

**DISPUTE RESOLUTION SERVICE**

**DRS11995**

**Decision of Independent Expert**

Stop Go Networks Limited

and

Sinclair Technology Solutions Ltd

**1. The Parties:**

Complainant: Stop Go Networks Limited  
10 Newton Place  
GLASGOW  
G3 7PR  
United Kingdom

Respondent: Sinclair Technology Solutions Ltd  
Sinclair House, 24A Dunraven Place  
Bridgend  
Mid Glamorgan  
CF31 1JD  
United Kingdom

**2. The Domain Name(s):**

thepaydaypig.co.uk

**3. Procedural History:**

11 October 2012 11:10 Dispute received  
11 October 2012 12:20 Complaint validated  
11 October 2012 14:06 Notification of complaint sent to parties  
30 October 2012 01:30 Response reminder sent  
02 November 2012 11:36 Response received  
02 November 2012 11:36 Notification of response sent to parties  
07 November 2012 01:30 Reply reminder sent

12 November 2012 08:16 Reply received  
12 November 2012 08:25 Notification of reply sent to parties  
12 November 2012 08:26 Mediator appointed  
15 November 2012 14:04 Mediation started  
21 November 2012 12:26 Mediation failed  
21 November 2012 12:26 Close of mediation documents sent  
30 November 2012 09:09 Expert decision payment received

#### **4. Factual Background**

The Complainant is Stop Go Networks Limited, a company incorporated under the Companies Act No. SC380072 with its registered office at 10 Newton Place, Glasgow, G3 7PR.

The Respondent is Sinclair Technology Solutions Limited, a company incorporated under the Companies Act No. 7632492 with its registered office at 2nd floor, 7 Dunraven Place, Bridgend, Wales, CF31 1JF.

The Expert, Peter Davies, was appointed on 5 December, 2012, having certified to Nominet that he was independent of the Parties and knew of no circumstances that would call his impartiality into question.

At the date of this Decision, the Domain Name appears to be inactive and does not resolve to a website. Beyond this there appears to be little agreed common factual background.

#### **5. Parties' Contentions**

##### **5.1 Expert's introduction**

The Parties have made extensive submissions which the Expert has read with care. Much of what has been submitted relates to questions of law and/or fact unrelated to the Domain Name or otherwise outside the scope of the DRS Procedure. The lack of clarity of the Complaint, the inclusion within it of a large amount of irrelevant material and the difficulty which the Expert has encountered in establishing exactly what arguments the Complaint relies upon, and identifying which evidence the Complainant relies upon to support those arguments, make the task of summarising the Complaint impossible. Accordingly, it is set out below in its entirety. Where the Domain Name has been referred to in full, it has been rendered as "the Domain Name", and distracting spelling errors have been corrected. Otherwise, the Complainant's contentions are given as originally submitted. These are followed by the Expert's summary of the Response and the Complainant's Reply to the Response.

## 5.2 Complainant

The Complaint in its entirety reads as follows:-

### ***“What rights are you asserting?”***

*The Complainant asserts the right to use the name "Payday Pig" in connection with an internet money loans business.*

*The Complainant asserts the right to conduct its business without the risk of confusion between the Complainant and the Registrant and without suffering passing-off and IP infringement at the hand of the Registrant.*

*The Complainant asserts the right to a finding that the Registrant's registration of the Domain Name is an abusive registration and the Complainant asserts the right to a transfer of the Domain Name to the Complainant.*

### ***Why is the Domain Name an Abusive Registration?***

*The Complainant states -*

- 1. That the Complainant is Stop Go Networks Limited, a company incorporated under the Companies Act No. SC380072 and having its registered office at 10 Newton Place, Glasgow, G3 7PR.*
- 2. That the Registrant is Sinclair Technology Solutions Limited, a company incorporated under the Companies Act No. 7632492 and having its registered office at 2nd floor, 7 Dunraven Place, Bridgend, Wales, CF31 1JF.*
- 3. That the Registrant is associated with The Lending Platform Limited, a company incorporated under the Companies Act No. 1381228 and having its registered office at 7 Dunraven Place, Bridgend, Wales, CF31 1JF*
- 4. That the Registrant and The Lending Platform Limited are both run by William Ellis Sinclair, residing at 9 Priory Avenue, Bridgend, Wales CF31 3LP. His is a Director of the Registrant. He is the controlling mind of the Registrant and The Lending Platform Limited.*
- 5. That the Complainant has operated a loan broking business comprising several websites for over two years. A website called "Payday Pig" is its main method of conducting business. Payday Pig accounts for about half the Complainant's turnover.*
- 6. That the Complainant's website has the web address [www.paydaypig.co.uk](http://www.paydaypig.co.uk). The Complainant has a Consumer Credit Licence from the Office of Fair Trading. It has registered the trading style "Payday Pig" with the Office of Fair Trading.*
- 7. That the Complainant has built up substantial goodwill in its business, in the trading name "Payday Pig" and in the "Payday Pig" website. Currently*

*the Complainant's business is turning over in excess of £200,000 per month. Its turnover is increasing.*

8. *That on or about 26 September 2012 the Complainant became aware that a confusingly similar website had become available on the world wide web. The Complainant only found this out because a customer telephoned the Complainant, claiming to have applied for a loan through "Payday Pig". The Complainant had no record of any such application. After investigation it became clear that the customer had actually interacted with a website also called "Payday Pig". The look and feel of the website imitated the Complainant's website. The logo on the offending website as well as being literally identical to that of the Complainant was also in the same colours. The said website was accessible at two web addresses namely the Domain Name and [www.thepaydaypig.com](http://www.thepaydaypig.com). The Complainant produces herewith a screen shot taken on 26th September of the bogus "Payday Pig" website. It is further to be noted that shortly thereafter the Complainant telephoned William Sinclair for an explanation. Within minutes of the telephone call Mr Sinclair removed the "The" from the bogus website. This is seen by the Complainant as powerful evidence that Mr Sinclair realised what he was doing was passing off. It is further also evidence that Mr Sinclair does not need the word "The" and consequently has no need for ownership of the Domain Name The current text of the "The Payday Pig" website also omits "The" - it states for example "Payday Pig loans are here to help you! Pay day Pig loans are a short term lending solution for those who need a little extra cash to see them through to their next pay day. Even if you have poor credit or no credit at all, the Payday Pig loans may still be able to help. Don't listen to Payday Pig spam from our competitors; instead check out a Payday Pig review! Whether you have a sudden expense, or just need a little extra to pay the bills before pay day, Payday Pig loans may be able to help!"*

9. *The Domain Name is registered to the Registrant.*

10. *That the domain "thepaydaypig.com" was registered to the Registrant until approximately 10.00 on Thursday 4th October 2012. It was then transferred to a company in Panama. It was transferred again on 8th October 2012 to a company in Mexico. These transfers seem to have been prompted by telephone calls and emails from the Complainant's solicitors to Mr Sinclair in essence requiring him to cease passing off in connection between Payday Pig and The Payday Pig, and requiring him to cease infringement of the Complainant's IP rights.*

11. *The Registrants website "The Payday Pig" visible at the Domain Name and [www.thepaydaypig.com](http://www.thepaydaypig.com) stated on its home page until approximately 10.00 on 4th October 2012 that it was "run by" the First Registrant. The full statement read "The Payday Pig is run by The Lending Platform Limited, Registered Office Dunraven Place, Bridgend, Mid Glamorgan CF31 1JF. We have consumer protection and data protection licensing, contact us for more details." This statement was removed at the same time as the changes in registration of the domain [thepaydaypig.com](http://thepaydaypig.com) were effected.*

12. *That neither the Registrant nor Mr Sinclair nor The Lending Platform Limited in fact has neither a current OFT Consumer Credit licence nor a Notification on the Register of Data Controllers. The Registrant is however named on a pending OFT Consumer Credit Register application by The Lending Platform Limited as the person who “Runs” The Lending Platform Limited. Mr Sinclair is named on the same OFT application as the person who “runs” The Lending Platform Limited. Mr Sinclair is the controlling mind of the Registrant and The Lending Platform Limited*

13. *That these three entities are passing off a connection between their business and that of the Complainant. They are infringing the IP rights of the Complainant. The name of the Complainant’s business and that operated by Mr Sinclair, the Registrant and The Lending Platform Limited is virtually identical. The colour schemes of the “PaydayPig” and “The Payday Pig” logos are virtually identical. There is a substantial risk of confusion between the two websites and the two businesses. Confusion has already occurred. The risk of confusion is explicitly recognised by the Mr Sinclair, the Registrant and The Lending Platform Limited. At the foot of the “The Payday Pig” website it is stated “If you happen to be looking for [www.paydaypig.co.uk](http://www.paydaypig.co.uk) instead of [www.thepaydaypig.com](http://www.thepaydaypig.com) you can click here to find the other website”. Clicking on the said wording purports to link the user to the Complainant’s website. The link is not functional. The Complainant has neither been asked for permission nor granted any permission for the Mr Sinclair, the Registrant and The Lending Platform Limited to link through to the Complainant’s website.*

17. *That in the circumstances Mr Sinclair, the Registrant and The Lending Platform Limited are collectively causing damage to the goodwill enjoyed by the Complainant and the Complainant’s business. That damage is being caused by a misrepresentation by Mr Sinclair, the Registrant and The Lending Platform Limited in the course of trade that the two businesses “Payday Pig” and “The Payday Pig” are connected. The misrepresentation is made to prospective and actual customers of the services supplied by the Complainants. The misrepresentation is calculated to injure the business and goodwill of the Complainants. The confusion between the names of the two businesses and the fact that Mr Sinclair, the Registrant and The Lending Platform Limited are taking the benefit of the goodwill enjoyed by the Complainants is causing actual damage to the business and goodwill of the Complainants.*

17. *That there is further damage to the reputation and goodwill of the Complainants by the perception in the marketplace that the Complainant’s business and that of Mr Sinclair, the Registrant and The Lending Platform Limited are connected. The Complainant has obtained an appropriate credit control licence from the Office of Fair Trading. Mr Sinclair, the Registrant and The Lending Platform Limited have not. The Complainant does not wish its name associated with any suggestion of unlawful trading. The Complainant has submitted a complaint to the OFT. The Registrant has also attempted to register with the OFT the trading styles “Cash Cow Now” and “The Payday Parrot”. The Complainant has already registered with the Office of Fair Trading the trading styles “Cashcow Now” and “Payday Parrot”.*

18. *That Mr Hynes, a Director of the Complainants has spoken with the Mr Sinclair on several occasions. Mr Hynes has stated to Mr Sinclair that he, the Registrant and The Lending Platform Limited are operating illegally and that their actions are damaging to the Complainant's brand and customers. Mr Hynes offered Mr Sinclair the option of working together in a legal fashion or desisting from Mr Sinclair's operations (and those of the Registrant and The Lending Platform Limited) entirely. Mr Sinclair refused. The Complainant on 5th October 2012 obtained an interdict (injunction) preventing the visibility of "The Payday Pig" website in Scotland. A copy is provided. That interdict has been served - in person - also on 5th October 2012. It has been ignored. The "The Payday Pig" website is still visible. Two emails have been sent by the Complainant's solicitors to Will Sinclair on 8th and 9th October stating, in terms, that he is regarded as being in contempt of court. Both have been ignored.*

19 *The Complainant maintains that the Registrant's registration of the Domain Name is abusive. The registration has been effected solely for the purpose of facilitating the illegal passing off and IP infringements referred to above. The Registrant's registration is also abusive because it is a blocking registration that prevents the Complainant from registering the domain name. The damage to the Complainant's brand and established goodwill as a result of passing off and intellectual property infringement outweighs any damage that may be caused to the Registrant if the domain is transferred. The Registrant could have selected any name for its business. It has elected to plagiarise the established trading name of the Complainant. It has elected to copy the Complainants name and the colour of the Complainant's logo. The Registrant's business has been trading for a significantly lesser period than that of the Complainant. The balance of convenience favours the established brand owner, the Complainant, in preference to an interloper. The Registrant could continue trading under a different name.*

20. *In all the circumstances the Complainant seeks transfer of the Domain Name*

***How would you like this complaint to be resolved?***

*Transfer*

***Additional Complainants:***

*[no additional Complainants]*

***As far as you are aware have any legal proceedings been issued or terminated in connection with the Domain Name?***

*There is a Petition for interdict (injunction) in the Court of Session. An interim interdict was granted on 5th October against the Registrant, its MD and director/shareholder Will Sinclair, and a second company run by Mr Sinclair of which he is also a director/shareholder called The Lending Platform Limited which operates his money lending business "The PaydayPig". The interdict prohibits Mr Sinclair and these companies from making "The Payday Pig"*

*website visible in Scotland. Mr Sinclair was in person served with the interdict order also on 5th October 2012 but he has ignored it. The "The Payday Pig" website is still visible in Scotland. It has been spelled out to Mr Sinclair in two emails by the Applicant's solicitors on 8th and 9th October 2012 that Mr Sinclair is in contempt of court. Those emails have also been ignored. An application for Breach of Interdict is in the process of being submitted to the Crown Office for their approval and will then be submitted to Court with a view to seeking punishment of Mr Sinclair which may entail a fine or his imprisonment."*

### **5.3 Respondent**

The Respondent takes issue with virtually everything contained in the Complaint. Much of the Response seems to the Expert to be irrelevant but has been generated by the process that the Respondent has (understandably) followed, of providing an item by item response to every point raised in the Complaint. The main points of relevance raised in the Response can be summarised as follows:

1. The Complainant has no Rights in the term "Pay Day Pig". In the short period of time (13 months) between the Complainant's registration of its <paydaypig.co.uk> on 22/3/2011 and the Respondent's registration of the Domain Name on 25/5/2012, it is not possible for the Complainant to have built up "substantial goodwill" around its mark, a position supported by precedent in UK law.
2. Claims of exclusive use of the term "Pay Day Pig" are eroded by the existence of other websites using these words and not in the Complainant's hands.
3. It is unclear how long the Complainant has been trading under the name "Pay Day Pig". Mere registration of a domain name is not proof of trading activity. The Complainant's website does not appear in industry standard Internet directories and it does not appear when searched for on Google.co.uk. Evidence of The Complainant's marketing activity or other use of the mark is hard to find.
4. The Complainant's claim that half of its turnover is accounted for by its website is implausible. An independent survey of traffic to its site by Compete.com shows only approximately 6600 visitors in September 2012. £100,000 turnover from this number of visitors implies revenue per visitor of £15, which is a highly questionable number.
5. The Complainant has no registered trademarks in its trading name. If it so important to the Complainant, why have they not registered it as a trademark? The Complainant has submitted a trademark application, on 27 September, 2012, but such a step can still be contested.
6. The Complainant has registered a trading style "Pay Day Pig" on its OFT Credit License. This is a registry of trading names, approved by the OFT for the conduct of regulated business. It is not a registry of IP rights and the OFT has no requirement that trading names be unique to each licensee.

7. The site at the Domain Name is not “confusingly similar” to that of the Complainant.
8. The Complainant has not proved that the Domain Name is used in the manner alleged. All the evidence submitted by the Complainant relates to <thepaydaypig.com> which is not the subject of this Complaint. The Complaint’s allegation that a website called “Pay Day Pig” can be found at the Domain Name is not correct. The Respondent can show that the Domain Name is not being used in the manner alleged. Evidence is submitted showing the result of entering the Domain Name in a web browser, and a response to a ping on the Domain Name. In both cases the Domain Name is shown not to be connected to the Complainant’s website.
9. The Complainant has submitted no evidence to support the allegation that the registration is Abusive, aimed solely at passing off the Respondent’s site as being connected to the Complainant.
10. The Complainant appears to confuse the Domain Name with <thepaydaypig.com>. A number of websites use “Pay Day Pig” in their name, and <thepaydaypig.com> is not registered to the Respondent. Evidence is submitted of the current identity-protected registration of <thepaydaypig.com>, which is unconnected to the Domain Name.
11. At the time of registration of the Domain Name, the Respondent was unaware of any Rights claimed by the Complainant, who had no registered trademark, no visible website and no apparent trading profile so far as the Respondent could discern. As the Respondent had no knowledge of the Complainant or its alleged Rights at the moment of registration of the Domain Name, it could not be accused of blocking a registration by the Complainant. The Complainant could have registered the Domain Name at the same time as its registration of <paydaypig.co.uk>, but chose not to do so.
12. Contrary to the Complainant’s assertion, transfer of the Domain Name would cause significant commercial damage to the Respondent.

### **5.3 Complainant’s Reply**

The Complainant exercised its right to submit a Reply to the Response, and made a further non-standard submission further to Rule 13b of the DRS Procedure. The Reply compounds the confusion that was present in the original Complaint by adding even more irrelevant material. It also contains material which, if the Complainant thought it relevant, should have been included in the original Complaint - the Expert has discretion whether or not to consider this material and the 13b non-standard submission. The Expert has found it impossible to disentangle all this material so has considered it to the extent it is relevant. The Expert’s view of all of this material is set out in the Discussion section at Paragraph 6 below.

In summary, the Reply proposes alternative search resources to counter the Respondent’s assertion that the Complainant had little or no web presence at the relevant time. Arguments are made to rebut the Respondent’s negative inference that



the Domain Name could be of no importance to the Complainant because it had not registered it first and had not obtained a registered trademark in its trading name.

Extensive evidence is provided purporting to show that the web site at <thepaydaypig.com> is or was in some way connected to the Respondent and had damaging consequences vis-a-vis the interests of the Complainant.

The Complainant's non-standard submission deals with argument arising from UDRC Proceedings between the Parties in respect of <thepaydaypig.com> which aims to cast light upon the alleged evasive behaviour of the Respondent in respect of authorship and control of this site and the site which it is said was located at the Domain Name. A large amount of poorly presented and difficult to understand forensic evidence seeking to cast doubt as to the bona fides of various parties is annexed to the submission or contained within the Reply.

## **6. Discussions and Findings**

### **6.1 Introduction**

Paragraph 1 of the DRS Policy provides that the Complainant must establish, on the balance of probabilities that:

*i. the Complainant has Rights in respect of names or marks which are identical or similar to the Domain Name; and*

*ii. the Domain Name, in the hands of the Respondent, is an Abusive Registration.*

The Expert must apply the DRS Policy to these two matters only and extracting the arguments pertinent to them from the Complaint has been extremely difficult. In particular, the Complaint contains much that is beyond the scope of the DRS: allegations are made against the Respondent of attempting to obscure the identity of the party responsible for the site content formerly to be found at the Domain Name, of passing off and of trading without the necessary OFT license. The Complainant has begun proceedings in the Scottish courts, and has made a complaint against the Respondent under the UDRC Dispute Resolution Procedure in respect of <thepaydaypig.com>. The Expert makes no comment on the forgoing matters and takes no account of them in arriving at his Decision.

### **6.2 Complainant's Rights**

With no registered rights, (a trademark application being insufficient to establish Rights under the DRS Policy), the Complainant claims unregistered rights based on goodwill generated in the course of trade, and also upon an inference or presumption as to its Rights deriving from a registration of its trading name with the OFT.

So far as its goodwill is concerned, the Complainant maintains, and the Respondent denies, that the 13 months old registration of its active trading website, and the reported turnover of its business activities are sufficient to establish this goodwill.

The DRS Expert's Overview summarises this matter as follows:

*If the right is unregistered trade mark right, evidence needs to be put before the Expert to demonstrate the existence of the right. This will ordinarily include evidence to show that (a) the Complainant has used the name or mark in question for a not insignificant period and to a not insignificant degree (e.g. by way of sales figures, company accounts etc) and (b) the name or mark in question is recognised by the purchasing trade/public as indicating the goods or services of the Complainant (e.g. by way of advertisements and advertising and promotional expenditure, correspondence/orders/invoices from third parties and third party editorial matter such as press cuttings and search engine results).*

The Complainant has provided virtually no evidence of this kind and such material as has been provided is confusing, not clearly explained and virtually unsupported by any corroborating material. The Complainant asserts that its revenues are running at about £200,000 per month and that 50% of these revenues are attributable to its website. Elsewhere the Complainant confusingly asserts that the website is its "main method of doing business". The revenue figures are supported only by a chartered accountant's brief letter of confirmation, stating, (in its entirety),

*"Dear Sirs,  
Stop Go Networks Ltd*

*As accountants for the above client, since October 2010, we are able to confirm the following:*

*On review of the Company's site report, the revenues generated by the brand "Pay Day Pig" exceeded £100,000.*

*Yours faithfully,".*

There is no explanation of what the "site report" is, or of the trading period to which it applies. No copy of this document is made available. This vague, second-hand reference to a document not made available to the Expert is inadequate. The Complainant or its accountants of two years' standing are presumably in a position to provide proper documentary evidence (for example audited accounts, or management accounts at least) which might have provided firmer support for its position. They have not done so despite a direct challenge by the Respondent to the Complainant's claim to goodwill arising from extensive trading activity.

In the Complainant's Reply to the Response, more information is offered. Some of this is new material which should have appeared in the original Complaint and which the Expert may elect to consider or not, in his discretion. The question is academic, as even if the Expert found grounds to admit the material, it is so confusingly set out and so lacking in evidentiary support as to be of little or no value in reaching a decision. For example, the Complainant asserts that, as of October 2012, its trading site had received 44,966 hits, generating 15,000 loans. That would appear to suggest that one in three visitors to the site takes out a loan, which seems an extraordinarily high figure and which without further corroboration the Expert finds unable to accept. The Expert is clearly not seeking individual customer information, but more is needed to understand the significance of these figures in the context of the Complainant's business and to establish the credibility of these claims.

A screen shot of the Complainant's trading website is provided, but without proof of marketing or trading activity of any kind. If 50% of the Complainant's business comes via its website as it claims, where does the other half come from, and what is transpiring to generate this business and the goodwill upon which the Complainant relies? With better evidence of tangible trading activity, the Expert would have found it easier to accept that the existence of its website for 13 months implies goodwill sufficient to get the Complainant past the Rights hurdle.

The Respondent argues that 13 months online presence is, in law, not long enough to establish the Complainant's goodwill. This is not correct – goodwill may in appropriate circumstances be generated very quickly indeed – but it is nevertheless for the Complainant to prove, with appropriate evidence, that it has generated goodwill in this period. It seems to the Expert that (absent the accountant's letter – as to which see above) the Complainant's case is bare assertion. The Respondent clearly took issue with the Complainant's claim to goodwill and the Complainant could and should have dealt with this issue in its Reply – instead it departed into a range of irrelevant and speculative material about the identity and bona-fides of various people without addressing the key issue – proving its goodwill. For the purposes of establishing the Complainant's common law Rights, 13 months may or may not be “*a not insignificant period*”, but the Expert cannot accept, on the evidence available, that these rights have been established. Neither can the Expert accept an inference of Rights arising solely from a successful licensing registration with the OFT, the purpose of which is unconnected to establishing, protecting or providing evidence for such rights. Accordingly the Expert finds that the Complainant has not established it has Rights under the DRS Policy.

### **6.3 Abusive Registration**

In the absence of proof of the Complainant's Rights in a name or mark which is identical or similar to the Domain Name, the question of whether the Registration is Abusive in the hands of the Respondent does not arise. The Expert will however, for the sake of completeness, address the Parties' submissions in this respect.

The Expert rejects the Respondent's contentions as to lack of similarity. <thepaydaypig.co.uk> and <paydaypig.co.uk> are manifestly similar terms.

In those circumstances the question of Abusive Registration then turns on Paragraph 1 of the DRS Policy which defines Abusive Registration as

*“..a Domain Name which either:*

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

Paragraph 3 of the Policy sets out a non-exhaustive list of factors which may be evidence that a domain name is an Abusive Registration, including

*i. Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily:*

*A. for the purposes of selling, renting or otherwise transferring the Domain Name to the Complainant or to a competitor of the Complainant, for valuable consideration in excess of the Respondent's documented out-of-pocket costs directly associated with acquiring or using the Domain Name;*

*B. as a blocking registration against a name or mark in which the Complainant has Rights; or*

*C. for the purpose of unfairly disrupting the business of the Complainant;*

*ii. Circumstances indicating that the Respondent is using the Domain Name in a way which has confused people or businesses into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant;*

The Complainant argues that this registration falls within the contemplation of each of the sections of Paragraph 3 quoted above, asserting at various points that:

- the Respondent offered to sell the Domain Name to the Complainant,
- the registration is a blocking registration in the Respondent's hands,
- the registration is unfairly disrupting the Complainant's business
- the Domain Name site has given rise to customer confusion.

In respect of the first three contentions, the Complainant offers nothing beyond unsupported assertion. As to the fourth, the Complainant cites just one case of customer confusion, where a caller had the mistaken impression that it had been dealing with the Complainant when they had visited the site at the Domain Name. Properly presented, (and assuming that the Complainant had been able to establish its Rights) this fact alone might have assisted in showing that the registration was Abusive under Paragraph 3.ii of the DRS Policy. As it stands, this important element in the Complainant's case is simply anecdotal, hampered by woefully poor presentation and a complete absence of evidence of the customer's confusion, or even existence.

The Respondent bases his defence upon three principal assertions:

- that the Complainant provides evidence only in relation to <thepaydaypig.com> and not the Domain Name,
- that it does not have the Rights claimed because its trading name is not sufficiently distinctive to the Complainant,
- that, in the absence of marketing or other evidence of trading activity by the Complainant, the Respondent acted in ignorance of the Complainant's earlier appearance on the market under its trading name.

So far as the Expert can discern, the Complainant's case that the Respondent's

registration of <thepaydaypig.co.uk> is Abusive is based in large measure upon the contents, use and ownership <thepaydaypig.com> and the web site found at that address. Nowhere is this argument clearly explained, although the Expert infers that the Complainant is seeking to establish that at some point the contents at this site and the Domain Name site were identical. The Expert's role is however to focus upon the Domain Name and the web site, if any, to which it resolves. Extraordinarily the Complainant has provided no evidence about this – so far as the Expert can determine at no point has the Complainant provided any screen shots or proper details of what was present historically in terms of content at <www.thepaydaypig.co.uk>. As indicated above, at the time of preparing this decision no active website exists at that address. In general terms the content of other sites, at other web addresses, is likely to be of little or no relevance and outside the scope of this Decision - at least without a clear and understandable explanation of the supposed relevance. If the Complainant believes that circumstances require the Expert to look beyond the Domain Name to other web sites, its reasoning must be more clearly articulated.

The Complainant further argues that its business activities establish the distinctiveness of its trading name and that other, similarly-named sites are either already controlled by the Complainant, address different markets and therefore fail to dilute the distinctiveness, or are part of the Respondent's improper trespass upon its IP and common law rights. While the names in question are clearly similar, the Expert does not take the view that the Complainant's trading name is so completely distinctive or unusual that it is impossible to conceive the Respondent independently devising it. In particular the Respondent has produced evidence of other lenders using the terms "payday" and "pig" in this context - for example the Respondent points out that <paydaypiggy.com> and <paydaypig.com> have been in existence since 2007. The Complainant in its Reply states that these are US sites which are not in competition with the Complainant. This however is to miss the point, as once it is accepted that other parties are using substantially similar terms and have done so prior to both the Complainant and the Respondent commencing activity, the inference, (which is what the Complainant's case comes down to) that the Respondent was aware of the Complainant and deliberately chose the name to imitate that of the Complainant, becomes much less compelling.

The Complainant also appears to say that the similarity of content between its site and those sites connected with or controlled by the Respondent leads inescapably to the conclusion that the Respondent knew of the Complainant when it registered the Domain Name. This argument is so poorly presented that the Expert does not even understand what similarities are relied upon. In any event, these issues do not absolve the Complainant from the need to submit proof, at least on the balance of probabilities, to counter the Respondent's positive assertion that he did not know of the Complainant. The Complainant might, with supporting evidence, have succeeded in showing that the Respondent could not have been ignorant of its market presence. As presented, the Complainant's submissions rely upon bare assertion and provide no rebuttal of the Respondent's position.

Elsewhere, in trying to establish the Respondent's state of mind when registering the Domain Name, the Complainant relies upon a lengthy account of the Respondent's behaviour, most of which is more properly a matter for the courts. While Expert decisions should not fly in the face of legal principles, a DRS Complaint cannot resolve questions of IP infringement or the tort of passing off. The DRS Procedure is

intended to be a simple method of resolving disagreements over the proprietorship of domain names in certain narrow circumstances. A careful reading of the two-stage test for succeeding in a Complaint, (see above), shows what a Complainant must establish; the Experts' Overview offers guidance on how, using supporting evidence, submissions should be made. The Expert notes that the Complainant is represented by solicitors, and sees little sign that the Complainant or its legal advisors properly considered what was needed to support a Complaint and discharge the burden of proof required under the Policy. Even had the Complainant established its Rights, the evidence submitted in support of its allegations of Abusive Registration would have been insufficient to tilt the balance of probabilities in its favour.

Nominet publishes a wealth of material on its website, including the Experts' Overview document and the guide entitled "Making a Complaint". These clearly emphasise that it is for the Complainant to prove its case – for example paragraph 6 of the latter document reads as follows:

*"Gather your supporting evidence*

*You will need documents such as trademarks, Companies House documentation, invoices, screen shots, communication (letters and emails) and other material as supporting evidence. If you have a 'reputation', the expert will need proof of this. Just saying that you do is not enough. An expert cannot find in your favour if you have not given them proof."*

The Complainant must take responsibility for its failure to act upon this advice.

## **7. Decision**

The Expert finds that the Complainant has failed to establish on the balance of probabilities that it has Rights in a name or mark identical or similar to the Domain Name. Accordingly, the question of Abusive Registration does not arise and no action should be taken in respect of the Domain Name. For completeness, if the Complainant had established that it had Rights, the Expert would have concluded that the Domain Name was similar to the name in which such Rights subsisted, but that the Complainant had failed to establish that the registration of the Domain Name was Abusive.

**Signed: Peter Davies**

**Dated: 4 January, 2013**