

## **ADMINISTRATIVE PANEL DECISION**

Intecq Limited v. NHC Advisors Pty Ltd

Case No. DAU2023-0013

### **1. The Parties**

The Complainant is Intecq Limited, Australia, represented by Wynnes Patent and Trademark Attorneys Pty Ltd, Australia.

The Respondent is NHC Advisors Pty Ltd, Australia, represented by Cooper Mills Lawyers, Australia.

### **2. The Domain Name and Registrar**

The disputed domain name <ebet.com.au> is registered with Drop.com.au Pty Ltd (the “Registrar”).

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on February 28, 2023. On the same day, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On March 3, 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 .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 March 7, 2023. In accordance with the Rules, paragraph 5(a), the due date for Response was March 27, 2023. The Response was filed with the Center on March 27, 2023.

The Center appointed Matthew Kennedy as the sole panelist in this matter on March 31, 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.

On April 4, 2023, the Complainant sent an email communication to the Center enquiring as to whether it would have an opportunity to address issues in the Response with further evidence. On the same day, the

Center replied, copying the Respondent. On the same day, the Respondent sent an email communication to the Center objecting to any further submissions from the Complainant. On April 5, 2023, the Complainant made an unsolicited supplemental filing. On April 10, 2023, the Respondent sent an email communication to the Center objecting to the Complainant's unsolicited supplemental filing. On April 11 and April 12, 2023, the Complainant and the Respondent exchanged three further communications that were copied to the Center.

#### 4. Factual Background

The Complainant is an Australian company that holds the following Australian trademark registrations:

- 1264226 for EBET, registered as a fancy word mark in colors, entered on the register on May 27, 2009 with a priority date of September 23, 2008, specifying goods and services in classes 9, 38, and 41;
- 1617447 for EBET, entered on the register on October 12, 2016 with a priority date of April 15, 2014, specifying goods and services in classes 7, 9, 38, and 41. This registration includes an endorsement that the provisions of subsection 41(4) of the Trade Marks Act 1995 (C'th) were applied;<sup>1</sup> and
- 1666348 for EBET, registered as a fancy word mark, entered on the register on September 7, 2016 with a priority date of December 24, 2014, specifying goods and services in classes 7, 9, 38, and 41. This registration includes an endorsement that evidence and/or other circumstances were provided under subsection 41(4).

The Respondent is an Australian company that describes itself as an e-commerce developer.

The disputed domain name was registered by the Respondent on April 16, 2021. It resolves to a landing page displaying Pay-Per-Click ("PPC") links related to betting, online gambling sports, and online sports books. The landing page displays a hyperlink that reads "Buy this domain" followed by the message "This domain may be for sale".

#### 5. Parties' Contentions

##### A. Complainant

The Complaint is based on the Complainant's rights in its Australian registered trademarks. The Respondent is infringing the Complainant's trademarks by hosting advertisements for online gambling and betting on the website associated with the disputed domain name. The Respondent does not seem to meet the requirements for owning the disputed domain name. The Respondent seems to be a domain name squatter as can be seen from other domain names that it holds, such as <petco.com.au>.

The Respondent has no rights or legitimate interests in respect of the disputed domain name. There is no evidence of the Respondent's *bona fide* use of, or demonstrable preparations to use, the disputed domain name or a name corresponding to the disputed domain name in connection with an offering of goods or services. The Respondent is not known by the disputed domain name; the Respondent has not acquired any trademark or service mark rights in the name. The Respondent is not making any legitimate noncommercial or fair use of the disputed domain name.

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<sup>1</sup> Subsection 41(4) of the Trade Marks Act 1995 (C'th) applies where a trademark is, to some extent, but not sufficiently, inherently adapted to distinguish the designated goods or services from the goods or services of other persons, and the trademark does not and will not distinguish the designated goods or services as being those of the applicant, having regard to the combined effect of the trademark's inherent adaptability to distinguish, the use or intended use of the trademark by the applicant, and any other circumstance.

The disputed domain name was registered or is subsequently being used in bad faith. The disputed domain name was registered in order to prevent the owner of the trademark (*i.e.*, the Complainant) from reflecting that mark in a corresponding domain name. The disputed domain name was registered primarily for the purpose of disrupting the business or activities of the Complainant.

## **B. Respondent**

The Respondent was unaware of the Complainant or its alleged trademark rights when the Respondent registered the disputed domain name. The Respondent develops and invests in businesses, predominantly in the online space. The Respondent and its related entities favor generic or descriptive domain names that they develop into businesses, such as <broker.com.au>. The Respondent registered the disputed domain name with the intention of developing it into an online electronic betting portal and parked it pending such development. The parked page displays by default a "This domain may be for sale" message but the disputed domain was never for sale by the Respondent. The Complainant unsuccessfully tried to acquire the disputed domain name but refused to pay the Respondent's legitimate out-of-pocket expenses. It was recently reported by the media that the Complainant's business is one which provides "membership management, loyalty and reporting software and programs to gaming venues, including pubs, clubs, and hotels". This is clearly not a business in competition with the use proposed by the Respondent. auDRP proceedings are designed to deal with straightforward cases of cybersquatting. That is not the situation here. There is no evidence of the Complainant's reputation; there is no evidence of bad faith. The Complainant merely repeats words from the Policy without substantiation. For this reason alone, the Complainant has not met its burden and the Complaint should be dismissed.

The Complainant does not provide any evidence of reputation or use of any of the trademarks that it relies upon. "Ebet" is a common term used to describe "electronic betting". The Trade Marks Office accepted that the word "ebet" in registration number 1617447 was descriptive and issued three adverse reports; when it was finally registered, EBET was registered under the provisions of subsection 41(4) of the *Trade Marks Act (C'th)* with an endorsement. The Complainant does not have trademark rights for EBET in respect of betting services, electronic betting services or gambling. The Trade Marks Office did not give the Complainant any rights over EBET in respect of its generic or descriptive meaning. Registration number 1666348 does not cover betting or electronic betting either. The disputed domain name is not identical or confusingly similar to either of the Complainant's fancy word marks because they both include a fancy logo. The term "ebet" on its own does not perform the function of a trademark. Where a domain name contains only part of the Complainant's trademark and that part is highly descriptive or generic, the domain name is unlikely to be confusingly similar. "PetCo" is an abbreviation for "pet company"; the Complainant argues that anyone who registers a generic or descriptive term is a domain name squatter if there is a matching trademark. This is not the case. People are attracted to generic and descriptive domain names because of their inherent value and ability to inform Internet users of what goods and services the registrant is offering. Additionally, the terms "ebet" and "ebetting" are also commonly used in the industry as descriptive terms.

The Complainant clearly fails to carry its burden to make out a *prima facie* case that the Respondent does not have any rights or legitimate interests in respect of the disputed domain name. Where a domain name is highly descriptive, as in the present case, the Complainant must make a strong case, which the Complainant has not made. Even if the Complainant makes a *prima facie* case, the Respondent rebuts it. Where the disputed domain name consists of a dictionary word or phrase and is used to host PPC links genuinely related to the dictionary meaning of the word or phrase, and not to trade off the Complainant's trademark, the Respondent's rights or legitimate interests can arise. That is the situation here.

The disputed domain name was not registered or subsequently used in bad faith. The Complainant provides electronic gaming technology to pubs and clubs. It is not licensed as a bookmaker in Australia and does not take bets from Australian consumers. In sharp contrast, the Respondent's current and intended EBET service is directed at Australian consumers. The Complainant and Respondent are not in competition. The Respondent was not aware of the Complainant when it acquired the disputed domain name. The Complainant does not direct its marketing to consumers and the Respondent is not a pub or club operator. The word "ebet" is an abbreviation of Electronic Betting and is a generic English descriptor. It is not bad faith for a registrant to register a domain name solely comprising "ebet". The Respondent was unaware of the

Complainant's alleged trademark rights when the Respondent registered the disputed domain name. The Complainant provided no evidence of use, reputation, or awareness of the Complainant or its trademarks in 2021 when the Respondent registered the disputed domain name. The Respondent did not register the disputed domain name to take advantage of or trade off any trademark rights that the Complainant may have had in 2021. The Respondent registered the disputed domain name because of its intrinsic value as an abbreviation and generic descriptive domain name, and to use in its proposed business venture. The Respondent notes that there are many organizations and businesses that use (or could use) Ebet. Ebet is not unique or distinctive, and does not strongly point to the Complainant in respect of source or origin. The Complainant has provided no evidence that the Respondent targeted the Complainant or registered the disputed domain name because of the Complainant. The Complainant has not provided any evidence of bad faith. The Respondent's website does not reference the Complainant or its business. The Respondent registered the disputed domain name for use in its electronic betting business with a view to creating a lead generation website in the future and in the meantime offers a PPC service for the search term "ebet". The Complainant is not well-known, and the parties are not competitors, hence there cannot be any confusion between the Respondent and the Complainant. Moreover, the Respondent never approached the Complainant and never reached out to sell the disputed domain name to the Complainant. The Complainant approached the Respondent. The Respondent has a webpage that invites offers for the disputed domain name and suggests that the disputed domain name "may be" for sale. Without more, this is not evidence of bad faith under the Policy. This is not a case where the Complainant let the domain name lapse. The Respondent acquired the disputed domain name at public auction for AUD 5,000; the Complainant has never owned it. The Respondent has never been the subject of any prior auDRP or UDRP complaint. The Respondent is not a cybersquatter.

## **6. Discussion and Findings**

### **6.1 Unsolicited Supplemental Filing**

On April 5, 2023, five days after the appointment of the Panel, the Complainant made an unsolicited supplemental filing, in which it sought to address issues raised in the Response as well as conduct that allegedly occurred after the Complaint was filed, which is referred to in the Response.

The Respondent submits that the auDRP and Rules do not make provision for further submissions and that it is incumbent upon the Complainant to put its best case forward at the time of filing. It also submits that the Complainant's supplemental filing does not raise any new matters that could not have been raised in the Complaint.

The Panel recalls that paragraph 12 of the Rules provides that "[i]n addition to the complaint and the response, the Panel may request or permit, in its sole discretion, further statements or documents from either of the Parties". At the same time, paragraph 10(b) and (c) of the Rules requires the Panel to ensure that "each Party is given a fair opportunity to present its case" and that "the administrative proceeding takes place with due expedition". The purpose of the auDRP is to provide a simple administrative procedure for dealing with domain name disputes. Accordingly, the Panel will only admit the Complainant's supplemental filing into the record in exceptional circumstances, such as the existence of new facts, newly available evidence, or a material allegation in the Response that could not reasonably have been anticipated at the time of the Complaint.

The Panel has reviewed the Complainant's supplemental filing and sees no exceptional circumstances that would justify admitting it. First, the allegations of new facts (concerning a conversation and correspondence between the Parties after the Complaint was filed) are not substantiated. Second, the new evidence (a screenshot of a page linked to the landing page associated with the disputed domain name) is not newly available. The Complainant maintains its position that it does not have to provide evidence of its reputation because it has registered its trademarks. Third, the allegations in the Response regarding the nature of the term "ebet" and the terms of the Complainant's trademark registrations could reasonably have been anticipated in the Complaint or can be judged on their face.

Therefore, the Panel finds that the Complainant was already given a fair opportunity to present its case in the Complaint. In the interests of ensuring that this administrative proceeding takes place with due expedition, the Panel declines to admit the Complainant's supplemental filing as part of the record of this proceeding. Having declined to admit that supplemental filing, the Panel sees no reason to admit the chain of correspondence between the Parties that followed it.

## 6.2 Substantive Issues

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. Failure to prove any one element will result in denial of the Complaint.

### A. Identical or Confusingly Similar

Based on the evidence presented, the Panel finds that the Complainant has rights in the EBET mark and the EBET fancy word marks.

The dominant and sole textual element of all three marks is EBET. While the two later registrations include endorsements regarding the application of subsection 41(4) of the Trade Marks Act 1995 (C'th), none of the registrations includes an endorsement disclaiming exclusive use of the term EBET.

The two EBET fancy word marks contain graphic or stylized elements. These cannot be represented in a domain name for technical reasons and they do not dominate the marks such that the textual elements are insignificant. Accordingly, these graphic or stylized elements do not prevent a finding of confusing similarity between the disputed domain name and the EBET portion of the fancy word marks. See *Lance John Picton v. KK Factory Seconds Online / Dean James Mackin*, WIPO Case No. [DAU2007-0005](#).

The Respondent refers to the services in respect of which the Complainant's EBET mark is registered. However, the Panel does not consider the nature of the services specified in the trademark registrations to be relevant to the first element of paragraph 4(a) of the auDRP, which generally entails a side-by-side comparison between a domain name itself and the textual components of a trademark. See, for example, *eScuba Pty Limited v. Underwater Australasia Pty Ltd*, WIPO Case No. [DAU2022-0023](#).

The disputed domain name wholly incorporates the Complainant's EBET mark, and the textual component of the two EBET fancy word marks. The only additional element in the disputed domain name is the Secondary Level Domain ("2LD") extension ".com.au". The 2LD extension may be disregarded in an assessment of identity or confusing similarity for the purposes of the auDRP. See *BT Financial Group Pty Limited v. Basketball Times Pty Ltd*, WIPO Case No. [DAU2004-0001](#).

Therefore, the Panel finds that the disputed domain name is identical to one trademark, and confusingly similar to two other trademarks, in which the Complainant has rights. The Complainant has satisfied the first element in paragraph 4(a) of the auDRP.

### B. Rights or Legitimate Interests

Given the Panel's findings below regarding the third element of paragraph 4(a) of the auDRP, it is unnecessary to evaluate the second element.

### C. Registered or Subsequently Used in Bad Faith

Paragraph 4(b) of the auDRP provides that certain circumstances, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith, although they do not constitute an exhaustive list. The second and third of these circumstances are as follows:

- (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;
- (iii) [the respondent has] registered the domain name primarily for the purpose of disrupting the business or activities of another person.

The registration of the disputed domain name in fact prevents the Complainant from reflecting the EBET mark and the textual component of the EBET fancy word marks in the “.com.au” 2LD, because the disputed domain name is identical to EBET. That may, in turn, disrupt the Complainant’s business. However, in order to succeed, the Complainant must demonstrate that this was the Respondent’s purpose, which requires, as a minimum, a showing that the Respondent knew or should have known of the Complainant’s mark when it registered or subsequently used the disputed domain name.

The disputed domain name was registered by the Respondent in 2021, years after the registration of the Complainant’s EBET mark in 2016 and its EBET fancy word marks in 2009 and 2016. However, it is not alleged that the Complainant coined the term “ebet”. Although the Panel is unaware of any dictionary definition for “ebet”, that term is composed of the dictionary prefix “e-” (an abbreviation for “electronic”<sup>2</sup>) without the hyphen, and the dictionary word “bet” (which is both a noun and a verb). The Complainant’s fancy word marks both show “e” in a different color or tone from “bet”, indicating that it functions as a prefix. The Respondent provides evidence that the terms “ebet”, “ebetting”, and “e-betting” are used by English-speaking overseas businesses in a descriptive sense. While the Respondent does not explain its reason for registering an exact match with the EBET mark rather than, say, “ebetting” or “e-betting”, its position is that “ebet” is an abbreviation for “electronic betting”. The Respondent’s sole director provides a statutory declaration that at the time it purchased the disputed domain name he was not aware of the Complainant or its mark. In view of these circumstances, the Panel finds it plausible that “ebet” was registered in the disputed domain name based on its descriptive sense rather than its trademark value.

The Complainant maintains that it does not have to provide evidence of its reputation because it has registered its trademarks. However, the history of the EBET mark shows that that term was only registered after the Complainant amended the description of certain goods and services “in relation to online betting or gambling” to read “in relation to networked gaming systems” instead. That amendment takes account of the descriptive sense of “ebet”. The only evidence on the record of the existence of an Australian business named eBet consists of a hyperlink to a paywall-protected press article from September 19, 2022 reporting that Tabcorp’s eBet was to be acquired for AUD 62 million. If the business to be acquired was the Complainant, it is not clear why it was referred to as “eBet” when its current name is “Intecq Limited”. The Respondent indicates that the business was described as a provider of electronic gaming technology to pubs and clubs. The Panel is unable to infer merely from the identity of the vendor and the reported price that the Complainant had developed a reputation in the trademark EBET so as to render it more likely that the Respondent knew, or should have known, of its existence in 2021.

The Complainant suggests that the Respondent is a domain name squatter, pointing to the Respondent’s registration of another domain name identical to a prior third party trademark, *i.e.*, <petco.com.au>, which combines a dictionary word (“pet”) with an abbreviation (“co” meaning “company”), and is identical to the trademark PETCO. The Respondent argues that “PetCo” is generic and descriptive. Even though there is no requirement to establish a pattern of conduct under paragraph 4(b)(ii) of the auDRP, the Panel considers this evidence relevant as it is less likely that the Respondent registered two domain names identical to prior trademarks by coincidence rather than one. Nevertheless, the Panel does not consider that two registrations give rise to an inference of bad faith in the circumstances.

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<sup>2</sup> For example, see dictionary definitions at “[www.collinsdictionary.com/dictionary/english/e-](http://www.collinsdictionary.com/dictionary/english/e-)”; and “[www.britannica.com/dictionary/e-](http://www.britannica.com/dictionary/e-)”

As regards use, the Respondent uses the disputed domain name to resolve to a landing page displaying PPC links. The links relate to betting, online gambling sports, and online sports books, which reflect the descriptive sense of “ebet”. None of them refers to the Complainant and nothing on the record shows that any of the linked websites offer services that compete with those of the Complainant. Although the Respondent fails to substantiate its alleged future plans to develop the disputed domain name into an online electronic betting portal, its current use of the disputed domain name is not an indication of bad faith. The Panel also takes note that the landing page associated with the disputed domain name indicates that it may be for sale, without displaying a price. Given the descriptive sense of the disputed domain name, the Panel does not find that the Respondent has, by using the disputed domain name, sought to take advantage of the value of the Complainant’s trademark.

For the above reasons, the Panel is unable to find that the Respondent has registered the disputed domain name in order to prevent the Complainant from reflecting its marks in a corresponding domain name within the terms of paragraph 4(b)(ii) of the auDRP. As no separate basis was advanced for the Complainant’s other claim of bad faith, the Panel is unable to find that the Respondent has registered the disputed domain name primarily for the purpose of disrupting the business or activities of the Complainant within the terms of paragraph 4(b)(iii) of the auDRP.

The Complaint also includes a statement under the first element that “[t]he Respondent does not seem to meet the requirements for owning the disputed domain name”. This may imply an allegation of bad faith under paragraph 4(b)(v) of the auDRP, which refers to circumstances where “any of [a respondent’s] representations or warranties as to eligibility or third party rights given on application or renewal are, or subsequently become, false or misleading in any manner”. The Panel takes note that the current .au Domain Administration Rules: Licensing (“Licensing Rules”) came into effect on April 12, 2021, which was shortly prior to the Respondent’s registration of the disputed domain name. However, the Complainant does not refer to the Licensing Rules or offer any argument as to why the Respondent might not meet their requirements, other than an allegation that the Respondent seems to be a domain name squatter, which is not proven, for the reasons set out above. In any case, nothing in this Decision prevents the Complainant from filing a complaint under the process established by Part 3 of the Licensing Rules.

For the above reasons, the Panel does not find, based on the balance of probabilities, that the disputed domain name was registered or subsequently used in bad faith. The Complainant has failed to satisfy the third element in paragraph 4(a) of the auDRP.

#### **D. Reverse Domain Name Hijacking**

The Respondent requests that the Panel make a finding of reverse domain name hijacking. It submits that this is a classic case where the Complainant reached out to acquire a domain name legitimately owned by the Respondent and filed this Complaint as a “second bite” when that approach failed. The Complaint could never succeed. Furthermore, the Complainant is represented by a reputable law firm who would have advised it of the futility of this Complaint, or at the very least ought to have been aware that the auDRP is for cases of simple cybersquatting which is not the case here.

Paragraph 15(e) of the auDRP Rules provides that, if the panel finds that the complaint “was brought in bad faith, for example in an attempt at Reverse Domain Name Hijacking or was brought primarily to harass the domain-name holder”, the panel shall declare in its decision that the complaint was brought in bad faith and constitutes an abuse of the administrative proceeding. Paragraph 1 of the auDRP Rules defines “Reverse Domain Name Hijacking” to be “using the Policy in bad faith to attempt to deprive a registered domain name holder of a domain name”.

The Panel has denied the Complaint based on the evidence but that does not imply that the Complainant’s case was necessarily spurious or doomed from the outset. Further, the Respondent did not substantiate its allegation regarding the pre-Complaint negotiations to acquire the disputed domain name. In these circumstances, the Panel does not find that the Complaint was brought in bad faith or that it constitutes an abuse of the administrative proceeding.

## 7. Decision

For all the foregoing reasons, the Complaint is denied.

*/Matthew Kennedy/*

**Matthew Kennedy**

Sole Panelist

Date: April 14, 2023