

DISPUTE RESOLUTION SERVICE

DRS 05782

Decision of Independent Expert

Essex and Herts Air Ambulance Trust

and

Mr Dave Dexter

DRS 05783

Essex and Herts Air Ambulance Trust

and

Essex IT

1. The Parties

Case 05782

Complainant: Essex & Herts Air Ambulance Trust
Address: Air Ambulance Office
The Business Centre
Earls Colne Business Park
Colchester
Essex

Postcode: CO6 2NS
Country: England

Respondent: Mr Dave Dexter
Address: Suite 15
Dorset House
Chelmsford
Essex

Postcode: CM1 1TB
Country: England

Case 05783

Complainant: Essex & Herts Air Ambulance Trust
Address: Air Ambulance Office
The Business Centre
Earls Colne Business Park
Colchester
Essex

Postcode: CO6 2NS
Country: England

Respondent: Essex IT
Address: Suite 15
Dorset House
Chelmsford
Essex

Postcode: CM1 1TB
Country: England

2. The Domain Names

Case 05782

essexairambulance.org.uk
copterkidz.co.uk

Case 05783

hertsairambulance.org.uk
ehaa.org.uk
essexandherts.co.uk
hertsandessexairambulance.co.uk
essexandhertsairambulance.co.uk
hertsandessexairambulance.org.uk
essexandhertsairambulance.org.uk
essexairambulance.me.uk
airambulancelottery.co.uk

Procedural History

05/06/2008 Dispute entered into system
09/06/2008 Hardcopies received
09/06/2008 Complaint validated
09/06/2008 Complaint documents generated
01/07/2008 Non-Standard electronic response received: received by hard copy
01/07/2008 Response hardcopies received
01/07/2008 Forward response to complainant documents generated
10/07/2008 Non-Standard electronic reply received: received by email
10/07/2008 Reply received and mediation documents generated
09/09/2008 Dispute suspended. Reason: still in mediation
22/09/2008 Dispute un-suspended. Reason: mediation ended
23/09/2008 Consolidated with 05783
24/09/2008 Dispute suspended. Reason: cases back in mediation
29/09/2008 Dispute un-suspended. Reason: cases out of mediation
02/10/2008 Fees received from Complainant
02/10/2008 Mr Stephen Bate selected as expert.

1. As this procedural chronology indicates, the two cases were consolidated by Nominet on 23 September 2008. The power to consolidate is in paragraph 12c. of Version 2 of the DRS Procedure, being the DRS Procedure applicable to these cases (“the Procedure”). Consolidation had been requested by the Complainant in the light of the fact that Mr Dexter had put in a Response to both Complaints in a single document dated 27 June 2008, referring to ‘the Respondent’ in the case of registrations in his own name and in the name of Essex IT. The WHOIS searches for both names show the registrant to be an individual with the same address. For the reasons given below in the section Discussion and Findings, Essex IT is or was a trading name of Mr Dexter personally, and of 2 companies, namely Inture Ltd and Essex IT Ltd, associated with him. Save where otherwise appears, I shall refer to these 3 individuals and companies as ‘the Respondent’.
2. On 3 October 2008 proceedings were issued in the Chelmsford County Court against the Complainant by Essex IT Ltd., which advanced claims for monetary compensation arising out of alleged breach by the Complainant of clause 12.3 of the document relied on by Mr Dexter as his main defence to the claims advanced in the DRS cases before me. The terms of clause 12.3 are set out under the section of this Decision headed ‘Discussion and Findings’.
3. The claims in the County Court proceedings relate to the domain names ehaa.org.uk and hertsairambulance.org.uk. The claim of Essex IT Ltd. is advanced (by paragraph 3 of the Particulars of Claim) as follows, -

‘On or around June 2007 and following the dissolution of Inture Limited it was expressly and/or impliedly agreed between the Claimant and the Defendant that the Claimant would substitute Inture Ltd as ‘the Provider’ as defined in the Agreement and therefore the Agreement became the [c]ontractual terms between the parties.’

Mr Dexter appears to have signed the Statement of Truth required for the Claim Form as a director of Essex IT Ltd.

4. By paragraph 20a. of the Procedure, a dispute reference relating to a domain name will be suspended if legal proceedings are commenced in relation to that name. Accordingly, by emails dated 8 October 2008, the parties were informed by Nominet that the reference relating to ehaa.org.uk and hertsairambulance.org.uk had been suspended. Accordingly, this Decision concerns itself only with the remaining domain names.

4. Factual Background

5. The consolidated cases concern the Rights in now 9 domain names, which with the possible exception of one (airambulancelottery.co.uk), were created as a result of work done by the Respondent for Essex & Herts Air Ambulance Trust (“the Trust”), previously incorporated as Essex Air Ambulance Trust, a company limited by guarantee and incorporated on 18 March 2005. Prior to its incorporation on that date, the Essex Air Ambulance Trust was an NHS Trust created by the National Health Service and Community Care Act 1990, which established the Essex Air Ambulance Fund under a deed dated 22 May 1997, by which it constituted itself sole trustee of a trust for the purpose of enabling (among other things) the operation of an air ambulance service in Essex and any other relevant geographical area.
6. The Respondent was engaged by the Trust between 2003 and 2007 to deliver a range of IT services for its back-office and internet- based public activities. The parties fell out in the second part of 2007, with the Respondent wanting a new contract and demanding payment for work that it said had been done. The Trust did not want to enter into a new contract, did not accept the financial claims being advanced and demanded transfer of the domain names. By October 2007, the Trust had instructed solicitors, Messrs Fisher Jones Greenwood and correspondence ensued with Mr Dexter, writing on behalf of Essex IT Ltd.

5. The Parties’ Contentions

7. In a nutshell, the Trust says that it has Rights in the 9 domain names arising out of the contractual relationship between itself and its predecessors in interest on the one hand and Mr Dexter, trading as Essex IT on the other hand and other entities associated with him, arising out of instructions given by the Trust to Mr Dexter between 2003 and 2007. At virtually all times during this period the Trust has dealt with Mr Dexter, who has carried out the relevant IT work for the Trust. The Trust denies that the Respondent has any contractual or other rights in the domain names.
8. The Complaints go into considerable detail as to the dealings between the Trust on the one hand and the Respondent on the other hand. They say that the Trust engaged Mr Dexter to address a large number of the IT requirements for its office administration, as well as the registration of domains and web-site

design, all as part of an internet resource for the Trust to carry on its charitable activities.

9. The Trust says that it has paid in full for the work done except for one invoice rendered in July 2007, which it has disputed but for which it has asked for a breakdown. It also asserts Rights in the domain names through its trademarks, publicity material, newsletters and existing website and email accounts. Hence, its primary case is that it has contractual Rights, but it also has a case that it has Rights based on Common Law and Statute.
10. The Respondent, on the other hand, says in the Response that with one exception, the dispute should not be dealt with under the DRS Procedure, because it is a 'complicated contractual dispute more fitting for the High Court or County Court'. It is said that the Respondent is entitled to retain ownership of the applicable domain names by reason of certain contractual rights. The Response also goes into some detail as to the dealings between Mr Dexter and the Trust in recent years.
11. The exception relates to airambulancelottery.co.uk, which is said to have nothing to do with the work Mr Dexter did for the Trust and was registered in respect of the air ambulance industry generally, with which the Respondent has had other dealings.
12. The Response alleges that the Complaints, -

'include a number of inaccuracies and misrepresentations and if Nominet is minded to hear this dispute we are prepared to set out our own version of events. Meanwhile, some of the inaccuracies and falsities set out in the [C]omplaint are dealt with in Schedule A to this letter'.
13. The Reply consists of a one-page letter. It says that the Response does not deal with the real issue, namely ownership of the domain names. The Trust repeats that it owns these domains because they were 'acquired under instruction' from the Trust and says that it has applied to register the terms 'Essex Air Ambulance' and 'Herts Air Ambulance' as trademarks.

6. Discussion and Findings

Introduction

14. I do not consider it appropriate to make findings on the wider contractual dispute between the parties affecting any services rendered by Mr Dexter or entities associated with him. However, subject to the 2 domain names the subject of legal proceedings, I consider it appropriate to decide the dispute affecting ownership of the remaining names. This aspect of the contractual dispute is not complicated and can be fairly determined under the Procedure.
15. Although this Decision does not affect the domain names pertaining to the County Court proceedings, evidence relating to those 2 domain names may in

principle be relevant to findings concerning the 9 names that are material. Thus, where it is appropriate to do so, I will take such evidence into account and have done so in the limited respects set out below.

16. The Response stated that the Respondent is prepared to give further details of the alleged inaccuracies in the Complaint. I quite understand his position that the DRS Procedure should not be used to determine this dispute. However, paragraph 5.c.ii of the Procedure required the Respondent to set out all of the grounds on which it relied to rebut the case advanced against it, and it was therefore incumbent on the Respondent to do so.
17. Having said that, the thrust of the Respondent's case is that it has a contractual right to retain ownership of the domain names. That case is wholly inconsistent with any possible case that the Respondent was not engaged to create and register the domains. Indeed, with the exception of airambulance.co.uk, that much is not disputed.

Does the Trust have Rights in the Domain Names?

18. Does the Trust have Rights in the 9 domain names? Rights are defined by paragraph 1 of the Policy (Version 2), being the applicable Policy ("the Policy"), as follows -

'Rights includes, but is not limited to, rights enforceable under English law. However, a complainant will be unable to rely on rights in a name or term which is wholly descriptive of a complainant's business.'

This definition does include contractual rights, as well as rights arising by Statute or Common Law. I shall therefore consider the contractual case advanced by the Trust and if that case does not succeed, I shall consider the merits of its alternative case on Rights.

19. Who were the parties who agreed to create the domain names for the Trust? The first 2 domain names to be registered were essexairambulance.org.uk (19 November 2003) and copterkidz.co.uk (28 January 2005). The other domains were registered from June 2006 onwards. I find that Mr Dexter trading as Essex IT or Essex IT Solutions was the person who agreed to create the domain names essexairambulance.co.uk and copterkidz.co.uk. The letter of instruction for essexairambulance.co.uk dated 4 May 2003 and subsequent correspondence and invoices in Bundles I and L to the Complaints show this to be so. I also take into account that the registrations for these 2 names are in Mr Dexter's own name.
20. In relation to the remaining 6 names apart from airambulancelottery.co.uk (as to which see paragraphs 37 and 38), there are 2 issues, namely (1) what is the identity of the registrant Essex IT and (2) who was the contracting party or parties who agreed to create these domain names for the Trust? The WHOIS searches record Essex IT as being an individual, with an address at Suite 15, Dorset House, Chelmsford, CM1 1TB. However, other evidence, including the document relied on by the Respondent as the relevant contract, identifies

Essex IT as a trading name of a company called Inture Ltd: see clause 16 of that document. Inture Ltd is expressed in that document to be the contracting party, which was to provide IT services to the Trust: see cl. 2.1. Letters written by Mr Dexter to the Trust in the period between September and November 2007 were on the writing paper of Essex IT Ltd, expressed to be trading as Essex IT, again showing the address at Suite 15, Dorset House revealed by the WHOIS search records for Essex IT. The undated letter faxed on 28 November 2007, which included the contract relied on by the Respondent for the purposes of these DRS cases, was written by Mr Dexter on behalf of Essex IT Ltd. There is also an earlier letter from Essex IT Ltd dated 19 October 2007 in which Mr Dexter wrote, 'Please find enclosed a copy of our standard Terms and Conditions, ...' I also bear in mind the allegation in paragraph 3 of the Particulars of Claim that the reason why contractual claims are asserted on behalf of Essex IT Ltd is because of the allegation in that paragraph that this company is, in effect, the assignee of the contractual rights relied on and that Inture Ltd has been dissolved.

21. I therefore conclude and find that Essex IT is an alias of Mr Dexter and also a trading name of Inture Ltd and of Essex IT Ltd and that Mr Dexter is and was at all material times authorised to act on behalf of each company with respect to the matters now in dispute in these consolidated cases.
22. Looking at the evidence overall, I find it more likely than not that the contracting party which was instructed to create the other 6 domain names was Inture Ltd, acting by Mr Dexter. If not, that party was Mr Dexter.

essexairambulance.org.uk and copterkidz.co.uk

23. I shall deal first with these 2 domain names. It is clear from the dates of the Nominet registrations (see paragraph 19 above) that these names were created before the term of the agreement relied on by the Respondent, which was expressed to commence on 10 March 2005. I also find that it was Mr Dexter who first registered these names pursuant to the instructions given to him by the Trust. The stamped invoices for each domain name strongly suggest that payment was made, having been stamped as authorised for payment. There is no suggestion by Mr Dexter that payment was not made and his claims for outstanding payments due (see his letter of 24 September 2007) do not include this work. The printed terms on the invoices show that it was the intention of the Respondent that ownership of the domains was to pass following payment and I find that the essence of the bargain between the Trust and Mr Dexter was that the Trust should own these domain names for all purposes. I therefore find that payment was made in full for these names and that the Trust owns them.
24. It also follows that the contract relied on by the Respondent affords no defence to the claims for these 2 domain names. I note that the County Court proceedings brought to enforce clause 12.3 of the agreement do not include them, being 2 of the 4 in use by the Trust, the other 2 being ehaa.org.uk and hertsairambulance.org.uk, the 2 domain names the subject of the County Court proceedings. Therefore, I find that the Trust owns the domain names as a

matter of contract and has Rights in both of them. The Rights exist in respect of names that are identical to these 2 domain names, being the very registrations in question.

25. In those circumstances, it is not necessary for me to consider the alternative case on Rights in these names, based on trademarks and passing off.

essexandherts.co.uk, essexairambulance.me.uk,
hertsandessexairambulance.co.uk,essexandhertsairambulance.co.uk
hertsandessexairambulance.org.uk
essexandhertsairambulance.org.uk

26. I shall now deal with the remaining domain names except for airambulancelottery.co.uk. What were the terms of the contractual arrangements for ownership of these other 6 domain names?
27. The essence of the bargain between the parties to these agreements was that Inture Ltd was instructed to create and register these domain names for the purposes of the Trust.
28. The question however is whether and if so at what point the right to ownership would pass to the Trust. The Respondent relies on contractual provisions set out in the document contained in Annexe O to each Complaint.
29. The document was sent by Mr Dexter under cover of the undated letter faxed on 28 November 2007 to Fisher Jones Greenwood, in response to their letter of 21 November 2007. He also says that it was sent under cover of an earlier letter dated 19 October 2007.
30. The document is headed 'TERMS AND CONDITIONS FOR IT SERVICES' and the parties to it are Inture Ltd, defined as 'the Provider', and the Trust. It is not signed by either party.
31. Mr Dexter relies on clauses 12.2 and 12.3. Clause 12.1 is also pertinent. I shall set out clause 12 in full.

'12. Intellectual Property

12.1 All the intellectual property rights created as a result of the work carried out by the Provider hereunder including, but not limited to, in relation to the supply of source codes, software, and domain names shall be retained by the Provider until all fees, payments, dues and commissions are paid by the Customer in full under the terms of this agreement.

12.2 All domain names licensed to the [C]ustomer are on terms which allow the [C]ustomer the unrestricted right to use those domain names for the purposes of its business for the duration of this agreement only.

12.3 In the event the [C]ustomer wishes to use those domain names after expiration or termination of this agreement, they may do so subject to the following condition:

12.3.1 Payment is made to the Provider of no less than [t]hirty per cent ... of the total value of goods and service[s] supplied by the [P]rovider to the Customer in the [t]welve months immediately preceding the termination hereof per domain name.'

32. As indicated in paragraph 23 above, the contractual term was expressed to start on 10 March 2005. The services to which the Terms and Conditions were expressed to apply are described in the 'Specification of Services Schedule' as, 'Service and Maintenance, Domain Name, Licences and email maintenance as per terms and conditions'.

33. I find that this document did not have contractual effect, for the following reasons, -

33.1 It is unsigned and therefore cannot itself be the contract.

33.2 If it were to be alleged that the terms were agreed orally and/or by conduct so as to be evidence of agreed terms, there is no evidence asserting, let alone establishing, how each of the parties agreed to be bound by its terms.

33.3 Clauses 9.4, (consequences of failure to deliver the services with care and skill), 10 (detailed provisions as to confidentiality) and 18 (jurisdiction – whether exclusive or non-exclusive) are each accompanied by square brackets either in whole (clauses 9.4 and 10) or in part (clause 18). The inference I draw from the state of these provisions is that further discussion was necessary if the terms in the document were to be agreed. I also bear in mind that the document was not signed and conclude that in this case the parties did not intend to be bound until these clauses had been agreed.

33.4 Clause 12.2 and 12.3 contemplate that the Trust will be entitled to use the domain names beyond the term of the agreement only if a specified payment is made for each domain name. This is flatly contradicted by Mr Dexter's email of 12 May 2007, exhibited to and referred to in the Complaints. In that email he states in answer to a question concerning ehaaorg.uk and another domain name (not one of the 11) that, 'I can confirm .. that as with all transactions you become the "title" and deed owner of any product or products upon payment of invoice which also serves as your receipt and proof of purchase.' The Respondent has not explained this inconsistency.

I also find that the essence of the bargain between the Respondent and the Trust with respect to these 6 domain names (as with the previous 2) was that the Trust would own all the rights to them. The domain names were created

for the Trust to use for the purposes of its charitable activities. Further, they were names, which inherently identified the Trust or activities associated with it and there was no legitimate reason for the Respondent to use the domain names itself.

34. I also find that the Trust did pay for each of the 6 domain names. In the Complaints, it alleges that, -

‘The respondent has received payment in full for all invoices. Other than [one] in July 2007, which has been formally rejected, although the Charity has asked for a breakdown.’

The Respondent has not alleged that the Trust has failed to pay for any of these domain names. The defence run is that the Respondent is entitled to prevent use of domain names where the further payment equal to 30% of the value of relevant goods and services has not been made under clause 12.3. I should add that even if payment had not been made for these 6 domain names, I am not satisfied that this would not have entitled the Respondent to keep them. The Respondent has not established the existence of any term preventing or restricting ownership of the rights in these 6 names until payment has been made. Mr Dexter’s email of 12 May 2007 is not adequate to establish the existence of such a term, nor is the evidence as a whole.

35. I did have some reservations as to whether it was likely that the Trust authorised the Respondent to create the domain name ‘essexairambulance.me.uk, which was first registered on 24 July 2007. On the face of it, this might seem unlikely. However, no such allegation has been made and I make no such finding. The most that the Trust says in its Complaints is that in respect of some domain names, including .com names, the Respondent ‘no longer [has] any need, as the [Respondent is] no longer supplying services, and [has] no interest [in the names].’ Furthermore, there is no assertion by the Respondent that the Trust has failed to pay him for creating this domain name.
36. Having paid for these names, which were created on the instructions of the Trust, it has a right arising under contract to own each of these 6 domain names. I therefore find that the Trust has Rights in those names. Hence, it is not necessary for me to make findings on the alternative case on Rights. The Rights exist in respect of names that are identical to these 6 domain names, being the very registrations in question.

airambulancelottery.co.uk

37. I find that the Trust has not shown to the required standard of proof that it has a contractual right to this domain name. There is no detailed evidence as to how it commissioned the Respondent to create this name. In its Response, the Respondent specifically challenges the right of the Trust to that name. The Reply does not deal with this at all, other than by way of a general restatement of the case advanced by the Trust.

38. I also find that the Trust has no trademarks or rights that would support an action for passing off in this name. Though not wholly descriptive, the words are nonetheless substantially descriptive and are not, on the evidence before me, sufficiently distinctive of the lottery activities of the Trust. The evidence relied on is that there is no other air ambulance service in Essex or Hertfordshire that might wish to use the domain names. That evidence does not support a claim to an exclusive right to use the word 'airambulancelottery'.

Are the 8 Registrations Abusive?

39. The 8 registrations in question are each of the domain names the subject of this Decision, except for airambulancelottery.co.uk. By paragraph 1 of the Policy, -

'Abusive Registration' means 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 took unfair advantage of or was unfairly detrimental to the Complainant's Rights.'
40. Subparagraph i does not apply. However, I find that subparagraph ii does apply. The Respondent's retention of these domain names has been itself unfair, being wholly inconsistent with the Rights of the Trust in those names and quite contrary to the whole basis of the contractual arrangements between the parties: that the domain names were to be created for and owned by the Trust. The retention of the registrations in reliance on what Mr Dexter wrongly understood to have been his contractual right to do so and as, I find, a bargaining counter in his wider dispute with the Trust, accompanied by his refusal to transfer the domain names in violation of the Rights of the Trust, has amounted to a use of the registrations which took unfair advantage of the Rights of the Trust.
41. I accept the uncontradicted evidence in the Complaints on the issue of unfair detriment. In view of the fact that the Respondent has refused to transfer the domain names, the Trust has incurred costs in obtaining and maintaining 5 additional domain name registrations for its internet-based activities, whereas it should have been in the position to use each of the 8 registrations. This has caused immense disruption to a small team that raises funds for an important life-saving service, all of which is unfairly detrimental to its Rights.
42. I therefore find that these 8 Domain Names are Abusive Registrations within the definition of subparagraph ii of paragraph 1 of the Policy.

7. Decision

43. In the light of the foregoing findings, namely that the Complainant has Rights in respect of names that are identical to the 8 Domain Names referred to below and that each of the Domain Names, in the hands of the Respondent, is an Abusive Registration, the Expert directs that the following Domain Names –

essexairambulance.org.uk
copterkidz.co.uk
essexandherts.co.uk
essexairambulance.me.uk
hertsandessexairambulance.co.uk
essexandhertsairambulance.co.uk
hertsandessexairambulance.org.uk
essexandhertsairambulance.org.uk,

be transferred to the Complainant. The Complainant has stated in the Complaints that it is prepared to pay the Respondent for the renewal fees applicable to these registrations. I have no jurisdiction to order payment of those sums, which is a matter for the Complainant.

44. In the light of the foregoing findings with respect to the domain name airambulancelottery.co.uk, the Expert is not persuaded on the evidence before him that the Complainant has the relevant Rights and the Expert therefore declines to order transfer of this domain name to the Complainant.

STEPHEN BATE

27 October 2008