

**WASPA appeals panel
Complaint 10802**

REPORT OF THE APPEALS PANEL

Date:

Appellant: Smartcall Technology Solutions / Lessa Ltd

Complaint Numbers: 10802

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 10802. This complaint is similar to those in complaint numbers 9792 and 10152. The IP in this instance is the same as in those two matters, but there is some dispute as to the identity of the SP, as will be set out below. Complaints 9792 and 10152 are also currently before the panel.
- 1.2 In this particular matter, the complainant received a "WAP link" which, according to him, was unsolicited. He provided a copy of the message. The complainant demanded to know who had subscribed him to this service, and where they had obtained his personal information.
- 1.3 The IP replied that the complainant (or someone else with access to his phone) clicked on a web banner which then directed him to their WAP site. The IP's system was not able to recognise the complainant's MSISDN, so the complainant was redirected to a page where he entered the MSISDN manually. The IP suggested that the complainant may have entered the site using a Wi-Fi connection and as a result of the system did not pick up his MSISDN.
- 1.4 The SP provided similar logs as "proof of subscription" to those provided in complaints 9792 and 10152. According to the SP, the logs include the "date and IP which documents that the customer gave us the permission to contact him."
- 1.5 To this the complainant replied that he had disabled WAP and data connections on his mobile phone and was consequently incapable of accessing WAP services. He further denied subscribing to anything or acknowledging any terms and conditions. It is noteworthy that, while the SP advised that they had refunded the complainant in full, the complainant responded that there was nothing to refund in the first place. The complainant further advised that the IP address listed on the logs provided by the member was not that of his cellphone, but of his Vodacom data connection that he used to investigate the WAP site.

2 THE APPLICATION OF THE CODE AND RULES

The Code, v9.0

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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:

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

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

(a) the recipient has requested the message;

(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.

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.

11.2.2. 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.

11.2.4. If a subscription service is initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation message must be sent to the customer's mobile handset in order to prove that the number entered matches the customer's mobile handset number. This message may either:

(a) contain a PIN number which is then confirmed or validated on the web page, or

(b) contain a URL with a unique identifier, which, when clicked, validates the handset number.

11.4.1. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:

(a) The name of the subscription service;

(b) The cost of the subscription service and the frequency of the charges;

(c) Clear and concise instructions for unsubscribing from the service;

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(d) The service provider's telephone number.

11.9.2. When requested to do so by WASPA, a member must provide clear logs for any subscription service customer which include the following information:

- (a) proof that the customer has opted in to a service or services;
- (b) proof that all required reminder messages have been sent to that customer;
- (c) a detailed transaction history indicating all charges levied and the service or content item applicable for each charge; and
- (d) any record of successful or unsuccessful unsubscribe requests.

14.3.12. Providing incorrect or fraudulent information in response to a complaint, or in response to any other request to provide information is itself a breach of this Code.

3 THE DECISION OF THE ADJUDICATOR

3.1 The adjudicator dealt with the question of whether or not the IP had sent spam to the complainant but felt that he could not draw any conclusions on the evidence.

Subscription without Consent

3.2 The central issue according to the adjudicator was how the member had handled the subscription service. The adjudicator found that while the complainant alleged that he had been automatically subscribed to a subscription service without opting in to that service, in contravention of section 11.2.1 and 11.2.2 of the Code of Conduct, the log entry provided by the SP as "proof of subscription" does not in fact provide evidence that the complainant was subscribed to a subscription service at all.

3.3 In the apparent absence of sufficient evidence one way or the other, the adjudicator determined to approach the matter purely on the facts given by the member.

3.4 If the complainant was indeed subscribed to a subscription service, then the member would have had to follow a certain process in confirming the subscription. The member is obliged to maintain logs of certain information relating to members interactions with subscription service customers.

3.5 As part of the original adjudication process, the member was requested to "deliver a copy of all logs showing all messages sent between the SP and the consumer from the date of subscription to the date of unsubscription;"

3.6 If the complainant had indeed been subscribed by manually entering his MSISDN into the member's WAP site, then in terms of section 11.2.4 of the Code of Conduct the IP would have had to send a subscription confirmation message to the complainant to prove that the MSISDN entered on the site matched the complainant's true MSISDN. Once the complainant had responded to this confirmation message, the IP would have been obliged to

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send the complainant a welcome message to confirm the subscription as required by section 11.4.1 of the Code of Conduct.

- 3.7 As it happens, the logs of the member provided did not show evidence of this confirmation, validation or welcome message is as required.
- 3.8 The member made no claim that any data had been lost or that the logs provided were deficient in any way and thus the adjudicator reached the conclusion that the required messages were not sent. Therefore the member on its own version had breached the Code of Conduct by failing to comply with the subscription process as set out in various subclauses of section 11.

Sanction

- 3.9 The adjudicator referred to the infringements and sanctions imposed by the adjudicators in complaints 9792 and 10152 in imposing sanction. He took account of the repeated breaches of the Code of Conduct in similar circumstances in those complaints, and in the light of the seriousness of the infringements concerned he determined that a greater sanction was now required than imposed in those previous complaints. Accordingly the adjudicator imposed the following sanctions:

1. Smartcall is required to terminate all services to the SP for a period of not less than 90 days.
2. A fine of R100 000.00 is imposed on the SP, to be paid to the Secretariat within 5 working days of the date of delivery of this report failing which the SP shall be expelled from WASPA.
3. In the event that the SP is expelled from WASPA, the Secretariat is directed to notify all network operators and other members accordingly.

- 3.10 Note that the adjudicator refers to “SP” where the panel would refer to “IP”.

4 GROUNDS OF APPEAL

- 4.1 Both the SP and the IP submitted appeals in this matter.
- 4.2 To deal the SP's appeal first, the SP acknowledged that the IP in this particular case was “Lessa Mobile”, but advised that the IP did not use its facilities in this particular instance. Clickatell, another WASPA member, acted as the SP in this case. Accordingly the SP maintained it should be removed as a party to the complaint.
- 4.3 The IP for its part appealed on the following grounds.
- 4.4 The adjudicator based his findings and sanction on the assumption that the complainant was subscribed to the IP's subscription service. However, the service in question allows for consumers to either join a subscription service, or to download content on a per item basis. If the user entered the website in question and his MSISDN was not recognised, the user would be required to enter his or her MSISDN in the WAP site in either case. A confirmation message would then be sent to the user to confirm the MSISDN. In the

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complainant's case, a confirmation message was sent to the complainant which read as follows:

<http://chat.mob.vc/?cmp=78>

- 4.5 The complainant accessed this URL but did not subscribe to the service and consequently no welcome message was sent. The complainant only entered the site for single downloads. The complainant was not billed and no subsequent marketing messages or correspondence were sent to the complainant.
- 4.6 The IP provided the required a log of details to WASPA and accordingly there was no breach of section 11.9.2 of the Code of Conduct.
- 4.7 The IP also noted that the manner in which the service was explained to consumers was insufficient and that in future they would see to it that the difference between the subscription and nonsubscription portions of the service were adequately explained.

5 FINDINGS OF APPEALS PANEL

- 5.1 Once again the panel finds itself in a position where an adjudicator has made a decision based upon very little information.
- 5.2 To deal with the SP's appeal first, the panel has little reason to disbelieve the SP's submission that it did not act as the aggregator in this matter, and consequently the SP's appeal against the adjudicator's findings and sanctions is upheld insofar as they relate to the SP.

Subscription Services

- 5.3 The adjudicator only found that the IP had infringed sections of the Code of Conduct relating to subscription services. He commented that the logs provided by the IP do not prove that subscription to a service took place, but then proceeded on the basis that the complainant had in fact been subscribed to the IP's service based on the complainant's version.
- 5.4 The record however is very unclear as to whether the complainant was indeed subscribed, which is central to a finding of infringement of section 11. The complainant initially refers to having been subscribed to "mobile spam", and later asks who subscribed him to the IP's services. In examining the original case files, the panel found the logs of the unsubscribe service run by the WASPA Secretariat. These unfortunately do not confirm that subscription to a service took place, but merely that the complainant made an unsubscribe request. It is not clear from these logs whether the complainant wished to be removed from a mailing list or from a subscription service. Moreover, the complainant's e-mail dated 19 October 2010 is instructive: when commenting on the IP's response, he remarks that it is ridiculous that the IP should have claimed to have refunded him, as no billing had ever taken place. This would indicate that the complainant was aware that he had not actually been subscribed to a subscription service.
- 5.5 Consequently there is insufficient proof that the complainant actually subscribed to a subscription service, attempted to do so, or that anyone

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subscribed or attempted to subscribe him to such a service without his consent. Nor is there any screenshot of the "consent" page of the WAP site in question. Consequently the panel is of the view that there are not sufficient grounds to make a finding in respect of any subsection of section 11 of the Code of Conduct.

- 5.6 The IP's appeal in respect of section 11 is upheld.

Spam

- 5.7 The adjudicator did not decide on the issue of spam due to a lack of evidence, but the panel wishes to revisit this aspect.

- 5.8 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.

- 5.9 The following factors also militate against the IP's version:

5.9.1 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.

5.9.2 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.

5.9.3 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.

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- 5.9.4 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.
- 5.10 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.
- 5.11 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.
- 5.12 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

- 5.13 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.
- 5.14 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.
- 5.15 The panel substitutes the following sanctions for those imposed by the adjudicators in complaints 10512 and 10802.
- 5.16 In respect of the IP’s infringement of section 5.3.1 in complaints 10512 and 10802:
- 5.16.1 a formal reprimand; and
- 5.16.2 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.
- 5.17 In respect of the IP’s infringement of section 4.1.2 in complaints 10512 and 10802:
- 5.17.1 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.

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5.18 The SP's appeal was successful, and accordingly its appeal fee is to be refunded in full.

5.19 The IP's appeal was not upheld, and it forfeits its appeal fee.