

DISPUTE RESOLUTION SERVICE

D00009482

Decision of Independent Expert

Lenox Corporation

and

Mr Michael Toth

1. The Parties:

Lead Complainant: Lenox Corporation
Lenox Corporation
1414 Radcliffe St
Bristol
Pennsylvania
United States

Respondent: Mr Michael Toth
35 Cowpasture Road
Ilkley
West Yorkshire
LS29 8SY
United Kingdom

2. The Domain Name(s):

lenox.co.uk

3. Procedural History:

18 January 2011 11:08 Dispute received
18 January 2011 12:00 Complaint validated
18 January 2011 12:20 Notification of complaint sent to parties
09 February 2011 08:21 Response received
09 February 2011 08:21 Notification of response sent to parties

16 February 2011 14:28 Reply received
17 February 2011 12:14 Notification of reply sent to parties
17 February 2011 12:15 Mediator appointed
22 February 2011 12:08 Mediation started
10 March 2011 17:27 Mediation failed
10 March 2011 17:29 Close of mediation documents sent
24 March 2011 11:20 Expert decision payment received

4. Factual Background

- 4.1 The Complainant is a US corporation which deals in the manufacture and retail of cutlery, glassware and porcelain under the mark LENOX.
- 4.2 The Complainant is the owner of the domain names lenoxuk.com and lenox.com. The domain name lenox.com points to a website which promotes the Complainant's goods and from which the Complainant's goods can be purchased. The domain name lenoxuk.com points to a website which announces that the Complainant's products will be coming to the UK in 2011.
- 4.3 The Complainant is the owner of a number of trade marks which include the name LENOX including UK registered trade mark number 1403702 which was filed on 19th October 1989 and community trade mark number 173062 which was filed on 1st April 1996.
- 4.4 In the last few months the Complainant filed a complaint under Nominet's DRS against the Respondent in relation to the Domain Name but this was withdrawn before a Decision was given.
- 4.5 The Domain Name was registered by the Respondent on 30th August 2004 and is being used to redirect to the Respondent's website at www.unitedkingdom.co.uk.
- 4.6 The Respondent is the owner of a large number of domain names including a number relating to place names and a number relating to personal names (first names and surnames).
- 4.7 The Respondent has been a party to a number of cases under Nominet's DRS including three cases in the last two years in which he has been found to have made an Abusive Registration.

5. Parties' Contentions

The parties' contentions can be summarised as follows;

Complaint

1. The Complainant has Rights in a name or mark which is similar or identical to the Domain Name because:
 - It has been using the name LENOX in connection with the manufacturing, retailing and e-tailing of cutlery, glassware and porcelain under the LENOX mark across the globe for many years including in the United Kingdom since the early 1980's;

- The LENOX brand is internationally famous and the quality of the product has recently been recognised by the White House when President Obama chose LENOX china to set the table for the first State Dinner on 24th November 2009;
 - It is the owner of the domain names lenoxuk.com and lenox.com;
 - It is the owner of a portfolio of international trade marks including a UK registered trade mark and a community trade mark which include the word LENOX together with a device element.
2. The Domain Name is an Abusive Registration because the Respondent has registered it to block the Complainant's own legitimate registration;
 3. The Domain Name points to a website at www.unitedkingdom.co.uk which is an information site about the UK and has no correlation with the Domain Name;
 4. The consumer typing the Domain Name into its web browser would expect to be redirected to the Complainant's website and may therefore believe that this site is in some way connected to the Complainant;
 5. The Complainant has received evidence from the Respondent that he has registered a large number of domain names which he has no connection with and that the domain names have been registered as a block to the rightful owners of legitimate registration of these domain names;
 6. The Respondent is a serial domain name squatter and has no apparent rights in many of the domain names he has registered;

Response

1. The Complainant has registered trade marks which satisfy the low threshold required to establish Rights under the Policy;
2. The trade marks that the Complainant seeks to rely on are figurative marks, not words marks and this therefore provides them with more limited rights;
3. A trade mark does not provide the owner of a mark with an absolute monopoly over all uses of the mark and there are a number of other legitimate uses of the mark LENOX;
4. The Respondent denies having heard of the Complainant prior to receiving a letter from the Complainant's solicitors on 26th October 2010;
5. The Complainant has failed to produce evidence to show that it is well known. Alternatively, if it is well known then that fame is limited to its presence in the US;
6. The Respondent registered the Domain Name because it is a personal and place name. The Respondent has registered a number of other personal and place

names and registered this Domain Name because he felt it had some intrinsic value and had some plans to develop it;

7. The Respondent produces a number of pieces of evidence showing the use of the word “lenox” in various search results in a number of different contexts;

8. The Respondent seeks to rely on paragraph 4(a)(i)(A), (a)(ii), (d) and paragraph 4(e) of the Policy in support of his case;

9. The delay of the Complainant in bringing this Complaint should be a bar to the Complainant succeeding;

10. The Respondent contends that this Complaint is no more than a re-filing of a previous Complaint and should therefore not be entertained on that basis;

11. The Respondent reminds the Expert that the Reply should be restricted to dealing with matters newly raised in the Response and should not be used to introduce matters which should have properly been dealt with in the Complaint.

Reply

1. The credibility of the Respondent’s denial that he knew about the Complainant when he registered the Domain Name should be scrutinised carefully in line with the emirates.co.uk Appeal Decision;

2. It is up to the Panel to decide, based on the evidence and the Respondent’s abusive pattern of registering domain names in which he has no rights, whether the Respondent is actually an honest man and registered the Domain Name in good faith;

3. The Complainant accepts that this is the second time in recent months that it has filed an almost identical DRS Complaint. It points out that the need to re-file this Complaint was due to the Respondent having missed the deadline for a Response and then seeking to rely on system errors at Nominet for the late filing. Ultimately the Complainant felt that any chance of success at summary decision was severely prejudiced by the Respondent’s behaviour and it therefore took the decision to re-file a Complaint;

4. The Respondent has engaged in a pattern of purchasing a large volume of domain names for the sole reason of seeking financial gain as can be demonstrated by the over 200 place names that he has registered;

5. The Complainant points to a number of domain names which have been registered by the Respondent and which correspond to the names of famous people. The Complainant says that the Respondent can only have registered these in the hope that these people approach him with a view to purchasing these domain names;

6. The Respondent is a serial domain name squatter with no apparent rights in any of the domain names he has registered;

7. The Respondent has not used the Domain Name to provide legitimate goods and services;
8. The Complainant does not accept that the Domain Name is generic or descriptive and provides some analysis of the Respondent's points about LENOX being the name of a place or person;
9. In relation to delay, the Complainant refers to the decision of the Appeal Panel in emirates.co.uk which states that delay alone is not a ground on which a Complaint may be denied.

6. Discussions and Findings

Preliminary Issue

- 6.1 The Respondent has raised one point which it is sensible for me to deal with in advance of everything else. The Respondent submits that because the Complainant has previously brought a Complaint on the same facts against the Respondent that I should not decide this Complaint. There is no suggestion from the Respondent that a Decision was reached on this first Complaint. There is a bit of a dispute between the parties about precisely why it was withdrawn but it seems to be the case that deadlines were missed on one or both sides which ultimately led to the Complainant deciding to withdraw this first Complaint being withdrawn prior to a Decision.
- 6.2 Nominet's Dispute Resolution Service Policy ("the Policy") sets out the position in relation to the resubmission of earlier complaints. This is contained in paragraphs 10(e), (f) and (g) of the Policy. It is however clear that these paragraphs only apply in circumstances where the earlier Complaint has reached the Decision stage. This is clearly not the case here and I cannot see that these paragraphs apply.
- 6.3 I therefore do not think that there is anything in this preliminary point which the Respondent has raised. The earlier Complaint which was filed and then withdrawn by the Complainant is not a resubmission within the meaning of the Policy and there is therefore no reason why I should not carry on and hear this Complaint.

Introduction

- 6.4 Paragraph 2 of the Policy requires that the Complainant must prove, 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.*

Rights

6.5 As a first step I must therefore decide whether the Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name.

6.6 The definition of Rights in the Policy is as follows:

Rights means rights enforceable by the Complainant whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning.

This has always been treated in decisions under Nominet's DRS as a test with a low threshold to overcome and I think that must be the correct approach.

6.7 The Complainant is the proprietor of at least a UK and a Community Trade Mark registration, both of which include the mark LENOX together with a device. Both of these pre-date quite considerably the Respondent's registration of the Domain Name.

6.8 The Complainant has also clearly used the mark LENOX in relation to its range of cutlery, glassware and porcelain and indeed the Complainant's product has previously been recognised by the White House when President Obama chose its china for his first state dinner in 2009. The Complainant submits that it has used the mark LENOX worldwide (including in the UK) since the early 1980's. No evidence has however been submitted to support this submission or from which I can discern the length or extent of that use.

6.9 The Respondent for his part accepts that the Complainant has registered trade marks, ".....which satisfy the low threshold required to establish Rights under the Policy." The Respondent does however make the point that these marks are not word marks, but include a figurative or device element. The Respondent also makes a number of points about the Complainant's reputation in the UK. I think that all of these points in relation to the nature of the Complainant's registered marks and about the strength of its reputation or otherwise in the UK are probably more relevant to considerations of Abusive Registration and for the purposes of deciding whether the Complainant has Rights in a name or mark which is identical to the Domain Name, I do not need to go any further;

6.10 As I have said the threshold for deciding whether or not a Complainant has Rights is a low one under Nominet's DRS and I have no doubt that, on the balance of probabilities, it is met in this case. I therefore conclude that the Complainant does have Rights in a name or mark which is identical or similar to the Domain Name.

Abusive Registration

6.11 Abusive Registration is defined in Paragraph 1 of the Policy 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 took unfair advantage of or was unfairly detrimental to the Complainant's Rights.*

This definition allows me to consider whether the Domain Name is an Abusive Registration either at the time of registration/acquisition or subsequently through the use that was made of it.

6.12 Paragraph 3 of the Policy provides a non-exhaustive list of the factors which may evidence that a Domain Name is an Abusive Registration and Paragraph 4 of the Policy provides a non-exhaustive list of the factors which may evidence that the Domain Name is not an Abusive Registration.

6.13 The Policy provides for the Complainant to prove, on the balance of probabilities, that the Domain Name is an Abusive Registration. The burden of proof is therefore firmly on the Complainant.

6.14 In order to make a finding of Abusive Registration it is reasonably common ground amongst Nominet Experts that, in all but a minority of cases, there must be an element of knowledge on the part of the Respondent in the sense that the Respondent must, on some level, be aware of the Complainant's Rights. In some cases where the name in which the Complainant has rights is particularly well known this will be fairly obvious and straightforward while in other cases where the name in which the Complainant has Rights is less well known and/or where there are other meanings or uses which can be made of the name this will require substantial evidence from the Complainant.

6.15 The position on knowledge has been summarised by Nominet's Appeal Panel in an earlier case involving the Respondent, Verbatim Limited –v- Michael Toth DRS04331. This was a case relied on heavily by the Respondent in its Response and it is convenient to reproduce the following paragraphs from the Appeal Panel's decision here:

8.13 *In this Panel's view the following should be the approach to the issues of knowledge and intent in relation to the factors listed under paragraph 3 of the Policy:*

- (1) *First, some knowledge of the Complainant and/or its brands/rights is a pre-requisite for a successful complaint under all heads of the DRS Policy other than paragraph 3(a)(iv)*

(giving false contact details). The DNS is a first-come-first-served system. The Panel cannot at present conceive of any circumstances under which a domain name registrant, wholly unaware of the Complainant and its Rights, can be said to be taking unfair advantage of or causing unfair detriment to the Complainant's Rights.

- (2) Secondly, "knowledge" and "intention" are pre-requisites for a successful complaint under all heads of paragraph 3(a)(i) of the Policy. The wording of that paragraph expressly calls for the relevant intent, which cannot exist without the relevant knowledge.*
- (3) Thirdly, "intention" is not a necessary ingredient for a complaint under paragraph 3(a)(ii) of the DRS Policy). The test is more objective than that. However, some knowledge of the Complainant or its name/brand is a pre-requisite.*
- (4) Fourthly, while some knowledge of the Complainant or its name/brand is a pre-requisite for a successful complaint under the DRS Policy (save for a complaint under paragraph 3(a)(iv), knowledge is not of itself conclusive in favour of the Complainant. The Expert/Appeal Panel will still need to be satisfied that the registration/use takes unfair advantage of or is causing unfair detriment to the Complainant's Rights.*
- (5) Fifthly, when a Respondent denies all knowledge of the Complainant and/or its Rights at the relevant time, that denial is not necessarily the end of the matter. The credibility of that denial will be scrutinised carefully in order to discern whether, on the balance of probabilities, the relevant degree of knowledge or awareness was present.*

8.14 Accordingly, in the view of this Panel, for this complaint to succeed, the Complainant must satisfy the Panel, as an opener, that the Respondent was aware of the existence of the Complainant or its brand at the date of registration of the Domain Name.

It is also worth referring to the decision of the Expert in Rileys.co.uk DRS04769 in this regard:

"The onus is on the Complainant to make out its case. Is the Complainant so famous that the Respondent must have had the Complainant in mind when registering the Domain Name and for the abusive purposes alleged by the Complainant, namely to damage the Complainant's business or to extort money from the Complainant?"

The Complainant has made no attempt to demonstrate to the Expert the fame of the Complainant's brand. There are no details of its business over the years, nothing in the way of sales figures or

promotional or advertising material. Accordingly, the Expert is simply not in a position to make any inference adverse to the Respondent on that basis.”

- 6.16 The first issue here is therefore one of knowledge. Did the Respondent know about the Complainant’s Rights at the time he registered the Domain Name? In its Complaint, the Complainant asserts that the Registrant simply must have known about it because the Complainant is internationally famous and has had a presence in the UK since the 1980’s. In support of this submission I can point to the Complainant’s UK registration for LENOX and device which dates back to October 1989. Against the Complainant’s submission, the Complainant does not appear until recently to have had a UK specific domain name or website and indeed registered the domain name lenoxuk.com shortly after it first complained to the Respondent about this matter.
- 6.17 I am also bound to say that the Complainant has not really helped itself here. It has really just made the bare assertion that its trade mark is famous without providing any evidence that this was in fact the case. The sort of thing that I would have hoped to have seen would have been examples of press coverage, advertising or general other marketing activities. Indeed, it is interesting to compare this case to the recent Appeal Decision in Emirates –v- Michael Toth DRS8634. In that case it was accepted that the word “Emirate” had an ordinary generic meaning, but the Complainant was able to adduce evidence of widespread marketing and advertising such as to persuade the Appeal Panel that the word “Emirates” had acquired a secondary meaning which was synonymous with the Complainant.
- 6.18 In this case, it is very difficult indeed for me to draw any conclusions about the extent of the Complainant’s trade either worldwide or in the UK. What the Complainant does have in its favour here is the nature of the word or mark LENOX. Fairly self-evidently this is a relatively unusual word. It does not have the every day meaning of a “Verbatim” or an “Emirates” and it follows that the Complainant has rather less to do to persuade me that the Respondent would have had it in mind when he registered the Domain Name. On the other hand, as far as I am aware, it is not a household brand such as a KODAK or a COCA COLA . I regret to say that if I am wrong about this last point then it is the Complainant’s fault for not producing any evidence that is indeed the case.
- 6.19 It is also relevant to consider what the Respondent says about the question of knowledge of the Complainant’s Rights. This can be summarised in three points as follows:
1. He did not know anything about the Complainant when he registered the Domain Name;

2. The Respondent had a legitimate reason for registering the Domain Name in that he has a portfolio of domain names which include a number of personal and place names;
3. The name LENOX is a homophone for the popular first name/surname Lennox. It is also a name in its own right and a place name.

6.20 It is important to put what the Respondent says about his knowledge in the context of his business. As I understand it the Respondent's business is concerned, amongst other things, with buying domain names which he can then use to link to websites with sponsored links from which the Respondent will receive some revenue each time those links are followed. Undoubtedly the Respondent will also manage to sell some of the domain names he registers. As the Respondent says, there is nothing intrinsically wrong with this practice and it is a legitimate way of making money. What the Respondent says is that at the time he registered the Domain Name, he was also registering a large number of generic .uk domain names and therefore for each one he would have no time other than to form a personal opinion about a particular domain name.

6.21 My views on the various reasons that the Respondent puts forward to register the Domain Name are as follows:

Place Name

6.22 The Respondent says that he registered the Domain Name because it was a place name. He has produced as evidence to support that a fairly long list of other place names which he has registered. The vast majority of these place names are reasonably well known and that is where there is a difference with the Domain Name. As the Complainant says in its Reply, the name Lenox is not common in geographic terms in the same way as the many country or even regional place names that the Respondent has previously registered. In its Reply, the Complainant lists out six places which have the name Lenox. All of these are in the US and none of them have a population of more than 9,000. I would say that I am minded to agree with the Complainant on this point and I think it unlikely that the Respondent had a place called Lenox in mind when he registered the Domain Name.

Person's Name

6.23 The Respondent also says that he had in mind the name of a person when he registered the Domain Name. To support that he has produced an extract from the website "Babynamessuggester". This says that the name "Lenox" has a popularity of 4.202 where zero is "extremely rare" and six is "super popular". I have no idea how these results have been calculated and I do not know, for example, how that

score of 4.202 would compare with other names. I am therefore not prepared to put much weight on this particular piece of evidence.

- 6.24 Additionally the Respondent says that Lenox is a homonym for the more popular name “Lennox” which is of course the first name of the heavyweight boxer, Lennox Lewis and the surname of the singer Annie Lennox. I assume that the Respondent’s point here is that Lenox is a popular mis-spelling of “Lennox” and therefore a website at www.lenox.co.uk is likely to pick up some traffic on that basis. This is just about plausible.

Past Usage

- 6.25 The Respondent also relies on a print out from Google Insight. The Respondent relies particularly on the lists of “top searches” and “rising searches” in the period 2004 to date. No explanation is given as to what exactly these lists refer to, but I assume that what they are is the ten most popular searches which contain or relate to the word “Lenox”. Similarly, the list of rising searches is presumably those that are of increasing popularity. I am not that familiar with this kind of data and I do not really know how accurate it is likely to be or what weight to place on it. As the Respondent says however, it is noteworthy that the Complainant does not appear on either list. I do not know how this squares with the traditional Google search which the Respondent has also provided. This shows that a search of Lenox in Google’s search engine produces a range of results, but the top result is for the Complainant. It therefore seems odd that the Complainant does not come within either list on the Google Insight print out.

Decision on knowledge

- 6.26 My feeling on the Respondent’s various reasons for having registered the Domain Name is broadly that these are all things which the Respondent has thought of in hindsight. They are all very clever, well thought out, excuses why the Respondent may have registered the Domain Name and they have varying degrees of plausibility. What is interesting is the way that the Respondent puts his case. He does not say “I registered the Domain Name for purpose A”. He simply says, “Here are a range of possible reasons why I may have registered the Domain Name.” I think what the Respondent means is, “The Domain Name sounded like it might attract some interest although I didn’t have anything particular in mind at the time I registered it.”
- 6.27 The central question here is therefore the one that the Appeal Panel posed in Verbatim i.e. whether the Respondent was aware of the Complainant or its brand at the date of registration. In this context the Respondent also seeks to rely on the DRS decision in Chivas Brothers Limited –v- David William Plenderleith DRS00292 where a four stage test for the circumstances in which an Expert may draw an inference of bad faith is set out. I do not think that on these facts this

adds very much, if anything, to the decision of the Appeal Panel in the Verbatim case which I have set out above.

- 6.28 The question of the Respondent's knowledge is very closely linked with how well known the Complainant was at the time that the Respondent registered the Domain Name. Despite the Complainant's assertions that its brand is internationally well known there is no evidence of this beyond the Complainant's assertions.
- 6.29 In the absence of any proper evidence of how well known the Complainant or its brand are I may also be happy to infer knowledge if the Domain Name was being used in a way that suggested that the Respondent was aware of the Complainant. However the website (www.unitedkingdom.co.uk) that the Domain Name links to bears no obvious relationship to the Complainant or its brand and displays a fairly disparate collection of links to various other parties none of which appear to compete with the Complainant. The Complainant does not get any assistance from this website.
- 6.30 In all the circumstances I therefore do not think that I can make a finding that the Respondent knew about the Complainant or its brand at the date of registration of the Domain Name or indeed at any time afterwards until the Complainant's lawyers wrote to the Respondent shortly before this complaint was filed.. Therefore, on the balance of probabilities and very much on the evidence that has been put forward in this case, I am not persuaded that the Domain Name is an Abusive Registration.

Other Points

Blocking Registration

- 6.31 I am conscious that in its Complaint the Complainant has put its case in terms of the Domain Name being a blocking registration i.e. a registration which prevents the Complainant from registering the Domain Name. I will not deal with this in any detail because it follows that having found that, on the balance of probabilities and on the evidence in front of me, the Respondent had no knowledge of the Complainant, the Domain Name simply cannot have been a blocking registration.

Pattern of registrations

- 6.32 In its Reply, the Complainant also suggests that the Respondent is engaged in a pattern of purchasing a large volume of domain names for the sole reason of seeking financial gain. As I have said above there is nothing, by itself, wrong with that. The Complainant does however point to a number of domain names which the Complainant holds and which do seem to accord to the surnames of famous people. The examples that the Complainant gives are as follows:

Agassi.co.uk
Burger.co.uk
Blairs.co.uk
Defoe.co.uk
Faldo.co.uk
Garcia.co.uk
Imbruglia.co.uk
Lennon.co.uk
Mandelson.co.uk
Stansfield.org.uk
Sutherland.co.uk

- 6.33 The Respondent has cautioned me about allowing a Reply which goes further than dealing with strictly matters in reply. However, I think that this particular part of the Reply simply reinforces a point which was made albeit indirectly in the Complaint. I am however not convinced that the Domain Name forms part of any pattern. I am not in a position to make a finding about any of the domain names which the Complainant lists, but even if I do accept for a moment that these domain names are Abusive Registrations, I cannot see that the Domain Name is part of this pattern as the domain names that the Complainant has listed all appear to be the names of very famous people and the Domain Name fairly self-evidently is not. In short, even if there is a pattern here, I do not accept that the Domain Name is part of that pattern.

Three Strikes Rule

- 6.34 The Respondent has been involved in four cases under Nominet's DRS in the last two years. In one of these, Verbatim.co.uk DRS04331, the Respondent was successful in the sense that there was no action taken as a result of the Complaint. The Respondent has however been unsuccessful in three other cases. These are DRS08634 Emirates.co.uk, DRS03316 Bounce.co.uk and DRS01740 Universityoflondon.co.uk. Paragraph 3(c) of the Policy provides for there to 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.
- 6.35 Despite the fact that the Respondent would appear to fall within this provision, it is not a point which the Complainant has raised. As a result, the Respondent has not directly had an opportunity to deal with it or to rebut the presumption of Abusive Registration as he is entitled to try to do. I am also conscious that one of those decisions DRS03316 bounce.co.uk was the subject of a Complaint by the Respondent against Nominet and I must therefore exercise some caution before relying on it.
- 6.36 Ultimately however I am not persuaded that this is an Abusive Registration and therefore if Paragraph 3(c) of the Policy applies I

think that, on the balance of probabilities, the Respondent has done enough to have rebutted that presumption under Paragraph 4(c) of the Policy. Put another way the Respondent has persuaded me, on the balance of probabilities, that he did not know about the Complainant at the time of registration and therefore that this is not an Abusive Registration. In the absence of any real evidence to the contrary from the Complainant I cannot make a finding of Abusive Registration against the Respondent.

Reverse domain name hi-jacking

- 6.37 The Respondent has raised a number of points in his Response. Having found in favour of the Respondent, I do not need to deal with most of these at this stage. There are two points that I do need to address. The first of these is the Respondent's submission that this is case where I should make a finding of "Reverse domain name hi-jacking". This is a finding that the Complaint has been made in bad faith. I simply do not think that is right. There is no evidence that the Complainant has acted in bad faith and indeed it may well be that its only failing was not to produce more evidence of the fame of its brand. That is not bad faith by any measure and the Respondent's submission fails.

Delay

- 6.38 The second point is delay. The Respondent submits that because he has held the Domain Name for over 6 years prior to the Complainant bringing this Complaint the Complaint must automatically fail because of this delay. This delay point has been raised before and was considered by the Appeal Panel in the Emirates.co.uk case. In that case the Appeal Panel concluded as follows;

"The Panel accepts that there may be a case for delay or acquiescence amounting to a defence to the complaint under the Policy but is not at all satisfied that this is such a case. The delay is not such as to prejudice the proper consideration of the issues. Even if the Respondent could properly claim to have acted on the assumption that the Complainant had no objection to his registration and use of the Domain Name, we do not consider that he has suffered any unfair prejudice as a result of the delay. As we have found, he cannot be said to have developed a proper business under the Domain Name or a "genuine offering of goods or services" in the sense of paragraph 4aiA of the Policy. Rather, its use has been for click-through traffic and as a place holder for a valuable domain name. The Panel finds that the Respondent has not in reality developed a business under the Domain Name in the belief that the Complainant had no objection to his using it or with the encouragement of the Complainant."

6.39 I tend to agree with the Appeal Panel. There may be cases where delay is a factor in deciding against a Complainant or even where delay is the determining factor. My feeling is that those are likely to be cases where the Respondent has been genuinely prejudiced by that delay or where the Complainant has actively encouraged, or has acquiesced in, the Respondent's activities. What the Respondent is arguing for is a kind of adverse possession type defence where the Domain Name "becomes his" if he holds it for more than a certain period of time. I am not at all persuaded by this or by the Respondent's attempts to draw analogies with the Trade Marks Act 1994 and the law generally and I think that each case needs to be judged on its merits. In any event this is not a case where I think that delay is a factor in deciding against the Complainant.

7. Decision

I find that, on the balance of probabilities, the Complainant has Rights in a name or mark which is identical or similar to the Domain Name, but that the Domain Name in the hands of the Respondent is not an Abusive Registration. I therefore direct that no action should be taken in relation to the Domain Name.

Signed ...Nick Phillips

Dated ...20/4/11.....