

**Nominet UK Dispute Resolution Service**

**DRS 08398**

**Kevin Keatley Ltd.**

and

**Janatha Carden**

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**Decision of Independent Expert**

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**1 Parties**

Complainant: Kevin Keatley Ltd.  
(Trading as Wildlife Watching Supplies)

Address: Tiverton Way  
Tiverton Business Park  
Tiverton  
Devon

Postcode: EX16 6TG

Country: United Kingdom

Respondent: Janatha Carden

Address: Stealth Wildlife Ltd  
The Close, Cinnamon Lane North  
Fearnhead  
Warrington  
Cheshire

Postcode: WA2 0AH

Country: United Kingdom

## **2 Domain Names**

<wildlifewatchingsuppliesuk.co.uk>  
<ukwildlifewatchingsupplies.co.uk>

## **3 Procedural History**

- 3.1 On 17 March 2010 the complaint was received by Nominet, which checked that it complied with the Nominet UK DRS Policy (“the Policy”) and DRS Procedure (“the Procedure”). Nominet notified the respondent on 18 March 2010. The respondent responded on 12 April 2010, and the complainant replied on 16 April. The matter was not resolved in mediation. The complainant requested referral of the matter for expert decision under the Procedure, and on 7 May 2010 paid the applicable fee.
- 3.2 I was appointed as expert on 13 May 2010. I have made the necessary declaration of impartiality and independence.

## **4 Factual background**

- 4.1 The complainant has been trading since the 1990s. Its business is designing, manufacturing and selling products associated with observing and photographing wildlife.
- 4.2 The respondent registered the domain names on 21 December 2009 and 10 February 2010.

## **5 Parties’ Contentions**

### *Complainant*

- 5.1 The complainant argues that it has traded for many years. In support of that it has produced a price list from 1994. It says it has invested in promoting its products through advertising and through websites at <wildlifewatchingsupplies.co.uk> and <wildlifewatchingsupplies.com>, domains registered in 2000 and 2001. It says it is regularly referred to in articles in the media and online by its trading name “Wildlife Watching Supplies”.
- 5.2 The complainant argues that the text and style that has been used on a website associated with the domain names is very similar to that used on its own website. In support of that it has produced a screenshot it says was taken on 17 March 2010, which shows the words “Wildlifewatching Supplies UK” prominently at the top of the page.
- 5.3 The complainant argues that the domain names have confused people looking for its own website. It refers to the screenshot, saying the confusion has been compounded by the fact that the website associated with the domain names appears to say that “Wildlife Watching Supplies UK” is in association with Stealth Wildlife.

- 5.4 According to the complainant there are other ways of describing the business both parties are involved in. The complainant says it has and has had many competitors in the nature watching, bird watching and photography supplies market which have not traded using the phrase "Wildlife Watching Supplies".
- 5.5 The complainant believes the respondent has been using its name and reputation intentionally to disrupt its business and attract users to Stealth Wildlife Ltd's site.
- 5.6 Finally, the complainant says the respondent offered to sell it the domain names after receiving a letter from its solicitors.

#### *Respondent*

- 5.7 The respondent says Stealth Wildlife Ltd. also designs, manufactures and supplies wildlife watching supplies for the wildlife watching market. The words "wildlife watching supplies" are simply descriptive of that business; there is no other way of describing it. The domain names simply describe the respondent's business and indicate that it is based in the UK.
- 5.8 The respondent argues that it has been quite clear from looking at the respondent's websites that they are run by Stealth Wildlife Ltd. There can be no confusion.
- 5.9 The respondent says that, since the complainant's solicitor wrote, the websites associated with the domain names have been "turned off".
- 5.10 Finally, in her response the respondent mentions that the use of the domain names is an exercise of freedom of speech.

## **6 Discussion and Findings**

#### *General*

- 6.1 Under paragraph 2(a) of the Policy a complainant must show on the balance of probabilities 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.

#### *Rights*

- 6.2 Rights are defined in the Policy as rights enforceable by the complainant, whether under English law or otherwise.
- 6.3 The complainant has produced evidence that it has been trading under the name "Wildlife Watching Supplies" since the 1990s. The complainant has also said, and it is not disputed, that in 2000 and 2001 it registered the domains

<wildlifewatchingsupplies.co.uk> and <wildlifewatchingsupplies.com>, which it continues to use.

- 6.4 At the third level (i.e. disregarding “.co.uk”), the dominant element of the domain names is the three-word phrase used by the complainant as its trading name and in its domains.
- 6.5 In my view, the inclusion in the domain names (at either the beginning or the end) of the additional letters “uk”, which can clearly be interpreted as having geographical significance, does not make them dissimilar to the complainant’s trading name and domains.
- 6.6 In those circumstances I am satisfied that the complainant has rights in respect of a name which is similar to the domain names.

#### *Abusive Registration*

- 6.7 Under paragraph 1 of the Policy, abusive registration means 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.

This definition obviously covers both the time of registration, and later use.

- 6.8 Under paragraph 3(a)(i)(A) of the Policy, it may be evidence of abusive registration if there are circumstances indicating that the respondent has registered or otherwise acquired the domain name primarily for the purposes of selling, renting or otherwise transferring it to the complainant for valuable consideration in excess of the costs directly associated with acquiring or using it.
- 6.9 But deciding to sell a domain name after registration, even for profit, is not in itself abusive use. The respondent’s husband’s offer to sell following contact from the complainant’s solicitors does not in itself show the respondent intended at the time of registration to sell the domain names to the complainant, or that sale was her primary purpose.
- 6.10 Under paragraph 3(a)(ii) of the Policy, circumstances indicating that the respondent is using the domain name in a way which has confused or is likely to confuse people into believing it is connected with the complainant may be evidence of abusive registration.
- 6.11 Given that the domain name is so similar to the complainant’s trading name and domains, I am satisfied that initial interest confusion has been likely between the domain name and the complainant. Any confusion would in my view be likely to have been compounded by the fact that the domain name has been used for a website advertising products similar to the complainant’s. Even had it been

immediately made clear to visitors that the domain names are in no way connected with the complainant (and it isn't obvious that it was, going by the uncontested screenshot produced by the complainant) the potential for confusion would not in my view be mitigated.

- 6.12 In my view therefore, there is a prima facie case that the domain name has been used in a manner which took unfair advantage of the complainant's rights.
- 6.13 It is of course for the complainant to make good its case. However, since I have concluded that a prima facie case has been established, I will now consider what if any answer the respondent has.
- 6.14 Under paragraph 4(a)(i)(c) of the Policy it may be evidence against abusive registration if, before being aware of the complainant's cause for complaint, the respondent has made legitimate non-commercial or fair use of the domain name.
- 6.15 However it is not clear from the evidence that the respondent was unaware of the complainant, its name or its domains before registering or using the domain names. The respondent does not say so.
- 6.16 Under paragraph 4(a)(ii) of the Policy it may be evidence against abusive registration if the domain name is generic or descriptive and the respondent is making fair use of it.
- 6.17 The phrase "wildlife watching supplies" is arguably descriptive of the respondent's business. However even if that is accepted, it does not automatically follow that the respondent's use of it in the domain names was fair.
- 6.18 The respondent has argued that there is no other way of describing Stealth Wildlife's business, but I am not persuaded. In my view at least some choice was and is available from a range of possible terms capable of describing the business. The respondent has not explicitly argued that the choice of these domain names was made independently of or without knowledge of the complainant's trading name and domains, and on the evidence I am not satisfied that it was.
- 6.19 Finally, the fact that websites associated with the domain names have now been "turned off" makes no difference. It is enough for a finding of abuse that the domain name has been used unfairly.
- 6.20 For the reasons I have given I am satisfied on the balance of probabilities that each of the domain names, in the hands of the respondent, is an abusive registration.
- 6.21 In arriving at that conclusion I have considered the issue of free speech raised by the respondent. Freedom of expression is not an unqualified right, but must be balanced against the complainant's rights. Taking that into account, in my view a finding of abusive registration and transfer of the domain names to the complainant is in the circumstances of the case both justified and proportionate.

## **7 Decision**

- 7.1 I find that the complainant has rights in a name which is similar to the domain names; and that each of the domain names, in the hands of the respondent, is an abusive registration.
- 7.2 The complaint is upheld. I direct that the domain names be transferred to the complainant.

Carl Gardner

3 June 2010