

DISPUTE RESOLUTION SERVICE

DRS 7353

Decision of Independent Expert

Westbuild Homes (Reading) Limited

and

Penwood Systems Limited

1. The Parties:

Complainant: Westbuild Homes (Reading) Limited
Address: Hunters Lodge
Rectory Road
Padworth Common
Berkshire
Postcode: RG7 4JB
Country: United Kingdom

Respondent: Penwood Systems Limited
Address: Beech Tree House
St. Johns Road
Mortimer Common Reading
BRK
Postcode: RG7 3TR
Country: United Kingdom

2. The Domain Name(s):

westbuild-homes.co.uk

3. Procedural History:

The complaint was lodged on 10 June 2009 and sent to the Respondent. A response was received on 12 June 2009. From the dispute history log I have been provided with, it appears that the Respondent, also on 12 June 2009, then offered to transfer the Domain Name and on 16 June 2009 a transfer form was received from the Complainant followed the next day by a cheque for the transfer fee. However, for whatever reason, the transfer by consent did not take place and a mediator was then appointed on 29 June 2009. Mediation was unsuccessful and on 22 July 2009 the Complainant paid for a decision by an Expert. I was subsequently appointed as the Expert.

4. Factual Background

The Complainant is part of an established family owned house building business based in the Berkshire area which trades as "Westbuild Homes". It does not have any registered trade mark rights in the name but it does have a significant and long established business under the name dating back to the 1960's. Its website uses the domain name westbuildhomes.co.uk.

The Respondent is a company owned and controlled by Mr Mathew Campling and Mrs Lynda Campling.

Mr and Mrs Campling are customers of the Complainant having purchased a newly built house in 2008. In that respect, one point I noted is that the Mrs Campling who is said to be the joint purchaser of the house is referred to as Mrs Catherine Campling, not Mrs Lynda Campling. However, neither the Complainant nor the Respondent, which is represented by Mr Campling, explained or took any issue over the different forename. I have therefore proceeded on the basis that they are one and the same person, but in any event I do not believe anything turns on it.

There were problems and faults with the standard of building work which resulted in a dispute between the Complainant and Mr and Mrs Campling. This led to a settlement agreement being reached on 9 February 2009 under which agreed rectification works were undertaken and compensation paid. However, further issues have arisen and the dispute, which is still ongoing, has become somewhat acrimonious.

The Domain Name was registered by the Respondent on 14 April 2009. As at 5 June 2009 the Domain Name resolved to a website which featured a photograph of Mr and Mrs Campling's house with "Coming Soon..." underneath it.

5. Parties' Contentions

Complainant:

In summary the Complainant says that:

- The Respondent is a private company incorporated on 17th November 1998. There are two shareholders, Mrs Lynda Campling and Mr Mathew John Campling. Mrs Campling is the company secretary. Mr Campling is the sole director. The address for each is given as Beech Tree House, St Johns Road, Mortimer, Reading Berkshire RG7 3TR.

- There are three current “Westbuild” companies under the control of the same family (the Wests). They are Westbuild Homes Limited, Westbuild (Reading) Limited, and the Complainant, Westbuild Homes (Reading) Limited. Separately and together they are known as “Westbuild” but Westbuild Homes Limited is dormant.
- The principal business of each of the Westbuild companies is in building houses. This activity has carried on unabated for about 45 years. In the 1960s and early 1970s the West family were, through their companies, developing privately owned housing estates. Estates comprising of 100 and more houses were built in this way in Yatley, Tilehurst and Wantage.
- More recently the Westbuild companies have concentrated on high quality smaller developments in the Berkshire, South Oxfordshire, North Hampshire and Wiltshire areas.
- The names of Westbuild and Westbuild Homes have never been the subject of a trade mark registration.
- The Complainant's website is at www.westbuildhomes.co.uk which gives information about the history of the business, current building developments and information about those recently completed and intended future developments.
- The combined turnover for the three Westbuild companies in the year to 31st March 2009 was about £10 million. The turnover for the year to 31st March 2010 is budgeted at about £5 million.
- Mr Mathew John and Mrs Catherine Campling are customers of the Complainant having purchased plot 3 (now known as Beech Tree House), The Retreat on 16th June 2008, which is the property that is displayed on the home page of the website to which the Domain Name resolves at www.westbuild-homes.co.uk.
- Between June and September 2008 a number of “snagging” issues were identified and dealt with. Various additional works were also carried out at Mr Campling’s request. Some works were paid for by the Complainant, some by the Camplings. The Complainant also carried out repairs to doorframes at Mr Campling’s request.
- In September 2008 a dispute arose about a fault with the plastic electrical capping and also plastering which had not been carried out to NHBC standards. A surveyor was appointed, the extent of the remedial works was calculated and the dispute was resolved as set out in an Agreement dated 9th February 2009.
- Following the date of the Agreement a new issue arose in relation to a staircase at the property. Although a written second agreement was drafted to take into account the remedial works and consequential matters including compensation in relation to the staircase, Mr Campling was unwilling to enter into this second agreement.
- During the ongoing dispute it transpired that Mr Campling had approached prospective and actual purchasers of the remaining plots on the site. In respect of potential purchasers, Mr Campling sought to dissuade them from purchasing.

- The Complainant has now carried out all of its obligations under the Agreement and has also paid Mr Campling the sum of £10,000 by way of compensation for inconvenience suffered as provided by the Agreement and £6,000 in relation to the staircase.
- Mr and Mrs Campling, who were permitted under the Agreement to occupy Plot 2 at the Retreat whilst the works were being carried out, vacated that property on 29th May 2009.
- Notwithstanding the above, Mr Campling is continuing to make claims. Firstly he is claiming that his rights to occupy Plot 2 at the Retreat still subsist and secondly he maintains that further snagging works need to be carried out.
- The dispute has at times been acrimonious.
- On about 21st May 2009 it came to the attention of the Complainant that the Respondent had registered the Domain Name. This discovery had been made as a result of one of the Complainant's employees overhearing a conversation between Mr Campling and a neighbour. The employee heard Mr Campling say that he intended it for a website to publish photographs of the remedial works undertaken on his house.
- When questioned about the registration, Mr Campling sent a brief email in reply. No response has been made to that email.
- Other than as a purchaser of a house built and sold by the Complainant, Mr and Mrs Campling have no relationship with any of the Westbuild companies. The Respondent similarly has no relationship.
- The Respondent and/or Mr and Mrs Campling have purchased the Domain Name for the purpose of unfairly disrupting the business of the Complainant, and/or they intend to use the Domain Name in a way which is likely to confuse people into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant or any Westbuild company.
- The Complainant has a right in the Domain Name in that it is identical or similar to the company name and trading name.

Respondent:

In summary the Respondent says that:

- The Domain Name at the time of registration was not owned or registered by the Complainant. As the domain was unregistered and unwanted at the time of registration Mr and Mrs Campling made the decision to register the Domain Name and use the www location as a site dedicated to their Westbuild home in Mortimer and their experience with the Complainant.
- Mr and Mrs Campling purchased their Westbuild home in June 2008. Between June 2008 and June 2009, they have battled with the Complainant to overcome a large number of defects with their home. The number of defects now totals over 186. A legal agreement was entered into which provided for a surveyor (Ridge Consulting) to manage the defects.

- In February 2009 Mr and Mrs Campling were forced to leave their home for an originally agreed six week period allowing the Complainant to rectify a number of documented defects. This original six week period ended up as four months during which a variety of remedial works took place.
- They say their issues go on and on and no family should have to go through what Mr and Mrs Campling have been through.
- The website to which the Domain Name resolves will be used in a positive manner not to provide any incorrect or misleading facts, simply to provide an honest account of Mr and Mrs Campling's experience and to allow current and prospective purchasers a chance to talk to an existing Westbuild owner.
- Other web pages that support the dispute can be found at www.ourwestbuildhell.co.uk.

6. Discussion and Findings

General

In order to succeed the Complainant must prove, on the balance of probabilities, two matters, i.e. that:

1. The Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name; and
2. The Domain Name, in the hands of the Respondent, is an Abusive Registration.

These terms are defined in the Nominet DRS Policy as follows:

- **Rights** means rights enforceable by the Complainant, whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning.
- **Abusive Registration** means a Domain Name which either:
 - i. was registered or otherwise acquired in a manner which, at the time when the registration or acquisition took place, took unfair advantage of or was unfairly detrimental to the Complainant's Rights; or
 - ii. has been used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's Rights.

Complainant's Rights

The Complainant has no registered trade marks for the Westbuild or Westbuild Homes names. However, it has a long established business trading under the name Westbuild Homes and uses the domain name westbuildhomes.co.uk to resolve to its

website which advertises its business. The Complainant has also exhibited copies of its audited accounts and brochures. In the circumstances I am satisfied that it has Rights in the name Westbuild Homes being a name or mark which is identical or similar to the Domain Name. Ignoring the hyphen and the .co.uk suffix, it is identical.

Abusive Registration

From the matters relied on by the Complainant in its submissions the following parts of paragraph 3 of the Policy (being factors which may be evidence that the Domain Name is an Abusive Registration) are potentially relevant:

Paragraph 3 a. i. C *"Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily for the purpose of unfairly disrupting the business of the Complainant."*

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;"*

From the matters relied on by the Respondent in its submissions the following parts of paragraph 4 of the Policy (being factors which may be evidence that the Domain Name is not an Abusive Registration) are potentially relevant:

Paragraph 4 b. *"Fair use may include sites operated solely in tribute to or in criticism of a person or business."*

It is clear that this dispute over the Domain Name is part of a wider dispute between the parties, or strictly speaking between the Complainant and Mr and Mrs Campling who own and control the Respondent company.

It is possible for a domain name to be registered and used quite properly to resolve to a website devoted to fair criticism of a business. I note a recent DRS Appeal decision in April 2009 in respect of the domain names rayden-engineering.org.uk and rayden-engineering.co.uk (DRS06284). That case dealt with and reviewed previous DRS decisions relating to the legitimacy of protest sites which use a domain name identical to that of the Complainant's name without any further modifier or variant to make it obvious that the domain name is associated with a protest site.

I believe that in order for a domain name to be registered and used fairly to resolve to a website devoted to criticism of a business, whilst the domain name may include or allude to the name of the business, the domain name itself must make it clear that the website associated with it is a criticism site not connected to the business. Because such domain names will usually include or allude to the name of the business being targeted, the website associated with it is likely to be found by those searching for websites associated with the business. If it only becomes apparent once the visitor has entered the website that it is not connected to the business but is in fact critical of the business, that can lead to confusion and unfair disruption.

In this case, the only use that appears to have been made of the Domain Name is to resolve to a single page website containing nothing but a photograph of Mr and Mrs Campling's house built by the Complainant with "Coming Soon..." underneath it. Bearing in mind that the Domain Name is identical to the Complainant's business name, and bar the hyphen between the two words is also identical to the domain name used by the Complainant for its official website, that could easily lead a visitor

to assume they had found the Complainant's official website but that it was still under construction.

If Mr and Mrs Campling wish to have a website devoted to criticism of the Complainant or, as they say, "*to provide an honest account of our experience and to allow current and perspective [sic] purchasers a chance to talk to an existing Westbuild owner*", then they must do so in such a way that it does not cause confusion and unfair disruption to the Complainant's business. I believe that using the Domain Name to resolve to such a website would be likely to cause confusion and unfair disruption to the Complainant's business and as such the Domain Name is, in the hands of the Respondent, an Abusive Registration.

However, it seems that Mr and Mrs Campling have a ready made alternative website which they referred me to in support of their case, being www.ourwestbuildhell.co.uk, although at present it has no content.

7. Decision

For the reasons outlined above I find that the Complainant has proved, on the balance of probabilities, that it has Rights in respect of the name Westbuild Homes, being a name or mark which is identical or similar to the Domain Name, and that the Domain Name, in the hands of the Respondent, is an Abusive Registration.

In the circumstances I order that the Domain Name be transferred to the Complainant.

Chris Tulley

Dated 24 August 2009