

DECISION

Date of decision : 28 December 2012

Case number : 2012/03

Appellant : J Wijnakker

Respondent : Foundation for Internet Domain Registration in the Netherlands

Appeal against : Decision of the Foundation for Internet Domain Registration in the Netherlands dated 16 July 2012

Subject : Appeal against a decision to undo a registrant change for the domain name carcasting.nl

Introduction

- 1.1 In an e-mail dated 15 August 2012 and by letter, the Appellant appealed to the Complaints & Appeals Board for .nl Domain Names (referred to below as the 'C&AB') against a decision made by the Foundation for Internet Domain Registration in the Netherlands (referred to below as 'SIDN') dated 16 July 2012 (referred to below as the 'Decision').

The documents made available 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 in the name of the registrant of the domain name 'carcasting.nl', which had been made on 17 January 2012, as provided for in Article 9 of the General Terms and Conditions.

The consequence of the Decision was that the change in the name of the registrant, as recorded in SIDN's database, was reversed ('undone'). The former and original registrant, Car Casting & Consultancy – a business that, according to SIDN, was operated at the risk and expense of Mr Van der Meer – (referred to below as the 'Registrant') was thus reinstated as the registrant of the domain name.

In the notice of its Decision, SIDN drew attention to Article 13, clause 3, of the General Terms and Conditions, which states that appeal to the C&AB may be made against a decision made on the basis of Article 13, clause 1.

The Appellant's case

- 1.2 In the appeal document, the Appellant asked for the Decision to be reviewed and for the change in the name of the registrant of the domain name to be upheld.

The Appellant contended that Webstekker, an SIDN registrar, had provided the Appellant with the transfer token required to transfer a domain name from one registrar to another. Webstekker apparently assured the Appellant by phone that the token had been correctly issued. Webstekker also apparently told the Appellant that, according to its records, the domain name was not registered in the Registrant's name.

The Appellant also stated that he had spent more than six months setting up a business using the domain name carcasting.nl. Hence, the domain name had become an integral feature of his business activities. For example, the domain name and e-mail address had been published on film production sites, in mail-outs and in production agendas and trade journals. If the Appellant were no longer allowed to use the domain name, six months of promotional work and a considerable amount of printed material and goodwill would all be lost, it was stated.

The Appellant could not understand why SIDN had not acted earlier, in response to a communication from the Registrant in January 2012. The Appellant stated that he had arranged to speak to the Registrant about use of the domain name, but that the Registrant had changed his mind about negotiating with the Appellant due to SIDN's failure to arrive at a prompt decision.

Acknowledgement by C&AB

- 1.3 The C&AB sent the Appellant an e-mail on 24 August 2012 acknowledging receipt of the appeal document, and wrote to him on 14 September 2012 acknowledging receipt of the obligatory appeal fee. In the latter correspondence, the Appellant was also asked to provide any further information that he might have relating to the question of who the domain name's registrant was or regarding any arrangements made with the existing Registrant. The Appellant did not respond to that request.
- 1.4 On 14 September 2012, 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. The C&AB additionally decided to inform the Registrant of the appeal and to give him the opportunity to respond to the contents of the appeal document, as provided for in Article 5, clause 8, of the Complaints and Appeals Regulations. The C&AB decided to inform the Registrant because the outcome of the appeal process would have direct consequences for him.

The Registrant's case

- 1.5 The Registrant responded by e-mail on 25 September 2012, stating that he had demonstrably been the rightful owner of the domain name carcasting.nl since 2000. The phrase 'Car Casting' had apparently been coined by the Registrant's neighbour, in collaboration with whom the registrant had for some time supplied cars, based partly on use of the domain name carcasting.nl. In due course, circumstances apparently led to the associated website being taken off line, but the domain name had been retained for possible use in connection with future activities.

At the start of 2012, the Registrant was informed by his webmaster that the domain name carcasting.nl was no longer registered in the Registrant's name, but in the Appellant's name. The Registrant was subsequently in contact with the Appellant, who apparently acknowledged that the domain name belonged to the Registrant, and offered to buy it from the Registrant. The Registrant was initially noncommittal, but later decided to break off contact with the Appellant, because he was not satisfied with the way negotiations were progressing. According to the Registrant, the Appellant falsely claimed that SIDN was in the process of reviewing the case to establish who the rightful owner was. However, believing that the Appellant would automatically become the owner if no action was taken, the Registrant asked SIDN to undo the registrant change. In his e-mail, the Registrant provided the C&AB with various documents supporting his case.

Response by SIDN

- 1.6 SIDN responded by e-mail on 11 October 2012 and by post, accompanying its response with supporting documentation. SIDN explained that its register does not record who is entitled to a domain name, or who the domain name's user is. The register records only the identity of the party with whom SIDN has entered into a service contract for the domain name. Consequently, when making decisions regarding the registration of a domain name or regarding subsequent changes to the registration, SIDN does not consider who is entitled to the relevant domain name. SIDN simply follows the rules and procedures applicable to its contractual relationships with its registrants and registrars.

SIDN asserted that the supporting documentation showed that the domain name *carcasting.nl* was registered on 20 October 2000 in the name of Car Casting & Consultancy. Although the business in question had subsequently ceased trading, the extract from the Trade Register showed that it had been operated at the risk and expense of a sole proprietor, Mr R van der Meer. In SIDN's experience, it was not uncommon for a registration to be in the name of a business that had ceased to exist. In such circumstances, if the business had been a sole proprietorship, SIDN regarded the person at whose risk and expense the business had previously been operated as the party entitled to succeed the business as the registrant. In the case under consideration, that party was Mr R van der Meer. The fact that the registration was in the name of Car Casting & Consultancy while the business was actually called Car Casting & Consulting was regarded by SIDN as a trivial discrepancy. SIDN's reasons for taking that view were that the registration included the Trade Register number of Car Casting & Consulting and that there was no registered business called Car Casting & Consultancy. Car Casting & Consultancy had remained the registrant of the domain name from the time of registration in 2000 until 17 January 2012.

Since its registration, the domain name had, however, been transferred between registrars on several occasions. On 17 January, Registrar.eu transferred the domain name to its own control and then changed the registrant's name to that of the Appellant. The fact that the transfer and registrant change were performed by a reseller of the registrar did not matter according to SIDN, since under the terms of the contract with SIDN, the registrar was responsible for the actions of resellers. SIDN has no contractual relationship with a reseller, and a reseller has no formal status within SIDN's regulatory system.

In its response, SIDN explained how a domain name transfer (the transfer of a domain name from one registrar to another) is performed. A registrar is entitled to transfer a domain name to itself only if the registrar has been instructed to do so by the registrant, or at least has the registrant's permission. In order to prevent a domain name being transferred against the wishes of the registrant, SIDN requires the use of a transfer token: a unique identifier linked to the domain name, which SIDN issues to the managing registrar. The managing registrar is required to disclose the token to the

registrant if the latter requests it, so that the registrant may give it to another registrar in order that a transfer may be effected.

According to SIDN, the supporting documentation showed that Registrar.eu had received the transfer token for the domain name carcasting.nl from the Appellant. The transfer token was then used to transfer the domain name to Registrar.eu. The Appellant had obtained the transfer token from a certain Mr Kloos, from whom the Appellant believed he had purchased the domain name for € 100. Mr Kloos had in turn obtained the transfer token from Webstekker, the registrar that managed the domain name prior to the transfer. SIDN reported that, on 29 January 2012, Webstekker had explicitly acknowledged having disclosed the transfer token to 'an unauthorised person' due to an 'administrative error'.

SIDN therefore concluded that the transfer token had been given to a third party without any instruction from or the consent of the Registrant, thus enabling the domain name to be transferred without the Registrant's consent. Then, according to SIDN, the name of the domain name's registrant recorded in SIDN's registration system had been changed to the Appellant's name, apparently at the Appellant's request. In an explanation of the regulations and procedures applicable to domain names, SIDN stated that Article 9 of the General Terms and Conditions allows for a domain name's registrant to be changed. The article in question refers to further information on SIDN's website, which describes how a registrant who wishes to have a change made has to arrange the change through the registrar (who may have a special procedure for requesting a change). The registrar is, in turn, bound by the General Terms and Conditions for Registrars (in this case the version dated 20 May 2010). Article 4.1 of those Terms and Conditions states that a registrar may make changes to a domain name's registration only on the registrant's instructions and that, whenever a registrar is instructed to make a change, the registrar should verify whether the party giving the instructions is indeed the registrant. According to SIDN, there was no evidence that, in the case under consideration, any steps had been taken to verify the status of the party giving the instructions. SIDN also stated that, when asked to do so by SIDN, Registrar.eu had also been unable to demonstrate that it had acted on the instructions of or with the consent of the Registrant.

SIDN additionally provided a chronological summary of events surrounding the report of a wrongful change of registrant and the response to that report. The summary showed that the matter was drawn to SIDN's attention by an advisor of the Registrant on the day that the domain name was transferred, i.e. 17 January 2012.

- 1.7 SIDN initially referred the Registrant to the registrar that had disclosed the transfer token, and to the registrar that had arranged the change of registrant. SIDN had subsequently been informed by Webstekker that it had issued the transfer token to the wrong person.
- 1.8 On 2 February 2012, the Appellant contacted SIDN in an effort to prevent the change of registrant being reversed, arguing that he had legitimately acquired the domain name

from Mr Kloos. SIDN however responded that the Appellant could have ascertained that Mr Kloos was not the domain name's registrant by referring to the public WHOIS on SIDN's website and the Trade Register.

- 1.9 Because it was clear that the Appellant had in the meantime contacted the Registrant or the Registrant's representative, SIDN subsequently told the Registrant that it assumed that the matter would be resolved by negotiation between the parties. It was also indicated that SIDN would not intervene unless the Registrant made a reasoned request to that effect. SIDN eventually received such a request on 14 June 2012. In response to that request, SIDN decided to undo the registrant change for the domain name carcasting.nl on 16 July 2012. According to SIDN, the Appellant was not able to demonstrate that he had acted on the Registrant's instructions. On that basis, SIDN concluded that the registrant change had not been made in accordance with the rules and should therefore be reversed.
- 1.10 Because SIDN does not ordinarily concern itself with the question of who is entitled to use a domain name, SIDN did not consider whether the Appellant had by this stage acquired an interest in the use of the domain name. SIDN indicated that it had nevertheless considered in general terms whether its decision was likely to have unacceptable (social) consequences. In very exceptional circumstances, where such consequences are anticipated, Article 28 of the General Terms and Conditions allows SIDN to depart from its procedures and to decide not to reverse a wrongful change of registrant. However, in the case under consideration, SIDN saw no reason to depart from its procedures, and accordingly decided that the change should be reversed. One of the factors that influenced that decision was that the Appellant had been made aware of the Registrant's dissatisfaction within days of the change being made.
- 1.11 SIDN concluded its response to the appeal by asserting that its decision was lawful and consistent with SIDN's own procedures and regulations, and that, taking all the circumstances into account, it was reasonable for SIDN to reach the decision it had made. SIDN accordingly asked the C&AB to dismiss the Appellant's appeal.

2 **Consideration of the appeal**

- 2.1 The appeal was considered at the C&AB session on 20 November 2012. The session was attended by the Appellant, Mr J Wijnakker, the Registrant, Mr R van der Meer, and Mr M Simon (SIDN's General Counsel) and Meester A K Vink (also representing SIDN).
- 2.2 At the session, the Appellant elaborated on the arguments set out in the appeal document. The Appellant stated that he had reason to assume that Mr Kloos was the rightful registrant, because he was unable to trace Car Casting & Consultancy in the trade register and Webstekker had informed him that the transfer token had been correctly issued. The Appellant could not understand why SIDN had waited nearly four months before deciding to reverse the change. During that period, he had invested in the further development of the domain name. He had not merely remained passive, but had made enquiries and had established that it was Webstekker that had been at fault. At the same time, he had agreed with the Registrant that they would await the outcome of SIDN's review of the matter.
- 2.3 The Registrant reported that the Appellant had shown an interest in the domain name as long ago as 2009. At first, the Registrant had been willing to negotiate concerning the domain name. The Appellant had indeed asked the Registrant to wait and not to undertake action. At the session, it became apparent that there had been a misunderstanding between the Appellant and the Registrant as to which of them should take action; each had been waiting for the other. When it became apparent that the domain name would automatically become the Appellant's if the Registrant did nothing, the Registrant decided to object to SIDN about the change. In the meantime, there had been talks about the possibility of the Appellant using the domain name, but the Registrant had withdrawn his cooperation because he felt that the Appellant was not abiding by their agreements.
- 2.4 SIDN added to the information in its response document by asserting that the transfer of the domain name from Webstekker to Registrar.eu had been irregular. The releasing registrar had disclosed the transfer token in error. Although a wrongful transfer had been made in this particular case, SIDN stressed that such problems were very unusual. Furthermore, SIDN was not required to make a decision of this kind within a particular period of time. SIDN had been led to believe that the disputing parties were in negotiations and considered it best to refrain from active intervention pending the outcome of those negotiations. However, the negotiations had continued for an unusual length of time.
- 2.5 In that period, SIDN made an interim decision to leave the Appellant's name server linked to the domain name, so that internet users were directed to the Appellant's website and the Appellant was thus able to continue making active use of carcasting.nl.

3 **Consideration**

- 3.1 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 2, of the Regulations on the Composition, Working Methods and Procedures of the Complaints & Appeals Board. The Appellant's appeal against SIDN's Decision of 16 July 2012 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.
- 3.2 Those facts having been established, the C&AB considered the legitimacy of SIDN's Decision. Article 9 of the General Terms and Conditions states that the registrant may convey a domain name's registration to another person or entity by arranging for the name of the registrant recorded in SIDN's database to be changed to that of the other person or entity. It also states 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 an amendment instruction is the registrant or someone authorised to represent the registrant.
- 3.3 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 name *carcasting.nl* was changed. The registrar was certainly unable to provide any documentary evidence that the change had been made on the registrant's instructions. From the information provided by the parties, it also seems likely that the registrar did not check (or adequately check) whether the party requesting the change 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. Nor did the Appellant adequately explain why he should be regarded as the rightful registrant.
- 3.4 The C&AB therefore considers that SIDN's reversal of the change was consistent with the General Terms and Conditions and the General Terms and Conditions for Registrars.
- 3.5 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.

In reaching that view, the C&AB has taken account of the fact that the Appellant was aware of the Registrant's dissatisfaction within days of the transfer being made on

17 January 2012. The fact that SIDN took a considerable time to arrive at a decision is not significant in that context.

- 3.6 The C&AB nevertheless believes that SIDN could make it clearer to the parties in such cases what provisional measures will apply pending a definitive decision and what the scope of such provisional measures is, such as SIDN's interim decision in this case that allowed the Appellant to continue using the domain name pending resolution of the disagreement.
- 3.7 The C&AB also emphasises that, in accordance with Article 3.7 of the Complaints and Appeals Regulations, the C&AB has considered only whether SIDN's decision was lawful and consistent with SIDN's own regulations, and whether SIDN acted reasonably at all times in arriving at its decision.
- 3.8 Hence, the C&AB's decision takes no account of the relationship between the Appellant and the Registrant. If and insofar as legal matters remain to be resolved, the parties should make use of the appropriate resolution mechanisms, such as SIDN's Dispute Resolution System for .nl Domain Names or the civil courts.

4 **Decision**

The Complaints & Appeals Board of the Foundation for Internet Domain Registration in the Netherlands hereby declares that the Appellant's appeal dated 15 August 2012 is unfounded. The C&AB accordingly orders SIDN to remove the limitations placed upon the domain name and to leave the registration in the name of the current Registrant.

This decision was issued on 28 December 2012 by Meester AJ van der Meer, Chairman of the Complaints & Appeals Board, Professor Th CJA van Engelen and EJ Louwers, members of the Complaints & Appeals Board, in the presence of Meester HJM Gardeniers, Secretary to the Complaints & Appeals Board.

[Signature of] The Chairman

[Signature of] The Secretary

AJ van der Meer

Meester HJM Gardeniers