

# DISPUTE RESOLUTION SERVICE

**DRS 16945**

## Decision of Independent Expert

The Ashley Foundation

Complainant

and

Christopher Sherry

Respondent

### 1 The Parties

Complainant:	The Ashley Foundation
Address:	81 Abingdon Street Blackpool Lancashire FY1 1PP United Kingdom

Respondent:	Christopher Sherry
Address:	c/o Wiljam White 23 Northfield Avenue Blackpool Lancashire FY1 2ND United Kingdom

### 2 The Domain Names

*ashleyfoundation.co.uk* and *theashleyfoundation.org.uk* (together, the "Domain Names").

### 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 into question my independence in the eyes of one or both of the parties.

12 January 2016	Dispute received
13 January 2016	Complaint validated
13 January 2016	Notification of complaint sent to parties
13 January 2016	Response received
14 January 2016	Notification of response sent to parties
19 January 2016	Reply reminder sent
21 January 2016	Reply received
21 January 2016	Notification of reply sent to parties
22 January 2016	Mediator appointed
26 January 2016	Mediation started
09 February 2016	Mediation failed
09 February 2016	Close of mediation documents sent
15 February 2016	Expert decision payment received

## 4 Factual Background

- 4.1 The domain name *theashleyfoundation.org.uk* (the "First Domain Name") was registered on 6 February 2003 to Christopher Sherry, who is identified on the Whois database as a UK sole trader. The registrant's address is given as:

*"c/o Wiljam White  
23 Northfield Avenue  
Blackpool  
Lancashire  
FY1 2ND  
United Kingdom"*

- 4.2 The domain name *ashleyfoundation.co.uk* (the "Second Domain Name") was registered much more recently on 23 December 2015 to Christopher Sherry with the same address as that set out in paragraph 4.1 above. However, on that occasion the registrant is described as a "non-UK Individual".
- 4.3 The Ashley Foundation is a charity supporting homeless people, which was established in 1997. It appears to operate primarily or solely in the Blackpool area.

## 5 Parties' Contentions

### Complaint

- 5.1 The Complaint has been prepared by Lee Dribben, CEO of the Complainant, The Ashley Foundation, which provides accommodation and support to single homeless persons and normally houses over 100 people every night. It was established in 1997, is incorporated in England with company number 3366712 and is a registered charity number 1063208.
- 5.2 The Complainant states that in 2003 a software developer, "*Chris Sherry, helped us with our fledgling website and registered our domain name www.theashleyfoundation.org.uk*". Mr Sherry therefore appears to have registered the First Domain Name in his own name on behalf of the Complainant. The Complainant says that Mr Sherry "*later*" moved to Canada.
- 5.3 "*About 6 months ago*", i.e. presumably in approximately July 2015, the Complainant accepted an offer from a Wiljam White who volunteered to "*help us publicise our services*". The

Complainant says that Mr White then fell out with it and "*has now 'stolen' our domain name*". It says that Mr White transferred "*our domain name*" (i.e. presumably the First Domain Name) into his own account and changed the domain tags, which means it no longer points to the Complainant's website and also means its emails are inaccessible to it. The Complainant maintains that "*this is causing serious damage to the charity*".

- 5.4 The Complainant makes a number of other serious allegations of Mr White. The Complainant says that the email address provided for both Domain Names, *sherrychristopher0@gmail.com*, was recently created by Mr White and "*is a fake account*".
- 5.5 None of those assertions is supported by any evidence. Indeed, the Complainant has filed no evidence at all in support of its Complaint.
- 5.6 The Complainant says that Christopher Sherry's real email address is *kaflooy@gmail.com* and that it is in touch with Mr Sherry "*who tells us that has never heard of Mr White and will assist us in any way to sort this matter out*".
- 5.7 The Complainant further asserts that the postal address shown on the Whois look up for the First Domain Name (referred to at paragraph 4.1 above) is not Mr Sherry's address, nor the Complainant's, but that of Mr White. It says the same applies to the Second Domain Name. Further it says that: "*we are certain that Mr White has recently registered that domain name purely to cause us trouble*".
- 5.8 In answer to the question on the complaint form as to whether, so far as the Complainant is aware, any legal proceedings have been issued or terminated in connection with the Domain Names, the Complainant has answered in the negative.

#### Response

- 5.9 Under paragraph 5 of the DRS Procedure, the Response must be submitted to Nominet by the Respondent. "Respondent" is defined in paragraph 1 of the DRS Procedure as follows:
- "Respondent means the person (including a legal person) in whose name or on whose behalf a Domain Name is registered"***
- 5.10 In other words, the Respondent to the Complaint can only be the registrant of the Domain Names, Christopher Sherry, and the Response must be submitted by him, or by a person or entity (such as a law firm) acting on the Respondent's behalf and with his authority.
- 5.11 The author of the purported Response is indeed identified as Christopher Sherry. However, it is written in the third person. Moreover, in one of the two statements provided by Mr White pursuant to a paragraph 13 (a) request (see paragraph 5.21 below), he refers to "*my original response*". It is therefore plain that the author of the purported Response is not the Respondent. It is Mr White. This is problematic, to put it neutrally.
- 5.12 In the first place, Mr White has incorrectly identified Mr Sherry as author of the purported Response, when in fact it was Mr White. This was either an unhelpful mistake or an attempt to mislead Nominet and the Expert as to the true position.
- 5.13 Secondly, the document submitted by Mr White ("Mr White's Document") cannot, for the reasons explained at paragraphs 5.9 and 5.10 above, and in light of Mr White's failure to confirm that he is authorised to act on behalf of Mr Sherry (see paragraph 5.27 below), stand as a Response under the DRS.

- 5.14 Mr White explains in his document that Mr Sherry "*has been the registered owner of the domain name (theashleyfoundation.org.uk) since it was first registered.*" He says that in August 2015 Mr Dribben of the Complainant asked for that domain name to be transferred to the Complainant and that such a transfer was subsequently made "*based on the assumption that he would pay for the services being rendered (1) in connection with the transfer and (2) associated with the website that the domain name pointed to.*"
- 5.15 Mr White submits that the Second Domain Name was recently registered and should not form part of the Complaint because "*it is not being used for commercial purposes by anyone and has never been used by The Ashley Foundation.*"
- 5.16 Mr White says that the Second Domain Name, and further unspecified domain names, "*were secured by Christopher Sherry to prevent Lee Dribben and the Ashley Foundation from using them to access the protected content published to The Ashley Foundation website that has not been paid for.*" He further asserts that the fact that the Complainant has filed a Complaint in respect of the First Domain Name is evidence that he never intended to pay for the services provided.
- 5.17 Mr White says that the Second Domain Name was registered on 23 December 2015 "*to prevent The Ashley Foundation from using the copyrighted content on The Ashley Foundation website without payment.*" He explains that since the Complainant had failed to pay for services rendered, "*legal notice was given and after the notice period, service to the domain name was suspended and the original registrant details were returned; i.e. Christopher Sherry.*" It is characterised as "*a simple matter of a commercial dispute.*" He says that as soon as the Complainant pays for the services rendered, the First Domain Name "*shall be restored and once cleared funds have been received, the original transfer can be restored and the domain name can be put into the name of The Ashley Foundation.*"
- 5.18 Mr White says that proceedings were issued "yesterday", i.e. on 12 January 2016, against the Complainant in the Preston County Court and that therefore this DRS proceeding should be stayed until the outcome of those proceedings.
- 5.19 In support of those submissions, Mr White has filed the following copy documents:
- (a) a letter from him to the Complainant dated 21 December 2015 entitled "*Notice of intent to issue proceedings*";
  - (b) an invoice from WireNews Limited to the Complainant dated 30 November 2015 in the sum of £5,550 (one of the services in respect of which the invoice was issued is for "*recovery of domain name (theashleyfoundation.org.uk) from a disgruntled third party in Canada (by all means necessary)*");
  - (c) a further letter from Mr White to the Complainant of 28 December 2015, informing the Complainant inter alia that: "*this letter confirms that service of the domain name (theashleyfoundation.org.uk) has been suspended*" and threatening to issue proceedings on the following day, i.e. 29 December 2015;
  - (d) a further invoice from WireNews Limited to the Complainant dated 28 December 2015 in the sum of £250 for what is described as a "*domain name reconnection fee*";
  - (e) a Claim Form ostensibly issued against the Complainant in the Northampton Combined Court by Mr White and a Katarina Theohari trading as WireNews Limited (the claim form is not sealed and there is no claim number or issue date);

(f) an Order, apparently in those proceedings (though identifying only one claimant, Mr White), made on 22 February 2016 in the County Court Money Claims Centre in Salford transferring the action to the Blackpool County Court (that order includes what appears to be a Court seal or a facsimile thereof); and

(g) a Notice of Transfer of Proceedings to the Blackpool County Court dated 22 February 2016 addressed to Mr White (again identifying only Mr White as claimant).

### Reply

5.20 The Complainant filed a Reply which reads as follows:

*"Mr White is deceiving you. Not only has he 'hijacked' theashleyfoundation.org.uk name but he is also pretending to be Mr Sherry, the original registrant. I repeat, MR WHITE IS PRETENDING TO BE MR SHERRY. In discussions with the police, they describe Mr White as a 'keyboard warrior' and have removed computer equipment from his home. There are thousands of pages on the internet about Mr White in that name and the numerous aliases he has used. He is an 'old hand' at domain name battles and I suggest you look at the history of amazon.gr together with the protracted court hearings in that matter. [...]"*

*Regarding his statement, The Ashley Foundation has been operating as a charity since 1997 and has NEVER failed to pay its bills. Mr White says 'this is a simple matter of a commercial dispute'. We have received an employment tribunal claim from Mr White and we are told that civil court proceedings are in motion. In the event, I suggest that ALL the domain names are suspended to allow time for Mr White to exhaust the actions he is taking."*

### Paragraph 13(a) request

5.21 On 29 February 2016 the Expert requested further information pursuant to paragraph 13(a) of the DRS Procedure of both the Respondent, Christopher Sherry, and of Mr White, as follows:

"1 *Mr Sherry to provide confirmation in writing whether or not (a) he is Registrant of both Domain Names, (b) Mr White is representing him in this dispute, and (c) the submissions made by Mr White in the Response and exhibits thereto are made with Mr Sherry's knowledge and authorisation, such confirmation to be accompanied by a copy of Mr Sherry's passport, driving licence or similar identification document (such copy document to be certified by a regulated professional, e.g. accountant, solicitor, doctor, or similar); and*

2 *Mr White to provide confirmation in writing whether or not he is the author of the Response and, in any event, an explanation of the basis on which he has filed a Response on behalf of Mr Sherry (if that is the case), such confirmation to be accompanied by a copy of Mr White's passport, driving licence or similar identification document (such copy document to be certified by a regulated professional, e.g. accountant, solicitor, doctor, or similar)."*

5.22 That request was sent by Nominet to Mr White and also to Mr Sherry both at the email address on the Whois database (*sherrychristopher0@gmail.com*) and at the email address for Mr Sherry mentioned by the Complainant (*kaflooe@gmail.com*). Nominet asked for responses from Mr Sherry and from Mr White by 8 March 2016.

- 5.23 No response was received from Mr Sherry from either email address.
- 5.24 Mr White provided the copy identification requested (though uncertified) and two further statements, repeating some of the submissions already made in his earlier document and making a number of new allegations, e.g. that the Complainant was guilty of an abuse of process, that it had provided false and misleading information to Nominet, and that Mr Dribben of the Complainant had intimidated and threatened Mr White and his wife.
- 5.25 Mr White states that the registrant of the First Domain Name has always been Christopher Sherry. He says that he was asked by Mr Dribben of the Complainant to transfer that Domain Name to the Complainant and that he executed that transfer: *"I performed the transfer on his behalf, with the login information provided to me by Lee Dribben and Laura Cooper. Ms Cooper paid the Nominet UK transfer fee for the transfer with her personal debit/credit card"*. He contends that Mr Dribben of the Complainant asked him to transfer the Domain Name from Mr Sherry to the Complainant *"without the permission and/or knowledge of Mr Sherry and without any documentation to support that transfer"*.
- 5.26 Because Mr Dribben *"refused to pay me for my services"*, in November 2015 Mr White *"reversed the previously made transfer from The Ashley Foundation to the original registrant, which is and always was Mr Sherry"*. He says that there is therefore no question of any impersonation and that *"these facts have been previously disclosed to Nominet UK in my original response"*. He says that: *"it is a simple case of The Ashley Foundation/Lee Dribben having failed to pay for the original transfer and the Domain Name being reverted back to the original registration information. Due to my control of the Domain Name I have suspended service to the Domain Name, including web hosting and email."*
- 5.27 Mr White did not, however, provide the confirmation requested by the Expert, namely *"whether or not he is the author of the Response and, in any event, an explanation of the basis on which he has filed a response on behalf of Mr Sherry (if that is the case)"*.
- 5.28 As matters presently stand, therefore, neither Mr Sherry nor Mr White has provided the clarification requested. Nor has the Complainant provided any comment on Mr White's further statements, as he was invited to do by Nominet. Nominet has confirmed that Mr White's 13(a) statements were provided to the Complainant.

## 6 Discussions and Findings

### General

- 6.1 To succeed under the Policy, the Complainant must prove on the balance of probabilities, first, that he has Rights (as defined in the Policy) in respect of a name or mark that is identical or similar to the Domain Name (paragraph 2(a)(i) of the Policy), and secondly, that the Domain Name is an Abusive Registration in the hands of the Respondent (paragraph 2(a)(ii) of the Policy).
- 6.2 Abusive Registration is defined in paragraph 1 of the Policy in the following terms:
- "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

- 6.3 Paragraph 2(a)(i) of the Policy requires the Complainant to prove that it "*has Rights in respect of a name or mark which is identical or similar to the Domain Name*". "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*".
- 6.4 The Complainant has failed even to address the question of any Rights in the Domain Names, let alone provide any evidence thereof. The closest it probably gets is to explain its charitable purpose.
- 6.5 Accordingly, it would be open to an Expert to decide on that basis alone that the Complaint must fail because the Complainant has failed to prove, on the balance of probabilities, that it has Rights in respect of a name or mark that is identical or similar to the Domain Names or either of them.
- 6.6 However, in light of the complexities of this particular case, the Expert has briefly considered the Complainant's website and the fact that it has undertaken charitable activities under the name The Ashley Foundation since it was established in 1997. On that basis, the Expert is satisfied that the Complainant has common law rights in the Ashley Foundation name, which is similar to each of the Domain Names.
- 6.7 For that reason, it would probably be unconscionable not to find that, pursuant to paragraph 2(a)(i) of the Policy, the Complainant has Rights (as defined) in respect of a name or mark that is identical or similar to the Domain Name.

#### Abusive Registration

- 6.8 Again, the Complainant has failed to set out much of a case on this issue. It makes no attempt to refer to the relevant provisions of the Policy.
- 6.9 It is the Complainant's case that Mr White (who is not the registrant) transferred the First Domain Name "*into his own account*", as a result of having fallen out with the Complainant. It is plain from Mr White's Document and subsequent submissions that the cause of this falling out was a dispute over an unpaid invoice submitted to the Complainant by Mr White for services which he says he performed for it.
- 6.10 The invoices in question are dated 30 November and 28 December 2015 respectively. A letter before action was apparently sent three weeks after that invoice was issued (there is no evidence that it was ever received by the Complainant) which was followed by the commencement of proceedings on 12 January 2016 for "*unpaid invoice (#30112015-1) for services rendered from August 2015 until November 2015 inclusive, including domain name transfer, activation of website, updating and correcting website content, marketing, publicity and press release drafting, re-writing and publication of corporate media and news*".
- 6.11 Mr White does not seriously challenge those contentions. Indeed, Mr White's Document asserts that:

*"Unfortunately, The Ashley Foundation and or Lee Dribben has failed to pay the money owed by The Ashley Foundation for the services rendered. As a result, legal notice was given and after the notice period, service to the domain name was*

*suspended and the original registrant details were returned; i.e. Christopher Sherry. This is a simple matter of a commercial dispute. The Ashley Foundation has failed to pay for the services rendered in connection with the domain name. Upon payment of the monies, service to the domain name (theashleyfoundation.org.uk) shall be restored and once cleared funds have been received, the original transfer can be restored and the domain name can be put into the name of The Ashley Foundation."*

6.12 This is therefore a clear admission on the part of Mr White that he is essentially using the fact that Mr Sherry is registrant of the First Domain Name and that he (Mr White) has secured control of it to obtain negotiating leverage over the Complainant in relation to a "commercial dispute" between a company in which he has an interest and the Complainant over an unpaid invoice.

6.13 Mr White's admission and acknowledgement in this regard also bears on the question of whether these DRS proceedings should be stayed pending the outcome of the proceedings commenced by Mr White (in his name or in the name of a company owned by him and another – the documentary evidence is inconsistent) against the Complainant in the County Court. As is clear on the face of the claim form in those proceedings, it is a claim for an unpaid debt.

6.14 The DRS Procedure provides as follows at paragraph 20(a):

*"If legal proceedings relating to a Domain Name are issued in a court of competent jurisdiction before or during the course of proceedings under the DRS and are brought to our attention, we will suspend the proceedings, pending the outcome of the legal proceedings."*

6.15 That therefore raises the question of the meaning of the phrase "*legal proceedings relating to a domain name*". The Expert's Overview document provides no guidance on the intended meaning of paragraph 20(a). However, it cannot, in this Expert's view, extend so far as to include proceedings for recovery of a debt arising from an invoice for services provided, some of which related to one of the domain names in dispute. Nor can it cover a situation such as this where the only connection between the domain name and the legal proceedings is that a party to the legal proceedings, who is not the registrant but apparently has *de facto* control of the domain name, is refusing to transfer a domain name to a Complainant (which he apparently accepts is otherwise entitled to it) until the latter accedes to the claim(s) being made in the legal proceedings.

6.16 The purpose of the provision is presumably to avoid the risk of parallel ADR and Court proceedings in relation to essentially the same issue, namely who is the proper registrant of a particular domain name. It might apply, for example, to claims in trade mark infringement, passing off, or for breach of contract, where the domain name is the subject of the proceedings.

6.17 That is very different from the current case where the link between the proceedings in question and the Domain Names are:

- (a) that the Respondent is declining to transfer the Domain Names until the invoice which forms the subject matter of those proceedings is paid; and/or
- (b) the invoice relates in part to services which were provided in relation to one of the Domain Names.



- 6.18 Further, those proceedings for the unpaid invoice have not been brought by the Respondent but by Mr White.
- 6.19 For that reason, the Expert is not persuaded that these DRS proceedings should be stayed or suspended pending the outcome of Mr White's debt claim against the Complainant.
- 6.20 The Complainant alleges that the registration of both Domain Names to Christopher Sherry is a sham because the person who is actually controlling them is Mr White.
- 6.21 In his first paragraph 13(a) statement, Mr White is candid about what has happened. It would appear that Mr Sherry was always the registrant of the First Domain Name, presumably because, as described by the Complainant, he helped to set up the Complainant's website and registered the First Domain Name in his own name, albeit on behalf of the Complainant. While such a practice is obviously undesirable, it is far from uncommon and does not in itself necessarily indicate any bad faith on the part of the registrant. It is unclear whether the Second Domain Name was in fact registered by the ostensible registrant, Mr Sherry, and, if so, for what purpose.
- 6.22 The difficulty in this case is that no Response or other submissions have been received from Mr Sherry, nor has Mr White felt able to provide the confirmation sought in the paragraph 13(a) request, namely that he was authorised to respond to the Complaint on behalf of Mr Sherry.
- 6.23 In those circumstances, it seems more likely than not that Mr White is dealing with the Domain Names, and responding to this Complaint, as he sees fit and without any reference to, let alone authorisation by, Mr Sherry. Mr White has been given an opportunity to provide the confirmation sought, as indeed has Mr Sherry, but none has been forthcoming. In those circumstances Mr White has no standing to respond to the Complaint (see paragraph 5.14 above).
- 6.24 Moreover, even if he had been so authorised by the registrant, for the reasons set out at paragraphs 6.9 to 6.12 above, the First Domain Name has been used in a manner which takes unfair advantage of or is unfairly detrimental to the Complainant's Rights and the Second Domain Name was registered in a like manner.
- 6.25 Accordingly, the Expert is satisfied, on the balance of probabilities, that the Domain Names have been used (in the case of the First Domain Name) and/or registered (in the case of the Second Domain Name) in a manner which took and takes unfair advantage of the Complainant's Rights in the Ashley Foundation name and/or was unfairly detrimental to those Rights.

## **7 Decision**

- 7.1 The Expert therefore finds that the Complainant has rights in a name or mark which is identical or similar to the Domain Names and that the Domain Names are, in the hands of the Respondent, Abusive Registrations.
- 7.2 It is therefore determined that the Domain Names be transferred to the Complainant.

Signed **David Engel**

Dated 24 March 2016