



DISPUTE RESOLUTION SERVICE

D00019217

D00019391

Decision of Appeal Panel in Joined Cases

Shenzhen Foscam Intelligent Technology Co., Ltd

and

Ravattrading

Foscam Digital Technologies LLC

and

Shenzhen Foscam Intelligent Technology Co., Ltd

1. The Parties:

D00019217

Complainant:

Shenzhen Foscam Intelligent Technology Co., Ltd

Room AB 9th Floor

Block F5

TCL International E City, No. 1001 Zhongshanyuan Road

Shenzhen

Guangdong 518055

China

Respondent:

Ravattrading

12633 Memorial Dr. #211

Houston

Texas 77024

United States

D00019391

Complainant:

Foscam Digital Technologies LLC

16727 Park Row Dr.

Houston

Texas 77084

United States

Respondent:

Shenzhen Foscam Intelligent Technology Co., Ltd

Room AB 9th Floor

Block F5

TCL International E City, No. 1001 Zhongshanyuan Road

Shenzhen

Guangdong 518055

China

For reasons explained further in Section 6 below the Appeal Panel will proceed on the basis that the Complainant in DRS 19217 and Respondent in case DRS 19391 is Shenzhen Foscam Intelligent Technology Co., Ltd which will be referred to as "Foscam Shenzhen" and the Respondent in DRS 19217 and Complainant in DRS 19391 is Foscam Digital Technologies LLC which will be referred to as "Foscam Houston".

2. The Domain Names:

The domain names at issue are <foscam.co.uk> and <foscam.uk>. These are referred to as the "Disputed Domain Names" in this decision.

3. Appeal Panel Declaration

Nick Gardner, Ian Lowe and David King (the "Appeal Panel") have each made a statement in the following terms:

"I confirm that I am independent of each of the parties. To the best of my knowledge and belief, there are no facts or circumstances, past or present, or that could arise in the foreseeable future, that need be disclosed as they might be of such a nature as to call into question my independence in the eyes of one or both of the parties".

4. The Policy

These appeal processes are governed by version 4 of the Policy that applies to disputes filed on or after 1 October 2016 (the "Policy"). This document is available for inspection on the Nominet website (<https://www.nominet.uk/resources/policy/policies-rules/#drspolicy>). The Policy sets out how cases under Nominet's Dispute Resolution System ("DRS") will be determined.

5. Procedural History

These appeals have a procedurally complex background. On 8 August 2017 Foscam Shenzhen filed a complaint under the Policy against Ravat trading in respect of the Disputed Domain Names (DRS 19217). No response was filed and on 13 September 2017 the appointed Expert, Clive Trotman, issued a decision upholding the complaint and directing the transfer of the Disputed Domain Names to Foscam Shenzhen. The decision was notified to the parties on the same day. No appeal against the decision was submitted by Foscam Houston within the time allowed by the Policy. As appears below Foscam Houston has now submitted an application for permission to appeal out of time.

As appears in more detail below, Foscam Houston's case is that it never received the Complaint in DRS 19217 or the decision of the Expert, and only became aware of what had happened when the Disputed Domain Names were removed from its control on 2 October 2017. It says that the underlying reason for its failure to receive both the Complaint and the Expert's decision was the occurrence of the tropical storm Hurricane Harvey and the widespread disruption that caused to Houston in general and to Foscam Houston's business in particular. This issue is discussed further below.

Foscam Houston then contacted Nominet to discuss the position on or around 4 October 2017. It was informed by Nominet (this was confirmed in writing on 9 October 2017) that the time for appeal against the decision in DRS 19217 had expired and Nominet's file was closed. On 7 October 2017, Foscam Houston filed a complaint against Foscam Shenzhen in respect of the Disputed Domain Names (DRS 19391). Foscam Houston claimed that, because of the effects of Hurricane Harvey in Houston in August 2017, it did not have notice of the original complaint in DRS 19217 until after the decision was issued and the time to appeal had expired. Furthermore, it alleged that in any event Nominet had had no jurisdiction to hear the original complaint because there was an agreement between the parties to refer disputes to arbitration in Houston under the Settlement Agreement (as defined below). It in substance claimed that the Disputed Domain Names in the hands of Foscam Shenzhen were abusive registrations because Foscam Shenzhen had procured their transfer by submission of a DRS complaint which was inaccurate, incomplete and misleading, and which it had not had an opportunity to respond to.

On 2 January 2018, the Expert in DRS 19391 issued a decision dismissing the complaint substantially on the grounds that: (i) it constituted an impermissible attempt to appeal the decision in DRS 19217 out of time; and (ii) the parties had in any event agreed that the dispute should be resolved by arbitration in Texas and Foscam Houston could not invoke a jurisdiction (the DRS) which at the same time it disputed existed.

On 17 January 2018, Foscam Houston submitted an Appeal Notice in DRS 19391 restating that the Disputed Domain Names in the hands of Foscam Shenzhen were abusive registrations on the grounds that Foscam Shenzhen had obtained a default decision in 19217 by concealing the position with regard to the Settlement Agreement

and it was only because of the force majeure effect of Hurricane Harvey that Foscam Houston had been unable to appraise the Panel properly of the true position.

After a preliminary review, the Appeal Panel in DRS 19391 issued a Panel Order on 29 March 2018 indicating that the Appeal Panel considered that under the Policy there was no absolute bar on any appeal out of time. The Appeal Panel noted that the provisions of the Policy (in particular paragraphs 20.8 and 24) granted the Appeal Panel sufficient discretion to admit an appeal out of time and to allow further evidence to be filed – subject to the requirements in the Policy of its being an exceptional case and the interests of justice so requiring. The Appeal Panel directed that Foscam Houston should seek permission to file an appeal out of time in relation to DRS 19217 within 15 days and gave consequential directions.

Foscam Houston filed an application for permission to Appeal with supporting evidence within the permitted time. Foscam Shenzhen then filed a response to that application.

It accordingly follows that the Appeal Panel now has to determine the following:

- (i) Should Foscam Houston be allowed to proceed with an appeal out of time in DRS 19217?
- (ii) If so should that appeal be allowed?
- (iii) Depending on the answers to (i) and (ii) what, if anything, should now happen with regard to the appeal in DRS 19391?

The Appeal Panel has considered one further procedural issue. In its Appeal Notice Foscam Houston submits that the Expert in DRS 19217 erred in making a finding in respect of <foscam.uk> on a complaint filed only as to <foscam.co.uk>. In its Appeal Response, Foscam Shenzhen says that <foscam.uk> was included in the original complaint. The Appeal Panel has checked Nominet's on-line file and this is correct. The Appeal Panel is satisfied that it was correct for DRS 19217 and DRS 19391 to proceed on the basis that the original complaint referred to both Disputed Domain Names.

6. Identity of the Parties and their relationship

Before turning to consideration of the issues identified above it is convenient to consider who the parties are and the evidence as to the relationship between them. The submissions of the parties and evidence filed in these two cases establish the following.

Foscam Shenzhen is a Chinese company. It is a manufacturer of security cameras and associated equipment. Foscam Houston is an independently owned US corporation. It was between 2010 and 2016 the US distributor of products made by Foscam Shenzhen.

These companies fell into dispute. The Appeal Panel does not know the details, but it is common ground that this dispute was settled by an agreement made on 7 January

2016. The parties to this agreement were Foscam Shenzhen, Amcrest Global Holdings Limited (an Irish company), Foscam Houston, and Amcrest Technologies LLC (a Texas company). This agreement is referred to in this decision as the “Settlement Agreement”.

Foscam Digital Technologies LLC recently changed its name to Amcrest Industries LLC. It, together with Amcrest Technologies LLC and Amcrest Global Holdings Limited, are owned and/or controlled by an individual called Abdurahman Ravat.

The respondent in DRS 19217 is Ravatrading (erroneously referred to in the decision in that case as ravatradingllc@gmail.com - this e mail address was the contact details given for the registrant, rather than the registrant itself). However, the body of the Complaint makes clear that the Complaint relates to the activities of Foscam Houston. “Ravatrading” would seem to be a trading name or style adopted by Mr Ravat. It is not in dispute that Mr Ravat effected the registration on behalf of Foscam Houston. The Complainant and the Expert in DRS 19217 proceeded on the basis that Foscam Houston was the substantive registrant of the Disputed Domain Names and all of the subsequent documentation in DRS 19391 has proceeded on the same basis and the Appeal Panel will do so as well.

7. Application for permission to appeal out of time in DRS 19217

The relevant timetable so far as communication with Foscam Houston is concerned is as follows.

Notification of the Complaint was sent on 8 August 2017 by e mail to ravatradingllc@gmail.com; postmaster@foscam.co.uk, and postmaster@foscam.uk and postal notification was sent the same day addressed to ravatradingllc@gmail.com, 12633 Memorial Dr. #211 Houston, Texas 77024 United States. The Expert’s decision was notified by the same means on 13 September 2017.

Although a great deal of evidence has been filed in these cases as to the magnitude and effect of the tropical storm commonly identified as Hurricane Harvey, the Appeal Panel does not propose to repeat that in any detail as it is a matter of public record. The salient facts for present purposes are as follows. Harvey reached tropical storm status south of the Caribbean on 17 August 2017 and various warnings were issued. As it entered the Caribbean it had weakened, and the relevant alert status was discontinued on 18 August 2017. However, it subsequently regenerated and on 23 August 2017 a tropical storm alert was in place, which was upgraded the same day to a hurricane alert. By 24 August 2017, when it made landfall in Texas, it was a major hurricane. Very substantial damage was caused as well as significant injuries and loss of life. Some 30 inches of rain fell on Houston and widespread flooding occurred. A state of emergency was declared, and curfews were put in place. Damage estimates exceed USD 125 billion, primarily relating to flood damage in the Houston metropolitan area.

Against this background Mr. Ravat has provided a sworn declaration. In this he says (amongst other things) as follows:

- Foscam Houston never received notice of DRS 19217 or the Expert’s decision in that case.
- On 2 October 2017 it received notification from its service provider that the Disputed Domain Names were being transferred.
- ravatradingllc@gmail.com is an email address used by the administrator of Mr. Ravat’s business operations largely for administrative purposes. The server dealing with these business operations is located at a remote address at 12633 Memorial Dr. #211 Houston, which is serviced by on-site visits by the administrator to check the server and retrieve mail received there. These on-site visits by the administrator occur infrequently, typically weekly, since the daily business of Mr Ravat’s companies is conducted electronically through other domain emails.
- postmaster@foscam.co.uk, and postmaster@foscam.uk addresses are not valid email addresses as they were never set up.
- no letter was ever received from Nominet at 12633 Memorial Dr. Houston, Texas, 7702444.
- By 27 August, 12633 Memorial Dr. Houston, Texas, 7702444 was underwater.
- Mr Ravat’s priority during Hurricane Harvey was to address his family and immediate business concerns – he describes this as a “triage” process. The administration of the relevant server and collection of mail from the address in question was low priority in this regard.

Foscam Shenzhen makes the following points in opposing any permission to appeal being granted:

- DRS 19217 was filed 18 days before any force majeure event took place (26 August 2017).
- Mr Ravat states that from 13 August 2017 his business and family were in ‘triage’, yet all Tropical Storm warnings and watches were discontinued on 18 August 2017
- Warnings were only reinstated on 23 August 2017 when Harvey “*reattained tropical storm intensity*”.
- This gave Foscam Houston between the date of filing (8 August 2017) and when warnings were issued (23 August 2017) to become aware of the complaint and provide a response or ask for the deadline to be extended.
- Nominet has confirmed emails were sent to the three email addresses: ravatradingllc@gmail.com, postmaster@foscam.co.uk and postmaster@foscam.uk

- Foscam Houston acknowledges that postmaster emails were non-existent and never setup.
- Foscam Houston claims emails from Nominet to ravattradingllc@gmail.com were not received on five occasions (8, 28 and 31 August and 4 and 13 September 2017), despite claiming the email being actively monitored, and subsequent Gmail accounts receiving emails without fail.
- Nominet confirm a letter was sent on 9 August 2017 via Royal Mail Special Delivery, tracking number RJ554507240GB to the address at which the domain name was registered.
- Tracking information is no longer available for this letter. However, this tracking number was checked at a previous date and Foscam Shenzhen believes this showed as being delivered on or around 14 August.

The relevant test the Appeal Panel has to apply is whether under paragraph 24.1 of the Policy “exceptional circumstances” exist so as to allow the Appeal Panel to extend time for filing the Appeal. If so, do the interests of justice allow the Appeal Panel to admit what will by definition be new evidence on the appeal as permitted by paragraph 20.8 of the Policy?

It would clearly be possible to embark on a more detailed forensic investigation as to exactly what happened between 8 August 2017 and 2 October 2017 and explore in more detail the points that Foscam Shenzhen makes as to these events. However, in circumstances where the overall fact of Hurricane Harvey is not in dispute and Mr Ravat has provided sworn testimony as to why the server at which the relevant email would have been received was not checked, and why postal mail to that address may not have been received, the Appeal Panel does not consider that to be either appropriate or necessary. It is clear that these events took place at the time a major natural disaster was developing or occurring, and the Appeal Panel is not likely to be able to go behind Mr Ravat’s evidence (which it regards as credible) within the framework of the DRS. As matters currently stand, Foscam Houston has been deprived of the Disputed Domain Names without any opportunity to present its case. As appears below, the Appeal Panel considers that case to be one which, had it been presented at the relevant time, would have succeeded. The result is that injustice would be done if permission to appeal is not granted (together with permission to introduce new evidence). The fact that injustice may result is not automatic grounds to allow an appeal out of time. That may not be appropriate if it were the fault of the Respondent that it did not deal with matters within the stipulated timetable. In the present case, the Appeal Panel is not prepared to reach that conclusion, given the known facts about Hurricane Harvey and the damage it caused and the sworn evidence from Mr Ravat. In reaching this conclusion, the Appeal Panel also has in mind:

- (i) no credible reason has been suggested as to why Mr Ravat or his companies would not have dealt with DRS 19217 expeditiously had they become aware of what was happening at an earlier date. Indeed, the

- background to these cases and the present appeals suggest that the reverse is likely to be the case;
- (ii) this decision will not leave Foscam Shenzhen without a remedy. As appears below, the Appeal Panel concludes that the proper forum for this dispute is and always has been as provided under the Settlement Agreement and that is where Foscam Shenzhen should pursue any claim it may have;
 - (iii) the Appeal Panel does not think there is any logical difficulty with a party seeking to advance a case that Nominet has no jurisdiction to determine the dispute. This seems to the Appeal Panel to be analogous to the well-known position under English law where a party to proceedings can enter a limited appearance to contest the court's jurisdiction, but such an appearance is not a more general submission to jurisdiction.

In the circumstances, the Appeal Panel therefore determines that Foscam Houston's application for permission to appeal out of time in DRS 19217 and to introduce new evidence on the appeal should be allowed.

8. Appeal of the Decision in DRS 19217

As is clear from paragraph 20 of the Policy, appeals against DRS decisions are conducted by way of a full review of the whole matter, by considering all of the submissions made by the parties at first instance as well as the appeal documents. The Appeal Panel proceeds on that basis.

The point at issue is entirely straightforward. There is no dispute that Foscam Shenzhen has Rights for the purposes of the Policy. Foscam Houston simply says that Nominet has no jurisdiction to deal with this dispute as the parties had agreed in the Settlement Agreement that this dispute was to be determined by arbitration.

The substance of the Complaint in this case was an allegation that Foscam Houston was using its website to which the Disputed Domain Names resolved to sell products that were not manufactured by Foscam Shenzhen. As part of this allegation the Complaint stated that *"In January 2016, Foscam Shenzhen and Amcrest Entities entered into a settlement agreement, according to which the trademarks that Foscam US maliciously registered would be transferred to Foscam Shenzhen and they were transferred to us by April 2017. The settlement agreement also allows Foscam US to continue use the above two website addresses as long as they are used to sell Foscam-branded products only. Foscam US no longer stock or supply Foscam branded products and are in breach of this settlement agreement."*

The Settlement Agreement has been placed in evidence. Although it is said to be confidential, both parties have referred to it and the Appeal Panel will also do so, though avoiding repeating any terms that are commercially sensitive. The parties to the Settlement Agreement are described above. It is a complex document some 18 pages long with a further 35 pages of annexes.

Article 21 of the Settlement Agreement provides:

“The validity of this Agreement and any of its terms and provisions, as well as the rights and duties of the Parties, shall be governed by the laws of the State of Texas (notwithstanding its conflicts of law doctrines) and the venue for any action to enforce or interpret this Agreement shall only and exclusively be in a court of competent jurisdiction located in Harris County, Texas”.

Article 13 is a lengthy clause dealing with arbitration and commences as follows:

“Article 13. Settlement of Disputes & Arbitration. All Claims, disputes or controversies arising out of, in connection with or in relation to this Agreement, and regardless of whether any such claim, dispute or controversy is based or claimed to be based in whole or in part on a claim by either Party of breach of this Agreement by the other Party, shall be decided by resort to arbitration utilizing a single arbitrator agreed upon by the Parties in accordance with the Commercial Rules of the American Arbitration Association in force at the time of the arbitration. If the Parties are unable to agree on a single arbitrator, then the arbitration will proceed with three arbitrators with each party selecting one arbitrator and the two selected arbitrators selecting the third arbitrator. The arbitration shall be held in Houston, Texas. Texas law shall apply to this Agreement and the arbitration proceeding notwithstanding any principles of conflicts of laws that would invoke the laws of another jurisdiction. The decision arbitrator shall be final, binding and enforceable in any court of competent jurisdiction and the Parties agree that there shall be no appeal from the arbitrator's decision except as to arbitratorial misconduct.”

It does not appear to be in dispute that pursuant to the Settlement Agreement Foscam Texas was to retain ownership and control of the Disputed Domain Names. There are several pages of provisions in the Settlement Agreement which appear to the Panel to regulate what Foscam Houston may or may not do with the Disputed Domain Names. It seems quite clear that the allegations raised by Foscam Shenzhen as to the conduct by Foscam Houston entitling it to a transfer of the Disputed Domain Names are also allegations that Foscam Houston is in breach of these provisions in the Settlement Agreement. Indeed, the quotation from the Complaint set out above expressly alleges that Foscam Houston is in breach of the Settlement Agreement.

In these circumstances it seems to the Appeal Panel that this dispute is wholly unsuitable for resolution by the DRS for the following reasons:

It requires as a logical first step the Expert or this Appeal Panel reaching a conclusion that Foscam Houston's conduct is in breach of the Settlement Agreement. Even if the relevant allegations are clear (and the Appeal Panel offers no view in this regard) that would involve a determination as to matters covered by Texas law which is outside the scope of the Expert's or Appeal Panel's knowledge and competence. Any enquiry of this nature would invite an investigation of any applicable defences that Foscam Houston had available and then immediately become a matter which the Expert or Appeal Panel was not competent to determine, and which would need to be determined in Texas.

Further, even if there is a clear breach of the Settlement Agreement that does not itself mean the DRS should be deployed. The Parties have agreed that any dispute that the manner in which the Disputed Domain Names are used amounts to a breach of the Settlement Agreement should be determined in Texas, as should the applicable remedy – there appears to the Appeal Panel to possibly be a conflict between Articles 13 and 21 of the Settlement Agreement (which if so would itself need to be resolved by Texas law) but whichever prevails the result is that the parties have agreed that a forum in Texas should determine this dispute and its consequences.

The Appeal Panel does not necessarily agree that Nominet and the DRS have no jurisdiction in relation to the Disputed Domain Names. The Appeal Panel would analyse this by saying that it is not possible for Foscam Shenzhen to say that Foscam Houston's conduct amounts to the Disputed Domain Names being used in a manner which has taken unfair advantage of or has been unfairly detrimental to its Rights, when it has not sought to avail itself of the mechanism(s) which it contractually agreed should apply in the circumstances which it alleges have now arisen. It is entirely possible to envisage circumstances where the DRS would have jurisdiction – for example if an award had been made in Texas ordering one party to transfer to the other the Disputed Domain Names but the award had not been complied with. It is then easy to see how the continued use of the Disputed Domain Names could be said to be unfairly detrimental and properly the subject of a DRS complaint.

However, in the present case it seems clear that the facts and matters which Foscam Shenzhen rely upon are facts and matters which are said to be in breach of the Settlement Agreement and the parties have agreed that a dispute of this nature should be resolved in Texas (pursuant to either clause 13 or 21 of the Settlement Agreement). The position seems analogous to the well-established principle that a court will decline jurisdiction to deal with a given dispute where the parties have agreed a different dispute mechanism should be employed. On that basis the DRS is not the correct forum for resolving this dispute.

Accordingly, the Appeal Panel concludes that this Appeal should be allowed and that the Disputed Domain Names <foscam.co.uk> and <foscam.uk> should be transferred back to Foscam Digital Technologies LLC. In reaching this conclusion the Appeal Panel makes no finding at all as to whether or not that company is in breach of any provision of the Settlement Agreement.

9. Appeal of the Decision in DRS 19391

Given the Appeal Panel's decision in DRS 19217 (above) the Appeal Panel considers that the Appeal in DRS 19391 has become redundant and that no useful purpose would be served by considering it further or making any determination on it. The Appeal Panel accordingly orders this Appeal to be dismissed without any finding being made as to its merits.

10. Decision

For the foregoing reasons the Appeal Panel orders that the Domain Names <foscam.co.uk> and <foscam.uk> should be transferred back to Foscam Digital Technologies LLC.

Signed **Dated** 6 May 2018

Nick Gardner

Signed **Dated** 6 May 2018

Ian Lowe

Signed **Dated** 6 May 2018

David King