

Nominet UK Dispute Resolution Service

DRS 00228

Active Web Solutions v Peter Shaw

Decision of Independent Expert

1. PARTIES

Complainant: Active Web Solutions

Address Felaw Maltings
44 Felaw Street
Ipswich
Suffolk

Postcode: IP2 8SJ

Country: GB

Respondent: Peter Shaw

Address: 59 High Street
Horsall
Woking
Surrey

Postcode: GU21 4UA

Country: GB

2. DOMAIN NAME

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

3. PROCEDURAL BACKGROUND

The complaint was entered on to the Nominet system on 30 January 2002. Nominet validated the complaint on 4 February 2002 and on the same day despatched a copy of the complaint to the Respondent by post to the address recorded in the register entry for the Domain Name. The register entry records no email address for the Respondent. Accordingly, the complaint was also sent by email to the address postmaster@activewebsolutions.co.uk on 4 February 2002. The Respondent was

informed that he had 15 days within which to lodge a Response. The Respondent failed to respond and was informed by a letter dated 26 February 2002 and an email of the same date that if the Complainant paid the requisite fees by 12 March 2002 the matter would be referred to an Expert for a decision under the Dispute Resolution Service. On 8 March 2002 the Complainant paid Nominet the appropriate fee for a decision of an Expert pursuant to paragraph 6 of the Nominet UK Dispute Resolution Service Policy (the "Policy"). The Complaint was then returned by The Royal Mail undelivered due to inadequate postage having been paid. The procedure was suspended at this point to allow the complaint to be re-sent. The further copy posted on 19 March 2002 to the Respondent indicated that the Respondent had until 11 April 2002 to respond. This was returned by the Royal Mail marked "NOT KNOWN HERE. RETURN TO SENDER". No response has been received from the Respondent.

I, Stephen Bennett, the undersigned, (the "Expert") have confirmed to Nominet that I know of no reason why I cannot properly accept the invitation to act as Expert in this case and have further confirmed that I know of no matters which ought to be drawn to the attention of the parties, which might appear to call into question my independence and/or impartiality.

4. **OUTSTANDING FORMAL/PROCEDURAL ISSUES**

The Respondent has not submitted any Response to Nominet in compliance with paragraph 5a of the Procedure for the conduct of proceedings under the Dispute Resolution Service (the "Procedure").

Paragraph 15b 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. Nominet has attempted to communicate the complaint to the Respondent by e-mail and post. Although the hard copy postal copy has been returned marked "not known here" the efforts made by Nominet are in accordance with the Procedure and accordingly, the Expert will now proceed to a Decision on the Complaint notwithstanding the absence of a Response.

Paragraph 15c of the DRS 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." I am not aware of any exceptional circumstances in this case and so will draw inferences as appropriate.

5. THE FACTS

Active Web Solutions Limited, the Complainant, is a company incorporated in England and Wales on 21 September 1999 (not 27 September 1999 as the Complainant submits). The Domain Name, activewebsolutions.co.uk, was registered on 27 October 1999 for a "Peter Shaw", the Respondent. The tag holder in respect of the Domain Name at the time of registration was "NameCity". As of the date of the complaint, the Domain Name had been "detagged". As at the date of this decision there is nothing displayed at the address www.activewebsolutions.co.uk.

6. THE PARTIES' CONTENTIONS

Complainant:

The Complainant contends that it has rights in the name Active Web Solutions. The basis for the claim to rights in this name is the fact of incorporation of the company Active Web Solutions Limited and use of "Active Web Solutions" as a trade name.

In relation to the issue of Abusive Registration, the Complainant puts forward a case which would appear to be an allegation of some form of conspiracy. The chronology of the submissions runs as follows:

Chronology as Alleged by Complainant

10/09/99	Complainant secured active IPS Limited of Charles House, 5, Lower Regent Street, London SW1Y 4LR to register the domain name activewebsolutions.co.uk .
27/9/99 (actually 21/9/99)	Active Web Solutions Limited is incorporated in England and Wales.
27/10/99	The Respondent registered the Domain Name through NameCity.
17/01/00	The "registration" is "invoiced" to the Respondent on 17 January 2000 although "never assigned".
05/12/01	A conversation takes place involving an unidentified person on behalf of the Complainant and an unidentified representative of a business operating under the name "NameCity", in which it is alleged that the Respondent was "...identified by NameCity as being known to them"

unspecified date	Active ISP Limited applied for registration of the name activewebsolutions.co.uk through NameCity. <i>"The AWS [Complainant] application for registration was unsuccessful..."</i>
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The Complainant submits that the Domain Name is an Abusive Registration in the hands of the Respondent on the basis of an alleged relationship between NameCity and the Respondent. The Complainant submits that the arrangements it (the Complainant) made for securing the Domain Name for itself were to enlist the services of a company called Active ISP Limited who, in turn, were to ask NameCity to obtain registration of the Domain Name for the Complainant. It is alleged that NameCity did not secure that registration for the Complainant but, subsequently, acted to acquire the registration for the Respondent. It is alleged that the Respondent: is "...known to" NameCity; that the Respondent "...has a connection with NameCity..."; and that NameCity "...have a direct relationship with Peter Shaw [Respondent]...". No further details are given in the submission as to what this "connection" or "relationship" is claimed to be nor what the significance of the Respondent being "...known to" NameCity is meant to be.

The Complainant alleges that the Domain Name has been purchased as a blocking registration as the Domain Name has been "...parked since 27 October 1999 and still remains so...".

Respondent:

The Respondent has not responded.

7. **DISCUSSION AND FINDINGS**

General

The complaint refers to no documentary evidence to support any of the Complainant's submissions. The complaint is, however, the subject of a declaration signed on behalf of the Complainant stating that the information in the complaint is true to the best of the Complainant's knowledge. Accordingly, I will treat the complaint itself as the Complainant's evidence. That does not mean that the submissions made in the complaint are to be treated as proof, merely that those statements can be weighed to assess the Complainant's case.

Complainant's Rights

The Complainant relies on two matters to establish its Rights in the name Active Web Solutions. Firstly, its own incorporation as Active Web Solutions Limited on 27 September 1999 (in fact, Companies House records show a date of 21 September 1999). Secondly, the claim that Active Web Solutions is its trading name. Nothing is said in the complaint as to when the Complainant began trading under the name Active Web Solutions and, in particular, whether it traded under that name before incorporation or before registration of the Domain Name by the Respondent. No details have been given as to the extent of the Complainant's use of the Active Web Solutions name and the extent of the Complainant's reputation and goodwill in that name. The Complainant does not rely on any registered trade mark to establish its Rights.

The Complainant's case that it had Rights at the relevant time is not clearly made out. The incorporation of a company under a particular name does not of itself give rise to the right to prevent others using that name - the most that can be achieved by that registration alone is that it will block anybody else attempting to register exactly the same name with Companies House. Use of the name in the course of business, which is what the Complainant appears to allege, may be sufficient to establish rights in passing off. Whilst the Complainant alleges that the name Active Web Solutions is its trading name, no detail is supplied in support of this claim. Although the definition of Rights in the Dispute Resolution Service Policy is not restricted to rights enforceable in English law, the Complainant has not asserted a claim to any other type of rights in the name Active Web Solutions.

Despite the lack of supporting information as to the extent of use of the Active Web Solutions name by the Complainant, I find on balance (although barely) that the Complainant does have Rights in the name Active Web Solutions. I base this on the Complainant's statements verified by the signed declaration in its complaint that Active Web Solutions is its trading name and that use of a trading name can be sufficient, even at low levels, to establish a case of passing off. The Complainant's incorporation under the same name counts as some support to this claim.

Abusive Registration

To be an Abusive Registration the Domain Name must be one which "*...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...*". The second limb of the definition of Abusive Registration, in relation to use is not relevant in this complaint as it appears no use has been made of the Domain Name.

Section 3 of the Policy contains a *non-exhaustive* list of factors which may be evidence that the Domain Name is an Abusive Registration. These are as follows:

"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 purposes 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 web-site is not in itself evidence that the Domain Name is an Abusive Registration."*

The only one of these factors to which the complaint refers is factor 3a(i)B of the DRS Policy - that the Domain Name was registered as a blocking registration against a name

or mark in which the Complainant has Rights. There are no circumstances or evidence in this case to suggest that the Domain Name was obtained as a blocking registration. The fact that the Domain Name does not appear to have been used does not indicate that at the time it was acquired it was obtained as a blocking registration (or that the Domain Name is an Abusive Registration) - Policy, paragraph 3(b).

The Complainant also alleges that the Domain Name is an Abusive Registration in the hands of the Respondent on the basis of the alleged relationship between the Respondent and NameCity. This is not one of the factors set out in paragraph 3 of the Policy. The factors set out in paragraph 3, however, represent only a *non-exhaustive* list of factors which may be evidence of an Abusive Registration. Other factors, circumstances or conduct may equally indicate that a registration is Abusive. The essential requirement as set out in the definition of Abusive Registration in the Policy is that the Complainant establishes that the Domain Name was registered in a manner which "*..., at the time when registration...took place, took unfair advantage of or was unfairly detrimental to the Complainant's Rights...*". The Complainant's case in this respect seems to invite the Expert to read between the lines and find some form of conspiracy. The Complainant states that it asked one company, Active ISP Limited, to register the name Active Web Solutions on 10 September 1999. Active ISP Limited, according to the complaint, in turn asked NameCity to register the name. It appears this registration did not occur. No reason is given as to why this should be the case. The complaint then states that within 6 weeks of the alleged request by the Complainant to Active ISP Limited to register the Domain Name, the Respondent registered the Domain Name through NameCity. NameCity is the billing and technical contact in respect of the Domain Name and is the original tag holder. It is alleged that the Respondent has "*...a connection with NameCity...*" was "*...known to...*" NameCity; and that NameCity "*...have a direct relationship with [the Respondent]*".

At no point in the complaint is the nature of this relationship/connection between the Respondent and NameCity explained. The closest the complaint comes to providing an explanation is to state the complaint is made as the Domain Name "*... is a clear representation of [the Complainant's] registered trading name and was applied for and declined by a Company (NameCity) who have a direct relationship with [the Respondent]*". It is not explained how this account set out in the complaint establishes that the registration was acquired in such a way as to render the Domain Name an Abusive Registration in the hands of the Respondent. There is, it seems, intended to be an innuendo in the complaint to the effect that this relationship between the Respondent and NameCity was in some way underhand. That is a serious allegation. However, not only is it not stated what the nature of that relationship is claimed to be and how it might

render the Domain Name an Abusive Registration, there is no evidence put forward to back up these allegations.

The small gap in time between the Complainant's alleged request for registration and the registration of the Domain Name (as the Complainant points out, approximately 6 weeks) is of interest and could be taken to support the Complainant's case. This would be more convincing if the name itself were a "made-up" name or were particularly distinctive. That does not appear to be the case here - the name, although not incapable of being distinctive, is simply a collection of words commonly used in the information technology field. In the absence of any explanation as to how the alleged relationship between the Respondent and NameCity could render the Domain Name an Abusive Registration in the hands of the Respondent, or any evidence that, for instance, there was a splash of publicity upon incorporation which could have encouraged the Respondent to register the Domain Name in an Abusive way (perhaps hoping to sell to the Complainant for a profit), the relatively short period between incorporation of the Complainant and the registration of the Domain Name is not sufficient to establish that the Domain Name is an Abusive Registration.

Had the nature of the alleged relationship been explained and its relevance to the issue of Abusive Registration set out, then a different conclusion may have been reached. However, on the basis of the complaint, the Procedure and the Policy, there is insufficient to establish that the Domain Name is an Abusive Registration in the hands of the Respondent.

DECISION

The Complainant has Rights in the name activewebsolutions. The Complainant has not established that the Domain Name in the hands of the Respondent is an Abusive Registration.

The Complainant's request for a transfer of the Domain Name is refused.

Stephen Bennett

Date