



## ADMINISTRATIVE PANEL DECISION

Provisio Technologies Pty Ltd

-v-

Brenden Thomas Rolley

Case No. LEADR-auDRP 13/10

**Domain Name:** provisio.com.au  
**Complainant:** Provisio Technologies Pty Ltd  
**Respondent:** Brenden Thomas Rolley  
**Provider:** LEADR  
**Panelist:** Sara Delpopolo

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### 1. THE PARTIES

- (a) The complainant is Provisio Technologies Pty Ltd (ACN 123 121 684) of PO Box 1455, Melbourne Victoria 3001 (**Complainant**).
- (b) The respondent is Brenden Thomas Rolley of PO Box 1183, Eagle Farm, BC Queensland 4009 (**Respondent**).

### 2. THE DOMAIN NAME AND REGISTRAR

The disputed domain names are <provisio.com.au> (**Domain Name**). The registrar is IntaServe (**Registrar**).

### 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 27 May 2010.
- (c) On 4 June 2010, LEADR sent the Respondent a dispute notification letter and a copy of the complaint submitted by post and email.
- (d) A copy of the complaint submitted and the dispute notification letter sent to the Respondent were also posted to the Registrar on 4 June 2010.
- (e) The Registrar was also sent an email on 4 June 2010 requesting to lock the Domain Name in dispute.

- (f) LEADR advised auDA of the complaint on 4 June 2010 via email.
- (g) On 4 June 2010, LEADR sent a notification letter to the Complainant by email along with a copy of the notification letter sent to the Respondent.
- (h) On 4 June 2010, the Registrar confirmed via email that the Domain Name in dispute has been locked.
- (i) On 24 June 2010, the Respondent submitted a response to the Domain Name complaint.
- (j) On 25 June 2010, 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 28 June 2010.
- (k) The Panellist was informed on 28 June 2010 that the package was being sent for Adjudication.

## 4. FACTUAL BACKGROUND

### 4.1 Facts Alleged by Complainant

The Complainant is a registered Australian company in the name of Provisio Technologies Pty Ltd (ACN 123 121 684). It was incorporated on 13 December 2006. Its business is to develop financial software applications for the Australian financial planning and superannuation industries.

On 12 January 2010, the Complainant became aware that Provisio Corporate Pty Ltd (ACN 115 026 214) (**Prior Registrant**), which was a registrant of the Domain Name at that time, had ceased trading and had deregistered its company with ASIC.

The Complainant lodged a complaint with auDA requesting that the Domain Name be released to the public on the ground that the Prior Registrant was no longer eligible under the *Domain Name Eligibility and Allocation Policy Rules for Open 2LDs (Eligibility Rules)*.

After investigation, auDA found in favour of the Complainant and instructed the Registrar to delete the Domain Name from the registry in order for it to become available for registration by anyone on a first come and first served basis.

On around 1 March 2010, the Domain Name was available for registration. The Complainant attempted to register the Domain Name, however, was advised that the Respondent had already registered the Domain Name (**First Registration**).

The Complainant noticed that the Respondent had registered the Domain Name using his personal ABN (58 826 317 854) for an "*Eligibility Type*". The Complainant considered that this was in breach of the auDA's Eligibility Rules for registration of domain names because there was no connection between the Domain Name and the Respondent (or his ABN).

The Complainant thus lodged a complaint with auDA on 10 March 2010. After investigation, auDA found that the Respondent was in fact in breach of the Eligibility Rules and instructed the Registrar to delete the Domain Name on 20 April 2010.

On 14 May 2010, the Domain Name again became available for registration by anyone on a first come and first served basis. Within approximately 15 minutes of being released by the Registrar, the Respondent registered the Domain Name again (**Second Registration**).

On 14 May 2010, the Complainant sent an email to the Respondent and expressed its interest in acquiring the Domain Name while informing him of auDA's eligibility criteria for registration under the Eligibility Rules.

In response, the Respondent indicated that he was aware of the complaint against his First Registration of the Domain Name and further stated that he believed he was not in breach of auDA's Eligibility Rules in relation to the Second Registration. The Respondent also suggested the Complainant to provide him with a proposal to acquire the Domain Name.

*"As you maybe aware, provisio.com.au has recently been the been [sic] the subject of an auDA complaint. As the registrant, I can assure you that I have fully complied with auDA Domain Name Eligibility and Allocation Policy Rules for Open 2LDs (2008-05) and that I am entitled to register the name.*

*I plan to utilise the domain name for a commercial enterprise. However, I will consider any proposals presented."*

Upon investigation, the Complainant found that a registered domain name cannot be transferred to another party for a period of 6 months from the date of registration under the *Transfers (Change of Registrant) Policy*. Thus, the Complainant sent the Respondent another email on 14 May 2010 and proposed the Respondent to lease the Complainant the Domain Name for 6 months and then voluntarily relinquish the Domain Name after this period lapsed.

On the same date, the Respondent replied by email that:

*"I won't be relinquishing the domain voluntarily. If you wish to explore your idea of leasing the name please provide a proposal."*

The Complainant then offered \$500.00 for leasing the Domain Name for 6 months provided it will be transferred to the Complainant after 6 months.

On 19 May 2010, the Respondent replied that:

*"Taking into account the costs incurred to secure the name and my plans for the use of the name, I would like to advise you that I will be declining your offer at this time."*

On the same date, the Complainant sent an email and informed the Respondent that it will commence an auDRP. The Respondent subsequently responded that:

*"I suggest that before you go to the expense and trouble of commencing an auDA Dispute Resolution process that you submit another complaint against my registration of provisio.com.au"*

In the Complainant's view, the Respondent does not meet the Eligibility Rules for registration of the Domain Name as it does not represent the Respondent's name and there is not connection between them. The Complainant also submitted that the Domain Name is identical to the Complainant's company name.

The Complainant therefore seeks to have the Domain Name transferred to it under this Complaint.

#### 4.2 **Facts Alleged by the Respondent**

The Respondent validly submitted a response to the Complaint within a limited time required under *.au Dispute Resolution Policy (auDRP)*

On 1 April 2010, the Respondent registered a business name "Provisio Internet" (BN 21579489) (**Business Name**) in Queensland and he is listed as the sole proprietor.

At 1:00 pm on 14 May 2010, the Domain Name became available for registration by anyone. It was 14 calendar days after the Domain Name had entered the "*Pending Policy Delete*" and "*Purge Cycle*" status.

At 1:15 pm on the same date, the Respondent registered the Domain Name via the Registrar.

In the Respondent's view, he has legitimate interests in the Domain Name which is identical to his business name. The Respondent also claims that he satisfies the following criteria in Schedule C of the Eligibility Rules so that he is eligible to register the Domain Name in that he is either:

*"... b) trading under a registered business name in any Australian State or Territory; or*

*c) an Australian partnership or sole trader; or ..."*

The Respondent therefore seeks to have the Complaint dismissed.

### 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 Schedule A of 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));
- (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)).

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

The Panel must determine whether, on the basis of the facts set out in paragraph 4(a)(i) above, the Complainant has rights in a relevant name, trade mark or service name.

The footnote 1 of the paragraph 4(a)(i) 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; or*

*(b) the complainant’s personal name.”*

The Complainant has had the company name “Provisio Technologies Pty Ltd” since 13 December 2006. This is supported by a copy of the Certificate of Registration of a Company which was issued by *Australian Securities and Investments Commission (ASIC)* as provided by the Complainant with this Complaint.

The Panel therefore finds that the Domain Name <provisio.com.au> is substantially identical and confusingly similar to the name in which the Complainant has rights, as such the Complainant satisfies the above paragraph 4(a)(i).

## 5.2 **Paragraph 4(a)(ii) of the auDRP:**

Paragraph 4(c) of Schedule A of the auDRP provides the list of circumstances to be taken to demonstrate the registrant’s rights or legitimate interest to the domain name for purpose of paragraph 4(a)(ii):

- (i) the registrant’s bona fide use of, or demonstrate preparations to use, the domain name in connection with an offering of goods or service (not being the offering of domain names that you have acquired for the purpose of selling, renting or otherwise transferring); or
- (ii) the registrant (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) the registrant is 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, trade mark at issue.

In order to demonstrate its legitimate rights on the Domain Name, the Respondent provided a copy of Certificate of the Registration of the Business Name “Provisio Internet” which was issued by Office of Fair Trading in Queensland on 1 April 2010.

Except for the Certificate of Registration of the Business Name, the Respondent has not demonstrated that his activities fall within the scope of the specified activities enumerated in paragraph 4(c) of Schedule A of the auDRP, which is a basis for bona fide use of the Domain Name.

The Panel, thus is only bound to the evidence presented to it, that is, the existence of the Business Name *solus* for determining the criteria of the element of paragraphs 4(a)(ii) and 4(c).

The Panel pays attention to the date of registration of the Business Name by the Respondent, which is 1 April 2010. According to facts alleged by the Complainant and supporting evidence, the Respondent firstly registered the Domain Name on around 1 March 2010 but was then found by auDA in breach of the Eligibility Rules on 20 April 2010 following a complaint made on 10 March 2010.

Having regard to the auDA's complaints handling process, the Respondent would have been aware that the complaint against his First Registration had been confirmed by auDA, because he would have been invited by auDA to provide a response to the complaint and/or would have been advised by his Registrar that the Domain Name was locked after auDA commenced its investigation on 10 March 2010.

Paragraph 3 of the auDA's *Complaints Policy* provides auDA's complaint handling process and confirm that the Respondent had been notified of the complaint to his First Registration.

*"3.2 On receipt of your complaint, where appropriate, auDA will request a response from the registrant, register or reseller involved. auDA will investigate your complaint based on the facts provided by all parties involved in the matter. auDA may seek further information from any party to assist with its investigation. auDA may place a registry server lock on the domain name(s) in question, in order to preserve the status quo whilst the investigation is pending."*

In his email response of 14 May 2010, the Respondent also admitted that he knew there was an auDA complaint regarding the Domain Name:

*"As you maybe aware, provisio.com.au has recently been the been [sic] the subject of an auDA complaint."*

In these circumstances, the Respondent registered the Business Name after being made aware that the Complainant had an interest in the Domain Name and was disputing the Registrant's eligibility to the Domain Name in relation to the Respondent's First Registration, and subsequently for the Second Registration.

The Panel refers to page 889 of *Shanahan's Australian Law of Trade Marks and Passing Off*, 4th edition (2008) that:

*"In order to rely on this [paragraph 4(c) of the auDRP], the registrant needs to demonstrate its use or preparations to use the domain name prior to it being aware of the subject matter of the dispute, rather than simply prior to notice of the dispute itself. This slight variation from the UDRP prevents a registrant from using or preparing to use the domain name after knowing that there may be a dispute but before dispute proceedings are commenced."*

The Panel notes that the existence of a business name *solus* does mean the Respondent has legitimate rights on the Domain Name without evidence that the Respondent has carried on a bona fide business under the Business Name. Moreover, the Business Name itself cannot be taken into account for demonstrating the Respondent's legitimate rights on the Domain Name because it was acquired after knowing that there was a dispute regarding the Domain Name.

Absent any evidence having been produced by the Respondent, the Panel therefore finds that the Respondent has no legitimate rights to use the Domain Name.

Paragraphs 4(a)(ii) and 4(c) of Schedule A of the auDRP are therefore satisfied by the Complainant.

### 5.3 **Paragraph 4(a)(iii) of the auDRP:**

Paragraph 4(a)(iii) of Schedule A of the auDRP requires that the Domain Name has been registered or subsequently used in bad faith.

Paragraph 4(b) of Schedule A of the auDRP sets out a non-exhaustive list of circumstances which can be taken as “*evidence of the registration or used of a domain name in bad faith*”. The grounds under paragraph 4(b) include:

- (i) circumstances indicating that the Respondent has registered or has acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to another person for valuable consideration in excess of the Respondent documented out-of-pocket costs directly related to the domain names ; or
- (ii) the Respondent has registered the domain name in order to prevent the owner of a name, trademark or service mark from reflecting that name or mark in a corresponding domain name; or
- (iii) the Respondent has registered the domain name primarily for the purpose of disrupting the business or activities of another person; or
- (iv) by using the domain name, the Respondent has intentionally attempted to attract, for commercial gain, internet users to a website or other online location, 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.

Although specific circumstances constituting bad faith are expressly identified as above, bad faith is not exhaustively defined in the auDRP: *ADHD (Aust) Inc v ADDults with ADHD (NSW) Inc* LEADR Case No auDA 05\_07 (**ADHD (Aust) Inc Case**).

In the Panel’s view, the onus of proof rests on the Complainant, and the Panel’s determination of whether “*bad faith*” occurred in this case is focused on the correspondence between the parties regarding transferring the Domain Name to the Complainant.

In the emails on 14 May 2010 relating to the Complainant’s offer for sale and/or lease of the Domain Name to it, the Respondent stated that:

*“I plan to utilise the domain name for a commercial enterprise. However, I will consider any proposals presented.”*

*“If you wish to explore your idea of leasing the name please provide a proposal.”*

The Respondent rejected the Complainant's offer for the sale and/or lease of the Domain Name for \$500.00 on 19 May 2010:

*"Taking into account the costs incurred to secure the name and my plans for the use of the name, I would like to advise you that I will be declining your offer at the time."*

The Panel finds that by continuously inviting the Complainant to propose an arrangement for transferring the Domain Name, the Respondent was seeking to transfer the Domain Name. The Panel also takes both the Respondent's action of declining the price of \$500.00 and this statement *"Taking into account the costs incurred to secure the name ..."*. Considering that the Respondent had no operational business under the name "Provisio" nor was there any active website, the price of \$500.00 would appear to be a valuable consideration in excess of out-of-pocket costs for registering the Domain Name. Again, the Respondent's only other out-of-pocket expense was the registration of the business name after having already received notice of the Complainant's first claim.

The Panel has not ignored the Respondent's statement in his email of 17 May and 19 May 2010 that he intended to use the Domain Name (for a commercial enterprise) in the future. This leads to the question before the Panel of whether the Respondent registered the Domain Name *primarily* for the purpose of selling or renting, or otherwise had he registered it with a genuine intention to use it but then turned his mind to selling or leasing it upon receiving the Complainant's offer.

The Respondent did not provide evidence in support that affirms his plan to use the Domain Name. However, the Panel refers to the *ADHD (Aust) Inc case*, which says there is no requirement under the auDRP for parties to provide the Panel with statutory declarations or the like in order to affirm the truthfulness of allegations made by them.

A factor which does influence the Panel in this context is the interest which the Respondent has in affairs concerning the name "Provisio". At the time of the First Registration of the Domain Name, the Respondent was not eligible to register it nor had the Respondent legitimate rights over it. This was found by auDA after investigation of the complaint lodged by the Complainant over the First Registration.

The Respondent registered the Business Name "Provisio Internet" on 1 April 2010 after realising he would need evidence to support his eligibility to hold the Domain Name following the investigation in relation to the First Registration by auDA. In the alternative, the Respondent registered the Business Name for the Second Registration in case auDA had the Domain Name deleted (this in fact occurred).

In either case, the Respondent would have had knowledge that the Complainant's name was "Provisio Technologies Pty Ltd" at the time of the Second Registration (the subject of this proceeding). From this it can be inferred that the Domain Name was registered for the purpose of selling or renting, or at least in order to prevent the Complainant from using it, and therefore it was registered in bad faith.

The Panel is satisfied that the Respondent registered the Domain Names in bad faith and that the Complainant has satisfied the requirements of paragraph 4(a)(iii) of the auDRP.



**6. DECISION**

I find that the Complainant has made out all of the elements of paragraph 4(a) of the auDRP. Accordingly, the Domain Name <provisio.com.au> is to be transferred by the Registrar, IntaServe, to the Complainant.

Sara Delpopolo  
Sole Panelist

20 July 2010