

**DISPUTE RESOLUTION SERVICE**

*D00015342*

**Decision of Independent Expert**

**Ashton Finance Limited**

and

**Media Resources Limited**

**1. The Parties:**

Lead Complainant: Ashton Finance Limited  
Ashton Finance Limited  
11 Holne Chase  
London  
N2 0QP  
United Kingdom

Respondent: Media Resources Limited  
81 Oxford St  
London  
W1D 2EU  
United Kingdom

**2. The Domain Name(s):**

tvcatchup.co.uk

**3. Procedural History:**

3.1 I can 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 a such a nature as to call in to question my independence in the eyes of one or both of the parties.

15 January 2015 11:58 Dispute received  
15 January 2015 12:15 Complaint validated  
15 January 2015 12:16 Notification of complaint sent to parties  
03 February 2015 01:30 Response reminder sent  
04 February 2015 15:09 Response received  
04 February 2015 15:09 Notification of response sent to parties  
04 February 2015 15:59 Reply received

04 February 2015 16:00 Notification of reply sent to parties  
06 February 2015 10:19 Mediator appointed  
12 February 2015 13:04 Mediation started  
02 March 2015 15:11 Mediation failed  
02 March 2015 15:11 Close of mediation documents sent  
12 March 2015 01:30 Complainant full fee reminder sent  
12 March 2015 09:53 Expert decision payment received

- 3.2 After this file was sent to me for a Decision and therefore considerably after the Reply was received the Complainant provided a written submission pursuant to Paragraph 13b of the DRS procedure (“the Procedure”). Paragraph 13b of the Procedure deals with the situation where submissions are submitted outside of the standard process. It reads as follows:

*“Any communication with us intended to be passed to the Expert which is not part of the standard process (e.g. other than a complaint, response, reply, submissions requested by the Expert, appeal notice or appeal notice response) is a ‘non-standard submission’. Any non-standard submission must contain as a separate, first paragraph, a brief explanation of why there is an exceptional need for the non-standard submission. We will pass this explanation to the Expert, and the remainder would only be passed to the Expert at his or her sole discretion. If there is no explanation, we may not pass on the document or information.”*

- 3.3 In this case the paragraph submitted under Paragraph 13b of the Procedure read as follows:

*“I on behalf of the Claimant failed to submit a series of emails from Mr Pilley, director and representative of the Respondent, with my original claim. These emails verify the Complainant’s assertion that interest and the loan remain unpaid and also an undertaking that the Respondent would transfer the registration of the domain, which never occurred and which the Complainant is requesting Nominet execute. The other document is confirmation from The Insolvency Service that Mr Pilley of the Respondent was rendered personally bankrupt on 8 January 2015.”*

The Expert’s Overview has the following to say about further statements under 13b:

*“The Procedure is intended to provide a satisfactory basis for expeditious and cost-effective resolution of domain name disputes within the ambit of the Policy. Unsolicited further statements from the parties tend to run counter to that intention. If one party is permitted to submit a further statement, the Expert will normally, in the interest of justice, permit an answering submission from the other party. The case gets weighed down with paper and delays ensue. Experts will normally require an explanation from the party wishing to submit an additional submission, justifying a departure from the prescribed procedure.”*

- 3.4 In this case the Complainant does not provide any explanation for why these documents were not submitted in the standard process. It simply says that it “failed” to submit them. In these circumstances, I see no reason to depart from the prescribed procedure and I decline to take these additional documents into account.

#### **4. Factual Background**

- 4.1 The Complainant is a finance company.

- 4.2 The Domain Name was acquired by the Respondent in May 2007. It is not currently linked to a live website or parking page.
- 4.3 In 2014 the Complainant loaned some money to Mr Bruce Pilley who at that time was a director of the Respondent. The terms of this loan are set out in a Loan Facility Agreement between the Complainant and Mr Pilley dated 26 June 2014 a copy of which was provided by the Complainant with its Complaint..
- 4.4 As security for its loan the Complainant was assigned the Domain Name by the Respondent together with another domain name and all intellectual property therein. This was done by way of a Deed of Assignment also dated 26<sup>th</sup> June 2014 a copy of which was provided by the Complainant with its Complaint. As well as the Complainant and the Respondent the Respondent's licensee, TVcatchup (UK) Limited, was also a party to this assignment.
- 4.5 The terms of this assignment provide, inter alia, for the Domain Name to revert to the Respondent on Mr Pilley repaying the Complainant the loan together with interest and any other monies due in accordance with the terms of the loan agreement. Tvcatchup (UK) Limited also agreed, inter alia, that if Mr Pilley defaulted on the loan then its licence from the Respondent to use the Domain Name would terminate.
- 4.6 Solicitors for the Complainant wrote to the Respondent on 9 September 2014 seeking, inter alia, details which would enable the Complainant to take control of the Domain Name.
- 4.7 Mr Pilley has recently been declared bankrupt.
- 4.8 An earlier complaint was made by the Complainant against the Respondent on essentially the same facts. This earlier complaint had DRS Reference number D00014785. It was withdrawn by the Complainant before a decision was made.

## **5. Parties' Contentions**

### **5.1 Complaint**

The Complaint can be summarised as follows;

- 5.1.1 There is a dispute between the Complainant and the Respondent. This concerns a loan made to Bruce Pilley as a Director of the Respondent under the terms of a Loan Facility Agreement dated 26 June 2014.
- 5.1.2 Mr Pilley is in default of the Loan Facility Agreement by virtue of unpaid interest. Notice of default has been served on Mr Pilley and the Complainant has written to the Respondent pointing out the default.
- 5.1.3 As security for Mr Pilley's indebtedness to the Complainant the Respondent executed a Deed of Assignment on 26 June 2014. In this Deed the Respondent assigned to the Complainant all its right, title and interest in the Domain Name (and the domain name TVcatchup.com) and all intellectual property rights embodied in them.
- 5.1.4 Under the terms of the Deed of Assignment, the Rights would have reverted to the Respondent if Mr Pilley (or someone on his behalf) paid all the monies due under the Loan Facility Agreement when they were due. This has not happened and therefore

the right of reversion has now lapsed and the Complainant has the benefit of the Domain Name and all intellectual property rights in it.

- 5.1.5 The Domain Name is an Abusive Registration because under the terms of the Deed of Assignment the Domain Name should by now have been transferred to the Complainant and it has not been.

## **5.2 Response**

The Respondent submits that the Complainant should not succeed for the following reasons:

- 5.2.1 The Complaint merely duplicates a previous withdrawn claim DRS Reference D00014785 (which was withdrawn by the Complaint following settlement on 5 December 2014). This claim therefore amounts to an attempt by the Complainant to make a further civil claim in relation to an already settled matter without the inconvenience of pursuing any civil recovery process.
- 5.2.2 The earlier claim was resolved and this is therefore an attempt by the Complainant to extort a further settlement through an abuse of application to Nominet's DRS.
- 5.2.3 Title of the Domain Name in question was in fact transferred to a Mauritian company at the end of 2014 but this transfer cannot be perfected because the Domain Name was locked by Nominet following receipt of this Complaint. Mr Pilley no longer has any involvement in the ownership, control, management or use of the Domain Name in question or the established business to which it relates.
- 5.2.4 This is not a Complaint which should properly be heard under Nominet's DRS. Specifically there is no name or mark which is identical or similar to the Domain Name and there is no question of Abusive Registration. This is a settled financial dispute which is contested and should be pursued in the Courts.
- 5.2.5 This dispute lies outside Nominet's jurisdiction. Nominet has no jurisdiction in the matter of a civil dispute relating to financial issues. The appropriate means of dealing with any financial claims is in the civil courts as threatened previously by the Complainant.

## **5.3 Reply**

In reply the Complainant says as follows:

- 5.3.1 There was no settlement on 5 December 2014. The previous Complaint was simply closed down by Nominet because the Complainant "missed the date by which I needed to respond". It therefore needed to start the complaint process again.
- 5.3.2 The Complainant confirms that it has not received the monthly interest payments due under the loan to Mr Pilley nor has it received repayment of the loan.
- 5.3.3 The agreement between the Complainant and the Respondent is extremely clear. A loan has been made on agreed terms and those terms have not been honoured by the Respondent. These terms provide that in the event of default the Domain Name is to be transferred to the Complainant by the Respondent and this has not happened. In the meantime, Mr Pilley has been made bankrupt by the UK Courts and Respondent

is now attempting to move the Domain Name to avoid its liability under the loan agreement.

## 6. Discussions and Findings

6.1 As a preliminary point I must decide the Respondent's submission that this Complaint amounts to a rehearing of a previous complaint and therefore for that reason I should not entertain it. The position on the re-submission of an earlier complaint is set out in Paragraph 10e of the Policy which makes it clear that an earlier Complaint will only count for the purposes of a re-submission when it has reached the Decision stage. In this case it seems to be common ground between the parties that the earlier complaint was withdrawn well before a Decision and therefore I do not think that there can be any serious objection to the current complaint continuing.

6.2 Paragraph 2(a) of Nominet's dispute resolution policy ("the Policy") requires that the Complainant must prove, on the balance of probabilities, that;

*"(i) The Complainant has Rights in respect of name or mark which is identical or similar to the Domain Name; and*

*(ii) the Domain Name, in the hands of the Respondent, is an Abusive Registration."*

6.3 This is not the usual Nominet DRS case. Nominet DRS cases typically (but not exclusively) involve the consideration of registered trade mark/passing type rights in names or marks which are the same as or similar to the Domain Name. In the present case however, the Complainant's case is not that it has acquired a registered trade mark or other unregistered trade mark type rights in a name or mark which is the same as or similar to the Domain Name, but that because of a contract between the Complainant and the Respondent it is entitled to the Domain Name itself (together with all associated intellectual property rights).

6.4 I am aware of a number of cases where what were essentially contractual disputes were considered under Nominet's DRS. These cases include the Appeal Panel's decision in *David Munro v Celtic.com, Inc. (DRS 04632)*, and the DRS cases of *Bristan Group Limited v Michael Gallagher/ Galaco Enterprises Limited (DRS 07460)* and *Thorntons Solicitors v Mr Ian Watson (DRS 14417)*. I have set out below some of the relevant part of the findings in those three cases;

*"Two preliminary issues arise from a consideration of the Rights claimed by the Complainant in this case: first, are rights to a domain name itself (as opposed to rights in a name or mark identical or similar to the domain name) sufficient to found Rights for the purposes of the Policy? Second, if so is a contractual right to use the domain name or to require the transfer of the domain name sufficient to constitute the necessary Rights?*

*The primary purpose of the Policy (and of similar dispute resolution policies in respect of other domains) is to deal with unfair or abusive registration or use of domain names that trespass on the rights of the owners of trade marks or of those who have acquired similar rights such as to give rise to a claim in passing off under English law. The definition of Rights in the Policy does not, however, exclude rights in respect of the domain name itself or, indeed, contractual rights to the domain name.*

Furthermore, the Policy itself clearly recognises that rights (including contractual rights) to a domain name may validly found a complaint under the Policy. Paragraph 3a sets out the following as one of the factors on the non-exhaustive list of those that may be evidence that a domain name is an Abusive Registration:

*“The Domain Name was registered as a result of a relationship between the Complainant and the Respondent, and the Complainant:*

*A. has been using the domain name registration exclusively; and*

*B. paid for the registration and/or for the renewal of the domain name registration.”*

*The underlying assumption is that such circumstances, reflecting a contractual or similar relationship between the parties, may well have given rise to relevant Rights in the first place.*

*The Panel has also had cited to it a number of DRS cases in which Experts have had to consider whether the relevant rights may include contractual rights. In the majority of those cases, Experts have concluded that contractual rights may suffice for this purpose.*

*The fundamental issue in this case, however, is the suitability of the DRS to determine contractual disputes. The Panel supports the view expressed by several Experts (including the Expert in this case) that as a general proposition contractual disputes are best left to the courts to resolve.*

*In addition, there remains the difficulty as to how the Nominet DRS might deal with overseeing the performance of the contract and what jurisdiction it has to do so.”*  
**Appeal Panel in David Munro v Celtic.com Inc (DRS 04632)**

*“The question of whether or not experts can and should decide contractual disputes is one which has been the subject of some debate in many decisions under the Policy. On the one hand, the Policy was not intended to provide a general mechanism to resolve all disputes relating to domain names, but merely to provide a remedy in respect of certain types of abusive use. On the other hand, there are aspects of the Policy which suggest that at times an expert can and should make contractual judgments (for example paragraph 4(a)(iii) of the Policy expressly requires an expert to form a judgment on whether the holding of a domain name is consistent with an express term of a written agreement).*

*As a consequence, generally the approach of experts under the Policy has been to approach such questions with some caution. In appropriate cases experts have been prepared to decide contractual questions but if the issue was legally complex or the facts uncertain, the tendency has been to leave the issue to be determined by the courts.”*  
**Bristan Group Limited v Michael Gallagher/ Galaco Enterprises Limited (DRS 07460)**

*“In these circumstances, the Expert has had regard to the decision of the Appeal Panel in David Munro v. Celtic.com, Inc. (DRS 04632) which considered in some detail the question of whether the Policy is a suitable vehicle for the resolution of a contractual dispute relating to a Domain Name. The Appeal Panel in that case stated that while contractual rights may suffice for the purpose of establishing Rights as defined in the Policy, as a general proposition contractual disputes are best left to the courts to resolve. The Expert does not propose to rehearse all of the reasons given by the Appeal Panel for the general proposition but would commend the decision to the*

*Parties, along with the helpful discussion in a subsequent first instance case which reflected on Munro v. Celtic, namely Bristan Group Limited v. Michael Gallagher / Galaco Enterprises Limited (DRS 07460)'' Thorntons Solicitors v Mr Ian Watson (DRS 14417)*

- 6.5 From these three cases it is clear that the definition of Rights in the Policy is wide enough to include both contractual rights as well as the kind of trade mark and passing off rights with which Nominet DRS cases are normally involved. For completeness, I should note here that the Appeal Panel in the *Munro v Celtic.com* was concerned with an earlier version of the Policy which contained a slightly definition of Rights, although I do not think that the subsequent changes affect this particular issue.
- 6.6 It can also be seen that there is no bar on experts deciding what are essentially contractual issues as part of a DRS Complaint. However, there has always been a marked reluctance to do so particularly in cases which are either legally or factually complex. This is due to a number of reasons not least of which is the unsuitability of Nominet's DRS for such a task. Not only is the process by definition a simple, streamlined one with no opportunity for the Expert to really explore the veracity of what either party has alleged, Nominet experts are generally not experts in the law of contract and indeed Nominet experts are generally not selected for their ability to resolve complex contractual disputes.
- 6.7 The present case involves a pure contractual dispute. It is tempting to say that the issues are not at all complicated. The Complainant has loaned a director of the Respondent some money. The security for that loan was the Domain Name and on the director's default the Complainant is entitled to the Domain Name. The Respondent however says that there is a dispute about whether the loan has been satisfied or indeed whether there has been a separate settlement of that loan. I have to emphasise that nothing that the Respondent says is terribly convincing and its Response consists of a series of bare assertions without any substantiation, but it does at least raise the possibility of a dispute which I am not at all equipped to decide.
- 6.8 All things considered I am very much of the view that Nominet's DRS is not the suitable forum to resolve this dispute however straightforward or otherwise it may appear, particularly when I have not had the benefit of any detailed submissions from either party as to what the true position is. I am therefore very much of the view that this is a dispute which should be more appropriately dealt with by the Courts. I would therefore reject this Complaint as not being appropriate for adjudication under the Policy.
- 6.9 I should however stress that in declining this dispute I am making no decision about the strengths or otherwise of either party's case, simply that this is not the appropriate forum for this dispute to be determined.

**7. Decision**

- 7.1 For the reasons set out above, I have decided that this Complaint should be dismissed and therefore that no action should be taken in relation to the Domain Name.

**Signed: Nick Phillips**

**Dated: 7<sup>th</sup> April 2015**