

Nominet UK Dispute Resolution Service

DRS Number 04632

Parties: David Munro v Celtic.com, inc.

Decision of Independent Expert

1. Parties

Complainant: David Munro
Address: 28 King Street
Mossley
Ashton under Lyne
Lancs
Postcode: OL5 9HX
Country: GB

Respondent: Celtic.com, Inc.
Address: 438 Savoie Drive
Palm Beach Gardens
Florida
Postcode: 33410
Country: USA

2. Domain Name

Ireland.co.uk

This domain name is referred to below as the "Domain Name".

3. Procedural Background

A hardcopy of the Complaint was lodged with Nominet on 30 April 2007. Nominet validated the Complaint on 1 May 2007 and notified the Respondent. In this correspondence Nominet informed the Respondent that it had 15 working days within which to lodge a Response to the Complaint. A Response was submitted within this time limit. The Complainant submitted a Reply within the time frame required under the Nominet Dispute Resolution Service Procedure ("the Procedure"). The dispute was not resolved in mediation. On 3 July 2007 the Complainant paid Nominet the appropriate fee for a decision of an Expert pursuant to paragraph 7 of the Nominet Dispute Resolution Policy ("the Policy").

Sallie Spilsbury, the undersigned ("the Expert") has confirmed to Nominet that she knew of no reason why she could not properly accept the invitation to act as Expert in this case and further confirmed that she knew of no matters which ought to be drawn to the attention of the Parties which might appear to call into question her independence and impartiality.

4. Outstanding Formal/Procedural Issues

There are no outstanding issues.

The Complaint purports to append 9 annexures. The fifth of these has been omitted by the Complainant. The missing annex is described in the Complaint as confirming the status and address of a representative of the Respondent. The Expert has taken the description of the document in the Complaint as a true record and is not therefore inclined to delay matters by requesting a copy of the missing document from the Complainant. In any event the document has no bearing on the Expert's decision.

5. The Facts

The Complainant

The Expert has little information before her about the status of the Complainant in this matter save that his "Complainant Type" is given as "Individual". Annex 8 to the Complaint suggests that the Complainant sought to acquire the Domain Name from the Respondent in 2006 in order to set up an Ireland travel portal.

The Respondent

The Respondent is a corporation chartered in the State of New York, and having a place of business in Florida. A Nominet WHOIS search shows that the Domain Name was registered by the Respondent on 20 October 1996. The Complaint records that the earliest recorded website under the Domain Name occurred on 29 February 2000 and was simply a "Site under Construction" sign. From at least 21 June 2000, the Domain Name resolved to a "Celtic Store" – selling inter alia Celtic jewellery, music and travel information. There have been various incarnations of the site but its essential content remained the same. The Respondent does not take issue with this information. The Respondent updated its Nominet contact details in October 2006. Previously a New York address had been given but this was changed to the Florida address shown at the beginning of this decision. This point is of relevance to the Complainant's submissions.

Background to the Dispute

The Complainant alleges that in September 2006 a binding contract was formed between the Respondent and the Complainant for the transfer of the Domain Name and that the Respondent is in breach of the contract by failing to transfer the Domain Name as agreed.

The sequence of events is set out in the Complaint and is supported by Annex 8 which contains copies of email correspondence. The sequence is as follows:

The Complainant first enquired about purchasing the Domain Name by completing a form on the Respondent's website on 5 April 2006. There followed what the Complaint records as "a brief flurry of emails" , the upshot of which was that the price suggested by the Respondent for transfer of the Domain Name (US\$ 15,000) was higher than the Complainant was prepared to pay and the matter proceeded no further at that time.

On 2 September 2006 the Respondent contacted the Complainant by email to enquire whether he remained interested in purchasing the Domain Name. The email read as follows:

"I was wondering are you still interested to purchase the domain name you inquired about? Please let me know and perhaps we can work out an agreeable price." (sic)

In an email of 4 September 2006 the Complainant asked: "*What is lowest price you can accept?*" He received a reply from the Respondent on 5 September stating: "*\$6,000 is my lowest. I paid \$5,000 for it*"

The Complainant replied on 6 September: "*OK, I agree to your price of \$6,000. How do we proceed from here?*"

The Respondent replied as follows by email of 6 September 2006:

There are two ways to proceed. You could use Escrow.com to initiate this transaction.... Your payment will stay with them until the domain is transferred to you. Then they will send me the payment. However you would be responsible for their fees.....

The other approach is to wire money directly to my bank account....

Either way works....

Let me know which way you want to proceed.

It was decided that the transaction would take place using the services of Escrow.com. In an email dated 6 September 2006 the Respondent agreed to pay the Nominet transfer charge of £30. By return email the Complainant wrote "*Thanks for offering to pay the Nominet transfer charge*".

The Complainant made the payment which was received by Escrow.com on 11 September 2006. Under the procedure envisaged by the parties the Respondent should then have completed the sale by returning completed Nominet transfer forms for the Domain Name to the Complainant; at which point the funds would have been released to the Respondent. This did not occur. The Complainant chased the Respondent on 14 September and 28 September 2006. The Respondent replied on 29 September 2006 in the following terms: "*I am sorry but I have decided not to proceed with the sale of this domain. I got a well know(n) independent domain appraisal company to appraise ireland.co.uk and they said it was worth between \$125,000 and \$150,000. So Escrow.com will wire the money back to your account. Again I apologize for the inconvenience.*"

By email of 30 September the Complainant wrote "*As far as I am concerned we have a binding contract and I expect the deal to be honoured*".

The Complainant confirms in its Reply that the monies remain in the escrow account.

This factual account is not disputed by the Respondent.

6. The Parties' Contentions

This has become an acrimonious dispute. The submissions made by the parties raise matters of complexity. They are summarised below- repetition has been avoided in the summary where possible. Where appropriate the relevant content of the submissions have been reproduced to avoid distortion.

The **Complaint** is based on the following grounds.

Rights

- The Complainant asserts that it has Rights in the Domain Name for the purposes of the Policy. The Rights claimed are contractual rights and/or (in the alternative) beneficial rights. The Complainant does not assert that it has any trademark rights to the Domain Name and confirms that it has not used the Ireland mark in any trademark sense. There is nothing to indicate that the Complainant has changed its position in any way save the payment of the monies held in escrow in reliance on performance of the alleged contract.

In support of its contention that contractual and related rights fall within the concept of Rights under the Policy the Complainant cites a number of earlier decisions under the Policy in which it claims that Independent Experts have found that contractual rights have been sufficient for the purposes of establishing Rights under the Policy. The relevant decisions are helpfully annexed to the Complaint (but are not expanded upon in the Complaint itself). They are as follows:

- *1&1 Internet Limited v SSL (DRS 0442)*
- *Cardiff Exhausts v Another.com Ltd (DRS 01863)*
- *Wired Sussex v Web Optionz Limited (DRS 01336)*
- *Kiley-Hale solicitors v Personal Injury Management Services (DRS 4438)*
- *Dragon Hotel Ltd v Les Evans (DRS 4447)*
- *Delecto Gifts Limited v Alasdair MacPherson (DRS 04376)*
- *Tullis Russell Hot Press Limited v Pattishall Computer Maintenance Limited (DRS 0984)*
- *Ductwork UK Ltd v Mark Knight (DRS 4247)*
- *Kiley-Hale Solicitors v Vincent Moss (DRS 04436)*

The Complainant also cites the decision of a Policy Appeal Panel in *Seiko UK Limited v Designer Time/Wanderweb (DRS 00248)* (decision of Appeal Panel) as authority for the breadth of the concept of “Rights” under the Policy and also Nominet’s own guidance on the provisions of the Policy.

In relation to the subsistence of contractual rights the Complainant states that:

By my [i.e. the Complainant’s] email of 6 September 2006 I believed that I had accepted the Respondent’s offer to sell me the domain for US\$6,000. I believe that we had a binding contract at that point. Even if the Expert rejects my submission that there was a binding contract between the Respondent and myself when I emailed my acceptance of the \$6,000 price; further and in the alternative I submit that a contract was formed when the Respondent accepted my offer to pay that price. The Respondent’s conduct in setting up the formalities of the sale, as evidenced in the subsequent emails in September 2006 and their dealings with Escrow.com, clearly amount to acceptance of the contract for the sale of the domain at the agreed price.

It is clear from that email that the Respondent simply decided that he did not want to honour the contract that had been entered into because he now felt that the domain was worth more than he agreed to sell it to me for. I suggest that he had plenty of opportunity to evaluate the domain before agreeing to sell it to me. In fact the Respondent had between April and September to form a view on the value of the domain – and it was the Respondent who revived the transaction in September by approaching me. It is not open to a party to a contract to seek to unilaterally cancel a contract after it has been made, simply because it has had second thoughts about the bargain that has been struck. I made it clear in emails to Escrow.com that I was of the view that there was a binding contract in place between the Respondent and myself. I rejected the attempt to unilaterally cancel that contract by the Respondent.

Abusive Registration

The Complainant makes 2 submissions to support its case that the Domain Name is an Abusive Registration under the Policy:

- The Complainant has a valid contractual right to the Domain Name and the Respondent’s ongoing retention and use of the Domain Name is an Abusive Registration in accordance with the definition in the Policy – inter alia that the Domain Name “has been used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant’s Rights”. The Complainant asserts that the Policy decisions it cites include examples where the respondent had agreed to transfer or acquire a domain name for the complainant. When that contract was subsequently not honoured, the complainant had succeeded in showing the registration was abusive. The Complainant accepts that this submission does not fall directly into the “non-exhaustive list of factors” giving rise to a presumption of Abusive Registration in paragraph 3 of the Policy. However this list is expressed to be non-exhaustive. Paragraph 3 of the Policy contemplates possible situations of abuse where rights derive from a contractual relationship (3(a)(v)). The Complainant goes on to observe that this is the type of Abusive Registration for which the Policy was designed to

provide a cost effective forum in order to provide the Complainant with the remedy of enforcing his contractual rights.

- Secondly, the Nominet WHOIS service has been provided with false contact details for the Respondent. Annex 4 to the Complaint is produced to support the submission that the correct contact address for the Respondent is in New York and not Florida. The annex is a printout that shows that the Respondent is listed by the New York Department of State as a US corporation. The WHOIS contact details for the Respondent were changed in October 2006 shortly after the Respondent tried to cancel the alleged contract with the Complainant. The Complainant asserts that the change was an attempt to deceive the Complainant into thinking that the registrant for the Domain Name may have changed. Alternatively, it was "an unsubtle attempt to discourage the Complainant from pursuing his contractual rights". Alternatively the Complainant alleges that providing false contact details for the Respondent is one of the factors that indicates an Abusive Registration under paragraph 3(a)(iv) of the Policy.

The **Respondent** denies that the Complainant has contractual "rights" in the Domain Name. It also denies that the "rights" claimed are within the scope of the Policy. The Expert is also reminded by the Respondent that whilst she may order transfer of the Domain Name under the Policy, she is not empowered to enforce payment or any other contractual terms.

The **Response** contains the following submissions relevant to the claims made by the Complainant.

The existence of a binding contract for transfer of the Domain Name: In New York where the Respondent is chartered and in Florida where it conducts business, no binding contract would be held to exist under the relevant laws. The contract would exceed the monetary limit of the respective Statutes of Frauds, requiring "a signed writing" (sic). While the Respondent had expressed indecision in its email as to "how should we proceed?", and the parties had tentatively explored the use of a US escrow system, there was no reason to believe, and the Respondent did not expect, it had formed a contract of conveyance in the UK. The Complainant has no beneficial interest in the use of the Domain Name, nor does it claim rights in a "name or mark" independent of its activities of attempting to negotiate a proposed purchase. The Respondent has received no payment, and the Complainant claims no use or reliance in use of the Domain Name as a trade name. Further, the Respondent contends, the Complainant has not been damaged by the withdrawal of discussions proposing the sale of the Domain Name.

Jurisdiction under the Policy in relation to Rights: The Respondent rejects the Complainant's assertion that "rights" include a non-executed contract of sale. The Respondent distinguishes the decisions cited by the Complainant. According to the Respondent the decisions comprise "substantial other determinative factors". In general in the decisions cited, definite contracts had been signed and monies had been received by the respondents to those complaints, or the domain registrations at issue belonged to the complainant corporations by virtue of an agency relationship at the time the domains were acquired. In all of the cited cases the expectations held by the complainant were based on their having already owned either rights to the name separate from the contract, or in which a prior contract had already been performed to the point that the domain name in question was being used by the complaining party as the equitable owner of rights therein. The only exception to this is the decision in *Delecto Gifts Limited v Alasdair MacPherson (DRS 04376)* in which the respondent had purchased the assets of a competitor, and also the competitor's domain name from an ex-employee. Both parties in DRS 04376 knew that the domain had transferred to the complainant as a result of the purchase of underlying and independent intellectual property and the decision of the Expert was also based upon an independent "name or mark" right. Unlike the cases cited, the Complainant in the

current dispute has never had nor used the Domain Name, nor has the Complainant completed a purchase of the Domain Name.

Further the Complainant has not referred to the line of decisions under the Policy which suggests that the Policy is not a proper forum for deciding contractual disputes. For example in *Legal Surfing Limited v Millennium Internet Know-how (DRS 01113)* the Expert concluded a survey of cases involving contractual rights by observing: "It is difficult in my view to categorise the behaviour complained of in these cases as infringements of rights "in a name" since the right alleged is effectively a right to sue for breach of contract relating to the standard of performance of the agency services. I respectfully agree with the expert in cityid.co.uk that such contractual disputes are better suited to the ordinary civil forum."

Nominet prescribes the recognised form of transfer agreement for domain names in .co.uk. No claimed transfer of a domain name can be carried out between two contracting parties absent the use of the procedures prescribed by Nominet for a transfer authorisation agreement. Knowing that no transfer of the domain name has been authorised, the Complainant is attempting to evade the Nominet transfer authorisation procedure in bringing this Complaint.

To the extent that the Complainant relies upon the proposed use of Escrow.com to facilitate the transaction, the Terms of Use of [escrow.com](http://www.escrow.com) posted at https://www.escrow.com/resources/to_use.asp, expressly state: "This Agreement shall be governed by the laws of the State of California. Any dispute shall be resolved pursuant to the Dispute Resolution and Governing Law/Venue provisions of the General Escrow Instructions." The Complainant makes the claim that it entered into a binding agreement containing an express dispute resolution clause, and has opted to breach the very terms of the agreement the Complainant itself claims, by instead pursuing the Policy. The Complainant cannot pick and choose the circumstances of when it has, or has not, entered into a contract, nor can the Complainant amend which terms it chooses to apply [to] its claimed contract on an ad hoc basis.

The Complaint is an invitation for the Policy to become a vehicle for development of a body of law of contract formation such as it may relate to parties in different countries and under circumstances in which the manifest expectations of the parties as to the terms of such contracts, or even the jurisdiction under which such contracts properly arise, do not reflect an agreement on all relevant terms nor an intention to be bound by preliminary discussions conducted via email. The Respondent submits that the Policy was intended to address primarily intellectual property interests in a "name or mark" apart from other claims of entitlement to a domain name per se. Accordingly, the Respondent submits the present proceeding is beyond the scope of disputes which the Policy was intended to address.

- ***The alleged provision of false contact details to Nominet:*** The Respondent's corporate principal recently changed his address, and accordingly in October 2006 it updated the business address reflected in the WHOIS data. The United States does not have a national corporate charter system, and it is not unusual for a corporation to be chartered in one state and to conduct business in another. US corporations do not form entities in all fifty states. The Complainant's contention that a US corporation chartered in New York must conduct business in and use New York addresses for such conduct is described in the Response as "arrant nonsense".

In the **Reply** the Complainant makes the following additional submissions on the matters raised:

- ***The existence of a binding contract for transfer of the Domain Name:*** When the Domain Name was registered the Respondent submitted itself to the terms of the Policy and to be governed by English law. References to what may or may not be probative in the US are irrelevant. The Domain Name is subject to Nominet's Terms

and Conditions of Registration. The Respondent agreed to be bound by those terms upon registering the Domain Name. In particular, condition 39 states: "This contract is made under the law of England and any court proceedings must be in the English courts." The Respondent also submitted to the jurisdiction of the Policy when registering the Domain Name. Part of the purpose of the Policy is to provide parties with a cheap and fair system to resolve disputes without having to resort to the courts, much less engage in legal argument about which courts have jurisdiction over a .uk domain. As Nominet's own website says: "For most people the court system is too expensive and difficult, so we provide the DRS [Dispute Resolution Service] as a cheap, fair and quick way of dealing with these disputes."

A contract for anything other than real property may be concluded verbally under English law. This dispute relates to a .uk domain name and the contract is governed by English law – under which a binding contract was entered into.

Escrow.com does not accept payment from a buyer until both parties have agreed the terms under which the transaction will proceed. As part of the Escrow.com procedure both parties have to click on an "Agree" button on the Escrow.com "Transaction Details Screens" to reach the stage where a buyer can make a payment (this is explained further at Annex 3 to the Reply). Terms had therefore been agreed in order for the Complainant to transfer money to Escrow.com.

The terms of use of Escrow.com to which the Respondent refers relate to the contract between Escrow and the parties rather than the agreement between the parties themselves.

The Complainant is not trying to evade Nominet's transfer process. Where an agreement to transfer has been reached and payment made to the Seller's chosen agent, it is within the scope of the Policy to provide a remedy to enforce the transfer of the Domain Name. If the Respondent's registration is found to be Abusive and a transfer is ordered, it is then a matter for the Respondent to consider what action to take to recover any payment that it thinks remains due to it. Such consideration should not have any impact on a finding of an Abusive Registration.

- ***The alleged provision of false contact details to Nominet:*** The explanation given in the Response is not supported by evidence. A review of the Domain Name on www.archive.org shows the Respondent's website displaying the current Florida address for contact as long ago as 2003 (Annex 1 to the Reply). In any event, the address now on the WHOIS service is not one shown on the Respondent's company records as an address for service. Nominet imposes a duty on registrants to list accurate contact information. The Complainant is not suggesting that the Respondent has to "conduct business" at a particular address; rather that it has a duty to maintain accurate and consistent contact details with Nominet.

7. Discussion and Findings

In their submissions both parties have drawn the Expert's attention to previous decisions under the Policy. The Expert has considered the decisions but she would remind the parties that the Policy does not operate on a strict precedent system as would be found in a court of law. The Expert's focus in reaching her decision must be on the terms of the Policy.

General

Clause 2a of the Policy provides that a Respondent must submit to proceedings under the Dispute Resolution Service if a Complainant asserts according to the Procedure, that:

- i the Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name; and

ii the Domain Name, in the hands of the Respondent, is an Abusive Registration.

The *Complainant* is required to prove to the Expert that both elements are present on the balance of probabilities (clause 2b of the Policy).

By filing a Response the Respondent has submitted to the Policy and Procedure. The Respondent is not precluded from submitting that the issues that arise in any Complaint do not fall within the scope of the Policy.

Complainant's Rights

Rights are defined in clause 1 of the Policy as including but not limited to "rights enforceable under English law". As the Complainant points out Nominet's own guidance on the Policy states that "the definition [of Rights] covers all rights enforceable at English law, so contract rights can be enough." (www.nominet.org.uk/disputes/drs/rights). The guidance also reminds users of the Dispute Resolution Service that the main point of the Rights test "is to make sure that the person who complains is someone with a proper interest in the complaint".

The Complainant's Rights

In order to decide whether the Complainant has rights enforceable under English law one has to determine whether a binding (i.e. a legally enforceable) contract was concluded between the parties through their email correspondence of September 2006. This is a prerequisite to any finding of Rights. The Complainant itself rules out any Rights arising through trademark ownership or his prior use of the Ireland mark. The Complainant says yes a contract was formed: the Respondent says no because the formalities of the potentially relevant US state laws have not been complied with. The parties to the contract are respectively an English gentleman and a US corporation (apparently incorporated in New York but with a place of business in Florida). If a contract were concluded it was through electronic means. The Domain Name would be transferred in England. The payment for the transfer would be made in the US. One immediately runs against the question of which system of law one should apply in order to decide whether a legally enforceable contract has been concluded. This is a (relatively sophisticated) question of law. The Complainant has not contested the Respondent's submission that if US state law were to apply the agreement between the parties would be unenforceable.

Both parties seek to offer a short cut to the choice of law question. The Respondent points to the terms and conditions of Escrow.com which stipulate that Californian law shall govern the contract. However, as the Complainant points out, this holds good for the agreement with Escrow for the use of its services but not to the underlying agreement between the parties for the transfer of the Domain Name. The Complainant relies on Nominet's Terms and Conditions for Domain Name Registration which the Respondent would have entered into with Nominet when the Domain Name was registered. These terms and conditions *are* governed by the law of England. However the terms and conditions do not purport to regulate the terms of any agreement to transfer a domain name vis-a-vis the transferring parties save that the registrant is under an obligation to use the Nominet transfer process and to make sure that the person taking over the domain name accepts what remains of the contract with Nominet in full. Neither of these submissions is helpful in determining which system of law will apply to determine whether a contract has been formed between the parties in this matter.

On the submissions before her the subsistence of a binding contract is a question which the Expert is simply unable to determine. She has received no useful submissions from the parties about which law should apply to decide whether a contract had been formed or indeed about the provisions of the relevant national/state laws which she should apply having determined the governing law. It follows that the Complainant has failed to show on the balance of probabilities that it has a legally binding contractual right to the Domain Name. The consequence of this is that it cannot establish that it has Rights under the Policy.

In relation to the Complainant's alleged beneficial interest in the Domain Name this again is an issue of complexity. However the Complainant has not begun to establish on the evidence that there was any intention between the parties to create a trust. The Complainant's submissions fail on this point also.

It is the view of the Expert that the Policy is not a suitable vehicle for the determination of anything other than very straightforward legal questions relating to contract formation. As the Complainant notes the Policy is designed to offer a cheap, fair and quick route to dealing with disputes. However it cannot achieve this aim and also be the arbiter of issues of legal complexity. On the facts the Complainant has no standing to make a Complaint if it does not have a binding contractual right to the transfer of the Domain Name. The Policy is not the vehicle to determine whether an enforceable contractual right arises.

It follows that the Complainant is unable to establish that it has Rights under the Policy and as such its claim under the Policy fails.

Jurisdiction Issue

It therefore becomes unnecessary in this decision for the Expert to decide whether- had there been a binding agreement to transfer the Domain Name in existence- the Policy would be an appropriate mechanism to enforce the transfer of the Domain Name through the concept of Abusive Registration in circumstances where the Complainant's Rights arise solely from a breach of contract.

The Expert has however given some thought to this issue when considering her decision and she is strongly of the view that the Policy should be used with caution in any such claim. As the Respondent points out, under the terms of the Policy an Expert has no power to enforce the reciprocal obligations of the parties to the contract. The jurisdiction is simply to order a transfer of the Domain Name. Where the consideration for the transfer has yet to be paid it will generally be inappropriate for the Expert to enforce one half of the bargain and to leave the transferor to pursue a remedy through the courts should the transferee fail to fulfil its obligations. It really comes back to the observations that the Expert makes in relation to Rights. Where the Complaint involves anything other than the most straightforward contractual dispute over the transfer of a Domain Name (e.g. *Cardiff Exhausts v Another.com Ltd (DRS 01863)*) it will not be appropriate to be determined under the Policy. The decisions to which the Expert has been referred in this matter do not detract from this general observation.

Clause 3(a)(v) does, as the Complainant suggests, indicate that at least 1 type of contractual dispute could be evidence of Abusive Registration. However its ambit is narrow and precise. It relates to circumstances where the respondent has registered a domain name under a contractual arrangement with the complainant under which the complainant has paid for the registration and has used the domain name exclusively for itself. This does not apply to the facts at issue in this matter and in the view of the Expert the inclusion of this ground into the list of factors indicative of Abusive Registration was not intended to pave the way for the automatic classification of other types of contractual breaches as potential abuses.

The Respondent's submission that by using the Policy the Complainant is evading the formal Nominet procedure for transfer of a Domain Name seems to be technically correct on a procedural level. However it is a permissible step. By registering the Domain Name with Nominet the Respondent agreed to comply with the Policy and Procedure (clause 14 of the Nominet Terms and Conditions of Domain Name Registration). Had the Expert upheld the Complaint and ordered a transfer of the Domain Name this would supercede the conventional transfer procedure applicable to willing parties.

Abusive Registration

Because the Complainant has not made out its claim on Rights it is not strictly necessary to consider whether the Domain Name is an Abusive Registration in the hands of the Respondent. Clearly the Complainant's submission that by failing to honour contractual obligations the Respondent's conduct amounts to abuse stands or falls with the Rights claim and has been disposed of accordingly.

The Complainant has a secondary line of submission on Abusive Registration relating to the alleged provision by the Respondent of inaccurate contact details to Nominet. For the sake of completeness the decision will consider this submission.

Abusive Registration is defined in clause 1 of the Policy as follows:

A Domain Name which either:

i 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 [*italics for emphasis*],

OR

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

The Complainant's case is based on the Respondent's use of the Domain Name.

A non-exhaustive list of factors which may be evidence that the use of the Domain Name is an Abusive Registration is given in clause 3a of the Policy. This includes at 3(a)(iv)

It is independently verified that the Respondent has given false contact details to us [Nominet]

The Expert finds that the Complainant's submissions in this regard are not sufficient to discharge its burden of showing Abusive Registration on the balance of probabilities. Firstly there is no independent verification that the details are false. Secondly the Expert is not persuaded that the details are false. Under Nominet's Terms and Conditions of Domain Name Registration (clause 4.1) the Respondent was under a duty to;

Give and keep us [Nominet] notified of your correct name, postal address and any phone, fax or e-mail information.....

The Complainant has established that the Respondent's details do not relate to its formal registered office or address for service. But the details do not need to do so under the above terms and conditions. These simply require that the details given are "correct". There is nothing in the correspondence between Nominet and the Respondent in relation to this dispute to indicate that the communications sent via the current contact details did not reach the Respondent. The Complainant finds the timing of the change of details to be suspicious. But this suspicion does not in itself discharge its burden of proof under the Policy.

It follows that the Complainant's claim under the Policy fails. It has not established Rights in the Domain Name nor that the Respondent's conduct amounts to Abusive Registration. This decision is reached on grounds that are attributable to the inevitable limitations of the Policy to resolve legally complex issues. The decision should therefore by no means be interpreted as an endorsement of the Respondent's conduct in this matter in relation to its dealings with the Complainant.

8. Decision

The Expert finds that the Complainant has not proved on the balance of probabilities that it owns Rights in respect of a name or mark which is identical or similar to the Domain Name nor that the Domain Name in the hands of the Respondent is an Abusive Registration.

Accordingly the Expert finds that the Complaint should be rejected.

Sallie Spilsbury
23 July 2007