



## DISPUTE RESOLUTION SERVICE

**DRS20412**

### Decision of Appeal Panel

Zoetis Services LLC (Lead Complainant) and  
Zoetis, Inc

v

Trifega Limited (Respondent)

#### 1. The Parties

Complainants/Appellants:

**Zoetis Services LLC** (Lead Complainant) and **Zoetis, Inc**, both of 10 Sylvan Way,  
Parsippany, New Jersey 07054, United States

Respondent:

**Trifega Limited** of Sovereign House, 14-16 Nelson Street, Douglas, IM1 2AL, Isle of Man

#### 2. The Domain Name

The domain name the subject of this appeal is equest.co.uk

It is referred to as the "Domain Name" in this decision.

#### 3. Appeal Panel Declaration

Nick Gardner, Philip Roberts and Anna Carboni (the "Appeal Panel") have each made a statement in the following terms:

*"I 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 such a nature as to call into question my independence in the eyes of one or both of the parties".*

## **4. The Policy**

This appeal is governed by version 4 of Nominet’s Dispute Resolution System (“DRS”) Policy that applies to disputes filed on or after 1 October 2016 (the “Policy”). This document is available for inspection on the Nominet website (<https://www.nominet.uk/resources/policy/policies-rules/#drspolicy>). The Policy sets out how cases under Nominet’s DRS will be determined. Capitalised terms used in this decision shall have the meaning set out in the Policy unless otherwise stated.

## **5. Procedural History**

This is an appeal by the Complainants/Appellants against a decision of Keith Gymer (the “Expert”) dated 5 October 2018. The Expert found that the Complainants had Rights in a trade mark and that the Domain Name was identical to that trade mark but that the Respondent’s registration of the Domain Name was not an Abusive Registration. He did so primarily on the basis that the Complainants had not established that the Respondent would have had knowledge of the Complainants and/or their trade mark when registering the Domain Name, having regard to the fact that “equest” is a term he considered could readily have been independently derived, and he accepted the Respondent’s evidence to that effect. He also concluded that the Respondent’s subsequent actions in linking the Domain Name to a “parking page” with automatically generated links did not mean that the Domain Name was an Abusive Registration. Further details of the Expert’s reasoning can be found in his decision which is available on Nominet’s website.

On 19 October 2018 the Complainant gave notice of intent to appeal against the Expert’s decision and paid the appeal decision deposit. The balance of the appeal payment was made on 8 November and the Appeal Notice was filed on 9 November 2018. Nominet notified the Respondent of the appeal on the same day, and the Respondent filed an Appeal Response on 16 November 2018.

On 26 November 2018 Nick Gardner was appointed as chair of the Appeal Panel with Philip Roberts and Anna Carboni as co-panellists.

## **6. The Nature of This Appeal**

Paragraph 20.8 of the Policy provides that: “The appeal panel will consider appeals on the basis of a full review of the matter and may review procedural matters”. This appeal relates to substantive rather than procedural matters and will therefore proceed as a re-determination on the merits. The case is however unusual in that the primary basis for the Complainants’ Appeal relates to matters which have occurred subsequent to the Expert’s decision (see below). This has various consequences which are discussed further below.

For convenience the Panel will continue to refer to the parties as the “Complainants” (identifying the Lead Complainant when referring only to that entity) and the “Respondent”.

## **7. Factual Background**

The Appeal Panel adopts the Expert's summary of the factual background, as follows.

The lead Complainant, Zoetis Services LLC, is one of the companies in the Zoetis group of which the co-Complainant, Zoetis, Inc., is the principal entity. The Zoetis group develops and manufactures a diverse portfolio of animal health medicines and vaccines for pets and livestock, complemented by diagnostic products, genetic tests, biodevices and a range of services for veterinarians and livestock farmers and companion animal owners. It markets equine anthelmintic treatments under the EQUEST mark.

The Lead Complainant holds trade mark rights, including UK trade mark registration no. 2019798, filed on 4 May 1995 and EUTM registration no. 2738250, filed on 18 June 2002, for the EQUEST mark in Class 5 for anthelmintics.

The Complainants provide a website at [www.zoetis.com](http://www.zoetis.com), with information on their EQUEST products at [www.zoetis.com/products-services/companion-animals/horses.aspx](http://www.zoetis.com/products-services/companion-animals/horses.aspx).

The Respondent, Trifega Ltd, is a company registered in the Isle of Man. It holds a large number of domain names, which are offered for sale. According to the Nominet WhoIs records, the Respondent registered the disputed Domain Name on 6 July, 2006. A website page, hosted by Sedo, was accessible via the Domain Name, displaying an invitation to "Buy this domain" with a link to enable visitors to "make an offer" to purchase the Domain Name.

The Appeal Panel would add that it is also convenient to reproduce in this decision screenshots of the relevant webpages, being (i) the webpage as placed in evidence before the Expert (which it will refer to as the "Original Parking Page") and (ii) the webpage which the Complainants now seek to place in evidence in this Appeal (which is at the same address but has different links now displayed (which it will refer to as the "Revised Parking Page").

These screenshots are shown at respectively Annexes 1 and 2 to this decision.

## **8. Parties' Contentions**

### **The Complaint**

The essential points the Complainants made in the original Complaint were as follows.

They own trade mark rights in the EQUEST mark, as specified above, predating the registration of the Domain Name.

They only recently became aware of the Domain Name registration.

They asserted that the Respondent knew of the Complainants and their trade marks (but without any evidence or explanation as to why that would be), and registered the Domain Name to seek to capitalise on those rights by selling, renting or otherwise transferring the Domain Name to the Complainants or a competitor. The Complainants submitted that the

Respondent's conduct in the present matter, and previously, demonstrates that the registration of the Domain Name is abusive.

The Complainants argued that the Respondent's business model was to engage in the abusive predatory registration of domain names to which the Respondent has no legitimate rights or interests with the purpose of selling to the highest bidder in excess of the Respondent's documented out-of-pocket costs directly associated with acquiring or using the domain names. The Complainants referred to Nominet decision D00017732 of 18 October 2016 in this regard, in which it was found that the Respondent had abusively registered the domain name jakks.co.uk. The facts of that matter established that the Respondent demanded in excess of US\$12,000 for the said domain name, which was held to be an abusive registration.

Further, the Complainants alleged that the Domain Name was a blocking registration against a mark in which the Complainants have rights, and that it was the deliberate intention of the Respondent, to intercept internet traffic intended for the Complainants in relation to their EQUEST products.

The Complainants noted that the (Sedo hosted) website accessed via the Domain Name contained links to various weight loss products. They said such use of the Complainants' trade marks by the Respondent was unauthorised and the Complainants have no control over what is being offered to potential customers. The result was an inevitable interference with the Complainants' business because business is diverted and/or the Complainants' reputation is damaged or tarnished.

The intention of the Respondent in using the Complainants' trade mark as the Domain Name was to attract prospective customers to its website. The Domain Name was registered and was being used in a way which has confused or is likely to confuse customers into believing that the Domain Name is registered to, or operated or authorised by, or otherwise connected with the Complainants.

Additionally, the Complainants submitted that the Respondent's registration of the Domain Name was part of a pattern of registrations incorporating trade marks to which the Respondent has no rights. The Complainants pointed to the previous Nominet decision D00017732 (jakks.co.uk) against the Respondent, in support of this contention.

## **The Response**

The Respondent recognised that the Complainants may have registered trade mark rights, but asserted that a trade mark in Class 5 (for animal anthelmintics) was not relevant to the internet, domains, marketing, sales, or business in general.

The Respondent noted that the Domain Name was registered in 2006, 12 years before the Complaint was filed. The Respondent said that in 2005 it was registering hundreds of generic domain names a day and had a portfolio of over 40,000 domains. It admitted that checking for Class 5 trade marks on words with an "e" in front of them was not part of the process.

The Respondent stated that it was unaware of the Complainants and their trade mark until receiving the DRS Complaint, and that it was "unreasonable" to assume that the

Complainants' brand was recognisable beyond its own very niche horse/livestock vaccination industry.

The Respondent acknowledged that it has been engaged in the speculative registration of generic word/phrase/expired domains with the objective of selling them for more than the purchase price to anyone who makes an acceptable offer – and asserted that this is a known and acceptable business practice. It says that the Domain Name is still for sale, and that this is not abusive.

With reference to the Complainants' citation of one adverse prior DRS decision against it as being evidence of a pattern of abusive registrations, the Respondent pointed out that one negative decision against a business which, at its peak, owned over 40,000 domains, and has been registering them for over 15 years, is a very tiny percentage, and certainly doesn't represent a "pattern" for the purposes of the Policy.

The Complainants' allegations that the Domain Name is held as a "blocking registration", to "unfairly disrupt the Complainants' business", or to attract the Complainants' prospective customers to the website, were all denied. The Respondent stressed the lack of any evidence to support the Complainants' assertions on these grounds. It noted that the Complainants themselves do not appear to have any other domain name using the EQUEST mark, and that the Complainants' website itself makes very little reference to the EQUEST products. The Respondent also noted that the website accessed via the Domain Name is clearly a parking page, made no reference to the Complainants, and was very rarely accessed (as evidenced by Sedo's traffic figures).

The Respondent contended that the assumptions, supposition and non-existent evidence presented by the Complainants were not enough to prove abuse. It explained that the Domain Name was originally registered by the Respondent along with thousands of others at a time (2006) when "i" anything and "e" anything were buzzwords (referring to by way of example <https://en.wikipedia.org/wiki/IPod>). The Respondent registered and still owned over 100 other e<word> domains (of which examples were provided). It had also sold many and left many hundreds more to expire over the years.

The Respondent claimed to have registered [equest.co.uk](https://en.wikipedia.org/wiki/EverQuest) for possible use in connection with a MMORPG (Massively multiplayer online role-playing game) in view of the success of EverQuest (<https://en.wikipedia.org/wiki/EverQuest>) and subsequently EverQuest 2.

It provided a copy of the earliest archive.org website capture in 2008 (<https://web.archive.org/web/20080122140706/http://www.equest.co.uk:80/>), which is filled with references to games and computer games.

In the Respondent's view, its reasons for registration of the Domain Name were clearly not abusive. It reiterated that it had no knowledge of the Complainants prior to the DRS Complaint, that the Complainants had waited an unreasonably long time to make this claim via the DRS, and that they had not proved that the Domain Name is an Abusive Registration.

## **The Complainants' Reply**

The Complainants provided a Reply to the Response. They disputed the Respondent's assertion that trade marks are not relevant to the internet, pointing out that businesses are entitled to market their products or services over the internet using their trade marks. They asserted that EQUEST is an invented word, and not a generic term as claimed by the Respondent, and provided results of an identical search for "EQUEST" marks using the UKIPO's searching tool which returned six results. They asserted that the Respondent should have conducted at least such a search before registering the Domain Name, and restated their view that the Respondent was not entitled to register or own the Domain Name in light of the Complainants' proven prior rights. The Respondent had thereby disrupted the Complainants' business and prevented them from being able to register the Domain Name. They said it was self-evident that this was a blocking registration as the Complainants could not register the domain in respect of a product whose trade mark was registered prior to the date of the Domain Name registration.

The Complainants had registered rights in the mark EQUEST and ignorance of such rights is no defence. They also submitted that the Complainants were not barred from bringing a complaint at this time and indeed, a complaint was brought as soon as the Complainants became aware of the domain.

The Respondent had not provided any evidence that it used or prepared to use the Domain Name in connection with a genuine offering of goods or services.

The Complainants considered that, despite denials, the Respondent has essentially admitted engaging in what amounts to a pattern of abusive registrations, with a portfolio of over 40,000 domains, which the Complainants asserted are not all generic as alleged.

The Complainants submitted that, in any event, regardless of the situation and intention of the Respondent at the time of registration, the Domain Name was being used as an Abusive Registration at the time the Complaint was submitted with no reference to computer games.

The Complainants maintained their previous position and confirmed their request that the Domain Name be transferred.

They also made the statement that mediation [as offered by Nominet, without charge] was "not appropriate in this case".

## **The Appeal Notice**

In their Appeal Notice, the Complainants highlight the fact that the Expert found that they had rights which are identical to the distinctive element of the Domain Name, and approve of the Expert's finding that the delay between registration and complaint should not preclude the Complainants from seeking a remedy. However, they submit that the Decision contains little or no assessment of the Complainants' allegation that the Respondent is using the Domain Name in a way that is likely to confuse people.

The Complainants argue that, given the identity of the term "equest" in the Domain Name with its EQUEST trade marks, the use of the Domain Name will inevitably lead to initial

interest confusion among consumers, and they rely on DRS appeal 03027 *EPSON Europe BV v. Cybercorp Enterprises* in support. On that basis, they say that, regardless of the content of the website hosted at [www.equest.co.uk](http://www.equest.co.uk), the use of the Domain Name is likely to confuse people into believing that it is registered to, operated or authorised by, or otherwise connected with the Complainants.

The Complainants say that, while the Respondent denied prior knowledge of the Complainants, they now clearly have full knowledge as a result of these proceedings, and assert that the Respondent at [www.equest.co.uk](http://www.equest.co.uk) now links to various products including “horse wormers”, which is precisely what the Complainants provide under the EQUEST trade mark (see the Revised Parking Page reproduced at the end of this decision). The Complainants assert that the links must appear either deliberately or due to the various algorithms applied by the Respondent to the website such that the links are based on the relevant internet user’s search history, and say that, whichever is the case, when the Complainants’ customers encounter the website they will be confused.

According to the Complainants, the Respondent has an obligation to ensure that such confusion is avoided, which is not being fulfilled. As it stands, and for as long as the Domain Name remains beyond the Complainants’ control the risk of confusion is likely with resultant damage to the Complainants.

The Complainants complain that the Expert’s suggestion that the Complainants’ EQUEST mark was not an invented word, but was “more likely to have been conceived simply by truncating equestrian” was mere speculation. They say that the word has no meaning and cite the fact that it does not appear in the Chambers’ online dictionary, and that, regardless of how it was conceived, EQUEST is a distinctive trade mark, such that its use in the Domain Name combined with web links to “horse wormers” will inevitably confuse consumers.

The Complainants argue that, if the Revised Parking Page is considered to be “new” evidence, it should nevertheless be admitted into the appeal in the interests of natural justice and procedural economy, since the Respondent’s Reply and the Expert’s Decision both make reference to the historical websites appearing at the Domain Name, which have been shown to have changed over time. The Complainants submit that the use made immediately prior to the Complaint is abusive and that the use that has occurred since the Complaint was submitted is also abusive. They add that, if the use that has occurred since the Complaint was submitted is not considered at this stage, the Complainants would be required to submit a further complaint addressing the new circumstances of abusive use, which would result in a multiplicity of proceedings.

### **The Appeal Response**

The Respondent says it agrees with everything that the Expert wrote and expresses surprise that the Complainants did not want to use the Nominet mediation service to at least open a dialogue and that the Complainants still haven’t tried to make any contact, but have opted to continue down the appeal route instead.

The Respondent says that the Complainants’ appeal relies on additional evidence, which is expressly prohibited by “the guidelines” and says that it does not accept or wish to include

the new evidence in the case. However, the Respondent says that, if the Complainants' new evidence is considered, the Panel should also consider the Respondent's additional evidence and explanation. On the other hand, the Respondent's preference is for neither the Complainants' additional evidence nor its own to be taken into account.

The explanation given by the Respondent is as follows:

Once the equest.co.uk DRS was concluded, the Respondent enabled the equest.co.uk domain's Name Servers so that the domain would revert to the Sedo parking page again. At that point the domain was still showing the same results, unrelated to the Complainant.

On receiving the Appeal Notice and seeing the screenshot of the Revised Parking Page, the Respondent checked the Sedo reporting and found that on 30 October 2018 the domain parking page received five visits (the most daily visits in the domain's history, and more than it often receives in a month). The report also showed that for the first time since the domain was registered a search was carried out in the search box on the page, for "horse worming"; in fact out of the five visits to the page, four of them used the search box to search for keywords: "horses for rehome", "horse worming", "wormers", and "rehome". There were also two subsequent searches for "ponies for sale" and "horse".

The Respondent points out that the Complainant's new evidence itself doesn't show the URL for the screenshot, nor does it have a timestamp on it, and says that nor has a single entry in archive.org ever shown similar results ([https://web.archive.org/web/\\*/www.equest.co.uk](https://web.archive.org/web/*/www.equest.co.uk)). It says that one way to make such a screenshot would be to enter the search term "horse worming" into the Search Ad box on the page and screenshot the resulting page; another potential way to make such a screenshot would be simply using Photoshop; and a third way would be to manipulate the Sedo parking algorithm using "Search Ads" keyword searches. The Respondent explains that the way that a Sedo parking page algorithm automatically optimizes the default landing page results it shows is through a combination of factors including the search terms entered into the search box. Given that the domain received virtually no traffic and had never received any searches before 30 October 2018, these four searches could potentially have changed the page search results to one that showed the results in the Complainants' new evidence.

The Respondent refers back to the following statement in its Response at first instance:

*'17. True - you do have a Class 5 Trade Mark in "Animal anthelmintics". Also true, the domain is showing links to diet weight loss juice, healthy diet meals and the fatty liver diet [see domain-screenshot.jpg as we have now removed the Name Servers from the domain to avoid "manipulation" of keywords etc]'*

It says that, while it may be coincidence that the first ever searches on the page in over 12 years were carried out once it enabled the domain again, resulting in the Revised Parking Page, it is more likely that the keyword manipulation was carried out in bad faith by or on behalf of the Complainant.

The Respondent says that it has again removed the domain's Name Servers and it has now manually set the default keywords for this parking page to be "computer games" to ensure that there is no future manipulation, deliberate or otherwise.



The Respondent ends with some comments about the rationale for the rule against filing new evidence on appeal (which the Panel deals with below), and invites the Panel to comment on whether the new evidence in this case would be of any assistance in a new Complaint, which the Complainant has said it would file if the new evidence isn't admitted on appeal. Finally, the Respondent repeats its position that the Domain Name is not an Abusive Registration and should not be transferred.

## **9. Discussion and Findings – in relation to matters that were before the Expert**

Although the nature of this appeal is a rehearing, the Panel wishes to record at the outset that, insofar as the Appeal concerns matters which were before the Expert, it takes the same view as the Expert did, and reaches the same conclusions as he did, for the same reasons as he expressed. The Panel therefore adopts the decision of the Expert but will in addition summarise its views in relation to delay/laches and Rights relatively briefly, below. As regards the main issue of Abusive Registration, the Appeal Panel will first analyse the position as at the date of the Expert's decision. Insofar as this Appeal concerns matters which have occurred subsequent to the Expert's decision, these are discussed separately at Section 10 below.

### **Delay/laches**

Even if there has been delay (which the Complainants dispute) the Appeal Panel does not consider that the circumstances are such as to prevent the Complaint proceeding. See the previous appeal panel decisions in DRS17490 (cheltenham-festival.co.uk) and DRS15788 (starwars.co.uk) for discussion of the relevant principles.

### **Rights**

There is no dispute that the Complainant has Rights in the trade mark EQUEST for the purpose of the Policy. The Appeal Panel has accordingly not found it necessary to analyse this issue in any more detail. The Appeal Panel is satisfied that the Complainants have Rights in a name or mark that is identical to the operative part of the Domain Name.

### **Abusive Registration**

In order to establish that the Domain Name in the hands of the Respondent is an Abusive Registration, the Complainants must show that the Domain Name either:

- i) was registered or otherwise acquired in a manner which, at the time when the registration took place, took unfair advantage of or was unfairly detrimental to the Complainants' 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 Complainants' Rights.

Establishing either or both of these requirements on the balance of probabilities will result in a finding of Abusive Registration.

## **Abusive Registration – at the time when the registration took place**

It is important to bear in mind that the system of registration of domain names is a “first come first served system”. As a general rule any person is entitled to register any available domain name. In order to show that a domain name amounts to an Abusive Registration under (i) above, a Complainant generally needs to show on the balance of probabilities that the Respondent was aware of the Complainant and/or its rights in a name or mark identical or similar to the domain name at the time it was registered. It may also in some circumstances be sufficient to show that the Respondent should have been aware of the Complainant and/or its rights – see further discussion below.

In the present case the Complaint is singularly devoid of any information about the Complainants’ Equest product beyond stating that it is a parasite control product for horses. No information is provided as to whether it is sold in the UK and if so in what quantities, or through what channels, or as to how it is marketed, or about what (if any) advertising is carried out, or as to whether there are alternative competing products available, or indeed any other meaningful information. In those circumstances there is no evidence of any kind before the Appeal Panel that would suggest the Complainants or their EQUEST branded products have any wider recognition outside the direct purchasers/users of such products (assuming in the Complainants’ favour that such direct purchasers/users exist). Accordingly there is nothing before the Appeal Panel to suggest that the general public in the UK (or elsewhere) would have any knowledge of the Complainants, or their products, or their EQUEST trade mark.

Against that background the Appeal Panel regards the Respondent’s denial of any knowledge of the Complainants or their EQUEST trade mark (until it received the present Complaint) as entirely credible and sees no reason to doubt it. The Respondent’s explanation as to how it came to choose “equest” for registration as a domain name also appears entirely credible and reasonable and again the Appeal Panel sees no reason to doubt it.

In those circumstances the Panel considers there is no basis for concluding that the original registration took unfair advantage of or was unfairly detrimental to the Complainants’ Rights. It is inevitably the case that where there is a pre-existing earlier identical trade mark, then the effect of registration of a word the same as the trade mark will be to block the trade mark owner from subsequently registering that word as the operative part of a domain name. The Complainants suggest that this falls within the Policy, in that paragraph 5.1.1 provides that evidence of Abusive Registration includes: “5.1.1 Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily: ..... 5.1.1.2 as a blocking registration against a name or mark in which the Complainant has Rights”. That suggestion runs contrary to the consistent approach of successive DRS Experts and Appeal Panels - see paragraph 2.4 of the DRS Expert Overview (v3) and Appeal Panel decision DRS 04331 (verbatim.co.uk) referred to therein. The settled interpretation of paragraph 5.1.1.2 is that it requires that the registrant must have acquired the domain name *as a blocking registration*, that is to say the registrant must have had the intention of blocking when effecting the registration. In circumstances where the Respondent had no knowledge of the Complainants or their EQUEST trade mark this cannot be the case. The same is also true of the provisions of paragraphs 5.1.1.1 and 5.1.1.3 of the Policy which the Complainants also rely upon.

The Complainants have also submitted that the Respondent is engaged in a pattern of registrations which correspond to well-known names or trade marks in which the Respondent has no apparent rights and that the Domain Name is part of that pattern. The Complainants point to DRS 17732 (jakks.co.uk) in this regard. The decision in that case is available on Nominet's website. It appears to the Appeal Panel to be a decision where the merits were relatively finely balanced, although the Expert ultimately decided for the complainant. That single data point does not in the opinion of the Appeal Panel provide a credible basis for an adverse finding against the Respondent in the present case – particularly when the Respondent has been in the business of registering and trading in domain names for many years, and has held many thousands of domain names.

What paragraph 5.1.3 of the Policy provides is that one consideration which may be evidence that a domain name is an Abusive Registration is where: “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”

The Appeal Panel agrees with the Respondent that a single adverse finding does not amount to a “pattern”. The Appeal Panel therefore rejects this argument.

More fundamentally the Complainants appear to take strong objection to the Respondent's business of speculatively registering domain names and offering them for sale for significant sums. The Complainants seem to regard this practice as objectionable per se. For example in the Complaint they state that “It is submitted that the Respondent's business model is to engage in the abusive predatory registration of domain names to which the Respondent has no legitimate rights or interests with the purpose of selling to the highest bidder in excess of the Respondent's documented out-of-pocket costs directly associated with acquiring or using the domain names”. Unpacking that allegation, the practice therein described does not merit the tendentious adjectives 'predatory' or 'abusive'. . It is well established that speculative trading in domain names is not in itself objectionable - the Policy expressly provides in paragraph 8.4 that “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”.

It should be recognised that there are circumstances where a finding of Abusive Registration may be made, not on the basis of a respondent's actual knowledge, but instead on the basis that a respondent should have been aware of a complainant's Rights. This arises in circumstances where a respondent is in effect wilfully blind, or fails to make any proper enquiries, typically for example when acquiring a portfolio of multiple domain names, or automatically re-registering lapsed domain names. That type of activity is entirely permissible but if a respondent fails to carry out at least some enquiries it may well be at risk of such a finding if it turns out it has registered a domain name which, had it considered the matter, it would have known corresponded to a name or trade mark in which Rights subsisted. In any such case the relevant facts will be important including how well known the trade mark or name in question was. There is not however a general obligation on all registrants of domain names to proactively carry out trade mark searches. On the facts of this case (above) it has not been demonstrated that the Respondent should have known of the Complainants or their EQUEST trade mark.

The Appeal Panel therefore declines to find that the Domain Name was registered or otherwise acquired in a manner which, at the time when the registration took place, took unfair advantage of or was unfairly detrimental to the Complainants' Rights.

**Abusive Registration – the subsequent use made of <equest.co.uk> in evidence before the Expert**

The Domain Name was linked to a “parking page” hosted by SEDO a copy of which is at Annex 1 to this decision. Beyond providing this screenshot the Complainants have not provided any further detail about what a visitor to the webpage will experience if he or she interacts with the links on the page. It appears to the Appeal Panel that all the links on the page in question are indirect links in the sense that, when clicked on, they will take the visitor to a further page of links. The Appeal Panel thinks it likely that such further pages will then contain direct links each of which, when clicked on, takes the visitor to a third party website. This is, in the Appeal Panel's experience, a common way for parking pages to be arranged, the intention being to attract visitors to a page of direct links more likely to be of interest to them.

Such pages are in the Appeal Panel's experience widely used, in particular by traders in domain names. The relevant pages are typically automatically created and some revenue will be generated if visitors to the page click through via the links to another site, although the amounts concerned are typically very small. The advantage of this arrangement is that it provides a mechanism for making the domain name available for sale whilst potentially earning some revenue to defray the cost of maintaining the domain name registration.

It is convenient at this stage to repeat what an earlier Appeal Panel said in a recent DRS case which raised very similar issues about parking pages, namely D00019567 (forte.co.uk) as follows:-

“ The manner in which the content of such pages is automatically created is not straightforward to understand. In cases where parties wish to rely upon the detail of such pages as an important feature of a case they would be well advised to provide appropriate technical evidence explaining precisely what is happening. In the present case the evidence is not satisfactory and has led to significant dispute.

The Appeal Panel's understanding is as follows. The algorithms used often take into account the words contained within the domain name itself. They may also draw on other sources of data, such as Google or other search engines. They may well also take into account data relating to the particular visitor to the webpage. This could include the geographical association of the visitor's IP address and also cookies or other data stored on the visitor's system indicating for example other searches carried out or websites visited. Some or all of these factors are used to generate automatically a page of links, which may well be generated “on the fly” for a particular visitor and change dynamically in response to what the visitor clicks on.

The Appeal Panel does not know in what circumstances Indirect Links are generated rather than direct links, or what exactly causes any given link to be generated. However, it is clear that the content of the parking page may vary depending upon when it is visited and by whom. It also seems that the operator of the parking site (who may or may not be the domain name owner) has the ability to

modify how the page content is generated and can ultimately remove the page altogether, either replacing it with another type of page (for example a simple “this domain is for sale” page) or leaving the domain name dangling so it no longer resolves at all.

The Appeal Panel considers that linking portfolios of domain names to parking pages in this manner is unobjectionable in itself. However the links generated on the parking page may be objectionable; whether they are objectionable is a question of fact depending on all the circumstances of the case. It will be necessary to consider the detail of the links in question and assess to what extent such links are causing or are likely to cause the complainant harm. In circumstances where it seems on the evidence that harm is being caused or is likely to be caused then a respondent may come under an obligation to change the nature or behaviour of the page or risk the domain name being found to have been used in a manner which has been unfairly detrimental to the complainant’s Rights. Similar remarks apply to the respondent deriving unfair advantage from the links because of the complainant’s Rights.”

In the present case no evidence was provided at first instance as to the amount of traffic the Original Parking Page attracted. There is also no evidence about the numbers of internet users who visit relevant pages of the Complainants’ website at [www.zoetis.com](http://www.zoetis.com) or indeed about how well known (or not) the Complainants’ EQUEST products are. The Appeal Panel does not therefore consider there to be any evidence which would suggest that significant numbers of persons looking for a website concerning the Complainants or their EQUEST product would by mistake arrive at the Original Parking Page. It is also in the Appeal Panel’s opinion relevant to note that as a matter of common sense if a visitor to the Original Parking Page had nevertheless arrived there looking for a webpage operated by or associated with the Complainants, or related to their EQUEST products, that visitor would inevitably immediately realise that he was not at the page he was looking for and would adopt an alternative approach to find the destination he wanted.

The Appeal Panel cannot see how the content of the Original Parking Page can realistically be said to have caused the Complainants harm or benefitted the Respondent in a way that could be said to take unfair advantage of the Complainants’ Rights. Even if the Panel were to assume that an actual or potential customer of the Complainants arrived at this page by mistake (for example by incorrectly guessing the web address for the Complainants’ Equest products) the Appeal Panel considers it would immediately realise its error and adopt another approach, particularly given that there is no evidence that any of the links in question lead to products that compete with those of the Complainants. The Appeal Panel does not consider that this is a case where such “initial interest confusion” plays a major role or justifies a finding of Abusive Registration (see the Overview paragraph 3.3) given the lack of any information about the Complainants’ business in their EQUEST branded products, the self evidently specialised nature of those products, and the fact that none of the indirect links on the Original Parking Page seem to have anything to do with that type of product.

This conclusion rests on the facts of this case and the nature of the Complainants’ business. A different analysis might apply to a parking page which promoted links to products that competed with those of a complainant, although the relevant facts would need to be considered. Evidence as to the nature of the products in question, the likely customers for such products, the amount of traffic likely to be attracted to the parking page in question,

and the nature of the domain name itself are all at least potentially relevant factors to be considered.

In conclusion, the Appeal Panel does not find it credible that the Complainants have lost any sales as a result of the Respondent's activities or that, for example, they have unfairly had to pay (indirectly) for pay-per-click visits to their website. Accordingly the Appeal Panel considers that the Respondent has not unfairly benefited from the coincidental match between <equest.co.uk> and the Complainants' Rights in their EQUEST trade mark.

## **10. Discussion and Findings – in relation to matters that have occurred subsequent to the Expert's decision**

In their Appeal the Complainants now seek to rely upon the Revised Parking Page (see copy at Annex 2). The Respondent objects to this new evidence being adduced but has responded with its own evidence which it asks be admitted in the event that the Appeal Panel does consider the Complainants' case in this regard.

The Policy provides (paragraph 20.6) that “an appeal notice should not exceed 1000 words, should set out detailed grounds and reasons for the appeal, but shall contain no new evidence or annexes” [emphasis added].

The Appeal Panel nevertheless has a discretion to admit new evidence as the Policy also provides (paragraph 20.8) that “The appeal panel should not normally take into consideration any new evidence presented in an appeal notice or appeal response, unless they believe that it is in the interests of justice to do so” [emphasis added].

In addition paragraph 21.2 of the Policy deals with repeat complaints and provides:

“21.2 In determining whether a complaint is a resubmission of an earlier complaint, or contains a material difference that justifies a re-hearing the Expert shall consider the following questions:

21.2.1 Are the Complainant, the Respondent and the domain name in issue the same as in the earlier case?

21.2.2 Does the substance of the complaint relate to acts that occurred prior to or subsequent to the close of submissions in the earlier case?

21.2.3 If the substance of the complaint relates to acts that occurred prior to the close of submissions in the earlier case, are there any exceptional grounds for the rehearing or reconsideration, bearing in mind the need to protect the integrity and smooth operation of the DRS;

21.2.4 If the substance of the complaint relates to acts that occurred subsequent to the close of submissions in the earlier decision, acts on which the re-filed complaint is based should not be, in substance, the same as the acts on which the previous complaint was based.”

In the Appeal Panel's view these provisions make clear that where new evidence of a material change of circumstances arises after the original complaint has been determined by

the first instance Expert, the appropriate course is to file a repeat complaint and rely upon the provisions of paragraph 21.2 as to why that complaint should proceed. Given the existence of these provisions, the Appeal Panel does not consider it is in the interests of justice within the meaning of paragraph 20.8 to depart from the normal rule in paragraph 20.6, and declines to admit the Complainants' new evidence.

It follows that the appropriate course is for the Complainants to file a new complaint if they wish to proceed with their case in this regard. The Complainants in their notice of appeal appeared to recognise this possibility, but suggested that natural justice made it more convenient to proceed by way of appeal, and this potentially avoided a "multiplicity of proceedings". The Appeal Panel does not agree. The original complaint is (after this Appeal decision) now determined and a repeat complaint would involve a single further complaint, in accordance with the Policy.

The determination of any such complaint, if submitted, will be for the appointed Expert based on whatever evidence is filed. For the assistance of the parties the Appeal Panel does however wish to record one observation in relation to the evidence which was sought to be admitted in the Appeal, relating to the Revised Parking Page.

As noted above, the appeal panel in DRS 19567 (forte.co.uk) addressed very similar issues as to parking pages in that case and stated as follows: "the manner in which the content of such pages is automatically created is not straightforward to understand. In cases where parties wish to rely upon the detail of such pages as an important feature of a case they would be well advised to provide appropriate technical evidence explaining precisely what is happening. In the present case the evidence is not satisfactory and has led to significant dispute".

The above observations apply with equal force in the present case. The Complainant has sought to place in evidence a single screenshot of the Revised Parking Page. It has not explained when that screenshot was taken or by whom or in what circumstances. All of the links on the page in question appear to be indirect links which presumably, if clicked on, lead to further automatically generated pages with links to third party sites. None of those further pages have been placed in evidence, so it is not clear what ultimate destinations might be reached by a visitor as a result of any given sequence of interactions with the webpages in question. Further, no details are given as to whether repeat visits to the Revised Parking Page have been made in the course of obtaining this screenshot, and if so how many. Nor has any information been provided which assists in determining whether or not other aspects of whatever system was used to access the Revised Parking Page (such as for example "cookies", browsing history, and geolocation) might have influenced the content of the displayed page.

The Respondent for its part has sought to adduce evidence which appears to show that the content of the page in evidence is atypical and may have been influenced by searches for particular terms carried out via the search facility available on the Revised Parking Page. It suggests (amongst other possibilities) this search was likely carried out by the Complainants or their representatives and in effect caused the behaviour which is now said to be objectionable. The Appeal Panel does not need to resolve this issue, but would nonetheless emphasise that any party seeking to rely on the content of an automatically generated webpage or webpages should provide appropriate supporting evidence. In particular it is desirable to ensure that the evidence should, wherever possible, reflect what

a “typical” visitor to the webpage(s) in question will experience. It should also fully explain how the page(s) in question operate and demonstrate exactly what happens if any links relied upon are clicked on. The Appeal Panel’s view is that it cannot be sure that has happened in the present case and hence that it would be unwise to reach any conclusion as to the Respondent’s bad faith based solely on this evidence.

## **11. Decision**

The Appeal Panel declines to admit new evidence from the Complainants which concerns matters subsequent to the Expert’s decision. The Appeal Panel concludes that the Complainants have Rights in a mark (EQUEST) which is identical to the Domain Name but have failed to show that the Domain Name is an Abusive Registration. For the foregoing reasons the Appeal Panel orders that the appeal be dismissed.

**Dated 9 January 2019**

**Signed .....**

**Nick Gardner**

**Signed .....**

**Philip Roberts**

**Signed .....**

**Anna Carboni**



## ANNEX 1 – Original Parking Page

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## ANNEX 2 – Revised Parking Page

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