republic of Ireland, was the sole Panellist chosen by WIPO to decide the case. He filed a Declaration of Impartiality and Independence in accordance with the UDRP Rules. Following submissions from both Allos and Mr Patel the Panel upheld Allos's complaint. Mr Payne found that paragraph 4a of the UDRP policy applied in that:

- (i) the Domain Name was confusingly similar to Allos's US Trade mark registration of " Allos Therapeutics Inc" and the Allos Therapeutics corporate name;
- (ii) Mr Patel had no right or legitimate interest in the Domain name; and
- (iii) Mr Patel had registered and used the Domain name in bad faith.

Mr Payne's decision on bad faith was based on paragraph 4b(ii). I quote:— " The Complainant has provided the Panel with the results of a search performed on March 15 2007 in the name of the respondent which returned 181 different domain names. The Complainant has inserted a selection of 13 of these registrations into the Complaint all being domain names of well-known pharmaceutical companies.

The Complainant also cites 6 domain name decisions which feature the Respondent as the registrant of domain names which were identical or confusingly similar to a complainant's trade mark and were all transferred to the relevant complainant in the dispute ... In view of this evidence of the respondent's activities the Panel infers that the Respondent has registered the Disputed Domain Name in order to prevent the Complainant from registering it as a domain name. Based on the Respondent's pattern of past conduct of multiple domain name registrations it appears to the Panel that the respondent is a serial cybersquatter. In addition to this, the Respondent has failed to provide sufficient evidence in this instance to persuade the Panel of the respondent's stated intention to create a legitimate criticism site."

In making his finding under paragraph 4b(ii) it appears that Mr Payne took into account Mr Patel's evidence that an employee of Allos covertly attempted to buy the domain name from him. Mr Patel relied on this as evidence of bad faith on Allos's part, saying that Allos was trying to trick him into displaying a commercial interest in acquiring the site. He alleged that this supported a case of so-called reverse domain-name hijacking on Allos's part.

14 Mr Payne's decision of 11th June 2007 contained, in accordance with the UDRP rules, an order that the domain name *allostherapeutics.com* be transferred to Allos. On 29th June 2007 Mr Patel issued the claim form in these present proceedings with the intention and (by virtue of UDRP paragraph 4k) the effect of blocking implementation of the Panel's Order . It is conceded that, despite his bankruptcy Mr Patel did not need the permission of the Court to start proceedings as the claims he makes are personal rather than proprietary.

Mr Patel's claims in this action

15 Before turning to the details of Mr Patel's pleading, I must first deal with the question of the status of the Panel decision. Paragraph 4k of the Policy appears to assume that the court to whom the matter is referred may be able to review the Panellist's decision on its merits, because the paragraph speaks of "referring the dispute" to the court for "independent resolution". However it is trite law that an agreement cannot confer a jurisdiction on the court which it does not otherwise have. Under the Policy the Registrar will abide by a judicial decision, but the function of this Court is not as a judicial review or appellate body. The claimant must demonstrate some independent right of action justiciable in this Court. Thus if a complaint is dismissed, the complainant may refer the case to the Court for an order that its trademark has been infringed. If, on the other hand, the complaint is upheld, the burden is not on the complainant to establish infringement. It is for the registrant to plead and prove a cause of action giving him an interest in retaining the domain name. An unsuccessful registrant therefore faces considerable difficulty in identifying a cause of action upon which the Panel's decision can be challenged.

16 Mr Patel is aware of and indeed made it plain to me that he deplores this difficulty, which he regards as one of many indications of bias against registrants in the UDRP system. What he wants is for Allos to have to establish trademark infringement under English or European law as he firmly believes that (see e.g. paragraph 16 of his witness statement) Allos has no cause of action against him. Allos's Counsel, Miss Pickard, submits that Allos would have no difficulty in proving both passing-off and trademark infringement, citing [British Telecommunications plc v. One in a Million Limited \[1999\] 1 WLR 903](#) and [Trade Marks Act 1994 s. 10\(3\)](#). Mr Patel submits to the contrary that there is no infringement in circumstances where he provides no competing products or services and has no profit motive in registering the domain name. He also relies on the First Council Directive 89/104/EEC of 21st December 1988 (to approximate the laws of European Member States relating to trademarks) and various EC Council regulations on the Community Trademark. I do not understand his reliance on Council Regulation (EC) No 40/94 Article 12 as Mr Patel does not allege that he comes within any of its provisions. Whatever the merits of that dispute, however, the question whether Mr Patel is entitled to maintain registration under the terms of his contract is, as I have said, distinct from that whether there has been an infringement under domestic or Community law. Article 92 (giving the Community trade mark courts exclusive jurisdiction over infringement actions relating to community trade marks) is not therefore in point. It is for the claimant to establish a right of action if he comes to this court seeking a remedy. Mr Patel regards this as inherently unfair, and the terms of his contract, incorporating the UDRP, as an unwarrantable interference with his freedom of action. His particulars of claim are aimed at attacking his contract and raising the issue of whether there has been trademark infringement.

17 I am unable to see how some of his alleged causes of action can assist Mr Patel in maintaining his registration with OVH, as they are at best tangential to the question of whether he has a sufficient interest in the domain name to justify his retaining it. Miss Pickard says in her skeleton argument:—

" the Panel determined that Mr Patel had no right or interest in the Domain Name and, unless he can show that that decision was wrong, he cannot succeed in his claim."

I agree that Mr Patel cannot succeed in his objective of overturning the order of the Panel unless he can show some right to retain the domain name. However, irrespective of any action that the Registrar may or may not take as a result of this action, each of Mr Patel's complaints in the action must be considered on its merits, as indeed paragraph 5 of the UDRP appears to contemplate.

18 Mr Patel's amended particulars of claim (dated 29th September 2007) in some respects combine and confuse polemic with legal formulation. The pleading contains an emotive narrative of events concerning registration, the UDRP complaint, the decision of the Panel and Mr Patel's motivation for the action that he has been taking against pharmaceutical companies generally. He also makes general unparticularised allegations of greed, bias and dishonesty against the pharmaceutical industry, corporate lawyers, neutral dispute resolution providers and the judicial system.

19 However doing the best I can (with the assistance of Mr Patel's detailed skeleton argument) I detect a number of potential causes of action in his amended particulars of claim. I will deal with them in turn.

Human Rights

20 Mr Patel's first claim is to set aside the UDRP process on some ground under the [Human Rights Act 1998](#). I put it thus vaguely, because the Convention Rights (set out in [Schedule 1](#) to

the Act) relied upon are not spelt out. First I infer that he says he has not had a fair hearing under Article 6 . He objects to having to submit to the mandatory UDRP arbitration process. The claim seems to be that he could not have a fair trial under the UDRP because of inherent bias in the system towards complainants. He says that such bias is “ well-known” and cites an article quoting statistics that the vast majority of WIPO-conducted arbitrations are decided in favour of complainants. He also told me in argument that Mr Payne's firm is one which frequently acts for trademark holders in infringement cases. For present purposes I will assume that Mr Patel could at trial prove the statistics he cites. In my judgment however there is nothing in his case to establish bias in law and such a claim as pleaded is bound to fail. Mr Patel's complaint amounts to no more than that he is dismissive and distrustful of the procedure in which all his arguments were heard, but rejected.

21 A second claim under the 1998 Act was spelt out in more detail in the course of argument. Mr Patel submits that the decision of the Panel ought to be set aside because it infringes his right to freedom of expression, that is to say the Article 10 Convention right.

22 This freedom is not unqualified, and must be balanced against the rights of others, such as the rights of a minority not to suffer abuse, or, as in this case, the rights of a trademark owner freely to enjoy its own rights and property.

23 It is generally considered to be in the public interest to provide free speech forums on the Internet to criticise companies and their actions. However, certain factors take the present case out of this general proposition. Mr Patel uses a domain name which is no more than the trading name of the company itself, without any additional indication to show that it is a protest site. More, the site adopts Allos's own trademark. In effect, Mr Patel is posing as Allos in order to attract members of the public to the site. It is intended that there should be confusion in the mind of the public. It is hardly free speech to use a domain name and trademarks that Internet users will (and are meant to) associate with Allos in order to trick those users. Further, as found by Mr Payne and as Mr Patel accepts, there is no active criticism site, or link to one, at the domain.

24 Paragraphs 16 to 19 of Mr Patel's witness statement illuminate his view of his situation. He regards the costs of litigation, the damage to his business and the loss of time he has been unable to spend with his small daughter as the direct result of the actions of Allos and other companies, whom he describes as “ like school-yard bullies” . He cannot accept that he is the aggressor, not the victim. He is not debarred from making legitimate criticisms of pharmaceutical companies nor from setting up proper criticism websites from which he and others may do so. Instead, he has chosen to usurp names and logos contrary to the UDRP Policy.

25 It seems to me that the claim that Mr Patel's rights of free expression are undermined in relation to this domain name site is therefore bound to fail. As Lawrence Collins J said in another of Mr Patel's cases, *Patel v. Endo Pharmaceuticals Inc and Others* (2006) EWHC 3461 (Ch):—

“ ... as regards a serious issue to be tried, try as I may to understand Mr Patel's complaints, I cannot see any serious cause of action in a complaint that two American corporations have exercised their rights under the domain name arbitration procedure to prevent what would plainly be an obvious case of passing-off, bar the fact that Mr Patel disclaims any intention to trade in any way. There seems to me no legitimate basis for complaint that corporations should not be able to protect their own domain names by preventing registration of domain names which not only use their names but their logos.”

Unfair Contract Terms

26 In paragraph 4 of his pleading, Mr Patel claims that his contract with the Registrar contains unfair terms, namely that under the Policy and Rules it was Allos alone which was given the choice of approved neutral dispute resolution provider, and, fundamentally, that Mr Patel had no choice about having the dispute heard through the UDRP arbitration process.

27 This is not a case of an exclusion clause, and thus the [Unfair Contract Terms Act 1977](#) can have no application. Mr Patel is perhaps invoking the [Unfair Terms in Consumer Contracts Regulations](#) (implementing the EC Council directive 93/13). However, I cannot see that, even if these regulations were capable of application in this case (a matter on which the Court was not addressed), I can consider such a complaint in litigation between Mr Patel and Allos (which was not a party to Mr Patel's contract) where the other party to the contract, the Registrar, has not been joined.

28 Again, in my judgment this claim is wholly without merit.

Defamation and Malicious Falsehood

29 Mr Patel claims that Allos's complaint under the UDRP was defamatory. The crux of Mr Patel's grievance is that Allos has no cause of action against him in intellectual property proceedings because his use of its name does not involve trading or competition on his part. Thus, he argues, any statement that he is passing off or breaching Allos's trademarks is necessarily false and libellous. The detail of the allegation is similar to that which he made in the Endo Pharmaceuticals case, summarised by Lawrence Collins J in the following terms:—

“ The defendants ... were fully aware that he was not a “ cybersquatter” and that he was not infringing their trademarks. They deliberately set out to relieve him of his property and his rights. Their actions of making malicious false statements, false allegations and libellous statements were designed to cause damage and done in order to cause a decision favourable to them; this resulted in a decision being made which contained malicious false statements, which was then published on the NAF [in this case WIPO] website.”

30 One of several fundamental problems with this allegation is that Mr Patel's claim assumes that he was not a cybersquatter or infringer in the sense used by Allos in the complaint and Mr Payne in his judgment. While these expressions may be used to import an intention to profit from registration, it is plain from the face of Mr Payne's judgment that he is using them in the sense of abusive or bad faith registration of a domain name against the UDRP rules. “ Serial cybersquatter” is used to mean a person who repeatedly acquires domain names for the purpose of damaging the person whose name it is. Mr Patel cannot complain that this description is false. Further, Mr Payne heard and took into account Mr Patel's submissions as to his intention to create a legitimate criticism site and his lack of commercial motivation.

31 Mr Patel has produced no particulars of alleged non-disclosure on Allos's part, nor is there any evidence of legal malice necessary to establish the causes of action on which he relies. When asked by the Court what were his particulars of malice, he could only point to two things. First, that he was not a cybersquatter or an infringer and Allos knew it. As I have found, this depends (among other things) on the words having a meaning which neither Allos nor Mr Payne in fact ascribed to them. Secondly, there is the fact that Allos had obtained a copy of the judgment in the Endo case, which Mr Patel submits is evidence of some conspiracy between Endo (and other pharmaceutical companies) and Allos. If indeed Endo was the source of this copy of the judgment, I see nothing sinister in the fact. Certainly it is insufficient as evidence of malice. Similarly there is no evidence of acts of fraud as alleged in the Claim Form and Mr Patel's skeleton argument.

Harassment

32 Mr Patel claims that he has been harassed, referring to the Protection from Harassment Act 1977 . He asserts that there is an actionable course of conduct for the purposes of s.7(3) of that Act comprising the sending of a cease and desist letter from Allos's American lawyers, initiation of the UDRP administrative proceedings and the terms of Allos's complaint in those proceedings. However it is a defence to a claim of harassment under s. 1(3)(c) of the Act if the person who pursued the conduct complained of shows that “ in the particular circumstances the pursuit of the course of conduct was reasonable” . Again I quote Lawrence Collins J in the Endo case:—

“ I cannot see any serious cause of action in a complaint that [a corporation has] exercised [its] rights under the domain name arbitration procedure” .

In other words, it was reasonable for Allos to invoke that procedure, and obviously so in circumstances where the Panel found in Allos's favour. I have already dealt with the alleged falsehoods in Allos's complaint.

Threats of Infringement

33 [S.21 of the Trade Marks Act 1994](#) affords a right of action to any person aggrieved by groundless threats of infringement proceedings. In such a case the burden is on the defendant to show that the acts in respect of which proceedings were threatened constitute an infringement of the trademark concerned. This section perhaps affords Mr Patel his best opportunity of airing his assertion that he has not been guilty of any infringement of Allos's marks because of his lack of

commercial motive. Miss Pickard submits that Allos is entitled to summary judgment on that issue because of the proper construction to be placed on what is use “ in the course of trade in relation to goods or services” for the purposes of [s. 10\(3\)](#) of the Act.

34 However that may be, it seems to me that there is a more fundamental objection to Mr Patel's claim under this head. The 1994 Act (applying to UK and Community trademarks) only extends to the United Kingdom and the Isle of Man: see [s.108](#) . The conduct relied upon as threatening infringement for the purposes of [s. 21](#) is a cease and desist letter dated 19th January 2006 from Allos's Colorado lawyers to Mr Patel. The letter describes Allos's US registered marks, and refers to the terms of “ federal law” and “ the Lanham Act” . In my judgment the threat “ to file a lawsuit against you” is plainly and incontrovertibly a threat of proceedings in the United States courts under United States federal law for the infringement of the United States registered trademark. As such, the 1994 Act is inapplicable and the claim under this head must fail also.

Conclusion

35 In my judgment, Mr Patel's claims are totally without merit. Neither the claim form nor the particulars discloses any reasonable grounds for bringing the action. The Claim is inherently coherent but the causes of action pleaded are to my mind obviously ill-founded. I am aware that I may differ from the reported views of Peter Smith J as to the application of [CPR rule 3.4](#) to this case. I would therefore add that if I am wrong on that matter I would in any event give summary judgment for the defendant under [CPR rule 24](#) on the basis that Mr Patel has no real prospect (I would say no prospect at all) of succeeding in his claim and there is no other compelling reason why the case or issue should be disposed of at trial.