

ADMINISTRATIVE PANEL DECISION

Liquor Marketing Group Ltd v. Leo Mark Grogan
Case No. DAU2022-0040

1. The Parties

The Complainant is Liquor Marketing Group Ltd, Australia, represented by Sparke Helmore Lawyers, Australia.

The Respondent is Leo Mark Grogan, Australia.

2. The Domain Name and Registrar

The disputed domain name <img.net.au> is registered with Melbourne IT Ltd ("the Registrar").

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on December 9, 2022. On December 9, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On December 13, 2022, the Registrar transmitted by email to the Center its verification response confirming that the Respondent is listed as the registrant and providing the contact details.

The Center verified that the Complaint satisfied the formal requirements of the .au Dispute Resolution Policy (the "Policy" or ".auDRP"), the Rules for .au Dispute Resolution Policy (the "Rules"), and the WIPO Supplemental Rules for .au Domain Name Dispute Resolution Policy (the "Supplemental Rules").

In accordance with the Rules, paragraphs 2(a) and 4(a), the Center formally notified the Respondent of the Complaint, and the proceedings commenced on December 15, 2022. In accordance with the Rules, paragraph 5(a), the due date for Response was January 4, 2023. On December 15, 2022, the Center received two email communications from the Respondent. The Respondent did not submit any formal response. Accordingly, the Center notified the commencement of panel appointment process on January 5, 2023.

The Center appointed John Swinson as the sole panelist in this matter on January 9, 2023. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

4. Factual Background

The Complainant is an Australian corporation that was incorporated in 1977. The Complainant is an alcohol marketing group. The Complainant represents many independent alcohol retailers. According to the Complainant's website (located at "lmg.com.au"), the Complainant has 4 key retail brands, including Bottlemart and SipnSave.

Since about October 2008, the Complainant has used <lmg.com.au> as the primary online location for the Complainant's website.

The Complainant owns an Australian Trademark Registration for LMG, being Australian Registration No. 1764121 that was filed on April 11, 2016.

According to the historical Whois records submitted by the Complainant, on or about July 17, 2011, the Respondent registered the disputed domain name in association with ABN 34 264 183 454 for "Leo Mark Grogan".

The Respondent's name is "Leo Mark Grogan", and it appears that he goes by the name "Mark Grogan". The Respondent provides training services in connection with real estate, and operates a business called "Real Estate Property Training Services". According to the Complainant, at the time the disputed domain name was registered, the Respondent owned an Australian company called LMG Commercial Property Services Pty Ltd. According to Australian Securities & Investments Commission ("ASIC") records, this company was registered in 2005 and was deregistered on January 20, 2019.

The Respondent has a LinkedIn profile (provided by the Complainant) and a Twitter account (found by the Panel and not referred to in the Complaint). The LinkedIn profile states that the Respondent is a director and trainer for Real Estate Property Training Services (from October 2016 to present) and the owner of LMG Commercial Property (September 2005 to present). The Twitter account is located at "@LMGTraining". The most recent post on this account was in October 2018 promoting enrollment in a training course. The Twitter account has a link to a domain name <lmgtraining.com.au>. This domain name diverts to a webpage at "realestatepropertytrainingservices.com.au/lmg". This webpage was provided by the Complainant in the Complaint. This page states: "Real Estate Property Training Services, FORMERLY, LMGTRAINING.COM.AU. Mark Grogan is the business owner of Real Estate Property Training Services and LMG Training, which is no longer in operation and is trading as Real Estate Property Training Services." According to a Whois search provided by the Complainant, the domain name <realestatepropertytrainingservices.com.au> is owned by LMG Commercial Property Services Pty Ltd.

At the present time, the disputed domain name does not resolve to an active website.

The Complainant's solicitors wrote to the Respondent on November 9, 2022. The letter stated that the Respondent did not operate a business in connection with the "LMG" acronym or brand, whether on his own account as a sole trader or in connection with a registered company. The letter further stated that the disputed domain name was not used in connection with a website relating to a commercial enterprise, and the Respondent had not used the disputed domain name in connection with a website for at least 10 years. The letter asked the Respondent to withdraw his application for the domain name <lmg.au> and put the Respondent on notice that the Complainant may bring the present Complaint.

5. Parties' Contentions

A. Complainant

In summary, the Complainant made the following submissions:

The Complainant owns trademark registrations for LMG, including the trademark registration referred to

above in Section 4. The disputed domain name is identical to the LMG trademark.

The disputed domain name is also confusingly similar to the Complainant's <img.com.au> domain name, which resolves to the official website of the Complainant. Consequently, there is a real risk that traffic will be diverted away from the genuine LMG website to the website to which the disputed domain name resolves.

At no time has the Complainant authorised the Respondent to use its valuable and distinctive LMG trademark, or any sign substantially identical with, or deceptively similar to, its LMG trademark, for the disputed domain name, or at all.

The Respondent does not operate a business in connection with the "LMG" acronym or brand, whether on the Respondent's own account as a sole trader, or in connection with a registered company. The Respondent does not use the disputed domain name in connection with a website relating to a commercial enterprise and has not done so for at least 10 years.

The Respondent is not commonly known by the disputed domain name. The Respondent is not making a legitimate noncommercial or fair use of the disputed domain name.

The Complainant's solicitors wrote to the Respondent as set out above in Section 4. The continued use of the disputed domain name by the Respondent is in bad faith, as the Respondent is now knowingly preventing the Complainant, the registered owner of the LMG trademark, from reflecting the trademark in a corresponding domain name. The Complainant refers to paragraph 4(b)(ii) of the Policy.

B. Respondent

The Respondent did not file a formal response.

The Respondent sent two emails, both on December 15, 2022, from an email address comprising the disputed domain name. The emails asked whether the Complaint was a scam. (The Complainant's solicitors responded that the Complaint was not a scam.) The Respondent stated that he had telephoned the Complainant's solicitors and spoke with them. The Respondent wrote in one of the emails (which was also sent to the directors or management of the Complainant): "I am happy to discuss, but any cost to me you will need to cover.....i think that's fair. How about someone rather than your costly lawyers call me to have a rational discussion?"

6. Discussion and Findings

Paragraph 4(a) of the auDRP provides that a complainant must prove each of the following elements:

- (i) the disputed domain name is identical or confusingly similar to a name, trademark or service mark in which the complainant has rights; and
- (ii) the respondent has no rights or legitimate interests in respect of the disputed domain name; and
- (iii) the disputed domain name has been registered or subsequently used in bad faith.

The burden of proof of each element is borne by the Complainant.

Paragraph 15(a) of the Rules directs the Panel to decide the Complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that the Panel deems applicable.

A. Identical or Confusingly Similar

The first element that the Complainant must establish is that the disputed domain name is identical with, or confusingly similar to, the Complainant's name, trademark or service mark.

There are two parts to this inquiry: the Complainant must demonstrate that it has rights in a name or mark at the date the Complaint was filed and, if so, the disputed domain name must be identical or confusingly similar to the name or mark.

For present purposes, the Complainant has proven that it owns a registered trademark for LMG as discussed in section 4 above.

Typically, and as is appropriate in this case, it is permissible to disregard respectively the Top and Second Level Domains, ".net.au", as a functional component of the domain name system. Disregarding the ".net.au", the disputed domain name is identical to the Complainant's LMG registered trademark.

The Complainant succeeds on the first element of the Policy.

B. Rights or Legitimate Interests

The Complainant's allegations as to the Respondent's lack of rights or legitimate interests in the disputed domain name are outlined above in Section 5A. The Panel finds that the Complainant has made a *prima facie* showing that the Respondent lacks rights or legitimate interests in the disputed domain name.

The Complainant has rights in its trademark which precedes the Respondent's registration of the disputed domain name.

The disputed domain name is not currently being used in connection with an active website created by the Respondent. The Panel notes the Respondent is able to send emails from an email address comprising the disputed domain name.

The Respondent has failed to produce any evidence to establish any rights or legitimate interests in the disputed domain name.

It is apparent from the available record that:

1. The Respondent's initials are LMG (*i.e.*, Leo Mark Grogan).
2. The Respondent operated a business called LMG Training, but this is now named Real Estate Property Training Services.
3. The Respondent was a director of a business called LMG Commercial Property Services Pty Ltd, but this company has been deregistered.

The appropriate time to assess whether the Respondent has rights or legitimate interests in the disputed domain name is the date when the Respondent became aware of the dispute about the disputed domain name. Here, this date is November 9, 2022 (which is the date that the Complainant's solicitors wrote to the Respondent). However, if there are such prior rights or interests that no longer exist at the time the Respondent was made aware of the dispute, those "expired" rights or interests will not assist the Respondent establish rights or legitimate interests in the disputed domain name for the purposes of the Policy. See *Geek Group Pty Ltd v. SG Corporate Services Pty Ltd*, WIPO Case No. [DAU2019-0009](#). In respect of paragraph 4(c)(i), there is evidence before the Panel, provided by the Complainant, that before November 9, 2022, the Respondent used LMG as part of the business name LMG Training in connection with the offering of training services. However, it also appears that this use has ceased. The Respondent's website states that the Respondent has abandoned LMG Training as its name. ASIC records also show that

LMG Commercial Property Services Pty Ltd was deregistered more than 2 years ago.

According to ASIC records, the Respondent still owns the business name registration for “LMG Training”. This business name was registered on December 20, 2016. It was due for renewal on December 20, 2022; there is no evidence that it was renewed. The ASIC records show that its status is “registered”. As stated above, the Respondent’s own website contains statements to the effect that this business name has been abandoned. The Respondent’s continued registration of a business name which incorporates “LMG” does not show *bona fide* use and does not mean the Respondent is commonly known by this name where there is no evidence that a business now operates under that name. See *Geek Group Pty Ltd v. SG Corporate Services Pty Ltd*, WIPO Case No. [DAU2019-0009](#).

There is no evidence before the Panel that the Respondent is commonly known as LMG, or by his initials, or by his former business names. See *Bernard Janes v. L.J. Bubenicek & A. J. Main, A&L Technologies*, WIPO Case No. [DAU2010-0014](#). The Respondent has a Twitter account (@LMGTraining), but there is no evidence that this account has been used since 2018.

The *prima facie* case established by the Complainant has not been rebutted and the Complainant succeeds on the second element of the Policy.

C. Registered or Subsequently Used in Bad Faith

Unlike the UDRP, the requirements that the disputed domain name be registered or used in bad faith are disjunctive in the auDRP. That is, it is sufficient for the Complainant to show either that the disputed domain name was registered in bad faith or has been used in bad faith.

The Complainant does not allege bad faith registration. No doubt this is because when the disputed domain name was registered in July 2011, the Complainant was associated with LMG Commercial Property Services Pty Ltd.

The Complainant relies on paragraph 4(b)(ii) of the Policy, which states:

“the following circumstances, 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:

(ii) you have registered the domain name in order to prevent the owner of a name, trademark or service mark from reflecting that name or mark in a corresponding domain name;”

The focus of paragraph 4(b)(ii) is the time of registration, and raises the issue of the Respondent’s motivation. There is no evidence that the Respondent had knowledge of the Complainant in 2011, and even if the Respondent had such knowledge, there is no evidence that the Respondent registered the disputed domain name in order to prevent the Complainant using LMG in a corresponding domain name. There is a plausible alternative explanation for the registration of the disputed domain name by the Respondent in 2011: most likely, the Respondent registered the disputed domain name because it reflected his initials and the name of his company, LMG Commercial Property Services Pty Ltd. See, *R S Capital Partners Pty Ltd t/a My SMSF v. Adviser IT Ltd*, WIPO Case No. [DAU2019-0007](#).

Without more, it is not bad faith to continue to own and not use a domain name after receiving a letter from a solicitor informing you of another’s trademark rights. Compare *Ulendo Roode, Curatura Pty Ltd v. Eco Care Services Pty Ltd*, WIPO Case No. [DAU2020-0001](#).

The Respondent has owned the disputed domain name for over 10 years. There is no evidence that the Respondent has tried to sell the disputed domain name at any time. There is no evidence that the Respondent has used the disputed domain name to disrupt the Complainant’s business (or used the disputed domain name at all, other than in his email address). The Respondent and the Complainant are not

in the same line of business. There is no suggestion of consumer confusion. The Panel finds that there is no evidence that the disputed domain name has been used in bad faith.

The Complainant has failed to prove the third element of the Policy.

7. Decision

For all the foregoing reasons, the Complaint is denied.

/John Swinson/

John Swinson

Sole Panelist

Date: January 23, 2023