

DISPUTE RESOLUTION SERVICE

D00010360

Decision of Independent Expert

Landcruise Ltd.

and

ALCO Leisure Ltd

1. The Parties:

Lead Complainant: Landcruise Ltd.
5303 Spruce Ave,
Burlington
Ontario
L7L 1N4
Canada

Respondent: ALCO Leisure Ltd
1 Chalder Farm Cottages
Chalder Lane
Sidlesham
Chichester
West Sussex
PO20 7RN
United Kingdom

2. The Domain Name(s):

LandCruise.co.uk

3. Procedural History:

06 October 2011 16:44 Dispute received
01 November 2011 11:05 Complaint validated
01 November 2011 11:09 Notification of complaint sent to parties

09 November 2011 13:27 Response received
09 November 2011 13:28 Notification of response sent to parties
10 November 2011 12:37 Reply received
10 November 2011 12:37 Notification of reply sent to parties
10 November 2011 12:37 Mediator appointed
11 November 2011 15:12 Mediation started
11 November 2011 15:13 Mediation failed
11 November 2011 15:30 Close of mediation documents sent
23 November 2011 01:30 Complainant full fee reminder sent
23 November 2011 12:44 Expert decision payment received

4. Factual Background

- 4.1 The Complainant is a Canadian based company called Landcruise Limited.
- 4.2 The Respondent is a UK based company called ALCO Leisure Limited.
- 4.3 The Complainant has since at least 1998 run a successful motor home hire business based in Canada. The Complainant's business involves the hire of motor homes for use around Canada.
- 4.4 The Complainant also markets itself in other jurisdictions around the world including the UK which it sees as being its primary market based on Canada's historical interest in the UK traveller, the generous currency exchange rate between the UK and Canada, the availability of cheaper petrol in Canada and the suitability of "RVing" as the best way to see all of Canada.
- 4.5 The Complainant also owns a number of other domain names which include the name of mark "LandCruise" including landcruise.com, landcruise.org and landcruise.net.
- 4.6 The Complainant has applied to register the word, "LandCruise" as a US trade mark and that application is currently going through the USPTO.
- 4.7 The Complainant has marketed its business by a variety of means including advertising and attending trade shows in the UK.
- 4.8 The Respondent's business was set up considerably after the Complainant's business and it post dates 2009.
- 4.9 The Respondent is involved in the hire of motor homes in the UK.
- 4.10 The Respondent is the registered proprietor of a UK trade mark registration for the word mark, "LandCruise" which was registered as of 15th December 2009.

- 4.11 The Complainant previously filed a complaint against the Respondent in or about May 2011, but this previous complaint was withdrawn by the Complainant before it reaching the decision stage.

5. Parties' Contentions

The parties' contentions can be summarised as follows:

Complaint

- 5.1 The Complainant has rights in a name or mark which is similar or identical to the Domain Name because:
- The Complainant is in the final stages of obtaining trade mark protection in the US for the word mark "LandCruise";
 - The Complainant has been a "branded name" in the global market, since 1998 and owns a number of other domain names which include the name "LandCruise" including landcruise.com, landcruise.org and landcruise.net;
 - The Complainant views the UK as its primary market and has marketed its business towards customers in the UK consistently since 1998. These marketing activities include attending exhibitions, advertising, participating in social networking and generally being active online.
- 5.2 The Domain Name is an Abusive Registration for the following reasons:
- The Respondent would have found out about the Complainant during the process of registering the Domain Name and would have been drawn to at least look at the Complainant's website;
 - The Respondent has taken a course of building its business of the back of the Complainant's established business, rather than establishing a truly independent brand;
 - Given the established goodwill and reputation that the Complainant has, both in the UK and worldwide, there will inevitably be confusion with another company who uses the same or very similar name in relation to the same or very similar business;
 - The fact that the Respondent's website looks different to the Complainant's website is irrelevant due to the constantly changing nature of websites generally and a genuine repeat customer of the Complainant who types in either, "LandCruise" or "Land Cruise" as search terms into a search engine will inevitably be channelled towards the Respondent.

Response

- 5.3 The Complaint is a re-filing of an earlier Complaint which was filed by the Complainant in May 2011 and subsequently withdrawn.
- 5.4 The name “LandCruise” was devised by the Respondent with no knowledge of the Complainant’s brand. The Respondent has not copied the Complainant’s brand.
- 5.5 The Respondent came up with “LandCruise” based on a company called, “Just Cruizin Clothing” which the Respondent had recently come across. This then became “Landcruiz” and eventually “LandCruise”.
- 5.6 Prior to adopting the name “LandCruise”, the Respondent carried out extensive research into this name and did not come up with the Complainant’s name. There is nothing unauthorised about the Respondent’s business and indeed they have a UK registered trade mark for the name “LandCruise” and this was registered in December 2009.
- 5.7 The Respondent finds it insulting to be accused of passing itself off as being part of the Complainant and it is fiercely proud of its own business.
- 5.8 There is no question that the Respondent has taken unfair advantage of the Complainant because:
- The Respondent knows its customers personally and they are simply not thinking that the Respondent is part of a bigger entity;
 - Training search engines to recognise the name “LandCruise” is not abusive;
 - The Complainant target market is centred on Chichester and 79 % of its customers have never been in a motor home before;
 - The Respondent has carried out an “informal” survey of its customers since first becoming aware of the Complainant’s complaint and this survey has shown absolutely no confusion whatsoever;
 - The Respondent questions whether the Complainant is truly a global brand as the Complainant does not supply its motor homes anywhere other than in Canada;
 - The Respondent accepts that the Complainant has a number of other websites aimed at other countries in the world, but there do not appear to be any national offices in these countries, further the Complainant has no international representatives or contacts;

- The Complainant's website has no mention of the UK nor is there any sign of the Complainant having a website in the UK.

Reply

- 5.9 The earlier complaint was filed under the mistaken belief that Nominet could assist with "top level domain names". The Complainant's main priority was to deal with the Respondent's registration of LandCruise.uk.com following which it was deal with second level domains such as the Domain Name. Therefore when it was informed by Nominet that Nominet could not deal with top level domains, the original complaint was withdrawn.
- 5.10 In relation to LandCruise.uk.com the Complainant is pursuing a US trade mark and once that US trade mark is granted it will take further action against the Respondent.

6. Discussions and Findings

Preliminary Issue

- 6.1 The Response raises one point which it is sensible for me to deal with in advance of everything else. It is common ground that the Complaint is simply a re-filing of a complaint which was previously filed with Nominet in May 2011 but then was withdrawn before a decision was ever made. It is not entirely clear why this earlier complaint was withdrawn although the Complainant says that it was filed originally in the mistaken belief that Nominet had jurisdiction to deal with .uk.com domain names and therefore that this was the appropriate forum to deal with the Respondent's registration for LandCruise.uk.com which was of more immediate concern to the Complainant than the Domain Name.
- 6.2 Nominet's Dispute Resolution Service Policy ("the Policy") sets out the position in relation to the resubmission of earlier complaints. This is contained in paragraphs 10(e), (f) and (g) of the Policy. It is however clear that these paragraphs only apply in circumstances where the earlier Complaint has reached the Decision stage. This is clearly not the case here and I cannot see that these paragraphs apply.
- 6.3 I therefore do not think that there is any reason why I should not go ahead and decide this Complaint. The earlier complaint which was filed and then withdrawn by the Complainant is not a resubmission within the meaning of the Policy and there is therefore no reason why I should not carry on and hear this Complaint.

Introduction

- 6.4 Paragraph 2 of the Policy requires that the Complainant must prove, on the balance of probabilities, that:

- a. *The Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name; and*
- b. *The Domain Name, in the hands of the Respondent, is an Abusive registration.*

Rights

6.5 As a first step I must therefore decide whether the Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name.

6.6 The definition of Rights in the Policy is as follows:

Rights means rights enforceable by the Complainant whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning.

This has always been treated in decisions under Nominet's DRS as a test with a low threshold to overcome and I think that must be the correct approach.

6.7 The Complainant does not have any granted registered trade marks for the mark, "LandCruise" or anything similar although it is in the process of obtaining a US trade mark through the USPTO. However, it is clear that the Complainant has been using the mark, "LandCruise" since 1998 primarily in Canada where its business is based, but also in the UK where it has clearly carried out some marketing activities over the years on the basis that it has apparently targeted the UK as its primary market.

6.8 In relation to the UK use of "LandCruise" by the Complainant, this appears to have taken a number of forms including attendance at conferences, social networking and also some sponsorship on an airline flying between Canada and the UK. Additionally, and while fairly understandably the Complaint has not dealt with this in any great detail, there will also inevitably have been substantial use of "LandCruise" in Canada where the Complainant's business is based. In all these circumstances, and given the Complainant's use of the mark, "LandCruise" in both the UK and Canada over a number of years, I find it inevitable that the Complainant will have built up some kind of rights in the name, "LandCruise".

6.9 As I have said the threshold for deciding whether or not a Complainant has Rights is a low one under Nominet's DRS and I have no doubt that, on the balance of probabilities, it is met in this case. I therefore conclude that the Complainant does have Rights in a name or mark which is identical or similar to the Domain Name.

Abusive Registration

- 6.10 Abusive Registration is defined in Paragraph 1 of the Policy as 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 used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's Rights.*

This definition allows me to consider whether the Domain Name is an Abusive Registration either at the time of registration/acquisition or subsequently through the use that was made of it.

- 6.11 Paragraph 3 of the Policy provides a non-exhaustive list of the factors which may evidence that a Domain Name is an Abusive Registration and Paragraph 4 of the Policy provides a non-exhaustive list of the factors which may evidence that the Domain Name is not an Abusive Registration.
- 6.12 The Policy provides for the Complainant to prove, on the balance of probabilities, that the Domain Name is an Abusive Registration. The burden of proof is therefore firmly on the Complainant.
- 6.13 In order to make a finding of Abusive Registration it is reasonably common ground amongst Nominet Experts that, in all but a minority of cases, there must be an element of knowledge on the part of the Respondent in the sense that the Respondent must, on some level, be aware of the Complainant's Rights. In some cases where the name in which the Complainant has rights is particularly well known this will be fairly obvious and straightforward while in other cases where the name in which the Complainant has Rights is less well known and/or where there are other meanings or uses which can be made of the name this will require substantial evidence from the Complainant.
- 6.14 The position on knowledge has been summarised by Nominet's Appeal Panel in the earlier case of, Verbatim Limited –v- Michael Toth DRS04331 and it is convenient to reproduce the following paragraphs from the Appeal Panel's decision here:

8.13 In this Panel's view the following should be the approach to the issues of knowledge and intent in relation to the factors listed under paragraph 3 of the Policy:

- a. *First, some knowledge of the Complainant and/or its brands/rights is a pre-requisite for a successful complaint under all heads of the DRS Policy other than paragraph 3(a)(iv) (giving false contact details). The DNS is a first-come-first-*

served system. The Panel cannot at present conceive of any circumstances under which a domain name registrant, wholly unaware of the Complainant and its Rights, can be said to be taking unfair advantage of or causing unfair detriment to the Complainant's Rights.

- b. Secondly, "knowledge" and "intention" are pre-requisites for a successful complaint under all heads of paragraph 3(a)(i) of the Policy. The wording of that paragraph expressly calls for the relevant intent, which cannot exist without the relevant knowledge.
- c. Thirdly, "intention" is not a necessary ingredient for a complaint under paragraph 3(a)(ii) of the DRS Policy). The test is more objective than that. However, some knowledge of the Complainant or its name/brand is a pre-requisite.
- d. Fourthly, while some knowledge of the Complainant or its name/brand is a pre-requisite for a successful complaint under the DRS Policy (save for a complaint under paragraph 3(a)(iv), knowledge is not of itself conclusive in favour of the Complainant. The Expert/Appeal Panel will still need to be satisfied that the registration/use takes unfair advantage of or is causing unfair detriment to the Complainant's Rights.
- e. Fifthly, when a Respondent denies all knowledge of the Complainant and/or its Rights at the relevant time, that denial is not necessarily the end of the matter. The credibility of that denial will be scrutinised carefully in order to discern whether, on the balance of probabilities, the relevant degree of knowledge or awareness was present.

8.14 Accordingly, in the view of this Panel, for this complaint to succeed, the Complainant must satisfy the Panel, as an opener, that the Respondent was aware of the existence of the Complainant or its brand at the date of registration of the Domain Name.

It is also worth referring to the decision of the Expert in Rileys.co.uk DRS04769 in this regard:

"The onus is on the Complainant to make out its case. Is the Complainant so famous that the Respondent must have had the Complainant in mind when registering the Domain Name and for the abusive purposes alleged by the Complainant, namely to damage the Complainant's business or to extort money from the Complainant?"

The Complainant has made no attempt to demonstrate to the Expert the fame of the Complainant's brand. There are no details of its business over the years, nothing in the way of sales figures or promotional or advertising material. Accordingly, the Expert is

simply not in a position to make any inference adverse to the Respondent on that basis.”

- 6.15 The first issue here is therefore one of knowledge. Did the Respondent know about the Complainant’s Rights at the time it registered the Domain Name?
- 6.16 This is not a case where the Complainant clearly has no reputation and the Respondent simply cannot have known about it nor however is it a case where the Complainant is so famous that the Respondent simply must have known about it. The position is somewhere on the scale between these two extremes and very much turns on a consideration of how well known the Complainant is, the Respondent’s account of how it came about the Domain Name as well as its subsequent use of the Domain Name.
- 6.17 The Respondent’s knowledge of the Complainant and the fact that the Respondent has taken advantage of the Complainant’s brand is central to the way in which the Complaint is framed. The Complainant argues that when the Respondent was registering the Domain Name, it simply must have come across the Complainant’s .com, .net and .org domain names and would have been led to look at the Complainant’s site (s). Once the Respondent knew about the Complainant’s business, then it was far easier for the Respondent to build its own business off of the back of the Complainant’s existing reputation, rather than to start from scratch with another brand and this is what the Respondent has done.
- 6.18 The Complainant seeks to illustrate the Respondent’s conduct in taking unfair advantage of the Complainant’s brand by making four points which I will set out as the Complainant puts them:
- “Point 1: The domain name Registrant is a computer “expert” who knows how to manage the internet, for both IT, websites and marketing.*
- Point 2: Knows enough to “train” Google robots to acknowledge the website;*
- Point 3: Has informed Google to track his date; including “key words” such as “LandCruise” which are vital parts of conducting business online.*
- Point 4: Use of word “LandCruise” in matter and in the URL hypertext that connects web page’s inside his site.”*
- 6.19 The Complainant therefore submits that the goodwill and reputation which it has built up over 13 years in the name, “LandCruise” is being misappropriated by the Respondent. Unfortunately for the Complainant all of its 4 points are equally things that a brand new business which has an internet presence would seek to do regardless or not of whether it was seeking to take unfair advantage of an earlier brand. I do not therefore think these points assist very much.

6.20 A central aspect of the state of the Respondent's knowledge is however a consideration of the use the Complainant has made of "LandCruise" and particularly to consider whether this use was likely to have come to the attention of the Respondent. The use which the Complainant identifies in its Complaint is as follows:

- the Complainant has been physically represented at a host of motor home and travel related consumer shows in the UK since September 1998, including, "Destinations" at Earls Court;
- In 1998 the Complainant attended the International Caravan Association Rally in the UK;
- The Complainant has marketed its brand in the UK as the exclusive motor home supplier of Zoom Airlines, an airline which flew between Canada and the UK;
- The Complainant has been a member of the UK based, "Ecademy" since 14th October 2005;
- The Complainant has been listed on a UK chat room called "Motorhome Facts" since 2005;
- The Complainant has been active in business online in the global community generally since 1998.

It would be fair to add to this list the use the Complainant has made of "LandCruise" by virtue of actually operating its business which it has done in Canada since 1998.

6.21 The Respondent denies that it had any knowledge whatsoever of the Complainant when it chose its name. Instead, the Respondent gives a fairly full account of the genesis of the name "LandCruise" in relation to its business.. The Respondent submits that its use of "LandCruise" was taken from or was at least heavily influenced by a business card from, a business called "Just Cruizin Clothing" which one of the directors of the Respondent had recently come across and indeed the Respondent exhibits a copy of this card and early mock ups of its own, "LandCruise" brand.

6.22 The Respondent explains that when it came to setting up its business in 2008/2009 the Respondent did search for, "motor home hire" on the UK pages of Google and the Complainant did not appear. The Respondent also says that it researched the leading UK motor home hire directories such as www.just-motorhomes.co.uk and again the Complainant did not appear.

6.23 In summary the Respondent's position is therefore that it did not know about the Complainant when it set up its business and indeed as

far as I can tell the Respondent did not know about the Complainant until it received correspondence from the Complainant in March 2011 by which time the Respondent's business had become established and had already obtained a UK trade mark for the mark, "LandCruise" which was filed on 15th December 2009.

- 6.24 In considering whether the Respondent would have known about the Complainant when it registered the Domain Name, it is important to consider how well known the Complainant would have been and whether the Respondent would have been likely to have known about it. It is clear that the Complainant has carried out some marketing activities in the UK which pre-date quite considerably the Respondent's registration of the Domain Name. It is however not at all clear to me whether those marketing activities were on such a scale that the Respondent must have known about the Complainant. No information has been provided about the circulation of any adverts which the Complainant ran or about how widely the exhibitions it showed its products at were advertised or attended.
- 6.25 It is also relevant to take into account the nature of the Domain Name. While it is not the most obvious domain name for a motor home hire company, it is also not the most original. I say this not to criticise either party in any way, but simply to make the point that it would not be at all impossible or inconceivable that two separate parties independently came up with this name for their own very similar businesses.
- 6.26 The Complainant's best point is probably that the Respondent would have seen its site when it came to register the Domain Name because it would have seen that other extensions were taken and would have been drawn to check these out. The Respondent's explanation that the registration of the Domain Name was handled for it by an IT company and it therefore simply did not question the fact that other domain name extensions were taken and did not find out about the Complainant. I am in two minds about the Respondent's explanation. It could be argued that it is a little unlikely given that the Respondent was savvy enough to have carried out some UK internet searches prior to launching its business/registering the Domain Name. Ultimately however, and very much on the balance of probabilities I find the Respondent's explanation plausible given the descriptive nature of the Domain Name and the fact therefore that it would have been no great surprise to find domain names containing this name taken as they would be desirable domain names for tour companies or even car companies. I therefore do not think that the fact that other extensions were taken would necessarily have put the Respondent on enquiry that there was a problem.
- 6.27 I also find entirely plausible the Respondent's story about how it came to develop its "LandCruise" brand independently of the Complainant and this particular explanation is helped by the example of the "Just Cruizin Clothing" card and the logo concepts that the Respondent

annexes to its Response which give the Respondent's story some substance and therefore in my view, credibility.

6.28 The Respondent's use of the Domain Name also does not support a finding of Abusive Registration.. The Respondent's evidence (which is unchallenged) is that its marketing activities are directed at companies within a radius of Chichester, that 72% of the Respondent's customers are from the counties of West and East Sussex, Hampshire and Surrey and that for 79% of its customers this is their first motorhome experience. While it is not essential to the Complainant's case it would also be helpful if there was any suggestion that the Respondent's website mimics the Complainant's website or style in anything other than by its use of the name, "LandCruise". While I accept that it could be enough for a finding of Abusive Registration for the Respondent to have built its newer business on a loose association with the Complainant's goodwill in its brand the Complainant's case in this regard does not ever really rise above the level of bare assertion and there is no tangible evidence to support this.

6.29 I am also swayed in the Respondent's favour by Paragraph 4(i)A of the Policy. Paragraph 4 of the Policy lists a number of non-exhaustive factors which may be evidence that the Domain Name's not an Abusive Registration. Of this list the one that is relevant here is as follows:

"i. Before being aware of the Complainant's cause for complaint (not necessarily the "Complaint" under the DRS), 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;"

6.30 The Domain Name was registered in January 2010. I am not aware of when the Respondent began to use the Domain Name, but it does seem clear that the Respondent only became aware of the Complainant's complaint in March 2011 and by that time the Respondent had registered a UK trade mark and had started to trade using the Domain Name to offer its own motor homes for rent and the Respondent therefore seems to fall squarely within this provision.

6.31 My finding is therefore that the Complainant has failed to establish, on the balance of probabilities, that the Domain Name is an Abusive Registration in the hands of the Respondent.

6.32 This dispute does however have all the makings of a wider dispute between the Complainant and Respondent and I would therefore like to stress that my finding is limited to Nominet's DRS which has been established as a relatively informal and contractual dispute resolution process. By definition therefore, it is not geared to deciding on the

finer points of international trade marks or on questions of passing off, particularly those with an international dimension.

7. Decision

For the reasons set out above I find, on the balance of probabilities, that the Complainant has Rights in names or marks which are identical or similar to the Domain Names, but that the Complainant has failed to show that the Domain Name in the hands of the Respondent is an Abusive Registration. I therefore direct that no action should be taken in relation to the Domain Name.

Signed Nick Phillips

Dated 20 December 2011