

NOMINET-UK DISPUTE RESOLUTION SERVICE

BETWEEN:

EXETER AIRPORT DIRECT

Complainant

-and-

CLINT THROWER

Respondent

DECISION OF INDEPENDENT EXPERT

Appointment

1. I was appointed by a letter dated 19 March 2004 to decide, under the DRS Procedure, a complaint of Abusive Registration. I am required to give my decision by the 8 April 2004.

Terminology

2. In this Decision:
 - “Nominet” means Nominet-UK
 - “the DRS Procedure” means Nominet’s current dispute resolution procedure
 - “the Policy” means Nominet’s current dispute resolution policy
 - “the Domain Name” means the domain name “exeterairportdirect.co.uk”

Materials

3. I have been provided with the following materials:
 - (1) .Dispute History
 - (2) Complaint
 - (3) Standard correspondence between Nominet UK and the parties
 - (4) Register entry for exeterairportdirect.co.uk
 - (5) Printout of website at exeterairportdirect.co.uk
 - (6) Copy of Nominet UK's Policy and Procedure.

The Complaint

4. The Complainant asserts that the Domain Name in the hands of the Respondent is an "*Abusive Registration*".
5. The Complaint, which is dated the 27 January 2004 and which is signed by a Mr. Ive on behalf of the Complainant, is in the following terms:

"I confirm that Domain Name(s) in dispute are identical or similar to a name or mark in which I have Rights.

I confirm that the Domain Name(s) in the hands of the Respondent is an Abusive Registration.

Around November 2000, Clint Thrower an ex employee at Granite Internet now trading under the name ascertis was appointed by Lets Go Travel to register the domain www.exeterairport.co.uk on their behalf. This domain was to become a trading name for the company at a later date. Lets Go Travel now also trading under the name Exeter Airport Direct have during the last 3 years worked to develop a separate brand and holiday brochure which now trades by this name. However it has recently been brought to the companies attention that despite their request to register the above mentioned domain to Lets Go Travel, the registrant for whatever reason did in fact register the domain under his personal name. We therefore request that the domain name www.exeterairport.co.uk be assigned to Exeter Airport Direct,

a trading name of Lets Go Travel without delay. We understand that the above mentioned domain has now been detagged. If required Exeter Airport Direct would be happy to supply stationary or a copy of the holiday brochure to confirm the usage of this name by Lets Go Travel."

Response

6. No Response has been provided by or on behalf of the Respondent. The Complaint not being challenged, I am entitled to, and will, assume that the facts asserted in the Complaint are true. Indeed, there is no reason to doubt the veracity of those asserted facts.

Jurisdiction

7. Under paragraph 2a of the Policy, the Respondent is required to submit to proceedings if a Complainant asserts to Nominet in accordance with the DRS Procedure that

- "i. The Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name: and*
- ii. The Domain Name, in the hands of the Respondent, is an Abusive Registration".*

8. Under paragraph 2b of the Policy, a Complainant is required to prove both these elements on the balance of probabilities.

Rights

9. Paragraph 1 of the Policy defines "*Rights*" as including but not being "*limited to, rights enforceable under English law*". This definition is subject to a qualification which is not material.

10. Exhibited to the Complaint is a copy of a travel brochure for Exeter Airport Direct. In this it is stated that Exeter Airport Direct is a division of Lets Go Travel Ltd. This provides corroboration for the assertion made in the Complaint that *“Lets Go Travel now also trading under the name Exeter Airport Direct have during the last 3 years worked to develop a separate travel and holiday brochure which now trades by this name.”*
11. The usage of a trade name over a period of time can even if quite short
- (1) give rise to the inference that members of the relevant trade or of the public recognise the name as denoting the goods or services of a particular manufacturer or supplier; and/or
 - (2) attach goodwill to the name.
- Once this is established the user has sufficient rights in the name to protect it, should the need arise, in an action for “passing off”.
12. The Complaint not being challenged, and the user of the name being established, I am satisfied and find as a fact that the Complainant had rights enforceable under English law in the name Exeter Airport Direct.
13. Whilst this, being three words rather than one, is not identical to the Domain Name, in my judgment it is similar to it, and I so find.

Abusive Registration

14. Paragraph 1 of the Policy defines *“Abusive Registration”* as:

“a Domain Name which either

- i. 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

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

15. The Policy provides:

"3. Evidence of Abusive Registration

a. A non-exhaustive list of factors which may be evidence that the Domain Name is an Abusive Registration is as follows:

i. Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name:

A. primarily for the purpose of selling, renting or otherwise transferring the Domain Name to the Complainant or to a competitor of the Complainant for valuable consideration in excess of the Respondent's documented out-of-pocket costs directly associated with acquiring or using the Domain Name

B. as a blocking registration against a name or mark in which the Complainant has Rights; or

C. primarily for the purpose of unfairly disrupting the business of the Complainant;

ii. Circumstances indicating that the Respondent is using the Domain Name in a way which has confused people or businesses into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant;

iii. in combination with other circumstances indicating that the Domain Name in dispute is an Abusive Registration, the Complainant can demonstrate that the Respondent is engaged in a pattern of making Abusive Registrations; or

iv. it is independently verified that the Respondent has given false contact details to us.

b. Failure on the Respondent's part to use the Domain Name for the purposes of email or a website is not in

itself evidence that the Domain Name is an Abusive Registration.

4. *How the Respondent may demonstrate in its response that the Domain Name is not an Abusive Registration*

a. *A non-exhaustive list of factors which may be evidence that the Domain Name is not an Abusive Registration is as follows:*

i. *Before being informed of the Complainant's dispute, the Respondent has*

A. *used or made demonstrable preparations to use the Domain Name or a Domain name which is similar to the Domain Name in connection with a genuine offering of goods or services;*

B. *been commonly known by the name or legitimately connected with a mark which is identical or similar to the Domain Name;*

C. *made legitimate non-commercial or fair use of the Domain Name; or*

ii. *The Domain Name is generic or descriptive and the Respondent is making fair use of it.*

(b) *Fair use may include sites operated solely in tribute to or criticism of a person or business, provided that if:*

i. *the Domain Name (not including the first and second level suffixes) is identical to the name in which the Complainant asserts Rights, without any addition; and*

ii *the Respondent is using or intends to use the Domain Name for the purposes of a tribute or criticism site without the Complainant's authorisation.*

then the burden will shift to the Respondent to show that the Domain Name is not an Abusive Registration.”

16. It does not seem to me that any of the non-exhaustive list of factors which may be evidence that a Domain Name is not an Abusive Registration are applicable. This is because there is no evidence of the Respondent having made any use at all of the Domain Name. Nor is this fact in itself evidence that the Domain Name is an Abusive Registration.
17. Nor does it seem to me that there is any evidence that the Respondent:
- (1) registered the Domain Name for the purposes of extracting a “profit” from the Complainant or any competitor, or as a blocking registration;
or
 - (2) in using the Domain Name in a way which has confused people into believing that it is registered to the Complainant etc, or
 - (3) is engaged in a pattern of making Abusive Registrations; or
 - (4) has given Nominet false contact details.
18. However, the fact remains that the Respondent was engaged to register the Domain Name on behalf of the Complainant, and for some reason, for which no explanation has been provided, he did not. It is reasonable to infer that he must have realised that this was likely to have the effect of unfairly disrupting the business of the Complainant.
19. The list of factors which may be evidence of an Abusive Registration is not exhaustive. I consider that if someone who is engaged to register a Domain Name on behalf of business belonging to someone else registers it in his own name without any justification, the registration is an Abusive Registration

even if in fact the registration's prime purpose was not to unfairly disrupt that business.

20. In the present case no explanation or justification has been provided. In these circumstances I am of the opinion that the registration at the time when it took place was unfairly detrimental to the Complainant's Rights either because the Respondent's prime purpose was to unfairly disrupt the Complainant's business or because he must have realised that it was likely to have that effect and he had no justification for acting as he did.

Decision

21. For the reasons given above, I find that the Domain Name was registered in a manner which at the time when the registration took place was unfairly detrimental to the Complainant's Rights and, in the hands of the Respondent, is an Abusive Registration.
22. The Complainant has requested the transfer of the Domain Name. On the basis of the material before me I consider that that is an appropriate remedy and accordingly that the Domain Name should now be transferred to the Complainant as requested.

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David Blunt QC

31st March 2004