

DISPUTE RESOLUTION SERVICE

DRS08421

Decision of Independent Expert

Sourcesense Limited

and

Mr Samuel Neil Allcock

1 The Parties

Complainant: Sourcesense Limited
Address: 44 London Fruit and Wool Exchange
56 Brushfield Street
London
Post Code: E1 6AG
Country: United Kingdom

Respondent: Mr Samuel Neil Allcock
Address: 32 Durham Drive
Buckshaw Village
Chorley
Lancashire
Post Code: PR7 7AW
Country: United Kingdom

2 The Domain Name

sourcesense.co.uk (“the Domain Name”).

3 Procedural History

- 3.1 On 19 March 2010 the complaint was received. On 22 March 2010 the complaint was validated and notification of the complaint was sent to the parties. On 13 April 2010 a response was received and notification of the response was sent to the parties. On 21 April 2010, after no reply was received, a mediator was appointed. The mediation failed and on 10 June 2010 the expert decision payment was received.
- 3.2 On 11 June 2010, Patricia Jones (“the Expert”) confirmed to Nominet that she knew of no reason why she could not properly accept the invitation to act as expert in DRS 08421 and further confirmed that she knew of no matters which ought to be drawn

to the attention of the parties which might call into question her independence and/or impartiality.

4 Factual Background

- 4.1 The Complainant has been trading in the UK since 20 March 2007. It is part of a European Group, Sourcesense Europe, with offices in London (Sourcesense UK), Amsterdam (Sourcesense NL), Milan and Rome (Sourcesense Italy).
- 4.2 The Domain Name was originally registered in 2007 by the Complainant's former Managing Director and was used for the Complainant's corporate website, which is also accessed via the domains sourcesense.com, sourcesense.nl and sourcesense.it. The Domain Name was also used for emails sent to the Complainant's UK office by customers, prospects, partners and employees.
- 4.3 The Domain Name was registered on 9 February 2010 by the Respondent, who is described on the WHOIS database as a non-trading individual who has opted to have his address omitted. The registrar is Custard Media Solutions Ltd.
- 4.4 On 17 February 2010 Marco Abis, the current Managing Director of the Complainant, contacted Custard Media using an enquiry e-mail at custardmedia.co.uk. He explained that the Domain Name expired in November 2009, that the Complainant had been trying to avoid the expiration since April 2009, when the Complainant had been the subject of a reshuffle and when he had replaced the Complainant's former Managing Director. Mr Abis further explained that the former Managing Director had failed to hand over the Domain Name and remembered about it only when it was too late. The Complainant was waiting until the end of the grace period to get hold of the Domain Name but the Respondent had been quicker. Mr Abis asked if the Domain Name could be transferred and said the Complainant would be happy to cover the costs.
- 4.5 On 18 March 2010 there was an exchange of e-mails between Sam of Custard Media and Mr Abis as follows:
 - (a) Sam said there would be an administration charge of £750 plus VAT to recover the Domain Name.
 - (b) Mr Abis responded querying why he should pay this sum when Nominet's Dispute Resolution Service would cost £200 or in the worst case £750. He offered £200 for the Domain Name as this was the sum the Complainant was likely to spend with Nominet.
 - (c) Sam replied that he was not looking to sell the Domain Name and the offer of £750 "is going against our investments". He queried what the Complainant was going to do with the Domain Name and whether the Complainant needed hosting, a new website designing, e-mail accounts or on line marketing. He said "maybe we can come to a deal if we can provide any of the above."
 - (d) Mr Abis said that the Domain Name had been used by the Complainant in the UK since the Complainant had started a few years back. He pointed out that he was writing from sourcesense.com and that the Complainant had a

sourcesense.tld for each country in which it operated. The Complainant already had websites (including a new one in development), emails and everything else as the Complainant is an IT company with the infrastructure in place.

(e) Sam responded that if the Complainant would host a page of content at the Domain Name and sourcesense.com, he would let the Complainant have the Domain Name for free. He needed a mention on the partner page of the Complainant's website for one of his clients with a link pointing through to the clients' site. Once this had been done and there was an assurance that the page would be hosted for at least a couple of years he would send the Domain Name across for free.

(f) Mr Abis replied that the Complainant was a serious business and its listed partners were proper partners the Complainant did lots of business with. He had the impression that a reasonable agreement would not be found and he would go through the Nominet Dispute Resolution Service.

(g) Sam made a final offer of £500 to sell the Domain Name.

4.6 On 19 March 2010 this offer was rejected by Mr Abis as it was too far off his proposed £200 for the Domain Name that he said clearly belonged to the Complainant (the Domain Name had been used for years by the Complainant, is the Complainant's registered company name and is not a pre-existing word). On the same day Sam responded that his final offer would stand until he received correspondence from Nominet.

4.7 At the time of the complaint, the Domain Name resolved to a holding page.

5 Parties' Contentions

5.1 The Parties contentions are brief and are as set out below.

Complainant

5.2 Sourcesense is the Complainant's legal name in all the countries where the Complainant operates and is a word the Complainant made up. It does not exist in any language.

5.3 The Domain Name is an Abusive Registration because it has been registered by the Respondent for the only purpose of selling or transferring it back to 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. The Complainant relies on the email exchange which has been summarised at paragraphs 4.5 and 4.6 above

Respondent

5.4 The Respondent accepts that the Complainant has rights in "Sourcesense" having companies registered in that name, including in the UK. However, the Complainant does not have universal rights to use "Sourcesense" in the UK as it is not a trade mark and can be freely used as long as the tort of passing off is not contravened.

- 5.5 The Respondent refutes that this was an Abusive Registration on any grounds, including the one asserted by the Complainant. The Respondent states that the email exchange summarised above shows that it was the Complainant who made contact with the Respondent and had they not done so the Respondent would never have communicated with the Complainant as the Respondent bought the Domain Name in order to create a blog about making sense of source code escrow to use in the course of the Respondent's business. The Respondent asserts that this is a fair and genuine use of the Domain Name and does not take advantage of the Complainant's rights in any way. It was only when asked by the Complainant to let them have the return of their previously owned Domain Name that the Respondent considered selling it.

6 Discussions and Findings

- 6.1 Paragraph 2 of the Nominet Dispute Resolution Service Policy ("the Policy") sets out that for a Complainant's complaint to succeed it must prove to the Expert on the balance of probabilities that:
- i. The Complainant 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.
- 6.2 The Complainant is required to prove to the Expert that both elements are present on the balance of probabilities.

Complainant's Rights

- 6.3 Under Paragraph 1 of the Policy, Rights is defined as "rights enforceable by the Complainant, whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning."
- 6.4 It is well accepted that the question of Rights falls to be considered at the time the Complainant makes its complaint. In this case the Respondent accepts that the Complainant has rights in "Sourcesense" but I must satisfy myself of this on the balance of probabilities.
- 6.5 The Complainant is an IT company providing consultancy and other services in relation to open source technologies. Although the Complainant has not presented any evidence of its turnover or that the name is recognised by purchasers as indicating the services of the Complainant, for example through details of advertising expenditure, I am satisfied that the Complainant has established enough use of Sourcesense to have Rights in that name. The Complainant operates its corporate website using that name. It is also the group name, UK company name and is a trading name. I consider that through such use the Complainant has established goodwill and reputation in Sourcesense and accordingly has Rights in that name. In coming to this conclusion I have taken into consideration that the question of Rights is generally considered to be a test with a low threshold to overcome. I have also taken into consideration that I do not consider "Sourcesense" to be a descriptive term for the Complainant's business. I am therefore not required

to satisfy myself that this term has acquired a secondary meaning of association with the Complainant.

- 6.6 Accordingly I find on the basis of the use made by the Complainant of the Sourcesense name that the Complainant has Rights in a name or mark which is identical or similar to the Domain Name.

Abusive Registration

- 6.7 The question to be considered then is whether the Domain Name, in the hands of the Respondent, is an Abusive Registration? Paragraph 1 of the Policy 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 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 of or has been unfairly detrimental to the Complainant's Rights.

- 6.8 The Complainant has relied on the first limb of the definition of Abusive Registration in the complaint but I am not required to restrict myself to this and I will consider in this decision each limb of the definition. It is sufficient to satisfy either of the limbs for there to be a finding of an Abusive Registration.

Abusive Registration under Paragraph 1(i) of the Policy

- 6.9 Paragraph 3(a) of the Policy sets out a non-exhaustive list of factors which may be evidence that the Domain Name is an Abusive Registration under Paragraph 1(i) of the Policy as follows:

- 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.

- 6.10 The Complainant relies on Paragraph 3(a)(i)A of the Policy as set out above in its complaint. However, it must be borne in mind that Paragraph 3(a)(i) of the Policy relates to the Respondent's motives at the time of registration of the Domain Name. Paragraph 4(d) of the Policy makes it clear that trading in domain names for profit is, of itself, a lawful activity. The Expert will review each case on its merits.

- 6.11 In this case, the Respondent is Mr Sam Allcock and the person who made the offer to sell the Domain Name is Sam of Custard Media. I consider that they are the same person and I have treated them as such in this decision. I note also that the Respondent does not indicate otherwise in his evidence and that they are the same person is also consistent with the registrar being "Custard Media".

- 6.12 The fact that in this case the Respondent offered to sell the Domain Name after the Complainant contacted him does not of itself mean that there was an Abusive Registration under paragraph 1(i) of the Policy. What must be considered was the Respondent's intent at the time of registration of the Domain Name. Did the Respondent register the Domain Name with the intent of selling it to the Complainant for a profit or as a blocking registration or for the purposes of unfairly disrupting the business of the Complainant?
- 6.13 In this respect for there to be an Abusive Registration under paragraph 1(i) of the Policy, it must be established that the Respondent had knowledge of the Complainant and/or its rights at the time of registration of the Domain Name.
- 6.14 I note that the Complainant has not provided any evidence of how the Respondent would have been aware of the Complainant at the time of registration of the Domain Name, for example the results of Google searches at that time. Nor has the Complainant provided any evidence as to the extent of its reputation, such as turnover figures or advertising spend, which could be relevant as to whether the Respondent was aware of the Complainant when the Domain Name was registered.
- 6.15 The Respondent states that he bought the Domain Name in order to create a blog about making sense of source code escrow to use in the course of business. I am sceptical of this explanation given that the Respondent has adduced no evidence to support this contention, such as evidence of preparations to create the blog, and given that the Domain Name is not being used for this purpose. It is noteworthy also that the Respondent made no mention of this in his e-mail correspondence with the Complainant.
- 6.16 However, the fact that the Respondent says he chose the Domain Name for a use in connection with source code escrow, a closely related field of activity to that of the Complainant, is suggestive that the Respondent was aware of the Complainant at the time of registration of the Domain Name, particularly since I do not regard "Sourcesense" as descriptive of a blog about source code.
- 6.17 Nevertheless, having weighed all the evidence, I do not consider that the Complainant has proved on the balance of probabilities, that the Respondent was aware of the Complainant at the time of registration of the Domain Name and that the Respondent registered the Domain Name with the intent of selling it at a profit to the Complainant or as a blocking registration or for the purposes of unfairly disrupting the business of the Complainant.
- 6.18 Whilst the Complainant has been able to establish that it has enough use of the Sourcesense name to have Rights under the Policy, the Complainant has not adduced evidence, for example on the extent and scope of that use, to establish that the Respondent was aware of the Complainant at the time of registration of the Domain Name. As I have said, there is nothing in itself wrongful under Paragraph 1(i) of the Policy about the Respondent seeking to sell the Domain Name at a profit or trying to agree a commercial deal with the Complainant which involves the transfer of the Domain Name after registration of the Domain Name, provided that was not the Respondent's intent at the time of registration of the Domain Name, which I do not find to be the case here. However, such conduct by the Respondent

may be relevant as to whether there is an abusive use of the Domain Name under Paragraph 1(ii) of the Policy on which I will comment further below.

- 6.19 I therefore do not consider that the Complainant has established that there is an Abusive Registration under Paragraph 1(i) of the Policy. I will now turn to consider whether there is an Abusive Registration under Paragraph 1(ii) of the Policy.

Abusive Registration under Paragraph 1(ii) of the Policy

- 6.20 There is a non-exhaustive list of factors under the Policy which may be evidence that the Domain Name is an Abusive Registration including:

(a) Paragraph 3(a)(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.

- 6.21 There is also a non-exhaustive list of factors under the Policy which may be evidence that the Domain Name is not an Abusive Registration including:

(a) Paragraph 4(a)(i): Before being aware of the Complainant's cause for complaint (not necessarily the 'complaint' under the DRS) the Respondent has:

A used or made demonstrable preparations to use the Domain Name or a domain name which is similar to the Domain Name in connection with a genuine offering of goods or services;

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

- 6.22 At the time of the complaint and after notification of the Complainant's Rights during the e-mail exchange, the Respondent was using the Domain Name to point through to a holding page. This featured "sourcesense.co.uk" and various headings as follows: "sourcesense"; "admin links"; "others"; "hub"; "Sourcesense UK"; "UKPostBox"; "MDemo"; "the Best Books"; "MARC: Mailing List AR" and "Open Source Software".

- 6.23 The Complainant has not presented any evidence that the Respondent's use of the Domain Name changed after notification of the Complainant's Rights. I therefore must presume in this decision that the Domain Name also pointed through to this holding page before the Complainant notified the Respondent of its Rights.

- 6.24 In the Appeal Panel decision of MySpace, Inc v Total Web Solutions Limited (DRS 04962), it was stated that *"To date experts and Appeal panels have reasonably consistently taken the view that if a registrant acquires a domain name in advance of the coming into existence of the complainant's rights, the registrant is entitled in principle to hold onto the domain name and to use it, notwithstanding that confusion of the 'initial interest' variety may be inevitable. Similarly, experts and Appeal panels have concluded that in such circumstances it is not of itself abusive for the registrant to demand a high price from the complainant for transfer of the domain name in recognition of its enhanced value. Problems only arise for the registrant if he actively does something to take unfair advantage of his position. In the <iTunes.co.uk> case,*

for example, the registrant sought to rack up the price by threatening to transfer the domain name to a competitor of the complainant.”

- 6.25 Further in Deutsche Telekom AG v Lammtara Multiserve Limited (DRS 05856) the Appeal Panel stated that *“Abusive Registration connotes culpable behaviour akin to knowing wrongdoing”*.
- 6.26 In this case I consider that the Respondent’s use of the Domain Name is likely to cause initial interest confusion. The Domain Name is identical to the name of the Complainant’s business (excepting the .co.uk suffix). This means it is likely that the Respondent’s site will feature high up on a search engine request for Sourcesense made by internet users looking for the Complainant. When the search engines results are returned, internet users are likely to visit the Respondent’s website in the expectation of finding the Complainant at the Domain Name. In particular, because Sourcesense Europe uses a country specific domain name for each country it operates in, it is likely that internet users will expect to find Sourcesense Europe’s UK business at the Domain Name. The Respondent’s website will therefore be likely to attract visitors who are looking for the Complainant in response to a search engine request or from internet users who have made an educated guess as to the Complainant’s domain name, particularly those looking for the Sourcesense Europe UK business.
- 6.27 The Respondent’s holding web page features prominently “sourcesense.co.uk” and also has various headings including for Sourcesense, Sourcesense UK and Open Source Software. Therefore, I consider that some visitors to the Respondent’s website who are looking for the Complainant may wrongly believe that they have found the Complainant’s site. However, even if visitors to the Respondent’s website realise that they have not found the Complainant, they would still have been initially confused into believing that the Domain Name was registered to, operated or authorised by or otherwise connected with the Complainant.
- 6.28 Furthermore, the Complainant’s evidence is that the Domain Name was previously used for e-mails sent to its UK office by customers, prospects, partners and employees. It may be that some of these third parties continue to use the Domain Name for e-mail and that the Respondent may therefore erroneously receive e-mails that were meant for the Complainant, although I have not been provided with any evidence of this.
- 6.29 In this case the Respondent did not acquire the Domain Name in advance of the coming into existence of the Complainant’s Rights. However, I have found that the Respondent acquired the Domain Name ‘innocently’ without knowledge of the Complainant’s Rights. In those circumstances, I regard the Respondent’s use of the Domain Name, before notification of the Complainant’s Rights, to point through to a holding page to be a fair use of the Domain Name in accordance with Paragraph 4(a)(i)(C) of the Policy, notwithstanding that such use may have caused initial interest confusion. In line with the MySpace decision, the Respondent should be entitled in principle to hold onto the domain name and to use it unless the Respondent has done something to take unfair advantage of or to exploit his position after notification of the Complainant’s Rights.

- 6.30 I have no evidence that the Respondent sought to take advantage of his position by changing his use of the Domain Name after notification of the Complainant's Rights. However, the Respondent did enter into negotiations to transfer the Domain Name. The Respondent offered to sell the Domain Name (for £750 and £500) and attempted to negotiate the provision of IT and on-line marketing services to the Complainant as part of a deal in relation to the transfer of the Domain Name. The Respondent also offered to transfer the Domain Name for free if one of the Respondent's clients could be mentioned with a link to the client's website on the partner page of the Complainant's website. It therefore needs to be considered whether by such conduct the Respondent has done something to take unfair advantage of his position so as to constitute an abusive use of the Domain Name.
- 6.31 As the Appeal Panel in the Deutsche Telekom AG decision stated "*dealing in domain names is a perfectly legitimate activity (per se) and commonly the price that a vendor will put upon the name is either the minimum that the vendor is prepared to accept for it or...the vendor's estimate of the value of the name to the purchaser.*"
- 6.32 I consider that there is nothing wrongful regarding the Respondent's offers to sell the Domain Names for monetary sums. These were put forward as the price the Respondent was prepared to accept for the Domain Names, were for fairly small amounts and there is no evidence that the price was inflated for an improper reason. Similarly, I do not consider there is anything wrongful in the Respondent offering his services as part of a deal involving the transfer of the Domain Name.
- 6.33 However, I am troubled by the Respondent's offer to transfer the Domain Name for free if a page of content was hosted for the Respondent's client at the Domain Name and sourcesense.com. On the face of it this is not conduct designed to increase the price for the Domain Name. The Respondent has not, for example, sought an inflated price for the Domain Name to avoid such use. Nevertheless I consider that the offer is relevant to paragraph 3(ii) of the Policy which provides that it may be evidence that the Domain Name is an Abusive Registration if the Respondent is threatening to use the Domain Name in a way which 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.
- 6.34 The Complainant's partners are companies in the field of open source technology. I deduce that the Respondent's client is also in a business connected with open source technology otherwise a mention and link on the Complainant's site would be unlikely to be of benefit to the Respondent's client and the Respondent would have been unlikely to raise this in negotiations.
- 6.35 I consider that if the Domain Name is used for the Respondent's client, an open source technology business, this would be 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, since the Complainant's business is also open source technology. People or businesses would be likely to be confused into believing that the Respondent's client is the Complainant or is a partner of the Complainant or has some other association or connection with the Complainant.
- 6.36 Accordingly, I consider that a threat by the Respondent to use the Domain Name for the business of the Respondent's client after notification of the Complainant's Rights

would be a factor strongly indicating an Abusive Registration. Whilst the Respondent has not made an express threat of such use, in my opinion if the Respondent has evinced an intention to make such use of the Domain Name in the future, this would constitute a threat.

- 6.37 To evaluate this, it is necessary for me to weigh up whether the Respondent's e-mail offer evinced an intention to use the Domain Name in connection with the Respondent's client if the Respondent could not reach a negotiated settlement with the Complainant or whether it was merely the Respondent trying to negotiate an advantageous settlement with the Complainant.
- 6.38 As I have stated above, I am sceptical of the Respondent's explanation that he intends to use the Domain Name in connection with a blog. The question is whether this is sufficient to support an adverse inference regarding the future use of the Domain Name in connection with the Respondent's client. Weighted against an adverse finding is the fact that the e-mail does not expressly say what the Respondent will do with the Domain Name if the offer is rejected and that after the Complainant rejected the offer on the basis that the Complainant has proper partner relationships, the Respondent reverted to an offer based on a monetary sum.
- 6.39 Overall, whilst I have concerns regarding the Respondent's offer I consider that after weighing the evidence, it supports a conclusion that the Respondent was attempting to negotiate the best settlement and has not threatened to use the Domain Name in a way, namely in connection with the Respondent's client, which 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.
- 6.40 I therefore do not find that there is an Abusive Registration under Paragraph 1(ii) of the Policy.

7 Decision

- 7.1 I find that the Complainant has Rights in a name or mark which is identical or similar to the Domain Name.
- 7.2 For the reasons set out above I do not find that the Domain Name in the hands of the Respondent is an Abusive Registration.
- 7.3 I direct that NO ACTION be taken in relation to the Domain Name.

Dr Patricia Jones

Dated 5 July 2010