

IN THE MATTER OF A DISPUTE OVER THE DOMAIN NAME <trade.com.au>

BETWEEN

FIRST ALLIANCE PTY LTD (ACN 079 700 502)

(COMPLAINANT)

and

BENGAMEN DAVID HALL

(RESPONDENT)

ADMINISTRATIVE PANEL DECISION

1 OCTOBER 2013

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ADMINISTRATIVE PANEL DECISION

First Alliance Pty Ltd v Bengamen David Hall

IAMA Case No. 5017

I. The Parties

1. The Complainant First Alliance Pty Ltd, is represented by Madeline Claire Walsh of Michael Sing Lawyers, 9 Ouyan Street, Bundall QLD 4217.
2. The Respondent Bengamen David Hall, ABN 81 267 371 285, has not participated in the proceedings.

II. The Domain Name and The Registrar

3. The disputed domain name ("**Disputed Domain Name**") is <trade.com.au> and the Registrar is Netfleet.com.au of Level 4, 1-3 Smail Street, Ultimo NSW 2007.

III. Procedural History

4. The complaint was submitted to the Institute of Arbitrators and Mediators Australia ("**IAMA**") on 27 August 2013 for decision in accordance with the .au Domain Name Dispute Resolution Policy ("**Policy**"), the Rules for .au Dispute Resolution Policy ("**Rules**"), and the IAMA Supplemental Rules for .au Domain Name Dispute Resolution Policy ("**Supplemental Rules**").
5. On 27 August 2013, IAMA verified that the complaint satisfied the formal requirements of the Policy, the Rules and the Supplemental Rules.
6. On 27 August 2013, IAMA sent the complaint, along with the auDRP Domain Name Dispute Complaint Cover Sheet to the Respondent by post and by email, thus starting the 20 day period within which a response had to be filed. IAMA sent a further email to the Respondent on 6 September 2013 indicating that the mail has been returned and requesting confirmation of receipt of the email message and requesting information of new postal address.
7. On 16 September 2013, IAMA further wrote to the Respondent by email advising that the response is due and should a response not be received, IAMA will proceed to appoint a panellist and a decision will be based on the information provided.
8. Having considered the steps taken by IAMA, the Panel is satisfied that IAMA has taken the necessary steps to notify the Respondent.
9. The Panel has not been provided with any 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.
10. In default of any Response being received from the Respondent, IAMA appointed I-Ching Tseng as the sole panellist in this matter on 19 September 2013.
11. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by IAMA to ensure compliance with the Rules, paragraph 7.

IV. Factual Background

12. As the Respondent failed to file a response, the following recitation of facts is taken from the complaint.
13. The Complainant operates a licensed brokerage house in Queensland, Australia.
14. Mr Andrew Damian Smith is the sole director of the Complainant. For the purposes of the complaint, the Complainant assumes all rights held by Mr Smith in relation to the Disputed Domain Name and the names "Trade Partners Network" and "Trade Online".
15. The Complainant is the holder of the following registered business names in Australia:
 - (a) "Trade Partners Network"; and
 - (b) "Trade Online".
16. The Complainant submitted that it allowed the "Trade Partners Network" business name to lapse between 16 August 2005 and 8 August 2013 and was primarily trading as "Trade Online".
17. The Complainant admitted that between 3 November 2012 and 8 August 2013, the "Trade Online" business name also lapsed in accordance with what the Complainant submitted as an administrative error.
18. The Complainant reregistered both the "Trade Partners Network" business name and the "Trade Online" business name on 9 August 2013.
19. The Complainant submitted that the Disputed Domain Name was registered by Mr Smith, trading as Trade Partners Network, on 22 October 2002, after bidding in auDA's Generic Domain Name Auction. The Complainant submitted that it and/or Mr Smith operated a website under the Disputed Domain Name in relation to the "Trade Online" and "Trade Partners Network" businesses ("the **Website**")
20. The Complainant asserted that it regularly renewed registration for the Disputed Domain Name from 22 October 2002, the last renewal the Complainant referred to was carried out on or about 20 August 2010. Annexure 14 submitted by the Complainant shows a screen shot provided to the Complainant by the registrar Enetica Pty Ltd showing the "Domain Notes" and renewals for the Disputed Domain Name. The Panel has reviewed the Domain Notes and was unable to find any reference to the Complainant or Mr Smith. It appears from the Domain Notes that relevant renewal information were sent to a Google account <auoasis@gmail.com>.
21. The Complainant also furnished tax invoices as proof of renewal of the Disputed Domain Name. The Panel has reviewed the tax invoices and was unable to find the Disputed Domain Name referenced in any of the tax invoices. Nor did the reference numbers or dates of renewals match those on the Domain Notes submitted in Annexure 14.
22. The Complainant asserted that on or about 8 May 2012, Mr Smith received an email from the Google Accounts Team advising that the password for his Google account <auoasis@gmail.com> was recently changed. The Complainant submitted that despite several attempts, Mr Smith was not able to regain access to the Google account. The Panel has reviewed Annexure 24 to Annexure 28 of the Complaint, which contain documents purporting to be communications between the Google Accounts Team and the Complainant regarding the recovery of the Google account <auoasis@gmail.com> and

was unable to find the Complainant, Mr Smith or Mr Smith's other Google email account <autrade@gmail.com> as addressee on the documents tendered.

23. The Complainant alleged that on or about 30 March 2013, Mr Smith attempted to amend the Website, however he was not able to gain access to the Website.
24. The Complainant asserted that upon inquiry by Mr Smith to Enetica on 1 April 2013, it was informed that:
 - (a) the registration of the Disputed Domain Name was transferred from Enetica to ZipHosting (Net Registry) Registrar on 8 May 2012;
 - (b) On 24 May 2012, an email was sent from the email account <info@bizx.com.au> , requesting a transfer of the Disputed Domain Name from the Complainant to an Australian registered Company Bizx Trading Pty Ltd;
 - (c) On 23 August 2012, the registration of the Disputed Domain Name was transferred from Bizx Trading Pty Ltd to the Respondent.

V. Contentions of the Parties

25. The Complainant makes three broad submissions:
 - (a) Firstly, the Disputed Domain Name is confusingly similar to the business names and common law trade marks held by the Complainant;
 - (b) Secondly, the Respondent has no rights or legitimate interests in respect of the Disputed Domain Name; and
 - (c) Thirdly, the Disputed Domain Name was registered, and is subsequently being used, in bad faith.
26. As to the first ground of complaint, the Complainant asserted that:
 - (a) It has become commonly known by the Disputed Domain Name by his extensive use of the Disputed Domain Name.
 - (b) It has common law trade mark rights to the names "Trade Partners Network" and "Trade Online", which are business names held by the Complainant; and
 - (c) The predominant and common feature of all of the Complainant's business names and common law trade marks is the word "Trade", which is also the predominant feature of the Disputed Domain Name.
27. In relation to the second ground of the complaint, the Complainant asserted that:
 - (a) The Respondent does not hold a registered trade mark or service mark which is similar to the Disputed Domain Name;
 - (b) The Respondent is not affiliated with the Complainant in any way;
 - (c) There is no evidence that the Respondent is commonly known by the Disputed Domain Name or any name similar to the Disputed Domain Name;
 - (d) There is no evidence that the Respondent has used the Disputed Domain Name in connection with a legitimate non-commercial use; and

- (e) The transfer of the domain name to the Respondent constitutes unauthorised transfer.
28. In relation to the third ground of the complaint, the Complainant asserted that the Disputed Domain Name was registered and used in bad faith as:
- (a) Circumstances indicate that the Disputed Domain Name was registered by the Respondent primarily for the purpose of selling the Disputed Domain Name to another person for valuable consideration in excess of the Respondent's out-of-pocket costs directly related to the Disputed Domain Name. The Complainant submitted that the Disputed Domain Name is currently being offered for sale on the Domain Name Trading Platform "Netfleet".
- (b) The Respondent must have been aware of the Complainant and the Complainant's rights in the Disputed Domain Name, because it was the Complainant's email account that was targeted by the Respondent in order to make the unauthorised transfer of the Disputed Domain Name.
- (c) There is no evidence that the Respondent is using or has used the Disputed Domain Name for any legitimate purpose.
29. The Respondent did not reply to the Complainant's contentions.

VI. Discussions and Findings

30. Paragraph 15 of the Rules provides that the Panel is to decide the Complaint on the basis of the statement and documents submitted and in accordance with the Policy, the Rules and any rules and principles of law that it deems applicable. To this end, while the Policy and the Uniform Domain Name Dispute Resolution Policy ("UDRP") are different policies, both share substantial similarities. As the Complainant relies heavily on authorities concerning the UDRP in its submissions, the Panel finds it appropriate to also rely on authority concerning the UDRP.
31. Paragraph 4 of the Policy provides that the proceeding may be brought when it is asserted by the Complainant that:
- "(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 registrant of the domain name has no rights or legitimate interests in respect of the domain name; and*
- (iii) *the domain name has been registered or subsequently used in bad faith."*
32. Moreover, paragraph 4 of the Policy also provides that:
- "In an administrative proceeding, the complainant bears the onus of proof."*
33. In order to succeed, the Complainant must establish each of the three elements referred to in paragraph 31.
34. In relation to the first element, the Complainant asserted that it holds common law trade mark rights in its business names "Trade Partners Network" and "Trade Online" and that the predominant feature of the Disputed Domain Name, the business names and the alleged common law trade mark rights is the word "Trade".

35. The Panel takes guidance from authority concerning the UDRP when considering what the Complainant needs to show to successfully assert common law or unregistered trade mark rights. The authority indicates that in order for the Complainant to be successful, the Complainant must show that the name has become a distinctive identifier associated with the Complainant or its goods or services.
36. The Panel recognises that the while the requirements of the Policy are similar to those applicable under the UDRP, there are some important distinctions. The main distinction for present purposes is that the Complainant need not establish that the Disputed Domain Name is identical or confusingly similar to its trade mark. Rather a name in which the Complainant has rights refers to:
- "(i) *the Complainant's company, business or other legal or trading name as registered with the relevant Australian government authority; or*
- (ii) *the Complainant's personal name."*
37. The question is whether it can be asserted that a word as descriptive as "Trade", which is the predominant feature of the Disputed Domain Name, can be asserted as confusingly similar to the business names owned by the Complainant.
38. By the Complainant's own evidence, it can not. The Complainant admitted at paragraph 8(g) of its submission that it attempted to register "Trade" as a business name. However, the application was rejected by the Queensland Government Office of Fair Trading on the basis that the proposed "Trade" business name was too similar to "Austrade", the name of the Australian Government's trade, investment and education promotion agency.
39. Nor did the Complainant established that the name or word "Trade" has become a distinctive identifier associated with the Complainant or its goods or services. The word "Trade" can describe any sort of activities involved in the transfer of goods or services.
40. By its own submission, the Complainant admitted that it neither held the business name Trade Online nor Trade Partners Network between 3 November 2012 and 8 August 2013. The Panel finds it difficult to reach a conclusion that the word or name "Trade" has become associated with the Complainant's goods or services when it allowed the business names on which it based its case to lapse for a substantial period of time.
41. It appears that the main website under which the Complainant and Mr Smith carries out business is the website under the domain name <firstalliance.com.au> and that is the name associated with the Complainant's goods or services.
42. Based on the reasons set out in paragraphs 34 to 41, the Panel found that the Complainant failed to establish the first element of Paragraph 4 of the Policy. Because this is an essential element of the claim, it is not necessary to resolve the remaining factual disputes regarding the other elements. See *Pet Warehouse v Pets.com, Inc.*, Case No. D2000-0105 (WIPO April 13, 2000) (Panel need not consider elements of legitimate interests or bad faith if Complainant failed to establish enforceable rights).
43. As substantial submissions were made in relation to the alleged unauthorised transfer of the Disputed Domain Name, the Panel consider it necessary to address the issue. As the Panel mentioned in its determination at paragraph 21 above, the Panel has reviewed the tax invoices presented by the Complainant and was unable to find the Disputed Domain Name referenced in any of the tax invoices. Nor did the reference numbers or dates of renewals match those on the Domain Notes submitted in Annexure 14 of the Complaint.

44. The Panel was also not able to find any other evidence of prior licence to the Complainant to use the Disputed Domain Name in the documents provided.
45. The Panel is compelled to find that there was insufficient evidence to demonstrate the Complainant's rights to the Disputed Domain Name.

VI. Conclusion

46. The Panel conclude that the Complainant has failed to prove that the Domain Name is identical or confusingly similar to a name in which it has rights.
47. Accordingly, and for the reasons set out above, the Panel orders that the Complaint be dismissed.

I-Ching Tseng

Panellist

Dated 1 October 2013