

Domain name dispute resolution

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charts the course of dispute resolution in cyberspace

The Domain Name Commissioner's Dispute Resolution Service (DRS) commenced in June 2006. The DRS system was introduced to provide an alternative process to court litigation for resolving disputes relating to ownership of New Zealand domain names (ie, domains which end in ".nz"). This article summarises the DRS procedure and assesses the effectiveness of the system over the past two years.

THEORETICAL BASIS

Domain name dispute systems are used by domain name registrars around the world to address the "first in time" nature of domain name registration. Intellectual property laws have been adapted to protect rights holders, who may not necessarily be the first to register a domain name, and to discourage cybersquatters from speculatively registering domain names in which third parties have rights.

The term "cybersquatter" has pejorative connotations, but it is important to note that not all speculative domain name registration is objectionable. Registration of a domain name comprising a generic word which does not infringe the rights of a third party is lawful, and the profit which may be made from selling that domain name to a third party is legitimate.

Problems arise, however, where the registrant has chosen a name, in relation to which a third party has intellectual property rights, primarily for the purpose of depriving the rights holder of the domain. This means that rights holders need to pay a premium to acquire the domain from the registrant or use a different domain.

Justifications for regulation relate in part to the interests of internet users and rights holders. Internet searching is less efficient if the content of a page bears no relationship to its URL address. By definition, users searching for a particular business or information about a product will not find the information they wanted as quickly as possible (or at all) if it is not in the most logical place. In addition, if a party other than the rights holder holds a domain name which includes the relevant mark, consumers may be misled or deceived by being diverted from the legitimate business which they sought.

Proponents of a more laissez-faire approach in turn argue that internet users typing in a domain name speculatively may not be looking for the official site, but may simply be seeking information about the product or business. They may also argue that parties who delay in registering a domain name ought not to be able to pick and choose which names they later want to obtain based on existing rights.

However, intellectual property laws recognise that use of a domain name which includes a third party's trade mark (whether registered or not) can amount to infringement of those trade mark rights, and there is a strong case for regulation to prevent such infringement.

DOMAIN NAMES AND IP

Prior to the DRS system coming into force in June 2006 a rights holder's only options for seeking transfer of a New Zealand domain name which allegedly infringed IP rights were either to commence High Court proceedings against the registrant, or try to enter into a negotiated settlement. Court proceedings in relation to domain name disputes are usually based on trade mark infringement (where applicable), breach of the Fair Trading Act 1986, and passing off.

New Zealand cases dealing with domain name disputes have largely followed UK law, where passing off has been adapted to deal with domain name cases in the absence of legislation equivalent to the Fair Trading Act. The leading case on passing off in the context of domain names is *British Telecommunications plc v One in a Million Ltd* [1998] 4 All ER 476 (CA). In that case the Court held that the registration of a domain name which includes a well-known name involves the creation of an instrument of fraud, by providing the means for the registrant or their assignee to deceive members of the public, and is actionable under passing off.

NEW ZEALAND SYSTEM

The DRS Policy is based on the system employed by Nominet, the registrar responsible for the ".uk" domain space. The New Zealand and UK systems both employ expedited timeframes and procedures (compared with court proceedings) because the facts, issues and arguments involved are necessarily limited.

A complainant concerned that a third party has registered a domain name which infringes its rights can complain to the Office of the Domain Name Commissioner under the DRS Policy. Paragraph 4.1 of the Policy requires a complainant to prove, on the balance of probabilities, that:

- (a) it has Rights in relation to a particular name which is identical or similar to a name which is being used in a third party's domain name; and
- (b) the domain name is an Unfair Registration in the hands of the respondent.

For the purposes of the DRS Policy, "Rights" is defined to include (but is not limited to) rights enforceable under New Zealand law. The most likely rights on which complainants will rely are registered trade marks or unregistered rights capable of providing a foundation for a claim in passing off or under the Fair Trading Act. The definition of "Rights" expressly excludes any name which is wholly descriptive of the complainant's business.

"Unfair Registration" is defined (in para 4.2 of the Policy) as registration in circumstances where the domain name:

- (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, or is likely to be, used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's Rights;

The DRS Policy contains a series of non-exhaustive factors to be considered by the Expert when determining whether the registration of the domain name in question is or is not "Unfair" (para 5.1), and also factors which may be evidence that a registration is not "Unfair" (para 6.1).

The procedure for a DRS case is as follows:

- The complainant lodges a complaint with the DRS (with a 2000 word limit).
- The Domain Name Commission (DNC) locks the domain (so that it cannot be transferred) and serves the complaint on the respondent, based on contact details provided at the time of registration.
- The respondent has 15 working days (from the date on which the DNC received the complaint) to file its response.
- The complainant may file a reply to the response if it wishes to do so, within five working days of receipt of the response.

There is then a two-week period allowed for free "informal mediation" if the complainant wishes to participate (mediation is not compulsory). There is a panel of nine mediators, all of whom are members of LEADR NZ. Mediations are usually conducted in shuttle form, with the mediator communicating with each party in turn by telephone and/or email during the two weeks allowed for mediation, rather than with both parties at the same time in a conference call or in-person meeting. The mediator's fees are paid by the DNC.

If the matter is not resolved following mediation, the complainant may elect to pay the dispute fee to the DRS and have the matter determined by an Expert. The dispute fee is \$1800 plus GST for a dispute involving up to five domain names. The Policy provides that the DNC will set a fee in consultation with the complainant for disputes involving six or more domain names. (This is the only fee which the complainant is liable to pay in the process, as there is no filing fee payable when the complaint is first made.)

The DRS then allocates the case to one of the eight Experts, who issues a decision within ten working days of being appointed. The Experts are all arbitrators (including three retired High Court judges) or IP practitioners. Five of the panellists also determine domain name cases under the World Intellectual Property Organization's domain name disputes service (which adjudicates on ".com" and ".org" disputes).

Unlike some quasi-judicial processes (such as the Advertising Standards Complaints Board), making a complaint under the Policy does not preclude the possibility of later court action.

Appeals are heard by a panel of three Experts, including Andrew Brown QC as Chair of the Experts (unless he was the Expert who gave the decision being appealed). The fee for an appeal is \$6600 plus GST, and the notice of intention to appeal (or appeal itself) must be filed within ten working days of the decision. There has been one notice of intent to appeal lodged to date, but the matter was settled before any decision was released.

KEY FEATURES

While the decisions do not have any precedent value, some key principles have been established. In the first case to be decided (*intercity.co.nz* (DRS 101)) Sir Ian Barker QC held that disputes under the DRS are proceedings in rem rather than proceedings in personam. This means that the Expert has jurisdiction to determine cases even where the respondent company has been struck off, for example. This principle was reaffirmed in *daddios.co.nz* (DRS 241).

In addition, various Experts have held that the prefix "www" (without a full stop) should be disregarded when considering similarity of a domain name with a mark in which the complainant has rights (eg *wwwbarfoot.co.nz* (DRS 113); *wwwseek.co.nz* (DRS 137)), although it will likely be relevant to the issue of whether the registrant has sought to take advantage of the complainant's rights. Similarly, the suffix (eg ".com", ".co.nz") has also been held to be irrelevant: *www.danone.co.nz* (DRS 257).

The Expert does not have the power to award costs to a successful complainant or respondent. This factor appeared to be material to Sir Ian Barker's finding that the Expert's jurisdiction is in rem. The absence of an ability to award costs could be seen as a weakness in the system, in that respondents could demand payment to allow the complainant the certainty of transferring the domain name. In practical terms, however, this is probably just recognition of the fact that the DRS provides a limited service and lacks the inclination or resources to enforce orders that one third party pay an amount to another.

Legal representation

The case reports indicate that not all complainants (and few respondents) are legally represented. The decisions in which the Experts have declined to transfer names illustrate that the accessibility of the system can lead to complainants underestimating the process, focusing on irrelevant arguments and/or failing to address the criteria set out in the Policy. In particular, some cases have been lost because the wrong party was the complainant, insufficient evidence was adduced as to ownership of intellectual property rights, or the complaint has focused on the similarity of names rather than the additional requirement that the registration is "Unfair" (as defined) in the hands of the respondent.

The Expert noted in *aerialmapping.co.nz / nzaerialmapping.co.nz* (DRS 172):

Neither the Complaint nor the Response appears to have been prepared with the benefit of legal advice, despite both parties being substantial companies. Neither really addresses the sections of the Policy relevant to this Complaint. Nor are the facts stated with any degree of particularity.

In some cases the Expert has undertaken trade mark searches on their own initiative (eg, *teachnz.co.nz* (DRS 156)). It may therefore be helpful for complainants to ensure that they are aware of any third parties with competing rights, so that such matters can be addressed in the complaint or reply statement even where they are not raised by the respondent.

As with any form of litigation, the fact that a complainant can proceed without legal representation does not mean that it is advisable to do so. Even in the absence of a costs sanction, an unsuccessful complaint will mean wasted time and cost (being the hearing fee). The position is even more acute if the complaint is against a competitor, as this will almost inevitably lead to some degree of commercial embarrassment for the unsuccessful complainant. The Policy expressly

prevents the resubmission of complaints unless there were major defects in the earlier decision, further evidence is now available or there has been further conduct which justifies a new complaint (para 12).

ANALYSIS OF NEW ZEALAND DECISIONS

The DRS's most recent statistics are available in the disputes section of the DNC's website, and are updated regularly. From June 2006 to 8 October 2008 the DRS received a total of 185 complaints. Of those, 141 were treated as valid and 44 were declared invalid and rejected. Complaints are regarded as invalid where there is a jurisdictional or procedural defect with the complaint at the outset, such as the complaint relating to a non ".nz" domain name, or where no signed copy of the complaint is received. Despite the restriction on resubmission of unsuccessful complaints, invalid complaints can be re-filed with the DRS at any point.

Of the 141 valid complaints received:

- 17 were still progressing as at 8 October 2008 (plus one case was still within the period allowed for appeal);
- 56 cases were referred to mediation and 27 of those cases settled at mediation;
- 23 cases settled immediately on receipt of the complaint by the respondent, so 50 cases were recorded as settling at or before mediation;
- 35 disputes were withdrawn for failure to pay the dispute fee;
- 39 cases required determination by an Expert (approximately 30 per cent of the total valid complaints received by the DRS). Of those cases:
 - in 32, the complaint was successful and the domain names were ordered to be transferred;
 - in one case, the complaint was partially successful and the domain name registration was cancelled (the sole Expert decision involving more than one domain name); and
 - in seven cases, the complaint was dismissed.

Hence, the Experts ordered domain names to be transferred to complainants in approximately 82 per cent of cases which went to adjudication. This is comparable to the corresponding statistics from Nominet's domain name dispute resolution service in the UK, where the success rate is around 80 per cent.

It is notable that there are no domain name court cases listed in *Linxplus* as having been decided since the DRS system came into effect. The DRS procedure leads to reduced costs compared with litigation, as there is no need for discovery, briefs of evidence or appearance at a hearing. This is possible because the legal rules are relatively clear, the facts are often not disputed, the issues for determination are well-defined, and the time-frame for the process is restricted.

TRANSFER REFUSED

There have been eight cases where an Expert has refused to transfer a disputed domain name to the complainant. The complaints in two of those cases, *wwwwharcourts.co.nz* (DRS 109) and *umbro.co.nz* (DRS 235), were rejected because the complainants failed to prove that they owned rights in relation to the relevant marks. The *umbro.co.nz* complaint was later resubmitted (DRS 255) and the Expert ordered the domain name to be transferred.

These decisions highlight the need for complainants to take the procedure seriously, even where they may consider their trading name or mark to be well-known, and to prove that it is the complainant (as opposed to a related entity) who has rights capable of being protected. The best way of providing such evidence is to file a supporting affidavit with the complaint.

***fleetpartnersnz.co.nz* (DRS 149)**

This complaint was novel in that it stemmed from the consequences for the complainant of the respondent's choice of domain name rather than diversion of business by the respondent. The complainant owned the domain name *fleetpartners.co.nz*, but was receiving up to 40 emails a day intended for the respondent (where the senders had erroneously sent the messages to *fleetpartners.co.nz* instead of *fleetpartnersnz.co.nz*).

The Expert, Robert Fisher QC, held that the complainant had rights in the domain name but that it was not an unfair registration in the hands of the respondent. The decision demonstrates that the primary reason for the DRS is to prevent unauthorised misappropriation of goodwill, rather than preventing registration of similar domain names of themselves.

***aerialmapping.co.nz* (DRS 172)**

The complaint in this case related to two domains, *nzaerialmapping.co.nz* and *aerialmapping.co.nz*. The complainant (NZ Aerial Mapping Ltd) and respondent (Terralink International Ltd) both provide aerial mapping and imaging services in Australasia. The respondent contended that the domain names were simply descriptive of the services which it provides.

The Expert found that the complainant had rights in relation to *nzaerialmapping.co.nz*, which covered its business name, but agreed with the respondent that *aerialmapping.co.nz* was descriptive and that anyone in the industry could use it. The refusal to transfer the latter domain name was on the basis that the complainant did not have sufficient rights.

***tradefree.co.nz* (DRS 202)**

This case involved a somewhat misconceived attempt to use the DRS process to acquire a domain name which was already registered when the complainant commenced business under the name TradeFree (and registered the domain name *tradefree.net.nz* itself). The Expert found that the complainant did not have any rights in the name "Tradefree" which predated the respondent's registration of *tradefree.co.nz*.

***aucklandairport.co.nz* (DRS 291)**

Auckland International Airport Ltd sought transfer of *aucklandairport.co.nz* from the registrant, which had acquired the domain and had been using it to link to a car rental and car rental reservation business. The website also contained discussion of Auckland Airport's corporate position and management decisions. While the respondent argued that the site was being used for the purposes of criticism, the Expert was not required to consider this argument since the complainant failed to show that it had sufficient rights in the name "Auckland Airport" to provide the basis for complaint in the first place.

As part of its reply to the respondent's submissions, the complainant alleged that the words Auckland Airport were descriptive of the complainant and its business. The Expert

noted that this is the very opposite of what the complainant must prove, namely that the mark in which it has rights is a trade mark (whether registered or unregistered). Even if the Expert were prepared to accept that the complainant (which was not legally represented and whose original complaint had contained fewer than 500 words) had meant that the words "Auckland Airport" were distinctive of its business instead of descriptive, it had not provided any evidence of distinctiveness. The Expert emphasised the need to provide details of use and reputation in the relevant name or mark.

The complainant filed a notice of intent to appeal the Expert's decision, but the appeal was withdrawn before the Appeal Panel released any decision and the complainant is now listed as the owner of the domain.

The decision illustrates the dangers of complainants not obtaining legal assistance in making complaints under the DRS system, and in particular failing to appreciate the need to prove the existence of relevant rights to the required standard.

***teachnz.co.nz* (DRS 156)**

The complainant was the national manager of the division of the Ministry of Education responsible for teacher supply. The TeachNZ unit was established in 1996 to promote teaching as a career option and increase the numbers of teachers in New Zealand. As part of this the complainant established a website, located at www.teachnz.govt.nz and undertook various activities (including promotions and advertising) under the name TeachNZ.

The complainant did not have any trade mark registrations, but the Expert was satisfied that it has sufficient unregistered rights in the name "TeachNZ" to found a complaint to the DRS in relation to teachnz.co.nz.

The respondent was a disgruntled UK teacher who had moved to New Zealand in 2000 but was forced to return to the UK following a dispute regarding his qualifications. He also registered the domain nzqa.co.nz, and according to the decision was using both sites to criticise NZQA.

The Expert had conducted a New Zealand trade mark search, and as such was aware that a third party owned a trade mark for a device (logo) which included the words "Teach NZ". Given the possibility of competing claims of entitlement to the domain name the Expert simply ordered that the respondent's registration be cancelled, rather than ordering the domain to be transferred to the complainant.

This approach is arguably not in accordance with the scheme of the Policy. The Expert process is effectively an inter partes, adversarial tribunal, intended to provide an alternative to court "where two parties are in dispute over who the registrant of a '.nz' domain name should be" (para 1 of the Policy). If the Expert accepts that a party has rights in a domain name, it is not for the Expert to undertake investigations on whether any parties might have competing claims for rights (whether registered or unregistered), or to determine such issues if the Expert becomes aware of them. The Policy does not provide that a complainant must have exclusive rights in relation to a name.

If a third party which owns rights in relation to a transferred domain name is concerned that the registration infringes those rights, it can bring a complaint itself. Until such a complaint, however, the Expert should proceed on the basis that the party who has made the complaint and proved that they have sufficient rights to bring the complaint is entitled to

receive the domain name. The DRS Policy does not provide that registered rights should be given priority over unregistered rights; the question is simply whether the complainant has met the threshold of showing that it has rights.

In the event, the TeachNZ unit now appears to be the registered owner of the disputed domain name. It is worth noting, however, that some businesses claim to be able to automatically register deleted domain names as soon as they become available. The complainant would obviously have had little faith in the DRS system if a third party had managed to register the domain name before it, and it was forced to take the same action against a cybersquatter. This could conceivably have led to the same result, with the new registration only being cancelled as well.

***mountainbuggy.co.nz* (DRS 186)**

The most controversial decision to date has been *mountainbuggy.co.nz*. In that case the complainant was a New Zealand company which manufactures and distributes pushchairs in New Zealand and throughout the world. The CEO, co-founder, director and shareholder of the complainant's major competitor, Phil & Ted's Most Excellent Buggy Company Ltd, was the respondent.

The Expert accepted that the complainant had "Rights" in the name MOUNTAIN BUGGY (based on its registered trade mark). Having done so, however, the Expert then proceeded to comment on the "descriptive" nature of the name in the context of whether or not the registration was "Unfair" in terms of the Policy. The Expert did not explain how descriptiveness might be relevant to this issue, and did not express a conclusion on the point.

The Expert concluded that the registration was not "Unfair" because:

- the respondent had not offered the domain name for sale (para 5.1.1(a));
- the registration could not be regarded as a "blocking registration" (para 5.1.1(b)), apparently because of restrictions on admissibility of evidence resulting from para 5.4:

the Respondent's motives or possible knowledge of the Complainant when making the registration are inaccessible, and cannot be reconstructed from more recent events or be coloured by the Complainant's claim;

- there was no evidence that the respondent had registered the domain name in order to disrupt the complainant's business (para 5.1.1(c));
- the domain name had not been used in a way which was likely to confuse, mislead or deceive people into believing that the domain name was being used by the complainant (para 5.1.2) because the domain name was not being used;
- the respondent had not used the domain name in a manner which took unfair advantage of the complainant's rights because that phrase relates to conduct such as "typosquatting"; and
- there was no evidence of detriment to the complainant.

General approach of the Expert

The Expert's decision is open to criticism in several respects. First, the Expert attempted to deal with each of the factors set

out in paras 5.1.1 before addressing the broader issues of whether the registration took unfair advantage of or was unfairly detrimental to the complainant's rights.

The specific factors set out in para 5.1.1 are intended to assist with this inquiry but should not be regarded in isolation from the broader test for "Unfair Registration". The Expert is required to consider whether the registration of a domain name which includes a name in which the respondent has rights is Unfair as defined in the Policy (ie is it detrimental to or does it take unfair advantage of the complainant's rights) and then in particular, but without limitation, whether the complainant has proven on the balance of probabilities that the respondent is likely to have acquired the domain name:

- (a) for resale; or
- (b) primarily as a blocking registration to prevent the complainant from registering the domain name itself; or
- (c) to disrupt the complainant's business.

If the complainant can make out any of these factors on the balance of probabilities, the Expert should order the transfer of the domain name. The Expert's conclusion that the case was "closely argued", but that the complainant had not "tipped the balance of probabilities in its favour" is perhaps indicative of the Expert having attempted to weigh the merits of the case in a global sense rather than strictly following and applying the criteria set out in the Policy.

Whether MOUNTAIN BUGGY is descriptive

Second, there are a number of problems with the manner in which the Expert considered whether MOUNTAIN BUGGY was descriptive or generic. It is not clear why the Expert discussed the issue of whether or not the complainant's mark was descriptive in the context of whether the registration was "Unfair" as he did not seem to express a conclusion as to the consequences of this statement, and the point is not relevant.

More importantly, however, the Expert's suggestion that "the words ... of the Complainant's trademark are found to be at least strongly descriptive of the Complainant's business" is incorrect. In terms of trade mark law, "descriptive" means literally true. While "buggy" may be a generic term for a pushchair, "Mountain Buggy" is not descriptive. MOUNTAIN BUGGY would be descriptive only in relation to pushchairs or other buggies for use on mountains, in the same way that "mountain bike" is not descriptive but is generic. The combination of two potentially descriptive words does not make the resulting phrase descriptive. This appears to have been one of the major flaws in the Expert's reasoning in the decision. There are numerous examples of registered trade marks which comprise a combination of two existing words, one of which is descriptive of the relevant goods or services (eg JUST JUICE). The issue of whether "Mountain Buggy" is generic was not expressly considered by the Expert, but it is notable that he did not accept the respondent's assertions that the phrase was generic.

The DRS Policy deliberately adopts a low threshold for proof of existence of rights to avoid the need for the Expert to assess and weigh the value of such rights. If a trade mark is on the register this should be regarded as definitive; otherwise all respondents will raise objections to the validity of a complainant's trade mark as a matter of course.

Accordingly, the main focus for the Expert should be the circumstances in which the respondent registered and used

the domain name. If a complainant can prove that it has rights in a name which are enforceable under New Zealand law, and that name is not wholly descriptive or generic, a party which is aware of the complainant's name and chooses to register the domain name is likely to have that registration regarded as Unfair. The likelihood of the Expert holding that the registration is "Unfair" should increase if the parties are business competitors, where the strong inference should be that the registration was intended to prevent the rights holder from registering the domain name itself and/or to inconvenience the rights holder's customers or prospective customers such that they might not proceed to the complainant's proper website.

The Policy provides a mechanism for dealing with contested claims to names which are alleged to be descriptive in para 6.1.2. If the respondent has registered a domain name which includes a name in which the complainant claims rights, it may be able to defend a domain name complaint if it can show that it has used the domain name consistent with the descriptive or generic nature of the name. This "defence" is not available, however, where the respondent has not created a website, and was not applicable in *mountainbuggy.co.nz*.

Admissibility of evidence

Thirdly, the Expert appears to have excluded relevant evidence based on an incorrect interpretation of one of the rules in the Policy. The Expert seems to have concluded that there cannot be a finding of "Unfair Registration" on the basis of the first limb of the definition (ie, "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") where the initial registration of the domain name was more than three years prior to the date of complainant. The reason for this finding appears to be a misapprehension of para 5.4 of the Policy, which provides:

In making their decision, the Expert shall not take into account any evidence of acts or omissions amounting to unfair registration or use which occurred more than three years before the date of the Complaint.

This is a rule of evidence intended to limit the amount of material being provided to the Expert. It does not mean, as the Expert appears to have found, that domain names registered more than three years ago attain some degree of impunity from complaint under the first limb of the definition of "Unfair Registration". It may be quite proper for the Expert to find that an improper motive can be inferred at the time of registration based on subsequent conduct and comments. It is appropriate that the Expert should consider factual matters such as, for example, the length of time which the parties had been competing when the domain name was registered, whether the complainant's trade mark was registered at the time the domain name was registered and whether the complainant was using or had used similar domain names.

It seems unlikely that para 5.4 was intended to be given a restrictive interpretation which would prevent the Expert from inferring a respondent's knowledge or intention.

A "blocking registration"?

Fourth, the Expert's finding that the respondent did not register the domain name as a blocking registration, which appears to have been influenced by the exclusion of evidence from more than three years prior to the complaint, appears to be incorrect.

If a complainant alleges that a domain name was registered by one of its competitors in order to deprive it of the domain name, and that the competitor was aware of the complainant's use of the trade mark (whether they were actually aware of the fact of registration or not) the burden of proof should shift to the respondent to show that its registration was not Unfair.

Paragraph 5.2 of the Policy provides that failure on the respondent's part to use a domain name is not in itself evidence that the domain name is an Unfair Registration. Equally, however, the fact that a domain name is not being used does not prevent a finding that the domain name was acquired as a blocking registration or to disrupt the complainant's business. The effect of para 5.4 is simply to provide that there may be exculpatory factors even where a domain name has not been used. Indeed, given that the respondent indicated that he would not be using the domain name to host a website it seems likely that he retained it simply to prevent the complainant from acquiring the domain name itself.

The respondent must have been aware of the fact that the complainant used the name MOUNTAIN BUGGY as a brand, even assuming that it was not aware that the mark had been registered. It is difficult to resist the conclusion that the respondent registered mountainbuggy.co.nz primarily as a blocking registration, to prevent the primary competitor of

the company of which he was a founder, director, shareholder and CEO from using its trade mark/brand name in its domain name.

Detriment

Finally, even if none of the factors in para 5.1.1 can be shown, detriment to the complainant should be clear where it is being deprived of the opportunity to operate a website using the domain which comprises its registered trade mark. The actual detriment suffered will depend on number of hits (or attempted hits) which the respondent's domain has received, which is a matter only within the knowledge of the respondent. The Expert should be prepared to infer detriment in such circumstances.

CONCLUSION

While the interpretation of certain aspects of the Policy may need to be revisited following the *mountainbuggy.co.nz* decision, the DRS system is generally functioning well and is attractive for complainants compared with litigation in the High Court. This attractiveness is likely to be based on accessibility, in terms of being lower in cost and a relatively quick process. Potential complainants should obtain legal advice at an early stage to avoid underestimating the process and to ensure that the DRS system is preferable to High Court proceedings in light of the facts of their particular situation. □