

IN THE HIGH COURT OF JUSTICE

No. HC05C02884

CHANCERY DIVISION

**[2005] EWHC 3049 (Ch)**

Royal Courts of Justice

Tuesday, 25<sup>th</sup> October 2005

Before:

MR. JUSTICE MANN

B E T W E E N :

ALLIANCE FRANCAISE DE LONDRES LTD.

Claimant

- and -

NOMINET UK

Respondent

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MRS. M. HEAL (instructed by Farrer & Co) appeared on behalf of the Claimant.

MR. P. ROBERTS (instructed by CMS Cameron McKenna) appeared on behalf of the Respondent.

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**J U D G M E N T**

(As approved by the Judge)

1 MR. JUSTICE MANN:

- 2
- 3 1. This is an application for joinder of Nominet UK as a second defendant to this  
4 part 8 application and an application for an injunction against Nominet. The  
5 injunction seeks to prevent Nominet from causing a lapse of the registration of  
6 a domain name “alliancefrancaise.org.uk” as a result of the dissolution of the  
7 company in whose name it was apparently accidentally registered. It ought to  
8 have been registered in the name of Alliance Francaise de Londres Ltd., the  
9 claimant. It was actually registered in the name of a company that procured  
10 the registration in the first place and it ought not to have been.  
11
- 12 2. In the light of the evidential state of play as it now is, the application is itself  
13 not pursued. Mrs. Heal, who appears for the claimant, now accepts that the  
14 available evidence of Nominet’s intentions and systems is now such that  
15 joinder and the injunction are no longer necessary. Nevertheless, she seeks the  
16 costs of this application on the footing that it was only at a late stage today,  
17 when the evidence was supplemented by means of an undertaking to provide a  
18 witness statement, that it became sufficiently clear on the evidence that her  
19 clients were not in peril.  
20
- 21 3. The question for me in relation to costs is whether or not this application was  
22 necessary and justifiable up to that point, or whether it was, as Mr. Roberts, for  
23 Nominet, says, neither necessary nor justifiable from the outset. In order to  
24 deal with that I need to go back a little into the history of how this application  
25 came about, but I do not have to go back into the history of how it was that the  
26 registration came to be in the wrong name.  
27
- 28 4. By 12<sup>th</sup> October 2005 it was apparent to Alliance Francaise that they had a  
29 problem arising out of the dissolution. I do not know precisely when it  
30 became apparent but that does not matter. On that date, Mr. Crusher of  
31 Farrers, solicitors to the claimant, was informed of the problem in relation to  
32 the domain name, and pursuant to that he spoke to Mr. Penman in Nominet’s  
33 legal department. They had a discussion as to what was going to happen in  
34 these circumstances and Mr. Crusher told Mr. Penman that an application for a  
35 vesting order was being made under s. 44(2) of the Trustee Act 1925, the  
36 effect of which, if in due course made, would be to vest the domain name in  
37 Alliance Francaise; and the respondent to that application, in the normal way,  
38 was the Attorney-General. An application of that nature is familiar territory  
39 where a company has been dissolved whilst still holding an asset.  
40
- 41 5. Apparently Mr. Crusher understood that something would have to happen by  
42 26<sup>th</sup> October 2005. His attendance note reads:  
43

1 “I [that is Mr. Crusher] explained that we were facing a very short  
2 deadline, 26<sup>th</sup> October 2005. He [that is Mr. Penman] said that he  
3 couldn’t do anything about that but as soon as they received a sealed  
4 claim form, they would postpone any removal of the name from the  
5 register”.

6  
7 6. It seems at that stage that in very general terms Alliance Francaise were given  
8 an indication that removal of the domain name from the register, which is what  
9 they feared and which they feared would have catastrophic consequences, or  
10 potentially catastrophic consequences, if it happened, would be postponed  
11 once a sealed claim form was received. Although it is not express in terms, it  
12 seems to me to be clear enough that what Nominet would receive under that  
13 regime was a claim form to which they were not a party. It just wanted to be  
14 satisfied that an application for a vesting order had been made. Absent an  
15 application for a vesting order Nominet’s then, and current, procedures were  
16 and are such that the domain name would lapse and could be taken up by  
17 somebody else. That was the event that Alliance Francaise feared. It would be  
18 exposed to the risk of someone else registering the name, thereby preventing  
19 Alliance Francaise from exploiting it and, worse still, having some malefactor  
20 putting inappropriate material on a new website under the domain name  
21 leading to a false attribution to Alliance Francaise.

22  
23 7. On 14<sup>th</sup> October Mr. Crusher spoke again to Mr. Penman, asked various  
24 questions about the renewal of the domain name, and asked whether the  
25 26<sup>th</sup> October cancellation date was set in stone. He was told it would not be  
26 cancelled before that date but it could be cancelled on that date or any date  
27 thereafter. Then there was a discussion of matters which are not germane to  
28 my decision.

29  
30 8. At that point, therefore, Alliance Francaise knew of the urgency of doing  
31 something about this. They responded to that urgency in due course by issuing  
32 a claim form. The claim form was issued on 18<sup>th</sup> October 2005 and that claim  
33 form joins just Her Majesty’s Attorney General as the respondent. It seeks a  
34 vesting order. In order to safeguard the position there were then, apparently,  
35 further conversations and emails passing between Mr. Crusher’s firm on the  
36 one hand, and Nominet on the other. On 19<sup>th</sup> October, at 12.22, Mr. Crusher  
37 asked a Ms. Leanne Kenny of Nominet for

38  
39 “an undertaking that pending the outcome of the part 8 application, the  
40 domain name alliancefrancaise.org.uk would not be cancelled. While  
41 I am grateful for your confirmation that it has been so marked, if we are  
42 not going to seek an injunction I would be grateful for the requested  
43 undertaking”.

1 The indication that there would be a marking is not recorded in anything I have  
2 seen, but that is obviously an assurance that Farrers were given.

3  
4 9. Ms. Kenny responded to that as follows:

5  
6 “Dear Mr. Crusher,

7  
8 Thank you for your email, I have passed your request for Nominet to  
9 give an undertaking to our company solicitor for comment.

10 Unfortunately he is out of the office today. However, I will speak to him  
11 on his return tomorrow”

12  
13 That was sent on 19<sup>th</sup> October at 12.36.

14  
15 10. There was a response the next day, on the 20<sup>th</sup>, from Faresha Constable, who is  
16 an assistant solicitor, and she said this:

17  
18 “Nominet will not be able to provide you with the requested undertaking.  
19 Nominet is not a law firm and, therefore, does not give undertakings.  
20 Neither I nor the company solicitor will be prepared to give an  
21 undertaking when we have 130 people working here and cannot  
22 personally guarantee that such a cancellation cannot occur.

23  
24 “However, I can confirm that our records of the domain  
25 alliancefrancaise.org.uk have been marked ‘do not cancel’ pending  
26 receipt of the vesting order, and on that basis I see no reason why the  
27 domain should be cancelled while we await the vesting order. Please also  
28 note that seeking an injunction will not make any difference to the actions  
29 we take with regards to the domain. Even with an injunction the effect on  
30 us will be to do no more than we have already done, i.e. mark your  
31 domain ‘do not cancel’”.

32  
33 11. That apparently did not satisfy Mr. Crusher and there was apparently a further  
34 telephone conversation between him and Ms. Constable, which is not recorded  
35 but is referred to in an email of the next day. On that next day, (21<sup>st</sup> October)  
36 at 12.40, Mr. Crusher referred to the previous email and pointed out the  
37 importance of the domain name to the client and said:

38  
39 “The feeling is that the domain name is of such importance to the client  
40 that it is not sufficient for the client to rely upon the assurance you have  
41 given in your email. We are left with no real alternative but to seek an  
42 injunction from the court. The fact that the legal department and  
43 Nominet are only prepared to give an assurance does not fill our client

1 with confidence that the legal department and Nominet are sufficiently  
2 satisfied with the effectiveness of their own systems to ensure that our  
3 client's domain name will not be removed from the register".

4  
5 He invited consent to joinder.

- 6  
7 12. That was responded to by Ms. Constable, who referred to the email and a  
8 telephone conversation and said:

9  
10 "As discussed in my email of 20<sup>th</sup> October and telephone conversation  
11 with you earlier today, by marking our system 'do not cancel' in relation  
12 to the domain alliancefrancaise.org.uk we have done all that is physically  
13 possible to ensure that the domain is not cancelled before the receipt of  
14 the vesting order. The 'do not cancel' instruction cannot be overridden  
15 even by events which would typically lead to automatic cancellation of a  
16 domain such as failure to pay renewal fees. In any case,  
17 alliancefrancaise.org.uk is not due for renewal until 2<sup>nd</sup> June 2007. We  
18 treat all domains which for some reason should not be cancelled in the  
19 same way and there is no further action we can take. Any application  
20 would be a waste of both your client's and our client's costs as we have  
21 already done what you are seeking an injunction for. Therefore as well as  
22 opposing any application you make we will seek costs".

- 23  
24 13. Pausing there, Mrs. Heal, who appears for the claimant, says that the  
25 assurances given up to that point were not sufficient. In particular, she says, it  
26 was not apparent that the system could not be overridden and it was not even  
27 apparent from that exchange that they were protected by anything other than  
28 some paper record to which reference would have to be made by an employee,  
29 in the nature of a schedule or even, metaphorically speaking, some form of  
30 Post-it note. She says her clients were exposed.

- 31  
32 14. I do not accept that. It seems to me that a fair reading of those emails,  
33 although it does not make the system completely plain, would lead one to  
34 suppose that where one has an electronically sophisticated system, such as a  
35 domain name registration scheme, one would assume that it could well be the  
36 case, if one did not assume that it would inevitably be the case, that the notes  
37 that were going to be made, and the checks and balances, were going to be  
38 electronic and that, therefore, there would be some electronic bar to  
39 cancellation. That has in fact turned out to be the case from the evidence,  
40 which I will come to in a few moments.

- 41  
42 15. It seems to me that either that is plain enough from the emails, or it is probable  
43 from the emails so that what is required is clarification, and even if that is not

1           apparent, it seems to me to be sufficiently likely to be the case that  
2           clarification could be called for. Ms. Constable is obviously not a technical  
3           person and would have to refer to somebody else for an answer to the question,  
4           but it seems to me that the correspondence thus far raises at worst a question  
5           which could usefully have been raised, and at best makes the position plain.  
6

- 7   16. That that is the case is, in my view, strengthened by the fact that on that same  
8   day, 21<sup>st</sup> October, Alliance Francaise has received a letter from its expert,  
9   Mr. Nigel Roberts FBCS, about protection, and he concludes his letter of that  
10   date directed to Alliance Francaise's solicitors by saying this:

11  
12            “What should be done is that the records of alliancefrancaise.org.uk  
13            should be marked as ‘frozen’ or set to be ‘non-deletable’ in the registry or  
14            otherwise prevented from deletion from their database. If this is not  
15            possible at application level, it ought to be, as I understand this is not the  
16            first case of its kind they have seen”.

17  
18           He is therefore saying that if it is not currently possible for Nominet to prevent  
19           deletion electronically, then it ought to be possible.  
20

- 21   17. That letter is exhibited to a witness statement of Mr. Crusher of the same date,  
22   so it is apparent that on 21<sup>st</sup> October Mr. Crusher was in possession of a point  
23   made by the expert which goes to reinforce the question which, it might be  
24   said, should have been asked of Nominet. The question which it seems to me  
25   should have been asked, if Alliance Francaise were uncertain, is whether or not  
26   the relevant entries would be electronic or would depend on the continuing  
27   vigilance or intervention of some human in order for the cancellation to be  
28   prevented. That clarification was not sought. Instead, Alliance Francaise went  
29   at that stage to the application for joinder and for an injunction.  
30

- 31   18. The injunction sought, I should record, is very wide ranging. It does not  
32   merely seek an injunction restraining the removal or the cancellation of the  
33   entry. It requires notice to be given to all sort of people in terms which it  
34   seems to me are, on any footing, wholly inappropriate in this case; but I do not  
35   need to say any more about that.  
36

- 37   19. Alliance Francaise supported their application with a witness statement  
38   provided by the managing director of Alliance Francaise, and in paragraph 13  
39   she sets out her concerns, so far as cancellation is concerned:

40  
41            “The claimant is concerned that Nominet's refusal to give an undertaking  
42            that the domain name will not be cancelled leaves the claimant exposed to  
43            the prospect that the domain name may, nevertheless, be cancelled due to

1 the neglect or failure of a Nominet employee or agent or due to a failure  
2 of Nominet's systems and/or record keeping".

3  
4 20. That was said to be the fear, and it was amplified by Mrs. Heal this morning as  
5 being a fear which would extend to the possibility of a rogue employee  
6 interfering with the records, although at the end of her submissions she did not  
7 make that a central feature.

8  
9 21. The witness statement was served yesterday. This morning a witness  
10 statement of Susan Caroline Barty, who is a solicitor at CMS Cameron  
11 McKenna, solicitors for Nominet, was provided, and that witness statement  
12 deals with how the system actually works, and in paragraph 7 she makes it  
13 plain. At paragraph 6 she says that the registered database kept by Nominet  
14 records over 4.2 million UK domain names. The only sensible way of reading  
15 that is that it is an electronic database. In paragraph 7 she says this:

16  
17 "Domain names are held in the Register Database in a table".

18  
19 That, again, in my view, is clearly a reference to an electronic table. Anybody  
20 reading this with any sense at all would realise that what is being talked about  
21 here are electronic records, particularly bearing in mind the context in which  
22 all this is taking place. The next sentence reads thus:

23  
24 "This contains all the information, such as the registrant, nameservers  
25 (computers permanently connected to the Internet which executes a  
26 mapping function between a domain name and its IP addresses),  
27 addresses", etc.

28  
29 That makes it doubly plain that we are talking about an electronic table. Then  
30 this sentence:

31  
32 "Nominet has a second table which holds 'DNC' (do not cancel) notes.  
33 When a DNC note is applied in relation to a domain name, details of the  
34 domain name are inserted into the second table. Whenever a domain  
35 name is cancelled or suspended using Nominet's system, a second table  
36 is checked to see if there is a DNC for that domain name".

37  
38 22. That, in my view, makes it plain that the second table is an electronic table and  
39 that it is looked to electronically before any possible electronic suspension or  
40 cancellation. Mrs. Heal takes the point that it may be that it is only looked to  
41 after the suspension or cancellation. I suppose it may say that  
42

1 literally but, actually, I do not think that is a fair reading. But the position is  
2 made quite clear by the next paragraph:  
3

4 “In the ordinary course of Nominet’s business the existence of a DNC  
5 note for a domain name in the Register Database will prevent the  
6 cancellation of the domain name. Even if there is a scheduled  
7 cancellation, the existence of a DNC note will prevent such cancellation  
8 taking place. The second table is checked both when the domain name is  
9 scheduled for cancellation and again when it is cancelled. The existence  
10 of such a DNC note will prevent the domain name from being  
11 cancelled”.

12  
13 That is, in my view, quite clear - once the entry is made in the DNC table, the  
14 domain name will not be cancelled in the circumstances which Alliance  
15 Francaise fears.

- 16  
17 23. That is how I read that evidence. The matter was put beyond doubt by what  
18 Mr. Roberts told me this morning, and which he undertook to put in a witness  
19 statement, to the effect that all this was operating at an electronic level. But it  
20 in fact it seems to me that that extra evidence is quite unnecessary; the position  
21 is quite clear from the existing evidence.  
22
- 23 24. At any rate, faced with the fact that now, in the light of the extra evidence, it is  
24 apparent that there are electronic checks to prevent the cancellation taking  
25 place, Mrs. Heal says that she no longer pursues her injunction. She says,  
26 however, that she was justified in pursuing it up until that time, because until  
27 that was made clear it was not sufficiently clear that Nominet was going to  
28 take steps that were necessary to safeguard the position pending the vesting  
29 order, if it is made, and that she was justified in safeguarding trust property  
30 and therefore in making the application. I do not agree. I think this  
31 application was premature and it ought never to have been made. It has its  
32 roots in correspondence and, in particular, emails which do not perhaps quite  
33 address the point properly. It is unfortunate that the solicitor declined to give  
34 an undertaking in terms which made it look, as the first email of Ms. Constable  
35 might be said to have made it look, as though Nominet was somehow being  
36 cagey about the matter. It would have been helpful if Nominet had actually  
37 made the technical position a little clearer than it did. However, I think her  
38 second email does tend to make it clearer and, frankly, if it left a question  
39 mark open then it was a question which could have been addressed by an  
40 appropriately and simply formulated question emanating from Alliance  
41 Francaise’s side, particularly when their expert had pointed them to the  
42 relevant question, that is to say, whether or not the bars operated at application  
43 level or, to put it in layman’s terms, electronically. I think if that question had

