

Nominet UK Dispute Resolution Service

DRS 00333

Wavecrest Communications Plc v WaveCrest Computer Solutions Ltd

Decision of Independent Expert

1. Parties

Complainant: Wavecrest Communications Plc

Address: 6th Floor,
Clements House,
14-18 Gresham Street,
London
Postcode: EC2V 7NN
Country: UK

Respondent: Computer Independent Associates Ltd
(formerly WaveCrest Computer Solutions Ltd)

Address: 83 Leyland Trading Estate
Wellingborough
Northants
Postcode: NN8 1RT
Country: UK

2. Domain Name:

wavecrestcom.co.uk

3. Procedural background:

The Complaint was lodged with Nominet on April 24, 2002. Nominet validated the Complaint and notified the Respondent on May 2, 2002 and informed the Respondent that it had until May 24, 2002 within which to lodge a Response. On May 8, 2002 the Respondent filed a response. On May 8, 2002 Nominet forwarded a copy of the response to and notified the Complainant that it had until May 17, 2002 to file a reply. On May 16, 2002 the Complainant filed a reply which was copied to the Respondent on May 17, 2002.

On June 7, 2002 Nominet informed the Complainant and the Respondent that it had not been possible to achieve a resolution of the dispute by Informal Mediation..

On June 24, 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 June 24, 2002 Andrew Goodman, 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 June 26, 2002 Andrew Goodman was appointed as the Expert.

1. Procedural Issues

There are, so far as I am aware, no live procedural issues raised by either party which have a bearing upon this decision.

2. The Facts

On January 18, 2002 the Domain Name was registered by Easyspace for Mr Lee Edwards and Mr Carl Warburton of 83, Layland Comple, Wellingborough, NN8 1RT who I understand are the directors of the Respondent company which, according to the Companies Register I have seen, was not registered until February, 12 2002 as WaveCrest Computer Solutions Ltd. It changed its name to Computer Independent Associates Ltd on February 20, 2002. As at the date of the Complaint the Domain Name operated to host a website which bore a homepage with the information “Closing Down Sale wavecrestcom Company for Sale” (sic) in large type with a clipart picture of a burglar and the words “Hey you stop, pay me my salary and expenses! Don’t you think a year is a long time to wait already!!!” (sic). . The page also refers to “WaveCrest Computer Solutions Limited “ although, as I have said, that company did not then exist.

At the date of this decision the site operates as the home site of “Wavecrest Computer Solutions.” So far as I am aware the Respondent company trading as Wavecrest Computer Solutions has no obvious connection with the Complainant or its Domain Name, wavecrestcom.com which was registered in October, 2001

3. Contentions of the Parties

Complainant:

The substance of the Complaint may be set out shortly as follows:

It is said by the Complainant (i) The Domain Name in dispute is identical to similar to a name or mark in which the Complainant has rights; (ii) in the hands of the Respondent it is an Abusive Registration; (iii) the Respondent has since its registration used the Domain Name in an abusive way, namely to attack the business of the Complainant by posting a message that the Complainant was closing down, to the extent of linking the site to the government Insolvency Service website, and to indicate that the site could be purchased for £7,500. In support of its complaint the Complainant has printed off and appended what it says are accurate copies of all messages and modifications appearing on the site between January 22nd 2002 and April 25th 2002.

The Complainant requests that the Domain Name is transferred.

Respondent's Response:

The Response rejects the Complaint and the evidence supporting it and contends

(i) the Respondent has been commonly known by the name or legitimately connected with a mark which is identical or similar to the Domain Name;

(ii) although it changed its company name, the Respondent retained the right to use the name Wavecrest Computer Systems as a trading name or trading style in connection with its legitimate business.

(iii) it rejects the evidence of Mr Williams of the Complainant: no conversation with the Complainant's Chief Executive Officer about modifying the site is recollected; the authenticity of the copied web pages produced by the Complainant is challenged on the basis that they may have been tampered with; no page has ever stated that the page could be purchased.

Complainant's Reply:

By its Response to the Reply the Claimant joins issue with the evidence of the Respondent and makes what I regard as an important point, namely that Mr Edwards of the Respondent is a former employee of European Digital Communications Plc, a company whose business was purchased by the Complainant some time after the termination of Mr Edwards' employment, and that Mr Edwards claims that monies are due to him arising from his termination. This throws light upon the message shown on the site on April 25th 2002.

4. **Discussion and Findings:**

General

(1) The complaint is founded on an allegation of abusive registration. Under the Nominet Dispute Resolution Service Policy an abusive registration is defined as

“a Domain Name which

i was registered or otherwise acquired in a manner which, at the time when the registration or acquisition took

place, took unfair advantage or was unfairly detrimental to the Complainant's Rights; or

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

For the purpose of this definition “Rights” includes but is not limited to rights enforceable under English law. However a Complainant will be unable to rely on rights in a name or term which is wholly descriptive of the Complainant's business.

- (2) Part 3 of the Nominet Dispute Resolution Service Policy provides a non-exhaustive list of factors which may be evidence that the Domain Name is an Abusive Registration. I set out the relevant sections 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 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.

- (3) Part 4 of the Nominet Dispute Resolution Service Policy provides a non-exhaustive list of factors which may be evidence that the Domain Name is not an Abusive Registration. I set out the relevant sections 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 and 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.

Complainant's Rights

- (4) To succeed on this complaint the Complainant has to prove pursuant to paragraph 2 of the Policy that on balance of probabilities first that it has rights as defined in paragraph 1 of the Policy in respect of a name

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.

- (5) The Domain Name uses the mark “wavecrestcom”. The Complainant trades as Wavecrest Communications and has done so for some time. I consider it reasonable to infer that the Complainant has goodwill associated with that name sufficient to mount an action for passing off that name. The name is neither generic nor descriptive.
- (6) Accordingly I find that the Complainant has rights in respect of a name which is identical or similar to the Domain Name.

Abusive Registration

- (7) I consider that the use of the name “WaveCrest” by a former employee of a company whose business was bought out by the Complainant to be too much of a coincidence. There is a strong inference to be drawn that the Respondent, in registering WaveCrest Computer Solutions Ltd, although only using that name for one week, and using the trading name “Wavecrest Computer Solutions”, was attempting either to capitalise upon the goodwill attaching to the Complainant’s name and reputation or to damage its business name. I consider it reasonable to infer that members of the public who searched the web by use of the Domain Name expected to find a site connected with the Complainant’s business and not connected with the Respondent’s business.
- (8) I further consider that on the balance of probabilities the Respondent acquired the Domain Name as a blocking registration against a name or mark in which the Complainant has Rights; or primarily for the purpose of unfairly disrupting the business of the Complainant, or for the purpose of selling, renting or otherwise transferring the Domain Name to the Complainant or 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. In support of this finding I accept the authenticity and accuracy of the Complainant's evidence namely

(i) on January 22nd 2002 the website for the Domain Name displayed a message addressed to "Dear Lord P Whoobeck, the muggle of wavecrest" which stated "To Buy This Site please make your cheque payable to me £7,500. Plus £900 plus plus plus Wavecrest comes crashing down."

(ii) I accept that at 16.09 hrs on the afternoon of that day as a result of a telephone complaint made by Mr Anderson of the Complainant to the Respondent, the existence of which telephone call is support by telephone billing records, the site was modified by the Respondent to read "The wave crest comes crashing down !!!" (sic)

(iii) on January 23rd, 2002 the site was showing the figure of £7,500 with the phrase "No childish amount" and the amount "£950" with the phrase "Grown up money". I consider it reasonable, in view of the previous day's display, to infer that this was the proposed sale price of the site. Only later that day, at 16.27 hrs, did the site first display any indication of a service or product in keeping with the business of computer consultants or engineers.

(iv) on January 25th 2002 the site directed the reader to Callwave, an internet call waiting service.

(v) on April 2nd 2002 the site directed the reader to the government's Insolvency Service website.

(vi) I have referred above to the display on the site as at the date of the Complaint.

I reject as not credible the Respondent's implicit but not express assertion that the Complainant downloaded the Domain Name web pages, tampered with them , and then produced the resulting evidence in order dishonestly to discredit the Respondent.

- (9) I further find the above evidence amounts to 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.
- (10) The Respondent has not sought to adduce any evidence that before being informed of the Complainant's dispute, it 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 and services; I do not accept that the Respondent has been commonly known by the name or legitimately connected with a mark which is identical or similar to the Domain Name. I am unaware of any goods or services offered by the Respondent with which the Domain Name could properly be identified prior to the Complaint arising.
- (11) In the premises I find that there has been an Abusive Registration of the Domain Name by the Respondent at the date of registration.
- (12) If I am wrong in my foregoing conclusions or any of them I find that the conduct of the Respondent, particularly having regard to the page display on April 25th 2002 amounted to an Abusive Registration under the second limb of the definition of that term in the Nominet Dispute Resolution Service Policy, namely that the Domain Name has been used by the Respondent in a manner which took unfair advantage or was unfairly detrimental to the Complainant's Rights.

- (13) I have arrived at this conclusion because the Respondent's use of the Domain Name is primarily for the purpose of unfairly disrupting the business of the Complainant, by suggesting that the company is closing down and or insolvent. If this is untrue it is capable of amounting to a malicious falsehood.
- (14) Accordingly I find that the Domain Name in the hands of the Respondent is an Abusive Registration as defined in paragraph 1 of the Policy.

8. Decision

In light of the foregoing findings, namely that the Complainant has rights in respect of a name or mark which is identical to the Domain Name and that the Domain Name in the hands of the Respondent is an Abusive Registration, I direct that the Domain Name, wavecrestcom.co.uk, be transferred to the Complainant.

Andrew Goodman

11 July 2002