



## ADMINISTRATIVE PANEL DECISION

### **Wendgold Pty Ltd v. Ozbizweb Pty Ltd as trustee of THE BLUE SKY TRUST**

**LEADR-auDRP 10\_07**  
**<eastcoastparkcabins.com.au>**

#### **1 The Parties**

The Complainant is **Wendgold Pty Ltd** trading as **Eastcoast Homes & Park Cabins** at Currumbin in Queensland. It was represented in the proceedings by Ms Cheryl Gabriel, who is responsible for its sales and marketing.

The Respondent is **Ozbizweb Pty Ltd** in its capacity as **trustee for The Blue Sky Trust**, with an address in Tweed Heads, New South Wales. It was represented in the proceedings by Mr Jim Munro, who appears to be a director.

#### **2 The Disputed Domain Name and Registrar**

The disputed domain name is <eastcoastparkcabins.com.au>. The registrar of the Disputed Domain Name is Enetica Pty Ltd.

#### **3 Procedural History**

This is an administrative proceeding pursuant to the .au Dispute Resolution Policy originally adopted by auDA on 13 August 2001, and subsequently amended on 1 March 2008 (“auDRP”); the auDA Rules for .au Dispute Resolution Policy (“Rules”) and the LEADR Supplemental Rules to Rules for .au Domain Name Dispute Resolution Policy (“LEADR Supplemental Rules”).

For reasons which will become apparent, the Procedural History needs to be recounted in an abnormally high level of detail.

A LEADR Domain Name Dispute Complaint Form naming “OZBIZ HOLDINGS P/L” as respondent was filed with LEADR on or about 18 March 2010. On 22 March 2010 LEADR forwarded a copy of the Complaint to the Registrar and advised auDA of the Complaint. A copy of the Complaint was concurrently posted to Mr Jim Munro at Ozbiz Holdings Pty Ltd at 32 Myeerimba Parade, Tweed Heads, NSW and also sent by email to <jim@ozbizweb.com>. The Registrar confirmed to LEADR on 12 April 2010 that it had received a copy of the Complaint and that the Disputed Domain Name had been locked. The Registrar was not asked to confirm and did not indicate whether Ozbiz Holdings Pty Ltd was the registrant of the Disputed Domain Name.

Under Rule 5(a) a Response was due 20 calendar days after the proceeding commenced. Under Rule 4(c) the proceeding is taken to have commenced on the date on which

LEADR completed its responsibilities under Rule 2(a) in forwarding the Complaint to the Respondent. Under Rule 2(g) times are calculated from the date a communication was first made under Rule 2(f). LEADR's notification of the Complaint was sent to <jim@ozbizweb.com>. If LEADR had notified the Respondent of the Complaint on 22 March 2010, the due date for the Response under Rule 5(a) would have been 11 April 2010. In its cover email LEADR in fact advised the due date for Response as 15 April 2010.

On 16 April 2010 Mr Munro sent an email to LEADR from <jimmunro@ozbiz.net.au> stating, amongst other things, "Thank you for your email" and "I have not been able to answer this before today, please advise if we still have time to provide a proper response". The email's signature block was as follows:

Jim Munro  
ShopSafe Pty Ltd  
PH: 0755 999999  
FX: 0755 999888  
FC: 1300 369111  
<http://www.ShopSafe.com.au/>  
<http://australia.ShopSafe.com.au/>

The email included seven attachments and a number of substantive responses to the Complaint. LEADR responded by advising that a panellist for the domain name dispute was to be allocated on Monday 19 April 2010.

At 9.55 am on 19 April 2010 Mr Munro sent a reply to LEADR from <jimmunro@ozbiz.net.au> stating, amongst other things:

"Thank you for letting us know. (We also received your telephone call on Friday afternoon).

Please advise your panellist that we do not want to cause any angst over this.

The success of our project is not dependent on the domain name and there are hundreds of similar combinations still available for us to use. If you find in our favour (and I expect that you will) we undertake to give the domain to the complainant if they donate \$500 to a tax-deductible registered charity.

I just found this one on the Internet – [URL given] – I do not know anything about them but it looks like a worthy cause."

The same signature block as before was used, being from Mr Munro apparently on behalf of ShopSafe Pty Ltd, with no other entity being named.

On 19 April 2010 LEADR replied to Mr Munro's email advising that his email would be forwarded to the panellist and that he would receive a notification regarding the panellist allocated to the case. On the same day LEADR duly appointed a panellist and confirmed that by notice posted to the Complainant, noting that a decision was due on or before 6 May 2010. A notice to the same effect was sent by Express Post to Jim Munroe [sic] at 32 Myeerimba Parade, Tweed Heads, NSW.

On 6 May 2010 the panellist rendered a decision in favour of the Complainant and LEADR forwarded a copy of it to the Complainant and to auDA on 10 May 2010 at 3.32 pm. At the same date and time LEADR emailed a copy of the decision to Mr Munro at both <jimmunro@ozbiz.net.au> and <jim@ozbizweb.com>. Also on 10 May 2010,

LEADR sent a copy of the decision by Express Post to the Complainant, to the Registrar, and to Mr Munro at 32 Myeerimba Parade, Tweed Heads, NSW 2850.

On 17 May 2010, before the decision had been made public but after it had been made available to the parties, the Registrar and auDA, Mr Munro lodged by fax a complaint with auDA (and copied to LEADR) on the grounds of procedural unfairness. The basis on which this approach to auDA was made was paragraph 7.3 of auDA's Published Policy 2008-01 (to which the auDRP and Rules are schedules A and B respectively). That paragraph provides as follows:

7.3 If the unsuccessful party is not satisfied with the way in which the proceeding was administered by the provider, they should raise their concerns directly with the provider in the first instance. auDA may intervene in the administration of a proceeding in cases where there has been a clear and substantive procedural flaw.

In seeking auDA's intervention Mr Munro stated "we have been denied the opportunity to provide a response to the complaint which we say is vexatious". Amongst other things, Mr Munro went on to assert that:

"LEADR sent notification by email to an irregularly-monitored email address (although my normal address was well-known to the complainant).

LEADR sent notification by post to premises we do not occupy (we did occupy them once – until 2008 – our current addresses are publicly available).

We did not receive any [panellist appointment] notification, whether by phone, fax, post or email.

Please note that the notification of decision was addressed to Ozbiz Holdings Pty Ltd. While this is one of our companies, it is not related to this matter and not the owner of the domain in question. Please note that neither Ozbiz Holdings Pty Ltd nor ShopSafe Pty Ltd is related in any way to this matter. The owner of eastcoastparkcabins.com.au is Ozbizweb Pty Ltd ATF The Blue Sky Trust.

We want the opportunity to present the facts and have them considered fairly. We believe you have a statutory obligation to assist us in this regard."

Mr Munro also asserted that the panellist had made erroneous findings and expressed concern at the affect on the reputation and business of ShopSafe Pty Ltd if the panellist's decision were published.

The fax was on OZBIZWEB letterhead which gave a company name of Ozbizweb Pty Ltd, an address of " Myeerimba Parade, Tweed Heads" [sic] and the same fax number as had appeared in the signature blocks of Mr Munro's emails sent to LEADR and which appeared in the fax header transmitted by the sending fax machine. Although the fax header read "02/05/10 06:50 0755999888 OZBIZWEB PTY LTD PAGE 01/02" LEADR has advised that it received its copy of the fax (and its two successors) on 17 May 2010 about three hours later than the time recorded in the header. [It would appear that the time and date settings on the fax machine used by Mr Munro were approximately 15 days and 3 hours behind real time]. Despite the letterhead, the signature block on this fax was as follows:

Jim Munro  
For  
ShopSafe Pty Ltd  
Ozbiz Holdings Pty Ltd  
Ozbizweb Pty Ltd  
PH: 0755 999999  
FX: 0755 999888  
FC: 1300 369111

In a second fax sent to auDA and copied to LEADR 2 hours and 46 minutes after the first, but sent on plain paper bearing the fax header "02/05/10 09:36 0755999888 OZBIZWEB PTY LTD PAGE 01/02", Mr Munro stated amongst other things:

"Further to our phone conversations and faxes [sic] this morning. I have just noticed this heading from the PDF which was supposed to be sent to us at the outset of these proceedings. Here is a copy of the heading:"

After setting out the addressee details from LEADR's 22 March 2010 email purporting to notify the Respondent of the Complaint, Mr Munro asserted that LEADR plainly knew both the Respondent's telephone and fax numbers but employed neither to notify the Complaint. He then stated:

"Not only did LEADR incorrectly send to a postal address that we do not occupy and to an unmonitored email address but also LEADR failed to use either one of the two pieces of correct information they possessed, namely our fax number, to advise us.

....

Accordingly I ask auDA to intervene and ensure we have the opportunity to prove rightful ownership of our domain as there has been a "clear and substantial procedural flaw" on the part of the provider, LEADR, causing us to be treated unfairly/unjustly".

In a third fax sent to auDA and copied to LEADR 1 hour and 49 minutes after the second but sent on plain paper bearing the fax header "02/05/10 11:24 0755999888 OZBIZWEB PTY LTD PAGE 01/01" Mr Munro stated, amongst other things:

Further to our phone conversations and faxes this morning and this afternoon.

[Mr Munro then recited certain findings made by the panellist in relation to what the panellist believed to have been an offer for sale of the Disputed Domain Name by ShopSafe Pty Ltd].

How did the panellist create this outrageous misstatement? Please be advised the [sic] ShopSafe Pty Ltd has never sold a domain name or offered one for sale. (None of our companies have offered a domain name for sale or sold one).

There is still time to negotiate this fiasco to the benefit of every participant including the complainant. I do understand that I am seeing a comedy of errors rather than a farrago of lies. It would be funny if it were not so serious.

However, we do not have the luxury of time if we are to prevent the publication of this slander. Tomorrow lunchtime is your deadline. After that, I will seek legal advice."

The second and third faxes were each signed by Mr Munro over the following signature block:

Jim Munro  
ShopSafe Pty Ltd  
PH: 0755 999999  
FX: 0755 999888  
FC: 1300 369111

On 28 May 2010 auDA notified LEADR as follows:

Based on the case file, we have found the following:

- the respondent named in the complaint and the decision (OzBiz Holdings Pty Ltd) is not the actual domain name registrant (The Trustee for the Blue Sky Trust); and
- LEADR did not fax the complaint to the respondent, as required under paragraph 2(a)(i) of the auDRP Rules.

Our legal advice is that, taken together, these two errors could be regarded as constituting a clear and substantive procedural flaw in the proceeding. Accordingly, we believe that it is necessary and appropriate for auDA to intervene in this matter.

We request LEADR to:

- amend the complaint to show the correct respondent name;
- appoint a new panellist to determine the proceeding on the basis of the materials already submitted to LEADR by the parties (with the exception of the amended complaint); and
- advise the parties of the above.

As a result of LEADR's request this Panel was appointed on 4 June 2010 having advised LEADR that there was no conflict of interest with any of the parties. LEADR duly advised the parties of the Panel's appointment and foreshadowed a decision being due on 18 June 2010. The Panel received the case file from LEADR on 10 June 2010.

The case file revealed that at 10.24 am on 8 June 2010 Mr Munro had sent an email to LEADR in these terms:

We are reasonable people, I am not suggesting that your organisation's actions and omissions have been intentional but it seems to me that, from the outset, this procedure has followed a course which has placed our company at a disadvantage. Given that AUDA has obviously directed you to do the right thing, wouldn't it make sense to ensure that both parties are treated fairly this time?

No doubt your previous and current actions can be justified by standing rules and procedures but the rules and procedures are obviously wrong. The treatment that we have received in this matter is proof of that.

We were not allowed the required timeframe to make a formal submission in the initial instance because of mistakes and omissions on your organisation's part.

We would like to make a formal submission. We do not require 20 days to prepare it.

I would like to know by the end of the day whether or not we will be allowed our right to submit a formal submission. I would appreciate your early reply.

Also, please correct your files. You have already been advised of the following:

My name is Jim Munro, not Jim Munroe

You are still using the wrong address. It is 34, NOT 32. (I do not know if you have sent another hardcopy notice or not but if so, we have not yet received it).

This email was sent from <jim@ozbizweb.com.au> but had the same signature block as Mr Munro had used with his earlier emails sent from <jimmunro@ozbiz.net.au >:

Jim Munro  
ShopSafe Pty Ltd  
PH: 0755 999999  
FX: 0755 999888  
FC: 1300 369111  
<http://www.ShopSafe.com.au/>  
<http://australia.ShopSafe.com.au/>  
ShopSafe - Data Feed Best Practices.

On 10 June 2010 the Panel, having reviewed the case file and Mr Munro's 8 June email, invoked paragraphs 10 and 12 of the Rules by directing the Respondent to file a Response by 4 pm on 16 June 2010 and to ensure that such Response was accompanied by a copy of its trust deed and an execution copy of its registration agreement with the Registrar. Notwithstanding auDA's request that the Panel re-hear the matter based on the original filings, the Panel's inescapable conclusion based on auDA's reasons for requesting a rehearing as well as Mr Munro's claims was that the Respondent had to be afforded additional time to submit whatever it felt it had not had an opportunity to submit in the proceedings to date. As Mr Munro had made clear that the Respondent did not require 20 days within which to prepare its additional material, the Panel felt that the deadline mentioned in its direction was a fair balancing of the requirements of paragraphs 10(b) and (c) of the Rules.

At 6.02 pm on 10 June 2010 Mr Munro advised both LEADR and the Complainant by email from <jim@ozbizweb.com.au> that "We will respond within the allotted time and provide a copy to WendGold Pty Ltd". The signature block used was:

Jim Munro  
Ozbizweb Pty Ltd  
PH: 0755 999999  
FX: 0755 999888  
FC: 1300 369111  
<http://www.ozbizweb.com.au>

During the morning of 16 June 2010 LEADR received by Express Post from Mr Munro a five page Response dated 15 June 2010 the first two paragraphs of which comprised the complaint mandatory language prescribed by paragraph 3(b)(xiv) of the Rules.

The Response was on original three-colour letterhead of Ozbizweb Pty Ltd, showed a street address of 32 Myeerimba Parade, Tweed Heads, cited an Australian Company Number of "100 961 026", an Australian Business Number of "55 100 961 026", an email address of <mail@ozbizweb.com> and was accompanied by a copy of a Deed of Settlement dated 25 September 1996 which revealed Braymon Pty Ltd (ACN 075 445 359) to be the settler and initial trustee of The Blue Sky Trust. Mr Munro also asserted that he did not understand the Panel's 10 June direction that the Respondent file "an execution copy of its registration agreement with the Registrar" and used language which suggested he thought it referred to a "Contract of Sale" by which the Disputed Domain Name would be assigned to the Complainant.

At 1.44 pm on 16 June 2010 Mr Munro (using the same email address and signature block as his 10 June email) sent an email to LEADR which stated “Please find attached the response of Ozbizweb Pty Ltd as well as the following attachments in support”. The contents of the attachment named RESPONSE.pdf are not exactly the same as the hard copy of the response which had been sent by post; it is not on any letterhead stationery but is headed “---- Response from Ozbizweb Pty Ltd -----“. Unlike the hard copy, it begins with the two paragraphs required by paragraph 5(b)(viii) of the Rules. Its text then tracks that of the hard copy although the pagination and some of the formatting differs. Whilst not stated, the Panel infers that Mr Munro realised his error with the commencing language of the hard copy and decided to send a replacement Response by email the next day, albeit preserving the “15/06/10” date. However, the emailed Response does not attach the Deed of Settlement. Instead it is accompanied by eight other attachments which appear to be copies of the seven attachments that accompanied Mr Munro’s 16 April 2010 email to LEADR together with an additional attachment containing screenshots of the website to which the Disputed Domain Name now resolves.

At 3.35 pm on 16 June 2010 Mr Munro (using the same email address and signature block as his 10 June email) sent an email to LEADR which stated “We have just noticed that the submission did not include the electronic version of the Trust Deed as requested” and indicated that it was now attached. The copy of this email forwarded to the Panel did not have an attachment comprising the Settlement Deed but instead included the same eight attachments as had been included with the email sent at 1.44 pm.

Given the discrepancy between the name and ACN of the entity shown in the Settlement Deed and the name and ACN of Ozbizweb Pty Ltd given on its letterhead, the Panel at 11.59 am on 17 June 2010 invoked paragraph 12 of the Rules by directing the Respondent to file by 4pm on 18 June 2010 a true copy of:

- a) the document by which Ozbizweb Pty Ltd (ACN 100 961 026) became trustee of The Blue Sky Trust instead of Braymon Pty Ltd (ACN 075 445 359); and
- b) the agreement with Enetica Pty Ltd by which it became registrant of the domain name <eastcoastparkcabins.com.au>.

At 2.12 pm on 17 June 2010 LEADR received from Mr Munro an email (using the same email address and signature block as his 10 June email) advising that:

- a) Ozbizweb Pty Ltd was the entity with Australian Company Number 075 445 359 and that it had formerly been known as Braymon Pty Ltd. (A Certificate of Registration on Change of Name dated 22 November 1999 was referenced which corroborated Mr Munro’s advice.) Mr Munro advised also, apparently without appreciating that its letterhead stated to the contrary, that Ozbizweb Pty Ltd in fact had an Australian Company Number of 075 445 359; and

- b) In response to paragraph (b) of the Panel’s 17 June direction, Mr Munro stated

“We are not wanting to be difficult but we do not know what is meant by “the agreement with Enetica”. Enetica is the Registrar but my understanding is that purchases are made via the Registration Services Provider which is another company of ours. No agreements are exchanged for an individual purchase. Please ask the panellist to specify what is being asked for here in terms that a layman can understand”.

At 12.51 pm on 18 June 2010 Mr Munro (using the same email address and signature block as his 10 June email) sent an email to LEADR as follows:

“We have not heard anything regarding the requested document re “Agreement with Enetica”.

As far as we are aware, Enetica is merely the Registrar whereas our company is the Registration Services Provider.

We are keen to provide exactly what is required. Are you able to request clarification for us?”

At 2.09 pm on 18 June 2010 Mr Munro (using <jimmunro@ozbiz.net.au>) emailed to LEADR a copy of Enetica’s Certificate of Registration dated 19 May 2009 in respect of the Disputed Domain Name asking if it satisfied the panel’s direction (b). The signature block on the email was:

Jim Munro  
ShopSafe Pty Ltd  
PH: 0755 999999  
FX: 0755 999888  
FC: 1300 369111  
<http://www.ShopSafe.com.au/>  
<http://australia.ShopSafe.com.au/>

At 3.26 pm on 18 June 2010 Mr Munro (using <jimmunro@ozbiz.net.au >) emailed two further documents to LEADR, asking “Are either of these the documents that the Panellist is looking for?”. The first document was a copy of auDA Policy 2005-001, being the Domain Name Eligibility and Allocation Rules for second level domains under the .au domain. The second document was version 1.1 dated 29 April 2002 of what was entitled a Template Registrant Agreement between Enetica and licensees of domain names for which it was the Registrar. The signature block on the email was:

Jim Munro  
ShopSafe Pty Ltd  
PH: 0755 999999  
FX: 0755 999888  
FC: 1300 369111  
<http://www.ShopSafe.com.au/>  
<http://australia.ShopSafe.com.au/>

from ShopSafe - Father's Day Gift Ideas.

At 4.35 pm on 18 June 2010 the Panel emailed LEADR as follows:

“In response to the Respondent’s request for clarification of paragraph (b) of the Second Administrative Order made in these proceedings, please advise the parties that the Panel requires the Respondent to furnish a copy of the application it made for <eastcoastparkcabins.com.au> (whether that application was made direct to Enetica Pty Ltd or through a reseller of Enetica) and to indicate whether the terms of the 29 April 2002 (version 1.1) template registrant agreement it provided at 3.26 pm this afternoon are the same as the terms of its registrant agreement with Enetica as at 19 May 2009.”

At 10.45 am on 22 June 2010 Mr Munro (using <jim@ozbizweb.com.au>) emailed LEADR in these terms:

“We emailed Enetica on Friday immediately after your panellist’s request.

This morning I spoke with Shane from Enetica. He advised that his colleague had contacted auDA for clarification and at this point has not heard back. I will contact you as soon as their advice is received.

My understanding as a layman on reading these rules is that the burden of proof is upon the complainant. I have not read anything regarding this issue where that [sic] the complainant has alleged they had any concern with the method of registration of this domain.

While I am pleased to be able to provide this information to you as soon as it is to hand, I wonder what its relevance and purpose is.”

The signature block on the email was:

Jim Munro  
Ozbizweb Pty Ltd  
PH: 0755 999999  
FX: 0755 999888  
FC: 1300 369111  
<http://www.ozbizweb.com.au>

At 11.47 am on 23 June 2010 Mr Munro (using <jim@ozbizweb.com.au >) emailed LEADR in these terms:

“The response from Enetica is attached.

In brief it says “In regards to the request for clarification from LEADR concerning the terms, the following comment is applicable:

The Registrant Agreement version 1.1 29th April 2002 outlines the current Terms and Conditions for holding a domain licence with Enetica. ”

The document previously supplied should be read in conjunction with current auDA policy which is also attached.

For the avoidance of doubt we state that the registration of the domain was effected by the Trustee of the Blue Sky Trust as per 5.4 Legal Status of Registrant in the auDA policy document and the domain was registered in compliance with the close and substantial connection rule as per 10.5 Allocation Criteria – meaning of Close and Substantial Connection in the attached auDA policy document.

We have provided evidence of continuous publication in this field since 2007, the complainant did not even have a website online for half of last year and the first part of this year and surely must be disqualified from any rights in this regard as a consequence. I look forward to an early dismissal of this complaint.”

The signature block on the email was the same as that on Mr Munro’s last email.

All other procedural requirements in relation to the proceedings before this Panel appear to have been satisfied.

Despite an initial temptation to hold an in-person hearing pursuant to paragraph 13 of the auDRP, the Panel has decided the matter ‘on the papers’ in the conventional way to satisfy the objectives of the auDRP for an inexpensive expedient remedy for clear cases of cybersquatting. However, due to the exceptional procedural history and the number of communications from Mr Munro, pursuant to paragraph 10(c) of the Rules the Panel extends the time within which a decision is to be delivered until Friday, 9 July 2010.

#### **4 Factual Background**

The following salient background facts are taken from the Complaint (read according to auDA’s request that references to Ozbiz Holdings Pty Ltd be read as references to the Respondent), from the Response, and from the numerous items of correspondence submitted by Mr Munro to LEAD and auDA.

Some years before the present dispute arose, the Complainant commissioned Ozbiz Holdings Pty Ltd (**Ozbiz**) to create and host a website for its *Eastcoast Homes and Park Cabins* business. That business, as its name suggests, manufactures park cabins, resort cabins and other prefabricated homes and office structures. As part of the services Ozbiz provided to the Complainant it registered <eastcoasthomes.com.au> and <eastcoastparkcabins.com> on the Complainant’s behalf, and pointed the first of these to the Complainant’s new website which Ozbiz and/or its associated entities also created and hosted. The relationship between Ozbiz and the Complainant was a continuing one which involved Mr Munro acquiring personal knowledge of the businesses of the Complainant including its scope and its competitors. The WhoIs record for <traymark.com.au>, which was also registered in the Complainant’s name by Ozbiz, gives the technical contact as Mr Jim Munro with an email address of <jim@ozbizweb.com>.

In relation to <eastcoastparkcabins.com>, the email addresses for Ms Gabriel, the Complainant’s representative in this proceeding, and who is named as both administrative and technical contact, were recorded as <domains@ozbizweb.com.au>. For the Disputed Domain Name the registrant and technical contact email address given is <domains@ozbizweb.com.au> and Mr Munro is named as the contact in both cases.

For reasons which do not need to be set out here, the Complainant had a falling out with Mr Munro and, on 18 May 2009, by a letter to “Angela & Jim at Ozbiz” advised the cessation of its relationship with Ozbiz, referred to the need to move its website hosting and maintenance to another provider, and sought password and other information necessary for the logistics of the request to be accomplished seamlessly. As at that date it is apparent that moneys were owed to Ozbiz by the Complainant for hosting services because the Complainant, in anticipation of termination, had not renewed nor paid for a further period of hosting after that service from Ozbiz had earlier expired. It had only been continued by Ozbiz as a gesture of goodwill. Nevertheless the Complainant invited Ozbiz to render an account for the effort involved in transitioning to its new host and service providers.

The Disputed Domain Name was registered to the Respondent on 19 May 2009, the day after Ms Gabriel’s letter had been sent to Ozbiz.

## 5 Parties' Contentions

### Complainant

The Complainant makes the following principal contentions:

#### **A. The Disputed Domain Name is confusingly similar to a name, trademark or service mark in which the Complainant has rights.**

- The Complainant submits that the Disputed Domain Name is confusingly similar to its registered business name, *Eastcoast Homes and Park Cabins*.

#### **B. The Respondent has no rights or legitimate interests in respect of the Disputed Domain Names.**

- The Respondent has never been and is not commonly known by the Complainant's business name.
- The Respondent is controlled or associated with Mr Jim Munro, whose activities on behalf of the Complainant disentitle the Respondent to the Disputed Domain Name.
- The Respondent is not eligible to hold the Disputed Domain Name under auDA Policy 2008-05 (referred to above) because the Disputed Domain Name is not an exact match, abbreviation or acronym of the Respondent's name or trademarks, and nor is there the requisite "close and substantial connection".

#### **C. The Disputed Domain was registered or is being used in bad faith.**

- The Respondent is controlled by Mr Jim Munro whose activities on behalf of, and knowledge of, the Complainant and its businesses make it inescapable that the Respondent must be taken to also possess that knowledge.
- The Disputed Domain Name was registered to "The Trustee of the BLUE SKY TRUST" the day after the Complainant confirmed to Mr Munro the cessation of its business relationship with Ozbiz.
- The Disputed Domain Name resolves to a website operated by a competitor of the Complainant which disrupts the Complainant's business given that it commissioned advertising using the Disputed Domain Name inadvertently instead of its <eastcoastparkcabins.com> domain name.

### Respondent's Response

The Response claims that:

- the Disputed Domain Name was "registered by the Respondent to beneficially advertise the business of the Complainant, to present their company ... in the best possible light and not negatively affect their company or any other company in any way".
- The Respondent is a publisher of online magazines, representing more than one thousand online merchants. It is the Respondent's intention to use the Disputed

Domain Name “to publish an online magazine and reference for the niche serviced by the Complainant”.

- Mr Munro did not point the Disputed Domain Name to a website of the Complainant’s competitor until the Complainant “asserted they had a right to our domain. After that call it was my decision to point the domain to its current position – I assumed it would dissuade them from creating mischief”.
- The Complainant should be ruled ineligible to hold the Disputed Domain Name as it would be “a perpetuation of their intent to secure the name to the detriment of their competitors”.
- The “original website was named long before there was an auDA or an auDA dispute resolution policy and the original purchase was valid”.
- It was the Respondent that terminated the relationship with the Complainant, not vice versa, and therefore no need for the Respondent to “get back” at the Complainant.
- The Respondent built the original <eastcoasthomes.com.au> website many years previously but it was long past its use by date. It was an embarrassment to the Respondent and no use to the Complainant.
- The Respondent expects to sell advertising space to the Complainant on a website to which the Disputed Domain Name will be pointed.
- The Respondent had every right to believe that its purchase of the Disputed Domain Name was non contentious.
- In response to paragraph 4(a)(i) of the auDRP, all the words in the Disputed Domain Name are generic and there are scores of “eastcoast businesses” including Eastcoast Village Homes Pty Ltd, the Complainant’s competitor in Tweed Heads.
- In response to paragraph 4(a)(ii) of the auDRP, the Respondent is a respected online publisher who has built many websites “like this”.
- In response to paragraph 4(a)(iii) of the auDRP, the Respondent has not used the Disputed Domain Name in bad faith nor was it registered in bad faith. Both the Respondent and the Complainant know that “the domain’s current position is appropriate”.
- We are still prepared to give the Disputed Domain Name to the Complainant “provided they donate \$500 to a registered charity. Please remember that we still expect [the Complainant] to advertise with us. I have no doubt about it”.

The Response also addressed in some detail many issues raised by the original panellist in the first unpublished decision. This Panel declines to consider that decision and therefore has not taken into account those parts of the Response unless they have other utility.

## 6 Discussion and Findings

Paragraph 15(a) of the auDRP Rules requires the Panel to “decide a complaint on the basis of the statements and documents submitted in accordance with the auDRP, the Rules, and any rules and principles of law that it deems applicable.”

Paragraph 4(a) of the auDRP requires a Complainant to prove that:

- (i) the Disputed Domain is identical or confusingly similar to a name, trade mark or service mark in which the complainant has rights; and
- (ii) the Respondent has no rights or legitimate interests in respect of the Disputed Domain ; and
- (iii) the Disputed Domain has been registered *or* subsequently used in bad faith.

The onus of proof is on the Complainant in relation to all three of these elements.

### **Identical or confusingly similar to a trademark or name in which the Complainant has rights**

Unlike the UDRP, which requires a complainant to establish rights in trademarks, the auDRP offers an additional ground to a complainant that can establish rights in a name. In this case the Panel is entirely satisfied that the Complainant has rights in its registered business name, *Eastcoast Homes and Park Cabins*.

Ignoring the ccTLD and 2LD components of the Disputed Domain Name as one does unless they are themselves part of the alleged confusion, the Panel finds that the Disputed Domain Name is confusingly similar to the Complainant’s registered business name and the confusion is enhanced by virtue of the words’ secondary role as descriptive of a part of the Complainant’s business.

The Complainant has therefore made out the first limb of the auDRP.

### **Rights or Legitimate Interests in respect of the Disputed Domain Name**

The second and third limbs of the auDRP need careful thought when the respondent is a trustee of what appears to be a trading trust. Here the evidence shows that the Respondent was appointed trustee of The Blue Sky Trust by a Settlement Deed dated 25 September 1996. However, that trust is not eligible to hold a domain licence in its own name in Australia – such a licence can only be held in the name of its trustee. See paragraphs 5.3 and 5.4 of auDA’s GUIDELINES FOR ACCREDITED REGISTRARS ON THE INTERPRETATION OF POLICY RULES FOR OPEN 2LDS (Policy No: 2008-06 published on 30 May 2008).

As noted above, the Respondent’s letterhead states that its Australian Company Number is 100 961 026. As is now known, that is incorrect, although the Australian Business Register shows Australian Business Number 55 100 961 026 as belonging to “Trustee of the BLUE SKY TRUST” without naming Ozbizweb Pty Ltd. The correct Australian Company Number of the Respondent is 075 445 359. Its letterhead therefore does not comply with the Corporations Act. In the Panel’s view licences of domain names under the .au ccTLD should be recorded in the name of a legal entity of which a trust is not an example. The licensee of the Disputed Domain Name should be recorded as “Ozbizweb

Pty Ltd ATF The Blue Sky Trust”. The omission of the name of the trustee does not provide the transparency and utility that the .au Names Policy envisages and should not be permitted. The Panel draws to the attention of auDA the need for Registrars to be reminded not to accept trusts as registrant names unless the formal legal name of the trustee is included. The name of the Respondent in this proceeding has been modified by the Panel to ensure that the name of the recorded trustee registrant is included.

In the Panel’s view “The Trustee for THE BLUE SKY TRUST” has not a shred of right or legitimate interest in becoming or remaining registered as licensee of any domain name licence in the .au country code space. Even with the record corrected to show Ozbizweb Pty Ltd as trustee, that entity has shown no right or interest in using the Complainant’s name as part of the Disputed Domain Name, and has shown no other basis for that choice of name. Mr Munro’s assertions about there being a close and substantial connection between the Disputed Domain Name and the Respondent are entirely baseless so far as the Panel can discern from any material submitted by Mr Munro or publicly available.

The legitimacy of the Respondent’s claim is independently undermined by its bad faith conduct, discussed below.

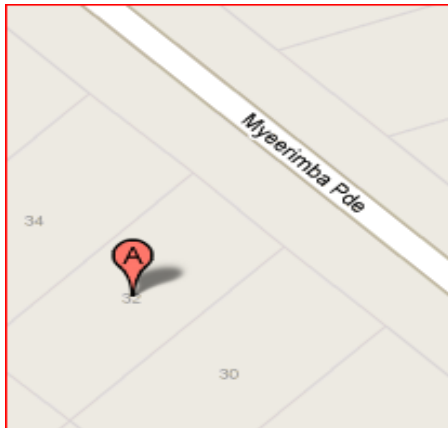
The second limb of the auDRP is clearly made out by the Complainant.

#### **Registered or subsequently used in bad faith**

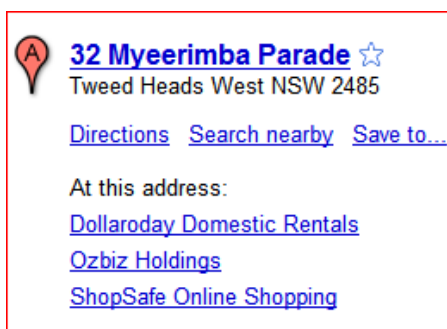
Paragraph 4(a)(iii) of the auDRP requires the Complainant to demonstrate that the Disputed Domain was *either* registered *or* subsequently used in bad faith.

The Panel is of the view that the Disputed Domain Name was both registered and continues to be used in bad faith by the Respondent. A finding of either of those forms of conduct would have been sufficient for the Complainant to succeed on this ground of the auDRP.

In the Panel’s view, Mr Munro’s assurance that the Disputed Domain Name was registered in good faith the day after Mr Munro received Ms Gabriel’s correspondence about cessation of their business relationship is improbable and implausible in the extreme. For Mr Munro to assert otherwise is regarded by the Panel as disingenuous if not an outright lie. When considered in the light of other bases on which Mr Munro’s credit is undermined, the Panel is compelled to find against the Respondent on this limb. Mr Munro’s 17 May 2010 complaint to auDA and his successive supplementary submissions to auDA and to this Panel make much of procedural unfairness constituted by LEADR having allegedly sent communications to incorrect email and street addresses. Taking the Respondent’s street address as an example, it is shown on its current letterhead (on which the Response was submitted) as “32 Myeerimba Parade, Tweed Heads”. It is shown on the *With Compliments* slip attached to the Settlement Deed in the same form save that the “32” has been overwritten by hand with “34”. And on the first fax submitted to auDA on 17 May 2010 the street number has been masked, leaving an unexplained gap before the street name. The Panel infers that Mr Munro’s businesses are conducted from premises at both 32 and 34 Myeerimba Parade, Tweed Heads and that it is most likely that the original Complaint came to his attention in plenty of time for him to have been able to prepare and lodge a formal Response. So far as can be gleaned from Google Maps and Google Streetview, 32 and 34 Myeerimba Parade, Tweed Heads are adjoining residential properties in a normal suburban street.

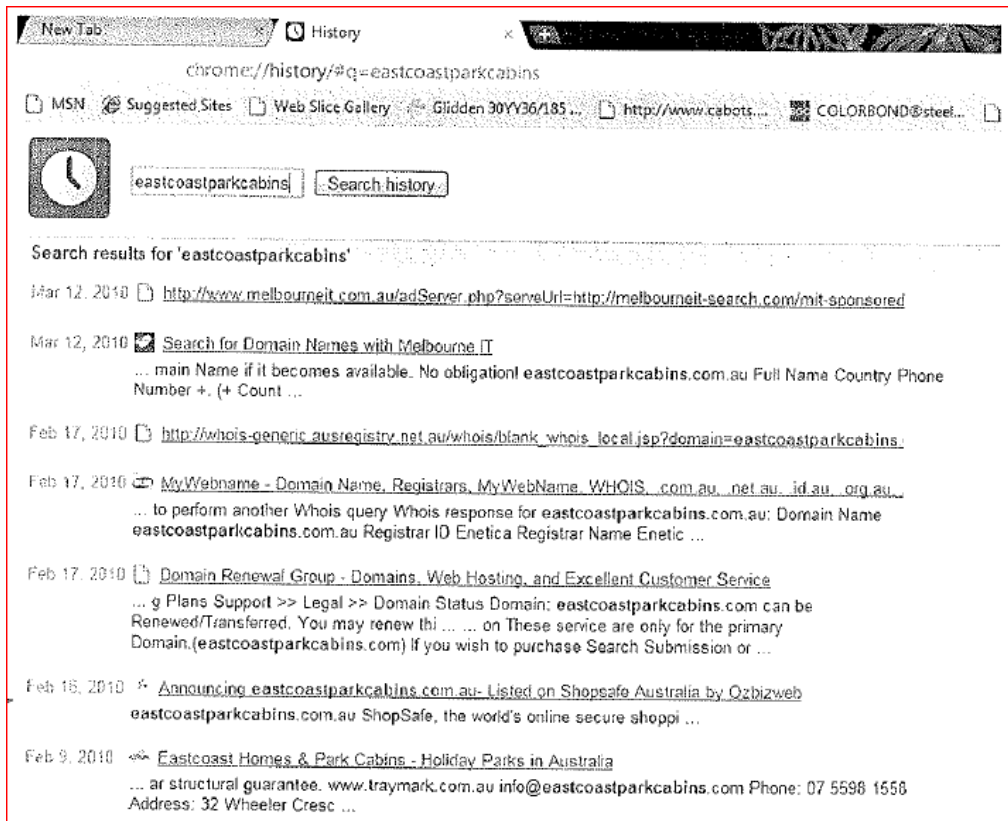


Furthermore, Google Maps as at 9 July 2010 records this in respect of number 32:



Mr Munro’s use of various email addresses and signature blocks in his communications and his references to the multiple entities which he appears to direct as “we” makes it impossible to accept as genuine his assertion that any of those entities would suffer irreparable damage if the conduct of one of them were wrongly ascribed to another of them. Similarly it renders improbable any assertion that delivery of documents to the address at which any of those businesses are conducted would not come to the attention of Mr Munro in a timely way.

The undated search result showing the Disputed Domain Name as available for some purpose through ShopSafe Pty Ltd is not so easily dismissed by Mr Munro – it has not been explained to the satisfaction of the Panel in circumstances where Mr Munro makes great play of the damage that would accrue to ShopSafe Pty Ltd’s reputation if the previous panel’s adverse finding were maintained. At best for the Respondent there was reference to the Disputed Domain Name in a way that gave the Complainant legitimate cause for concern. At worst it was an offer to sell the Disputed Domain Name via ShopSafe, despite Mr Munro’s vehement denial. The penultimate entry in the following extract shows how the impugned entry appeared to the Complainant as a result of Ms Gabriel’s search for “eastcoastparkcabins”:



The Complainant has made out paragraph 4(a)(iii) of the auDRP to the Panel's satisfaction.

## 8 Decision

The evidence amply supports the grounds on which the Complainant relies. Accordingly, the Complaint must be upheld and the Panel therefore orders that <eastcoastparkcabins.com.au> be transferred to the Complainant.

## 9 Recommendations

Mr Munro's precise position in relation to the Domain Name Reseller role of Ozbiz Holdings Pty Ltd is not clear, but the Panel recommends that auDA consider whether his conduct both in relation to the Complainant but also in relation to his submissions to auDA comply with auDA's requirements of its accredited registrars and their resellers.

It is possible that paragraph 5.4 of Policy 2008-06 needs to be reworded to avoid any ambiguity by lay readers. The Panel recommends to auDA that the first sentence of that paragraph, which reads "*With regard to the categories listed in paragraph 5.3, the registrant would be the owner of the registered business name or trade mark, the trustee of the trust or the individual partners of the partnership*" should be modified to read "*With regard to the categories listed in paragraph 5.3, the registrant field must contain the formal legal name of the actual person or entity making the application for a domain name licence, even if it is applying in the capacity of an owner of a registered business name or trade mark or the trustee of a trust, or one of the individual partners of a partnership. 'Fruit Harvest Pty Ltd as trustee of The Orange Orchard Trust' is an example of how to correctly record a trustee as a domain name registrant*".

Dated this 9th day of July 2010

***P Argy***

Philip N Argy

Sole Panellist