

DECISION

Date of decision : 4 February 2013

Case number : 2013/01

Appellant : Me and More c.v. trading as iCloudi Webdesign and More

Respondent : Foundation for Internet Domain Registration in the Netherlands

Appeal against : Decision by the Foundation for Internet Domain Registration in the Netherlands dated 14 September 2012

Subject : Appeal against decision to undo a registrant change for the domain names campingdemaasthorst.nl; hofmansaannemersbedrijf.nl; hofmansoss.nl; hofmanstransport.nl; hofmansgrondbank.nl; hofmanstransportoss.nl; hofmanszand.nl; hofmanszandschajik.nl; hofmanszandoss.nl and recreatieoordemaasthorst.nl

Introduction

- 1.1 In an e-mail dated 10 October 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 14 September 2012 (referred to below as the 'Decision').
- 1.2 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 following domain names, which had been made on 22 August 2012, as provided for in Article 9 of the General Terms and Conditions: campingdemaasthorst.nl; hofmansaannemersbedrijf.nl; hofmansoss.nl; hofmanstransport.nl; hofmanszand.nl; hofmansgrondbank.nl; hofmanstransportoss.nl; hofmanszandschajk.nl; hofmanszandoss.nl and recreatieoordemaashorst.nl.

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, T (APM) Hofmans (referred to below as the 'Registrant') was thus reinstated as the registrant of the domain names. 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

- 1.3 In the appeal document, the Appellant asked for SIDN's Decision to be reversed. The Appellant reported having undertaken website-related work for the Registrant, in both a personal and capacity and a professional capacity. The Appellant stated that the work was governed by the Appellant's General Terms and Conditions, which include an article that, according to the Appellant, entitles the Appellant to change the name of any website hosted for a client by the Appellant, in the event of that client failing to pay the Appellant as agreed. If the relevant article is invoked, the Appellant explained, the change is subsequently reversed if financial settlement is made. According to the Appellant, the Registrant had not paid sums due to the Appellant, and the Appellant was therefore entitled to put the domain names in its own name, as provided for in the Appellant's General Terms and Conditions.

Acknowledgement by C&AB

- 1.4 The C&AB wrote to the Appellant on 26 October 2012, acknowledging receipt of the appeal document. Immediately thereafter, 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 On 21 November 2012, the Registrant's lawyer responded by e-mail and by post to the arguments put forward. In that correspondence, the lawyer stated that the Registrant had arranged for ten domain names to be registered for him about eight years earlier. He commissioned the Appellant to build websites linked to two of the domain names, and to do some other minor work. According to the Registrant, the commissioned work was all paid for and no other work was commissioned by the Registrant. However, the Appellant made additional requests for payment, relating to previously uninvoiced work in progress. The Registrant declined to pay for the additional work. According to the Registrant, the Appellant had still failed to produce any evidence that the work was ever commissioned, to detail what the work entailed, or to demonstrate that the work had actually been done.
- 1.6 The Registrant disputed first that the Appellant's General Terms and Conditions were applicable to the agreement made regarding the building of the two websites. The tender submitted by the Appellant did not state that the Appellant applied General Terms and Conditions, nor was any other statement made regarding the applicability of the General Terms and Conditions. Because the Registrant had not accepted the applicability of the General Terms and Conditions, it was argued, they were not applicable in this case. The Registrant additionally disputed that the General Terms and Conditions accompanying the appeal document were those that the Appellant applied at the time that the Appellant was commissioned to build the two websites. The wording of the General Terms and Conditions had been revised, it was claimed, to suit the circumstances of the dispute under consideration. Since the Appellant's appeal was based solely on what was permitted under the General Terms and Conditions, the appeal was groundless, it was argued, because the General Terms and Conditions were not applicable to the agreement between the Appellant and the Registrant.
- 1.7 Even if the Appellant's General Terms and Conditions were applicable, the Registrant took the view that the Appellant's action had been unjustified, since the Appellant had failed to demonstrate that the additional work was ever commissioned, or therefore that the amounts invoiced to the Registrant were in fact due.

Furthermore, the Registrant contended that the wording of the article in the General Terms and Conditions upon which the appeal was based was ambiguous. The Registrant's response was accompanied by various supporting documents.

SIDN's response

- 1.8 SIDN responded by e-mail on 28 November 2012 and by post. In its response, SIDN indicated that, until 22 August, the domain names to which the appeal relates were registered in the name of the Registrant. On that date, the managing registrar performed a registrant change for all the domain names in question, thus making the Appellant the registrant. On 27 August 2012, SIDN was approached by both the Appellant and the Registrant regarding the amendment. The Registrant indicated that the change had been made without his consent or instructions. The Appellant indicated that the changes were made in accordance with its General Terms and Conditions. On 3 September 2012, the Registrant submitted an Undo Registrant Change form to SIDN, stating that no consent had been given for the registrant change. SIDN then gave the Appellant the opportunity to demonstrate that the change was indeed authorised. The Appellant's lawyer responded to SIDN's enquiry; the lawyer stated that the change did have the Registrant's effective consent, because consent was deemed to have been given under the Appellant's General Terms and Conditions. However, SIDN took the view that the Appellant's General Terms and Conditions did not entitle the Appellant to make a registrant change; SIDN accordingly decided to honour the Registrant's request and to undo the change.
- 1.9 In an explanation of the regulations and procedures applicable to domain names, SIDN stated that Article 9 of the General Terms and Conditions for .nl Registrants 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, in the case under consideration, the managing registrar (Registrar.eu) had been unable to demonstrate, when asked to do so, that steps had been taken to verify that the Appellant was authorised by the Registrant to perform a registrant change for the domain names in question.

- 1.10 SIDN took the view that consent in the sense of the rules on changing a domain name's registrant could not be derived from the article of the Appellant's General Terms and Conditions, upon which the appeal was based. The latter article (article 4.9) states that, if the principal fails to meet his obligations, iCloudi Webdesign and More is authorised to change the name of any website administered by iCloudi Webdesign and More, on the principal's behalf. The article goes on to say that name change will be undone once the principal has paid iCloudi Webdesign everything owing to it. SIDN did not exclude the possibility that a party's General Terms and Conditions might provide a legitimate basis for the derivation of a registrant's consent for a registrant change, and thus for transferring a registration into the name of another party (typically the party laying down the General Terms and Conditions and typically in connection with the non-payment of sums due). However, SIDN took the view that that could be the case only if the General Terms and Conditions in question unambiguously made provision to the effect described. According to SIDN, that implied the use of explicitly formulated General Terms and Conditions, which did not refer to changing the name of a website, when what was meant was changing the name of a domain name's registrant.
- 1.11 Regardless of whether the Appellant's General Terms and Conditions were in fact applicable, SIDN took the view that those General Terms and Conditions did not give the Appellant the authority to instruct the registrar to transfer the registrations in question to the Appellant's name.
- 1.12 In its response, SIDN indicated that it had considered very superficially 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 domain names in question were all derived from the names of businesses affiliated to the Registrant.
- 1.13 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 17 December 2012. The session was attended by the Registrant, Mr APM Hofmans, Mr WH Hofmans and the Registrant's lawyer, Mr LPM van Erp, and by Mr M Simon (SIDN's General Counsel) and Meester AK Vink (also representing SIDN). The Appellant did not attend.
- 2.2 SIDN added to the information in its response document by stating that article 4.9 of the Appellant's General Terms and Conditions related only to websites, not domain names. The author of those General Terms and Conditions could reasonably be assumed to know the difference between a website and a domain name, SIDN argued. The assumption that the author knew the difference was supported by the wording of another article of the Appellant's General Terms and Conditions. Article 4.9 related only to changing the names of websites, not to changing the registrants of the domain names used to reach websites. In summary, SIDN regarded the article as too ambiguous to attach any significance to it.
- 2.3 At the hearing, the Registrant was asked to explain the supporting items previously submitted. The C&AB observed that there was an inconsistency between the two copies of the work tender of 11 April 2012 that it had received (one from the Appellant and one from the Registrant). One copy, which had been signed, referred to the Appellant's General Terms and Conditions, while the other copy, which had not been signed, made no such reference. The Registrant told the hearing that he had never accepted the Appellant's General Terms and Conditions or signed the work tender. The Registrant also emphasised that, even if the Appellant's General Terms and Conditions were applicable, any contract had been with the Registrant's business, not with the Registrant, in whose name the domain names were registered. Hence, if the General Terms and Conditions were applicable in relation to the tendered work, the Registrant was not bound by them.

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 14 September 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 names at the centre of this case 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.
- 3.4 The C&AB also takes the view that, in the appeal document, the Appellant failed to adequately demonstrate an entitlement to change the registrant of the domain names on the grounds that the Registrant was bound by the Appellant's General Terms and Conditions.
- 3.5 The agreement that the Appellant argued was governed by the General Terms and Conditions was between the Appellant and a company owned by the Registrant, H Hofmans BV, not the registrant himself. Furthermore, partly in view of the information provided at the hearing, it is unclear to the C&AB whether it was ever agreed that the Appellant's tender of 11 April 2012 was governed by the Appellant's General Terms and Conditions; indeed, there is reason to believe that the tender as presented by the Appellant was not signed by Mr ACM Hofmans. Nor is it clear whether the version of

the General Terms and Conditions that apparently accompanied the tender actually included the passage that formed the basis of the Appellant's claim of entitlement to change the registrant of a domain name. Nor has it been demonstrated to the C&AB's satisfaction that the Appellant's General Terms and Conditions are applicable to the Appellant's relationship with the Registrant.

- 3.6 The C&AB takes the view that the Appellant's inability to demonstrate that the Registrant was bound by article 4.9 of the Appellant's General Terms and Conditions is in itself sufficient to support the conclusion that the Appellant had no authority to arrange a registrant change. Hence, the C&AB has not considered the legitimacy of the Appellant's claim that the Registrant owes the Appellant money for additional services provided, which turns primarily on the question of whether the additional services were actually commissioned. Nor has the C&AB considered whether a provision such as that made in article 4, clause 9, of the Appellant's General Terms and Conditions may (taking its ambiguity in account) confer the authority to change the registrant of a domain name.
- 3.7 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.
- 3.8 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 decision-making.
- 3.9 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.
- 3.10 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 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 names in question and to leave the registration in the name of the current Registrant.

This decision was issued on 4 February 2013 by Meester AJ van der Meer (Chairman of the Complaints & Appeals Board), D van Roode and Meester 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

Meester AJ van der Meer

Meester HJM Gardeniers