

## **ADMINISTRATIVE PANEL DECISION**

### **Annexio Australia Pty Ltd v. Au Domains Fund**

### **Case No. DAU2023-0028**

#### **1. The Parties**

The Complainant is Annexio Australia Pty Ltd, Australia, internally represented.

The Respondent is Au Domains Fund, Australia.<sup>1</sup>

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

The disputed domain name <lottogo.au> is registered with GoDaddy.com, LLC (the “Registrar”).

#### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on May 31, 2023. On June 1, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On June 1, 2023, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the disputed domain name which differed from the named Respondent (Robert Hinds) and contact information in the Complaint. The Center sent an email communication to the Complainant on June 7, 2023 providing the registrant and contact information disclosed by the Registrar, and requiring the Complainant to submit an amendment to the Complaint. The Complainant filed an amended Complaint on June 8, 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 June 9, 2023. In accordance with the Rules, paragraph 5(a), the due date for Response was June 29, 2023. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on June 30, 2023.

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<sup>1</sup> The Panel notes the Respondent’s name has been updated to “R Hinds Pty Ltd as The Trustee for Au Domains Fund” in the Whois Records.

The Center appointed Staniforth Ricketson as the sole panelist in this matter on July 13, 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**

In the absence of any Response from the Respondent (see further below), the following matters may be stated as uncontested. The Complainant is the Australian subsidiary of a group of companies headquartered in the Isle of Man that offer online betting and gaming services. The Complainant does this in Australia pursuant to a licence granted by the Northern Territory Racing Commission. The Complainant asserts that it has been offering these services since April 2018 and has done this using the domain name <lottogo.com.au>, which allows customers to register an account, deposit funds and then play various online lotteries or games. It does not appear from the Complaint that the Complainant has any registered trade mark for this name in Australia or elsewhere, nor is there any evidence of this being included in a registered Australian business or company name. In asserting its rights therefore the Complainant relies upon its common law rights in the unregistered mark LOTTOGO: see further below.

The disputed domain name was registered on October 4, 2022 and there was email correspondence (Annex 6) between the Complainant and the Registrar's brokering service in which the Parties negotiated unsuccessfully for the Complainant to purchase the disputed domain name, the final offer by the Respondent being rejected by the Complainant as excessive. The disputed domain name resolves to a website displaying pay-per-click ("PPC") links sending site visitors to competing websites. On this website, there is a banner link with the words "Get this domain" and further links to the Registrar's site that offers a domain broker service.

#### **5. Parties' Contentions**

##### **A. Complainant**

The Complainant asserts that the disputed domain name is identical to a trade mark in which it has rights within the meaning of paragraph 4(a)(i) of the Policy. In this regard, it claims that it has significant goodwill in the unregistered trade mark LOTTOGO in Australia and states that, since April, 2018 it has acquired over 121,000 registered customers, with a turnover of over AUD 18.3 million. It asserts further that it has spent over AUD 5 million in promoting its services under the mark LOTTOGO in Australia. It argues that this goodwill is protected in Australia through the action of passing off.

The Complainant asserts further that the Respondent has no rights or legitimate interests in the disputed domain name within the meaning of paragraph 4(a)(ii) of the Policy. In particular, it points to the fact that disputed domain name "is parked free of courtesy of GoDaddy" on a landing page with a banner link with the words "Get this domain" and further links to the Registrar's site that offers a domain broker service (see further Annexes 4 and 5). In the Complainant's view, these indicate several possible commercial uses of the disputed domain name: to profit potentially from sending site visitors to third party websites (although it is unclear whether such profit would go to the Registrar or to the Respondent) or to profit from the sale of the disputed domain name. The Complainant states that, despite research, no other use of the disputed domain name, commercial or otherwise, by the Respondent has been found, for example, through the Wayback Machine, searches on news websites, and other searches. It points also to a search of the ABN number on the Whois page for the disputed domain name that links to an entity called "The Trustee for AU Domain Fund", which appears to be a Fixed Unit Trust somehow connected to the Respondent and indicates, in the Complainant's submission, to a possible connection to the Respondent having other domain name interests with an ".au" extension (this ABN search is not exhibited as an annex and the Complainant does not indicate what, if any, inference it is seeking to make here).

The Complainant alleges finally that the registration of the disputed domain name by the Respondent was in bad faith within the meaning of paragraph 4(a)(iii) of the Policy, pointing here to its email correspondence with the Registrar's brokering service (exhibited in Annex 6) in which an initial offer of AUD 3,500 and then AUD 5,000 was rejected by the Respondent who made a counter-offer of AUD 7,000. This, in turn, was rejected by the Complainant as excessive, in light of the lack of evidence that the Respondent had made any actual use of the disputed domain name or had made any preparations for its use. The Complainant submits that the amount requested by the Respondent must significantly exceed the Respondent's out of pocket expenses in registering the disputed domain name, and contends that this demonstrates that the registration was made in bad faith in order to profit from a sale of a domain name whose only value is attributable to the goodwill owned by the Complainant in the trade mark LOTTOGO.

## **B. Respondent**

The Respondent has not submitted any response to the Complaint.

## **6. Discussion and Findings**

Paragraph 4(a) of the Policy provides that in order to divest the Respondent of the disputed domain name, the Complainant must demonstrate each of the following (these are cumulative requirements):

- (i) the disputed domain name is identical or confusingly similar to a name, 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 or subsequently used in bad faith.

When a respondent has defaulted and in the absence of exceptional circumstances, paragraph 14(a) of the Rules requires the Panel to proceed to a decision on the Complaint. Paragraph 15(a) of the Rules then requires the Panel to decide the dispute on the basis of the statements and documents that have been submitted and any rules and principles of law deemed applicable. Limited factual research of publicly available online resources may also be conducted by the Panel to confirm or elaborate upon matters alleged by the parties.

### **A. Identical or Confusingly Similar**

There are two parts to the inquiry required under paragraph 4(a)(i) of the Policy: the Complainant must demonstrate that it has rights in a name, trade mark or service mark and, if so, the disputed domain name must be identical or confusingly similar to that name, trade mark or service trade mark.

It is the first of these limbs that poses some difficulty for the Complainant in the present proceeding: if the claimed trade mark is compared with the disputed domain name, there is little problem in concluding that the second limb will be made out, as the only difference between the two is the addition of country code Top-Level Domain ("ccTLD") ".au" in the case in the disputed domain name, and this may be disregarded as a functional requirement of the domain name system: *GlobalCenter Pty Ltd v. Global Domain Hosting Pty Ltd*, WIPO Case No. [DAU2002-0001](#); otherwise the two are identical.

However, the Complainant has no registered trade or service mark for LOTTOGO in Australia and no other registration for the same mark elsewhere has been cited. There is also no registration of a corresponding business or company name that has been put in evidence, although it appears that the Complainant is registered as the owner of the domain name [lottogo.com.au](#) and the Complainant asserts that it has been providing its online services to customers under this domain name since April 2018. However, in the absence of some registered trade or service mark or business or company name, its claims to "rights" in a name or mark must rest upon whatever protection is available at common law for unregistered marks (or names). This, in turn, must depend upon evidence as to the way on which its services have been

marketed under this mark within Australia and evidence as to the existence of goodwill and reputation that has thereby been built up in the mark as a signifier of those services. While rights in unregistered marks are clearly capable of protection under the Policy, it is clear that this requires a complainant to support its complaint with evidence establishing its “rights”. In this regard, the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (“[WIPO Overview 3.0](#)”)<sup>2</sup>, section 1.3 provides the following guidance that reflects the decisions of previous panels:

“To establish unregistered or common law trademark rights for purposes of the UDRP, the complainant must show that its mark has become a distinctive identifier which consumers associate with the complainant’s goods and/or services.

Relevant evidence demonstrating such acquired distinctiveness (also referred to as secondary meaning) includes a range of factors such as (i) the duration and nature of use of the mark, (ii) the amount of sales under the mark, (iii) the nature and extent of advertising using the mark, (iv) the degree of actual public (e.g., consumer, industry, media) recognition, and (v) consumer surveys.

Specific evidence supporting assertions of acquired distinctiveness should be included in the complaint; conclusory allegations of unregistered or common law rights, even if undisputed in the particular UDRP case, would not normally suffice to show secondary meaning.”

Is there sufficient material here on which the Panel can assess its claim that the Complainant has “significant goodwill in the unregistered trade mark LOTTOGO in Australia”, and that LOTTOGO has thereby acquired a secondary significance in denoting its services? To the extent that LOTTOGO may be regarded as having some degree of descriptiveness about the services offered under it – that is to say, ready access to online lottery services – this may also make the task of showing the necessary acquired distinctiveness a more difficult one.

The Complaint annexes evidence on these matters, apart from the statements in the Complaint as to the numbers of registered customers of the site, the Complainant’s turnover in the relevant period, and the size of its advertising and promotion expenditure. In the absence of a Response, these statements may be accepted at face value but more detail on these matters referred to here would have been useful, including some examples of the way in which the mark is used on the Complainant’s website, the services provided by that website by reference to the mark, the volume of usage of the site, and samples of the way in which the Complainant has promoted and advertised its services under the mark in other media. In that respect, the Panel visited the “[www.lottogo.com.au](#)” website and observed that the mark is used at the top of each page, together with descriptions of the various lottery and online gaming services offered on those pages. Customers are then invited to register and to use these services by reference to this mark which appears on the login page, subject to the relevant Australian laws governing such activities. The Panel has also visited the Internet Archive, which indicates that the website has been in existence since at least 2019. Accordingly, it may be accepted that the Complainant is actively offering its online gaming services under the domain name <[lottogo.com.au](#)> and, more generally, under the unregistered mark LOTTOGO.

In the absence of a Response, the Panel is entitled to act on the basis of the statements and material before it, and, as noted above, these indicate that the Complainant’s website has a significant body of registered users and a significant overall revenue since its inception, together with a sizeable expenditure on promotion and advertising. The Panel’s own inquiries have also confirmed the use of the mark on the webpage and the services that are there provided and this goes back until at least 2019. While these matters alone might not have been sufficient to show that the Complainant had established its rights in the mark as required under paragraph 4(a)(i), there is further material that has been filed with respect to paragraph 4(a)(iii) which is relevant to the issue of “rights” and makes it easier to reach this conclusion. This relates to the unsuccessful attempt by the Respondent to sell the Complainant the disputed domain

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<sup>2</sup> Given the similarities between the Policy and the Uniform Domain Name Dispute Resolution Policy (the “UDRP”), the Panel will refer to cases decided under both the Policy and the UDRP and notably [WIPO Overview 3.0](#), as relevant to this proceeding.

name for an amount likely in excess of out of pocket expenses: see the email correspondence in Annex 6. This clearly indicates that the Respondent saw value in the mark, and the Panel accepts the Complainant's submission that this was done "in order to profit from a sale of a domain name whose only value is attributable to the goodwill owned by the Complainant in the trade mark LOTTOGO". While this material also goes to the issue of bad faith under paragraph 4(a)(iii)(see further below), it is relevant for the purposes of paragraph 4(a)(i), and the Panel is therefore prepared to find that the Complainant has done sufficient to establish its rights in the alleged mark for the purposes of that paragraph.

The Panel therefore finds that the Complainant has met the requirements of paragraph 4(a)(i).

## **B. Rights or Legitimate Interests**

Paragraph 4(c) of the Policy provides that the following circumstances may be situations in which a respondent has rights or legitimate interests in a disputed domain name:

- (i) before any notice to you of the dispute, your use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a *bona fide* offering of goods or services; or
- (ii) you (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trade mark or service mark rights; or
- (iii) you are making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trade mark or service mark at issue.

This is an illustrative list only of the situations in which a respondent can show rights or legitimate interests in a domain name.

The Complainant bears the onus of proving this requirement of the Policy, as is the case for each of the other elements listed in paragraph 4(a) of the Policy. However, unlike paragraph 4(a)(i) where the matters to be shown are very much within the knowledge and control of the Complainant, Panels have also consistently recognized the difficulties that arise where a party has to prove a negative, particularly in situations where much of the relevant information is in, or likely to be in, the possession of the respondent, rather than the complainant. This is the case with paragraph 4(a)(ii). In general, then, it is usually enough for a complainant to state a *prima facie* case against the respondent under this head, with the evidential burden then shifting to the respondent to rebut that case. See further the [WIPO Overview 3.0](#), section 2.1, and the cases cited therein, and see *e.g.*, *GlobalCenter Pty Ltd v. Global Domain Hosting Pty Ltd*, WIPO Case No. [DAU2002-0001](#); *Wal-Mart Stores, Inc. v. WalMart Careers, Inc.*, WIPO Case No. [D2012-0285](#); *AW Faber-Castell (Aust) Pty Ltd. v. Pen City Pty Ltd. / Atf Diblasi Jones Unit Trust*, WIPO Case No. [DAU2013-0018](#); *OSRAM GmbH. v. Mohammed Rafi/Domain Admin, Privacy Protection Service INC d/b/a PrivacyProtect.org*, WIPO Case No. [D2015-1149](#).

The disputed domain name is identical to the Complainant's LOTTOGO mark, which moreover carries a high risk of assumed or implied affiliation with the Complainant. In the present case, there has been no Response and there is therefore no evidence before the Panel of any basis which might show independent rights or legitimate interests on the part of the Respondent. The Complainant has clearly not authorized the Respondent to register or use the disputed domain name or any domain name containing the LOTTOGO trade mark and there is no association between the Complainant and the Respondent, other than the correspondence through the intermediary of a Registrar that is attached in Annex 6.

In addition, the disputed domain name is not the name of the Respondent or any business of the Respondent; nor is it derived from any name by which the Respondent appears to be known. Likewise, it is not reflected in the registration details of the disputed domain name ("Robert Hinds" and "AU Domains Fund"). The Panel also accepts the Complainant's statement that, despite research, no other use of the

domain name, commercial or otherwise, by the Respondent has been found, for example, through the Wayback Machine, searches on news websites and other searches. The fact that the disputed domain name is “parked” on a Registrar landing page with a banner link with the words “Get this domain” and further links to the Registrar site that offers a domain broker service (see further Annexes 4 and 5) suggests that it has been registered for the purposes of resale or, as the Complainant submits, to profit potentially from sending site visitors to third party websites. None of this points to any rights or legitimate interests in the disputed domain name on the part of the Respondent.

In these circumstances, the Panel finds that the Complainant has established a *prima facie* case that the requirements of paragraph 4(a)(ii) of the Policy are satisfied; as this is un rebutted, the Complainant prevails under this element.

### **C. Registration or Subsequently Used in Bad Faith**

In contrast to UDRP, under paragraph 4(a)(iii) of the Policy the Complainant must establish that the disputed domain name has been either registered or subsequently used in bad faith by the Respondent (these are disjunctive requirements). Paragraph 4(b) of the Policy then provides the following, non-limiting, list of circumstances which, if present, will be evidence of such registration or use of a domain name in bad faith:

- (i) circumstances indicating that you have registered or you have 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 your documented out-of-pocket costs directly related to the domain name; or
- (ii) you have registered the domain name in order to prevent the owner of a name, trade mark or service mark from reflecting that name or mark in a corresponding domain name; or
- (iii) you have registered the domain name primarily for the purpose of disrupting the business or activities of another person; or
- (iv) by using the domain name, you have 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; or
- (v) if any of your 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.

In the present Complaint, there is no evidence before the Panel that falls directly within the circumstances referred to in sub-paragraphs (ii)-(v), although the disputed domain name is identical to the Complainant's LOTTOGO mark and is almost identical to the Complainant's domain name <lottogo.com.au> which is inherently misleading and suggests that the disputed domain name clearly targets the Complainant and its business. However, sub-paragraph (i) is clearly engaged: the final offer (rejected by the Complainant) was likely (and in the absence of evidence from the Respondent to the contrary) in excess of Respondent's out-of-pocket expenses, and indicates that this was the primary purpose for which the disputed domain name was acquired – and even if it was not, it is difficult to see any reason for its registration other than to target the Complainant and its business in some way. In the absence of any response from the Respondent, the Panel finds that a case has been made here that falls within the circumstances referred to in sub-paragraph (i) and that the disputed domain name was therefore registered and has been used in bad faith.

## 7. Decision

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

*/Staniforth Ricketson/*

**Staniforth Ricketson**

Sole Panelist

Date: July 27, 2023