

**DISPUTE RESOLUTION SERVICE**

**D00015614**

**Decision of Independent Expert**

Edward James Associates Ltd t/a Tickling Trout

and

IT Solutions

**1. The Parties:**

Lead Complainant: Edward James Associates Ltd t/a Tickling Trout  
Edward James Associates Ltd  
Amphion House  
Picket Piece  
Andover  
Hampshire  
SP11 6LU  
United Kingdom

Complainant: Wiltshire Grain  
Rollestone Crossroads,  
Shrewton  
Wiltshire  
SP3 4DS  
United Kingdom

Respondent: IT Solutions  
42 Firs Road, Firsdown  
Salisbury  
Wiltshire  
SP5 1SL  
United Kingdom

**2. The Domain Name:**

wiltshiregrain.co.uk

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

I confirm that I am independent of each of the parties. To the best of my knowledge and belief, there are no facts or circumstances, past or present, or that could arise in the foreseeable future, that need be disclosed as they might be of such a nature as to call in to question my independence in the eyes of one or both of the parties.

10 March 2015 17:18 Dispute received  
11 March 2015 09:01 Complaint validated  
11 March 2015 09:07 Notification of complaint sent to parties  
30 March 2015 02:30 Response reminder sent  
02 April 2015 09:01 No Response Received  
02 April 2015 09:02 Notification of no response sent to parties  
16 April 2015 02:30 Summary/full fee reminder sent  
16 April 2015 13:03 Expert decision payment received

The Complaint was filed in the name of Edward James Associates Ltd of Amphion House, Picket Piece, Andover, Hampshire SP11 6LU, but it is apparent that it is merely acting as a representative of the Additional Complainant Wiltshire Grain. Accordingly, I treat Wiltshire Grain as the Complainant.

Emails to the email address of the Respondent have been notified undeliverable and letters to the Respondent's address have been returned marked "Gone Away". I am satisfied however that Nominet fulfilled its obligations under the DRS Procedure to attempt to serve the Respondent with the Complaint by available means and that it is therefore deemed to have been served.

### **4. Factual Background**

The following are the facts appearing from the Complainant's submissions which I find to be proven and which are the basis for my decision:

- i. The Complainant had a website set up using the Domain Name some four years ago.
- ii. It used the Respondent's services in an agency capacity to achieve this.
- iii. The Complainant terminated the relationship with the Respondent for its services in 2013.

### **5. Parties' Contentions**

The Complainant has submitted as follows:

- i. The Respondent acted as an agent for the Complainant when registering the Domain Name and establishing the Complainant's website using the Domain Name.

- ii. The Respondent agrees that the details of the Domain Name registration were handed over to the Complainant two years ago and that he has no interest in the Domain Name.
- iii. The Complainant has sought to contact the Respondent in order to ensure that there would be no interruption when the Domain Name expires in July 2015.
- iv. The Respondent has failed to respond to the Complainant's requests for transfer of the Domain Name to the Lead Complainant, which is the current supplier to the Complainant.
- v. The registration of the Domain Name in the Respondent's name was fair, but has become unfair following the Complainant's decision to terminate its relationship with the Respondent in 2013 in the light of the Respondent's refusal to transfer the Domain Name to the Complainant.

The Respondent failed to file any Response.

## **6. Discussions and Findings**

Any complainant in the Nominet DRS procedure must prove, on the balance of probabilities, that he has Rights and that the respondent's registration or continued registration of a domain name, is an "Abusive Registration". I shall look at both of these concepts in order.

### ***Rights***

"Rights" are defined in the DRS Policy as "*rights enforceable by the Complainant, whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning*".

Under paragraph 2(a) of the DRS Policy, a complainant must show that it "*has Rights in respect of a name or mark which is identical or similar to the Domain Name*".

The Complainant has not submitted any evidence of formal entitlement to trade mark rights, such as certificates demonstrating the ownership of a trade mark in a name or mark similar to or identical with the Domain Name. Moreover, the Complainant has provided no evidence of any other sorts of rights such as might constitute Rights for the purposes of the DRS Policy: these other rights could be found in the marketing materials of the Complainant's business name which might go to demonstrate goodwill such as would be the basis for an action in passing off.

In fact, despite the guidance given by Nominet as to the presentation of a Complaint under the DRS Policy, the Complainant has not provided any information as to who or what it is, what its business is or what use has been made of the website at the Domain Name. The Complainant has provided no evidence whatsoever of any Rights of any sort. I assume the Complainant is some sort of federation of grain farmers or traders operating in the Wiltshire region. I could further assume that the Complainant indeed does some form of marketing

such as would demonstrate some sort of goodwill or other informal rights which would constitute Rights under the DRS Policy.

However, my function is not to make assumptions or conduct private research, but simply to review the evidence submitted by the parties or, in this case, just the Complainant, to assess whether that evidence, on the balance of probabilities, shows an entitlement to Rights under the DRS Policy.

The Experts Overview<sup>1</sup> states at paragraph 2.2,

*“As indicated above, the relevant right has to be an enforceable right (i.e. a legally enforceable right). Bare assertions will rarely suffice. The Expert needs to be persuaded on the balance of probabilities that relevant rights exist. The Expert will not expect the same volume of evidence as might be required by a court to establish goodwill or reputation, but the less straightforward the claim, the more evidence the better (within reason – this is not an invitation to throw in the ‘kitchen sink’).*

...

*If the right is an unregistered trade mark right, evidence needs to be put before the Expert to demonstrate the existence of the right. This will ordinarily include evidence to show that (a) the Complainant has used the name or mark in question for a not insignificant period and to a not insignificant degree (e.g. by way of sales figures, company accounts etc) and (b) the name or mark in question is recognised by the purchasing trade/public as indicating the goods or services of the Complainant (e.g. by way of advertisements and advertising and promotional expenditure, correspondence/orders/invoices from third parties and third party editorial matter such as press cuttings and search engine results).”*

While Decisions under the DRS Policy show that the entitlement to Rights is a relatively low threshold to cross, I have concluded in this case that the Complainant has failed to 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”.

### ***Abusive Registration***

Having found that the Complainant has failed to establish any Rights, it is not strictly necessary (or indeed possible) for me to consider whether the Respondent’s registration or holding of the Domain Name is an Abusive Registration. I will for completeness, however, consider the point.

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<sup>1</sup> <sup>1</sup> The Experts Overview is a document put together by Nominet’s panel of Experts which deals with a range of issues which frequently come up for decision in DRS Policy disputes. It can be found on Nominet’s website in its current version, from which I have quoted, at [http://www.nominet.org.uk/sites/default/files/drs\\_expert\\_overview.pdf](http://www.nominet.org.uk/sites/default/files/drs_expert_overview.pdf)

The Complainant has again provided very little information or evidence to support its contentions. From the little information provided, what appears to have happened is that the Complainant retained the Respondent's services to register the Domain Name and to create a website using that Domain Name. The arrangement might well have been an informal one, but there appears to have been no objection at the time to the Respondent registering the Domain Name in its own name rather than in that of the Complainant.

For reasons not disclosed in the evidence, the Complainant decided to terminate the Respondent's services in 2013. The Complainant says that it has requested the transfer of the Domain Name to the Lead Complainant, but that there has been no response. There is no evidence, in the form of correspondence, of these requests made to the Respondent, or of any responses received from the Respondent. The Respondent has not responded to this Complaint and a letter addressed to it was returned marked "gone away". Whether the Complainant was able to speak or otherwise communicate with the Respondent is unclear. From what the Complainant says, there appears to be no contention about the Complainant's entitlement to transfer of the Domain Name, it is simply the case that the Respondent has not done so and the Complainant fears that it will not, at least in time to renew the Domain Name in July 2015.

Assuming that everything the Complainant says is correct, this may well be a case falling within paragraph 3(a)(v) of the DRS Policy, in that the Domain Name was registered as a result of a relationship between the Complainant and the Respondent. However, the Complainant has not provided any evidence (or even made any assertion) as to the fulfilment of the condition set out in paragraph 3(a)(v)(B) (that the Complainant paid for the registration or renewal of the Domain Name). If the Complainant had provided evidence to support these contentions, I would have decided that this was an Abusive Registration and that the Domain Name should be transferred.

However, with the Complainant not having made good its entitlement to Rights, and not having provided any evidence to support its contentions as to there being an Abusive Registration, this is academic. In the absence of supporting evidence, I would not have found that this was an Abusive Registration.

## **7. Decision**

My decision is as follows:

1. The Complainant has not shown that it has Rights in respect of a name or mark which is identical or similar to the Domain Name;
2. The Complaint in respect of the Domain Name therefore fails and I direct that no action be taken in relation to the Domain Name.

**Signed: Richard Stephens    Dated: 5 May 2015**