

.nz Dispute Resolution Service

DRS Reference: 1350

**Andco Realty Limited
trading as Lowe & Co**

v

Huang Xiaoliang

Key words – Identical and similar trademark – Registered mark owned by directors – identical – Unfair Registrations – likely to mislead – deceive and confuse – unfairly disrupting complainant’s business

1. Parties

Complainant:

Andco Realty Limited trading as
Lowe & Co
8 Kent Terrace
Mt Victoria
Wellington
New Zealand

Respondent:

Huang Xiaoliang
Nan Ning Shi de Zheng Lu
Nan Ning Shi
Guangxi
China

2. Domain Name/s

loweandco.co.nz
Registrar: PDR Ltd

3. Procedural history

- 3.1. The Complaint was lodged on 20 March 2019 and Domain Name Commission (DNC), notified the Respondent of the validated Complaint on 21 March. The domain was locked on 21 March 2019, preventing any changes to the record until the conclusion of these proceedings.
- 3.2. No Response was filed.
- 3.3. The Complainant paid Domain Name Commission Limited the appropriate fee on 20 May 2019 for a decision of an Expert, pursuant to Paragraph 9 of the .nz Dispute Resolution Service Policy (“the Policy”).
- 3.4. Sir Ian Barker QC, the undersigned, (“the Expert”) confirmed to the DNC on that he knew of no reason why he could not properly accept the invitation to act

as expert in this case and that he knew of no matters which ought to be drawn to the attention of the parties, which might appear to call into question his independence and/or impartiality.

4. Factual background

4.1. The name Lowe & Co has been used in the provision of real estate services by Lowe & Co Realty, a real estate agency owned by Andco Realty Limited (Andco), since 2015. It is a well-known real estate agent with an established reputation in New Zealand. The name Lowe & Co is derived from the name of Craig Lowe, an Andco director. Lowe & Co has a New Zealand registered trademark number 1039846 with a deemed registration date of 27 August 2015.

4.2. The disputed domain name was previously registered to Andco, by its director, Craig Lowe. Due to an administrative oversight, on its expiry in 2017, the domain name registration was not renewed.

4.3. Andco currently owns the rights to the following domain names, which redirect to the primary website, loweandco.nz:

Wellingtonproperty.nz – owned since 30 March 2015
loweandcorealty.nz – owned since 27 November 2014
loweandcorealty.co.nz – owned since 29 November 2014
craiglowe.co.nz – owned since 20 June 2002.

4.4. The disputed domain name is another derivative of the above domain names, and is identical in spelling to the Lowe & Co trade mark. The trade mark has an ampersand instead of the word “and”; but that does not alter its identical nature. It has since been purchased by the Respondent, who set up a sham online shopping site (currently taken down). The site did not appear to operate legitimately, and demonstrated no connection with the name Lowe & Co or its branding.

5. Parties’ contentions

a. Complainant

5.1. The disputed domain name does not describe the services provided by Lowe & Co. There are no other names or businesses associated with the name Lowe & Co in New Zealand. The name relates directly to the Lowe & Co’s director, Craig Lowe.

5.2. Kyla Hamilton, General Manager of Lowe & Co, sent an email, seeking a discussion to the administration address from the website. Possibly in response to this, the website was taken down. However, the Complainant would like to claim its rights in the disputed domain name as there can be no certainty that it will not be used misleadingly in the future.

5.3. Other than the administration email address, the Complainant is not aware of any of the Respondent’s contact details, or of any other details about the Respondent.

5.4. The registration is unfair as the Respondent’s use of the disputed domain name is unfairly detrimental to the Complainant’s rights. The Respondent’s use of

the domain name is likely to confuse, mislead and deceive people into believing that the domain name is meant to be associated with the Complainant.

- 5.5. The disputed domain name was previously registered to the Complainant, and was later acquired by the Respondent. The unfair use of the disputed domain name has occurred as follows. Initially, the domain name linked to a sham shopping website, listing miscellaneous products which, although unable to be purchased directly through the site, appeared to be a scam with no association to the Company. This was confusing for the Complainant's clients and potential clients, who may have tried to access the Complainant's website through the disputed domain name. A client or potential client being directed to the scam website would be very confused as to why he/she was unable to access the real estate services sought. This could have, and may have already, led to the Complainant losing clients or potential clients.
- 5.6. Internet users could also be misled to believe that the Complainant's business was associated with a retail internet scam activity; this is unfairly detrimental to the Complainant's legitimate business activity and reputation.
- 5.7. With the scam online shopping website currently offline, the disputed domain name links to a default page which states that the site "can't be reached". The default page suggests redirecting to "loveandco.co.nz". This is an Auckland property developer's website, offering real estate services for the development of homes in Auckland. This relates closely to the real estate services of the Complainant, and would be very confusing for its potential clients. This could lead, and may have already led, so many people directing their real estate needs to Love and Co, or pursuing other real estate agents in the Wellington region. Additionally, it may imply that the Complainant is associated with Love and Co, which is not the case, and unfairly and detrimentally exposes the Complainant to the unknown reputation and trading exigencies of Love and Co.

b. Respondent

- 5.8. The Respondent filed no response.

6. Discussion and findings

- 6.1. The dispute is governed by the following relevant portions of the Policy:

"3. Definitions ...

Unfair Registration means 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, or is likely to be used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's Rights.

4. Dispute Resolution Service

- 4.1 This Policy and Procedure applies to Respondents when a Complainant asserts to the DNC according to the Procedure that:

- 4.1.1 The Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name; and
- 4.1.2 The Domain Name, in the hands of the Respondent, is an Unfair Registration.

5. **Evidence of Unfair Registration**

5.1 A non-exhaustive list of factors which may be evidence that the Domain Name is an Unfair Registration is set out in paragraphs 5.1.1 – 5.1.5:

- 5.1.1 Circumstances indicating the Respondent has registered or otherwise acquired the Domain Name primarily:
 - (a) for the purposes of selling, renting or otherwise transferring the Domain Name to the Complainant or to a competitor of the Complainant, for valuable consideration in excess of the Respondent's documented out-of-pocket costs directly associated with acquiring or using the Domain Name;
 - (b) as a blocking registration against a name or mark in which the Complainant has rights; or
 - (c) for the purpose of unfairly disrupting the business of the Complainant; or
- 5.1.2 Circumstances demonstrating that the Respondent is using the Domain Name in a way which is likely to confuse, mislead or deceive people or businesses into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the complainant;
- 5.1.3 The Complainant can demonstrate that the Respondent is engaged in a pattern of registrations where the Respondent is the registrant of domain names (under .nz or otherwise) which correspond to well known names or trade marks in which the Respondent has no apparent rights, and the Domain Name is part of that pattern;
- 5.1.4 The Complainant can demonstrate that the Respondent has knowingly given fake contact details to a Registrar and/or to the DNC; or
- 5.1.5 The Domain Name was registered arising out of a relationship between the Complainant and the Respondent, and the circumstances indicate that it was intended by both the Complainant and the Respondent that the Complainant would be entered in the Register as the Registrant of the Domain Name."

6.2. In order to support a complaint the Complainant must satisfy three elements:

- (a) Rights in respect of a name or mark (para 4.1.1);
- (b) Identity or similarity between that name or mark and the Domain Name (para 4.1.1); and
- (c) Unfair registration in the hands of the Respondent (para 4.1.2).

Each of these elements is addressed below:

6.3. Rights in respect of a name or mark (Para 4.1.1 of Policy)

- (a) In terms of assessing whether the Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name the Expert must consider the wording of the Policy.
- (b) The expression “Rights” is referred to in the definition of “Unfair Registration” in paragraph 3 of the Policy. It is directed to a Domain Name which “took unfair advantage of or was unfairly detrimental to Complainant’s Rights in some way”. The primary question is whether some disadvantage or detriment occurs in relation to the Complainant’s Rights.
- (c) The Complainant must establish the requisite Rights in order to establish that some form of disadvantage or detriment is likely to occur through the existence or use of the Domain Name by the Respondent.

6.4. Whilst it would have been more appropriate for Craig Lowe, the owner of the trade mark to have been the Complainant, the fact that he is a director of the Complainant is sufficient to give him the necessary rights in respect of the mark.

6.5. Identity or similarity (Para 4.1.1 of Policy)

- (a) The disputed domain name and the Complainant’s mark owned by the Complainant’s eponymous director, Mr Lowe, are identical, although the mark features an ampersand instead of the word “and”.
- (b) This ground is thus established.

6.6. Unfair registration (Para 4.1.2 of Policy)

- (a) The Expert needs to be satisfied that the Respondent has registered or otherwise acquired the Domain Name primarily for certain purposes.
- (b) The primary question under Rule 4.1.2 of the Policy is whether the Domain Name, in the hands of Respondent, is an Unfair Registration.

6.7. This is a clear case of opportunistic cybersquatting. The Respondent purchased the disputed domain name when its renewal of registration lapsed and it became available to purchase.

6.8. The Respondent has no connection whatsoever with the Complainant and its real-estate business. The Respondent initially limited the disputed domain name to a sham shopping site. Later, when receiving an email from the Complainant, the Respondent removed the shopping site and referred internet users to the website of another real estate firm with a name of almost identical spelling in another city but also in New Zealand.

6.9. Clearly, this is an unfair registration in the various ways set out in the Complainant’s contentions above. Paragraphs 5.1.1(b) and (c) and 5.1.2 obviously are applicable to the Respondent’s conduct.

7. Decision

The Complainant has established its case and is entitled to the relief sought. The Expert orders that the domain name <loweandco.co.nz> be transferred to the Complainant.

Place of decision **Auckland**
Date **22 June 2019**
Expert Name **Hon Sir Ian Barker QC**

Signature

A handwritten signature in blue ink that reads "Ian Barker". The signature is written in a cursive style with a horizontal line underneath the name.