

DISPUTE RESOLUTION SERVICE

D00018352

Decision of Independent Expert

The NorthView Group Limited

and

Mr Andrew Ostromecki

1. The Parties:

Lead Complainant: The NorthView Group Limited
Ascot House, Maidenhead Office Park
Maidenhead
Berkshire
SL6 3QQ
United Kingdom

Second Complainant: Kensington Mortgage Company Limited
Ascot House, Maidenhead Office Park
Maidenhead
Berkshire
SL6 3QQ
United Kingdom

Respondent: Mr Andrew Ostromecki
46 Glengate
South Wigston
Leicester
LE18 4SP
United Kingdom

2. The Domain Name(s):

- i) infokensington.co.uk
- ii) infokmc.co.uk
- iii) kensingtonmortgagecompany.co.uk
- iv) kensingtonsimplyspecialist.co.uk

3. Procedural History:

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

04 January 2017 16:30 Dispute received
05 January 2017 10:12 Complaint validated
05 January 2017 10:15 Notification of complaint sent to parties
24 January 2017 10:56 Response received
24 January 2017 10:56 Notification of response sent to parties
24 January 2017 12:07 Reply received
24 January 2017 12:08 Notification of reply sent to parties
24 January 2017 12:08 Mediator appointed
27 January 2017 14:59 Mediation started
28 February 2017 17:11 Mediation failed
28 February 2017 17:12 Close of mediation documents sent
10 March 2017 01:30 Complainant full fee reminder sent
13 March 2017 17:28 Expert decision payment received
14 March 2017 Keith Gymer appointed as Expert with effect from 17 March 2017

Version 4 of the DRS Policy, effective from 1 October 2017, applies to this Complaint.

4. Factual Background

The Lead Complainant, The NorthView Group Limited (formerly known as Kensington Group Limited), provides management services and holds intellectual property rights, including registered trade marks, for a number of subsidiary companies which provide a range of residential and buy-to-let mortgage loans and mortgage servicing services. The Second Complainant, Kensington Mortgage Company Limited is a wholly-owned subsidiary of the Lead Complainant, which operates and has operated since the late 1990s, a specialist mortgage service principally via its website at www.kmc.co.uk.

These parties are jointly referred to as the Complainants.

The Complainants have UK and EU registered trade marks, including:

UK 2195190 KENSINGTON DIRECT in Class 36, dating from 21 April, 1999

UK 2195189 KENSINGTON in Class 36, dating from 21 April, 1999

UK 3204697 KMC in Class 36, dating from 3 January, 2017

EU 1351014 KENSINGTON in Class 36, dating from 19 October, 1999

The Respondent held a mortgage with a third party GEMONEY, whose loan book was sold on and ultimately taken over by the Complainants.

After he became aware of this change, on 7 February, 2016, the Respondent registered the Domain Names.

5. Parties' Contentions

Complainants

In addition to the Complainants' registered trade mark rights [as listed at 3 above] the Complainants say they have established a substantial reputation in the United Kingdom and elsewhere under the brands KENSINGTON and KMC as a result of its use of these brands throughout the United Kingdom.

They therefore assert that they have rights which could be applied to prevent the use of the Domain Names by actions for both trade mark infringement and for passing off.

The Respondent is a borrower of the Complainant. Through multiple company buyouts and reorganisation, the Respondent's mortgage was ultimately transferred from a different provider to the Complainants. The Respondent was aggrieved by this, and did not believe that he should have any liability to the Complainants on his mortgage. The Complainants advised that the Respondent should provide evidence to support this claim, or refer the matter to the Financial Ombudsman Service, but the Respondent failed to do so by the applicable deadline, and has now time barred himself from doing so. Consequently, on 7 February 2016, the Respondent registered the four ".co.uk" Domain Names complained of, as well as a ".today" domain.

Originally, the Respondent set up a www.kensingtonmortgagecompany.co.uk website with the same background graphics as the Complainants' legitimate website at www.kmc.co.uk. The Respondent also transcribed extracts from all the telephone conversations he had had with the Complainants' customer service advisors, as well as disclosing their names.

The Respondent further offered all the Domain Names for auction on the www.kensingtonmortgagecompany.co.uk website for the sale of all of the Domain Names for £4,699.00, being approximately the same amount as was left on his mortgage with the Complainants.

The majority of such content has now been removed, however the Respondent has still been in communication with the Complainants. On 25 November 2016, the Respondent told the Complainant that he would not surrender the Domain Names because "*no one can make him*" and it was the Complainants' fault "*that they did not secure them first*". On 21 December, 2016 the Respondent again called the Complainants and said he would sell the Domain Names to the Complainants, in return for the writing off of his mortgage balance, which was then £4638.89. (The Complainant says that recordings of such telephone conversations may be made available if required, but the Expert has not found it necessary to review these.)

As the Respondent placed an auction on the website to sell all the disputed Domain Names (and the ".today" domain name) for a value which is disproportionately higher than the cost of registering them, the Domain Names are Abusive Registrations.

Further, the Respondent's use of the Complainant's registered and unregistered trade marks and copyright, without authorisation or consent, on the website and in the

Domain Names, causes customer confusion, damage to the Complainants' reputation and may divert customers away from the Complainants' business.

Remedy Requested

The Complainants seek the transfer of the Domain Names.

Respondent

In Response, the Respondent makes the following observations and arguments.

In October of 2015 the Respondent's mortgage was with GEMONEY, with an outstanding balance then of around £8000.

In January 2016 the Respondent noticed that instead of GEMONEY the letters KMC appeared against his mortgage debit. His bank informed him that KMC was short for KENSINGTON MORTGAGE COMPANY.

The Respondent found that the Complainants business used the domain name kmc.co.uk, noticed that the Complainants had not registered the longer version kensingtonmortgagecompany.co.uk, and so decided to purchase this Domain Name himself.

Some time later, the Respondent called the Complainants to discuss why his mortgage had been transferred, noting that GEOMONEY had not informed him that his mortgage had been taken over.

Subsequently he also informed the Complainants of his acquisition of the Domain Name kensingtonmortgagecompany.co.uk, at which the Respondent says they did not express particular concern.

The Respondent asserts that he did not sign any contract with Kensington in the first place, and that they purchased his debt from GEOMONEY for less than 50% of the outstanding amount, and that they boast about purchasing the GEMONEY portfolio for `billions`. He claims to have made proposals to pay off the total balance due, which he says the Complainants have declined to accept. He says that there are not many glowing reports online from the Complainants' customers, and that he believes many others who had their mortgage transferred will feel aggrieved. He complains that those responsible for the Complainants' decisions have consistently been unwilling to meet with him or to return his calls to discuss his own complaints.

The Respondent notes that it has taken the Complainants a year to bring this Complaint, and queries why they hadn't purchased the longer Domain Name kensingtonmortgagecompany.co.uk themselves before, as they have been in business for so many years.

The Respondent points out that, as it currently stands, the website he put up at www.kensingtonmortgagecompany.co.uk is blank, without visuals or any audio, and

that it is “funny” that financial businesses typically record customer calls themselves, but apparently object if a customer has recorded them!

The Respondent says that if the Complainants just get rid of his account he will gladly transfer any/all the domain names he has, and that they want. He considers this a matter of principle. As he is maintaining his monthly payments, the amount he claims he would settle for is less as each month passes by, as the balance left outstanding on his mortgage reduces.

He characterizes himself as just a man trying to take on a company whose bosses/shareholders will not talk to him or see him face to face to discuss the matter, querying why the people who send out the Complainants’ letters are never available to discuss the matter on a phone, and why the Complainants would pay for solicitors to possibly take him to court rather than talk to him directly.

The Respondent asks why should he hand over disputed Domain Name to a company that he never borrowed any money from, and had no knowledge of, prior to January 2016, and says that all he has tried to do was “to find a more unique way of making a complaint” to a company who boasts of being very wealthy.

Complainant’s Reply

The Respondent effectively admits that the Domain Names complained of were purchased with the sole purpose of extracting money from the Complainants; who own the goodwill in the disputed Domain Names, by seeking to have his debt reduced by a substantial amount in exchange for transferring the Domain Names.

The Complainants have registered and unregistered trade mark rights in the disputed Domain Names. The Respondent has no legitimate interests or rights in the Domain Names and by holding them to ransom in return for serious monetary gain is deliberately acting in bad faith, in breach of the DRS Policy.

The Complainants reiterate their request that the Domain Name be transferred to them and add a request that the Respondent should pay all costs.

6. Discussions and Findings

General

Paragraph 2 of the Policy requires that, for the Complainant to succeed, it must prove to the Expert, on the balance of probabilities, both that

2.1.1 The Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name(s); and

2.1.2 The Domain Name, in the hands of the Respondent, is an Abusive Registration

Complainant's Rights

The Complainants have demonstrated registered trade mark right in the marks KENSINGTON DIRECT and KENSINGTON from 1999, and in the mark KMC from January, 2017.

Additionally, the Complainants assert that their use of the KENSINGTON marks on their website with the kmc.co.uk domain since the late 1990s means that they have also established unregistered common law rights, notably in KMC.

The disputed Domain Names are

- i) infokensington.co.uk
- ii) infokmc.co.uk
- iii) kensingtonmortgagecompany.co.uk
- iv) kensingtonsimplyspecialist.co.uk

In Paragraph 1 of the Policy, Rights are broadly 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 clearly has potentially enforceable rights in KENSINGTON, which long predate the registration of the Domain Names. It will be evident that the relevant components of the Domain Names i), iii) and iv) above will naturally be perceived by English readers as i) info-Kensington, iii) Kensington-Mortgage-Company, and iv) Kensington-Simply-Specialist, respectively. In each case, the distinctive element is KENSINGTON, which is identical to the Complainants' KENSINGTON mark.

The Expert therefore is in no doubt that the Complainants do have relevant Rights in a name or mark, which is at least similar to each of those Domain Names.

With respect to the Domain Name ii) infokmc.co.uk, however, this is less straightforward. Although the Complainants do now have registered trade mark rights in the element KMC (since January 2017), those rights post-date the registration of the Domain Name ii). The Complainants have raised a claim to have established unregistered common law rights through longstanding earlier use of KMC for their business' website at www.kmc.co.uk, but the evidence provided to support this claim is meagre, in the Expert's view. KMC is not even identified as a trading name (whereas Kensington is) in the footer of the website's home page. The Expert has seen little indication that KMC has itself been used directly in a trade mark sense. There are references in the copies submitted of the second Complainant's accounts to acting as mortgage administrator for apparently related companies KMC Stirling Square Limited and KMC Berkeley Square Limited, which do suggest that KMC has been used in a reference to Kensington Mortgage Company, but the evidence is hardly substantial.

However, the accounts do show that the Complainants have conducted a significant level of mortgage loan business over the years and that the website has been associated with the business for many years. On this basis, and on the balance of probability, the Expert is prepared to accept that the Complainants will have established goodwill with customers in the UK, not just in the Kensington Mortgage

Company *per se*, but also in relation to the abbreviation KMC as used in the Complainants' domain name, and that they will have at least some recognisable common law rights in KMC as a result.

Consequently, the Expert concludes that the Complainants meet the requirements of Paragraph 2.1.1 of the Policy with regard to all of the Domain Names.

Abusive Registration

The Complainants also have to show that the disputed Domain Names are each an Abusive Registration. Paragraph 1 of the Policy defines "Abusive Registration" as 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. is being or has been used in a manner, which has taken unfair advantage of or has been unfairly detrimental to the Complainant's Rights.

A non-exhaustive list of factors which may be evidence that a Domain Name is an Abusive Registration are set out in Paragraph 5 of the Policy. The following examples appear pertinent to the present dispute:

5.1.1 Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily:

5.1.1.1 for the purposes of selling, renting or otherwise transferring the Domain Name to the Complainant or to a competitor of the Complainant, for valuable consideration in excess of the Respondent's documented out-of-pocket costs directly associated with acquiring or using the Domain Name;

5.1.1.2 as a blocking registration against a name or mark in which the Complainant has Rights; or

5.1.1.3 for the purpose of unfairly disrupting the business of the Complainant;

5.1.2 Circumstances indicating that the Respondent is using or threatening to use the Domain Name in a way which has confused or is likely to confuse people or businesses into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant;

5.1.3 The Complainant can demonstrate that the Respondent is engaged in a pattern of registrations where the Respondent is the registrant of domain names (under .UK or otherwise) which correspond to well known names or trademarks in which the Respondent has no apparent rights, and the Domain Name is part of that pattern;

Conversely, Paragraph 8 of the Policy additionally provides observations on “How the Respondent may demonstrate in its response that the Domain Name is not an Abusive Registration”, of which the following may be considered relevant::

8.1.1 Before being aware of the Complainant's cause for complaint (not necessarily the 'complaint' under the DRS), the Respondent has:

...

8.1.1.3 made legitimate non-commercial or fair use of the Domain Name.

...

Or

8.1.4 In relation to paragraphs 5.1.3 and/or 5.3; that the Domain Name is not part of a wider pattern or series of registrations because the Domain Name is of a significantly different type or character to the other domain names registered by the Respondent.

8.2 Fair use may include sites operated solely in tribute to or in criticism of a person or business.

The factors listed in Paragraphs 5 and 8 of the Policy are only intended to be exemplary and indicative. They are not definitive either way. It is Paragraph 1 of the Policy, which provides the applicable definition as indicated above.

In the present case, unfortunately for the Respondent, his explicit admissions that he purchased the Domain Names because the Complainants had not registered them, and that he would transfer them in exchange for cancellation of his outstanding mortgage balance, albeit decreasing monthly, but still amounting to considerably in excess of the costs directly associated with acquiring or using the Domain Names, leave no reasonable room for doubt.

It is not a matter for the Expert to consider whether or not the Respondent may have legitimate grounds for complaints in relation to the handling of the transfer of his mortgage from GEMONEY to the Complainants, nor to assess the merits of those complaints one way or the other.

The Respondent might have thought that it would add weight to his complaints to register the Domain Names. However, it is naïve at best for the Respondent to imagine that registering Domain Names which intentionally include elements comprising trade marks of the Complainants, and then using them in attempts to leverage significant financial gain from the Complainants could ever be legitimate as a “more unique way of making a complaint”.

If the Respondent had confined himself to raising his personal complaints on a criticism site (using say “mykensingtongripes.co.uk”) then that might have been defensible.

Kensington is, of course, also a well known area of London. It could certainly have been arguable that “infokensington.co.uk” could have had legitimate alternative uses not relevant to the Complainants. Similarly, there are other businesses using the marks KENSINGTON and KMC in their names, so the same could have applied for

“infokmc.co.uk”. However in the present case it is quite clear the Respondent selected these domain names because of their relevance to the Complainants’ business.

For “kensingtonmortgagecompany.co.uk” and “kensingtonsimplyspecialist.co.uk” (“simply specialist” being a strapline used by the Complainants in connection with Kensington, as it appeared on the copies made by the Respondent on the webpages he originally set up using the Domain Names), there could be no such legitimate alternatives.

Overall, the Respondent has surely hoist himself on his own petard. The Domain Names were all expressly registered for purposes intended to be detrimental to, or to take unfair advantage of the Complainants’ Rights. Consequently, the Expert concludes that all of the Domain Names are Abusive Registrations for the purposes of the Policy.

Although the Complainants requested in their Reply that the Respondent should be held liable for all costs, the Policy does not provide for any costs award to be made to a prevailing party, so the Expert’s Decision is confined to making a determination on the elements 2.1.1 and 2.1.2 of the Policy as identified above.

7. Decision

Having found that the Complainants have relevant Rights and that the Domain Names, in the hands of the Respondent, are Abusive Registrations, the Expert orders that the Domain Names be transferred to the Lead Complainant.

Signed
Keith Gymer

Dated 3 April, 2017