

DISPUTE RESOLUTION SERVICE

D00016584

Decision of Appeal Panel

Polo Enterprises Ltd T/A Ascot Park Polo Club

and

Mr Nick Beitner

1. The Parties:

Lead Complainant: Polo Enterprises Ltd T/A Ascot Park Polo Club
1 Wood Hall
Woodhall Lane
Sunningdale
Berkshire
SL59QW
United Kingdom

Respondent: Mr Nick Beitner
73 Hamilton Terrace
London
NW8 9QX
United Kingdom

2. The Domain Name(s):

polo.co.uk
polo.uk

3. Procedural History

This is an Appeal by the Respondent against the decision of Steve Ormand (the “Expert”) issued on 15 April 2016 (the “Expert’s Decision”) in favour of the Complainant. The Expert’s Decision is available on Nominet’s website.

Definitions used in this decision have the same meaning as set out in the Nominet UK Dispute Resolution Service Policy, version 3, July 2008 (the “Policy”) and/or the Nominet UK Dispute Resolution Service Procedure, version 3, July 2008 (the “Procedure”) unless the context or use indicates otherwise.

The Complaint was filed on 18 November 2015, the Response on 10 December 2015, and the Reply on 18 December 2015. Both parties subsequently filed non-standard submissions under paragraph 13b. of the Procedure, which were admitted into the case by the Expert. Their dates and details of which are set out in the Expert’s Decision and discussed further below. The Respondent’s Appeal Notice was filed on 24 May 2016 and the Complainant filed an Appeal Notice Response on 9 June 2016.

Nick Gardner, Claire Milne and Anna Carboni (together, the “Panel”) were appointed by Nominet as the Panel on 20 June 2016 and have each made a statement to the Nominet Dispute Resolution Service in the following terms:

“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 in to question my independence in the eyes of one or both of the parties.”

4. The Nature of This Appeal

Pursuant to paragraph 10a. of the Policy, the Panel is required to deal with this appeal on the basis of a full review of the matter and thus to conduct a re-determination on the merits. It is therefore not necessary to review the Expert’s Decision in any detail. However, in a case where the appeal panel agrees with a first instance decision (or parts of it), it can save time and avoid unnecessary duplication to refer to that decision; and, where the appeal panel reaches a different conclusion, it can be helpful – particularly for the losing party – to identify where the points of disagreement with the first instance decision lie. In this case it is particularly useful to be able to refer back to the Expert’s Decision, since this set out the parties’ lengthy and complicated arguments and evidence in some considerable detail. The Panel also identifies certain points of agreement and disagreement with the reasoning in the Expert’s Decision in the substantive sections below.

At this point, the Panel simply records that the Expert concluded that the Complainant had Rights in a name or mark which is identical or similar to each of the Domain Names and that the Domain Names are Abusive Registrations in the hands of the Respondent, and therefore should be transferred to the Complainant.

For convenience the Panel will continue to refer to the parties as the “Complainant” and the “Respondent”.

5. Formal and Procedural Issues

As mentioned above, both parties made non-standard submissions under paragraph 13b. of the Procedure. This started with the Respondent asking to submit further arguments and evidence in response to the Complainant's Reply, which – having been admitted on the strength of an explanatory paragraph – turned out to be five pages and 24 paragraphs long (plus two Appendices). This was, closely followed by another (one page) non-standard submission from the Respondent which was said to be to produce some correspondence and an official record relating to the original registration of the <polo.co.uk> Domain Name, and in fact also added in some information and photographs about changes made to the signage at the Ascot Park Polo Club operated by the Complainant;. The Complainant was then permitted to respond to each of those non-standard submissions (which was necessary because they introduced new material), which it did in eight pages of further text plus several further Annexes; and the Respondent was then allowed to reply – which took the form of a four page, closely-spaced critique of the Complainant's submissions.

The mere fact that the parties felt it necessary to expand on already long and detailed submissions was an indicator that this case might be at the fringes of the scope of the DRS, which is intended to be an efficient, cost-effective alternative dispute resolution policy and procedure for handling domain name disputes in the .uk domain. There is no provision for calling or cross-examining witnesses and so the written submissions and evidence have to be sufficiently clear to enable the expert to reach a view on the key questions of the complainant's alleged "Rights" and whether the circumstances of registration and/or use of the domain name concerned are such as to establish that it is an "Abusive Registration". This should be possible to do within the space of the key documents comprising the complaint, the response and the reply, with additional submissions only being appropriate to take into account if there is an "exceptional need" to do so.

In this case, it is understandable why the Expert was prepared to allow additional submissions into the case after the Reply, because there were gaps and inconsistencies in the parties' respective positions up to that point, and the Respondent's initial explanatory paragraph in support of making a non-standard submission indicated that "further 3rd party information" and "independently verifiable facts" had come to light since the Reply which would clarify the position. In fact, they did not do so, as is reflected in the Expert's comment in section 3 of the Expert's Decision that the parties' submissions were "lengthy and repetitive", that they contained "contradictions ... made by the same party", and that he had had to retain far more of the submissions than would usually be necessary in order to support his decision.

Furthermore, the Complainant's case essentially rests on establishing the existence and terms of one or more contracts with the Respondent. The Expert highlighted the fact that the DRS is not an appropriate forum for determining contractual disputes, but that these are best left to the courts to resolve (as stated in previous cases such as in the appeal in DRS 04632 – [ireland.co.uk](#)). The Panel in this case endorses that view, particularly in relation to cases where there is no written contract, but the parties are relying on the DRS to work out the terms of an alleged contract that is based on a mixture of informal email exchanges, oral

discussions and/or a course of conduct over a long period of time. While every expert (and appeal panel) will try their best in such cases to determine whether a contract truly existed in relation to the domain name concerned, and whether this supports the existence of relevant Rights and/or an Abusive Registration, they must not feel obliged to aim for a definitive answer on such matters where the facts are contested and the documents do not speak for themselves.

Having reminded themselves of the above points, the Panel has nevertheless taken all of the submissions and evidence from each party into account in reaching its decision.

When discussing certain points of principle below, the Panel refers to version 2 of the Experts' Overview (the "Overview"), which helpfully summarises some of the issues that have been raised in DRS cases and/or considered by DRS Experts in the past, and can be found on Nominet's website.

6. The Facts

The Complainant, Polo Enterprises Limited, was incorporated as a private limited company on 18 December 1978 (company number 01405695). The founder of the company, Peter Grace OBE, 1938-2013, was well-known in the world of polo. His wife Elisabeth, his four daughters Janey, Victoria, Pippa and Katie, and his grandson Max have also been involved with the company.

The company has operated a polo club and carried out related business, using the trading name Ascot Park Polo Club. The most recent annual accounts filed for the company prior to the Complaint, for the year ended 31 March 2014, show its directors as being E M Grace and V A R Grace; they show negative net assets of around £360,000 for this year and also the previous year¹.

For most of the period from 1994 to 2014, the Respondent, a polo enthusiast, was a member of this polo club. In the early years he was studying Computer Science at the University of Southampton. He received discounted club membership and polo facilities. He also was instrumental in the registration of polo.co.uk ("DN1") in 1995 or 1996² with the predecessor of Nominet, and in mounting websites reached through DN1.

An archived copy of the website from 1997 is headed "Making the Most of Polo Wherever You Are, in association with ASCOT PARK POLO CLUB". It contains both general material about the game of polo, with links to online discussion forums, and content specifically related to the history and current activities of the Club. The website currently found at DN1 is devoted to the Club, having the Ascot Park

¹ Accounts to 31 March 2015 have since been filed on 31 March 2016 and show net liabilities of £509,975.

² Considerable energy and effort have been devoted to resolving accurately the date of this registration, which predated Nominet's formation. At the end of the day it appears that the date was in 1996, but the point does not matter save in establishing that an email the Respondent relies upon (see below) was contemporaneous with the registration.

Polo Club logo on every page. The most recent fixture mentioned is “Pro-Am City Champs” in September 2015.

A letter dated 12 June 2015 from the Respondent to Elisabeth Grace says:

“Dear Elisabeth

Regarding the domain name polo.co.uk and other related services.

It is my understanding that Ascot Park is not offering polo club memberships and/or livery this season, and is unlikely to do so in the future.

As a long-standing member for almost 20 years, this brings me great sadness.

At the same time this raises the issue of compensation for the use of the domain name and related email services which I have been providing to the club in exchange for membership and other benefits for the better part of the last 20 years.

I further understand that the club is not currently in a position to adequately compensate me for the use of the domain name and related email services.

Given our longstanding relationship, as an act of goodwill, I am prepared to allow you to continue using the domain name and email services for the duration of the 2015 summer polo season on the proviso that the outstanding balance of £365 on my account is cancelled and that should there be an IWPA ladies tournament in the summer that we are given a free entry to a level of our choosing.

Kind regards, Nick Beitner”.

This letter led to a dispute concerning the ownership of the Domain Names, which led to the filing of the Complaint.

7. The Parties’ Contentions

The original Decision includes a detailed list of the contentions that the two parties provided in the Complaint, Response and Reply and non-standard submissions. The Appeal Panel agrees with that list, and therefore builds on it by summarising the main relevant points, and adding new points from the Appeal Notice and Appeal Response.

The parties to this dispute have different views about the terms on which the Respondent registered DN1 and provided web services relevant to the club. Crucially, there is a lack of contemporaneous evidence from either side. The Complainant maintains, as follows, that there was a contract to this effect between the parties:

“Establishment of the existence of a contract is a simple and elementary test suitable for an expert with a non-contract specialist background to determine, as demonstrated below:

- (i) **Offer** (by Respondent to register the site, express or by conduct);*
- (ii) **Acceptance** (agreement by the Complainant for the Respondent to register the domains);*
- (iii) **Intention to create legal relations** (both parties acted for businesses);
and*
- (iv) **Consideration** (discounted polo services which the Respondent admits he received).”*

The Respondent however says that the relationship was based on personal friendship and goodwill, with the web services being an expression of this goodwill, and discounted polo services being continued (after his student status lapsed) to retain his membership. For example, he says:

“Due to his participation in and love for the sport of polo, as well as his emerging friendship with the Grace family and his interest in the story of the late Peter Grace, Dr Beitner opted to purchase a domain name (“polo.co.uk”) and set up a website. Aspect Internet Marketing Ltd (“Aspect”), a company that Dr Beitner was working for, brought [sic.] the domain name on his behalf, something that was quite a regular occurrence.”

and

“At the time of registration, the Grace family were unable to appreciate the value of a website or domain as they did not know what a domain name was, and were non-technical like many people of that generation. They had no cause to desire or request a domain name either, let alone pay for one, had it been offered to them. They were not asked to pay for the name or web site, nor did they pay for it.”

and

“The respondent accepts that he has received discounted rates from the Club of various degrees during his time at the Club, but this was to keep Dr Beitner’s patronage and talents vested in the club. It did not in any way relate to ownership of the “polo.co.uk” Domain Name. However, he denies the fact that he was ever employed as an “IT and Domain Name Administrator” nor in any capacity at the Club and asserts that he was only helping with the Club’s (and the family’s) IT out of his friendships with them. There is no evidence of an agreement between the parties of a relationship of employment.”

Correspondingly, the parties take different views of who paid for the original registration and subsequent renewals. They agree that the Respondent was responsible for actually making payments to the Registrar. However, the Complainant believes that it has reimbursed those payments in kind (through discounted polo services) and consequently has effectively paid. The Respondent does not accept that, in the absence of written agreement, part of his discounted polo services amounted to reimbursement.

The parties similarly have opposing views in relation to Rights. The Complainant believes that the contract between itself and the Respondent gives it a contractual right to DN1, and cites several previous DRS cases in its support. The Respondent believes that no contract exists and therefore no such right is implied. He also says:

“There is no direct association between "polo.co.uk" and Ascot Park Polo Club which is stronger than its link with any other polo club, or other associated brands with a stronger link to the word 'Polo' (such as Ralph Lauren).”

The Complainant claims Abusive Registration in the Respondent's refusal to transfer DN1 to themselves. They say that his intention was unfairly to disrupt their operations, citing email interruptions and suspicions among staff of their email being read. The Complainant regards the letter of 12 June 2015 as threatening and amounting to a “ransom demand”, “clearly” using “the domain name as a bargaining tool to relieve his debt to the company and receive free polo services”. It complains that the Respondent has deliberately misled or confused its representatives in relation to the ownership of DN1, and has not replied to emails requesting transfer of DN1.

The Respondent says that DN1 has always been his registration, which he has allowed the Complainant to use. He has at all times maintained the associated website and email services as desired by the Complainant; apparently disused email accounts were closed, but re-opened on request. He has replied to emails, apart from one from Max Grace dated 13 August 2015, which he felt it inappropriate to reply to, as he was unclear of this person's status in relation to the club and had had no reply to his letter to Elisabeth Grace.

A further difference of opinion between the parties arises in relation to changes of the name in which DN1 was registered, to Polo Enterprises Ltd in 2011 and to the Respondent in 2013. The Respondent claims that he changed the registrant's name to the Complainant's temporarily in order to help them to secure refinancing. The Complainant however says that they requested a permanent transfer to Polo Enterprises Ltd “in order to avoid any discrepancies with regards to the disclosed list of assets that were owned by the company for tax purposes”. Neither party provides evidence in support of its view.

Each party says that the other has no real use for DN1. The Complainant says, “*Mr. Beitner has no use for the Domain Name as he is an IT professional, highly unlikely to ever need to use the Domain Name for personal or commercial use*”, while the Respondent says, “*There is little use for the marketing and information elements which once were helping the Club generate business. In the same vain [sic.] the Domain Name is no longer of use to the company due to the fact that there are no longer any staff employed by the Club.*”

Both claims are rebutted. The Complainant says: “*Mr Beitner's understanding that the company has abandoned trade and has no use for the domain name is absolutely false. The company has not abandoned trade and still have staff working on a daily basis and the domain name is in full use as depicted by the website and the usage of the staff email accounts.*”

The Respondent says: *“Dr Beitner has made legitimate non-commercial and fair use of the Domain Name “polo.co.uk” throughout the years as a tool for developing initially Aspect’s and latterly his own IT skills, and to express his interest in polo, and he now wishes to continue to use it to be involved with the polo community at large.*

The Domain Name itself is generic and descriptive and Dr Beitner will be making fair use of it when it is used in respect of other polo clubs.”

The Appeal Notice claims that the Expert was wrong to order a transfer when the facts around registration of DN1 could no longer be clearly ascertained, when much turns on complex contractual issues which are outside the scope of the DRS, and especially given that the burden of proof rests with the Complainant. It claims that the case was not established on the balance of probabilities, and disagrees with the Expert’s findings both on Rights and on Abusive Registration. Furthermore, it points out that the Decision does not address the Respondent’s defence that he was making fair use of DN1 under paragraph 4(a)(ii) of the Policy.

The Appeal Response largely reiterates earlier arguments and supports the Expert’s reasoning. It highlights the inconsistency between the Respondent’s claim that there was no agreement between the parties relating to use of DN1 and related services, and his request for compensation in his letter of 12 June 2015. It points to other inconsistencies: between the Respondent’s claim that he did not originally register DN1 in his own name for purposes of anonymity, and his later willingness to use his own identity for registration; and between the alleged purpose of the initial registration *“to express his [the Respondent’s] interest in polo”* while *“the primary content of the website at the time related to the Ascot Park Polo Club”*.

The Complainant does not set out any separate basis for the Domain Name <polo.uk> (“DN2”) being an Abusive Registration, and nor does the Respondent present any separate arguments in relation to DN2. Both parties seem to assume that the finding should be the same in relation to both Domain Names, presumably on the basis that the Respondent was able to register DN2 due to its existing registration of DN1, and therefore DN2 should stay with DN1, whether it stays with the Respondent or is transferred to the Complainant. The Panel proposes to proceed on that basis and not consider DN2 separately save where specifically necessary.

8. Discussion and Findings

General

Pursuant to paragraph 2 of the Policy, the Complainant must prove in relation to each of the Domain Names, on the balance of probabilities, that:

- i. the Complainant has Rights in respect of a 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.

Rights

“Rights” are defined as “rights enforceable by the Complainant, whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning”.

The Complainant cited a long list of reasons for saying that it had relevant “Rights”, which included: the ownership of trade mark registrations; the registration and use of its company name and trading name; the acquisition of goodwill and reputation as a result of its trading activities, including through the website found at www.polo.co.uk, all involving some use of the word “polo”; and the fact that the Complainant had the contractual right to call for the Domain Names. This latter point seemed to be relied on most heavily, and was emphasised in the Appeal Notice Response.

It is worth noting that, while it is common to ignore domain name suffixes when assessing the existence of Rights, the Complainant’s contractual argument is essentially a claim to have Rights in the Domain Names themselves, for which purpose the suffixes form part of the relevant “name or mark” in the definition of “Rights”.

The Panel takes each of the potential Rights in turn below. But before doing so it is worth stating the rather obvious fact that “polo”, in the context of the Complainant’s business, has a descriptive meaning of being “a game of Eastern origin resembling hockey, played on horseback with a long-handled mallet” (see, e.g. <http://www.oxforddictionaries.com/definition/english/polo>). Thus one would expect it to be extremely difficult to obtain registered or unregistered trade mark rights in the word “polo” alone, in the context of such a business.

Registered trade marks

The Complainant presented evidence of the existence of three UK trade mark registrations, for the word marks “Ascot Park City Polo Club” and “Ascot Park Pro-Am City Polo Championship”, registered in its name, and the series of two logo marks shown below, registered in the name of Victoria Anne Russell Grace, who can be assumed for the sake of argument to hold these for the benefit of the Complainant.



In the Panel’s view, the inclusion of the word “polo” in each of these marks is insufficient to justify a claim of similarity to either of the Domain Names (with or without the .uk or .co.uk suffix), given its entirely generic meaning as the sport of polo. Thus the marks are incapable of giving rise to relevant Rights.

Company name and/or trading name

The Complainant's registered company name is Polo Enterprises Limited, and the Complainant emphasised throughout its submissions that it trades as ("T/A") Ascot Park Polo Club.

The Complainant does not seem to be suggesting that its company name *per se* amounts to Rights, and indeed the Panel agrees with the consensus view of the DRS Experts that the mere registration of a company name does not of itself give rise to Rights within the meaning of the Policy.

On the other hand, the use of a trading name can give rise to Rights if the use is sufficient to give rise to reputation and goodwill in relation to a relevant name which is identical or similar to the Domain Names concerned (see below).

Unregistered trade mark rights / reputation and goodwill

From the evidence that has been presented about the use of the company name and trading name on the website found at DN1 and in marketing materials about the Ascot Park Polo Club, it is likely that the Complainant has built up reputation and goodwill in its business conducted by reference to the name "Ascot Park Polo Club". However, if it is suggested that there is reputation and goodwill in relation to the name "Polo Enterprises Limited" or just "Polo Enterprises" or indeed "Polo", the Panel finds the evidence insufficient to establish that.

As with the registered marks, the Panel concludes that the name "Ascot Park Polo Club" is insufficiently similar to either of the Domain Names (with or without their suffix) to amount to relevant Rights to get this case off the ground.

A further possibility that arises from the Complainant's submissions and evidence, but which does not appear to have been considered by the Expert at first instance, is that the Complainant may have acquired reputation and goodwill in relation to the name "polo.co.uk" itself by virtue of its use of DN1 as the address for its website over a period of many years. Thus, while people who have visited the website would not associate the name "polo" exclusively with the Complainant, they arguably know that the Complainant's website is accessible through the "polo.co.uk" domain and thus associate that name with the Complainant to the exclusion of others. An analogy to this situation might be the early days of the website at <www.lastminute.com>: while internet users might originally not have associated the descriptive name "lastminute" with any particular holiday provider, the promotion and use of the on-line travel service at <www.lastminute.com> soon created an exclusive association with the company behind it. Of course, in that case, the company itself was called Lastminute.com Limited and it also used the trading name "Lastminute.com". However, the Panel considers that the consistent use of the "polo.co.uk" domain to host its website for many years (see below for further consideration of the detail of the chronology in this regard) is sufficient to overcome what is a relatively low hurdle of establishing Rights in that name, which is identical to DN1.

Contractual rights

The Panel has also considered the Complainant's claim to have Rights by virtue of a contractual right to call for the Domain Names because the Respondent had

registered them at the Complainant's behest and has been paid for doing so. This claim is effectively a claim to have rights to the Domain Names themselves rather than a claim to have rights in a name or mark identical or similar to the Domain Names.

A similar claim was made in DRS 04632 ([ireland.co.uk](#)) in which the appeal panel said the following:

“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 circumstances, reflecting a contractual or similar relationship between the parties, may well have given rise to relevant Rights in the first place.”

The Panel is not convinced by the logic of the appeal panel in [ireland.co.uk](#) that the inclusion of paragraph 3a. in the Policy inevitably means that the existence of a relationship described in paragraph 3a. is enough in itself to establish relevant Rights, though it has since been approved and followed in at least one other case: DRS 015217 [boattripscardiff.co.uk](#)). Another interpretation, which this Panel prefers, is that paragraph 3a. only applies (like all the other factors in the list of evidence of Abusive Registration) in circumstances where the Complainant can first show – in addition to the relationship described above – that it has a right to a name or mark that is identical or similar to the domain name. This is more in keeping with the requirement in paragraphs 2a. and b. of the Policy that **both** Rights **and** Abusive Registration must be established as two separate elements. It also avoids the difficulty highlighted by the appeal panel in [ireland.co.uk](#) with the DRS being used to determine contractual disputes. But it would not exclude the possibility, hypothesised by the expert in [boattripscardiff.co.uk](#), that Rights might derive from an obligation to transfer the domain name because the circumstances surrounding its registration mean that the complainant is effectively the equitable owner of that domain name.

In this case, given the Panel's conclusion that the Complainant has managed to establish the existence of relevant Rights by virtue of its website being hosted on DN1 and available to the general public and its members for many years, it is not necessary to reach a definitive conclusion on the question of whether the contractual relationship relied on by the Complainant would be sufficient, on its own, to give rise to Rights within the meaning of the Policy. The claimed relationship itself is examined further below in the context of the second key requirement of whether the Domain Names are Abusive Registrations.

Abusive Registration

“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”

Paragraph 3a of the Policy provides a list of factors which may establish a registration as Abusive. The case advanced by the Complainant is not squarely within any of these examples, but the list is non exhaustive. As the Panel understands it the Complainant's case is that the Respondent's failure to transfer the Domain Names when requested renders their registration Abusive. The essence of this case is that the Respondent registered DN1 on behalf of the Complainant and that the Complainant is entitled now to call for its transfer into its name. As the entitlement to register DN2 was based upon the registration of DN1 the same is said to apply to DN2. This entitlement to call for the transfer of the Domain Names is said to arise pursuant to the terms of a contract between the parties. As indicated above, the Complainant says in relation to this contract, in its Appeal Notice –

“Establishment of the existence of a contract is a simple and elementary test suitable for an expert with a non-contract specialist background to determine, as demonstrated below:

- (i) **Offer** (by Respondent to register the site, express or by conduct);
- (ii) **Acceptance** (agreement by the Complainant for the Respondent to register the domains);
- (iii) **Intention to create legal relations** (both parties acted for businesses); and
- (iv) **Consideration** (discounted polo services which the Respondent admits he received).”

The Panel agrees that this statement sets out the relevant elements required under English law to form a binding contract. In general terms the Panel is however doubtful that the DRS is the appropriate forum for an expert (particularly with a non-contract specialist background) to decide on the existence and terms of a contract, save in extremely clear cut cases or where there is little or no dispute about the issue.

In any event in the present case the Panel is firmly of the view that it is neither “simple” nor “elementary” to identify the relevant elements. Indeed the Panel notes that the Complainant itself has not identified all of these elements but simply invited the Panel to infer they must all exist. That however is far from straightforward. Neither party has suggested that any document or documents exist which might wholly or in part make up, or evidence, the relevant contract. Neither party has even identified who on the Complainant's part dealt with the Respondent in whatever discussions took place. Peter Grace died in 2013. The

evidence suggests he was the driving force behind the Complainant. Whilst that gives rise to an obvious possibility that it was he who discussed these matters with the Respondent, the Panel simply does not know. Still less does the Panel know what was said in any discussion (whether with Mr Grace or someone else) that took place. For all the Panel knows there may have been a discussion where the Respondent agreed to procure DN1 for the Complainant and receive in return benefit in kind. Equally however there may have been a discussion where the Respondent explained his plans to develop a polo related web site using DN1 which he was registering and invited the Complainant to assist by providing material to be placed on the web site. Other credible possibilities can also be hypothesised.

How is the Panel to determine now, some 20 years after the events in question, what actually happened? The Panel does not have the benefit of hearing oral evidence from witnesses, or of seeing what such witnesses say under cross-examination when their evidence is tested. Nor does the DRS procedure provide for compulsory disclosure of documents - so the record before the Panel is simply of whatever documents the parties choose to provide. In such circumstances the Panel considers that all it can do is identify the relevant materials in evidence and see whether they corroborate or support one version of events and, if so, to what extent. In particular does such an exercise enable the Panel to conclude, on the balance of probabilities, that the Complainant's case is correct? If so, the Complainant succeeds. If not, it fails.

Looking at the record in this case the Panel assesses it as follows:

Material that broadly supports the Complainant's case

- (i) DN1 was originally registered in the name of Ascot Park Polo Club. If, as the Respondent says, this was intended to be his own site dedicated to polo generally, then this seems curious, to put it mildly. He says it was so he was not publicly identified as being responsible for the site, but the Panel does not follow why that was of concern to him. See also the letter from Mr Bernard (see below) which contains a further explanation for this, although the Panel does not understand that explanation. Overall however this point seems consistent with and supports the Complainant's case.
- (ii) The fact that the Complainant's use of DN1 has been continuous for many years. Whilst originally some content of the web site at DN1 was generic (see below) it came to be the position that the web site was devoted to the Complainant and its activities. It seems surprising that this has occurred without the Respondent (until very recently) recording anywhere in writing that DN1 was his property and he was allowing the Complainant to use it.
- (iii) Although there is some correspondence at the time DN2 was registered this is inconclusive (see below). Again it seems surprising that the Respondent did not confirm when he effected this registration that he was registering it in association with his existing ownership of DN1.
- (iv) In 2011 the registration of DN1 was changed by the Respondent into the name of Polo Enterprises Limited. The Respondent says he did this at the

Complainant's request in order to assist the Complainant with the extension and refinancing of its overdraft and debt, while the Complainant denies this. This issue troubles the Panel. If the Respondent is correct that he was "lending" the registration of DN1 to the Complainant to assist it with refinancing, then questions might arise as to whether some sort of deception was taking place. In any event, apart from raising at least a concern about the propriety of what was being done, it seems very odd that no documentation at all has been produced by the Respondent to show how this came about or what (if anything) he said about his ownership rights at the time. Presumably on his case someone at the Complainant must have asked him to do this, and one would have thought it extremely unlikely (on his case) that he would have done so without at least documenting what he now says was the "temporary" nature of this arrangement. On June 10, 2013 he transferred the registration into his own name. The Respondent says this was to avoid any ambiguity following the death of Peter Grace (who died in March 2013) but again it seems odd that no contemporaneous documentation has been provided.

- (v) The Complainant has relied on various items of correspondence. They are discussed separately below as it is more convenient to consider these together with further correspondence to which the Respondent has referred.

Material that broadly supports the Respondent's Case

- (vi) The only contemporaneous document from the time when DN1 was registered which the Panel has seen is an email dated March 27, 1996. This is from an individual with an email address at Aspect Group, a company group the Respondent was then associated with (see below), to an individual at another email address and reads as follows

"Richard,

what qualifies for a .org.uk address ...

Nick wants to register polo.co.uk but .co.uk doesn't [sic] really fit !?"
J. "

The Respondent says this email followed on from enquiries he was making because he was intending to develop a generic polo site and thought a .org.uk address might be more appropriate for such a site. Whilst hardly conclusive it seems to the Panel this evidence is consistent with what the Respondent says he was doing. However the Panel considers its significance should not be overstated bearing in mind that in the end it was a .co.uk address that he registered.

- (vii) The Respondent has also produced a letter from Aspect Group's managing director, Rory Bernard dated December 7, 2015 which reads as follows:-

"To whom it may concern,

I hereby confirm I was a founder, director and CEO for Aspect Internet Marketing (AIM) and Aspect Internet Holdings from it's [sic] inception in December 1995 until the company was sold in 2004 building the company from nothing.

We purchased the domain polo.co.uk in March 1996 on the instructions of Dr N Beitner for his personal use from Nominet UK through our ISP, Netkonect. The company paid for the domain on his behalf and we generated no other invoices for the cost of the domain.

We used the domain, amongst others, to help develop our in house proprietary CMS technology as we needed trial sites to test the system on that were not in use by anyone. As part of this testing we used Ascot Park Polo club as the content for the site as it was relevant and they were not using the web as part of their day to day business. This included setting the registrant of the domain to be consistent with the content on the site – however this did not imply or change the ownership of the domain from Dr N Beitner.

As AIM grew and expanded we became less able to service personal projects due to the resource constraints of the commercial service teams. At this point the control and responsibility of domain was passed back to Dr Beitner for him to administer and control himself, along with any costs involved.”

The Panel assumes that this letter must have been produced at the Respondent's request and may well have been drafted by the Respondent. Without the opportunity to see Mr Bernard cross-examined, the Panel is cautious in attributing weight to this evidence, but notes that it is broadly consistent with the Respondent's case. It also provides what is said to be the reason for the registration being placed in the name of Ascot Park Polo Club, although the Panel does not understand the explanation which is given.

- (viii) Although the Complainant initially suggested otherwise it seems clear that the Respondent has always paid the renewal fees for the Domain Names and has not sought to recharge those directly to the Complainant. The Complainant of course says the Respondent has received benefits in kind in return (see further below).
- (ix) The Respondent has directed the Panel to the relevant entry at www.archive.org which he says corresponds to the website at DN1 as it existed in April 1997. The Complainant has not disputed the accuracy of this material. The relevant entry (see <http://web.archive.org/web/19970401224506/http://www.polo.co.uk/>) contains content including the following:-

A landing page headed WWW.POLO.CO.UK with a strap line under this reading “Making the Most of Polo Wherever You Are” and then underneath a polo related photograph followed by a link “Click here to continue” and the message “in association with ASCOT PARK POLO CLUB”

Clicking the entry link leads to a page reading as follows:-

“When you're not out there enjoying the pleasures of playing or watching polo, WWW.POLO.CO.UK brings it all to you here on the Internet.

[an image of the 4 Grace Sisters then follows]

Amongst other things, this site is home to the Grace's family run Ascot Park Polo Club. Aside from the friendly atmosphere that surrounds the club, the wonderful Grace sisters are known for their unique team which always has an incredible impact on and off the polo field.

This site will share theirs and other's best polo experiences for all to enjoy. A polo resource library will be built up over time capturing many aspects of the sport of kings for beginners and experienced players alike. Whether you are after intellectual stimulation, up-to-date information on news, reviews and events, or just interesting stories, this site aims to provide it all. If there is anything you would like to see on this site, just let us know.”

There are further pages on the site, most of which relate to the Complainant and its activities. Some pages are however of a general nature (for example the rules of polo).

It seems to the Panel that this material is of some significance and confirms that, as at that date, the website in question was, albeit in rudimentary form, presented as a general polo related site but then featuring specific material relating to the Complainant in particular. This seems to the Panel to be consistent with what the Respondent says happened.

- (x) The Respondent says that in 1995 or 1996 the Complainant would not have had any interest in the Internet or domain names and would not have been interested in any proposals involving it obtaining them. He at the time was a student of computer science and had a natural interest in this area. The Panel accepts that as at that date the commercial use of the internet was in its infancy and, without any evidence to the contrary on the Complainant's part, accepts the Respondent's case in this regard as lending some support to the Respondent's overall case.
- (xi) The Respondent has relied on various items of correspondence. They are discussed separately below as it is more convenient to consider these together with further correspondence to which the Complainant has referred.

Material that is inconclusive or cuts both ways

- (xii) The Respondent says that if what the Complainant says was true he would have registered a much more specific name for the Complainant such as ascotparkpolo.co.uk. The Panel is unable to assess whether that is correct. Clearly polo.co.uk is short and memorable and might well be thought a useful name even for a specific club (noting however the point discussed above about this date being very early in the commercialisation of the

internet). Conversely however it is obviously entirely suitable for a generic site about polo.

- (xiii) Some reference is made by the Respondent as to Ascot Park Polo Club not being a legal entity and suggesting this in some way casts doubt on the Complainant's case. The Panel does not follow this argument and does not regard this point as significant as Ascot Park Polo Club is and always has been the trading name of Polo Enterprises Limited - which has existed since 1978.
- (xiv) It is not in dispute that the Respondent has received discounted or subsidised membership fees. He says these in fact commenced prior to registration of DN1, when he was receiving discounted student rates. The Panel does not know if that is correct but it does not matter. It is also the case that over the years the Respondent has provided the Complainant with some degree of technical assistance in administering its domain names and its email systems. The extent of the applicable discounts, and the amount of assistance provided, are unclear to the Panel. It does not seem to the Panel that these arrangements show one way or another whether the Respondent registered DN1 for the Complaint in return for an ongoing discount. The discounts might have been in return for his ongoing assistance, independent of the ownership of DN1, or they may have been part of a wider arrangement which also included ownership of DN1 – the Panel simply cannot tell.

Correspondence

Various items of correspondence between the parties have been placed in evidence, although it does not seem to the Panel that the material in question necessarily represents a complete picture of all relevant exchanges. The Panel's views on the significant ones that the Panel has seen are as follows (in chronological order).

- (xv) On October 20, 2005 Victoria Grace having received a renewal reminder relating to appc.co.uk emailed the Respondent as follows:-

"Nick,

*Could you confirm what we should do re the email below - do I need to renew it with them or do it do it through you. Also could you confirm the situation with www.polo.co.uk . Also do you know if we own www.ascotpark.co.uk as I think that we ought to if we don't already.
Thanks very much*

The Respondent replied

"Tor

I am in the process of transferring them away from LBIcon as it is getting harder to get the renewed by the company.

I will renew them for you once the transfer has taken place.

Victoria Grace then the same day sent a further email to the Respondent:

*“Could you confirm if polo.co.uk and ascotpark and appc.co.uk are registered to Ascot Park Polo Club or to Polo Enterprises Ltd. Also how much do they cost to renew.
Thanks Nick”*

He replied the same day:

*“Ah, now that is harder!
To date I haven't been charging you to renew or manage them. I am in the process of trying to consolidate them into a single place, it proving time consuming and expensive. But I am working on it.
The domains are registered to Ascot Park Polo Club ... it is just a name.
The iwpa one seems to be registered to Aspect, that is easy to change.”*

There then follows in the text of the email what is clearly a copy of applicable whois data which commences with the entry

“Domain Name:

polo.co.uk

Registrant:

Ascot Park Polo Club”

Viewed from the perspective of the Respondent's case the final email is very curious, to put it mildly. It would have been entirely straightforward for him to have said “As you know polo.co.uk is my own domain name, which I originally registered but let the club use in return for discounted membership, as originally discussed with [name]...”. Instead he said “*The domains are registered to Ascot Park Polo Club ... it is just a name*”. It is entirely unclear to the Panel what he meant by the comment “it is just a name”. The natural meaning one assumes Victoria Grace would have taken from this exchange seems to the Panel to be that DN1 was registered in the Complainant's trading name and owned by the Complainant³.

- (xvi) On July 4, 2014 Lucy Wilson, the Complainant's General Manager sent the Respondent an email which read as follows

“Hi Nick

³ The Panel acknowledges that Nominet's conditions provide that a domain name registration is not property and hence cannot technically be “owned” but this term is used as a convenient way of looking at the contractual rights concerned. The same issue arises in other places in this decision.

Following on from conversations with Pippa requesting you to purchase .uk, thank you so much for doing this, although, from what I understand it's still in your personal name. If you could change this over as a matter of urgency, so we get everything in order, it would be great.

We have also revamped the polo.co.uk website with the help of Lucy Northmore so we would like this to replace the existing one. I think she has already dropped you an email about this week!

Many thanks again for all your help this week with emails etc - I will have a proper look at your last email and scratch my head about it!

*Kind Regards,
Lucy Wilson”*

This email clearly is written on the basis that Ms Wilson considered polo.uk (DN2) would be the property of the Complainant, and presumably also thought the same was true of DN1. However the Panel does not know what led Ms Wilson to that belief. The Panel does not know what, if any reply was sent by the Respondent.

(xvii) On February 20, 2015 an exchange of emails took place as follows:

Victoria Grace emailed the respondent:

“To: Nick Beitner

Subject: Email address: victoria.grace@polo.co.uk

Dear Nick,

I am writing to confirm that although I have resigned as a Director of Polo Enterprises Ltd after working for the company for 24 years, I am still a major shareholder of the company. As such, I am writing to confirm that victoria.grace@polo.co.uk is my personal email address and I would like to continue to use it in the future. Please do let me know if I owe you any fees for running this service.

Please do not hesitate to contact me if you have any concerns or would like to discuss this matter further.

*Best regards,
Victoria”*

The Respondent replied:

“To

I am very sorry to hear you have resigned as a Director of Polo Enterprises Ltd. The sheer scale of your contribution to the club over the years is impossible to measure, and until recently the club has been a beacon of joy in my life. Sadly, since you moved on, the club has been in a steady decline. I have had relatively few dealings with the club as of late, and have not been a member since the winter season.

On the strength of our long standing relationship, I continue to let them use domain name for their web site and also email addresses and my google

*app service. I am happy for you to continue using the email address and would not dream of charging you.
I had always assumed that the email address I had arranged for you was personal, but it is duly noted.
Should circumstances change I will let you know.
Kind regards
Nick”*

The Panel does not think this exchange assists in establishing entitlement of the Domain Names – whilst it is not inconsistent with the Respondent’s claim, it can equally be read as an email to the Respondent as the person who is assisting the Complainant on an ongoing basis in administering its email accounts. The Respondent’s email does (if it is read carefully) contain a statement that in effect asserts ownership of the Domain Names – the Panel does not know whether the Complainant noticed that at the time or if there was any further correspondence after this.

(xviii) An e mail on August 13, 2015 from Max Grace to the Respondent read as follows

“Dear Nick,

Please can you provide the administrator log-in details for the servers of Ascot Park Polo Club’s following domain names:

- 1. Polo.co.uk*
- 2. Polo.uk*
- 3. Ascotpark.co.uk*
- 4. Thepolocompany.co.uk*
- 5. Appc.co.uk*
- 6. Proamcitychamps.co.uk*
- 7. Proamcitychampionshiops.co.uk*
- 8. Citypoloclub.co.uk*
- 9. Iwpa.co.uk*
- 10. Londonpoloclub.com*
- 11. Proamcitychampionships.com*
- 12. Proamcitychamps.com*

Can you please also change the registrant and Nominet authorisation email for all the domains to mn12170@bristol.ac.uk.

Furthermore, can you provide us with the encryption key for the online backup system, iDrive.

*Regards,
Max”*

The reference to DN1 and DN2 as being comprised within the list of Ascot Park Polo club’s domain names is of some relevance as is the request for administrator log-ins and for the registrant to be changed. Presumably Max Grace believed (or assumed) DN1 and DN2 belonged to the Complainant. However the Panel does not know what the basis for any such belief was – Max Grace was not involved in the original registration of DN1 as he was at the time a small child. The Respondent says he did not reply to this email as

Max Grace was the grandson of the club's founders and not directly dealing with club matters.

(xix) A chain of email correspondence took place on October 31, 2013 as follows:

Victoria Grace emailed the Respondent as follows:

*Dear Nick,
Great chatting the other day and wonderful to hear about the 2 new additions to the 'family'!! I bet that you can't wait for the Summer to enjoy playing them.*

I have a note in my diary that polo.co.uk expires on the 3rd November 2013 – can you confirm if you need any payment from Sarah to renew the website for Polo Enterprises or if you need Pippa to do anything. Thanks so much.”

The Respondent replied:-

“I have polo.co.uk set to auto renew.

The following of your names are due to expire shortly, do you want me to renew them?

*ascotpark.co.uk 19 November, 2013
appc.co.uk 19 November, 2013
iwpa.co.uk 26 January, 2014
londonpoloclub.com 23 March, 2014
citypoloclub.co.uk 16 May, 2014
proamcitychamps.com 17 May, 2014
proamcitychampionships.com 17 May, 2014
proamcitychampionships.co.uk 17 May, 2014
proamcitychamps.co.uk 17 May, 2014
thepoloccompany.co.uk 28 May, 2014
N.”*

There then followed a further email from Pippa Gillard (one of the Grace sisters) which read

*“Hi Nick
Can you let me know the cost of renewing each of these sites and also can you confirm if they all point to Ascot Park other than the iwpa.co.uk.*

*The definite ones for renewal would be
ascotpark.co.uk 19 November, 2013
appc.co.uk 19 November, 2013
iwpa.co.uk 26 January, 2014*

*Depending on cost I will discuss the following with Janey:
londonpoloclub.com 23 March, 2014
citypoloclub.co.uk 16 May, 2014
proamcitychamps.com 17 May, 2014*

proamcitychampionships.com 17 May, 2014
proamcitychampionships.co.uk 17 May, 2014
proamcitychamps.co.uk 17 May, 2014
thepoloccompany.co.uk 28 May, 2014

.....”

The Respondent replied

“The .co.uk domains cost £5 for 1 year
The .com domains cost £11 for 1 year

.....”

and Pippa Gillard then responded

“Hi Nick
Many thanks for getting back so quickly.....
Please can we renew all that need renewing and also can you confirm if
they all point to Ascot Park other than the iwpa.co.uk address. Can you
please also confirm which email address the renewal reminders are sent to
and if it is not info@polo.co.uk can we please change it so that the office is
kept aware of what is going on.

Many thanks
Pippa”

This exchange ultimately seems to the Panel to be inconclusive. On the one hand the Respondent seems to be dealing with DN1 differently from the various other domain names being discussed, automatically renewing it and not referring to it directly in relation to costs. On the other hand Victoria Grace’s initial email seems to be based on the assumption that the Complainant will pay the renewal fee for DN1 and the Respondent does not suggest anything to the contrary – he does not say that DN1 is his property and hence he is paying the relevant fees himself. Overall whilst considering the Respondent’s silence somewhat odd the Panel simply does not find that this exchange materially assists the Panel’s analysis.

(xx) On June 12, 2015 the Respondent wrote a letter to Elisabeth Grace as follows:-

“Dear Elisabeth,

Regarding the domain name polo.co.uk and other related services.

It is my understanding that Ascot Park is not offering polo club memberships and/or livery this season, and is unlikely to do so in the future.

As a long-standing member for almost 20 years, this brings me great sadness.

At the same time this raises the issue of compensation for the use of the domain name and related email services which I have been providing to the club in exchange for membership and other benefits for the better part of the last 20 years.

I further understand that the club is not currently in a position to adequately compensate me for the use of the domain name and related email services.

Given our longstanding relationship, as an act of goodwill, I am prepared to allow you to continue using the domain name and email services for the duration of the 2015 summer polo season on the proviso that the outstanding balance of £365 on my account is cancelled and that should there be an IWPA ladies tournament in the summer that we are given a free entry to a level of our choosing.

Kind regards

Nick Beitner

It is this letter which has led to the present case. This (and the February 20th 2015 email above) are the only documents the Panel has seen in which the Respondent in effect expressly states his claim to be the owner of the Domain Names. The Complainant describes this letter as “a bargaining tool” being used by the Respondent to “relieve his debt to the company” and describing it as “threatening” and demanding a “ransom”. Whilst the Panel can understand that the letter may have been unwelcome, and may indeed have surprised the Complainant if it had been assuming it owned the Domain Names, it does not seem to the Panel as significant as the Complainant has portrayed it – the amount of the debt involved - £365 - is relatively modest and the proposed transaction does not seem manifestly unreasonable if the Respondent’s position was as he alleges. Overall the Panel does not consider that this letter casts significant doubt on the Respondent’s position.

Peripheral or Irrelevant Material

For completeness the Panel notes that there is also a substantial amount of material in evidence that is either irrelevant or at best simply forms part of the background to the dispute. For example:-

- (xxi) The Complainant makes much of a book Mr Grace wrote entitled “Polo” with a foreword by his Royal Highness, the Prince of Wales, but other than confirming Mr Grace was a well known figure in the world of polo (which is not in dispute) this material advances neither side’s case. Similarly the Complainant draws attention to Mr Grace’s award of an OBE, which again is only relevant, if at all, as background.
- (xxii) There is also material in evidence about the use by the Complainant and its staff of email accounts and allegations (which are vehemently denied) that the Respondent has interfered with this in some way. The Panel is entirely

unable to assess these allegations and has not attempted to do so given it does not consider this material relevant.

- (xxiii) Additionally the Respondent attaches significant weight to the Complainant's motives and says its business has now ceased, polo at its former premises is now conducted by an unrelated business and its property is for sale. The Complainant disputes at least some of these allegations. The Respondent has made various allegations about the veracity of some of the Complainant's evidence about its recent activities. The Panel is again unable to assess these matters. Beyond noting that it appears to be the fact that there was at least a change in the nature of the Complainant's business, and this acted as the trigger for the correspondence (above) which led to this case, the Panel does not consider these matters relevant to the issues before the Panel.
- (xxiv) Various Facebook pages have been placed in evidence but do not really add anything relevant.

Assessment of this material

Taking all of this material together the Panel is unable to reach a conclusion. It is left with an impression that the Respondent may originally have had a plan for a generic polo related website, but used material from the Complainant to populate that website. What was said about this and with whom, at the time that DN1 was registered and the website was first created, is simply unknown. Over time the site has changed and become devoted exclusively to the Complainant without, so far as the Panel knows, either the Respondent or the Complainant saying anything about ownership of DN1. Perhaps unsurprisingly given the period of time involved, some or possibly all of the Complainant's personnel formed the view, or simply assumed, that the Complainant owned the Domain Names. If it was the case that whatever initial discussions took place were with Peter Grace, then following his death in 2013 it may be that no one at the Complainant knew what had originally been said. The fact is that whatever was originally said remains entirely unclear.

There is no doubt in the Panel's mind that aspects of the Respondent's case are unsatisfactory. In particular the email exchange in 2005 (see above) seems at best disingenuous, and the transfer of registrant details in 2011, apparently without any documentation, seems very odd indeed. The Respondent has also failed on other occasions to make clear to the Complainant what he now says is the true position. It was (as the Panel understands it) these issues which led the Expert to find in the Complainant's favour, and the Panel understands why he did so. The difficulty however is that the Complainant's case is one based on inference as to what it says must have happened, without any direct evidence confirming that it did in fact happen. Finding in favour of the Complainant and accepting its case would in effect amount to the Panel concluding that the Respondent was lying. Whilst a Panel can make such a finding in clear cases, or where inherently incredible or improbable evidence is being advanced, it should be cautious of doing so where matters are more complex and different possible scenarios exist, particularly when the alternative case is one based on inference.

In court proceedings witnesses attend in person and are cross-examined, and questions about the significance to be derived from documents apparently inconsistent with their case can be raised. None of that is available within the normal DRS procedure, which makes it inherently unsuitable for deciding disputed questions of truthfulness which depend upon complex factual enquiries. In the present case, whilst the Panel shares the Expert's view in finding some aspects of the Respondent's case unsatisfactory, it declines to find that this should mean the Complainant's inferential case is accepted.

Put another way, this is a case which is simply not suitable for resolution within the framework provided by the DRS. In circumstances where an individual who seems likely to have been a key witness (Peter Grace) is dead, and where there is a dearth of contemporaneous documentation before the Panel, it seems to the Panel that disclosure, oral evidence and cross examination would be necessary to assess this case properly. While paragraph 14a. of the DRS Procedure does envisage the possibility of an in person hearing being held in exceptional cases and in the sole discretion of the expert, this has never been done in the history of the DRS. In this Panel's view, it would only ever be appropriate to exercise this discretion in circumstances where the expert believes that a hearing would help to clarify matters in a way which accords with the overall aim of the DRS, which is to provide a relatively low cost, informal and quick mechanism for resolving straightforward cases in a fair manner. In practical terms it is hard to think of an example where a hearing would be appropriate, but there might for example be an unusual case where the best way of checking a fact would be to arrange for the parties to join a conference call.

In any event it is not clear whether the possibility of holding a hearing applies to appeal panels. But even if it did, the Panel would not find it helpful to hold one. The provision is not intended to allow for a quasi-'trial' which tests all of the arguments and evidence and assesses the credibility of witnesses, which is what would be needed in this case. Such issues are manifestly more appropriate to adjudication elsewhere (as to which see below). Accordingly the Panel will reach its decision, as is the norm, on the basis of the written arguments and evidence that the parties have chosen to make available. On that basis, the Panel is unable to reach a definitive view on which side's explanation of the arrangement with regard to the Domain Names is correct and thus concludes that the Complainant has not discharged the burden of proving, on the balance of probabilities, that the Domain Names are Abusive Registrations.

Further Remedies

The Respondent in his Appeal Notice suggests that a further reason for finding in his favour is that, even if that decision is wrong, the Complainant can seek further remedies in court proceedings, whilst if alternatively the Panel were to find in the Complainant's favour he (i.e. the Respondent) then has no further remedy. The Complainant disputes this analysis.

The Panel is not persuaded that the Respondent's analysis is necessarily correct, but in any event does not consider it is appropriate to adjust whatever it otherwise concludes is the correct decision because of the availability or otherwise of further relief. That would be an abdication by the Panel of the task it is required to carry

out. The Panel declines to adopt such an approach. So far as further relief is concerned, it seems to the Panel that the DRS is the proper forum for determining whether a registration is an Abusive Registration⁴ but proceedings could be brought before the court in relation to other matters in issue between the parties, whether in contract or for trade mark infringement or passing off, which could at least in theory result in the court making an order about the fate of the Domain Names. The Panel offers no view as to the merits of any such proceedings but, as noted above, considers that the availability of oral evidence, cross examination and disclosure means that court proceedings may be able to determine matters which the Panel is unable to resolve within the mechanism of the DRS.

9. Decision

The Appeal is allowed and the Panel directs that the domain names polo.co.uk and polo.uk should be retained by the Respondent. The Panel finds that the Complainant has Rights in respect of polo.co.uk, but declines to find that it is an Abusive Registration. According to Nominet's rules for .uk domain names, the rightful registrant of polo.co.uk has first call on polo.uk, so the two domains remain together.

Signed:

**Nick Gardner
Claire Milne
Anna Carboni**

Appeal Panel

Dated: 3 August 2016

⁴ See *Toth v Emirates* [2012] EWHC 517 (Ch) (7 March 2012)