

The Leeds Festival (Mela) Ltd. –v- The Preview Channel

Nominet UK Dispute Resolution Service

DRS 188

The Leeds Festival (Mela) Ltd. –v- The Preview Channel

Decision of Independent Expert

1. Parties:

Complainant: The Leeds Festival (Mela) Ltd.
Address: Harehills Place Community Centre
Harehills Place
Leeds
West Yorkshire

Postcode: LS8 5JL
Country: GB

Respondent: Mr Kam Sian
Address: The Preview Channel
Unit 19/20 Penraevons Ind. Estate
Penraevons Street
Leeds
West Yorkshire

Postcode: LS7 2AW
Country: GB

2. Domain Name:
leedsmela.co.uk ("the Domain Name")

3. Procedural Background:

The Complaint was lodged with Nominet UK ("Nominet") on 10 January, 2002. Nominet validated the complaint and notified the Respondent of the complaint on 10 January, 2002 (deemed received 11 January 2002) and informed the Respondent that he had 15 days within which to lodge a response. The Respondent replied on 31 January 2002 by Email and the hard copy was received on 1 February 2002. Nominet so informed the Complainant on 1 February 2002. The Complainant replied to the response within the prescribed time limit and this was copied to the respondent. Mediation was entered in to between 8 February 2002 and 22 February 2002 but this failed to produce an agreement. On 4 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").

On 6 March, 2002, the undersigned, Mr Alistair Abbott, ("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. He was subsequently selected by Nominet as the Expert for this case.

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

The complaint has been correctly lodged and complies with the requirements of The Procedure for Conduct of Proceedings under the DRS.

The response was sent by Email on 31 January 2002 and faxed on even date albeit outside normal working hours and therefore received on 1 February 2002, the closing date for the response. It is noted however that the fax differs from the Email in as much as page 2 of what appears in the Email is missing from the faxed copy.

In addition the requirements of section 5 (v) of the Procedure have not been complied with in as much as the documents are not signed by the respondent or an authorised representative and do not contain the required declaration as to truthfulness and compliance.

No adverse inference is drawn by the submission being close to the closing date.

In section 5 (C) the response must be submitted in electronic form and hard copy within the time permitted. It is page 2 of the missing faxed document which is of most relevance as it deals with the complainant's issues directly and in numerical order. Should this be deemed as not served and therefore disregarded? In the opinion of the Expert these documents can be read together as being the response as the intention of the respondent was clear even if a clerical error has been made. This is accepted as exceptional circumstances provided for in section 15b of Policy.

Paragraph 15c 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."

In the Expert's opinion because of the absence of the declaration and a signature an inference can be drawn which would tend to reduce the weight given to the contents of the document and will be viewed in the light of this accordingly.

5. The Facts:

At the very outset, it is clear that the Complainant and the Respondent had a mutually beneficial business relationship which had operated successfully for a period of time prior to December 2001. From the documentation produced in this matter it is apparent that a complete breakdown of the business relationship has occurred and a considerable amount of bitterness now exists between the parties. Reference is made to Court proceedings that had resulted in a County Court Judgement made in favour of the respondent relating to matters totally unconnected with this dispute. Although unconnected all matters need to be viewed in the light of an unhappy business relationship resulting in a degree of animosity. The Expert views this matter entirely upon the issues surrounding the Domain Name dispute and not any other matters and all references to other areas of friction are accordingly left to one side.

The complainants business involves and includes the organisation of The Leeds Mela, a largely Asian Festival with the support of, and a grant from The Leeds City Council.

The Respondents business provides web site design and access to an ISP for the purpose of registering Domain Names and associated services. The respondent also states they are developing a site to host Asian Music with live web casts of other Mela's in the UK. This would be through a Portal from, (and the respondent does not make this clear) either leedsmela.co.uk or leedsmela.com. There is no other evidence to link The Preview Channel with the Mela.

The complainant, The Leeds Festival (Mela) Ltd, have been instrumental in the organisation of The Leeds Mela since 1996 although had operated as The Leeds Festival Ltd. until 1999. Although some confusion exists there is no actual challenge or dispute that the complainant is The Leeds Festival (Mela) Ltd.

The issue arises when the complainant instructed The Preview Channel to arrange the registration of the Domain Name leedsmela.co.uk. The intention of the Complainant was that the Domain Name be registered in their name.

The Respondent registered the domain name via CIX their ISP and invoiced the Complainant accordingly on 3 February 2000. Web site development continued and CIX an ISP host were retained and this continued for 3 months until the business relationship declined in December 2001 and the Complainant made alternative arrangements of which there is no dispute. Leeds Festival (Mela) Ltd. first approached Nominet on or before the 10 December 2001 having discovered that The Preview Channel had registered the Domain Name leedsmela.co.uk in their own name rather than in the name of the Complainant. Acting on this information a Nominet representative made efforts to rectify what he understood to be a simple clerical error but this was not accepted by the Respondent.

The Complainant then contends that The Preview Channel then took control of the Domain Name and Email and used it to forward visitors to the web site to the respondents own web site leedsmelacon.co.uk where it is alleged defamatory remarks about the Complainant had been posted.

It is stated by the Respondent that use of the Domain Name could continue until the County Court proceedings were concluded. The documentation is silent as to when this actually occurred and the respondent does not state what use he has made of the name.

6. The Parties' Contentions:

Complainant:

The substance of the Complaint is

1. The Respondent has registered the Domain Name primarily for the purpose of transferring the name for valuable consideration in excess of the Respondents out-of-pocket costs directly associated with acquiring the Domain Name.
2. The Respondent has registered the Domain Name primarily for the purpose of disrupting the Complainants business.
3. Circumstances indicate that the respondent is using the Domain Name in a way which has confused people and businesses into believing that the Domain Name is registered to us and is using it to destroy our business.

- 4 The Respondent has provided false contact details to Nominet and the Complainant
- 5 The Complainant seeks a transfer of the Domain Name to their ownership as registrant.
- 6 There are no pending legal proceedings associated with this matter.
- 7 The Complainant agrees to the submission to the jurisdiction of the English Courts and the relevant exclusions. The declaration as to truthfulness and compliance. The document is signed.

RESPONDENT

The Respondent filed a written response on 31 January 2002 in which it was acknowledged that the Domain Name leedsmela.co.uk had been registered by them and that they transferred the domain and activated the site at CIX who managed the site for some 3 months.

The Respondent states they have been aware of the registrant details from the outset.

Specifically the Respondent states:

- 1 The Preview Channel rejects the suggestion that they intended to gain financially from the transfer of the Domain Name.
- 2 The Respondents challenge the Complainant to produce evidence that the registration was made in error
- 3 The Respondent acknowledges a dispute with Leeds Festival (Mela) Ltd. but not with Leeds Festival Ltd.
- 4 The Respondent confirms they left the use of the Domain Name with the complainant until the outcome of the County Court Proceedings.
- 5 The Respondent is unaware of any false contact details relating to the original registration.
- 6 The Preview Channel will not agree to the transfer of the Domain Name.
- 7 No response

The Complainants exercised their right to reply to the response and on the 5 February 2002 clarified the confusion between the company names, The Leeds Festival Ltd. and The Leeds Festival (Mela) Ltd.

The Complainants assert that The Preview Channel were unaware that they were the registered owners of the Domain Name until advised by Nominet

The complainants maintain their rights of ownership of the festival and the web site address because of their involvement since 1996.

7. Discussion and Findings:

General

The Complainant claims a right to the Domain Name as being identical or similar to a Domain name in which they have rights 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

The Respondents do not appear to be claiming a better right to the Domain Name because of usage, history or business activities. The claim to ownership appears to be more objective and based upon what actually happened at the time of registration.

In 1999 the assets and business activities of The Leeds Festival Ltd. were transferred to a new company named the Leeds Festival (Mela) Ltd presumably to better reflect the activities of the company in its name. The former company was removed from the companies register. As clearly the activities of the 2 companies were the same this would suggest continuity over some 6 years and in the absence of other persuading factors would give The Leeds Festival (Mela) Ltd. a right to the website address leedsmela.co.uk

The name of the Complainant company in which the directors have rights and the disputed Domain Name are so similar to convince the Expert that the complainant can justifiably bring this claim for Abusive Registration.

In considering the circumstances surrounding the events which took place at the time of registration it is important to consider the facts to decide the intentions of the parties. Clearly the complainant intended for The Preview Channel to register the domain name in the name of The Leeds Festival (Mela) Ltd. They believed this was done and settled the invoice for the registration accordingly. Their belief is evidenced by the action taken when they discovered that the registration was not in their name. This was to immediately contact Nominet to report an error in the registration.

It is not clear what the respondent's intention was at this point. The registrant appears as The Preview Channel and gives the administrative contact as Kam (the first name of the respondent at The Preview Channel) however the address is the address of the Complainant as is the phone number but the fax number given is that of the Respondent. The billing and technical support details registered are those of the ISP.

The respondents themselves state that it is their practice to register Domain Names for clients in the clients name and they have never registered a Domain Name in their own name. Obviously they mean knowingly, as clearly their business name appears as the registrant. The question arises as to why this would be an exception to their own rule unless an error or/and confusion had occurred between The Preview Channel, the ISP and the details communicated to Nominet?

Furthermore, when Mr Kam Sian was telephoned by Scott Jones of Nominet having been notified of an error by the Complainant Mr Sian allegedly confirmed the mistake. The content of that phone call is confirmed in writing on the 11 December 2001 by Scott Jones. It would seem most unlikely that a letter confirming the conversation would have been produced and sent had the conversation not taken place. There is no evidence to support the respondent's version regarding bogus phone calls and no reasoning as to why he would have agreed or disagreed with the caller regarding the error.

Taking all these factors in to account, it is apparent that the party's intentions were that the domain name be registered in the name of The Leeds Festival (Mela) Ltd and that an error has occurred or that The Preview Channel knowingly registered the domain name in their own name which now leads on to considering an abusive registration

Abusive Registration

Is the Domain Name, in the hands of the Respondent, an Abusive Registration?

A non-exhaustive list of factors, which may be evidence that the Domain Name is an Abusive Registration, is set out in paragraph 3a of the Policy.

"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;

This is point 1 in the Complainant's schedule of issues but lacks supporting evidence. The Respondent states they have never sold a Domain Name and always registers names in the clients own name. Whether deliberate or in error there is no evidence to support the Complainant's contentions.

The next pertinent consideration is:

C Primarily for the purpose of unfairly disrupting the business of the Complainant;"

The Complainant states that The Respondent is using the site leedsmela.co.uk to divert visitors to their own site where remarks are made which could cause damage to their business and reputation. The Respondent challenges the Complainant to produce evidence that the registration was made in error.

A print out of a web page is produced in support and undoubtedly the commentary would be harmful to the reputation and business of the complainant and therefore would unfairly disrupt the business of the complainant. The respondents comment is dealt with above. The complainant's inability to use their Email address has caused considerable disruption to the business process of the complainant and evidence is produced of the type of communication they would normally expect to receive.

3 a ii Circumstances indicate that the Respondent is using the Domain Name in a way which has confused people or business in to believing that the Domain Name is registered to, operated or authorised by, or otherwise connected to the complainant.

There is no evidence to suggest that The Respondent is "mascarading" as the Complainant which would be evidence to support this contention and it is unlikely given the nature of the defamatory remarks viewed on the respondents web site via the complainants that a confusion would arise.

3a iii The Respondent has given to Nominet false contact details,

The bulk of the Experts decision is dealt with above. The Registrant and the contact address given and the phone and the fax numbers do not “tally up” and can only be incorrect.

There is clearly a case to answer as an abusive registration and the Respondent is now required to show;

Paragraph 4 i A Before being informed of the dispute, the Respondent has:
Used or made demonstratable preparations to use the Domain Name in connection with a genuine offering of goods and services.

There is no evidence that the respondent is using the site for this purpose. The reference to The Asian music site is referenced above but on the balance of probabilities is not evidence in support of the Respondents case and it is not clear even to which Domain name they refer.

4 i B Been commonly known by the name or is legitimately connected with a mark which is identical or similar to the domain name.

Although the Respondent has similarly named website confusion between sites is not being raised here and so is irrelevant.

4 i C Made legitimate non – commercial use of the Domain Name or (ii) The Domain Name s generic or descriptive and the Respondent is making use of it.

The Respondent has failed to show that he is making legitimate fair use of the Domain Name and therefore fails also on this point.

Accordingly, the Expert finds that the Domain Name is an Abusive Registration within the definition of that term in paragraph 1 of the Policy on the basis that it was registered in a manner which, at the time when the registration took place, took unfair advantage of the Complainant's rights.

8. Decision:

In light of the foregoing findings, inter alia that the Complainant has rights in respect of a name or mark which is similar to the Domain Name and that the Domain Name, in the hands of the Respondent, is an Abusive Registration, the Expert directs that the Domain Name, leedsmela.co.uk, be transferred to the Complainant.