

Dispute Resolution Service

DRS 06365

Decision of Appeal Panel

Dated: 26 March 2009

1. PARTIES:

Complainant: Oasis Stores Limited

Address: The Triangle

Stanton Harcourt Industrial Estate

Stanton Harcourt

Witney

Oxon

Postcode OX29 5UT

Country: United Kingdom

Respondent: J Dale

Address: PO Box 2626

Bristol

Avon

Postcode: BS8 9BN

Country: United Kingdom

Note the above address is the address that the Respondent says is out of date - see below - but the Panel has not been furnished with any other.

In this decision the parties are referred to by reference to their nomenclature at first instance. In other words the Complainant remains "the Complainant" and the Respondent remains "the Respondent".

2. DOMAIN NAME IN DISPUTE:

This domain name is referred to below as “the Domain Name”

3. PROCEDURAL BACKGROUND:

- 3.1 The Complaint entered Nominet’s system on 6 October 2008. The Complaint was validated under Nominet’s dispute resolution service policy version 3 (the “Policy”) and sent to the Respondent on 7 October 2008. Nominet informed the Respondent that he should file any Response by no later than 29 October 2008. The Respondent filed no Response and Nominet informed the Complainant and Respondent of that fact in letters dated 30 October 2008. Mediation not being possible and the Complainant having paid the relevant fee, the Complaint was referred to the Expert.
- 3.2 On 20 November 2008 Mr Matthew Harris was appointed as an Expert to determine the Complaint. He gave a decision on 8 December 2008 in which he found that the Complainant had rights in the name Oasis and that it was identical or similar to the Domain Name and that the Domain Name in the hands of the Respondent was an Abusive Registration. He accordingly directed that the Domain Name should be transferred to the Complainant. A copy of his decision is available on Nominet's website. As appears below the Respondent did not participate in the determination of the Complaint by the Expert.
- 3.3 On 19 January 2009 the Respondent filed an appeal notice seeking to appeal the decision of the Expert.
- 3.4 In February 2009, Nick Gardner, Claire Milne and David King (the undersigned, “the Panel”) were appointed to determine this Appeal and have each confirmed to the Nominet Dispute Resolution Service 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.”*
- 3.5 Accordingly this is an Appeal against the decision of the Expert at first instance. The Panel was appointed to provide a decision on or before 23 March 2009. This date was subsequently extended by ten days (see below). This process is governed by the Procedure for the conduct of proceedings under the Dispute Resolution Service version 3 (“the Procedure”) and the Decision is made in accordance with the Policy. Both of these documents are available for inspection on the Nominet website (<http://www.nominet.org.uk/disputes/drs>).

4. THE NATURE OF THIS APPEAL

- 4.1 The Panel has considered the nature of this appeal process and the manner in which it should be conducted. The Policy paragraph 10a provides that: “the appeal panel will consider appeals on the basis of a full review of the matter and may review procedural matters”.
- 4.2 The Panel concludes that in so far as an appeal involves matters other than purely procedural complaints the appeal should proceed as a re-determination on the merits.

Accordingly, the Panel does not propose to undertake a detailed analysis of the Expert's decision.

- 4.3 In this Appeal the Respondent seeks permission to introduce new evidence. The Respondent did not participate in the initial determination of this Complaint. He says that was because the posted copy of the Complaint was sent to an out of date address and an emailed copy was overlooked.
- 4.4 In this context the Panel notes:
 - 4.4.1 Paragraphs 18c and 18f of the Procedure provide that an appeal notice and response should contain no new evidence or annexes.
 - 4.4.2 Paragraph 18h of the Procedure provides that the Panel should not normally take into consideration any new evidence "unless they believe that it is in the interests of justice to do so".
- 4.5 The Panel concludes that it has discretion to admit further evidence, although it should not normally do so unless satisfied that it is in the interests of justice to do so. In order to apply this test in this case the Panel considered it needed to review the evidence and then decide whether the interests of justice required this evidence to be admitted.
- 4.6 The Panel has therefore called for the non-standard submissions which each party had filed in accordance with paragraph 13b of the Procedure. In accordance with paragraph 13c of the Procedure these submissions had not previously been provided by Nominet to either the Panel or the other party. Having reviewed this material, the Panel noted that the Complainant had not had an opportunity to file any submissions or evidence in response to the material contained in the Respondent's non-standard submission (including its annexes). Had the Respondent introduced this material in the course of the original determination of the Complaint, the Complainant would have been entitled to file a Reply within 5 days of receiving the material.
- 4.7 The Panel considered that it should firstly afford the Complainant the opportunity of reply that it would have had if this evidence had been introduced at the correct time. Nominet communicated this decision to the parties on 13 February 2009 and invited the Complainant to file, within 5 days of the date of receipt of the notice, any reply evidence it wished to submit in response to the evidence the Respondent seeks leave to introduce. The notice made clear that this invitation did not represent a decision by the Panel that it would admit any further evidence - that issue is considered below. At the same time the Panel extended the date for determining this appeal by ten days. On 16 February 2009 the Complainant responded to the material contained in the Respondent's non-standard submissions.
- 4.8 The Panel considers that the correct way to proceed is to consider all the evidence before it and decide what outcome, on the evidence, should be reached. If that outcome is to uphold the decision of the Expert and provide for the Domain Name to be transferred to the Complainant then the question of whether or not the Respondent should be allowed to adduce new evidence becomes academic as no prejudice is caused to the Complainant by so doing. If on the other hand the Panel reaches the conclusion that the Decision of the Expert should not be upheld, and the Domain Name should be retained by the Respondent, it will then become necessary to decide whether the interests of justice do allow this evidence to be admitted. If the evidence is not

admitted the Panel would then have to decide whether, absent such evidence, its decision should be different.

- 4.9 On 5 March 2009 the Panel received, via Nominet, a further communication from the Respondent making submissions following the Complainant (or its parent company) having gone into administration. On 23 March 2009 the Panel received, via Nominet, yet further submissions from the Respondent. The Panel declines to admit each of these submissions.

5. THE FACTS AT FIRST INSTANCE

- 5.1 The relevant facts that were before the Expert at first instance were as set out in this section. These facts are all as at the time of filing the Complaint.
- 5.2 The Complainant was incorporated on 2 January 1991 and first began trading as Oasis in that year. The Complainant has used the term Oasis in connection with clothing, fashion and fashion related accessories.
- 5.3 The Complainant presently operates 269 retail outlets in the UK and a further 132 world-wide, including locations throughout Europe as well as Indonesia, Russia, Saudi Arabia and the United Arab Emirates. The Complainant's annual turnover in the past five years has been in excess of £160 million and on occasion in excess of £230 million.
- 5.4 The Complainant is the owner of numerous registered trade marks that comprise or incorporate the word "Oasis". These include:
- 5.4.1 United Kingdom registered trade mark no 2336917 for the word "Oasis" in class 25, filed on 4 July 2003 and registered on 30 January 2004; and
 - 5.4.2 Community Trade Mark No 206250 for the word "Oasis" in classes 3, 14, 18, 21 and 25, filed on 1 April 1996 and registered on 25 April 2007.
- 5.5 The WhoIs record for the Domain Name reveals that the Domain Name was registered at some time before August 1996.
- 5.6 On August 28, 2008 the Complainant's lawyers wrote a letter before action in relation to the Domain Name to the Respondent at his PO Box No. address in Bristol in an envelope marked with the name of the Complainant's lawyers' law firm. The letter was returned by Royal Mail in September 2008 marked "addressee gone away".
- 5.7 From at least the date of the Complaint, and up to the date of the first instance decision, the Domain Name had been used for a web site that although varying in style and format had all the hallmarks of having been generated by a "domain name parking service".
- 5.8 Around the time that the Complaint was filed those typing the Domain Name into an internet browser would be diverted to a web site operating from the url <http://oasis.co.uk.imondo.com/>. The term "oasis.co.uk" and a search box were displayed at the top of the page. Below that were the tabs "Home", "Coast Stores Co UK", "Oasis Clothing UK" and "Beyonce Clothes", and below that a series of "Sponsored listings". The exact sponsored listing varied from time to time and possibly minute by minute but at one point the sponsored links displayed were as follows:

- Women's Clothing Shop
- Woman's Clothes
- UK Clothes
- Flax Clothes at Gidgets
- Shop SKECHERS and Save
- Large Womens Clothes
- Plus Size Consignment
- DorothyPerkins UK
- On-Dek Womens' Clothing
- Ladies Clothes

To the right of the page were a series of "Related Searches". Again the exact searches displayed varied from time to time, but at the same time as the sponsored links listed above were displayed, the Related Searches were:

- Oasis Clothes
- Oasis Clothing UK
- Oasis Fashion Shops
- Design Clothing
- Wallis Clothes
- Coast Stores Co UK
- Beyonce Clothes
- Bay Trading Clothes
- Club Oasis Oasis Lowest

The page also contained the link "Enquiries about this domain?", which linked to a page where it was possible to make an offer to purchase the Domain Name.

6. FURTHER MATERIAL NOW BEFORE THE PANEL

- 6.1 The Respondent now seeks leave to admit a submission and evidence which (he says) establishes the following further facts.
- 6.2 There are some 190 registered trade marks shown in a search at the UK Intellectual Property Office for the word 'Oasis'.
- 6.3 The Respondent did not have any interest in women's clothes shops and he was not aware of the Complainant nor did he have it in mind when he purchased the Domain Name in 2006 for £4,000.

- 6.4 The Respondent purchased it because it was an attractive 'highly evocative generic word' He says that he buys and develops websites on such domains and gives examples of others where he says he has an 'equity interest' including gambling.co.uk, poker.co.uk and financialadvice.co.uk. He says that he wanted to use the Domain Name either for an online bingo idea that he had or to provide a brand for a financial services site. He says that in due course he developed plans for the IFA network with a company called ThinkEngine Limited.
- 6.5 The Respondent purchased the related oasis.com and oasis.de domain Names for \$65,000 in September 2008 before being aware of the complaint.
- 6.6 The Respondent says that any offer for sale of the Domain Name contained on the parking page is generated automatically by Imodo (the parking company) and that in any event buying and selling generic Domain Names is not objectionable.
- 6.7 The Respondent then goes on to allege that the particular use that has occurred of the Domain Name, in terms of the links displayed on the parking page hosted by Imodo, has been caused by the actions of the Complainant. As appears below this is a matter of some significance and it is worth setting out precisely what he says, which is as follows

"The results of innocent PPC [pay per click] use changed – not because of any changes made by me, but rather (confirmed by Imodo) because the complainant appears to have purchased the domains ("oasis.co.uk" and "oasis.com") as keywords for its paid advertising. Ian Collier of Imodo has provided a statement confirming that the only keywords used for the domain are "oasis.co.uk" and "oasis.com" both of which are my domains. I have done nothing to encourage the associations with clothing that have since appeared. However records (including Yahoo search results) indicate that the Complainant has purchased advertising the domains themselves as keywords making it impossible for the parked page to avoid showing the adverts they now complain about. This is not a case of my seeking take advantage of their trade mark – but rather the parking software being driven away from the other more general adverts that previously appeared".

- 6.8 This submission is accompanied by a statement (signed with a Statement of Truth) by Ian Collier who describes himself as 'Director, 1plus.net Ltd, Imodo.com'. This statement is relatively short and reads as follows:-

"To whom it may concern: The Oasis.co.uk domain name on our nameservers has been set to display advertising extrapolated from the keywords "oasis.com" or "oasis.co.uk". The keywords used are an exact match for the domain names owned by our client.

The advertisements and any other text that appear on a parking page will vary from day to day. This is dependent on which companies are advertising under the keywords set against the domain at any given time. In this case, it seems that Oasis Stores and Coast Stores are advertising using the keywords of "oasis.com" and "oasis.co.uk".

When companies choose to advertise specifically using a client domain name as a keyword, it is impossible to completely remove their advertisements from the parking page. This is because Yahoo's content display algorithm will always consider the domain name (and the domain name minus the domain extension, i.e. "oasis") as being of some importance, even if irrelevant keywords are set.

Both Imodo and its upstream advertising partner, Yahoo, take trademark infringement very seriously. We would not permit trademark infringing domain names nor infringing keywords to be used by a client.

I believe that the facts stated in this statement are true."

7. THE PARTIES' CONTENTIONS

The Panel does not feel it necessary to set out in full here the Complainant's contentions at first instance. They are set out by the Expert in his decision of 8 December 2008. The issues before the Panel are set out in the Appeal Notice, Response and further submissions, which are quoted in full below.

7.1 The Respondent's Appeal Notice

It is convenient to set out in full the Respondent's Appeal Notice. It reads as follows.

Procedure

I did not receive the hard copy Complaint – the address on the WHOIS was out of date and Nominet's systems require replacing each address under separate accounts. I have many other domains and had failed to notice that this one had my old address. Nominet have my current address on all my more recent records, but this was not tried, even though the Complaint makes clear that their letter to the old address had failed. The email was received but unfortunately was missed and not seen by anyone until I was told by a third party that they had seen the decision against me. I therefore invite the panel, in the interests of justice, to admit a non-standard submission that includes proof of my preparations to use the domain with a third party; as well as evidence from my parking company that I did not target the complainant; and had no way of preventing their paid for advertising when it targeted the domain name itself as a keyword.

Rights

I accept the complainant has rights to the word oasis. However these are not a monopoly rights – as evidenced by the 190 registered trademarks listed at the IPO for the word search "oasis". I am a man and I do not have any interest in women's clothes shops. I was not aware of the Complainant, nor did I have them in mind, when I purchased the domain in 2006 for £4,000.

*I purchased the domain because it is an attractive highly evocative generic word. I buy and then develop websites on such domains. Examples where I have an equity interest include gambling.co.uk, poker.co.uk and financial advice.co.uk. I wanted use the domain either for an online bingo idea that I had or to provide a brand for a financial services site. In due course I developed the IFA network idea with ThinkEngine Limited and have adduced evidence of such plans. I purchased the related oasis.com and oasis.de for \$65,000 in September 2008 (before being aware of the complaint) as part of that planning. I refer to the **maestro.co.uk** and **verbatim.co.uk** Appeals in support of my position.*

Abusive Registration

In respect to of the claims relating to my alleged primary intentions when registering the domain, I reconfirm that I did not have the Complainant in mind (much less primarily in mind) when I registered the domain. It follows – as set out in the verbatim.co.uk appeal at paragraphs 8.13 et seq – that all of the Complainant’s complaints relating to registration must fail.

I deny registering to sell to the complainant. Imodo (the parking company) had a standard invitation to make offers for domains on their pages – these have now been altered by them – but it should not be taken as a specific offer to sell, much less in relation to the complainant. Buying and selling generic domains is in any event unobjectionable.

I deny registering to block the complainant – I purchased at market value an attractive generic domain for no other reason than that it is an attractive domain and I plan to use it.

3(a)(i) (C) only refers to motivation at the time of the registration; although I also deny that I later sought to unfairly disrupt the business of the complainant.

*Whilst I am preparing to develop domains I often park them. The earliest record on archive.org is from 7 April 2006 shows results that do not feature clothing at all. My temporary use of a generic domain as a parking page was unobjectionable from the complainant’s point of view. The idea suggested that any parking content or site would automatically lead to an association with them is nonsense – I do not think they are even the most famous oasis mark, much less a “Coca Cola” type mark. I refer to the **wiseinsurance.co.uk** and **myspace.co.uk** Appeals in this respect and submit that conduct that was unobjectionable when it commenced (shortly after the purchase of the domain) does not later become objectionable simply if the results shown are altered.*

*I disagree with the Expert’s analysis of the **myspace.co.uk** Appeal, particularly in respect of the importance he attaches to the allusory (sic) nature of that name. I submit that it is true of any generic or descriptive name that innocent registration and subsequent PPC use has been held to remain innocent, even when the results of that PPC use may be altered by events outside the control of the registrant.*

That is what happened here. The results of innocent PPC use changed – not because of any changes made by me, but rather (confirmed by Imodo) because the complainant appears to have purchased the domains (“oasis.co.uk” and “oasis.com”) as keywords for its paid advertising. Ian Collier of Imodo has provided a statement confirming that the only keywords used for the domain are “oasis.co.uk” and “oasis.com” – both of which are my domains. I have done nothing to encourage the associations with clothing that have since appeared. However records (including Yahoo search results) indicate that the complainant has purchased advertising using the domains themselves as keywords – making it impossible for the parked page to avoid showing the adverts that they now complain about. This is not a case of my seeking to take advantage of their trademark – but rather the parking software being driven away from the other more general adverts that previously appeared.

I deny intentionally giving false contact details and confirm that Nominet has my correct details on other accounts.

Fair Use

I have made demonstrable preparations to use the domain prior to being made aware of the complaint. I have a statement from ThinkEngine confirming our plans to develop the family of Oasis domains for a national network of IFAs and can also show emails (pre-dating the complaint) relating to the purchase of those names and also proof of our plans for use.

*I also refer to **wiseinsurance.co.uk** and **myspace.co.uk** and claim fair use of a generic domain for parking under 4(a)(ii) and 4(e) – I should not be punished for the results of the complainant’s advertising”.*

7.2 Complainant’s Response to Appeal Notice

It is also convenient to set out the Complainant's response in full, as follows

“We repeat the submissions made in the Complaint dated October 6 2008 and deal in turn below with the issues raised by the Respondent in his Appeal.

Procedure

- 1. In the first paragraph of the Appeal, the Respondent claims that he did not receive a hard copy of the Complaint. He also claims that he did not respond to the Complaint because (i) the address on the WHOIS for the Domain Name was out of date and (ii) the email to him from Nominet was “unfortunately” missed.*
- 2. The Respondent also refers to a non standard submission and in the explanatory paragraph of that submission he claims that he did not file a response to the Complaint because he was “unintentionally unaware” of the Complaint. In that explanatory paragraph, he also claims that the “domain is a valuable business asset of mine”.*
- 3. There is nothing exceptional about this. The failure to receive the Complaint was as a result of the Respondent’s carelessness and he should not be able to benefit from the carelessness by now submitting material which, as per Nominet Procedure, he is time barred from doing. The Respondent should have ensured, as he is under an obligation to do so through his registration agreement, that his WHOIS details were kept up to date.*
- 4. We therefore submit that the Panel disregard the evidence now put forward by the Respondent.*

Abusive registration

- 5. In the first paragraph of the Appeal, the Respondent states that he “did not target the complainant”. Instead, he blames the Complainant for causing clothing related links to appear on the Web Site because of the Complainant’s alleged keyword purchases. Interestingly, the Respondent does not attempt to provide an explanation for how the links to companies in the same corporate group as the Respondent (sic) appeared on the Web Site.*
- 6. This theme continues in the tenth paragraph of the Appeal, where the Respondent makes the fanciful suggestion that the Complainant controls the*

content of the Domain Name because of the alleged purchasing of keywords (again there is no explanation regarding the links to the companies within the Complainant's corporate group). The Respondent uses this as an attempt to deflect the attention from his own wrongdoing. The Respondent goes on to say that he has "done nothing to encourage the associations with clothing since they have appeared". This is not the case and we refer to the Expert's decision, in particular at paragraphs 6.1, 6.29 and 6.32-6.34. The Respondent cannot hide behind the excuse that the links were created by software which is out of the Respondent's control. As the Expert makes clear, it is the Respondent who has chosen to cede control over how his domain is used. It would therefore be inequitable to allow the Respondent to reap the benefits provided by the parked service without being held liable for the wrongdoings (in this case, taking unfair advantage of the reputation of the Complainant's trade mark) caused as a result of that service being in place.

7. *In the second paragraph of the Appeal, the Respondent states that he "was not aware of the Complainant, nor did I have them in mind when I purchased the domain in 2006". We dispute this given that the Complainant has a presence on the majority of high streets across the country and that there are 6 of the Complainant's stores/concessions in Bristol where the Respondent is based. Almost anyone who has walked down a major high street or into a Debenhams store in this country (particularly in a city where there are 6 stores/concessions) will be aware of the Complainant, especially somebody who owns a domain name with the same name.*
8. *However, even if the Panel are to believe that the Respondent was not aware of the Complainant when it bought the Domain Name in 2006, it cannot be the case that the Respondent was not aware of the Complainant up until late 2008. This must be inferred by the number of links related to Oasis and clothing which appeared on the Web Site. Even if they were selected by a software package it must be inferred that the Respondent would have been aware of what appeared on the Web Site given that that "domain is a valuable business asset of mine". Further and perhaps most crucially, at no place in the Appeal does the Respondent deny knowledge of the Complainant after 2006.*
9. *Whilst the word OASIS is an ordinary English word there are no links on the Web Site, nor have there ever been, which relate to this ordinary meaning of the word. OASIS cannot in any way be considered as descriptive of clothing (or of other companies within the Complainant's corporate group). The links to clothing and other companies within the Complainant's group can only be explained through the unfair advantage taken over the Complainant's trade mark.*
10. *The Respondent also alleges that he has made preparations to use the Domain Name. However, he has submitted no evidence to support this (any evidence submitted outside the deadline should be disregarded) and instead the facts stand for themselves. The Respondent purchased the Domain Name almost three years ago in 2006. In that time there has been no development of the Web Site and it has remained as a parked website. We submit that if there were any genuine plans to develop the Domain Name it would not have remained as a parked domain for so long. Even if there were plans to make*

use of the Domain Name it does not act as a defence to the incidents of abuse cited in paragraphs 3(iv) and 3(vi) of the Complaint. "

7.3 The Respondent's Non-Standard Submissions

The Respondent's non-standard submissions comprised an explanatory paragraph and a number of documents. By and large the contents of these documents are described in the Complainant's response to the non-standard submissions (set out below). To the extent anything further turns upon the precise contents of any of these documents that is discussed later in this decision. The documents are:

- Emails about developing oasis.co.uk:
 - Email of 23 August 2008 from Robert (Prime) to the Respondent at contact@financialadvice.co.uk
 - Email of 24 August 2008 from the Respondent to Robert (Prime)
 - Email of 8 September 2008 from Robert (Prime) to the Respondent
- Emails about purchasing oasis.com and oasis.de:
 - Email of 13 September 2008 from the Respondent to Webmaster (ais.webteam@smc.com) with reply of 15 September 2008
 - Email of 16 September 2008 from Webmaster to the Respondent with the Respondent's reply of 18 September 2008
 - Email of 16 September 2008 from the Respondent to Webmaster with reply of the same date
- Web.archive print out for oasis.co.uk at 07/04/2006
- Letter of 16 January 2009 from ThinkEngine to the Nominet Panel
- Letter of 16 January 2009 from Ian Collier, Director of 1PLUS, addressed "To whom it may concern"
- Result of Yahoo search (undated) against "oasis.com"
- Result of Yahoo search (undated) against "oasis.co.uk"
- Trade Mark Enquiry – Search results for OASIS

7.4 The Complainant's Reply to the Respondent's Non-Standard Submissions

The Complainant's reply to these submissions was as follows.

"These submissions are made in response to the Respondent's non standard submission (the "RNSS")

We repeat the arguments as put forward in our Appeal Notice Response ("ANR") dated 3 February 2009 and our non standard submission dated 26 January 2009 as to why the evidence put forward by the Respondent in the RNSS should not be admitted.

Annex 1 to the RNSS

1. *This is a letter from Ian Collier, a director of 1plus.net Ltd. We refer the Panel to paragraphs 5 and 6 of the ANR and we reiterate the points raised in those paragraphs. Despite the bizarre suggestions by the Respondent to the contrary, the Complainant does not control the content of the Web Site. As Mr Collier points out, the Domain Name “has been set to display advertising extrapolated from the keywords “oasis.com” or “oasis.co.uk”. The Respondent, through 1plus.net Ltd, therefore has control over the content of the Web Site.*
2. *Mr Collier makes unsubstantiated allegations that “Oasis Stores and Coast Stores are advertising using the keywords of “oasis.com” and “oasis.co.uk””. We submit that this would make no difference to the outcome of the Complaint, but in any event these allegations are not supported by any evidence and should therefore be disregarded.*
3. *Mr Collier then goes on to say that, because of certain software, “it is impossible to completely remove their advertisements from the parking page”. Whilst this may or may not be true, it is certainly not the impossible to remove the advertisements from the Web Site as a whole. The Respondent made the choice to operate the Web Site as a parked page, but he did not have to do so and at any stage he could have changed the content of the Web Site or taken the Web Site down.*

Annex 2 to the RNSS

4. *This is a one page print out from the UK IPO web site. It is impossible to tell exactly what it is attempting to prove, but we surmise that the Respondent has used it to support his comments in the second paragraph of his Appeal Notice.*
5. *The Complainant has never claimed to have a complete monopoly right over the OASIS name and recognises that there are other trade mark registrations for the OASIS name. However, the Complainant does claim rights over the OASIS name in relation to clothing, fashion and fashion related accessories and these are the rights which the Respondent has taken unfair advantage of and/or used to the detriment of the Complainant. In that regard the other OASIS trade mark registrations are irrelevant and do not alter the abusive registration by the Respondent.*

Annex 3 to the RNSS

6. *This is a chain of emails in August and September 2008 between the Respondent and an unidentified third party in relation to the possible use of the Domain Name as an operational site. As we set out in paragraph 10 of the ANR, even if there were notional plans to one day make use of the Domain Name they do not act as a defence to the incidents of abuse cited in paragraphs 3(iv) and 3(vi) of the Complaint. Furthermore, and in the Respondent’s own words (see email dated 24 August 2008 to “oldleads@aol.com”), until August 2008 at the very earliest, “oasis.co.uk is just sitting there”. We submit that until that date at the earliest, the Respondent had no plans to use the Domain Name and instead was just waiting to sell it. In the same email the Respondent also states that “[he had} been offered £90k for the FA site previously as it stands, which is obviously far too low”. Rather than making preparations to use domain names, it seems that the*

Respondent is quite prepared to sell them. Therefore, the Respondent does not have a defence to any of the incidents of abuse cited in the Complaint.

Annex 4 to the RNSS

7. *This is a print out from web.archive.org which purportedly shows the links on the Web Site in April 2006. We have no way of telling whether these are accurate and therefore have no further comments to make.*

Annex 5 to the RNSS

8. *This is a letter to the Panel from ThinkEngine Ltd dated 16 January 2009. This letter supports the points raised in paragraph 6 above that the Respondent made no plans to use the Domain Name before August 2008 (the initial correspondence between the Respondent and ThinkEngine was in July 2008 in relation to www.financialadvice.co.uk) and the Respondent has produced no evidence whatsoever to support the idea that he did have plans to use the Domain Name prior to August 2008. In fact, no substantial evidence has been produced by the Respondent to support his claim that there are currently plans to make use of the Domain Name. There is reference in the letter from ThinkEngine to a formalised agreement, but no evidence of such an agreement has been put forward by the Respondent. We would again point that today, just as when the Complaint was lodged, the Domain Name still operates as a parked web site.*

Annex 6 to the RNSS

9. *This appears to be a screen grab of Yahoo search results for "oasis.co.uk". We presume this is being included by the Respondent to support the allegations that the Complainant has purchased adverting [sic] using the Domain Name as a keyword which in turn has caused the clothing related links and links to the Complainant's corporate group to appear on the Web Site. However, we note that this screen grab is not dated and as such we submit that it cannot be relied on by the Respondent to support its arguments. This screen grab could have been produced prior to the Respondent owning the Domain Name or after the Complaint was lodged. In no way can it support the Respondent's allegations that the clothing related links were caused by the Complainant's alleged use of the Domain Name as a keyword.*
10. *In any event, even if these screen grabs could be verified and dated, we submit that they would make no difference to the outcome of the Complaint. As we have already made clear, in the ANR and paragraph 1 and 3 above, it is the Respondent who is in control of the Domain Name through 1plu.net Ltd.*

Annex 7 to the RNSS

11. *This appears to be a screen grab of Yahoo search results for "oasis.com". We repeat our submissions at paragraph 9 and 10 above.*

Annex 8 to the RNSS

12. *This is a chain of emails from September 2008 between the Respondent and various individuals at SMSC relating to oasis.com and oasis.de.*

13. *The Respondent appears to have purchased these domain names from SMSC and then sold them to ThinkEngine. To date, no evidence has been brought forward by the Respondent to show that he has any plans to use these domains. As of today, and just like the Domain Name, oasis.com and oasis.de remain as parked web sites, no doubt operating on a click through for revenue basis. Furthermore, this again shows that it was not until August 2008 at the earliest that the Respondent even gave thought to using the Domain Name constructively and no evidence has been put forward to suggest there were plans to use the Domain Name before that date. In August 2008 the Domain Name was just "sitting there", as it is today along with oasis.com and oasis.de.*

8. DISCUSSION AND FINDINGS (SUBJECT TO A DECISION AS TO WHETHER ADDITIONAL EVIDENCE ON APPEAL IS ADMITTED)

General

- 8.1 In order for the Complainant to succeed it must (Policy paragraph 2) prove to the Panel, on the balance of probabilities, both:
- 8.1.1 that it has Rights in respect of a name or mark which is identical or similar to the Domain Name; and
 - 8.1.2 that the Domain Name, in the hands of the Respondent, is an Abusive Registration as defined in Paragraph 1 of the Policy.
- 8.2 Rights are defined in Paragraph 1 of Version 3 of 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."*
- 8.3 If the Complainant satisfies the Panel that the Complainant has relevant rights, the Panel must address itself to whether the registration by the Respondent of the Domain Name is abusive.
- 8.4 An Abusive Registration is defined in the Policy as follows:
- "Abusive Registration means a Domain Name which either:*
- 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*
- has been used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's Rights";*
- 8.5 It is convenient to identify first what is not in dispute. The Respondent accepts that the Complainant has Rights in the name 'Oasis'. The Complainant for its part accepts that although it has these Rights there are other parties, in different fields of activity, who also have rights in the name 'Oasis'.
- 8.6 It is also not in dispute that the Domain Name is identical to the name in which the Complainant has Rights.

- 8.7 Accordingly the issue is whether or not the Domain Name, in the hands of the Respondent, is an Abusive Registration.
- 8.8 In this respect two issues need to be considered. First the possibility that the Respondent's purchase of the Domain Name in 2006 was in itself sufficient to render the registration Abusive. Second, if not, whether the subsequent use that has been made of the Domain Name renders it Abusive.
- 8.9 Dealing with the first issue, namely the Respondent's purchase of the Domain Name in 2006, the Respondent has said he was not aware of the Complainant at the time he purchased the Domain Name. The Complainant disputes this given that it has a presence on the majority of High Streets across the country, and that there are six of the Complainant's stores or concessions in Bristol where the Respondent is based.
- 8.10 The Panel is not able to resolve this dispute, but absent any evidence that the Respondent was purchasing the Domain Name as part of some sort of deliberate scheme to take advantage of the Complainant's established name and business (and there is no such evidence), even had the Respondent known of the Complainant's business that does not itself make the purchase of a Domain Name, which comprises an ordinary English word, objectionable. This is not a case where the word is a made up word which, if contained within a domain name, inevitably raises at least an inference that it will be associated with the party most commonly associated with the word. In such cases an Expert can infer that the purpose of the purchase was to take advantage of that connection. It would for example be relatively easy to infer (at least absent any credible explanation) that a third party purchasing, say, kodak.co.uk intended to take advantage of the name and reputation enjoyed by the well known Kodak company. The same is not true where the name comprises a common English word where any number of uses may be perfectly unobjectionable – particularly where, as here, the evidence shows a large number of trade marks for that word co-exist.
- 8.11 There is no evidence (beyond the evidence of how the parking page has behaved – as to which see below) that the Respondent purchased the Domain Name with any intent to target the Complainant's business or to associate it with that business. The Respondent has provided a signed statement that he did not do so. He has also produced at least some evidence of discussions with third parties (these are some of the documents forming the Respondent's non standard submissions) as to proposals to exploit the name in a different field of activity, namely financial services. In these circumstances the Panel declines to make any findings of any intent on the part of the Respondent when he purchased the Domain Name to associate it in some way with the Complainant's business. Accordingly the Panel does not find that the Respondent's acquisition of the Domain Name in itself was Abusive.
- 8.12 Accordingly the question of whether the registration is Abusive turns upon the use which has been made of the Domain Name since the Respondent acquired it by using it as a "parking page". This in turn depends on how that parking page has behaved and what its contents have been.

8.13 In this context the Panel notes that the current version of the Policy now provides, at paragraph 4e, as follows:

"Sale of traffic (i.e. connecting domain names to parking pages and earning click-per-view revenue) is not of itself objectionable under the Policy. However, the Expert will take into account:

i. the nature of the Domain Name;

ii. the nature of the advertising links on any parking page associated with the Domain Name; and

iii. that the use of the Domain Name is ultimately the Respondent's responsibility".

8.14 It is not in dispute that at all material times the Domain Name has been used to link to a 'parking page' in this case operated by 1plus.net Limited who trade as Imodo. It is also not in dispute that the content of that parking page has from time to time contained links to women's fashion and clothing. There may be a dispute as to the precise quantity of such links by comparison to other links on the page and how these matters have changed over time. The evidence before the Panel is not entirely clear in this regard.

8.15 In cases such as this, where the behaviour of a 'parking page' is involved and an Expert or an Appeal Panel is asked to reach conclusions based on such behaviour, the relevant party would be well advised to provide full and detailed explanations as to exactly what is happening and what is causing the relevant page to behave in the manner concerned.

8.16 The Panel in this case is aware in general terms of the nature of parking pages and how they operate and potentially earn revenue if the content of the page generates "click through" traffic by visitors to the page clicking on links found on the page. The Panel does not however profess to have a detailed understanding of the inner workings of such pages. Given that the content of those pages may be generated automatically (by what may well be relatively sophisticated proprietary software) and may also operate in a particular way based on certain parameters specified by its owner, some caution is needed in reaching any conclusion based on simply looking at a page, without further explanation. Where (as here) the exact way in which the page behaves, and the reasons for that behaviour, are of significance then detailed explanation as to what exactly is going on is likely to be of considerable assistance to the Expert or the Panel. That is conspicuously lacking in this case.

8.17 In this case, as appears at paragraphs 6.7 and 7.1 above, the Respondent has in effect made an allegation that the way the parking page behaves has been influenced, at least in part, by actions that the Complainant itself has taken. Specifically the Respondent seems to say that the Complainant has paid for advertising which has caused the page to behave in a particular way. Although it could have been much more clearly expressed, it seems to the Panel that when the Respondent's submission is read carefully, in conjunction with Mr Collier's statement, what is alleged is that the Complainant is paying Yahoo for the use of "keywords" comprising the text strings "oasis.co.uk" and "oasis.com". The effect of such payment is that the search results Yahoo will return, if the relevant term is used for a search, will be weighted in some way to the sites the advertiser selects to associate with such keywords – in this case the Complainant's own web site. It also appears that the allegation is that the parking page displays advertising which is "extrapolated" from the search results that Yahoo

returns for the domain name in question .. If this is correct it seems to the Panel to be of considerable significance – if it is the Complainant's own behaviour which has caused the parking page to start displaying links which the Complainant says are objectionable, it is difficult to see how that can make the use in question, by the Respondent, Abusive.

- 8.18 The Panel has to say that the way this allegation has been made by the Respondent is very brief and lacking in detail. He has produced a statement from Mr Collier of Imodo (see paragraph 6.8 above) which in substance repeats the allegation. This too is unhelpfully short of detail (and presumably Mr Collier as a representative of the company that provides the parking page ought to have been in a position to provide a fuller explanation, though the Panel appreciates he may have chosen not to do so for reasons of commercial confidentiality). The Panel notes that the Respondent is not legally represented. Accordingly the Panel concludes that although the evidence could have been much fuller it does raise important issues and accordingly the Panel has to deal with this evidence the best it can. The Panel has therefore turned to consider what the Complainant says about this allegation.
- 8.19 The Complainant says in its response to the Appeal that *'the Respondent makes the fanciful suggestion that the Complainant controls the content of the Domain Name because of the alleged purchasing of keywords...'* and *"The Respondent uses this as an attempt to deflect the attention from his own wrongdoing"*.
- 8.20 In the response filed by the Complainant to the Respondent's non-standard submission (see paragraph 7.4 above) the Complainant refers to the statement from Mr Collier and says:

'despite the bizarre suggestions by the Respondent to the contrary, the Complainant does not control the content of the Web Site. As Mr Collier points out the Domain Name has been set to display advertising extrapolated from the keywords 'Oasis.com' or 'Oasis.co.uk'. The Respondent through 1plus.net Limited therefore has control over the content of the website'.

The Complainant goes on to state that

'Mr Collier makes unsubstantiated allegations that 'Oasis stores and Coast stores are advertising using the keywords of 'Oasis.com' and 'Oasis.co.uk'. We submit this would make no difference to the outcome of the complaint but in any event these allegations are not supported by any evidence and should therefore be disregarded.

- 8.21 This did not seem to the Panel to be a satisfactory response. Although it could have been better put by the Respondent it seems to the Panel that the Complainant has squarely understood the allegation being made. That allegation, particularly given the statement from Mr Collier accompanied by a statement of truth, seemed to the Panel to merit a full and comprehensive rebuttal. It would have been an entirely straightforward matter for a representative of the Complainant to provide evidence that confirmed the Complainant had not in fact engaged in purchasing these keywords. It has not done so. The Panel also does not accept the submission that the Respondent's allegations are "not supported by any evidence" – Mr Collier's statement is clearly such evidence.
- 8.22 A further factor of relevance confirms the Panel's view in this respect. In the course of discussing this aspect of the Appeal, the Panel concluded that it would be helpful to examine the web sites referred to in the Complaint and the Appeal. Paragraph 16a of

the Procedure (as applied to Appeals by virtue of paragraph 18i of the Procedure) allows the Panel so to do.

- 8.23 Accordingly on 12 February 2009 the Panel viewed on line the Complainant's web site, which can be found at the URL www.oasis-stores.com. If that site is accessed and an option of 'source' is selected on the 'view' menu on a standard internet browser the underlying HTML coding for the site can be seen.
- 8.24 What that shows (amongst other things) is that coded into the Complainant's own web site are a large number of 'metatags' under the 'meta name' section of the HTML code. This section contains, for example terms such as 'oasis', 'spring collection', 'party dress', 'little black dress', 'fashion trends' and so on. For present purposes however what is significant is that it also contains the terms 'oasis.com', 'oasis.co.uk' and 'oasis.net'.
- 8.25 The Panel considers this information tends to confirm the thrust of the allegations made by the Respondent – namely that the Complainant is itself seeking to use the domain names oasis.co.uk and oasis.com to attract traffic to its own site. It may well be that this metatag use will also have some influence on the search results that Yahoo (and other search engines) return when these domain names are used as search terms
- 8.26 Accordingly the Panel accepts the Respondent's evidence that the Complainant has itself used the names of domains belonging to the Respondent (oasis.co.uk and oasis.com) as keywords in advertising with Yahoo. It also finds that the Complainant has used them as meta tags on its own web site. The Panel accepts the Respondent's evidence that the use of these names as keywords will have caused Yahoo to rank the Complainant's site higher than would otherwise have been the case in response to searches performed on such terms. The Panel accepts the Respondent's evidence (which does not seem to be challenged) that the content of the parking page is automatically generated by software which is using the terms oasis.co.uk and oasis.com as some form of input and which is linked to results that Yahoo returns in respect of searches on such terms. That in itself is not objectionable given those domain names belong to the Respondent. The Panel infers that this, when combined with the way in which the Complainant has paid Yahoo for use of those terms as keywords, has at least to some degree caused the parking page to generate links relating to women's fashion and/or the Complainant's site.
- 8.27 In short the Panel concludes that the Complainant, by choosing to use as keywords with Yahoo (and possibly also as metatags on its own web site - www.oasis-stores.com) text which corresponds to domain names which it does not own, including the Domain Name, has to some degree caused the parking page to which those domain names are linked to behave in the manner which the Complainant now says is Abusive. The Panel believes it is clear that this cannot be Abusive Behaviour by the Respondent. He has said he did nothing to alter the behaviour of the site and if a significant cause is the actions of the Complainant it cannot rely on those as evidence of Abusive Behaviour by the Respondent. Accordingly the Panel considers, if all the evidence before it is admitted, that the registration is not an Abusive Registration, and it should not be transferred to the Complainant.
- 8.28 Insofar as the Panel's finding is based upon inferences it has drawn as to what is happening it believes it is entitled to reach those inferences. As indicated above the Respondent's evidence was not particularly clear, but Mr Collier's statement in

particular, squarely raises the case that the Complainant was using the Domain Name as some form of keyword advertising. That case has been understood by the Complainant but was unanswered, and its failure to deal properly with that issue leads the Panel to conclude it is proper to draw the inferences it has reached.

- 8.29 The Panel has also had regard to the appeal decision in DRS 04962 MySpace, Inc v Total Web Solutions Limited concerning myspace.co.uk, given that it also considers abuse arising out of the behaviour of a parking page, and given the extensive consideration of that decision by the Expert in his decision in the current matter. The Panel in the MySpace decision concluded that

*"However, the registration of domain names is still a first-come-first-served system and the Panel is reluctant to place any duty on a registrant, who has merely had the good fortune (or maybe ill fortune) to register a name in good faith, which subsequently, through no fault of his own, acquires notoriety, **provided that he does nothing actively to exploit his position**". [emphasis added]*

It seems to the Panel in the present case that such reasoning is even more applicable in circumstances where, as here, not only has the Respondent done nothing actively to exploit his position, but in fact it is the Complainant's actions which have caused the behaviour of which complaint is made.

- 8.30 Finally the Panel notes that one further factor which the Expert regarded as of some significance was how the content of the parking page appeared to change whilst the Complaint was pending – see paragraph 6.49 et seq of his decision. It may well be that this is a factor which again has been caused by the use of keyword advertising – which can change on a daily basis, but in any event since neither party has advanced any detailed submissions on this issue in the Appeal, the Panel does not consider it necessary to consider this issue further.

9. SHOULD THE NEW EVIDENCE BE ADMITTED?

- 9.1 Having considered this case in the light of all the available evidence, the Panel must now decide whether or not to admit the additional evidence submitted during the Appeal process. As explained at 4.3 to 4.8 above, additional evidence should not normally be provided in the course of an Appeal, but the Panel has discretion to admit such evidence if it believes it is in the interests of justice to do so.
- 9.2 Both parties to the case are aware that new evidence is not normally admissible at the Appeal stage. The Respondent asks for permission effectively to treat the Appeal as his response to the original Complaint, on the grounds that his failure to respond originally was an accidental oversight. The Complainant points out that it is the Respondent's responsibility to keep his contact details up to date and to pay attention to communications from Nominet, and accordingly asks the Panel to disregard the new evidence.
- 9.3 The Panel agrees with the Complainant that it is the Respondent's responsibility to keep his contact details up to date for all his registered domain names, and to attend promptly to communications from Nominet. Against this, however, the Panel needs to weigh the fact that its assessment of all the evidence points to this not being a case of

Abusive Registration, and that a decision in favour of the Complainant would deprive the Respondent of a valuable asset.

- 9.4 The Panel accepts that the Respondent's failure to respond at first instance was careless rather than intentional. While carelessness in administrative matters is not to be condoned, depriving the Respondent of the Domain Name for this reason alone would appear to the Panel to be a disproportionate and hence unjust penalty. He has had to pay the costs of the Appeal (which are not recoverable) which, in the particular circumstances of this case the Panel regards as a sufficient penalty. That should not be taken to mean that any Respondent who ignores a Complaint (whether intentionally or inadvertently) has a right to submit new evidence on Appeal upon paying the fee.
- 9.5 Accordingly, the Panel decides that in this instance it is in the interests of justice to admit the new evidence submitted on Appeal.

10. DECISION

The Panel therefore allows the Appeal and directs that NO ACTION be taken in respect of the Complaint.

Nick Gardner, Claire Milne, David King

Dated 26 March 2009