



ABN 69 008 651 232

LEADR DOMAIN NAME DISPUTE ADMINISTRATIVE PANEL

auDRP 03/2005

Single Panelist Decision

13 FLOWERS PTY LTD (ACN 111 323 061)

v.

FLOWERS ON THE NET PTY LTD (ACN 105 311 297)

1. The Parties

1.1 The Complainant is 13 Flowers Pty Ltd (ACN 105 311 297) of 234 Pullenvale Road, Pullenvale, Queensland, Australia 4069.

1.2 The Respondent is Flowers on the Net Pty Ltd (ACN 105 311 297) of 4-14 Edmonds Road, Prahran, Victoria, Australia 3181.

2. Domain Name and Registrar

2.1 The domain name upon which complaint is based is www.13flowers.com.au ("the Disputed Domain Name").

3. Preliminary matters

3.1 Schedule A of the .au Dispute Resolution Policy ("auDRP") applies to disputes which meet the requirements set out in paragraph 4(a) of Schedule A of the auDRP. This subparagraph 4(a) requires that any party holding a domain name licence issued in the 2LDs "*..submit to a mandatory administrative proceeding in the event that a third party (a "complainant") asserts to the applicable Provider, in compliance with the Rules of Procedure that:*

- (i) [their] domain name is identical or confusingly similar to a name, trademark or service mark in which the complainant has rights; and
- (ii) [they] have no rights or legitimate interests in respect of the domain name, and
- (iii) [their] domain name has been registered or subsequently used in bad faith.

In an administrative proceeding, the complainant bears the onus of proof."

3.2 On 7 February 2005 the Complainant lodged a complaint with Melbourne in IT requesting a review of the allocation criteria in relation to the Disputed Domain Name. The Complainant submitted, *inter alia*, that:

1. *The websites with the domain names www.13flowers.com.au and www.13flowers.com contain no content, there is no link and an enquirer is presented with a "Page cannot be displayed" notice;*
2. *There is no registered business name, company name or trade marks which are owned by Flowers on the Net Pty Ltd or Interflora relating to "13 Flowers"; and*
3. *The products and services offered by Flowers on the Net Pty Ltd or Interflora do not, in our view, have a close and substantial connection with "13 Flowers".*

3.3 The Registrar warranted that the name met one of the alternative possible criteria for the holding of a domain name licence in the com.au 2LD, namely, criteria 2(c)(ii), viz, that the domain name must be closely and substantially connected to the registrant, because the domain name "refers to a service that the registrant provides".

4. Procedural History

4.1 This complaint has been made in accordance with the .au Dispute Resolution Policy ("auDRP") and Rules which were approved by auDA in 2001 and commenced operation on 1 August 2002 and LEADR's Supplementary Rules (LEADR is the Provider in relation to this matter).

4.2 The Complainant lodged the complaint with the Provider on 25 February 2005. The application was received on this date, however due to a defect in the complaint (ie the initial fee was not attached to the complaint) paragraph 4.1 of LEADR's supplementary Rules was not satisfied. The completed application was not submitted until 1 March 2005.

4.3 On 1 March the Respondent was sent by post a dispute notification and a copy of the complaint. The dispute notification letter and the complaint were also forwarded to the respondent's legal representative on the same day. The Respondent and the legal representative were also advised that they had 20 days from 7 March 2005 to submit a response to be considered by the Adjudicator.

4.4 A copy of the dispute notification letter was posted to the Complainant's legal representative on 1 March 2005. This letter was also posted to the Registrar along with a copy of the complaint on the same day.

4.5 The Provider also advised auDA of the complaint on 1 March 2005 via e-mail.

4.6 The Registrar was additionally advised by email to lock the website www.13flowers.com.au on 1 March 2005. The Registrar confirmed to LEADR by e-mail on 4 March 2005 that the domain name had been locked.

4.7 Through various correspondence between the Claimant and the Respondent's solicitors and LEADR the response time was extended by LEADR until 29 March 2005. Both parties agreed to this extension of time and the Provider has e-mails from both parties to confirm the extension.

4.8 LEADR appointed Rowena McNally as the sole panelist in the matter on 30 March 2005. The Panelist has confirmed that she has no conflict of interest in relation to the matter.

4.9 All procedural requirements appear to have been satisfied.

5. Factual Background - The Claimant's case

5.1 In October 2004 the Complainant says that it became aware of a website www.smartnumbers.com.au where telephone numbers which have an alpha-numeric combination ("phone words") were being sold by way of an on-line public auction.

5.2 The Complainant successfully bid at the online auction for the telephone number 13 3569 (or 13-3569) and purchased the phone number on 7 October 2004.

5.3 The telephone number 13 356 converts to "13 FLOW", "13FLOWER" or "13 FLOWERS with an over dial of two or three digits.

5.4 The Complainant says there are a number of advantages in the use of phone words. Some of these are described in paragraph 6 of the Complainant's submissions and include ease of recollection and low user cost, as customers nationwide pay only local call prices.

5.5 The Complainant's intention was to set up a business for the national sale and supply of flowers using the phone word "13 Flowers".

5.6 On or about 8 October 2004 the Complainant engaged Pipers Trade Mark Attorneys to conduct a search of the Australian Trade Mark Register and to proceed to lodge its first trade mark for "13-Flowers" (words only).

5.7 On approximately 8 October 2004, the Complainant obtained the registration of the various domain names listed in the Schedule (page 2) in order to operate its business and receive orders online.

5.8 On approximately 11 October 2004, the Complainant registered its company 13 Flowers Pty Ltd (ACN 111 323 061) (formerly known as 13-Flowers Pty Ltd), formed a family trust "13-flowers" and registered its business name, "Thirteen Flowers", in anticipation of commencing business.

5.9. Between October 2004 and January 2005 the Complainant expended substantial time and expense as a preliminary to commencing business. This work is detailed in paragraphs 9 – 19 of the Complainant's submission and is not disputed by the Respondent. This preliminary work included graphics, marketing and promotional materials and the creation of a website, which was activated on 18 January 2005.

5.10 During January 2005, while it was making commercial arrangements in relation to the delivery of flowers nationally, the Complainant contacted Interflora Australia Unit Limited ("Interflora") and learned that the Respondent is a wholly owned subsidiary of Interflora.

5.11 On or about 25 January 2005 the Complainant met with Inteflora's, Queensland Business Development Consultant, Ms Carla Deckert in relation to the Complainant's possible membership with Interflora. The Complainant says, *inter alia*, it was told that the web domain www.13flowers.com.au would be tightly held by Interflora.

5.12 The Complainant says that its application for membership with Interflora was declined a few days later.

5.13 The Complainant alleges that it (by Mr William (Doug) Scott) was advised on 28 January 2005 by Interflora's National Sales & Marketing Manager, Mr Andrew White that:

- (i) he was not aware of Interflora's domain name ownership of www.13flowers.com nor of the Respondent's domain ownership of www.13flowers.com.au;
- (ii) "13 Flowers threaten Interflora" in that "*the whole concept of no retail outlets, phone words, internet and orders direct to wholesalers threaten Interflora. Interflora's business and its members' businesses are based on retail outlets*".

and that subsequently that day Mr White:

- (iii) confirmed Interflora held both web domains www.13flowers.com.au and www.13flowers.com;
- (iv) offered both web domains to the Complainant for \$152,500 based on the sale price for www.1300flowers.com.au allegedly paid by Mr John Singleton.

5.14 The Complainant says that it informed Mr White that \$152,500 was the sale price for the telephone number 1300 356937 purchased by Mr Singleton which equated to the phone word, "1300 Flowers" and that Mr White then asked for an offer close to the amount of \$152,5000 to either himself or the Chief Executive Officer (CEO) of Interflora, Garry Korn.

5.16 In relation to the matters set out in 5.11 - 5.14 above, the Respondent says that:

- (i) The Complainant's application for membership of Interflora was never formally declined however in discussions between the Complainant, Ms Deckert and Mr White it "*became apparent that the [Complainant] did not meet Interflora's usual requirements for membership in that its proposed premises were a warehouse rather than a retail shop*";
- (ii) Mr White denies that he told Mr Scott that 13 Flowers threatened Interflora;
- (iii) It was Mr Scott who first asked Mr White whether the domain name was for sale, at which time Mr White named what he considered to be a patently unrealistic sale price in order to deter Mr Scott from pursuing a sale;
- (iv) Each of the instances of correspondence and discussions regarding a potential sale were initiated by the Complainant;
- (v) Mr White denies that he requested that the Complainant make an offer close to the amount of \$152,500 to either himself or Mr Korn;
- (vi) Neither Mr White nor Mr Korn in the usual course of their duties have the authority to offer to or agree to sell any business asset of Interflora or the Respondent, such as the Domain Name and that the required board authority had not been sought or received.

5.17 The Panelist accepts the submission in (vi) as to Mr White however even if Mr Korn had no actual authority, a CEO could normally be expected to have authority to engage in discussions in relation to such matters¹. In any event, this is of little consequence.

5.15 On 28 January the Complainant wrote to the Respondent seeking an explanation for their holding of the Disputed Domain Name.

5.16 The Complainant says that:

- (a) on 31 January it sent an email to Mr White stating, *inter alia*, that the Complainant was struggling to justify the sum of \$152,500 "for web domains that are not operational" and were subsequently advised by Mr White that:
 - (i) he and the CEO had revised their offer to \$8,000-\$10,000; and
 - (ii) that if the Complainant did not accept the offer and wished to continue down the "legal road", Interflora would "draw it out in the courts for years and the complainant's legal bills could reach \$25,000."
- (c) Mr White said on 3 February 2005 that [Interflora] would not sell the www.13flowers.com domain name but would sell the Disputed Domain Name for \$8,000 to \$10,000, later advising on 7 February 2005 that Interflora would not sell either domain name.

5.17 The Respondent has not disputed or otherwise dealt with the matters set out in 5.16.

5.18 In February, 2005, the Complainant commenced trading and received orders for bundles of roses on Valentines Day, 14 February 2005 through its info@13-flowers.com.au address.

5.19 The Complainant says:

- (a) it has been unable to proceed with promotion and advertising because consumers "*are likely to be confused and/or not differentiate between "13-flowers" and "13flowers" in any reference to domain names*"; and
- (b) The Disputed Domain Name website was only activated after the Respondent received notification of the Complainant's complaint; with that activation purely a redirection of consumers and not the display of a service in relation to "13 Flowers".

¹ Section 129(3)(b) Corporations Act

6. Factual Background – The Respondent's case

6.1 The Respondent says that the Disputed Domain Name was first registered by the Respondent's predecessor in title, Flowers on the Net Pty Ltd ACN 086 951 948 ("Old FOTN"). AuDA have confirmed the creation date is 22 January 2003.

6.2 Old FOTN registered the Domain Name in connection with its business of selling, marketing and distributing floral relay orders (orders interchanged between members of a floral relay system) delivered using the internet.

6.3 By way of Agreement dated 22 July 2003, Interflora Australia Unit Ltd ("Interflora") acquired the sole share in Old FOTN from its previous sole director and shareholder, Mr AL Rodgers.

6.4 Prior to the acquisition by Interflora of the sole share in Old FOTN, Mr Rodgers (or entities associated with him) was the registrant of a number of other domain names associated with "flowers", business names and trade mark applications, some (but not all) of which were transferred to Old FOTN at Interflora's request and as part of the sale process.

6.5 The Respondent was incorporated on 27 June 2003 as a wholly owned subsidiary of Interflora. The Respondent says, and the Panelist accepts, that it has remained a wholly owned subsidiary of Interflora since its incorporation. All of the directors of the Respondent are also directors of Interflora.

6.6 Old FOTN changed its name to its ACN and the Respondent changed its name to "Flowers on the Net Pty Ltd" on 22 July 2003. By Agreement dated 5 September 2003 the Respondent acquired all of Old FOTN's Intellectual property rights, which specifically included the Disputed Domain Name.

6.7 On 14 September 2004, as part of the sale of Old FOTN assets the Respondent acquired and became registered as the owner of the trade mark "Flowers.com.au Australia's Leading On-line Flower Shop" (Number 927184) on 4 November 2004 (Flowers.com.au Trade Mark).

6.9 The Respondent says;

- (a) the Flowers on the Net business of selling flowers online from the www.flowers.com.au website for delivery via Interflora's international floral relay system (FOTN Business) has been operated continuously by Old FOTN and the Respondent since at least September 2002 using the Flowers.com.au Trade Mark.
- (b) the licence for the Disputed Domain Name and other domain names acquired by the Respondent under item 2 of the Schedule to the Sale of Assets agreement are part of the Old FOTN Business acquired by the Respondent.

6.10 The Respondent says that it is opposing the registration of the Complainant's trade marks on a number of grounds, which are set out in its submission.

6.11 There are a number of other matters in respect of which the Respondent has been silent. These include:

- (a) the conversations alleged by the Complainants to have occurred with Mr White on 31 January and 3 and 7 February, 2005, referred to in Section 5 above and paragraphs 31, 31 and 32 of the Complainant's submissions);
- (b) any asserted actual use of the Disputed Domain Name www.13flowers.com.au either by Old FOTN, the Respondent or Interflora;
- (c) that it was only during February 2005 that that the website www.13flowers.com.au was activated to the extent of re-directing consumers to www.flowers.com.au.

6.12 While the Respondent says, and the Panelist accepts, that the Flowers on the Net Business has been operated continuously since at least September 2002, there is (as the Complainant says) no asserted use, and nor is there any evidence provided by the Respondent of use of the Disputed Domain Name prior to February 2005.

7. The Complainant's Contentions

7.1 The Complainant seeks to have the Disputed Domain Name licence transferred to itself.

7.2 In order to be successful in this regard the Complainant bears the onus of showing that:

- (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 domain name, and
- (iii) The Respondent's Disputed Domain Name has been registered or subsequently used in bad faith.

(Clause 4(a) Schedule A auDRP)

7.3 The criteria in Clause 4(a)(i) - (iii) are not alternatives (as the Complainant's Grounds for Complaint at para. 1 seems to erroneously suggest) and must all be made out². Each of these criteria will now be examined:

[That the domain name is identical or confusingly similar to a name, Trademark or service mark in which the Complainant has rights [para 4(a)(i)]

7.4 The Complainant says that the Disputed Domain Name is identical or confusingly similar to a name, trademark or service mark in which the complainant has rights. The Complainant's submissions in this respect are set out on page 7 of its submissions, being essentially that:

- (i) the Disputed Domain name is identical to the Complainant's company name, business name and trade marks, which names were obtained in good faith after obtaining the phone name 133569 at a public auction and after searches of the various government registries;
- (ii) the Complainant's business and marketing plans are currently being frustrated and there is a risk of the Complainant being confused with the Respondent's Disputed Domain Name.

7.5 The Respondent concedes (for the purpose of this proceeding alone) that the Complainant by virtue of its company name, has rights or a legitimate interest in the Domain Name.

7.6 In the Panelist's view the Disputed Domain Name is "identical or confusingly similar to" a name, trademark or service mark in which the Complainant has rights.

[That the Respondent has no rights or legitimate interests in respect of the domain name (4(a)(ii))]

7.7 In support of its contention that the Respondent has no rights or legitimate interests in the Disputed Domain Name, the Complainant says:

- (a) *There was originally no content in the Respondent's website at www.13flowers.com.au and it had remained inactive for some time.* The Panelist considers this contention is most likely correct and there is nothing in the Respondent's material to assist me to form a contrary view.
- (b) *The Respondent only activated the website at www.13flowers.com.au after receiving notification of the Complainant's complaint and the activation was purely a redirection of consumers and not the display of a service in relation to 13 Flowers.* I consider this contention is most likely correct and there is nothing in the Respondent's material to assist me to form a contrary view.

² Clause 4(a) Schedule A auDRP; 0800 Flowers Ltd, Phone Names Ltd v 0800 Blossoms Ltd (Case No. DAU 2003-0053) at 6.2;

- (c) *Neither the Respondent (nor its parent company, Interflora) is commonly known by the name "13 Flowers".*

I consider that this contention is correct. In this respect however I note that it is common knowledge that Interflora is and has for many years been involved in the business of selling flowers to consumers and the Respondent's business name, "Flowers on the Net Pty Ltd" is descriptive of a similar service.

- (d) *The Respondent warranted to Melbourne IT that it provided a "13 Flowers" service but the Complainant has been unable to locate any such service in any online material and further:*
- (i) *the National Sales and Membership Manager was not aware of the existence of domain names which were an exact match to the alleged services; and*
 - (ii) *the correspondence from the Respondent's lawyers discusses the Respondent's intention of use but not use of 13 Flowers.*

7.8 The Complainant referred the Panelist to the WIPO decision of *Bianjade*³. In *Bianjade*, however, it was the Complainant who had a well established business and the Complainant's name (use of which was complained of) appeared in the Respondent's website, but not in the Respondent's name. The Panel found it was "*most likely that the Respondent knew of the Complainant's name and online activities at the time of registering the domain name.*"⁴

7.9 By contrast, here it is the Respondent and its parent, Interflora, who have the more established business, and a significant part of the Disputed Domain Name, namely, "flowers" is part of the Respondent's name and the business of the Respondent and its parent company, Interflora.

7.10 This aside, it is improbable that the Respondent has been providing any service using the Disputed Domain Name, unless one considers that to include the recent activation of that domain name and the limited "redirection" role in which the site has since been utilized.

7.11 This is not to say however that the Respondent has no right or interest in the domain name sufficient to defend itself.

7.12 In relation to the Respondent's rights or interest in the domain name the Respondent says:

- (a) The Respondent (and previously Old FOTN) trades as Flowers on the Net; has the company name Flowers on the Net Pty Ltd; is the registered owner of the Flowers.com.au Trade Mark and is in the business of selling and arranging for the delivery of flowers on the internet;
- (b) A domain name and the word(s) upon which the domain name is based do not need to be identical;
- (c) The Respondent had, as part of its usual business processes already been preparing and intended to conduct a strategic review of the FOTN business and the Interflora.com.au business, including use of the Disputed Domain Name and each other domain name acquired from Old FOTN.
- (d) The decision to initially register and subsequently to transfer the Domain Name, but not other domain names that the Old FOTN's owner had registered to the Respondent (both of which pre-dated the Complainant's business) and the decision to renew the registration of the Disputed Domain Name in January 2005 all point to the Respondent's bona fide intention to use the Disputed Domain Name in connection with its offering of goods and services at some future time.
- (e) The Respondent's business in relation to the sale of flowers, including flowers on the net gives it a legitimate interest in the Disputed Domain Name. The Respondent says the "13" can be comparatively meaningless or have other descriptive or commercially significant meanings.

³ *Bianjade Enterprises Pty Ltd v Leigh Michael Connelly* (Case No. DAU 2003-0003)

⁴ *Bianjade Enterprises Pty Ltd v Leigh Michael Connelly* (Case No. DAU 2003-0003) at p. 5

7.13 As to the Respondent's rights and interests, the Panelist accepts the Respondent's arguments in 7.12 and notes that the 2003 Share Acquisition Agreement and Sale Agreement transferred to the Respondent the Old FOTN's rights and interests in the licence to use the Disputed Domain Name.

7.14 It is the Panelist's view that the Respondent had, at the date of the Sale Agreement, and still has rights and legitimate interests in respect of the Disputed Domain Name.

7.15 The legitimacy and *bona fides* of the Respondent's rights and interests in respect of the Disputed Domain Name would, in the Panelist's view, continue to erode over time were they to be (or remain) unexercised.

[That the Domain name has been registered or subsequently used in bad faith: (4(a)(iii)]

7.16 In support of this contention the Complainant submits that:

(a) *The Respondent registered the domain name for the purpose of preventing competitors including the Complainant obtaining the domain name.*

The Panelist rejects this submission. The Panelist accepts that the Respondent's decision to purchase the name from Old FOTN was a deliberate one and that the Respondent had at the time, and still holds a *bona fide* intention to use the Disputed Domain Name in connection with its offering of goods and services at some future time. The Panelist also notes that the Respondent's purchase of the Disputed Domain Name preceded the establishment of the Complainant's business by some 12 months.

(b) *That the Respondent has subsequently held the domain name for the purpose of disrupting the activities of its competitors as it has felt threatened and accordingly, has used the domain name in bad faith.* While it cannot be known why the Old FOTN registered the domain name, there is no evidence to rebut the Respondent's position that the Respondent had at the time it purchased the domain name, and still holds a *bona fide* intention to use the Domain Name in connection with its offering of goods and services at some future time.

7.17 Previous Panel decisions have considered the circumstances in which inaction (passive holding) can constitute a domain name being used in bad faith and found that the question can only be answered in respect of the particular facts of a specific case.⁵ In addition, a remedy can be obtained under the Uniform Policy only if those circumstances show that the Respondent's passive holding amounts to bad faith⁶.

7.18 The issue here is whether the Respondent's conduct has been such in the current circumstance as to amount to bad faith. The failure by the Respondent to actively use the website in the 18 months since it purchased the licence (among other assets) from Old FOTN is not sufficient, in the Panelist's view, to prove bad faith. The Complainant's position in this regard may well have been strengthened had the Disputed Domain Name remained unused for a longer period of time. The Respondent's apparent intention of reviewing domain name use in the context of a strategic review is credible in the context of a corporate strategic planning cycle, but would, in the Panelist's view, become increasingly less credible over a longer timeframe.

7.19 The Complainant says that an adverse inference of bad faith should be drawn as to the Respondent's failure to respond to the Complainant's request for an explanation for its holding of the Disputed Domain Name. The Panelist agrees failure to respond to such a request can be evidence of bad faith⁷ but is not satisfied that such an inference is warranted in this case. This is particularly so given that only about one week elapsed between the date of the demand for an explanation from the Respondent and the referral of the matter by the Complainant to Melbourne IT.

⁵ Telstra Corporation Limited v Nuclear Marshmallows (Case No. D2000-0003) at 7.11

⁶ Telstra Corporation Limited v Nuclear Marshmallows (Case No. D2000-0003) at 7.11

⁷ Global Centre Pty Ltd v Global Domain Hosting Pty Ltd (Case No. DAU 2002-001) at 5.5

7.20 The Complainant says that www.13flowers.com.au contained no content and was not activated for an extended period of time but after receipt of notification from the Complainant the Respondent activated the website and directed consumers to its website.

7.21 The Panelist considers that the Respondent has not responded satisfactorily to this and that the Complainant's comments in this regard are most probably correct. However, re-direction of itself is not of itself evidence sufficient to satisfy 4(a)(iii) of the Policy⁸. The Panelist does not consider that it can be said here that the Respondent does not operate a business with a legitimate relationship to the name, and in this respect there is a significant difference to the facts in *Global*⁹.

7.22 The Complainant says that the Respondent has acted in bad faith by intentionally attempting to attract, for commercial gain, internet users to its websites, by creating a likelihood of confusion with the Complainant's name and trade mark, as to the source sponsorship, affiliation or endorsement of the websites, or the products and services at the linked websites.

7.23 The Panelist accepts that confusion with the Complainant's name and trade mark may be a consequence of the Respondent using its Disputed Domain Name. No doubt steps could be taken by the parties by way of notices to reduce this risk.

7.24 The Panelist is not satisfied either that activation of the domain name is sufficient per se to show bad faith on the part of the Respondent, or that the Respondent has done so to reap commercial gain from an affinity with the Complainant's business.

7.25 The Complainant has provided no evidence that there has been any attempt to attract users to the site for commercial gain, although persons who find their way to the site are directed to another of the Respondent's websites. In this regard the Panelist notes that the Respondent and its parent company have been engaged in the business of selling flowers for a longer period than has the Complainant. The Respondent is also apparently challenging the Complainant's trademark. The issue of trade marks is yet to be decided and this issue is outside the jurisdiction of this determination.

7.26 The Complainant says that the Respondent offered to sell the Disputed Domain name to the Complainant for \$152,500 and later for \$8,000 and \$10,000 which is an example of bad faith by virtue of paragraph 4(b)(i) of the Rules.

7.27 The Panelist considers that it is more likely than not that Mr White did offer to sell the Disputed Domain Name to the Complainant as outlined in the Complainant's submissions (regardless of whether they he or Mr Korn had any actual authority or intention do so).

7.28 The Respondent says that at the time of initial registration of the Domain Name and the acquisition of the Domain Name by the Respondent, there are no circumstances indicating that the registration or acquisition was for the primary purpose of selling, renting or otherwise transferring the domain name registration to another person for the purposes of selling the registration to another person for valuable consideration exceeding the out-of-pocket costs directly related to the domain name. The Respondent says that even if the Complainant's characterization of the alleged "offers to sell" is taken at its highest, the alleged offer occurred well after the relevant times for the purposes of paragraph 4(b)(ii) of the Policy and that this ground of bad faith is not made out.

7.29 The Panelist's view is that the Respondent's submissions on this point are correct. In addition the Panelist notes that the Complainant's establishment of its business 13-flowers occurred at least a year after the Respondent purchased the domain name from Old FOTN.

⁸ Global Centre Pty Ltd v Global Domain Hosting Pty Ltd (Case No. DAU 2002-001) at 6.19

⁹ Global Centre Pty Ltd v Global Domain Hosting Pty Ltd (Case No. DAU 2002-001)

8. Decision - Relief sought by the Complainant

8.1 The Panelist concludes that the Complainant has failed to satisfy two of the three essential requisites to the relief sought by the Complainant: namely, either a lack of right or legitimate interest (under 4(a)(ii)), or bad faith (under 4(a)(iii)) of the Policy.

8.2 Accordingly the domain name www.13flowers.com.au must remain with the Respondent.

9. Decision – Relief sought by the Respondent

9.1 The Respondent says (para 39) that its (and its predecessor's) registration of the Disputed Domain Name long precede the Complainant's incorporation, application for registration of any trade marks or commencing to trade, all of which took place at a time when the Complainant could have discovered, if it was not actually aware, of the Respondent's rights in the Disputed Domain Name by way of a whois search at www.ausregistry.com.au.

9.2 The Respondent seeks a finding that the Complainant's complaint has been brought in bad faith in an attempt at Reverse Domain Name Hijacking or primarily to harass the Respondent.

9.3 In order to make such a finding this Panelist would need to be satisfied that the Complainant has brought the current application for determination in bad faith to attempt to deprive a registered domain name holder of a domain name.

9.4 There is no evidence submitted by the Respondent in support of this application and this Panelist does not consider, on the basis of the material contained in the Complainant's and Respondent's material, that such a finding is warranted. Accordingly, the Respondent's request for a finding as outlined above is refused.

9.5 The Respondent has also sought a declaration that the Complaint was brought in bad faith and constitutes an abuse of the administrative proceedings. Having reviewed the Complainant's submissions and material, it appears that the Complainant, having found what seemed to be a good business idea, and spent significant funds seeking to advance that business, now finds itself in an unenviable position. The Panelist does not consider, on the basis of the material contained in the Complainant's and Respondent's material, that there is sufficient evidence of bad faith on the part of the Complainant to justify such a conclusion, and nor does the Panelist consider, in the circumstances, that the Complaint constituted an abuse of the administrative proceedings. Accordingly, the Respondent's request for a declaration is also refused.

DATE: 8 April, 2005

.....

Rowena McNally
Panelist