



Domain Name: freelife.com.au

Name of First Complainant: Freelife International Holdings, LLC

Name of Second Complainant: Freelife International Australia Pty Limited

Name of First Respondent: Wealth Creators Australia Ltd

Name of Second Respondent: Corey Allan Sievers

Name of Third Respondent: Linda May Barker

1. THE PARTIES

1.1 The First Complainant is Freelife International Holdings, LLC a Connecticut limited liability company. The Second Complainant is Freelife International Australia Pty Ltd ACN 111 834 381. Taken together ("Complainants")

1.2 The First Respondent is Wealth Creators Australia Pty Ltd ACN 120 579 142. The Second Respondent is Corey Allan Sievers. The Third Respondent is Linda May Barker. Taken together ("Respondents").

2. THE DOMAIN NAME AND PROVIDER

2.1 The current matter is regarding the disputed domain name <freelife.com.au> ("**Domain Name**").

2.2 The Provider in relation to this proceeding is LEADR ("**Provider**").

3. PRELIMINARY MATTERS

3.1 Schedule A of the .au Dispute Resolution Policy ("**auDRP**") applies to disputes which meet the requirements set out in Paragraph 4(a) of the Schedule A of the auDRP. Paragraph 4 (a) denotes the grounds whereby the Complainant bears the onus of proof in establishing the following circumstances:

- (i) the Domain Name "is identical or confusingly similar to a name, trademark or service mark in which the complainant has rights; and
- (ii) the Respondent has "no rights or legitimate interests in respect of the domain name"; and
- (iii) by the Respondent's actions, the "domain name has been registered or subsequently used in bad faith."

4. PROCEDURAL HISTORY

4.1 LEADR has appointed the Panel. The Panel confirms that it has no prior knowledge or association with either party and has no conflict of interest.

4.2 All procedural elements appear to have been satisfied. The Panel has been properly constituted.

5. MATTER ARISING BEFORE THE PANEL

5.1 Paragraph 15 (a) of the auDRP states:

"A Panel shall decide a complaint on the basis of the statements and documents submitted in accordance with the auDRP, these Rules and any rules and principles of law that it deems applicable".

6 .FACTUAL BACKGROUND – The Complainant's Submission

In extensive and detailed submissions to the Panel, the Complainants state the following:

6.1 The First Complainant commenced business operations in 1995 under the name 'Freelife International'.

6.2 Freelife International operates a network marketing system whereby the website occupies a central point operating as both a primary contact and information tool for the cultivation of

members ('Marketing Executives') and equally a key promotional tool for various health and wellbeing products and services that come to be positioned by the business.

6.3 The First Complainant registered the domain name <freelife.com> in February 1999.

6.4 In 2003, the First Complainant HAD undertaken preliminary launch publicity in Australia and invested in local product promotion for one of its pre-existing products. The First Complainant also sought Australian trademark registration for 'Freelife'.

6.5 In May 2004, the First Complainant files for Australian trademark registration for 'Freelife International'.

6.6 On 28 May 2004, the Complainants state that the Domain Name first evidenced site activity such that it became an active website by reference to an independent third party archive and internet indexing entity.

6.7 In May 2004, the Complainants state discovered an association between the Second and Third Respondents and a large international competitor organisation operating a similar structured network marketing distribution business in personal care and nutritional products, not being a direct party to these proceedings ("**Competitor Organisation**").

6.8 The Complainants subsequently came by further information that evidenced that the Second and Third Respondents enjoyed longstanding involvement and ultimately came to enjoy senior executive standing with Competitor Organisation.

6.9 In Nov 2004, the name of Freelife International Australia Pty Limited was registered to the Second Complainant.

6.10 The First Complainant asserts that they hold numerous domain name registrations comprising the term 'freelife' including over forty appearing in singular form and mirror syntax in 'both top and 2ld domains'.

6.11 The Complainants assert that the practice of the Respondents in adopting the same pattern and word order in the company name and the trade name, as well as an identical term being chosen and registered in Australia (reflected by the Domain Name) as was adopted by the First Complainant in their .com domain, is simply too great a coincidence.

7. FACTUAL BACKGROUND - The Respondent's Submission

The Respondents claim in their detailed submissions:

7.1 Initial use of the Domain Name was restricted to substantially email address usage and some restrictive access requirements applied to internal member usage.

7.2 Business cards cite the Domain Name website was used in and around this time for "team website" purposes.

7.3 The Domain Name is not confusing to members of the general public since it does not name or specify the Complainants product on any part of the website occupied by the Domain Name.

7.4 The Second and Third Respondents state that they had no knowledge of the existence of the relevant Complainants business at the time they registered the Domain name.

7.5 The Respondents acknowledge their association with competing network marketing company but assert that this provides them with an additional reason for not having this knowledge given that they would not wish to be associated with a lessor status organisation and since it might also confuse their own members.

7.6 The Domain Name was registered in good faith with no knowledge whatsoever relating to the existence of the Complainants.

7.7 The Second and Third Respondents do not accept the claim by the Complainants that they attempted to disguise their continuing close association with Competitor Organisation.

8. FINDINGS

Elements of a successful complaint

8.1 In accordance with Paragraph 4(a) of the auDRP, a person is entitled to complain about the registration or use of a domain name where:

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

(ii) the respondent to the complaint has no rights or legitimate interests in respect of the domain name; and

(iii) the respondent's domain name has been registered or subsequently used in bad faith."

8.2 Taking the first element of the Paragraph 4(a) enquiry: Is the Domain Name identical or confusingly similar to a name, trademark or service mark in which the complainant has rights?

The Panel is to determine whether the complainant can evidence such rights in a relevant name, trademark or service mark. The auDRP states:

"For the purpose of this policy, auDA has determined that a name ...in which the complainant has rights" refers to:

(a) The Complainant's company, business or other legal or trading name, as registered with the relevant Australian government authority; or

(b) The complainant's personal name.

The Panel makes the following findings:

- (i) The Domain Name at issue is <freelife.com.au>. There is clear non-butted evidence to show that the Complainant is the holder of various registered trademarks containing both the term Freelife and Freelife International.
- (ii) The complainant has a longstanding established business organisation operating under the commercial name of Freelife International.
- (iii) Amongst other domain names containing the term “freelife”, the complainant continues to hold and enjoy a similarly long association with the 2ld domain <freelife.com> .

Clearly, the domain name is substantially identical to the trademarks, trading names and various domain names of the Complainant. The Panel has no hesitation in finding that the Complainant has readily met the burden of proof as established by subparagraph 4 (a) (i).

RIGHTS OR LEGITIMATE INTERESTS

8.3 Taking the second element of the Para 4 (a) enquiry: Is it established on the evidence that the Respondent to the complaint has no rights or legitimate interests in respect of the Domain Name?

(a) Para 4(c) of the auDRP sets out the particular circumstances (without limitation), which can demonstrate a Respondent’s *“rights or legitimate interests to the domain name for the purposes of Paragraph 4 (a)(ii).”*

(b) The Respondent has not demonstrated that any of their activities fall within the scope of the specified activities in accordance with Para 4 (c) of the auDRP for providing a basis for bona fide use of the Domain Name.

8.4 The Panel makes the following findings:

(i) The Complainants asserts that the Respondents have no business or other connection with Freelife International and/or the First Complainant. This is clearly accepted on the evidence.

(ii) The site of the Domain Name has in the past (and continues to a varying extent, through to the date of examination) to cross- refer and enlist various categories of third party services. Those third party services can fairly be described as being significantly represented by Competitor Organisation although disclosure relating to the identity of that entity is not immediately apparent to any non-member inspection of the site.

(iii) There is a failure of the Respondents to submit satisfactory proof that they collectively, as a business or otherwise in any individual capacity, are commonly known by reference to the Domain Name.

(iv) More particularly, the Panel does not find any real association between the Respondent's name and the Domain Name which may indicate that the Respondents have been commonly known by the Domain Name. Rather, the Respondents use of the word conjunction 'freelife' appears in varying forms throughout the assorted materials published by them.

(v) The variation in form and placement of the term 'freelife' throughout the promotional copy on behalf of the Respondents appears as an anachronism to the clear association the Respondents hold to Competitor Organisation. On other occasions, there is little attempt to portray the term in any consistent manner. Certain unhelpful references such as to a 'freelife team', appear on the same page and directly alongside express reference to the Competitor Organisation welcoming the site visitor or prospective member to their catalogue of products and services.

(vi) There appears more compelling evidence to the contrary, namely that other competing interests could be served by the registration and subsequent use of an internet domain that might effectively co-opt the well known trade name of the Complainants, which was clearly well recognised by those companies operating in direct marketing circles (and related trade magazine materials) as far back as 1998.

(vii) Greater reliance can however be placed on more numerous indications in the file that the Respondent sought by registering the domain to misleadingly divert members of the public for opportunistic purposes and/or for commercial gain with the intent to tarnish the trading name of the Complainant in the marketing category of health and wellbeing distributed products and services.

Accordingly, in the absence of any indications as to a legitimate interest of Respondents to use the disputed domain name, the Panel finds that the Complainants have fulfilled their burden of proof under Para 4 (a) (ii).

RESPONDENTS REGISTRATION AND/OR USE IN BAD FAITH

8.5 Adopting the third element of the Para 4 (a) enquiry: Has the Respondent's Domain Name been registered or subsequently used in bad faith?

The Panel accepts the general proposition that bad faith is not likely to be found when a Complainant relies on a trademark that did not exist at the time a disputed domain name is registered when seeking to make use of the auDRP. However, a number of recognised exceptions do exist.

Kangwon Land, Inc. v. Bong Woo Chun (K.W.L. Inc.) WIPO case No. D2003-0320. While the Panel in this instance acknowledged the “Respondent’s registration of the Domain Name was prior to any of the trademark or service mark registration applications of the Complainant” it found bad faith had arisen due to circumstances where the “Respondent registered the Domain Name fully conscious of what ‘business’ he could make out of mistakenly being affiliated with the Complainant.”

8.6 The Panel makes the following findings:

(i) On the balance of evidence, the Panel determines that the Respondents were aware of the existence of the First Complainant at the time of the registration of the disputed domain name by virtue of their pre-existing association with Competitor Organisation. The fact that Competitor Organisation occupies a highly similar international market niche inside the multi-level marketing health and wellness product industries is also generally supportive of the direct inference available to the Panel on this head.

(ii) It is clear from the file that the Respondents are capable and successful business people. The special circumstances appearing in this case are such that the Respondents sustained a close, privileged and ongoing successful third party association with the Competitor Organisation through-out. It is the finding of this Panel that this relationship enabled the Respondents to attain an early understanding of the business that they could make by being mistakenly associated with the Complainants. The subsequent conduct of the Respondents in 2004 coinciding with the Complainants commercial launch of product reinforces the notion that Respondents activities were geared at all relevant times to hinder the registration by the Complainants and thereafter to use the domain and website in a manner that supported this practice.

(iii) I also note in passing that the First Respondent is variably self-described as both beneficial owner of the Domain Name, the subject of these proceedings and then, in more recent times, as the Trustee on behalf of a third party Network Trust. However, no such Trust documentation is advanced by the Respondent in support of this contention and for the purposes of this decision I have taken them to comprise one and the same entity.

For the reasons stated and in accordance with the auDRP, the Panel orders that the Domain Name <www.freelife.com.au > be transferred to the Complainants.

Dated this 17th day of October 2008

Matthew Russell

Sole Panellist