

Nominet UK Dispute Resolution Service

DRS 4631

Mr Anthony Croxford

v

Mr Jonathan Ogden

Decision of Independent Expert

1. PARTIES

Complainant: Mr Anthony Croxford

Address: 10 Forest Grove, Ecclestone Park, Prescot, Merseyside

Postcode: L34 2RZ

Country: UK

Represented by Mr Jim Davies of Bell Denning Solicitors, 15 Buckingham Gate,
London SW1E 6PB

Respondent: Mr Jonathan Ogden

Address: 5 Champs des Arbes, La Verte Rue, St Mary

Postcode: JE3 3DA

Country: Channel Islands

The Respondent is not separately represented.

2. DOMAIN NAME

This complaint concerns the domain name business.co.uk (the “Domain Name”).

3. PROCEDURAL BACKGROUND

3.1 A Complaint in respect of the Domain Name under Nominet UK's Dispute Resolution Service Policy (the “Policy”) was received from the Complainant on 19 April 2007. Nominet forwarded the Complaint to the Respondent. A non standard response was filed on 24 May 2007. A reply was filed on 12 June 2007.

3.2 The dispute was referred for a decision by an Independent Expert following payment by the Complainant of the required fee in accordance with paragraph

5d of Nominet's Procedure for the conduct of proceedings under the Dispute Resolution Service Procedure (the "Procedure"). I was appointed as Independent Expert on 18 July 2007 and confirmed to Nominet that I was independent of the parties and I knew of no other facts or circumstances that might call into question my independence in the eyes of the parties.

4. OUTSTANDING FORMAL/PROCEDURAL ISSUES (IF ANY)

4.1 The Complainant has objected to the non-standard format of the Response which is an e-mail with various attachments. I will admit the Response in the form in which it has been provided as I do not consider that its non-standard arrangement has materially prejudiced either the Complainant, or my coming to a decision.

4.2 At one stage issues appear to have been raised in correspondence as to whether the Domain Name was subject to the Policy. Both parties now appear to accept that it is, and have proceeded on that basis. I shall therefore do the same.

5. THE FACTS

5.1 For reasons that will become apparent this complaint is unusual. The papers filed by each party raise complex issues of both fact and law which it is in practice impossible for me to disentangle. I will summarise what seem to me to be the key facts as succinctly as I reasonably can, although in the absence of hearing detailed oral argument and evidence, together with cross-examination (all of which would involve a procedure much fuller and more detailed than a complaint under the Policy is likely to be), it is impossible to ascertain with any certainty all of the relevant information. Accordingly, the details set out below should be regarded as my present understanding of what has taken place. I am not going to attempt to summarise every factual matter which has been raised.

5.2 The Domain Name is self evidently an "attractive" (and no doubt valuable) domain name. It was originally registered on the 3rd June 1994 and accordingly predates Nominet's involvement in the administration of .uk domain names.

5.3 At the heart of the dispute between the Complainant and the Respondent is an argument as to who should own the Domain Name following changes in its recorded ownership that took place subsequent to its original registration. It is convenient to start what is a convoluted story with the Respondent, as he appears on the scene first, chronologically.

5.4 The Respondent appears to be an internet entrepreneur who, amongst other things, was responsible for launching and developing the business which subsequently became the well known WorldPay payment processing system. He says he originally registered the Domain Name in 1994, although registration was effected on his behalf by a third party. The recorded ownership of the Domain Name appears to have been subsequently placed in the name, or possibly different names over time, of a number of companies associated with the Respondent. The Domain Name was used at various dates to point to a number of different web sites associated with the Respondent's businesses.

- 5.5 The history also involves various corporate transactions involving a number of companies. I am not going to attempt to disentangle the events concerned, but they involved, amongst others, PSINet Inc, Interactive Telephony Limited, Engergis, and Royal Bank of Scotland. Corporate insolvencies, changes of control and contested take over bids appear to have taken place. In the course of these it appears that disagreements have arisen between the Respondent and at least some of the corporate entities involved. For present purposes the most relevant entity appears to be the company called Interactive Telephony Limited which is a Jersey company, and which I think subsequently changed its name to PSINet Jersey Limited. I shall refer to it below as "ITL"
- 5.6 When Nominet assumed responsibility for administration of the Domain Name, the records it took over indicated that the name was registered in the name of ITL.
- 5.7 At about this time the Respondent filed a statutory declaration giving a detailed account of the history of the Domain Name and his ownership of it and his relationship with the various companies concerned, including with ITL. On the basis of that declaration Nominet subsequently transferred ownership of the Domain Name to the Respondent.
- 5.8 However it was at about this time that the Complainant arrived on the scene. In essence his case is that in August 2006 ITL, as the then owner of the Domain Name, had no use for the Domain Name, and following an approach from him, agreed to transfer it to him. The Complainant has exhibited a series of email correspondence with Telstra Europe Limited, who by this date appear to have some corporate relationship with ITL, possibly as the ultimate parent company. This email correspondence concludes with an email of 4th August 2006 from a Mr Matt Gould (his title appears to be General Counsel and Company Secretary Telstra Europe Limited) which email concludes "*Tony – bearing in mind our conversation and having given the matter further thought, I have decided to hand the domain over to you! I will complete the forms and put them in the post. Obviously not asking for anything in return but if there is any services we can provide in the future please do let me know.....*". It appears Mr Gould may at this time have provided signed forms intended to give effect to the transfer.
- 5.9 As best I can tell, what then seems to have happened is that Mr Gould, possibly at the instigation of the Respondent, appears to have changed his mind as to whether ITL had the right to dispose of the Domain Name and wrote to Nominet informing them accordingly, and asking Nominet not to action the transfer to the Complainant. It is then (I think) that the Respondent filed the statutory declaration referred to above. After various correspondence between the parties and Nominet, and also involving solicitors, the Domain Name was eventually registered in the name of the Respondent.
- 5.10 The above account seeks to summarise what is an incredibly complicated and convoluted series of events taking place over many years. The relevant material has not been presented to me in anything like a coherent form and in the interests of simplicity I have sought to distil out what seemed to be the key events. In doing so I have missed much of the underlying detailed information which is contained in the papers which accompany the submissions filed by the

Complainant and the Respondent. I have however I think captured the essence of the factual background to this matter.

6. THE PARTIES' CONTENTIONS

Complainant

- 6.1 The Complainant in essence says that completed and signed forms, completed by Mr Gould on behalf of ITL were lodged with Nominet in August 2006, the relevant fee was paid by the Complainant and as a result the Domain Name should have been transferred to him. The way he puts it in his Complaint is to say "*I claim both contractual rights to the Domain and/or beneficial rights by way of a gift to the Domain and/or the beneficial interest in the Domain and/or Consumer Rights to the Completion of the transfer by Nominet*".
- 6.2 Further arguments are also advanced based on estoppel and the provisions of the Law of Property Act 1925. The Domain in the hands of the Respondent is said to be an "Abusive Registration" as the transfer to the Respondent post-dates the Complainant's alleged entitlement to acquire the Domain Name. Various other complaints are also made including allegations that the Respondent had induced breach of contract and so on.

Respondent's Submissions

- 6.3 The Respondent has filed a relatively brief Response together with a number of attached documents. His position is best summarised by quoting from his Response where he says "*Unequivocal documentary confirmation has already been provided confirming my ownership of the domain business.co.uk since the date of its first registration. This documentation has been supplied by WorldPay, Royal Bank of Scotland Group, PSINet (Jersey) Limited and by the former President of PSINet. I have no knowledge of Mr Croxford nor have I ever sanctioned, agreed, signed or promised the transfer of the domain business.co.uk to him.*"
- 6.4 Amongst the documents exhibited by the Respondent is a letter from Mr Matt Gould, describing himself as a Director of PSINet Jersey Limited dated 21st May 2007 addressed "to whom it may concern". In this letter Mr Gould apparently acknowledges that arrangements were made to transfer the domain to Mr Croxford (although he points out there was no agreement actually to do so and no consideration were sought or obtained). He appears to accept that the transfer paperwork was prepared and submitted to Nominet. He however goes on to say that it became clear that the beneficial ownership of the Domain Name was unlikely actually to be owned by PSINet Jersey at which point Nominet was instructed not to complete the transfer of the Domain Name. Mr Gould indicates that his company formed the view that the beneficial ownership of the Domain Name was with Mr Ogden.
- 6.5 Accordingly Mr Ogden's submission essentially boils down to the fact that he is, and always has been, the beneficial owner of the Domain Name and the transfer of it into its own name was giving effect to his title.

7. DISCUSSION AND FINDINGS

- 7.1 The Policy is not the appropriate mechanism for resolving complex and disputed questions of fact and law. The Complainant is represented by solicitors and I have to say I am surprised that it was not apparent to them that the types of issues being raised by this Complaint would need to be determined by a court of law rather than under the Policy.
- 7.2 In essence the Complainant says that the rightful owner of the Domain Name agreed to transfer it to him. The Respondent says that he is, and always has been the rightful owner of the Domain Name. For what it is worth, so far as I can determine, the party in whose name the Domain Name was actually registered at the relevant time, being ITL, appears, at one point, to have agreed to transfer the Domain Name to the Complainant. However it then appears to have changed its mind and the evidence now filed, if taken at face value, appears to show that it did so because it accepted the beneficial owner of the Domain Name was, at all times, the Respondent.
- 7.3 So far as the Policy is concerned the Complainant has firstly to establish that he has Rights in respect of a name or mark which is identical or similar to the Domain Name. As I understand it, his claim to Rights arises entirely out of his dealings with ITL. I am not in a position to form a view as to whether those dealings have, or have not, as a matter of law, resulted in a concluded agreement between him and ITL. Apart from anything else that would involve an enquiry as to what ITL's title was to the Domain Name, which would involve a lengthy investigation into the history of the Domain Name and all the matters set out by the Respondent in relation to that history, as well as (I suspect) questions of Jersey law.
- 7.4 Furthermore the Complainant also has to establish that the Domain Name in the hands of the Respondent is an Abusive Registration. The Complainant has not established any of the (admittedly non exhaustive) list of factors which may be evidence of Abusive Registration as shown in paragraph 3 of the Policy. The Complainant's allegation of Abusive Registration, as against the Respondent, appears again to turn on his allegations that he is the rightful owner of the Domain Name. Again, for the same reasons as explained above, I am unable to identify who may be right and who may be wrong.
- 7.5 I accordingly decline to find in favour of the Complainant. In doing so I make absolutely no finding as to who is right and who is wrong in relation to the various matters that have been canvassed in the Complaint, the Response and the Reply. Those are all matters that would need to be determined by an appropriate Court.
- 7.6 It is worth noting that the Policy recommends that both parties use Nominet's guidance and help information (paragraph 2c of the Policy). Nominet's published guidance is found on its website, and includes information under the section "comparing the DRS and the Courts" which reads as follows: "*the DRS does not seek to replace the Courts and you may wish to take independent legal advice if uncertain which system is more suitable for your dispute*" and "*however there are some cases which are too complicated for the DRS (for*

example, very difficult contract cases, or cases on technical points of trade mark law which have to go to Court". There is absolutely no doubt in my mind that this case falls within the category of a very difficult case which would need to be resolved by an appropriate Court. It is entirely unsuitable for determination under the Policy. As indicated above I am surprised that the solicitors acting for the Complainant ever thought the Policy was the right forum for this dispute.

8. DECISION

8.1 I accordingly decline to find in favour of the Complainant. No action is needed to implement my decision.

Signed:

N J Gardner

Dated: 5 August 2007