

## DISPUTE RESOLUTION SERVICE

DRS 08347

Decision of Independent Expert

THE COCA-COLA COMPANY

and

B and Bs.co.uk (PAUL LEAHY)

### 1. The Parties:

Complainant: The Coca-Cola Company  
Represented by: Simmons & Simmons  
Address: One Coca-Cola Plaza  
Atlanta  
Georgia  
Postcode: 30313  
Country: United States of America

Respondent: B and Bs.co.uk (apparently an alias for Paul Leahy)  
Address: 7 Corinthian Close  
Llandough  
Cardiff  
South Wales  
Postcode: CF64 2LL  
Country: UK

### 2. The Domain Name:

5alive.co.uk

### **3. Procedural History:**

The Complaint was received by Nominet on 4 March, 2010. Nominet checked the Complaint and validation was confirmed on 5 March, 2010. Nominet duly sent notifications of the Complaint to the Respondent, by both letter and by e-mail also on 5 March, 2010, noting that the Dispute Resolution Service had been invoked and that the Respondent had 15 days (until 26 March, 2010) to submit a Response. A Response was received from the Respondent on 26 March, 2010 and forwarded to the Complainant on 29 March, 2010 with an invitation for the Complainant to submit any Reply by 7 April, 2010. On 7 April, 2010 the Complainant submitted its Reply, which Nominet also duly copied to the Respondent that day. Nominet invited the Parties to participate in confidential Mediation to resolve the dispute. A Mediator was appointed on 7 April, 2010. Mediation commenced on 14 April, 2010 and was subsequently deemed to have failed as of 29 April, 2010. Nominet invited the Complainant to pay the fee to obtain a Full Expert Decision pursuant to paragraph 7 of the Nominet Dispute Resolution Service Policy (“the Policy”) and Paragraph 21 of the Nominet Dispute Resolution Service Procedure (“the Procedure”). The fee for a Full Decision was duly received by Nominet on 14 May, 2010.

Nominet then invited the undersigned, Keith Gymer (“the Expert”), to provide a decision on this case and, following confirmation to Nominet that the Expert knew of no reason why he could not properly accept the invitation to act in this case and 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, Nominet duly appointed the undersigned as Expert with effect from 20 May, 2010.

On 20 May, 2010 Nominet reported to the Expert that a non-standard submission had been received from the Respondent. The Expert asked Nominet to forward this submission for consideration. However, the Expert believes the submission not to be material and has not taken it into account in this Decision.

### **4. Factual Background**

The Complainant, The Coca-Cola Company, is the internationally famous soft drinks business. It has a principal website at [www.coca-cola.com](http://www.coca-cola.com) which includes a listing with information on Coca-Cola and its various other brands. One such is Five Alive, which is the name for a five fruit blended juice drink.

The Complainant owns a UK Trade Mark registration 1138915 for the mark FIVE ALIVE for non-alcoholic beverages in Class 32, dating from 16 August, 1980. That registration is subject to an express disclaimer that “*Registration of this mark shall give no rights to the exclusive use of the word ‘Five’*”. The Complainant also holds later UK Trade Mark Registration 2302695 for the mark 5 ALIVE, for corresponding goods in Class 32, and dating from 13 June 2002. This registration is not subject to any express disclaimer.

According to the minimal information available from the current Nominet WHOIS record, the Domain Name 5alive.co.uk was registered in the name of “B and

Bs.co.uk”, supposedly being a “UK Individual”, whose address was withheld on the basis that allegedly “The registrant is a non-trading individual who has opted to have their address omitted from the WHOIS service”. That registration dates from 2 August 2003.

## **5. Parties’ Contentions**

### **Complainant:**

The Complainant has asserted that:

1. The Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name (Policy Paragraph 2a(i)); and
2. The Domain Name, in the hands of the Respondent, is an Abusive Registration (Policy Paragraph 2a(ii)).

The following reproduces the allegations from the Complaint:

### **Complainant’s Rights**

The Complainant is the famous beverages company, The Coca-Cola Company. The Complainant is the owner of an extensive reputation and goodwill in the marks FIVE ALIVE and 5 ALIVE and associated marks for beverages.

FIVE ALIVE is the name of the Complainant’s well known juice drink, FIVE ALIVE. FIVE ALIVE juice drinks have been available in the UK since 1980 and are currently sold in 3 varieties in the UK: Citrus, Berry and Tropical. Further varieties are available elsewhere in the world including in Canada, Kenya, Nigeria, Northern Ireland and South Africa. [Extracts from the Complainant’s website at [www.coca-cola.com](http://www.coca-cola.com) showing the range of FIVE ALIVE beverages sold by the Complainant were annexed to the Complaint.]

The Complainant only very recently became aware of the Domain Name. This is therefore the first opportunity that it has had to file proceedings under the DRS Policy.

The Complainant owns Rights in the UK in the names FIVE ALIVE and 5 ALIVE, as defined in the DRS Policy. These Rights include trade mark registrations which are enforceable under English law.

The Complainant is the owner of the following United Kingdom registrations that consist of or contain the words FIVE ALIVE or 5 ALIVE in relation to beverages, including but not limited to:

- (A) United Kingdom Trade Mark registration no. 2302695 for 5 ALIVE in Class 32; and
- (B) United Kingdom Trade Mark registration no. 1138915 for FIVE ALIVE in Class 32.

The FIVE ALIVE mark has been used in the UK since 1980. During this time, the FIVE ALIVE and 5 ALIVE marks have earned a notable reputation both in the UK and abroad. FIVE ALIVE has become a household brand, particularly in the USA and UK. This is evidenced by the use of references to FIVE ALIVE in popular culture, including the songs “Babies of the 80s” by Something Corporate and “Couldn’t Care Less” by the Barenaked Ladies. It has also been mentioned on popular TV programmes such as “Saturday Night Live” and “American Dad”, both of which have wide international distribution. [A Wikipedia article was annexed as evidence of the international distribution and renown of FIVE ALIVE beverages.]

The Domain Name consists of 5 ALIVE and is therefore identical or highly similar to the Registrations and the Complainant’s Rights.

### **Why is the domain name an Abusive Registration?**

According to the details on the WhoIs extract, the Respondent is a UK individual. Brief internet searches conducted by the Complainant did not reveal anything further about the identity of the Respondent or its business interests.

The website at the Domain Name consists of one “parked” page. The Website does not offer any goods for sale or make any connection (legitimate or otherwise) with beverages. The Website only provides “click-through” links to other unrelated websites. The Complainant notes that these links appear to change regularly.

A search of the internet archive website [www.archive.org](http://www.archive.org) did not retrieve any data on how the Website has been used since registration. It is therefore not possible to obtain information on how the Domain Name has been used in the past.

The Domain Name was registered by the Respondent on 11 April 2004. At that time, the Complainant had been the owner of registered trade mark rights in FIVE ALIVE in the UK for 24 years and in 5 ALIVE in the UK for 2 years. It had also enjoyed extensive reputation through its use of FIVE ALIVE and 5 ALIVE since that time.

The Respondent is not a licensee of the Complainant. The Complainant has never consented to the registration or use of the Domain Name by the Respondent.

The Respondent does not have any legitimate interest in the Domain Name, particularly given that FIVE ALIVE is a well-known brand in relation to beverages and a distinctive mark registered and used exclusively by the Complainant.

Given that the Domain Name was registered in the face of the Complainant’s extensive rights in FIVE ALIVE and 5 ALIVE through use and registration, the only reasonable interpretation is that the Respondent

registered the Domain Name with the Complainant in mind and with the intention of capitalising on the Complainant's goodwill.

As referred to above, the Website consists of a parked page, that is to say it provides links through to various unrelated websites. In the time that the Complainant reviewed the Website the links included a "goldfish swallowing" and "married women wanting to date" site. The first website contained videos and images of sometimes provocatively dressed women swallowing various live aquatic creatures. The second website was not accessible by the Complainant's advisors as a result of it being blocked due to its adult and explicit nature. Linking these types of websites to the Domain Name will undoubtedly harm the reputation of the Complainant's FIVE ALIVE and 5 ALIVE marks, particularly given that its juice beverages are aimed at parents for their children. The provision of such links at the Domain Name is therefore unfairly detrimental to the Complainant and its FIVE ALIVE products.

Given the Complainant's well-known trade marks FIVE ALIVE and 5 ALIVE for beverages, it is impossible to conceive of any good faith use of the Domain Name by the Respondent.

The Complainant submits that:

- (A) any goods or services sold by the Respondent from the Domain Name (or otherwise) under the name FIVE ALIVE would mistakenly be linked by consumers with the Complainant; and
- (B) the Complainant's customers seeking information on the Complainant's FIVE ALIVE beverages in the UK would be diverted away from the Complainant, such that its legitimate business would be unfairly disrupted.

The Website is parked and therefore does not make (and apparently has not made during the six years since registration):

- (A) a genuine offering of goods or services; or
- (B) legitimate non-commercial or fair use of the Domain Name.

Previous DRS decisions have held that it is sufficient for a "parked" page to constitute an Abusive Registration. For example, in *Page the Packers -v- www.wight-holiday-hotels.co.uk* (DRS case no. 3273), the Independent Expert commented that:

"In this case, there is no evidence of any use by the Complainant of the Domain Name and there is no allegation that the Respondent has sought to sell it to the Complainant for a sum in excess of its documented out-of-pocket costs. It is accordingly a purely "passive holding". Nevertheless, I am of the view that the Respondent can have had no legitimate purpose in registering the Domain Name and that it is, as the Complainant alleges, a blocking registration against a business competitor."

Similarly, the only reasonable inference that can be made from the lack of content on the Website is that it was set up by the Respondent without a legitimate purpose and with the sole intention of diverting attention away from the Complainant and/or unfairly disrupting its legitimate business.

Under clause 3(a)(iv) of the Policy, it is evidence of an Abusive Registration if it is independently verified that the Respondent has given false contact details to Nominet. The registrant of the Domain Name is listed as a UK individual on the WhoIs database. However, the name provided for the registrant is “B and Bs.co.uk” which is clearly not the name of a UK individual. It is unclear whether the Respondent’s name is entirely fanciful or whether it is related to the domain name <BandBs.co.uk>. “B and Bs.co.uk” is not a UK individual and therefore Nominet has been provided with false registration details which amounts to an Abusive Registration.

In summary, the Complainant submits that, at the time that the Domain Name was registered, it is without doubt that the Respondent:

- (A) knew of the Complainant’s business and its FIVE ALIVE/5 ALIVE beverages;
- (B) registered or otherwise acquired the Domain Name 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; and
- (C) provided false registration details to Nominet.

Consequently, this registration amounts to an Abusive Registration as defined in the Policy.

#### **How would you like this complaint to be resolved?**

Transfer.

#### **Respondent:**

The Respondent submitted a brief online Response, which appeared to incorporate observations from an unidentified “rep[resentative]” on his behalf. Edited points from this Response are reproduced below:

#### **Why should the complaint not succeed?**

They suggest that it has only come to their knowledge although the name was registered 6 years ago. So I find it a bit weird that they have only just got around to it.

Here are their trade marks for 5alive

<http://www.ipo.gov.uk/domestic?domesticnum=2302695> coca cola register 2002

There is also another trademark for other people namely

<http://www.ipo.gov.uk/domestic?domesticnum=2410276> which was only registered in 2006 and for classes 09, 16, 25, 26, 28, 41

coca cola obviously had no objection that stopped it going through

coca cola’s trade mark is for “5 alive” with space and in lower case.

Therefore if it is so important why have they not registered 5-alive.co.uk

No match for "5-alive.co.uk".  
This domain name has not been registered.  
WHOIS lookup made at 12:12:06 10-Mar-2010

My thought is it the lawyers creating fees.

And 5alive.com was not registered until 2005 and not to coca cola. This I find a little strange.

Domain: 5alive.com  
Date Registered: 10/30/05  
Date Modified: 01/15/10  
Expiry Date: 10/30/10  
DNS1: ns1.above.com  
DNS2: ns2.above.com  
Registrant  
Cayman Ninety Business  
Domain Administrator  
P.O. Box 522  
West Bay, Grand Cayman (KY)  
GT

They say in their complaint that it points to a parked page that lists unrelated web-sites.

They suggest that a parked page is not a legitimate use of the name but DRS results proves otherwise.

There was nothing in the advertising that related to the product in their complaint or to the company itself. It is a generic term and as such could be used for any amount of things as the other trademark proves.

When I registered 5alive my idea is to create a sports site as I owned 5aside.com and if googled there is 5alivesoccercentre.com I wish to keep this name.

### **Complainant's Reply:**

The Complainant provided various observations in reply to the questions raised in the Response. Edited extracts follow below:

#### **Time lapse in filing proceedings**

The Respondent queries the Complainant's knowledge of the Domain Name given that it was registered six years ago. The Complainant only very recently become aware of the Domain Name during a review of its rights in, and online presence of, the FIVE ALIVE mark. This review was conducted as part of a new marketing campaign for FIVE ALIVE beverages, the first in five years. Annex 1 is an article from Marketing Magazine dated

March 2010 that discusses the new campaign. This is therefore the first opportunity that the Complainant has had to file these DRS proceedings.

### **Trade mark registration for 5 ALIVE identified by the Respondent**

The Respondent claims that the Complainant did not object to United Kingdom Trade Mark registration no. 2410276 in Classes 9, 16, 25, 26, 28 and 41 for a 5alive figurative mark. The above mark is highly stylised and is very different to the Complainant's get-up and imagery for its FIVE ALIVE beverages. It is also registered for non-beverage related goods that are not of concern to the Complainant. The fact that the Complainant did not oppose UK registration no. 2410276 therefore cannot be seen as an admission that the Complainant has tolerated the use or registration of any mark that is confusingly similar to the 5 ALIVE or FIVE ALIVE marks in which it has registered rights.

### **Other 5alive and 5-alive domain names**

The Respondent queries why the Complainant has not registered the domain names 5alive.com or 5-alive.co.uk. The Complainant submits that its selection of domain names to register is irrelevant to these DRS proceedings but notes that:

(A) the Complainant's trade marks are 5 ALIVE and FIVE ALIVE and it therefore has no need to register the domain name 5-alive.co.uk; and  
(B) the 5alive.com domain name is in a different domain space to the .co.uk domain space and is therefore irrelevant.

### **Parked pages**

The Respondent suggests that a "parked" page is a legitimate use of a domain name, but does not provide any DRS case law to support its position. The Complainant refers to the case law and submissions in the Complaint which supports the position that it is sufficient for a parked page to be an Abusive Registration.

### **The Respondent's choice of Domain Name**

The Respondent claims that the Domain Name was registered with the intention of creating a "sports site". The Respondent refers to the domain 5alivesoccercentre.com as evidence in support of this intention. The WhoIs record for the domain name 5alivesoccercentre.com shows that it is registered to "5 Alive Soccer Centre Limited". This is not the Respondent and no explanation is given as to the relationship between 5 Alive Soccer Centre Limited and the Respondent. Therefore, the website at 5alivesoccercentre.com cannot be allowed as evidence of the Respondent's intention for the website at 5alive.co.uk at the time of registration.

Even if it was the Respondent's intention to create a "sports site" (which is not admitted), the Respondent has had six years in which to establish a website at the Domain Name, but it has failed to do so. The Respondent's failure to take any action at all to establish such a website, indicates that this was not the Respondent's sole intention at the time of registration.

The only reasonable inference that can be made from the lack of use of the Domain Name during this time, is that it was set up without any legitimate

purpose. Instead, the Respondent intended to divert consumers away from the Complainant, unfairly disrupting its legitimate business, and to block registration of a mark in which the Complainant has rights.

## **6. Discussions and Findings**

### **General**

Paragraph 2 of the Policy requires that, for the Complainant to succeed, it must prove to the Expert, on the balance of probabilities, both that it has Rights in respect of a name or mark which is identical or similar to the Domain Name; and 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 Complainant in this case has asserted that it has Rights in the 5 ALIVE trademark and that this mark should be considered similar to the Domain Name because the Domain Name consists of 5 ALIVE. The Respondent has pointed out that the Complainant's rights are for 5 ALIVE rather than 5ALIVE. It is well known that spaces are not allowed in domain names, and that, consequently, spaces are often simply ignored or replaced by a hyphen (-) or an underscore (\_) in transcribing word marks into domain names. The presence or absence of a space in the Complainant's registered trade marks is immaterial in the present context, as is the domain extension ".co.uk" in the Domain Name. The Domain Name incorporates the Complainant's mark and will be read and pronounced as FIVE ALIVE dot CO dot UK.

The Expert therefore accepts that the Complainant has relevant Rights in 5 ALIVE, and that 5 ALIVE is highly similar if not practically identical to the Domain Name at issue, in accordance with Paragraph 2.a.i of the Policy.

### **Abusive Registration**

The Complainant also has to show that the Domain Name is an Abusive Registration. Paragraph 1 of the Policy defines "Abusive Registration" as a Domain Name which either:

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; OR

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

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

From the Complainant's submissions and supporting evidence, it is clear that at least the following examples are potentially applicable in this case:

3a. A non-exhaustive list of factors which may be evidence that the Domain Name is an Abusive Registration is as follows:

- i. Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily:
  - A. 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;
  - B. as a blocking registration against a name or mark in which the Complainant has Rights; or
  - C. for the purpose of unfairly disrupting the business of the Complainant;
  
- ii. Circumstances indicating that the Respondent is using or threatening to use the Domain Name in a way which has confused or is likely to confuse people or businesses into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant;
  
- ...
- iv. It is independently verified that the Respondent has given false contact details to us; or
  
- ...
- b. Failure on the Respondent's part to use the Domain Name for the purposes of email or a web site is not in itself evidence that the Domain Name is an Abusive Registration.

The factors listed in Paragraph 3 of the Policy are only intended to be exemplary and indicative. They are not definitive. It is Paragraph 1 of the Policy, which provides the applicable definition as indicated above.

Additionally, Paragraph 4 of the Policy provides observations on "How the Respondent may demonstrate in its response that the Domain Name is not an Abusive Registration", of which the following may be considered pertinent to the present Complaint:

- 4d. Trading in domain names for profit, and holding a large portfolio of domain names, are of themselves lawful activities. The Expert will review each case on its merits.
  
- e. Sale of traffic (i.e. connecting domain names to parking pages and earning click-per-view revenue) is not of itself objectionable under the Policy. However, the Expert will take into account:
  - i. the nature of the Domain Name;

- ii. the nature of the advertising links on any parking page associated with the Domain Name; and
- iii. that the use of the Domain Name is ultimately the Respondent's responsibility.

The Expert has found it difficult to reach a Decision in this dispute, principally as a consequence of the time that has elapsed between the original registration of the Domain Name on 11 April, 2004 and the submission of the DRS Complaint, very nearly six years later, on 4 March, 2010.

The Complainant opines that it allegedly has "only very recently become aware of the Domain Name", and that this is supposedly "the first opportunity that the Complainant has had to file these DRS Proceedings." At the same time, the Complainant argues that the fact that the Respondent "has had six years in which to establish a website at the Domain Name, but it has failed to do so" should be accepted as evidence of the Respondent's bad faith.

It seems to the Expert that if he is to accept that it is reasonable for the Complainant to take six years to decide to bring a Complaint, it cannot conversely be unreasonable for the Respondent to take the same time to establish a website. Clearly, neither task has been seen as a priority by the party concerned.

Furthermore, the Policy does not require a registrant to establish a website and, as indicated by Paragraph 4e, use of parking pages is not automatically objectionable. A Domain Name may be used simply for email purposes, for example, but no evidence is provided as to whether or not this is the case for the Domain Name at issue.

Indeed, in the Expert's view, the evidence in this dispute is also deficient and not most appropriate to support the Complainant's contentions in particular.

The Complainant claims to have an "extensive reputation and goodwill" in the marks FIVE ALIVE and 5 ALIVE for beverages, but only provides a page from its own website showing images of currently available FIVE ALIVE drinks, and a copy of a Wikipedia article in support. There is no information on the volumes and values of sales and, most relevantly, no information as to how the mark was used and the extent of recognition in 2004 when the Domain Name was registered and when the Complainant claims the Respondent knew of the Complainant's business. Wikipedia articles can be changed by almost anyone, and so cannot be given much weight in the absence of verification from other sources. Interestingly also, when the Expert sought to check the Complainant's FIVE ALIVE webpage, it had been changed from that submitted with the Complaint. References to FIVE ALIVE had been replaced by 5 ALIVE in the descriptions of the various different blended drinks.

As far as the evidence now shows, the Respondent does have a parking page, which might be considered to be a skeletal website in any event, and which has various – and reportedly variable – links to other websites. Significantly, none of the links relates to the Complainant, nor to any of its FIVE ALIVE or 5 ALIVE products. In the Expert's view, no visitor to that webpage is going to think that it has any connection whatsoever with the Complainant.

The Respondent has pointed out that there are other domain names, which the Complainant could have sought to register incorporating 5 ALIVE – e.g. 5alive.com – but that it does not appear to have registered any other such combination before bringing the present Complaint. The Respondent has also noted the existence of a third party registration for “5 alive” in a trade mark logo, and by another party in the domain name “5alivesoccercentre.com”.

The Respondent additionally claimed that he intended to create a sports site, as he also owned 5aside.com. However, he provided no evidence to support that contention and the Expert therefore regards that claim with due scepticism.

The Complainant argues that its previous selection (or perhaps more accurately non-selection) of domain names to register is irrelevant and that the existence of the 5alivesoccercentre.com website is not evidence of the Respondent’s alleged intentions with respect to 5alive.co.uk.

However, in the Expert’s view, the fact that there are plainly other users of 5ALIVE out there, both in trade marks and in domain names, does suggest that perhaps the Complainant’s own rights and reputation in 5 ALIVE are not quite so extensive and well-recognised as it seeks to assert. Verbally, the mark FIVE ALIVE or 5 ALIVE is simply two ordinary words with an attractive rhyme, which could be – and apparently is – used without conflict by others.

The Expert also finds it hard to credit that in an international organisation as large as the Complainant, there was apparently no-one monitoring the use and registration of domain names incorporating the company’s trade marks – like 5 ALIVE and FIVE ALIVE – until now – just when there is reportedly a new 5 ALIVE marketing campaign to be launched.

Rather, it seems more likely that the Complainant may previously have had a policy not to bother with domain names other than those incorporating the house mark “Coca-Cola”, and so has passively tolerated registration and use of domain names, like 5alive.co.uk, which might incorporate such a subsidiary brand.

And now, six years on, the Complainant has perhaps had a change of mind, found that 5alive.com which, as the Respondent suggests, might reasonably have been expected to be the Complainant’s first choice for an international brand, has been taken by another party in the Cayman Islands, and decided to go after 5alive.co.uk instead. Perhaps the prospects of success under the DRS are perceived as greater than under the UDRP?

If a later registered trade mark has co-existed in use with an earlier, potentially conflicting registration for five years, then in general the owner of the earlier right will no longer be able to challenge the later one. There is no express equivalent provision in the Policy in relation to domain names. However, the Expert believes that in situations like this, where there has been such a long delay between the registration of the Domain Name and the initiation of the Complaint, there has to be evidence beyond mere assertion to justify the claim that this is an Abusive Registration.

In 2004, when the Domain Name was registered, the Complainant had a trade mark registration for 5 ALIVE. It had Rights, but its lack of interest and concern about the Domain Name then, and for nearly six years since, makes it difficult now to accept that registration then took unfair advantage of or was unfairly detrimental to those Rights.

The Complainant's case that the Domain Name may have subsequently been used in a manner, which took unfair advantage of or was unfairly detrimental to the Complainant's Rights, may perhaps appear somewhat stronger. The Complainant says that the Respondent intended to divert customers away from the Complainant, to unfairly disrupt its business and to block registration of a mark in which the Complainant has rights.

However, as the Domain Name is being used now and at the time of the Complaint, there is no obvious attempt to trade off any association with the Complainant's business. There is also a distinct lack of any evidence of what use may have been made over the preceding six years or of why the Complainant would not have been concerned any sooner at the supposed diversion of its customers. If the Respondent had also registered 5-alive.co.uk and/or other variations like 5\_alive.co.uk and fivealive.co.uk and five-alive.co.uk and five\_alive.co.uk, the argument for intent to block would be more convincing, but there is no evidence before the Expert of any systematic pattern of suspect registrations by the Respondent, and again the Complainant's lack of concern for nearly six years rather suggests that the Domain Name was in reality no more blocking than an overgrown hedgerow on a footpath at the side of the main road the Complainant was using to conduct its business.

The Expert notes that the parking pages put in evidence do include the statement "Buy this domain - The domain 5alive.co.uk may be for sale by its owner!". However, the Complainant has not otherwise provided any evidence that the Respondent registered the name with the object of selling it to the Complainant or a competitor for any excessive consideration.

The Complainant has also argued that the Domain Name should be considered an Abusive Registration because the Respondent has given false details to Nominet.

The Expert has considerable sympathy with this submission. The nominal registrant is "B and Bs.co.uk", which is supposedly a "UK Individual", who has also opted to have his address omitted from the WHOIS service on the basis that he is allegedly a "non-trading individual". In the Expert's experience, the use of an alias instead of a real name and the concealment of a contact address on the basis that the registrant is allegedly a "non-trading individual" is indeed a potential indicator for an Abusive Registration. The Expert considers it to be highly unsatisfactory that Nominet does not impose stricter conditions on the proper identification of supposedly "Individual" and "non-trading" registrants seeking to exploit the opportunity to conceal any contact details in this way. It would seem perfectly reasonable for Nominet to require evidence to verify an individual's identity (e.g. copy – which could be certified - of passport or driving licence, and to have a registrant seeking to opt-out sign an undertaking that they will not be making any monetisation from the Domain Name. Monetised click-through links, as typically

operated by domainers, do clearly amount to “trading”, and should disqualify a registrant from the opt-out.

Somewhat to the Expert’s surprise, the Complainant does not seem to have investigated further the potential connection between the purported registrant “B and Bs.co.uk”, a corresponding domain name like bandbs.co.uk, and Mr Leahy (who is apparently the real person behind the nominal registrant) and any other domain names he may be holding.

However, as Nominet itself does not appear to have established any standards for true or false identification of a “UK Individual” or his alleged “non-trading” status, and as it is possible that the nominal registrant may have adopted the name “B and Bs.co.uk” (e.g. by deed poll) and the Complainant has not provided evidence of the false identity or of actual trading under the Domain Name, the Expert holds, not without regret, that he cannot conclude that the Domain Name is an Abusive Registration on the grounds specified in Paragraph 3a(iv) of the Policy.

Overall, therefore, for the reasons explained above, and principally because of the time lapse before these proceedings, the Expert is unable to hold that the Domain Name is an Abusive Registration. Had the proceedings been brought closer to the date of registration the balance may easily have been tilted the other way, but at this late remove, the Expert considers that the balance favours the status quo.

Accordingly, the Expert concludes the Domain Name in the hands of the nominal Respondent is not an Abusive Registration.

## **7. Decision**

Having concluded that the Complainant does have Rights in respect of a name or mark, which is similar to each of the Domain Names, but that it has not proven that the Domain Name, in the hands of the Respondent, is an Abusive Registration, the Expert determines that no action should be taken in respect of the Domain Name 5alive.co.uk and the Complaint is therefore dismissed.

**Signed Keith Gymer**

**Dated: 10 June, 2010**