

# **DISPUTE RESOLUTION SERVICE**

**D00018941**

## **Decision of Independent Expert**

indigospring (Scotland) Ltd

and

Ms Morag Davidson

### **The Parties**

Complainant: indigospring (Scotland) Ltd  
272 Bath Street  
Glasgow  
Lanarkshire  
G2 4JR  
United Kingdom

Respondent: Ms Morag Davidson  
103 Oldwood Place  
Livingston  
West Lothian  
EH54 6US  
United Kingdom

### **The Domain Name**

indigospring.co.uk

## **Procedural History**

1. I can confirm that I am independent of each of the parties. To the best of my knowledge and belief, there are no facts or circumstances, past or present, or that could arise in the foreseeable future, that need be disclosed as they might be of a such a nature as to call in to question my independence in the eyes of one or both of the parties.
  
2. The following is a brief summary of the procedural steps in this case, -
  - 30 May 2017 Dispute received by Nominet;
  - 31 May 2017 Complaint validated and notification of complaint sent to the parties;
  - 05 June 2017 Response received and notification of response sent to parties;
  - 05 June 2017 Reply received and notification of reply sent to parties;
  - 07 June 2017 Mediator appointed;
  - 08 June 2017 Mediation started;
  - 15 Sept. 2017 Mediation failed;
  - 19 Sept. 2017 Expert decision payment received.

## **Factual Background**

3. The Domain Name was registered by the Respondent in 2005 for use by a partnership which she carried on with a Mr Kevin Davidson ('Mr Davidson'). The partnership business was information technology (IT) consultancy. The partnership traded as 'indigospring' until early 2011 when it was dissolved. The business continued to trade under the same name, but was carried on by the Complainant from April 2011. The Respondent resigned as a director of the company in January 2017 and since then Mr Davidson has been its sole director. In May 2017, the Respondent took control of the management and administration of the Domain Name, excluding Mr Davidson.

## **Parties' Contentions**

4. The Complaint alleges, -
  - 4.1 The Domain Name has been exclusively used since 2005 by 'indigospring', an IT consultancy business. Until 2011 that business was a partnership between the Complainant and the Respondent.
  - 4.2 Since April 2011, the business has been carried on by the Complainant, a limited company. The Respondent was a director of the company but resigned in January 2017. Mr Davidson is now its sole director. The company uses the website indigospring.co.uk and has always traded as 'indigospring'.
  - 4.3 The Domain Name was first registered by the Respondent and all registration and renewal costs associated with it have been paid for either by the partnership or by the Complainant, which is the only registered company using the name 'indigospring'.
  - 4.4 On 26 May 2017 Mr Davidson was informed by the support service of 123 Reg that the Domain Name had been removed from his control following a claim by the 'true owner' of the Domain Name.
  - 4.5 The Respondent is the person who has made this claim and 123 Reg has given her control of the Domain Name.
  - 4.6 However, when she resigned as a director of the company, the Respondent stated that she wanted nothing further to do with it. She does not trade as an IT consultant and she has a previous history of deliberately disrupting the company's business by powering off the computer servers between 12 February 2017 and 17 February 2017.

4.7 'indigospring' is a small business and relies on contact with customers via its website and by email, both of which have been used in advertising and in print since 2005. Removal of either will give the false impression that 'indigospring' has gone out of business.

4.8 The Respondent is trying unfairly to disrupt the Complainant's business and/or sell the Domain Name for a consideration in excess of her out of pocket expenses: paragraphs 5.1.1.3 and 5.1.1.1 of the DRS Policy ('the Policy').

5. The Response alleges as follows, -

5.1 The Domain Name was first registered by the Respondent in 2005 as an individual, using her personal email address. At that time the Respondent carried on business in partnership with Mr Davidson. The partnership was dissolved in 2011.

5.2 When the Complainant was incorporated in 2011, the Respondent asked him if he wanted the Domain Name to be transferred to the company. 'His view was that it was a lot of hassle when it didn't matter that [the Respondent] owned the domain as an individual. He did nothing about transferring the domain to the company.'

5.3 Mr Davidson is wrong to assert that 'indigospring' has been the exclusive user of the Domain Name since 2005, because 'indigospring' was a partnership until 2011, so was not a legal entity and could not use the Domain Name in its own right.

5.4 The official register of companies indicates that there is another business using the name 'indigospring'.

5.5 Mr Davidson has unlawfully harassed and intimidated the Respondent and her children.

- 5.6 The Respondent has never said that she wanted nothing further to do with ‘indigospring.’ She was forced to resign as a director to protect herself from Mr Davidson’s unreasonable demands. However, she still owns 50% of the shares in the company and is therefore a ‘Person of Significant Control.’
- 5.7 The Respondent discovered recently that Mr Davidson has blocked access to a number of her ‘accounts’, while leaving her payment details. The Registrant has moved the Domain Name to her own account so that she can maintain control of it. She has ‘also asked 123reg to remove [her] card details from the old account.’ She has taken that step to protect her rights and there is no truth to the suggestion that the Respondent has disrupted, or plans to disrupt, the business of ‘indigospring.’
- 5.8 There is also no truth to the allegation that the Respondent has deliberately disrupted the business of ‘indigospring.’ Mr Davidson was asked on numerous occasions to remove the company’s equipment from the house and he failed to do so. It was costing the Respondent £25 per month in electricity costs to run this equipment. For these and other reasons, there was no attempt whatever to disrupt the business. The steps that the Respondent did take were entirely reasonable, designed to protect her family.
- 5.9 In the circumstances, as the owner of the Domain Name, the Respondent did no more than was reasonable to protect her own interests and retain full access to the accounts associated with it. Further, it is reasonable for the Respondent to have a say in the use of the Domain Name, which she owns, to make sure that it is used responsibly.
- 5.10 There is no reason why the Respondent, as owner of 50% of the shares in the Complainant, should try and disrupt its business. In truth, since

November 2016 she has had to act to stop Mr Davidson bringing the company into disrepute.

6. The Reply alleges, -

- 6.1 Much of the Response is defamatory, irrelevant and untrue.
- 6.2 A partnership cannot register a domain name, which is why the Respondent registered the Domain Name in her own name. All the costs for the Domain Name were paid for out of the partnership bank account.
- 6.3 Being the registrant, only the Respondent had the power to transfer the Domain Name to the company. She chose not to do so for spurious reasons of privacy.
- 6.4 Once the business had been incorporated in April 2011, the Complainant continued to trade as 'indigospring', with the same customer base and contacts. The website associated with the Domain Name was operated by the company.
- 6.5 In November 2016 Mr Davidson and the Respondent separated. Following her resignation as a director in January 2017, the Respondent turned off the servers used by the company for email and telephone, contrary to her solicitors' insistence that 7-10 days' notice of cessation be given by reference to an agreed date. No date was agreed and she switched off the servers, which caused great disruption to the business, including lost emails and concerns expressed by customers that 'indigospring' had gone out of business.
- 6.6 A search of the official register of companies shows that there are no other limited companies currently trading with the name 'indigospring.'

- 6.7 Referring to the relevant clauses of Nominet's dispute resolution procedure, the Domain Name should be transferred to the Complainant in view of paragraphs 5.1.5, 5.1.5.1 and 5.1.5.2 of the Policy (payment for, and exclusive use of, a domain name).
- 6.8 The Registrant has withdrawn the Complainant's ability to manage the Domain Name via the control panel provided by 123 Reg. so as to unfairly disrupt its business and/or to sell, rent or otherwise transfer the Domain Name for a consideration in excess of her out-of-pocket expenses.

## **Discussion and Findings**

7. A Complainant is required under subparagraphs 2.1 and 2.2 of the DRS Policy ('the Policy') to prove on the balance of probabilities that the following two elements are present, namely: -
- 7.1 he has Rights in respect of a name or mark which is identical or similar to the Domain Name; and
- 7.2 the Domain Name, in the hands of the Respondent, is an Abusive Registration.
8. I have taken into account all the facts and matters relied on by each party, but have limited the findings in this decision to those necessary to dispose of the dispute in accordance with the Policy. Therefore, it is not necessary to resolve all the issues raised by the parties.
9. I refer to, and repeat as findings, paragraph 3 above.

### Rights

10. By paragraph 1 of the Policy, -

*'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.'*

The Complainant has established that it has traded since April 2011 under the name 'indigospring', which is inherently distinctive but also likely to be distinctive of services provided by the Complainant in the field of IT consultancy.<sup>1</sup> The goodwill attaching to that trade name may be local only, but that would be sufficient to support a claim of passing off. Hence, the Complainant owns unregistered rights in the name 'indigospring'.

11. The name 'indigospring' is identical to the Domain Name, the 'co.uk' suffix being ignored for the purposes of the comparison under the DRS. Therefore, the Complainant has Rights in respect of a name or mark, which is identical to the Domain Name. Accordingly, the Complainant has established that it owns Rights.

#### Abusive Registration

12. By paragraph 1 of the Policy, -

***Abusive Registration** means a Domain Name which either:*

- i. was registered or otherwise acquired in a manner which, at the time when the registration or acquisition took place, took unfair advantage of or was unfairly detrimental to the Complainant's Rights; or*
- ii is being or has been used in a manner which has taken unfair advantage of or has been unfairly detrimental to the Complainant's Rights.*

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<sup>1</sup> The other registered company bearing the name 'indigospring' was dissolved in 2014 and had a registered office in Hampshire. It is not clear in what field it traded.



By paragraph 5 of the Policy, -

**5. Evidence of Abusive Registration**

*5.1 A non-exhaustive list of factors which may be evidence that the Domain Name is an Abusive Registration is as follows:*

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

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

*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;*

.....

*5.1.5 The Domain Name was registered as a result of a relationship between the Complainant and the Respondent, and the Complainant:*

*5.1.5.1 has been using the Domain Name exclusively; and*

*5.1.5.2 paid for the registration and/or renewal of the Domain Name registration;*

.....

13. Paragraph 8 of the Policy provides as follows, -

***8. How the Respondent may demonstrate in its response that the Domain Name is not an Abusive Registration***

*8.1 A non-exhaustive list of factors which may be evidence that the Domain Name is not an Abusive Registration is as follows:*

*8.1.1 Before being aware of the Complainant's cause for complaint (not necessarily the 'complaint' under the DRS), the Respondent has:*

*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;*

*8.1.1.2 been commonly known by the name or legitimately connected with a mark which is identical or similar to the Domain Name; or*

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

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

*8.1.3 In relation to paragraph 5.1.5; that the Respondent's holding of the Domain Name is consistent with an express term of a written agreement entered into by the Parties; or*

.....

*8.4 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.*

14. The essential facts are these. The sole reason for the registration and use of the Domain Name has been in connection with the business 'indigospring'. Whatever the precise reasons why ownership of the Domain Name was not transferred to the company (it is not necessary to make findings on this issue), the company has paid for all renewals of the registration after April 2011.
15. The Domain Name has been used to host the company's website from which it conducts its business, trading as 'indigospring.' Although the Respondent owns 50% of the shares in the company, the basic position is that a company acts in law by its directors, whoever they may be, unless and until they are removed by the company's shareholders, are disqualified or otherwise unable to act.
16. The Respondent is no longer a director of the company, which since her resignation in January 2017 has acted by its sole director, Mr Davidson.
17. Do the matters raised by the Respondent, if true, render it fair or unfair (for the purposes of the DRS) for her to assume control of the Domain Name to the exclusion of the company?
18. The Respondent does not trade as 'indigospring', nor is she trading as an IT consultant. None of the matters alleged by the Respondent justify the exclusion of the Complainant from the management, administration and control of the Domain Name in circumstances where it has paid for the

Domain Name since its incorporation in April 2011 and has consistently run its business using that Domain Name, to host its website and to communicate with its customers, trading under the name 'indigospring'. Such exclusion is unfairly detrimental to the Complainant's Rights.

19. Despite the Complainant's reliance on parts of paragraph 5 of the Policy, I have preferred to rest my decision on the wider considerations in the definition of Abusive Registration under paragraph 1 of the Policy.
20. In view of the findings set out in paragraphs 3 and 14 -18 above, the Domain Name has been used and is being used in a manner which has been unfairly detrimental to the Complainant's Rights for the purposes of subparagraph ii of the definition of Abusive Registration contained in paragraph 1 of the Policy.

## **Decision**

21. The Complainant has Rights in a name or mark, which is identical to the Domain Name, and the Domain Name in the hands of the Respondent is an Abusive Registration.
22. Therefore, the Expert determines that the Domain Name 'indigospring.co.uk' be transferred to the Complainant.

**Signed** STEPHEN BATE

**Dated** 04.10.17