

REPORT OF THE APPEALS PANEL

Date: 21 September 2009
Appellant: Blinck Mobile Ltd
Complaint Number: 4463
Code version: 5.7

1 INTRODUCTION TO THIS APPEAL

- 1.1 The appellant is not the SP but the IP, a company based in Holland, providing services through the SP, Buongiorno. The WASPA Secretariat attempted to contact Blinck with no success although its correspondence was received by the SP and the SP replied to WASPA.
- 1.2 In the appeal the IP apologises for not having communicated with WASPA but puts this down to a hole in internal communications when a staff member left without handing the matter over to their replacement.
- 1.3 The adjudication makes a finding against and imposes a fine on both the IP and SP.
- 1.4 There was some confusion in the documentation regarding the remedy sought by the complainant who initially requested a refund then claimed not to want a refund, but ultimately did require a refund following a response from the SP. Based on the documentation provided to us, we assume that the SP is not appealing at all and that the IP is not appealing the sanction regarding the refund on the basis that they have agreed a settlement amount with the complainant.
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2 RELEVANT INFORMATION

- 2.1 *WASPA and the public interest*
- 2.1.1 We often mention the public interest in our findings. This is because we consider this to be an overriding and significant factor when applying the Code. WASPA is required to take the public interest into account when considering any complaint.
- 2.1.2 The General provisions of the Code have application in all cases in relation to matters dealt with by WASPA. Section 3.1.1 provides that: ~~%~~Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.+ Section 3.1.2 provides that ~~%~~Members are committed to lawful conduct at all times.+

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- 2.1.3 These general rules should always be uppermost in the minds of members when checking that a service complies with the Code, particularly when there is any suggestion that the advertisement may be suitable only for adults, or that it will contain adult content, or that it should be available only to adults.
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3 BASIS OF THE COMPLAINTS

3.1 *The service complained of*

- 3.1.1 The service appeared to be a subscription to access content on an ongoing basis, particularly screen savers, which had been advertised on television as ~~free~~.
- 3.1.2 The complainant made the complaint on behalf of his daughter of 12. The complainant therefore alleged she had no capacity to contract, but that the advertisement was clearly aimed at children.
- 3.1.3 According to the SP, the service was a ~~loadin~~ service, permitting downloads of 60 pieces of content from a selection of wallpapers, ringtones, java games and so on. For the first month there was no charge but after that subscribers were required to unsubscribe if they no longer wanted to access the service.
- 3.1.4 The television advertisement was not part of the initial complaint in that the body of the complaint was focussed on the charges levied against the complainant's cellphone account which were debited without his consent. The adjudicator did not consider the television advertisement although the SP copied the text into its response (note only the SP replied to the complaint).
- 3.1.5 The television advert (text provided by the SP) stated ~~6~~ SMS GO to 30123 (First month FREE then R30 per month). Helpline: 082 280 3333 (VAS rates apply). This subscription service is charged at R1 per day. To unsubscribe, SMS STOP LOADIN to 30123 (free SMS). Please note that you require a WAP enabled handset to make use of the Loadin Service. E&OE. We regret no refunds. Loadin may contact you with special offers."

3.2 *The Code*

- 3.2.1 The complainant did not mention the sections of the Code relied upon but the adjudicator referred to sections 2.8 (definition of ~~children's~~ services), 4.1.2 (provision of information to customers), 7.2.1 (prohibited practises), 11.1.4 and 11.1.6 (subscription services . manner of subscription).
- 3.2.2 The adjudicator did not find it necessary to consider the Advertising Rules or rules specific to television advertising.

4 DECISIONS OF THE ADJUDICATOR

4.1 Findings on Complaints

4.1.1 In summary, the adjudicator found that the SP was in breach of:

4.1.1.1 section 7.2.1 read with section 4.1.2 because the SP appears to have disseminated information ~~that~~ that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission. From a child's perspective this proved to be the case ~~and~~ and

4.1.1.2 section 11.1.6 since ~~members~~ members are reminded to ensure that children accessing subscription services confirm that they have permission from a parent or guardian to do so. The SP did not provide any proof that this was indeed the case and the adjudicator is of the opinion that there was a clear breach of this section ~~and~~ and

4.2 Sanctions

4.2.1.1 A R20,000 fine was imposed against the SP taking into account the prior record of Buongiorno in relation to breaches of the Code and actions taken on behalf of the client, and the SP was ordered to refund the complainant 100% for content downloaded; and

4.2.1.2 A R30,000 fine was imposed on the IP for failure to respond and its ill-regard of the process, and the IP was ordered to refund the complainant 100% for content downloaded.

5 GROUNDS OF APPEAL

5.1 The IP's grounds are not legally based, in that it seeks relief because it has previously replied to every WASPA complaint in a ~~professional~~ professional manner, and ~~it~~ is very aware of its continuing obligations to comply with the WASPA Code of Conduct and the WASPA Advertising Guidelines and at all times Blinck has done its very best to comply with these requirements.

5.2 The facts set out in support in part of the appeal, include a log for the complainant's MSISDN indicating that 16 download attempts were made, reminder messages were sent at regular intervals, overall spend was R910, and cancelled the service on request. They also confirm that they offered the complainant a R200 refund which he accepted, but at the date of the appeal they were waiting for his banking details.

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6 FINDINGS OF APPEALS PANEL

- 6.1 Although our panel is not convinced that the finding in relation to the classification of the service, as a service not for children is correct, since there appears to be no reason why a child ought not to be attracted to or subscribe to this service, we have relied on the grounds for appeal only in considering the sanctions and making our decision on the appeal. As an aside, we support the adjudicator's advice to parents to monitor their children's use of cellphones particularly given the frequency and number of attempted downloads in this case, over a period of several months, of which the complainant must surely have been aware.
- 6.2 The IP did not include the text of the original message indicating that the service required parental consent or should not be accessed by minors, but states our services are for users over the age of 18 years or with prior guardian approval. Even though the responsibility of payment in these cases is with the parents we maintain strict procedures when it comes to minors subscribing. The SP's response to the complaint sets out the text of the television advertisement, but this does not suggest that the service was not for children.
- 6.3 Neither the SP nor the IP appeals the determination that the service was ultimately aimed at children, and as this constitutes a material part of the complaint and the adjudication, we must assume that the SP and IP accept that the service was in fact not to be accessible to children, and accordingly we find that the service was not adequately described.
- 6.4 We find the grounds for appeal by the IP namely that it tries to comply and wasn't aware of the complaint because of internal staff issues, inadequate to support the appeal on the basis that to accept such arguments would not support the public interest in WASPA members upholding the Code.
- 6.5 The appeal is accordingly dismissed. The appeal fee is not refundable.