



ADMINISTRATIVE PANEL DECISION

HMAS Sydney Search Pty Ltd as Trustee
for the Finding Sydney Foundation

-v-
PCMail Pty Ltd

Case No. LEADR-auDRP10/07

Domain Name: hmassydney.com.au
Complainant: HMAS Sydney Search Pty Ltd as Trustee for the Finding Sydney Foundation
Respondent: PCMail Pty Ltd
Provider: LEADR
Panellist: Sara Delpopolo

1. THE PARTIES

- 1.1 The complainant is HMAS Sydney Search Pty Ltd (ACN 096 017 275) as Trustee for the Finding Sydney Foundation C/- Mallesons Stephen Jaques of Level 10, 152 St Georges Terrace, Perth WA 6000 (**Complainant**).
- 1.2 The respondent is PCMail Pty Ltd (ABN 41 087 958 389) of 40 Wharf Street, Bli Bli QLD 4560 (**Respondent**).

2. THE DOMAIN NAME AND REGISTRAR

The disputed domain name is <hmassydney.com.au> (**Domain Name**). The registrar is Melbourne IT.

3. PROCEDURAL HISTORY

- (a) The complaint was submitted for decision in accordance with the (auDRP) Policy and Rules, which was approved by auDA in 2001 and commenced operation on 1 August 2002 and LEADR's Supplementary Rules (LEADR is the Provider).
- (b) The complete application was received from the Complainant by LEADR on 22 October 2007.
- (c) On 2 November LEADR contacted the Respondent via phone and confirmed that the application had been received on 1 November 2007.

- (d) On 24 November 2007 LEADR express posted to the Respondent a dispute notification letter and a copy of the application.
- (e) A copy of the application and a copy of the dispute notification letter were also posted to the registrar MelbourneIT on 24 October 2007. The Registrar confirmed that the website was locked on 20 November 2007.
- (f) LEADR advised auDA of the complaint on 24 October 2007 via e-mail.
- (g) On 19 November 2007 the provider approached the Panellist. The panellist confirmed her availability, informed LEADR that they had no conflict issues with the parties and accepted the matter on 20 November 2007.
- (h) The response was due on 21 November 2007. No response was received by that date.
- (i) The Panellist was informed on 19 November 2007 that the package was being sent for Adjudication.

4. FACTUAL BACKGROUND

4.1 Facts Alleged by Complainant

Complainant's Background

The Complainant was formed to find the Royal Australian Navy Light Cruiser HMAS Sydney II, lost in action with all hands during November 1941. Its objectives are to find the HMAS Sydney II wreck and to finally commemorate its missing crew. This is of particular significance to Australia. A search has been planned for late 2007/early 2008 to cover approximately 1,500 sq nautical miles in deep water offshore from Carnarvon and Western Australia's Coral Coast. The Complainant's aim is to find the HMAS Sydney II wreck to ensure preservation of this important war grave for the entire community.

The majority of funds required to conduct this important search has been granted by the Federal government and the State governments of Western Australia and New South Wales.

The Complainant has the following registered domain names, all of which are redirected to its website at www.findingsydney.com.au (**Website**):

- hmassydney.net
- hmassydney.org
- hmassydney.net.au
- hmassydney.org.au

The Website is the official site for the search of the HMAS Sydney II and information pursuant to the Complainant's contractual arrangement with the government will be made available to the public via the Website. Further, the Complainant has permission to use the RAN Badge with a statement of support on its Website.

Respondent's Background

The Respondent is not connected with the Complainant or its search of the HMAS Sydney II in any way.

The Respondent had some limited contact with one of the Complainant's directors, who mistakenly believed that the Respondent had been engaged by the Complainant to assist with the Website. However, there was never any authorisation by this director or the Complainant for the Respondent to register the Domain Name and/or create a website in relation to HMAS Sydney II or the search (**Unauthorised Website**).

The Complainant has evidence that the Respondent's representative contacted the Senior Naval Historical Officer to obtain information for the Unauthorised Website, stating that he was assisting the Complainant's director.

The Unauthorised Website contains information that appeared to have been copied from the Website. It also contained Google advertising for the likely purpose of generating revenue to the Respondent (depending on the amount of traffic directed to the Unauthorised Website). The Domain Name is identified in Google search as the "Official Site for Information Regarding, HMAS Sydney History and Current Search Information".

On 27 September 2007, the Complainant's solicitors wrote to the Respondent regarding the Domain Name and the Unauthorised Website. In particular, the Complainant asserted that the Respondent's registration of the Domain Name is misleading the public into believing that it is the official website for the HMAS Sydney Search and that it is being used to redirect traffic to the Unauthorised Website in order to generate revenue from the Google advertising.

Since receipt of the Complainant's letter of 27 September 2007, the Google advertising was removed from the Unauthorised Website, but no response was forthcoming.

The Complainant wrote to the Respondent again to seek the transfer of the Domain Name to it, on the basis that the public would still be misled into believing that the Unauthorised Website was the official Website. On 10 October 2007, the Respondent's representative emailed the Complainant asserting that the Respondent "bought this website from melbourneit" and therefore it is "legally the owner".

The Complainant once again wrote to the Respondent on 11 October 2007 setting out its legal right to the Domain Name and requesting a transfer. The Respondent replied in an email on the same date indicating that it would not transfer the Domain Name, and offering to publish information on the Unauthorised Website on behalf of the Complainant.

On 12 October 2007, the Complainant's solicitors contacted the Respondent confirming that the Respondent was not authorised to provide information regarding the HMAS Sydney whatsoever. The Respondent's representative confirmed that the Domain Name would not be relinquished.

The Respondent registered the Domain Name on 26 August 2007, which is only recent. The Complainant states that the Respondent has not been commonly known by, or had any previous connections with, the Domain Name.

To date, the Respondent has not provided to the Complainant or its solicitors any explanation of its interest or connection with HMAS Sydney.

In the Complainant's view, the Respondent is not making a legitimate or fair use of

the Domain Name without intent for commercial gain, and is using the Domain Name misleadingly to divert those searching for the Website.

4.2 **Facts Alleged by the Respondent**

The Provider has not received any response from the Respondent in relation to this Proceeding.

The Panellist is satisfied that reasonable attempts were made by the Provider to contact the Respondent in this Proceeding and the Respondent was given a reasonable opportunity to respond to the Complaint.

The Respondent is in default in this Proceeding and the Panellist has the authority to make inferences based on the failure of the Respondent to reply to the Complaint in accordance with paragraph 5(e) of the Policy.

5. **DISCUSSION AND FINDINGS**

In order to have the Domain Name transferred to it, the Complainant must make out each of the following elements under the auDRP:

- (a) the Respondent's domain name is identical or confusingly similar to a name, trade mark or service mark in which the Complainant has rights (paragraph 4(a)(i)); and
- (b) the Respondent has no rights or legitimate interests in the domain name (paragraph 4(a)(ii)); and
- (c) the Respondent registered or subsequently used the domain name in bad faith (paragraph 4(a)(iii)).

(a) ***Paragraph 4(a)(i) of the auDRP:***

The Domain Name is substantially identical and confusingly similar to Complainant's company name "HMAS Sydney Search Pty Ltd as Trustee for the Finding Sydney Foundation".

The Domain Name is also substantially identical and confusingly similar to the Complainant's other registered domain names (all of which incorporate "HMAS Sydney" and are redirected to the Complainant's Website).

The Panellist finds that the Domain Name is so similar to the Complainant's name (of which the prominent part is "HMAS Sydney") that Paragraph 4(a)(i) of the Policy must be regarded as being satisfied.

(b) ***Paragraph 4(a)(ii) of the auDRP:***

The Respondent has no legitimate rights to use the Complainant's name, nor represent itself as authorised to register the Domain Name on the Complainant's behalf.

The Complainant's evidence supports the assertion that the Respondent was aware of the Complainant and its Website at the time of registration given the high profile nature of the Complainant's activities.

The Respondent has not presented any bona fide reason for the registration of the Domain Name.

The Panellist is of the opinion that the Respondent has no legitimate rights or interest to use or register the Domain Name and Paragraphs 4(a)(ii) and 4(c) of the Policy are satisfied by the Complainant.

(b) ***Paragraph 4(a)(iii) of the auDRP:***

The Complainant states that the Respondent's registration of the Domain Name is misleading and deceptive as it creates a false impression that a connection exists with Finding Sydney. The Complainant submits that there has never been any business relationship between the parties, nor has the Complainant authorised the Respondent to use the name "HMAS Sydney".

Further, the Complainant provided evidence that the Unauthorised Website contained Google advertisements allegedly placed in order to generate revenue for the Respondent based on the amount of traffic from Internet users who may in fact be searching for the Complainant's official Website.

In the circumstances, the Complainant contends that the Respondent registered the Domain Name:

- a) in order to prevent the owner of the Name from reflecting that Name in a corresponding domain name; and/or
- b) primarily for the purpose of disrupting the business or activities of the Complainant.

The Panellist is satisfied that the Respondent's unauthorised use of the Domain Name is disrupting the business and activities of the Complainant, and that the Complainant has satisfied the requirements of paragraph 4(a)(iii).

8. DECISION

I find that the Complainant has made out all of the elements of paragraph 4(a) of the auDRP Rules. Accordingly, the domain name <hmassydney.com.au> is to be transferred by the Registrar, Melbourne IT, to the Complainant.

Sara Delpopolo
Sole Panellist

13 December 2007