

DECISION

Date of decision	: 29 January 2016
Case number	: 2016/01
Appellant	: DD Webhosting B.V.
Respondent	: Foundation for Internet Domain Registration in the Netherlands
Appeal against	: Decision by the Foundation for Internet Domain Registration in the Netherlands dated 8 September 2015
Subject	: Appeal against decision by the Foundation for Internet Domain Registration in the Netherlands to cancel the Appellant's registrar contract

Introduction

- 1.1 In a letter dated 25 September 2015, the Appellant submitted an appeal to the Complaints & Appeals Board for .nl Domain Names (referred to below as 'the C&AB'), against a decision dated 8 September 2015 made by the Foundation for Internet Domain Registration in the Netherlands ('SIDN') regarding the termination of the appellant's registrarship ('the Decision').

The effect of the Decision was the immediate cancellation of the registrar contract between SIDN and the Appellant, as provided for in Article 8, clause 3, of the General Terms and Conditions for Registrars ('the General Terms and Conditions'). Article 4, clause 2, of the Regulations on the Composition, Working Methods and Procedures of the Complaints & Appeals Board ('the Complaints and Appeals Regulations') allows for appeal against a decision made pursuant to Article 8.3 of the General Terms and Conditions to be made to the C&AB within thirty days of the decision in question.

Substance of the appeal

- 1.2 In the appeal document prepared by the Appellant's legal counsel, it was stated that the Appellant considered the Decision to be inconsistent with the General Terms and Conditions applicable to the contract between the Appellant and SIDN. With reference to Article 8, clause 3, of the General Terms and Conditions, the Appellant contended that, in this case, the Decision served no useful purpose. The Appellant reported that a sum of money owing to SIDN had to be paid no later than 8 September 2015, and had been paid only six days after the due date, on 14 September 2015.
- 1.3 The Appellant accepted that the sum in question had been paid after the due date, but took the view that the exception provided for in the second sentence of Article 8, clause 3b, of the General Terms and Conditions was applicable. The passage in question states that the relationship between SIDN and a registrar will not be terminated with immediate effect if "immediate termination of the relationship would be an unreasonably severe sanction in relation to the nature of the failure or action in question and considering the implications of termination for the registrar". The Appellant claimed that the nature of the default was purely administrative: failure to arrange prompt payment of the sum due. While acknowledging that prompt payment was an important condition of the contract between the parties, the Appellant contended that the nature of the default and the fact that the sum in question was paid within a week of the due date meant that the sanction (immediate cancellation of the contract) was unjustified.

The Appellant also took the view that the serious and far-reaching nature of the Decision's consequences for the Appellant's business made it disproportionate in relation to the default and considering its nature. The Appellant argued that the lack of proportionality between the default and (the consequences of) the Decision meant that the Decision could not be reconciled with Article 8, clause 3b, of the General Terms and Conditions.

Alternatively, the Appellant asserted that, if the foregoing arguments were not accepted, the Decision should be annulled (and possibly a less severe sanction imposed in its place) in accordance with the procedural hardship provisions. In support of that argument, the point was made that the Appellant was a company operated by a sole trader, for whom association with SIDN served as a seal of quality. The Appellant therefore attached great value to its relationship with SIDN and had a strong interest in maintaining that relationship. If the Decision were upheld, it was likely to result in the failure of the company, the Appellant stated. The Appellant concluded by contending that SIDN had not acted in accordance with its procedures and, in view of the need for proportionality and for fairness and reason, called upon the C&AB to annul the Decision and to require continuation the relationship between SIDN and the Appellant.

Acknowledgement by C&AB

- 1.4 The C&AB wrote to the Appellant by e-mail and by post on 13 October 2015, acknowledging receipt of the appeal document. The acknowledgement drew the Appellant's attention to the fact that, in its original form, the appeal document did not satisfy all the requirements set out in Article 4, clause 3, of the Complaints and Appeals Regulations. Those requirements were not satisfied insofar as the appeal document was not accompanied by a copy of the decision against which appeal was made (although the

Appellant had explicitly described the import of that decision). The Appellant accordingly supplemented the appeal document by post and by e-mail on 20 October 2015. The necessary appeal fee was received on the same date. On 2 November 2015, 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 and requested a response.

SIDN's response

- 1.5 SIDN responded by e-mail and by post on 27 November 2015, stating its case and providing supporting documentation. In its response, SIDN stated that the Appellant had failed to settle SIDN's invoice of 6 July 2015 within the term of twenty-one days. By 8 September 2015, the invoice had still not been settled, despite several reminders having been sent to the Appellant in the interim. On 8 September 2015, SIDN accordingly decided to end its relationship with the Appellant.

A registrar's financial obligations are governed by Article 5 of the General Terms and Conditions. That article makes reference to a specification of payment terms on SIDN's website. On the basis of that specification, the Appellant should have settled the invoice no later than 27 July 2015. Since payment was not ultimately made until 14 September 2015, it was clear in SIDN's view that the Appellant had not fulfilled its financial obligations.

In its response, SIDN described the procedure that was followed in the event of a registrar failing to settle an invoice. SIDN had acted in accordance with that procedure. SIDN had originally issued the invoice on 3 July 2015 by sending it by e-mail to the address nominated for the purpose by the Appellant. On 20 July 2015, SIDN had attempted to collect the sum due using the direct debit system, but the transaction was refused by the bank because there were insufficient funds in the relevant account. On 30 July 2015, having noted that payment had not been received, SIDN issued a reminder by post and by e-mail. On 11 August 2015, after establishing that payment had still not been made, SIDN placed restrictions on the Appellant's registrar account and informed the Appellant accordingly by post and by e-mail. On 25 August 2015, after establishing that payment had still not been made, SIDN suspended the Appellant's registrar account and informed the Appellant accordingly by post and by e-mail.

On 1 September 2015, a staff member of SIDN's Registration & Service Department phoned Mr Den Dulk, the Appellant's administrative contact and proprietor, to inform him that SIDN intended to strike off the company as a .nl registrar. During the conversation, Mr Den Dulk had said that the invoice would be settled the following day. However, payment had still not been made by 8 September 2015, prompting SIDN to decide to end its relationship with the Appellant. That decision was communicated to the Appellant by e-mail and by registered post.

In addition to describing the procedure that had been followed, SIDN said that the previous payment behaviour of the Appellant and its legal predecessor, Mr Den Dulk, had a significant bearing on the case. Since Mr Den Dulk had become a registrar in late 2011, SIDN reported, there had been numerous payment-related incidents. In 2012, SIDN had once suspended Mr Den Dulk's registrar account due to failure to settle an invoice

promptly, and a direct debit transaction was once refused by the bank due to insufficient funds. In 2013, SIDN had twice made non-standard payment arrangements with Mr Den Dulk at the latter's request, and direct debit transactions were refused by the bank on two occasions due to insufficient funds. In 2014, SIDN had twice made non-standard payment arrangements with Mr Den Dulk at the latter's request, and direct debit transactions were refused by the bank on nine occasions due to insufficient funds.

Furthermore, SIDN had placed restrictions on Mr Den Dulk's registrar account eight times due to failure to promptly settle an invoice. At the end of October 2014, because of the frequency of direct debit transactions being refused, SIDN had cancelled Mr Den Dulk's direct debit arrangement and had informed him that he was in future required to arrange payment within twenty-one days. In 2015, SIDN had on six occasions placed restrictions on Mr Den Dulk's registrar account and subsequently on the account of the Appellant (a company of which Mr Den Dulk was the sole proprietor, which had succeeded Mr Den Dulk in March 2015) due to failure to promptly settle an invoice. On four of the six occasions, the account had subsequently been suspended, and on three occasions direct debit transactions were refused by the bank due to insufficient funds. Failure to promptly settle SIDN's invoice of July 2015 had ultimately led to the Appellant being struck off as a registrar.

- 1.6 In its response, SIDN stood by its decision. In SIDN's view, it was clear that the Appellant had failed to fulfil its financial obligations. SIDN had accordingly decided to terminate the Appellant's registrar contract, as provided for in Article 8, clause 3b, of the General Terms and Conditions. The said provisions allow SIDN to end its relationship with a registrar with immediate effect if the registrar fails to meet any of its obligations to SIDN. In the period prior to the Decision, SIDN had in circumstances where it was entitled to terminate its relationship with the Appellant repeatedly chosen to impose less severe sanctions, as provided for in Article 8, clause 4, of the General Terms and Conditions. Those sanctions involved placing restrictions on and suspending the registrar account of the Appellant and the Appellant's legal predecessor.

In view of the circumstances of the case, SIDN did not consider termination of the Appellant's registrar contract to be an unreasonably severe sanction. SIDN asserted that it had been very lenient in terms of giving the registrar the opportunity to meet its financial obligations and had repeatedly drawn the registrar's attention to the consequences of failing to do so. Hence, SIDN did not consider its action to be disproportionate. Furthermore, SIDN did not believe that the payment behaviour of Mr Den Dulk/the Appellant suggested that the Appellant attached great value to its association with SIDN as a seal of quality. SIDN pointed out that in the period that Mr Den Dulk/the Appellant had been a registrar, the registrar account's access password had been reset by SIDN on five occasions, after being lost or forgotten by the registrar. That too was considered by SIDN to be inconsistent with the assertion that the registrar attached great value to its relationship with SIDN. SIDN ended its argument by pointing out that it had a contract with the Appellant, DD Webhosting B.V., not with Mr Den Dulk personally. No grounds therefore existed for arguing that a less severe sanction should be imposed on the Appellant because of the consequences of severe sanction for Mr Den Dulk personally.

In its response, SIDN concluded that the Decision was made in accordance with the law and with the rules defined by SIDN (the General Terms and Conditions and the published procedures), and that, considering all the circumstances, the Decision was reasonable. SIDN accordingly called on the C&AB to refuse the Appellant's appeal.

2 Consideration of the appeal

2.1 The appeal was considered at the C&AB hearing on 18 December 2015. The hearing was attended by Mr B den Dulk, the Appellant's proprietor, and Mr BPJ van Riel, the Appellant's legal counsel, both representing the Appellant, and by Ms AK Vink and Ms L van Mierlo, representing SIDN.

2.2 At the hearing, the Appellant's legal counsel added to the arguments presented in the appeal document by contending that SIDN's response contained insufficient evidence that SIDN had assessed the proportionality of its action before proceeding. The only justification given for the action was that the payment term had been exceeded. It was acknowledged that SIDN had followed due procedure, but that did not diminish the fact that the consequences for the Appellant were disproportionate, particularly in such difficult economic times. The Appellant's legal counsel argued that less severe sanctions could have been taken, such as again placing restrictions on the Appellant's account.

At the hearing, the Appellant said that SIDN had indeed phoned him as part of the debt recovery procedure. However, due to circumstances that the Appellant said were beyond SIDN's control, the letter confirming the details of the conversation had not reached him in time. The delayed receipt of the letter combined with the fact that, according to the Appellant, the contents of the associated e-mail differed from the contents of the letter, meant that it was not apparent to him that 7 September 2015 was the deadline for payment.

The Appellant's legal counsel concluded by asserting that, from a compassionate viewpoint, the most reasonable and fair course of action was to reverse the Decision.

2.3 At the hearing, SIDN repeated that the Appellant had failed in its financial obligations to SIDN by not settling the invoice dated 6 July 2015 until 14 September 2015. In accordance with the General Terms and Conditions and the associated procedures, the invoice should have been settled no later than 27 July 2015. Under the circumstances, the General Terms and Conditions allowed SIDN to end its relationship with the registrar immediately. However, SIDN had instead followed a procedure under which less severe sanctions were first imposed. In the context of that procedure, the Appellant had been given several opportunities to fulfil its financial obligations to SIDN. SIDN had also sent several reminders and had even contacted the Appellant by phone. In those reminders, SIDN told the hearing, the consequences of continued failure to settle the outstanding invoice had been made clear. It was also reported that other invoices issued to the Appellant remained unpaid. SIDN believed that it had been very patient and had handled the matter correctly. In view of the circumstances of the case, SIDN did not consider termination of the Appellant's registrar contract to be an unreasonably severe or disproportionate sanction.

The response document had described the Appellant's payment history prior to March 2015. In that period, the Appellant's registrar account had been in the name of Den Dulk Solutions, under which the Appellant's proprietor had operated as a sole trader. From March 2015, the limited company DD Webhosting B.V. had taken over the account. SIDN regarded the payment history prior to March 2015 as significant, because it revealed a pattern. SIDN argued that the pattern in the behaviour of Mr Den Dulk/the Appellant had a significant bearing on SIDN's consideration of the Appellant's request that SIDN should reconsider the Decision. According to SIDN, the pattern of behaviour displayed by Mr Den Dulk/the Appellant did not form the basis of the Decision, but was taken into account when considering whether to revise the Decision. At the hearing, SIDN also indicated that it was unwilling to reconsider the rejected payment deferral request.

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 8 September 2015 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. In accordance with Article 3, clause 7, of the Complaints and Appeals Regulations, consideration was limited to two questions: whether SIDN had arrived at its decision in a manner consistent with the law and the rules defined by SIDN, and whether, taking all factors into account, it was reasonable for SIDN to arrive at its Decision.
- 3.3 More specifically, consideration focused on whether Article 8, clause 3, of the General Terms and Conditions permitted SIDN to decide to cancel the Appellant's registrar contract with effect from 8 September 2015 in response to the Appellant's non-fulfilment of its financial obligation to promptly pay the invoice issued to the Appellant on 6 July 2015.
- 3.4 In forming its opinion, the C&AB noted first and foremost that the Appellant did not dispute SIDN's assertion that the Appellant had failed to promptly settle the invoice of 6 July 2015. In view of the Applicant's default, Article 8, clause 3b, of the General Terms and Conditions gave SIDN the authority to terminate the Appellant's registrar contract with effect from 8 September 2015.
- 3.5 Furthermore, it is the C&AB's opinion that it was reasonable for SIDN to exercise that authority. One of the main facts informing that opinion is that explicit reference to the payment term is made in SIDN's General Terms and Conditions and the associated procedures. Furthermore, after noting that the invoice of 6 July 2015 had not been settled on time, SIDN followed a lengthy debt recovery procedure, in the context of which the Appellant's attention was repeatedly drawn to the fact that payment had not been made and to the potential consequences. In the context of that procedure, less severe

sanctions were initially imposed, including first placing restrictions on and subsequently suspending the Appellant's registrar account. Any possibility that the Appellant might not have fully understood the procedure and its consequences were addressed in a telephone conversation between SIDN and the Appellant.

- 3.6 The C&AB sees no grounds for SIDN's reconsideration of the matter or the Decision. The C&AB is also of the opinion that, in view of the Appellant's behaviour, it was reasonable for SIDN to decline the Appellant's request for additional time to meet its financial obligations. Moreover, at the hearing, the Appellant was unable to make any reasonable, concrete proposal that provided assurances sufficient to support reconsideration of that request.
- 3.7 The considerations set out above lead to the conclusion that the Appellant's appeal is unfounded.

4 **Decision**

The Complaints & Appeals Board of the Foundation for Internet Domain Registration in the Netherlands hereby declares that the appeal of 25 September 2015 lodged by DD Webhosting B.V. is unfounded.

This decision was issued on 29 January 2016 by Meester AJ van der Meer (Chairman of the Complaints & Appeals Board), Meester JI de Vreese-Rood and Meester ThCJA van Engelen (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

Meester AJ van der Meer

Meester HJM Gardeniers