

**DISPUTE RESOLUTION SERVICE**

**D00014615**

**Decision of Independent Expert**

Loch Ness Glamping

and

Mr Donald Maclean

**1. The Parties:**

Complainant: Loch Ness Glamping  
Loch Ness Glamping  
The Jennings, Drumnadrochit  
Inverness  
Inverness-shire  
IV63 6XT  
United Kingdom

Respondent: Mr Donald Maclean  
Loch Ness Glamping  
Bearnock Country Centre  
Glen Urquhart  
Drumnadrochit  
Inverness-shire  
IV63 6TN  
United Kingdom

**2. The Domain Name:**

lochness-glamping.co.uk

**3. Procedural History:**

I 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 being of

such a nature as to call in to question my independence in the eyes of one or both of the parties.

10 August 2014 19:05	Dispute received
11 August 2014 09:38	Complaint validated
12 August 2014 15:23	Notification of complaint sent to parties
01 September 2014 02:30	Response reminder sent
01 September 2014 09:18	Response received
01 September 2014 09:19	Notification of response sent to parties
04 September 2014 02:30	Reply reminder sent
05 September 2014 08:04	Reply received
08 September 2014 13:42	Notification of reply sent to parties
08 September 2014 13:42	Mediator appointed
12 September 2014 14:44	Mediation started
01 October 2014 14:49	Mediation failed
01 October 2014 14:57	Close of mediation documents sent
13 October 2014 02:30	Complainant full fee reminder sent
13 October 2014 12:25	Expert decision payment received

On 15 October 2014, a request, by way of an explanatory note under paragraph 13b of Nominet's Dispute Resolution Service (DRS) Procedure was lodged by the Complainant. The Complainant wished to submit additional evidence which had recently come to light demonstrating further confusion and also of what he described as 'malicious intent' of the Respondent. Being a 'non-standard' submission, it was in the discretion of the Expert to allow such further evidence. The Expert did so allow the further evidence, which is described below, although it has made no material difference to this Decision.

#### **4. Factual Background**

The Complainant has operated a 'glamping' (glamorous camping) business under the name Loch Ness Glamping, since 2012. Four glamping pods (known as Armadillas) were purchased for use at his glamping site in February 2012, the first being delivered at the end of May 2012, and the second in June 2012. Two domain names were registered on behalf of the Complainant on 14 March 2012: <lochnessglamping.co.uk> and <lochnessglamping.com> and by May 2012, they were being used for the Complainant's website and e-mails. Two further domain names were subsequently purchased on behalf of the Complainant: <glampinglochness.co.uk> and <lochnessglamping.com>.

Loch Ness Glamping opened for business on 1 July 2012 and the business was listed on three glamping websites. Another listing (on Private House Stays with a linked availability calendar) followed in November 2012.

The Complainant has annexed a considerable amount of documentary evidence, such as e-mail correspondence with guests, booking forms, an advertisement and Trip Advisor reviews, demonstrating that his business,

trading under the name Loch Ness Glamping, is active. Scottish Field Magazine took an interest in Loch Ness Glamping and the glamping site is to feature in a Channel 4 documentary. Loch Ness Glamping has an active site on twitter and Facebook.

The Respondent also provides a glamping site, taking advantage of the rise in popularity of glamorous camping.

Shortly before acquiring the Domain Name, the Respondent began making glamping units which are called Hobbit Houses. To not offer glamping, would have put him at a considerable disadvantage given the trend towards glamorous camping and the nature of his business, namely that of providing luxury cottages, log cabins etc.

The Respondent approached a website design business which recommended a domain name that would indicate 'who we are' and 'what we do'. The Respondent chose the industry in which he operated – 'glamping' and the area of operation – 'Lochness', hence the domain name <lochness-glamping.co.uk> (hereafter the 'Domain Name'), which was registered on behalf of the Respondent on 26 July 2013.

The glamping sites of the Complainant and Respondent are a short distance from one another.

## **5. Parties' Contentions**

The Complainant contends as follows:

- The Respondent trades under the name of Bearnoch Country Centre or BCC and has other domain names which describe his business as BCC followed by 'Hostel', 'Cottages' and 'Log Cabins'.
- The Respondent has registered the Domain Name for the camping/glamping side of his operation to ride on the back of the Complainant's success and cause confusion and mis-selling
- The Complainant's operation is different and superior to that of the Respondent.
- The timing of registration of the Domain Name demonstrates an intention to benefit from the Complainant's success, the Complainant's business having become very successful and popular.
- The Complainant's log of occurrences of customers having been confused or mis-sold indicates that the Domain Name is an abusive and time wasting registration, as well as one that potentially mis-directs customers expecting to enjoy the Complainant's Loch Ness Glamping experience. The Respondent's recent use of the email address info@lochness-glamping.co.uk (despite his website address being

www.bcclochnesscottages.co.uk), probably in the hope of directing email traffic to his site, only adds to the confusion.

- The Respondent has listed Loch Ness Glamping on [www.pitchup.com](http://www.pitchup.com) along with a booking calendar facility which is causing confusion as it is not connected in any way to the Complainant and his availability calendar (provided by Private House Stays on his website at [www.lochnessglamping.co.uk](http://www.lochnessglamping.co.uk)).
- A Google search using the terms 'booking loch ness glamping' demonstrates just how confusing the search results are, listing both the Complainant's and Respondent's businesses.
- The Complainant suggests that a customer expecting to stay in one of his Armadillas, superior to the glamping facilities offered by the Respondent, would be disappointed if he ended up glamping with the Respondent.
- The Complainant has contacted the Respondent three times to try and explain the confusion and resolve the problem but the only response he has had is that it is a free country and that he (the Respondent) is allowed to do what he is doing.

The Respondent contends as follows:

- The Respondent acquired some materials and started making glamping units which he called 'Hobbit Houses' and completed at least one of these glamping units before the Complainant acquired their units.
- The words 'glamping' and 'Lochness' are generic and descriptive.
- The Respondent has put considerable time and effort into making his website informative and accurate for people wishing to come glamping in the Loch Ness area.
- The Respondent maintains that the Domain Name does not infringe anyone's *'Trading Name because as far as we can ascertain at this time it is neither reserve-word, trademarked or registered'*.
- The Respondent welcomes competition in the glamping sector.

The Complainant replies to the contentions of the Respondent as follows:

- The Respondent's Bearnoch Country Centre's main business from 2006 was self catering cottages. It was only after the Complainant's success in 2012, that the Respondent added glamping units to his site

as demonstrated by the timing of his web site and registration of the Domain Name.

- The Respondent provides no evidence to support his statement that he completed at least one of his glamping units before the Complainant acquired his units. The units described as 'Hobbit Houses' are widely available to buy in kit form (and can be found on many glamping sites) which is inconsistent with the assertion that the Respondent acquired some materials and started making glamping units.
- Choosing a domain name which included 'Loch Ness' and 'glamping' was difficult for the Respondent as the Complainant had used most of the options available. The domain name he chose causes confusion for customers and much extra work for the Complainant in dealing with the Respondent's angry and disappointed customers (who had assumed they had booked with the Complainant).
- The Complainant has traded as Loch Ness Glamping since May 2012; it is not a 'reserve word' or a trade mark but the name of his business, and the name used on his web site.
- The Domain name is identical apart from one hyphen and infringes upon both the Complainant's ability to trade and prospective customers' ability to be sure they are staying in the accommodation of their choice.
- The Complainant welcomes competition in the area but not when it causes customer confusion.

The Complainant's further evidence under paragraph 13b:

- An e-mail exchange demonstrating customer confusion beginning with an e-mail enquiry to the Respondent, the customer subsequently e-mailing the Complainant, assuming it to be the Respondent, and the Complainant explaining the confusion to the customer.
- Information concerning three more domain names registered by the Respondent in February 2014, which he regards as offensive.
- A document described as a nuisance log, which reads as follows:

*'Nuisance Log*

*10.10.14*

*21.57pm The abusive registrants customer arrives at my door trying to gain entry disturbing my customers. Then the customer rings my mobile convinced that he has arrived at his destination. A discussion ensues where I try to convince him that he has not*

*booked with us as he is looking for Hobbit houses and we do not have any such thing on our site’.*

## **6. Discussions and Findings**

Under the provisions of the DRS Policy (the Policy), for a Complaint to succeed, a Complainant is required to prove, on the balance of probabilities, that it has rights in respect of a name or mark which is identical or similar to the domain name in issue and that the domain name in the hands of the Respondent is an Abusive Registration. Both elements are required.

### Complainant’s Rights

The meaning of ‘Rights’ is defined in the Policy 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’.*

The Complainant has no registered trade mark rights but that matters not as long as he can show rights of some sort which are enforceable. Where a complainant has no registered rights to rely on, rights afforded by the law of passing off are often used to found a complaint.

In any action for passing off under English law, a claimant must satisfy three elements – the ‘classic trinity’: goodwill or reputation associated with the name (or get up) of the products or services offered by the claimant; a misrepresentation by the defendant to the public resulting or with the likely result that the public believes that his goods or services are those of the claimant; and damage to the claimant. Whilst an English common law concept, Scottish law also recognises passing off and indeed has adopted the classic trinity approach. It is the first element of this classic trinity that Nominet Experts are concerned with, namely goodwill and reputation, for if either can be demonstrated, such goodwill or reputation would ordinarily be protectable (under the law of passing off). In these circumstances, a complainant should be treated as having Rights for the purposes for the Policy. There is no need to consider the other elements of passing off – misrepresentation and damage, because Experts under the DRS are not deciding whether there has in fact been passing off, but only that a complainant has enforceable rights and therefore standing to bring a complaint.

It has been stated in many DRS decisions that the test for demonstrating Rights is at a relatively low threshold. As paragraph 2.3 of the DRS Expert Overview (Version 2) puts it *‘...the first hurdle (i.e. proving the existence of rights in a relevant name or mark) is intended to be a relatively low-level test. Issues relating to confusion are best addressed under the second hurdle. The objective behind the first hurdle is simply to demonstrate a bona fide basis for making the complaint.’*

As low threshold as the test might be however, when dealing with unregistered rights '*...evidence needs to be put before the Expert to demonstrate the existence of the right. This will ordinarily include evidence to show that (a) the Complainant has used the name or mark in question for a not insignificant period and to a not insignificant degree (e.g. by way of sales figures, company accounts etc) and (b) the name or mark in question is recognised by the purchasing trade/public as indicating the goods or services of the Complainant (e.g. by way of advertisements and advertising and promotional expenditure, correspondence/orders/invoices from third parties and third party editorial matter such as press cuttings and search engine results)*' (paragraph 2.2 of the Expert Overview).

Moreover, when dealing with rights in descriptive or generic terms (being more difficult to acquire than rights in distinctive terms, given the lower likelihood that any one person could acquire for themselves the necessary goodwill or reputation in them, one has to be even more circumspect. But, as the definition of Rights (in the Policy) makes clear, where the descriptive term in question has acquired a secondary meaning - in other words, it has become, by its use, associated with the complainant's goods or services in the minds of relevant consumers, it is quite possible for a complainant (relying on a descriptive term) to satisfy this limb of the test.

The Respondent argues that the words comprising the Domain Name and the Complainant's business name are generic and descriptive. Loch Ness and Glamping are indeed geographic and descriptive or generic. Sometimes, descriptive or generic terms when used together, makes the resulting combination something other than purely descriptive. On the face of it, that cannot be said to be the case here.

However, the Complainant has produced a considerable amount of evidence showing his use of the business name, Loch Ness Glamping, since 2012. For instance, the Complainant has had correspondence addressed to him at Loch Ness Glamping, he has used Loch Ness Glamping signage at his site, visitors posting Trip Advisor reviews refer to the Complainant's business as Loch Ness Glamping (e.g. '*My partner and I were looking for a weekend away and came across Loch Ness Glamping*'), and his business has been the subject of interest from Channel 4, an e-mail (dated 15 May 2014) stating '*...Channel 4 thought you and Loch Ness Glamping were great!*' The Complainant is also active through social media.

In the Expert's view, the Complainant has acquired goodwill and reputation in his business name, Loch Ness Glamping and also (to the extent separate and distinct therefrom), a secondary meaning in that name.

The Expert is of the view that, on the balance of probabilities, the Complainant has established Rights for the purposes of the Policy in the name, Loch Ness Glamping.

### Similarity

Ignoring the suffix '.co.uk' as Experts are permitted to do when carrying out a comparison, the only difference between the name Loch Ness Glamping and the Domain Name, is that the words 'Loch' and 'Ness' are joined, and there is a hyphen between the combined 'lochness' and glamping. It is not possible to have spaces within a domain name – all elements must be joined (e.g. 'lochness') or separated by a permitted character (e.g. lochness-glamping). The domain name, <lochnessglamping.co.uk>, owned by the Complainant, would be regarded as identical to the Complainant's business name. The next closest domain name would be the Domain Name itself. It is as close to identical as it is possible to get without actually being so.

In these circumstances, the Expert finds that the Complainant has Rights in respect of a name or mark which is similar to the Domain Name.

Accordingly, it is necessary to consider whether the Domain Name in the hands of the Respondent, is an Abusive Registration.

### Abusive Registration

Paragraph 1 of the Policy defines Abusive Registration as a domain name which was either *'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 which *'has been used in a manner which has taken unfair advantage of or was unfairly detrimental to the Complainant's Rights;'*

A useful guide as to what might constitute an Abusive Registration is contained in paragraph 3(a) of the Policy. It contains a non-exhaustive list of factors which may indicate that a domain name is an Abusive Registration. Such factors include circumstances indicating that the Respondent has registered or otherwise acquired the domain name primarily for the purposes of selling, renting or otherwise transferring the domain name to the complainant (or a competitor) for valuable consideration in excess of the respondent's out-of-pocket costs, as a blocking registration against a name or mark in which a complainant has rights, or for the purpose of unfairly disrupting the business of a complainant.

Other factors suggesting an Abusive Registration include a respondent using or threatening to use a 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. It is this example which seems to encapsulate the Complainant's complaint.

A non-exhaustive list of countervailing factors is set out in paragraph 4 of the Policy. This paragraph contains a useful guide as to what does not constitute an Abusive Registration and includes, by way of example, factors such as:

*'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;*
  - B. been commonly known by the name or legitimately connected with a mark which is identical or similar to the Domain Name;*
  - C. made legitimate non-commercial or fair use of the Domain Name; or*
- ii. The Domain Name is generic or descriptive and the Respondent is making fair use of it;'*

The Respondent appears to rely, as an answer to the Complaint, on the assertion that the Domain Name is generic and descriptive (and it is assumed that the Respondent intends also to assert that he is making fair use of it, referring, as he does, to the 'spirit of fair competition').

Being non-exhaustive lists, neither Complainant nor Respondent need demonstrate that they 'fit' into any particular section of paragraph 3 or 4 respectively, of the Policy. Nevertheless, such factors are at the least, useful starting points.

There is little doubt, having reviewed the material provided by the Complainant, that the Domain Name is causing confusion. Not surprisingly, much of the evidence is of glampers contacting the Complainant's Loch Ness Glamping site assuming it to be the Respondent's glamping site, rather than the other way around. In the Expert's view, the Complainant has made out a case for a finding of Abusive Registration and it is therefore for the Respondent to demonstrate that it has an answer to that case.

Although the Response does not expressly rely on any particular factors in paragraph 4 of the Policy, those set out above might be said to be the most relevant and thus a useful starting point.

It appears from what is said in the Response, that the Respondent did not start using the term Loch Ness Glamping (or variation thereof) until registration of the Domain Name. Asserting, as he does, that he completed at least one glamping unit before the Complainant acquired his (which is disputed in any event), is no answer to the Complaint. Given the wide use made of the name Loch Ness Glamping by the Complainant or by others when referring to the Complainant since 2012, and the close geographic proximity of the two businesses, the Expert is satisfied that the Respondent is likely to have known that the Complainant would have cause for complaint before acquiring or using the Domain Name, or making preparations to do so.

Furthermore, the Respondent was not commonly known by the name Loch Ness Glamping or otherwise legitimately connected with such name, before the point in time when he was likely aware that use of such name in a domain name would result in a complaint by the Complainant.

And it cannot be said that the Respondent is making non-commercial use of

the Domain Name.

As to 'fair use', it would be difficult to accept that making use of a domain name which causes confusion because of its similarity to another's name or mark in which that other person has rights, could ever be fair when used to supply competing services unless, of course, the domain name registrant had legitimate reason to use the domain name. Such legitimate reason might be, by way of example, that the respondent's use pre-dates the complainant's rights, but that does not appear to be the case here. Another might be that the respondent came up with the domain name in issue completely independently of the complainant. Of course, when dealing with descriptive or generic terms, a case based on independent creation is likely to be more readily accepted than if the terms in question are distinctive. But, whilst in this proceeding, there is some suggestion of independent creation, in the Expert's view, the evidence does not go far enough.

The Respondent approached a website design business who recommended a domain name that would indicate 'who we are' and 'what we do'. However, given the date of registration of the Domain Name (26 July 2013), it is likely that consideration of which domain name to pick, took place at least a year after the Complainant first starting using the name, Loch Ness Glamping. The Complainant's two domain names (<lochnessglamping.co.uk> and <lochnessglamping.com>) were registered on 14 March 2012 and his website (and e-mails) was up and running by May 2012. The limited evidence of independent creation does not displace the Expert's view that, for the reasons earlier given, the Respondent was likely aware of the use being made by the Complainant of the name Loch Ness Glamping at the time of his registration of the Domain Name. Indeed, such awareness has not been denied and no other legitimate reason can be conceived of that would justify use of the Domain Name in the hands of the Respondent that might be said to amount to fair use.

The Respondent's case cannot be aligned to any of the factors set out in paragraphs 4(i)(A) to (C) of the Policy.

As to paragraph 4(ii), what is envisaged is not just a domain name that is generic or descriptive, but also that the respondent is making fair use of it. For the reasons given, the Expert does not accept that fair use is being made of the Domain Name.

The main thrust of the Respondent's case is that the words in question are descriptive and generic. However, absent any legitimate reason for registration or use of a domain name, be it fair use or otherwise, a respondent cannot prevent a finding of Abusive Registration in circumstances where the complainant has shown Rights in the albeit descriptive or generic name that is similar to the domain name.

In all the circumstances, the Expert is satisfied that the Domain Name was registered in a manner which, at the time when the registration took place, took unfair advantage of or was unfairly detrimental to the Complainant's Rights

and/or that subsequent to registration, the Domain Name has been used in a manner which has taken unfair advantage of or which is unfairly detrimental to the Complainant's Rights.

## **7. Decision**

The Expert finds that the Complainant has rights in a name or mark that is similar to the Domain Name and is satisfied on the evidence before him that the Domain Name in the hands of the Respondent is an Abusive Registration. Accordingly, the Expert directs that the Domain Name, < lochness-glamping.co.uk>.be transferred to the Complainant.

**Signed** .....  
**Jon Lang**

**Dated 7 November 2014**