

**DISPUTE RESOLUTION SERVICE  
D00019313**

**Decision of Independent Expert**

BrainSmart

and

Garth Piesse

**1. The Parties:**

Complainant: Clare Strange  
4 Hogfair Lane  
Burnham  
S. Bucks  
SL1 8BY  
United Kingdom

Respondent: Garth Piesse  
PO Box 181  
Palmerston North  
Manawatu  
4440  
New Zealand

**2. The Domain Name:**

brainsmart.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 which could arise in the foreseeable future, that need be disclosed as being of a such a nature as to call in to question my independence in the eyes of one or both of the parties.

07 September 2017	Dispute received
08 September 2017	Complaint validated
08 September 2017	Notification of complaint sent to parties
27 September 2017	Response reminder sent
27 September 2017	Response received
27 September 2017	Notification of response sent to parties
02 October 2017	Reply reminder sent
03 October 2017	Reply received
03 October 2017	Notification of reply sent to parties
03 October 2017	Mediator appointed

06 October 2017	Mediation started
06 October 2017	Mediation failed
06 October 2017	Close of mediation documents sent
18 October 2017	Complainant full fee reminder sent
23 October 2017	No expert decision payment received
25 October 2017	Expert decision payment received

#### **4. Factual Background**

The Complainant is the proprietor of UK trade mark registration No. UK3094164 for the figurative mark containing the stylised words 'BrainSmart Mindpower in Action' and combined brain/light bulb device, registered on 29 May 2015 (in Classes 9 and 41), and is also co-owner of Australian trade mark registration No. 1604614 for the word mark BrainSmart, registered on 20 January 2015 (in Class 41). The trade marks are registered under the Complainant's maiden name of Edwards, rather than her married name of Strange in which she brings this Complaint.

The Complainant was the proprietor of the Company, Brainsmart Limited incorporated on 8 February 2016 under Company Number 9992064 but on the advice of her accountants, applied for it to be struck off in August 2017.

The Complainant also owns the domain name, brain-smart.com, and the website at that domain name describes the services offered by the Complainant under the name BrainSmart. As the Expert is permitted to do pursuant to paragraph 18.1 of Nominet's Dispute Resolution Service (DRS) Policy (the Policy), which allows the Expert to '*... check any material which is generally available in the public domain*', the expert visited the Complainant's website. Set out below is an extract from its home page describing the services (or some of them) the Complainant offers:

*'Here at BrainSmart, we take the learnings from the world of Neuroscience and combine these with our experience of working with organisations to provide practical solutions to workplace challenges.*

*We help organisations and their people work more effectively to maximise their potential and we work with organisational leaders to develop inspiring leadership to support greater levels of engagement and effect lasting and sustainable change.'*

The figurative UK trade mark is displayed prominently throughout the website.

The Complainant operates the BrainSmart business in the UK and Australia. The co-owner of the Australian word mark is a company of an Anne Paterson (who is also interested in the BrainSmart business).

The Complainant attempted to acquire the domain name in dispute, brainsmart.co.uk (hereafter the Domain Name) from its previous owner, one Joan Frances Boyle but was unsuccessful. The Domain Name became generally available and was acquired by the Respondent, on 17 August 2017.

The Respondent is in the business of buying, selling and monetising domain names.

## 5. Parties' Contentions

The following is summary of the key assertions of the parties.

### *The Complaint*

In relation to *Rights* (as the term is defined below), the Complainant says that she owns the trade mark for 'brainsmart' in the UK and Australia and explains how she approached Ms Boyle (the earlier owner of the Domain Name) asking her *'to transfer the UK domain name to me in good faith'*, that she was unsuccessful and then wrote to the Respondent *'asking the same in good faith'*, only to be rebuffed with an email stating:

*'Hi Clare,  
Thanks for your letter.  
I reject any legal claim.  
The price I have been quoting out is \$3,695.  
Best,  
Garth'*

The Complainant asks, rhetorically, *'How is it possible for someone to 'blackmail' me with this amount of money for a domain name for which I own the trademark?'*

The Complainant states that she owned BrainSmart Ltd *'to protect my intellectual property'*, that she *'let it go'* and hopes that *'this does not adversely affect my rights'*.

As to *Abusive Registration* (again, as the term is defined below), it is said that the Domain Name has no link to a website, goes straight to a broker and given the nature of the email received (as set out above), she believes that the Respondent has purchased it with the primary purpose of selling or renting it for much more than he paid. The Complainant goes on to say that *'It seems like I am not the only person to have been duped by this man and this is how he makes his money'*, providing four references (links) in support which concern registrations by the Respondent.

The Domain Name directs to the website of Uniregistry Market, a domain name marketplace on which the Domain Name is listed for sale.

### *The Response*

As to the issue of *Rights*, the Respondent says that the Complainant does not own the trade mark for 'brainsmart' in that it is registered to a 'Clare Lesley Edwards', not 'Clare Strange' the named Complainant (albeit it is acknowledged they are probably one and the same person despite the absence of any explanation), and also that the UK trade mark is for the stylised words 'BrainSmart Mindpower in Action' plus device, which is not similar to the Domain Name.

Whilst the Respondent accepts that the Australian word mark is identical to the Domain Name, the same point is taken as to the identity of the proprietor but, additionally, it is noted that there is an Australian co-owner (a company who is not a party to the present proceedings), but again without any explanation. In the circumstances, the Respondent disputes that the Complainant has standing to rely on this trade mark in the absence of the co-owner.

The Respondent states that the Complainant has made no efforts to establish unregistered rights in the term 'Brainsmart' and that it is far from clear who of the various names mentioned is actually trading, where and under which name, 'Brainsmart' or 'BrainSmart Mindpower in Action'.

Further, the Respondent notes a possible complication by virtue of Brainsmart Ltd having been created '*to protect my intellectual property*', raising the possibility of intellectual property rights having been transferred out of the business.

In short, the Respondent contends that the Complainant has failed to establish *Rights*.

As to *Abusive Registration*, the Respondent refers to the 2007 DRS Appeal Panel Decision in *Verbatim Limited v Michael Toth (DRS 4331)* which states that '*for this complaint to succeed, the Complainant must satisfy the Panel, as an opener, that the Respondent was aware of the existence of the Complainant or its brand at the date of registration of the Domain Name or at commencement of an objectionable use of the Domain Name*'.

The Respondent describes becoming aware that the Domain Name was on a list of domain names which were about to '*drop*' and assumed that the previous owner no longer wanted it. The Respondent thought it a potentially attractive domain name because it reflected a very obvious combination of two common generic terms. The Respondent owns numerous other domains which consist of (a) the term '*brain*' plus a descriptive word and (b) a descriptive word followed by '*smart*'. A list is attached to the Response which shows that a few weeks before registration of the Domain Name, the Respondent registered <futuresmart.co.uk>, <brandsmart.co.uk> and <braincode.co.uk>, as part of a similar generic pattern.

The Respondent says that he had it in mind to sell the Domain Name to any third party interested in it (for whatever reason) and that since registration, it has always redirected to the webpage at [www.uniregistry.com](http://www.uniregistry.com) inviting purchase enquiries. The Respondent states that he was not aware of the Complainant on registration, only becoming aware on being approached by her. Given this lack of knowledge, the Respondent states that he did not acquire the Domain Name for the purposes of sale to the Complainant.

It is said that the Complainant has produced no evidence of reputation anywhere, let alone in the UK, or in New Zealand, where the Respondent resides.

The Respondent describes the results of a Google search for the term 'brainsmart' which brings up 324,000 '*hits*' in total, but only a few of which relate to the Complainant (the results being dominated by a different 'Brainsmart' business offering '*brain supplements*' (at [www.brain-smart.net](http://www.brain-smart.net))).

The Respondent notes that there is a third party UK trade mark for 'BRAINSMART' (in classes 5 and 35) and another for a device incorporating the term 'Brain Smart' (in class 28), suggesting that the combination of 'brain' and 'smart' is an obvious one and far from unique to the Complainant.

It is said that the Complainant has not demonstrated (or even claimed) that the Respondent was aware of the existence of the Complainant or her brand at the date of registration of the Domain Name, or at the commencement of any use objected to, or that the Respondent acquired the

Domain Name for the purposes of sale to the Complainant.

The Respondent asserts that the Complaint is based on a fundamental misunderstanding that the Respondent is not entitled to engage in domain name trading.

The Respondent sets out a summary of the course of correspondence between the parties as follows:

- a) The Complainant made an inquiry via the website to which the Domain Name resolves and on which it is offered for sale on 4 September 2017;
- b) On the same day, the Complainant sent a letter to the Respondent asking for transfer of the Domain Name at the '*normal market value*' on the (incorrect) basis of ownership of the trade mark for 'BrainSmart' in the UK;
- c) On 5 September 2017, the Respondent's broker responded to the Complainant's website enquiry, proposing a price of \$3,695.
- d) The Complainant responded to the broker on the same day saying she would '*go down the legal route*' as this was '*pure theft*'.
- e) On 7 September 2017, the Respondent responded to the Complainant's letter rejecting any legal claim and reiterating the price of \$3,695.
- f) On the same day, the Complainant filed the Complaint and also replied to the Respondent saying that she had discovered '*how you make your money*' and that she was not sure '*how you sleep though*'.
- g) The Respondent responded that he slept well.

The Respondent strongly rejects and resents the pejorative terms used in the Complaint – he has not '*blackmailed*' anyone and the articles referred to in the Complaint do not show that anyone has been '*duped*'.

#### *Reverse Domain Name Hijacking (RDNH)*

The Respondent requests a finding of attempted RDNH.

The Respondent states that the Complainant has failed to assert, (let alone prove), any facts which could conceivably constitute *Abusive Registration*, but rather has '*fired off*' the Complaint in a state of '*righteous indignation*'. The Complainant made no effort to check what *Abusive Registration* meant and whether there were grounds to file a Complaint under the Policy.

The Respondent refers to the Complainant's letter to the previous registrant of the Domain Name (Ms Boyle) exhibited to her Complaint, as being illustrative of '*the Complainant's propensity to throw out wild and uninformed allegations of "cybersquatting"*', in that instance relying on the fact that the services offered did not seem to the Complainant to relate to '*brain*' or '*smart*' related services (the Domain Name then resolving to a complimentary therapy site). The Respondent goes on to say that the Complaint should never have been launched, that the Respondent has been put to unnecessary cost and inconvenience and makes reference to the DRS Panel Decision in *so31.co.uk (DRS 16688)*, where an unrepresented complainant had a finding of RDNH made against it in similar circumstances.

## Reply

The Complainant, in responding to the Response in relation to *Rights*, comments on the background to the relationship with Anne Paterson and her Australian interests, the use of different names (*'Edwards'* being her maiden name, *'Strange'* her married name) and why the trade marks in the UK and Australia are different. As to this latter point, the Complainant explains that she *'submitted the request for a trade mark in exactly the same manner as I did in Australia in 2014, however the UK Trademark process included our strapline and I assumed that this would still provide some form of intellectual property protection'*.

The Complainant says that, not being an intellectual property expert, she does not understand the term *'unregistered rights'* and hence the suggestion that no effort has been made to establish such rights.

As to BrainSmart Ltd, the Complainant states that she was advised by an accountant that she could not operate as BrainSmart Ltd because of the nature of her husband's work and thus chose Strange Enterprise Services Ltd (based on her married name), for the purposes of trading as BrainSmart. The Complainant attaches a bank statement from a business account of BrainSmart. She also notes that BrainSmart Ltd was never *'an acting concern'*.

As to *Abusive Registration*, the Complainant acknowledges that she cannot prove that the Respondent was aware of her particular business when he registered the Domain Name. However, she goes on to say that as someone who buys and sells domain names for profit, she can only assume he would have been aware of businesses generally with this name as such knowledge can be gained by a simple internet search

The Complainant says that she does not understand the reference to the domain name, <verbatim.co.uk>.

In relation to the Respondent's business of buying and selling domain names, the Complainant states that when she registered two previous domain names in Australia (<change-works.com.au> and <brain-smart.com>), she was required to provide evidence that her business was related to the domain name being registered and *'made the incorrect assumption that in the UK any domain name that was purchased must have a direct link to the business of the person purchasing it'*.

The Complainant appears to agree with the Respondent's assertions concerning his lack of knowledge of her (the Complainant), but states that whilst he might not have been aware of her business in the UK and Australia (*'if he had not searched the terms on the internet'*), there must have been some commercial interest in the Domain Name otherwise he would not have purchased it for resale in the first place.

As to the allegation that no evidence has been produced of *'reputation'*, the Complainant says she cannot respond as she does not understand the point, but would be happy to provide evidence once she does understand. However, the Complainant goes on to give an example of what the Respondent might be *'requesting'*, namely evidence of services provided under the name BrainSmart. She then refers to her website at [www.brain-smart.com](http://www.brain-smart.com) and the ability to *'produce invoices if this is what you mean'*.

As to the Google search referred to by the Respondent, the Complainant says that whilst few of the 324,000 searches are related to her business, her social media page (Facebook) and website (www.brain-smart.com) appear 6th and 7th on the first page, suggesting that her business is an active concern.

As to other Brainsmart trade marks, whilst the Complainant accepts that there are other Brainsmart related businesses in the UK operating in different industry classes, she sees little relevance to the original request to have the Domain Name transferred at normal market value.

The Complainant states she has never claimed that the words 'brain' and 'smart' are unique to her business.

As to the suggestion that the Complaint is based on a fundamental misunderstanding that the Respondent is not entitled to engage in domain name trading, the Complainant says that her *'assumption was based on a) my experience of purchasing domain names in Australia and b) my belief that this was morally wrong. I realise that there is a difference between my beliefs and the law'*.

The Complainant states that she did not assume that the Respondent had acquired the Domain Name in order to sell it to her, explaining she was attempting to acquire the Domain Name *'in a mutually respectful manner with my letter of 4th September. What I did assume was that I would have some form of right to request transfer based on my active trading and trademarks in Australia and the UK. This is obviously incorrect'*.

The Complainant apologises for the emotional language used with the Respondent, explaining that she *'could not understand how people buy domain names to sell at \$3694.01 more than the \$0.99c cost. I did not realise that this was a legal business'*.

As to RDNH, the Complainant says that her understanding is that what needs to be shown is use of the dispute resolution service in bad faith in an attempt to deprive a respondent of the domain name in issue. The Complainant refutes that this is the case here – there was no intention to *'deprive'* and that she *'just wanted to be able to purchase the UK domain name that my business operates under at market value'*.

The Complainant also refutes the suggestion that she *'fired off a complaint in a state of righteous indignation'*, stating that *'Yes I don't understand the practice of buying and selling domain names where active businesses are trying to protect their intellectual property and I thought that I would have some element of protection in the trademarks that I own but it appears that this is not the case in the UK.'* She goes on to say that *'I approached the previous owner, as I did with Mr Piesse, asking for transfer at market value as her business of reiki healing did not reflect the name of Brainsmart. This was based on my experience of needing to submit evidence (in Queensland) of my business reflecting the domain name I was purchasing.'*

Finally, the Complainant states that she does not have legal representation nor any means of paying for it, stating that *'I am a small business trying to operate ethically and I am guilty of holding beliefs as such. I have no desire to demand or deprive the domain name if Mr Piesse legally owns it and wants to sell it at a profit'*.

## 6. Discussions and Findings

Disputes under the DRS are decided by reference to the terms of the Policy, not the general law. Under the provisions of that Policy, for a Complaint to succeed, a Complainant is required to prove, on the balance of probabilities, that it has *Rights* in respect of a name or mark which is identical or similar to the domain name in issue and that the domain name in the hands of the Respondent is an *Abusive Registration*. Both elements are required.

Whilst there is no system of binding precedent under the Policy, a measure of consistency is naturally preferable. The DRS Experts' Overview, version 3 (the Overview) is designed to assist participants in disputes to be decided under the Policy by describing commonly raised issues and explaining how Nominet Experts have dealt with those issues. Reference will be made to that Overview.

### *Complainant's Rights*

The meaning of '*Rights*' is defined in the Policy as follows: '*Rights means rights enforceable by the Complainant, whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning*'.

In this case, the Complainant has registered trade mark rights in a UK figurative mark which includes the stylised words 'BrainSmart Mindpower in Action', and co-owns an Australian word mark for BrainSmart, both registered in 2015, prior to registration of the Domain Name. The Respondent contends that the Complainant lacks *Rights* for the purposes of the Policy on various bases as set out earlier.

As to the Australian mark, the Overview at paragraph 1.5 makes clear that an overseas right can constitute a relevant right for the purposes of the definition of *Rights*. As long as the rights are enforceable, there is no geographical or jurisdictional restriction. The Expert is satisfied that Clare Edwards (the co-owner of the Australian word mark) and Clare Strange, the Complainant herein, are one and the same person (as reflected in the Factual Background section above). Furthermore, the Expert is of the view that for the purposes of establishing *Rights* under the Policy, the fact that the Complainant is a co-owner as opposed to sole owner of the mark, matters not. The fact that consent, before enforcement proceedings are taken, may be required from the other co-owner (if indeed that is the case) or, absent consent, the co-owner joined to any infringement proceedings as a defendant (again, if that is what might need to happen), does not make the trade mark right unenforceable *per se*. Moreover, the co-owners will have enforceable rights in relation to the trade mark as between themselves, regardless of the position in relation to third parties. The Expert is therefore satisfied that the Complainant has *Rights* in respect of a mark which, ignoring the suffix '.co.uk' as the Expert may do for comparison purposes, is identical to the Domain Name.

As to the Complainant's UK mark, whilst rights in a figurative mark may not necessarily equate to trade mark rights in respect of any words featured in that mark, it is possible that they might, depending on the nature of the words in question and their prominence. Whilst the words 'BrainSmart' are not the only words used in the mark, their graphical representation is far bigger than the words which appear underneath them ('Mindpower in Action'). Whilst the mark as a whole is not identical to the Domain Name, given that 'BrainSmart' is the dominant element (and that 'Mindpower in Action' appears to be more in the nature of a 'strapline' or subsidiary phrase), the



Expert's view is that the mark is similar to the Domain Name. Accordingly, the Complainant is able to rely on her UK mark too for the purposes of establishing *Rights* under the Policy.

In these circumstances, the Expert need not consider the issue of unregistered rights.

Given these findings, it is now necessary to consider the issue of whether the Domain Name, in the hands of the Respondent, is an *Abusive Registration*.

#### *Abusive Registration*

Paragraph 1 of the Policy defines Abusive Registration as a domain name which was either '*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 which '*is being or has been used in a manner which has taken unfair advantage of or was unfairly detrimental to the Complainant's Rights*;'.

A non-exhaustive list of factors which may indicate that a domain name is an *Abusive Registration* is set out in paragraph 5 of the Policy. Such factors include circumstances indicating that the Respondent has registered or otherwise acquired the domain name *primarily* 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; as a blocking registration against a name or mark in which the Complainant has rights, or for the purpose of unfairly disrupting the business of the Complainant.

Other factors suggesting an *Abusive Registration* include the Respondent 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; or where the Complainant can demonstrate that the Respondent is engaged in a pattern of registrations where the Respondent is the registrant of domain names which correspond to well known names or trade marks in which the Respondent has no apparent rights, and the Domain Name is part of that pattern.

Where the domain name is an exact match for the name or mark in which the complainant has rights, the complainant's mark has a reputation and the respondent has no reasonable justification for the registration, that too may evidence an *Abusive Registration*.

Also, there shall be a presumption of *Abusive Registration* if the Complainant proves that the Respondent has been found to have made an *Abusive Registration* in three or more DRS cases in the two years before the complaint was filed (although this presumption can be rebutted).

A non-exhaustive list of countervailing factors is set out in paragraph 8 of the Policy i.e. factors which may indicate that the Domain Name is not an *Abusive Registration*. This includes circumstances suggesting that before being aware of the complainant's cause for complaint, the respondent has used or made demonstrable preparations to use the domain name in connection with a genuine offering of goods or services. A respondent being commonly known by the name or legitimately connected with a mark which is identical or similar to the domain name, or having made legitimate non-commercial or fair use of the domain name, will also be indicative of a registration that is not

abusive. Further, if the Domain Name is generic or descriptive and the Respondent is making fair use of it, that too may indicate that the Domain Name is not an *Abusive Registration*.

The Complainant has not sought to base her Complaint on the examples of what might constitute *Abusive Registration* under paragraph 5, although she does suggest that the Respondent purchased the Domain Name with the primary purpose of selling or renting it (generally, as opposed to selling or renting it to the Complainant or a competitor), for much more than he paid. But this, in itself, is not contrary to the Policy. The Complainant appears to have given very little attention to the Policy (and in view of what it is said below in relation to the underlying purpose of the Policy), there would seem little point in analysing the issue of *Abusive Registration* by reference to individual provisions of paragraphs 5 or 8 (the examples in which, in any event, are non-exhaustive). Instead a more general approach will be taken.

At the heart of the Policy, is the requirement to prove unfairness and thus for a registration to be considered '*abusive*' there should be something unfair in the object or effect of the respondent's behaviour. It is perfectly possible for a respondent to make fair use of a domain name that incorporates a Complainant's trade mark and which also, for that matter, causes confusion. Knowledge of a Complainant and/or its rights is a crucial element in most cases, but particularly so where, as in this case, the domain name constitutes an expression or combination of words in fairly wide use, as the Google search described earlier shows. The importance of knowledge on the part of a respondent is illustrated by the 2007 DRS Appeal Panel decision in *Verbatim Limited v Michael Toth (DRS 4331)*, in which it was said:

*'... the following should be the approach to the issues of knowledge and intent in relation to the factors listed under paragraph 3 [now paragraph 5 of version 4] of the Policy:*

*(1) First, some knowledge of the Complainant and/or its brand/rights is a pre-requisite for a successful complaint under all heads of the DRS Policy other than paragraph 3(a)(iv) [now paragraph 5.1.4] (giving false contact details). The DNS is a first-come-first-served system. The Panel cannot at present conceive of any circumstances under which a domain name registrant, wholly unaware of the Complainant and its Rights, can be said to be taking unfair advantage of or causing unfair detriment to the Complainant's Rights '*

It should be noted that *Verbatim* was decided by reference to version 2 of the Policy. The current version of the Policy (4), is different and indeed the jurisprudence in relation to DRS proceedings in some respects may have moved on. But there must still be something unfair in the object or effect of the respondent's behaviour to which the Expert now turns.

It seems clear that the Claimant uses 'BrainSmart' as a trading name but there is no reason to disbelieve the Respondent's account in relation to knowledge and how he came to register the Domain Name. Indeed, his account is not seriously contested by the Complainant. In these circumstances, it is difficult to conceive of a situation where a *prima facie* case could be made out against the Respondent. Internet searches, if carried out, would have demonstrated that the expression 'Brain Smart' was not unique to the Complainant, nor likely to lead to a dispute, let alone a dispute with the Complainant, and there is certainly no obligation on a potential registrant of a domain name to search trade mark registries around the world. Had the Complainant adduced evidence that her trading name was so widely known that it was very likely the Respondent was aware of her business (and of rights in her trading name), the position may be different. But the

Complainant has not done so, apparently being a little confused by the Respondent's criticism of her failure to show the existence of reputation. The Complainant clearly finds it irksome is that there is a business in buying and selling domain names, some of which may prove useful to owners of trade marks to which they are similar or identical. However, as paragraph 8.4 of the Policy makes clear, *'Trading in domain names for profit, and holding a large portfolio of domain names, are of themselves lawful activities. The Expert will review each case on its merits'*. A domain name trader does not of course get a *'free pass'*, but the activity in and of itself (trading in domain names) is quite lawful and not contrary to the Policy.

The Complainant has not made out a *prima facie* case against the Respondent by reference to the Policy. To the extent that she had, the Respondent would have an answer to that case. Accordingly, no finding of *Abusive Registration* can be made.

#### *Reverse Domain Name Hijacking (RDNH)*

Reverse Domain Name Hijacking means using the DRS in bad faith in an attempt to deprive a Respondent of a Domain Name. There is very little guidance on RDNH. In the DRS Panel Decision of *Speciality Welds Ltd v Hydroweld (DRS02676)*, the Expert said

*'In any event, in the view of this Expert, reverse domain name hijacking is a term which should be restricted to abusive use of the Policy to deprive a registrant of a domain name in circumstances where the Complainant knows that the Complaint has no merit within the terms of the Policy. Here, the Respondent's case is that the Complainant expected the Complaint to succeed.'*

The Respondent has been critical of the Complainant's approach not just in relation to him, but also the previous registrant, and relies on the DRS Panel Decision in *so31.co.uk (DRS 16688)*, where a finding of RDNH was made. This was a case said to bear similarity to the present case and indeed, it did involve a domain name trader as respondent and an unrepresented party as complainant. The expert in that case, in dealing with RDNH, acknowledged that a finding that a Complaint had been brought in bad faith was *'a serious one and suggests some element of wrongdoing rather than mere ignorance or lack of understanding of the Policy'*. However, he went on to say that an expert is entitled to assume and expect that a complainant has read the Policy before commencing proceedings and that had the complainant in that case done so, he would have known that the complainant would almost certainly fail. Moreover, the expert (in *DRS 16688*) goes on to say that even if the complainant didn't read the Policy, that would be tantamount to a deliberate closing of eyes and that a finding of bad faith would be justified.

There is much that could be criticised in the Complainant's approach. In relation to her letter to the earlier Registrant exhibited to the Complaint, she inaccurately refers to ownership of the trade mark 'brainsmart' in the UK, raises the prospect of 'cyber squatting' without properly understanding the basis for doing so and states that she would prefer to avoid *'going down the legal route'* and, (inappropriately for a '.co.uk' registration), *'starting a Uniform Domain Name Dispute Resolution Process'*. Later, she refers to *'going legal'*. In her letter to the Respondent of 4 September 2017, she says that she does not *'want to go down a legal route'* and in her e-mail to the Respondent's broker the next day, she says *'I will go down the legal route as I have the trademark for BrainSmart and this is pure theft'*. In her e-mail to the Respondent on 7 September 2017, she says (after commenting that *'I'm not sure how you sleep though'*, that *'You will hear from me through another party'*. In her Complaint she refers to *'blackmail'* and others having been *'duped'*. It is remarkable that someone

who so freely makes serious allegations and threatens action, knows so little about or misunderstands so profoundly, the principles that would apply if and when action is taken and such allegations tested. The Complainant's approach is that much more surprising given that one of the four references in her Complaint is to a report of another DRS case in which the Respondent was involved, where the complainant failed and a finding of RDNH was made.

Despite this criticism however, the test for RDNH is whether the Complainant, in bad faith, has sought to deprive the Respondent of the Domain Name.

In this Expert's view, for a finding of RDNH to be made, some dishonesty is required, not just bad judgment, or a mistaken belief or ignorance of one's own position. Moreover, it would be wrong to use of a finding of RDNH to punish a Complainant for not doing a very good job in pursuing a Complaint under the Policy. The manner in which the Complainant has dealt with these proceedings suggests to the Expert that this is a case of the Complainant, perhaps somewhat overcome with what she fervently (but mistakenly) believed was inappropriate conduct by the Respondent, giving insufficient attention to the framework within which her Complaint would be decided. It does not suggest, in the Expert's view, an intention to launch what she new to be a poor and speculative Complaint with the intention of wrongfully depriving the Respondent of the Domain Name.

In all the circumstances, the Expert makes no finding of reverse domain name hijacking.

## **7. Decision**

For the reasons given, whilst the Complainant has made out her case in relation to *Rights* for the purposes of the Policy, she has not done so in relation to *Abusive Registration* and the Complaint therefore fails. No finding of reverse domain name hijacking is made. Accordingly, the Expert directs that no action be taken in respect of the Complaint.

Signed .....  
**Jon Lang**

Dated .....