

Nominet UK Dispute Resolution Service

DRS 00490

British Critical Incident Stress Foundation –v- John Durkin

Decision of Independent Expert

1. Parties:

Complainant: British Critical Incident Stress Foundation
Address: New Cottage
Beachern Wood
Aldridge Hill
Brockenhurst
Hampshire

Postcode: SO42 7QD
Country: UK

Respondent: Mr John Durkin
Address: 3 Clayhithe Farm Cottages
Horningsea
Cambridgeshire

Postcode: CB5 9JB
Country: UK

2. Domain Name:

bcisf.org.uk (“the Domain Name”)

3. Procedural Background:

The Complaint was lodged with Nominet on 10 July 2002. Nominet validated the Complaint and notified the Respondent of the Complaint on 16 July 2002 and informed the Respondent that he had 15 working 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 12 August 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”).

Andrew Murray, the undersigned, (“the Expert”) 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 19 August 2002, he was appointed to decide the Complaint.

On 27 August 2002 the Respondent contacted Nominet to request the submission of further information to the Expert in accordance with paragraph 13 of the Procedure. The Expert agreed to the submission of such further information on that date and on 28 August 2002 a submission was entered by the Respondent and was notified to the Complainant. The Complainant then sought to submit a reply to the Respondent’s submission and on 29 August 2002 the Expert, in accordance with paragraph 13 of the Procedure, allowed the Complainant to enter a further statement. At this date the Expert notified the parties he would accept no further submissions.

4. Outstanding Formal/Procedural Issues:

The Respondent failed to submit a response to Nominet in time in compliance with paragraph 5a of the Procedure for the conduct of proceedings under the Dispute Resolution Service (“the Procedure”).

The Expert has seen copy communications from Nominet to the Respondent and has no reason to doubt that the Respondent had been properly notified of the Complaint in accordance with paragraph 2 of 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 being no evidence before the Expert to indicate the presence of exceptional circumstances; the Expert felt able to proceed to a decision on the Complaint notwithstanding the absence of a Response. On this basis the Expert took the Complaint under consideration on 19 August 2002.

On 27 August 2002 the Respondent contacted Nominet and asked for permission to make a submission to the Expert. Under paragraph 13 of the Procedure the Expert may consider further documents and submissions from the parties, but is under no obligation to do so. On that date the Expert indicated to Nominet that given the previous lack of response from the Respondent, he would be willing to consider a submission from the Respondent. The Respondent entered this submission on 28 August 2002. On 29 August 2002 the Complainant entered a reply to the Respondent’s submission. In the interests of fairness to all parties the Expert accepted this further statement into the record under paragraph 13 of the Procedure. Relevant materials contained in these further submission are outlined in the considerations below.

5. The Facts:

The Complainant is a United Kingdom based not-for-profit organisation established by Letter of Understanding, between the Complainant and International Critical Incident Stress Foundation Inc. of Maryland, USA on 18 June 2002. The Complainant was established to promote Critical Incident Stress Management within the United Kingdom and is, under the terms of the Letter of Understanding, a “non-profit, open membership foundation dedicated to the prevention and mitigation of disabling stress through the provision of education, training and support services for all emergency services professionals” and is to act as the sole UK agent of the International Critical Incident Stress Foundation.

The address www.bcisf.org.uk is currently not in use. Reference to the Nominet WHOIS database confirms it is owned by the Respondent and was registered on his behalf by Webconsultancy on 27 June 2002.

6. The Parties' Contentions:

Complainant:

The Complainant's contentions are as follows:

The Complainant contends that the Respondent has taken advantage of confidential information to opportunistically register the Domain Name for his own use and to obstruct the BCISF's work. On 7 May 2002 formal proceedings were begun to legally establish the British Critical Incident Stress Foundation. At this stage such proceedings involved the transmission of a Letter of Understanding from Dr. Wasyl Nimenko and Chrisie Nimenko (proposed Director and Company Secretary of BCISF) to the board of the International Critical Incident Stress Foundation Inc. of Maryland, USA for formal adoption at the next board meeting of the latter. It is further contended that the Respondent was made privy to this confidential information on 14 May 2002, along with the information that the Complainant intended to make use of the disputed Domain Name following formal establishment of the British Critical Incident Stress Foundation.

The Complainant contends that on this same date the Respondent registered the Domain Name. (Note: Here there is some confusion. The Complainant asserts that the Domain Name was registered by the Respondent on 14 May 2002. The Respondent in an e-mail to the Complainant dated same also suggests he is the owner of the Domain Name. The WHOIS database though records 27 June 2002 as the registration date of the Domain Name.)

The Complainant further contends that despite several approaches to the Respondent seeking transfer of the Domain Name to the Complainant, the Respondent has refused to do so. The Complainant asserts that the registration is being used by the Respondent primarily as a blocking registration. On this basis the Complainant contends that the Domain Name in the hands of the Respondent is an abusive registration under the terms of the Policy.

Respondent:

The Respondent's contentions are as follows:

The Respondent contends that he was invited to contribute to the setting up of the British Critical Incident Stress Foundation in partnership with Dr. Wasył Nimenko. In part-preparation for this he registered the Domain Name. He contends it was never his intention to use the Domain Name personally, or to use it as a blocking registration. He accepts that his actions in refusing to transfer the Domain Name to the Complainant may now appear to be an abusive registration, but contends this was not his intention at the time.

The Respondent further contends that the Complainant has failed to make a full and honest declaration to Nominet in breach of paragraph 3(b)(ix) of the Procedure, and that their rights in the matter are therefore 'diminished'. The Expert does not here recount the terms of the claim made by the Respondent in relation to this matter as they are irrelevant to the consideration of the case at hand.

7. Discussion and Findings:

General

To succeed in this Complaint the Complainant has to prove to the Expert pursuant to paragraph 2 of the Policy on the balance of probabilities, first, that they have rights (as defined in paragraph 1 of the Policy) in respect of a name or mark identical or similar to the Domain Name and, secondly, 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

Paragraph 1 of the Policy defines rights as "including but not limited to, rights enforceable under English Law." The nature of these rights may be varied and would include a trade mark right or a right to common law protection such as 'passing off'. Here the Complainant is unable to rely upon a trade mark right and must therefore rely upon a common law right to the name in question.

The Complainant appears to base their claim of a right in the name upon two factors (1) the Letter of Understanding between them and the International Critical Incident Stress Foundation dated 18 June 2002 and (2) the confidential nature of the information which was revealed to the Respondent on 14 May 2002.

With regard to the first claim, that based upon the Letter of Understanding, the date of registration of the Domain Name becomes of utmost importance. If the date of registration is 14 May 2002, as claimed by Complainant, then at that date the Complainant appears to have no rights in the name in question. If though the date of registration is 27 June 2002, as recorded by the WHOIS database, then at that date the Complainant *may* have rights in that name. Under paragraph 2(a) of the Policy, *the Complainant* is required to assert that they have rights in respect of the name or mark. Paragraph 2(a) therefore requires the establishment of these rights without recourse to any third party data. Reference to the WHOIS database is as a result an irrelevant

consideration in regard to this matter unless introduced by the Complainant. In the Expert's opinion therefore, the relevant date must be calculated solely by reference to the date asserted by the Complainant. In the instant case the relevant date is therefore 14 May 2002. As the Letter of Understanding postdates the relevant date it cannot, therefore, be relied upon to establish rights in the name. The first branch of the Complainant's claim is therefore rejected as incapable of creating the rights referred to in paragraph 2(a)(i).

With regard to the second claim, that based upon the confidential nature of the information passed on to the Respondent, the Complainant asserts that the Respondent had access to confidential information on 14 May 2002, and that the registration of the Domain Name on that date was as a result of an abuse of this position of confidentiality. The issue to be decided is whether the nature of the relationship between the parties was such as to create a 'right' in the name in favour of the Complainant at that date. To return to the definition of 'right' given by paragraph 1 of the Policy, this right "includes but is not limited to, rights enforceable under English Law." There is little doubt that a relationship of confidence leads to "rights enforceable under English Law". The issue though is the nature of these rights. Although the Complainant has a personal right of confidence, which they may enforce against the Respondent, this does not, in the opinion of the Expert, create a right "in respect of a name or mark" in terms of paragraph 2(a)(i) of the Policy. The fact that there was a relationship of confidence *inter partes* does not give rise to a right in relation to a name or mark.

For the reasons set out above, I find that the Complainant has failed to establish that it has rights in respect of a name or mark which is identical or similar to the Domain Name. The Complaint therefore fails.

Abusive Registration

As the Complainant has not proven that it has rights in respect of a name or mark, which is identical or similar to the Domain Name, it is unnecessary to decide whether the Domain Name in the hands of the Respondent is an Abusive Registration.

Comment

Although the Expert therefore finds in favour of the Respondent on the basis of the relevant information the Expert feels that he should comment on the submissions of the parties generally, and upon the suitability of the Nominet Dispute Resolution Procedure in dealing with disputes such as this. Both parties in their submissions to the Expert made extreme personal attacks on one another, bringing into question each other's professional ability and professional qualifications. The Expert has studiously ignored all such irrelevant considerations in dealing with this Complaint. It is apparent from the submissions that underlying this case is an ongoing personal dispute between the parties. It is not the role of the Nominet Dispute Resolution Procedure to intervene in such disputes and parties are reminded that submissions and responses should be limited to the issues outlined in the Policy and Procedure.

8. Decision

In light of the foregoing finding, namely that the Complainant has not proven on a balance of probabilities that it has rights in respect of a name or mark which is identical to the Domain Name, the Expert directs that the Complaint in respect of the Domain Name bcisf.org.uk be refused.

Andrew Murray

30 August 2002