

DISPUTE RESOLUTION SERVICE

DRS 07800

Decision of Independent Expert

Dyna Pro Dynamometers Limited

and

Mark Dent

1. The Parties:

Complainant: Dyna Pro Dynamometers Limited
Address: 3rd Floor
Kings House
12-42 Wood Street
Kingston Upon Thames, Surrey
Postcode: KT1 1TG
Country: GB

Respondent: Mark DENT
Address: 74 Ashridge Way
Sunbury on Thames
Postcode: TW16 7RW
Country: GB

2. The Domain Name(s):

<dynapro.co.uk> ("the Domain Name")

3. Procedural background

The Complaint was filed with Nominet on 25 November 2009. Nominet validated the Complaint on 25 November 2009 and notified the Respondent by post and by email, informing him at the same time that he had until 16 December 2009 to file a Response. The Respondent filed a Response on 16 December 2009. Nominet notified the Complainant that it had until 23 December 2009 to file a Reply, and the Complainant did so on 24 December 2009.

The Informal Mediation procedure failed to produce an acceptable solution for the parties and so on 16 February 2010, Nominet informed the Complainant that it had until 2 March 2010 to pay the fee for the decision of an Expert pursuant to paragraph 7 of the Nominet Dispute Resolution Service Policy ("the Policy"). On 23 February 2010 the Complainant paid Nominet the required fee.

On 2 March 2010 the undersigned, David Taylor ("the Expert"), confirmed to Nominet that he knew of no reason why he could not properly accept the invitation to act as an Expert in this case and further confirmed that he knew of no matters which ought to be drawn to the attention of the parties which might appear to call into question his independence and/or impartiality.

On 5 March 2010, the Respondent submitted a non-standard submission to Nominet, in accordance with paragraph 13b of the Nominet Dispute Resolution Service Procedure ("the Procedure"). Nominet sent this to the Expert by email on 5 March 2010.

On 17 March 2010 the Expert sent a request for an additional submission by the Complainant to Nominet, in accordance with paragraph 13a of the Nominet Dispute Resolution Service Procedure ("the Procedure"). Nominet sent this to both parties by email on 18 March 2010 and gave the Complainant until 20 March 2010 to file a further statement. The Complainant submitted a further statement to Nominet. Nominet sent this to the Expert by email on 22 March 2010. The Respondent was given a further 2 working days to comment on the further submission by the Complainant but declined to do so.

4. The facts

The Complainant, an English company founded on 26 February 2009, is specialised in the manufacturing of chassis dynamometers.

The Complainant's director, Kevin Dent and the Respondent, Mark Dent, are brothers. They were both directors of the company Dyna Pro Limited, incorporated on 10 September 2004. This company was put into a voluntary liquidation by directors on 18 August 2009. Kevin Dent and the Respondent were also directors of the company Dyna Pro Electronics Limited, incorporated on 22 November 2007. The Respondent resigned from this position on 12 November 2009.

On 7 October 2009, the Complainant purchased all assets, goodwill and intellectual property rights of the company Dyna Pro Limited. This fact is confirmed by a letter from a member of the Institute of Chartered Accountants of England and Wales. As a result of this purchase, the Complainant is the registered proprietor of UK trade mark registration number 2364744 and Community trade mark registration number 4151676. Both of these trade marks are for the term DYNAPRO.

The Domain Name was registered by the Respondent on 2 June 2004 in his own name.

At the time that the Complaint was filed, the Domain Name was pointing to a page indicating "Domain name for sale". At the date of the decision, the Domain Name is pointing to a holding page.

5. The Parties' Contentions

Complaint

The Complainant asserts that Kevin Dent and the Respondent spent a year developing a chassis dynamometer before setting up the company Dyna Pro Limited. The Complainant points out that Dyna Pro Limited spent five years marketing the name www.dynapro.co.uk and that the primary means of communication of the company was via email.

According to the Complainant, although the registrant of the Domain Name was the Respondent, the Domain Name was registered on behalf of Dyna Pro Limited and all domain name renewal fees and website hosting fees were paid for by Dyna Pro Limited and its development company.

The Complainant asserts that, since the Respondent's resignation from Dyna Pro Electronics Limited, neither Dyna Pro Electronics Limited, nor the Complainant were able to access the Domain Name and the email communications associated with the Domain Name, although the Complainant has purchased all intellectual property rights and trade marks owned by Dyna Pro Limited in good faith. The Complainant points out that the Respondent has ceased the web hosting services associated with the Domain Name but has kept the email addresses associated with the Domain Name active.

The Complainant asserts that the Respondent is no longer involved in the company Dyna Pro Electronics Limited and thus has no legal rights to view emails intended for this company, especially as the Respondent does not pass such emails on to Dyna Pro Electronics Limited or to the Complainant.

According to the Complainant, the Respondent is sending emails from the email address sales@dynapro.co.uk, thereby giving the impression that he is

part of the Complainant company and of the company Dyna Pro Electronics Limited, while he is not.

The Complainant asserts that as the Respondent has ceased the web hosting services associated with the Domain Name this has had a serious effect on the sales figures for Dyna Pro Electronics Limited and the Complainant, especially as Dyna Pro Electronics Limited and the Complainant have distributors relying on the website found at www.dynapro.co.uk for information and for their own marketing. According to the Complainant, this amounts to a breach of the Complainant's trade mark rights. The Complainant has set up a temporary mirror website at www.dynapro.ws to try to limit the damages incurred by not holding the Domain Name and not operating the website found at www.dynapro.co.uk.

The Complainant therefore requests transfer of the Domain Name.

Response

The Respondent states that he registered the Domain Name three months before the company Dyna Pro Limited was incorporated.

According to the Respondent, the name DYNAPRO was chosen because the Respondent's young son used the gamer tag Dynawolf, and this tag inspired the Respondent for the website he was creating at the time and thus he registered <dynapro.co.uk>. The Respondent asserts that he took the term DYNA from "Dynawolf" and added the word "Pro" for professionals and then purchased the .CO.UK domain name corresponding to DYNAPRO.

The Respondent states that he is very well known in the dynamometer industry and started working with an Australian company on the engine management system before the company Dyna Pro Limited was incorporated.

According to the Respondent, the Domain Name and the associated website have always been associated with the Respondent and the Respondent received several hundreds emails on the website www.dynapro.co.uk on a daily basis. The Respondent asserts that he paid for the website maintenance from his own personal finances although he fails to indicate who paid for the renewal of the Domain Name.

The Respondent points out that there has never been any discussion or agreement as to whether the website www.dynapro.co.uk would be operated by the company Dyna Pro Limited but that it was tacitly agreed that should the Respondent leave the company Dyna Pro Dynamometers Limited, the content of the website www.dynapro.co.uk would be used by the company while the Domain Name would go with him. According to the Respondent, the Respondent had operated the website www.dynapro.co.uk at all times and built up a reputation in relation to the Domain Name.

The Respondent asserts that he ceased operating the website www.dynapro.co.uk as soon as the company Dyna Pro Limited was liquidated

"firstly for sentimental reasons... as it was in part responsible for the fame he now enjoys in the biking community and secondly, to ensure the continuance of [his] reputation and very good name".

The Respondent contends that, although the Respondent was unaware of any bidding regarding the sale of the company Dyna Pro Limited after its liquidation, Kevin Dent apparently won the bid and repurchased the company in order to use the Domain Name and the associated website. According to the Respondent, the Complainant was dormant since its incorporation until Kevin Dent bought the assets of Dyna Pro Limited.

The Respondent asserts that Kevin Dent has acted unethically when paying the liquidated company's creditors and he fears that such behaviour may affect his reputation.

The Respondent claims that Kevin Dent posed as the legal owner of the Domain Name to dupe the hosting provider into allowing him access to the website associated with the Domain Name. This is the reason why the Respondent proceeded to change all protocols, passwords and payment details in relation to the hosting of the website.

The Respondent asserts that no emails have been received at the email address associated with the Domain Name since the liquidation of Dyna Pro Limited.

With respect to the decrease in the sales of the Complainant's products, the Respondent contends that this is due to the current economic situation and to the fact that it takes time to build a reputation. In addition, the Respondent underlines that the new website used by the Complainant, www.dynapro.ws, is almost identical to the one created by the Respondent for the website to which the Domain Name was previously pointing.

As a gesture of goodwill and in exchange of a small consideration, the Respondent would be prepared to provide a link to the Complainant's website www.dynapro.ws on the website www.dynapro.co.uk.

Reply

In its Reply, the Complainant states that the Respondent and Kevin Dent used the name DYNAPRO together before the incorporation of the company Dyna Pro Limited.

The Complainant also asserts that the Respondent was aware of the purchase of Dyna Pro Limited by Kevin Dent.

According to the Complainant, the new website www.dynapro.ws is not a substitute for the website www.dynapro.co.uk as the latter was known to many past customers and users.

The Complainant contends that the Respondent attempts to appear reasonable by offering to provide a link to www.dynapro.ws on www.dynapro.co.uk.

Respondent's non-standard submission

The Respondent submitted a non-standard submission to Nominet, in accordance with paragraph 13b of the Procedure. The Respondent's non-standard submission provides that Kevin Dent is in breach of the Insolvency Act of 1986 prohibiting the re-use of a trading name after liquidation which includes the use of a domain name to suggest association with the previous company.

Complainant's additional submission

The Expert requested on 17 March 2010 that the Complainant provide any invoices showing who actually paid the registration and renewal fees of the Domain Name as well as more details about the emails that the Respondent is apparently still receiving and sending. The Expert also gave the Respondent the opportunity to comment. The Complainant provided (i) invoices including one from the Domain Name registrar, Active 24 Ltd, which cover the hosting of the website and management of the Domain Name, relating to the hosting of the website www.dynapro.co.uk dated 2 September 2009; (ii) a circuit board data for the first Dynamometers built dated 3 April 2004; (iii) Board meeting notes; and (iv) emails received on the email address sales@dynapro.co.uk between the day Dyna Pro Limited was liquidated and the day the Respondent resigned from Dyna Pro Electronics Limited. As an additional note, the Complainant indicates that the content of the non-standard submission submitted by the Respondent was irrelevant.

6. Discussions and Findings

Under paragraph 2(a) of the Policy, the Complainant is required to demonstrate, on the balance of probabilities, that:

- (i) It has Rights in respect of a name or mark which is identical or similar to the Domain Name; and
- (ii) The Domain Name, in the hands of the Respondent, is an Abusive Registration.

Complainant's Rights

The Complainant has demonstrated that it holds Community and UK trade marks in the term DYNAPRO. The Expert is therefore satisfied that the Complainant has Rights in this term under the Policy (which defines Rights as including, but not limited to, rights enforceable under English law).

Furthermore, the Policy stipulates that the name or mark in which the Complainant has Rights (DYNAPRO) must be identical or similar to the

Domain Name (dynapro.co.uk). It is accepted practice under the Policy to discount the ".co.uk" suffix, and so there is no difference between the Domain Name and the Complainant's mark.

The Complainant's mark and the Domain Name are thus identical to one another.

As a result the Expert finds that paragraph 2(a)(i) of the Policy is satisfied and the Complainant has Rights in respect of a mark which is identical to the Domain Name.

Abusive registration

Abusive Registration is defined in paragraph 1 of the Policy to mean a Domain Name which:

- (i) was registered or otherwise acquired in a manner which, at the time when the registration or acquisition took place, took unfair advantage of or was unfairly detrimental to the Complainant's Rights; OR
- (ii) has been used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's Rights.

There seems to be no suggestion on the part of the Complainant that the Domain Name took unfair advantage of, or was unfairly detrimental to, the Complainant's Rights at the time that it was *registered*. Indeed, given the facts as set out above, it would appear that the Respondent registered the Domain Name before the incorporation of the Complainant, in all likelihood with a view to setting up the business/company with his brother, Kevin Dent since the company was incorporated some 3 months later and had the same name: Dyna Pro Limited. This assumption underlines that at the time of registration, the registration was not abusive and therefore limb (i) of the above definition should therefore be discounted. It does however indicate that the Domain Name and company creation were in the minds of the two brothers and likely part of the same business venture.

In order to succeed in obtaining a transfer order under the Policy, it is therefore necessary for the Complainant to prove, on the balance of probabilities, that the Domain Name was *used* in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's Rights, in accordance with limb (ii) of the definition of Abusive Registration above.

In this regard, paragraph 3(a) of the Policy sets out a non-exhaustive list of five factors which may be evidence of Abusive Registration. In the Expert's opinion, paragraph 3(a)(ii) is particularly relevant in this case, and this reads as follows:

"ii. Circumstances indicating that the Respondent is using or threatening to use the Domain Name in a way which has confused or is likely to confuse

people or businesses into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant"

Previous Experts have seen fit to interpret paragraph 3(a)(ii) as requiring a mere likelihood of confusion, and this is also felt to be appropriate here.

In this regard, the Complainant argues that, although the Respondent is not involved in the Complainant company and is no longer involved in the company Dyna Pro Electronics Limited, he is still receiving email communications addressed to Dyna Pro Electronics Limited or to the Complainant without passing them on to the Complainant. The Complainant also argues that the Respondent is also sending emails from the email address sales@dynampro.co.uk which gives the impression that he is still part of one or both of the companies. The Respondent argues to the contrary, namely that he has not sent emails from the email address sales@dynampro.co.uk since the liquidation and has not viewed any emails meant for the newest company since, as far as he is aware, there have not been any. A dispute over such facts is always difficult to deal with. However, pursuant to the Request for Additional Submission made by the Expert on 17 March 2010, the Complainant provided evidence showing that emails were received on the email address sales@dynampro.co.uk, with some of them addressed directly to Kevin Dent. It is reasonable therefore to assume that actual and potential consumers of Dyna Pro Electronics Limited and of the Complainant have not ceased sending emails to sales@dynampro.co.uk since the Respondent resigned as they would naturally assume that the email address remained valid unless a delivery failure message was received. The Respondent has not put forward any such evidence nor provided any further submission to the Request for Additional Submission made by the Expert on 17 March 2010.

In addition, according to the Complainant, the fact that the Respondent has closed down the hosting of the website www.dynampro.co.uk has a serious affect on sales for Dyna Pro Electronics Limited and the Complainant, especially because these companies have distributors relying on the www.dynampro.co.uk website for information and their own marketing.

The Complainant provides a screen capture showing that the Domain Name is not being used, and in fact was pointing to a Domain Name for sale holding page at the time of filing the Complaint. Given the surrounding facts (as evidenced by the Complaint, the Response, the Further Statement and the accompanying annexes) the Expert is satisfied that, from the moment the Respondent closed down the hosting of the website at the Domain Name, any customers of Dyna Pro Electronics Limited and Dyna Pro Dynamometers Limited wishing to access information about the products of these companies via the website formerly at the Domain Name would have effectively found themselves on an inactive website.

The question is whether the use of the Domain Name by the Respondent causes initial interest confusion. As stated in the case of <joidevivreholidays.co.uk> (DRS 05122), initial interest confusion is the

"phenomenon whereby visitors to the Domain Name, in the moment before they actually reach the website, believe that the Domain Name is in some way connected to the Complainant". In other words, this initial confusion causes some advantage to the Respondent, and it is the gaining of that advantage, that is unfair. The advantage referred to does not need to be monetary and could simply be a disadvantage to a third party, one person's gain is another person's loss, for example by causing disruption to the Complainant's business.

In the Expert's view, certain customers may have been astute enough to realise that the Dyna Pro Electronics Limited and Dyna Pro Dynamometers Limited were still offering their products, and thus tried to search for the new website at, but others may well have been misled by the Respondent's non-use of the Domain Name into thinking that these companies were out of business since the website www.dynapro.co.uk is inactive and emails to the company via sales@dynapro.co.uk are presumably not replied to since apparently none are being received. The fact that the Domain Name was pointing to a page indicating that the Domain Name was for sale further leads to a conclusion that the business is finished. In this regard it is worth noting that even though Kevin Dent has used different companies to operate his business, the name DYNA PRO is common to Dyna Pro Limited (the company which was liquidated), Dyna Pro Electronics Limited (the company from which the Respondent resigned) and the Complainant, Dyna Pro Dynamometers Limited (the company which bought Dyna Pro Limited's assets). Given the degree of similarity between the Complainant's current, and previous company names, together with the fact that the Domain Name is identical to the two registered trade marks for DYNAPRO, in the Expert's opinion it is therefore highly likely that certain internet users will in fact be confused into thinking that the inactive website at the Domain Name is the Complainant's website and thus that the Complainant is not in business.

In any event, whether confused or not, once on the inactive website www.dynapro.co.uk, certain customers may then have decided to send an email to the email address they had previously used to contact the Complainant and such emails are not reaching the Complainant. There is thus a potential loss of business for the Complainant, had the customer been planning to put an order with the Complainant.

In the Expert's opinion, by not forwarding emails received on the email address sales@dynapro.co.uk, while this email address was apparently previously used to contact Kevin Dent and/or Mark Dent as co-director of Dyna Pro Limited, the Respondent's conduct falls within paragraph 3(a)(ii) of the Policy.

The Respondent has attempted to explain the reasons behind his choice of the Domain Name in the Response and whilst they can be considered, such explanations appear somewhat farfetched, but in reality whatever the explanation it does not negate the above.

Whatever the reason for the registration by the Respondent the facts clearly demonstrate that the Respondent allowed the Domain Name to be used for the brothers' Dyna Pro Limited's business for its incorporation on 10 September 2004, some 3 months after registration of the Domain Name. Indeed, the Respondent himself indicates that he ran the website at the Domain Name and this was for the benefit of the company.

The Respondent claims that with regard to email none have been received. The Expert has some doubt about the credibility of such a claim, it amounts to a company suddenly ceasing to receive emails at its previous address on one of the Directors leaving. The Complainant provides evidence to the contrary.

The Respondent asserts that his name is synonymous with the Domain Name and that "*Googling Mark Dent would already give you hundreds of hits with his Dynapro domain name*". The Respondent further asserts that he paid for the website maintenance and upkeep through his personal finances. However, the Respondent did not provide any copies of invoices in this respect, even pursuant to the request for further submissions of 17 March 2010 and in this respect the Expert notes that some 20 days have passed since that request was made. The Expert is ready to believe that the Respondent may have paid some of the website hosting fees, however the Complainant has provided invoices evidencing that Dyna Pro Limited has at least paid some of them including the renewal of the Domain Name itself.

The Expert stresses that Nominet UK's Dispute Resolution Service (DRS) is essentially a fast, simple procedure designed predominantly for clear cut cases of Abusive Registration under the Policy (often referred to as "cybersquatting"). It is not intended to deal with complex points of English law in relation to liquidation, which would be better left to a court of competent jurisdiction.

The facts in this case are not entirely clear, and given the nature of these proceedings it is difficult to form clear view as to which party is telling the truth. Some of the claims by the Respondent are unsubstantiated, many by the Complainant are evidenced.

In essence, the Respondent claims that the Domain Name has been his all along, that he receives hundreds of emails on a daily basis to that Domain Name, that since terminating the business venture his brother and the Complainant receive no emails (though the Complainant has provided evidence of the contrary) and that in any event there was a tacit agreement that should he leave the company Domain Name would go with him.

However the facts point to the rights in the name DYNAPRO now belonging to the Complainant, and that the Respondent fully acquiesced to the Domain Name being used in the course of the business venture with his brother and that the company paid for its renewal. Moreover the assets, goodwill and Intellectual Property vested in the company were purchased by the Complainant, Dyna Pro Dynamometers Limited, on 7 October 2009 as evidenced letter from the liquidator, licensed by the Institute of Chartered

Accountants of England and Wales. It is inconceivable that there is no email traffic associated with this Domain Name directed to the Complainant given a 5 year business operation. To the Expert the facts point to the Respondent holding the Complainant hostage regarding email traffic and not allowing an active website. Indeed, the Respondent states himself in his Response that "the site is closed and so is its email address". As such one has to wonder why such dead domain name space cannot be fruitfully used by the Complainant seeking to carry on business using the Domain Name which was previously associated with the brothers company. The various claims of unethical behaviour and breach of English law relating to insolvency are outside the scope of this examination. It is a shame matters have come to this and that the Nominet DRS is the forum for such a dispute, one would have thought that this was an ideal case for a successful mediation.

The Expert therefore finds that, on balance of probabilities, limb (ii) of the definition of Abusive Registration is satisfied and that the Domain Name has been used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's Rights.

In conclusion, the Expert has considered the admissibility, relevance, materiality and weight of the evidence as a whole and is satisfied that the Complainant has succeeded in proving, on balance of probabilities, that the Domain Name is an Abusive Registration in accordance with paragraph 2(a)(ii) of the Policy.

7. Decision

In light of the above findings, namely that the Complainant has Rights in a mark which is similar to the Domain Name, and that the Domain Name, in the hands of the Respondent, is an Abusive Registration, the Expert directs that the Domain Name be transferred to the Complainant.

Signed: David Taylor

Dated: 7 April 2010