

WASPA appeals panel
Complaint 7872

REPORT OF THE APPEALS PANEL

Date: 24 March 2011

Appellant and Service Provider (SP): AMV Holdings

Information Provider (IP): /

Complaint Number: 7872

Applicable versions: 7.4

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a complaint lodged in October 2009, by an individual against AMV Holdings, the Service Provider (SP).

1.2 The SP is a South African company and full member of WASPA. The SP is appealing the adjudicator's findings and the sanctions.

1.3 The complaint relates to adult services which were offered when the complainant believed he had only signed up for a free text message service.

1.4 The complaints, the findings of the Adjudicator, the IP's response to and appeal against the complaint, are fully recorded in the case files provided to this appeals panel, and as these are, or will be, publicly available on the WASPA website, they will not be repeated in full in this appeal panel's report.

2. CLAUSES OF THE CODE CONSIDERED

2.1.1 The adjudicator considered the following clauses of Code 7.4:

2.23, 3.1.1, 3.1.2, 4.1.1, 4.1.2, 4.2.2, 6.2.9, 6.2.10, 6.2.11, 8.1.1, 8.1.2, 8.1.3, 8.1.4, 11.1.1, 11.1.2, 11.1.4, 11.1.5, 11.1.8, 11.1.10, 11.1.11, 11.2.5, 11.5.1, 11.5.2, 11.6.2, 12.3.2.

2.1.2 The adjudicator found the Appellant in breach of the following clauses of the Code:

4.1.1, 4.1.2, 4.2.2, 6.2.11, 8.1.1, 8.1.2, 8.1.3, 8.1.4, 11.1.1, 11.1.2, 11.1.5, 11.1.8, 11.1.11.

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR

3.1 Finding of the Adjudicator

The Adjudicator stated, *inter alia*:

I could go on but the central issue here is that the SP trapped the complainant (and, no doubt, other visitors to the MJoy website) using a misleading mechanism. It did not obtain the complainant's informed consent to make use of his personal information for purposes other than providing an online sms service and proceeded to subscribe him to an adult service as part and parcel of the sms service he explicitly opted to make use of.

3.2 Sanctions

The following sanctions were given:

- The SP is fined an amount of R250 000, payable to WASPA within 10 business days of receiving notice of this report;
- The SP is ordered to refund all amounts charged to the complainant for his use of the service from 11 October 2009 to date of termination of his subscription.
- Such refund must be paid within 10 business days of receiving notice of this report;
- The SP is ordered to cease all instances of the service for so long as the service (and its variations) continue to be in violation of the Code; and
- The SP is ordered to send all the service s (and its variations) current subscribers a notification in the format prescribed by Rule 11.5.2 of version 9.0

of the Code, being the current version of the Code.

4. GROUNDS OF APPEAL

4.1.1 We have quoted some of the key points of the Appeal verbatim below:

- The Mjoy website states under its “HOW IT WORKS” section that by joining the service a consumer can:

Send FREE text messages to any mobile phone in the world.

Sync and save all contacts on your phone with mjoy

Post your updates to the world and follow others

Find interesting people at mjoy and connect to friends

Install applications such as games and widgets.

Download music, videos, pictures and more.”

Clearly the Mjoy service is a broader service offering than merely “unlimited Free Text Messages” as the Adjudicator believes.

- The consideration for the provision of such services is clearly set out in the websites terms and conditions. The pertinent provisions are extracted below. For the avoidance of doubt the terms and conditions indicate clearly that:
“These terms were last revised March 2nd, 2009.”
These terms therefore were relevant to the complainant as at the time of them using the service.

“By using the mjoy Services, you agree that we may communicate with you regarding mjoy and other entities by SMS, MMS, text message or other electronic means to your mobile device and that certain information about your usage of the Mobile Services may be communicated to us.

We will strongly limit the personal data shared about you. However, we hereby reserve the right to share user information such as mobile phone numbers from your mjoy account with a select group of trusted partners.”

The terms and conditions therefore set the expectation that the consumers will receive communication as a result of their participation in the service and that those communications may reasonably be expected from trusted partners. The complainant is mistaken if they believe that the Mjoy website does not allow for the subsequent marketing and sharing of information.

- AMV replicated the complainants' experience via the Mjoy service and concluded the following. Having entered the relevant data, security code, and then pressing the „join“ button, the handset instantly receives the following SMS:

“From: mjoy

Mjoy message – open the link to complete your registration

<http://mjoy.com/m/t/KTDWJX6RHMPBSOJZGY62VFMJZV3WYJF7DULHK74GNLFB5G2BA3A>”

5.4 Upon attempting to retrieve the link the AMV test handset was actually diverted through to an AV barred page and we were unable to proceed. The message read:

“*RESTRICTED ACCESS!*

Access to this service is restricted as Content Control is in place.

If your 18 years or over go to ‘Remove Content Control’ to remove it now, or select ‘About Content Control’ for other ways to remove it.”

5.5 It is clear that any user under 18 with content control would be unable to access such a service.

- The complainant, having received the WAP link following registration on the Mjoy website proceeded to browse onto the homepage of the site using a SonyEricssonK800iv handset.

The site states that:

CLICK TO SUBSCRIBE FOR

R14.5/2DAY

Please confirm you are aged 16+

Provider: BS Mobile.

YES

By clicking Yes you confirm subscription service entry. R14.5/2days.

Sms STOP to 31922 to end service.

6.4 At 18:08:01 the user clicked the 'Yes' button to accept the terms and join the subscription.

6.5 The user was then diverted through to the Hotbook site and sent the following welcome message:

“Thanks 4 Adult Hotbook!Content link on its way!Click on it 2 get ur content!Probs? Call 011-461-0317.Sms STOP to 31922 to end subscription.R14.5/2day.18+”

6.6 The message contents expressively indicated the adult nature of the service, indeed this particular header clearly included the word „Adult“ thus putting the complainant on notice.

6.7 Only after clicking the „Yes“ button was the user subscribed to the service, and provided with access to the Hotbook site.

6.8 The complainant only received 5 messages during the entire period of their subscription, including the initial free welcome message.

6.9 To summarize, these messages were ONLY received after the consumer:

Responded to the AMV promotion.

Actively browsed the site confirmation page and;

Positively accepted to join the subscription by clicking the „yes“ button.

- The action of refunding the complainant was indeed a gesture of goodwill given the legitimacy of the complainants engagement with the service and the service mechanic in question (c/f clause 6 above).8.4.1 AMV have demonstrated clearly that the subscription and charges that were incurred as a result, were only submitted after the consumer actively demonstrated their interest in such a service;
8.4.2 AMV maintain that the complainant was not obligated to view the promotional link sent to their handset;
8.4.3 the complainant was not automatically subscribed to the service after viewing the promotional link;
8.4.4 all company contact details were provided to the complainant directly on the confirmation page;
8.4.5 Finally the complainant received a full and explicit message advising them of the absolute costs of the service, together with instructions as to how to opt-out of the service but did not elect, at any stage, to do so.

5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

- 5.1.1 The complaint was made on 20 October 2009. The Adjudicator stated that “This complaint was filed shortly after most recent update to the Code to version 8.0. However, given the complaint’s subject matter pre-dated version 8.0, I have reviewed this complaint in the context of version 7.4 in order to determine compliance with the Code.”
- 5.1.2 The Panel agrees with this approach and Version 7.4 of the Code, in use from 17 June 2009 to 13 October 2009, applies.

5.2 Finding

- 5.2.1 We start by noting that we will not consider every potential breach of the Code. We will consider each issue, and whether it breaches any part of the Code. A finding that there is a breach of a specific clause of the Code

does not in this case imply that the same behaviour did not at the same time breach other clauses. It is simply superfluous to the ultimate finding.

5.2.2 From the documents before this panel, it appears that it is agreed that what initially happened is as follows:

On 26 July 2009, the complainant visited and entered his details on the following site:

mjoy

JOIN HOW IT WORKS ABOUT MJOY CONTACT

mjoy

Send unlimited **FREE** Text Messages to any mobile phone in the world. Enter your phone number below and we will send you a message with a link to our service.

1 Your country:

2 Your phone number:
Security code: 

JOIN

Latest news Press

" Right now, mjoy has **366345** users from all parts of the world - **106** new members have joined today. People from **157** countries access mjoy mobile internet and send their free text messages with mjoy. "

Join | About mjoy | Advertising | Developers | Terms | Privacy | Contact

SHARE

On 11 October 2009 the complainant received the following sms's:

Jana has sent u a secret XXX

Video on her Hotbook! with the following link attached

<http://wap.mob365.net/mcs60p0a-z39ipl-s3dwx-elgwz.wml>

Thanks 4

*Adult Hotbook! Content link on its way! Click on it 2 get ur content! Probs? call 011-461-0317 sms stop to 31922 to end subscription.
R14.5/2days 18+*

On 19 October 2009 the complainant received the following sms:

*Jess has sent
you a striptease on Adult Hotbook! with the following link
<http://wap.mob365.net/ncs60p0a-z328p-s3ny1-elhid.wml>*

5.2.3 At this point, it is less clear what happened. It seems that the complainant accessed the link, as he says, "If I accessed their site it was due to the fact that it was done in error via a link sent to me via unsolicited message and not as they claim via the internet or explicitly by my own choice."

The Appellant states that the complainant accessed the webpage and responded to the following invitation:

*The site states that:
CLICK TO SUBSCRIBE FOR
R14.5/2DAY
Please confirm you are aged 16+
Provider: BS Mobile.
YES
By clicking Yes you confirm subscription service entry. R14.5/2days.
Sms STOP to 31922 to end service.*

He then allegedly received the following message:

*"Thanks 4 Adult Hotbook!Content link on its way!Click on it 2 get ur content!
Probs?Call 011-461-0317.Sms STOP to 31922 to end
subscription.R14.5/2day.18+"*

5.2.4 The Appeals Panel feels that there are two issues here:

- The fact that the complainant was sent marketing material for an adult site after signing up for free text messages.
- The fact that the complainant was subscribed to the adult site.

The marketing material

5.2.5 The Appellant has stated that the terms and conditions of the site make it clear that subscribers may be sent marketing material.

5.2.6 The screen shot provided by the Appellant shows no reference to these terms and conditions.

5.2.7 The terms and conditions in turn make no reference to the potential adult nature of the marketing messages.

5.2.8 Clause 4.2.2 states that: Members must respect the confidentiality of customers' personal information and will not sell or distribute such information to any other party without **the explicit consent** of the customer, except where required to do so by law. (our emphasis)

5.2.9 There is nothing before the Panel to suggest that the complainant was aware of or consented to the terms and conditions. At the very least, there should have been a reference to them on the screen which was completed to sign up for the free text messages, which there was not.

5.2.10 The sharing of personal information is a serious issue and it is for this reason that explicit consent is required, both by the Code and by the law. A consumer's attention needs to be clearly and unambiguously drawn to the fact that they are giving such consent.

5.2.11 The Panel is satisfied that this did not occur, and that there was a flagrant breach of Clause 4.2.2.

5.2.12 The issue becomes even more serious when the personal information is used to send adult content marketing messages. The Panel accepts that there was nothing pornographic about the actual marketing message. However, the message itself could be upsetting to a user who is sensitive about this type of content.

5.2.13 Clause 8.1.2 states "Any adult service must be clearly indicated as such in **any** promotional material and advertisements". (our emphasis)

5.2.14 The Panel is of the opinion that the explicit consent required above should also refer to the fact that the marketing might be for adult services. The terms are, in this context, a form of promotional material.

5.2.15 The Panel is satisfied that there was a breach of Clause 8.1.2.

5.2.16 The final point that the Panel wishes to explore in relation to this is Clause 8.1.4 which states, “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.”

5.2.17 There has been some discussion around the three month period in relation to this complaint. The Panel, however, finds that this discussion is misdirected. What is important is the words “. . . sent to a customer of an adult service if that customer has not made use of the service. . .”. What the Clause expressly seeks to prevent is people who have not knowingly accessed an adult site being sent adult content promotional material.

5.2.18 The site that the complainant had accessed in the 3 month period was for free text messages. He did not, to the Appellant’s knowledge, access the relevant adult service as required by the clause.

5.2.19 The Panel is therefore satisfied that there was a breach of Clause 8.1.4.

The adult subscription service

5.2.20 This aspect of the Appeal is less clear cut.

5.2.21 The message that the complainant received was “Jess has sent you a striptease on Adult Hotbook!” with the following link <http://wap.mob365.net/ncs60p0a-z328p-s3ny1-elhid.wml>, and “Jana has sent u a secret XXX Video on her Hotbook!” with the following link attached

<http://wap.mob365.net/mcs60p0a-z39ipl-s3dwx-elgwz.wml>

5.2.22 The complainant has said the following of the sms messages: Without any additional information attached, if this was promotional material surely additional information should have been attached indicating where it originated and that it was of adult content. (our emphasis).

5.2.23 The Panel agrees that these messages do not make it clear that they are promotional in nature, and that they must be confusing, coming as they did, to a person unaware that they have signed up for promotional material. This confusion comes, in part, from a failure to identify that this was promotional material for a subscription service.

5.2.24 Clause 11.1.1 states that, “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.”

5.2.25 The Panel is satisfied that there was a breach of Clause 11.1.1.

5.2.26 What is more problematic for the Panel is the complainant’s allegation that he had no way to be aware of the adult nature of the links. The Panel finds this unlikely, given the use of words such as “striptease” “Adult Hotbook”, “secret XXX video” and “hotbook”.

5.2.27 It would seem to the Panel that when the complainant accessed the link, for whatever reason, he must have been reasonably aware that he might be exposing himself to adult content.

5.2.28 As stated above, Clause 8.1.2. reads, “Any adult service must be clearly indicated as such in any promotional material and advertisements.”

5.2.29 In so far as it relates to the content of the sms alone, there was no breach of Clause 8.1.2.

5.2.30 Having followed the link, for whatever reason, and noting that he should reasonably have been aware of the adult territory that he was entering, he then allegedly responded to the following invitation:

CLICK TO SUBSCRIBE FOR

R14.5/2DAY

Please confirm you are aged 16+

Provider: BS Mobile.

YES

By clicking Yes you confirm subscription service entry. R14.5/2days.

Sms STOP to 31922 to end service.

5.2.31 According to the complainant, he was subscribed without any action from his part. According to the Appellant, he actively clicked the “yes”. What is agreed is that he subsequently received a message saying, “Thanks 4 Adult Hotbook! Content link on its way! Click on it 2 get ur content! Probs? Call 011-461-0317 sms stop to 31922 to end subscription. R14.5/2days 18+”. At this point, in either version, he became aware of his subscription.

5.2.32 The relevant clauses of the Code are 11.1.1 and 11.1.2, which respectively read:

- 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.
- Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.

5.2.33 The Panel is unsure of what in fact happened. On one hand, the Appellant has records showing an active “yes” subscription. On the other hand, the Panel is not impressed with the unethical conduct of the Appellant in relation to the other aspects of this complaint, and this inevitably raises questions about the Appellant’s credibility.

5.2.34 The Panel therefore makes no finding on this aspect of the complaint. It does not consider it material to the sanction at this point, given the numerous other breaches.

5.3 Sanctions

5.3.1 The breaches of the Code recorded above are serious in nature, and indicative of a dubious marketing strategy.

5.3.2 The Appellant has a long history of breaches, with over 30 complaints upheld since 2008. Previous fines and sanctions appear to have had no effect on the Appellant’s behaviour.

5.3.3 It is acknowledged that some of the problem may have originated with the IP who is no longer a partner of the Appellant. This having been said, the Appellant still had the responsibility of ensuring compliance with the WASPA Code.

5.3.4 The Appellant also does not seem to acknowledge any problems with the events that occurred.

5.3.5 In the circumstances the fine remains at R250 000,00, payable within 10 days of receipt of this ruling.

5.3.6 The cost of appeal is non-refundable.