



ABN: 69 008 651 232

Domain Name: campertrailerswa.com.au
Name of Complainant: Camper Trailers WA Pty Ltd
Name of Respondent: Off Road Equipment Pty Ltd
Provider: LEADR
Panel: N J Hickey

1 THE PARTIES

- 1.1 The complainant in this proceeding is Camper Trailers WA Pty Ltd of Unit 21/8 Booth Place, Balcatta, Western Australia ("**Complainant**").
- 1.2 The respondent to the proceeding is Off Road Equipment Pty Ltd of 61 McCoy Street, Myaree, Western Australia ("**Respondent**").

2 THE DOMAIN NAME, REGISTRAR AND PROVIDER

- 2.1 The domain name in dispute in this proceeding is "campertrailerswa.com.au" ("**Disputed Domain Name**").
- 2.2 The registrar of the Disputed Domain Name is Melbourne IT of Level 2, 120 King Street, Melbourne, Victoria ("**Registrar**").
- 2.3 The provider in relation to this proceeding is LEADR ("**Provider**").

3 PROCEDURAL MATTERS

- 3.1 This proceeding concerns a complaint ("**Complaint**") submitted in accordance with:
- (a) the .au Dispute Resolution Policy No. 2002/22 ("**auDRP**"), which was approved by .au Domain Administrator Ltd ("**auDA**") in 2001 and which commenced operation on 1 August 2002, including:
 - (i) Schedule A ("**auDRP Policy**"); and
 - (ii) Schedule B ("**auDRP Rules**");
 - (b) the Provider's Supplemental Rules to Rules for au Domain Name Dispute Resolution Policy ("**LEADR Rules**").
- 3.2 The Provider has supplied the Panel with a document entitled "Procedural History - www.campertrailerswa.com.au". Pursuant to this document, the Complaint was lodged on 11 October 2004 (following the rectification of certain defects by the Complainant). Also on that day, the Respondent was sent the Complaint, the Provider advised auDA of

the Complaint, and the Registrar was advised to lock the Disputed Domain Name. The Panel was appointed on 13 October 2004.

4 FACTUAL BACKGROUND

Facts alleged by the Complainant

4.1 In submissions attached to its Complaint, the Complainant raises the matters set out below:

- (a) The Complainant has previously traded under the names “Cavalier Camper Trailers” and Drive to Adventure”.
- (b) The Complainant was registered as a company in April 1991 (“**Complainant’s Company Name**”).
- (c) The Complainant specialises in selling and hiring camper trailers.
- (d) On 22 August 2000, the Complainant registered the domain name “campertrailerswa.com”.
- (e) On 18 January 2001, the Complainant registered the business name “CAMPERTRAILERS WA.COM” with the Western Australian Ministry of Fair Trading (“**Complainant’s Business Name**”). A corresponding Certificate of the Registration of a Business Name is exhibited to the Complainant’s submissions.
- (f) The Complainant holds a Motor Vehicle Dealers License (number 1461) in Western Australia under the Complainant’s Business Name.
- (g) On 14 May 2004, the Disputed Domain Name was registered with the Registrar.
- (h) On 1 September 2004, a customer telephoned the Complainant and indicated that he or she had been unable to locate the Complainant’s web-site on the Internet by using the Disputed Domain Name, but had instead been directed to the Respondent’s web-site. The Complainant gave the customer advice about how to access the Complainant’s web-site.
- (i) On 2 September 2004, the Complainant attempted to register the Disputed Domain Name, but was unable to do so.
- (j) On 4 September 2004, the Complainant telephoned the Respondent and asked the Respondent to “do something about” the Disputed Domain Name, as consumers were being confused by its similarity to the Complainant’s Business Name and the Complainant was being damaged as a consequence. The Respondent replied, “It’s good for our business.”.
- (k) On 8 September 2004, the Complainant registered the domain names “CamperTrailerWA.Com.Au” and “CamperTrailerWA.com” with the Registrar.

Facts alleged by the Respondent

4.2 In an email sent to the Provider on 22 October 2004 (“**Response**”), the Respondent responds in terms set out below:

- (a) The Respondent has been established since 1972.
- (b) In 2000, the Respondent began selling camper trailers under a dealer licence.
- (c) The name “Off Road Equipment” has been used by the Respondent “for a long time”.
- (d) The name “Off Road Equipment” does not reflect every product the Respondent sells. For example, the Respondent sells tyres and fuel tanks.
- (e) The Respondent registered the Disputed Domain Name because it “felt that [the Respondent] needed a domain name that reflected this particular product in the location that [the Respondent] sells it as [the Respondent] sells these products statewide”.
- (f) Part of the web-site the Respondent operates using the Disputed Domain Name concerns camper trailers. This page is “still under construction”.

4.3 The Respondent did not otherwise respond to any of the allegations made by the Complainant.

Factual findings generally

4.4 Except for the Complainant’s submissions concerning alleged telephone conversations on 1 September 2004 and 4 September 2004, the Panel proceeds on the basis that the factual allegations made by the parties are true.

Findings with respect to telephone calls

4.5 The Complainant claims that a customer gave feedback about the impact of the Disputed Domain Name by a telephone call made on 1 September 2004. Whilst there is no reason to disbelieve the Complainant’s assertion, it is not necessary for the purpose of this decision to make any finding about whether the telephone call occurred or, if it did, what was said during it.

4.6 As to the alleged telephone conversation on 4 September 2004 between the Complainant and the Respondent, the Respondent has neither admitted nor denied that the telephone call occurred, nor addressed the Complainant’s version of what was discussed. The Panel is satisfied that the alleged telephone conversation occurred, and that during the conversation the Complainant told the Respondent it was concerned about the Respondent’s use of the Disputed Domain Name. As to the alleged response by the Respondent (ie “It’s good for our business”), this is not admitted by the Respondent. It is not necessary for the purpose of this decision to make any finding about whether this statement was made.

5 THE PARTIES’ CONTENTIONS

The Complainant’s contentions

5.1 The Complainant’s submissions contend that;

- (a) the Disputed Domain Name is subject to the auDRP Policy;

- (b) the Disputed Domain Name is confusingly similar to a domain name registered by the Complainant, namely “campertrailerswa.com”;
- (c) the Disputed Domain Name is confusingly similar to the Complainant’s company name, namely “Camper Trailers WA Pty Ltd” (“**Complainant’s Company Name**”);
- (d) the Disputed Domain Name is confusingly similar to the Complainant’s Business Name;
- (e) the Respondent’s business name makes no reference to camper trailers;
- (f) the web-site operated by the Respondent using the Disputed Domain Name contains no “source code” or “meta tags” referring to camper trailers as products that the Respondent sells;
- (g) the Complainant and the Respondent are direct competitors;
- (h) the Respondent intends to divert consumers away from the Complainant’s web-site in order to sell camper trailers;
- (i) in confusion, consumers mistakenly go to the web-site operated by the Respondent using the Disputed Domain Name instead of the Complainant’s web-site;
- (j) the Respondent is engaging in the practice known as “cyber squatting”;
- (k) the Respondent has registered the Disputed Domain Name in bad faith;
- (l) the Respondent has breached the Registrar’s terms and conditions for domain licensing, because the Respondent has intentionally attracted consumers to its web-site by using the Complainant’s Company Name and the Complainant’s Business Name;
- (m) the Respondent has intentionally prevented the Complainant from registering a domain name corresponding to the Complainant’s Business Name;
- (n) the Respondent’s registration of the Disputed Domain Name violates the Complainant’s rights to be the sole user of the Complainant’s Business Name, as set out in the *Trade Practices Act 1974* (Cth); and
- (o) the Respondent has hijacked the Complainant’s domain name.

The Respondent’s contentions

5.2 In its Response, the Respondent contends that:

- (a) the fact that it has been selling camper trailers since 2000 means that its registration and use of the Disputed Domain Name does not constitute “cyber squatting”;
- (b) since the Disputed Domain Name relates to products the Respondent sells in Western Australia, it was not registered in bad faith;

- (c) the Respondent considered other domain names but did not find a suitable name “as others were taken”; and
- (d) the Respondent has “put considerable resources” into the Disputed Domain Name and it is neither justifiable nor necessary for the Respondent to change its domain name.

6 DISCUSSION AND FINDINGS

Jurisdiction

6.1 Paragraph 2.1 of the auDRP states,

“All domain name licences issued in the open 2LDs from 1 August 2002 are subject to a mandatory administrative proceeding under the auDRP. At the time of publication, the open 2LDs are asn.au, com.au, id.au, net.au and org.au...”

6.2 The Disputed Domain Name is an open 2LD within the meaning of this provision. It was registered with the Registrar on 14 May 2004. It is therefore subject to the mandatory administrative proceeding prescribed by the auDRP.

Basis of decision

6.3 Paragraph 15(a) of the auDRP Rules states,

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

Elements of a successful complaint

6.4 According to paragraph 4(a) of the auDRP Policy, 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.

6.5 It is to be noted that the three elements of a complaint under paragraph 4(a) of the auDRP Policy are cumulative; all of them must be proved if the complaint is to be upheld.

Is the Disputed Domain Name identical or confusingly similar to a name, trade mark or service mark in which the Complainant has rights?

6.6 The Panel must determine whether, on the basis of the facts set out in section 4 above, the Complainant has rights in a relevant name, trademark or service mark.

6.7 Note 1 to the auDRP Policy states,

“For the purposes 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;*
- (b) *the complainant’s personal name.”*

6.8 Accordingly, the Complainant has relevant rights in at least:

- (a) the Complainant’s Company Name; and
- (b) the Complainant’s Business Name.

6.9 The auDRP Policy does not provide guidance as to the intended meaning of “identical” or “confusingly similar”. It is therefore useful to consider principles arising from other domain name dispute decisions:

- (a) *“Identical”*

As was noted in BlueChip InfoTech Pty Limited v Roslyn Jan and Blue Chip Software Development Pty Ltd LEADR Case No. 06/03 (26 December 2003), “essential or virtual identity” is sufficient.

- (b) *“Confusingly Similar”*

- (i) The “level domain” components of domain names (that is, “.com”, “.net” and similar suffixes) are to be ignored when comparing domain names with other names or marks (see for example *GlobalCenter Pty Ltd v Global Domain Hosting Pty Ltd*, WIPO Case No DAU2002-0001 (5 March 2003) referred to in *Esat Communications Pty Ltd v Kingford Promotions Pty Ltd* LEADR Case No. 03/2003 (11 July 2003)).

- (ii) The test of “confusing similarity” is confined to a comparison between the disputed domain name and the name or trade mark alone, independent of other marketing and use factors usually considered in trade mark infringement or other competition cases (see for example *The Crown in Right of the State of Tasmania trading as “Tourism Tasmania” v James Gordon Craven*, WIPO Case No DAU2003-0001 (16 April 2003)).

6.10 These principles do not, of course, clarify what is meant by “confusing similarity”. In particular, it is not clear what is contemplated to be “confusing” in circumstances where similar domain names and other names are registered or used by different persons. It could be that the test of “confusing similarity” is to be applied in much the same way as the test of “deceptive similarity” in trade mark infringement cases, where the concept of “deception” contemplates consumers who may be deceived or “caused to wonder” about the source or origin of goods or services.

6.11 In a close case, these analytical difficulties may need to be resolved. However, that is not necessary for the purposes of resolving the present complaint:

- o If one compares the Complainant’s Company Name (“Camper Trailers WA Pty Ltd”) with the Disputed Domain Name, they are virtually identical. To the extent there are any differences, they only concern capitalization and spacing.

- Likewise, the Complainant’s Business Name (“CAMPERTRAILERSWA.COM”) only contains the additional component “.COM” to its business name (bearing in mind one should ignore the “.com.au” component of the Disputed Domain Name in making the comparison as identified in *GlobalCenter* above).
- 6.12 The Disputed Domain Name is so similar to the Complainant’s Company Name and the Complainant’s Business Name (if not virtually identical with respect to the former) that, however the concept of “confusingly similar” is construed, paragraph 4(a)(i) of the auDRP Policy must be regarded as satisfied.
- Does the Respondent have any rights or legitimate interests in respect of the Disputed Domain Name?**
- 6.13 The auDRP requires the Panel to have regard to several matters when considering whether the Respondent has “any rights or legitimate interests” in respect of the Disputed Domain Name.
- 6.14 First, Note 2 to the auDRP Policy states,
- “For the purposes of this policy, auDA has determined that “rights or legitimate interests in respect of the domain name” are not established merely by a registrar’s determination that the respondent satisfied the relevant eligibility criteria for the domain name at the time of registration.”*
- 6.15 This means paragraph 4(a)(ii) of the auDRP Policy is not satisfied simply because the Respondent has previously been treated as eligible for the Disputed Domain Name.
- 6.16 Paragraph 4(c) of the auDRP Policy sets out particular circumstances, any of which, “if found by the Panel to be proved based on its evaluation of all evidence presented, is to be taken to demonstrate ... rights or legitimate interests to the domain name for purposes of Paragraph 4(a)(ii). These circumstances include:
- (i) before the respondent is notified of the subject matter of the dispute, the respondent’s bona fide use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with an offering of goods or services (not being the offering of domain names acquired for the purpose of selling, renting or otherwise transferring); or
 - (ii) the respondent (as an individual, business or other organisation) has been commonly known by the domain name, even if the respondent has acquired no trademark or service mark rights; or
 - (iii) the respondent is making a legitimate non-commercial fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the name, trademark or service mark at issue.”
- 6.17 Paragraph 4(c) of the auDRP Policy states that the above circumstances are “without limitation”, so that rights or legitimate interests could exist in respect of a domain name even if none of the above circumstances are applicable in the particular case.
- 6.18 The first question is whether the Respondent, prior to being notified of the subject matter of the present dispute, made “bona fide use of or demonstrable preparations to use the domain name or a name corresponding to the domain name in connection with an offering

of goods or services” (paragraph 4(c)(i)). There is no requirement that the nature of the goods or services have any connection with the Disputed Domain Name.

- 6.19 The Respondent clearly engaged in a “use” of the domain name. The Complaint is predicated on a concern that the Disputed Domain Name has been used (prior to the Complaint being made) in connection with an offering of goods or services by the Respondent, in particular, camper trailers. The Respondent states that it has used the Disputed Domain Name in connection with a web-site that advertises products the Respondent has sold (including camper trailers) in a location where those products have been sold (namely, Western Australia, or “WA”).
- 6.20 The question, however, is whether that use was “bona fide”. Based on its evaluation of all the evidence presented, the Panel is not satisfied that the Respondent’s use of the Disputed Domain Name in connection with the offering of goods or services was “bona fide”. In particular, the Panel considers that the following matters militate against that conclusion:
- First, at all relevant times the Complainant and the Respondent have been competitors, inasmuch as they are both Western Australian companies that use online marketing to sell goods which include camper trailers. In such circumstances, the Respondent’s use for commercial advantage of a domain name so closely resembling the Complainant’s business name is colourable.
 - Secondly, the evidence discloses that the dominant (and perhaps only) products and services offered by the Complainant concern camper trailers. By contrast, the Respondent’s offering of camper trailers for sale is neither a principal focus of its business nor a prominent feature of its web-site. Whereas “campertrailerswa.com .au” would seem a natural domain name for the Complainant to use, it is questionable whether a reasonable person in the Respondent’s position, acting bona fide, with alternative domain names available, would have chosen to use it.
 - Thirdly, since 2000, the Complainant has been the registrant of “campertrailerswa.com”, a domain name calculated to inform consumers about the source of goods and services offered by the Complainant (this is in addition to the Complainant’s Company Name and the Complainant’s Business Name). By contrast, the Respondent has no business name, trade mark or service mark similar to the Disputed Domain Name, and the Disputed Domain Name is not suggestive of the Respondent’s business name, nor, for the reasons mentioned above, its business activities.
 - Fourthly, the Respondent asserts that it “considered other domain names but did not find a name as others were taken”, yet does not cite any examples. The Panel is not persuaded that the Respondent, with reasonable effort, would have been unable to find an alternative name.

- 6.21 With respect to paragraphs 4(c)(ii) and 4(c)(iii) of the auDRP Policy, the Respondent has neither been commonly known by the Disputed Domain Name, nor is the Respondent making legitimate non-commercial fair use of it. The evidence does not disclose any other basis on which the Respondent could be said to have a right or legitimate interest in the Disputed Domain Name.
- 6.22 Accordingly, the Panel finds that the Respondent has no right or legitimate interest in the Disputed Domain Name, and so paragraph 4(a)(ii) of the auDRP Policy has been satisfied by the Complainant.

Has the Disputed Domain Name been registered or subsequently used in bad faith?

- 6.23 Paragraph 4(b) of the auDRP Policy sets out circumstances which, “in particular but without limitation, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith”. These are:

- (i) circumstances indicating that the respondent has been registered or has acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to another person for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name; or
- (ii) the respondent has registered the domain name in order to prevent the owner of a name, trade mark or service mark from reflecting that name or mark in a corresponding domain name; or
- (iii) the respondent has registered the domain name primarily for the purpose of disrupting the business or activities of another person; or
- (iv) by using the domain name, the respondent has intentionally attempted to attract, for commercial gain, Internet users to a website or other online location, by creating a likelihood of confusion with the complainant’s name as to the source, sponsorship, affiliation, or endorsement of that website or location or of a product or service on that website or location.

- 6.24 With respect to paragraph 4(b)(i) of the auDRP Policy, there is no basis for a finding that the Respondent has been registered or has acquired the Disputed Domain Name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to another person. On the contrary, the Respondent seeks to resist any transfer of the Disputed Domain Name.

- 6.25 With respect to paragraph 4(b)(iii) of the auDRP Policy, there is insufficient evidence for a finding that the Respondent has registered the Disputed Domain Name primarily for the purpose of disrupting the business or activities of another person, including the Complainant. It must have been foreseeable to the Respondent that its registration of the Disputed Domain Name might disrupt the Complainant’s business in some way. However, the evidence does not establish that the Disputed Domain Name was registered *primarily* for that purpose.

- 6.26 However, with respect to paragraph 4(b)(ii) of the auDRP Policy, the Panel considers there is sufficient evidence for a finding that the Respondent has registered the Disputed Domain Name in order to prevent another person, namely the Complainant, from reflecting its company name or business name in a corresponding domain name, namely

the Disputed Domain Name. In this regard, the Panel has had regard to the matters set out in paragraph 6.20 above.

- 6.27 Moreover, it is telling to ask whether, if the parties had not been competitors, the Respondent would have registered the Disputed Domain Name, rather than some other domain name. The most compelling inference from the evidence is that the Respondent registered the Disputed Domain Name knowing the Complainant was the registrant of “campertrailerswa.com”, aware of the Complainant’s presence in the market, and hoping to capture the custom of consumers who were seeking to access the Complainant’s web-site but who had omitted to add “.au” to the domain name. The Respondent must have appreciated that registering the Disputed Domain Name would have the dual effects of preventing the Complainant from having total effective control of the “campertrailerswa” domain name and increasing Internet traffic to the Respondent’s competing web-site. In the Panel’s view, the likelihood is that the Respondent registered the Disputed Domain Name intending (and, therefore, in order) to achieve both of those outcomes.
- 6.28 In view of the above findings, the Panel infers that the Respondent has registered the Disputed Domain Name in order to prevent the Respondent from doing so.
- 6.29 Moreover, with respect to paragraph 4(b)(iv) of the auDRP Policy, the Panel considers that by using the domain name, the Respondent has intentionally attempted to attract, for commercial gain, Internet users to its web-site by creating a likelihood of confusion with the Complainant’s name as to the source of products or services advertised on that web-site. The likelihood of confusion comprises the probability that consumers accessing the Disputed Domain Name would expect to be directed to the Complainant’s web-site, not the Respondent’s.
- 6.30 For the reasons outlined above, paragraph 4(a)(iii) of the auDRP Policy has been satisfied by the Complainant.

7 RELIEF

Transfer of the Disputed Domain Name

- 7.1 The Complainant has sought relief in the form of:
- (a) revocation of the Respondent’s licence in respect of the Disputed Domain Name; and
 - (b) transfer of the licence in the Disputed Domain Name to the Complainant.
- 7.2 According to paragraph 4(i) of the auDRP,
- “The remedies available to a complainant pursuant to any proceeding before an Administrative Panel shall be limited to requiring the cancellation of your domain name or the transfer of your domain name registration to the complainant (provided that the complainant is otherwise eligible to hold that domain name).”*
- 7.3 From the language of this paragraph, it seems that only one form of relief can be made in a given case: either cancellation or transfer. In the present case, the relief sought by the Complainant will be substantially impacted by an order that the Disputed Domain Name be transferred to the Complainant.

7.4 Eligibility for a domain name in the open 2LDs is governed by auDA's Domain Name Eligibility and Allocation Rules for the Open 2LDs (2002-07), which commenced operation on 8 May 2002 ("**Eligibility Rules**"). Schedule C of the Eligibility Rules relates to "com.au" domain names, and provides,

- "1. To be eligible for a domain name in the com.au 2LD, registrants must be:*
 - (a) an Australian registered company; ...*
- 2. Domain names in the com.au 2LD must:*
 - (a) exactly match:*
 - (i) the registrant's company, business, trading, association or statutory body name; or ...*
 - (b) be an acronym or abbreviation of 2(a)(i)...; or*
 - (c) be otherwise closely or substantially connected to the registrant, because the domain name refers to:*
 - (i) a product that the registrant manufactures or sells; or*
 - (ii) a service that the registrant provides..."*

7.5 The Complainant is an Australian registered company and the Disputed Domain Name is closely connected to the Complainant, as it refers to a product that the Complainant sells, namely camper trailers.

7.6 The Panel orders that the Disputed Domain Name be transferred to the Complainant.

8 Decision

8.1 The Complainant has satisfied the elements of paragraph 4(a) of the auDRP Policy.

8.2 The Panel directs that the Disputed Domain Name be transferred to the Complainant.

Dated this 12th day of November 2004.

Natalie J Hickey

Sole Panelist