

**WASPA appeals panel
Complaint 10152**

REPORT OF THE APPEALS PANEL

Date:

Appellant: Smartcall Technology Solutions / Lessa Ltd

Complaint Numbers: 10152

Applicable versions: 9.0

1 BACKGROUND TO THE APPEAL

- 1.1 This is an appeal against the finding and sanction imposed on the Appellant by the adjudicator in complaint 10152. This complaint involves the same members as those who were party to complaint number 9792. The facts are moreover remarkably similar those in complaint numbers 9792 and 10802, which are also before the panel.
- 1.2 The complainant in this matter complained of receiving a "WAP push message" which according to her was unsolicited and accordingly spam. When she "opened the website listed in the content of the message" she observed that it was in respect of a subscription to a sex-related chat service. She found that there was no way of exiting the website and the cursor would not move away from the subscribe button. She did not click on the subscribe button, but immediately switched off her mobile phone. She nonetheless started receiving frequent unwanted sex-related calls and SMSes from an unknown male.
- 1.3 According to the complainant, she is an experienced computer programmer, web designer and cellphone user.
- 1.4 The member for its part advised that the complainant visited the WAP site in question from a banner advertisement used for advertising the site. The complainant then proceeded beyond the landing page of the WAP site. In other words she "accepted" provision of the service. Due to the fact that the system could not recognise her MSISDN, she was redirected to a page where she entered her MSISDN manually. The "WAP push message" was a confirmation of her subscription to the service.

2 THE APPLICATION OF THE CODE AND RULES

The Code, v9.0

- 2.1 The adjudicator correctly applied version 9.0 of the WASPA Code of Conduct to this complaint, the relevant sections of which are reproduced here for convenience:

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;

**WASPA appeals panel
Complaint 10152**

(b) the message recipient has a direct and recent (within the last six months) prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or

(c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

8.1.4. Marketing messages (including commercial communications) may no longer be sent to a customer of an adult service if that customer has not made use of the service during the preceding three months. This is to prevent the accidental marketing of such services to children as a result of a recycled telephone number.

8.2.3. Adult services may not be marketed via direct communications with a customer of non-adult services, unless that customer has explicitly given permission for such marketing to take place and the customer has confirmed that they are, in fact, an adult.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

11.1.7. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian to do so.

11.2.1. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.

11.2.3. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian to do so.

3 THE DECISION OF THE ADJUDICATOR

3.1 The adjudicator indicated that she was going to address the issue of the complainant receiving unwanted sex calls and SMSes, but never did. The panel looked at the original complaint files, and was of the view that there is insufficient information for the adjudicator to have made a determination. The panel can in any event not consider on appeal a matter that the adjudicator has not dealt with.

Spam and Adult Services

3.2 The adjudicator was initially of the view that the lack of evidence on the status of the message complained of should favour the member, and given that there was no way for the member to prove that the complainant had not in fact entered her MSISDN details, the "WAP push message" could not be shown to be spam. However, the adjudicator then decided to look for corroboration in other complaint reports, and came upon the report in complaint 9792. She

**WASPA appeals panel
Complaint 10152**

found the member's response there to be essentially identical to that given in this complaint, which led her to take the view that the member's subscription process was "not altogether transparent and honest." Moreover she felt that the defence relied upon is open to abuse in that by alleging that the complainant's MSISDN had to be entered manually, the member removes any connection between the phone and the subscription process. This allowed the member to rely upon a lack of proof to avoid any adverse finding.

- 3.3 The fact that the service complained of was of an adult nature was further problematic to the adjudicator. She stated that she did not see that the WAP push message apparently requesting confirmation of subscription complied with the requirements of section 8 of the Code of Conduct, particularly 8.1.4 and 8.2.3 thereof.

Subscription without Consent

- 3.4 The adjudicator examined the complainant's claim that it was not possible to unsubscribe from the service, and found that there was insufficient evidence to make any determination on this point. She then went on to note that according to the screenshot of the "landing page" provided by the member, a button with "confirm" on it is to be found directly beneath the text reading "You must be 18+ to use this service!", and that this is a dishonest practice. Consumers would click on the button to confirm their age and not with the intention of subscribing to the service. The adjudicator does not specify the infringed section, but such a practice would amount to an infringement of section 11.2.1 of the Code of Conduct.

Sanction

- 3.5 The adjudicator followed the report in complaint 9792 exactly in respect of non-pecuniary sanctions, as well as mitigating and aggravating factors, and the panel's comments made in that regard apply in this matter too. She then went on to fine the SP R50,000 for its breach of "section 8", and R30,000 for its breach of "section 11".

4 GROUNDS OF APPEAL

Spam and Adult Services

- 4.1 In response to the adjudicator's findings as reflected in paragraphs 3.2 and 3.3, the SP provided "logs the user that entered the WAP site." The panel notes that this is a single log entry which was also submitted in respect of the original adjudication. The log shows the following:

- Date: "19-Jul-2010 Mon 18:30"
- MSISDN: [complainant MSISDN]
- Type: "WAP menu"
- Menu/Prd.No – "WAP Chat"
- Download(s): 2

**WASPA appeals panel
Complaint 10152**

- Handset Details: "IP:41.208.11.193 Mozilla/5.0 (SymbianOS/9.3; Series60/3.2 NokiaE75-1/202.12.01; Profile/MIDP-2.1 Configuration/CLDC-1.1) AppleWebKit/525 (KHTML, like Gecko) Version/3.0 BrowserNG/7.1.19424"
- 4.2 The SP submitted that the above shows that the complainant did interact with the WAP site. As clause 8.1.4 forbids the transmission of marketing messages in respect of adult content to users who have not used the service within the last three months, the adjudicator was incorrect in finding an infringement of the section, as the complainant had used the service within this period.
- 4.3 As to section 8.2.3, there could be no breach of this section as customers had to confirm that they were above 18 years of age before they could use the service.
- 4.4 The SP further submitted that the adjudicator could not make reference to the adjudication in complaint number 9792 unless the appeal document and final sanction had been taken into consideration. The panel takes this to mean that the adjudicator should not have taken account of a complaint that was subject to appeal at that time.

Subscription without Consent

- 4.5 In responding to the adjudicator's remarks as described in paragraph 3.4 above, the SP noted that the user has to confirm that he or she is over the age of 18 when subscribing to the service and that the terms and conditions on the screenshot referred to by the adjudicator commence by stating that by confirming, the user agrees to the terms and conditions and that the user will be entered into a subscription service. The SP provided another copy of the screenshot of its "confirmation page" which it had provided in the original adjudication process.

General

- 4.6 The SP did not make any submissions directly in respect of sanction, but raised several arguments of general application:
- 4.6.1 The SP denied being in breach of section 8 of the Code of Conduct.
- 4.6.2 The SP also denied being in breach of section 11 of the Code of Conduct and submitted that it had followed all the processes as set out in section 11 in respect of subscription services.
- 4.6.3 The adjudicator did not set out which subsection of section 11 of the Code of Conduct the SP had allegedly infringed, and consequently the adjudicator did not give any reason for her decision.
- 4.7 The adjudicator should not have taken the decision in complaint 9792 into account as it was subject to appeal at the time.
- 4.8 It is common practice for complainants to claim that they never subscribed to a service and that they received an SMS from the IP which they never requested. However, the IP keeps a record of interaction with the service and these logs were provided in this case.

5 FINDINGS OF APPEALS PANEL

- 5.1 Not only are the facts of this complaint similar to those of complaints 9792 and 10802, but the panel is faced with a similar dearth of evidence one way or the other.
- 5.2 The same parties are involved in this complaint as were involved in complaint 9792, and fulfil the same roles. The panel will hence take the same approach as taken in that matter. Accordingly:
- 5.2.1 The adjudicator was incorrect in making an adverse ruling and applying sanctions against Smartcall Technology Solutions as SP, and consequently Smartcall Technology Solutions' appeal is upheld in its entirety insofar as the adjudicator's decision and sanctions apply to it.
- 5.2.2 The panel will apply the grounds of appeal raised by Smartcall Technology Solutions to the adjudicator's decision in respect of Lessa Ltd.
- 5.3 While Smartcall Technology Solutions notes in its appeal to complaint 9792 that it and Lessa Ltd are affiliated parties, it is by no means clear what this means. Where the SP provides documentation that pertains to the IP, such as log extracts of interactions with the IP's WAP site, the panel assumes that these logs originate from the IP.

Subscription without Consent

- 5.4 The panel agrees with the adjudicator that the member's subscription process, as evidenced by the screen shot of the WAP Site "consent page", is in breach of the Code of Conduct. The effect is to mislead consumers into thinking they are merely confirming their ages, when they are in fact subscribing to a subscription service. Whether or not subscription would be followed by a confirmation message would be a factor in mitigation should an infringement be found (a factor that was not touched on by the complainant, SP or adjudicator).
- 5.5 While such a misleading practice would be an infringement of section 11.2.1 of the Code of Conduct, the adjudicator merely stated that the member had infringed "section 11".
- 5.6 It appears to the panel, however, that the adjudicator did not deal with a central issue: the complainant alleges she was subscribed to the service in question without her consent. She states that she did not click on any link on the website "landing page" but that she nonetheless found that she was subscribed to the service. So for example in her e-mail of 19 August 2010 the complainant says the following:
- The problem was not that I could not unsubscribe, I did not give any permission to be subscribed in the first place. The web page is designed in such a way that a user can not exit. I switched off my phone without subscribing.
- 5.7 The issue here was not that the complainant could not unsubscribe from the service, but that she was subscribed in the first place, apparently without

**WASPA appeals panel
Complaint 10152**

interacting with the WAP site at all. The panel however could not find any evidence in the original complaint files that the complainant had actually been subscribed to anything.

- 5.8 The panel is of the view however that an infringement of section 11.2.1 is possible where it is clear that a member's conduct is such that a consumer would be likely to be misled into subscribing without his or her consent. It is not necessary for the consumer to actually be subscribed.
- 5.9 Unfortunately, section 11 is one of the longest and most complex in the Code of Conduct. It is not sufficient merely to state, as the adjudicator did, that a member has infringed the section as a whole – the adjudicator must state which sub-section has been infringed. The panel has no option but to agree with the SP's submission that because adjudicator did not specify the sub-section infringed, she effectively did not give a reason for her decision. This oversight on the part of the adjudicator is fatal to her decision in respect of this infringement. It would be procedurally unfair to allow a decision to stand where the member does not know what section of the Code of Conduct it has infringed.
- 5.10 Consequently the IP's appeal in respect of section 11 is upheld.

Spam and Adult Services

- 5.11 The panel accepts the SP's argument that it is inappropriate to take into account the adjudicator's decision in report 9792 in determining whether or not the message complained of was spam or a confirmatory message due to the fact that the complaint in question was subject to appeal at the time. Moreover, the corresponding ruling in complaint 9792 was made contingent upon proof of the offending message being provided, and was consequently inchoate.
- 5.12 The complainant provides no proof that she received a spam message from the IP. Neither the text nor any other property of the alleged message is available to the panel to determine the truth or otherwise of her version.
- 5.13 The SP provides a log extract as proof of its submission that the message in question was a confirmation stemming from a visit to its WAP site by the complainant via a WAP banner advertisement, and not a spam message. In the panel's opinion, it proves no such thing, but merely a proof that the complainant visited the WAP site in question.
- 5.14 Neither party has provided sufficient information for the panel to reach a clear conclusion as to the facts. The adjudicator appears to have assumed in finding an infringement of section 8 that the message sent to the complainant had been unsolicited, that the complainant had made no use of the service in question in the preceding three months, and that the SP's log entry merely shows the complainant following the WAP link contained in the message. The panel does not believe that such a conclusion can be drawn on the limited evidence available.
- 5.15 While the adjudicator raised the question of spam (section 5.3.1), and the evidence for such an infringement would have been the same as that relevant to an infringement of "section 8", she did not make a ruling on the matter.

**WASPA appeals panel
Complaint 10152**

- 5.16 While the adjudicator did not decide on the issue of spam due to a lack of evidence, the panel wishes to revisit this aspect.
- 5.17 While the panel agrees that the adjudicator could not take account of certain other complaints that were subject to appeal, the panel is adjudicating those very appeals simultaneously with this one, and can certainly take account of those complaints in reaching a finding.
- 5.18 Complaint numbers 10512 and 10802 involved the same IP. The complainants in both matters are apparently technically proficient. The complainant in complaint 10512 is an experienced web developer, and the complainant in complaint 10802 made an effort to trace the IP's IP address. Taken individually, each complaint offers slender evidence that the messages complained of were spam and not confirmatory messages. It would be very difficult to disprove the IP's version in any one instance, especially where complainants do not provide copies of messages received. However, taken together, the two complainants' versions become more compelling, and the panel is inclined to believe their version of events.
- 5.19 The following factors also militate against the IP's version:
- 5.19.1 The complainant in complaint 10802 makes the point that he disabled the data and web functionality of his cellphone, and that he consequently could not have landed on the IP's WAP page from a banner advertisement. The panel accepts the complainant's statement, but cannot accept its implication at face value. The IP, perhaps anticipating this argument, had stated that the complainant must have accessed its site using Wi-Fi connectivity. Blocking cellular data services does not, as far as the panel is aware, prevent one from accessing data services via Wi-Fi connectivity, but merely restricts GPRS and other cellular data connectivity. Thus the IP's version is possible: the complainant could have accessed its WAP site using Wi-Fi connectivity, which would explain both his ability to connect to the WAP site, and the fact that his MSISDN was not discernible by the IP's system. The panel finds this most unlikely however, and is inclined to believe the complainant's version.
- 5.19.2 The IP also uses the theory that the complainants connected via Wi-Fi connectivity in both complaints to explain why its system didn't pick up the complainants' MSISDNs. As the adjudicator in 10512 points out, this approach very conveniently removes any connection between the phone and the subscription process.
- 5.19.3 In both complaints the IP could have provided logs proving that the confirmation messages were sent to the complainants. The logs that it DID provide merely showed an interaction of some kind with the WAP site and did not prove that the complainant had either subscribed or been sent a confirmation message.
- 5.19.4 When the adjudicator in complaint 10802 requested that the IP send him a log of all communications with the complainant, the IP sent a log showing all "MO", "MT" and "WAP Opt-in" messages for the complainant's MSISDN. It also provided the text of the confirmatory message sent to the complainant. That message does not appear in the log.

**WASPA appeals panel
Complaint 10152**

- 5.20 The panel is of the view that the messages that were the cause of complaint in complaints 10512 and 10802 were sent to the respective complainants before the complainants accessed the IP's WAP site, or indeed had any commercial contact with the IP. The IP can thus not rely on any alleged visit to its WAP site to establish a "prior commercial relationship". Consequently the messages complained of were unsolicited commercial messages and the IP infringed section 5.3.1 in complaints 10512 and 10802.
- 5.21 The above findings imply that the IP has intentionally misled WASPA and the complainants in complaints 10512 and 10802, and accordingly the IP is found to have infringed section 4.1.2.
- 5.22 The panel disagrees with the adjudicator's findings in respect of sections 8.1.4 and 8.2.3 – both of these sections require a previous or existing relationship between the member and the complainant in order for an infringement to take place. Consequently, neither applies in this complaint, where the communications sent to the complainants were entirely unsolicited.
- 5.23 The panel is of the view that the IP's conduct probably also constitutes an infringement of section 14.3.12, but as the adjudicator did not make a ruling on this section, the panel will make no finding in this regard.

Sanction

- 5.24 Spam has the potential to give the industry a poor reputation and must be severely dealt with; the IP's dishonesty is a significant further aggravating factor, as is the fact that the spam in question was in respect of adult services.
- 5.25 On the other hand, the IP's only infringements of the Code of Conduct to date were in complaint numbers 9792, 10152 and 10802, which are all before the panel. The panel notes however that the IP joined WASPA on the 4th of December 2009, and the first of these complaints was made on 21st of June 2010. Consequently the IP's record is a moderate mitigating factor only.
- 5.26 The panel substitutes the following sanctions for those imposed by the adjudicators in complaints 10512 and 10802.
- 5.27 In respect of the IP's infringement of section 5.3.1 in complaints 10512 and 10802:
- 5.27.1 a formal reprimand; and
- 5.27.2 a fine of R100 000, of which R70 000 is suspended on condition that the IP does not infringe section 5.3.1 for a period of six months from the date of publication of this report.
- 5.28 In respect of the IP's infringement of section 4.1.2 in complaints 10512 and 10802:
- 5.28.1 a fine of R150 000, of which R130 000 is suspended on condition that the IP does not infringe section 4.1.2 for a period of six months from the date of publication of this report.
- 5.29 The SP's appeal was successful, and accordingly its appeal fee is to be refunded in full.