

DISPUTE RESOLUTION SERVICE**D00019655****Decision of Independent Expert**

WPH Group Ltd

and

Ms Mandy Simpson

1. The Parties:

Lead Complainant: WPH Group Ltd
23 Weston Hill Chalet Park
Bridge Lane
Weston-on-Trent
Derbyshire DE72 2BU
United Kingdom

Respondent: Ms Mandy Simpson
17 Weston Hill Chalet Park
Bridge Lane
Weston-on-Trent
Derbyshire DE72 2BU
United Kingdom

2. The Domain Name: westonhillchaletpark.co.uk**3. Procedural History:**

I can confirm that I am independent of each of the parties. To the best of my knowledge and belief, there are no facts or circumstances, past or present, or that could arise in the foreseeable future, that need be disclosed as they might be of such a nature as to call in to question my independence in the eyes of one or both of the parties.

08 December 2017 11:56 Dispute received
12 December 2017 13:21 Complaint validated
12 December 2017 13:23 Notification of complaint sent to parties
02 January 2018 10:05 Response received
02 January 2018 10:06 Notification of response sent to parties
05 January 2018 01:30 Reply reminder sent
08 January 2018 11:45 Reply received
08 January 2018 11:45 Notification of reply sent to parties
11 January 2018 09:21 Mediator appointed
12 January 2018 16:07 Mediation started
20 June 2018 17:48 Mediation failed
20 June 2018 17:48 Close of mediation documents sent

02 July 2018 02:30 Complainant full fee reminder sent

02 July 2018 10:02 Expert decision payment received

4. Factual Background

The Complainant is a limited company owning and operating a number of parks offering long-term leasehold sites and shorter-term holiday accommodation in mobile homes, chalets and other premises. Its directors are Mr Michael Mark White and his son Mr Michael Thomas White. The Complaint is written by a professional representative of one of the above named directors (referred to as “my client” and “he”) but does not specify which of the two is represented. I proceed on the basis that the Complainant is WPH Group Ltd.

The Domain Name registrant of record is 123-reg Ltd. However, it is not in dispute that the de facto proprietor of the Domain Name, and thus the Respondent in this Complaint, is Ms Mandy Simpson, a resident of the park in question and chairwoman of the Weston Hill Chalet Park Residents’ Association. Members of this association maintain the site to which the Domain Name resolves.

The Parties have been in dispute since the Complainant, under its earlier company name, acquired the site of the Weston Hill Chalet Park in 2007. The Domain Name points to a website containing text highly critical of the Complainant and its directors.

The chalet park is referred to in the parties’ submissions as either Weston Hill Chalet Park or Westonhill Chalet Park. For consistency I will use the former version throughout this decision unless quoting directly from either of the parties.

5. Parties’ Contentions

Introduction

Both parties’ submissions contain much that is outside the scope of this decision. I summarise below only those points of direct relevance to the provisions of Nominet’s DRS Policy.

Complainant

The Complainant states that it specialises in the sale of park homes, leisure lodges and leisure lodge holidays across 10 parks within the UK. The head office address is listed within the Weston Hill Chalet Park.

The Complainant states that, under its previous name of Weston Wood Lodges, it bought the land on which Weston Hill Chalet Park stands in 2007. The Complainant is also the owner of an adjacent site, Weston Wood Lodges, selling holiday rentals in properties on the site. The Complainant also promotes the sale of lodges at Weston Wood Lodges via its own website at <www.westonwoodlodges.co.uk>.

The Complainant company’s name was changed to WPH Group in August 2015 and lists Michael White as Director and his address as 23 Weston Hill Chalet Park.

Abusive Registration

The Complainant recounts how the Respondent, a resident of Weston Hill Chalet Park who was unhappy with developments in the park (including its new owners and changes to residents' rights imposed by the local council), registered the Domain Name. On the site to which the Domain Name resolves the Respondent has published negative and, says the Complainant, inaccurate content which is having a harmful impact on its business, leading to difficulty in selling residential homes or holiday lettings at its locations across the UK. A search for "Michael White Park Homes" results in the Respondent's critical website being prominent in search results.

The Complainant maintains that the Weston Hill Chalet Park Owners Group who have created the website should have registered a domain name that is more applicable to purposes of their group and further, should refrain from listing untrue facts which are having a negative impact on their business.

Respondent

The Respondent questions the Complainant's claims that the site at the Domain Name is harming its business, naming five purchasers of properties at the Weston Hill Chalet Park site in recent times and citing the numerous other park sites in the Complainant's possession.

The Respondent argues that the content of the Domain Name website amounts to the residents "telling their story" and expressing their opinions of the situation as it has developed at this Park. As such, she and the group which she chairs are exercising their rights to free speech under Article 10 of the Human Rights Act 1998.

The Respondent states that the disputed name accurately reflects the name of the residents' association and that it has twice offered to correct any inaccuracies that the Complainant's solicitors may wish to bring to its attention, but without response.

Complainant's Reply to the Response

The Complainant exercised its right to reply to the Response, pointing out that the website at the Domain Name provided no information about the Residents' Association but focuses exclusively on criticism of the Complainant and its directors. The Complainant also uses the Reply to repeat its suggestion that the Respondent should have registered a domain name that indicated more clearly that its site was maintained by a residents' association.

6. Discussions and Findings

Introduction

This Complaint arises out of a protracted dispute, or at least an atmosphere of distrust and ill will, that exists between the Parties. I offer no view on the rights and wrongs of this dispute, the substance of which is thoroughly set out in the web site at the Domain Name and in a site set up by the Complainant in rebuttal. I will however make reference in my decision to the nature of the Domain Name website content where this bears upon the Respondent's position under the DRS Policy. The relevant parts of the Policy are quoted below; they are concerned with the narrow questions of whether the Complainant has rights in a name which is identical or similar to the Domain Name and, if the Complainant has such rights, whether the Domain Name

falls within the DRS Policy definition of an abusive registration.

The website to which the Domain Name resolves is a so-called “criticism site”. The present complaint has certain features which distinguish it from other cases of this kind which have been considered by Nominet experts. Most significantly, the Domain Name does not repeat the Complainant’s company name or the names of its directors. This calls into question the Complainant’s claim to rights in a name which is similar or identical to the Domain Name.

Secondly, the Domain Name does not include, (as many criticism site names do), any element to suggest that its website contains material critical of the Complainant, such as <ihate[complainant].co.uk> or <[complainant]ruinedmylife.co.uk>.

Thirdly, the Respondent speaks for the Weston Hill Chalet Park residents’ association and collectively these residents might conceivably have rights of their own over the use of the park’s name. They own homes located on plots in the park which are leased from the Complainant. They are invested in many ways in the park and feel protective of its character and good name. Finding the Domain Name to be available in 2009, two years after the Complainant’s had acquired the park, it might be argued that they have a right to use its name in their Domain Name which at least balances and possibly overrides any rights the Complainant might claim.

In the discussion below I have quoted extracts from the Nominet DRS Expert Overview, a document which can be consulted on the Nominet website which is designed to offer advice to parties who are, or who envisage being, involved in a Nominet domain name dispute.

DRS Policy

Paragraph 1 of the DRS Policy defines Abusive registration as a Domain Name which either:

- 1.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*
- 1.ii. is being or has been used in a manner which has taken unfair advantage of or has been unfairly detrimental to the Complainant's Rights;*

Paragraph 2 of the DRS Policy requires a complainant to show that

- 2.1.1 The Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name; and*
- 2.1.2 The Domain Name, in the hands of the Respondent, is an Abusive Registration*

Complainant’s Rights

Paragraph 1 of the DRS Policy contains a definition of Rights as follows:

***Rights** means rights enforceable by the Complainant, whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning;*

The Domain Name is not the name of the Complainant company and the Complainant has not submitted evidence of registered trademark rights in the name Weston Hill Chalet Park, nor has it made an explicit claim to unregistered rights in the name. However, the Complainant is the lawful owner of this park and exercises some form of managerial oversight of it. The Complainant might thus be said to trade under the site's name, in the course of which it has acquired goodwill in that name.

I refer above to the possibility that the residents' association of the park might have alternative grounds for claiming rights in the name of the park where they live. Such a possibility does not adversely affect the question of the Complainant's rights in the present dispute. The generally accepted view among Nominet experts is that the test for rights under the DRS Policy is not intended to be overly rigorous, aiming to establish whether the Complainant has a bona fide basis for bringing the Complaint. On this limited basis I find that the Complainant has the requisite Rights.

Abusive Registration

Paragraph 5 of the DRS Policy sets out a non-exhaustive list of circumstances which may give rise to a finding of Abusive Registration. For the purposes of this Decision the relevant factors are found at paragraphs 5.1.1.3 and 5.1.2 of the Policy as follows:

5.1.1 Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily:

.....

5.1.1.3 for the purpose of unfairly disrupting the business of the Complainant;

5.1.2 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;

The Domain Name resolves to a site, the content of which is unmistakably critical of the Complainant. The opening heading on the website reads "Welcome to our Nightmare". Without drawing conclusions as to the accuracy or fairness of this content, its clear aim is to question the probity of the Complainant and its directors and have a detrimental effect upon its business by "warning off" potential customers. The Respondent claims that the site is doing no more than "telling our story", exercising a well-established right to free speech. Accurate or inaccurate, truthful or not, the nature of the site content in my view goes beyond simple story-telling, falling within the contemplation of paragraph 5.1.1.3 of the DRS Policy quoted above.

The problem with the Respondent's position is that it has elected to "tell its story" via a Domain Name which uses the unadorned name of the caravan park in question, with no hint of the contentious nature of the content users will encounter. While some visitors to the website may know what to expect and be interested in the views of the residents' association, others seeking general information about the park, such as its commercial terms and conditions, would be surprised to be confronted with the first page headline "Welcome to our Nightmare". The risk of confusion for this second category of visitor is obvious. Confusion of this sort, or the likelihood of it, is evidence of an abusive registration as identified in paragraph 5.1.2 of the DRS Policy.

I note that the Respondent suggests that this issue is being addressed, saying

We have already called a meeting over this issue and will discuss the possibility of another name but Westonhill Chalet Park Residents Association is who and what we are and I can't see how we can be called anything else!

This observation does not assist the Respondent. The Procedural History of the Complaint shows that the Parties have been unable to resolve this matter over a period of several months and perhaps longer. The continued use of the Domain Name to host a criticism site, and the Respondent's questionable reasoning in the comment quoted above that to move the website to another domain name would require a change in the name of the residents' association, suggests a reluctance to seek a domain name which more accurately describes the association's identity and purpose.

Possible defences under Paragraph 8 of the DRS Policy

Paragraph 8 of the DRS Policy, offers a non-exhaustive list of circumstances which may establish that a domain name is not an abusive registration. Of relevance to this Complaint are paragraphs 8.1.1.3 and 8.2 as follows:

8.1.1 Before being aware of the Complainant's cause for complaint (not necessarily the 'complaint' under the DRS), the Respondent has:

....

8.1.1.3 made legitimate non-commercial or fair use of the Domain Name.

8.1.2 The Domain Name is generic or descriptive and the Respondent is making fair use of it;

.....

8.2 Fair use may include sites operated solely in tribute to or in criticism of a person or business.

The Respondent's case is based largely, when translated into the language of the DRS Policy, upon the terms quoted above. To take advantage of the paragraph 8 defences, paragraph 8.1.1 sets out a pre-condition that the Respondent should have acted as it did "*before being aware of the Complainant's cause for complaint (not necessarily the complaint under the DRS)*". It is clear from the Response, and from the website content, that the relationship between the parties started to deteriorate more or less from the moment the Complainant's directors acquired the park in 2007. The Domain Name was registered in 2009, by which time the Respondent is likely in my view to have known that the Domain Name site would be a cause of complaint from the Complainant. Such an order of events would be typical in the setting up of criticism sites. However, lest I err in my judgement of the Respondent's prior knowledge of the cause for complaint, I will proceed to an assessment of whether the Domain Name constitutes a legitimate non-commercial or fair use of the Domain Name as required in paragraph 8.1.1.3 of the Policy.

Paragraph 8.1.2 requires the Respondent to show that the Domain Name is generic or descriptive. The Respondent argues that it is indeed descriptive saying

“Westonhill Chalet Park Residents Association is who and what we are and I can't see how we can be called anything else!”

I have acknowledged that the Respondent and the residents she represents have strong ties to the Weston Hill Chalet Park, but they are not synonymous with it. They no doubt have contractual rights to the plots upon which their homes stand, but they are not the legal owners of the park site itself. Neither is it clear from the Parties' submissions how responsibilities for maintenance and administration of the park are distributed between the owners of the park and its residents. Thus the statement of the Respondent quoted above fails to draw the distinction between “Weston Hill Chalet Park” which is the name repeated in the Domain Name and “Weston Hill Chalet Park Residents' Association” which more fully describes who has registered the Domain Name and maintained the website to which it points.

Paragraph 8.2 allows that fair use *may* include criticism sites. However, this is not automatically the case as paragraph 4.9 of the DRS Experts Overview explains:

...the use of the word "may" means that even if a site is operated solely as a tribute or criticism site it is still open to the Expert to find that it is abusive. In assessing the fairness or otherwise of the use, the Expert needs to have regard to both the nature of the domain name in dispute and its use.

The Expert Overview goes on to consider the earlier DRS decision in DRS 06284 <rayden-engineering.co.uk> where an appeal panel set out the consensus view of Nominet experts in dealing with criticism sites of this kind.

The appeal decision in DRS 06284 (rayden-engineering.co.uk) confirmed the consensus view among experts today that the nature of the domain name is crucial to the exercise. A criticism site linked to a domain name such as <IhateComplainant.co.uk> has a much better chance of being regarded as fair use of the domain name than one connected to <Complainant.co.uk>. The former flags up clearly what the visitor is likely to find at the site, whereas the latter is likely to be believed to be a domain name of or authorised by the Complainant.

The present case is complicated by the fact that the Domain Name is not identical to the Complainant's name. However, I am required to reach a view on all the circumstances in this case with the aim of reaching a just outcome and in doing so I accept that the Complainant is sufficiently associated with the Weston Hill Chalet Park to establish its right to bring the complaint. On this basis, and notwithstanding the fact that the Complainant's company name is not repeated in the Domain Name, I concur with the conclusions based on the <rayden-engineering.co.uk> case set out in the Expert Overview below.

A modified name that made it clear that this was a protest site would presumably have been less successful in drawing the protest to the attention of customers of the Complainant. The Panel concluded there was a balance to be drawn between the right to protest (which could be effected via a modified

name) and the Complainant's rights in its own name, and that in this case at least the latter outweighed the former.

I cannot accept that the use of a simple geographic locator <westonhillchaletpark> is a fair use of the Domain Name in these circumstances. I reach this conclusion offering the view that a domain name more fully descriptive of the Respondent's identity and/or purpose, such as <westonhillchaletparkresidentsassociation.co.uk> would stand a much better chance of qualifying as "descriptive" for the purpose of paragraph 8.1.2 of the Policy and as "fair use" for the purposes of paragraph 8.2 of the Policy.

Accordingly, I do not think that the Respondent can rely upon the provisions of paragraph 8 of the Policy to avoid a finding of Abusive Registration.

Decision

For the reasons set out above, I find that the Domain Name is an Abusive Registration in the hands of the Respondent and direct that it be transferred to the Complainant.

Signed **Peter Davies**

Dated: 27 July, 2018