

ADMINISTRATIVE PANEL DECISION

RC & TS Investments Pty Ltd v. colbert ltd, kevin molinas,
Bewebconcept, and colbert consult, colbert
Case No. D2024-3538

1. The Parties

The Complainant is RC & TS Investments Pty Ltd, Australia, represented by Gladwin Legal Pty Ltd, Australia.

The Respondents are colbert ltd, Mauritius, kevin molinas, Bewebconcept, Mauritius and colbert consult, colbert, Bahamas.

2. The Domain Names and Registrars

The disputed domain names <lungstanks.com>, <lung-tanks.com> and <mylungstank.com> are registered with OVH.

The disputed domain name <lungtanks.store> is registered with NameCheap, Inc.

The disputed domain name <lungtank.store> is registered with Hostinger Operations, UAB (all together the “Registrars”).

3. Procedural History

The Complaint was filed in English with the WIPO Arbitration and Mediation Center (the “Center”) on September 1, 2024. On September 2, 2024, the Center transmitted by email to the Registrars a request for registrar verification in connection with the disputed domain names. On September 3, 2024, the Registrars transmitted by email to the Center their verification responses disclosing registrant and contact information for the disputed domain names which differed from the named Respondent (Privacy Protect, LLC (PrivacyProtect.org)) and contact information in the Complaint.

The Center sent an email communication to the Complainant on September 3, 2024, with the registrant and contact information of nominally multiple underlying registrants revealed by the Registrars, requesting the Complainant to either file separate complaint(s) for the disputed domain names associated with different underlying registrants or alternatively, demonstrate that the underlying registrants are in fact the same entity and/or that all domain names are under common control. The Complainant filed an amended Complaint on September 7, 2024, adding the disputed domain name <lungtanks.store> to the current proceeding.

On September 3, 2024, the Center informed the parties, in French and English, that the language of the registration agreement for the disputed domain names <lungstanks.com>, <lung-tanks.com> and <mylungstank.com> is French. On September 3, 2024, the Complainant confirmed its request that English be the language of the proceedings. The respondents did not submit any comments on the Complainant's submission.

On September 10, 2024, the Registrar Namecheap, Inc, transmitted by email to the Center its verification response disclosing registrant and contact information for the disputed domain name <lungtanks.store> which differed from the named Respondent and contact information in the Complaint.

The Center sent an email communication to the Complainant on September 10, 2024, with the registrant and contact information of nominally multiple underlying registrants revealed by the Registrars, requesting the Complainant to either file separate complaint(s) for the disputed domain names associated with different underlying registrants or alternatively, demonstrate that the underlying registrants are in fact the same entity and/or that all domain names are under common control. The Complainant filed a second amended Complaint on September 12, 2024.

The Center verified that the Complaint together with the amended Complaints 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 Respondents of the Complaint, and the proceedings commenced on September 16, 2024. In accordance with the Rules, paragraph 5, the due date for Response was October 6, 2024. The Respondents did not submit any response. Accordingly, the Center notified the Respondents' default on October 7, 2024.

The Center appointed Louis-Bernard Buchman as the sole panelist in this matter on October 16, 2024. 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 company, founded in December 2022, which sells online, principally through the Shopify platform, refillable breathing tanks, hand pumps, diving masks and other diving equipment under the LUNG TANK brand and logo. The Complainant's business generated sales in excess of 700,000 Australian Dollars during its first months of operation and the Complainant's website had over 1,2 million visitors in the first five months of 2023.

The Complainant owns the Australian trademark LUNG TANK, registered under No. 2365340 on June 27, 2023, the European Union trademark LUNG TANK, registered under No. 1751721 on August 29, 2023 and the International trademark LUNG TANK, registered under No. 1751721 on August 29, 2023 (together hereinafter referred to as: "the Mark").

The Complainant is the registrant of the domain name <lungtank.com>, registered on January 19, 2023, which directs to its official website.

The disputed domain names <lungtank.store>, <lungstanks.com>, <lung-tanks.com> and <mylungstank.com> were registered on May 22, 2023. The disputed domain name <lungtanks.store> was registered on September 3, 2024.

The Complainant has submitted evidence that the disputed domain names <lungtank.store>, <lungstanks.com> and <lungtanks.store> resolved to a website which is a copycat of the Complainant's

website and offering the Complainant's products for sale. The disputed domain names <lung-tanks.com> and <mylungstank.com> did not resolve to any active website. At the time of this decision, the disputed domain names resolve either to an error page or to a danger-warning page or to a coming-soon page.

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 names.

Notably, the Complainant contends that:

- (i) the disputed domain names reproduce the Mark, in which the Complainant has rights, and are confusingly similar to the Mark insofar as the disputed domain names contains the Mark in its entirety, which remains recognizable in the disputed domain names;
- (ii) it never authorized the Respondents to use the Mark in any manner and it never had any affiliation with the Respondents, who have no rights or legitimate interests in respect of the disputed domain names;
- (iii) the Respondents have registered and are using the disputed domain names in bad faith; in particular, the Respondents had knowledge of the Mark when registering the disputed domain names, and by creating confusion with the Mark, the Respondents are using the disputed domain names in bad faith.

The Complainant requests that the disputed domain names be transferred to the Complainant.

B. Respondents

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

6. Discussion and Findings

6.1. Procedural Aspects

A. Request for Consolidation – Multiple Respondents

The Complaint was filed in relation to nominally different domain names registrants. The Complainant alleges that the disputed domain names registrants are the same entity or mere alter egos of each other, or under common control. The Complainant requests the consolidation of the Complaint against the multiple disputed domain names registrants pursuant to paragraph 10(e) of the Rules.

The disputed domain names' registrants did not comment on the Complainant's request.

Paragraph 3(c) of the Rules states that a complaint may relate to more than one domain name, provided that the domain names are registered by the same domain name holder.

In addressing the Complainant's request, the Panel will consider whether (i) the disputed domain names or corresponding websites are subject to common control; and (ii) the consolidation would be fair and equitable to all Parties. See WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (["WIPO Overview 3.0"](#)), section 4.11.2.

As regards common control, the Panel notes that:

- three disputed domain names are sharing the same registrant and are registered with the same Registrar;
- all disputed domain names were registered on the same date, except the disputed domain name <lungtanks.store>;
- the registration date of the last-registered disputed domain name <lungtanks.store> is the same as the date when the Complainant was notified of the registrant and contact information of nominally multiple underlying registrants revealed by the Registrars;
- all disputed domain names share the same structure, being composed in an identical or near identical way to the Complainant's domain name, i.e. all containing the Mark.

The combination of the above circumstances may indicate that the disputed domain names have been, in fact, registered by the same person or entity and are subject to common control.

As regards fairness and equity, the Panel sees no reason why consolidation of the disputes would be unfair or inequitable to any Party.

Accordingly, the Panel decides to consolidate the disputes regarding the nominally different disputed domain names registrants (referred to below as "the Respondent") in a single proceeding.

B. Language of the Proceeding

The language of the Registration Agreement for the disputed domain names <lungstanks.com>, <lung-tanks.com> and <mylungstank.com> is French, whereas the language of the Registration Agreement for the disputed domain names <lungtank.store> and <lungtanks.store> is English. Pursuant to the Rules, paragraph 11(a), in the absence of an agreement between the parties, or unless specified otherwise in the registration agreement, the language of the administrative proceeding shall be the language of the registration agreement.

The Complaint was filed in English. The Complainant requested that the language of the proceeding be English on the grounds that Kevin Molinas, the registrant of the disputed domain names <lungstanks.com>, <lung-tanks.com> and <mylungstank.com>, has submitted a bogus trademark infringement notice in English targeting the Complainant's website (thus the inference may be drawn that the Respondent who did so must read and understand English). Furthermore, the disputed domain names <lungstanks.com>, <lungtank.store> and <lungtanks.store> reproduce the Complainant's website, which have English language content only.

The Respondent did not make any specific submissions with respect to the language of the proceeding.

In exercising its discretion to use a language other than that of the registration agreement, the Panel has to exercise such discretion judicially in the spirit of fairness and justice to both parties, taking into account all relevant circumstances of the case, including matters such as the parties' ability to understand and use the proposed language, time and costs (see [WIPO Overview 3.0](#), section 4.5.1).

In addition, pursuant to paragraph 10(c) of the Rules, the Panel must ensure that the administrative proceeding takes place with due expedition.

Having considered all the matters above, the Panel, who is conversant in both English and French, considering the time and cost for the Complainant of translating and submitting the Complaint in French, determines pursuant to paragraph 11(a) of the Rules that the language of the proceeding shall be English.

C. Failure to Respond

Under the Rules, paragraphs 5(f) and 14(a), the effect of a failure to submit a formal response by the Respondent is that, in the absence of exceptional circumstances, the Panel shall proceed to a decision on the basis of the Complaint.

Under paragraph 4(a) of the Policy, it is the Complainant's burden to establish that all three of the required criteria for a transfer of the disputed domain names have been met, even in the absence of a formal response.

Under paragraph 14(b) of the Rules, the Panel is empowered to draw such inferences from the Respondent's failure to file a formal response as it considers appropriate under the circumstances.

In this case, the Panel finds that the Respondent has failed to rebut any of the reasonable factual assertions that are made and supported by evidence submitted by the Complainant.

In particular, by failing to respond, the Respondent has failed to offer the Panel any of the types of evidence set forth in paragraph 4(c) of the Policy or otherwise, from which the Panel might conclude that the Respondent has any rights or legitimate interests in the disputed domain names, such as making legitimate noncommercial or fair use of the disputed domain names.

Moreover, as discussed below, the Respondent has failed to provide any exculpatory information or reasoning that might have led the Panel to question the Complainant's arguments that the Respondent has acted in bad faith.

6.2. Requirements of paragraph 4(a) of the Policy

A. Identical or Confusingly Similar

It is well accepted that the first element functions primarily as a standing requirement. The standing (or threshold) test for confusing similarity involves a reasoned but relatively straightforward comparison between the Complainant's trademark and the disputed domain name. [WIPO Overview 3.0](#), section 1.7.

The Complainant has shown rights in respect of a trademark or service mark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.2.1.

In addition to its registered trademark, the Complainant asserts unregistered, common law rights on the LUNG TANK term, or in the alternate, nascent rights therein, and contends that the amount of prior sales under the LUNG TANK brand and the high number of earlier visits of the Complainant's website demonstrate that the Complainant's branded products had already acquired distinctiveness. Furthermore, the Complainant alleges that the manner in which the Respondent targeted the Complainant's products supports the assertion that the term had achieved significance as a source identifier. [WIPO Overview 3.0](#), section 1.3.

The Panel notes that as aforesaid, the Respondent did not rebut these assertions and finds that despite the addition in certain disputed domain names of an interposing or final letter "s" or a hyphen or the word "my", the Mark is recognizable within the disputed domain names.

Although these additions may bear on the assessment of the second and third elements, the Panel finds that such differences do not prevent a finding of confusing similarity between the disputed domain names and the Mark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.8.

Accordingly, the disputed domain names are confusingly similar to the Mark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.7.

Regarding the generic Top-Level Domains (“gTLD”) “.store” or “.com” respectively in the disputed domain names, it is well established that a gTLD does not generally affect the assessment for the purpose of determining identity or confusing similarity. [WIPO Overview 3.0](#), section 1.11.1.

The Panel finds the first element of the Policy has been established.

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.

Although 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 difficult 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 (although the burden of proof always remains on the complainant). If the respondent fails to come forward with such relevant evidence, the complainant is deemed to have satisfied the second element. [WIPO Overview 3.0](#), section 2.1.

Having reviewed the available record, the Panel finds the Complainant has established a prima facie case that the Respondent lacks rights or legitimate interests in the disputed domain names. The Respondent has not rebutted the Complainant’s prima facie showing and has not come forward with any relevant evidence demonstrating rights or legitimate interests in the disputed domain names such as those enumerated in the Policy or otherwise.

The Panel finds the second element of the Policy has been established.

C. Registered and Used in Bad Faith

The Panel notes that, for the purposes of paragraph 4(a)(iii) of the Policy, paragraph 4(b) of the Policy establishes circumstances, in particular, but without limitation, that, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith.

Although the Complainant’s trademark registration postdates the registration of four out of the five disputed domain names, the Complainant has demonstrated prior use of the Mark before the registration of these disputed domain names. The Respondent’s use of the disputed domain names to allegedly sell the Complainant’s products, further evidences an intent to target the Complainant. Accordingly, the Panel finds it more likely than not that the Respondent was aware of the Complainant’s rights in the Mark at the time of registering the disputed domain names.

In the present case, the Panel notes that with respect to the disputed domain names <lungstanks.com>, <lungtank.store> and <lungtanks.store>, the Respondent intentionally attempted to attract, for commercial gain, Internet users by creating a likelihood of confusion with the Mark.

Panels have also found that the non-use of a domain name (including a blank or “coming soon” page) would not prevent a finding of bad faith under the doctrine of passive holding. [WIPO Overview 3.0](#), section 3.3.

Having reviewed the available record with respect to the disputed domain names <lung-tanks.com> and <mylungstank.com>, the Panel notes the composition of the disputed domain names and finds that in the circumstances of this case, the passive holding of these two disputed domain names does not prevent a finding of bad faith under the Policy.

The Panel finds that the Complainant has established the third element of the Policy.

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 names <lungstanks.com>, <lung-tanks.com>, <lungtanks.store>, <lungtank.store> and <mylungstank.com> be transferred to the Complainant.

/Louis-Bernard Buchman/

Louis-Bernard Buchman

Sole Panelist

Date: October 23, 2024