

DISPUTE RESOLUTION SERVICE

DRS09331

Decision of Independent Expert

JD Sports Fashion Plc

and

Mr Denys Ostashko

1. The Parties

Complainant: JD Sports Fashion Plc
Address: Hollinsbrook Way
Pilsworth
Bury
Lancashire BL9 8RR
Country: United Kingdom

Respondent: Mr Denys Ostashko
Address: Apt 433, Chynoweth House
Trevisson Park
Truro TR4 8UN
Country: United Kingdom

2. The Domain Name

allsports.co.uk (“the Domain Name”)

3. Procedural History

- 3.1 On 25 November 2010 the complaint was received. On 26 November 2010 the complaint was validated and notification of it sent to the parties. On 17 December 2010 the response was received and notification of it sent to the parties. On 24 December 2010 the reply was received, notification of it sent to the parties and a mediator appointed. On 11 January 2011 the mediation failed and on 24 January 2011 the expert decision payment was received.
- 3.2 On 3 February 2011 Patricia Jones (“the Expert”) confirmed to Nominet that she knew of no reason why she could not properly accept the invitation to act as expert in DRS 09331 and further confirmed that she knew of no matters which ought to be drawn to the attention of the parties which might call into question her independence and/or impartiality.

4. Factual Background

- 4.1 The Complainant is a retailer of sport inspired fashion clothing, footwear and accessories. It was founded in 1981 and by the time of its listing on the London Stock Exchange in 1996 had 56 stores across the United Kingdom. In 2002 it acquired First Sport, adding 200 stores, and thereafter made various other acquisitions (Scotts in 2004, Bank Fashion in 2007 and Chausport in 2009). The Complainant also owns the rugby brands 'Canterbury' and 'Canterbury of New Zealand' as well as 'The Duffer of St. George' and 'Kooga Rugby' brands.
- 4.2 The Complainant acquired the assets of Allsports Limited and its subsidiaries following their administration in 2006. This included a UK registered trade mark for "allsports" registered on 3 July 1998 in Classes 25 and 28 and a UK registered trade mark for "all:sports" registered on 27 October 2000 in classes 18, 25 and 28. The Complainant is the registered proprietor of these marks. Both marks have recorded against their registry entry that they are proceeding because of distinctiveness acquired through use and that there is honest concurrent use with another UK trade mark registration.
- 4.3 The Respondent registered the Domain Name on 4 July 2007. On 11 August 2010 the Complainant's representatives, Urquhart-Dykes & Lord LLP, sent a letter to the Respondent notifying him of the Complainant's trade mark registrations and requesting various undertakings, including the transfer of the Domain Name. This letter was returned marked 'addressee gone away'. On 19 October 2010 the letter was re-sent to the Respondent using the recent contact details on the Whois record. No response has been received by the Complainant to this letter.
- 4.4 There is a dispute between the parties as to how the Domain Name has been used since registration (see further Section 5 below). However, it is common ground that after the letter of 19 October 2010, the Domain Name resolved to a parking page with a search box under the phrase "What you need, when you need it" (Exhibit 4 of the complaint). The page also indicates that the Domain Name may be for sale.

5. Parties' Contentions

- 5.1 The Parties' contentions are as set out below.

The Complainant's complaint

- 5.2 The Domain Name consists exclusively of the word 'allsports', which is identical or almost identical to the Complainant's trade mark registrations and is confusingly similar to those registrations.
- 5.3 The Complainant's trade marks pre-date the registration of the Domain Name as does the Complainant's acquisition of them.
- 5.4 The Complainant has not licensed or permitted the Respondent to use its trade marks for the registration of the Domain Name and the Complainant has no relationship with the Respondent. The Complainant submits the Domain Name is a blocking registration under Section 3(a)(i)B of the Dispute Resolution Service Policy ("the Policy") since the Respondent is not known as "Allsports".

- 5.5 The Complainant says that on 20 October 2010, the Domain Name resolved to a parking site at www.sporthaven.com which provided information relating to sport and featured sponsored links, some of which related to the sale of sporting articles and goods from competitors of the Complainant. The Complainant submits that the Respondent is generating click-through revenue through the Domain Name, that the use of a parking page does not constitute legitimate non-commercial or fair use of the Domain Name or a genuine offering of goods or services as it involves taking unfair advantage of the Complainant's rights and that the use of the Domain Name to re-direct internet users to sponsored links for competitors of the Complainant is disrupting the business of the Complainant within the scope of the Policy.
- 5.6 After the Complainant's representatives notified the Respondent of the Complainant's trade mark registrations, the Domain Name no longer resolved traffic to www.sporthaven.com, but it still resolved traffic to a parking site (see paragraph 4.4 above).
- 5.7 The Respondent appears in the Nominet 3 Cases Respondent Table and there is a presumption of Abusive Registration in accordance with paragraph 3(c) of the Policy. The decisions against the Respondent indicate a pattern of abusive registrations.
- 5.8 The Complainant submits that by virtue of its registered trade marks it has earlier enforceable rights against the Respondent and the Domain Name is an Abusive Registration as at the time of registration it took unfair advantage of or was unfairly detrimental to the Rights of the Complainant and has been used in a manner that takes unfair advantage of or is unfairly detrimental to the Rights of the Complainant.

The Respondent's response

- 5.9 The Respondent disputes that the Complainant has Rights in "allsports" on the following basis:
- (a) The Respondent asserts that under the Policy the Complainant cannot rely on rights in a name or term that is wholly descriptive of the Complainant's business. The Respondent states that "allsports" is in general everyday use as a descriptive phrase combining the dictionary meaning of the words "all" and "sports" to describe everything related to sports, including services, activities, fitness programmes, goods, news and products and that this term is used regularly throughout the UK by businesses, broadcasters, consumers and sport people. The Respondent asserts that these generic words must have acquired a secondary meaning to have them associated with the Complainant, which the Respondent says has not happened.
 - (b) The Complainant's trade mark registration for "allsports" is limited to classes 25 and 28 and does not represent the vast amount of other classes which can be used for 'all sports' purposes. The Respondent notes this registered trade mark was granted in honest concurrent use with another registered UK trade mark.
 - (c) The Complainant has not demonstrated how long it has traded as "allsports" or the extent of its trading under that name. The Respondent states that the Complainant's website shows that the Complainant is not using "allsports" in its trading activities and that the mark is currently not related to the

Complainant's business. The Respondent further states that the mark has never been used since its purchase by the Complainant and that the trade mark registrations are vulnerable to cancellation for non-use.

- (d) The 'All Sports' phrase has strong descriptive connotations and the Complainant has failed to provide evidence that it has acquired a secondary meaning. The Respondent relies on the Expert decision in DRS 05571 (*Villagefetes -v- Owen Webster*) that in order to satisfy section 1 of the Policy on Rights the Complainant has the burden of demonstrating that "*the words have acquired a secondary meaning associating them to the Complainant.*"
- (e) The Respondent states that the Complainant has failed to establish such a secondary meaning as the phrase 'All Sports' is being used by dozens of online businesses and UK companies:
- a. There are 29 UK companies whose trading name begins with 'ALL SPORTS', such as ALLSPORTS ACADEMY, ALLSPORTS BETTING, ALLSPORTS DIRECT, ALLSPORTS NUTRITION, ALLSPORTS (RETAIL) LTD and there are about the same number of companies whose name starts with 'ALL SPORT'.
 - b. A Google search for 'allsports' generates a large list of websites and businesses incorporating this phrase in their title which the Respondent says demonstrates that 'All sports' is a generic descriptive phrase used by many businesses in the UK and worldwide. The search results include:
 - i. Amart All Sports - Australia's best sports store (amartallsports.com.au);
 - ii. Allsports Physiotherapy Website - Australia based clinic specialising in the treatment of all sporting related injuries (allsportsphysio.com.au);
 - iii. Welcome to AllSports! ATHLETIC EQUIPMENT | BAGS | HATS | LICENSED APPAREL | LICENSED (allsportslex.com);
 - iv. Allsports Grand Prix - indoor high speed karting facility (allsportsgp.com);
 - v. Allsports Distribution Limited – company specialising in representing some of the finest brands in the outdoor industry (allsports.co.nz);
 - vi. allsports equipment (allsports.com.sg);
 - vii. ALLSPORTS SPORTS SUPPLEMENTS (allsports-online.co.uk);
 - viii. Allsports Trophies - trophies, trophy manufacturer and supplier of trophies in the UK (allsportstrophies.com);
 - ix. Allsport Medical - leading specialist and provider of sports first aid, sports training equipment and sports supports (allsportmedical.co.uk); and
 - x. [news result] FHSAA Releases Tentative Districts in All Sports Except Football
- (f) The Respondent relies (by analogy) on the Expert decision in DRS 08347 (5alive.co.uk) as follows "*the fact that there are plainly other users of 5ALIVE out there, both in trademarks and in domain names, does suggest that perhaps the Complainant's own rights and reputation in 5 ALIVE are not quite so extensive and well-recognised as it seeks to assert. Verbally, the mark FIVE*

ALIVE or 5 ALIVE is simply two ordinary words with an attractive rhyme, which could be – and apparently is – used without conflict by others."

5.10 The Respondent disputes that the registration of the Domain Name was abusive for the following reasons:

- (a) The Respondent says he registered the Domain Name based on its development and secondary market potential of being a generic descriptive domain name wanted by many businesses. He states that he registered the Domain Name immediately after it was released by the previous registrant and estimates at least 30 people were trying to register the Domain Name for its descriptive potential.
- (b) Until the Complainant's communication, the Respondent was unaware of the Complainant's existence. The registration of the Domain Name was not made in bad faith or with a view to being detrimental to the Complainant nor was it a blocking registration, as the Domain Name is not uniquely attributable to the Complainant and the Complainant does not trade using this name. The Respondent cites the Expert in DRS 05571 (*Villagefetes -v- Owen Webster*) as follows:

"The appeal panel in DRS 04884 (Maestro International, Inc v Mark Adams) concluded: 'Where a domain name is a single ordinary English word, the meaning of which has not been displaced by an overwhelming secondary meaning, the evidence of abuse will have to be very persuasive, if it is to be held to be an Abusive Registration'. The appeal panel's conclusion clearly extends to two ordinary English words and therefore, has significant implications for the Complainant. If the Complainant could have demonstrated sufficient Rights to satisfy the first limb of the test under s2 of the Policy it would still have a significant hurdle to overcome to satisfy the second limb of that test. Conversely, if the Complainant had been able to overcome the hurdle of demonstrating an overwhelming secondary meaning in the words, it would have a relatively easier task to demonstrate abuse."

- (c) The Respondent denies that the Domain Name redirected traffic to www.sportshaven.com. The Respondent states he has no association with this site and that it is [allsports.com](http://www.allsports.com) which redirects to this site.
- (d) The Respondent states that since registration the Domain Name has hosted a generic parking page displaying various advertisement links, a result of advertisers targeting the generic 'sports' keyword. The Respondent further states that all previous parking pages displayed various generic sports and fitness related links which were not similar to the Complainant's goods or services and the Domain Name has never displayed any links related to the Complainant or competitors of the Complainant. An example of a previous page is archive.org/web/20070708203413/http://www.allsports.co.uk. The Respondent asserts that this proves that there was no unfair advantage to the Complainant.
- (e) The Respondent says he has received various offers to sell the Domain Name which he considers unsurprising as many different businesses currently trade as 'all sports something' and would prefer their web presence to occupy a premium spot using the Domain Name.

- (f) The three previous DRS cases cited by the Complainant were over 3 years ago and do not affect the current case.

The Complainant's Reply

5.11 The Complainant's reply on Rights in the name "allsports" is as follows:

- (a) The Complainant's trade marks proceeded to registration because of distinctiveness acquired through use, which indicates that the UKIPO viewed "allsports" as having a distinctive character and a secondary meaning.
- (b) The number of classes covered by the Complainant's trade mark registrations is irrelevant. The Policy requires an examination of whether a name or mark is identical or similar to the Domain Name and there is no examination relating to the scope of a trade mark registration.
- (c) The grant of the Complainant's registrations in honest concurrent use with another UK registered trade mark is irrelevant, as it only demonstrates co-existence without any confusion or objection from the other trade mark owner and does not imply that the Complainant's rights are diluted. There are no other UK or Community trade marks for 'allsports' or 'all sports'.
- (d) The use of the "allsports" mark by the Complainant is irrelevant, as the complaint is based on the Complainant's registered trade mark rights rather than common law rights. The Complainant denies that the Complainant's trade marks are vulnerable to cancellation for non-use.
- (e) The decision in DRS 05571 (*Villagefetes vs. Owen Webster*) is irrelevant as this related to common law rights rather than registered trade mark rights.
- (f) It is irrelevant that there are numerous UK companies using allsports as the registration of a company name does not in itself create rights in a name and the companies may not be trading under the "allsports" name. In this respect, some of the companies listed by the Respondent are dissolved, dormant or in the process of being struck off. Even where the businesses are trading, there may not be any direct conflict with the Complainant's business activities, for example All Sports Betting Limited operates gambling and betting activities. Some companies, such as Allsports (Retail) Limited and Allsports.co.uk Limited, are related to the Complainant and share the same registered office.
- (g) The majority of the domain names cited by the Respondent are not UK based and are irrelevant to the complaint. The UK based domains do not appear to have any direct conflict with the business activities of the Complainant, for example www.allsportmedical.co.uk relates to first aid supplies.
- (h) The decision in DRS 08347 (*5alive.co.uk*) relates to common law rights based upon goodwill and reputation, whereas the Complainant is solely relying upon rights arising from the registered trade marks.
- (i) It is irrelevant that other companies, in different business fields, may use allsports. As there is no conflict of business activities there is no reason for the

Complainant to take any legal action. The Policy requires the Complainant to establish rights, not 'exclusive rights'.

5.12 The Complainant's reply on Abusive Registration is as follows:

- (a) The Complainant disputes that the Domain Name was registered because of its market potential. The Respondent has made no preparations to commence legitimate use of the Domain Name since its acquisition in July 2007. There is no evidence to show that not less than 30 people were trying to register the Domain Name due to its alleged descriptive nature and the Complainant submits that the Respondent registered the Domain Name with the sole intention of selling it for a profit.
- (b) The Complainant states that it is unlikely that the Respondent was unaware of the Complainant's existence until communication from them given that the Complainant has long been established as the leading UK specialist retailer of branded and own brand sports and casual wear and has over 500 stores across the UK. Further, given the previous presence of the allsports branded stores on the high street, the Complainant submits that the Respondent would have been aware of the brand. The Complainant states that even after the Respondent received the communications from the Complainant, he chose to ignore them.
- (c) The decision in DRS 05571 (*Villagefetes vs Owen Webster*) is irrelevant, as the Complainant does have sufficient rights to satisfy the provisions of the Policy, these being trade mark registrations which proceeded to registration on the basis of distinctiveness acquired through use.
- (d) The Complainant submits that the Domain Name, when viewed on 20 October 2010, directed traffic to www.sportshaven.com and provides a witness statement from the Complainant's representative in support.
- (e) The Complainant asserts that the Respondent's statement that the Domain Name hosts a generic parking page and that he has received numerous offers to sell the Domain Name, does not constitute legitimate non-commercial or fair use of the Domain Name nor can it constitute a genuine offering of goods or services. DRS cases have held that a parked page can constitute an Abusive Registration, including DRS 08347. The Complainant alleges that the Respondent had no legitimate purpose for registering the Domain Name, there is no evidence to demonstrate that, prior to the acquisition of the Domain Name, the Respondent had any connection with or interest in the name "allsports" and the Domain Name was purchased with the intention of selling it for a profit. The Complainant relies on the failure by the Respondent to make any preparations to commence legitimate use of the Domain Name since its acquisition in July 2007.
- (f) There is only one archived page on archive.org/web/web.php which post-dates the Respondent's purchase of the Domain Name. This does not sufficiently demonstrate how the Domain Name has been previously used by the Respondent, and there is no evidence to show that the Domain Name has not featured sponsored links to the Complainant's competitors. Some of the archive web pages for 2006 (when the Complainant purchased the allsports brand) feature the Complainant and its website further demonstrating that "allsports" is a recognised trade mark associated with the Complainant.

- (g) The Respondent is listed in the '3 Cases Respondent Table', which is a clear indication that the Registrant has a pattern of abusive registrations.

6. Discussions and Findings

- 6.1 Paragraph 2 of the Policy sets out that for a Complainant's complaint to succeed it must prove to the Expert on the balance of probabilities that:
- i. The Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name; and
 - ii. The Domain Name, in the hands of the Respondent, is an Abusive Registration.
- 6.2 The Complainant is required to prove to the Expert that both elements are present on the balance of probabilities. However, under Paragraph 3c of the Policy there shall be a presumption of Abusive Registration if the Complainant proves that the Respondent has been found to have made an Abusive Registration in three or more DRS cases in the two years before the complaint was filed.
- 6.3 The Respondent is currently listed in Nominet's "3 cases Respondent Table". However, Nominet makes it clear that the disputes in this Table are listed without any guarantee that they occurred within the last two years and that this is a fact for the Expert to decide in any new decision. I have reviewed the dates of the cases cited in the Table (DRS 04719, DRS04620 and DRS04448) which are all in 2007, more than two years before this complaint was filed. Accordingly, there is no presumption of Abusive Registration in this complaint, although I can take into account that there have been previous findings of bad faith registrations against the Respondent, and I approach this complaint accordingly.

Complainant's Rights

- 6.4 Under Paragraph 1 of the Policy, Rights is defined as "rights enforceable by the Complainant, whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning." It is well accepted that the question of Rights falls to be considered at the time the Complainant makes its complaint. It is also well accepted that the question of Rights is generally considered to be a test with a low threshold to overcome.
- 6.5 The Complainant is the owner of UK registered trade marks for "allsports" and "all:sports" registered since 1998 and 2000 respectively. The Complainant has made it clear that it relies only on these registered trade marks to establish Rights under the Policy and not on any unregistered rights in relation to the "allsports" name. Indeed, the Complainant has not adduced any evidence of use of the "allsports" name since the acquisition to help establish unregistered rights through the ownership of goodwill and reputation in such name. Nevertheless I am satisfied on the basis of the trade mark registrations that the Complainant has Rights in the "allsports" name.
- 6.6 The Respondent has cited a number of cases in relation to the requirement to establish that descriptive terms have acquired a secondary meaning. As I comment on below (paragraph 6.18) I consider that "allsports" is a descriptive term. If the

Complainant was relying on unregistered rights through the establishment of goodwill and reputation in “allsports” then I would have been required to satisfy myself that this term had acquired a secondary meaning, as being distinctive of the Complainant, at least in relation to certain goods or services. However, as the Complainant is relying on its registered rights alone I do not have to consider this. The UKIPO was satisfied through evidence of use during the prosecution of the trade marks that “allsports” was distinctive at that time of the goods for which registration was sought.

- 6.7 In this respect, I note that there is some suggestion from the Respondent that the trade marks are vulnerable to cancellation for non-use. The extent of use of the “allsports” mark by the Complainant is not relevant to the issue of Rights where reliance is placed only on registered trade marks. The Complainant had subsisting registered trade mark rights for the “allsports” mark at the time of its complaint which I consider is sufficient for the Complainant to establish Rights in the “allsports” name under the Policy. However, the extent of the Complainant’s use of the “allsports” mark is relevant to whether the Domain Name, in the hands of the Respondent, is an Abusive Registration on which I comment below.
- 6.8 Accordingly, on the basis of the Complainant’s registered trademarks I find that the Complainant has Rights in a name or mark which is identical or similar to the Domain Name.

Abusive Registration

- 6.9 It therefore has to be considered whether the Domain Name, in the hands of the Respondent, is an Abusive Registration. Paragraph 1 of the Policy defines Abusive Registration as a domain name which either:
- i. was registered or otherwise acquired in a manner which, at the time when the registration 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.
- 6.10 It is sufficient to satisfy either of the limbs for there to be a finding of an Abusive Registration.

Abusive Registration under Paragraph 1(i) of the Policy

- 6.11 Paragraph 3(a) of the Policy sets out a non-exhaustive list of factors which may be evidence that the Domain Name is an Abusive Registration under Paragraph 1(i) of the Policy as follows:
- i. Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily:
 - A. for the purposes of selling, renting or otherwise transferring the Domain Name to the Complainant or to a competitor of the Complainant, for valuable consideration in excess of the Respondent's documented out-of-pocket costs directly associated with acquiring or using the Domain Name;

B. as a blocking registration against a name or mark in which the Complainant has Rights; or

C. for the purpose of unfairly disrupting the business of the Complainant.

6.12 The Complainant appears to rely on Paragraphs 3(a)(i)A and 3(a)(i)B of the Policy in its complaint and reply. In particular the Complainant relies on the fact that the Domain Name has not been used since its acquisition in July 2007 (save in relation to parking pages, the content of which is disputed between the parties) as being indicative that the Respondent registered the Domain Name with the sole intention of selling it at a profit.

6.13 It is important to bear in mind when considering Paragraph 3(a)(i) of the Policy that it relates to the Respondent's motives at the time of registration of the Domain Name. It is an intrinsic part of this that for there to be an Abusive Registration under paragraph 1(i) of the Policy, it must be established that the Respondent had knowledge of the Complainant and/or its rights at the time of registration of the Domain Name.

6.14 In this respect, the Respondent states that he was unaware of the Complainant at the time of the registration of the Domain Name and only became aware of the Complainant when the Complainant's representatives wrote to him in 2010. The Complainant responds that this is unlikely given that the Complainant is a leading UK specialist retailer of branded and own brand sports and casual wear with over 500 stores across the UK.

6.15 To help determine the Respondent's knowledge at the time of registration of the Domain Name in July 2007 I consider it relevant to consider the Complainant's use of the "allsports" mark at that time. The Complainant states that it acquired the assets of All Sports Limited following its administration in 2006. I note that the entry from the Complainant's website (Exhibit 4 to the response) states that it purchased over 70 stores from Allsports in 2005. However, leaving aside the exact date of the acquisition, there is no evidence that "allsports" has been used by the Complainant following the acquisition. In response to the Respondent's assertion of non-use of the trade marks, the Complainant says that "some use" of the trade marks has been made post acquisition, but does not specify what or provide any evidence of the same. Further the Complainant says it has "firm plans to revive the allsports brand" which indicates that the Complainant has not used this as a trading brand name post acquisition. This is why, no doubt, the Complainant has not relied on any unregistered rights to establish Rights under the Policy.

6.16 With this in mind, the fact that the Complainant may be a leading UK specialist retailer of sports and casual wear does not necessarily mean that the Respondent would be aware of the allsports brand or the Complainant's rights to this brand on registration of the Domain Name the year after the acquisition (or possibly later if the acquisition was in 2005). The Complainant states that given the previous presence of allsports branded stores on the high street, the Respondent would have been aware of the brand. However, by the time of registration of the Domain Name the brand and these stores had disappeared from the high street.

6.17 In determining the Respondent's knowledge at the time of registration of the Domain Name it is also relevant to consider the Respondent's given reasons for

registering the Domain Name. The Respondent states that the Domain Name was registered because of its development and secondary market potential of being a generic descriptive domain name wanted by many businesses.

- 6.18 In my view “allsports” has a descriptive nature and is a term which can be used in connection with “all sports”. In this connection I note that a search I carried out on the Complainant’s website using “allsports” brought up a branded “Allsport Capri Pant” and a search using “all sports” brought up a variety of results relating to various sport clothing and equipment. These results are illustrative of the descriptive nature of this term. Indeed, the trade mark registrations were only obtained through evidence of use submitted during the registration process that “allsports” was distinctive of the goods for which registration was sought. However, “allsports” is not a mark which is the exclusive preserve of the Complainant. The Complainant has adduced evidence of trade mark registrations which contain “allsports” as part of the mark and the Respondent has adduced evidence of company and trading names containing “allsports”. Indeed the Complainant appears to accept that there are companies trading under “allsports”, albeit in different business areas to the Complainant.
- 6.19 It is for the Complainant to prove on the balance of probabilities that there was an Abusive Registration under Paragraph 3(a)(i) of the Policy, including that the Respondent was aware of the Complainant’s Rights at the time of registration of the Domain Name. In this case, I am satisfied with the Respondent’s explanation as to why he registered the Domain Name given the descriptive nature of “all sports”. The Respondent has stated that he registered the Domain Name with the intention of selling it to one of the many businesses he says would be interested in it because of its descriptive nature. There is nothing, in itself, objectionable under paragraph 3(a)(i) of the Policy about trading in domain names so long as the Respondent’s motive at the time of registration of the Domain Name was not to sell the Domain Name to the Complainant or to a competitor of the Complainant at a profit. In this case, the Complainant has adduced no evidence of this. I also do not consider that the Respondent was aware of the Complainant’s Rights in “allsports” at the time of registration of the Domain Name, given that the Complainant had ceased use of this mark in the year before the Domain Name was registered (if not earlier).
- 6.20 Accordingly, having weighed all the evidence, I do not consider that the Complainant has proved on the balance of probabilities, that the Respondent was aware of the Complainant at the time of registration of the Domain Name and that the Respondent registered the Domain Name with the intent of selling it at a profit to the Complainant (or a competitor of the Complainant) or as a blocking registration or for the purposes of unfairly disrupting the business of the Complainant.
- 6.21 I therefore do not consider that the Complainant has established that there is an Abusive Registration under Paragraph 1(i) of the Policy.

Abusive Registration under Paragraph 1(ii) of the Policy

- 6.22 There is a non-exhaustive list of factors under the Policy which may be evidence that the Domain Name is an Abusive Registration including:
- (a) Paragraph 3(a)(ii): Circumstances indicating that the Respondent is using or threatening to use the Domain Name in a way which has confused or is likely to confuse people or businesses into believing that the Domain Name is registered to, operated or authorised by or otherwise connected with the Complainant.

(b) Paragraph 3(a)(iii): The Complainant can demonstrate that the Respondent is engaged in a pattern of registrations where the Respondent is the registrant of domain names (under .uk or otherwise) which correspond to well known names or trade marks in which the Respondent has no apparent rights, and the Domain Name is part of that pattern.

6.23 Paragraph 3(b) of the Policy makes it clear that failure on the Respondent's part to use the Domain Name for the purposes of email or a web site is not in itself evidence that the Domain Name is an Abusive Registration.

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

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

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

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

(b) Paragraph 4(a)(ii): The Domain Name is generic or descriptive and the Respondent is making fair use of it.

(c) Paragraph 4(d): Trading in domain names for profit, and holding a large portfolio of domain names, are of themselves lawful activities. The Expert will review each case on its merits.

(d) Paragraph 4(e): Sale of traffic (i.e. connecting domain names to parking pages and earning click-per-view revenue) is not of itself objectionable under the Policy. However, the Expert will take into account: i. the nature of the Domain Name; ii. the nature of the advertising links on any parking page associated with the Domain Name; and iii. that the use of the Domain Name is ultimately the Respondent's responsibility

6.25 The evidence of use of the Domain Name that I have is as follows:

(a) The archived web-page at:
web.archive.org/web/20070708203413/http://www.allsports.co.uk said to be from 8 July 2007, a few days after the Domain Name was registered by the Respondent.

The Respondent says this archived webpage is an example of previous parking pages for the Domain Name which the Respondent asserts all displayed various generic sports and fitness related links and did not display any links related to the Complainant or its competitors. The Complainant says that this does not sufficiently demonstrate how the Domain Name has been previously used by the Respondent, and there is no evidence to show that the Domain Name has not featured such sponsored links. However, the burden of proof is on the Complainant to establish an abusive use of the Domain Name and in this

respect I will only consider the evidence that has been adduced on use of the Domain Name as set out in this paragraph 6.25.

(b) The use of the Domain Name on 20 October 2010 to direct to www.sporthaven.com. The Respondent disputes such use took place and I will consider this further at paragraph 6.28.

(c) The use of the Domain Name on 25 November 2010 to point through to a parking page with a search engine box.

6.26 I have found that the Respondent was not aware of the Complainant's Rights in "allsports" when the Domain Name was registered. The Complainant has not used "allsports" as a trading brand since registration of the Domain Name. Accordingly, I do not consider that the Respondent would have been aware of the Complainant's Rights in "allsports" until it received the letter before action from the Complainant's representatives, which was sent on 19 October 2010. Accordingly, I find that the uses of the Domain Name at 6.25(a) and (b) above were made when the Respondent was unaware of the Complainant's Rights in "allsports"¹.

6.27 In relation to the archived webpage of 8 July 2007, this contains links to nutritional supplements, health and fitness training, tickets for sporting events and various training programmes. I do not regard the use of the Domain Name on 8 July 2007 to take unfair advantage of or be unfairly detrimental to the Complainant's Rights. The links are generic in nature and do not appear to relate to the Complainant or its competitors.

6.28 The Complainant asserts that on 20 October 2010 the Domain Name was used to resolve to www.sporthaven.com which provides information relating to sport and features sponsored links, some of which relate to sale of sporting articles and goods from competitors of the Complainant. The Respondent disputes that the Domain Name was used to resolve to this site. The Complainant has submitted a witness statement from Ms Rachel Hearson of the Complainant's representative (Exhibit 5 of the response) that the Domain Name was used in this way. Whilst the Respondent's denial may be genuine, I accept the Complainant's evidence on this point.

6.29 The captured page at www.sporthaven.com on 20 October 2010 shows a list of links to various sports, featured player biographies and various sponsored links relating to sports and sports equipment, such as golf clubs, football jerseys, tennis shoes and baseball gloves. However, the Complainant has not adduced any evidence as to the content of these sponsored links, other than a bare assertion that some of these sponsored links relate to sale of sporting articles and goods from competitors of the Complainant. On the face of it the sponsored links are relatively generic in nature, and without evidence of the content of them, I am unable to find as a matter of fact that these related to competitors of the Complainant.

6.30 I also have to consider paragraph 3(a)(ii) of the Policy which relates to 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

¹ The letter from the Complainant's representatives was sent on 19 October 2010. I do not consider that this would have been received by 20 October 2010, when the use of the Domain Name at paragraph 6.25(b) was made.

that the Domain Name is registered to, operated or authorised by or otherwise connected with the Complainant.

6.31 In this case I do not consider that the Respondent's use of the Domain Name to resolve to www.sportshaven.com would be likely to cause confusion that the Domain Name is registered to, operated or authorised by or otherwise connected with the Complainant. The Complainant operates from the domain name jdsports.co.uk and is not using "allsports" as a trading name or brand. There is no evidence whatsoever that in October 2010 the purchasing public recognised "allsports" in connection with the goods or business of the Complainant. It is generally accepted that paragraph 3(a)(ii) of the Policy may cover initial interest confusion, where internet users are likely to visit the Respondent's site in the expectation of finding the Complainant, for example in response to a search engine request or an educated guess as to the Complainant's domain name. In this case I do not consider that the Respondent's site would attract such visitors since the Complainant is not using the "allsports" mark in connection with its business or goods.

6.32 I find that there is no evidence of the Respondent's use of the Domain Name in connection with links to the Complainant's competitors and there is no initial interest confusion by internet users that the Domain Name is registered to, operated or authorised by or otherwise connected with the Complainant. I regard the Respondent's uses of the Domain Name on 8 July 2007 and 20 October 2010 to be fair in accordance with paragraph 4(a)(i)C of the Policy.

6.33 Whilst I do not need to go further than this, I would also comment that I would have regarded the use of the Domain Name on 20 October 2010 to be fair, even if the www.sportshaven.com page did contain sponsored links to competitors of the Complainant, because such use took place when the Respondent was unaware of the Complainant's Rights. In the Appeal Panel decision in DRS 04962 (*MySpace Inc v Total Web Solutions Limited*) it was stated: *"To date experts and Appeal panels have reasonably consistently taken the view that if a registrant acquires a domain name in advance of the coming into existence of the complainant's rights, the registrant is entitled in principle to hold onto the domain name and to use it, notwithstanding that confusion of the 'initial interest' variety may be inevitable. Similarly, experts and Appeal panels have concluded that in such circumstances it is not of itself abusive for the registrant to demand a high price from the complainant for transfer of the domain name in recognition of its enhanced value. Problems only arise for the registrant if he actively does something to take advantage of his position. In the <iTunes.co.uk> case, for example, the registrant sought to rack up the price by threatening to transfer the domain name to a competitor of the complainant."*

Whilst this complaint differs in that the Respondent did not acquire the Domain Name in advance of the coming into existence of the Complainant's Rights, I have found that the Respondent acquired the Domain Name 'innocently' without knowledge of the Complainant's Rights. In such circumstance I regard the Respondent's use of the Domain Name to point through to a holding page to be fair use of the Domain Name in accordance with paragraph 4(a)(i)C of the Policy, even if it contained sponsored links to the Complainant's competitors. This is also consistent with the statement of the Appeal panel in DRS 05856 (*Deutsche Telekom AG v Lammtara Multiserve Limited*): *"Abusive Registration connotes culpable behaviour akin to knowing wrongdoing"*.

- 6.34 In this respect, as set out at paragraph 6.25(c), after notification of the Complainant's rights, the Respondent directed the Domain Name to a parking page with a plain search box. I do not regard this to be an objectionable use of the Domain Name.
- 6.35 The parking page also states "this domain may be for sale", thereby inviting offers for the sale of the Domain Name. The Respondent has made it clear that he registered the Domain Name with the intention of selling it, because of its descriptive capability. In this respect, I do not consider that any significance can be placed on the fact that the Respondent has not used the Domain Name since registration. As Paragraph 3 (b) of the Policy makes clear failure on the Respondent's part to use the Domain Name for the purposes of email or a web site is not in itself evidence that the Domain Name is an Abusive Registration. Further, paragraph 4 (d) of the Policy makes it clear that trading in domain names for profit is of itself a lawful activity. There is no evidence, for example, of the Respondent inflating the price of the Domain Name for improper reason, after notification of the Complainant's Rights. Accordingly, I do not consider that the Respondent has done something to take unfair advantage of or to exploit his position after notification of the Complainant's Rights.
- 6.36 The Complainant relies on the three previous successful complaints against the Respondent as an indication that the Respondent has a pattern of abusive registrations. Paragraph 3(a)(ii) of the Policy refers to a pattern of registrations where the Respondent is the registrant of domain names (under .uk or otherwise) which correspond to well known names or trade marks in which the Respondent has no apparent rights, and the Domain Name is part of that pattern. The Complainant has provided no evidence in relation to this, for example of the other domain names owned by the Respondent. The significance of the previous cases against the Respondent is whether there is a presumption of Abusive Registration, which I have dealt with at paragraph 6.3 above, and the fact that there have been previous findings of bad faith registrations against the Respondent, which I have taken into account when weighing the evidence.
- 6.37 I therefore do not find that there is an Abusive Registration under paragraph 1(ii) of the Policy.

7. Decision

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