

**DISPUTE RESOLUTION SERVICE**

**D00010451**

**Decision of Independent Expert**

**Easy Live Auction Ltd**

and

**Lottbridge Systems UK Ltd**

**1. The Parties:**

Complainant: Easy Live Auction Ltd  
Auction House  
Finmere Road  
Eastbourne  
East Sussex  
BN22 8QL  
United Kingdom

Respondent: Lottbridge Systems UK Ltd  
4 Churchdale Road  
Eastbourne  
East Sussex  
BN22 8PS  
United Kingdom

**2. The Domain Names:**

easylive.co.uk  
easyliveauction.co.uk

### **3. Procedural History:**

26 October 2011 16:09 Dispute received  
27 October 2011 15:25 Complaint validated  
27 October 2011 15:29 Notification of Complaint sent to parties  
15 November 2011 01:30 Response reminder sent  
15 November 2011 17:12 Response received  
15 November 2011 17:13 Notification of Response sent to parties  
18 November 2011 01:30 Reply reminder sent  
23 November 2011 13:14 Reply received  
23 November 2011 13:15 Notification of Reply sent to parties  
23 November 2011 13:15 Mediator appointed  
30 November 2011 09:57 Mediation started  
28 February 2012 12:15 Mediation failed  
28 February 2012 12:45 Close of mediation documents sent  
13 March 2012 09:51 Expert decision payment received

Ravi Mohindra was appointed as Independent Expert as of 19 March 2012 and confirmed to Nominet that he was independent of the parties and knew of no facts or circumstances that might call into question his independence in the eyes of the parties.

### **4. Factual Background**

- 4.1 The Complainant was incorporated as a UK company on 5 April 2009 and operates a website using the domain name <easyliveauction.com>.
- 4.2 The Respondent is listed as the registrant of the Domain Names. The Domain Name <easyliveauction.co.uk> was registered on 24 April 2008, and the Domain Name <easylive.co.uk> was registered on 13 October 2009.
- 4.3 The parties' contentions are considerable and raise a number of conflicting points. As a result, there are no further relevant facts that can be ascertained from the Complaint, the Response or the Reply.

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

- 5.1 Given the lack of facts and the complex set of arguments made by each party, the Expert has set out below the majority of the parties' contentions rather than summarising them, as would ordinarily be the case.

#### The Complainant

##### Background

- 5.2 The Complainant is an on-line auction site, operated under the domain name <easyliveauction.com>, and has been trading since January 2010. It

carries auctions being conducted by established auction houses in real time. It allows on-line bidders to submit bids to the auctioneer conducting the classical face-to-face auction. Paul Achilleous ("PA") is the main mover behind the Complainant. He has his own bricks-and-mortar auction house, Eastbourne Auction Rooms Ltd ("EAR").

- 5.3 Jonathan Napier ("JN") was a director of the Complainant and held fiduciary duties to the Complainant not to take advantage of his position.
- 5.4 EAR had a trading relationship with Lottbridge Systems Ltd ("LSL") since June 2004.
- 5.5 LSL was owned 50/50 by JN and Jonathan Burnside ("JB").
- 5.6 PA conceived the idea of a live auction. Together with JN and JB, he set up the Complainant to run the software related to the online live auction project. All three knew each other and were engaged by the Complainant to develop the software which the Complainant began using in January 2010.
- 5.7 In recent times, relations between (i) PA and JB and (ii) JN have become strained due to JN not putting in adequate time to development of the software. This resulted in JB ceasing to be a director of LSL. JB is presenting an unfair prejudice petition in relation to his exclusion from LSL.
- 5.8 JN wrongly registered <easyliveauction.com> and the Domain Names in the name of LSL when they should have been registered in the name of the Complainant. JB noticed this and transferred all three domain names out of LSL into the name of the Complainant. JN complained to Nominet, and following an investigation the Domain Names were transferred back into LSL since LSL first registered the Domain Names. It is believed JN also complained to the registrar of the .com domain name, but their complaints procedure differed and as JN was no longer a director of the Complainant he was unable to access the necessary codes and the Complainant was able to keep the domain name <easyliveauction.com> registered in its name.
- 5.9 By way of retaliation JN has sought to evoke a term of the shareholders' agreement between him and JB in relation to LSL. The significance of this is that the company's accountants have given a share valuation dated 13th July 2011. In particular, paragraph 3 of this valuation says: "*The only valuable intellectual property owned by the company is that of the office 360 and Easy Live Auction packages. This was developed as part of a partnership with Easy Live Auction Limited and Eastbourne Auction Rooms Ltd.*"

#### Rights

- 5.10 The main website used by the Complainant is [www.easyliveauction.com](http://www.easyliveauction.com). It has been trading since January 2010.

5.11 The Complainant has goodwill in the name “Easy Live Auction” and is entitled to assert passing-off rights in respect of this name.

### Abusive Registration

5.12 The Domain Name <easylive.co.uk> redirects to the website located at the Domain Name <easyliveauction.co.uk> site, which is marketed as being under construction.

5.13 The Domain Names were registered 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. In support of this contention, the following matters are relied upon:

- LSL had a trading relationship since June 2004 with EAR.
- LSL had no part in the development of the software which was carried out for the Complainant by JN, JB and PA.
- LSL had no right to use the Complainant’s name for its own purposes.
- As a director, JN owed fiduciary duties to the Complainant including a duty to advance the business of the Complainant and not to use his position for personal advantage. Registering the Domain Names in other companies owned by him (LSL and the Respondent) was a breach of his duties to the Complainant.

5.14 The use of the Domain Names has taken unfair advantage of or has been unfairly detrimental to the Complainant’s Rights. In support of this contention, the following matters are relied upon:

- A person who finds that <easyliveauction.co.uk> is “under construction” may well think that the Complainant is not yet trading, or has temporarily ceased trading. A significant number may not search further to discover the easyliveauction.com site.
- Using <easylive.co.uk> as a link to <easyliveauction.co.uk> will reinforce this impression.

### The Respondent

5.15 It is denied that Easy Live Auction is “*an on-line auction site*” although it is admitted that it is intended to facilitate real-time online bidding in auctions being conducted in auction houses and to trade online from [www.easyliveauction.com](http://www.easyliveauction.com). It is denied that PA was the ‘main mover’ behind the Complainant although the significance of this assertion is not understood.

5.16 PA had noticed within the auction community the rising popularity of ‘online auctions’ as offered by companies such as ATG Media (The Antiques Trade Gazette) – to whom EAR was paying thousands of pounds a month for the privilege of being listed.

5.17 PA had approached JN on a number of occasions regarding a partnership to create a better, rival product. PA expressed the greatest respect for JN’s

ability and work ethics having already spent £66,283.92 + VAT with LSL in the 5 years between June 2004 and April 2009 on various support, development and hardware services.

- 5.18 PA was, however, simply an auctioneer with no technical grasp of the magnitude of the project he was proposing – a system capable of dealing with multiple simultaneous auctions with thousands of bidders following, and bidding simultaneously and in real-time online against live salerooms with touchscreen panels for the auctioneers and plasma displays in the auction houses, complete with a complex back-end management system for the auctioneer to run their office/business. However JN, with years of experience in creating complex business management systems for multi-million pound companies, was immediately aware of the size of the project as well as the heavily 'I.T. centric' nature of it.
- 5.19 Due to this heavily 'I.T. centric' nature of the project, JN was not agreeable to partnering up with PA on the terms initially put forward by him. JN needed to be able to steer the project in the right direction and not cut corners in terms of development or hardware along the way if the project was to succeed. However an agreement was reached on 16 April 2009 that the project as a whole should be exploited by a company vehicle set up expressly for the purpose. This company was the Complainant and JN was to hold 50 % of the shares with a casting vote and a shareholders agreement in these terms was prepared (although not signed).
- 5.20 In order to finance the project development costs of £6,000 + VAT per month (for an initial period of 12 months) were agreed and to be borne equally by EAR and LSL. This resulted in EAR paying LSL the sum of £3,000 + VAT per month and LSL bearing (and being deemed to have contributed) an equal amount of value in the development every month. All costs such as hosting, hardware, and services paid for were split equally between EAR and LSL. An invoice was raised monthly by LSL to EAR for the project costs in the sum of £3,000 + 50 % of any other project related costs that month (e.g. hosting) + VAT (copies of invoices are available for inspection). LSL and EAR were to recoup their investment from profits made by the Complainant.
- 5.21 Shortly after development work on the project commenced, JN spoke to PA about bringing JB on board (as a shareholder and director) with the business vehicle company (the Complainant). JB did not have the same degree of technical ability as JN, but had been a friend and business colleague of JN for approximately 8 years. He was also a director of LSL although JN maintained control of the company LSL via a shareholders agreement and casting vote. JN felt that LSL's position would not be weakened with respect to the easyliveauction project by this as LSL's directors would effectively still represent a controlling majority of the vehicle company, namely the Complainant. PA was agreeable, but was unsure about the return of profits if EAR was contributing half, and yet LSL represented 2/3 of the vehicle company. It was agreed that from the initial profits, half would go back to EAR, and half would go back to LSL until the initial cash investment had been realised, at which point profit share would

be equally divided between all three shareholders. Everyone agreed and the draft shareholders agreement was updated accordingly.

- 5.22 LSL developed a working software platform for the Complainant and the intellectual property for the easyliveauction project remains with LSL as the developer. The back-end management system that the auctioneers use to run their business, setup their sales, administer their buyers/vendors and lots database, deal with enquiries posted via easyliveauction.com, and collect post-sale payments from buyers is a package called office360 – which was originally created by LSL (by JN) back in July 2006 with a Window Installer variant for the Double Glazing installer market. LSL has a number of double glazing installers and a window manufacturer in their customer base. The product office360 was brought to the table by LSL to boost the speed of development on this back-end management system. Naturally, the intellectual property for the office360 package also remains with LSL as the developer.
- 5.23 Development of the project had proceeded well and was already to market and, in December 2010, the software package had received “better than the competition” reviews.
- 5.24 Completely out of the blue, on January 4th 2011, JB informed JN that he was resigning from LSL without notice. A letter of resignation was handed to JN by JB, a copy of which is attached to the Response. Allegations made in that letter of resignation are without basis and strenuously denied by JN and LSL.
- 5.25 Also, on January 4th 2011, PA informed JN that LSL’s development services were no longer required by EAR, and a letter confirming this was handed to JN, again attached to the Response.
- 5.26 It also became apparent on that day that over the holiday period the offices of LSL (which occupied the top-floor of the Auction House at EAR premises) had been entirely cleared out by JB and PA and loaded into the back of a removal lorry. The contents were dropped off at JN’s home address. This was almost catastrophic to LSL – as it had projects to complete and customers to service.
- 5.27 On December 23rd 2010 JB had – in partnership with PA – secretly contacted LSL’s suppliers to remove JN’s access to the servers paid for by LSL that were hosting the Easy Live Auction and office360 projects. They had also wrongfully transferred away the domains <easyliveauction.com>, the Domain Names, <office360.co.uk>, and <eastbourneauction.com> from LSL to EAR (notably not the Complainant). They also deleted all the source code from LSL’s servers pertaining to the projects and sabotaged email accounts on LSL’s servers. They had also contacted LSL’s telephone provider and re-routed calls intended for LSL.
- 5.28 JB resigned as a director of LSL and no “unfair prejudice petition” has been received by LSL or JN in relation to his resignation or any other issue.

- 5.29 The allegation that '*JN was not putting in adequate time into the software development*' is absurd. The speed of progress with the project and what was accomplished in the timescale are testament to the dedication to the project that JN was showing. PA and JB obviously did not fully appreciate this, due to their distance from the development.
- 5.30 On 6th January 2011, legal proceedings were threatened by LSL against JB and PA, but progress had been delayed by the catastrophic situation they had put LSL in. Damaged reputation with customers had to be restored, outstanding Corporation Tax bills had to be addressed, as did company business loans (for which JB was a guarantor). There was also a significant amount of money outstanding owed to the company by JB via a Director's Loan Account. Replacement staff needed to be recruited and trained at the same time as customers satisfied, bills paid, and solicitors and accountants liaised with.
- 5.31 JN has also wrongfully (and unlawfully) been removed as a director of the Complainant (see further below).
- 5.32 The content for the office360 system has been moved from the <office360.co.uk> domain by JB and PA and is now being promoted on <http://auctioneer.easyliveauction.com/>. It is obvious that the <office360.co.uk> domain was clearly owned by LSL and has been since 2006.
- 5.33 LSL's authorship of the Easy Live Auction system (easyliveauction.com) is also confirmed by JB himself in an email to a prospective customer, a copy of which is attached to the Response.
- 5.34 The forms showing resignation of JN as a director of the Complainant, and attached to the Complaint, are misconceived. JN never resigned from the Complainant as a director and neither was he invited to a meeting where his removal as a director was voted upon. Notwithstanding the filing with Companies House, JN should still be regarded as a director (he also remains a shareholder) of the Complainant until such time as proper procedure is followed to remove him as a director. In any case he has certainly not resigned.
- 5.35 LSL has now been pursuing its legal claims for the last 3 months as it is now in a financially stable enough position to be able to do so.
- 5.36 The Domain Names were purchased by LSL on a prospective basis and were never linked with or functionally connected to the project in any way, shape or form. The cost of purchasing them was not shared with EAR (unlike all costs which actually related to the project).
- 5.37 As mentioned above, JB (purporting to act for LSL) transferred the domain office360.co.uk and the Domain Names to EAR (and not even the Complainant). On 16 February 2011 LSL contacted Nominet to explain the situation and the domains were returned. On 18 February 2011, JB (having misrepresented to Companies House that he had been re-appointed as a

director of LSL) re-transferred the domain name office360.co.uk and the Domain Names to EAR (and not the Complainant). Following an investigation by Nominet, the domains were returned to LSL. LSL then arranged for the domains to be held on its behalf by Lottbridge Systems UK Limited to limit the possibility of further unauthorised transfers.

- 5.38 LSL's contribution to the Easy Live Auction project so far has been: £69,999.77 + VAT (EAR has also contributed the same amount). LSL has seen no return for its investments and it is not yet clear if EAR has received re-payment from the Complainant.
- 5.39 As stated by the Respondent's solicitor, the first owner of the copyright in easyliveauction.com and all other associated websites, office360.co.uk and all other associated websites and the office360 product is LSL. Not only is this clear from the fact that LSL purchased certain domain names and built the office360 product long before the Complainant was even thought of, but in any event it is clear law that consultants by default own the copyright in the works that they create during the consultancy even if they have been expressly commissioned to do the work (*Robin Ray –v- Classic FM PLC* [1998] FSR 622). In the absence of any written agreement to the contrary (and copyright can only be assigned in writing and signed by the assignor in accordance with s90 Copyright Designs and Patents Act 1988)) it is clear that the above items belong to LSL and may not be used without LSL's consent. JB's behaviour in denying JN access to works that LSL own and created and deleting the source code not only infringes the statutory common law and contractual duties, but may also infringe the criminal law and amount to a serious offence under the Computer Misuse Act 1990 which is punishable with imprisonment.

### Rights

- 5.40 It is denied that the Complainant has any goodwill or Rights in the name "Easy Live Auction". These are descriptive words and no evidence of reputation or goodwill has been submitted.
- 5.41 Furthermore, no attempt has been made by LSL or JN to actively use the Domain Names and therefore cannot have passed off the Domain Names as connected with the Complainant. Certainly the 'easylive.co.uk' Domain Name could be a suitable domain for any future unrelated project that a technology company such as LSL might carry out.

### Abusive Registrations

- 5.42 The Domain Names were not registered in a manner which took unfair advantage of or were unfairly detrimental to the Complainant's Rights. The Complainant was a new company formed for the express purpose of being a commercial vehicle to exploit a jointly resourced online auction product. The Complainant had no Rights at the relevant time (or even now). Indeed, in respect of the Domain Name <easyliveauction.co.uk>, at the time of its registration (registered on 24 April 2008) the Complainant didn't even exist (it was incorporated on 5 April 2009).



- 5.43 The use of the Domain Names has not taken unfair advantage of or has been unfairly detrimental to the Complainant's Rights. Firstly, the Complainant does not have any proven Rights. Secondly, the Domain Names have not actively been used (other than to display an 'under construction' notice) and non-use (or such limited use) cannot be complained of. To the extent that the Complainant has any Rights (which is denied) the Domain Name <easylive.co.uk> does not take any advantage of or cause any detriment to (let alone unfair advantage or detriment) those Rights. 'easy live' is a phrase unrelated to auctions and applicable to many arenas of commercial enterprise. The Complainant has no Rights in the phrase and cannot monopolise it against others.
- 5.44 This recent complaint about these domains is a small part of the whole larger picture which is currently being pursued by the Respondent's solicitors.

### The Reply

- 5.45 PA is the main mover behind the Complainant. He was paying £375 every six weeks for a year or two to be listed with an online auction provided by the Antiques Trade Gazette media. It is not a great deal of money but he wanted his own online auction facility. PA was the one to fund it and he thought of the name. PA and his family had recently received a flyer for easyPizza.com set up by the founder of Easy Jet (attached to the Reply). It had been a long-standing family joke that PA looks like Stelios. PA wanted the company to be called Easy Live Auction. JN was against it but PA insisted. Domain name availability was investigated and PA directed JN to acquire Easy Live domain names. This was in the spring of 2008.
- 5.46 It is correct that PA approached JN about a partnership to develop his own online auction product. Negotiations between the parties started in 2008, at the time that PA had decided on the name, Easy Live Auction. Negotiations continued until January 2009 when PA insisted agreement had to be reached between himself, JN and JB or else the project would be abandoned. Agreement was, therefore, reached at this time, January 2009 and as a consequence the Complainant was incorporated 5th April 2009 and a bank account set up for it.
- 5.47 It was PA who suggested JB be included in the partnership and become a Director and equal shareholder in the Complainant. PA did this because of the increasing tension between JN and JB, to avoid a falling-out between the two men.
- 5.48 There was no shareholders' agreement and JN never had a casting vote. JN and JB were engaged by the Complainant to work on the project. The first month the Complainant paid them £1,000 each. The cheques were written out on 30th April 2009 by JN himself. The cheques were drawn on the Complainant's bank account on 30th April 2009.

- 5.49 At the end of the second month, 27th May 2009, JN wrote out two further cheques, £1,370 each for himself and JB, wages for May. These again were cheques from the Complainant. These were the first four cheques from the company's cheque book.
- 5.50 This was how the project was set up. The Complainant employed JN and JB to develop the software. They were employed as individuals and at no time was LSL involved. PA was to pay £3,000 per month into the Complainant. This money was to cover the salaries of JN and JB together with such other costs as hosting and hardware as arose. The entire backend management system JN refers to was developed at this time, at the direction of PA. Everything JN refers to, "*the backend management system that the auctioneers used to run their business, set up their sales, administer their buyers/vendors and lots database, deal with enquiries posted by easyliveauction.com. and collect post-sales payments from the buyers*" was software developed for the Complainant.
- 5.51 The software developed is nothing to do with Office 360. The Office 360 project developed by LSL was something different, it was never finished. There were three customers initially interested in it, who invested a total of £6,000. It was intended to be a web application but only approximately 5 % of the entire project was completed. The three investors did not use it and it died a death. When PA, JN and JB started working for the Complainant, PA told JN not to use Office 360. It was nothing more than a database and a few web pages. JN used it anyway, to save himself work, rather than start from scratch and said it formed part of his contribution to the project.
- 5.52 At the outset, JN advised the project would take twelve months and cost in the region of £40,000. In fact, development of the project was extremely slow, mainly due to JN's lack of application. PA directed JN to write live bidding software. JN wrote the programme in Ajax rather than in Flash, as he was asked and as a consequence, it did not work. Three months were wasted in this manner until JN finally agreed to rewrite the programme in Flash.
- 5.53 Relations between (i) PA and JB and (ii) JN became strained, mostly because JN was not putting in adequate time into the software development. He arrived late to start work and left for home early, taking a long lunch break. In addition to this, JN was working on his own account as some of the works carried out for PA's company EAR by LSL were invoiced by JN in a personal capacity without informing his fellow director and shareholder, JB.
- 5.54 After being paid by cheques from the Complainant for two months, PA's accountant said JN and JB needed to be set up on the payroll. It was JN's suggestion that, to avoid paying VAT, National Insurance or Income Tax, he, through his established company, LSL, would raise an invoice addressed not to the Complainant but to EAR, also an established company.
- 5.55 It was never agreed that LSL would recoup anything from the Complainant's profits, because LSL did not make any financial contribution

to the Complainant. PA was the only one who made any financial contribution. The original time estimate of twelve months was extended by a further nine months and PA paid over £70,000 into the project. JN did not make a like for like contribution working on the project. In any event, JN did not work enough hours to justify what he was paid.

- 5.56 The agreement with regard to profit was that from any profit made by the Complainant, first of all, the investment made by PA would be repaid. Beyond that, any profit would be divided three ways. No money was to be paid to LSL because it was not involved with the project, LSL was nothing to do with the Complainant.
- 5.57 By December 2010 PA, frustrated at the continued cost yet lack of progress, felt something needed to be done. JN refers to “*better than the competition*” reviews from this date, but neither PA nor JB are aware of any such reviews. JB was unimpressed with his co-director’s behaviour, his removal of funds from LSL. It was at this time that JB wrote to JN to resign. His resignation was rejected and JN insisted they talk about their company, LSL. The fact that JB remained a director was confirmed to JN’s solicitors in a letter dated 25th January 2011 (attached to the Reply).
- 5.58 Acting in breach of all instructions given to him and acting in breach of all duties to his employer and quite clearly favouring himself over and above any colleagues, partners or employer, JN set up everything in the name of LSL. All the Easy Live Auction software had been set up as Office 360.co.uk. This had been done at JN’s insistence and whilst it was agreed, it was only temporary and would be used only while the project was being developed and that it would later be set up as easyliveauction.com. Once the project was completed, a .co.uk domain name would not be attractive to businesses worldwide as the primary domain name. It was agreed .com would be used. The .co.uk domains were registered to re-direct to the primary domain and to protect the trading name. To protect the Complainant, for whom he was working in December 2010 JB transferred the domain names incorrectly set up with LSL to EAR. It is correct JN complained to Nominet and all domain names were transferred back to LSL with the exception of easyliveauction.com but only because they had been set up by LSL in the first instance. This of course was incorrect as LSL had nothing to do with the project. This was done by JN to favour himself, to act in his interests alone and his behaviour took unfair advantage of, and was unfairly detrimental to, the Complainant’s rights and interests.
- 5.59 JN has no connection with EAR and his access to confidential information held by EAR had to be terminated. EAR holds confidential information such as names and addresses, credit card and banking details to which JN could not be allowed to have access.
- 5.60 The fact that JN has the letter of 23rd December 2010 from JB addressed to Cameron at the hosting company, UK Fast, is clear evidence that JN had access to confidential information he was not entitled to see. This could be a criminal matter.

- 5.61 The screenprint off Google showing Office 360 demonstrates nothing as it merely picks up what JN probably wrote for his own website. Office 360 was never a complete office management system, the project never got off the ground.
- 5.62 JB's email to a prospective customer refers to projects with which he was personally involved. He was authorised by PA to make mention of the Easy Live Auction system if it assisted him in any way to acquire new business for LSL.
- 5.63 A project that should have lasted 12 months at a cost of £40,000 was not complete after a year and nine months, and had cost £70,000. Even today, work is still being carried out to try and correct many of JN's mistakes.
- 5.64 The Domain Names purchased at the direction of PA should never have been registered with anyone other than the Complainant.
- 5.65 The Domain Names were registered in a manner that was not only incorrect but which took unfair advantage of, and were unfairly detrimental to the Complainant's rights. JN acted in self-interest. Not only was the Complainant a new company formed for the express purpose of being the commercial vehicle to develop an online auction product, it was always intended that all rights in that project were vested in the Complainant or a parent company created for this very purpose. JN had the unfortunate habit of applying the wrong labels to products. The auction package that was developed for the Complainant was a completely different product from Office 360. Whilst in development, it was initially referred to by JN as Office 360 but it was later called Easy Live Auction Auctioneer. The parent company set up to own the Complainant was called Lottbridge Developments Limited at JN's suggestion, but it was not his company. JN's email of 3rd April 2009 (attached to the Reply) makes it quite clear that all intellectual property of Office 360 and/or Easy Live Auction Auctioneer was to be vested in the Complainant and/or its parent company Lottbridge Developments Limited. For completeness, a letter sent on 13 January 2011 to JN's then solicitors is also attached to the Reply.

## **6. Discussions and Findings**

### General

- 6.1 The Complainant is required under paragraph 2b. of the Policy to 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 Names; and
  - (ii) the Domain Names, in the hands of the Respondent, are Abusive Registrations.

### Complainant's Rights

- 6.2 Paragraph 1 of the Policy provides that 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*". Rights may be established in a name or mark by way of a trade mark registered in an appropriate territory, or by a demonstration of unregistered so-called 'common law rights'.
- 6.3 The Complainant has not submitted any evidence that registered trade mark rights exist in the mark Easy Live Auction, or anything similar. The Expert notes that the masthead of the Complainant's main website (located at [www.easyliveauction.com](http://www.easyliveauction.com)) contains a logo followed by the words "easyLiveAuction.com ®". Use of the ® symbol indicates that the Complainant is asserting that registered trade mark rights exist in the mark preceding it (ie the logo plus the words easyLiveAuction in the form used on the website), somewhere in the world, but the Expert's opinion is that this alone is not sufficient to establish such registered trade mark rights for the purpose of the Policy. If registered trade mark rights do exist, the Complainant could have attached to its Complaint copies of any registration certificates and/or database extracts from the relevant trade mark registries to prove the existence of such rights, but it has failed to do so.
- 6.4 The Complainant's company name includes the words "Easy Live Auction". However, the Expert follows the guidance provided under paragraph 1.7 of the Experts Overview<sup>1</sup>, where it states:

*"The consensus view of recent Experts' meetings has been that mere registration of a company name at the Companies Registry does not of itself give rise to any rights for this purpose".*

- 6.5 The Complainant submits that it is entitled to assert passing off rights in respect of the name Easy Live Auction (and as such that it has unregistered (or common law) rights in the name for the purpose of the Policy). In *Petmeds Limited –v- Amdega Brands Ltd* (D00009189), the Expert considered the issue of passing off as applied to the Policy, as follows:

*"It is often remarked that the Nominet Dispute Resolution Service (DRS) is intended to be a fast, simple procedure designed predominantly for clear cut cases of Abusive Registration under the Policy (often referred to as "cybersquatting"). It is not intended to deal with complex points of law, which are better left to a court of competent jurisdiction. However, brief consideration of the law of passing off is somewhat unavoidable in these circumstances, as it is inextricably linked to the concept of unregistered trade mark rights.*

*Under the law of England and Wales, it is generally accepted that three elements must be satisfied for a successful action in passing off, as follows:*

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<sup>1</sup> The Experts' overview is a document put together by Nominet's panel of Experts which deals with a range of issues that come up in DRS disputes. It is published on Nominet' website at: [http://www.nominet.org.uk/digitalAssets/39192\\_DRS\\_Expert\\_Overview.pdf](http://www.nominet.org.uk/digitalAssets/39192_DRS_Expert_Overview.pdf).

*(i) First, the claimant has to prove that he has goodwill or reputation attached to the goods or services supplied, so that the identifying 'get-up' (whether brand name or trade description or the individual features of labelling or packaging) is recognised by the public as distinctive of those goods and services.*

*(ii) Secondly, the claimant must demonstrate a misrepresentation by the defendant to the public, leading or likely to lead the public to believe that the goods or services offered by him are the goods or services of the claimant.*

*(iii) Finally, the claimant must prove that he has suffered damage by reason of the public's belief that the source of the defendant's goods or services is the same as the source of those offered by the claimant.*

*For the purposes of considering whether the Complainant has Rights under the Policy, the Expert is of the opinion that it is not necessary to come to a view on all three points listed, only point (i)".*

6.6 The name Easy Live Auction is, in the Expert's opinion, relatively descriptive of the services that are offered by the Complainant under the name (an online live auction portal). There is therefore a higher hurdle to climb in relation to point (i) above than where the mark is inherently distinctive, and if the Complainant were bringing a passing off claim through the Courts it would need to adduce substantial evidence to prove that the mark has acquired a secondary meaning and become wholly associated with the Complainant's services.

6.7 However, where the Complainant is relying on unregistered trade mark rights to prove that it has Rights for the purpose of the Policy, paragraph 2.2 of the Experts Overview states:

*"If the right is an 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)."*

6.8 The Complainant's evidence in this regard is weak. The only relevant evidence of use of the name supplied by the Complainant is (i) a request for the Expert to visit the Complainant's site at [www.easyliveauction.com](http://www.easyliveauction.com), (ii) company information for Easy Live Auction Limited as extracted from the Companies House database and (iii) a set of accounts for Easy Live Auction Limited dated 30 April 2010. There is no evidence of the type set out in part (b) of paragraph 2.2 from the time that the Complainant claims that it started trading (January 2010). Indeed, the Expert notes that the company accounts are headed "Dormant Accounts" and show the company's current assets at £150, made up of 150 shares at £1 each. This suggests that the company was in fact not trading at 30 April 2010.

6.9 The Expert notes however that the requirement to demonstrate Rights under the Policy is not a particularly high threshold test, and is more a

question of establishing whether or not the Complainant has the standing to bring a complaint under the DRS.

- 6.10 Given that the Complainant (i) currently trades under a website at the domain name [www.easyliveauction.com](http://www.easyliveauction.com) (a fact which the Respondent admits), (ii) claims to have done so since January 2010 (a claim not denied by the Respondent), and (iii) is an incorporated company whose name contains the words Easy Live Auction, the Expert is prepared to find, on the balance of probabilities, that the Complainant has Rights in respect of the name EASY LIVE AUCTION.
- 6.11 In light of the fact that the <easylive.co.uk> Domain Name is included as part of this Complaint, the question arises as to whether the Complainant also has Rights in respect of the name EASY LIVE. The Complainant has not submitted any evidence of trading under the name EASY LIVE alone, and there is no evidence of any other use of the name. There is nothing in the Complaint to suggest that the Complainant has any other rights (registered or unregistered) in the name, and as such the Expert finds that on the balance of probabilities the Complainant does not have Rights in respect of the name EASY LIVE.
- 6.12 The next question for the Expert to decide is whether the name EASY LIVE AUCTION in which the Complainant has Rights is identical or similar to the Domain Names.

#### The Domain Name <easyliveauction.co.uk>

- 6.13 The only differences between the name EASY LIVE AUCTION and the Domain Name <easyliveauction.co.uk> are the omission of the spaces between the words in the Domain Name and the generic suffix “.co.uk”. As (i) spaces are not permitted within domain names, and (ii) it is accepted practice to discount the generic “.co.uk” suffix, the Expert finds that the Complainant has Rights in respect of a name which is identical to this Domain Name.

#### The Domain Name <easylive.co.uk>

- 6.14 The same points regarding spaces and the generic “.co.uk” suffix apply in respect of this Domain Name, but there is one further difference in that the word “AUCTION” does not appear in the Domain Name. In assessing similarity under the DRS, the omission of an element of the Complainant’s mark or name from the domain name is not necessarily fatal to the Complainant’s case – indeed there have been a number of cases where the Domain Name has been held to be similar on the basis of it being an abbreviation of the name or mark in which the Complainant has Rights.
- 6.15 In this case however, the Expert’s view is that the word AUCTION is one of the dominant elements of the Complainant’s name. The Complainant’s business is concerned with auction related services and there is no evidence to suggest that its customers or people who deal with it would shorten its name to EASY LIVE or EASYLIVE. With the word AUCTION being excluded

in its entirety from the Domain Name, and with the generic words EASY and LIVE being the only terms in the Domain Name <easylive.co.uk> there is nothing to suggest that the Domain Name or any website that the Domain Name resolves to has any connection with the Complainant's Rights in the name EASY LIVE AUCTION.

- 6.16 Accordingly, the Expert finds that although the Complainant has Rights in respect of the name EASY LIVE AUCTION, this name is neither identical nor similar to the Domain Name <easylive.co.uk>. The Complainant's case in relation to this Domain Name therefore fails.

### Abusive Registration

- 6.17 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 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 has been unfairly detrimental to the Complainant's Rights.
- 6.18 A non-exhaustive list of factors, which may be evidence that the Domain Name is an Abusive Registration, is set out in paragraph 3a. of the Policy.
- 6.19 The Complainant's case in respect of Abusive Registration is essentially that PA, director and shareholder of the Complainant, thought of the name EASYLIVEAUCTION and directed JN, sole director and shareholder of the Respondent, to register and acquire the Domain Name. There is no evidence however that supports the first of these claims other than the contentions of the Complainant, which the Respondent denies. In respect of the second claim, the Complainant has put forward a chain of emails from February 2008 between JN and Jeannette May ("JM"), described as the partner of PA, where JN advises JM of the availability of certain domain names, the Domain Name being one of them, and asking JM if he should "*put in an offer of £200*" for it. JM responded to that email on the same day stating "*not sure*". JN then sent a further email, again on the same day, asking JM if she wanted him to investigate the possibility of getting the Domain Name. The chain of correspondence relating to acquisition of the Domain Name ends there.
- 6.20 Other than the Complainant's contentions, there is no evidence to prove that JM instructed JN to acquire the Domain Name, and even if she did it is not clear in what capacity JM was acting at that time or on what terms the Domain Name was acquired, although the Expert notes that JM's email address refers to EAR, the company behind PA's traditional auction house.
- 6.21 Paragraph 3a.v of the Policy sets out a factor which may be evidence that a Domain Name is an Abusive Registration, as follows:



"v. *The Domain Name was registered as a result of a relationship between the Complainant and the Respondent, and the Complainant:*  
A. *has been using the Domain Name registration exclusively; and*  
B. *paid for the registration and/or renewal of the Domain Name registration.*"

- 6.22 The Domain Name was registered on 24 April 2008, almost a year before the Complainant company was incorporated. The Complainant claims to have started trading in January 2010 – a considerable time after the Domain Name was registered and the Expert finds that neither the Complainant nor anyone connected with the Complainant held Rights in the name EASY LIVE AUCTION at the date of registration of the Domain Name <easyliveauction.co.uk>.
- 6.23 Despite the lack of Rights at the date of registration of this Domain Name, it is clear from the materials submitted by both parties that a relationship existed between the Complainant and the Respondent, illustrated *inter alia* by the fact that JN, director of the Respondent, was a founding shareholder and director of the Complainant.
- 6.24 There is no evidence that suggests that the Complainant has used the Domain Name registration exclusively and therefore sub-paragraph A is not applicable in this case. Further, paragraph B does not apply as (i) the Complainant was not incorporated (and therefore did not exist) at the date of registration of the Domain Name and (ii) there is no evidence to show that any renewal of the Domain Name was paid for by the Complainant.
- 6.25 On the other hand, the Respondent does not deny that PA came up with the name EASY LIVE AUCTION for the online auction project that JN and PA had been discussing prior to incorporation of the Complainant. JN appears to have registered the Domain Name <easyliveauction.co.uk> as well as <easyliveauction.com> at a time when JN and PA were in negotiations over the formation of a partnership to exploit the new online auction project (through the Complainant), although it is not clear from the Complainant's evidence whether these negotiations commenced prior to registration of the Domain Name <easyliveauction.co.uk>.
- 6.26 Notwithstanding this lack of clarity, it is clear that JN held interests in the Complainant from the date of its incorporation and is likely therefore to have been aware of the plans to incorporate the Company under the name Easy Live Auction Limited. If that is the case, it follows that the parties' intentions may well have been that domain names incorporating the term easyliveauction would be used for the online live auction project. It therefore appears unlikely that JN could have registered these domain names "on a prospective basis" for a future project unrelated to the one that JN and PA had been discussing.
- 6.27 Overall, this case centres on a complex set of circumstances based on the relationships between the Complainant and the Respondent, and their related entities and parties. There are a number of serious allegations

made by both parties and legal proceedings surrounding some of these appear to be in place, including what the Respondent alleges was the wrongful and unlawful removal of JN as a director of the Complainant. There is also very little common ground in the contentions and evidence submitted by the parties, and there is nothing that sets out the terms on which the Domain Names were registered – in particular regarding legal and/or beneficial ownership.

- 6.28 Accordingly, this is not a clear cybersquatting case appropriate to be determined under the Policy and the hearing of evidence may be necessary to determine the terms agreed between the parties regarding ownership of the Domain Name, who is entitled to use it and for what purpose. The Complainant admits that the Domain Name <easyliveauction.co.uk> points to an “under construction” page, rather than a website which competes with the Complainant’s business and there is nothing in the materials to suggest that the Respondent is threatening to do so.
- 6.29 In the circumstances, on the basis that the facts are disputed and the evidence regarding Abusive Registration is not clear, the Expert is unable to make a finding that on the balance of probabilities the Domain Name <easyliveauction.co.uk>, in the hands of the Respondent, is an Abusive Registration.

## **7. Decision**

- 7.1 The Expert finds that the Complainant has Rights in respect of a name which is identical to the Domain Name <easyliveauction.co.uk>; but not in any name which is identical or similar to the Domain Name <easylive.co.uk>.
- 7.2 It has not been determined that the Domain Name <easyliveauction.co.uk>, in the hands of the Respondent, is an Abusive Registration.
- 7.3 The Complaint in respect of both Domain Names therefore fails and the Expert directs that no action be taken in relation to the Domain Names.

**Signed Ravi Mohindra**

**Dated 12 April 2012**