

***Fulcra Holdings PL and Balmaghie Investments PL – auDRP\_23\_03***

**Determination re: fulcrafinancial.com.au; fulcrasolution.com.au;  
fulcrasolutions.com.au**

1. I received the complaint and procedural history on 27 March 2023. The complaint was filed on 17 February 2023 and receipt was acknowledged on 21 February 2023. The relevant domain name registrar was notified of the complaint on 21 February 2023 and confirmed lock on the challenged domain names on 21 February 2023. The respondent and auDA were notified of the complaint on 27 February 2023. The response was received on the due date of 19 March 2023. All the foregoing were by email.

**Complainant's contentions**

2. The complainant's material states the following matters (summarised or inferred from its submissions and documents) in support of its application to have the challenged domain names transferred to it under para 6.1(b) of the auDA Dispute Resolution Policy (auDRP) or, if the registrar determines that the complainant is not eligible to hold the domain names under the auDRP or the auDA Rules, that each domain name be cancelled under para 6.1(a) of auDRP:

2.1 The complainant was incorporated on 20 April 2021 with its current name "Fulcra Holdings PL"; its related corporation Fulcra Financial PL was incorporated on the same date and collectively was called the Fulcra Group. The complainant provides finance, banking and advisory services as a full member and corporate credit representative of the Connective broker network. The complainant's name and service marks all contain the word "Fulcra" and "Fulcra Financial" which it uses in its business and on its website fulcragroup.com.au. There are nine registered business names to the complainant that contain "Fulcra" or "Fulcra Financial", with any balance of the

name being “Group” and/or a geographic indicator (Australia, NSW, Qld, Vic). The complainant uses a distinctive business logo of a stylised pyramidal shape with “Fulcra Financial”. Fulcra Financial PL previously used “Fulcra Financial” as coincident with the substantive part of its corporate name but on about 25 January 2023 registered “Fulcra Financial” as a business name and on 27 January 2023 transferred that registration to the complainant. The challenged domain names are said to be identical or confusingly similar because they contain “fulcra” or “fulcrafinancial” as an integral substantive component and the use in two names of “solution” or “solutions” does not sufficiently remove the confusing similarity.

2.2 The complainant engaged the respondent’s related corporation, Balmaghie PL (Balmaghie), as a contractor, assisted by two specified approved persons being its directors, to provide finance, banking and advisory services to the complainant under a written Independent Contractor Agreement provided to the respondent and Balmaghie on 22 April 2021. On about 19 April 2021 the respondent registered the challenged domain names which were instructed to be held by it on trust for the complainant. The respondent provided the contracted services from 1 May 2021.

2.3 The complainant terminated the Contractor Agreement on 25 November 2022 by notice of termination specifying Balmaghie’s breaches of confidentiality obligations, duties of loyalty and non-competition under cll 16, 10.10 and 20 respectively of the Contractor Agreement, by removing and copying Fulcra Group data. The termination was said to be effective immediately and without compensation under cll 6.1 and 6.2 and despite emails from the respondent resigning as contractor from 1 January 2023 under cl 5. The Contractor Agreement cl 7.2 required the contractor and each approved person immediately to cease representing or giving any impression to any person of association with the Fulcra Group; cl 20 also required that there be no representation of connection with or interest in the business of the Fulcra Group. Clause 16.3 required return of all documents relating to the

contract services and Fulcra Group. Clause 17 required cessation of display and use, and return, of intellectual property (IP) of the Fulcra Group. In particular, cl 17 required the cancellation or transfer of all registrations of IP including account log-ins, email addresses and domain names and business name and transfer of the challenged domain names to Fulcra Group or its nominee. Although no express mention was made of these provisions, I note that cl 19 provided that nothing prevented the contractor from continuing to operate its existing business so long as the performance of such did not interfere with or prevent the contractor provided the services. Clause 28 provided “The parties to this Agreement expressly record that the relationship created by this Agreement is that of Principal and Independent Contractor and nothing herein shall be construed so as to constitute either of the parties as an agent, partner, or joint venturer. Nor shall anything herein contained or implied constitute the relationship of employer and employee between the parties.” Item 14 in the Schedule to the Contractor Agreement acknowledged that the contractor would continue to provide services to seven other named entities.

2.4 The respondent refuses to transfer the challenged domain names to the complainant because it asserts the continued right to use them as a “partner” of the complainant. The complainant denies any alleged “partnership” with the respondent or any continuing affiliation or common ownership or directorate between the respondent, its directors or Balmaghie. The refusal to transfer the challenged domain names prevents the complainant from reflecting its business name “Fulcra Financial” in a domain name.

2.5 The respondent continues to maintain [www.fulcrafinancial.com.au](http://www.fulcrafinancial.com.au) as a website but to re-direct all web-based inquiries for the complainant’s services to its own business website <https://balmaghie.com.au>. It has refused to transfer to the complainant the business name “Fulcra Financial (Melbourne)” which the respondent registered on 28 July 2022. Each of the respondent’s directors incorrectly state on their LinkedIn profiles that each was a director at

that business name from May 2021 to the present. These activities are likely to mislead the public into assuming that the respondent is related to or affiliated with the complainant or part of the complainant's business.

2.4 Accordingly, all elements required to establish the relief sought are said to have been established.

### **Respondent's contentions**

3. The respondent denied each matter in the complainant's contentions. In summary on the relevant matters to this auDA process:

3.1 The respondent said that Fulcra Financial (Melbourne) was owned and run by the directors of and shareholders in Balmaghie. Balmaghie was set up and operated "as part of a partnership in early 2021 to collectively create the business known as Fulcra Financial by four partners" who were named as the principals of the complainant and Balmaghie. The "entity" (not clearly defined) began trading on 1 May 2021.

3.2 The Contractor Agreement was never agreed to or signed: it "was prepared by [one principal, of the complainant] and presented as a fait accompli without any consultation with the other business partners. It did not reflect the agreement between the parties." Its purported date was 22 April 2021, after registration of the challenged domain names by the respondent on 19 April 2021.

3.3 Accordingly, the Contractor Agreement did not govern the rights between the parties and there was no basis for a termination notice which was disputed at the time by the respondent and the respondent and Balmaghie's then-retained lawyers.

3.4 Pursuant to their role in the partnership the respondent acquired

registration of the challenged domain names effectively as partnership property and operated them as such until 25 November 2022. One of the challenged domain names, [www.fulcrafinancial.com.au](http://www.fulcrafinancial.com.au), was said to have a copyright notice in favour of Fulcra Financial partnership. (An extract in relevant period from the website was not in evidence.)

3.5 The challenged domain names were registered on 19 April 2021, before the registration on 20 April 2021 of the complainant and Fulcra Financial PL. The complainant's domain name [www.fulcragroup.com.au](http://www.fulcragroup.com.au), was said to have been originally owned by Balmaghie and was redirected in early May 2021 to [www.fulcrafinancial.com.au](http://www.fulcrafinancial.com.au). This was to establish the Office 365 mail system and partnership email addresses.

3.6 The complainant registered the "Fulcra Financial" business name only shortly before it filed this complaint. It registered the business names on which it relies for the present claim after registration by Balmaghie of "Fulcra Financial (Melbourne)".

3.7 A direct copy of [www.fulcrafinancial.com.au](http://www.fulcrafinancial.com.au) registered to Balmaghie was made and hosted on [www.fulcragroup.com.au](http://www.fulcragroup.com.au).

3.8 The logo was partnership property created and purchased by all partners with invoices being issued to Balmaghie by the designer and marked paid.

3.9 Since October 2020 the complainant and respondent and relevant principals have jointly owned the premises from where Fulcra Financial (Melbourne) continues to be registered on Google as operating.

3.10 Refusal to transfer the challenged domain names was an incident of and integer in the overall dispute which included the claim by the respondent and Balmaghie that the complainant was withholding "hundreds of thousand in commissions due to the respondent for settled disputes".

3.11 Further evidence would be provided to the correct jurisdictional forum to determine the characterisation of the relationship between the parties.

4. Both parties filed further material after the Panel appointment. There is clear power to permit either or both parties to put further material before a determining panel, in writing or in a hearing (auDRP 2016-01 Sch B paras 10, 12, 13). The usual course is that the complaint is determined on the material provided in the first instance by each party: auDRP Sch B para 15. The policy of administrative determination within tight time parameters and minimal cost, with the parties left to their curial rights if dissatisfied, would not be served by too easy a dispensation from the usual course which is known to the parties when they file their material. In a situation where it is known to the parties that the usual position is that a party has one turn to put material forward on the determination, a complainant needs to put forward all relevant material on the central issues and anticipate what may reasonably be said by the respondent in a contest. In accord with auDRP 2016-01 Sch B para 5(e), in the absence of a response and unless there are exceptional circumstances, the dispute is determined on the complainant's material. However, in this case, given the closeness of the date of provision of the material and that it was provided by both parties, I have looked at it.

#### **The auDRP requirements to be proved by the complainant**

5. 5.1 The matters which the complainant is required to establish are set out in para 4a of Sch A to the auDRP 2016-01 (current to 29 September 2022):

- (i) the challenged domain name is identical or confusingly similar to a name (Note 1), trademark or service mark in which the complainant has rights;
- (ii) and the respondent has no rights or legitimate interests in respect of the challenged domain name (Note 2); and
- (iii) the challenged domain name has been registered or subsequently used in

bad faith.

**Note 1**

For the purposes of this policy, auDA has determined that a “name ... in which the complainant has rights” refers to:

- (a) the complainant’s company, business or other legal or trading name, as registered with the relevant Australian government authority; or
- (b) the complainant’s personal name.

**Note 2**

For the purposes of this policy, auDA has determined that “rights or legitimate interests in respect of the domain name” are not established merely by a registrar’s determination that the respondent satisfied the relevant eligibility criteria for the domain name at the time of registration.”

5.2 On each of the requirements, and overall, the complainant bears the onus.

5.3 Under para 4c of Sch A, any of the following circumstances, in particular but without limitation, if found by the panel to be proved based on its evaluation of all evidence presented, is to be taken to demonstrate the respondent’s rights or legitimate interests to the domain name for purposes of para 4a(ii):

(i) before any notice to the respondent of the subject matter of the dispute, the respondent's bona fide use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with an offering of goods or services (not being the offering of domain names that the respondent has acquired for the purpose of selling, renting or otherwise transferring); or

(ii) the respondent (as an individual, business, or other organisation) has been commonly known by the domain name, even if the respondent has acquired no trademark or service mark rights; or

(iii) the respondent is making a legitimate non-commercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the name, trademark or service mark at issue.

5.4 Under para 4b of Sch A, for the purposes of para 4a(iii), the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith:

(i) Circumstances indicating that the registrant has registered or 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 the registrant's documented out-of-pocket costs directly related to the domain name; or

(ii) the registrant 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; or

(iii) the registrant has registered the domain name primarily for the purpose of disrupting the business or activities of another person; or

(iv) by using the domain name, the registrant has intentionally attempted to attract, for commercial gain, Internet users to a web site 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 web site or location or of a product or service on that website or location; or

(v) if any of the registrant'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.

## Discussion and decision on each auDRP requirement

6. As to the first auDRP requirement, the complainant has registered business names to which one or other of the challenged domain names is identical in text, identical in text but with the addition of a locality, or substantially similar. The evidence established, as the respondent contended, that registration of those business names does not pre-date the registration of the challenged domain names and the registration of the business name with the addition of another locality by the respondent or Balmaghie.
7. There is a strong basis for an inference of association with the complainant's business names and the corporate name of its associate despite the additional locality element or a different word which is still connected with financial services in some of the challenged domain names. There is no evidence of actual confusion. These matters may be relevant to, but are not in themselves necessarily determinative of, aspects of trade mark registration and challenge, the general law and the domain name dispute resolution policy in its early versions or in its form in other jurisdictions. However, the test under auDRP 2016-01 Sch A para 4a is that one simply compares the substantive word(s), in this case in the registered business and corporate names and the challenged domain names, ignoring the domain suffix unless that forms part of the mark or name with which the challenged domain name is compared: see, eg, costumesdirect.com.au LEADR auDRP 02/11 (3 person panel) at [10]-[12]; cp engineer.com.au LEADR auDRP 03/09 at [6]: "auDRP proceedings are designed to deal with relatively straight forward cases of cybersquatting; that is conduct that *classically involves a respondent registering as a domain name another person's mark*" [emphasis added]; *Tigers Direct* WIPO DAU 2010-005 at [6A] (where the complainant had a registered trade mark).
8. Here, on the required comparison the common substantive part of the

challenged domain names is identical with the common substantive part of the registered business and corporate names of the complainant or its associate, with the rest of the domain and other names being the addition of a locality or a different word which although generic in itself (“solution” or “solutions”) is still in context integrally connected with financial services.

8.1 The addition of the locality in the domain name does not diminish the confusing similarity with the registered names of the complainant or its associate. It simply gives a territorial element that without more does not differentiate from the complainant. Internet users would likely mistake the domain name as being owned or affiliated with the complainant on that basis, regardless of whether or not the domain name currently resolves to an active website”: *Telstra Corporation Ltd v Nuclear Marshmallows* WIPO case no D2000-0003; there are similar statements in many other WIPO and auDRP cases.

8.2 The fact that the respondent and its associate Balmaghie had a prior-registered business name that showed the same features is not the focus in para 4a(i); as will be seen, it is a focus in the other auDRP requirements

Paragraph 4a(i) is satisfied.

9. Turning to the second auDRP requirement, a decision that the name meets the eligibility requirements for registration as a domain name does not of itself affect rights to challenge the use by that registrant (the respondent) of the domain name: Note 2 to auDRP 2016-01 Sch A para 4a.
10. The respondent has provided evidence of its registration of a business name with a core element of the challenged domain names, “Fulcra”, and the addition of a geographical element before the complainant registered its business names and on the same day, 20 April 2021, that the complainant’s associate registered its corporate name with that core element. The

respondent provided evidence that the challenged domain names were registered the day before, on 19 April 2021. There was no evidence to the contrary of the respondent's contention that the respondent and Balmaghie operated under at least one of the challenged domain names. Importantly, there was no conclusive evidence as to the characterisation of the basis on which the respondent registered the challenged domain names and its business name and used and operated under those names:

10.1 There was no evidence, including no signed document, to show that the alleged Contractor Agreement governed the parties' rights and roles including in respect of IP and the parties' rights to terminate and on termination. The rights under the Contractor Agreement were central to the complainant's case on the characterisation of the relationship and these matters.

10.2 There was evidence that supported the inference of a partnership, although it was contestable since there was also no finalised partnership agreement in evidence. An email of 20 April 2021 from a principal of the complainant spoke of "agreed split" of net amounts. In an email of 12 October 2022 a principal of the complainant spoke of the need for a separation deed and agreement on property and IP that was consistent with a partnership dissolution and that clients and referral relationships "will need to be bought out both ways and agreed" with ultimately "two businesses".

10.3 A document titled "Licence Agreement Framework October 2022" spoke of a 50/50 proposed ownership structure in the "IP Co" Fulcra Financial PL with licences to each agreed partner's current and future asset holding entity. While this spoke of futurity and did not establish an existing partnership, it was not inconsistent with being the formalisation of an existing partnership as much as the conversion of a contracting relationship.

10.4 An email chain in November 2022 was equally inconclusive. In talk of separation from "the Fulcra brand", there was reference to joint clients and

sole clients, and to transfer of all data “we have created together over the past few years”.

10.5 There was an email after the proceedings commenced dated 24 March 2023 from a person within the financial services licence provider setting out his understanding of the relationship, which raised matters said to be consistent with the complainant’s characterisation of the relationship. This was in the supplementary evidence mentioned earlier and there was no opportunity for the respondent to answer it.

11. On the evidence the complainant has not satisfied its onus to establish the second requirement in para 4(a)(ii) with note 2 and para 4c.
12. Turning to the third auDRP requirement, the dates of registration and other matters described above when dealing with the second auDRP requirement, even if contestable, mean that there is real doubt as to the character of the relationship between the parties. In particular, the absence of the signed version of the Contractor Agreement on which the complainant strongly relies leaves no clear basis for its assertion of unilateral rights by reason of its registration of business and corporate names in the face of documents, albeit contestable and inconclusive, that characterise registrations and activity as part of a partnership.
13. The inconclusive state of the evidence means that the complainant has not provided sufficient evidence to resolve in its favour the claim that respondent and its associate have no commercial or other rationale for registration and use of the challenged domain names.
14. On the evidence the complainant has not satisfied its onus to establish the third requirement under auDRP 2016-01 paras 4a(iii) with para 4b.

## Result

15. The complainant has not discharged its onus to establish all the required elements to obtain the remedy it seeks. The complaint is determined in favour of the respondent. The lock on the challenged domain names should be removed within the time limits under the auDRP absent any successful interlocutory application to the contrary of that removal in another appropriate forum. This result does not forestall the parties litigating ownership of or rights to the challenged domain names in another forum as part of determining the underlying dispute as to the characterisation of their relationship: see auDRP paras 2.3, 7.2, Sch A paras 4k, 5, 6, Sch B para 18.

## Determination

- 16. The complaint is not made out and is determined in favour of the respondent. The lock on the challenged domain names should be removed within the time limits under auDRP absent any successful interlocutory application to the contrary of that removal in another appropriate forum.**

5 April 2023

Determining Panel

Gregory Burton SC

Liability limited by a scheme approved under Professional Standards Legislation in addition to under the auDRP