Draft translation

Judgement
Reykjavík District Court, 12 July 2012 in case number E-561/2012:
Datacell ehf.
(Sveinn Andri Sveinsson Supreme Court Attorney.)
versus
Valitor hf.
(Helga Melkorka Óttarsdóttir Supreme Court Attorney.)

This case is filed by DataCell ehf., Sídumúli 28, Reykjavík with a writ filed on 6 February 2012 on Valitor hf., Laugavegur 77, Reykjavík. The case was taken for judgement, subsequent to the main hearing last 21 June.
The plaintiff claims that the defendant be judged, with the addition of daily fines of the amount of ISK 1 million, to open the payment gateway according to the agreement between the plaintiff and the defendant dated 15 June, 2011. In addition to this, the plaintiff demands litigation costs, according to the statement to the amount of ISK 4,529,169.
The defendant demands to be judged free of all claims of the plaintiff. He demands litigation costs, according to the statement to the amount of ISK 1,877,700.

The plaintiff says he has two types of operation. On the one hand, he operates data centres here in this country and in Switzerland and sells access to them. First and foremost, payment is made for this service with credit cards. On the other hand, he works for parties that base their operations on free donations. He receives electronic payments to these parties according to an agreement with parties that provide payment services and that operate within the international credit card companies. One of its customers in this field is Sunshine Press Productions ehf., the operating company of WikiLeaks whistleblower website.

The plaintiff says that in this country there are three parties that offer payment services for those that agree to payment by credit card. In addition to the defendant they are KortaThjónustan ehf. and Borgun hf.

On 15 June, 2011 the parties to this case made an agreement on a payment gateway for the plaintiff. It was taken into use shortly after that date and the plaintiff says that donations had streamed in. The word had been spread in this country through the media and abroad that it was possible to donate to WikiLeaks by credit card through the plaintiff's payment gateway.

The defendant closed the plaintiff's payment gateway without notice on 8 July, 2011. He notified the plaintiff about the closure with an e-mail at 8.59 on that day. There it says: "… Valitor hf. has decided to terminate the collaboration agreement between Valitor and Datacell ehf., dated last 15 June and the agreement on the use of the Valitor service web dated last 30 June because of a breach of general terms of business of a merchant and because of the fact that international credit cards groups do not authorise the service that

Datacell provides for WikiLeaks that was not specified in the application. The termination takes effect immediately."

The plaintiff's attorney objected to the termination on the same day. He stated that employees of the defendant had been informed of the purpose for which the payment gateway had been opened.

The attorney reiterated his objection on two occasions and the defendant finally replied on 4 August, 2011. There it is rejected that the defendant had been informed of the planned use of the payment gateway.

The exchange of letters was terminated with a letter from the plaintiff's attorney that same day and the writ in this case was issued and delivered last 6 February.

Both in the writ and in the plaintiff's brief reference is made to the fact that the Danish company, Teller A/S had terminated an analogous agreement with the plaintiff on 7 December, 2010. This had been done at the demand of Visa Europe and Master Card International, according to news reports at that time.

Ólafur Vignir Sigurvinsson, spokesman for the plaintiff gave evidence at the main hearing of the case. He said that he considered that the company's service to WikiLeaks was hosting and that one needed to have specific technology to be able to provide such service. He said that they had hidden nothing in their dealings with the defendant. He said that he had filled out the form on the defendant's website and that there were limits to what one could write in the form. The defendant's employees had examined the website, opened the website and tested payment. They must have seen that it was planned to receive payments for WikiLeaks. Then he said that it was known that KortaThjónustan had already closed business to them.

Ólafur said he had followed the communications between Valitor and Exodus, which worked on setting up the payment gateway for the plaintiff. Exodus employees had asked directly if they knew what the purpose was and employees of Valitor said that they knew. Ólafur stated that WikiLeaks was not involved in illegal operations.

Vidar Thorkelsson, the CEO of the defendant, gave testimony to the court. He said that he had not been involved in the matter when the agreement was made with the plaintiff. He said that WikiLeaks had sought an agreement in 2010 but that their request had been rejected. He said that applications were evaluated according to the information they contained. In this case it had come to light that the plaintiff provided collection of money for third parties. The information in the application, had thus not been correct. That is why the agreement had been cancelled.

Vidar said that he had spoken to employees of Visa in Europe that had told him about these transfers to WikiLeaks and had pointed out that Teller had discontinued their

transactions with DataCell because the credit card association considered that the transactions were not in accordance with their operating rules. He had, however not given him direct instructions.

Vidar said he did not know how the examination of the plaintiff's payment gateway had been implemented.

Reginn Mogensen, A manager at the defendant, gave testimony to the court. He said he had not been involved in any way with the work on the plaintiff's application. He said that he did not know that there had been talk about the intention to stop payments to WikiLeaks. He had heard about it when a person at Visa talk to about it on the phone. They had then looked at the matter and later the agreement had been terminated. It had been terminated because it had been in breach of their conditions of business. It had been a case of receiving payment for a third-party. They needed to know the party that was receiving the payment. This had not been specified in the application.

Reginn said that he was not aware of any of the defendant's staff having examined plaintiff's webpage or payment gateway.

Hlynur Thór Jónsson works as a programmer with Xodus. He gave testimony to the court. He said that Ólafur Sigurvinsson had asked to set up what was called a donations page. They had designed a page where information was provided on donations to WikiLeaks and they had sent the link to the page to the defendant.

Atli Már Jóhannsson works as a graphic designer with Xodus. He gave testimony to the court. He said that they had designed the payment gateway for the plaintiff. In doing the work he had communicated with two of the defendant's employees. At least one of them had known that this was a case of collecting funds for WikiLeaks. They had also received the link to the page where this could be seen.

Then Jóhannes Ingi Kolbeinsson, CEO of KortaThjónustan, gave evidence to the court. He confirmed that they had at one time opened a payment gateway for the plaintiff. The agreement had been cancelled on the demand of the credit card companies. This was authorised according to their conditions.

Anna Gudrún Jónsdóttir, works at Greidsluveitan, which did work on analysing the plaintiff's payment gateway. She said before the court that they had examined the gateway and tested making payments through it with a test card. She said that here they had been told that it was what is called a donations page.

In the writ the defendant was challenged to submit copies of letters from the international credit card companies where it was required of the defendant to close the payment gateway in question. The defendant replied to this by saying that he had received no letter from these parties.

Then the writ allowed for depositions being taken from the defendant's employees that were involved in the case and the defendant was also challenged to inform the court about who they were. The defendant answered in this manner: "The plaintiff requests information on who 'were involved in the matter' but it is not entirely clear what he is referring to in this connection. The defendant points out that in the documents of the case there are names of several of the defendant's employees that were involved in the making of the agreement and/or the termination of the agreement. The defendant refers to this."

Pleas in law and legal arguments of the plaintiff

The plaintiff asserts he has a claim that the defendant honour the agreement between the parties as made. The plaintiff asserts that he has not changed his operations from the time that the agreement was signed nor failed to inform on the purpose of opening the payment gateway. He has not breached the conditions of the agreement or misused it. The plaintiff refers to Article 4.2 in the defendant's terms of business which prohibits the use of cards for payment of pornography, prostitution, drugs, etc, and for the purposes of funding terrorism. The plaintiff says that the operations of WikiLeaks do not fall into these categories.

Then the plaintiff considers that the defendant cannot base case on Article 4.3 which says that a merchant is not authorised to receive payments for transactions of a cardholder with a third party. The plaintiff says that this is a case of prohibiting misuse by allowing a third-party to make transactions through the payment gateway. The situation here is different. Collection donations is part of the business of the plaintiff. He had provided Sunshine Press with reception services for a fee, for the contribution of funds from supporters of Wikileaks. The donors are not doing business with Sunshine Press or Wikileaks.

Then the plaintiff says that the provisions of 21.3 and 21.5 in the general terms of business of the defendant cannot authorise termination in this case. The defendant says that he pleads that he has in no way changed the nature of his operations. Also that the facility provided by the collaboration agreement has not been misused.

The plaintiff says that there is no authorisation to terminate the agreement between the parties because of instructions from international credit card groups.

The plaintiff pleads that the defendant had known that the purpose of the payment gateway had been to receive donations to WikiLeaks. The gateway had been examined and tested, among other things by making a payment through it. In order to do this, one would need to have a link to the homepage of the party to the agreement. To see what goods and services are being sold. In this way the defendant's employees would have seen that cardholders could support the operations of WikiLeaks through the gateway. The plaintiff says that it is a main principle in Icelandic law that a party that offers its services for commercial purposes is bound to provide the services to any party that requests them unless important and logical reasons negate this. This applies not least in

the case of services subject to licence and services that only a few parties offer. These considerations apply particularly to credit card companies because if they reject business this can prohibit a party from conducting his operations. Considerations on the obligation to make agreements apply in this case and should be implemented to limit the authority to terminate an agreement.

The plaintiff says that his constitutionally protected right to conduct business is at risk, as the defendant through his actions is preventing the plaintiff from conducting his operations. He says that his situation is such that he cannot apply to any other party for the service in question.

The plaintiff refers to act number 120/2011 on payment services, general rules of the claims and contractual law number 7/1936.

Pleas in law and legal arguments of the defendant

In his brief, the defendant says that he had accepted to comply with the conditions and instructions received by him from VISA and MasterCard Credit card companies and to ensure that his customers did likewise.

The defendant pleads that he had been authorised to terminate the agreement with the plaintiff. The plaintiff had breached the terms of business and that breach authorised termination. The defendant refers to Article 4.3 which says that a merchant is not authorised to receive payments for transactions of a cardholder with a third party. For this reason, it had been unauthorised to use the defendant's service to receive funds for a third-party.

Then the defendant pleads that the plaintiff had changed its operations from those that were specified when the agreement was made, without making notification of the change. This is in breach of Article 21.5 in the conditions where it says that any change in the nature of operations should be notified. It was stated in the provision that significant changes authorised the termination of the agreement. The plaintiff had not notified that he planned to receive donations for a third-party, on the basis of the agreement with the defendant. This had not been specified in the application. With this, the plaintiff had breached the defendant's terms of business.

The defendant says that Greidsluveitan ehf. had accredited the plaintiff system, but this does not constitute recognition of propriety of the plaintiff's operations. The defendant's employees had not known that the payment gateway was to be used to receive donations for WikiLeaks.

The defendant pleads that because of the above specified breaches of its terms of business that it had been authorised to terminate the agreement between the parties. In this instance his grounds are Article 21.3 in the terms of business.

The defendant says that one must assume that it had been clear to the plaintiff that he had breached the terms of business. He points out that shortly before, an agreement with the plaintiff had been terminated by Teller a/s at the demand of the international credit card groups. It should have been clear to him that the reception of donations for WikiLeaks Did not harmonise with the business policy of these parties For this reason there had been a special obligation on the plaintiff to indicate to the defendant the planned use of the payment gateway.

The plaintiff refers to the general principles on breached grounds. It should have been clear to the plaintiff that the defendant was not authorised to provide the service of receiving payments for WikiLeaks. It is clear that the defendant would not have made an agreement with the plaintiff had it been clear to him what the plaintiff's purpose was. The defendant had practised deceit. It had been a decision criterion for the agreement that the plaintiff did not provide service to a third party and that the fulfilled the terms of business in all respects. Then it had been as criterion of the defendant that the plaintiff's transactions work correctly described in the application. One can also apply the principle of breached grounds if a party has been in error from the outset with regards to specific aspects. The defendant also points out that the plaintiff seems to have entered into the business relationship in a fraudulent manner. It had been clear to him that his business did not harmonise with the business policy of the international credit card companies and had concealed the purpose of his application.

With respect to the above, the defendant refers also to Article 33 of the act on contractual obligations number 7/1936. The plaintiff had concealed important aspects in a dishonest manner when making the agreement.

The defendant rejects that there is a main principle on the obligation of those who offer services to do business with anyone who so requests. Quite to the contrary, freedom of agreement is a main principle. The defendant also considers that it is not in his brief to assure the plaintiff's freedom to do business.

Finally, the defendant states that regardless of whether the termination had been authorised, there is no reason to accept the plaintiff's claim for the obligation to open the payment gateway for the plaintiff or to impose daily fines. In this respect the plaintiff does not refer to any legal authorisation.

The defendant rejects the reference to act number 120/2011 as that act came into force after the events of this case took place. So no provisions in law apply in this case. The defendant refers to the general rules of contract and claim law, particularly to the contractual obligation of agreements and grounds. Then he refers in general to the Act on contractual law number 7/1936.

Conclusion

It is not disputed that the parties made a binding agreement. The dispute is on whether the defendant had been authorised to terminate the agreement.

The parties plead that they made what is called a collaboration agreement, which was dated 15 June, 2011. Detailed conditions cannot be found in this agreement but clear reference is made to the defendant's general terms of business. In the agreement it is stated that the plaintiff's business is called 7372 computer programming. In the plaintiff's application, which was sent to the defendant by e-mail on 14 June, 2011, it is stated that he operates a data centre, hosting and technical services.

There is nothing in the agreement or in the application that indicates that the plaintiff had intended to collect donations to another party, that is WikiLeaks. The plaintiff's contention that the reception of donations can be called technical services is not accepted.

The defendant has submitted documentation in the case, which show that the termination by KortaThjónustan of an agreement with the plaintiff had become known and one must assume that the defendant's employees must have known that the plaintiff had participated in collecting funds for WikiLeaks. In addition to this it is proven with the evidence of witnesses in this case and from the plaintiff's website, which the defendant must have investigated before making the agreement, that it was clear that the purpose of the payment gateway was, among other things, to receive donations for WikiLeaks. It is taken into consideration in this connection that the defendant did not call as witnesses those of its employees that had communications directly with the plaintiff, but only managers who said that they had not been involved in making the agreement. One must therefore assume that agreement was made to some extent in a manner other than is stated in the written text.

As it was clear to the defendant that the plaintiff planned to collect money on behalf of WikiLeaks through the payment gateway, he cannot use the provision in the terms of business that it is unauthorised to use the gateway for transactions for another party, or that the plaintiff's operations had changed.

As it is considered that the purpose of the payment gateway must have been clear to the defendant, his plea that the plaintiff had concealed issues from him that he had known were very significant and that it was dishonest of the plaintiff to invoke the agreement.

The defendant pleads that he had not been authorised to receive payments to WikiLeaks and that this had been clear to the plaintiff. This assertion by the defendant has not been supported by any documentation nor has he referred to any legal rules that ban the reception of funds for this party. Nor has he shown that the reception of donations to WikiLeaks is incompatible with the business policy of the credit card companies. For this reason, it cannot be accepted that the agreement could be terminated because of breached or wrong grounds.

The defendant considers that it is not authorised to impose daily fines on him. This authorisation can be found in Paragraph 4 Article 114 of Act number 91/1991. The obligations of the defendant will not be fulfilled with enforcement and so daily fines will need to be imposed to enforce the fulfilment of the duty. The defendant did not object to the amount claimed by the plaintiff, but nevertheless, because of the defendant's objection to the claim for penalty interest, the amount will have to be decided. Daily fines are reasonably decided at ISK 800,000. The notice given to fulfil the obligation is reasonably decided at 14 days and from that time daily fines will be imposed.

When deciding litigation fees for the plaintiff one must consider that the issue in dispute in this case is not complex and the collection of information was simple. There are however important interests at stake. Litigation fees are decided at ISK 1,500,000 including VAT.

Jón Finnbjörnsson, District Court Judge, pronounces this judgement.

The judgement

The defendant, Valitor hf., is bound within 14 days from the issue of this judgement, on pain of daily fines to the amount of ISK 800,000 for each day after that time, to open the payment gateway according to the collaboration agreement between the plaintiff, DataCell ehf., and the defendant, dated 15 June 2011.

The defendant will pay the plaintiff ISK 1,500,000 in litigation costs.