

DISPUTE RESOLUTION SERVICE

D00018336

Decision of Independent Expert

Horizons Aviation Limited

and

HORIZON AVIATION LTD

1. The Parties:

Lead Complainant: Horizons Aviation Limited
Horizons Aviation Limited
19 Drove Hill
Chilbolton
Stockbridge
Hampshire
SO20 6AR
United Kingdom

Respondent: HORIZON AVIATION LTD
HANGAR C2
COTSWOLD AIRPORT
CIRENCESTER
GLOUCESTERSHIRE
GL7 6FD
United Kingdom

2. The Domain Name(s):

horizonaviation.co.uk (“the Disputed Domain”)

3. Procedural History:

I can confirm that I am independent of each of the parties. To the best of my knowledge and belief, there are no facts or circumstances, past or present, or that could arise in the foreseeable future, that need be disclosed as they might be of such a nature as to call in to question my independence in the eyes of one or both of the parties.

21 December 2016 20:27 Dispute received
22 December 2016 09:34 Complaint validated
22 December 2016 09:48 Notification of complaint sent to parties
13 January 2017 01:30 Response reminder sent
23 January 2017 13:01 Response received
23 January 2017 13:01 Notification of response sent to parties
26 January 2017 01:30 Reply reminder sent
30 January 2017 13:44 Reply received
30 January 2017 13:44 Notification of reply sent to parties
02 February 2017 16:06 Mediator appointed
03 February 2017 11:15 Mediation started
14 February 2017 12:09 Mediation failed
14 February 2017 12:09 Close of mediation documents sent
15 February 2017 16:36 Expert decision payment received

4. Factual Background

4.1 The complainant was incorporated on 29 June 2004 and is run by its managing director, Simon Chin, and company secretary and solicitor, Lesley Chin. The domain used by the complainant, horizonsaviation.co.uk, was registered in the name of Mr Chin on 2 July 2004. The complainant says that it has been active since incorporation carrying out a range of activities including flight training services, pilot flight planning software development and marketing, pilot ground school training, aircraft ferrying and aircraft management. It says that since 2009 it has also provided services as a bespoke software design house and since 2010 has marketed smart phone apps.

4.2 In 2016 the complainant registered two UK trade marks. The first was applied for on 5 March 2016 and entered in the register on 3 June 2016 and was for the following figurative mark:



This mark is registered under number 3 153 318 for a variety of goods in Class 9 including computer software for use on cellular and mobile phones, embedded software, and software for flight control, flight automation. It is also registered for “education providing of training flying instruction” in Class 41 and a range of scientific, technical and computer software related services in Class 42. The second registration is for the words “Horizons Aviation”. This was applied for on 15 August 2016 and registered on 25 November 2016 under number 3 180 335. It is registered in the same three classes for the same range of goods and services as the figurative mark office save that e-commerce related goods and services are expressly excluded from the scope of the registration.

4.3 The complainant has referred to a variety of evidence to support its claims and it is helpful to understand the issues in this dispute to summarise the nature and effect of that evidence. The complainant has produced its accounts from incorporation to date. The first set of accounts, which run to 30 June 2005, describes the complainant's principal activities in the following terms:

“The company's principal activity during the year continued to be the selling of flight planning software and consultancy in a flight instructor role. The company continues to develop more software in the future.”

4.4 The complainant's turnover for the first year following incorporation was £2336 split almost equally between sales and consultancy. The following year the principal activity was the same save that it indicated that more software had been developed. Turnover for the year was £2604, more than 90% of which was sales rather than consultancy. By June 2009 turnover had risen to £13336 with the bulk being consultancy. The accounts also indicate that there had been negotiations with a view to licensing the complainant's source code to a defence company. The following year the negotiations are reported as having been successful which is reflected in a licensing fee forming just under a third of the total turnover of £63469, almost all of the remainder being consultancy. By June 2011 the complainant is reporting that it has started smart phone application development and virtually all of the turnover of £51359 is from consultancy. The principal activities at this point expressly continue to include “selling of flight planning software and consultancy is a flight instructor role”. Thereafter the complainant's accounts show that it began marketing the smartphone applications and turnover has been within the range of £60-70000, almost all being consultancy. The complainant has given no detailed explanation of the nature of the consultancy services but has referred me to its current website which lists on its home page as the services it provides “Flight Training” and “Software Design” as well as a range of apps as products offered for the Windows and Android operating systems. The description of flight training indicates that the complainant provides a range of services relating to flying of light aircraft including flight and ground training services provided to flying schools.

4.5 The complainant has provided very little direct evidence of how it makes its sales. There is a spreadsheet from 2005-6 showing a number of sales of a software application called “Notam Check” which is downloaded: the price is £20 a unit. This software is the subject of a forum discussion from the same period in which the complainant is mentioned as its source. Notam Check is a form of flight planning software although it is not clear to me (I have no flying expertise and the materials before me contain insufficient information) precisely what it does. The complainant says that it has been licensed to commercial flight schools as well as the public. The complainant relies upon these sales as demonstrating its reputation under the name Horizons Aviation. It relied in correspondence on the fact that the software is used by thousands of pilots but I have been given no figures. However, save for the mention of this as the source of the software, it is impossible to determine whether the people who purchased the software simply purchased something called Notam Check or purchased it knowingly from the complainant. I have to assume, there being no evidence to the contrary, that the downloads of which there is evidence were from the complainant's website. However, even on this assumption, the reputational effect of

these sales is small as the sales of software have hardly ever exceeded £2000 a year and for the last few years have been a few hundreds of pounds. The complainant has produced no invoices for particular sales of software or services although some have clearly been supplied to the respondent as they are referenced in the correspondence between them. I have not been given copies of these documents although from its submissions it appears that the respondent thinks that I have because it complains that they are part of the evidence submitted by the complainant and are misdescribed in the schedule accompanying the complaint.

4.6 The complainant relies upon large numbers of downloads from the Android platform, now Google Play, of apps it has developed. The most downloaded are two free apps, metal detector and tape measure. These have approximately 320 000 downloads between them. The complainant has produced a picture showing that the app start up splash screen has the Horizons Aviation logo shown above on it. The complainant does not say how long the apps have had that splash screen but it seems likely that this or something similar will have appeared since the apps were first marketed. These apps, however, appear to have nothing to do with flying or air transport. A free trial version of a third app called “Radio Nav Aids” had been downloaded 28 921 times by 15 December 2016 whilst the paid for full version had been downloaded 706 times. It appears from the complainant’s website to be some form of radio navigation system simulator to be used as a pilot training aid. Again, as I have no flying experience, I am unable to discern more about it.

4.7 The complainant has also referred to its YouTube channel which has a number of videos on it. Two are videos of flights in a light aircraft which have almost no views. The third is a demo of the Android metal detector app. The latter has just over 180 000 views.

4.8 Finally the complainant relies upon its company registration of the name Horizons Aviation and the fact that it has traded under that name since incorporation. It has produced no invoices or correspondence to back up this claim but there is no effective challenge to it so that I can rely upon it.

4.9 The respondent was incorporated in July 2012 under the name Horizon Aviation Limited and registered the Disputed Domain immediately thereafter. The respondent’s business is in flight training services, aircraft ferrying and aircraft management. It is run by two flying instructors and from its website to which I have been referred, appears to have light planes available for teaching purposes. I have been considerably hampered in my understanding of the respondent’s position by the disjointed (and sometimes incomprehensible) and argumentative presentation of its case in the response. What follows, therefore, is my summary of what appears to me to be the case gleaned from both parties’ submissions and the materials to which they have referred me.

4.10 The respondent has given little or no detail about the scope or size of its business. The complainant has produced two sets of abbreviated accounts for the respondent’s first years of trading which are presumably the ones it could find at Companies House. These show a turnover of £758 with a cost of sales of £731 in the first year of trading to 31 July 2013 and provide only an abbreviated balance sheet for the following year from which one can deduce pretty well nothing of relevance to this

dispute. I am therefore left completely in the dark as to the precise nature and extent of the respondent's activities which goes some way towards mitigating the complainant's failure to give any explanation about how or when it first became aware of the respondent (the only reference I have found is the statement in the initial letter of complaint that its attention had been drawn to the respondent's company name and website; it does not say when, in what circumstances or by whom). It is unclear whether the respondent has traded on any significant scale at all, let alone for any period. It certainly does not appear to have carried out any significant activities before 2013 and the scale of its operations thereafter can only be guessed at.

4.11 I have been referred to the respondent's website operating on the Disputed Domain according to which it carries out pilot training, aircraft management and aircraft ferrying. As can be seen from their addresses the parties are not far apart. The complainant says that the parties' respective bases are at locations which are 45 miles apart and this is not challenged by the respondent.

4.12 According to the respondent there was another company which used the name Horizon Aviation between 2004 and 2010. It asserts that the company traded but gives no information about the nature or scope of its activities. It says that the complainant took no action against this company.

4.13 There do not appear to have been any instances of confusion between the parties which have been recognised either by the party who has been approached or the person approaching it. At least, there is nothing in either party's submissions or the supporting materials they have submitted to suggest this. On the contrary, the respondent asserts that the parties are in different areas of endeavour and that it is unaware of any occasions on which it has been mistaken for the claimant.

4.14 The complainant first raised the present complaint in correspondence with the respondent by a letter dated 20 July 2016 in which it sought undertakings from the respondent to cease use of the Disputed Domain and the name Horizon Aviation on the grounds that these activities constituted passing off and trade mark infringement. Since then there has been lengthy if inconclusive and rather combative correspondence between the parties up to the date of the present complaint. The approach taken in the correspondence from the respondent is both belligerent and unhelpful. It has done little to identify the real issues between the parties and nothing to attempt to resolve them. Nevertheless, some of the information I have relied upon comes from the content of this correspondence as it adds to the information supplied by the parties.

4.15 The combative approach to the dispute has continued in the parties' submissions. Each heavily criticises the other's presentations. There is more substance in the complainant's attack on the respondent's submissions than vice versa. As will be seen from my comments below, the respondent's submissions contain incomplete sentences, passages which I have been unable to understand and allegations which appear to be either obviously wrong or irrelevant. For a document prepared by professional advisers, this is both surprising and unacceptable. Frankly, however, neither party has presented its case to its best advantage.

5. Parties' Contentions

Rights

5.1 The complainant asserts that it has rights by virtue of its registration of the domain *horizonsaviation.co.uk* and its company name, the use of those names in trade and the registration of its trade marks. The respondent does not directly address this aspect of the case but does allege that the complainant is in a different area of business from the respondent, the complainant being a provider of software rather than a provider of aeronautical services. It says that the complainant is a software supplier, not an aeronautical services supplier. It points to the fact that Mr Chin's occupation is given as a software engineer in the company report at Companies House. The complainant points out that he has always had a private pilot's licence.

5.2 The respondent points to the fact that the services listed at Companies House under its system of Standard Industrial Classification (SIC) as being provided by the complainant (SIC 62012: business and domestic software development; SIC 71129: other engineering activities) did not include until recently anything expressly related to aeronautical services (now added are: SIC 96090: other service activities not elsewhere classified). It contrasts this with the SIC codes for which the respondent is registered (SIC 52230: service activities incidental to air transportation; SIC 85590: other education not elsewhere classified). It goes on to say (insofar as I can understand the allegation made) that the business carried on by the complainant was until recently in accord with the limited scope of the activities listed at Companies House. It appears to be saying that what the complainant has recently done is in conflict with this limited registration. I may, however, not properly have understood the allegations as they are written in sentences which are either incomplete or make no sense. The complainant responds that the activities registered at Companies House are irrelevant and that what matters is what it has actually done. It also points out that the SIC codes for a company's business listed at Companies House may not reflect the nature of the services provide to the public, giving the example of Virgin Atlantic Airways which has the SIC code 70100: activities of head offices.

5.3 The respondent asserts that the complainant has both changed its logo to look more like that of the respondent and registered its trade marks in order to strengthen its position in the present dispute. The complainant denies this and says that it is an allegation made without evidence and is without substance. It says that it has not changed its logo since registering its first trade mark registration (which is of course for the logo it is apparently now using). The respondent also alleges that the complainant has adapted its website since the commencement of the present dispute to make it look more as if there is a closer correspondence between the parties' respective businesses than is in fact the case. It has given no details of the alleged changes. The complainant, unsurprisingly in the circumstances, responds only that there is no evidence to back up this allegation.

5.4 The respondent challenges the complainant's reputation and puts it to strict proof of the use of its name. It denies that the complainant has a far-reaching reputation.

5.5 The respondent attacks the complainant's trade mark rights without apparently challenging their validity on the basis that they were applied for only after the complainant commenced correspondence with the respondent about the dispute the subject of the complaint. That is manifestly incorrect from the dates noted above as the respondent itself recognises later in its submissions where it accepts that the earlier of the registrations predates the correspondence. Consequently, I have been unable to understand what the respondent is complaining about or what the purported thrust of this allegation is supposed to be.

5.6 The parties take issue with each other on whether Companies House should have registered the respondent's name on the ground that it is so similar to that of the complainant that it should have been treated as being the same. According to the guidance issued by Companies House and relied upon by the complainant singular versions of plural names and vice versa should be treated as being too close to each other. Be that as it may, the fact is that both companies' names have been registered, whether in breach of this guidance or not.

Abusive registration

5.7 Turning to whether the Disputed Domain is an Abusive Registration the complainant asserts that the respondent has no legitimate right to the Disputed Domain because at the time it was registered the complainant was already registered and trading under its virtually identical name. The complainant says that use of the Disputed Domain by the respondent amounts to trade mark infringement and passing off. The complainant asserts that the respondent is using the Disputed Domain in a manner which is likely to confuse the public or businesses contrary to the DRS Policy paragraph 5.1.2.

5.8 The complainant supports these claims by reference to a number of facts which appear to be undisputed. First, a range of Google searches containing the words "horizons aviation" present the respondent's website as the first response whilst the complainant either does not appear in the top results at all or is below the respondent. Thus, a search for "horizons aviation" alone gives the respondent as the first result and the complainant as the second. Interestingly, Google's algorithm clearly associates the name "horizons aviation" with the respondent because the respondent's company details appear in the identification box at the top right of the page. A search for "horizons aviation flight training" gives the respondent as the first result and the complainant only in position 7. There are several other Horizon results listed including Horizon Aviation in Boston and Rhode Island. A search for "horizons aviation contact details" gives the respondent as the first results and a Companies House result for the complainant at eighth position. A search for "horizons aviation Hampshire address" gives the respondent's address in Gloucestershire as the first result together with the full identification box at the top right of the screen, a business directory entry for the complainant second, the respondent as third result and then a series of directory and Companies House results for the complainant. A search for "horizons aviation consultancy" gives the respondent's consultancy page as the first result, again with the corporate identification box followed by three more results for the respondent before going on to results unconnected with either party. Other results are similar.

5.9 The complainant says that a potential customer for the complainant's services would be misled by these results into approaching the respondent in the mistaken belief that it was the complainant.

5.10 The respondent denies that it is responsible for these search results. It says that the reason for it appearing at the top of the Google search results for the complainant's name "is an acceptance of the Respondent's wise and good reputation for providing aviation training and services". In answer to the allegation that potential customers may be confused it says that it has not been approached by any potential customer of the complainant in the belief that it is the complainant and that no evidence of actual confusion has been provided by the complainant. It says that the complainant has therefore suffered no loss or damage. It says that the parties are in different fields of business relying upon the different business descriptions given for the two companies at Companies House.

5.11 In addition to this, the respondent asserts that it is not liable for passing off because it is not using the same name as the complainant and the name it is using "is not an exact match to the Complainant's name". It says it has no interest in the trade mark which the complainant has obtained and points out that when the complainant registered its trade marks it carried out no searches although searches would have revealed the existence of the respondent.

5.12 The respondent's submissions do not directly address the issue of the similarity between the parties' names and domain names or the consequent question whether the use by the respondent of the Disputed Domain is likely to confuse people or businesses into believing that the Disputed Domain is in some way connected with or run by the complainant. The respondent says only that, if there were an issue as to the similarity between the parties' names, it should have been raised at the time of registration. I infer that it means by this that the Companies Registrar would and should have objected to the registration of the respondent's company name on the ground that it is too similar to that of the complainant.

5.13 The complainant asserts that it is not unreasonable to conclude that the respondent registered the Disputed Domain for the purpose of unfairly disrupting the complainant's business contrary to DRS Policy paragraph 5.1.1.3. In support of this submission the complainant points out that a very basic level of due diligence using Google and Companies House online searches when the respondent was incorporated would have revealed the prior existence of the complainant. The complainant says that the searches were either not done or the results ignored. Taken with the hostile and threatening letters which have been sent on the respondent's behalf prior to the complaint, it says that an intention to disrupt the complainant's business should be inferred.

5.14 The respondent denies any knowledge of the complainant prior to receipt of the complainant's letter of complaint dated 20 July 2016. Later in its submissions, however, the respondent says this: "the Respondent states that when it applied for registration of its name, it was noted that the nature of the businesses were completely distinct the Respondent's principle [sic] business is 'service activities incidental to air transportation'". As expressed these allegations are irreconcilable. It seems that what the respondent means is that it did carry out the basic due diligence at Companies

House which the complainant says should have been done and concluded that the complainant was not a relevant business because its principal registered activities were in a different field from that of the respondent. It first became aware that the complainant claimed to operate in the same or a closely related field to the respondent when it received the initial letter of complaint. Again, I make clear that I have had to deduce what I think the respondent meant to say and that it is possible that I have not done so accurately. If so, the respondent has only itself to blame.

5.15 The respondent also denies having written in a hostile and threatening manner. Having read the correspondence, this may strictly be correct. The respondent's letters are however argumentative, take a series of irrelevant or peripheral points and written in a rather belligerent tone so that I can well understand why the complainant might reach the conclusion that they are hostile.

5.16 The respondent concludes this part of its submissions by denying that it has conducted itself in any manner designed to disrupt, interfere with, and/or obtain any potential commercial benefit against the complainant. It says it has no interest in the complainant's business and the two businesses are completely different.

Other matters

5.17 There is a dispute about whether the respondent's response should be admitted. The complainant asks me to refuse to look at it because it was submitted out of time and the respondent should not have been given an extension of time to submit it as the ground upon which the extension was granted was spurious. The extension of time having been granted, I do not think that I can revisit it now. The complainant has seen the response and has had and taken the opportunity to reply to it. I have therefore read and taken account of the respondent's submissions in the response as well as the matters raised in the reply.

6. Discussion and Findings

Introduction

6.1 An Abusive Registration is defined by paragraph 1 of the DRS Policy as being one which

- “(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) is being or has been used in a manner which took unfair advantage of or is unfairly detrimental to the Complainant's Rights.”

Rights are defined under paragraph 1 of the DRS Policy as meaning “rights enforceable by the Complainant, whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning.”

6.2 There are in substance two grounds put forward by the complainant in support of its case that the Disputed Domain is an Abusive Registration falling within the definition in the DRS Policy. These are the matters identified in paragraphs 5.1.1.3 and 5.1.2 of the DRS Policy. Paragraph 5 of the DRS Policy sets out matters which may constitute evidence of Abusive Registration. Paragraph 5.1.1.3 is that the respondent that there are “circumstances indicating that the Respondent registered or otherwise acquired a domain name primarily ... for the purpose of unfairly disrupting the business of the Complainant”. Paragraph 5.1.2 of the DRS Policy is that there are “circumstances indicating that the Respondent is using or threatening to use the Domain Name in a way which has confused or is likely to confuse people or businesses into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant.”

The complainant's rights

6.3 It has repeatedly been stated in DRS appeal decisions and is recorded in the Expert Overview that the establishment of Rights sufficient to satisfy the requirement of the DRS is a low threshold test. In the present case there can be no doubt that the complainant has established that it has rights. It has two trade mark registrations for marks which either include or comprise the term “Horizons Aviation”. That name is plainly very similar to the Disputed Domain. Indeed, it is practically identical, differing only in the fact that the first word of the name is plural in the complainant’s name and singular in the Disputed Domain. The approach in trade mark law (which I recognise does not apply directly here) is that differences between two marks which would be likely to go unnoticed by the average consumer may be disregarded when determining whether two marks should be considered to be identical or merely similar. The difference between the two marks in issue seems to me fall within that principle. It seems to me that someone of reasonable perspicacity approaching one of these names having seen the other might well fail to spot the difference. Accordingly, in my view, the names horizonsaviation and horizonaviation ought prima facie to be treated as identical for present purpose. In any event, there can be no reasonable argument that the two are not so similar that there is a likelihood of confusion between them. I reject without hesitation the respondent’s submission to the contrary which seems to me to lack any sense of reality or perspective.

6.4 In addition, the complainant has shown that it has been trading on a significant, if small, scale for over a decade. It must therefore have acquired a reputation and goodwill amongst the clientele with whom it has done business and those to whom that clientele may recommend its goods and services. It is worth noting that a number of the downloads of the Notam Check software listed in the exhibit provided by the complainant show that customers were led to it by personal recommendation. This shows that the complainant’s reputation and goodwill extend beyond those who are actually its customers to a surrounding penumbra of people to whom its goods and services have been or may be recommended. That the goodwill is probably relatively small and, in relation to the complainant’s air training and transportation related services, almost certainly relatively localised, does not deprive it of value or the need for protection.

6.5 The respondent has relied upon the alleged existence of another company called Horizon Aviation for several years against which the complainant took no

action. It has, however, provided no information about this company and I am therefore unable to take it into account in considering whether the complainant has rights.

6.6 In these circumstances it seems to me that the complainant plainly satisfies the threshold requirement that it has Rights in the Disputed Domain or a name confusingly similar thereto.

6.7 At this point I should address the respondent's allegations that the complainant has registered its trade marks and changed its logo and website to strengthen its position in this dispute with the respondent. As the complainant has noted, these allegations are made entirely without evidence. They are also made on the basis of at least one factual allegation (that the complainant registered its logo mark after the correspondence which has led to the present dispute commenced) which is plainly wrong and which elsewhere in its submissions the respondent acknowledges not to be the case. It is, in my view, axiomatic that a trade mark registration will strengthen the legal hand of a person who wishes to protect that mark. Without a registration all he has are common law rights. With a registration he has the registered right to enforce. It cannot, therefore, in my view be an objection to the obtaining of a trade mark registration that the underlying motive was for a complainant to strengthen his position against a potential infringer. That is so even where the registration is made after the registrant becomes aware of the potential infringement if the mark has been in use because he can always rely upon seniority of use to support the validity of the registration. Here, there does not seem to be any dispute that the complainant is the senior user and that may well be why the respondent has not sought to challenge the validity of the complainant's registrations. Accordingly, it seems to me that this aspect of the respondent's allegations has no bearing on the resolution of the dispute.

6.8 Turning to the allegations that the complainant has changed its logo and website to make them appear closer to those of the respondent, I have no basis for reaching the conclusion that these allegations are justified. The respondent has presented no evidence of any kind to support them: they are pure assertions. Prima facie, the allegations appear to be undermined by the fact that the application for the complainant's first trade mark registration which is for the logo now relied upon and used by the complainant was made several months before the initial letter of complaint which has led to this dispute. I should add that, even had the complainant changed its logo before registering the present logo, it seems to me that it would require some evidence that this was done for a malign purpose before it could be taken into account. Businesses routinely refresh their logos and other presentations so that the mere fact that there has been such a change is itself anodyne and proves nothing. Had the respondent presented these allegations with some factual basis or evidence I might be able to address them properly. As it is, all I can do is to say that there is not a shred of evidence before me to support them. I therefore reject them.

Abusive Registration

6.9 This is an unfortunate and avoidable dispute between two small businesses which can ill afford to expend their limited resources on it. A dispute of this nature between two larger businesses would I suspect already have been the subject of conventional litigation. Given the nature of the dispute it would in my view be better

resolved by a fuller examination of the facts and evidence that the procedures available in litigation permit. It is obvious, however, that such a process would be prohibitively expensive and time-consuming for businesses of the size of the present parties. It is therefore necessary to do the best that one can to resolve it within the confines of the DRS. If the parties find the analysis that it has been possible for me to conduct within the limitations of this forum inadequate and wish to pursue the dispute hereafter in litigation, then that is a matter for them.

6.10 The respondent's position in relation to its knowledge of the complainant when the respondent was first incorporated and registered is unsatisfactory. It appears to allege both that it did not know of the complainant and that it found it by searching at Companies House and concluded on the basis of its SIC code indications that it was not relevant to the business which the respondent intended to conduct. As I have explained above, I have concluded that the latter is the only likely explanation for what is said. That being so, I cannot understand why, having found the complainant, the respondent did not carry out some form of further due diligence. Reliance upon the SIC codes is, for the reason demonstrated by the complainant, unwise and may be unjustified. Simply downloading the complainant's latest accounts would have alerted the respondent's promoters to the fact that one of the complainant's principal activities is "consultancy in a flight instructor role". If that had not set alarm bells ringing (which it clearly should have) further online searches to see whether there was a domain registration or website for horizonsaviation would undoubtedly have done so. A simple WHOIS search would have found the complainant's domain registration and a web search would immediately have located its website. Apparently, however, the respondent did not follow up its initial findings even with further information available from Companies House. Had it done so, it would presumably have found that the complainant, even if primarily a software house, provides and develops software relating to aviation and provides flight instruction consultancy, possibilities to which the complainant's name clearly points. I can only conclude that the respondent took the risk that the complainant's business might conflict with its own proposed business rather than carry out appropriate due diligence. Whilst this is not a ground for concluding that the Disputed Domain is an Abusive Registration, it does mean that when considering matters which do provide such grounds, one may take into account that the respondent has by its approach laid itself open to that risk coming to fruition.

6.11 The conclusion I have reached as to the manner in which the respondent approached its incorporation under the name Horizon Aviation and the consequent registration of the Disputed Domain means that I am not satisfied that it registered the Disputed Domain primarily for the purpose of disrupting the business of the complainant. It appears more likely than not that the respondent's promoters found the complainant and ignored it. They had no subjective or objective intent towards the complainant beyond this. The complainant's allegation under paragraph 5.1.1.3 of the DRS Policy is therefore not made out. The respondent may have been thoughtless, or even careless or reckless as to whether there might be a conflict between the parties' respective businesses but that is not a ground for finding that there is an Abusive Registration.

6.12 I turn, therefore, to the complainant's second complaint, that the Disputed Domain has been used in a way which is likely to confuse the public or businesses into believing that the Disputed Domain is connected with the complainant.

6.13 The evidence before me shows that the complainant has for several years been developing and marketing software which is used for flight planning and pilot training in the use of radio navigation systems. It also appears to offer flight training services and consultancy services to flight schools. I am unable to determine the scale or extent of its activities but, as I have said above, these activities have been on a sufficient scale to give rise to a small but significant goodwill amongst its customers and potential customers. It offers aircraft ferrying services on its website. It also has two trade mark registrations which cover services including flight training services.

6.14 The respondent provides flight training services and air transport related activities including aircraft ferrying and management services. It uses the Disputed Domain to present those services to the public. The Disputed Domain is virtually indistinguishable from the complainant's name. Most people would in my view not notice the difference unless they looked closely and, even when they did, they would be likely to think that they were either the same business or related to each other. Only someone who thought carefully about the additional letter "s" on the word Horizons and then, having realised that there is a difference, carried out some additional checking, would be likely to work out that the two names in fact belong to entirely unrelated businesses. Both parties are small trading entities in almost adjacent counties and are less than 50 miles apart.

6.15 In these circumstances, the question I have to decide is whether a member of the public or a business who is aware of the complainant and in particular its flight related software, would be likely to think that the services offered by the respondent are related to the complainant as a result of being offered through a website with an apparently identical or almost identical name. Given that the complainant's software includes a flight training simulation program and that the respondent offers pilot training services, it seems to me that such confusion is virtually inevitable. It is only too easy to imagine an aspiring pilot who has used the complainant's software and thought it good, coming across the respondent's flight training services and thinking that they are either from the same or a related supplier and therefore have the same stamp of quality. The scale and extent of confusion is impossible to predict.

6.16 The fact that neither party is in a position to identify any confusion makes no difference. The respondent says that no-one has contacted it believing it to be connected with the complainant. How does it know? My long experience in this field has taught me that instances of confusion in cases like this are notoriously difficult to identify explicitly. Even where customers are confused, they frequently do not realise it and even more frequently say nothing to anyone which brings out their confusion. Accordingly, many instances of confusion are simply overlooked. It is unusual for direct evidence of confusion to surface unless the complainant goes out looking for it. In a case like the present, where the greatest likelihood of confusion appears likely to be in relation to complementary rather than directly competing services, the likelihood of actual instances of confusion coming to light is in my view even smaller. Given that these are small businesses, the number of potentially confused people is relatively small, further reducing the likelihood of identifying specific instances of confusion.

The absence of evidence of actual confusion therefore seems to me to make no difference to the prima facie conclusion that confusion of the public or businesses is likely.

6.17 Accordingly, it seems to me that the complainant's complaint under paragraph 5.1.2 of the DRS policy is made out and the Disputed Domain is consequently an Abusive Registration.

6.18 As a codicil to this finding I would make the following point. The respondent consciously or unconsciously took the risk that the result of its failure to carry out even the most basic due diligence once it has discovered the existence of the complainant company might be that a conflict might arise between the parties' respective businesses as a result of them being carried on under almost identical names. It cannot therefore in the circumstances which have now arisen either be surprised or have any complaint that that risk has come to fruition and caused it to be deprived of the Disputed Domain.

7. Decision

I direct that the Disputed Domain, horizonaviation.co.uk, be transferred from the respondent to the complainant.

Signed ...Michael Silverleaf...

Dated 14 March 2017