

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CC47/2015

[2016] SCSC 670

ESCAVE LTD
First Plaintiff

GGS LTD
Second Plaintiff

versus

RITZIO PURCHASE LIMITED
First Defendant

Heard:

Counsel: Mr. Serge Rouillon for first plaintiff
and second plaintiff
Mr. Philip Boule for defendant

Delivered: 16 September 2016

RULING

Robinson J

[1] **The background**

[2] First Plaintiff is Escave Ltd. First Plaintiff is a Seychelles International Business Company bearing registration number 125765.

- [3] Second Plaintiff is GGS Ltd. Second Plaintiff is an Anguilla International Business Company registered as company number 2152333.
- [4] Defendant is Ritzio Purchase Limited. Defendant is a Cyprus Limited Company registered in Nicosia, Cyprus with company number HE 144533.
- [5] This is a claim by First and Second Plaintiffs for a declaration and related reliefs arising out of a dispute between First and Second Plaintiffs and Defendant over the registration and use of six registered Internet Disputed Domains —

<casino-vulcan.co>

<vulcan-casino.co>

<club-vulcan.com>

<vulcan-cazino.org>

<vulcan-casino2.com>

<cazino-vulcan.com>,

(the "Disputed Domains"), which First Plaintiff registered for itself. Second Plaintiff operates websites at each of the Internet Disputed Domains. Defendant is the registered proprietor of the trademark "BYJKAH" (translated into English as "Vulkan" or "Vulcan" meaning "Volcano"). Defendant registered its "BYJKAH" trademark with the Russian trademark office.

- [6] Defendant has raised pleas *in limine litis*, before filing defence on the merits, which read as follows —

- "1. The arbitration decision is *res judicata* and the court has no jurisdiction to review the merits of the arbitration decision.
2. The plaint discloses no cause of action."

- [7] The plea *in limine litis* raised at plea 2 above is intimately linked with the crucial plea *in limine litis* raised at plea 1 above. So that plea 2 can be conveniently dealt with in a consideration of plea 1. It is necessary to refer to the material averments contained in the plaint.
- [8] Paragraph 10 of the plaint alleges that Defendant, having formed the opinion that its rights were being infringed, filed an administrative complaint against First Plaintiff under the rules of the Uniform Domain Name Dispute Resolution Policy (hereinafter referred to as "**the UDRP**"), "*a specialized non-final streamlined arbitration proceeding*", requesting that the Disputed Domains be transferred to Defendant.
- [9] The arbitration panel issued a decision (hereinafter referred to as "**the Decision**") that the Disputed Domains should be transferred to Defendant.
- [10] Paragraph 13 of the plaint alleges that the Decision was wrong. Pursuant to the UDRP, First and Second Plaintiffs dispute the outcome of the UDRP proceeding, which halts the execution of the Decision. The UDRP does not prevent either party from submitting the dispute to a court of competent jurisdiction for an independent resolution.
- [11] First and Second Plaintiffs are asking Court to fully review the merits of First and Second Plaintiffs arguments and to evaluate the validity of Defendant's putative trademarks and registration as the Decision is subservient to Court's decision on these matters.
- [12] First and Second Plaintiffs, therefore, seek a declaratory relief to establish that First Plaintiff's registration and Second Plaintiff's use of the Disputed Domains do not infringe on putative trademarks held by Defendant, and an injunctive relief to prevent the transfer of those Disputed Domains to Defendant.
- [13] *The reliefs* – First and Second Plaintiffs are jointly and severally asking Court for the following reliefs ---

"1. *A declaration that the Plaintiffs have not infringed the Defendant's Putative Trademarks, meaning —*

- (a) *the 1st Plaintiff has lawfully and rightfully registered the Disputed Domains in good faith and has not infringed the Defendant's putative trademarks.*
 - (b) *the 2nd Plaintiff has lawfully and rightfully used the Disputed Domains and the Websites in good faith and has not infringed the Defendant's putative trademarks.*
 - (c) *the Defendant has no trademark rights in Russia or Ukraine where the Websites are used*
 - (d) *a declaration that the registration and use of the Disputed Domains by the Plaintiffs and the Websites are lawful; and*
2. *For an Injunctive Relief prohibiting the Transfer of the Disputed Domains meaning —*
- (a) *that the UDRP arbitration panel has incorrectly decided this matter because the Plaintiffs did not register or use the Disputed Domains and the Websites in an unlawful manner and they do not infringe on any of the Defendant's rights, including its putative trademark rights; and*
 - (b) *the Plaintiffs have no other prompt and expeditious remedies to protect their interests and to prevent them from the irreparable harm if the Disputed Domains were wrongly transferred to the Defendant in accordance with the decision of the UDRP arbitration panel.*
 - (c) *under the circumstances, injunctive relief from this honourable court is necessary and appropriate at this time in order for the First and Second Plaintiffs to protect their legitimate interests in and to the Disputed Domains*
 - (e) *the Plaintiffs therefore request that this Honourable Court issue an injunctive order prohibiting the transfer of the Disputed Domains to the Defendant; and*
3. *an order for the costs of this suit in favour of the Plaintiffs and against the Defendant including any reasonable*

travelling expenses incurred by the Plaintiffs in processing their case."

[14] **The issue to be decided**

[15] The issue to be decided is —

- (a) whether or not Court has jurisdiction to review the merits of the Decision that the Disputed Domains are to be transferred to Defendant? or
- (b) whether or not the jurisdiction of the court is limited to a situation in which any of the cases mentioned in Article 134 of the Commercial Code Act CAP 38 (the Commercial Code Act CAP 38 is hereinafter referred to as the "CFACT") are identified in the Decision (on the basis that the Decision is in the nature of a decision in an arbitration)?

[16] **The parties' contentions**

[17] Mr. Boule started his oral submission by negating any argument that Court has jurisdiction to review the merits of the Decision; indeed he emphasised that the Decision is final and binding and that the First and Second Plaintiffs have no reasonably arguable cause of action, and that the claim should, therefore, be dismissed. Elaborating on the submission, Mr. Boule urged Court that an arbitral award shall have the authority of "*res judicata*", unless the award is contrary to public policy or the dispute was not capable of settlement by arbitration under Article 133 of the CFACT. Mr. Boule pointed out that an arbitral award may be attacked before a court in Seychelles only by way of an application to set aside and may be set aside only in any of the cases mentioned in Article 134 (2) and Article 134 (3) of the CFACT. Consequently, Mr. Boule contended that when only the allegations in the plaint are considered, the plaint discloses no arguable cause of action because First and second Plaintiffs have not pleaded any of the cases mentioned in Article 134 (2) and Article 134 (3) of the CFACT.

[18] Mr. Rouillon filed submissions in reply. Mr. Rouillon contended that there is a right of review of the Decision because the UDRP proceeding does not oust the jurisdiction of

Court, in terms of paragraph 5, of the UDRP, and the UDRP proceeding is not meant to be a final arbitration of the dispute between the parties and does not prevent either party from submitting the dispute to a court of competent jurisdiction for an independent resolution after such proceeding is concluded under paragraph 4(k) of the UDRP. Further, Mr. Rouillon contended that Article 110 (3) of the CCACT finds application in this case. Court states at this juncture that the said Article finds no application in this case.

[19] **The relevant UDRP**

[20] The UDRP provides an administrative procedure for resolving complaints about domain name registrations. Rules, approved by the Internet Corporation for Assigned Names and Numbers (hereinafter referred to as "ICANN"), govern that procedure. Proceedings in respect of complaints are dealt with in accordance with the UDRP Rules.

[21] "Uniform Domain Name Dispute Resolution Policy

(As approved by ICANN on October 24, 1999)

1. Purpose. This Uniform Domain Name Dispute Resolution Policy (the "Policy") has been adopted by the Internet Corporation for Assigned Names and Numbers (hereinafter referred to as "ICANN"), is incorporated by reference into your Registration Agreement, and sets forth the terms and conditions in connection with a dispute between you and any party other than us (the registrar) over the registration and use of an Internet domain registered by you. Proceedings under Paragraph 4 of this Policy will be conducted according to the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules of Procedure"), which are available at <http://www.icann.org/en/dndr/udrp/approved-providers.htm>, and the selected administrative-dispute-resolution service provider's supplemental rules.

4. Mandatory Administrative Proceeding.

This paragraph sets forth the type of disputes for which you are required to submit to a mandatory administrative proceeding. These proceedings will be conducted before one of the administrative-dispute-resolution service providers listed at <http://www.icann.org/en/dndr/udrp/approved-providers.htm> (each, a "Provider").

a. Applicable disputes. You are required to submit to a mandatory administrative proceeding in the event that a third party (a "complainant") asserts to the applicable Provider, in compliance with the Rules of Procedure, that

(i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and

(ii) you have no rights or legitimate interests in respect of the domain name; and

(iii) your domain name has been registered and is used in bad faith.

In the administrative proceeding, the complainant must prove that each of these three elements is present.

e. Initiation of proceeding and Process and Appointment of Administrative Panel. The Rules of Procedure state the process for initiating and conducting a proceeding and for appointing the panel that will decide the dispute (the "Administrative Panel")

i. Remedies. 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.

j. Notification and Publication. The Provider shall notify us of any decision made by an Administrative Panel with respect to a domain name you have registered with us. All decisions under this Policy will be published in full over the Internet, except when an Administrative Panel determines in an exceptional case to redact portions of its decision.

k. Availability of Court Proceedings. The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded. If an Administrative Panel decides that your domain name registration should be cancelled or transferred, we will wait ten (10) business days ... before implementing that decision. We will then implement the decision unless we have received from you during that ten (10) business day period official documentation ... that you have commenced a lawsuit against the complainant in a jurisdiction to which the complainant has submitted under Paragraph 3(b)(xiii) of the Rules of Procedure. ... If we receive such documentation within the ten (10) business day period, we

will not implement the Administrative Panel's decision, and we will take no further action, until we receive (i) evidence satisfactory to us of a resolution between the parties; (ii) evidence satisfactory to us that your lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from such court dismissing your lawsuit or ordering that you do not have the right to continue to use your domain name.

5. All Other Disputes and Litigation. All other disputes between you and any party other than us regarding your domain name registration that are not brought pursuant to the mandatory administrative proceeding provisions of Paragraph 4 shall be resolved between you and such other party through any court, arbitration or other proceeding that may be available."

Underlining is mine

[22] **Discussion**

[23] *Whether or not Court has jurisdiction to review the merits of the Decision that the Disputed Domains are to be transferred to Defendant?*

[24] First and Second Plaintiffs bring the dispute concerning the Disputed Domains to Court in reliance solely on the basis of paragraph 4k of the UDRP. The argument made on behalf of First and Second Plaintiffs, in particular, is that a UDRP proceeding is in effect, *"a form of non-binding alternative dispute resolution which by its very terms contemplates the ability of the parties to fully and without prejudice have their rights adjudicated by a court of full and competent jurisdiction"*. That argument is based on paragraph 4k of the UDRP, which reserves the right of the domain name registrant to apply to Court to decide the dispute, and precisely to decide whether or not the trade mark or other rights of Defendant have been infringed. It is in that context that Mr. Rouillon for First and second Plaintiffs is arguing that Court has the power to make the declarations prayed for. Mr. Boule for Defendant contends that the Decision is intended to be final and binding and that there is no arguable cause of action disclosed by the plaintiff.

[25] First and Second Plaintiffs have chosen the words, *"review of the merits of Plaintiffs' arguments..."* which describe a re-hearing that will lead to a new pronouncement of the

rights of First and Second Plaintiffs and Defendant. Court, First and Second Plaintiffs and Defendant have approached the case on the footing that it is a "*de novo*" review of the merits of the Decision that is being sought, and Court shall address that point.

[26] Court refers to decisions of the High Court that have considered the interaction between decisions under the UDRP or equivalent policy and the courts: Toth v Emirates [2012] EWHC 517, [2012] F.S.R. 26 and Yoyo. Email Ltd v Royal Bank of Scotland Group plc [2015] EWHC 3505, [2016] F.S.R. 18 both decisions were relied upon by Playboy Enterprises International, Inc. Neutral Citation Number: [2016] EWHC 1379 (IPEC) together with Patel v Allos Therapeutics Inc [2008] E.T.M.R. 75.

[27] **Toth** turned on the interpretation of clause 10d of the Dispute Resolution Service Policy (the Dispute Resolution Service Policy is hereinafter referred to as "the DRS") (and clause 17(c) of the related procedural rules) regulating the service offered by Nominet to deal with complaints that certain UK registered domain names were identical or similar to names or marks owned by the complainant and that the registration of those domain names was abusive. Under the DRS the complaint would be determined by a person described as an "Expert", subject to a right of appeal. Clause 10d of the DRS stipulates that —

"the operation of the DRS will not prevent either the Complainant or the Respondent from submitting the dispute to a court of competent jurisdiction".

By paragraph 14 of its amended particulars of claim, the claimant purports to submit the dispute relating to the Domain Names to the court in reliance on clause 4k of the UDRP in the ICANN system governing the complaint between the claimant and defendants before the Panel.

[28] In **Toth** the claimant had registered the domain name "Emirates.co.uk" about which the well-known Dubai airline of that name complained to Nominet pursuant to the DRS. The complaint was upheld. Mr Toth then started proceedings in the Patents County Court for negative declaratory and other relief. At first instance, on an application to strike, His

Hon Judge Birss QC, as he then was, refused to strike out the claims for declarations. In allowing the appeal Mann J held that the DRS did not create a cause of action (para 48), that the question of whether there had been an abusive registration was for the expert appointed pursuant to the DRS and there was no room for parallel court proceedings on the point (paragraph 53) and that there was no basis for (or practical utility in) granting a declaration where the DRS left the question of abusive registration to the expert. With regards to paragraph 17c or paragraph 10d of the DRS Mann J stated —

"This was one of those cases where the parties had entrusted a decision to an expert, and if the expert decision could not be impeached on recognised grounds then it stood and the court had no further role. Whether or not that was the case here is principally a question of the construction of the contract. The question is whether the contract provides a cause of action independently of the dispute resolution mechanism, on which Mr Toth can base a claim to a de novo rehearing of the abusive registration point, and obtain a declaration. The answer is that there is no such cause of action. Nor will a declaration by itself serve any useful purpose, and it is a misuse of the court's jurisdiction to seek to go behind the agreed dispute resolution procedure by seeking one. The Decision was intended to be final and binding. Neither paragraph 17c of the Procedure nor paragraph 10d of the DRS were intended to confer a right to have the dispute tried all over again, and it would be commercially unreal to determine that that was permitted because the whole purpose of the procedure was to provide for a quick and relatively cheap determination of the dispute within it. That would be defeated if the matter could be raised again in court proceedings. All this is said to be sufficiently clear so that it can be decided now, at a strike-out hearing. The matter had been determined by the proper tribunal, and that was that. The judge below misconstrued the terms of the DRS and the Procedure."

[29] In Patel the defendant had successfully complained under the UDRP with regards to a disputed domain name that the panel ordered to be transferred to the defendant. The unsuccessful respondent to that complaint then commenced proceedings in the Chancery Division and was met with an application for summary judgment. Ms Proudman granted summary judgment to the defendant. She dismissed the claim holding that the proceedings disclosed no cause of action and were totally without merit. With regards to clause 4k of the UDRP she said that —

"[the sub-clause] appears to assume that the court to whom the matter is referred may be able to review the Panellist's decision on its merits, because the paragraph speaks of "referring the dispute" to the court for "independent resolution". However, it is trite law that an agreement cannot confer a jurisdiction on the court which it does not otherwise have. Under the [UDRP] the Registrar will abide by a judicial decision, but the function of this Court is not as a judicial review or appellate body. The claimant must demonstrate some independent right of action justiciable in this Court. Thus if a complaint is dismissed, the complainant may refer the case to the Court for an order that its trade mark has been infringed. If, on the other hand, the complaint is upheld, the burden is not on the complainant to establish infringement. It is for the registrant to plead and prove a cause of action giving him an interest in retaining the domain name. An unsuccessful registrant therefore faces considerable difficulty in identifying a cause of action upon which the Panel's decision can be challenged..."

[30] On a consideration of all the above, Court opines that —

- (1) paragraph 4k of the UDRP does not give rise to an independent cause of action in favour of First and Second Plaintiffs;
- (2) nor does it give any jurisdiction to this court to try the dispute all over again (or to act as an appeal or review body from the Decision), the Decision being final and binding;
- (3) there are no material differences between the wording and construction of the DRS and the UDRP schemes (at least so far as paragraphs 10d and 4k are concerned); therefore, Court applies the reasoning in Toth and Patel, although by analogy, to this case.

[31] Court reminds itself that it is being invited to exercise its discretion to dismiss the plaint under section 92 of the Seychelles Code of Civil Procedure (hereinafter referred to as the "SCCP"). Section 92 of the SCCP enforces the rules of pleading.

[32] Section 92 of the SCCP provides —

"92. The court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in such case, or in case of the action or defence being shown by the pleading to be frivolous or vexatious, the court may order the action to be stayed or dismissed, or may give judgment, on such terms as may be just".

- [33] Section 92 of the SCCP concerns the discretion of Court to strike out any pleading where, on the face of the pleading, it discloses no reasonable cause of action or answer. Where this is the only ground on which the application is made, evidence is not admitted: see A. –G. of Duchy of Lancaster v. L. & N. W. Ry., [1892] 3 Ch. 278; Republic of Peru v. Peruvian Guano Co. (1887), 36 Ch. D. 489, 498). On that ground, Court retains the discretion to stay or dismiss the proceedings or may give judgment on terms as may be just.
- [34] "There is some difficulty in affixing a precise meaning to" the term no reasonable cause of action or defence. "In point of law, [...] every cause of action is a reasonable one" (per Chitty, J., Rep. of Peru v. Peruvian Guano Co., 35 Ch. D. P. 495). A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered (per Lord Pearson in Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688; [1970] 1 All E.R. 1094, C.A.). However, the practice is plain, so long as the plaint or the particulars (Davey v Bentinck [1893] 1 Q. B. 185) disclose some cause of action, or raise some questions fit to be decided by a Judge. The mere fact that a case is weak, and not likely to succeed, is no ground for striking it out (Moore v. Lawson, 31 T.L.R. 418, C.A.; Wenlock v. Moloney [1965] 1 W.L.R. 1238; [1965] 2 ALL E.R. 871, C.A.). I also bear in mind that pleadings should only be struck out or dismissed in plain and obvious cases.
- [35] Does the plaint raise any questions fit to be decided by Court? Court has considered the allegations in the plaint and the documents that might be available at trial, namely the documents listed in respect of the UDRP proceeding, and Court is satisfied that the issue here is one of interpretation of the UDRP, as will appear. Court finds the paragraphs of the plaint quite incapable of giving rise to the reliefs sought by First and Second Plaintiffs in light of the findings of Court on plea *in limine litis* raised at plea 1.

[36] Whether or not the jurisdiction Court is limited to a situation in which any of the cases mentioned in Article 134 of the Commercial Code Act CAP 38 (the Commercial Code Act CAP 38 is hereinafter referred to as the "CFACT") are identified in the Decision (on the basis that the Decision is in the nature of a decision in an arbitration)?


[37] In light of the approach taken that First and Second Plaintiffs were seeking a full re-hearing of the case, and the findings of Court on that point, Court opines that it need not consider the issue that arises for consideration.

[38] **Decision**

[39] In light of the above, Court rules that the Decision is final and binding and the plaintiff does not disclose any reasonable ground for bringing the action.

[40] Court dismisses the plaintiff with costs.

Signed, dated and delivered at Ile du Port on 16 September 2016


F Robinson
Judge of the Supreme Court

