

DECISION

Date of Decision : 25 January 2012

Case number : 2012/01

Appellant : G den Broeder

Respondent : Foundation for Internet Domain Registration in the Netherlands

Appeal against : Decision by the Foundation for Internet Domain Registration in the Netherlands dated 5 September 2011

Subject : Appeal against decision to reverse a change in the registrant of the domain names *mecvvereniging.nl* and *me-cvvereniging.nl*

Introduction

- 1.1 In an e-mail dated 9 September 2011, the Appellant appealed to the C&AB against a decision made by the Foundation for Internet Domain Registration in the Netherlands (referred to below as 'SIDN') on 5 September 2011 (referred to below as 'the Decision').

The documents e-mailed to the C&AB by the Appellant included a copy of the notice issued by SIDN regarding the Decision against which the appeal was made. The Decision entailed the reversal, as provided for in Article 13, clause 1, of the General Terms and Conditions for .nl Registrants (referred to below as 'the General Terms and Conditions'), of a change made on 26 August 2011 in accordance with Article 9 of the General Terms and Conditions, in the name of the registrant of the domain names *mecvvereniging.nl* and *me-cvvereniging.nl*. The effect of the Decision was that the change in the name of the registrant was nullified in SIDN's register. The former and original registrant, R Landman (referred to below as 'the Registrant'), was thus reinstated as the current registrant of the two domain names. In the said notice, SIDN referred the Appellant to Article 13, clause 3, of the General Terms and Conditions, which states that appeal may be made to the C&AB against a decision made pursuant to Article 13, clause 1.

- 1.2 In the appeal document, the Appellant asked for the Decision to be revised and for the change to the name of the registrant of the domain names to be re-implemented. In support of this request, the Appellant stated that, on 22 April 2005, the registrant had registered the domain names in his capacity as a member of the Governing Board of the ME/CSV Vereniging (referred to below as: 'the Association'). According to the Appellant, it was clear from statements made by the registrant in an online discussion forum that the registrant had not made the registrations in a private capacity. It was argued that the statements in question confirmed that the domain names were intended for the use of the Association, rather than for the registrant's own use. By way of evidence, the Appellant submitted a number of screen dumps of discussion forum threads. The Appellant went on to say that the two domain names had been registered in the registrant's name in 2005 because SIDN's Domain Names Register did not allow for a natural person to indicate when applying to register a domain name that he/she was acting on behalf of a legal entity. The Appellant regarded that as a shortcoming in SIDN's administrative system, which had contributed to the problems that had occurred in connection with the domain names. According to the Appellant, the registrant had himself asked in late 2010 for the registrations to be conveyed from his name to that of the Association, but failed to subsequently follow up that request. According to the Appellant, the registrant later took active steps to personally change the content of the websites associated with the domain names.

- 1.3 On 19 September 2011, the C&AB contacted the Appellant by e-mail to confirm receipt of the appeal document. In the e-mail, the C&AB stated that the appeal submitted by e-mail did not satisfy the conditions set out in the Regulations on the Composition, Working Methods and Procedures of the Complaints & Appeals Board (referred to below as 'the Complaints and Appeals Regulations'). The Appellant was accordingly asked to provide additional information and to comply with the other conditions set out in the Complaints and Appeals Regulations. The Appellant was also asked to indicate whether the appeal was being made in a private capacity or in the Appellant's capacity as a governor of the Association, since it was not clear from the original appeal document what capacity the Appellant was acting in. It was additionally indicated that, if the Appellant was acting as a governor of the Association, further documentation should be provided, demonstrating that the Appellant was entitled to act on the Association's behalf.
- 1.4 In a letter dated 23 September 2011 and received by the C&AB on 27 September 2011, and in an e-mail dated 23 September 2011, the Appellant provided additional information to support the appeal. To accompany the material sent by e-mail on 9 September, the Appellant provided a copy of the Association's constitution, dated 11 December 2006. Further information concerning certain aspects of the appeal was also provided in a covering letter on the Association's headed notepaper and signed by the Chair and sole governor of the Association, G. den Broeder. According to the Appellant, the registrant had developed the Association's website, completing the work in 2010. Reference was made to a decision of the Almelo Court (Almelo Court summary judgement, 11 July 2011, LJN: BR1312), which the Appellant argued set a precedent, by which the Association, as the principal, was entitled to assert itself as the rightful registrant of the domain names. The Appellant accordingly asked to be reinstated as the registrant of the two domain names.
- 1.5 On 12 October 2011, in accordance with Article 5, clause 4, of the Complaints and Appeals Regulations, the C&AB sent a copy of the appeal document to SIDN. As provided for in Article 5, clause 8, of the Complaints and Appeals Regulations, the C&AB also decided to inform the registrant and to afford him the opportunity to respond to the appeal, since the C&AB's ultimate decision would have direct implications for him.
- 1.6 The registrant responded by e-mail on 23 October 2011, stating that the Appellant had abusively changed the name of the registrant recorded in the Domain Name Register. According to the registrant, the Appellant had made the change without the written consent of the registrant or of the Association's legitimate Board of Governors. According to the registrant, the Appellant was not entitled to act on the Association's behalf. Authority to represent the Association, it was asserted, lay solely with the Association's new and current Board, which had been elected at a Special Members' General Meeting on 11 June 2011. On 5 July 2011, the new Board had removed all reference to Den Broeder as Chair of the Association's Board of Governors from the

information registered with the Chamber of Commerce. The e-mail was accompanied by copies of letters written to the registrant by the Association's new Board, stating, amongst other things, that Den Broeder was no longer registered with the Chamber of Commerce as Chair of the Association's Board of Governors. In support of this assertion, a recent extract from the Trade Register was provided, together with copies of the associated correspondence.

- 1.7 In response to the registrant's reply, the Appellant provided additional information in an e-mail of 31 October 2011. The e-mail and accompanying documentation related mainly to the question of who was entitled to represent the Association. According to the Appellant, the re-formed Board was not legitimate and the revision of the Trade Register had been made without authority. In support of these assertions, minutes and a notice of a members' general meeting were provided, together with an extract from the Trade Register dated 4 November 2010. The Appellant stated that the registrant had since given other parties access to the domain name *me-cvvereniging.nl* with a view to modifying the content of the associated website. The Appellant questioned whether such action was consistent with the rules of the ongoing procedure and requested that, if the action was contrary to the procedural rules, the registrant be ordered to remove all the offending content.
- 1.8 In an e-mail of 11 November 2011 and by post, SIDN formally countered the appeal and submitted documentation in support of its position. In its counter argument, SIDN disputed the Appellant's entitlement to make an appeal and asked that the appeal accordingly be declared inadmissible. SIDN claimed that the Association acting as the Appellant in this case did not in fact have a legitimate interest (as registrant of the domain names *me-cvvereniging.nl* and *mecvvereniging.nl*) in the Decision against which appeal was made. According to SIDN, the only parties entitled to appeal against the Decision were the registrant who had lost control of a domain name as a result of the Decision (Den Broeder) and the former registrant (Landman). In support of this argument, SIDN referred to Article 13, clause 3, of the General Terms and Conditions, which states that 'both the requester and the registrant (or, possibly, former registrant) may appeal against the decision'. Moreover, Article 7 of the General Terms and Conditions states that the person or legal entity identified as the registrant in the Domain Name Register is to be regarded by SIDN as the registrant and as the party entitled to control the registration. SIDN emphasised that the question of whether the Appellant was entitled to proceed under the General Terms and Conditions was separate from the question of whether Den Broeder was entitled to represent the ME/ CVS Association and thus to appeal on behalf of the Association.

In case the C&AB might nevertheless declare the Appellant qualified to make an appeal, SIDN also addressed the substance of the appeal. SIDN stated that the Domain Name Register does not identify who has the right to a domain name, or who the user of a domain name is, but merely who is contractually entitled to SIDN's services in relation to a domain name. SIDN regards the person or legal entity identified as a domain name's registrant in its database as exclusively entitled to exercise contractual rights in relation to that name's registration. For SIDN, the registrant of a

domain name is by definition the party identified as such in the Register. Whether, legally speaking, a registrant controls a domain name in a personal capacity or as the representative of a third party is of no concern to SIDN. Therefore, when making decisions regarding the registration of a domain name or the subsequent amendment of the registration, SIDN does not consider who has the right to a domain; SIDN merely applies the defined rules and procedures governing its contractual relationships with registrants and registrars. In an explanatory note regarding the procedures and rules governing domain names, SIDN pointed out that Article 9 of the General Terms and Conditions allows for the registrant of a domain name to be changed by following a procedure described on SIDN's website. The procedural description states that the registrant must arrange a change through the registrar, who may follow an independently defined procedure consistent with the General Terms and Conditions for Registrars (in this case, the version dated 20 May 2010). Article 4.1 of the latter document states that the registrar may amend a domain name's registration only on the registrant's instructions and that, on each occasion such instructions are given, the registrar must verify that the instructions do indeed come from the registrant.

SIDN stated that, following the registrant's complaint to SIDN that the registrar had, without authority, changed the name of the registrant of the two domain names to that of Den Broeder, SIDN had asked the registrar to demonstrate that the changes had been made at the registrant's request. Moreover, SIDN had repeatedly contacted Den Broeder and given him the opportunity to demonstrate that he had instructed the registrar to make the change on the registrant's behalf. Since no evidence was forthcoming, SIDN had concluded that the Appellant was not authorised to request a change on the registrant's behalf. Hence, SIDN had decided that the change in the registrant of the two domain names had not been made in accordance with the rules and should therefore be reversed.

- 1.9 After deciding that, under the rules, the change in the registrant of the two domain names should be reversed, SIDN had summarily considered whether such a decision might have unreasonable social or other consequences. This possibility was considered because, under certain very exceptional circumstances, Article 28 of the General Terms and Conditions allows SIDN to depart from its defined procedures and to decline to reverse a change of registrant, even if that change was not made in conformance with the rules. However, SIDN saw no reason to exercise its entitlement to depart from the defined procedure in this case. Although the domain names correspond to the name of a particular association, that association was not, SIDN considered, a party to the dispute. Moreover, SIDN felt it was clear that there was division within the Association and that it could not be ascertained (certainly in the context of a summary review) which of the parties was authorised to represent the Association. Another consideration was that the domain names had been in the current registrant's name for more than six years, apparently with the Association's blessing. Against that background, SIDN had concluded that the dispute would need to be resolved by a court or another competent authority. SIDN accordingly decided not to depart from its defined procedures in this case and therefore to reverse the registrant changes.

- 1.10 In its response, SIDN concluded that it had acted in accordance with its rules and procedures and that the Association's appeal should therefore be rejected. Finally, SIDN pointed out that it had long been possible for an association to register a .nl domain name in the association's own name. It was therefore unclear to SIDN why the Association had not availed itself of that possibility, but had arranged for the domain names to be registered in the name of the registrant. SIDN accordingly saw no justification in the Appellant's claim that the domain names' registration to the registrant was merely an administrative necessity. The Association could have registered the two domain names itself; if it had done so, the registrant and the party contractually entitled to SIDN's services would have been the association, not the current registrant.

2 Interim decision

- 2.1 Before the appeal could be considered, (the Chairman of) the C&AB needed to decide whether the Appellant was entitled to represent the ME/CVS Association and therefore to appeal on the Association's behalf. It was concluded that the C&AB could not be certain from the information submitted by the Appellant and the registrant whether the Appellant was indeed entitled to appeal on the Association's behalf. It was apparent that the relevant parties were in dispute, but the particular competence of the C&AB did not permit it to definitively decide the question of the Appellant's status. In light of the information available to it, the C&AB accordingly decided that there were insufficient grounds for refusing to consider the appeal.

3 Consideration of the appeal

- 3.1 The appeal was considered at the C&AB session on 2 December 2011. The session was attended by Den Broeder and by the following representatives of SIDN: M Simon (General Counsel), AK Vink and C van Spaandonk (Registration & Service Department).

At the hearing, the Appellant went over the arguments presented in the appeal document. The Appellant expressed the opinion that, in legal terms, the case was 90 per cent comparable to the case involving a web developer, which the Almelo High Court had decided in July 2011. The Appellant stated that the website associated with the disputed domain names was the Association's primary medium of internal communication. Consequently, the registrant's activities were causing the Association considerable inconvenience. The registrant, it was asserted, had reinstated old content on the website, with the result that visitors were confronted by outdated information or could not find the information they required. The Appellant claimed that, at the end of 2010, the registrant had told the Association that all work would be completed by 1 January 2011 and that the domain names would then be handed over. Indeed, the registrant had apparently previously indicated orally that the domain names were already in the Association's name.

The Appellant stated that, in August 2011, he had, through his business Magnana Mu Publishing and Research, which was a 'reseller' for a registrar, changed the name of the registrant of the two domain names. It was the first time that he had changed the registrant of a domain name since becoming a reseller. Asked whether the appeal had been made on his own behalf or on behalf of the Association, the Appellant said that when he had written his first letter he had been unsure on that point, but that in subsequent correspondence and at the session he was acting on behalf of the Association.

- 3.2 In support of its written reaction to the appeal, SIDN stated in session that it was not relevant who was entitled to represent the Association, or even who was entitled to use the domain names. Such issues should properly be addressed through other legal channels, such as SIDN's Dispute Resolution System for .nl Domain Names. When entering into a registration contract, an applicant was required to agree to the General Terms and Conditions, under which the registrant was responsible for any infringement of third-party rights that a registration might entail. Any legal dispute arising out of that situation was not the business of C&AB.

In the case under consideration, SIDN had not departed from its standard procedure. It first considered whether the registrant had consented to the changes. SIDN had asked the registrar whether that was the case, but the registrar had been unable to produce any evidence to indicate that consent had indeed been obtained. The registrar's inability to provide evidence was due to the changes having been made by the registrar's reseller; the registrar forwarded reseller-initiated changes automatically. In this case, the changes were automatically forwarded by a 'sub-registrar' without any documentation being retained. Thus, the registrar had not adhered to the applicable procedural rules. SIDN had concluded that the various parties were in dispute, and that no consent had been given for the change of registrar. In that context, the Appellant's assertion that an oral undertaking had been made did not constitute evidence of consent. After reaching this conclusion, SIDN had, as provided for in Article 28 of the General Terms and Conditions, made a summary assessment as to whether a decision to reverse the change might have socially unacceptable consequences. At the time, SIDN had assumed that Den Broeder had arranged the change on his own behalf; SIDN had seen no clear evidence that Den Broeder had acted on the Association's behalf.

4 **Consideration**

- 4.1 The C&AB received the Appellant's appeal within thirty days of the date of the decision in question, as required by Article 13, clause 3, of the General Terms and Conditions, and Article 4, clause 4, of the Regulations on the Composition, Working Methods and Procedures of the Complaints & Appeals Board. The Appellant's appeal against SIDN's Decision of 5 September 2011 was therefore made in good time. Furthermore, the appeal fee required pursuant to Article 4, clause 4, of the Complaints and Appeals Regulations and Article 1, clause 1, of the Schedule of Appeal and Complaint Fees was paid to SIDN by the Appellant within the prescribed time limit.
- 4.2 Before the substance of the appeal may be considered, it is necessary to consider whether an appeal by the Appellant is admissible under the General Terms and Conditions and the Complaints and Appeals Regulations. According to Article 13, clause 3, of the General Terms and Conditions, either the requester or the registrant (or, as the case may be the former registrant) may appeal against a decision made by SIDN on the basis of Article 13, clause 1, of the General Terms and Conditions. More specifically, in this case, appeal may be made by the party who was displaced as registrant by the Decision, namely Den Broeder, or by the party who had previously been displaced as registrant but was reinstated as registrant by the Decision. The Association itself, being neither the current registrant nor the displaced registrant of the domain names *me-cvvereniging.nl* and *mecvvereniging.nl*, has no interest in the Decision. Hence, if the Association were to appeal against SIDN's Decision, that appeal would not be admissible.

The latter observation does not address the question of whether the C&AB was able to establish with reasonable certainty on whose behalf Den Broeder made the appeal. From the appeal documentation originally submitted, it was not clear to the C&AB who had an interest in the Decision and by whom, exactly, appeal was being made. The Appellant was accordingly asked for clarification. From the evidence given in session, it became apparent that the Appellant had not, when responding to the C&AB's enquiries concerning the capacity in which he was making the appeal, considered his response very carefully and had consequently stated retrospectively that he was acting on behalf of the Association, even though the original appeal document could have been interpreted as having been submitted by Den Broeder in a private capacity. The C&AB therefore considers that, in view of the confusion that may have arisen in the course of the procedure, the Appellant's failure to state clearly that he was appealing in a personal capacity should not preclude consideration of the appeal. In view of the interests at stake in this case, the C&AB considers it desirable that the appeal be deemed admissible. The C&AB has accordingly treated the appeal as having been made by Den Broeder in a personal capacity.

- 4.3 The appeal being deemed admissible, the correctness of the Decision may be considered. Article 9 of the General Terms and Conditions states that the registrant may convey a domain name to another person or entity by putting the registration into the name of that person or entity. It is also stated that the procedure for effecting such a change of registrant is as defined on SIDN's website. In summary, that procedure provides for the registrar that represents the registrant to effect the change by a method, in the definition of which the registrar is permitted a degree of discretion, subject to the condition that the General Terms and Conditions for Registrars are complied with. Article 4, clause 1, of the General Terms and Conditions for Registrars states that a registrar may amend a registration only on the instructions of the registrant, and that the registrar must always verify that the party giving amendment instructions is the registrant or someone authorised to represent the registrant. The C&AB notes that the provisions of Article 4, clause 1, of the General Terms and Conditions for Registrars were not complied with when the registrant of the domain names *mecvvereniging.nl* and *me-cvvereniging.nl* was changed. The registrar was certainly unable to provide any documentary evidence that the change had been made on the registrant's instructions or that steps had been taken to ascertain that the party giving amendment instructions was authorised to do so. The C&AB is of the opinion that the Appellant similarly presented no persuasive evidence, either in the appeal document or in session, that he had acted on the registrant's instructions when arranging the changes. The Appellant's assertion that the registrant had orally consented is contradicted by the registrant's actions and the e-mail dated 23 October 2011. The C&AB therefore considers that SIDN's reversal of the changes was consistent with the General Terms and Conditions and the General Terms and Conditions for Registrars.
- 4.4 The C&AB also considers that SIDN acted appropriately and in accordance with the General Terms and Conditions in other respects, and sees no grounds for the review of SIDN's assessments or decision-making. The C&AB accepts, for example, SIDN's assertion that it was always open to the Association to register the domain names in the name of the Association. If, due to unfamiliarity with the relevant rules and procedures, the Association failed to take advantage of the opportunity to register the domain names in its own name, that does not change the fact that it could have done so.
- 4.5 The C&AB takes the view that the judgement of the Almelo High Court (Almelo High Court summary judgement, 11 July 2011, LJN BR1312), to which the Appellant repeatedly referred, is not relevant to the C&AB appeal procedure. It is not within the remit of the C&AB to consider the legal principles underpinning that ruling. Other legal mechanisms exist for the consideration of such matters, including civil legal proceedings and action through SIDN's Dispute Resolution System.

5 **Decision**

The Complaints & Appeals Board of the Foundation for Internet Domain Registration in the Netherlands hereby declares that the Appellant's appeal dated 9 September 2011, as supplemented on 23 September 2011, is unfounded. The C&AB accordingly orders SIDN to remove the limitations placed upon the domain names and to leave the registration in the name of the current registrant.

This decision was issued on 25 January 2012 by Meester AJ van der Meer, Chairman of the Complaints & Appeals Board, Professor Th CJA van Engelen and Professor BJ Koops, members of the Complaints & Appeals Board, in the presence of Meester HJM Gardeniers, Secretary to the Complaints & Appeals Board.

The Chairman

The Secretary

Meester AJ van der Meer

Meester HJM Gardeniers