

THE
INSTITUTE *of*
ARBITRATORS & MEDIATORS

AUSTRALIA

ADMINISTRATIVE PANEL DECISION

IAMA Case No. 3353

Disputed Domain Name: **adelaidecasino.com.au**
Name of Complainant: **SKYCITY Adelaide Pty Limited [ABN 72 082 362 061]**
Name of Respondent: **Trellian Pty Ltd [ABN 55 098 223 048]**
Provider: **The Institute of Arbitrators & Mediators Australia [IAMA]**
Panel: **Philip N. Argy**

1. THE PARTIES

- 1.1 The Complainant **SKYCITY Adelaide Pty Limited** is represented by Jim Richardson, its Compliance Officer.
- 1.2 The Respondent **Trellian Pty Ltd** has not participated in these proceedings.

2. PROCEDURAL HISTORY

The Complaint was originally filed with the Trust Officer of IAMA (“IAMA”) on 10 September 2009. It purports to have been filed pursuant to the .au Dispute Resolution Policy (the “Policy”) and, the Panel has to assume, the Rules for .au Dispute Resolution Policy (the “Rules”), both as adopted by auDA on 13 August 2001 and amended on 1 March 2008, and IAMA’s Supplemental Rules (“Supplemental Rules”).

IAMA certified to the Panel that the Complaint complies with paragraph 3(b) of the Rules. The Complainant recites that it did NOT serve a copy of the Complaint on the Respondent. IAMA has certified to the Panel that it rectified this omission on 22 September 2009 by sending a copy of the Complaint to the Respondent.

There is no formal registrar verification that the Respondent is the registrant of the Disputed Domain Name. However, the WhoIs record is publicly available and the Panel is satisfied that the Respondent is the entity recorded as the current registrant of the Disputed Domain Name. Until 21 October 2009 the WhoIs record showed the Disputed Domain Name as having been registered with PlanetDomain on 30 January 2008 and as having a status of "OK" rather than locked. That was consistent with the registrar being oblivious to these proceedings. The Panel therefore directed IAMA to notify the registrar of the proceedings and to request that the Disputed Domain Name be locked before the Panel issued any decision. The registrar was subsequently notified of these proceedings on 19 October 2009 and the Disputed Domain Name was locked on 22 October 2009.

In default of any Response being received from the Complainant within 20 days, these proceedings officially commenced on 12 October, 2009.

IAMA appointed Philip N. Argy as the sole panellist in this matter. The Panel finds that it was properly constituted, and has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by paragraph 7 of the Rules.

All other procedural requirements appear to have been met.

4. Factual Background

The background facts are sufficiently set out in section 5A, and remain uncontested.

5. Parties' Contentions

A. Complainant

The Complainant holds a business name registration for "Adelaide Casino" under the Business Names Act 1996 of South Australia. It is also the sole licensee under section 5 of the Casino Act 1997 of South Australia, which is the legislative provision granting the licence to operate a casino in that State. By section 7 it is provided that only one licence is to be in force at any given time, and that absent a licence it is an offence to operate a casino in South Australia.

Early in the Complainant's negotiation process to acquire the Disputed Domain Name from the Respondent, the following statement was made in an email sent to the Complainant:

"I am sure that I advised you to answer with "your best offer". So I assume you did a typo and forgot to include a few extra 0s after \$75.00 to the end of your initial offer. "

It is the Complainant's contention that this is evidence, prima facie, of the Respondent having registered the Disputed Domain Name primarily for the purpose of selling, renting, or otherwise transferring its registration to another person for valuable consideration in excess of typical out-of-pocket costs associated with the Disputed Domain Name. Alternatively, the Disputed Domain Name may have been registered by the Respondent primarily for the purpose of disrupting the business or activities of the Complainant.

The Complainant then submits that, subsequent to its initial contact with the Respondent, changes were made to the website to which the Disputed Domain Name resolves so that it gave the appearance of having relevance to a gaming addiction assistance environment with links to a range of alternative sites that address problem gambling issues and other gambling related matters. It then simply contends that the actions of the Respondent and its representative provide sufficient evidence of the domain name in dispute having been registered by the respondent in bad faith.

The Complainant's case is stated to be that the Disputed Domain Name was registered in bad faith.

B. Respondent

The Respondent did not file a Response nor otherwise participate in these proceedings.

6. Discussion and Findings

The Complainant bears the onus of proving all three elements of paragraph 4(a) of the Policy, namely, that the Disputed Domain Name is identical or confusingly similar to a name, trademark or service mark in which the Complainant has rights, that the Respondent has no rights or legitimate interests in respect of the Disputed Domain Name, and that the Disputed Domain Name was registered or has subsequently been used in bad faith.

The objective of the Policy is to combat what is colloquially called cybersquatting. The Panel has to determine whether on the available material it is satisfied that each of the three elements of the Policy has been shown to exist. It must ensure that both parties have had a fair opportunity to present their case and must be careful not to favour one side over the other. In particular, the Complainant's obligation to make out its case has to have been discharged. It is not for the Panel to construct the case a complainant should have but fails to make out.

The Complaint does not take each of the three elements of the Policy and

methodically set out supporting evidence with contentions as to how the Complainant puts its case in relation to each one. It simply provides a minimal statement of facts, makes a bare bones argument explicitly in relation to bad faith registration, and annexes evidence of it holding a registered business name together with a copy of section 7 of the Casino Act 1997. It is the poorest example of a complaint this Panel has ever seen in almost 10 years of adjudicating disputes under both the Policy, and under the UDRP on which the Policy is based.

The Panel takes the opportunity to remind prospective complainants of the importance of addressing all elements of the Policy in a methodical way with factual statements, annexed evidence, and cogent submissions to ensure that the burden of proof is discharged. In this proceeding the competing policy considerations have troubled the Panel due to the paucity of the Complaint.

A. *Identical or Confusingly Similar*

The evidence submitted to the Panel is in the form of the current certificate of registration of the “Adelaide Casino” business name. It shows only that the Complainant registered the business name “Adelaide Casino” on 22 April 2009, is entitled to trade under that name until 22 April 2012, and is entitled to renew the business name registration for successive three year periods thereafter. A company is not entitled to carry on business in South Australia under a name different to its company name unless the name under which it carries on business is registered under the Business Names Act 1996 of South Australia. As a matter of strict law, mere registration of a business name does not confer “rights” in that name *per se*. Ordinarily there would need to be some reputational evidence before a finding in favour of a complainant could be made based on such a name, and under the UDRP a name needs to have acquired secondary distinctiveness as a common law trademark before it is recognised as affording any rights for the purposes of the equivalent limb of the UDRP. However, in footnote 1, auDA has declared that, for the purposes of the Policy, a business name registration confers sufficient rights to satisfy the first limb of the Policy, and the Panel is bound to accept that.

The South Australian Casino Act 1997 provides that a person may not operate a casino in that State without a licence. Section 5(1) provides that the initial licensee under the Act is to be Adelaide Casino Pty Ltd, being the corporate entity with an Australian Company Number of 082 362 061. The Panel observes that this is the Australian Company Number of the Complainant, despite it now being called SKYCITY Adelaide Pty Ltd. No explanation has been provided for the Complainant’s change of company name and subsequent business name registration but, for present purposes, the Panel is satisfied that the Complainant has been known as “Adelaide Casino” for sufficient time to have acquired rights in that name independently of its business name registration. The Complainant plainly existed in 1997 when the legislation was enacted.

Ignoring the “.com.au” Country Code top and second levels of the Disputed Domain Name, the omission of the space between “Adelaide” and “Casino”, and the lack of capitalisation, as one does in approaching the question under the first limb of the Policy, “adelaidecasino.com.au” is relevantly identical to “Adelaide Casino”, being a name in which the Complainant has rights.

The first limb of the Policy is satisfied.

B. Rights or Legitimate Interests

The Complainant does not address the second limb of the Policy in terms. Given that the Complainant bears the onus of proving that all three grounds exist for its complaint to succeed, this failure is potentially fatal. The question for the Panel is whether, at the time the Complaint was lodged, the Respondent had no rights or legitimate interests in respect of the Disputed Domain Name.

The Complainant notes that the website to which the Disputed Domain Name resolves, as at the time of the Complaint, appears directed at issues of gambling addiction and has links to organisations whose mission is to assist people with a gambling addiction. The Panel notes that the title of the landing page is “*Pathological Gambling Support Groups Resources*”. The Complainant does not assert that such a use is not legitimate. Inferentially it invites the Panel to find that for the revamp of the website to have occurred only after the Complainant sought to acquire the Disputed Domain Name from the Respondent is corroborative of its bad faith registration submission.

The Respondent does not help its cause by ignoring these proceedings. With even a very modest amount of effort the Respondent could have made out a legitimate interest in respect of the Disputed Domain Name by arguing in support of its right to operate a site warning of the dangers of gambling addiction and providing assistance to those adversely affected by an inability to control their gambling habits. Had it successfully done so, the Complaint would have had to be dismissed. Its failure to participate in this proceeding leads the Panel to draw an adverse inference in relation to the legitimacy of its conduct. The Panel is of the view that the superficially altruistic getup of the website to which the Disputed Domain Name currently resolves is a sham and that the Respondent’s true interest in the Disputed Domain Name is the illegitimate one of attempting to extort money from the Complainant.

Albeit with precious little assistance from the Complainant, the Panel finds the second element of the Policy made out by the slimmest of margins.

C. Registered or Subsequently Used in Bad Faith

The public WhoIs record suggests that the Disputed Domain Name was registered

with PlanetDomain on 20 January 2008, which pre-dates the Complainant's April 2009 business name registration. It is quite difficult for a complainant to make out bad faith registration when the registration of a disputed domain name pre-dates the commencement of the rights that the complainant relies on to satisfy the first limb of the Policy. However, an online search of "Adelaide Casino" at www.abr.business.gov.au shows various manifestations of that name having been in use for many years prior to January 2008, and all of them seem to be connected with the Complainant. As noted above, the Complaint does not address itself in terms to the second limb of the Policy. The Complainant simply contends that the Respondent registered the Disputed Domain Name in bad faith and says that it is relevantly identical to its registered business name.

The Wayback Machine at www.archive.org shows that the Disputed Domain Name has resolved to publicly available websites since at least 27 April 1999. The website cached as at that date, and indeed in respect of dates as recently as 26 September 2002, appears to be a website operated by the Complainant. There is then no website cached until 17 February 2006 from which time the Disputed Domain Name resolves to various websites that appear not to be connected with the Complainant and in some cases of no apparent relevance to gaming or gambling either. The Complaint contains no disclosure of the history of the Disputed Domain Name, and the Panel cannot speculate as to how the pages cached by the Wayback Machine came into existence, nor whether the Complainant was the registrant of the Disputed Domain Name before 2003. Had the Respondent chosen to file a Response, this lack of disclosure on the Complainant's part could have been damaging to its credibility.

Unlike paragraph 4(a)(iii) of the UDRP on which it is based, the equivalent paragraph of the Policy differs in a material respect, namely, the use of the disjunctive "or" between "registration" and "use" in bad faith. Thus, whereas a good faith registration with subsequent bad faith use generally cannot avail a respondent under the UDRP, under the Policy such circumstances can enable a respondent to prevail if made good. Similarly, a bad faith registration cannot be cured by a subsequent good faith use. In this case the Complainant submits that the Disputed Domain Name has been registered in bad faith but makes no submission in relation to bad faith use.

Rather than making good its bad faith registration contention by direct invocation of paragraph 4(a)(iii) of the Policy, the Complainant instead puts its case solely on the alternative bases of paragraphs 4(b)(i) and (iii) of the Policy. If the circumstances described in either paragraph 4(b)(i) or (iii) are found by the Panel to exist, the Policy provides that that "shall be evidence of the registration and use of a domain name in bad faith". Whilst the Policy does not say "conclusive" evidence, the consensus amongst panellists under both the auDRP and the UDRP has been to treat such evidence at least as requiring a respondent to demonstrate a rebuttal case if it is to have any chance of success.

Paragraph 4(b)(i) requires the Complainant to prove circumstances indicating that

the Respondent “registered or 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 its documented out-of-pocket costs directly related to the domain name”. The evidence shows that in an email dated 2 April 2009 a person describing himself as “domain manager and trellian support” for the Respondent indicated that the Disputed Domain Name could be acquired from the Respondent for not less than \$75,000. The Panel has little difficulty in concluding from that exchange that the Respondent indeed registered the Disputed Domain Name primarily for the purpose of selling the registration to the Complainant for valuable consideration considerably in excess of the Respondent’s documented out-of-pocket costs directly related to the Disputed Domain Name.

Were it necessary to do so, the Panel could also conclude that paragraph 4(b)(iii) had been made out, namely, that the Respondent’s primary purpose in registering the Disputed Domain Name was to disrupt the business activities of the Complainant. As indicated above, the Respondent could so easily have persuaded the Panel that its campaign against gambling was bona fide but its failure to respond to the Complaint in any way enables the Panel to infer that the site is in fact a sham site and that the Respondent’s true purpose was to extort money from the Complainant who might have been prepared to offer a large amount to get its domain name back.

On this limb of the Policy at least, the Complainant’s submissions and the evidence it has adduced clearly support a finding that it has made out the third element of the Policy, namely, that the Disputed Domain Name was registered or is subsequently being used in bad faith.

7. Decision

For all the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the domain name <adelaidecasino.com.au> be transferred to SKYCITY Adelaide Pty Ltd trading as Adelaide Casino.

 Philip N. Argy

Philip N. Argy

Sole Panellist

Dated: 24 October, 2009