

Nominet UK Dispute Resolution Service

DRS 03657

Spa Finders Europe Ltd -v- David Stechler

Decision of Independent Expert

1. Parties:

Complainant: Spa Finders Europe Ltd

Address: Suite C206
1-6 Barton Road
Water Eaton
Milton Keynes
Bucks

Postcode: MK2 3HU

Country: GB

Respondent: Mr. David Stechler

Address: The registrant is a non-trading individual who has opted to have their address omitted from the WHOIS service. As a result these details are not recorded here.

Postcode:

Country: GB

2. Domain Name: spafinder.co.uk (“the Domain Name”).

3. Procedural Background:

The Complaint was lodged with Nominet on 5 May 2006. Nominet validated the Complaint and notified the Respondent of the Complaint on 8 May 2006 and informed the Respondent that he had 15 days within which to lodge a Response. The Respondent failed to respond. Mediation not being possible in those circumstances, Nominet so informed the Complainant and on 6 June 2006 the Complainant paid Nominet the appropriate fee for a decision of an Expert pursuant to paragraph 7 of the Nominet UK Dispute Resolution Service Policy (“the Policy”) and paragraphs 5(d) and 8 of the Nominet UK Dispute Resolution Service Procedure (“the Procedure”).

Andrew Murray, the undersigned, (“the Expert”) has confirmed to Nominet that he knew of no reason why he could not properly accept the invitation to act as Expert in this case and further confirmed that he knew of no matters which ought to be drawn to the attention of the parties, which might appear to call into question his independence and/or impartiality. On 13 June 2006, Nominet invited the undersigned, the Expert, to provide a decision on this case.

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

The Respondent has not submitted a Response to Nominet in time (or at all) in compliance with paragraph 5(a) of the Procedure.

The Expert has seen copy communications from Nominet to the Respondent and has no reason to doubt that the Respondent has been properly notified of the complaint in accordance with paragraphs 2 and 4(a) of the Procedure. 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; accordingly, the Expert will now proceed to a Decision on the Complaint and notwithstanding the absence of a Response.

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. 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

The Complainant is a UK company having its registered office at Suite C206, 1-6 Barton Road, Water Eaton, Milton Keynes, MK2 3HU. The Complainant is a private limited company and suggests it is a subsidiary partner of Spa Finder Inc., a US registered company having its head office in New York. The Complainant was incorporated on 9 March 2006, with three directors: Mr. Peter Ellis, Mr. Kevin Turnbull and Aldbury Directors Ltd. It provides no evidence that it had commenced trading at the time of the Complaint. Spa Finder Inc. is a travel and marketing company for luxury and medical spas in North America and worldwide. It has been trading since 1986 through a variety of outlets including *SpaFinder Magazine* and its successor *Luxury SpaFinder Magazine*, the *Spa Finder Worldwide Directory* and *Spa Finder Gift Certificates*, and since September 1997 has operated a web presence from the domain name *spafinder.com*.

The Complainant provides evidence that Spa Finder Inc. possesses a number of proprietary interests in the name, including a US Trademark (no.2111806) in the term “Spa Finder”, registered 11 November 1997 and ownership of the *spafinder.com* domain name from September 1997.

The Domain Name was registered on 21 April 2004 by the Respondent. The domain name is not currently in use and the address www.spafinder.co.uk resolves to a simple error message stating that “the page is currently unavailable.”

6. The Parties' Contentions

Complainant:

The Complainant contends that:

The Complainant has rights in the name because:

1. *Spafinder.com* was first registered in September 1997.
2. The ‘Spa Finder’ registration (words only) were first registered with the US Patent and Trademark office for US and International use in November 1997. The ‘Spa Finder’ first commercial use was in March 1987. The ‘Spa Finder’ registration (words and mark) were registered with the US Patent and Trademark Office and first used for online application in May 1998.
3. The publications SpaFinder magazine and its retitled successor Luxury SpaFinder Magazine have been published since the early 1990’s. Other publications and marketing initiatives such as Spa Finder Worldwide Directory and Spa Finder Gift Certificates are published under the Spa Finder brand and are distributed internationally including the UK. Spa properties in the UK are active UK and International partners within the SpaFinder network. The website www.spafinder.com has been trading as an online spa marketing resource since 1997. Spa Finder Inc (and its subsidiary partners including Spa Finder Europe Ltd and Spa Finder Japan) is an actively trading company and committed \$792 to marketing/brand building expenses in 2005.
4. The Domain Name in the hands of the Respondent is abusive because:
 - (a) It has been registered with the purpose of driving traffic to non related sites.
 - (b) It has been registered to stop us registering it, despite our rights to the name.
 - (c) It is abusing our market position and taking unfair advantage of the Spa Finder goodwill in the UK and international markets.
 - (d) The registration is confusing people by pointing the URL at non related websites. The Respondent is falsely representing themselves as a related Spa Finder entity.

Respondent:

The Respondent has not responded.

7. Discussion and Findings

General

Under paragraph 2 of the Policy the Complainant has to establish that it has Rights as defined in paragraph 1 of the Policy in respect of a name or mark identical or similar to the Domain Name and that the Domain Name, in the hands of the Respondent, is an Abusive Registration as defined in paragraph 1 of the Policy.

Complainant's Rights

The Complainant claims rights in a name or mark identical or similar to the Domain Name on three bases. Firstly, a portfolio of US Patent and Trademark Office (USPTO) trade mark registrations including US Trademark no.2111806 in the term “Spa Finder”, registered in November 1997. Secondly, the possession, management and use of the domain name *spafinder.com* from September 1997, and thirdly, the goodwill which has attached to the Spa Finder brand through publications and promotional items such as: *SpaFinder Magazine*, *Luxury SpaFinder Magazine*, the *Spa Finder Worldwide Directory* and *Spa Finder Gift Certificates*. I will now examine each of these in turn. The Complainant has provided extracts for each of the USPTO registrations and applications (no.2111806 in the term “Spa Finder”, no. 3004327 in the term and mark “Luxury SpaFinder: The Luxury Lifestyle at its Finest” and application no.78834332 in the term and mark “Spafinder”). All these registrations are though registered in the names of US-based corporations with no.2111806 being registered in the name of Spa Finders Travel Arrangements Ltd. of Suite 301, 91 Fifth Avenue, New York, with nos. 3004327 and 78834332 being registered in the name of Spa Finder Inc. of sixth floor, 91 Fifth Avenue, New York. There is no indication that any of these trade marks are held on behalf of the Complainant or that the Complainant is acting in this complaint as agent for the trade mark holder. As a result I must reject these registrations, as being insufficient to demonstrate that the Complainant has rights in a name or mark identical or similar to the Domain Name. The Complainant has further provided evidence that the domain name *spafinder.com* has been registered, managed and used by Spa Finder Inc. of tenth floor, 257 Park Avenue South, New York, from September 1997. For the reason given above, I similarly cannot accept this submission as evidence that the Complainant has rights in a name or mark identical or similar to the Domain Name and must also reject this assertion. The Complainant’s final assertion is similarly afflicted. All the publications and promotional items listed by the Complainant are owned and operated by Spa Finder Inc., a New York based corporation with an address at Floor 10, 257 Park Avenue South, New York.

The Complainant fails to make the necessary connection with the owner of each of these proprietary interests to fulfill the requirements of paragraph 2(b) of the Policy that “on the balance of probabilities...the Complainant is to prove that...they have rights in respect of a name or mark identical or similar to the Domain Name.” The Complainant has provided proof of a portfolio of rights owned by a US-based corporation (or corporations). Some of which are registered in favour of Spa Finders Travel Arrangements Ltd. of Suite 301, 91 Fifth Avenue, New York, some in favour of Spa Finder Inc. of sixth floor, 91 Fifth Avenue, New York, and some in favour of Spa Finder Inc. of tenth floor, 257 Park Avenue South, New York. Although it is quite conceivable that these are all the same person, there is a failure to show a connection between these rightsholders and the Complainant. The only information the Complainant supplies about itself is its registered office, its date of incorporation and the identities of its Secretary and Directors (all taken from Companies House). There is no evidence that the Complainant is in any way linked with or connected to the US-based corporation, nor is there any evidence that the Complainant is licensed to use or defend any of the proprietary interests of the US-based corporation. In the absence of any such evidence I find that the Complainant has failed to establish on the balance of probabilities that it has a right in a name or mark identical or similar to the Domain Name. The claim is therefore rejected.

8. Decision

In light of the foregoing finding, namely that the Complainant has failed to demonstrate rights in respect of a name or mark which is identical to the Domain

Name the Expert directs that the Complainant's request for a transfer of the Domain Name spafinder.co.uk be refused.

Andrew D. Murray
15 June 2006.