



CPR Institute for Dispute Resolution

COMPLAINANT

Robert Joseph
 26 Palace View Road
 London E4 9EN, UK
 Tel: +1-44-7904-156697 and +1-758-715-2680
 Fax: +1-44-207-681-3462
 E-mail: rodneybay@clara.co.uk

File Number: CPR0402

Date of Commencement: February 10, 2004

Domain Name: rodneybay.com

Registrar: Network Solutions

vs.

Arbitrator: Peter L. Michaelson, Esq.

RESPONDENT

Robert Kisson
 16 Cecil Park, Pinner
 London HA5 5HH, UK
 Tel: +1-44-208-429-4593
 Fax: +1-44-208-429-3745
 E-mail: mail@ricardokisson.com

Before Peter L. Michaelson, Esq., Arbitrator

PROCEDURAL HISTORY

The Complaint was brought pursuant to the Uniform Domain Name Dispute Resolution Policy (“the Policy”), which was adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) on August 26, 1999 and approved on October 24, 1999 and in accordance with the ICANN Rules for Uniform Domain Name Dispute Resolution Policy (“the Rules”) as approved on October 24, 1999 and the CPR Institute for Dispute Resolution Supplemental Rules for Uniform Domain Name Dispute Resolution Policy then in effect (“the Supplemental Rules”).

The Complaint was filed with CPR on February 10, 2004 and, after review for administrative compliance, served on the Respondent. The Respondent filed its Response on February 25, 2004. On March 2, 2004, I was appointed as the sole Arbitrator pursuant to the Policy and the Rules.

Upon the written submitted record including the Complaint and its attached Exhibits 1-7 and the Response, I find as follows.

FINDINGS

CONTESTED DOMAIN NAME

The contested domain name <RODNEYBAY.COM> was registered by the Complainant's UK company Netvision Software Ltd. in 1998, renewed on October 5, 1999 and again renewed through this company on the October 3, 2003 for 9 years to October 5, 2012 (see a copy in Exhibit 1 to the Complaint of a renewal order confirmation e-mail dated October 3, 2003 which the Complainant

received from the Registrar). A copy of the UK Certificate of Incorporation for Netvision Software appears in Exhibit 4 to the Complaint.

The record reflects that the Respondent and subsequently the Complainant attempted to modify the registration records, specifically the ownership, for this domain name registration. The Respondent also attempted to renew the registration in his name. Inasmuch as the Registrar was and still is faced with conflicting requests to modify the registration record from these two individuals, each of whom, from the perspective of the Registrar, appears to have apparent legal authority to bind the registrant, the Registrar, being unable to determine which individual, Complainant or Respondent, has actual requisite legal authority to make this request, has effectively frozen the state of the domain name until such time as the ownership issue is appropriately resolved.

In initially registering the name and through both parties attempting to renew the registration, both parties agreed to submit to this forum to resolve any dispute concerning the domain name, pursuant to the UDRP, and is now so bound.

Paragraph 4(a) of the Policy provides that each of three findings must be made in order for a Complainant to prevail:

- i. Respondent's domain name is identical or confusingly similar to a trademark or service mark in which complainant has rights; and
- ii. Respondent has no rights or legitimate interests in respect of the domain name; and
- iii. Respondent's domain name has been registered and is being used in bad faith.

BACKGROUND

As the reader will quickly appreciate, the present dispute does not concern whether the contested domain name infringes the rights of a trademark, be it registered or at common law, but rather, as between two prior shareholders/officers of a common corporate venture who have since terminated their business relationship, which of those parties now rightfully owns the name.

In particular, the Complainant states that it registered the contested domain name for use in selling various services, which as of the filing date of the Complaint have included villa rental, apartment rental, property sales and car rental, all in the Rodney Bay area of St Lucia in the Caribbean. He began his business in August 1998 by offering short-term holiday rentals of his Villa Cleopatra property in St. Lucia. This business was conducted under the Complainant's company "Rodney Bay Associates Ltd."

During June 2000 and through Rodney Bay Associates, the Complainant purchased a second property and embarked on a project to renovate the property into a small hotel, later called the Ginger Lily Hotel which opened on January 12, 2002.

According to the Complainant, during November 2000, the Respondent, Robert Kisson, obtained, from the Complainant, an ownership share in Rodney Bay Associates Ltd with the result being that the Complainant and Respondent became equal owners.

Apparently, various disputes later arose between the Complainant and the Respondent which resulted in both parties terminating their business relationship. The Complainant has instituted legal proceedings against the Respondent in St. Lucia to determine ownership of the corporate properties, including the contested domain name and its associated web site. These proceedings are presently on-going.

FACTUAL REPRESENTATIONS and CONTENTIONS

While the facts, as presented in the pleadings and to the extent understood, are conflicting to some extent, an easy way to appreciate the situation between the parties is to simply list each of the Complainant's factual representations and contentions, followed by the Respondent's corresponding factual representations and counter-contentions. To assist the reader, each of the Complainant's factual representations and allegations will be preceded by "C:"; while those seemingly corresponding for the Respondent will be preceded by "R:".

C: The Complainant states that, during November 2000, the Respondent was added as a director to Rodney Bay Associates Ltd.

R: The Respondent, in contrast, states the directors are the Respondent and Ms. Cheryl Gustave.

C: The Complainant alleges that the Respondent proved to be a "sleeping partner" for the entire construction project and during the first year of operations, which led to internal disputes. Further, the Complainant alleges that the Respondent attempted a "ruthless" take-over bid of the operating company by manipulating the share holdings; this being a subject of the on-going legal proceedings.

R: The Respondent denies this.

C: The Complainant states that he is currently the undisputed owner of the Ginger Lily property. Also, his website, <**rodneybay.com**>, covers three separate businesses all operating in the Rodney Bay area of St Lucia: Villa/Apartment rental, Real Estate, and Hotel rental. The Respondent has no interest or involvement in the Villa or Real Estate business. As part of a possible settlement with the Respondent, the Complainant states that he was legally advised to put a claim in for his time spent on the hotel project, including hosting the company's hotel operations on the Complainant's website. The Complainant alleges that "In order to weaken my claim Mr. Kisson employed someone to hijack my website to make it look like Rodney Bay Associates Ltd own the website, therefore his hijacking of my website has been very damaging to all my businesses". In that regard, the Complainant states that he alerted the Registrar as soon as he noticed the hijacking being perpetrated, and that the domain name <**rodneybay.com**> was then frozen pending an arbitration decision on the rightful owner.

The Complainant avers that in an attempt to discredit the Complainant, the Respondent fraudulently hacked the Complainant's e-mail account and proceeded to complete the Registrar's lost password form which automatically re-sends the user-id and password out to the Complainant's registered e-mail address. Armed with the Complainant's user-id and password from the Registrar, the Respondent accessed the Complainant's domain registration record on November 19, 2003 and proceeded to change all the Complainant's personal details to those of the Respondent. See a copy of what the Complainant contends is the "correct registration" record in Exhibit 2 to the Complaint and the subsequent modified record shown in Exhibit 3.

The Complainant, on complaining to the Registrar, about the above fraud, was informed that the Registrar's telephone records showed that the Respondent telephoned the Registrar on several occasions prior to the dispute, requesting the Complainant's registration record be changed and claiming that the Complainant had purchased the domain name for the Respondent.

The Complainant also avers that the Respondent also fraudulently obtained the Complainant's web site hosting server's (Hostway) user-id and password, presumably by also completing the lost password from and eavesdropping on the Complainant's e-mail account to capture the Complainant's user-id and password when they were automatically re-sent to the Complainant's registered e-mail address. With access to the Complainant's Hostway account, the Respondent proceeded to download all the Complainant's web site files onto a desktop PC, which was then used to tamper with the Complainant's files.

The Complainant has provided, in Exhibit 5 to the Complainant, a Hitslink web site statistics report, showing the activity recorded on a PC at the time the above act was taking place. The Complainant notes that there are many references to a folder named "Kisson" from where attempts were being made to run the Complainant's web site on a local PC. Each page of the Complainant's web site has statistics reporting code for reporting its location and visitor details to the Hitslink server. Presumably somebody was acting on behalf of the Respondent to have file folders with the Respondent's name reference on it. During November 20, 2003, the Complainant noticed an abnormally low level of visitor traffic and had no incoming e-mail that day. This, in turn, made the Complainant immediately investigate his web site reports.

Recorded details of the physical PC being used to manipulate and run the Complainant's web site files are shown in a Hitslink report provided in Exhibit 6 to the Complaint.

R: The Respondent asserts that it was the Complainant that was removed as a director of Rodney Bay Associates, Ltd. The Respondent further asserts, that at a meeting at which this occurred, the Complainant defiantly drove off with the Respondent's Suzuki Escude "which was assigned to the manageress of the Ginger Lily and the following day, and on divers subsequent days returned to the premises of the Ginger Lily Hotel and behaved thereon in a disorderly manner in the presence of guests of the hotel whereupon he was asked to leave."

The Respondent states that, following the removal of the Complainant, various adjustments were made to the signatories of the company's accounts to reflect the change of directorship.

The Respondent alleges that the Complainant represented to him that if the Respondent were to match the investment of the Complainant that the Complainant would then convey his interest in the Ginger Lily building and land to the Respondent who would then own and operate a hotel thereon. The Complainant accordingly presented details of the full financial extent of his interest in the building and land to the Respondent, who then matched the Complainant's investment. The Respondent alleges that the Complainant failed and/or refused to execute the contemplated conveyance to the Respondent although the Respondent has been solely responsible for all loan payments ostensibly for the Ginger Lily Hotel, as a consequence of which the Respondent has suffered loss and damage.

The Respondent also alleges, that as part of his agreement with the Complainant and in exchange for his investment, the Respondent would pay for the development of the <rodneybay.com> website and that the Complainant would relinquish exclusive use of that site to the Respondent and would also remove all links to the Complainant's personal and competing guest-house, Villa Cleopatra, from that site.

The Respondent states that it paid for the development of the web site, including the fees charged by a website designer but that the Complainant upgraded the Villa Cleopatra to a spot of prominence on that site and refused to notify the Respondent of the password to access that site so that this situation could be remedied.

The Respondent alleges that through the site, the Complainant also diverted business from the Respondent to the Villa Cleopatra by falsely representing to guests and would-be guests that the Ginger

Lily was full and luring them away from the Ginger Lily Hotel to the Villa Cleopatra by promising those quests more affordable accommodation.

Further, the Respondent states that the Complainant placed a credit-card terminal at the premises of the Ginger Lily to process the Villa Cleopatra business that was being diverted from the front desk of the Ginger Lily.

The Respondent also alleges that the Complainant withdrew director funds for his own personal use in breach of a loan agreement with the Respondent's bankers that stipulated that the loan must be paid off first before director loans are repaid. The Respondent contends that this jeopardizes his position with his bankers and left Rodney Bay Associates, Ltd. desperately starved for cash at critical junctures. This, in turn, necessitated, as stated by the Respondent, that he infuse of over £400,000 to keep Rodney Bay Associates Ltd. afloat.

Lastly, the Respondent also alleges, that the Complainant, after being ordered by the St. Lucia court not to use the <rodneybay.com> website, has opened another website called <rodney-bay.com> on which the Complainant continues to advertise the Ginger Lily and the Villa Cleopatra.

JURISDICTION and CONCLUSION

It is axiomatic that any tribunal -- of which an ICANN panel is no exception, when faced with deciding a dispute, begins its task by assessing the limits of its jurisdiction and then ascertaining whether the issue being disputed and for which a decision is sought from the tribunal lies within those limits. Only after concluding that it has jurisdiction to act should that panel then proceed to the substance of the dispute and the remedies sought.

ICANN panels are tasked with very narrow and focused jurisdiction, namely to just decide issues of "abusive registration of domain names, or cybersquatting". Report of the WIPO Internet Domain Name Process, paragraphs 169, 170. See, e.g., *Draw-Tite, Inc. Plattsburgh Spring Inc.* Case No. D2000-0017 (WIPO March 14, 2000); *Weber-Stephen Products Co. v. Armitage Hardware* Case No. D2000-0187 (WIPO May 11, 2000). Matters beyond the narrow purview of an ICANN Panel are to be resolved in courts of appropriate jurisdiction. See *Nintendo of America Inc. v. Alex Jones* Case No. D2000-0998 (WIPO November 17, 2000).

The present dispute has absolutely nothing to do with cybersquatting and is utterly devoid of any allegations, let alone adequate proof, of all the elements required to prove actionable cybersquatting under paragraph 4(a) of the Policy. In the regard, an essential element of any claim of cybersquatting, as set forth in paragraph 4(a)(1) of the Policy, is that the contested domain name is either identical or confusingly similar to a trademark in which a complainant has rights. No such trademark has been raised here. Similar failures of proof exist for showings of a lack of rights and legitimate interests, and bad faith use and registration (paragraphs 4(a)(2) and (3) of the Policy, respectively).

This dispute, as its crux, concerns ascertaining the rightful ownership interests in and disposition of the assets of a corporate business, Rodney Bay Associates Ltd., as claimed by two individuals, the Complainant and Respondent, who were both previously investors and officers of that business but who have since dissolved their business relationship, and the legal ability of either to exercise control and dominion over those assets apart from the other. The contested domain name is simply one such asset. Such questions lie well outside the jurisdiction of this Panel and are best relegated to the courts.

Coloring this dispute as one involving cybersquatting and forcing its resolution under the Policy

completely disregard the highly targeted purpose underlying the Policy, and effectively turn the Policy on "its head" by utterly misusing it. See *ITMetrixx, Inc. v. Kuzma Productions* Case No. D2001-0668 (WIPO August 2, 2001) where the panel, in denying the complaint, stated: "This matter appears to be a dispute between business partners over the ownership of the business and its assets. This is not a case limited to cybersquatting, which is the problem that the Policy was designed to address." Also, see *Latent Technology Group, Inc. v. Bryan Fritchie* Case No. FA95285 (Nat. Arb. Forum September 1, 2000) where the panel stated: "If, because of the nature of the claims Complainant believes that it is entitled to own the domain name it should pursue its claims in a forum (e.g., a court) that is more appropriate for such claims"; and *Clinomics Biosciences, Inc. v. Simplicity Software, Inc.* D2001-0823 (WIPO August 28, 2001) where the panel in denying the requested relief stated: "Prior decisions have rejected complaints where the dispute is primarily contractual and therefore outside the scope of the Policy."

Rule 15(a) states: "A Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable". General principles of jurisprudence mandate that inherent in the power of any tribunal is its ability to dismiss a complaint if the tribunal does not have the legal authority, i.e., is incompetent, to hear it. Such a dismissal occurs before and hence forecloses any consideration of the merits of the complaint and any remedies sought there under. Paragraph 4(i) of the Policy specifies the very limited remedies afforded to an ICANN Panel: "The remedies available to a complainant pursuant to any proceeding before an Administrative Panel shall be limited to requiring the cancellation of your domain name or the transfer of your domain name registration to the complainant". However, the award of any remedy, whether it be grant or denial of a request to transfer or cancel a registration as set forth in paragraph 4(i), presupposes that an ICANN Panel is competent to decide the underlying issue placed before it. In the present case, this Panel clearly is not. Hence, the Panel has no authority to consider and rule on the remedies sought, and hence declines to do so.

Therefore, the Panel, having concluded that it has no jurisdiction to decide the present dispute, has no alternative but to dismiss the Complaint.

Inasmuch as the Panel finds that the Complainant has put forth its Complaint in what appears to be a good-faith, though candidly rather mistaken and misguided, attempt to gain clarification on the ownership of the contested domain name, the Panel does not find the Complainant has engaged in reverse domain name hijacking.

REMEDY

Accordingly, under paragraph 15 of the Rules, the Panel now DISMISSES the Complaint.

March ____, 2004

Peter L. Michaelson, Esq., Panelist