

ADMINISTRATIVE PANEL DECISION

Marcia Pilkington for the trustee for Marcia's Sushi Express Discretionary Trust No 2 v. Name Redacted
Case No. DAU2023-0023

1. The Parties

The Complainant is Marcia Pilkington for the trustee for Marcia's Sushi Express Discretionary Trust No 2, Australia, represented by Internet Removals Pty Ltd, Australia.

The Respondent is Name Redacted¹.

2. The Domain Name and Registrar

The disputed domain name <curvyswim.com.au> is registered with Tucows (Australia) Pty Ltd trading as OpenSRS (the "Registrar").

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on May 12, 2023. On May 12, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On May 12, 2023, the Registrar transmitted by email to the Center its verification response disclosing additional registrant contact information for the disputed domain name. The Center sent an email communication to the Complainant on May 22, 2023, providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. The Complainant filed an amended Complaint on May 23, 2023.

The Center verified that the Complaint together with the amended Complaint satisfied the formal requirements of the .au Dispute Resolution Policy (the "Policy" or ".auDRP"), the Rules for .au Dispute Resolution Policy (the "Rules"), and the WIPO Supplemental Rules for .au Domain Name Dispute Resolution Policy (the "Supplemental Rules").

In accordance with the Rules, paragraphs 2(a) and 4(a), the Center formally notified the Respondent of the Complaint, and the proceedings commenced on May 24, 2023. In accordance with the Rules, paragraph

¹ As explained under Sections 4 and 6.c., the Respondent appears to have used the name of a third party when registering the disputed domain name. In light of the potential identity theft, the Panel has redacted the Respondent's name from this decision, pursuant to the Overview of Panel Views on Selected auDRP Questions, Second Edition, section 5.1.2.

5(a), the due date for Response was June 13, 2023. The Respondent did not submit any response. Accordingly, the Center notified the Respondent's default on June 21, 2023.

The Center appointed John Swinson as the sole panelist in this matter on June 30, 2023. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

4. Factual Background

The Complainant is an Australian business that sells swimwear targeted at full figure women. The Complainant sells its swimwear online via a website located at the domain name <curvyswimwear.com.au>.

The Complainant owns two Australian Trademark registrations, both for logos that include the word "curvy" in large font. These registrations are:

1. Registration No. 1494798 for CURVY BY CAPRIOSCA SWIMWEAR and device, filed on June 5, 2012 and registered on March 13, 2013.
2. Registration No. 1831069 for CURVY SWIMWEAR and device, filed on March 10, 2017 and registered on May 16, 2018.

The disputed domain name was registered on August 20, 2022.

The Respondent did not file a Response, so little information is known about the Respondent.

According to the Whois database, the Respondent is a "partnership" that is also a trustee for an entity described as a management trust. The Respondent has an Australian Business Number (ABN), and the Australian Business Register for this number states that the ABN has been active since December 1, 2002 and the main business location is in the 2042 (Newton) area. The Respondent owns a business name "Celebrity Dress".

According to the Registrar's records, the "registrant contact name" is Lily Paily of "CurvySwim LTD" of North Ryde in Sydney. A DHL package from the Center to the address of Lily Paily in Sydney (as specified in the Registrar's records) was unable to be delivered because (according to DHL) it was a "bad address".

The website at the disputed domain name is an online store that at one time sold swimwear in competition with the Complainant. It also appears to target full figure women, however at the date of this decision no swimwear was listed for sale. The "about us" section of the website states, in part, "We create mid size and plus size fashion that's fit for you! Show your curves, enjoy your style and become confident and sexy on the beach this summer". The website does not identify any legal entity operating the website and does not include an Australian Business Number or an Australian Company Number. The website does not list a physical address or specify from where the goods are shipped. The "Terms and Conditions" on the website state that all pricing is "calculated in" United States dollars and that the customer terms are governed by the laws of France.

The Respondent is also the owner of the domain name <meetcurve.com.au> and appears to operate a website at <meetcurve.com>. (At the date of this decision, the <meetcurve.com.au> website was inactive.) The website at <meetcurve.com> has similar content and design elements to the website at the disputed domain name. According to the Complainant, the website at <meetcurve.com> has similar content to the Complainant's website and has copied swimwear designs from the Complainant's website.

The Complaint included correspondence from unhappy customers of the Respondent some of who appeared to believe that the Respondent's website was operated by the Complainant.

The Complaint included extracts from online forums discussing internet scams involving the Respondent, including one extract involving an online store at <pinkpearls.com.au>. Whois records show that <pinkpearls.com.au> is a domain name also owned by the Respondent.

According to the Complaint, the Respondent is associated with a real estate agent in Newton, Sydney, but that the Complainant believes that this real estate agent's trust name and Australian Business Number was used by the true respondent to register several domain names, including the disputed domain name, without permission of the named Respondent.

5. Parties' Contentions

A. Complainant

The Complainant contends that it has satisfied each of the elements required under the Policy for a transfer of the disputed domain name.

In addition, the Complainant makes the following submissions:

The Respondent is targeting Australian consumers through online advertising and social media campaigns.

The Complainant has received complaints from consumers who assumed that the website at the disputed domain name was operated by the Complainant. This is detrimental to the Complainant. Moreover, the Respondent has bad reviews on online review websites.

B. Respondent

The Respondent did not reply to the Complainant's contentions.

6. Discussion and Findings

Paragraph 4(a) of the auDRP provides that a complainant must prove each of the following elements:

- (i) the disputed 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 disputed domain name; and
- (iii) the disputed domain name has been registered or subsequently used in bad faith.

The burden of proof of each element is borne by the Complainant.

Paragraph 15(a) of the Rules directs the Panel to decide the Complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that the Panel deems applicable.

A. Identical or Confusingly Similar

The first element that the Complainant must establish is that the disputed domain name is identical with, or confusingly similar to, the Complainant's name, trademark or service mark.

There are two parts to this inquiry: the Complainant must demonstrate that it has rights in a name or mark at the date the Complaint was filed and, if so, the disputed domain name must be identical or confusingly similar to the name or mark.

For present purposes, the Complainant has proven that it owns a registered trademark for CURVY SWIMWEAR as discussed in section 4 above. The word elements are dominant in the Complainant's registered trademark, and so the Panel disregards the design elements of the trademark.

Typically, and as is appropriate in this case, it is permissible to disregard respectively the Top and Second Level Domains, ".com.au", as a functional component of the domain name system.

Disregarding the ".com.au", the Panel considers that the disputed domain name is confusingly similar to the Complainant's CURVY SWIMWEAR registered trademark. The only difference is that the disputed domain name does not include the word "wear".

The Complainant succeeds on the first element of the Policy.

B. Rights or Legitimate Interests

Paragraph 4(c) of the Policy provides a list of circumstances in which the Respondent may demonstrate rights or legitimate interests in a disputed domain name.

While the overall burden of proof in auDRP proceedings is on the complainant, panels have recognised that proving a respondent lacks rights or legitimate interests in a domain name may result in the often-impossible task of "proving a negative", requiring information that is often primarily within the knowledge or control of the respondent. As such, where a complainant makes out a *prima facie* case that the respondent lacks rights or legitimate interests, the burden of production on this element shifts to the respondent to come forward with relevant evidence demonstrating rights or legitimate interests in the domain name. If the respondent fails to come forward with such relevant evidence, the complainant is deemed to have satisfied the second element.

The Complainant's allegations as to the Respondent's lack of rights or legitimate interests in the disputed domain name are that the Respondent does not have any registered trademarks, business names or company names similar to the disputed domain name, and that the Complainant's use of its domain name predates the Respondent's use of the disputed domain name. The Panel finds that the Complainant has made a *prima facie* showing that the Respondent lacks rights or legitimate interests in the disputed domain name.

The disputed domain name is currently being used in connection with an active website which is a non-functional online store. At one time, this online store was functional, but competed with the Complainant's online store and was allegedly used for dishonest purposes by the Respondent. Currently, that website includes content that is nonsensical such as Terms and Conditions under French law, and those Terms and Conditions (and the website itself) does not identify the operator of the website. Use of a disputed domain name for dishonest purposes is not use in connection with a *bona fide* offering of goods or services.

While the Panel notes that the organization listed under the Registrant Contact was disclosed to be "CurvySwim LTD", the physical address disclosed in connection thereto was ultimately considered a "bad address" by the mail courier. Furthermore, given the Respondent's silence in face of the Complainant's claims on the Respondent's use of third party contact details for purposes of registering the disputed domain name, the Panel finds it more likely than not that the Registrant Contact's details are further evidence of fraud and were used in an attempt to legitimize the registration and use of the disputed domain name. The fact that the Complainant has presented evidence of various consumer complaints about the disputed domain name further reinforces the notion that there is no *bona fide* offering in connection with the use of the disputed domain name.

Considering these allegations, the burden shifts to the Respondent. The Respondent has failed to produce any evidence to establish any rights or legitimate interests in the disputed domain name.

Based on the available record, the Panel finds the second element of the Policy has been established.

C. Registered or Subsequently Used in Bad Faith

Unlike the UDRP, the requirements that the disputed domain name be registered or used in bad faith are disjunctive in the auDRP. That is, it is sufficient for the Complainant to show either that the disputed domain name was registered in bad faith or has been used in bad faith.

Generally speaking, a finding that a domain name has been registered or is being used in bad faith requires an inference to be drawn that the respondent in question has registered or is using the disputed domain name to take advantage of its significance as a trademark owned by the complainant.

That is the situation here. The website at the disputed domain name directly competes with the Complainant's website, with both websites focusing on swimwear for larger women. The evidence before the Panel shows that the Respondent copied swimsuit designs from the Complainant's website – even though the Respondent used these designs on its website at <meetcurve.com> and not at the disputed domain name, this demonstrates knowledge of the Complainant.

The Complainant also provided evidence that the Respondent registered the disputed domain name using the name and Australian Business Number of an innocent business without the permission of that business. The website at the disputed domain name provides no legal name, address, contact details (other than an email address) or Australian Business Number for the Respondent or any other person. This strongly suggests that the true Respondent is trying to hide its identity when engaging in unlawful conduct.

Panels have held that the use of a domain name for illegal activity, such as impersonation/passing off, or other types of fraud or illegal conduct, constitutes bad faith. Having reviewed the record, the Panel finds the Respondent's registration and use of the disputed domain name constitutes bad faith under the Policy.

The Panel finds that the Complainant has provided sufficient evidence to satisfy paragraph 4(b)(iv) of the Policy, namely, by using the disputed 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.

Based on the available record, the Panel finds the third element of the Policy has been established.

7. Decision

For all the foregoing reasons, in accordance with Paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the domain name <curvyswim.com.au> be transferred to the Complainant.

/John Swinson/

John Swinson

Sole Panelist

Date: July 14, 2023