

Nominet UK Dispute Resolution Service

DRS 04081

Gold Financial Group Ltd. v. Stephen Yates

Decision of Independent Expert

**1. Parties:**

Complainant: Gold Financial Group Ltd.  
Address: 1 Franklin Way  
Cherry Willingham  
Lincoln  
Lincolnshire  
Postcode: LN3 4GL  
Country: UK

Respondent: Stephen Yates  
Address: 1 Franklin Way  
Cherry Willingham  
Lincoln  
Lincolnshire  
Postcode: LN3 4GL  
Country: UK

**2. Disputed Domain Name:**

goldfinancialgroup.co.uk (the "Domain Name")

**3. Procedural Background:**

3.1 The Complaint in this case was lodged with Nominet UK ("Nominet") on 3 October 2006. Nominet validated the Complaint on the following day and notified the Respondent, giving them 15 working days within which to lodge a response. As of 26 October 2006, no response was received. On 2 November 2006, the Complainant paid to Nominet the appropriate fee for a Decision by an Expert pursuant to paragraph 7 of the Nominet Dispute Resolution Service Policy (the "Policy").

3.2 The undersigned, Andrew Murray (the "Expert"), was formally appointed on 9 November 2006. The Expert has formally confirmed to Nominet that he knows of no reason why he cannot properly accept the invitation to act as an expert in this case and further confirmed that he knows of no matters which might appear to call into question his independence and/or impartiality.

**4. Outstanding Formal/Procedural Issues (if any):**

- 4.1 The Respondent has not submitted a Response to Nominet in time (or at all) in compliance with paragraph 5(a) of the Procedure for the conduct of proceedings under the Dispute Resolution Service (“the Procedure”).
- 4.2 It appears that the Respondent’s contact details are out of date. The Complainant did not set out any contact details in the Complaint, while the WHOIS record lists the Respondent as being contactable via the Complainant’s address, a state of affairs the Complainant confirms as not being the case. As it result it appears unlikely that any of the usual correspondence would have reached the Respondent. In such circumstances I must ask whether it is fair and reasonable to proceed with this decision.
- 4.3 By paragraph 3(c)(iii) of the Procedure the Complainant is required to “set out any of the Respondent’s contact details *which are known to the Complainant*”. This suggests that it is not the duty of the Complainant to identify the Respondent’s contact details. The Complainant clearly sets out in the Complaint that: “the respondent is unobtainable”. It appears that the Complainant has therefore fulfilled their duty under paragraph 3(c)(iii).
- 4.4 The duty of Nominet is set out at paragraph 2 of the Procedure where Nominet undertake to send the Complaint to the Respondent using some or all of the following means:
- i) sending the complaint by first class post, fax or e-mail to the Respondent at the contact details shown as the registrant or other contacts in our Domain Name register database entry for the Domain Name in dispute;
  - ii) sending the complaint in electronic form (including attachments to the extent available in that form) by e-mail to;
    - A. postmaster@<the Domain Name in dispute>; or
    - B. if the Domain Name resolves to an active web page (other than a generic page which we conclude is maintained by an ISP for parking Domain Names), to any e-mail address shown or e-mail links on that web page so far as this is practicable; or
  - iii) sending the complaint to any addresses provided to us by the Complainant under paragraph 3(b)(iii) so far as this is practicable.
- 4.5 I have seen the correspondence file in relation to this Complaint and I am satisfied that on 4 October 2006 Nominet attempted to contact the Respondent in accordance with paragraph 2 by mail, fax and electronic mail. All attempts failed. I believe Nominet therefore discharged its duty under paragraph 2 and that all attempts were made to contact the Respondent. I therefore have no reason to doubt that the Respondent has been properly notified of the Complaint in accordance with paragraph 2 of the Procedure.
- 4.6 Paragraph 15(b) of the Procedure provides, *inter alia*, that “If in the absence of exceptional circumstances, a Party does not comply with any time period laid down in this Policy or the Procedure, the Expert will proceed to a Decision on the complaint.” There is no evidence before the Expert to indicate the presence of exceptional circumstances. The failure of the notification procedures to reach the Respondent, does not in the Expert’s opinion qualify as such. To find in the alternative would afford a higher level of protection to a Respondent who deliberately hides his/her identity by giving false and/or incomplete contact details (in breach of paragraph 4.1 of the Terms and Conditions for the Registration of a .uk Domain Name) over those who simply fail to respond. This would

seem to be a breach of natural justice and accordingly, the Expert will now proceed to a Decision on the complaint notwithstanding the absence of an identifiable Respondent.

4.7 The lack of a response does not entitle the Complainant to a default judgement. The Complainant must still prove its case to the required degree. The Expert will evaluate the Complainant's evidence on its own merits and will draw reasonable inferences from it in accordance with paragraph 12(b) of the Procedure.

4.8 Paragraph 15(c) of the Procedure provides that "If, in the absence of exceptional circumstances, a Party does not comply with any provision in the Policy or this Procedure ..... , the Expert will draw such inferences from the Party's non-compliance as he or she considers appropriate." Generally, the absence of a Response from the Respondent does not, in the Expert's view, entitle an Expert to accept as fact all uncontradicted assertions of the Complainant, irrespective of their merit. In this case it seems to the Expert that the probable facts speak for themselves and that it is not necessary to draw any special inferences. The Expert finds that the probable facts asserted by the Complainant and set out in the next following section are indeed facts.

## **5. The Facts**

5.1 The Complainant is a UK registered company which has been trading as Gold Financial Group Ltd. since 5 March 2003. The Complainant provides independent financial advice.

5.2 The Domain Name was registered by the Respondent on 14 November 2002.

5.3 The Complainant was assigned the rights to the Domain Name by the Respondent on 16 February 2005 following the dissolution of their partnership.

5.4 The Complainant has advertised and promoted the Domain Name since 6 April 2005 and has in that time spent in excess of £1800 on advertising.

5.5 Following the assignation of the Domain Name the Complainant has managed both the Domain Name and its sister domain "goldfinancialgroup.com" and has funded website development at these domains.

5.6 As part of business restructuring, Gold Financial Group Ltd. wish to move domain hosters and cannot do so until registrant details of the .co.uk domain have been revised. As the Respondent is unobtainable Gold Financial Group Ltd have no option but to use the DRS facility to have domain ownership details amended.

## **6. The Parties' Contentions**

### ***Complainant***

6.1 The Complainant submits that the Domain Name in dispute is identical or similar to a name or mark in which it has rights and that the Domain Name in the hands of the Respondent is an Abusive Registration.

6.2 The Complainant trades under the name "Gold Financial Group Ltd" and has done so since 5 March 2003.

6.3 The Complainant has advertised and promoted the Domain Name since 6 April 2005 and has in that time spent in excess of £1800 on advertising.

6.4 The Domain Name in the hands of the Respondent is abusive because it was registered due to a prior relationship but the Complainant is now using the site, and paying registration/renewal fees.

### ***Respondent's Response***

No response was received.

## **7. Discussion and Findings:**

### ***7.1 General***

According to paragraph 2 of the Policy, in order to succeed in this complaint, the Complainant has to prove to the Expert that, on the balance of probabilities:

- i. the Complainant has Rights (as defined in paragraph 1 of the Policy) in respect of name or mark which is identical or similar to the disputed domain name; and
- ii. the disputed domain name is an Abusive Registration (as defined in paragraph 1 of the Policy).

These matters must be proven by the Complainant, notwithstanding the failure by the Respondent to respond. The effect of the Respondent's default is rather that, under paragraph 15(c) of the Procedure (there being no exceptional circumstances in this case) the Expert is required to draw such inferences from the Respondent's non-compliance as he considers appropriate.

### ***7.2 Complainant's Rights***

7.2.1 The Complainant has put forward minimal evidence as to its rights in the Domain Name. The Complaint makes the bare assertion that "the Complainant trades under the name "Gold Financial Group Ltd" and has done so since 5 March 2003" and provides evidence of a Companies House Registration.

7.2.2 Ordinarily the fact that the Domain Name registration predates the Company registration by a period of some three and a half months would have rendered this of little value, but in this case there is further evidence.

7.2.3 Particularly the Complainant has provided a copy of a partnership agreement dated 7 January 2003 between the Respondent and two fellow Directors of the Complainant in which it was agreed the Domain Name, among other items was held subject to that agreement and that upon termination of partnership the ownership of such items (whoever held the registration) was to revert to the Company upon payment of appropriate fees. It appears the Respondent terminated the partnership on 16 February 2005, and that he accepted payment to cover costs on that date.

7.2.4 In light of this evidence the Expert is satisfied that the Complainant has rights in respect of the mark “Gold Financial Group Ltd” which is sufficiently similar to the Domain Name (disregarding, for these purposes, the generic domain suffix).

7.2.5 Consequently, the Expert finds that, for purposes of the Policy, the Complainant has rights in respect of a name or mark, which is identical or similar to the Domain Name.

### ***7.3 Abusive Registration***

7.3.1 Paragraph 1 of the Policy defines “Abusive Registration” as:-

“a Domain Name which either:

was registered or otherwise acquired in a manner, which at the time when the registration or acquisition took place, took unfair advantage of or was unfairly detrimental to the Complainant's Rights; OR

has been used in a manner, which took unfair advantage of or was unfairly detrimental to the Complainant's Rights.”

7.3.2 Under paragraph 3(a) of the Policy is listed a non-exhaustive list of factors which may be evidence that the Domain Name is an Abusive Registration. The Complainant has indicated that they believe they may make out a claim under paragraph 3(a)(v):

“The domain name was registered as a result of a relationship between the Complainant and the Respondent, and the Complainant:

A. has been using the domain name exclusively; and

B. paid for the registration and/or renewal of the domain name registration.”

7.3.3 The introduction of Paragraph 3(a)(v) is discussed at length by Ian Lowe in *Daniel Thwaites Public Limited Company v Clues Internet Limited* [2006] DRS 3841.

7.3.3 “The factors described at Paragraph 3(a)(v) of the Policy were introduced by Nominet when Version 2 of the Policy was introduced in September 2004. The new provision was intended to deal with a reasonably common occurrence whereby through error, oversight or lack of foresight a domain name when first registered was registered in the name of the agent for the intended user of the domain name, classically a web designer or ISP. As illustrated by a number of expert decisions under the Policy prior to September 2004, the user later encountered difficulties in renewing the registration or moving the website to a different ISP or updating the website because the agent in whose name the domain name had been registered had disappeared or been dissolved or was otherwise uncontactable. Experts had come to conflicting views as to whether the registration by the agent could be characterised as abusive in such circumstances, particularly where the original registration in the name of the agent had been deliberate or simply an error. It was hard to describe such circumstances as the domain name having been registered or used ‘in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's Rights.’ With the introduction of the new

version of the Policy, including the additional factors specifically aimed at a situation where there had been a relationship between the Complainant and the Respondent, relief is now expressly available through the Policy. In view, however, of the special nature of the new provision, I consider that in order to succeed on this ground a Complainant does need to satisfy the Expert that all the elements of Paragraph 3(a)(v) are present.

7.3.4 Following this guide, has the Complainant made out its case? The first step of the test requires the Complainant to establish that it has been using the Domain Name exclusively. This is not, it must be said, entirely clear. The Complainant asserts that “The Complainant has advertised and promoted the Domain Name since 6 April 2005” (at para. 5.4) and “Following the assignation of the Domain Name the Complainant has managed both the Domain Name and its sister domain “goldfinancialgroup.com” and has funded website development at these domains.” (at para. 5.5). It is not clear what use the Domain Name was put to prior to this date. What is clear though is that since the assignment of the Domain Name it has been exclusively used by the Complainant, and as the provision of Paragraph 3(a)(v)(A) does not require exclusive use in perpetuity it may be reasonably expected that the use the Complainant has made of the Domain Name following its assignment falls within the standard case Mr. Lowe describes above. I therefore find this step has been met.

7.3.5 The second step is considerably more straightforward. The Complainant has provided clear evidence that it has paid all costs in relation to hosting, renewing and transferring the Domain Name following the assignation of the Domain Name in February 2005. This step has clearly been met.

7.3.6 Having found the Complainant to have made out a prima facie case under the Policy the burden under paragraph 4 now shifts to the Respondent to demonstrate their use is not an Abusive Registration. The Expert having found the Respondent has a case to answer, the Respondent must make that answer. Here the Respondent has failed to answer and therefore cannot rebut the presumption of Abusive Registration.

7.3.7 Accordingly, the Expert finds that the Domain Name is an Abusive Registration as defined by paragraph 1 of the Policy on the basis that it is being used in a manner which takes unfair advantage of the Complainant’s rights.

## **8. Decision:**

In light of the foregoing findings, namely that the Complainant has rights in respect of a name which is similar to the Domain Name and that the Domain Name, in the hands of the Respondent, is an Abusive Registration, the Expert directs that the Domain Name, goldfinancialgroup.co.uk, be transferred to the Complainant.