

O-531-15

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 3026379
BY DANIELA ELENE VIDAS**

TO REGISTER THE TRADE MARK

casinodino

**& APPLICATION NO. 3026399
BY DANIELA ELENE VIDAS
TO REGISTER THE SERIES OF TWO TRADE MARK**



BOTH IN CLASSES 9, 35 & 41

AND

**IN THE MATTER OF CONSOLIDATED OPPOSITIONS
THERE TO UNDER NOs. 401677 & 401680 BY PARTNER MEDIA LTD, 401678 &
401679 BY WEBHOST LIMITED AND 401681 & 401682 BY GREEN CAPE MEDIA
LTD**

Background and pleadings

1. On 16 October 2013 Daniela Elene Vidas (“the applicant”) applied to register the three trade marks shown on the first page. They were all published in the Trade Marks Journal on 8 November 2013 for the following goods and services:

Class 9: Computer software platforms; Computer game programs; Computer game software; Computer games programs downloaded via the internet [software]; Computer games programs [software]; Computer games software; Computer software; Computer software [programmes]; Computer software programs; Games software; Software.

Class 35: Advertisement and publicity services by television, radio, mail; Advertisement for others on the Internet; Advertising; Advertising and advertisement services; Advertising and marketing; Advertising and marketing services; Advertising and promotion services; Advertising and promotional services; Advertising and publicity; Advertising and publicity services; Advertising, including on-line advertising on a computer network; Advertising, marketing and promotion services; Advertising, marketing and promotional services; Advertising of the services of other vendors, enabling customers to conveniently view and compare the services of those vendors; Advertising on the Internet for others; Advertising, promotional and marketing services; Advertising research; Advertising services; Advertising services provided over the internet; Advertising services provided via the internet; Advertising space (Rental of -); Advertising space (rental of-) on the internet; Advertising through all public communication means; Advertising via electronic media and specifically the internet; Advisory services relating to advertising; Advisory services relating to market research; Advisory services relating to marketing; Information, advisory and consultancy services relating to business and management or business administration, including such services provided on line or via the internet; Information services relating to advertising; Online advertisements.

Class 41: Casino facilities; Casino facilities [gambling] (providing-); Casino facilities [gambling] (Providing -); Casino, gaming and gambling services; Casino services; Casinos; Entertainment; Entertainment agency services; Entertainment information; Entertainment information services; Entertainment provided via the internet; Entertainment services; Entertainment services relating to competitions; Gambling; Gambling services; Game services; Game services provided on-line from a computer network; Games offered on-line (on a computer network); Games services provided on-line from a computer network; Gaming machine entertainment services; Gaming services; Gaming services for entertainment purposes; On-line entertainment; On-line gaming services; Organisation of entertainment competitions; Organisation of entertainment events; Organisation of games; Organisation of quizzes, games and competitions; Organising competitions; Organising events for entertainment purposes; Organising of competitions for entertainment; Organising of entertainment; Organising of entertainment competitions; Organising of games; Services for the operation of computerised bingo; Services for the organisation of games.

2. Trade mark application no. 3026399 is for a series of two marks with the “Mark description” being “The mark is a green dinosaur and has the arm in the form of a slot machine lever”.

3. On 10 February 2014, Partner Media Limited, WebHost Limited and Green Cape Media Limited (“the opponents”) individually opposed the two trade mark applications. Given the nature of the claim and the economic link between the opponents these proceedings were subsequently consolidated.

4. Each opposition is based on Section 3(6) of the Trade Marks Act 1994 (“the Act”). In essence the opponents’ claim is that the applicant acquired the casinodino.com (“the domain name), paid for by the opponents, following fraudulent activity by an employee of the opponents called Mr Zinke. The employee also increased website traffic to the applicant so that she may earn more commission than what she was entitled, and in order to prevent the applicant from entering the UK market she filed the trade mark applications, the subject of the oppositions. Therefore, the opponents’ claim the trade mark applications were filed in bad faith.

5. The applicant filed a counterstatement denying bad faith and requested that the opponents prove the allegations made.

6. Both sides filed evidence in these proceedings. This will be summarised to the extent that it is considered appropriate/necessary.

7. A telephone hearing took place on 28 August 2015, with the opponents represented by Mr Philip Herbert of Hamllins LLP and the applicant by Mr Jim Davies of Elevation Legal. The submissions made during the hearing have been fully considered in reaching this decision and will be referred to as and when appropriate.

Evidence

Opponent’s evidence

Witness statement of Philip Herbert and exhibits PH1 – PH9

8. Mr Herbert is an employee of Hamllins LLP, the opponents’ professional representatives. He broadly summarises the opposition claim as follows¹:

“In summary, with the aid of Mr Zinke, Ms. Vidas (the Applicant):

- a. came into possession of a domain paid for by the Opponents,
- b. was provided with fraudulent traffic which increased the commission that she earned,
- c. received press releases and translations paid for by the Opponents,
- d. was provided with all the website design and content affiliates would usually have to either design themselves, or pay for themselves”

¹ Paragraph 13

9. He states that all of the opponents, namely, Green Cape Media Limited, Webhost Limited and Partner Media Limited, are companies registered in the British Virgin Islands, Belize and Gibraltar respectively. They are all collectively owned by Aldenham Investments Limited and are involved in the online gaming and gambling industry. They provide online gambling to customers through branded casino sites such as River Belle, Lucky Nugget, The Gaming Club, Jackpot City, King Neptune's and Casino Epoca. He refers to these as the "Branded Sites" and provides screen shots of the websites.²

10. Mr Herbert states that part of the opponent's business is their affiliate program. He describes the program as follows³:

"Affiliate programs work mostly in the same way as insurance brokers. They refer potential customers to the Opponent's online gaming websites and earn commission for their referrals if the person referred spends money in the Opponents' Casino websites. Affiliates who sign up to affiliate programs enter into a contract whereby they agree to drive traffic to the Branded Sites such that if this traffic results in someone using the Branded Sites, then the affiliate gets a share of the revenue generated. The Applicant was a registered affiliate of the affiliate program found at www.referback.com"

11. A copy of the referback.com terms and conditions has been submitted at exhibit PH2.

12. In order for affiliate program members to generate income they send emails to various recipients containing links to the Branded sites. Alternatively they may have banners on their own website which then link to the Branded sites. Once the link (either by email or banner) has been activated and money spent, the affiliate will receive commission. This is tracked by using their affiliate account number.

13. According to Mr Herbert, the opponents do not assist affiliates with the creation and maintenance of their websites, but do assist them with "banners and buttons linking their casino websites (these can be pasted into the affiliate's website and send traffic to the Opponent's websites)".⁴ Mr Herbert states that Ms Vidas was registered as an affiliate on 10 December 2012.⁵

14. Exhibit PH3 consists of various contracts of employment for Mr Sebastian Zinke. The contracts of employment show that Mr Zinke was initially employed by VR Services (Proprietary) Limited t/a Forward Slash, who are "part" of the opponent's business, as a Link Negotiator. He was subsequently promoted to Senior Link Negotiator, Head of Offsite SEO (Search Engine Optimisation) and Head of SEM (Search Engine Marketing) Operations. Mr Herbert states that at the time Mr Zinke acquired the domain name he was Marketing Director of Red Interactive who are part of the opponent's business which operated under an outsourcing agreement with Partner Media Limited. However, the latest contract of employment dated 24 October 2012 was between VR Services (Proprietary) Ltd t/a Forward Slash and Mr

² Exhibit PH1

³ Paragraph 6 of Mr Herbert's witness statement dated 3 September 2014

⁴ Paragraph 11

⁵ Paragraph 15 of Mr Herbert's first witness statement

Zinke. The exhibit also includes a list of Mr Zinke's duties which include developing links to the Branded sites.

15. Mr Herbert states that on 27 November 2012, as Marketing Director of Red Interactive, Mr Zinke acquired the domain name.

16. Mr Herbert states that there are effectively two types of remapping: manual remapping and fraudulent mapping. Manual remapping is where a customer has not been referred by any affiliate, so no commission is due to anyone, but an existing affiliate code is then applied so that an affiliate receives commission. Exhibit PH4 is an email exchange between Mr Zinke and Justin Kruger (member of the Business Information department of "the Opponents"⁶) with Hein Klopper copied in. The emails are dated 25 and 26 March 2013. A copy of the email exchange is attached at annex A. The email requests the "remapping" of affiliate account numbers 125898 and 109911. It is claimed that number 125898 is Ms Vidas' affiliate account number. Mr Herbert states that Mr Zinke asked Justin Kruger to remap the code since Ms Vidas was having "conversion issues (unable to get customers to download the casino software)". There is no reference to conversion issues in the email but Mr Herbert states that remapping the code results in commission being paid to that code when the affiliate would not be entitled to it.

17. With regard to "fraudulent remapping" Mr Herbert exhibits (PH5) an email from Stephan Theron to Mr Zinke dated 6 March 2013. The email signature states that Mr Theron is a SEO Specialist Developer for Digital Outsource Services, but it is not clear what their relationship is with the opponent. Mr Herbert claims that the email exchange shows that Mr Zinke requested one of the opponents' team members to send him a code for the website videopokiesonline.com (the opponent's own website). A copy of the email exchange is attached at annex B. There is no text in the emails. Exhibit PH6 are a selection of codes which show code "aff119691" crossed out and replaced with "aff125898", which is Ms Vidas' code. As a result of the change in code, Mr Herbert claims that Ms Vidas would have received commission, which she was not entitled to, that should have been accredited to the opponent's videopokiesonline.com website.

18. Exhibit PH8 are a selection of "referring url reports". There are references to www.casinodino.com. The reports are dated December 2012 to June 2013. Mr Herbert claims that these prove that Ms Vidas "would clearly have been aware from her Referback online account that she was receiving revenue"⁷. However, no revenue figures have been provided either in the exhibit or the witness statement.

19. Exhibit PH9 is an affidavit signed by Mr Zinke, in the presence of a solicitor name "S. Matheradas"⁸ from Osbornes Solicitors LLP, and dated 2 October 2013. I attach a copy of the affidavit at Annex C. Mr Herbert states that the affidavit is an admission to fraud. The specifics, including the amount of money which was allegedly defrauded, have not been entered into the affidavit.

⁶ Paragraph 19 of the witness statement

⁷ Paragraph 23 of the witness statement

⁸ The name is not entirely legible so may slightly differ to S. Matheradas

Applicant's evidence

Witness statement of Daniel James Stuart Davies and exhibits DJSD1-DJSD4

20. Mr Davies is a solicitor for Elevation Legal, the applicant's representatives. Mr Davies is based in Australia. The witness statement largely comprises of commentary and criticisms of the evidence filed by the opponent. I shall take these into consideration where necessary. Mr Davies' has submitted exhibits with his witness statement which I will not list exhaustively, but the points which may be relevant are as follows:

- Exhibit DJSD-1 consists of an exchange of letters. The first is dated 31 October 2013 from an Israeli based law firm called Herzog Fox Neeman Law Office to the applicant. It was sent to addresses in London and Germany. A response was issued by Elevation legal on 6 November 2013, then a subsequent email from Herzog Fox Neeman to Elevation legal on 25 November 2013. It is confirmed in Elevation Legal's letter that the domain name was registered in the name of Ms Vidas and that she met Mr Zinke at a trade convention.
- Exhibit DJSD-2 consists of screenshots of the WHOIS history for the domain name. They are for the period between 24 November 2012 and 6 December 2012. Mr Davies states that having reviewed these records he has not found any record of the domain name ever being registered to "the Opponents or to Mr Zinke or his employers".
- Exhibit DJSD-3 are Google analytic print outs which Mr Davies "believes"⁹ to be for the domain name between the period 1 November 2012 and 31 December 2013. In the witness statement it is confirmed that some of the pages are missing and no explanation has been provided. It is claimed that the print outs show that 62.48% of the traffic to casinodino.com was organic.

Opponent's evidence in reply

Witness statement of Philip Herbert and exhibit PAH10

21. The opponent's evidence in reply is another witness statement from Mr Herbert. At paragraph 5 Mr Herbert states (emphasis added):

"Whilst the Opponents may assist affiliates with matters such as, for example, banner and button linking to the Opponents' websites, the Opponents **do not ordinarily design websites on behalf of affiliates**. As set out in my First Witness Statement, the Opponents' investigations showed that all content for the domain www.Casinodino.com (the "Domain") was produced by the Opponents' creative team on the express instruction of Mr Zinke. The senior management team of the Opponents were unaware of Mr Zinke's activity in assisting the Applicant, which was not authorised within the scope of his employment. This level of assistance was far above that which would

⁹ Paragraph 23 of Mr Davies' witness statement

ordinarily be provided by the Opponents when assisting an affiliate. In the normal course of business affiliates would produce or pay for the content themselves.”

22. Exhibit PAH10 is a copy of an email exchange between Mr Zinke (the email address used was sebastienz@forwardslash.com) and Elena De Resende, a Senior Consultant for Travel League CC. The email exchange is headed “private holiday” and dated between 12 November 2012 and 4 December 2012. In the email exchange it states that the holiday is for Mr Zinke and Ms Vidas¹⁰.

Legislation

23. Section 3(6) of the Act states:

“A trade mark shall not be registered if or to the extent that the application is made in bad faith.”

Case law

24. The law in relation to section 3(6) of the Act (“bad faith”) was summarised by Arnold J. at paragraphs 130 to 138 in *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch):

“A number of general principles concerning bad faith for the purposes of section 3(6) of the 1994 Act/Article 3(2)(d) of the Directive/Article 52(1)(b) of the Regulation are now fairly well established. (For a helpful discussion of many of these points, see N.M. Dawson, “Bad faith in European trade mark law” [2011] IPQ 229.)

First, the relevant date for assessing whether an application to register a trade mark was made in bad faith is the application date: see Case C- 529/07 *Chocoladenfabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH* [2009] ECR I-4893 at [35].

Secondly, although the relevant date is the application date, later evidence is relevant if it casts light backwards on the position as at the application date: see *Hotel Cipriani Srl v Cipriani (Grosvenor Street) Ltd* [2008] EWHC 3032 (Ch), [2009] RPC 9 at [167] and cf. Case C-259/02 *La Mer Technology Inc v Laboratoires Goemar SA* [2004] ECR I-1159 at [31] and Case C-192/03 *Alcon Inc v OHIM* [2004] ECR I-8993 at [41].

Thirdly, a person is presumed to have acted in good faith unless the contrary is proved. An allegation of bad faith is a serious allegation which must be distinctly proved. The standard of proof is on the balance of probabilities but cogent evidence is required due to the seriousness of the allegation. It is not enough to prove facts which are also consistent with good faith: see *BRUTT Trade Marks* [2007] RPC 19 at [29], *von Rossum v Heinrich Mack Nachf. GmbH & Co KG* (Case R 336/207-2, OHIM Second Board of Appeal, 13

¹⁰ Email dated 3 December 2012 from Mr Zinke to Elena De Resende refers

November 2007) at [22] and *Funke Kunststoffe GmbH v Astral Property Pty Ltd* (Case R 1621/2006-4, OHIM Fourth Board of Appeal, 21 December 2009) at [22].

Fourthly, bad faith includes not only dishonesty, but also "some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined": see *Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd* [1999] RPC 367 at 379 and *DAAWAT Trade Mark* (Case C000659037/1, OHIM Cancellation Division, 28 June 2004) at [8].

Fifthly, section 3(6) of the 1994 Act, Article 3(2)(d) of the Directive and Article 52(1)(b) of the Regulation are intended to prevent abuse of the trade mark system: see *Melly's Trade Mark Application* [2008] RPC 20 at [51] and *CHOOSI Trade Mark* (Case R 633/2007-2, OHIM Second Board of Appeal, 29 February 2008) at [21]. As the case law makes clear, there are two main classes of abuse. The first concerns abuse vis-à-vis the relevant office, for example where the applicant knowingly supplies untrue or misleading information in support of his application; and the second concerns abuse vis-à-vis third parties: see *Cipriani* at [185].

Sixthly, in order to determine whether the applicant acted in bad faith, the tribunal must make an overall assessment, taking into account all the factors relevant to the particular case: see *Lindt v Hauswirth* at [37].

Seventhly, the tribunal must first ascertain what the defendant knew about the matters in question and then decide whether, in the light of that knowledge, the defendant's conduct is dishonest (or otherwise falls short of the standards of acceptable commercial behaviour) judged by ordinary standards of honest people. The applicant's own standards of honesty (or acceptable commercial behaviour) are irrelevant to the enquiry: see *AJIT WEEKLY Trade Mark* [2006] RPC 25 at [35]-[41], *GERSON Trade Mark* (Case R 916/2004-1, OHIM First Board of Appeal, 4 June 2009) at [53] and *Campbell v Hughes* [2011] RPC 21 at [36].

Eighthly, consideration must be given to the applicant's intention. As the CJEU stated in *Lindt v Hauswirth*:

"41. ... in order to determine whether there was bad faith, consideration must also be given to the applicant's intention at the time when he files the application for registration.

42. It must be observed in that regard that, as the Advocate General states in point 58 of her Opinion, the applicant's intention at the relevant time is a subjective factor which must be determined by reference to the objective circumstances of the particular case.

43. Accordingly, the intention to prevent a third party from marketing a product may, in certain circumstances, be an element of bad faith on the part of the applicant.

44. That is in particular the case when it becomes apparent, subsequently, that the applicant applied for registration of a sign as a Community trade mark without intending to use it, his sole objective being to prevent a third party from entering the market.

45. In such a case, the mark does not fulfil its essential function, namely that of ensuring that the consumer or end-user can identify the origin of the product or service concerned by allowing him to distinguish that product or service from those of different origin, without any confusion (see, inter alia, Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 48)."

Relevant date

25. Whether the trade mark was applied for in bad faith must be assessed at a particular point in time. As stated in the *Sun Mark* case, the relevant date is the date of the application to register the trade marks, i.e. 16 October 2013.

Hearsay evidence

26. Section 4 of the Civil Evidence Act 1995 permits hearsay evidence in civil proceedings but provides the following guidance as to the weight to be accorded to such evidence:

"Considerations relevant to weighing of hearsay evidence.

(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.

(2) Regard may be had, in particular, to the following -

(a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;

(b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

(c) whether the evidence involves multiple hearsay;

(d) whether any person involved had any motive to conceal or misrepresent matters;

(e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

(f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.”

27. All of the witness statements filed in these proceedings have been filed by the parties’ representatives rather than individuals who have firsthand knowledge of the circumstances surrounding the case. During the hearing Mr Moss argued that it would have been most useful for the applicant herself to have provided evidence and then, if necessary, it could have been challenged. I agree that evidence from Ms Vidas would most probably have assisted these proceedings, though it must be said that firsthand evidence from the opponent would have also been useful, particularly since it is for the opponent to show that the applications were filed in bad faith.

28. In this instance, witness statements from professional representatives are hearsay. Accordingly, I adopt the approach that the narrative statements of fact are given little evidential value, except where the statements have persuasive documentary support.

Findings of fact

- Mr Zinke and Ms Vidas met and began a relationship prior to the domain name being registered on 27 November 2012. The counterstatement states that Mr Zinke and Ms Vidas met at an SEO conference in Munich on 25 September 2012. It is established that their personal relationship began prior to the date of the domain name being registered since the email exchange headed “private holiday”, evidenced at exhibit PAH10 to Mr Herbert’s second witness statement, began on 12 November 2012.
- Ms Vidas became an affiliate member of the Referback program (affiliate program) around December 2012¹¹, which is after she had first met Mr Zinke.
- Mr Zinke purchased the domain name on 27 November 2012 using a company credit card. The domain name was registered in Ms Vidas’ name¹².
- Remapping of codes did take place, and were transferred to Ms Vidas’ affiliate account. It is alleged that the transfer of the codes was for Ms Vidas to receive commission to which she was not entitled. However, it is not established if this related to the fraud “allegation” pleaded or how much (if anything) Ms Vidas was not entitled to receive.
- Ms Vidas affiliate account was suspended and she subsequently met with representatives of the opponents (see below). This was two days prior to the relevant date.

Meeting

29. Both parties witness statements detail a meeting which took place between Ms Vidas, Tim Whyles and Brian Susskind (from Wynn Technologies who provide online

¹¹ Paragraph 15 of Mr Herbert’s first witness statement

¹² Paragraph 24 of Mr Herbert’s first witness statement

support and products for the opponents), and Mr Anthony Gevisser (an advisor). The meeting was held in a restaurant in Canary Wharf, London and was arranged following Ms Vidas contacting the opponent to discuss why her affiliate account was suspended. It appears that both parties agree that the opponents requested that the domain name casinodino should be transferred to them since, in their view, it was fraudulently acquired by Mr Zinke. Ms Vidas “robustly denied any knowledge of any wrongdoing”¹³.

30. There is no dispute over a meeting taking place and that the intention of the opponents was to obtain ownership of the domain name. The opponents claim that since Ms Vidas filed a trade mark application two days after the meeting, this supports their bad faith claim.

31. It appears that Ms Vidas believed that the domain name was purchased and registered in her name for her to then develop links and banners to the opponents’ branded sites for them to commercially benefit. In order to protect her website and the gambling activities that take place on that site, she then filed trade mark applications. The opponents’ claim is that Mr Zinke, whilst an employee of a company who are part of the opponents’ business, fraudulently acquired the domain name and registered it in the applicant’s name without the opponents’ authorisation. Whilst the evidence does not support the opponents’ fraud claim, even if this was the case, the filing of trade mark applications by Ms Vidas does not appear to be the result of her fraudulently acquiring the domain name. Accordingly, it appears that Ms Vidas reasonably believed that she had a right to registration of the trade marks and sought to protect her rights accordingly. Therefore, I do not accept the opponents’ claim that applying to register the trade marks was an act of bad faith.

32. As outlined in the evidence summary, Mr Herbert states that the opponents are collectively owned by Aldenham Investments Limited. None of the opponents are UK based, and it is not clear whether Aldenham Investments Limited is incorporated in the UK or not. Nevertheless, they run a number of branded websites. To support the branded websites, the opponents also run other websites which drive traffic to the branded sites to increase revenue. These affiliate programs drive traffic to the branded sites to increase revenue. Third parties who are not owned or connected to the opponents, known as affiliate programs, may also drive traffic to the branded sites by placing banners on their own websites. If the diverted traffic subsequently spends money on the branded sites, the affiliate program members receive commission.

33. It does not appear to be in dispute that Ms Vidas was an affiliate member. This appears to have begun in December 2012 which is one month after Ms Vidas and Mr Zinke first met and after what appears to be the beginning of their personal relationship.¹⁴

34. On 28 November 2012 Mr Zinke purchased the domain name for 600 Euros and registered it in the name of Ms Vidas¹⁵. The opponents claim that the affidavit¹⁶

¹³ Paragraph 33 of Mr Herbert’s witness statement

¹⁴ Exhibit PAH10 to the second witness statement of Mr Herbert

¹⁵ Exhibit DJSD-1 to the witness statement of Mr Davies

¹⁶ Exhibit PH9 to the first witness statement of Mr Herbert, and attached as Annex C

supports their view that Mr Zinke purchased the domain name without permission. I do not accept this claim. Whilst Mr Zinke has signed the Affidavit and there are references to some fraudulent activity, the specifics are not detailed. Instead I am left with Mr Herbert's hearsay account. He was not present at the time of the affidavit being signed and does not have firsthand knowledge of events. The evidence as filed creates doubt about the circumstances claimed.

35. Notwithstanding the above, there is no evidence that the opponents have used the mark *casinodino* in the UK or any other territory. Further, there is no evidence that the opponents had an intention to use the trade mark in the UK. Therefore, it does not appear that the opponents have a *bona fide* intention to use the mark *casinodino* in the UK or have a superior right to the trade mark over that of Ms Vidas. The fact that Mr Zinke used the company credit card to purchase the domain (fraudulently or not) has no bearing on whether the applications were filed in bad faith. If Mr Zinke stole money from the opponent for his, Ms Vidas' or both of their benefits does not automatically result in the domain name being their property. Further he purchased a domain name and not a trade mark application. It cannot follow that fraudulently purchasing a domain name means that the victim of the fraud owns the domain name or related trade mark applications. Therefore, this is not a valid basis for a third party to successfully oppose the trade mark applications on the basis that they were filed in bad faith.

36. Further, having considered all of the evidence filed, and by inference, the evidence that has not been filed, I conclude that the opponents' evidence is insufficient to support the bad faith claim. During the hearing Mr Moss agreed that clear and cogent evidence is necessary, but argued that a heavy emphasis should be placed on Ms Vidas not providing a witness statement denying the claims made. I accept that questions may be raised when a person faced with a bad faith claim does not submit their own evidence to deny the claims made. However, in this instance, the opponent could have not presented a *prima facie* case that the trade mark applications were filed in bad faith for the applicant to answer. Therefore her failure to provide a witness statement is not decisive

37. The opponents' case is effectively an assertion from the opponents' representatives that the applicant filed the trade mark applications after a fraudulently acquired domain name was registered in her name and various "codes" were tampered with so that she received additional commission. The applicant's counter argument is that Mr Zinke bought the domain name on behalf of his company, transferred it to Ms Vidas in consideration for traffic to be directed to the opponent. This explanation appears to me to be equally plausible. Further, even if the opponents' money was misused without their knowledge to buy and design Ms Vidas' affiliate website, that does not mean the name of that website became their property. The case law clearly states that whilst the standard of proof is on the balance of probabilities, due to the seriousness of a bad faith allegation cogent evidence is required. In this case, the opponent has failed to provide such evidence.

38. Accordingly, I find that the opponent has not proven their section 3(6) claim that the application was filed in bad faith.

OUTCOME

39. The opposition is dismissed. The application shall, subject to appeal, proceed to registration for all of the applied for goods and services.

COSTS

40. The applicant has been successful and is entitled to a contribution towards its costs. In the circumstances I award the applicant the sum of £2300 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

For considering the statement of grounds and preparing a counterstatement	£400
Considering the opponent's evidence, preparing and filing evidence	£1200
Preparing for and attending a hearing	£700

41. I therefore order Partner Media Limited, Webhost Limited and Green Cape Media being jointly and severally liable to pay Daniela Elene Vidas the sum of £2300. The above sum should be paid within fourteen days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 12th day of November 2015

MARK KING
For the Registrar,
The Comptroller-General

ANNEX A

Appendix C

Remap request

From: Sebastian Zinke
Sent: 26 March 2013 05:40 AM
To: Justin Kruger
Cc: Hein Klopper
Subject: RE: remapping

Hi Justin.

Can you please action the below.

With regards to pitsch1 and fjcr0054721412 do you have bigger netwin accounts (5k or more) for March that we could use instead?

Hein, these are key German affiliates and would advise to push these in the beginning..

Thanks

seb

From: Sebastian Zinke
Sent: Monday, March 25, 2013 10:01 AM
To: Justin Kruger
Cc: Hein Klopper
Subject: remapping

Hi Justin.

Hope you well.

In light of the previous ad hoc remapping (due to very poor conversion and value) can I ask you to please look at remapping the following for the German affs.

125898

pitsch1

tjc0054916711r

fjcr0055090278

109911

fjcr0054721412

tjc0055154804r

fjcr0054804216

Thanks
Seb

ANNEX B

Appendix D

Code was requested from Sebastian, he changed the affiliate codes on the website and send it to his team to upload.

For actual email please open file



Videopokies.msg

Code requested from Stephan Theron by Sebastian Zinke



Sat 3-6-2012 17:03 PR 1

Stephan Theron

To: Sebastian Zinke

Attachments:

video.html

Kind Regards

Stephan Theron

DIGITAL 01 21 9788
OUTSOURCE 01 21 9800
SERVICES 01 21 20 00

SEO Specialist Developer

Landline: +27 21 528 6916 | Mobile: +27 82 776 0795 | Skype: stephantj | Email: stephantj@forwardjosh.com
physical address: 1 Maitland Drive, Century City Boulevard, Century City, 7411, South Africa | Reception telephone: +27 21 528 9369

Returned of code to Stephan Theron to upload



Wed 3 6 2013 12:06 PM

Sebastian Zinke

please upload

To: Stephan Theron

Follow up. Start by Monday, August 12, 2013. Due by Monday, August 12, 2013.

Message index.html

From: Stephan Theron
Sent: Wednesday, March 06, 2013 12:08 PM
To: Sebastian Zinke
Subject:

Kind Regards

Stephan Theron

DIGITAL
OUTSOURCE
SERVICES

SEO Specialist Developer

*Landline: +27 21 528 6916 | Mobile: +27 83 776 0795 | Skype: stephant_fa | Email: stephant@forwardslash.com
Physical address: 1 Waterview Close, Century City Boulevard, Century City, 7441, South Africa | Reception Telephone: +27 21 527 0300*

ANNEX C

AFFIDAVIT

I, the undersigned

Sebastian Zinke (Passport Number):


Do hereby make oath and declare that:

1. I am an adult male currently residing at
2. The facts contained herein are within my personal knowledge and belief and are both true and correct.
3. I hereby confirm the following:
 - 3.1. I unlawfully, and fraudulently profited, at the expense of Red Interactive and Green Cape Media and its associated companies (the Claimant) in the amount of \$
 - 3.2. I had no lawful right to the aforesaid amount.
 - 3.3. I will repay this full amount on terms to be agreed.
 - 3.4. Failure to agree such terms will result in Red Interactive, Green Cape Media or an associated company being afforded the opportunity to approach a court of competent jurisdiction to have this amount repaid by way of order which proceedings will not be defended by me.
 - 3.5. I am aware that my actions are of a criminal nature and that, should the Claimant so desire criminal charges can be initiated against me
 - 3.6. The aforesaid amount is the total amount that I have defrauded and that in the event that it is discovered by the claimant that additional amounts have unlawfully been taken, then I will repay such amounts on demand and according to the conditions relating to the aforesaid amount.
4. I know and understand the contents of this declaration.
5. I have no objection to the taking of the prescribed oath.
6. I consider the prescribed oath to be binding on my conscience.


Sebastian Zinke 02/10/13

October 2013

I certify that the Affidavit was signed and sworn to before me this 2nd day of October 2013 by the Deponent after he declared that he knew and understood the contents of this Affidavit, that he had no objection to taking the prescribed oath which he regarded as binding on his conscience, and after he uttered the words: "I swear that the contents of this Affidavit are true, so help me God".


Commissioner of Oaths
S. Mathewadas - Solicitor
OSBORNE SOLICITORS LLP
LIVERY HOUSE
9 PRATT STREET
LONDON
E1W 6AR