

DISPUTE RESOLUTION SERVICE

D00015800

Decision of Independent Expert

24hr Aquaflow Services Limited

and

Mr James Bennett

1. The Parties:

Complainant: 24hr Aquaflow Services Limited
298 Ongar Road
Writtle
Essex
CM1 3NZ
United Kingdom

Respondent: Mr James Bennett
11 Glenfield Close
Luton
Beds
LU3 2HZ
United Kingdom

2. The Domain Name(s):

24hraquaflow.co.uk

3. Procedural History:

I can 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.

15 April 2015 11:03 Dispute received

15 April 2015 13:37	Complaint validated
15 April 2015 13:50	Notification of complaint sent to parties
20 April 2015 08:59	Response received
20 April 2015 09:00	Notification of response sent to parties
21 April 2015 15:28	Reply received
21 April 2015 15:32	Notification of reply sent to parties
21 April 2015 15:32	Mediator appointed
24 April 2015 12:11	Mediation started
13 May 2015 11:38	Mediation failed
13 May 2015 11:38	Close of mediation documents sent
18 May 2015 10:27	Expert decision payment received

4. Factual Background

The Respondent was employed by the Complainant as its IT Manager, initially on a contract basis and then as an employee. As part of his duties as the Complainant's IT Manager, the Respondent registered the Domain Name in 2012 and it has been used since then by the Complainant for its email accounts.

The Respondent's employment with the Complainant was terminated in March 2015. The Complainant then discovered that the Domain Name had been registered by the Respondent in his personal name and that the Complainant's email accounts that used the Domain Name were also controlled by the Respondent.

The Respondent says that he is owed outstanding salary and that he has paid for the Domain Name and its associated email accounts from his personal bank account ever since it was registered and he wishes to recharge those costs to the Complainant. He will only transfer the registration of the Domain Name to the Complainant once he has been paid.

5. Parties' Contentions

Complainant's Complaint

In summary, in its complaint the Complainant stated as follows:

- The Complainant should have ownership of the Domain Name, as its registration under the ownership of the Respondent was an abusive registration.
- The Respondent was contracted to the Complainant as an IT consultant and for some time was employed by the company to carry out this role.
- The Respondent is no longer working with the Complainant.
- When originally asked to set up the Complainant's e-mail accounts using the Domain Name the Respondent set them up under his own personal account with Freeola, instead of setting up an account in the name of the Complainant. As the Respondent was the Complainant's IT manager, the Complainant's directors had no knowledge of this.
- The Respondent is now holding ownership of the Domain Name and has control of the Complainant's e-mails, which obviously contain vital company information. Now that

the Respondent is no longer affiliated with the Complainant he should no longer have access to them.

- The Complainant has been established since 2003. The Respondent registered the Domain Name in 2012, when he was contracted to do so by the Complainant. The Respondent was put in a position of trust by the Complainant's directors and, whilst he may not have intended to abuse this trust at the time he registered the Domain Name, he is now abusing that trust by refusing to transfer the registration of the Domain Name to the Complainant.
- The Complainant sent emails to the Respondent on 17.03.2015 and 31.03.2015 requesting the transfer of the Domain Name, but has not had a definitive response. At this point the Complainant can only assume that the Respondent has no intention of making the transfer.

Respondent's Response

In his response the Respondent stated as follows:

- The Respondent purchased the Domain Name in 2012 through his personal bank and paid all relevant charges by a monthly direct debit from his personal funds and used his own personal time to manage the payments and annual renewals.
- In March 13th 2015, the Respondent's employment with the Complainant terminated. Since then the Respondent has been corresponding with the Complainant in relation to its request to transfer ownership of the Domain Name.
- The Respondent has no malice towards the Complainant and he has continued to pay the Domain Name's charges in order to prevent it from being cancelled even though he no longer works for the Complainant.
- At no point has the Respondent declined to transfer the Domain Name to the Complainant and he is willing to counter charge the charges that he has incurred in relation to the Domain Name throughout the period from 2012 to March 2015 so that the matter can be resolved.
- The Respondent has informed the Complainant that he will only transfer the registration of the Domain Name on payment of his final salary that he says he is still owed for days he worked for the Complainant and he will then also invoice the Complainant for the charges that he has incurred in relation to the Domain Name.
- Payment of his final salary which the Respondent says remains outstanding is the only reason that the Domain Name has not been transferred to the Complainant but he has been told by the Complainant that it will not release the funds to him until a meeting takes place so that all outstanding issues can be resolved. The Respondent has asked the Complainant to list the items that need addressing at the meeting but he is cautious of returning to the Complainant's premises as he was asked to leave in a hostile and volatile manner.
- The Respondent has no personal interest in withholding the Domain Name and as soon as his unpaid final salary is released he will then consent to counter charging the charges he has incurred and transfer the registration of the Domain Name to the Complainant, which he feels is a reasonable and justified position to take.

Complainant's Reply

The Complainant replied to the response and, in summary stated as follows:

- Any monies the Respondent feels he is owed is an entirely separate issue. The Respondent has been informed that if he does not wish to partake in a meeting to resolve that issue he should take legal proceedings.
- The Respondent states that he has no personal interest in withholding the Domain Name, however is clearly attempting to use it as a bargaining tool.
- The Complainant was not aware that the Domain Name was registered to the Respondent personally and that he was paying for it out of his personal account. This arrangement was never agreed between the parties. The Complainant cannot understand why the Respondent registered the Domain Name to his personal account and has been paying for it personally by choice. The Complainant obviously has no issue with paying for the Domain Name once it is registered to it.

6. Discussions and Findings

General

In order to succeed the Complainant must prove, on the balance of probabilities, two matters, i.e. that:

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

These terms are defined in the Nominet DRS Policy as follows:

- **Rights** means rights enforceable by the Complainant, whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning.
- **Abusive Registration** means 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; or
 - ii. has been used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's Rights.

Complainant's Rights

The section of Nominet's website dealing with its Dispute Resolution Service (DRS) contains extensive guidance for anyone considering making a complaint, including a detailed Guidance Booklet, a Complaint Guidance Questions booklet and a sample completed complaint form. Despite this, the Complainant has failed to address directly the actual Rights it claims to have in a name or mark which is identical or similar to the Domain Name and how those rights have been acquired.

The only indirect reference made in the complaint or the reply is that the Complainant says it has been established since 2003 and the Domain Name has been used for its email

account, but it gives no details whatsoever of what it does or what use it has made of its name “24hr AquafLOW Services Limited” or the extent of any previous use of the Domain Name for its email account. However, it did exhibit its exchange of emails with the Respondent and those emails contain signature and contact details that show the Domain Name being used as part of both an email address and a website address. The complaint itself did not refer to the website or invite me to visit it.

In addition, the name “24hr AquafLOW Services” is fairly descriptive of a round-the-clock drain clearing service and that might also have prompted the Complainant to provide at least some details of the nature and extent of use it has made of the name. However, I do not consider the name to be entirely descriptive of such a service and I note that the Respondent did not challenge the Complainant’s claim that it has been in business since 2003 and that the Domain Name has been used for its email account since it was registered by the Respondent in 2012.

In the circumstances, I find that the Complainant has put forward only just sufficient details to prove on the balance of probabilities that it has Rights in the name “24hr AquafLOW Services” for the purposes of the DRS. That name is clearly identical or similar to the Domain Name.

Abusive Registration

Paragraph 3 of the DRS Policy sets out a non-exhaustive list of factors which may be evidence that the Domain Name is an Abusive Registration. Paragraph 3(a)(v) states as follows:

The Domain Name was registered as a result of a relationship between the Complainant and the Respondent, and the Complainant:

A. has been using the Domain Name registration exclusively; and

B. paid for the registration and/or renewal of the Domain Name registration.

Paragraph 4 of the DRS Policy sets out a non-exhaustive list of factors which may be evidence that the Domain Name is not an Abusive Registration. Paragraph 4(a)(iii) states as follows:

“In relation to paragraph 3(a)(v); that the Respondent’s holding of the Domain Name is consistent with an express term of a written agreement entered into by the Parties”

In this case, the Domain Name was registered by the Respondent when in his position as the Complainant’s IT Manager and it seems that it has been used exclusively by the Complainant. However, the registration and renewal costs have been paid for by the Respondent not by the Complainant, though the Complainant says it was unaware of this and that is not challenged by the Respondent. In those circumstances, the holding of the Domain Name by the Respondent clearly was not pursuant to any express agreement between the parties, whether in writing or otherwise.

The Complainant says that it cannot understand why the Respondent would have paid those costs personally in his position as an employee of the Complainant. Paragraph 3(a)(i) of the DRS states 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”

There may be a suspicion that, as the IT Manager of the Complainant, the Respondent knew exactly what he was doing when registering the Domain Name in 2012 in his own name and paying for those costs from his own account without ever saying anything to the Complainant or ever asking for reimbursement until after he left the Complainant's employment. However, I have insufficient evidence to find that the Respondent deliberately did so with the primary intention of subsequently offering to transfer the Domain Name to the Complainant for a price in excess of the acquisition and use costs or as a blocking registration or in order to unfairly disrupt the Complainant's business, should the need ever arise.

But whatever his motive at the time of registration, as it turns out, the Respondent has now left the Complainant's employment and is now using the fact that the Domain Name is held in his personal name and he therefore controls the Complainant's email account as a ransom demand for payment of salary that he says is still due to him and which the Complainant has not paid.

I do not agree with the Respondent's assertion that in doing so he is taking a reasonable and justified position. The rights or wrongs of that separate dispute over alleged unpaid salary are not relevant for the purposes of the DRS and do not justify the Respondent's actions in retaining the Domain Name and the resulting control it gives him of the Complainant's email account. In the circumstances, the Respondent's continuing use of the Domain Name to control the Complainant's email account is using the Domain Name in a manner which is taking unfair advantage of and is being unfairly detrimental to the Complainant's Rights.

7. Decision

For the reasons outlined above I find that the Complainant has proved, 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.

In the circumstances I order that the Domain Name be transferred to the Complainant.

Signed: Chris Tulley

Dated 6 June 2015