

ADMINISTRATIVE PANEL DECISION

Tee of the Zhang FT Pty Limited v. Wddet Pioen
Case No. D2023-3472

1. The Parties

The Complainant is Tee of the Zhang FT Pty Limited, Australia, represented by Addisons, Australia.

The Respondent is Wddet Pioen, Hong Kong, China.

2. The Domain Name and Registrar

The disputed domain name <heavenaustralia.com> is registered with Name.com, Inc. (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on August 16, 2023. On August 16, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On August 17, 2023, the Registrar transmitted by email to the Center its verification response confirming that the Respondent is listed as the registrant and providing the contact details.

The Center verified that the Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the “Policy” or “UDRP”), the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the “Supplemental Rules”).

In accordance with the Rules, paragraphs 2 and 4, the Center formally notified the Respondent of the Complaint, and the proceedings commenced on August 23, 2023. In accordance with the Rules, paragraph 5, the due date for Response was September 12, 2023. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on September 13, 2023.

The Center appointed Jane Lambert as the sole panelist in this matter on September 22, 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 the registered proprietor of the following Trademarks:

Jurisdiction	Priority Date	Number	Mark	Specified Goods/Services
Australia	July 12, 2001	882028	HEAVEN	Class 25: Clothing, namely swimwear, beachwear and sports casuals, leisure clothing, sun visors, hats, headbands, belts and shoes
Australia	March 26, 2013	1548452	HEAVEN SWIM AUSTRALIA	Class 18: Beach bags; casual bags Class 24: Beach towels; towels of textile; hooded towels Class 25: Clothing; footwear; headgear for wear; swimwear; beachwear; hats; swimsuits; bathing caps; beach caps; beach clothes; beach shoes; rash vests; swimming shorts; headbands; visors (headwear); casualwear; sportswear
International	May 2, 2013	1163072	HEAVEN SWIM AUSTRALIA	Class 18: Beach bags; casual bags Class 24: Beach towels; towels of textile; hooded towels Class 25: Clothing; footwear; headgear for wear; swimwear; beachwear; hats; swimsuits; bathing caps; beach caps; beach clothes; beach shoes; rash vests; swimming shorts; headbands; visors (headwear); casualwear; sportswear

The Complainant has continuously used the HEAVEN and HEAVEN SWIM AUSTRALIA trade marks in relation to beachwear and swimwear since 2002. It markets those goods under those marks through its website at "www.heavenswimwear.com.au". It also supplies its goods under the sign HEAVEN AUSTRALIA in Australia, Hong Kong, China, Malaysia, New Zealand, Singapore, Taiwan Province of China, and other countries around the world.

The Disputed Domain Name was registered on March 15, 2022, and the Respondent has used the Disputed Domain Name to resolve to a website that reproduces images of the Complainant's merchandise. Images from that website together with images from the Complainant's site appear side by side in Annex 6.

By a letter dated August 4, 2023, the Complainant's solicitors notified the Respondent of the Complainant's trade mark registrations, copyrights and right to bring an action for passing off. They alleged that the Respondent had infringed those rights and passed off or attempted to pass off its goods as and for the Complainant's. They demanded several remedies including the immediate cancellation and cessation of all use of the Disputed Domain Name. The Respondent has not yet responded to that letter.

5. Parties' Contentions

A. Complainant

The Complainant requests the transfer of the Disputed Domain Name on the grounds that:

- (i) The Disputed Domain Name is identical or confusingly similar to a 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 Name; and
- (iii) The Disputed Domain Name has been registered and is being used in bad faith.

As to the first ground, the Complainant contends that the Disputed Domain Name incorporates the Trademark HEAVEN in its entirety. It refers to section 1.7 of WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ([“WIPO Overview 3.0”](#)) which states:

“Where a domain name incorporates the entirety of a trademark, [...] the domain name will normally be considered confusingly similar to that mark for the purposes of UDRP standing.”

The Complainant submits that the addition of the geographic indicator “Australia” to the HEAVEN trade mark in the second-level domain does not prevent a finding of confusing similarity between the Disputed Domain Name and the Complainant’s Trademark. In support of that submission, the Complainant relies on *Swarovski Aktiengesellschaft v. Hugel/ Carol Carol*, WIPO Case No. [D2014-0406](#) which resulted in an order for the transfer of the disputed domain name in that case to the complainant in that case.

Further, the Complainant contends that the Disputed Domain Name is confusingly similar to the HEAVEN SWIM AUSTRALIA marks in that the second level domain “heavenaustralia” differs from those marks only in the omission of the word “swim”. It submits that that word may be regarded as descriptive in relation to beachwear and swimwear. The Complainant also submits that that omission is not enough to alter the overwhelming impression of similarity between the Disputed Domain Name and the HEAVEN SWIM AUSTRALIA marks.

In support of its contention that the Respondent lacks rights or legitimate interests in the Disputed Domain Name, the Complainant states that the Respondent is not affiliated with the Complainant in any way. It has not been authorized by the Complainant to register or use the Disputed Domain Name or seek the registration of any domain name incorporating its HEAVEN trade mark or any domain name similar to its HEAVEN SWIM AUSTRALIA mark.

The Complainant avers that it has no evidence that the Respondent is commonly known by the Disputed Domain Name or by any similar name. Nor does it have any evidence that the Respondent has used, or made any demonstrable preparations to use, the Disputed Domain Name in connection with a *bona fide* offering of goods or services or for a legitimate noncommercial use.

In addition, the Complainant refers to section 2.1 of the [WIPO Overview 3.0](#) which states that “where a complainant makes out a *prima facie* case that the respondent lacks rights or legitimate interests, the burden of production shifts to the respondent to come forward with relevant evidence demonstrating rights or legitimate interests in the domain name.” It contends that it has established a *prima facie* case that the Respondent lacks rights or legitimate interests in the Disputed Domain Name and that the Respondent does not have any evidence to the contrary.

With regard to the third ground, the Complainant contends that by using the Disputed Domain Name, the Respondent has intentionally attempted to attract, for commercial gain, Internet users to its website, by creating a likelihood of confusion with the HEAVEN and HEAVEN SWIM AUSTRALIA marks as to the source of the products offered from the Respondent’s Website. In support of that contention, the Complainant relies on the use of the Disputed Domain Name for the website from which the images in Annex 6 have been downloaded. The Complainant adds that there can be no doubt that the Respondent was aware of the Complainant and its trading activities when the Disputed Domain Name was registered. It also states that it has been contacted by prospective consumers who have, in fact, mistaken the Respondent’s website for the Complainant’s.

Lastly, the Complainant relies on the Respondent’s failure to respond to its solicitors’ letter of August 4, 2023, as further evidence of registration and use in bad faith.

B. Respondent

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

6. Discussion and Findings

The agreement for the registration of the Disputed Domain Name incorporated the following provision of the Policy by reference.

Paragraph 4 (a) of the Policy requires the Respondent to submit to a mandatory administrative proceeding in the event that a complainant asserts to the applicable Provider, in compliance with the Rules of Procedure, that:

- (i) the Disputed Domain Name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and
- (ii) the Respondent have no rights or legitimate interests in respect of the Disputed Domain Name; and
- (iii) the Disputed Domain Name has been registered and is being used in bad faith.

In the administrative proceeding, the Complainant must prove that each of these three elements are present.

A. Identical or Confusingly Similar

The Panel finds that the first element is present.

All the registrations listed in the foregoing table are trade marks in which the Complainant has rights. The Disputed Domain Name is similar to those marks in that it incorporates the word "heaven". It is even more similar to the Complainant's trade marks HEAVEN SWIM AUSTRALIA in that it combines the country name "australia" with "heaven" omitting the term "swim".

The Panel finds that the trade mark HEAVEN is clearly recognizable in the Disputed Domain Name (see section 1.7 of the [WIPO Overview 3.0](#)). The Panel also notes that it is relevant in this case to take into account the content of the Disputed Domain Name to confirm the confusing similarity whereby it appears that the Respondent seeks to target the Complainant's trade marks through the Disputed Domain Name (see section 1.15 of [WIPO Overview 3.0](#)).

Therefore, the Panel finds that the Disputed Domain Name is confusingly similar to the Complainant's trade marks.

B. Rights or Legitimate Interests

The Panel finds that the second element is present.

As the Complainant has observed, the second paragraph of section 2.1 of [WIPO Overview 3.0](#) provides the following guidance:

"While the overall burden of proof in UDRP proceedings is on the complainant, panels have recognized 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 has averred that it has no connection with the Respondent, that it has not authorized it to register the Disputed Domain Name and that it has no evidence that any of the circumstances in paragraph 4(c) of the Policy applies. That is enough for a *prima facie* case that the Respondent lacks rights or legitimate interests in the Disputed Domain Name. Accordingly, the burden of production on this element has shifted to the Respondent to come forward with relevant evidence demonstrating rights or legitimate interests in the Disputed Domain name.

Furthermore, the Panel notes that Respondent has not provided any explanation related to any intention to use the Disputed Domain Name in connection to its dictionary meaning, or to any other circumstance that may be considered as rights or legitimate interests in the Disputed Domain Name.

The Respondent has had ample opportunity to adduce such evidence but has not taken advantage of it. In the absence of such evidence, the Complainant has satisfied the second element.

C. Registered and Used in Bad Faith

The Panel finds that the third element is present.

Paragraph 4(b) of the Policy lists several circumstances which if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith. One of those circumstances is subparagraph (iv):

“by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of your web site or location or of a product or service on your web site or location.”

The Respondent has used the Disputed Domain Name for the website referred to in Annex 6. Since merchandise is marketed from that site the Respondent expects commercial gain. The Panel finds that the Disputed Domain Name is confusingly similar to the Complainant's marks. There is actual evidence that consumers have been attracted to the site in the belief that it belonged to the Complainant. Indeed, the Complainant has alleged that Internet users have strayed onto the Respondent's website in the belief that it was the Complainant's. That indicates that the Disputed Domain Name is not only similar to the Complainant's trade marks but that such similarity is confusing. It follows that all the circumstances of subparagraph (iv) are satisfied.

That is enough for a finding of registration and use in bad faith but for the sake of completeness, the Panel adds that the Respondent's failure to the Complainant's solicitors' letter of August 4, 2023 is consistent with such a finding.

7. Decision

For the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the Disputed Domain Name, <heavenaustralia.com>, be transferred to the Complainant.

/Jane Lambert/

Jane Lambert

Sole Panelist

Date: October 6, 2023