

DISPUTE RESOLUTION SERVICE

D00012276

Decision of Independent Expert

Maiken Hvidbro-Mitchell

and

Wendy Croxford

1. The Parties:

Complainant: Mrs Maiken Hvidbro-Mitchell
Roytta House, Chart Road, Sutton Valance
Maidstone
Kent
ME17 3AW
United Kingdom

Respondent: Mrs Wendy Croxford
49 Stoney Lane
Weeke
Winchester
Hampshire
SO22 6DP
United Kingdom

2. The Domain Name:

hvidbro-mitchell.co.uk

3. Procedural History:

12 December 2012 11:03 Dispute received
12 December 2012 11:19 Complaint validated

12 December 2012 11:46 Notification of complaint sent to parties
02 January 2013 13:12 Response received
02 January 2013 13:13 Notification of response sent to parties
07 January 2013 01:30 Reply reminder sent
09 January 2013 10:26 Reply received
09 January 2013 10:26 Notification of reply sent to parties
09 January 2013 10:28 Mediator appointed
15 January 2013 11:59 Mediation started
24 January 2013 12:33 Mediation failed
24 January 2013 12:34 Close of mediation documents sent
24 January 2013 14:03 Expert decision payment received
8 February 2013 Expert's declaration of impartiality and independence received.

4. Factual Background

This is a dispute between two private individuals. It is necessary to set out some of the background in order to explain how the dispute over the Domain Name developed to the point of a complaint being made to Nominet of Abusive Registration.

A central character in the dispute is a third individual called Simon Mitchell ('Mr Mitchell') but he does not appear as a party in the dispute. Mr Mitchell was at one time married to the Respondent, who was then known as Wendy Mitchell. That marriage ended in divorce and the Respondent has since remarried and is now known as Wendy Croxford. There is an ongoing dispute between the Respondent and her former husband about monies that she claims he has not paid in child maintenance.

Mr Mitchell subsequently married the Complainant. Her given name was Maiken Hvidbro-Petersen but she changed her name to Maiken Hvidbro-Mitchell. Mr Mitchell also changed his surname to Hvidbro-Mitchell

The Domain Name, which is identical to the Complainant's surname Hvidbro-Mitchell, was initially registered in the name of Gareth Croxford, who is the Respondent's husband, on 8 October 2012. The registration was subsequently transferred to the Respondent. The Domain Name has been used as a criticism site to record the Respondent's opinions about her former husband.

5. Parties' Contentions

For the purposes of this section of the decision, the Expert has summarised the contentions of the parties but only insofar as they are relevant to the matters that the Expert is required to determine under the DRS Policy. In doing so, the Expert is at this stage making no findings of fact or passing any comment in relation to those contentions. The discussions and findings in relation to the evidence appear in section 6 below.

As noted in section 4 above, there is a personal dispute between the Respondent and the Complainant's husband. There are very serious allegations made by the parties, including harassment and fraud, which are outside the scope of the DRS. The Expert has disregarded any information that has been provided by either party that is not relevant to the issues that have to be determined under the DRS.

5.1 Complainant

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

5.1.1 Rights

The Complainant's name from birth was Maiken Hvidbro Pedersen, which consists of her given name (Maiken), her mother's last / family name (Hvidbro) and her father's last / family name (Pedersen). This naming protocol is common in Denmark where the Complainant was born. The Complainant was known to her family and friends as Maiken Hvidbro.

On 12 October 2002, following her marriage to Simon Mitchell, the Complainant changed her name by Deed Poll to Maiken Hvidbro-Mitchell. The Complainant's last / family name therefore changed to the hyphenated double-barrelled 'Hvidbro-Mitchell'. That surname is common to all members of her immediate family, including her husband, who changed his surname from Mitchell to Hvidbro-Mitchell, and their two children. Since 12 October 2002, the Complainant has become well-known as Maiken Hvidbro-Mitchell.

The Complainant's personal name is naturally a very significant and important part of her personal identity and it is the name by which she and her children are known to their family and friends.

The name Hvidbro is protected in Denmark by law. Under the Danish Act on Names a first and last name for every person is subject to the approval of the Ministry of Ecclesiastical Affairs and the Ministry of Family and Consumer Affairs. Further, surnames carried by 2,000 persons or fewer, are protected and cannot be taken by anyone other than those born with the name (subject to certain exceptions, such as spouses).

As far as the Complainant is aware, the name Hvidbro is unique to her family, as well as rare in Denmark. A search for Hvidbro using the online Danish enquiry service showed there to be 7 people in Denmark with name Hvidbro.

In relation to the United Kingdom, the Complainant has only been able to find one other person by the name of Hvidbro after conducting a search for Hvidbro using the online enquiry services provided by 192.com.

Since the name Hvidbro is so rare, it is not surprising that the Complainant is unaware of any other hyphenated double-barrelled names incorporating Hvidbro as the first part of the hyphenated and Mitchell as the second part.

The Complainant refers to the Nominet decision in DRS00693 (tahirmohsan.co.uk) where rights in the personal and uncommon name of the Complainant in that case were recognised by the Expert.

The Complainant submits that she has a substantial right and interest in her name Hvidbro-Mitchell.

The Complainant has rights in her personal name pursuant to the European Union Charter of Fundamental Rights (2000/C 364/01), and the UK Data Protection Act (The Data Protection Act 1998). The Supreme Court of England and Wales confirmed in the recent decision in *The Rugby Football Union v Consolidated Information Services Limited (Formerly Viagogo Limited) (In Liquidation)* [2012] UKSC 55 that the names and addresses of individuals are personal data.

Accordingly, the Complainant has the right to enforce the protection of her name pursuant to the European Charter and the UK Data Protection Act (as well as under the legislation of other European Union member states on the subject).

5.1.2 Abusive Registration

The Domain Name was registered in the name of Gareth Croxford on 8 October 2012. The registration of the Domain Name was made without the knowledge or consent of the Complainant. The Complainant first became aware of the website attached to the Domain Name in November 2012. The date in the Complaint is stated as November 2011 but, given that the Domain Name was not registered until October 2012, the Expert is proceeding on the basis that the date in the Complaint was an error.

The Complainant's solicitors wrote to Gareth Croxford demanding a transfer of the Domain Name. Following that letter, the Domain Name was transferred to the Respondent, who is the wife of Gareth Croxford. The Respondent is a former wife of the Complainant's husband, Simon Hvidbro-Mitchell.

The Domain Name is connected to a website at www.hvidbro-mitchell.co.uk (the 'Website') which consists of obsessive criticism about the Complainant's husband, Simon Hvidbro-Mitchell, and might be categorised as a 'hate site' or 'protest site'. The Website carries personal, emotive and one sided versions of events in terms intended to vilify Mr Hvidbro-Mitchell and cause anxiety and distress to the Complainant and her family; this appears to be the 'cause' promoted by the site.

The Complainant reported the contents of the Website and various other matters to the Police. In response to a Police visit, references on the home page of the Website to the Complainant's children and their school and home addresses were removed. However, references on the Website to the Complainant still remain.

The Respondent has registered the Complainant's unique name as a domain name without any adornment. Ignoring the prefix and suffix, the Domain Name is identical to the Complainant's personal name in which she holds rights.

It is clear from the Website that the Respondent was aware of the Complainant before registering the Domain Name. The Complainant's unique name has been deliberately registered to attract to the Website members of the public to whom the Complainant and her family were already familiar. The Complainant submits that this was done with the precise intention of misleading such potential visitors to the Website into believing that they would find a Website run or approved by the Complainant and/or her family.

This amounts to impersonation of the Complainant and such impersonation for the purposes of a criticism site constitutes unfair use under the Nominet Policy.

Members of the public who see the Domain Name on the internet or enter the Complainant's name into an internet search engine and whose search reveals the Domain Name or enter the Domain Name in the URL will inevitably believe that the Domain Name is a domain name registered to, operated or authorised by or otherwise connected with the Complainant, when this is not the case. The uniqueness of the Complainant's name is likely to mean that internet search results for it will put the Domain Name high up on the result pages. There can be no doubt that the Complainant's name was deliberately selected in bad faith and is currently being used to mislead members of the public and attract them to the Website under false pretences.

It does not matter that once on the Website, members of the public may swiftly realise they have arrived at a 'hate' or 'protest' site. The damage will already have been done at that stage. This is known as initial interest confusion and has long been considered as unfair use of the Complainant's rights under the Nominet DRS.

Neither the Respondent, Wendy Croxford (formally Wendy Mitchell), nor her husband (Gareth Croxford) have ever been known as Hvidbro-Mitchell so neither has a fair reason to register and / or use the name as a domain name.

The Respondent has not made legitimate use of the Domain Name. Neither the Respondent nor her husband, have any rights in respect of the Complainant's name; nor is it necessary to use the Domain Name to conduct a campaign against the Complainant's husband. The registration of the name was done in bad faith and its continued use for its current purpose is being continued in bad faith.

Wedlake Bell LLP wrote to the Respondent's husband (being the registrant at the time) on 30 November 2012 and requested the transfer of the Domain Name. Mr Croxford responded in an email dated 4 December 2012. Mr Croxford's email was headed 'Without Prejudice'. However, the Complainant

does not accept that the without prejudice privilege properly applies to that communication. The Domain Name was not transferred to the Complainant.

Following Wedlake Bell's letter, the details of Mr Croxford's address were removed from the Domain Name registration details at WHOIS. Subsequently, the Domain Name was transferred by Gareth Croxford to his wife Wendy Croxford and is now registered to the Respondent but still without details of her address.

The Complainant submits that the recent changes to the Domain Name registration have been done in direct reaction to receipt of Wedlake Bell's letter requesting the Domain Name be transferred, possibly in an attempt to disrupt the Complaint.

Following Wedlake Bell's letter, the Respondent / Respondent's husband has added a very small 'disclaimer' at the foot of the home page and a further 'disclaimer' as a separate tab at the Reply section of the Website. The intended purpose of this disclaimer appears to be to enable the Respondent to say what she wishes and to escape the consequences of what she publishes on the Website. Such disclaimers are ineffective in law and do nothing to detract from the initial interest confusion which inevitably arises; rather the disclaimers appear to have been engaged only recently, possibly as a ruse in an attempt to justify the continued misuse of the Domain Name.

The Complainant seeks a transfer of the Domain Name.

5.2 Respondent

The Respondent does not accept that the Complainant has rights in the name Hvidbro-Mitchell or that the registration and use of the Domain Name amounts to an Abusive Registration. The Respondent has set out a chronological timeline of events and refers to conversations with various statutory authorities and other organisations in support of her case that elements of the Complainant's case are totally untrue.

The Respondent disputes the validity of a number of documents that have been produced by the Complainant and suggests that the Complainant has acted in a fraudulent manner. The DRS is intended to be a cheap and quick way of resolving clear cases of domain name abuse and is not appropriate for resolving bitterly contested disputes of fact about issues that are not relevant to the two tests under the DRS of Rights and Abusive Registration.

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

The Respondent registered the Domain Name. The Respondent transferred the Domain Name from her husband to herself, as it was her site, albeit hosted through her husband's 1&1 account. The Respondent wanted to take full ownership and responsibility for the site. The Complainant's solicitors were informed that the registration had been transferred and was no longer registered to her husband. They did not respond to her husband's letter. Neither did the Complainant contact the Respondent as the new registrant.

The purpose of the Website was to highlight the outstanding court orders and judgments that the Respondent's ex-husband Simon Hvidbro-Mitchell failed to pay for child maintenance and costs awarded by the court. The Website has nothing to do with Mr Hvidbro-Mitchell's ex-partner Maiken Hvidbro-Mitchell. The only reason her name has been mentioned is because of the complaints she has made by letter to the Respondent's husband, via her solicitor, to Nominet and to the Police, together with the Respondent's belief that she has behaved in a fraudulent manner in relation to concealing assets on behalf of her now estranged husband.

The Respondent does not accept the validity of the marriage certificate produced by the Complainant as it is marked VOID COPY and UNAUTHORISED COPY. On the basis of some entries that appeared on Facebook, the Respondent does not believe that the Complainant married Mr Simon James Hvidbro-Mitchell (previously known as Simon James Mitchell) until May 2012.

The Respondent does not accept the validity of the Deed Poll dated 12th October 2002 produced by the Complainant for a number of reasons, including the fact that the company that issued the Deed Poll, H & M Associates Ltd. does not exist and neither does the website detailed at the bottom of the document www.directdeedpoll.co.uk.

On the basis of telephone conversations, the Respondent claims that Simon Hvidbro-Mitchell is now the estranged husband of the Complainant.

On 26th November the Complainant's estranged husband Mr Simon Hvidbro-Mitchell registered the following 12 domains: www.hvidbro-mitchell.net, www.hvidbro-mitchell.com, www.hvidbro-mitchell.org, www.simonhvidbro-mitchell.net, www.simonhvidbro-mitchell.com, www.simonhvidbro-mitchell.org, www.hvidbro.net, www.hvidbro.com, www.hvidbro.org, www.royttahouse.net, www.royttahouse.com, www.royttahouse.org.

Maiken Hvidbro-Mitchell registered the domain www.hvidbro-mitchell.dk.

The Complainant's ex-partner Simon Hvidbro-Mitchell made an offer via his solicitor in respect to his outstanding maintenance debts which was conditional on the Domain Name being transferred to him. The Respondent accepted the offer subject to a couple of minor amendments, such as transfer of the Domain Name would only be on receipt of final payment of the outstanding debt. Therefore on full and final payment the intention was to transfer the Domain Name to Mr Simon Hvidbro-Mitchell. In the meantime as per the conditions of the offer the contents of the website were removed.

The Police have confirmed that they are not taking any action. Contrary to the Complainant's claims, the Police did not warn the Respondent or advise her to make any changes to the website. She updated the site on a regular basis with latest information, adding and deleting material as she saw fit.

None of the updates to the site have been as any direct influence from the Police or from the Complainant's solicitors Wedlake Bell.

All material on the website was factual. Updates had been made based purely on the latest developments with both the Complainant and Complainant's estranged husband's actions and communications through solicitors, the Child Support Agency and contact made by the Complainant's estranged husband's daughter from his first marriage.

The Respondent relies upon paragraph 4 (b) of the Policy which states that fair use may include sites operated solely in tribute to or in criticism of a person or business. The website clearly stated its purpose both on the home page and the title pages which to highlight how Simon James Hvidbro-Mitchell has not paid court orders and judgments relating to his two children.

The following footer was also on every page 'This site is related only to Simon James Hvidbro-Mitchell (formerly Simon James Mitchell) and his family from his second marriage, which is myself Wendy, Scarlett & Jamie Mitchell. It does not have any interest, bearing or relationship to anyone else with the same surname. Visitors who use this website and rely on any information do so at their own risk.' At no point was there any impersonation of the Complainant, which was upheld by the Police and Nominet.

The Complainant claims that the name Hvidbro is rare and Hvidbro-Mitchell is unique. This is untrue, a quick search on Google reveals numerous Hvidbro's and Hvidbro-Mitchell's with 4,480 results returned on hvidbro and 344 results returned on hvidbro-mitchell, for example, Paolo, Pal, Paule, Davd, Poul, Polly, Davdi all with the surname of Hvidbro-Mitchell and there are too many Hvidbro's to even begin to list.

The 'Without Prejudice' email from the Respondent's husband responding to the Complainant's solicitor was an attempt to settle the matter, without the Complainant incurring any further legal costs. It simply outlined that she had no claim to the Domain Name and that her claims were not supported by either Nominet or the Police.

The Respondent has not received any communication from the Complainant or her solicitors as she claims. The Complainant's solicitor had originally written to the Complainant's husband, who responded and advised the Complainant that the Domain Name was no longer registered to him, however there was no further notification or communication to the Respondent as the new registrant of the Domain Name from the Complainant or her solicitors.

The Complainant's claim that the registration and use of the Domain Name are abusive is not true. The website does not have any content, this was removed some time ago as a result of legal actions instigated by the Respondent and negotiations through the Complainant's estranged husband's solicitor.

The contents of the website as produced by the Complainant are extremely out of date, the website had been updated many times since the screen captures, with the final update made some time ago to remove the contents of the website altogether, due to legal actions instigated by the Respondent and negotiations with the Complainant's estranged husband Simon Hvidbro-Mitchell to settle the outstanding debts he owes.

5.3 Reply

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

The Respondent disputes the Complainant's record of her marriage. The copy of the marriage certificate annexed to the Complaint is a copy of the original, which is held by the Complainant. When the original is copied, the design of the paper ensures that the copy carries the marking "UNAUTHORISED COPY" and "VOID" and "COPY". This is common to marriage certificate paper and is to prevent forgeries.

For the avoidance of any doubt, the Complainant remains married to her husband and has been married to him continuously since 12 October 2002.

The Respondent suggests that a Facebook post on 9 May 2012 contradicts the Complainant's record of her marriage. On 9 May 2012, the Complainant's husband joined Facebook. On setting up his account, he was prompted to input personal data, which included his marital status. The screenshot taken of Facebook by the Respondent is a screenshot of how Facebook recorded that action on the Complainant's husband's "Timeline". The comments below the update were made in jest.

The Respondent disputes the Complainant's record of her name change. The Complainant refers to the details of her name change as set out in her Complaint. The copy of the Deed Poll annexed to the Complaint is a copy of the original, which is held by the Complainant. On 11 September 2002, before flying to America for their wedding, the Complainant's fiancé (as he then was) customised a draft deed poll from the website www.directdeedpoll.co.uk for the Complainant and printed it off. The Expert will note from screenshots that in 2006 a message appeared on the site which notified the internet user that the company behind the website (H & M Associates Ltd) would cease to trade in June 2006. This is consistent with the Companies House details for H & M Associates Ltd, company no. 4368818 and the subsequent domain name registration and website content. Almost immediately after being married by Reverend Ron Porras, the Complainant signed and dated the Deed Poll, which was witnessed by the Reverend. On her return to the UK, the Complainant had the original notarised by Mr O'Driscoll in order for the Kingdom of Denmark to issue her with her new passport.

The Respondent disputes that the name Hvidbro is rare and that Hvidbro-Mitchell is unique. The Complainant refers to the detail in the Complaint about the names Hvidbro and Hvidbro-Mitchell. In relation to the online Danish

enquiry search result for Hvidbro, a translation has not been sourced due to the deadline for filing the Reply. However, should the Expert require one, Nominet should let the Complainant's representative know so that it can be done as soon as possible.

It is not clear to the Complainant what evidence the Respondent relies on. It seems she relies on a Google search of Hvidbro and Hvidbro-Mitchell, and/or searches of tracesmart.co.uk (a UK names directory with over 275 million records) returning results such as there being 3,938 people in the UK with the first name Paolo and 2 people with the last name Hvidbro-Mitchell being the Complainant and her husband. Examples of some tracesmart search results are at Annex 17. The references to Paolos etc is a function of tracesmart identifying the number of Paolos etc in the UK and trying to somehow match them with Hvidbro-Mitchell.

Unsurprisingly, many of the Google search results are to links associated with the Complainant and/or her family and/or the Respondent. For instance, in the results for hvidbro, there are numerous links to members of the Complainant's family's social media accounts. In the Google results for hvidbro-mitchell, the overwhelming majority of links with exact matches are associated with the Complainant, her husband and/or the Respondent (even the tracesmart results are associated with the Complainant). The Complainant considers that the low number of Google results and the overwhelming majority of the exact match links associated with her, her family and/or the Respondent further reinforce the fact that the name Hvidbro is extremely unusual and that the name Hvidbro-Mitchell is almost certainly unique in the UK.

Moreover, it is of particular note that the first result returned on both Google searches is for the Website. This will mislead members of the public into believing it to be authorised by the Complainant.

The Complainant is not suggesting that the personal data is confidential, rather that its use is protected by law in the UK and in Europe. The Complainant considers that the Respondent's use of her personal data in the Domain Name to be in breach of data protection law. Further, the Complainant considers that the Respondent's use of her personal data on the Website (as well as on other websites) is in breach of data protection law. This is the subject of a separate complaint by the Complainant and the Expert is referred to the Complainant's solicitors letter dated 21 December 2012. The Respondent has yet to formally acknowledge receipt or reply, although it is referred to on the Respondent's new website at www.wendymitchell.co.uk.

The Respondent disputes that she changed the content of the Website as a result of the involvement of the Police and/or the Complainant's solicitors. Yet, following such involvement, the references on the homepage of the Website to the Complainant's children, their school and their home address were removed. Disclaimers were also added. The Complainant does not consider this to be a coincidence and invites the Expert to draw the obvious inferences.

The Respondent seems to allege that she withdrew the Website as a result of accepting an offer from Mr Hvidbro-Mitchell in her email to his solicitor of 30 November 2012. This was confidential and without prejudice correspondence between Mr Hvidbro-Mitchell's solicitor and the Respondent which the Complainant understands the Respondent does not have permission to waive privilege in. It is therefore wholly inappropriate to publicise without prejudice material (which is privileged from disclosure and cannot be relied on without permission or Court Order) but to the extent that the Respondent wrongly suggests there has been an agreement, the Complainant reluctantly addresses that point. In fact and law, the Respondent's email to the solicitor on 30 November 2012 was a counter offer. As a result, the 'offer' was, in law, rejected by the Respondent. The solicitor's response was not, in law, an acceptance of the Respondent's counter offer. There was thus no agreement and there has been no agreement since then which deals with or relates to the Domain Name and/or Website. The Respondent is well aware of this. No terms of the counter offer were adhered to. The Website was not withdrawn immediately. There was no suggestion of it in Mr Croxford's email of 4 December 2012. There was no initial payment by 7 December 2012. Further, on 16 December 2012, the Respondent wrote on her Google+ account that she was 'about to issue a Bankruptcy Petition!' against the Complainant's husband. On 21 December she posted on her Google+ account that she was 'so looking forward to making my ex-husband Simon Hvidbro-Mitchell.co.uk bankrupt...The bankruptcy petition will be arriving very shortly'. The Respondent is not suggesting that the bankruptcy proceedings are a result of defaulting on a settlement agreement. She is referring to the 'outstanding court orders and maintenance' which is consistent only with no agreement having been reached.

In fact, the Website was removed on 21 December 2012 by the Domain Name registrar, 1 & 1 Internet Limited. Although the Website was removed, the contents of it have been transferred to the website attached to the domain name wendymitchell.co.uk.

Following advice to the Complainant in November 2012, she and her husband registered several domain names. This was done in an effort to avoid further misuse of the Complainant's name by the Respondent.

This complaint is not the correct forum for the resolution of any matter other than for the registration and/or use of the Domain Name. Accordingly, although the Complainant has in parts touched upon other issues, she has done so solely in an attempt to answer the points raised by Respondent and has tried to avoid unnecessary and irrelevant detail.

5.4 Non-standard submission

Amongst the papers in this case was a brief explanation of a non-standard submission from the Respondent pursuant to paragraph 13(b) of the DRS Procedure. Having considered that brief explanation, the Expert was not satisfied that the Respondent had demonstrated that there was an exceptional

need for a non-standard submission and accordingly the Expert did not request sight of the remainder of that submission.

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 Hvidbro-Mitchell which, for these purposes, is identical to the Domain Name. She says that on 12 October 2002, following her marriage to Simon Mitchell, she changed her surname to Hvidbro-Mitchell and it is also the surname of her husband and two children. The Complainant has produced copies of her passport, marriage certificate and a change of name deed poll.

The Respondent does not accept the validity of the marriage certificate and deed poll produced by the Complainant. She suggests, on the basis of some entries in Facebook, that the marriage did not take place until May 2012. She puts the issue of rights in these terms:

It is also poignant to point out that the complainant's surname is not that of marriage or birth, but one that has been contrived and supposedly changed by deed poll.

The Expert considers it perverse for the Respondent to argue that the Complainant's family surname was not changed to Hvidbro-Mitchell given that:

- the name Hvidbro-Mitchell was registered as a domain name specifically to enable the Respondent to highlight outstanding court orders made against her former husband; and
- the court orders that have been produced, which date back to 2006, record the parties to the matrimonial proceedings as Mrs Wendy May Mitchell and Simon James Mitchell (Aka Simon James Hvidbro-Mitchell).

The Complainant produced a copy of a previous passport issued on 14 December 2002 in the name Maiken Hvidbro-Mitchell with the Reply. The Expert is satisfied that the Complainant changed her surname to Hvidbro-Mitchell following her marriage to Simon Mitchell in October 2002. Thereafter, it became the hereditary name that is common to all immediate members of the Complainant's family as distinct from their Christian or other first names. The Complainant says that the hyphenated two word combination Hvidbro-Mitchell is very rare and the Expert accepts that contention.

There is a dispute between the parties about whether Simon Hvidbro-Mitchell is the Complainant's husband or her estranged husband but nothing turns on that point.

The Respondent has no obvious connection to the name Hvidbro-Mitchell. It just happens to be the surname adopted by her former husband and was registered as a domain name to enable the Respondent to express her views about her former husband publicly.

The issue is whether the Complainant has satisfied the burden that is upon her to prove, on the balance of probabilities, that she has Rights within the definition set out in the Policy. For reasons set out below, the Expert is not satisfied that she has done so.

The Complainant's case is put on the basis that her personal name is a very significant and important part of her personal identity and it is the name by which she and her children are known to their family and friends. The Complainant refers to the decision of the expert in DRS 693: tahirmohsan.co.uk on the issue of Rights. The Complainant relies upon that decision as support for her contention that Rights under the DRS can be established in relation to a personal and uncommon name. The case was one of the first decisions under the DRS to address the issue of Rights in a personal name.

The complaint in that case was brought by an individual called Tahir Mohsan and he sought a transfer of the domain name tahirmohsan.co.uk on the basis that it was an abusive registration. Tahir Mohsan was successful and the domain name was transferred to him. On the issue of rights, the expert in the case said the following:

The Complainant's case in relation to ownership of rights is straightforward: Tahir Mohsan is his own personal name and it is not a common one. It is said to be a well-known and important part of the Complainant's identity. This is the sum total of the 'evidence' of Rights before me.

As far as I am aware this is the first Nominet DRS decision involving Rights in a personal name (as opposed to a trading name), and only the second decision in a case brought by an Complainant who is an individual.

The definition of "Rights" under paragraph 1 of the Policy provides that they "include, but [are] not limited to rights enforceable under English law. However, a Complainant will be unable to rely on rights which in a name or term which is wholly descriptive of the Complainant's business". I have no hesitation in concluding that this definition is wide enough to encompass 'Rights' in personal names. Paragraph 1 does not introduce a requirement that the Complainant must be a 'business' – see for example paragraph 4(b) of the Policy which clearly implies that a Complainant may be either a person or a business.

The question then arises whether the Complainant in this case has discharged the burden of proving that he owns such Rights in his name. But what is the test? Is every natural person born with Rights in his or her name? If not, what must he or she demonstrate in order to establish ownership of Rights? My conclusion is that the Complainant's uncontroverted claims (i) that his name is Tahir Mohsan and (ii) that his name is uncommon in the United Kingdom are together sufficient for him to establish Rights in his name.

The expert went on to consider whether his conclusion would 'open the floodgates' to a large number of DRS complaints by people alleging infringement of a person's 'sense of identity' or 'right of personality'. He did not believe that it would. It should be noted at this stage that the case was concerned with the complainant's full name, i.e. his first name and surname.

The case supported the proposition that the definition of Rights was wide enough to encompass rights in a personal name that was identical to the domain name if that name was uncommon in the United Kingdom. However, that case was decided under an earlier version of the Policy and, crucially, a different definition of Rights. The complaint in that case was lodged with Nominet on 4 November 2002 and Version 1 of the Policy and Procedure applied to complaints started between September 2001 and October 2004.

The old definition of rights

Under Version 1 of the Policy the definition of Rights was as follows:

Rights includes, but is not limited to, rights enforceable under English law. However, a Complainant will be unable to rely on rights in a name or term which is wholly descriptive of the Complainant's business;

The current definition of rights

Under the current Version of the Policy, which came into effect on 29th July 2008, the definition of Rights 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;

Under the old definition, rights included but were not limited to enforceable rights but under the current definition the rights have to be enforceable. The Expert does not accept that, under the current version of the Policy, a personal and uncommon name is enough by itself to establish rights.

Previous decisions

The Expert has had regard to a number of other DRS decisions that deal with the issue of rights in personal names. It is clear from the analysis set out below that a personal and uncommon name has not of itself been taken to be enough to form the basis of an enforceable right under the current version of the Policy.

DRS 7418 laurenluke.co.uk (transfer)

The complaint was lodged on 25 June 2009 so the expert determined the case under the current version of Policy. The expert said this on the issue of rights:

There is evidence that the Complainant has traded under her own name and under the name "By Lauren Luke", as a supplier of make-up tutorials and make-up kits and has established a distinctive reputation in connection with make-up as a source of make-up products and services. She has therefore established that she has common law trademark rights in those names such as to entitle her to restrain use by others of those names to pass themselves off as the Complainant.

DRS 6806 bjornborg.co.uk (transfer)

The complaint was lodged on 30 January 2009 so the expert determined the case under the current version of Policy. The expert said this on the issue of rights:

I accept that the First Complainant owns a number of registered trade marks that incorporate the name “Björn Borg” and that its community trade mark comprises that name alone. I also accept that it is likely that the Second Complainant has unregistered trade mark rights in his name that would also provide rights that are recognised for the purposes of the Policy.

DRS 6783: fayed.co.uk (transfer)

The complaint was lodged on 29 January 2009 so the expert determined the case under the current version of Policy. The expert said this on the issue of rights:

The trade marks and the “alfayed” domain names are held by Harrods in any event, and the Expert therefore accepts that the Complainant has relevant Rights pursuant to Paragraph 2.a.i of the Policy in this case.

DRS 9932: andrewgrimwood.co.uk (no action)

There is a summary decision in which the Complainant did not succeed on the issue of rights but the expert helpfully explained his reasoning in the comments section of the decision in the following terms:

The Complainant relies purely on rights in his personal name. He does not assert or provide evidence that his name has been used to conduct a trade or business.

Paragraph 1.8 of the DRS Experts’ Overview on Nominet’s website states:

“1.8 Can rights in a personal name give rise to a right within the definition of Rights?

Yes. If the personal name in question is a trade mark (registered or unregistered), clearly that name is the subject of an enforceable right. If on the other hand, the name in question is not the name under and by reference to which the complainant conducts a trade or business, the position is not so clear. In DRS 00693 (tahirmohsan.co.uk), the Expert held that it was sufficient that the Complainant’s name was identical to the domain name and that his name was uncommon in the United Kingdom, but it is by no means certain that all Experts will adopt that approach. Complainants seeking to assert rights in respect of personal names need to be able to establish that there is an enforceable right in respect of the name.”

In this case, the Complainant has not suggested that his name is uncommon in the United Kingdom. Nor has he taken any other steps to establish, or even argue, that there is an enforceable right in respect of his personal name. Accordingly, the Complainant has failed to establish “Rights” under the DRS Policy.

There are cases decided under previous versions of the DRS Policy that went both ways on the issue of rights in a personal name. In light of the change in the definition of rights the Expert has had no regard to those decisions. It is clear from the revised definition of rights and the approach taken in the cases referred to above that a complainant seeking to assert rights in a personal name needs to establish that there is an enforceable right in respect of that name.

Right of personality

There is no free-standing general right of personality, i.e. a right by which a person with a particular name can seek to prevent the use of that name by others. There are of course circumstances in which an individual can legitimately complain about the use of their name and seek a remedy from the courts such as under the rules that apply to defamation, registered trade marks, passing off and breach of confidence actions. In other words, the mere fact that someone has a particular name is not of itself sufficient to found a cause of action. Other elements need to be present such as an untrue or malicious statement (under the rules of defamation), a registered right (under trade mark law), goodwill attaching to the name and misrepresentation (under the law of passing off) or a contractual or other legitimate expectation of confidence (under the law of confidence).

The Complainant does not have the benefit of a registered trade mark in the name Hvidbro-Mitchell. The Complainant says that she has become well-known as Maiken Hvidbro-Mitchell 'it being her personal name'. There is no suggestion and certainly no evidence that the Complainant has acquired unregistered rights in that name by reference to a trade or business carried on under that name.

The Complainant says that she has rights in her personal name pursuant to the Data Protection Act 1998 and the European Union Charter of Fundamental Rights and it is necessary to consider those provisions in turn.

The Data Protection Act

The Data Protection Act 1998 ('the DPA') was introduced to implement the Data Protection Directive (95/46/EEC) and it imposes broad obligations on those who collect and process personal data. It is aimed at the commercial or organisational use of personal data but it can extend to use by individuals. The DPA confers rights on individuals in relation to data held on them by data controllers which include:

- a right of access to be informed whether personal data of which he is the data subject is being processed by or on behalf of that data controller and, if so, a number of consequential rights; and

- a limited right to require the data controller not to process data where such processing causes, or is likely to cause, the individual or anyone else unwarranted substantial damage or distress.

There is an exemption in section 36 of the DPA which is headed 'Domestic Purposes' which provides:

Personal data processed by an individual only for the purposes of that individual's personal, family or household affairs (including recreational purposes) are exempt from the data protection principles...

There is some debate amongst lawyers and academics at the current time about the extent of this 'domestic purposes' exemption, particularly in the context of social networking sites.

The European Charter of Fundamental Rights

As the judgment in the case of *The Rugby Football Union v Consolidated Information Services Limited* [2011] EWCA Civ 1585 confirms the European Charter was given direct effect by adoption of the Lisbon Treaty in December 2009 and binds Member States when they are implementing EU law.

Article 8 of the Charter provides:

Everyone has the right to the protection of personal data concerning him or her;

Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law....

The Complainant claims that she has the right to enforce the protection of her name pursuant to the Data Protection Act and the European Charter. In the Reply the Complainant put it in these terms:

The Complainant considers that the Respondent's use of her personal data in the Domain Name to be a breach of data protection law.

This is not an accurate description of the rights conferred on individuals by the data protection provisions. The rights of individuals are to be informed about and, in certain circumstances, to object to the processing of personal data, which can include names. It does not follow from the fact that names and addresses can amount to personal data under the DPA that an individual has a right in their personal name.

In the Expert's opinion, the data protection provisions do not confer an enforceable right in respect the Complainant's name for the purposes of a domain name registration and to find otherwise would be to recognise an unorthodox form of personality right, which is not the role of an Expert under the DRS.

The Complainant says the use of her personal data on the website amounts to an infringement of data protection law which is the subject of a separate complaint. That may be the case but it is a matter for the appropriate authorities.

Personal name

The Complainant instructed solicitors who wrote to Gareth Croxford (who was at that time the registrant) on 30 November 2012 demanding a transfer of the Domain Name. The letter, which was attached to the Complaint, contains this passage:

It is undeniable that you deliberately took our clients' name without permission, and registered it as a domain name about four weeks ago: it seems that you did so with "malice aforethought".

In the Complaint it is asserted that 'the Respondent registered the Complainant's unique name as a domain name without any adornment' and 'ignoring the prefix and suffix, that the Domain Name is identical to the Complainant's personal name in which she holds rights.'

What these claims conveniently overlook is the fact that the Complainant's personal name consists of two elements being (i) her first name Maiken and (ii) the double-barreled surname Hvidbro-Mitchell. The name Hvidbro-Mitchell may be very unusual but it does not belong to the Complainant in the proprietary sense.

To demonstrate the Complainant's difficulties over her claim to rights in the name Hvidbro-Mitchell one can ask whether the name Hvidbro-Mitchell could sensibly refer to anyone other than the Complainant. The answer to that question is plainly yes – it could refer to her husband or, indeed, to anyone else who shares the same surname. The list of people who share that surname may be a very short list (in reality it is probably only her immediate family) but that does not justify the leap in reasoning to the conclusion that it is her unique name over which she has rights. It is abundantly clear on the evidence that the target of the Respondent's wrath was not, in fact, the Complainant at all: it was her husband, who shares the same surname. The Respondent says that the 'site has nothing to do with Mr Hvidbro-Mitchell's ex-partner Maiken Hvidbro-Mitchell.'

The Complainant says the name Hvidbro is protected in Denmark by law. The Complainant says there is a requirement to obtain approval for first and last names from the Ministry of Ecclesiastical Affairs and the Ministry for Family and Consumer Affairs. In addition, she says that surnames carried by 2,000 persons or less are protected. These provisions appear to impose limitations on third parties about the use of the name Hvidbro as a surname in Denmark. They do not in the Expert's opinion provide the Complainant with an enforceable right under the DRS in relation to her adopted double-barreled surname.

Nominet administers a number of second level domains ('SLDs'). The .co.uk SLD is a fully open domain which means that Nominet accepts applications on a first come first served basis. Nominet introduced the .me.uk SLD for use by individuals as personal domains. There are specific rules that apply to the .me.uk SLD. The Complainant's claim of impersonation would have been considerably stronger had the Respondent registered maiken-hvidbro-mitchell.me.uk as a domain name.

The Expert is not satisfied on the balance of probabilities that the Complainant has rights in the name Hvidbro-Mitchell as defined in the Policy and she has therefore failed the first test under the Policy.

Nominet publish a booklet called 'The Dispute Resolution Service (DRS) Making a complaint about a .uk domain name registration'. The booklet contains this passage:

The DRS is intended to be a cheap and quick way of resolving clear cases of domain name abuse, either by mediation, or a binding adjudication. To be successful with a DRS complaint, you will be required to prove two things. These two tests (the Rights and Abusive Registration) are covered in more detail later in this guide. There may be some situations where the DRS will not be able to offer a solution to your problem, or it won't be necessary to use the service.

This is a situation in which the DRS is not able to offer a solution to the Complainant's problem which stems from an acrimonious matrimonial dispute between her husband and his former wife. The Complainant and, perhaps more likely, her husband may have causes of action against the Respondent in relation to the material that appears on the website but that is not a matter for the DRS.

6.3 Abusive Registration

In light of the above finding, the Expert does not need to determine whether the Domain Name, in the hands of the Respondent, is an Abusive Registration.

7 Decision

For the reasons set out above, the Expert is not satisfied on the balance of probabilities that the Complainant has rights in a name which is identical or similar to the Domain Name. The Expert directs that no action be taken in relation to the Domain Name.

Signed Andrew Clinton

Dated 25 February 2013