THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS
TRIBUNAL DECISION

Tuesday 2 October 2012
TRIBUNAL SITTING No. 110
CASE REFERENCE: 06655

Level 2 provider: Sight Mobile LLC

Level 1 provider: Ericsson IPX AB and Oxygen8 Communications Limited

THIS CASE WAS BROUGHT BEFORE A REVIEW TRIBUNAL FOLLOWING THE GRANTING OF AN APPLICATION BY THE LEVEL 2 PROVIDER FOR A REVIEW UNDER PARAGRAPH 4.7 OF THE CODE

BACKGROUND

On a 2 August 2012, a Tribunal (the "**Original Tribunal**") decided a case against the Level 2 provider, Sight Mobile LLC. The case related to an Android app and a related premium rate subscription service (the "**Service**") that purported to extend the life of consumers' smart phone batteries. The Executive received in excess of 300 complaints regarding the Service. In the main, the complainants queried why they had incurred charges and raised issues concerning misleading promotional material.

The Original Tribunal hearing was heard in accordance with paragraph 4.5 of the PhonepayPlus Code of Practice (12th Edition) (the "**Code**"). The Tribunal upheld two breaches of the Code, rule 2.3.2 (misleading) and rule 2.3.12(d) (pricing, the content of subscription reminder messages).

The initial seriousness rating attributed to the breach of rule 2.3.2 was 'significant'. The initial seriousness rating attributed to the breach of rule 2.3.12(d) was 'moderate'. After taking into account two aggravating and two mitigating factors, the Original Tribunal considered the breaches overall to be 'significant' and issued the following sanctions:

- a formal reprimand;
- a fine of £75,000; and
- a requirement for the Level 2 provide to submit current or future app-based services with a premium rate service billing mechanism, including promotional material for prior permission for a period of one year.

On 13 August 2012, the Executive informally notified the Level 2 provider of the outcome of the Tribunal hearing. Full payment of the fine and PhonepayPlus' administrative charge was received on, or about, 22 August 2012.

On 19 July 2012, an earlier Tribunal adjudicated against the Level 2 provider Glass Mobile LLC (which was a related, but separate, legal entity) ("**Glass Mobile**") in relation to a near identical service and near identical breaches of the Code. The Tribunal considered the breaches overall to be 'minor' and issued the following sanctions:

- a formal reprimand;
- a fine of £5,000; and
- a requirement to seek compliance advice in relation to the Service.

REQUEST FOR REVIEW

On 31 August 2012 the Level 2 provider submitted an application for a review on six grounds relating to the sanctions imposed by the Original Tribunal. The Executive submitted the application for review to the Chair of the Code Compliance Panel ("**CCP**") on 31 August 2012. On 3 September 2012, the Chair of the CCP concluded that a review was merited stating:

> "The review of sanctions in the Sight Mobile case and the review of sanctions in the Glass Mobile case are to be heard by the same tribunal. The scope of the two reviews in these two separate cases is to be the same; namely, as I directed in the Glass Mobile case, *"The Review Tribunal is to proceed on the basis that liability has been established and on the facts found in the findings on liability. Otherwise, the Review Tribunal is to determine the issue of sanctions de novo, having considered afresh all aspects which are necessary for it to determine sanctions, including the seriousness rating of the breaches individually and collectively, any aggravating/mitigating factors and the weight if any to be given to service revenue and breach history."*

The specific grounds advanced by the Level 2 provider were as follows:

- Ground 1: "The decision (both in the breach decision and the fine sanction) was such a material departure from the earlier adjudication as against another, effectively indistinguishable Level 2 provider, Glass Mobile LLC, in relation to the same product or service model, as to demonstrate that the decision made in this case was so unreasonable that no reasonable Tribunal could have made it."
- Ground 2: "Sanctions: the sanctions imposed were outside those provided for by the Sanctions Guidelines, given the decision of 'significant'; and the sanctions, including the fine sanction, were disproportionate and clearly unreasonable in all the circumstances."
- Ground 3: "Mitigating factors: new issue of fact. New mitigating factor which ought to have been considered by the Tribunal (Compliance Regime at Sight Mobile LLC)."
- Ground 4: "Aggravating Factors: the Tribunal considered two aggravating factors, neither of which was included in the original case and one of which, on examination, ought not to have been considered as separate to the first (as it was based on materially the same facts). In any event, it was clearly unreasonable for the Tribunal not to consider this case and case 06680 (Glass Mobile LLC) together, as requested by the parties, but then to give weight to (i) two aggravating factors based on the close links between Sight Mobile, Glass Mobile and Pegasus, and (ii) the same aggravating factor separately in both cases (a single piece of compliance advice given to Pegasus) or consider a new purported aggravating factor derived from the same set of facts."
- Ground 5: "Mitigating factors: new issue of fact. New mitigating factor which ought to have been considered by the Tribunal (Sight Mobile LLC's voluntary suspension of the service)."
- Ground 6: "Mitigating factors: new issue of fact. New mitigating factor which ought to have been considered by the Tribunal (Sight Mobile LLC's engagement with the Executive going beyond that generally expected)."

The relevant Code provisions

Paragraph 4.7.1 states:

> "Tribunals may, at their discretion, review any determinations made in respect of

> applications for prior permission, adjudications, sanctions and/or administrative charges."

The application was made in writing under paragraph 4.7.2 of the Code. Paragraph 4.7.4 of the Code states:

> "Having received a request for a review, the Chairman of the CCP (or other legally qualified member of the CCP) will consider the grounds of the application and decide whether a review is merited. If it is decided that the review is merited, a Tribunal will carry out a review of the relevant decision(s) as soon as is practicable."

On 2 October 2012, and after hearing informal representations on behalf of the Level 2 provider, the Review Tribunal considered the Executive's submissions and the comments and additional evidence provided by the Level 2 provider.

REVIEW SUBMISSIONS AND CONCLUSION

THE LEVEL 2 PROVIDER'S CASE FOR REVIEW

The Level 2 provider's review application was submitted by its legal representatives and therefore quotes below may refer to 'our client' in places.

GROUND 1
"The decision (both in the breach decision and the fine sanction) was such a material departure from the earlier adjudication as against another, effectively indistinguishable Level 2 provider, Glass Mobile LLC, in relation to the same product or service model, as to demonstrate that the decision made in this case was so unreasonable that no reasonable Tribunal could have made it."

The Level 2 provider submitted that:

> "[T]he tribunal in the Glass Mobile case made an initial finding of 'Moderate' and an overall assessment of 'Minor'. This may be compared to 'Serious' and 'Very top end of significant' respectively in the present case. It is submitted that this decision was clearly unreasonable in the present case."

In addition, it was asserted that:

> "The fine sanction in the present case is some fifteen times that of the preceding case, despite the similar facts. However, only in the Glass Mobile case was the fine sanction set according to the Sanctions Guidelines in respect of the Tribunal's overall finding of seriousness. In the present case the recommended band was significantly exceeded."

As a result, the Level 2 provider submitted that, "given the distinct decision on similar facts by the earlier Tribunal, there may be, "a lack of clarity and regulatory certainty as to the way the offending service, and services of a similar nature, are to be delivered in future," in allowing the clearly unreasonable decision in the present case to stand".

The Level 2 provider also referred to an adjudication against Mobegen Limited (Case reference 06716, dated 02/08/2012). The Level 2 provider submitted that the case against Mobegen Limited was:

"[A] far more serious case (with four breaches, two 'Significant', one 'Serious' and one 'Very serious') that resulted in a similar or smaller fine (£70,000), and this is further evidence of the Tribunal having acted unreasonably in the present case."

In addition the Level 2 provider referred to an adjudication against Mobile Minded BV (Case reference 07657, dated 24/05/12). The Level 2 provider submitted the Mobile Minded BV adjudication had similar facts and a higher finding of breach severity (namely, Serious). Notwithstanding, the fine sanction was significantly lower (£10,000). The Level 2 provider submitted that the adjudications against Mobegen Limited and Mobile Minded BV, especially taken together, demonstrated that the Tribunal in the present case had clearly acted unreasonably.

CONCLUSION ON GROUND 1

The Review Tribunal considered the submissions made by the Level 2 provider under Ground 1 and noted that one of the submissions (the difference between the sanctions imposed in both cases) had been more substantially raised under Ground 2 below, and therefore it was necessary to consider it separately under this Ground. In relation to the submission made by the Level 2 provider regarding the difference in the seriousness ratings applied to the Sight mobile and Glass Mobile cases, the Review Tribunal concluded that the decision of the Original Tribunal was one which was within the boundaries of a decision that a reasonable Tribunal, exercising its discretion, was entitled to reach. With regard to the submissions relating to the application of Mobegen Limited and Mobile Minded BV cases, the Review Tribunal noted that those cases had very different facts to the instant case and in addition had been considered by the Original Tribunal. For these reasons the Review Tribunal concluded that the Original Tribunal's decision was not so unreasonable as to meet the level of unreasonableness required by paragraph 4.7.3 of the Code.

GROUND 2

"Sanctions: the sanctions imposed were outside those provided for by the Sanctions Guidelines, given the decision of 'significant'; and the sanctions, including the fine sanction, were disproportionate and clearly unreasonable in all the circumstances."

The Level 2 provider submitted that the Tribunal was plainly wrong in its approach to the case as if it had made a finding of 'serious', both *prima facie* and in respect of the fine sanction. This was on the grounds that a rating of 'serious' was not merited given that it was accepted that the Service was capable of providing some purported value. Further, the Original Tribunal had placed an unreasonable reliance on the Level 2 provider's revenue, without meeting test of 'serious' or 'significant'. It was further submitted that:

"On consideration of the I&SP and the recent precedents of Glass Mobile and Mobile Minded, the Tribunal was plainly acting unreasonably to have initially considered the case as 'Serious'. Even on its own conclusions, with which we may not agree but which are not the subject of this Review, we regard it as unlikely that a Tribunal acting reasonably would have considered the seriousness as 'Significant' (let alone 'Serious') prior to applying the factors in mitigation; but rather would have made a finding of 'Moderate', downgraded to 'Minor' on consideration of the mitigating factors, as in the Glass Mobile case. It was especially unreasonable, both *prima facie* and considering the above, for the Tribunal to approach the fine sanction as if the overall finding was 'Serious' when that was not the finding. This fact is compellingly illustrated in the considerable divergence from the fine sanctions issued in the recent precedents of Glass Mobile (see Ground 1) and Mobile Minded."

The Level 2 provider added that:

> "The Tribunal's decision to lower the band of seriousness, based on all the circumstances, is effectively meaningless if the Tribunal was determined, unreasonably, that the fine sanction was to be imposed as if the level were 'Serious'. It is clear that the Tribunal had noted the decision published on 19 July in the Glass Mobile case, which was known to be very similar in facts and law, and in which a seriousness level of 'Minor' was decided upon. It is equally clear that it would have appeared obviously and wholly perverse if the Tribunal's finding as to the level of seriousness was *three* whole bands higher than the previous case ('Serious' from 'Minor'). It is submitted that the Tribunal acted unreasonably by attempting to bring the finding as to the level of seriousness more in line with the previous decision in Glass Mobile, whilst making no attempt to do so in respect of the level of fine."

Finally, the Level 2 provider asserted that the Original Tribunal had placed an unfair reliance on inflated level of complaints. Specifically, it stated that:

> "The Breach Letter referred to 218 complaints but only 160 complaints were included in the Annex. The Tribunal relied on even more complaints, citing a figure in excess of 300. Sight Mobile was not given the opportunity to consider the additional complaints and to fully answer the case against it. This was unreasonable (or alternatively, the true number of complainants represents a new issue of fact)."

CONCLUSION ON GROUND 2

The Review Tribunal considered the submissions made by the Level 2 provider and found that, given both the impact rating found by the Original Tribunal and the precedent decision of the Tribunal in the Glass Mobile case in respect of a near identical service, "exceptional circumstances" (as defined at paragraph 90 of the first version of the I&SP, and being circumstances where a higher fine can be justified as being fair and proportionate or where it is required to act as an adequate deterrent to future non-compliance and which allows a Tribunal to impose a fine outside of the recommended banding) had not been demonstrated. This was so notwithstanding the Original Tribunal's references to the level of complaints and scale of the Services, as the Review Tribunal considered that these were not materially different from the previous case and were not exceptional circumstances. In light of this, the Review Tribunal concluded that it was unreasonable for the Original Tribunal to have imposed a fine outside of the recommended banding and was consequently a decision which a reasonable Tribunal, exercising its discretion correctly, could not have reached.

GROUND 3

"Mitigating factors: new issue of fact. New mitigating factor which ought to have been considered by the Tribunal (Compliance Regime at Sight Mobile LLC)."

The Level 2 provider provided a detailed account of its compliance regime. Specifically, the provider highlighted that it had engaged a consultancy service to ensure that it had access to UK compliance advice. Further, it had retained the consultancy service to ensure immediate customer refunds. In addition, the provider stated it was TrustE accredited.

The Level 2 provider asserted that the Original Tribunal had failed to take into consideration the compliance regime it had in place, which was an "important mitigating factor". The provider added that:

> "Such conscientious level of professionalism, demonstrated by Sight Mobile's permanent retention of [the consultancy service] and use of TrustE to assist with its UK regulatory obligations, ought properly have been weighed up in mitigation of any occasional breach by our client, or as against any relevant aggravating factor (such as a past failure to conform to the high compliance standards or to comply fully to advice duly sought). This significant and overarching mitigating factor was not considered in the Tribunal's decision – it therefore comprises new issues of fact not previously available to them. Otherwise, we would argue that the Tribunal had been clearly unreasonable in not even considering our client's comprehensive compliance regime, specifically provided for as a mitigating factor in the ISP and Sanctions Guidelines. As one example of the benefit of the measures listed above, the Tribunal did note the extremely high rate of customer refund and factor this in its final assessment. It did not, however, give our client the necessary credit for the regime which allowed this to happen."

CONCLUSION ON GROUND 3

The Review Tribunal considered the submissions made by the Level 2 provider and concluded that the submissions relating to the "compliance regime at Sight Mobile LLC was not a new issue of fact because it was clearly included in the papers before the Original Tribunal. The Review Tribunal considered that the Original Tribunal's findings in relation to the aggravating and mitigating factors clearly demonstrated that it had been considered.

GROUND 4

"Aggravating Factors: the Tribunal considered two aggravating factors, neither of which was included in the original case and one of which, on examination, ought not to have been considered as separate to the first (as it was based on materially the same facts). In any event, it was clearly unreasonable for the Tribunal not to consider this case and case 06680 (Glass Mobile LLC) together, as requested by the parties, but then to give weight to (i) two aggravating factors based on the close links between Sight Mobile, Glass Mobile and Pegasus, and (ii) the same aggravating factor separately in both cases (a single piece of compliance advice given to Pegasus) or consider a new purported aggravating factor derived from the same set of facts."

The Level 2 provider gave the following account:

> "The two Level 2 providers Sight Mobile and Glass Mobile were known by both the Executive and the Tribunal to operate with the same product, same service model and same personnel in their management team. The Tribunal accepted that it was hard to differentiate the two. The two companies were formed from a previous company, Pegasus Blue Inc. ('Pegasus'), which had previously requested and received compliance advice from the Executive in 2011. The fully disclosed relationship between the parties concerned was cited by the Tribunal as a second aggravating factor in the present case, when there was no secrecy, nor any irregularity in this arrangement. It had indeed been openly requested by both Sight Mobile and Glass Mobile that the parties be subject to the same investigation."

The Level 2 provider stated that it had made repeated requests for its case to be heard with that of Glass Mobile. The provider submitted that the Executive refused to list the cases together as:

> "[C]ontrary to its requirement under the principles of good regulation to be proportionate and consistent, and contrary to government's intention that the regulator be industry-facing – because it believed it had a better chance of recouping two significant fines by treating the two cases as separate. This is unfair and disproportionate and did not enable the Tribunal to make a reasonable decision and/or consider all the reasonably available facts in the context of the present case."

In addition, the Level 2 provider submitted that:

> "The Tribunal in the current case (06655) gave unreasonable weight to the same aggravating factor, namely compliance advice given to Pegasus (which company formerly incorporated both Sight Mobile and Glass Mobile), as had been considered in the Glass Mobile case (06680). It was considered as if it were a substantial new factor, which would not have been reasonable were the cases considered together. Furthermore, although only one aggravating factor had been investigated, in the present case the Tribunal considered this same single aggravating factor as two aggravating factors…This is wholly unfair, illogical and unreasonable for the Tribunal to consider as two separate aggravating factors, since they amount to the same thing: were Sight Mobile not in effect the same entity as Pegasus, it would be wholly wrong to consider compliance advice provided to it as effectively given to Sight Mobile and there would be no reasonable grounds to do so."

The Level 2 provider noted that the Original Tribunal had stated that:

> "In determining the final overall assessment for the case, the Tribunal took into account the following two aggravating factors:
>
> - The Level 2 provider failed to follow compliance advice given to its consultant during a Track 1 procedure in relation to the 'scareware' pop-up message.
> - In light of the explanation given in informal representations that the Level 2 provider was closely connected with Pegasus Blue and Glass Mobile LLC and the overlap of the services provided and the personnel of the three companies, the Tribunal considered it was hard to differentiate between the three entities. The Tribunal noted that Pegasus Blue had been the subject of a previous PhonepayPlus adjudication (28 April 2011, Ref: 851621). In particular, the Tribunal noted that Pegasus Blue was found to have breached provision 7.12.5 from the 11th edition of the PhonepayPlus Code of Practice relating to the content of subscription reminder messages."

The Level 2 provider further submitted that:

> "[T]he aggravating factor was not part of the case against our client (as set out in the Breach Letter). Further, the relation between this case and the previous single breach cited by the Tribunal is extremely unclear, on consideration of the facts of the case. In that case, the Executive relied on a single log which showed a user spend of over £20 a month, such that should have required Pegasus to send a reminder message. In the present case, there was no such confusion as to the necessity of the message. Sight Mobile was aware of its obligations: however, the subscription reminder message it initially sent by the service was

deemed *insufficiently clear* (a fact then duly corrected by Sight Mobile). In all the circumstances, it seems tenuous and unreasonable for the Tribunal to draw any direct connection between the two that may be considered significant aggravation of the present breach."

In conclusion, the Level 2 provider asserted that had the cases been considered together:

"[A]ny reasonable tribunal would not – considering the single aggravating factor and several mitigating factors over the cases – have come to decision which the Executive now seeks, namely two separate and very significant fines for the 3 related breaches by the same personnel, none of which were found to be 'Serious'.

CONCLUSION ON GROUND 4

The Review Tribunal considered the submissions of the Level 2 provider and concluded that in future it would be desirable to list similar cases before the same Tribunal. However, as the two cases were against two separate and distinct legal entities, the Executive was entitled to treat the cases separately.

In relation to the aggravating factors found by the Original Tribunal, the Review Tribunal considered that it was open to the Tribunal to consider these factors as being relevant ones and accord them whatever weight that it considered reasonable. The Review Tribunal concluded that the finding of the aggravating factors and the decision as to the weight to apply to them were reasonable and within the boundaries of decisions that a reasonable Tribunal, exercising its discretion, would be entitled to reach and could therefore not be so unreasonable as to meet the level of unreasonableness required by paragraph 4.7.3 of the Code.

In addition, the Review Tribunal noted that the Original Tribunal's comment about the previous adjudication against Pegasus Blue did not equate to the Level 2 provider's breach history within the meaning of the Code and was satisfied that it had not been considered as such.

GROUND 5
"Mitigating factors: new issue of fact. New mitigating factor which ought to have been considered by the Tribunal (Sight Mobile LLC's voluntary suspension of the service)."

The Level 2 provider raised what it asserted to be a new issue of fact, namely its voluntary suspension of all marketing of the Service. The Level 2 provider stated:

"Although not required by the Executive or specified in its correspondence or breach letter, our Client voluntarily suspended all marketing of the service as soon as possible. Since the breaches related entirely to marketing materials, these steps acted promptly to prevent any future breaches and negate entirely any danger of misleading consumers. This point has not been mentioned previously by the Executive nor by our client in submissions to the Tribunal, and as such raises an important new issue of fact in mitigation."

CONCLUSION ON GROUND 5

The Review Tribunal considered the submissions made by the Level 2 provider and concluded that, strictly speaking, the submissions did not raise a new issue of fact as such matters could (and should) have been raised at the original hearing. However,

in the interests of fairness, the Review Tribunal decided to consider the submissions noting that the Executive had not been afforded the opportunity to consider and respond to those submissions. Accordingly, the Review Tribunal found that the Level 2 provider's voluntary suspension of all marketing of the Service was a relevant mitigating factor and ought to be taken into account in the consideration of seriousness and sanctions.

GROUND 6

"Mitigating factors: new issue of fact. New mitigating factor which ought to have been considered by the Tribunal (Sight Mobile LLC's engagement with the Executive going beyond that generally expected)."

The Level 2 provider raised what it asserted to be a new issue of fact; namely its co-operation and engagement with the Executive, which it argued went above that generally expected. The Level 2 provider submitted that:

> "Our client considers that it attained an exceptional standard of cooperation in its dealings with the Executive's investigation, for which it has not received proper or indeed any credit. Despite our client making this clear in its response to the Executive's breach letter, such facts were not put before the Tribunal. Given the tremendous good faith and desire to cooperate and comply demonstrated in all aspects by our overseas client, this ought to have been considered – not least as part of the extremely punitive fine sanction. It would be clearly unreasonable otherwise not to have given credit for this, were the Tribunal aware of the facts."

The provider added that:

> "Even if the level of cooperation is not considered exceptional, the Tribunal was unreasonable, in all the circumstances, not to consider the extent to which our client *has* cooperated as a part of its overall assessment, in accordance with the ISP."

CONCLUSION ON GROUND 6

The Review Tribunal considered the submissions made by the Level 2 provider and concluded that this ground had been incorrectly pleaded as (i) the matter was not a new issue given its inclusion in the case papers which were before the Original Tribunal , and (ii) the Level 2 provider's references to a failure to take its engagement with the Executive into account therefore properly fell to be considered under the reasonableness test. The Review Tribunal consequently considered that whilst it would have been desirable for the Original Tribunal to have noted the Level 2 provider's comments regarding its engagement with the Executive, it concluded that the issue was not no significant that it would have impacted on the overall assessment of the seriousness of the case in such a way as to make the decision reached so unreasonable to the level required by paragraph 4.7.3 of the Code.

DECISION OF THE REVIEW TRIBUNAL

Given the conclusion of the Review Tribunal in relation to Ground 2, it concluded that the fine sanction of £75,000 imposed on the Level 2 provider was not in the circumstances a sanction which a reasonable Tribunal could have reached. In light of this finding and its finding in relation to Ground 5, the Review Tribunal considered that the appropriate fine sanction should be £50,000, being the recommended upper limit for cases rated as 'significant'. Accordingly, the Review Tribunal substituted a fine of £50,000. The Tribunal noted that the Level 2 provider had obtained prior permission for the Service and a second

new service. In light of the Level 2 provider's co-operation with the Executive and compliance record since the Original Tribunal, the Review Tribunal considered that there was no further regulatory purpose for continuation of the prior permission sanction and decided to lift the sanction accordingly. The Review Tribunal did not interfere with the decision of the Original Tribunal in relation to the formal reprimand as it considered that this was reasonable in the circumstances.