

# **DISPUTE RESOLUTION SERVICE**

**D00012276**

## **Decision of Appeal Panel**

**Mrs. Maiken Hvidbro-Mitchell**

and

**Mrs. Wendy Croxford**

### **1. The Parties:**

#### Complainant/Appellant:

Mrs. Maiken Hvidbro-Mitchell  
Roytta House, Chart Road, Sutton Valance  
Maidstone  
Kent  
ME17 3AW  
United Kingdom

#### Respondent:

Mrs. Wendy Croxford  
49 Stoney Lane  
Weeke  
Winchester  
Hampshire  
SO22 6DP  
United Kingdom

## 2. The Domain Name:

<hvidbro-mitchell.co.uk>

## 3. Procedural History

The main steps in the procedure to date in this case have been as follows:

12 December 2012	Complaint received
12 December 2012	Complaint validated
12 December 2012	Notification of Complaint sent to parties
02 January 2013	Response received
02 January 2013	Notification of Response sent to parties
07 January 2013	Reply reminder sent
09 January 2013	Reply received
09 January 2013	Notification of Reply sent to parties
09 January 2013	Mediator appointed
15 January 2013	Mediation commenced
24 January 2013	Mediation failed
24 January 2013	Expert decision payment received
25 February 2013	Expert decision
29 March 2013	Appeal Notice
09 April 2013	Appeal Response
11 April 2013	Appeal Panel appointment

Tony Willoughby, David King and Nick Gardner (together, “the Panel”) have each made a statement to the Nominet Dispute Resolution Service in the following terms:

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

This is an appeal against the decision of Andrew Clinton (the “Expert”) issued on 25 February 2013 in favour of the Respondent.

## 4. The Nature of This Appeal

Paragraph 10(a) of the Policy provides that: *“the appeal panel will consider appeals on the basis of a full review of the matter and may review procedural matters”*. The Panel concludes that insofar as an appeal involves matters other than purely procedural complaints the appeal should proceed as a re-determination on the merits.

In addition to the decision under appeal, the Panel has read the Complaint dated 12 December, 2012 (with annexes), the Response dated 2 January, 2013 (with annexes), the Reply dated 9 January, 2013, the Appeal Notice filed on 29 March, 2013, and the Appeal Response filed on 9 April, 2013.

## **5. Formal and Procedural Issues**

There are no outstanding formal or procedural issues before the Panel.

## **6. The Facts**

The relevant facts are set out in detail in the Expert's decision which is available on Nominet's website. For the purposes of this Appeal they can be shortly stated.

The Complainant's husband and the Respondent were at one time husband and wife. The marriage broke down and they each remarried. The Complainant married her husband (the Respondent's former husband) in 2002. Following that marriage they adopted the surname, "Hvidbro-Mitchell", it being a combination of the surname by which the Complainant was known prior to meeting her husband ("Hvidbro") and her husband's surname ("Mitchell").

The Domain Name, comprising the Complainant's surname and the generic '.co.uk' top level domain identifier, was registered by the Respondent's current husband, Gareth Croxford, on 8 October, 2012. It was connected to a website (the "Website") severely criticizing the Complainant's husband's behaviour in allegedly failing to meet his obligations to his former wife and their children. At one time the Website also featured some personal information relating to the Complainant's children.

On 30 November, 2012 the Complainant's solicitors wrote to the Respondent's husband objecting to the content of the Website and seeking transfer of the Domain Name. Following that letter the Respondent's husband transferred the Domain Name to the Respondent.

According to the Respondent's Appeal Response the purpose of the Website was as follows: "[Her] *intention was that this site would make him think about his children and re-establish contact with them as well as settling his outstanding debts without having to take further legal action.*"

At some stage prior to the filing of the Complaint the content of the Website was withdrawn and moved to a website connected to the Respondent's domain name, <wendycroxford.co.uk>. It has now been re-connected to the Domain Name, albeit now omitting any references to the Complainant's children.

In the view of the Panel these are the only relevant facts insofar as this administrative proceeding is concerned. While the papers in this case are littered with an overwhelming volume of allegations and counter-allegations, many of

which are highly emotive and contentious, the Panel ignores them all in their entirety.

## **7. The Parties' Contentions**

### The Complainant

The Complainant contends that she has rights in respect of her surname, which is identical to the Domain Name (absent the '.co.uk' top level domain identifier). The nature of these claimed rights is discussed in section 8 below.

The Complainant contends that the Respondent's acquisition/registration and use of her surname (and that of her husband and her children) without their permission and in order to connect it to a website publishing personal information about her family and criticizing her husband renders the Domain Name an Abusive Registration as defined in paragraph 1 of the Policy.

The Complainant seeks transfer of the Domain Name.

### The Respondent

The Respondent denies that the Complainant has any relevant rights in respect of her name and contends that the use to which the Domain Name is being put is a fair use. She also draws attention to paragraph 4(b) of the Policy, which provides that "*fair use may include sites operated solely in tribute to or in criticism of a person or business.*" and says that the registration is not abusive as it is solely a criticism site used for a legitimate purpose in drawing attention to what she regards as shortcomings in her former husband's behaviour.

## **8. Discussion and Findings**

### General

To succeed in this Complaint the Complainant has to satisfy the Appeal Panel pursuant to paragraph 2 of the Policy on the balance of probabilities, first, that she has "Rights" (as defined in paragraph 1 of the Policy) in respect of a name or mark identical or similar to the Domain Name and, secondly, that the Domain Name, in the hands of the Respondent, is an "Abusive Registration" (as defined in paragraph 1 of the Policy).

### First Element - Rights

For the purposes of assessing identity/similarity under this head of the Policy it is permissible for the Panel to ignore the '.co.uk' top level domain identifier. On that

basis the Domain Name, the only other component of which is the Complainant's surname, is of course identical to the Complainant's surname. The only issue here, the issue upon which the Expert found in favour of the Respondent, is as to whether or not the Complainant has Rights in respect of her surname. The Expert after a carefully considered analysis of the Complainant's claims concluded that the Complainant had no relevant rights and dismissed the Complaint.

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*". As the Expert noted in his carefully considered decision, this wording superseded that found in the earlier version of the Policy which provided that "*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 the Complainant's business*". The change to the wording of the definition of "Rights" to which the Expert draws attention in his decision was (as the Panel understands it) not intended to effect a change of substance but to clarify that the Rights in question could subsist under either English or foreign law but were not intended to include "rights" that were not enforceable at all. Specifically, for a right to be relevant under this head of the Policy it must be an enforceable right under some system of law.

There is no evidence before the Panel to the effect that the Complainant trades under or by reference to her surname, thus such rights as she may have in respect of her name do not include trade mark rights including rights based on the tort of passing off under English law.

The rights which the Complainant asserts in support of her claim are her rights in the name "Hvidbro" under The Danish Act on Names and her rights in her surname, "Hvidbro-Mitchell", pursuant to the provisions of both the Human Rights Act 1998 and the Data Protection Act 1998.

### **The Danish Act on Names**

The Panel has looked at The Danish Act on Names and on the material before the Panel it appears that (a) "Hvidbro", the name by which the Complainant was known prior to her marriage, is a protected name under that Act and (b) "*an individual who can present evidence that another person is using his or her name, or a name which is so similar that it may be confused with his or her name, without being entitled to do so, may demand that the other person be ordered to cease using said name by a court ruling.*"

### **Human Rights Act 1998**

Under the Human Rights Act 1998 most of the rights from the European Convention on Human Rights ("the Convention Rights") became enforceable in the United Kingdom. One of the Convention Rights is the right to respect for

private and family life (Article 8) and the Act requires public authorities to respect this right in the performance of their public duties. In the event of a breach of a human right by a public authority the person affected can take the authority in question to court and seek redress.

### **The Data Protection Act 1998**

The Data Protection Act 1998 controls how data relating to a living individual is processed. Any “data controller” (broadly speaking any person who processes anyone else’s personal data) is, subject to a range of possible exemptions, required to comply with a number of principles which are broadly designed to ensure that the data is accurate, kept safe and used fairly and lawfully. Where the provisions of the Act are breached, the Information Commissioner’s Office is empowered to take enforcement action. Additionally, there may be circumstances where misuse of an individual’s personal data can entitle the person affected to claim compensation for damage caused. Personal data is broadly defined and includes data relating to a living individual who can be identified from those data. Accordingly personal data includes a person’s name.

### **Discussion**

Do any of these rights constitute relevant rights for the purposes of this, the first element? They are all enforceable rights, but are they “rights in respect of a name or mark”? The Panel accepts that there is scope here for intelligent minds to diverge and has no criticism to make of the Expert’s careful consideration of the issues, but has come to the conclusion that the Complainant does have relevant rights in respect of her name.

The Panel proposes to sidestep The Danish Act on Names. The Panel is insufficiently informed to assess whether the Complainant currently has a right under that Act. Had the Panel been satisfied that she is entitled to the benefit of protection under that Act notwithstanding that she now resides in the United Kingdom and has adopted the surname “Hvidbro-Mitchell”, the Panel would have held the right to be a relevant enforceable right in respect of her name.

The Complainant’s rights under the Data Protection Act 1998 and the Human Rights Act 1998 fall into a different category. They are rights to seek redress in the event that provisions of those statutes are breached. Under each of those statutes an individual has actionable rights to object to certain types of conduct by others, and it is clear that the conduct in question could involve use of that individual’s name. Thus under the Human Rights Act interference with a person’s private life, such as publication of inherently private material, will in certain circumstances be actionable. Similarly under the Data Protection Act processing of personal data about an individual will in certain circumstances be actionable. In such cases the use of the individual’s name will often (indeed commonly) be an inherent part of the conduct in question. It seems clear to the Panel that under both of these statutes an individual has various rights to object and to seek

appropriate redress (in the terms provided by the statute) for conduct which involves the use of that individual's name.

Thus for example in The Information Commissioner v The FSA and Edem [2012] UKUT 464 (AAC) (11 December 2012) the Upper Tribunal (Administrative Appeals Tribunal) on an appeal from a decision of the First Tier Tribunal, in relation to a decision notice issued by the Information Commissioner, concluded that the names of certain FSA officials were personal data and that the provisions of the Data Protection Act meant that the FSA was entitled to refuse to provide this data in response to a Freedom of Information Act request it had received. It is clear from that decision that enforceable rights do subsist under the Data Protection Act in relation to personal names.

Also by way of example in Application no. 20390/07, Case of Garnaga v.Ukraine, the European Court of Human Rights concluded that where a domestic legal system generally permitted a person to change their forename or surname, then restrictions which purported to restrict the ability of a person to change their patronymic (the court defined a patronymic as a second given name derived from the father's forename with the appropriate gender suffix) were a violation of Article 8 of the European Convention on Human Rights, the right to respect for a person's private life. It accordingly appears clear that the European Convention on Human Rights, and the Human Rights Act giving force to that convention in English law, can provide in certain circumstances enforceable rights in respect of personal names.

Why should such rights not qualify for the purposes of the first element under the Policy? All that this element requires is that the Complainant has "rights enforceable by the Complainant, whether under English law or otherwise". It seems to the Panel that for the reasons set out above such rights do exist in relation to a person's name. In reaching this conclusion the panel notes that the first element is a relatively low threshold. As has been stated in many decisions under the Policy and as currently appears in paragraph 2.3 of the Experts' Overview, "*the objective behind the first hurdle is simply to demonstrate a bona fide basis for making the complaint*". The fact that a Complainant establishes that he/it has Rights does not mean that the domain name (even if identical or similar to the name in question) is Abusive. That then becomes the subject of the second element that has to be shown under the Policy, which is a different matter. Further the Panel notes that there is nothing in the Policy to restrict its application to persons engaged in business. No such distinction exists in terms of entitlement to apply for a domain name in the .co.uk namespace. A distinction whereby persons in business who can show a low threshold in terms of goodwill and can hence establish Rights, but individuals who do not trade cannot ever do so, seems to the Panel to be anomalous. In both cases such persons have a proper interest in their complaint being determined and for the relevant panel to go on to consider whether the name concerned is identical or similar to the domain name in question and, if so, whether the registration is Abusive.

The Panel recognises that in finding that Rights under the Policy includes rights in personal names, it is accepting that all individuals have relevant rights in respect of their names sufficient to found a complaint under the Policy, providing they can also show that the name in question is identical or similar to the domain name concerned. However, whether the use of a complainant's name constitutes an abusive use for the purposes of the second element/hurdle is another matter.

In reaching this conclusion as to the first element, it is important to note that the Panel is not required to form any view on whether or not the Respondent's activities do, or do not, amount to a breach of the Rights which the Complainant relies upon. Clearly the Policy is not intended to provide a forum where the relevant expert, or any Appeal Panel, can determine complex questions of law of this nature. Were it otherwise every case under the Policy would require the Expert or the Appeal Panel to determine whether the conduct in question was actionable in law (e.g. whether it amounted to trade mark infringement, or passing off, or breach of contract and so on). A Complainant has to establish (1) Rights; and (2) there is an Abusive Registration. These are separate requirements and it is not necessary in order to establish the subsistence of Rights, to establish the conduct complained of by the Respondent is in law an actionable breach of the Rights relied upon. It is merely necessary to show that Rights subsist as a general matter. Once that is shown the Expert or Appeal Panel then has to establish whether there is an Abusive Registration in accordance with the wording of the Policy

In both the <rayden-engineering.co.uk> and <nortonpesket.co.uk> cases (see below) the Rights which enabled the complainants in those cases to satisfy the First Element were trade mark rights (registered or unregistered) and in neither case was it a requirement for the Expert or Appeal Panel to determine whether or not the actions of the respondents concerned amounted to trade mark infringement or passing off. Similarly in the present case it is not necessary for the Panel to reach any conclusion as to whether the Respondent's actions do or do not contravene either the Human Rights Act or the Data Protection Act.

Accordingly the Panel having concluded that the Complainant does have Rights, the second element falls to be considered.

### Second Element (Abusive Registration)

**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 has taken unfair advantage of or has been unfairly detrimental to the Complainant's Rights; [Paragraph 1 of the Policy]*



Here we are dealing with what is essentially a ‘gripe’ site. The Respondent is using the Complainant’s surname for the Domain Name, which is connected to a website devoted to the publication of what she believes to be serious shortcomings in the behaviour of the Complainant’s husband towards her and their children. The fact that the Domain Name is also the surname of the Complainant and the Complainant’s children is merely incidental. Her purpose, she says, is to “*make [the Complainant’s husband] think about his children and re-establish contact with them as well as settling his outstanding debts without having to take further legal action.*”

## **Discussion**

The definition of Abusive Registration refers to registration and/or use of the Domain Name to take unfair advantage of or cause unfair detriment to the Complainant’s Rights. Is this the same thing as registration/use in breach or infringement of the Complainant’s Rights. The answer is “No”. One only needs to look at the two “gripe site” appeal decisions referred to elsewhere in this decision (the <rayden-engineering.co.uk> and <nortonpesket.co.uk> cases) to see that it is possible for a non-infringing use to constitute an Abusive Registration under the Policy. In those cases the rights relied upon by the complainants were trade mark rights and the offending uses were not in the course of trade and could not therefore constitute trade mark infringement.

The Panel is required to assess ‘unfair advantage’ and ‘unfair detriment’ by reference to the wording of the Policy, and not by determining whether or not the Rights the Complainant relies upon have been infringed or breached under the general law

What constitutes ‘unfair advantage’ of or ‘unfair detriment’ to the Complainant’s Rights? The Panel proposes to review this topic in some detail, because this is the first time in the experience of the Panel members that a case has come before them based on rights other than trade mark rights or contractual rights.

## **Unfair Advantage**

It is easy to see that a registrant’s registration and use of a domain name comprising a complainant’s trade mark may take unfair advantage of a trade mark in that, for example, it may enable him to gain some advantage (commercial or otherwise) from visitors to his site attracted by the trade mark and believing that they were heading for the complainant’s site (i.e. initial interest confusion). But is taking unfair advantage of a trade mark the same thing as taking unfair advantage of a trade mark right? The Panel is unsure.

The same goes for contractual rights. If a respondent retains and uses a domain name which he is contractually bound to transfer to the complainant, he may well be taking unfair advantage of the domain name, but he can hardly be said to be taking unfair advantage of the complainant’s contractual right to the name.

In this case the Panel has found that the Complainant has a good basis for a Complaint under the Policy by virtue of her rights under the Human Rights Act and the Data Protection Act, but again the Respondent cannot easily be said to be taking unfair advantage of those rights.

In the case of all those rights, however, the unfair advantage that the registrant of the domain name in issue has taken has been an unfair advantage of the complainant's name or mark.

### **Unfair Detriment**

In the trade mark context it is easy to see that unauthorised use of a complainant's trade mark may damage the distinctiveness of the trade mark and therefore cause damage to the trade mark right – detriment by dilution, for example. If it is likely to damage the complainant's goodwill, then again the complainant's ability to bring a passing off action could in certain circumstances be impaired, thereby causing detriment to the complainant's unregistered trade mark right.

With contractual rights one can see that a respondent holding onto a domain name which he is contractually bound to transfer to the complainant may well cause detriment to the complainant, but will it cause detriment to his contractual right? It seems unlikely unless self-inflicted, enabling the respondent to deploy a 'laches' defence.

With rights under the Human Rights Act and the Data Protection Act it is difficult to see how those rights can suffer detriment as a result of the Respondent's registration and use of the Domain Name. They will normally survive unimpaired, (a possible exception may occur in cases where loss of confidentiality in information concerning a person's name results, with the consequence that the right in question ceases to exist).

In the case of all the above rights, however, the real detriment is to the Complainant resulting from the unauthorised use of the name or mark in question.

### **Complainant's Rights**

The Panel is of the view that the use of the term "Complainant's Rights" in the definition of Abusive Registration is unfortunate. The wording of this paragraph of the Policy was directly derived from the Uniform Domain Name Dispute Resolution Policy (UDRP) which has been adopted by ICANN-accredited registrars in all gTLDs (.aero, .asia, .biz, .cat, .com, .coop, .info, .jobs, .mobi, .museum, .name, .net, .org, .pro, .tel and .travel), The UDRP is designed exclusively for the benefit of trade mark owners and, arguably, this wording is better suited to trade mark rights than other rights. Similar wording also appears in the European Trade Marks Directive (Council Directive No. 89/104/EEC, to approximate the laws of the Member States relating to trade marks), which uses the expressions "unfair advantage" and "unfair detriment". However, the Panel notes that in the Directive the subject of the unfair advantage/detriment is not to

the trade mark right per se, but to “the character or repute of the trade mark”, which seems to the Panel to be a much better approach.

Unlike the UDRP the Policy was never intended to be restricted to trade mark rights owners. The Panel is of the view that the Policy can be more readily applied to rights other than trade mark rights if the references to “Complainant’s Rights” be read as “the name or mark in respect of which the Complainant has rights” and the Panel approaches this case on that basis.

### **Unfair Use**

Essentially, for the Complaint to succeed, the Panel has to be satisfied that the Respondent’s registration and/or use of the Domain Name is an unfair use of the Complainant’s name.

In this case the Respondent says her use is fair. She relies upon paragraph 4(b) of the Policy, which provides: *“Fair use may include sites operated solely in tribute to or criticism of a person or business.”*

The Panel is satisfied that the Website is a site “operated solely in ... criticism of a person”. There is no suggestion that any commercial activity is associated with the Website. However this does not automatically mean that the registration is not abusive, as indicated by the use of the word “may” in the definition.

The meaning of paragraph 4(b) of the Policy is the subject of paragraph 4.8 of the Experts’ Overview, which reads:

*“4.8 Do tribute and criticism sites necessarily constitute fair use unless proved otherwise? [Paragraph 4(b) of the Policy]*

*“No. Paragraph 4(b) of the Policy provides that “Fair use may include sites operated solely in tribute to or in criticism of a person or business”. Note the use of the words “may” and “solely”— it will depend on the facts. If, for example, commercial activity beyond that normally associated with a bona fide fan site takes place, the registration may be abusive. See the Appeal decision in DRS 00389 (scoobydoo.co.uk). Note also that the use of the word “may” means that even if a site is operated solely as a tribute or criticism site it is still open to the Expert to find that it is abusive. In assessing the fairness or otherwise of the use, the Expert needs to have regard to both the nature of the domain name in dispute and its use. Some decisions in the past have concentrated solely upon whether the site fairly pays tribute to or criticises the Complainant (often a very difficult thing for an expert to assess in a proceeding of this kind).*

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

*In DRS 06284 the domain name was identical to the name in which the Complainant had rights. A modified name that made it clear that this was a protest site would presumably have been less successful in drawing the protest to the attention of customers of the Complainant. The Panel concluded there was a balance to be drawn between the right to protest (which could be effected via a modified name) and the Complainant's rights in its own name, and that in this case at least the latter outweighed the former. Note that the Panel did not rule that use of an identical name would always and automatically be unfair, but did conclude that it was only in exceptional circumstances that such use could be fair. The Panel declined to find that such exceptional circumstances existed in the case in question."*

Earlier this year another gripe site case came before an appeal panel, DRS 12265 (<nortonpesket.co.uk>). In that case the respondent was a disgruntled former client of the complainant, a firm of solicitors. He used an insignificant variant of the complainant's name for the domain name and connected the domain name to a website operated solely in criticism of the complainant. The panel followed the reasoning of the appeal panel in the <rayden-engineeering.co.uk> case as set out above.

In the present case the Panel adopts the same approach as is set out in the Expert's Overview, and as was followed in the <rayden-engineeering.co.uk> and <nortonpesket.co.uk> cases and concludes that the Respondent's use of a domain name which is identical to the surname of the Complainant and her husband, is unfair. The use of a Domain Name which is identical to that of the Complainant and her husband, to link to a gripe site such as the Website, and without any modifiers indicating the nature of the Website, is an appropriation of the Complainant's name which is likely to be unfair unless exceptional circumstances exist, for the reasons set out in detail in the <rayden-engineeering.co.uk> and <nortonpesket.co.uk> cases. The Panel does not consider such exceptional circumstances exist in the present case. Accordingly the Panel finds that the Domain Name, in the hands of the Respondent, is an Abusive Registration as defined in paragraph 1 of the Policy.

### **Consequences of this decision**

In forming this view the Panel notes that nothing in its decision prevents the Respondent from continuing to disseminate her views via the internet. In DRS 12265 (<nortonpesket.co.uk>) the panel concluded:

*"No doubt, notwithstanding this decision, the Respondent will seek to continue his publicity campaign against the Complainant using a website accessible via another domain name. The effect of the ruling of this Panel is merely that he will be unable to do so using the Domain Name <nortonpesket.co.uk>."*

The Panel anticipates that the same will be true of the Respondent in this case who, prior to the Expert's decision, moved her website to her domain name <wendycroxford.co.uk> before re-connecting it to the Domain Name. Nothing (at least as far as the decision of this Panel and the application of the Policy is concerned) prevents her doing so again.

## **9. Decision**

In light of the foregoing findings, namely that the Complainant has Rights in respect of a name or mark which is identical to the Domain Name and that the Domain Name, in the hands of the Respondent, is an Abusive Registration, the Panel reverses the decision of the Expert, allows the Appeal and directs that the Domain Name, <hvidbro-mitchell.co.uk>, be transferred to the Complainant.

**Dated: 22 May 2013**

**David King**

**Tony Willoughby**

**Nick Gardner**