

.nz Dispute Resolution Service

DRS Reference: 881

Key words

Domain names – rackspace.co.nz and rackspace.net.nz

Identical or similar trade mark or name – registered marks – identical – similar

Rights – demonstrable preparations to use (and used) before Complaint – legitimate or fair use

Unfair Registration – fair registration – fair use – offer to sell or otherwise transfer – likely to confuse, mislead or deceive – blocking registration - unfairly disrupting the business of the Complainant

Procedure – Complaint dismissed

1. Parties

Complainant:

Rackspace US, Inc.
5000 Walzem Road
San Antonio, Texas 78218
United States of America

Respondent:

Brendan McNeill
119 Aorangi Road
Christchurch 8005
New Zealand

2. Domain Name/s

rackspace.co.nz and rackspace.net.nz ("the Domain Name/s")

3. Procedural history

3.1 The Complaint was lodged by the Complainant's representative (Hamish Fraser of Truman Hoyle Lawyers at Sydney) on 12 July 2013. The domains were locked on 12 July 2013, preventing any changes to the record until the conclusion of this case. The .nz Domain Name Commission ("DNC")¹ notified the Respondent of the validated Complaint by letter dated 12 July 2013.

3.2 The Respondent filed a Response to the Complaint on 15 July 2013. The Complainant's representative filed a Reply to the Response on 24 July 2013. The substantive content of the Reply was of similar length to the Complaint.

¹ Domain Name Commission Limited is a company wholly-owned by InternetNZ (Internet New Zealand Inc) responsible for the day-to-day oversight of the .nz domain name registration and management system.

While the Complaint contained four annexures, the Reply contained six. As noted in paragraph B5.1 of the .nz Domain Name Commission Dispute Resolution Service Policy (“the Policy”),² the Reply should be confined to answering the Response; it is not an opportunity to reformulate the Complaint or to adduce annexures by way of evidence which ought to have been included with the Complaint.

- 3.3 The DNC referred the dispute to informal mediation on 26 July 2013. The DNC notified the parties on 27 August 2013 that it had not been possible to resolve the dispute by informal mediation.
- 3.4 By letters dated 27 August 2013, the DNC notified the parties that the Complaint would be referred to an independent expert for decision if the Complainant paid the appropriate fees by 10 September 2013. The Complainant’s representative paid the appropriate fees on 29 August 2013.
- 3.5 Terence Stapleton QC, the undersigned, confirmed to the DNC that he knew of no reason why he could not properly accept the invitation to act as Expert in this case and that he knew of no matters which ought to be drawn to the attention of the parties which might appear to call into question his independence and/or impartiality. On 30 August 2013, Mr Stapleton was appointed to act as the independent expert in this case (“the Expert”) pursuant to paragraph 9 of the Policy.

4. Factual background

- 4.1 The Complainant was founded in 1998. It provides cloud, managed and email hosting services. It has a number of international offices, including Australia, the Netherlands, the United Kingdom, Switzerland and Hong Kong.
- 4.2 The Complainant asserted, but did not provide documentary evidence to enable the Expert to find as facts, that:
 - (a) the Complainant’s offices serve a combined total of more than 200,000 customers worldwide;
 - (b) the Complainant generates approximately NZ\$1 million per month in revenue from its New Zealand customers and plans to open a dedicated office in New Zealand by the end of 2013 or early 2014.
- 4.3 The Complainant owns trade mark registrations in New Zealand for the words RACKSPACE and RACKSPACE HOSTING. Details of the Complainant’s trade marks are as follows:
 - (a) trade mark number 753337 for the word RACKSPACE is registered in class 42 which applies to technological and related services in the computer and internet fields. The trade mark was filed on 16 August 2006, is deemed to have been registered on that date, and is due for renewal on 16 August 2016;

² Words beginning with uppercase letters in this decision include terms defined in paragraph 3 of the Policy.

- (b) trade mark number 790281 for the words RACKSPACE HOSTING is registered in classes 35 (hosting and related services), 38 (telecommunications (including email) services) and 42 (as described above). The trade mark was filed on 29 May 2008, is deemed to have been registered on that date, and is due for renewal on 29 May 2018.

4.4 The Respondent is a company director with business interests in internet and related services. Details of his business interests relevant to this case are as follows:

- (a) in 1997 (the year before the Complainant was founded), Digiweb New Zealand Limited (“DNZL”) was incorporated on 7 April 1997;
- (b) since 7 April 1997, the Respondent and Kathrynne Dianne McNeill (“Ms McNeill”) have been directors of DNZL. From 7 April 1997 to 10 November 2009, they were the only directors of that company. On the latter date, they were joined as directors by Adrian David Grant (“Mr Grant”) and Robert John Rolls (“Mr Rolls”), both of Auckland;
- (c) from 7 April 1997 to 14 February 2008, the Respondent and Ms McNeill each held 500 of DNZL’s 1,000 shares. DNZL now has 1,100 shares which are held in two parcels (1,000 and 100 shares respectively) by Digiweb Holdings Limited (“DHL”);
- (d) DHL was incorporated on 2 April 2009. The Respondent, Ms McNeill and Messrs Grant and Rolls are the directors of that company. DHL’s five million shares are held in two parcels (three million and two million respectively) by Ken Lord (a Christchurch lawyer), the Respondent and Ms McNeill jointly as to three million shares³ and two million shares by Aminoex Capital Limited (“ACL”);
- (e) ACL was incorporated on 3 April 2009. Since that date, Messrs Grant and Rolls have been ACL’s only directors. ACL’s 1,000 shares are held equally by Messrs Grant and Rolls and associated or related interests;
- (f) Digiweb Australia Limited (“DAL”) was incorporated on 27 July 2011. The Respondent, Ms McNeill and Messrs Grant and Rolls are the directors of that company. DAL’s 1,000 shares are held as follows:
 - (i) 500 shares by Axiion Corporation Limited (“Discount Domains”) which was incorporated on 21 October 2005 as Discount Domains Limited. The Respondent and Ms McNeill are Discount Domains’ directors. Discount Domains’ 100 shares are all held jointly by Mr Lord, the Respondent and Ms McNeill;
 - (ii) 250 shares are held by interests associated or related to Mr Rolls;
 - (iii) 250 shares are held by interests associated or related to Mr Grant.⁴

³ The joint ownership suggesting ownership as trustees of a McNeill trust.

⁴ DNZL, DHL, ACL, DAL and Discount Domains are all companies incorporated under the Companies Act 1993. All details referred to in paragraph 4.4 of this decision are publicly available at www.companies.govt.nz.

- 4.5 On 13 March 1997 (approximately a month before the incorporation of DNZL), the Respondent registered the digiweb.co.nz domain name.
- 4.6 The Respondent purchased the rackspace.co.nz Domain Name on 12 October 2000, approximately six years before the deemed date of registration of the Complainant's RACKSPACE trade mark on 16 August 2006, and approximately seven and a half years before the registration of the Complainant's RACKSPACE HOSTING trade mark on 29 May 2008.
- 4.7 The Respondent purchased the rackspace.net.nz Domain Name on 2 March 2003, approximately three and a half years before the deemed date of registration of the Complainant's RACKSPACE trade mark on 16 August 2006, and approximately five years before the registration of the Complainant's RACKSPACE HOSTING trade mark on 29 May 2008.
- 4.8 Whois searches of the New Zealand Domain Name Registry Limited as at 12 July 2013 record that the status of each of the Domain Names was active at that date (the date the domains were locked). At that date:
- (a) the Domain Name rackspace.co.nz was being used for DNZL's website. A screenshot of the home page of DNZL's website at that date describes DNZL as "a full service cloud hosting, web hosting, domain name management and payment gateway operator providing services to small, medium and enterprise clients across New Zealand and Australia". The screenshot refers to DNZL's four datacentres (three in New Zealand and one in Australia) and describes DNZL's services (including web hosting, database hosting, SSL certificates, dedicated servers, cloud servers/VPS, backup services, megacloud storage, co-location, domain names, email services, e-commerce and the Digiweb partner network);
 - (b) the Domain Name rackspace.net.nz was being used for Discount Domains' website. A screenshot of the home page of Discount Domains' website at that date describes Discount Domains as "the New Zealand specialist in affordable domain name registration. As an authorised .nz domain names registrar, Discount Domains have met the strict criteria for access to the Shared Registry System (SRS) laid down by the office of the New Zealand Domain Name Commissioner". The screenshot asks browsers or customers "Want to register a domain? Purchasing a Domain name is Easy with our Four Step Process" and also provides an email address and a landline number for assistance.
- 4.9 Annexure D to the Reply is a screenshot of the home page of the website at digiweb.co.nz. The home page is headed "Services Dedicated Servers" and then contains information about dedicated servers. The screenshot states that "Digiweb is an authorised IBM business partner and has standardised on the provisioning of IBM system X series rack mount and blade servers for customers seeking a dedicated server option". The screenshot states "Servers can be provisioned in any one of Digiweb's New Zealand or Australian datacentre locations", contains information about monthly rentals, and states "Bespoke customer solutions can be developed including high availability, virtualisation and more". The screenshot describes Digiweb's

services in the same terms set out in the final sentence in paragraph 4.8(a) of this decision.

4.10 From 30 September 2011 to 23 November 2011, the parties exchanged emails about the Domain Name rackspace.co.nz as follows:

(a) on 30 September 2011, the Respondent emailed Mark Randall of the Complainant as follows:

I'm the owner of the domain rackspace.co.nz, and I understand you may be interested in purchasing it?

I established digiweb.co.nz in 1997, and in approximately 2000, I purchased the domain rackspace.co.nz along with virtualservers.co.nz and a few other domain names that depicted the services we offered.

I can understand why you would want to purchase the domain, and if you make me a fair offer it's yours.

(b) on 5 October 2011, Sabina Jausovec ("Ms Jausovec") emailed the Respondent as follows:

Mark Randall informed me that you are the owner of the domain rackspace.co.nz, and would be willing to sell it.

Could you please let me know what would you consider a fair offer?

(c) on 5 October 2011, the Respondent replied to Ms Jausovec's email as follows:

I understand that Rackspace.com is a successful hosting business with revenues approaching USD\$1.0B per annum, and over 3,000 staff world wide.

Securing the domain rackspace.co.nz provides opportunities for you to expand into the New Zealand marketplace, and to establish your brand in this domain space. While ultimately only you can determine its value to your business, I imagine it will be linked to the size of the NZ market, your potential revenue share over the next three to five years and beyond, combined with brand security.

I suggest you make me a value based offer, and I'll let you know if it is acceptable.

(d) on 17 November 2011, Ms Jausovec emailed the Respondent as follows:

I apologise for the delay, but trying to get an approved offer for you has taken some time.

We would like to put forward an offer of \$1,000 USD for the transfer of the domain rackspace.co.nz.

If this offer is acceptable, we can discuss the details around the transfer of the domain name and payment.

- (e) the relevant parts of the Respondent's reply to Ms Jausovec's email in (d) above are as follows:

I'm surprised that you value your brand so poorly, but then I guess there is nothing lost in asking me to give you the domain.

Unfortunately, you are a couple of zeros left of the decimal point short of my expectations. If I am going to be assisting a successful global competitor into the New Zealand market, then the compensation should be fair and reasonable.

To put that into perspective, USD \$100K is about what I pay for a senior systems engineer's salary for one year.

In any event, it's for you to decide.

- (f) on 23 November 2011, Ms Jausovec emailed the Respondent as follows:

Thank you for your time and thought on this matter.

Clearly your expectations are significantly greater than we are willing to pay for it. Given we're so far apart I can see little chance of reaching an agreement, so it's probably best to move on at this point.

I wish you all the best in the future.

- (g) on 23 November 2011, the Respondent replied to Ms Jausovec's email as follows:

Yes, that's fine. Thank you for closing the loop on the conversation.

All the best.

- 4.11 With the negotiations at an end, the Domain Names continued to be used as set out in paragraphs 4.8(a) and 4.8(b) of this decision, and there is no evidence of any further correspondence or events occurring over the 20 month period from November 2011 to July 2013.

5. The Complainant's contentions

- 5.1 In each case, the Complainant contends that the registration of the Domain Name is an Unfair Registration because:

- (a) the Respondent's use of the Domain Name for the provision of services identical or similar to those provided by the Complainant would clearly be an infringement of the Complainant's trade mark rights;

- (b) the Respondent has used the Domain Name for the purpose of selling, renting or otherwise transferring the Domain Name to the Complainant for excessive valuable consideration;⁵
- (c) the Respondent is using the Domain Name in a way which is confusing, misleading and deceptive;
- (d) the Respondent is using the Domain Name as a means of blocking registration against the Complainant;
- (e) the Respondent has registered the Domain Name primarily for the purpose of unfairly disrupting the Complainant's business;
- (f) it is impossible for the Respondent to demonstrate that the Domain Name is not an Unfair Registration in terms of paragraphs 6.1.1(b), 6.1.1(c) and 6.1.2 of the Policy (the Expert notes that the contention of impossibility is not made in respect of paragraph 6.1.1(a) of the Policy which is set out in paragraph 8.1 of this decision).

6. The Respondent's contentions

6.1 The Respondent's contentions are summarised as follows:

- (a) domain names in the .nz space are registered on a "first come first served" basis;
- (b) in each case, the Respondent purchased the Domain Name in good faith several years before the Complainant registered its trade marks;
- (c) the provision of rack space in DNZL's datacentres is a legitimate and generic service provided by DNZL and other hosting companies;
- (d) there is no attempt to pass off DNZL or Discount Domains as the Complainant;
- (e) in each case, relinquishing the Domain Name could have a negative commercial impact on DNZL's or Discount Domains' business;
- (f) in each case, the Respondent is willing to relinquish the Domain Name for a fair price that recognises the potential loss of business DNZL or Discount Domains could incur;
- (g) the Complainant has resorted to the lodgement of a specious claim with the DNC rather than progress commercial discussions with the Respondent on a fair and reasonable basis.

7. The Complainant's contentions in reply

7.1 The Complainant's contentions in reply are as follows:

⁵ As the contents of the emails set out at paragraph 4.10 of this decision relate only to the rackspace.co.nz Domain Name, this contention can relate only to that Domain Name, and not to rackspace.net.nz.

- (a) in each case, in summary, the Respondent has not shown any proper basis on which it can be said the registration is not an Unfair Registration and, more specifically, the Respondent has not adequately (or at all) addressed the definition of Unfair Registration in paragraph 3 of the Policy or any of the criteria set out in paragraph 6.1 of the Policy which provides a non-exhaustive list of factors which may be evidence that the Domain Name is not an Unfair Registration;
- (b) in terms of the definition of Unfair Registration in paragraph 3 of the Policy, it is an Unfair Registration if the Domain Name was registered in a manner which, at the time of registration, took unfair advantage of or was unfairly detrimental to the Complainant's rights OR has been, or is likely to be, used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's rights;⁶
- (c) in each case, the Respondent's summarised contentions did not demonstrate that the registration was not an Unfair Registration.

8. Relevant provisions of Policy and elements required to uphold Complaint

8.1 The dispute is governed by the Policy. Relevant provisions of the Policy in this case are as follows:

3. Definitions

Rights includes, but is not limited to, rights enforceable under New Zealand law. However, a Complainant will be unable to rely on rights in a name or term which is wholly descriptive of the Complainant's business;

Unfair Registration means a Domain Name which either:

- (i) was registered or otherwise acquired in a manner which, at the time when the registration or acquisition took place, took unfair advantage of or was unfairly detrimental to the Complainant's Rights; OR
- (ii) has been, or is likely to be, used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's Rights;

Part A – Policy

4. Dispute Resolution Service

4.1 This Policy and Procedure applies to Respondents when a Complainant asserts to the DNC according to the Procedure that:

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

4.1.2 The Domain Name, in the hands of the Respondent, is an Unfair Registration.

4.2 The Complainant is required to prove to the Expert that both elements are present on the balance of probabilities.

...

⁶ Described by the Complainant as the first and second limbs of the definition.

5. Evidence of Unfair Registration

5.1 A non-exhaustive list of factors which may be evidence that the Domain Name is an Unfair Registration is set out in paragraphs 5.1.1 – 5.1.5:

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

- (a) 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;
- (b) as a blocking registration against a name or mark in which the Complainant has Rights; or
- (c) for the purpose of unfairly disrupting the business of the Complainant; or

5.1.2 Circumstances demonstrating that the Respondent is using the Domain Name in a way which is likely to confuse, mislead or deceive people or businesses into believing that the Domain Name is registered to, operated or authorised, by or otherwise connected with the Complainant;

...

6. How the Respondent may demonstrate in its Response that the Domain Name is not an Unfair Registration

6.1 A non-exhaustive list of factors which may be evidence that the Domain Name is not an Unfair Registration is set out in paragraphs 6.1.1 – 6.1.4:

6.1.1 Before being aware of the Complainant's cause for complaint (not necessarily the Complaint itself), the Respondent has:

- (a) used or made demonstrable preparations to use the Domain Name or a Domain Name which is similar to the Domain Name in connection with a genuine offering of goods or services;
- (b) been commonly known by the name or legitimately connected with a mark which is identical or similar to the Domain Name;
- (c) made legitimate non-commercial or fair use of the Domain Name; or

6.1.2 The Domain Name is generic or descriptive and the Respondent is making fair use of it in a way which is consistent with its generic or descriptive character.

8.2 For an Expert to uphold a Complaint, paragraph 4.2 of the Policy requires the Complainant to prove to the Expert on the balance of probabilities that both the following elements are present:

- (a) the Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name;⁷ and

⁷ Paragraph 4.1.1 of the Policy.

(b) the Domain Name, in the hands of the Respondent, is an Unfair Registration.⁸

8.3 In its Reply, the Complainant contended that it was for the Respondent to show that registration was not an Unfair Registration by reference to the definition in paragraph 3 of the Policy and the criteria set out in paragraph 6 of the Policy which sets out a non-exhaustive list of factors that may evidence that the registration is not an Unfair Registration. The Complainant's contention is contrary to paragraphs 4.1 and 4.2 of the Policy and is not upheld by the Expert.

8.4 The Expert now considers each of the elements in paragraphs 4.1.1 and 4.1.2 of the Policy in respect of each of the Domain Names.

9. rackspace.co.nz

9.1 The Complainant has proved to the Expert on the balance of probabilities that the Complainant has Rights in respect of a name or mark (the trade marks RACKSPACE and RACKSPACE HOSTING) which are identical or similar to the Domain Name (rackspace.co.nz).

9.2 However, in view of the facts set out in part 4 of this decision, the Complainant has not proved to the Expert on the balance of probabilities that:

(a) the Complainant had those rights (which only commenced on the deemed date of registration on 16 August 2006) when the Respondent purchased (otherwise acquired) the Domain Name on 12 October 2000. The timing is such that the acquisition could not take unfair advantage of, or be unfairly detrimental to, rights which did not exist at the date of acquisition;

(b) the Domain Name has been, or is likely to be, used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's Rights. The use of the Domain Name for DNZL's website in accordance with paragraph 6.1.1(a) of the Policy does not take unfair advantage of and is not unfairly detrimental to the Complainant's Rights.

9.3 As the Complainant has not proved the element in paragraph 4.1.2 of the Policy (the Domain Name, in the hands of the Respondent, is an Unfair Registration), and thus not proved either the first or the second limb of the definition of Unfair Registration in paragraph 3 of the Policy, the Expert must dismiss the Complaint.

9.4 For completeness, the Expert addresses the Complainant's contentions in paragraph 5.1 of this decision as follows:

(a) contrary to the Complainant's contention in paragraph 5.1(a), the Respondent's use of the Domain Name for DNZL's website is not clearly an infringement of the Complainant's trade mark rights;

⁸ Paragraph 4.1.2 of the Policy.

- (b) the Complainant's contention in paragraph 5.1(b) does not correctly state paragraph 5.1.1(a) of the Policy. Correctly stated, and correctly construed, the contents of the emails between 30 September 2011 and 23 November 2011 set out in paragraph 4.10 of this decision are not circumstances indicating that the Respondent purchased (otherwise acquired) the Domain Name primarily for the purposes specified in paragraph 5.1.1(a) of the Policy. All that the emails record and establish is the Respondent (a director of an established business with Rights in respect of the Domain Name) indicating that he is prepared to sell the Domain Name to the Complainant if they can agree on price and any other terms;
- (c) contrary to the Complainant's contention in paragraph 5.1(c), there is no evidence before the Expert that the Domain Name is being used in a way which is likely to confuse, mislead or deceive people or businesses into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant (as required by paragraph 5.1.2 of the Policy). Proof of the circumstances specified in that paragraph is invariably provided by statements from browsers and customers to the effect that they used the Domain Name in the belief that it would take them to the Complainant's website, but instead it took them to another website which they did not wish to visit. No statements of evidence to that effect were provided with either the Complaint or the Reply in this case;
- (d) the Complainant's contention in paragraph 5.1(d) does not correctly state paragraph 5.1.1(b) of the Policy. The Respondent did not purchase (otherwise acquire) the Domain Name for the purpose (primary or otherwise) as a blocking registration against the Complainant's trade marks;
- (e) the Complainant's contention in paragraph 5.1(e) does not correctly state paragraph 5.1.1(c) of the Policy. The Respondent did not purchase (otherwise acquire) the Domain Name for the purpose (primary or otherwise) of unfairly disrupting the business of the Complainant;
- (f) the facts set out in part 4 and elsewhere in this decision are such that the Expert cannot, and does not, uphold the impossibility contention in paragraph 5.1(f) of this decision. As noted, the Complainant's contentions did not address paragraph 6.1.1(a) of the Policy, and the Expert's finding in respect of that paragraph is that the Domain Name has been, and is being, used in connection with the genuine offering of DNZL's goods or services.

9.5 In view of the Expert's finding that the Complainant has not proved the element in paragraph 4.1.2 of the Policy (the Domain Name, in the hands of the Respondent, is an Unfair Registration), it is not necessary for the Expert to address all the Respondent's contentions in paragraph 6.1 of this decision, but the Expert does note that the fact that domain names in the .nz space are

registered on a “first come first served” basis does not in any way override the Policy. All .nz domain name registrations are subject to the Policy.

10. rackspace.net.nz

- 10.1 The Complainant has proved to the Expert on the balance of probabilities that the Complainant has Rights in respect of a name or mark (the trade marks RACKSPACE and RACKSPACE HOSTING) which are identical or similar to the Domain Name (rackspace.net.nz).
- 10.2 However, in view of the facts set out in part 4 of this decision, the Complainant has not proved to the Expert on the balance of probabilities that:
- (a) the Complainant had those rights (which only commenced on the deemed date of registration on 29 May 2008) when the Respondent purchased (otherwise acquired) the Domain Name on 2 March 2003. The timing is such that the acquisition could not take unfair advantage of, or be unfairly detrimental to, rights which did not exist at the date of acquisition;
 - (b) the Domain Name has been, or is likely to be, used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's Rights. The use of the Domain Name for Discount Domains' website in accordance with paragraph 6.1.1(a) of the Policy does not take unfair advantage of and is not unfairly detrimental to the Complainant's Rights.
- 10.3 As the Complainant has not proved the element in paragraph 4.1.2 of the Policy (the Domain Name, in the hands of the Respondent, is an Unfair Registration), and thus not proved either the first or the second limb of the definition of Unfair Registration in paragraph 3 of the Policy, the Expert must dismiss the Complaint.
- 10.4 For completeness, the Expert addresses the Complainant's contentions in paragraph 5.1 of this decision as follows:
- (a) contrary to the Complainant's contention in paragraph 5.1(a), the Respondent's use of the Domain Name for Discount Domains' website is not clearly an infringement of the Complainant's trade mark rights;
 - (b) contrary to the Complainant's contention in paragraph 5.1(c), there is no evidence before the Expert that the Domain Name is being used in a way which is likely to confuse, mislead or deceive people or businesses into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant (as required by paragraph 5.1.2 of the Policy). Proof of the circumstances specified in that paragraph is invariably provided by statements from browsers and customers to the effect that they used the Domain Name in the belief that it would take them to the Complainant's website, but instead it took them to another website which they did not wish to visit. No statements of evidence to that effect were provided with either the Complaint or the Reply in this case;

- (c) the Complainant's contention in paragraph 5.1(d) does not correctly state paragraph 5.1.1(b) of the Policy. The Respondent did not purchase (otherwise acquire) the Domain Name for the purpose (primary or otherwise) as a blocking registration against the Complainant's trade marks;
- (d) the Complainant's contention in paragraph 5.1(e) of this decision does not correctly state paragraph 5.1.1(c) of the Policy. The Respondent did not purchase (otherwise acquire) the Domain Name for the purpose (primary or otherwise) of unfairly disrupting the business of the Complainant;
- (e) the facts set out in part 4 and elsewhere in this decision are such that the Expert cannot, and does not, uphold the impossibility contention in paragraph 5.1(f) of this decision. As noted, the Complainant's contentions did not address paragraph 6.1.1(a) of the Policy, and the Expert's finding in respect of that paragraph is that the Domain Name has been, and is being, used in connection with the genuine offering of Discount Domains' goods or services.

10.5 In view of the Expert's finding that the Complainant has not proved the element in paragraph 4.1.2 of the Policy (the Domain Name, in the hands of the Respondent, is an Unfair Registration), it is not necessary for the Expert to address all the Respondent's contentions in paragraph 6.1 of this decision, but the Expert does note that the fact that domain names in the .nz space are registered on a "first come first served" basis does not in any way override the Policy. All .nz domain name registrations are subject to the Policy.

11. Decision

11.1 In view of the findings made in this decision, the Expert:

- (a) dismisses the Complaint in respect of the Domain Name rackspace.co.nz;
- (b) dismisses the Complaint in respect of the Domain Name rackspace.net.nz.

Place of decision Wellington

Date 19 September 2013

Expert Name Terence Stapleton QC

Signature

