



ADMINISTRATIVE PANEL DECISION
Mount Wellington Cableway Company Pty Limited
V
The Trustee for the Dive Trust
auDRP_18_04
<mtwellingtoncablecar.com.au>

The Parties

- 1 The Complainant is Mount Wellington Cableway Company Pty Ltd of Level 1, 160 Collins Street, Hobart, Tasmania. It is represented by Simmons Wolfhagen Lawyers.
- 2 The Respondent is Louise Sales. Neither a postal nor physical address was provided by her, although an email address was provided.

The disputed Domain Name and Registrar

- 3 The Disputed Domain Name is <mtwellingtoncablecar.com.au>.
- 4 The Registrar of the Disputed Domain Name is TPP Wholesale Pty Ltd.

Procedural History

- 5 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” of “Policy”), the auDA Rules for .au Dispute Resolution Policy (“Rules”), which is Schedule B of the Policy and the Resolution Institute Supplemental Rules for .au Domain Name Dispute Resolution Policy (“RI Supplemental Rules”).
- 6 The application was received from the Complainant by Resolution Institute via email on Monday 21 May 2018. An acknowledgement of receipt of the complaint was emailed to the Complainant on Tuesday 22 May 2018.

- 7 On Tuesday 22 May 2018, a notification of non-compliance was issued to the Complainant. On Thursday 24 May 2018, a rectified complaint was received from the Complainant by email.
- 8 The Complaint comprised an application for dated 21 May 2018, Complainant's Submission, ASIC extract Mount Wellington Cableway Company Pty Ltd, copy email dated 23 April 2018 and a copy of Whois Lookup domain name search for the Disputed Domain Name.
- 9 A copy of the rectified complaint was emailed to the Registrar with a request to clarify the Respondent's details and lock the domain name pending the final decision of domain name dispute proceedings on Thursday 24 May 2018. On 29 May 2018 the Registrar confirmed via email that the domain name in dispute had been locked.
- 10 Resolution Institute advised auDA of the complaint on 29 May 2018 via email
- 11 On 29 May 2018, Resolution Institute emailed the Respondent with written notification of the rectified complaint lodged against them. The Complainant was copied in on these notifications.
- 12 The due date for the response to the rectified complaint was confirmed to be 18 June 2018. On 18 June 2018, the Respondent submitted their Response to the Resolution Institute via email. The Complainant was not included on the email.
- 13 On 19 June 2018, the Resolution Institute emailed the Respondent and Complainant indicating that any Response submitted must be forwarded to both the Complainant, as well as, Resolution Institute. The Respondent responded informing Resolution Institute that the Response had been emailed to the Complainant on 18 June 2018.
- 14 The Response comprised submissions by the Respondent and three appendixes described as "The Blank Trademark Box", "Mount Wellingtons of the World" and "Search Results for Mount Wellington Cable Car".
- 15 On 19 June 2018, the Provider approached the Panellist. The Panellist confirmed their availability, informed the Resolution Institute that they had no conflict issues with the Parties and accepted the matter on 19 June 2018.

16 The Case file and relevant correspondence was forwarded onto the Panellist on 20 June 2018.

17 The Parties to the dispute were notified of the Panellist's allocation on 20 June 2018.

18 Under clause 10 of Schedule B, the Panel may conduct the proceedings in such manner as it thinks fit. It is not bound by the rules of evidence and may view and have regard to the contents of the websites maintained by the parties if considered appropriate. I viewed both websites on 2 July 2018. I have taken the contents of the websites into account where indicated in these reasons.

Background

19 The following matters appear from the Complaint and Response to not be in dispute:

- (a) the Complainant is a proponent of the construction of and operation of a cable car and visitor center on Mount Wellington in Hobart;¹
- (b) a cable car a cable car and visitor centre at Mount Wellington has not yet been constructed and is not operational;
- (c) the Complainant's domain name was registered in April 2012 by Adrian Bold, a director of the Complainant, and transferred to the Complainant in June 2015;
- (d) the Complainant's website, accessed through the domain name "mtwellingtoncablecar.com", publishes information advocating construction of a cable car on Mt Wellington;²
- (e) the Respondent lives in the foot hills of Mt Wellington;³
- (f) the Respondent's website was registered on or about 10 April 2017;
- (g) the Respondent's website publishes information which advocates against the construction of a cable car on Mt Wellington; and

¹ Application at 5. The Respondent used the expression "kunyani" to refer to what the Complainant referred to as Mt Wellington. In these reasons I will use the expression "Mt Wellington" because that appears to be the expression which, rightly or wrongly, is more commonly used, and the use of the expression "Mt Wellington" is relevant to the matters in dispute.

² Application at 9.

³ Response at p1.

(h) the Complainant's proposal has generated "considerable debate".⁴

The Policy

20 The Policy sets out the elements that the Complainant must establish in order to be entitled to relief in paragraph 4(a). The Complainant must establish on the balance of probabilities that:

- (i) [the Respondent's] 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 Respondent's] domain name has been registered or subsequently used in bad faith.

21 I will consider each of these elements in turn.

Confusing similarity

22 The first element, under paragraph 4(a)(i) of the Policy has two components. First, there must be a "name, trademark or service mark" in which the Complainant has rights. Second, the dispute domain name must be "identical or confusingly similar" to it.

23 In relation to the first component, the Complainant did not provide any evidence of a "trademark" or "service mark" in which it had rights. I find that it has none.

24 The footnote to paragraph 4(a)(i) of the Policy reads:

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; or
- b) the complainant's personal name.

25 The name of the Complainant is shown on the ASIC corporate fact sheet as "Mount Wellington Cableway Company Pty Limited". This is the Complainants legal name. The Policy, by its footnote, does not require that the name of a company have any particular reputation or renown. It is sufficient, therefore, if a Complainant company is registered with the relevant name. I find, therefore, that there is a name, "Mount Wellington Cableway Company Pty Limited" in which the Complainant has rights. I also find, on the

⁴ Response at p1.

balance of probabilities, that the Complainant has a reputation in connection with its name, derived from the controversy connected with its proposal.

26 The second component of the first element is whether the domain name is “identical or confusingly similar” to the Complainant’s name.

27 The suffixes “com.au” and “com” may be disregarded in carrying out this comparison as immaterial to a reader of the domain name and company name. The “Pty Ltd” component of the Complainant’s name may be treated in the same way.

28 The operative part of the Disputed Domain Name is “mtwellingtoncablecar”. The operative part of the Complainant’s name is “Mount Wellington Cableway Company”. The name and the Disputed Domain Name are not identical. I consider, however, that they are confusingly similar. The essential elements of the two are the name of the mountain and the reference to “cable”. I consider that a user of the internet would not pay significant attention to the differences.

29 The Respondent argued that there were other Mt Wellingtons, so that the Complainant could expect a degree of confusion surrounding its name. That does not bear upon the question whether a person looking at or using the Disputed Domain Name would confuse it with the Complainant’s name. It merely means that there may be domain names other than the Respondent’s which are also confusingly similar to the Complainant’s domain name.

30 I find that the Complainant has made out the first element.

Legitimate interest

31 Paragraph 4(b) requires the Complainant to establish that the respondent has “no rights or legitimate interests in respect of the domain name”.

32 Guidance as to the means of establishing legitimate interests is provided by paragraph 4(c) of the [Policy], which reads:

Any of the following circumstances, in particular but without limitation, if found by the Panel to be proved based on its evaluation of all evidence presented, is to be taken to demonstrate your rights or legitimate interests to the domain name for purposes of Paragraph 4(a)(ii):

- (i) before any notice to you of the subject matter of the dispute, your 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 (not being the offering of domain names that you have acquired for the purpose of selling, renting or otherwise transferring); or

- (ii) you (as an individual, business, or other organisation) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or
- (iii) you are making a legitimate non-commercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the name, trademark or service mark at issue.

This guidance is not exhaustive. A respondent might have rights or legitimate interests not identified in paragraph 4(c).

33 The criteria identified at paragraph 4(c)(i) and (ii) are clearly not satisfied. The Respondent did not and was not preparing to offer goods or services, within paragraph 4(c)(i). The respondent, Ms Sales, is not known by the domain name, within paragraph 4(a)(ii).

34 The criterion set out at 4(c)(iii) is more problematic. The first question which arises under paragraph 4(c)(iii), is whether the Respondent's use was with the "intent for commercial gain to misleadingly divert consumers or to tarnish the name, trademark or service mark at issue". This expression might be described as the proviso to paragraph 4(c)(iii). I consider that the Respondent's use did not have this intent. There was no suggestion that the use was for "commercial purposes", that is to say, to make money. The Respondent's use of the website was to provide information to the public, for free.

35 The Respondent's use of the Disputed Domain Name was not to "tarnish" the name of the Complainant. In this context "tarnish" has a technical meaning. In *Titan Enterprises (Qld) Pty Ltd v Dale Cross/Contact Privacy Inc* Case No 2015-2062 (13 January 2013), the Panel said:

Tarnishment in this context refers to such unseemly conduct as linking unrelated pornographic, violent or drug-related images or information to an otherwise wholesome mark. The panel excluded "fair use" criticism from tarnishing conduct.

Although the Complainant objected to the contents of the Respondent's website, it was not suggested that the Respondent sought to tarnish the name of the Complainant in this way.

36 I find that the Respondent's use of the Disputed Domain Name did not fall within the expression "commercial gain to misleadingly divert consumers or to tarnish the name, trademark or service mark at issue"

37 However, the fact that the Respondent's use of the Disputed Domain Name does not fall within the proviso to paragraph 4(iii) does not mean that the Respondent's use of the Disputed Domain Name is "a legitimate non-commercial or fair use of the domain name".

38 The Respondent argued that it has legitimate rights to or interests in the domain name and had made fair use of the Disputed Domain Name because:

- (a) she has a right to free speech; and
- (b) she has a right to use geographical names and regional prefixes, together with ordinary words, such as "cable car".

39 It is important in this context to distinguish between the Disputed Domain Name and the contents of the site accessed by means of the Disputed Domain Name. This distinction was recognized by Prof Andrew Christie in a recent decision concerning the auDRP, *Miletenyi Biotec GmbH v Rachel A Liu-Williams* (WIPO Case No DAU 2015-1596). He said:

The Panel recognizes that the personal and public values that support an entitlement to speak freely ("free speech") are found, in varying degrees, in most countries. Without a doubt, an entitlement to free speech exists in, and is highly valued by citizens and residents of, Australia – the country in which the Respondent appears to reside. In the Panel's opinion, resolution of a perceived conflict between an entitlement to free speech and an entitlement to a domain name registered in a gTLD is one of the few instances in which considerations specific to the nation in which each party resides should be taken into account in making decisions under the Policy. Thus, the Panel has given careful consideration to the Respondent's contention that she has a right or legitimate interest in the disputed domain name by virtue of using it to resolve to a website at which she ventilates her criticisms of the Complainant.

Having given careful consideration to the matter, the Panel concludes that use of a domain name that consists solely of the complainant's trademark (*i.e.*, <trademark.tld>) for the purposes of engaging in criticism of the complainant does not, of itself, give rise to rights or legitimate interests in the domain name. The reason for this conclusion is that, as was said in *Monty and Pat Roberts, Inc. v. Bill Keith*, [WIPO Case No. D2000-0299](#), "the right to express one's views is not the same as the right to use another's name to identify one's self as the source of those views". While it is true, as the Respondent says, that it is unlikely that a visitor to the website to which the disputed domain name resolves would think that it is a website belonging to the Complainant once the content has been read, the fact is that prior to landing at the website a visitor would not know that it is not a website belonging to the Complainant. Indeed, the fact that the disputed domain name consists solely of the Complainant's trademark may lead a potential visitor to the website to think otherwise. This use of the Complainant's trademark is not, therefore, a legitimate use.

40 The reasoning is persuasive, and I adopt it. There is no reason to think that using a different domain name would require the Respondent to substantially alter the views currently

expressed on her website. Her right to free speech will not be significantly impaired if the Disputed Domain Name is transferred. I make no finding about whether the contents of website to which the Disputed Domain Name reverts are misleading or whether its contents were fair comment on the activities of the Complainant.

41 That leaves the argument that the Respondent has a legitimate right or interest in using the components of the Disputed Domain Name, namely “Mt”, “Wellington” (or “MtWellington”) and “cable car” because they are common English expressions. I am not persuaded by this argument for the following reasons.

42 Both the Complainant and the Respondent may be regarded as “promotional” sites, established and maintained to promote the views of the parties. Although neither the Complainant nor the Respondent engage in the commercial supply of goods or services, and thus are not competitors in a commercial way, they have competing views about the proposal to construct a cable car at Mt Wellington. They may be said to be competing in the market place of ideas and opinion, particularly, one assumes, among residents of Hobart and Tasmania, who might be able to influence whether a cable car is constructed at Mt Wellington or be affected by it. The Respondent has an interest, albeit, not a commercial one, in facilitating persons interested in whether a cable car should be constructed, to go to her website, rather than that of Complainant.

43 The Respondent commented that the Complainant’s proposal to construct the cable car had generated “considerable debate”. The Respondent lives in the foot hills of Mt Wellington. The purpose of the Respondent’s website is to provide information challenging the views expressed by the Complainant, its proposal and its activities. It may be inferred from these matters and I find that the Respondent was aware of the existence of the Complainant. This inference is also supported by the content and form of the two websites. The design of the Respondent’s website mimics elements of the design of the Complainant’s website. I have found that the Disputed Domain Name is confusingly similar to the Complainant’s name. Users of the internet searching for the Complainant’s website using obvious search criteria would likely be directed to the Respondent’s website rather than the Complainant’s. It may be inferred, and I find, that the Disputed Domain Name was selected with an intention that

this should occur, so as to divert some potential viewers of the Complainant's website to the Respondent's website.

44 In light of this conclusion, I consider that the Respondent was not making a "a legitimate non-commercial or fair use of the domain name".

45 I find the second element is made out.

Bad faith

46 The third element which the Complainant must establish is that the Respondent registered or subsequently used the Disputed Domain Name in bad faith.

47 Paragraph 4(b) provides a non-exhaustive list of circumstances in which there will be found to have been bad faith registration and use of the domain name. Most are not relevant. However, paragraph 4(b)(iii) deals with the situation where the Respondent has registered the domain name primarily for the purpose of disrupting the business or activities of another person. Based on the matters referred to in paragraphs 42 and 43 above, I find that that occurred here. I consider that the Disputed Domain Name was registered so that persons seeking information about the Complainant's activities would be diverted from the Complainant's site to another site which offered a sharply divergent view to that of the Complainant. This activity amounts to disrupting the business or activities of the Complainant.

48 Paragraph 4(b)(iv) also provides guidance. It deals with the situation where the domain name is used to intentionally attempt to attract, for commercial gain, internet users to a website by creating a likelihood of confusion with the complainant's name or mark, as to the source, sponsorship, affiliation, or endorsement of that website or location or of a product or service on that website or location. The creation of a likelihood of confusion with the Complainant's name as to the relationship between the Respondent's website and the Complainant for non-commercial purposes also amounts to bad faith use. The likelihood of confusion was significantly increased, in this case, because of the similarity in design of the two websites. Although a viewer of the website who had some understanding of the Complainant's activities would be able to work out, after a while, that the Respondent's website did not belong to the Complainant and was in fact attacking the

Complainant, the viewer would be confused for some time. The Respondent's website was intended to have this effect.

49 Prior decisions have concluded that the registration and use of a domain name that consists solely of the complainant's trade mark, for the purposes of criticising the complainant is registration and use of the domain name in bad faith. *Triodos Bank NV v. Ashley Dobbs*, (WIPO Case No. D2002-0776). The same principle applies to the use, in this case, of the essential components of a name.

50 The third element of paragraph 4(a) has been made out as well.

Decision

51 For the foregoing reasons, in accordance with paragraph 4(a) of the Policy and paragraph 15 of the Rules, I order that the Domain Name, <mtwellingtoncablecar.com.au>, be transferred to the Complainant.

A handwritten signature in blue ink, appearing to read 'DS Ellis', with a small comma at the end.

DS Ellis

Sole Panelist

Date: 3 July 2018