



Association of Dispute Resolvers

ABN 69 008 651 232

**LEADR Domain Name Dispute Administrative Decision**

**auDRP 13/02**

**Single Panellist Decision - Jennifer Scott**

**Domain Name: <cameroskiboat.com.au>**

**Complainant: STERLING MARINE PTY LTD**

**Respondent: The Trustee for THE COSTA FAMILY TRUST**

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**1. THE PARTIES**

- 1.1 The Complainant in this proceeding is STERLING MARINE PTY LTD of 17 Clarke Street, Norwood, South Australia, 5067, Australia
- 1.2 The Respondent to the proceeding is The Trustee for THE COSTA FAMILY TRUST of Lot 11 Angle Vale Crescent, Burton, South Australia, 5110, Australia

**2. SUBJECT MATTER OF COMPLAINT**

- 2.1 The domain name in dispute: "www.cameroskiboat.com.au" ("**Domain Name**").
- 2.2 Jurisdiction: auDRP Rules 3(a) and 3(b)(xv).
- 2.3 The registrar of the Disputed Domain Name is MYOB AUST E1, ("**Registrar**").

**3. BASIS OF DETERMINATION**

- 3.1 The complaint was submitted for determination by a single panellist under:
  - (a) The provisions of Schedule A of the .au Dispute Resolution Policy and Rules 2010-05 ("auDRP") and,
  - (b) LEADR's Supplementary Rules (LEADR is the Provider).

3.2 Section 4 of the auDRP covers Mandatory Administrative Proceedings.

#### 4. PROCEDURAL HISTORY

4.1 LEADR received the complaint on or about the **2/11/12**

4.2 LEADR sent non-compliance notification **5/11/2012**

4.3 LEADR resent non-compliance notification to claimant **20/02/2013**

4.4 The complete application was received from the Complainant by LEADR on **25/02/2013**

4.5 A copy of the complaint was submitted and a request to clarify Respondent details and lock the domain name during proceedings was emailed to the registrar **MYOB AUST E1 (Smarty Host)** on **05/03/2013**

4.6 On **14/03/2013** the Registrar confirmed via email that the domain name in dispute has been locked.

4.7 LEADR advised auDA of the complaint on **18/03/2013** via e-mail.

4.8 On the **18/03/2013** LEADR sent the Respondent (**The Trustee for THE COSTA FAMILY TRUST**) an email and sent to 130 Sir Donald Bradman Drive, Hilton, written notification of the complaint lodged against them. The Complainant was copied in on these notifications. On realising this was incorrect address; a further copy of the complaint was sent to Lot 11, Angle Vale Crescent, Waterloo Corner.

4.9 The due date for the response to the complaint was confirmed to be **7/04/2013**.

4.10 Acknowledgement of notification received from the Respondent on **19/03/2013**.

4.11 Reminder sent via telephone call to respondent one week before due date of response.

4.12 On **4/04/2013**, **Alouise Costa** on behalf of the Respondent (**The Trustee for THE COSTA FAMILY TRUST**) submitted a response to the domain name complaint.

4.13 On **8/04/2013** the provider approached the Panellist. The Panellist confirmed their availability, informed LEADR that they had no conflict issues with the parties and accepted the matter on **8/04/2013**.

4.14 The Case file and relevant correspondence was forwarded onto the Panellist on **9/04/2013**.

4.15 The Parties to the dispute were notified of the Panellist's allocation on the **9/04/2013**.

4.16 The decision is due is **23/04/2013**.

## **5. FACTUAL BACKGROUND**

### **Facts alleged by the Complainant**

5.1 In submissions attached to its Complaint and its response, the Complainant raises the matters set out below:

5.11 The Complainant is the registered business STERLING MARINE PTY LTD, trading as STERLING CAMERO SKI BOATS, a business manufacturing and selling Camero branded ski boats. Since 1992 the Complainant has owned the trademark "Camero". It has a registered business name that, according to the Complainant, is the same as the Domain Name. Further, the Complainant has registered websites - camiroskiboats.com, camero.com.au and camero-skiboat.com.au that are used for the purpose of marketing the Camero brand of ski boat.

5.1.2 The Complainant claims between 2008 and 2010, Sterling Marine Pty Ltd entered into a verbal agreement with Gino Costa from Costa Marine, a company in South Australia, to wholesale Stage II Camero Ski Boats and to undertake remaining fit out. It claims that Costa Marine was not actually a part of the Camero Dealer Network. During this period, the Complainant submits that Costa Marine only sold between 2% and 5% of the total Camero boats per year. Since 2010 there has been no relationship between the Respondent and Camero ski boats and that since then, none of the products or services marketed by the Respondent relate to Camero ski boats. The Complainant claims that the Respondent has no legitimate right to use the brand 'Camero' or the Domain Name and that the Respondent is holding it for 'spiteful' reasons.

5.1.3 Between June and October 2012, the Complainant phoned and emailed the Respondent requesting the Respondent transfer the Domain Name to the Complainant, and subsequently offered to purchase the Domain Name. The Respondent refused to transfer the Domain Name.

### **Facts alleged by the Respondent**

5.2 In submissions the Respondent raises the matters set out below:

5.2.1 The Respondent confirms that the Complainant approached it with a request to acquire the Domain Name and that the Respondent initially advised that it did not own it. The Respondent now acknowledges that it had registered the Domain Name.

5.2.3 The Respondent claims that the Complainant was aware and consented to the registration in order to promote the Camero brand. The Respondent claims that it still has a close connection with the Camero brand in that it continues to service and upgrade Camero boats and sell used Camero boats. The Domain Name has been linked to their main website since registering it.

## 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...”*

6.1.1 The Domain Name is an open 2LD within the meaning of this provision. Neither party has disclosed exactly when the Domain Name was registered except that it was registered some time after the Respondent began selling Camero ski boats as an agent of the Complainant in 2008. It is therefore subject to the mandatory administrative proceeding prescribed by the auDRP.

### Basis of decision

6.2 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

6.3 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.*

6.3.1 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 www.cameroskiboat.com.au identical or confusingly similar to a name, trade mark or service mark in which the Complainant has rights?**

6.4 The Panellist 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.

6.4.1 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."*

6.4.2 The auDRP Policy does not provide guidance as to the intended meaning of "identical" or "confusingly similar". Panellist N J Hickey in *Camper Trailers WA Pty Ltd v Off Road Equipment Pty Ltd* LEADR Case number 06/2004(12 November 2004) provided a summary of recent principles arising out of 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.*

6.4.3 Although neither party has provided evidence as to the date that the Domain Name was registered, the Panellist notes that the Respondent has provided an invoice from the Complainant dated 22/12/2009 (Document 3) that displays the Complainant domain name – www.camero.com. Document 2, a wholesale pricelist effective from 16/05/2010 also displays another of the Complainants domain name – www.cameroskiboats.com. The Panellist is satisfied that the Domain Name is identical in all respects to the Complainant's Company Name and

to the Complainant's trademark and is confusingly similar to other domain names owned by the Complainant.

- 6.4.4 The Complainant has, therefore, satisfied the requirement of "identical" in paragraph 4(a) (i) of the auDRP Policy.

**Does the Respondent have any rights or legitimate interests in respect of [www.cameroskiboat.com.au](http://www.cameroskiboat.com.au)?**

- 6.5 Paragraph 4(c) of the auDRP Policy sets out particular circumstances, which can demonstrate a Respondent's "*rights or legitimate interests to the domain name for purposes of Paragraph 4(a) (ii).*"

- 6.5.1 The first issue to consider 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)).

- 6.5.2 The Respondent submits that the Complainant 'was fully aware' the Domain Name had been registered in order to assist in marketing the Complainant's product. The Complainant does not admit nor deny giving permission. The Panellist notes, however, the Respondent has not been an agent for the Complainant since 2010 and no longer promotes the Complainant's product on behalf of the Complainant. Further, the Panellist notes that the two documents relied upon by the Respondent display only the Complainant's domain names. Although the Respondent claims it provides a service for Camero ski boats, it does not use the Domain Name to market that service. The site simply forwards the user to another website that markets other brands.

- 6.5.3 Based on its evaluation of all the evidence presented, the Panellist is not satisfied that the Respondent's use of the Domain Name was "bona fide".

- 6.5.4 With respect to paragraphs 4(c) (ii) and 4(c) (iii) of the auDRP Policy, the Panellist is satisfied that the Respondent has neither been commonly known by the Domain Name, nor is the Respondent making legitimate non-commercial or fair use of it. The Panellist considers the Respondent's website to be "*likely to misleadingly divert customers*" from the Complainant.

6.5.5 Accordingly, the Panellist finds that the Respondent has no right or legitimate interest in the Domain Name, and so paragraph 4(a)(ii) of the auDRP Policy has been satisfied by the Complainant.

**Has www.cameroskiboat.com.au been registered or subsequently used in bad faith? (Paragraph 4(a)(iii))**

6.6 Whether a domain name is registered and/or subsequently used in bad faith for purposes of the Policy may be determined by evaluating four (non-exhaustive) factors set forth in the Policy:

*i. Circumstances indicating that the registrant has registered or the registrant has acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of the registrant's documented out-of-pocket costs directly related to the domain name; or*

*ii. The registrant has registered the domain name primarily for the purpose of disrupting the business of a competitor; or*

*iii. By using the domain name, the registrant has intentionally attempted to attract, for commercial gain, Internet users to the registrant's website or other online location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of the registrant's website or location or of a product or service on the registrant's website or location. Paragraph 4(b) of the Policy.*

6.6.1 The Complainant claims that the Respondent is attempting to attract users by creating confusion with the Complainant's websites and marks. It has not alleged that the Domain Name was registered in bad faith, but that since the 2010 when the Respondent ceased its relationship with the Complainant, it has been used in bad faith.

6.6.2 The Panellist considers there is sufficient evidence for a finding with respect to paragraph 4(b) (IV) of the auDRP Policy. The evidence provided by the Complainant clearly shows that the Complainant and Respondent's company are currently competitors and are in the same business. The Respondent is aware of the Complainant's presence in the market and was, for about two years, an agent for the Complainant. The

clear inference is that the Respondent was hoping to capture the custom of consumers who were seeking to contact the Complainant through the internet. In the Panellist's view, the likelihood is that the Respondent uses the Domain Name to "*intentionally attempting to attract, for commercial gain, Internet users to a website or other online location by creating a likelihood of confusion.*"

6.6.3 For the reasons outlined above, the Complainant has satisfied the requirements of paragraph 4(a) (iii) of the auDRP Policy.

## 7. RELIEF

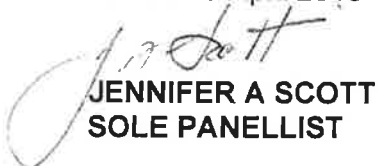
### Transfer of the Domain Name

- 7.1 The Complainant has sought that the Domain Name be transferred to the Complainant.
- 7.2 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) ("**Eligibility Rules**").
- 7.3 The Complainant is an Australian registered company and the Disputed Domain Name forms part of the Complainant's Company Name. The Complainant therefore satisfies the Eligibility Rules.
- 7.4 The Panellist orders that the Domain Name 'www.cameroskiboat.com.au' be transferred to the Complainant.

## 8. DECISION

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

Dated: 23 April 2013

  
JENNIFER A SCOTT  
SOLE PANELLIST