

DISPUTE RESOLUTION SERVICE

D00020452 and D00020453

Decision of Independent Expert

Eco Spray-Foam Systems Ltd

and

Lesley Forsyth

1. The Parties:

Lead Complainant: Eco Spray-Foam Systems Ltd
Eco Spray-Foam Systems Ltd
3 High Street, St Lawrence
Ramsgate
CT110QL
United Kingdom

Respondent: Lesley Forsyth
12 Eden Way
Cornwall
Par
PL24 2AS
United Kingdom

2. The Domain Names:

sprayfoam.co.uk and sprayfoam.uk (the "Domain Names")

3. Procedural History:

Two separate Complaints were filed with Nominet on 26 July 2018 concerning the Domain Names <sprayfoam.co.uk> and <sprayfoam.co.uk>.

The Complainant made a request for the DRS20452 (<sprayfoam.co.uk>) and DRS20453 (<sprayfoam.uk>) case files to be consolidated for an adjudication. One of the domain names is registered to an individual, and the second has been registered by that individual, but in the name of a privacy service. The same party

responded to both case files, and engaged in mediation. Dispute Resolution Service therefore has agreed to this request, and a single Expert was appointed to both cases to make a single decision addressing both domain names.

More precisely, Nominet validated the Complaint concerning the Domain Name <sprayfoam.co.uk> on 30 July 2018 and concerning the Domain Name <sprayfoam.co.uk> on 2 August 2018. Nominet notified the Respondent by post and by email, stating that the Response had to be received on or before 20 August 2018 and 23 August 2018 respectively. The same Response to both case files was filed on 7 August 2018 and Nominet notified the Response to the parties on the same day. Nominet notified the Complainant that a Reply had to be received on or before 14 August 2018. The Complainant's Reply was received on 10 August 2018 and the mediator was appointed on 15 August 2018.

The Informal Mediation procedure started on 16 August 2018 and failed to produce an acceptable solution for the parties and so on 21 September 2018 Nominet informed the Complainant that it had until 5 October 2018 to pay the fee for the decision of an Expert pursuant to paragraph 7 of the Nominet Dispute Resolution Service Policy ("the Policy"). On 4 October 2018 the Complainant paid Nominet the required fee.

On 9 October 2018 the undersigned, David Taylor ("the Expert"), confirmed to Nominet that he was independent of each of the parties and that, to the best of his knowledge and belief, there were no facts or circumstances, past or present (or that could arise in the foreseeable future) that needed to be disclosed as they might be of such a nature as to call in to question his independence in the eyes of one or both of the parties.

4. Factual Background

The Complainant, incorporated on 5 December 2012, supplies home insulation materials under its company name Eco Spray Foam Systems Limited. Since July 2017, the Complainant operated websites at the Domain Names <sprayfoam.co.uk> and <sprayfoam.uk> offering a particular kind of insulation known as Icynene.

The Respondent, Lesley Forsyth, appears to be an individual based in the United Kingdom. No additional information about the Respondent is known. However, the Complainant claims that the person in charge of the Domain Names is Mr. Craig Palmer, the Complainant's IT contractor, who registered the Domain Names on 29 June 2017 and managed them on behalf of the Complainant until a dispute arose between the parties.

The Domain Names became inactive on or about 9 July 2018 and listed for sale via a broker.

On 17 July 2018 the Domain Names were redirected to a website at <https://icynene.eu/>, being the website of the company supplying the product distributed by the Complainant.

At the time the Complaint was filed, the Domain Names redirected to a website of a competitor of the Complainant, <www.lapolla.co.uk>.

5. Parties' Contentions

Complaint

The Complainant claims that the person in charge of the Domain Names is not Lesley Forsyth but rather Craig Palmer, an IT contractor providing services to the Complainant, and who originally arranged for the purchase of the Domain Names by the Complainant.

The Complainant avers that on 6 July 2018 Craig Palmer sent an email to the Complainant in connection with a parting of ways between him and the Complainant following various disputes. The Complainant contends that in his email Craig Palmer stated that it was for the Complainant to renew the Domain Names and that failure to do so could mean they could be lost and relisted for sale at a "premium price", and that he would have no control over this.

The Complainant submits that the Domain Names were disabled on or about 9 July 2018 and listed by Craig Palmer for sale via a broker for \$72,000 (<sprayfoam.co.uk>) and for \$10,000 (<sprayfoam.uk>).

The Complainant claims that on 12 July 2018 the Complainant's solicitor wrote to Craig Palmer asserting that he had deliberately disabled the Domain Names in order to disrupt the Complainant's business and that his 6 July email was just a ploy to cover up his proposed interference with the Domain Names, as Craig Palmer was in full control of renewals for the Domains. The Complainant provides evidence that the same day, the registrant details for the domain <sprayfoam.uk> were changed five times, into the Craig Palmer's own name and into other names such as "Identity Protect" or "Amazing Domains".

Moreover, the Complainant states that on 13 July 2018 Craig Palmer sent an email to the joint founder of the Complainant stating that he would be willing to get the Domain Name <sprayfoam.co.uk> for \$29,000 with a \$17,000 down payment made the same day with the remainder over 4 months and that he would then transfer this Domain Name once it "comes" to him.

The Complainant adds that on 16 July 2018 Craig Palmer sent a further email to the joint founder of the Complainant advising that he wanted to resolve the matter without recourse to legal proceeding and asking that he be provided with a "brokerage" payment in order to "assist" with transfer of the Domain Names to the Complainant but claiming that he could not guarantee anything as they were no longer in his control.

The Complainant submits that the WHOIS details for the Domain Name <sprayfoam.uk> continued to change the next day, 17 July 2018. The Complainant argues that even if the names of the registrants of the Domain Name <sprayfoam.uk> changed multiple times, the contact email address remained the same. The Complainant also states that at the time the Complaint concerning the Domain Name <sprayfoam.uk> was filed, the registrant was shown as "Identity Protect" but all the contact details were the same as those provided for the Respondent, Lesley Forsyth.

The Complainant argues that on the same date, 17 July 2018, the registrant details for the other Domain Name, <sprayfoam.co.uk>, were switched from "Identity Protect" to the Respondent, Lesley Forsyth.

The Complainant's Rights

The Complainant relies on its unregistered rights in the Domain Names themselves arising from their extensive website and email use before they were misappropriated by the Respondent.

The Complainant avers that albeit that the term "spray foam" is descriptive, visitors to the Complainant's former websites at those Domain Names would associate the Domain Names with the Complainant to the exclusion of all others.

In addition, the Complainant argues that by definition, the Complainant's rights in the Domains themselves are identical to the Domains. The Complainant also relies on unregistered rights arising from its trading activities under the name "Eco Spray Foam Systems Limited" claiming that the Domain Names are similar to this name.

Abusive Registration

According to the Complainant, the Domain Names were registered abusively in that Craig Palmer initially registered them in his own name on 29 June 2017 and thereafter into proxy, instead of registering them in the Complainant's name as he had been instructed to do. The Complainant contends that the numerous subsequent registrations of the Domain Names were all abusive as they were all part of Craig's Palmer illicit scheme discussed below.

The Complainant argues that the activities of Craig Palmer from July 2018 onwards constitute use of the Domains in a seriously abusive manner. The Complainant contends that in order to try and extort a substantial sum of money from the Complainant and in order to take advantage of the Complainant's relative inexperience in relation to the Internet, Craig Palmer set out to deceive the Complainant by claiming that the Domain Names, which he controlled, were about to expire unless renewed by the Complainant, but then instead he retained and disabled them to the Complainant's business in order to give the false impression that the Domain Names had expired and that they were no longer under his control.

In addition, the Complainant states that the subsequent redirect of the Domain Names to the website of the Complainant's competitor was clearly designed to continue to up the pressure on the Complainant and is yet a further abusive use of the Domain Names.

The Complainant also contends that the Craig's Palmer registrant changes and other activities were designed to generate a sale to the Complainant and to unfairly disrupt the Complainant's business and the redirect of the Domain Names to the Complainant's competitors was designed to create a likelihood of confusion.

The Complainant argues that Craig Palmer has also used false contact details, in particular the extensive registrant changes following the communication from the Complainant's solicitors including use of the same email address for different registrants.

Response

The Respondent contends that the word 'Spray Foam' is a purely generic term and is very descriptive.

The Respondent's further contentions are reproduced in their entirety:

"exhibitSL.pdf DRS policy 8.1.1.1 used or made demonstrable preparations to use the Domain Name or a domain name which is similar to the Domain Name in connection with a genuine offering of goods or services. Note <https://lapolla.com/company/internationaldistributors/> south west insulation solutions limited are international distributors for lapolla.

exhibitSL.pdf is a clear letter from the CEO saying we can redirect the domains to there there site, as we are currently learning the industry for a business launch within 12 months- again this is why we registered the name for a 2 year period and is under our full control at godaddy. I can also state icynene & lapolla have recent merged and there was some confusion <http://icynene-lapolla.com> why the name pointed for a maximum of 48 hours to icynene eu website, we rectified this as soon as we were made aware. As you can clearly see the domain is generic 'Spray Foam' and is pointing to a spray foam website this is not to confuse but with a genuine offering of goods or services also 8.1.1.3 fair use of the Domain Name.

I refer to case reference D00020337- in the same way the complainant has provided very little or no evidence that it has rights under the policy, it also refers to its registration as a limited company at companies house. There is no evidence of relevant registered trademarks, Companies house also confirms it was registered as a limited company in December 2012 but changed its name from Profit Form Golf limited to Beamont insulation & render limited but only changed its name too Eco Spray-Foam Systems Limited on 25/11/13 exhibit-companyreg.pdf note the directors of the company are Muhamet Sylejmani and John Dunderdale until 17th July 2018

I have noted the complaint is very long winded about not having correct addresses however Nominet have sent us a recorded delivery that was signed for dismissing contact information being wrong, while we accept from the 8th July 18-16th July 18 there may have been a mix up with a number of changes of the names but email address remained ours. We were also concerned at this fact and on or around that time we logged in to Nominet and got the domain's put with our go daddy account with our details which are correct complying to Nominet rules 10.1.1

I have been fortunate enough to have the time and resources, to contact and gather evidence for this case to further assist a expert decision.

- Main facing customer email addresses- exhibitME.pdf & exhibitwebsiteincemail.pdf

- exhibit7917.pdf shows email address
- Other domains from 3rd parties exhibitdomainlist.pdf exhibit & screenshot 13/07/18 spray insulation.ltd not renewed along with deciding not to renew a lot of them – also see exhibit120718.pdf
- Please note Icyne is a trademark <https://euipo.europa.eu/eSearch/#basic/1+1+1+1/100+100+100+100/icy> nene and we refer to abusive registration DRS policy 5.1.3 reference nominet case D00019477 & wipo case number D2003-0085 referring back to exhibitdomainlist.pdf showing previous domain registrations of Eco Spray-Foam systems limited beyond reasonable doubt the registrations have been plainly abusive within the DRS policy.
- We now submit further evidence that there was no google analytics sent for the website, but in fact a google my business and the number 1111 of the complainants bullet point 5 is a total fabrication see exhibit81117.pdf we are in no dispute that the the number of people found you on google may have been 1111 however that dismisses the fact as stating visited website - visited and found are completely different words.
- exhibit28919.pdf Proof of a client sending in photographs of works carried out and note the email address that it was sent too.
- Please note <https://web.archive.org/web/20160804094504/http://www.ecosprayfoamsys.co.uk:80/contacts> email address on the website contact us. Once again https://web.archive.org/web/*/http://www.ecosprayfoamsys.co.uk:80/contacts since 2014 with copyright from 2013 at the very bottom, this is proof that this domain and website has always been the main focus the main website and the main domain and email address beyond reasonable doubt, We can state this to be fact as the company house records state Eco spray-foam systems limited 25/11/13 with the above links going live archived records too 2/12/14, we also found that the name sprayinsulation.co.uk <https://web.archive.org/web/20170711074924/http://sprayinsulation.co.uk/> with proof that the domain and website in the July of 2017 is also a redirect too [ecosprayfoamsys.co.uk](http://www.ecosprayfoamsys.co.uk) clearly showing that the main facing website has been EcoSprayFoamsys.co.uk from 2014.
- exhibitjd13718.pdf , exhibitjd1318.pdf & exhibitcp200718.pdf shows that through the mediation with John Dunderdale who still was a director of Eco spray-foam systems limited Muhamet the other director actually offered substantial funds for the 2 names- and dismissing the \$72,000 as claimed. It also proves mediation and full cooperation.
- exhibitcp200718.pdf a email between craig palmer and John Dunderdale 3 days after he stepped down as a director of the company according to company house records, it is a full break down of dates emails to and from CP and the business
- exhibit26717.pdf domain re-licencing/ renewals from 3rd parties
- exhibitsourced.pdf paragraph 4 line 5 'use'

- exhibitJD.pdf mediation length of time known each party and shows that there was full cooperation throughout there mediation that other names have been transferred out as requested and FTP files for 2 websites have been sent across. - Also cross referencing too exhibitJDQA.pdf

- exhibitdonotlikedomains.pdf a reply on 3rd July 17

- Further more the 6/7/18 is already listed as a exhibitmeeting.pdf this proves that CP adhered by the Registrar agreement, which outlines the standard terms and conditions. section B.1.13 of the agreement states that you must issue an expiry notice to Your Customer no more than 30 days prior to expiry of the domain. However, if you are not a Nominet registrar, which I don't think you are, this agreement would not apply. - Having a response from this email see exhibitreply.pdf its a clear indication the complainant has read understood the email set out and failed to act upon it. The exhibitmeeting.pdf shows that a clear indication to renewals, what would happen if they were not renewed annually from purchase date, there responsibilities, a option to transfer out to a registry of there choice, and clear links to invoices to make it easy for the complainant to notice dates of purchase- also cross referencing to exhibitJDQA.pdf from a director.

We would like to note that John Dunderdale who has acted as a mediator between CP & Eco Spray-Foam systems limited was in fact a equal director of the company until the 17th July 2018

- Finally we would like to produce exhibitJDQA.pdf please note the RED. Direct questions, this is from a equal partner of the business and the mediator, we would like to highlight this email and the responses in RED, there is sufficient evidence beyond reasonable doubt on the whole case."

Reply

The Complainant submits that it is unable to reply in detail because, among other reasons, the Response is very difficult to follow.

Moreover, according to the Complainant, the Response seems designed to muddy the water while evading all of the central issues raised in Complaint. The Complainant states that no attempt has been made to explain or to demonstrate that 'Lesley Forsyth', if she exists, is independent from Craig Palmer or that she is genuinely involved in the industry, or how she came to acquire the Domain Names. The Complainant states that it is clear from the nature of the Response and exhibits that Craig Palmer prepared the Response and that he remains in control of the Domain Names and continues to try to conceal his involvement. The Complainant argues that this of itself is powerful evidence of abusive registration.

In addition, the Complainant contends that no attempt has been made to explain the bizarre registrant changes set out in the Complaint.

As to the Respondent's redirect of the Domain Names, the Complainant adds that it is an accredited Icynene Spray Foam Installer, as such the redirect of the Domain Names to the

website at <https://icynene.eu/> was likely connected with and designed to capitalise on the Complainant's former use of the Domain Names before they were hijacked by Respondent.

Finally, the Complainant argues that there is no denial of awareness of the Complainant at any relevant date.

6. Discussions and Findings

Under paragraph 2.1 of the Policy, for the Expert to order a transfer of the Domain Name, the Complainant is required to demonstrate, on the balance of probabilities, that:

"2.1.1 The Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name; and

2.1.2 The Domain Name, in the hands of the Respondent, is an Abusive Registration."

The Complainant's Rights

Paragraph 1 of the Policy defines "Rights" as *"rights enforceable by the Complainant, whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning"*.

The Complainant seeks to assert Rights in the Domain Names based on its company name Eco Spray Foam Systems Limited. However, the consensus view amongst Nominet Experts is that *"the mere registration of a company name at the Companies Registry does not of itself give rise to any rights"* for the purpose of this proceeding (see the Experts' Overview, paragraph 1.7).

In view of the fact that the Complainant's company name is in and of itself insufficient to establish Rights for the purposes of the Policy, and that the Complainant has not supplied evidence of registered trade mark rights, it is necessary to examine whether the Complainant can rely on other Rights, such as unregistered trade mark rights, to support its Complaint.

In this regard, Paragraph 2.2 of the Experts' Overview provides that: *"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)."*

The Complainant has submitted considerable evidence showing that it has been trading as "Eco Spray Foam Systems Limited" since 2013 and that it has made substantial efforts to develop its business, as shown by invoices, advertisement in a magazine, quotes, photos posted on the web, GOOGLE opinions received from its customers and

the fact that the Complainant has used info@sprayfoam.co.uk as its customer-facing email address. Furthermore, the first hurdle under the Policy is intended to be a "relatively low-level test" and the objective is simply to demonstrate "a *bona fide* basis for making the complaint" and so the Expert considers that the Complainant has established Rights in accordance with the Policy. See paragraph 2.3 of Experts' Overview.

Furthermore, the Policy also requires that the name or mark in which the Complainant has Rights must be identical or similar to the Domain Names. The Complainant's trading name Eco Spray Foam Systems Limited is recognizable at the third level in the Domain Names. It is accepted practice under the Policy that the ".co.uk" and ".uk" suffixes may be discounted. Therefore the Expert finds that that the Complainant's name and the Domain Names are similar.

Therefore, the Expert finds that the Complainant has Rights in respect of a name or mark which is similar to the Domain Names, in accordance with paragraph 2.1.1 of the Policy.

Abusive Registration

Paragraph 1 of the Policy defines "Abusive Registration" as a domain name which either:

"(i) was registered or otherwise acquired in a manner which, at the time when the registration 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."

The Expert has considered both (i) and (ii) in turn, as follows:

(i) Abuse at the Time of Registration

Paragraph 5.1 of the Policy sets out a non-exhaustive list of factors which may be evidence that a domain name is an Abusive Registration. The Complainant appears to rely on the following:

"5.1.1 Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily:

5.1.1.1 for the purposes of selling, renting or otherwise transferring the Domain Name to the Complainant or to a competitor of the Complainant, for valuable consideration in excess of the Respondent's documented out-of-pocket costs directly associated with acquiring or using the Domain Name;

5.1.1.2 ...

5.1.1.3 for the purpose of unfairly disrupting the business of the Complainant;

The Expert agrees with the Complainant that the Domain Names are Abusive Registrations in accordance with paragraph 5.1.1.1 and 5.1.1.3 of the Policy.

The Expert notes that the Respondent justifies her choice to acquire the Domain Names on the basis that the Domain Names consist of common terms. Furthermore, the Respondent claims, but provides no evidence, that she has made demonstrable preparations to use the Domain Names or a domain name which is similar to the Domain Names in connection with a genuine offering of goods or services as she is currently learning the industry for a business launch within 12 months.

The Expert is, however, not persuaded by the Respondent's explanation for registering the Domain Names.

First of all, the Expert finds that the Respondent's arguments are difficult to follow. The Respondent failed to submit annexes with clear and descriptive file names (see paragraph 7.3.2 of the Policy) and included some annexes with documents that are badly scanned with parts of phrases missing. Moreover, the Respondent omitted to include some of the annexes such as exhibitSL.pdf or exhibitJDQA.pdf, which could allow the Expert to establish the type of connection between the Respondent and the current content of the websites to which the Domain Names are pointing.

The Expert also notes from the circumstances surrounding Mr. Craig's Palmer exchanges with the Complainant, including the coincidental timing of the changes of registrant information, that it is not implausible that Mr. Craig Palmer may still exercise control over the Domain Names. Indeed, the Expert finds that the Respondent, Lesley Forsyth, presents an unusual insight on the situation between the Complainant and its former IT contractor Craig Palmer who initially registered the Domain Names. For instance, the Respondent, Lesley Forsyth, included in the annexes to her Response a screen capture of the email box of Craig Palmer and she provided no explanation on how she obtained such evidence, which certainly raises suspicion and such suspicion is not dispelled in anyway by the Respondent's arguments.

The Expert finds it possible, indeed likely, that Craig Palmer set out to deceive the Complainant by claiming that the Domain Names, which he controlled, were about to expire unless renewed by the Complainant, but then instead he retained and disabled them to the Complainant's business in order to give the false impression that the Domain Names had expired and that they were no longer under his control.

The Expert also finds convincing the Complainant's argument that it was Craig Palmer who listed the Domain Names for sale via a broker. Craig's Palmer offer to "assist" with transfer of one of the Domain Names in return for a payment of \$29,000, indicates that he hoped to extort a substantial sum of money from the Complainant. The Expert therefore finds that the Domain Names were registered for the purposes of selling, renting or otherwise transferring the Domain Names to the Complainant or to a competitor of the Complainant, for valuable consideration in excess of the Respondent's documented out-of-pocket costs directly associated with acquiring or using the Domain Name (see paragraph 5.1.1.1 of the Policy).

Furthermore, given the overall circumstances of this case, Craig's Palmer act of disabling of the Domain Names, his subsequent use of the Domain Names to redirect to various websites and finally his acting as Lesley Forsyth, clearly suggests that he has registered the Domain Names for the purpose of unfairly disrupting the business of the Complainant (see paragraph 5.1.1.3 of the Policy).

As a result, the Expert finds that the Complainant has succeeded in proving that the Domain Names were registered in a manner which, at the time when the registrations took place, took unfair advantage of or was unfairly detrimental to the Complainant's Rights.

(ii) Abusive Use

Turning to limb (ii) of the definition of Abusive Registration concerning the *use* of the Domain Names, the Expert also finds that the Complainant has succeeded in proving this, regardless of whether the Domain Names are controlled by Craig Palmer or the Respondent, Lesley Forsyth, if such person exists.

In order to prove the abusive *use* of the Domain Names the Complainant appears to rely on the following circumstance of the Policy:

"5.1.2 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;"

The Expert agrees with the Complainant that the Domain Names are Abusive Registrations in accordance with paragraph 5.1.2 of the Policy.

The Expert finds that the use of the Domain Names to redirect to a website of the company supplying the product distributed by the Complainant and to a website of a competitor, amounts to Abusive Registration within the meaning of the Policy, as Internet users will likely be misled into thinking that the Domain Names are registered to, operated or authorised by the Complainant, when in fact they are not. See paragraph 3.3 of the Experts' Overview.

Furthermore, it is also clear that by redirecting the Domain Names to various websites, the registrant of the Domain Names was simply seeking to put pressure on the Complainant with a view to extract payment for the Domain Names.

For the sake of completeness, paragraph 8 of the Policy provides a non-exhaustive list of circumstances which may be evidence that the Domain Names are not an Abusive Registration but, as discussed above, none of those circumstances would seem to assist Craig Palmer or the Respondent.

In conclusion, the Expert has considered the admissibility, relevance materiality and weight of the evidence adduced as a whole and is satisfied that the Complainant has succeeded in proving, on the balance of probabilities, that the Domain Names are Abusive Registrations in accordance with Paragraph 5 of the Policy.

7. Decision

The Expert finds that the Complainant has Rights in a name or mark which is similar to the Domain Names, and that the Domain Names, in the hands of the Respondent, are

Abusive Registrations. The Domain Names should therefore be transferred to the Complainant.

Signed: David Taylor

Dated: 15 November 2018