

**DISPUTE RESOLUTION SERVICE**

**D00010558**

**Decision of Independent Expert**

**Coffee Conscience Ltd**

and

**Escrivo Limited**

**1. The Parties:**

Lead Complainant: Coffee Conscience Ltd  
Glenbeg-Upper Floor  
55 Ardbeg Road  
Ardbeg  
Isle of Bute  
Rothesay  
Argyll & Bute  
PA20 0NL  
United Kingdom

Respondent: Escrivo Limited  
18 Queen Street  
Edinburgh  
Lothian  
EH2 1JX  
United Kingdom

**2. The Domain Name:**

coffeeconscience.co.uk

**3. Procedural History:**

20 November 2011 16:48 Dispute received  
21 November 2011 08:52 Complaint validated  
21 November 2011 08:56 Notification of complaint sent to parties  
08 December 2011 01:30 Response reminder sent

12 December 2011 09:55 Response received  
12 December 2011 09:55 Notification of response sent to parties  
15 December 2011 01:30 Reply reminder sent  
19 December 2011 08:16 Reply received  
19 December 2011 08:18 Notification of reply sent to parties  
19 December 2011 08:25 Mediator appointed  
22 December 2011 12:04 Mediation started  
11 January 2012 17:02 Mediation failed  
11 January 2012 17:03 Close of mediation documents sent  
23 January 2012 01:33 Complainant full fee reminder sent  
25 January 2012 11:41 Expert decision payment received

## **4. Factual Background**

The Complainant, Coffee Conscience Limited, was incorporated at Companies House in Scotland on 20 September 2011. The sole director of the company is Mr Billy Miller. The Complainant says that it is a supplier of coffee, tea, beverage ingredients, equipment and services.

The Respondent, Escrivo Limited, is an internet consultancy business that was incorporated in January 2004. The Respondent registered the Domain Name on 31 October 2012 on behalf of a client, Caber Coffee Limited.

Caber Coffee Limited was incorporated on 28 August 2007. It is a wholesale supplier of beverage-related goods and services and it decided to launch a new brand 'Ethyco', which is a fair trade product. Mr Miller was retained by Caber Coffee Limited as a consultant from April 2011 until 18 September 2011, when he terminated his consultancy arrangement with immediate effect.

The Domain Name is directed to a website at [www.ethyco.co.uk](http://www.ethyco.co.uk) which is controlled by Caber Coffee Limited.

## **5. Parties' Contentions**

### **5.1 Complainant**

The Complaint, so far as is material, is summarised below.

#### **5.1.1 Rights**

The Domain Name is identical or similar to the Complainant's name.

The Complainant, Coffee Conscience Limited, is a supplier of coffee, tea, beverage ingredients, equipment, and services to the catering industry within Scotland and the UK with a bias towards ethical traded, Fairtrade, and Rainforest Alliance products. It was incorporated on 20th September 2011.

#### **5.1.2 Abusive Registration**

Mr Miller, who is the sole director of the Complainant, asked a former work colleague to set up a company website and register coffeeconscience.co.uk as a domain name for the company. On 28 October 2011 an IT colleague established that the domain name was available. On 4 November 2011 Mr Miller was told that the domain name

coffeeconscience.co.uk ('the Domain Name) had been registered to a company called Escrivo Limited ('Escrivo').

The Domain Name was registered by Escrivo on 31 October 2011. Escrivo is the hosting site for Caber Coffee Limited ('Caber Coffee') and Ethyco. There is a close family connection between Escrivo and Caber Coffee. The Managing Directors of the two companies are brothers, namely Cameron and Findlay Leask. Cameron Leask may have a previous relationship with Caber Coffee, perhaps in a (silent) director capacity.

Mr Miller worked as a consultant for Caber Coffee and believes there was clear intention by the web hoster, Escrivo, to disrupt the business, to hold the Domain Name for unethical purposes, and to register the Domain Name with a view of possibly diverting business or using it for a competitive advantage.

The Complainant contends that the registration by Escrivo of various domain names which incorporate the name Coffee Conscience, including the .co.uk; .com, .org, and .net domains, confirms the intention to prevent any other domain names being available for the Complainant.

The Complainant's business had previously formatted printed materials with the Domain Name which caused suppliers, including an ethical trading foundation, inconvenience and cost to the Complainant's business and theirs. This practice of using newly registered company names to prevent trading is both unethical and unprofessional, and an attempt to cause malicious harm to another organisation.

The Complainant contends that the intention of Escrivo was to prevent use of the Domain Name by the Complainant and to cause malicious disruption.

The Complainant seeks a transfer of the Domain Name.

## **5.2 Respondent**

The Response, so far as is material, is summarised below. It should be noted that the Respondent set out in some detail the circumstances in which Mr Billy Miller (the Complainant's director) became a consultant to Caber Coffee, as well as its description of how that relationship ended. A lot of the detail is not relevant to the issues that fall to be determined under the DRS and the contentions on peripheral issues are only briefly summarized below.

Escrivo Limited ("Escrivo") is a provider of internet consultancy services. Escrivo has been trading for over 9 years and was incorporated, under company number SC238772, in January 2004. Its main website is at [www.escrivo.com](http://www.escrivo.com).

Caber Coffee Limited ("Caber Coffee") is a wholesale supplier of beverage-related goods and services. Caber Coffee has been trading for over 23 years and was incorporated, under company number SC329912, on 28 August 2007. Its main website is [www.cabercoffee.com](http://www.cabercoffee.com). Caber Coffee has a broad client base including local authorities, universities and further education colleges, NHS, caterers, hotels, restaurants and cafes and a wide variety of commercial organisations.

Since establishing its first website some years ago, Caber Coffee has retained the services of Escrivo to develop and service its web presence. The managing director of Escrivo, Cameron Leask, has a close family relationship with the three directors of Caber Coffee: Maureen, Dughall and Findlay Leask.

On 31 October 2011, Escrivo was instructed by Caber Coffee to register a variety of domains related to the phrase "Coffee Conscience" including the Domain Name. Escrivo registered the Domain Name on 31 October 2011. In error, the Domain Name and the other domains were registered in the name of Escrivo and not Caber Coffee. Escrivo has transferred registrant details on the other domains to Caber Coffee. Escrivo intends to transfer the registrant details for the Domain Name to Caber Coffee once the DRS process is complete. The substantive response to the Complaint is submitted by Escrivo acting for itself and in its capacity as agent for Caber Coffee.

The Respondent contends that Caber Coffee devised and introduced a new brand of coffee, "Ethyco", which is a fair trade product which seeks to promote sustainability and community benefit. The new brand is promoted with use of a strap line and concept "COFFEE with CONSCIENCE". Caber Coffee have registered various domain names relating to its new brand "Ethyco" and its lead strap line and concept "COFFEE with CONSCIENCE". This forms part of Caber Coffee's effort to promote, develop and protect its new brand, strap line and concept.

On 9 November 2011, 12 days before the Complaint was lodged by the Complainant, Escrivo completed the development of a "holding page" website at domain name [www.ethyco.co.uk](http://www.ethyco.co.uk) ("Ethyco Site") where a range of Ethyco products being developed and promoted by Caber Coffee can be viewed. Escrivo also redirected all "Ethyco" and "Coffee Conscience" domains registered on behalf of Caber Coffee, including the Domain Name, to the Ethyco Site.

Escrivo are in the process of designing a more complete website on behalf of Caber Coffee with a view to promoting their new Ethyco brand and products and offering online services to their customers. This is expected to be completed in the near future.

In terms of the relationship between Mr Miller and Caber Coffee, the Respondent contends as follows:-

- Mr Miller was introduced to Caber Coffee by Mr Ian McRobbie, its National Sales Manager.
- Initial contact was made in November 2010 and a discussion about a possible consultancy took place in early 2011.
- In April 2011, Mr Miller was contracted by Caber Coffee to provide consultancy services.
- On 19 September 2011 Mr Miller resigned as a consultant with immediate effect. He represented in an e-mail that he was no longer able to provide any consultancy services due to other business interests and commitments. He made no reference to any intention to set up a new coffee business in competition with Caber Coffee.

The Respondent contends that, in the course of providing consultancy services, Mr Miller was involved in devising the new "Ethyco" brand which was specifically targeted at consumer sectors interested in fair trade, sustainability and community benefit. He was also in contact with Escrivo in their capacity as provider of internet consulting services to Caber Coffee.

The Respondent's case is that the decision to proceed with the new brand was made by Caber Coffee in early May 2011. It is said that, acting in his capacity as

consultant and representative of Caber Coffee, Mr Miller presented the new brand to the University Caterers Organisation on 18 and 19 May 2011, which is described as 'an important marketing opportunity with an influential industry body representing many of Caber Coffee's largest customers who were most likely to be interested in the new brand.'

The Respondent says that, after Mr Miller resigned, Caber Coffee continued with the development of the "Ethyco" brand and the lead strap line 'COFFEE with CONSCIENCE', which involved a substantial investment of time and financial resources. The Respondent contends that the following steps were taken:-

- Escrivo registered a series of domain registrations containing the "Ethyco" brand name on 12 September 2011.
- Caber Coffee contacted Escrivo on 14 October 2011 to discuss the development of the website for the Ethyco brand. The Respondent relies upon the artwork that was provided to show the use of the "COFFEE with CONSCIENCE" lead strap line and concept.
- On 31 October 2011 and 1 November 2011 Caber Coffee approached a number of customers to promote the Ethyco brand, and emailed promotional posters using the lead strap line 'COFFEE with CONSCIENCE'.
- On 9 November 2011, Escrivo completed development of a "holding page" website for the new Ethyco brand and made the appropriate arrangements for all of the "Ethyco" and "coffee conscience" domains that had been registered on behalf of Caber Coffee including the Domain Name, to be directed towards the Ethyco Site.

The Respondent says that on 28 October 2011 Mr McRobbie and Caber Coffee agreed to terminate his employment with immediate effect. The Respondent says that Caber Coffee only subsequently discovered the existence of the Complainant company and the fact that Mr McRobbie had gone to work for the Complainant.

The Response sets out the Respondent's case on a number of peripheral issues, including:-

- the negotiations said to have taken place between with Mr Miller and Mr McRobbie about the possible acquisition of an interest by them in Caber Coffee;
- the discussions said to have taken place with Mr McRobbie about the terms of his exit from Caber Coffee; and
- Mr McRobbie's conduct before he left Caber Coffee.

The suggestion is that Mr McRobbie acted in breach of his obligations to Caber Coffee whilst employed by that business. The Respondent says that a data recovery exercise was carried out on computer equipment returned by Mr McRobbie on 28th October 2011. The Respondent puts it in these terms:-

*On 1 November 2011, one of the directors of Caber Coffee visited its IT support contractor to review the progress of the data recovery exercise. The possible existence of a new company and potential competitor, apparently described as "Coffee Conscience" was identified. Caber Coffee instructed their accountants to make inquiries. Their accountants subsequently confirmed that "Coffee Conscience Limited" had been incorporated at Companies House on 20 September 2011, with Mr Miller being the sole*

*director. The incorporation took place the day after he had submitted his resignation to Caber Coffee. Caber Coffee were not aware of the incorporation until this time i.e. it was not known to Caber Coffee on 31st October 2011, the date of registration of the Domain Name.*

The Respondent contends that Mr McRobbie diverted business opportunities away from Caber Coffee and he misrepresented to a third party that Caber Coffee had rebranded as "Coffee Conscience" and that the third party dealt with the Complainant on this basis. It is said that, in light of the "Ethyco" brands use of the lead strap line and concept "COFFEE with CONSCIENCE", there is a significant likelihood of third parties being misled.

The Respondent points out that the Complainant asserts "rights" to the Domain Name based on the company name Coffee Conscience Limited being registered prior to the Domain Name registration. The only other factor relied upon by the Complainant is the formatting of promotional materials. The Respondent says that it is not known whether the Complainant was trading as at 31st October 2011. The Respondent does not believe the registration and use of the Domain Name has resulted in any unfair detriment or caused damage to the Complainant's business.

The Respondent makes the following submissions:-

- the Domain Name was not registered on 31 October 2011 in order to prevent the Complainant from registering it, or in order to sell it to them for an inflated value;
- the existence of that business was not known to the Respondents until 1st November 2011;
- the Respondents are not seeking to disrupt the Complainant's business, divert business opportunities or otherwise gain an unfair advantage from their registration and/or use of the Domain Name;
- the registration and subsequent use of the Domain Name by the Respondents is fair and genuine.
- Caber Coffee has rights to "COFFEE CONSCIENCE", which pre-date the Complainant's asserted "rights". These rights are based on the development and adoption and promotion of the "Ethyco" brand, including the "COFFEE with CONSCIENCE" lead strap line and concept; and
- the registration of the name "Coffee Conscience Limited" and the Complaint is made in bad faith by the Complainant. The Respondent suggests that the Complainant's action may constitute reverse domain name hijacking.

In relation to paragraph 4(a)(i) of the DRS Policy, the Respondent submits that the Domain Name was registered and used by Caber Coffee in connection with a genuine offering of goods and services i.e. the promotion of Caber Coffee's Ethyco brand and that Caber Coffee is making fair use of the Domain Name.

In relation to paragraph 4(a)(ii) of the Policy, the Respondent submits that the Domain Name is generic in its description of the fairtrade Ethyco brand and product, "coffee with conscience". Caber Coffee is making fair use of the registration of the Domain Name by using it in connection with the Ethyco brand.

### **5.3 Reply**

The Reply, so far as is material, is summarised below.

The Complainant points out that the Domain Name is 'Coffee Conscience' and not the name 'Ethyco'. The Complainant makes a number of contentions about the phrase or strapline 'Coffee with Conscience', including:-

- the phrase is neither exclusive nor original to Caber Coffee;
- the phrase is a common and general phrase used within the global beverage industry when describing Fairtrade or ethical sourced coffee;
- the phrase appeared in the UK coffee market as early as 2004 by 'Ivory Beverages Ltd' which was co-owned and managed by Billy Miller, the original creator and author of this strapline to promote Fairtrade to national sector business;
- 'Coffee with Conscience' describes to end user consumers, the values of Fairtrade ingredients and the conscious decision to select Fairtrade over other beverage selections available;
- Green Bean Company and Java Republic both use the phrase/ similar derivatives to support their ingredients sales, which is evidence of common and general use. Cafebar Ltd also used the phrase 'Coffee with Conscience' to promote an existing brand called 'Sense' launched in 2006; and
- on a global perspective 'coffee with conscience' and 'coffee with a conscience' are common phrases in similar operating business supplying or retailing coffee.

The Complainant sets out where it disagrees with the Respondent's description of the consultancy arrangements between Mr Miller and Caber Coffee. It says:-

- Mr Miller acted as a general beverage consultant for Caber Coffee from 1 April 2011 to 19 September 2011;
- the first contact was in November 2011 [this presumably is meant to be a reference to November 2010] and the first formal meeting did not take place until 9 February 2011;
- Mr Miller was not contracted to Caber Coffee as no signed contract document was made available despite verbal requests;
- Mr Miller was engaged with many general consultancy tasks and not exclusively to devise a new 'Ethyco' brand for Caber Coffee; and
- the new brand of 'Ethyco' did not appear until June 2011 and any decision taken to proceed would not have taken place on or after 16 May 2011.

Commenting on the presentation given to clients by Mr Miller, the Complainant says that the presentation was created in Autumn 2010 (i.e. before Mr Miller's consultancy arrangement with Caber Coffee began) and was based on a concept developed in 2009, whilst working within the third sector, to seek ways to use the ethical principles of Fairtrade within third sector charities with the UK. It is claimed that the presentation was an extension of previous works created by Mr Miller and almost all attendees had previous working relationships with Mr Miller and were familiar with his work and industry knowledge.

The Reply sets out the Complainant's case on discussions about the termination of the consultancy arrangement, which is not a material issue in this dispute.

The Reply contains the following passage:-

*In the morning of 31 October 2011, Mr McRobbie commenced work with Coffee Conscience and made contact with existing, new, and potential clients advising of his decision to work with Coffee Conscience Ltd. Incoming calls*

*suggested that the customers of Coffee Conscience and Caber Coffee were aware of Coffee Conscience based on the industry 'jungle drums' which normally pursue the departure of an employee.*

The Complainant contends that during the DRS process, when the Complaint was known, a direct link appeared diverted Domain to 'Ethyco'.

The Complainant's case is that Mr McRobbie was appointed Sales Director for Coffee Conscience Limited on 31 October 2011 following his termination at Caber Coffee. The Complainant says that no suggestion has being received from any clients or potential clients of Coffee Conscience Limited to indicate that Mr McRobbie misrepresented himself in his duties for Coffee Conscience Limited.

The Complainant contends that Coffee Conscience Limited was incorporated in September 2011 and registered as a trading company. The Complainant relies upon an e-mail from the Royal Bank of Scotland dated 28 September 2011 to show that a trading account was opened on that date by the company.

The Complainant contends that Coffee Conscience Limited has a genuine offering of goods and services and it is prevented from use of the Domain Name, which was registered on 31 October 2011.

## **6. Discussions and Findings**

### **6.1 General**

In order for the Complainant to succeed it must prove to the Expert, on the balance of probabilities, that:

*it has Rights in respect of a name or mark which is identical or similar to the Domain Name; and*

*the Domain Name, in the hands of the Respondent, is an Abusive Registration as defined in Paragraph 1 of the Policy.*

The meaning of 'Rights' is defined in the Policy in the following terms:

*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.*

An Abusive Registration is defined in the Policy as follows:

*Abusive Registration means a Domain Name which either:*

*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*

*has been used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's Rights.*

A non-exhaustive list of factors which may be evidence of an Abusive Registration is set out in paragraph 3 of the Policy. A non-exhaustive list of factors which may be

evidence that the Domain Name is not an Abusive Registration is set out at paragraph 4 of the Policy.

## 6.2 Rights

The Complainant claims to have rights in the name Coffee Conscience which, for these purposes, is identical to the Domain Name. The issue is whether the Complainant has satisfied the burden that is upon it to prove, on the balance of probabilities, that it has rights in that name.

The Nominet DRS Expert Overview ('the Overview') states as follows:-

*[T]he relevant right has to be an enforceable right (i.e. a legally enforceable right). Bare assertions will rarely suffice. The Expert needs to be persuaded on the balance of probabilities that relevant rights exist. The Expert will not expect the same volume of evidence as might be required by a court to establish goodwill or reputation, but the less straightforward the claim, the more evidence the better (within reason – this is not an invitation to throw in the 'kitchen sink').*

Extensive guidance is offered to potential complainants on Nominet's website, including a section headed 'Information for Complainants' and a booklet is available that helpfully lists guidance questions which have been designed to give an idea of the information that is required in order to make an effective complaint. The text on Nominet's website states that the complainant should provide as much detail as possible together with supporting evidence because an expert will give much more weight to a claim that is supported by documentation. The following 'health warning' then appears:-

*You should bear in mind that the complaint is the one opportunity you have to submit evidence to the expert which he or she is obliged to look at in coming to a decision. If you fail to mention anything at this stage which is relevant to the dispute, it may have an effect on the outcome of the dispute.*

The Complainant in this case does not have the benefit of a registered mark. For the purposes of establishing an enforceable right in an unregistered mark the Complainant needs to show that it has used the mark and that the mark is relied upon to identify the origin of the goods. The Overview supports this proposition by stating that, in the case of an unregistered right, the Complainant will ordinarily need to produce evidence to show that (a) it has used the mark for a not insignificant period and to a not insignificant degree and (b) the mark is recognised by the purchasing trade/public as indicating the goods or services of the Complainant.

The Complainant set out its case on rights in these terms:-

*Coffee Conscience Ltd is a supplier of coffee, tea, beverages ingredients, equipment, and services to the catering industry within Scotland and the UK with a bias towards ethical traded, Fairtrade, and Rainforest Alliance products. Coffee Conscience Ltd was incorporated on 20th September 2011.*

*Our business had previously formatted printed materials with the domain name which has caused suppliers, including an ethical trading foundation, inconvenience and cost to our business and theirs.*

The Response laid down a challenge to the Complainant on the issues of rights in the following terms:-

*The Complainant asserts "rights" to the Domain Name based on the company name "Coffee Conscience Limited" being registered prior to the Domain Name registration. The only other factor relied upon by the Complainant is the formatting of promotional materials. It is not known whether the Complainant was trading as at 31st October 2011.*

The Complainant's reply to that challenge was as follows:-

*Coffee Conscience was incorporated in September 2011 and registered as a trading company. An e-mail from the Royal Bank of Scotland on 28/9/11 confirms the trading account.*

The documents supplied in support of the case on rights comprise (i) a Certificate of Incorporation showing that Coffee Conscience Limited was incorporated on 20 September 2011 and (ii) an e-mail from RBS dated 28 September 2011 confirming that a bank account had been opened in the name of Coffee Conscience Limited.

This evidence establishes that, as at the date of registration of the Domain Name, the Complainant had taken a number of preparatory steps, including incorporating the business entity and opening a bank account. It may also have formatted printed materials which contained references to the Domain Name, although no documents have been produced to back up that claim.

As the Overview confirms, the consensus view amongst the Experts is that the mere registration of a company name at the Companies Registry does not, of itself, give rise to any rights within the definition set out in the Policy.

Some insight into the limited extent of the trading activity of the Complainant is provided in paragraph 18 of the Reply:-

*In the morning of 31st October 2011, Mr McRobbie commenced work with Coffee Conscience and made contact with existing, new, and potential clients advising of his decision to work with Coffee Conscience Ltd. Incoming calls suggested that the customers of Coffee Conscience and Caber Coffee were aware of Coffee Conscience based on the industry 'juggle drums' which normally pursue the departure of an employee.*

There is a reference in this statement to 'existing clients' but the extent of the reputation of the Complainant, as at that date, appears to be based solely on 'industry jungle drums' following Mr McRobbie's departure from Caber Coffee. The Complainant's own case is that Mr McRobbie did not leave Caber Coffee until 28 October 2011.

The Complainant has failed to address many of the guidance questions set out by Nominet on the issue of rights, including the following:-

- How long have you been trading?
- How do you trade (do you sell products online or in a shop or by wholesale)?
- How well-known or successful has your business been?
- What are your sales figures?
- Tell us the history of your use of the name or mark.

- How do you use the name or mark now?
- Are you recognised by the name or mark?
- Have you used it in any publications or in any advertising?

The Complainant has said very little of any substance about the nature and extent of its trading activities. There is no evidence before the Expert that any goods or services were, in fact, supplied by the Complainant to any member of the public or trade prior to 31 October 2011. There is no evidence that the name Coffee Conscience was recognised by the purchasing public or trade as indicating the goods or services of the Complainant.

The burden of proof is on the Complainant to prove that it has rights and it has failed to satisfy that burden. The Expert is not satisfied, on the balance of probabilities, that the Complainant has rights in respect of a name or mark that is identical or similar to the Domain Name and on that basis the Complaint fails.

The Complainant says that the phrase 'Coffee with Conscience' is not exclusive to Caber Coffee and that the phrase is in use with other brands. The Complainant has produced some evidence to support the latter claim. The fact that third parties may have rights in that name is not directly relevant to the issue of the Complainant's rights in that name, and would if anything tend to harm the Complainant's contention that it owns rights in the name. There is an absolute requirement on the Complainant to prove it has rights in the name and it has clearly failed to do so.

### **6.3 Abusive Registration**

In light of the above finding, the Expert does not strictly need to determine whether the Domain Name, in the hands of the Respondent, is an Abusive Registration. However, for the sake of completeness and for the assistance of the Appeal Panel should this matter go further, the Expert has considered the contentions put forward by the parties on the issue of abusive registration.

#### Summary of the contentions

The Complaint does not specifically identify any of the factors that are listed in paragraph 3 of the Policy which may be evidence of an abusive registration. The Complainant puts its case on the basis that the Respondent had a clear intention:-

- to prevent the Domain Name being used by the Complainant (which amounts to an allegation of a blocking registration under paragraph 3(a)(i)B);
- to maliciously disrupt the Complainant's business (which amounts to an allegation of unfair disruption under paragraph 3(a)(i)C);
- to divert business and use the Domain Name for its own competitive advantage (which amounts to an allegation of confusion under paragraph 3(a)(ii)); and
- to hold the Domain Name for unethical purposes.

The Respondent denies that its registration and use of the Domain Name was abusive. It says that the registration of the Domain Name was part of Caber Coffee's effort to promote, develop and protect its new brand 'Ethyco' and the associated strap line 'Coffee with Conscience'. It says that the use of the Domain Name, which is directed to the Ethyco website operated by Caber Coffee, is consistent with the ongoing development of that brand.

The Respondent specifically relies upon paragraphs 4(a)(i) and 4(a)(ii) of the Policy as factors which may amount to evidence that it is not an abusive registration.

Paragraph 4(a)(i) reads as follows:-

*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;*
- B. been commonly known by the name or legitimately connected with a mark which is identical or similar to the Domain Name;*
- C. made legitimate non-commercial or fair use of the Domain Name; or*

Paragraphs 4(a)(ii) reads as follows:-

*The Domain Name is generic or descriptive and the Respondent is making fair use of it;*

The Response was filed by the Respondent on its own behalf and on behalf of Caber Coffee Limited and references below to the Respondent should, where the context admits, be read as references to both of those companies.

#### Factual matrix

It is common ground that Escrivo was acting as an internet services business and registered the Domain Name on behalf of its client, Caber Coffee. It is also common ground that the sole director of the Complainant, Mr Miller, acted in a consultancy role for Caber Coffee before he set up Coffee Conscience Limited. The relevant events take place over a fairly short time frame. The following facts are either accepted by both parties or clearly established on the face of the documents before the Expert:-

<b>Date</b>	<b>Event</b>
April 2011	Mr Miller commences his consultancy role with Caber Coffee.
18 September 2011	Mr Miller confirms in writing that he is unable to continue with the consultancy role with immediate effect.
20 September 2011	Coffee Conscience Limited is incorporated. Mr Miller is the sole director.
28 September 2011	A bank account is opened in the name of Coffee Conscience Limited.
28 September 2011	Mr Ian McRobbie's employment with Caber Coffee is terminated by agreement.
31 October 2011	The Domain Name is registered by the Respondent. Mr McRobbie joins Coffee Conscience Limited.
20 November 2011	The Complaint is received by Nominet.

As indicated above, the Response and the Reply contain large sections of text that are given over to peripheral issues, including:-

- whether there were negotiations with Mr Miller and Mr McRobbie about the possible acquisition of an interest in Caber Coffee;
- the circumstances in which Mr Miller decided to terminate the consultancy arrangement with Caber Coffee;

- whether Mr McRobbie attempted to negotiate an exit from Caber Coffee which included taking a division of the business; and
- whether Mr McRobbie acted in breach of his obligations to Caber Coffee whilst employed by that business.

These issues are irrelevant to the issue of abusive registration and it is therefore not necessary for the Expert to make any findings in relation to these points.

The Respondent says in clear terms, on two occasions in the Response, that it had no knowledge of Coffee Conscience Limited prior to the registration of the Domain Name:-

*Caber Coffee were not aware of the incorporation until this time, i.e. it was not known to Caber Coffee on 31<sup>st</sup> October 2011, the date of registration of the Domain Name – paragraph 26.*

*The existence of that business was not known to the Respondents until 1<sup>st</sup> November 2011 – paragraph 29.*

The Respondent's case is that it conducted a data recovery exercise on the computer equipment that Mr McRobbie handed back when he left on 28 October 2011. It says that it was only on 1 November 2011 that evidence emerged of the possible existence of a new company and potential competitor called Coffee Conscience. The Respondent has produced an e-mail from its accountants dated 1 November 2011 which attached a report from Companies House (also dated 1 November 2011) giving the details of Coffee Conscience Limited.

The Complainant in its Reply had an opportunity to refute the suggestion that the Respondent had no knowledge of the Complainant's business at the date of registration of the Domain Name, but it did not do so. This is a very surprising omission given what it says about the Respondent's abusive intent. It is difficult to see how the relevant abusive intent can be said to exist on the part of the Respondent without some knowledge of the Complainant's business.

There is no evidence to show that the Respondent had knowledge of the Complainant's activities until 1 November 2011. The e-mail referred to above supports the Respondent's case that it only discovered the existence of Coffee Conscience Limited on 1 November 2011 and that was only because it was actively looking for information. There was certainly no mention in Mr Miller's e-mail dated 18 September 2011, when he terminated the consultancy arrangement with Caber Coffee, that his intention was to set up a business called Coffee Conscience.

As mentioned in section 6.2 above, there is no evidence to show that the Complainant used the name (in the sense that would be required to demonstrate goodwill) prior to the registration of the Domain Name on 31 October 2011. Nor is there any evidence before the Expert to show that the Respondent was aware that the Complainant had plans to make use of the name Coffee Conscience in the future.

Whilst there is no absolute requirement for the Respondent to prove that it has rights in the name (unlike the Complainant who must prove that it does) it is clearly relevant to consider and test the explanation that is put forward by the Respondent for choosing that particular name as a domain name. The explanation put forward by the Respondent, which is set out above, is certainly plausible and it finds some support in the evidence.

Mr Miller accepts that in May 2011, whilst acting as a consultant to Caber Coffee, he gave a presentation and the slides (which the Respondent has produced) do refer to a new brand, which at that time was 'Ethico', that was to be launched by Caber Coffee. The Complainant has produced an e-mail dated 6 June 2011 in which Mr Miller points out to Caber Coffee there may be problems with the name Ethico as it had been registered as a trade mark by an Australian business. Mr Miller suggests the brand name 'Ethyco' as an alternative and presses Caber Coffee to agree on the finished look in order to meet the production deadlines and fair-trade approval. The Respondent has produced artwork dated 13 and 14 October 2011 which is branded Ethyco and contains the strapline 'Coffee with Conscience'. The Respondent has also produced promotional material that it says was sent to customers on 31 October 2011 and 1 November 2011 that refers to the Ethyco brand and the Coffee with Conscience strapline.

The Complainant points out that this dispute is not about the brand name Ethyco, which, of course, is right. However, the evidence shows that the strapline 'Coffee with Conscience' was being used as part of the Ethyco brand. The Complainant contends that the phrase Coffee with Conscience is not exclusive to Caber Coffee and says it is a common phrase used in the same trading market by other companies. That may or may not be the case but it is not a matter that needs to be determined in order to resolve this dispute. The Expert has made a finding, based on the evidence, that the Respondent had no knowledge of the Complainant's business at the date of registration of the Domain Name. The explanation put forward by the Respondent for the choice of the name Coffee Conscience as a domain name is plausible and is supported by a number of documents. This amounts to further evidence of a lack of abusive intent on the part of the Respondent.

The evidence shows that Caber Coffee made genuine plans to use the Domain Name in connection with a genuine offering of goods or services and those plans were arrived at wholly without reference to the Complainant's business or rights. This is in essence what is required in order to rely upon paragraph 4(a)(i) of the Policy. There is no evidence at all to suggest that the Respondent's plans were not genuine, in the sense that they were made in order to try and defeat a complaint under the DRS or were designed to take unfair advantage of or damage the Complainant's rights or business.

The Complainant has failed to prove that the Domain Name, in the hands of the Respondent, is an Abusive Registration.

#### Reverse Domain Name Hijacking

The Respondent contends that the Complaint was brought in bad faith. Paragraph 16(d) of the Procedure states that if an Expert finds that the complaint was brought in bad faith, for example in an attempt at Reverse Domain Name Hijacking, the Expert shall state this finding in the Decision. Reverse Domain Name Hijacking is defined to mean:-

*using the DRS in bad faith in an attempt to deprive the Respondent of a Domain Name.*

A finding of 'bad faith' is a serious finding and it needs to be clearly supported on the evidence. The evidence does not establish that the Complainant has used the DRS in bad faith in an attempt to deprive the Respondent of the Domain Name. Whilst there is no evidence that, prior to the registration of the Domain Name, the Complainant had started trading under the name Coffee Conscience, it is clear on

the evidence that a number of preparatory steps had been taken. In the Expert's view, the evidence demonstrates that the Complainant had an intention to start trading under the name Coffee Conscience. The Complainant has not succeeded but it does not follow that the DRS has been used in bad faith.

## **7. Decision**

For the reasons set out above, the Expert makes the following findings:-

- The Complainant has failed to prove that it has rights in a name which is identical or similar to the Domain Name.
- The Complainant has failed to prove that the Domain Name, in the hands of the Respondent, is an Abusive Registration.

In light of the aforesaid findings, the Expert directs that no action be taken in relation to the Domain Name.

**Signed Andrew Clinton**

**Dated 24 February 2012**