

RESOLUTION INSTITUTE DOMAIN NAME DISPUTE ADMINISTRATIVE PANEL**auDRP_17_11****Single Panellist Decision****dkcb Pty Ltd****v****Eveready Pty Ltd****rushcouriers.com.au****The Parties**

1. The Complainant is dkcb Pty Ltd, ABN 57 121 152 056 (“dkcb”), a private company limited by shares and domiciled in New South Wales. Its representative is Mr Daniel Musson. It is represented for the purposes of this procedure by Mr Jeremy Noonan of Benjafield & Associates, lawyers.
2. The Respondent is Eveready Pty Ltd (formerly Eveready Couriers Pty Ltd) (“Eveready”), a private company limited by shares, registered in New South Wales, ABN 31 121 655 856. It has not nominated a representative for the purposes of this procedure.
3. The domain name in dispute is rushcouriers.com.au . The Registrar is Enetica Pty Ltd.

Chronology

4. The Complainant and the Respondent are both in the business of providing courier, freight, taxi truck, warehousing and allied services from their respective premises in Girraween, Sydney, with offices in other capital cities. The Complainant has been in operation since about 1999, and currently operates under the registered business name Rush Express (registered 10 Aug 2006). Its principal or only website has the domain name rushexpress.com.au . Its email addresses are of the form @rushexpress.com.au. Its vehicles carry the legend “Rush Express” prominently in red on white.
5. The Respondent has been in operation since about 1981, and currently operates under the registered business name Dependable Couriers (registered 21 Dec 2015). As well as the domain name in dispute, it also has a

web site with the domain name freightexpress.com.au, almost identical in design and layout with rushcouriers.com.au. Its email addresses are of the form @freightexpress.com.au. An ASIC internet search shows that Freight Express is also a registered business name of On Call Pty Ltd, a subsidiary of Eveready. The website also gives a telephone number for “Rush Couriers”, although an ASIC search shows that this business name is not currently registered.

6. On or about 19 Feb 2015, the Respondent registered the domain name rushcouriers.com.au and set up a website with that name.
7. The Complainant believes that the domain name is being used improperly, and seeks transfer of the name to it.
8. The completed Complaint was received on 8 Aug 2017. A copy was forwarded to the Registrar on 15 Aug 2017, and the Registrar confirmed on the next day that the domain name had been locked.
9. Resolution Institute forwarded the Complaint to the Respondent on 18 Aug 2017, giving a due date for the Response of 7 Sep 2017. No Response was received. On 12 September, Resolution Institute asked me, Alan Kenneth Chuck, to act as sole panellist, and I accepted on 12 September.
10. I have been given a bundle of material, consisting of the procedural history and the Complaint. There is no response from the Respondent.
11. I now proceed to determine this matter on the basis of the evidence before me.

Test to be satisfied

12. The test which the Complainant must satisfy in order to succeed is set out in the .au Dispute Resolution Policy (auDRP) Schedule A, which may be summarised as follows:
 - (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 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.

In such an administrative proceeding, the Complainant bears the onus of proof. Note that the limbs are additive, not alternative, ie all three must be satisfied.

Identical or confusingly similar

13. The essential element of the dispute is the word “rush”. A simple search of the ASIC website shows that some 100 Australian entities have rush (with various combinations of upper and lower case letters) in their names, of which nine include “rush express” or “rush espresso”.
14. The Respondent would no doubt argue that “rushcouriers” is not identical to “rushexpress”, and this is literally true. However, under the second alternative of the first limb, I find that the two **are** confusingly similar.
15. I therefore find that the first limb of the Complaint succeeds.

No rights or legitimate interests

16. The Respondent would normally have rights in the domain name rushcouriers, for the simple reason that it registered it. Eveready was, at the time, carrying on, or planning to carry on, a courier business. Whether it then had a right to the corresponding business name Rush Couriers has not been proved.
17. The question is then whether the Respondent has a legitimate interest in rushcouriers.
18. As noted above, there are many variants of the word “rush” in use all over Australia, and the Complainant must accept this. However, its contention is that the Respondent is ‘using “Rush” in its marketing materials to trade off [our] reputation . . .’ The Complainant also points out that the Respondent only began to use the “rush” variant from about 2015, long after dkcb had registered its business name and established its website and vehicle livery.
19. I find, on the evidence, that the Respondent has no legitimate interest in the term rushcouriers.
20. I therefore find that the second limb of the Complaint succeeds.

Used in bad faith

21. *Good faith* has been defined as “An act carried out honestly.”¹ There is no corresponding definition of *bad faith*, so I must interpret it to mean “an absence of good faith”, or “dishonesty”.

¹ Osborn’s Concise Law Dictionary 8e

22. The Complainant alleges that the Respondent must have been aware of dkcb's use of the term "Rush Express", as they operate within a short distance of each other in the same suburb of Sydney. It alleges that the Respondent, by use of rushcouriers in one of its websites, is attempting to attract internet users to its business, thinking that they were dealing with Rush Express.
23. I find, on the evidence available, that the Respondent has used the name in bad faith.
24. I therefore find that the third limb of the Complaint succeeds.
25. I note in passing that the Respondent already has an alternative website up and running, and does not use the disputed domain name for its email addresses. The transfer of the disputed domain name will therefore have very little practical impact on its legitimate business interests, but will remove a possible source of confusion to the public.

Decision

26. I therefore determine that the Complaint succeeds. The Registrar is directed to transfer ownership of **rushcouriers.com.au** to the Complainant, dkcb Pty Ltd.

DATE: 20 September 2017

Alan K Chuck

Alan K Chuck

Panellist