

DISPUTE RESOLUTION SERVICE

D00009355

Decision of Independent Expert

Overseas Keys SL

and

Mr Stephen Henley

1. The Parties:

Lead Complainant: Overseas Keys SL
Calle Ancona 9, Poligono de Santa Ana
Cartagena
Murcia
30319
Spain

Respondent: Mr Stephen Henley
8 Barco Terrace
Penrith
CA11 8NB
United Kingdom

2. The Domain Name(s):

overseaskeys.co.uk

3. Procedural History:

07 December 2010 17:13 Dispute received
08 December 2010 10:47 Complaint validated
08 December 2010 10:54 Notification of complaint sent to parties
08 December 2010 15:26 Response received

08 December 2010 15:27 Notification of response sent to parties
13 December 2010 11:13 Reply received
16 December 2010 13:09 Notification of reply sent to parties
16 December 2010 13:09 Mediator appointed
22 December 2010 15:06 Mediation started
19 January 2011 12:53 Mediation failed
19 January 2011 12:55 Close of mediation documents sent
26 January 2011 16:35 Expert decision payment received

4. Factual Background

The Complainant, Overseas Keys SL, is a Spanish company involved in the management and rental of privately owned villas and apartments. It specialises in providing its services to British owners of overseas properties. Its website is at www.overseaskeys.com from which it markets its business.

Prior to 30 April 2010 the Respondent, Stephen Henley, was employed by the Complainant, either as an employee or consultant, and he provided IT related services. The Respondent resigned his position by a letter dated 30 April 2010.

On 19 October 2010, the Respondent registered the Domain Name (www.overseaskeys.co.uk). At the time of the Complaint, it resolved to a website at www.overseaskeys.co.uk which contained various content relating to the Complainant's business and which was extremely critical of the Complainant. It accused it, and the Complainant's two owners, Kenneth Richardson and Samantha Jane Richardson, of Spanish VAT fraud, Spanish tax fraud, Spanish social security fraud and misleading and defrauding its customers.

The content of the website now relates to a business called Gringo Solutions Limited, which states that it is a UK registered company and a specialist in hospitality software e-commerce. The heading of the website now states:

*"Overseas Keys for privately owned holiday homes.
Book your holiday home directly with the owner - coming soon!!"*

The Respondent says that Gringo Solutions Limited is a company owned and controlled by him.

5. Parties' Contentions

In summary, the Complainant says as follows:

- The Complainant's business originally commenced trading as "Overseas Keys" in early 2007 as a trading name of Barrow Travel Limited, which was part of the Co-operative Group's travel business.
- On 21 February 2008, Mr Kenneth Richardson and his wife Samantha Richardson, who are the owners of the Complainant, purchased the Co-

operative Group's share of the Barrow Travel Limited business and commenced trading through Overseas Keys SL.

- The Complainant's website at www.overseaskeys.com has been live since early 2008 and is the principal marketing tool for the Complainant.
- The Complainant's business involves the management and rental of privately owned villas and apartments and its principal target customer is the British owner of overseas properties, who account for almost the entirety of its customer base.
- The Respondent is a former employee of the Complainant. The Respondent, together with another former employee of the Complainant, Max Iglesias, have used the Domain Name to resolve to a website which has the primary purpose of undermining the Complainant's business and confusing internet users. Both the Respondent and Max Iglesias are former employees with a grudge against the Complainant.
- Max Iglesias has used the Domain Name as an email address and has sent emails to the Complainant's customer database. The Complainant's customers' data is shown on the website to which the Domain Name resolves and this customer data must have been stolen from the Complainant's system.
- The comments and claims made on the website to which the Domain Name resolves have no basis in fact. The Complainant's accounts are prepared quarterly by accountants and are submitted to the Spanish Revenue in the normal way. The comments are slanderous and malicious and intended only to undermine the Complainant's business.

In his Response, the Respondent in summary says as follows:

- The Domain Name was registered for the purpose of providing holiday lettings to UK residents.
- The Respondent is the managing director of Gringo Solutions Limited, which was incorporated on 22 February 2010. It is the Respondent's intention to change the registrant details for the Domain Name from himself to Gringo Solutions Limited.
- He was not an employee of the Complainant. He was engaged by it as a consultant until he resigned. He resigned because of fraud committed by the management of the Complainant.
- Mr Kenneth Richardson is barred from being a UK company director and should not be entitled to any .co.uk domain name.
- Since the Respondent removed his services and support for the Complainant, the Complainant's website at www.overseaskeys.com has been non-functional.

The Respondent has every intention of purchasing overseaskeys.com as a domain name when the Complainant ceases trading.

- The Respondent's and Gringo Solutions Limited's business is not property management but holiday lettings, car hire and bureau de change services.
- The Respondent and Gringo Solutions Limited have not violated any laws or regulations.
- The Complainant is insolvent and will shortly be closed by the Spanish authorities because of its VAT fraud and fiscal fraud and systematic abuse of Spanish law. The Respondent says these are "statements of fact" and "truthful evidence" which the public has a right to see in line with the Freedom of Information Act which governs .co.uk domain names.
- The Complainant has no intellectual property rights to use "overseas" nor "keys" despite their logo displaying the "TM" sign suggesting that it is trade marked which in itself is deliberately misleading. Due to this misleading representation and the non-UK status of the Complainant, there are no legal restraints to prevent the use of the website associated with the Domain Name by any UK registered entity.

The Complainant's Reply takes issue with the content of the Respondent's Response. The Complainant submits that the Response does not address the issues as directed in Nominet's guidelines but does demonstrate *"the appalling abuse of the truth"* which is mirrored by the content of the website to which the Domain Name resolves at www.overseaskeys.co.uk. In particular, in its Reply:

- The Complainant points out that the Respondent's claim that the Domain Name was purchased for the purpose of holiday lettings to residents in the UK is contradicted by the actual content of the website to which the Domain Names resolved. It had an opening statement saying:

"This site has been created to provide evidence of Overseas Keys SL unlawful ongoing misrepresentations and slanderous lies about my health".

- The Complainant exhibits supporting documentation relating to the formation of the Complainant company, and points out that none of the allegations raised by the Respondent or Mr Max Iglesias on the website to which the Domain Name resolves has been the subject of any proven claims or judgments.
- The Complainant denies making any misleading use of the "TM" mark and confirms that, when it first started trading as part of the Co-operative Travel business, they were instructed to use the TM symbol although they subsequently did not feel it was necessary and ceased using it. In any event the use of the TM symbol does not mean that it is registered, as if that were the case the ® symbol would be used instead.

- The Complainant says that the Response demonstrates the Respondent's agenda in its stated intention to purchase the overseaskeys.com domain name when the Complainant ceases trading. The intention of the Respondent and Mr Max Iglesias, who are both directors of Gringo Solutions Limited, is to undermine the confidence of the Complainant's customer base, thereby damaging its business to the point where it can no longer trade and that is the only purpose of the website to which the Domain Name resolves. Mr Max Iglesias has previously sent emails to the Complainant's customers with the sole intention of getting them to visit the website to which the Domain Name resolves.
- The Complainant emphatically denies that Mr Kenneth Richardson has been barred from being a UK company director. It exhibits a copy of his driving licence and states that the information contained on the driving licence can be used on the UK Companies House website to check the register of banned UK directors and this would confirm that there is no record of him being a banned director.
- The Complainant says the fact that the Respondent confirms he incorporated Gringo Solutions Limited on 22 February 2010 is significant as he did not resign his position with the Complainant until 30 April 2010. The Respondent occupied a position of trust within the Complainant's business which the Respondent exploited by the theft of the Complainant's company data, including all of its customer data which has subsequently been used by the Respondent in his attempts to discredit and damage the Complainant's business *"for spite and commercial gain"*.
- The Complainant says that, through the Respondent's Response, the Respondent has demonstrated his *"abusive, arrogant and slanderous disregard for factual content"*.

6. Discussions and Findings

In order to succeed the Complainant must prove, on the balance of probabilities, two matters, i.e. that:

1. the Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name; and
2. the Domain Name is, in the hands of the Respondent, an Abusive Registration.

These terms are defined in the Nominet DRS Policy 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.

Abusive Registration means a domain name which either:

- (i) was registered on 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 has taken unfair advantage of, or has been unfairly detrimental to the Complainants Rights.

Complainant's Rights

The first point to make clear is that it does not matter that the Complainant is a Spanish company rather than a UK company. For the purposes of the Nominet DRS, foreign entities and rights are given equal weight to English entities and rights.

Nor does it matter that the Complainant has no registered trade mark rights in respect of its name, as unregistered rights also qualify as "Rights" under the DRS Policy as long as those rights are enforceable under the laws of at least one jurisdiction.

In addition, it is irrelevant whether or not one of the owners of the Complainant has been barred from being a director of a UK company, an allegation denied by the Complainant in any event. One point worth noting is that in support of its denial of that allegation, the Complainant exhibited a copy of Mr Richardson's driving licence but specifically requested that it was not provided to the Respondent for fear of it being misused. However, complainants should be aware that any such evidence submitted in support of a complaint will, unless exceptional circumstances apply, be made available to the Respondent in accordance with paragraph 2f i) of the Nominet DRS Procedure.

The Complainant says that it, and its predecessor in title, has been trading under the Overseas Keys name since 2007. That has not been challenged by the Respondent. The Complainant has exhibited what it says are its company formation documents, which are all in Spanish. However, in any event, the Complainant has exhibited one of its advertising leaflets which prominently displays the Overseas Keys name. Its website likewise makes prominent use of the name. In addition, it seems to be accepted and agreed by the Respondent that the Complainant has been trading for some time prior to the Complaint as the Respondent complains that the trading activities of the Complainant have been in breach of various Spanish laws.

The Respondent alleges that the Complainant's use of the "TM" symbol in association with its Overseas Keys logo is misleading as it is not a registered trade mark. However, as is pointed out by the Complainant, such use of the TM symbol in association with an unregistered trade mark is not misleading. The use of TM as opposed to the ® symbol is commonly used to denote an unregistered trade mark.

In the circumstances I find that the Complainant does have Rights in the name "Overseas Keys" being a name or mark which is identical or similar to the Domain Name. In particular, I find that it is identical to the Domain Name, ignoring the .co.uk suffix.

Abusive Registration

From the matters relied upon by the Complainant in its submissions, the following parts of paragraph 3 of the DRS Policy (being factors which may be evidence that the Domain Name is an Abusive Registration) are potentially relevant:

"Paragraph 3a.i.C - circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily for the purpose of unfairly disrupting the business of the Complainant."

"Paragraph 3a.ii - circumstances indicating that the Respondent is using or threatening to use the Domain Name in a way which has confused or is likely to confuse people or businesses into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant."

From the matters relied upon by the Respondent in his submissions, the following part of paragraph 4 of the DRS Policy (being factors which may be evidence that the Domain Name is not an Abusive Registration) is potentially relevant:

"Paragraph 4b - fair use may include sites operated solely in tribute to or in criticism of a person or business".

It is clear that the previous relationship between the Complainant and the Respondent came to something of a bitter end, with the Respondent accusing the Complainant of being guilty of tax and social security fraud under Spanish law and of misleading and defrauding its customers. The Respondent believes he has an unfettered right to voice his claims and allegations in view of the UK's Freedom of Information Act, which he believes governs .co.uk domain names. In that regard, the Respondent is incorrect. The registration and use of .co.uk domain names is governed by Nominet's terms and conditions and the DRS Policy and Procedure, and not by the UK's Freedom of Information Act.

The truth and accuracy of the allegations raised by the Respondent is vehemently denied by the Complainant. The Complainant has even obtained and exhibited a letter from its Spanish legal and tax advisors, Iberbrit Legal, which confirms that it is a Spanish legal and accountancy practice which acts on behalf of the Complainant for its tax accounting and legal purposes. The letter goes on to confirm that the Complainant has been one of its clients since January 2008 and that the practice submits the Complainant's quarterly and annual tax and IVA/VAT returns in full compliance with Spanish law. In addition, it states that, whilst they are aware of the claims of VAT and fiscal fraud alleged by the Respondent and his colleague, Mr Max Iglesias, they can confirm that there are no proven claims or judgments pertaining to the Complainant in relation to these allegations.

My role as the appointed independent Nominet expert is not to decide who is right and who is wrong in relation to the allegations raised by the Respondent against the Complainant. My role is to decide whether or not the Domain Name is, in the

hands of this Respondent, an Abusive Registration in accordance with the criteria set out in the DRS Policy.

The Policy, and in particular paragraph 4b set out above, recognises that the use of a domain name resolving to a website which operates solely in criticism of a person or business may be fair use of that domain name. I would emphasise the word "may".

The DRS "Experts' Overview", which is published on Nominet's website, explains how experts commonly deal with various issues. One of those issues is the use of a domain name for the purpose of resolving to a website in criticism of a person or business. Paragraph 4.8 of the Experts' Overview confirms that the consensus view among experts is that the nature of the domain name itself is crucial to deciding whether or not its use for the purposes of a criticism website is fair or abusive. In particular, a distinction is drawn between a domain name which flags up clearly what the visitor is likely to find at the website, such as "IhateComplainant.co.uk", as opposed to a domain name which consists of the Complainant's name with nothing more and which is likely to be believed to be a domain name of or authorised by the Complainant.

The Experts' Overview refers to the previous decision in DRS 06284 (rayden-engineering.co.uk), in which the appeal panel concluded that, whilst the use of a domain name identical to the Complainant's name and without any modification would not always and automatically be unfair, it was only in exceptional circumstances that such use could be fair. In that case, the panel declined to find that such exceptional circumstances existed in that case. Likewise, in this case, I can find no exceptional circumstances to justify the use of a domain name that is identical to the Complainant's name, and without any modification, for the purpose of a criticism website.

In my view, the fact that a visitor to the website would immediately be aware from the content of the website that it was not, in fact, a website controlled or authorised by the Complainant, does not assist the Respondent. One of the reasons for drawing a distinction between domain names which of themselves make it clear what the visitor is likely to find at any website to which it resolves, and domain names which do not make it clear, is commonly referred to as "initial interest confusion". Paragraph 3.3 of the Experts' Overview comments upon initial interest confusion and confirms that the overwhelming majority of experts view it as a possible basis for a finding of Abusive Registration and, in particular, that findings of Abusive Registration are most likely to be made where the domain name in issue is identical to the name or mark of the Complainant and without any adornment. That is precisely the case here.

Where, as in this case, the Domain Name is identical to the Complainant's name and without any adornment, there is a substantial risk that internet users will visit the website to which the Domain Name resolves in the mistaken belief that it is likely to be the Complainant's website, because the internet user has either guessed at the relevant URL or reached it via a search engine. There is a material risk that such a speculative visitor to the website will be visiting it expecting it to be a site that *"is registered to, operated or authorised by, or otherwise connected with*

the Complainant". Whilst the content of the website may well immediately dispel any such confusion, the only reason such a visitor reached the website in the first place was as a result of having been deceived by the fact that the Domain Name is identical to the Complainant's name.

7. Decision

In the circumstances, for the reasons outlined above, I find that the Complainant has proved, on the balance of probabilities, that it has Rights in respect of the name "Overseas Keys", being a name or mark which is identical or similar to the Domain Name and that the Domain Name is, in the hands of the Respondent, an Abusive Registration.

In the circumstances I order that the Domain Name be transferred to the Complainant.

Signed: Chris Tulley

Dated 21 February 2011