

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 10 November 2011
TRIBUNAL SITTING No. 88 / CASE 1
CASE REFERENCE: 03185

Level 1 and Level 2 Provider: TGH Management Limited (formerly known as Transact Group Holdings Limited), Cambridge

THIS CASE WAS BROUGHT AGAINST THE LEVEL 1/LEVEL 2 PROVIDER UNDER PARAGRAPH 4.4 OF THE CODE

BACKGROUND

On 16 September 2011, TGH Management Limited (formerly known as Transact Group (Holdings) Limited) (the “**L1/L2 provider**”) was sent a direction by PhonepayPlus to make payment of outstanding and overdue invoices totalling £294,842.51 (the “**Direction**”).

The timeframe for settling the payment, and therefore complying with the Direction, was set by PhonepayPlus as no later than 4pm on 30 September 2011, 14 days after the Direction had been sent.

The L1/L2 provider failed to act on the Direction given by PhonepayPlus. No extensions were requested in relation to the Direction, nor did the L1/L2 provider make any contact with PhonepayPlus on this matter following receipt of the Direction on 16 September 2011.

Background to the issuance of the Direction

The sum of £294,842.51, which was directed to be paid in full to PhonepayPlus, was the total outstanding sum in respect of four separate invoices (hereinafter referred to as “**Invoice 1**” to “**Invoice 4**” and collectively referred to as the “**Invoices**”), which had previously been issued to the L1/L2 provider.

The Invoices resulted from the following events:

Invoice 1

On 16 July 2010, a decision was made by an Oral Hearing Tribunal (the “**OHT**”) in relation to premium rate promotions and services operated by the L1/L2 provider. The OHT upheld various breaches of the PhonepayPlus Code of Practice (11th Edition, Amended April 2008) (“**Code 11**”) and imposed a fine sanction of £167,959. This was the amount represented on Invoice 1.

Invoice 2

In addition to the fine sanction, the OHT made a recommendation as to the level of administrative charges that the L1/L2 provider should pay. The administrative charge subsequently imposed was £52,342.51 (inc. VAT). This amount covered the costs of the Tribunal and 50% of the costs of the Executive. This was the amount represented on Invoice 2.

Invoice 3

On 6 August 2010, and following the decision by the OHT, the L1/L2 provider appealed the fine and administrative charge imposed. The case was subsequently heard by the Independent Appeals Body (the “**IAB**”).

On 14 December 2010, the L1/L2 provider paid a security for costs deposit of £5,000 (as required under paragraph 1.3 of Annex 2 of Code 11), as a condition to making an application for an appeal to the IAB (the “**Security**”).

On 11 January 2011, the L1/L2 provider formally changed its company name to TGH Management Limited.

On 21 June 2011, the IAB handed down its decision following the appeal. The IAB Tribunal imposed a fine of £220,000, thereby increasing the fine imposed by the OHT by £52,041.00. This supplement to the OHT’s fine was the amount represented on Invoice 3.

Invoice 4

In addition to the fine imposed, the IAB Tribunal also awarded total costs of £27,500 against the L1/L2 provider. This was the amount represented on Invoice 4.

None of the above Invoices were paid to PhonepayPlus by the L1/L2 provider.

On 23 August 2011, the Executive issued a formal reminder to the L1/L2 provider for payment of the Invoices. The formal reminder contained a warning that, “*Unless full payment of £294,842.51 is received by Tuesday 30 August 2011, PhonepayPlus will have to take further action as deemed appropriate*”.

On 31 August 2011, the L1/L2 provider responded to the Executive by email, stating:

“TGH Management Limited is regrettably not able to currently settle the amounts currently outstanding and due to Phonepayplus [sic]. Over the past few weeks the company has been attempting to realize funds by disposal of its aggregator connections. In this regard we believe that we may have possible acquirer for these connections. Although negotiations are in a relatively early stage at present, we are hopeful that a deal can be done to realize funds for the business in order that it can settle creditor amounts due. In the meantime the company is no longer formally trading and incurring any further liabilities.

I will keep you informed of how this matter progresses in the forthcoming weeks.”

The Executive responded to the above statement by issuing the Direction on 16 September 2011. The Direction as issued was to settle the outstanding Invoices, less the Security of £5,000. No further response was received from the L1/L2 provider and the invoices were not paid within the time limit specified.

THE INVESTIGATION

The Executive conducted this matter as a Track 2 investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice (12th Edition) (“Code 12”).

On 7 October 2011, the Executive sent a breach letter to the L1/L2 provider and raised the following potential breach of Code 12 under the following rule:

- Rule 3.1.4 (in respect of the general responsibility of any Network operator, Level 1 or Level 2 provider to act on any direction of PhonepayPlus).

On 31 October the L1/L2 provider submitted a letter in response to the breach letter.

On 10 November 2011, the Tribunal reached a decision on the Code 12 breach raised by the Executive, following informal representations made by the L1/L2 provider.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH

Rule 3.1.4 (General Responsibility)

“All Network operators, Level 1 and Level 2 provider must:

act on any direction, instruction, notice or request for information given by PhonepayPlus in pursuance of its duties as a regulator. Where PhonepayPlus specifies a timeframe for action or response that timeframe must be adhered to or an extension promptly requested in writing setting out clear reasons. Any such extension will be granted only in exceptional circumstances;”

1. The Executive submitted that the L1/L2 provider had failed to adhere to the Direction to satisfy the Invoices and pay to PhonepayPlus the outstanding amount of £294,842.51. As the L1/L2 provider had failed to adhere to the Direction, the Executive alleged that a breach of Code 12 had occurred by virtue of Rule 3.1.4.
2. The L1/L2 provider disagreed with the Executive’s claim that it was in breach of Rule 3.1.4 of Code 12, and cited the following exceptional circumstances:

The L1/L2 provider was in serious financial distress and entered into liquidation on 3 November 2011. The L1/L2 provider argued that its financial situation was caused by (i) loss of reputation and business arising from the outcome of the original case and subsequent hearings by the OHT and the IAB, (ii) the high legal costs incurred as a result of the hearings, and (iii) further loss of business arising from the imposition of a six-month barring sanction by the OHT which further exacerbated the L1/L2 provider’s financial position. The L1/L2 provider submitted that there were therefore no funds available to satisfy payment of the Invoices in accordance with the Direction.

The L1/L2 provider further submitted that there was no breach of Rule 3.1.4 of Code 12 as there was no wilful intent not to comply with the Direction. The L1/L2 provider argued that it was simply unable to comply with the Direction and that an inability to pay the Invoices was a wholly distinguishable circumstance from an unwillingness to pay. The L1/L2 provider invited the Tribunal to take this into account when interpreting Rule 3.1.4 of Code 12.

Furthermore, the L1/L2 provider confirmed that it had been in financial distress throughout the OHT and IAB appeal procedures. It said that the Executive had been aware of the L1/L2 provider’s financial position since November 2009 by virtue of the regular submission of accounts from the L1/L2 provider to the Executive. In light of this evidence, decisions had been taken by OHT and IAB to suspend the fine sanction as a direct result of the L1/L2 provider’s financial distress.

3. The Tribunal considered the evidence and, in particular, the exceptional circumstances concerning the liquidation of the L1/L2 provider.

The Tribunal concluded that Rule 3.1.4 of Code 12 did not provide for any distinction between *inability* and *unwillingness* to comply with the Direction. The provisions of Rule 3.1.4 were worded as an absolute requirement to adhere to, “*any direction, instruction, notice or request...*” and not to exercise best or reasonable endeavours.

The Tribunal noted that, notwithstanding the current financial situation of the L1/L2 provider, no arrangements had been made at any time since November 2009 to set aside funds to satisfy the fine sanction in the event of an unsuccessful outcome in the OHT or IAB hearings. The Tribunal further noted that the L1/L2 provider had not, at any stage, put forward any proposals for paying the invoices, whether in full or in stages.

The Tribunal accordingly upheld a breach of Rule 3.1.4 of Code 12.

Decision: UPHELD

SANCTIONS

The Tribunal commented that a failure to comply with a direction to satisfy payment of an unpaid sanction fine is potentially very serious, although the circumstances of the individual case are to be taken into account. The Tribunal concluded that it considered this particular breach to be **very serious**.

The Tribunal considered that there were no specific aggravating or mitigating factors which might affect its assessment of the seriousness of this case. Although it noted that the L1/L2 provider was financially unable to pay the Invoices, it did not consider this to be a mitigating factor.

Having regard to all the circumstances of the case, including the consequences of the L1/L2 provider having gone into liquidation, the Tribunal decided to impose the following sanctions:

- A Formal Reprimand.

The Tribunal noted that it was not minded to impose any further sanctions in this particular case in light of (i) the liquidation of the L1/L2 provider, and (ii) the Executive’s confirmation that proceedings had been issued in the High Court of Justice for the purpose of pursuing the outstanding sum on the Invoices.

The Tribunal was also minded to prohibit the directors of the Level 1/Level 2 provider from any involvement in any premium rate service in accordance paragraph 4.8.2(g) of Code 12. The Tribunal instructed the Executive to commence the procedure under paragraph 4.8.6 of Code 12, which will enable the individuals to request the opportunity to make informal representations to the Tribunal or request an oral hearing.

Case for Adjudication Tribunal Sitting, Case Number and Date	Case Ref	Level 1 and Level 2 Provider	Service Title and Type	Case Type	Breaches Upheld Against	Procedure
No. 88 Case 1 10/11/2011	03185	TGH Management Limited (formerly known as Transact Group Holdings Limited), Cambridge	N/A	N/A	Level 1 and Level 2 provider	Track 2

Decision Headnote:

On 16 September 2011, TGH Management Limited (formerly known as Transact Group (Holdings) Limited) was sent a direction by PhonepayPlus to make payment of outstanding and overdue invoices totalling £294,842.51. The sums owed on the invoices comprised a fine sanction and various legal costs arising from appeals of a decision of the Tribunal in an earlier Oral Hearing Tribunal on 16 July 2010.

TGH Management Limited failed to act on the direction given by PhonepayPlus. No extensions were requested in relation to the direction, nor did TGH Management make any contact with PhonepayPlus on this matter following receipt of the direction on 16 September 2011.

The Executive raised the following breach of the PhonepayPlus Code of Practice, 12th Edition (“Code 12”):

- Rule 3.1.4 (in respect of the general responsibility of any Network operator, Level 1 or Level 2 provider to act on any direction of PhonepayPlus).

The Tribunal took into account TGH Management Limited’s arguments against upholding a breach of rule 3.1.4 of Code 12 and noted, in particular, the circumstance of TGH Management Limited being in liquidation. The Tribunal upheld the breach of Code 12 under Rule 3.1.4. The Tribunal considered the case to be **very serious** and issued a Formal Reprimand. The Tribunal noted that it was not minded to impose any further sanctions in this particular case in light of (i) the liquidation of the L1/L2 provider, and (ii) the Executive’s confirmation that proceedings had been issued in the High Court of Justice for the purpose of pursuing the outstanding sum of £294,842.51. The Tribunal was also minded to prohibit the directors of the Level 1/Level 2 provider from any involvement in any premium rate service in accordance paragraph 4.8.2(g) of Code 12. The Tribunal instructed the Executive to commence the procedure under paragraph 4.8.6 of Code 12, which will enable the individuals to request the opportunity to make informal representations to the Tribunal or request an oral hearing.

Administrative charges awarded:

100%