

DISPUTE RESOLUTION SERVICE

D00009846

Decision of Independent Expert

Gold Canyon

and

Derek Gentry

1. The Parties:

Complainant: Gold Canyon
6205 S. Arizona Ave.
Chandler
AZ
85248
United States

Respondent: Derek Gentry
Phoenix
AZ
85085-5872
United States

2. The Domain Name:

<goldcanyon.co.uk>

3. Procedural History:

- 3.1 The dates and times of the main procedural steps in these proceedings are as follows:

28 April 2011 00:16 Dispute received
28 April 2011 09:33 Complaint validated

03 May 2011 09:42 Notification of complaint sent to parties
20 May 2011 02:30 Response reminder sent
25 May 2011 10:26 No Response Received
25 May 2011 10:28 Notification of no response sent to parties
07 June 2011 02:30 Summary/full fee reminder sent
08 June 2011 10:38 Expert decision payment received

- 3.2 At the time the Complaint was filed the short nature of the Complaint would have automatically resulted in the Complainant being provided with a copy of the “Chairman’s letter”. The Chairman’s letter is a letter sent out in the name of the Chairman of Experts, when Nominet receives a submission from a party, which, by reason of its brevity or lack of supporting evidence (i.e. exhibits), is thought might be inadequate. The person responsible for the submission is invited to reconsider its position (see paragraph 5.12 of the Experts Overview currently available on Nominet’s website at http://www.nominet.org.uk/digitalAssets/39192_DRS_Expert_Overview.pdf)
- 3.3 Further, on 28 April Nominet sent an email to the Complainant that read as follows:

Dear Gold Canyon

We have received your complaint.

We have not yet sent the complaint to the registrant of the disputed domain name, and are inviting you to review your case.

We do this when we receive short complaints, or complaints which do not have supporting evidence.

If you wish to withdraw your complaint and submit a new one, please advise us by email to drs@nominet.org.uk. If we do not hear back from you by Wednesday 4th May we will send this complaint to the registrant.

To help you assess your complaint, we recommend that you read the following documents:

The DRS Experts Overview.

This is a report made by the panel of adjudicators and summarises their opinions on common issues relating to the DRS policy and procedure. You can find it here:
<http://www.nominet.org.uk/disputes/drs/experts/drsoverview>

The DRS Policy, Procedure and a DRS Booklet these can be found here:
<http://www.nominet.org.uk/disputes/drs/policyandprocedure/>.

The Complaint

You are the "Complainant", and the burden of proof lies with you. This means that in order to be successful you must prove two points on the balance of probabilities.

You must prove that you have:

- 1) Rights in a name or mark that is identical or similar to the domain name(s) AND
- 2) the domain name(s), in the hands of the Respondent, is an Abusive Registration.

These are known as the 'Rights' and the 'Abuse' test.

You have (up to) 5,000 words in total to state your case and prove the 'Rights' and the 'Abuse' tests. You are allowed to attach exhibits and evidence in addition to the 5,000 words.

It is vital that you refer to evidence and then provide it with your complaint. Stating "and this can be provided on request" or "see our website" will not be enough.

An example Complaint form can be found on our web site at <http://www.nominet.org.uk/disputes/drs/complainant/complaint/example/>

All the previous DRS Expert decisions are published on our website here: <http://www.nominet.org.uk/disputes/drs/decisions/decisionssearch/>

You may find it useful to read some cases that have failed. Examples of these are martinyale.co.uk (DRS 4635), samatha.co.uk (DRS 6867) and vibe.co.uk (DRS 6949).

If you have any questions about the DRS process, please do call us on +44 (0)1865 332248.

Regards,
[Name of Administrator]
Nominet

4. Factual Background

- 4.1 There is a lack of clarity as to the underlying facts in this case. However, it is apparent that the Domain Name was registered on 10 April 2007 and was due for renewal on 10 April 2011. It is currently registered in the name of the Respondent.
- 4.2 It also seems reasonably clear from papers filed by the Complainant, that an individual with the Respondent's name pleaded guilty to various

offences before the Superior Court of Arizona. Maricopa County in April 2011.

- 4.3 No website appears to be operating from the Domain Name as at the date of this decision.

5. Parties' Contentions

- 5.1 The Complaint has been filed by an entity identifying itself as "Gold Canyon (non UK corporation)". It is extremely short. In the circumstances, it is easiest to simply to set out the substantive parts of that Complaint in full. They read as follows:

"What rights are you asserting?"

The current registrant was the former IT Manager. He purchased this domain under a personal account. He was recently convicted of frauding [sic] the company. He was suppose [sic] to turn over control of all domains. Since this domain has expired he did not. He has now been sentenced to jail and has begun to server [sic] his sentence.

Why is the domain name an Abusive Registration?

The domain was purchased and paid for by the company, but was not registered to the company."

- 5.2 Three documents have been filed in support of that Complaint. These are as follows:

- (i) A document titled "Transaction Privilege Tax licence" issued by the Arizona Department of Revenue on 1 July 1997. It refers to "Gold Canyon International LLC".
- (ii) A document titled "Privilege Tax licence" issued by City of Chandler Arizona Tax and License Division on 31 December 2011. It refers to "Gold Canyon Candles LLC"
- (iii) A document titled "Sentence - Imprisonment and Probation" in respect of proceedings brought by the State of Arizona against "Derek David Gentry". It appears to record sentences in respect of various offences. Although each of the offences is named, no further information in relation to those offences is recorded. However, at page 4 of this document there appears to be restitution order in favour of "Gold Canyon Candles LLC" in the sum of US\$581,548.80.

- 5.3 The Respondent did not file any Response in these proceedings.

6. Discussions and Findings

General

6.1 To succeed under the Policy, the Complainant must prove on the balance of probabilities, first, that it has Rights in respect of a "name or mark" that is identical or similar to the Domain Name (paragraph 2(a)(i) of the Policy) and second, that the Domain Name is an Abusive Registration in the hands of the Respondent (paragraph 2(a)(ii) of the Policy). The Complainant must prove to the Expert that both elements are present on the balance of probabilities (paragraph 2(b) of the Policy).

6.2 Abusive Registration is defined in paragraph 1 of the Policy in the following terms:

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

6.3 The failure by the Respondent to file a substantive submission in response to the Complaint does not entitle the Complainant to the equivalent of a default judgment on these issues. The Complainant still has to make out its case on the balance of probabilities under the Policy to obtain the decision it wants.

6.4 In the absence of any exceptional circumstances I am entitled to draw such inferences from the Respondent's non-compliance with the Policy or the procedure for the conduct of proceedings under the Policy (the "Procedure") as I consider appropriate (paragraph 15(c) of the Procedure). However, I decline to draw any adverse inference against the Respondent in this case, given that if the Complainant's contentions about the Respondent's convictions are correct, it is far from clear that the Respondent has either seen the Complaint or had a chance to respond to the same.

Rights

6.5 The Complainant has failed to my satisfaction to show that it has the rights for the purposes of the Policy.

6.6 The first reason for this is that it is not at all clear who is the Complainant. It has identified itself as "Gold Canyon (a non UK corporation)". However, no further explanation is provided. There is no reference in the Complaint to its corporate status or the laws of the state in which it is incorporated as

a separate legal entity. The documents that have been filed with the Complaint suggest that there are at least two LCCs (i.e. limited liability companies) that use “Gold Canyon” in their name: i.e. Gold Canyon Candles LLC and Gold Canyon International LLC. However, which, if either, of these two entities is the Complainant in these proceedings, is not explained.

- 6.7 This question of identity is a matter that perhaps could have been resolved by issuing a request for clarification under paragraph 13(a) of the DRS Procedure¹. However, there is also a second more fundamental problem with the Complaint. That is that even had the identity of the Complainant been clarified, there is no proper explanation of the rights relied upon by the Complainant.
- 6.8 Even if I were to assume that the corporate name of the Complainant contains or comprises the term “Gold Canyon”, it is noticeable that there is no attempt by the Complainant to rely upon any right in that term. Further, as is recorded in the “Expert’s Overview” (available on the Nominet website) the consensus view among experts is that a mere company name provides insufficient rights for the purposes of the policy. The use of the company of that name may in some circumstances be relevant to an allegation of unregistered or common law trade mark rights, but the mere fact that the term forms part of a company’s name is insufficient. In the present case there is no claim of unregistered rights or sufficient (or any) explanation of the complainant’s business or use of the “Gold Canyon” name in any jurisdiction that recognises unregistered rights, that might found such a claim.
- 6.9 Instead, the Complaint refers to the Respondent’s position as the Complainant’s IT manager and his alleged conviction. It is then asserted that the Respondent “was supposed to hand over control of all domains”. The legal basis of this requirement to hand over the Domain Name is not explained further.
- 6.10 The fact that Complaint does not appear to rely upon something akin to trade mark rights whether or not registered, is not necessarily fatal to the Complaint. Other types of right have been recognised as rights for the purposes of the Policy. There have for example, been cases where contractual rights have been held to be sufficient “rights” for the purposes of the policy (see paragraph 1.6 of the Expert’s Overview).
- 6.11 However, in such a case I am of the view that an expert should proceed with great care. The appeal panel decision in *David Munro v Celtic.com Inc* DRS 04632 (<ireland.co.uk>) is instructive in this respect. In that case the rights relied upon were alleged contractual rights in the domain name alone. The appeal panel appeared to accept that “Rights in respect of a name” in paragraph 2(i) of the Policy was wide enough to cover contractual rights alone. But it then declined to find in favour of the complainant. The reasons given for this were as follows:

¹ See, for example, *DC Comics/WB v Ms Lucie Riley* DRS9579

“The members of the Panel consider that the parties in this case may well have entered into a contract in respect of the Domain Name so that in refusing to transfer the Domain Name to the Complainant the Respondent is in breach of contract. But the members of the Panel each recognise that they were not appointed as experts in the law of contract. This Panel happens to comprise three experienced Intellectual Property lawyers. Their experience outside that specialist field is variable. A significant minority of the body of Experts are not lawyers at all.

Although it may be said that at first sight the contractual issues in the case are apparently straightforward, the dispute between the Complainant and the Respondent has raised a number of contested legal issues. These concern questions such as jurisdiction, was a binding and enforceable contract entered into, where was any contract made, what is the proper law of the contract, what are the terms of any contract, and what statutory provisions might govern the enforceability of the contract.

The members of the Panel are not in a position to come to a clear view on the contractual issues. The Panel is well aware that other Experts will be at least as uncomfortable on the topic. Had Nominet contemplated that pure, possibly complex, contractual disputes would fall to be resolved under the Policy, its system for selecting and appointing Experts to cases would have been very different and the procedure for dealing with the disputes more comprehensive than the simple paper-based system it is.

Moreover, the Complainant seems to assume that the natural consequence of a finding of breach of contract by a court will lead inexorably to an order for transfer of the domain name in issue. That is not so. A court might decide that the fair result should be a damages award. Yet, the only sanction available to the Panel is transfer (or cancellation). The Panel is not satisfied that in this case an order for transfer of the Domain Name would necessarily be the just result.

Even if specific performance of the contract were the just result, steps would have to be taken to ensure that the purchase price was paid over to the Respondent. Unlike a court, the Panel has no power to give any effective supervision to the enforcement of the contract.

For all the above reasons, the Panel is confident that pure contractual disputes of this kind are outwith the scope of the Policy. In all the circumstances, not only is the Panel unable to satisfy itself on the balance of probabilities that the Complainant has Rights but in any event it declines to allow the appeal.”

6.12 It was this reasoning that in *Bristan Group Limited (trading as Heritage Bathrooms) v. Michael Gallagher* DRS7460 led me to state as follows:

I therefore read [the *David Munro*] decision as suggesting that whilst it is open to me to construe a contract in any decision under the Policy, I should be wary of doing so if the case raises a substantial question of contractual interpretation. Only in a case where I have formed a “clear view” on a contractual issue would it be appropriate for me to decide a case on that basis. Even then, if it is likely that a significant number of my fellow experts (some of which are without formal legal training) would not consider the answer to be of equal clarity, it may be that I should still decline to decide that question.

- 6.13 Further, the *David Munroe* decision suggests that even if a contractual question can be answered clearly, there may be other reasons (for example the limited powers of the expert) that would mean that it is inappropriate to order a transfer of the domain name to the Complainant on the basis of such a right.
- 6/14 In the present case there is no direct allegation of contractual rights. There is a reference to a conviction, but there is no explanation as to why that conviction gives the Complainant rights to the Domain Name. There is also nothing in the “Sentence” document provided by the Complainant that suggests that the US courts have ordered the transfer of the Domain Name. Even if it had done so, I would remain to be convinced why that order should be enforced through proceedings under the Policy rather than through the US courts already seized of this matter.
- 6.15 Perhaps the complainant has some legal claim based upon the fact that the Respondent was the Complainant’s IT manager at the relevant time. Had these actions occurred in England and Wales, it is not impossible to conceive of arguments being constructed alleging a breach of an employment contract or even a claim in respect of the Domain Name under the law of trusts. However, this is merely speculation on my part. No such claim is clearly alleged or evidenced. Even if it had been, I would also remain to be convinced that these questions, which, if they arose at all in this case, would be governed by US law, could be sensibly addressed and determined by a Nominet expert.
- 6.16 So, in summary, the Complainant has failed to show with the necessary degree of clarity any different sort of right (i.e. a right not being a right akin to a trade mark) that might constitute a right of a sort recognised as a right for the purposes of the Policy, let alone demonstrate that it would be appropriate in the circumstances of the case for an expert to find in the Complainant’s favour on the basis of such a right.
- 6.17 I suspect that had the Complaint been prepared with greater care or with the benefit of legal advice, rights might have been shown in this case on more conventional grounds. Although no rights akin to a trade mark have been claimed, if the Complainant (whomever it may be) has been engaged in any significant activity in the United States under the “Gold Canyon” name for any period of time, it is likely that relevant rights could have been shown.

- 6.18 In such circumstances, an expert may be tempted to strain him or herself to do justice to what appear to be the likely facts of the case even where, as here, a complaint has been imperfectly prepared. However, it is one thing for an expert to independently verify an assertion made in a complaint from (for example) a web page or a database. It is quite another, to do a complainant's job for it in terms of constructing both the complainant's argument and to then find the evidence that supports that argument (see paragraph 5.10 of the Expert's Overview).
- 6.19 Further, there is extensive material available on Nominet's website to assist parties in preparing their case. That material includes detailed guidance to complainants as to how to prepare a complaint and as to how the Policy operates. It also clearly explains the importance of both a detailed complaint and the need to provide supporting evidence.
- 6.20 Last, but not least, and as has already been explained in section 3 of this decision, the Complainant received two notifications from Nominet in this case suggesting that the Complaint might be lacking. Notwithstanding these warnings, the Complainant decided to press ahead with the Complaint as it stood.
- 6.21 Against that background, I do not consider it appropriate to issue a request for a further statement under paragraph 13(a) of the DRS Procedure either on the issue of the identity of the Complainant or to permit the Complainant to reformulate its case on rights more generally.

Abuse

- 6.22 If, as the Complainant appears to contend, the Domain Name was registered in the Respondent's name when the Respondent was the Complainant's IT manager and the registration was paid for by the Complainant then it is highly likely that the Domain Name in the hands of the Respondent will be an abusive registration.
- 6.23 None of these claims are evidenced by the Complainant beyond the limited assertions made in the Complaint. However, the fact that something is not evidenced beyond an assertion in a Complaint is not necessarily fatal. As I stated in *Wolf Lingerie v Online Lingerie Store DRS7254*:

“Administrative proceedings under the Policy are not equivalent to a court process. They are intended to be a relatively simple, user-friendly method of adjudicating domain name disputes. As a consequence there are no formal rules of admissible evidence and experts are granted a wide discretion as to the assessment of admissibility, relevance, materiality and weight of material submitted (paragraph 12(c) of the Procedure). Against this background, assertions of fact contained within a statement filed by a party, particularly when those statements are not inherently incredible and can reasonably be expected to be within the knowledge of the party making the statement, can be treated as “evidence” for the purposes of these proceedings. They may not constitute strong evidence and may well be

easily outweighed by evidence to the contrary. Nevertheless, they are material that I can take into account in the context of this decision.”

6.24 Therefore, had this been the only weakness in the Complaint and in the absence of any evidence or assertion to the contrary in any Response, it may be that I would have been prepared to come to a finding of abusive registration. However, given the failure of the Complainant to show rights recognised by the Policy, it is not necessary to reach any finding on this issue.

7. Decision

7.1 In light of the foregoing, and in particular the Complainant’s failure to establish relevant rights for the purposes of the Policy, the Complaint is rejected.

Signed Matthew Harris

Dated 20 June 2011