



Administrative Panel Decision

Domain Name: www.ecohort.com.au

Name of Complainant: Ecohort Pty Limited

Name of Respondent: Earth Repair and Restoration Pty Limited

Provider: LEADR

Panel: Jennifer A Scott

1. THE PARTIES

1.1 The complainant in this proceeding is Ecohort Pty Limited c/- Wilkinson Lowry, Lawyers of Level 14 Australia Square, 264-278 George Street Sydney NSW 2000 ("**Complainant**").

1.2 The respondent to the proceeding is Earth repair and Restoration Pty Limited of 7 Worsley Street East Hills NSW 2213 ("**Respondent**").

2. THE DOMAIN NAME, REGISTRAR AND PROVIDER

2.1 The domain name in dispute in this proceeding is "www.ecohort.com.au" ("**Disputed Domain Name**").

2.2 The registrar of the Disputed Domain Name is NetRegistry, ("**Registrar**").

2.3 The provider in relation to this proceeding is LEADR ("**Provider**").

3. PROCEDURAL MATTERS

3.1 This proceeding concerns a complaint ("**Complaint**") submitted in accordance with:

(a) the .au Dispute Resolution Policy No. 2002/22 ("**auDRP**"), which was approved by .au Domain Administrator Ltd ("**auDA**") in 2001 and which commenced operation on 1 August 2002, including:

(i) Schedule A ("**auDRP Policy**"); and

(ii) Schedule B ("**auDRP Rules**");

(b) The Provider's Supplemental Rules to Rules for au Domain Name Dispute Resolution Policy ("**LEADR Rules**").

- 3.2 The Provider has supplied the Panel with a document entitled “Procedural History - ecohort.com.au”. Pursuant to this document, the Complaint was lodged on 23 July 2007
- 3.3 On the 26 August 2007 the Respondent was sent a dispute notification letter. The Respondent confirmed with the Provider that a copy of the Complaint had been received by the Respondent.
- 3.4 The Provider advised auDA of the Complaint, on the 26 July 2007 and the Registrar was advised to lock the Disputed Domain Name. The Registrar confirmed the website was locked on the 1 August 2007.
- 3.5 The Provider appointed Jennifer Scott as the sole panelist in this matter on 22 August 2007. 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 the Center to ensure compliance with the Rules, Paragraph 7.

4. FACTUAL BACKGROUND

Facts alleged by the Complainant

- 4.1 In submissions attached to its Complaint, the Complainant raises the matters set out below:
 - (a) Mr Freimanis, the Director of the Complainant Company and Mr Brogan, the Director of the Respondent Company conducted a business known as Earth Repair and Ecohort Pty Limited (**the Company**). This business relationship ended on 31 December 2003.
 - (b) It was agreed that Mr Freimanis would resign as a director and sell his shares, but would retain the use of the trading term “Ecohort” which he has used since 1997.
 - (c) It was agreed that Mr Brogan would retain the Company ABN, for the purposes of continuing to conduct the business through the Company.
 - (d) The Company is the registered owner of the Domain name “ecohort” which according to the Request for Domain Name Creation Date was created on 14 January 2004.
 - (e) On 22 September 2004 the Company changed its name to Earth Repair and Restorations Pty Limited

- (f) Mr Freimanis currently trades under the name “Ecohort” through his company Ecohort Pty Limited which was registered on 16 December 2003.

Facts alleged by the Respondent

- 4.2 Although the Respondent confirmed it had received the application on 2 August 2007 and on 26 August 2007 LEADR express posted to the Respondent a dispute notification letter and a copy of the application, no response has been received.

5. THE PARTIES’ CONTENTIONS

The Complainant’s contentions

- 5.1 The Complainant’s submissions in summary contend that;
- (a) The Disputed Domain Name is subject to the auDRP Policy;
 - (b) The Disputed Domain Name is identical to the Complainant’s company name;
 - (c) That the Respondent failed to amend its registration details after it changed its company name and that in changing its company name by removing the term “ecohort”, the Respondent has arguably forfeited its rights and interests in the ‘ecohort’ name, and in doing so has forfeited its rights and interests in the Disputed Domain Name.
 - (d) That the registration of the Disputed Domain Name by the Respondent was in bad faith in that it was registered one month after the Complainant had registered “ecohort” as an Australian company with ASIC.
 - (e) That it was the intention of the Respondent in registering the Disputed Domain Name to deprive the Complainant of the use of the name “ecohort”
 - (h) That there is a likelihood of confusion by internet users mistakenly believing that the Respondent, by virtue of the Disputed Domain Name, is affiliated with the Complainant which could result in commercial gain to the Respondent;

The Respondent’s contentions

- 5.2 There has been no response from the Respondent.

6. DISCUSSION AND FINDINGS

Jurisdiction

- 6.1 Paragraph 2.1 of the auDRP states:
“All domain name licences issued in the open 2LDs from 1 August 2002 are subject to a mandatory administrative proceeding under the auDRP. At the time of publication, the open 2LDs are asn.au, com.au, id.au, net.au and org.au...”
- 6.2 The Disputed Domain Name is an open 2LD within the meaning of this provision. It was registered with the Registrar on 14 January 2004. It is therefore subject to the mandatory administrative proceeding prescribed by the auDRP.

Basis of decision

- 6.3 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.”

Elements of a successful complaint

- 6.4 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.*
- 6.5 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 Disputed Domain Name identical or confusingly similar to a name, trade mark or service mark in which the Complainant has rights?

- 6.6 The Panel must determine whether, on the basis of the facts set out in section 4 above, the Complainant has rights in a relevant name, trademark or service mark.
- 6.7 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.”*

6.8 Although the Complainant alleges that Mr Freimanis has used the term “ecohort” since 1997, no supporting evidence has been submitted. However, the Complainant has relevant rights in at least:
(a) the Complainant’s Company Name;

6.9 The auDRP Policy does not provide guidance as to the intended meaning of “identical” or “confusingly similar”. Panelist N J Hickey in *Camper Trailers WA Pty Ltd v Off Road Equipment Pty Ltd* LEADR Case number 06/2004(12 November 2004) provided a summary of recent principles arising out of other domain name dispute decisions:

- “(a) “Identical”*
As was noted in BlueChip InfoTech Pty Limited v Roslyn Jan and Blue Chip Software Development Pty Ltd LEADR Case No. 06/03 (26 December 2003), “essential or virtual identity” is sufficient.

6.10 The Disputed Domain Name is clearly identical in all respects to the Complainant’s Company Name which was registered one month prior to the registration of the Disputed Domain Name by the Respondent. The Complainant has satisfied the requirement of “identical” in paragraph 4(a) (i) of the auDRP Policy.

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

6.11 Paragraph 4(c) of the auDRP Policy sets out particular circumstances, which can demonstrate a Respondent’s *“rights or legitimate interests to the domain name for purposes of Paragraph 4(a) (ii).”*

6.12 The first issue to consider is whether the Respondent, prior to being notified of the subject matter of the present dispute, made *“bona fide use of or demonstrable preparations to use the domain name or a name corresponding to the domain name in connection with an offering of goods or services”* (paragraph 4(c) (i)).

- 6.13 The Respondent provided no evidence of bona fide use of the Disputed Domain Name. The Complainant, on the other hand, has provided evidence that the term “ecohort” was deleted from the Respondent’s company name and that upon the cessation of the business relationship in December 2003, the Complainant was to retain the trading term “ecohort”.
- 6.14 Based on its evaluation of all the evidence presented, the Panel is not satisfied that the Respondent’s use of the Disputed Domain Name was “bona fide”. In particular, the Panel has considered:
- (a) the Complainant and the Respondent were previously in the business and known to each other;
 - (b) The Respondent has removed the name “ecohort” from its company name on 22 September 2004
- 6.15 With respect to paragraphs 4(c) (ii) and 4(c) (iii) of the auDRP Policy, the Panel is satisfied that the Respondent has neither been commonly known by the Disputed Domain Name, nor is the Respondent making legitimate non-commercial or fair use of it. The Panel considers the Respondent’s website to be “*likely to misleadingly divert customers*” from the Complainant.
- 6.16 Accordingly, the Panel finds that the Respondent has no right or legitimate interest in the Disputed Domain Name, and so paragraph 4(a)(ii) of the auDRP Policy has been satisfied by the Complainant.

Has the Disputed Domain Name been registered or subsequently used in bad faith?

- 6.17 Paragraph 4(b) of the auDRP Policy sets out circumstances “*evidence of the registration and use of a domain name in bad faith*”.
- 6.18 The Panel considers there is sufficient evidence for a finding with respect to paragraph 4(b) (ii) of the auDRP Policy, namely that the Respondent has registered the Disputed Domain Name in order to prevent another person, namely the Complainant, from reflecting its company name in a corresponding domain name, namely the Disputed Domain Name.
- 6.19 The Panel considers there is sufficient evidence for a finding with respect to paragraph 4(b) (iv) of the auDRP Policy. Although the evidence does not clearly show that the Complainant and Respondent are currently competitors, it can be inferred from the history of the relationship between Mr Freimanis and Mr Brogan that they were in the same business. The Respondent was aware of the Complainant’s presence in the market. The clear inference is that the Respondent was hoping to capture the custom

of consumers who were seeking to contact the Complainant through the internet. In the Panel's view, the likelihood is that the Respondent registered the Disputed Domain Name "*intentionally attempting to attract, for commercial gain, Internet users to a website or other online location by creating a likelihood of confusion.*"

6.20 For the reasons outlined above, the Complainant has satisfied the requirements of paragraph 4(a) (iii) of the auDRP Policy.

7. **RELIEF**

Transfer of the Disputed Domain Name

7.1 The Complainant has sought that the Disputed Domain Name be transferred to the Complainant.

7.2 Eligibility for a domain name in the open 2LDs is governed by auDA's Domain Name Eligibility and Allocation Rules for the Open 2LDs (2002-07) ("**Eligibility Rules**").

7.3 The Complainant is an Australian registered company and the Disputed Domain Name forms part of the Complainant's Company Name. The Complainant therefore satisfies the Eligibility Rules.

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

8 **Decision**

8.1 The Complainant has satisfied the elements of paragraph 4(a) of the auDRP Policy.

Dated this 6 September 2007

Jennifer A Scott
Sole Panelist

