



ADMINISTRATIVE PANEL DECISION

M2 Telecommunications Group Limited

v

Arun Varma

LEADR Case No. 11_07

Domain Name: **greenmobile.com.au**
Name of Complainant: **M2 Telecommunications Group Limited**
Name of Respondent: **Arun Varma**
Provider: **LEADR**
Panel: **Anthony P. Alder**

1. THE PARTIES

- 1.1 The Complainant is **M2 Telecommunications Group Limited** (“M2”).
The Respondent is **Arun Varma** (“AV”).

2. THE DOMAIN NAME AND PROVIDER

- 2.1 The current dispute is regarding the domain name **greenmobile.com.au** (“the Domain Name”).
2.2 The provider in relation to this proceeding is **LEADR** (“Provider”).

3. PRELIMINARY MATTERS

- 3.1 Schedule A of the *.au Dispute Resolution Policy* (“auDRP”) applies to disputes which meet the requirements set out in Paragraph 4(a) of Schedule A of the auDRP. This subparagraph 4(a) requires that any party holding a domain name licence “...submit to a mandatory administrative proceeding in the event that a third party (a “complainant”) asserts to the applicable Provider, in compliance with the Rules of Procedure that:

- (i) [their] domain name is identical or confusingly similar to a name, trademark or service mark in which the complainant has rights; and
 - (ii) [they] have no rights or legitimate interests in respect of the domain name; and
 - (iii) [their] domain name has been registered or subsequently used in bad faith.
- In an administrative proceeding, the complainant bears the onus of proof.”*

4. PROCEDURAL HISTORY

- 4.1 The Procedural History in this matter is set out at Annexure “A” to this determination.
- 4.2 LEADR has appointed this Panellist as the sole panellist in the matter. The Panellist has had no prior knowledge of or association with either party and has no conflict of interest.
- 4.3 The Panel additionally notes that the Procedural History does not include an email sent by the Respondent to the Complainant dated 26 November 2007. This email has been considered by the Panel and serves as an addition to the Complaint filed on 21 November 2007.
- 4.4 All procedural requirements appear to have been satisfied. The Panel has been properly constituted.
- 4.5 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”.

5. FACTUAL BACKGROUND – The Complainant’s Submission

- 5.1 In submissions made with the present Complaint, M2 as Complainant stated the following:
 - (a) M2 has used the trade mark “GREEN MOBILES” in respect of telecommunication services in Australia;
 - (b) M2 currently operates a telecommunications based business through its websites at URL greenmobiles.com.au, greenmobile.net.au, and greenmobiles.net.au;
 - (c) The domain names for greenmobiles.com.au, greenmobile.net.au, and greenmobiles.net.au were registered by the Complainant on 30 August 2007;
 - (d) M2 is the owner of the Australian trade mark application 1197318 for “GREEN MOBILE”. M2 submitted that this trade mark application “was successfully registered on 05/09/2007”. This is incorrect (based on IP Australia’s database as of 31st December 2007), as the trade mark application was lodged on 5th September

2007 and is subsequently pending examination by the Australian Trade Mark Office as of the date of this decision;

- (e) An offer of \$500 via an agent to the Respondent was made to purchase the Domain Name and that “Mr Varma indicated a willingness to part with it [Domain Name] based upon the offer but declined suggesting an offer of \$500 was not appropriate.”
- (f) For reasons argued in its submissions (and dealt with where requisite following) that the Respondent:
 - (i) has no rights or legitimate interests in respect of the domain name;
 - (ii) that the domain name was registered and being used by AV in bad faith;
 - (iii) that the registration or acquisition by AV of the domain name was primarily for the purpose of selling it.

5.2 M2 as Complainant seeks to have the domain name transferred to itself for the reasons argued.

5.3 The Complainant also submitted that they made a previous complaint to auDA regarding the Domain Name on the basis that the registration of the Domain Name failed to comply with the Domain Name Eligibility and Allocation Policy Rules for the Open 2LD’s (2005-01). auDA determined that the registration of the Domain Name complies with said policy and in their response stated that “The registrant [Respondent] has shown they are offering a service related to greenmobile.com.au. This is in the development stages and auDA have been advised of the progress”.

6. FACTUAL BACKGROUND – The Respondent’s Submission

6.1 Within his submissions, the Respondent stated that:

- (a) he initially registered the Domain Name on 5 January 2006;
- (b) he “will use www.greenmobile.com.au as another organisation which will help grow Green Mobile [the Respondent’s business] and supply advice to phone users on which phones and plans they should buy to save them money”. The Respondent also stated that he has an “intention to use” the domain name;
- (c) he has not currently used the website to promote his business nor used the Domain Name in the course of trade;
- (d) he is the owner of Queensland Business Name BN19719942 “Green Mobile” registered on 17 January 2006. The Panellist notes that this business name has been removed from the registrar of ASIC and is no longer enforce.

- (e) The trading name “Green Mobile” was added to the Respondent’s ABN registration details after the aforementioned initial complaint has made to auDA regarding the eligibility requirements for a domain name. The Respondent’s ABN number is ABN92489110914.
- (f) Asserts a right to the Domain Name;
- (g) Denies all allegations regarding Bad Faith in relation to this Domain Name usage and further submits that he had every intention of using the Domain Name; and
- (h) Resists the remedy now sought by the Complainant.

7. DISCUSSION AND FINDINGS

Elements of a successful complaint

7.1 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.*

7.2 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 the Domain Name identical or confusingly similar to a name, trademark or service mark in which the Complainant has rights?

7.3 The Panel must determine whether, on the basis of the facts set out in Paragraph 4 above, the Complainant has rights in a relevant name, trade mark or service mark.

7.4 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."*

7.5 The auDRP Policy does not provide guidance as to the intended meaning of "*identical*" or "*confusingly similar*". However, "*essential or virtual identity*" is sufficient. (*BlueChip Info Tech Pty Limited v Roslyn Jan and another* [LEADR case 06/03]).

7.6 The Panel makes the following observations:

- a) The Complainant has been using the trade mark GREEN MOBILES and has lodged a trade mark application for GREEN MOBILE;
- b) Whilst said trade mark application has not been granted and does not confer rights as a registered trade mark, it does demonstrate the date at which the Complainant first sought to protect their rights.
- c) The trade mark GREEN MOBILE and GREEN MOBILES are both substantially identical and confusingly similar to the Domain Name. Additionally, the Complainant's use of GREEN MOBILES has also attributed rights to it.

7.7 On the balance of material before the Panel, there is in the determination of the Panel, the real potential, and the actuality of, confusion of identity.

7.8 Accordingly, the Panel determines that the Complainant has satisfied the requirement of "*confusingly similar*" in Paragraph 4(a)(i) of the auDRP Policy.

Does the Respondent have any rights or legitimate interests in respect of the Domain Name?

7.9 Paragraph 4(c) of the auDRP Policy sets out particular circumstances (without limitation), which can demonstrate a Respondent's "*rights or legitimate interests to the domain name for purposes of Paragraph 4(a) (ii).*"

7.10 The Respondent has not demonstrated that any of their activities fall within the scope of the specified activities enumerated in Paragraph 4(c) of the auDA Policy for providing a basis for bona fide use of the domain name.

7.11 The Panellist makes the following observations:

- (a) the Respondent has not shown that they have used the words "Green Mobile" in relation to any activity by them other than registering the domain name and recording the name as a trading name on their ABN registration;

- (b) The recording of a trading name on the Respondent's ABN registration confers no right to use the trade mark and this action still requires the Respondent to register the business or trading name with the Queensland authorities before using it as a trading name;
- (c) The Respondent's prior registration of the Queensland Business Name BN19719942 has been removed and this further demonstrates that the Respondent has not continuously used the trade mark since the registration date of said Business Name; and
- (d) The Respondent stated that they have not yet used the trade mark GREEN MOBILE but intend to use it in the near future for products and/or services focused on mobile phones and telecommunications. This further demonstrates that the Respondent currently has no rights to either GREEN MOBILE or GREEN MOBILES in respect of common law or statutory rights attributed through the Trades Mark Act 1994 (Cth.).

7.12 Accordingly, the Panel 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 the Domain Name been registered or subsequently used in bad faith?

7.13 Paragraph 4(b) of the auDRP Policy sets out circumstances of "*evidence of the registration and use of a domain name in bad faith*". This Paragraph contains four sets of example circumstances, any one of which, if established, can constitute evidence of registration in bad faith. It is important to note also that it is a non-exhaustive list of circumstances such that, for example, the Panel is not necessarily constrained from a finding of bad faith should it arise (also by example) from not only any one or other of them, but from a combination of them, or indeed, upon the basis of other reliable material before the Panel inclusive of the illustrated list.

7.14 The Respondent denies the "*bad faith*" contentions by reference to their intentions to commercialise their goods and services by way of the website at the Domain Name.

7.15 The Panel is satisfied that there is sufficient evidence for a finding with respect to Paragraph 4(b)(i) of the auDRP Policy including for these reasons:

- (a) The Respondent has never used the Domain Name to display a website in relation to sale of goods or services or for any other reason;

- (b) The Respondent initially rejected a reasonable offer made by an agent of the Complainant as being not appropriate and then later attempted to accept the offer by an email (dated 26 November 2007) after the Complaint subject of the present proceeding was filed;
- (c) Paragraph 4(b)(i) states that:

For the purposes of Paragraph 4(a)(iii), 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: circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to another person for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name;
- (d) The Panel is of the view that the Respondent may have in this matter originally registered the Domain Name in faith and never used it and never acquired any right to the corresponding trade marks. The Complainant has successfully developed a business based on the trade marks GREEN MOBILE and GREEN MOBILES and the Respondent attempted to use the Domain Name in a manner to prevent the Complainant from using legitimately using it.

7.16 In the Panel's view, the combination of these factors combine together to establish that the Respondent continued with the Domain Name in Bad Faith despite his knowledge of the Complainant's rights.

7.17 For the reasons outlined above, the Complainant has satisfied the requirements of Paragraph 4(a)(iv) of the auDRP Policy.

8 DECISION

8.1 The Panel concludes for the reasons stated:

- (a) that the domain name is identical with and confusingly similar to a name, trade mark, or service mark in which the Complainant has rights;
- (b) that the Respondent has no rights or legitimate interest in the domain name; and,
- (c) that the Respondent subsequently continued with the domain name in bad faith.

8.2 For the reasons outlined, the Complainant has satisfied the elements of Paragraph 4(a) of the auDRP Policy.

9. RELIEF

Transfer of the Domain Name

9.1 The Panel orders that the Domain Name be transferred to the Complainant.

Dated this 31st day of December 2007

Anthony P. Alder

Sole Panellist