

DISPUTE RESOLUTION SERVICE

D00022205

Decision of Independent Expert

SailandStay Ltd

and

Maggie Stewart-Harris

1. The Parties:

Complainant: SailandStay Ltd
Damer House
Meadoway
Wickford
Essex
SS12 9HA
United Kingdom

Respondent: Maggie Stewart-Harris
3 Little Dippers
Pulborough
West Sussex
RH20 2DB
United Kingdom

2. The Domain Name:

catsailing.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.

07 January 2020	Dispute received
08 January 2020	Complaint validated
08 January 2020	Notification of complaint sent to parties
14 January 2020	Response received
14 January 2020	Notification of response sent to parties
17 January 2020	Reply reminder sent
21 January 2020	Reply received
21 January 2020	Notification of reply sent to parties
21 January 2020	Mediator appointed
24 January 2020	Mediation started
24 January 2020	Mediation failed
24 January 2020	Close of mediation documents sent
04 February 2020	Expert decision payment received
07 February 2020	Further submission from Respondent

4. Factual Background

The events that give rise to this complaint arise from the breakdown of the marriage of the (now) sole director and shareholder of the Complainant, Mr Stephen Stewart-Harris and the Respondent, a former director of the Complainant. Most of what has been submitted is irrelevant to proceedings under the DRS. The Expert will only record background so far as relevant or to provide context. The same approach will be taken in subsequent sections of this Decision.

Mr Stewart-Harris and the Respondent were once both directors of the Complainant. They were also once both directors of a Croatian company, Catamaran Sailing d.o.o., registered on 23 July 2018.

On 28 August 2018, catsailing.co.uk, the domain name in dispute (the Domain Name) was registered by the Complainant. It was paid for by the Complainant although it appears to have been used in connection with the business of Catamaran Sailing.

On 31 August 2018 a sailing catamaran was purchased for the purposes of a charter business to be operated through Catamaran Sailing. A website was created for Catamaran Sailing using the Domain Name over the winter months of 2018/2019, and charters commenced in April 2019. It appears that a few months later, matters became difficult between Mr and Mrs Stewart-Harris leading to difficulties in the business of Catamaran Sailing.

In late July 2019, Mr Stewart-Harris sold his interest in the sailing catamaran

On 27 July 2019, the Respondent changed the password for the Domain Name and registered herself as its registrant. Payment details for the Domain Name were also changed, with the Respondent being substituted for the Complainant. Mr Stewart-Harris thereafter tried to restore the website and regain access to the Domain Name but without success.

On 8 August 2019, Mr Stewart-Harris's shares in Catamaran Sailing were transferred to the Respondent. The Respondent is no longer a director of Catamaran Sailing.

On 29 November 2019, the Respondent resigned as a director of the Complainant leaving Mr Stewart-Harris as its sole director and shareholder.

5. Parties' Contentions

The essence of the parties' contentions, so far as relevant to these DRS proceedings (or to provide context) is summarised below with the aid of extracts from their respective submissions. For the sake of clarity, it should be mentioned that when the Complainant refers to the "company", it is a reference to itself i.e. SailandStay Ltd. When the Respondent refers to the "company" it is (usually) a reference to Catamaran Sailing.

Complaint

“My ex-wife has stolen my Company's intellectual property, namely the domain name that the Company purchased”.

“She has since been trading with this domain name, thus leaving me and my Company financially disadvantaged.”

Response

“At the time the domain name was purchased the respondent was a director of the company Sailandstay Ltd”.

Referring to the allegation that she changed the password for the Domain Name and re-registered herself as the registrant, the Respondent says, *“These actions were only taken to protect the business interests of the company when said Complainant had resigned and sold his interest in the vessel which was leased to the company”.*

Referring to the allegation that she stole the intellectual property of the Complainant, the Respondent says *“The Complainant has revoked all rights to the Domain Name , its client base, its suppliers, and web site when he resigned as a director on 25.06.2019, sold his share of the vessel on 27.07.2019 and finally sold his shares in the company, Catamaran Sailing d.o.o on 08.08.2019”.*

As to the alleged disadvantage suffered by the Complainant, the Respondent says that such disadvantage is the fault of Mr Stewart-Harris.

Reply

The Complainant's Reply was filed with Nominet on 21 January 2020 but on 7 February 2020, the Respondent filed a further submission, otherwise than in accordance with the DRS Policy, being an annotated version of the Reply. The Expert shall deal with this non-standard submission below but here, for the sake of completeness, shall deal with both the Reply and comments thereon.

In relation to a charge for website hosting debited to the Complainant's account in or around December 2019, in respect of which the Complainant unsuccessfully sought a refund, the Respondent says that *"After selling the vessel and company shares it is the responsibility of a former Director to contact suppliers to be removed from payment methods involving the company"*.

In relation to the Respondent's assertions of loss etc, the Respondent says *"The Complainant placed himself in this position. He sold half the vessel, he sold his shares and intellectual property,..."*

And as to the Complainant's assertions that the Domain Name is the intellectual property of the Complainant, the Respondent says *"The Complainant should have made this case in 08.08.2019 when he sold the shares not some 5 months later. The domain name was purchased when the Respondent was a Director of SailandStay Ltd"*.

6. Discussions and Findings

Preliminary comments

Paragraph 17 of the Policy deals with further statements beyond those expressly provided for. Whilst its provisions have not been complied with the Expert, in his discretion, has considered the comments the Respondent has made on the Complainant's Reply although they have not been determinative of the Decision reached.

Paragraph 2 of the Policy provides:

"A Respondent must submit to proceedings under the DRS if a Complainant asserts to us, according to the Policy, that:

2.1.1 The Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name; and

2.1.2 The Domain Name, in the hands of the Respondent, is an Abusive Registration

2.2 The Complainant is required to prove to the Expert that both elements are present on the balance of probabilities."

Under the provisions of the Policy, for a Complaint to succeed, a Complainant is required to prove, on a balance of probabilities, those matters set out in paragraphs 2.1.1 and 2.1.2 of the Policy i.e. that it has Rights in respect of a name or mark which is identical or similar to the domain name in issue and that the domain name in the hands of the Respondent is an Abusive Registration. Both elements are required.

An Expert appointed under the DRS must decide a Complaint in accordance with the Policy rather than the general law.

Complainant's Rights

The meaning of '*Rights*' is defined in the 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*'.

The Complainant asserts that "...*the domain name is undoubtedly the intellectual property of SailandStay Ltd [the Complainant]*". It is not. A Domain Name is not an intellectual property right. On acquiring a domain name, the registrant enters a contractual relationship with a registrar and obtains an exclusive right to use *the* domain name, but not the exclusive right to use the name or mark contained *within* the domain name. To stop a third party using the name or mark contained within a domain name, the registrant would have to rely on trade mark or similar unregistered passing-off rights. No claim has been made by the Complainant that it has trade mark (or similar) rights in the name *catsailing*. However, that in itself is not fatal to a Complaint under the DRS.

Whilst the primary purpose of the Policy is to deal with unfair or abusive registration or use of domain names that trespass on the rights of the owners of trade marks or of those who have acquired similar rights i.e. such as to found a claim in passing off under English law, the definition does not exclude rights in respect of the domain name itself or indeed contractual rights to the domain name. (Paragraph 1.6 of the DRS Experts' Overview, Version 3 and DRS Appeal decision 04632 in respect of ireland.co.uk).

Indeed, the Policy itself clearly recognises that contractual rights to a domain name may validly found a complaint under the Policy. Paragraph 5 of the Policy contains a non-exhaustive list of factors which may indicate that a domain name is an Abusive Registration. Paragraph 5.1.5 provides:

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

5.1.5.1 has been using the Domain Name registration exclusively; and

5.1.5.2 paid for the registration and/or renewal of the Domain Name registration;

The underlying assumption here is that a contractual or similar relationship between the parties may well have given rise to relevant Rights for the purposes of the Policy.

In this case, the Complainant clearly had a contractual right to the Domain Name. The Complainant is a separate entity from its directors and shareholders. Even though at the time the Respondent deprived the Complainant of access to, and its registration of the Domain Name, she was a director of the Complainant, it cannot be right, not least because of the duties directors owe to their companies, that she can simply dispose of the Complainant's assets. And the Complainant's right to use the Domain Name pursuant to its registration was indeed an asset, despite being used in the business of another entity (Catamaran Sailing). If, by way of example, it was not the Respondent who registered herself as the registrant of the Domain Name but a third party fraudster, there could be little doubt that the Complainant would have a right of action against that third party based on its contractual right.

The Expert finds that the Complainant has rights for the purposes of the Policy as a result of its registration of the Domain Name in August 2018. Given that we are dealing with rights to the Domain Name as opposed to rights "*...in respect of a name or mark which is identical or similar to the Domain Name*", there is no need to consider identity or similarity.

Accordingly, the Expert must now therefore consider whether the Domain Name is an Abusive Registration in the hands of the Respondent.

Abusive Registration

Paragraph 1 of the Policy defines Abusive Registration as a domain name which was either *'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 which *'is being or has been used in a manner which has taken unfair advantage of or was unfairly detrimental to the Complainant's Rights;'*.

As mentioned earlier, a non-exhaustive list of factors which may indicate that a domain name is an Abusive Registration is set out in paragraph 5 of the Policy. In addition to paragraph 5.1.5 set out earlier, such factors include circumstances indicating that the Respondent has registered or otherwise acquired the domain name primarily as a blocking registration against a name or mark in which the Complainant has rights (paragraph 5.1.1.2), or for the purpose of unfairly disrupting the business of the Complainant (paragraph 5.1.1.3).

Other such factors suggesting an Abusive Registration include the Respondent 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 (paragraph 5.1.2).

If the domain name is an exact match for the name or mark in which the complainant has rights, the complainant's mark has a reputation and the respondent has no reasonable justification for the registration, that too may evidence an Abusive Registration (paragraph 5.1.6).

A non-exhaustive list of countervailing factors is set out in paragraph 8 of the Policy i.e. factors which may indicate that the Domain Name is not an Abusive Registration. Included are circumstances suggesting that before being aware of the complainant's cause for complaint, the respondent has used or made demonstrable preparations to use the domain name in connection with a genuine offering of goods or services (paragraph 8.1.1.1). A respondent being

commonly known by a name or legitimately connected with a mark which is identical or similar to the domain name (paragraph 8.1.1.2), or having made legitimate non-commercial or fair use of the domain name (paragraph 8.1.1.3), will also be indicative of a registration that is not abusive. If the domain name is generic or descriptive and the respondent is making fair use of it, that too may indicate that it is not an Abusive Registration (paragraph 8.1.2).

Discussion on Abusive Registration

At the heart of the Policy, is the requirement to prove unfairness: for a registration to be considered 'abusive' there should be something unfair in the object or effect of the respondent's behaviour. Such behaviour may or may not be captured in one or more of the non-exhaustive examples mentioned in paragraph 5 of the Policy. Given that the Respondent deprived the Complainant of access to, and its registration of the Domain Name to which it (the Complainant) had a clear contractual right, a case of Abusive Registration has been made out. It is therefore for the Respondent to show it has an answer to that case by reference to paragraph 8 of the Policy, or otherwise.

It seems clear from the Response that the Respondent considers that it is the Complainant that has behaved in an unfair manner and that by divesting himself of his interest in the vessel used by Catamaran Sailing, and thereafter his shareholding in and directorship of Catamaran Sailing, he has lost his right to the Domain Name which was used by Catamaran Sailing. Indeed she states in her Response: *"The Complainant has revoked all rights to the Domain Name, its client base, its suppliers, and web site when he resigned as a director on 25.06.2019, sold his share of the vessel on 27.07.2019 and finally sold his shares in the company, Catamaran Sailing d.o.o on 08.08.2019"*.

Whilst the Expert appreciates the depth of feeling that exists all round, the Respondent's analysis does not provide an answer to the Complaint for the purposes of the Policy (and nothing else in her submissions would do so either). Mr Stewart-Harris resigning as a director of Catamaran Sailing (a third party company albeit one that is using the Domain Name), selling his interest in the vessel used by Catamaran Sailing and then his shares in Catamaran Sailing, cannot be a justification under the Policy for depriving the Complainant (a separate commercial entity distinct from either Mr or Mrs Stewart-Harris) of the Domain Name.

In the Expert's view, the Respondent's actions (whatever the motivation) cannot be regarded as fair behaviour for the purposes of the Policy and in all the circumstances, a finding of Abusive Registration has been made out.

7. Decision

The Expert finds that the Complainant has Rights to the Domain Name which in the hands of the Respondent constitutes an Abusive Registration. Accordingly, the Expert directs that the Domain Name <catsailing.co.uk> be transferred to the Complainant.

Signed
Jon Lang

Dated 24 February 2020