

**WASPA Appeals Panel
Complaint 8668**

REPORT OF THE APPEALS PANEL

Date: 10 August 2011

Appellant: Blinck Mobile Limited

Complaint Number: 8668

Complainant: Mr A Carter

Applicable version/s: 8.0

1 INTRODUCTION

This is an appeal against the finding against and sanction imposed on the Appellant by the Adjudicator in Complaint 8668.

2 BACKGROUND TO THE APPEAL

2.1 *The Complaint*

2.1.1 The Complainant became subscribed to the Appellant's service on 29 May 2009. On 26 November 2009 he logged an unsubscribe request on the WASPA unsubscribe system. WASPA notified the Appellant of the unsubscribe request and the Complainant was unsubscribed on 27 November 2009.

2.1.2 The Complainant was not satisfied with being unsubscribed from the service. On 21 January 2010 he wrote to the WASPA Secretariat alleging that he had been subscribed to the Appellant's wireless application service without his permission and that money had been taken from him. In a subsequent email sent on 22 January 2010, he complained that the Appellant had given him the "run around" when he tried to get a refund.

2.1.3 The Appellant contacted the Complainant on 22 January 2010 and asked him to send through an email with a refund application. As of 4 February 2010 the matter had not been resolved to the satisfaction of the Complainant who was yet to receive a refund. The WASPA Secretariat therefore escalated the matter to a formal complaint against Appellant.

2.1.4 The Appellant was notified of the formal complaint on 5 February 2010 as was its service provider, Sybase (Pty) Ltd. The Complainant, when notified of the escalation of the complaint, responded by reiterating that the Appellant had either illegally taken funds from his account or that he had in some way been tricked into subscribing

2.2 *Appellant's response to the formal complaint*

2.2.1 The Appellant responded to the complaint on 12 February 2010. It denied the allegations that the Complainant had been subscribed without his consent, that he had been tricked and that money had been taken from

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him without his permission. In its response, the Appellant sets out an account of its interaction with the Complainant in attempting to resolve his complaint. The Appellant confirmed that it had offered the Complainant a full refund.

2.2.2 In its account of its dealings with the Complainant, the Appellant claims to have called the Complainant on a number of occasions offering a refund. Despite this, the Complainant also contacted Sybase complaining that he had not been contacted by the Appellant. The Complainant and the Appellant sent each other emails but these were, apparently, not received. On 1 February 2010, the Complainant's bank details were taken down telephonically and the Appellant undertook to refund the Complainant within 28 days.

2.2.3 The Appellant prepared and attached an MO/MT Report to its response which indicates that –

2.2.3.1 multiple messages were sent to and from the Complainant's number on 29 May 2009 between 19:33 and 19:36 and that the following message was sent to the Complainant four times –

"Fill in this code 55334.Or reply OK.U will be subscribed to WFACE from Blinck@R20/sms,3sms/wk.Help?Call 0800980963.To unsubscribe:txt WFACE stop.";

2.2.3.2 following on the above message, the Complainant was then sent the following message –

"Welcome to WFACE!This service is charged R20/sms,3sms/week.To unsubscribe sms WFACE STOP to 31631.For Help call:0800980963.Info?Celdorado.com";

2.2.3.3 content was downloaded immediately thereafter and content was also downloaded during June 2010 - the Appellant does not specify what content was downloaded or the cost thereof;

2.2.3.4 a reminder message was sent on 29 June 2010 stating –

"U r subscribed to the Blinck WFACE service.3XR20/week.For help,txt HELP to 31631 or call 0800980963.To unsubscribe,Txt STOP to 31631.Have FUN!";

2.2.3.5 more unspecified content was downloaded in July 2010;

2.2.3.6 on 29 July 2010 a second reminder message was sent to which the Complainant responded "*take a hike*" – in response, the Appellant's system (or its service provider's) sent a message stating that his text was not recognised;

2.2.3.7 during August, September, October and November 2010 further unspecified content was downloaded;

2.2.3.8 reminder messages were sent at the end of August, September and October 2010 to which no response was received; and

2.2.3.9 the Complainant was unsubscribed on 27 November 2010.

2.3 **Complainant's reply to the Appellant's response**

2.3.1 The Complainant responded to the Appellant's response to the formal

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complaint on 16 February 2010. He persisted in his contention that he had not subscribed to the service. He stated that the "SMS list" (i.e. the MO/MT Report) was not proof of him requesting content but was proof of the Appellant sending him "junk".

- 2.3.2 He admits receiving telephone calls. In regard to the averment by the Appellant that messages were sent to him regarding the service, he states–

"I EXPLAINED I RECEIVED A MESSAGE THAT SAID SEND NO OR SOMETHING TO THIS EFFECT THAT I DELETED AS I DO NOT REPLY TO JUNK . I THEN DELETED ANYTHING I RECEIVED .AND AS YOU KNOW SOME OF THERE STUFF CANNOT BE DELETED, MORE REASON TO REALIZE THAT THIS IS FRAUD. I CANNOT BELIEVE YOU DO NOT KNOW ABOUT THIS .WHY HAVE I NOT RECEIVED ANYTHING IN WRITING FROM THEM? BECAUSE THEY WOULD THEN BE HELD RESPONSIBLE"

2.4 The Adjudication

- 2.4.1 The complaint was adjudicated on 29 July 2010. The Panel notes that the Adjudicator erroneously refers to the Appellant as the service provider whereas, in fact, the Appellant was the information provider. Nothing turns on this however.

- 2.4.2 The following sections of the Code were considered-

Section 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.

Section 11.1.2

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.

Section 11.1.5

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 into that service.

Section 11.1.8

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;
- (d) The service provider's telephone number.

Section 11.2.1

A monthly reminder SMS must be sent to all subscription service customers. This reminder must be sent within 30 days of the initial notification message, and once per calendar month thereafter.

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Section 11.2.2

The reminder messages specified in 11.2.1 must adhere exactly to the following format, flow, wording and spacing:

U r subscribed to [name of service provider] [content/service description]. Cost [cost] of service and frequency of billing]. For help, sms HELP [optional keyword] to [short code] or call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code].

or

U r subscribed to [name of service provider] [content/service description]. Cost [cost] of service and frequency of billing]. For help call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code].

Section 11.5.9

If a consumer lodges a request with WASPA to be unsubscribed from a subscription service, the WASPA member concerned must honour that request within two working days (48 hours) of that request being passed on by WASPA.

Section 11.6.2

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..

- 2.4.3 The Adjudicator found that-
- 2.4.3.1 the MO/MT Report did not constitute proof that the Complainant had intentionally subscribed to the service and did not provide any information on charges and applicable services or content;
 - 2.4.3.2 the fact that the SMS containing the access code was sent repeatedly to the complainant's number indicated that there was an error on the Appellant's system;
 - 2.4.3.3 the Complainant's text "*take a hike*" reinforced the finding that the Complainant had not intentionally subscribed to the service; and
 - 2.4.3.4 "*in the absence of further proof that the Complainant intentionally opted-in to the service*" the complaint was upheld.
- 2.5 The Adjudicator imposed the following sanctions:
- 2.5.1 the Appellant's membership of WASPA was suspended with immediate effect for a period of six months;
 - 2.5.2 all services and billing rendered by the Appellant via short code 31631 were suspended with immediate effect for a period of six months;
 - 2.5.3 the Appellant was given the option to then either terminate its membership

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permanently or offer services that are compliant with the Code; and

- 2.5.4 the Appellant was ordered to refund all amounts charged to the Complainant's account and send proof of the refund to the WASPA Secretariat within seven days of receipt of notice of the adjudication report.
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3 GROUNDS FOR APPEAL

The Appellant lodged an appeal with the WASPA Secretariat on 6 September 2010 appealing against the Adjudicator's findings and the sanction imposed as a consequence thereof.

3.1 ***Re: The findings***

- 3.1.1 The Appellant disagrees with the adjudicator's finding that the MO/MT Report does not constitute proper proof that the Complainant intentionally subscribed to the service. The Appellant states that it was not asked to provide a log file but the document that it did provide was based on its log files and it did indeed contain the information needed to show that the Complainant subscribed to the service.

- 3.1.2 The Appellant states that the adjudicator's impression that there was an error on its system was incorrect. It explains –

"Please note that there was nothing wrong with our systems. If a customer enters his mobile number and presses the submit/ok button, our system sends a message to that specific mobile number. In that message, we provide an access code that the customer must enter on the website. The requirement to enter the access code (which the customer received on his mobile phone) on the website, guarantees that the customer who enters (1) a mobile number and (2) the access code on the website is the same person who actually holds that mobile phone.

The fact that the complainant received four times the access code on his mobile phone, is because of the simple fact that the customer entered four times his mobile number on the website where the service can be ordered. In this particular case, the customer entered his number (all on 2009-05-29) on

19:33:49,

19:34:04

19:34:53 and

19:35:55.

Only after the fourth time the customer also entered (on 19:36:18) the access code on the website, confirming the subscription request.

The IP address of the computer on which the mobile number was entered (41.3.219.143) the same IP address is as the IP address of the computer on which the access code was entered.

Immediately after the customer entered the access code, we sent him a welcome message, confirming the subscription service. All confirmation messages and also the welcome message contained pricing information and information how to stop the service.

- 3.1.3 With regard to the criticism that the MO/MT Report does not disclose the content and the cost thereof, the Appellant states that this information is

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not relevant to the allegation that the Complainant was subscribed without his permission.

- 3.1.4 The Appellant disagrees with the inference drawn by the Adjudicator from the Complainant's "take a hike" message. In its view, the message is an indication that the Complainant regretted accepting the offer.
- 3.1.5 In order to substantiate its claim that the Complainant did indeed intentionally subscribe to the service, the Appellant refers the panel to its website and the information that is available there which includes:
 - 3.1.5.1 on the right top of the landing page it is stated that the service is a subscription service and the maximum costs per week is specified;
 - 3.1.5.2 on each page the fact that the service is a subscription service is repeated and the pricing of the service is specified above the terms and conditions;
 - 3.1.5.3 it is specified that the service is a subscription service in the terms and conditions and an explanation on how the service works is given; and
 - 3.1.5.4 in the "call-2-action" box the following text is displayed "Join now and get mobile games".

3.2 *Re: The Sanction*

With regard to the sanction imposed, that Appellant argues that, as it did not breach the Code, no sanction should be imposed. It states that the Complainant has been refunded.

4 FINDINGS OF APPEALS PANEL

- 4.1 The Appellant has provided the panel with sufficient information to show that the Complainant intentionally subscribed to the service. We have accepted these logs as there is no evidence to the contrary. In this regard -
 - 4.1.1 the Complainant provided his cell phone number four times and filled in the access code sent to him in messages unambiguously informing him that by doing so he would be subscribed to the service;
 - 4.1.2 the Complainant was sent a welcome message confirming his subscription and the costs but did not unsubscribe;
 - 4.1.3 the Complainant was sent monthly reminder messages but did not unsubscribe;
 - 4.1.4 the website clearly states that the service provided is a subscription service and that there are costs associated with joining; and
 - 4.1.5 the Complainant does not dispute that he received messages from the Appellant (which he deleted) or that he received content (which he regarded as junk) - this gives credence, in our view, to what is contained in the MO/MT Report.
- 4.2 In our view intention can be imputed to the Complainant by the fact that he filled in the access code that was sent to him in a message clearly and

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unambiguously confirming that he would be subscribed to the service. He also filled in the access code on a website that clearly stated that the service was a paid subscription service.

- 4.3 It is possible that the Complainant may not have fully understood the implications of his actions or that the "junk" he was receiving was part of the service. This having been said, he did download a considerable amount of content over a number of months which suggests that he must have had some understanding of the service that was offered. His "take a hike" response to the reminder message also suggests that he has had little experience of wireless application services and/or had a careless disregard for the messages sent to him. If the Complainant was indeed inexperienced he could have countered his lack of experience had he read what was contained on the website and in the messages sent to him.
- 4.4 The Appellant cannot be held accountable for the fact that the Complainant did not read properly what was contained on the website or that he did not read properly (or deleted) the various messages sent to him for his protection. The Appellant can also not be held accountable for the fact that the Complainant did not follow the unsubscribe directions sent to him in the welcome message or the subsequent reminder messages.
- 4.5 The Appeal is upheld and the panel orders that the Appellant's appeal fee be refunded.
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