



Tribunal meeting number 144 / Case 1

Case reference: 28374
Level 2 provider: Bongo Operations Pty Ltd (Australia)
Type of Service: Entertainment question and answer – “Ask Bongo”
Level 1 provider: OpenMarket Limited (UK)
Network operator: All Mobile Network operators

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

BACKGROUND

Between 5 June 2013 and 3 January 2014, PhonepayPlus received 67 complaints from consumers in relation to an entertainment question and answer service, which operated under the brand name “Ask Bongo” (the “**Service**”). The Service was operated by the Level 2 provider Bongo Operations Pty Ltd on the premium rate shortcodes 66668 and 85852. Consumers were charged £2.50 per SMS message sent to the Service. The Level 1 provider was OpenMarket Limited. The Service commenced in February 2008 and is currently operational.

The Service was promoted using a variety of methods including television advertisements, at live events, the Service website and social media websites. Consumers would send a question to the Service shortcode and in response would receive an answer to the question.

The majority of complaints were made by parents on behalf of their children. The parents reported that the children had engaged with the Service but had not realised that they would incur premium rate charges.

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) (the “**Code**”).

The Executive sent a breach letter to the Level 2 provider on 28 January 2014. Within the breach letter the Executive raised the following breach of the Code:

- Rule 2.2.5 – Pricing prominence and proximity

The Level 2 provider responded on 11 February 2014. On 20 February 2014, and after hearing informal representations by the Level 2 provider, the Tribunal reached a decision on the breach raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH 1

Rule 2.2.5

“In the course of any promotion of a premium rate service, written or spoken or in any medium, the cost must be included before any purchase is made and must be prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means of access to the service.”



1. The Executive submitted that the Level 2 provider had breached rule 2.2.5 of the Code as the cost of the Service was either, absent, or not prominent and proximate to the means of access to the Service in the following promotions for the Service.
 - 1) Service website promotions
 - 2) Promotions at live events
 - i) Vehicle
 - ii) Wristbands
 - 3) Facebook webpage event photographs

The Executive relied on the content of the PhonepayPlus Guidance on “Promotions and promotional material” (the “**Guidance**”). The Guidance states:

Paragraph 2.2

“As a starting point, pricing information will need to be easy to locate within a promotion (i.e. close to the access code for the PRS itself), easy to read once it is located and easy to understand for the reader (i.e. be unlikely to cause confusion).”

Paragraph 2.8

“Pricing information where consumers are unlikely to see it, or where it is hard to find, is unlikely to be judged as ‘prominent’, or ‘proximate’, by a PhonepayPlus Code Compliance Panel Tribunal (‘PhonepayPlus Tribunal’).”

Paragraph 2.9

“‘Proximate’ is a new term within this edition of the PhonepayPlus Code of Practice, and can be defined as being next to, or very near, the means of consumer access to a service. The most common example of information not being proximate is providing pricing information which is too far from the call to action (i.e. the telephone number, shortcode or other access code or means of payment for the service) within the promotion.”

Website promotion

The Executive obtained the complainants’ message logs from the Level 2 provider. The logs showed that some complainants had been sent promotional messages for the Service, which encouraged them to promote the Service to their friends on certain social networking websites. One promotional message stated:

“FreeMSG: Like that one did ya? Share your Bongo response with your mates on Facebook & Twitter & tag your mates! Click here: <http://bongokno.ws/18GWIKZ>.”

The Executive entered the link into its web browser and was presented with a webpage that contained an image of a mobile screen with an example of a Service SMS message conversation (**Appendix A**). The webpage displayed the Service shortcode but it did not contain any pricing information. As the promotional message invited consumers to share the URL on Facebook and Twitter, the Executive copied the URL into Facebook and the promotion was immediately posted and shared on its Facebook wall.

The Executive asserted that due to the lack of pricing information, any consumer using the Service as a result of copying the link into an internet browser would be unaware that they were engaging with a premium rate service and incurring a cost.

Promotions at live events



Vehicle

The Executive noted that the Level 2 provider used a vehicle at live events as part of its promotion of the Service. The Executive obtained photographs of the vehicle which were displayed on the Level 2 provider's Facebook webpage (**Appendix B and C**). In addition, a PhonepayPlus employee saw the vehicle in a public place and took a photograph (**Appendix D**).

The Executive noted that at the time the photographs were taken there was no pricing information on the vehicle. The Executive asserted that as a result consumers may have interacted with Service without being aware of the cost of the Service. During correspondence, the Level 2 provider stated that the pricing information was displayed on the rear window of the vehicle and it supplied a photograph (**Appendix E**). The Executive noted that the pricing information did not appear to have been present at the time the Facebook photographs and the PhonepayPlus employee photographs had been taken (**Appendix B and C**).

The Executive asserted that even if pricing information had been included on the rear of the window of the vehicle, it would not be visible at a distance. Further, the pricing information was not proximate to the means of access to the Service, which was displayed on the side of the vehicle.

Wristbands

The Executive noted that the Service was promoted by employees of the Level 2 provider who distributed wristbands at certain live events (**Appendix F**). The wristband contained the means of access to the Service on the front side and the pricing information for the Service on the back side. Accordingly, the Executive asserted that once the wristband was worn the cost of the Service would be hidden, unless it was removed and turned over. The Executive noted that the Service was promoted using wristbands until 23 August 2013.

The Executive submitted that the pricing information was not prominent and proximate to the Service shortcode (the means of access to the Service).

Facebook webpage event photographs

The Executive relied on the complainants' accounts and noted that many complaints had been made by parents on behalf of their children. Many of the children had accessed the Service after viewing a promotion on the social networking website Facebook. Complainants stated:

"My daughter came across a Facebook advert for ask bongo. She had to text 66668 and as she was on her mobile phone saw no information about charges."

"My 14 year old son found it on FB. You ask a question they answer it. No talk of charges then a £29.59 bill...."

"My 13yr old daughter saw a suggested post on Facebook which invited people to ask questions to bongo.com by texting 66668."



In addition, the Executive contacted some other complainants to establish how they or their child had come across the Service. Based on the nine responses received, three of the complainants had accessed the Service through Facebook. The complainants stated:

“My daughter heard about it through a school friend who seen it on Facebook.”

“My daughter found a link to the Ask Bongo page via a social networking site, she is adamant she never had saw a box stating there was a charge for this service.”

“My daughter saw a suggested post on Facebook.”

The Executive monitored the Service Facebook webpage and found photographs taken at live events showing the Service being promoted by representatives of the Level 2 provider (who amongst other promotional activities distributed wristbands). The Executive asserted that the photographs were used to promote the Service. The bottom right hand corner of the photographs contained a superimposed image of a mobile phone with the shortcode for the Service, an example of a SMS message sent to the Service and the Service logo, all of which directly or indirectly encouraged the use of the premium rate service. The Executive noted that these webpages did not contain any pricing information. As a consequence of providing the shortcode on these photographs, a consumer could potentially access the Service without being informed of the cost of the Service.

The Executive asserted that the webpage, vehicle and photographs on Facebook were promotions for the Service but noted that they contained no, or insufficient, pricing information for the Service. Furthermore, where pricing information was provided on the wristbands it was not prominent and proximate to the means of access to the Service. Accordingly, the Executive submitted that the promotions for the Service were in breach of rule 2.2.5 of the Code.

2. The Level 2 provider generally accepted that there had been a breach of rule 2.2.5 of the Code. However, it did not fully accept all the reasons advanced by the Executive.

Specifically in relation to the webpage promotions, the Level 2 provider stated that this issue was raised by the Executive on 16 August 2013 in a request for information. The Level 2 provider responded on 23 August 2013 stating that the issue only arose in relation to consumers who accessed the website via the “refer a friend” promotion. The Level 2 provider explained that the Executive’s monitoring was conducted on a laptop computer which resulted in a distortion of the graphics displayed on screen. It referred to correspondence with the Executive which highlighted that it had made several modifications to the promotion to ensure that any concerns were addressed. It stated that the screen was specifically formatted for mobile screens and therefore believed that the promotion had been compliant with the Code. Notwithstanding this, the Level 2 provider stated that it had suspended use of the messages on 23 August 2013 until it received confirmation from PhonepayPlus that the messages were compliant. The Level 2 provider drew attention to correspondence with the Executive where it had been agreed that the Service promotion had been viewed on a mobile handset and the pricing information appeared prominently at the top of the handset screen. The Level 2 provider stated that there was further correspondence with PhonepayPlus regarding the, “rendering on laptop computers”, and it was confirmed by PhonepayPlus on 30 August 2013 that the modifications made to the pricing information were compliant with the Code. Therefore, the Level 2 provider assumed that the matter had been resolved.



In relation to the use of the vehicle to promote the Service, the Level 2 provider stated that the vehicle had only been used at a limited number of live events. The Level 2 provider became aware of the concerns after enquiries were made of the Executive on 24 July 2013 and following this, it stated that it had worked to resolve the concerns. The Level 2 provider stated there was pricing information on the rear window of the vehicle. In addition, it stated that the vehicle was accompanied by its representatives at live events, who communicated the Service terms and conditions, including the cost of the Service, to consumers. However, the Level 2 provider accepted that in August 2013 the vehicle did not meet the Code requirements concerning pricing information and the vehicle was rebranded by 22 August 2013. It produced photographs of the rebranded vehicle. Further, it stated that the vehicle had not been used since 17 October 2013.

In relation to the promotional wristbands that were distributed at live events, the Level 2 provider commented that the cost of the Service was included on all wristbands but accepted that the pricing information would have been on the inside (and not visible) once it had been placed on the consumer's wrist. The Level 2 provider stated that it had been notified of this issue by the Executive on 23 August and it had immediately added all the key terms next to the call to action on both sides of the wristband. The Level 2 provider supplied a copy of the design of the modified wristband. Further, it added that it had not used wristbands as a method of promotion since 17 October 2013.

Specifically in relation to the Facebook events webpage photographs, the Level 2 provider stated that it had noted the Executive's concerns on 23 August 2013. It accepted that the photographs did not display the pricing information. However it asserted the following:

- The event photograph webpages would only be viewed by a consumer visiting the Facebook webpage.
- Consumers would have seen pricing information for the Service on its other webpages before visiting the Facebook events photographs webpage.
- Consumers could only access the Facebook webpage and the events photograph webpages by proactively "liking" the Service Facebook webpage.
- Consumers could only access the Facebook webpage and the events photographs webpage by selecting "Global Gathering" which was a festival that targeted over 18 year old consumers. It stated that it was likely that consumers who had attended the event would be the only people who would want to view the photographs. It estimated that approximately 7,000 consumers may have viewed the collection of photographs on the Facebook events webpage, which it stated was a low number when compared to other promotions for the Service.
- Consumers would generally be aware that the Service is a premium rate service and therefore they would have had some insight into the Service's terms and conditions.
- Not all Facebook "fans" would have seen the photographs as Facebook's algorithm does not permit the content to be, "pushed out to all fans without paying to do so via the "boost" function (which the Company does not do)".

The Level 2 provider stated that notwithstanding the above, it had noted the concerns raised by the Executive and made modifications to the event photograph webpages in August 2013. This included removing the shortcode for the Service, the phone icon image and the content of the sample message.

Accordingly, the Level 2 provider stated that it now only operates the Facebook webpage for brand awareness and the webpage does not contain any direct calls to action other than



in the “About” section of the webpage. The Level 2 provider stated that it had invited PhonepayPlus to provide feedback on the modifications but it had not received a response.

In summary, the Level 2 provider stated that:

- In all the promotions for the Service referred to by the Executive the pricing information was included.
- The webpage promotions on a mobile phone were deemed by PhonepayPlus to be compliant and only required minor adjustments to the display on a laptop.
- In relation to the vehicle, wristbands and Facebook photographs, the pricing information was present and the only issue was in relation to the proximity to the shortcode.
- All issues with the promotional material were remedied promptly.

During informal representations, the Level 2 provider reiterated its written submissions and stated that in July 2013, it had proactively identified the issues now referred to by the Executive.

The Level 2 provider clarified the dates that each of the promotions (referred to by the Executive) had been in operation and stated that:

- The messages and webpage promotions were operational between 28 May 2013 – August 2013 (the revised messages are still operational).
- The vehicle was used from 14 June 2013. It was rebranded on or about 22 August 2013 and had not been used since 17 October 2013.
- The Level 2 provider did not know the date it started using the wristbands. It amended them to include pricing on both sides on or about 23 August 2013 but had not used them since 17 October 2013.
- It did not know the start date for the Facebook event photographs but it ceased use of them on or about the 22 August 2013 (the amended photographs are still contained on the Service Facebook webpage).

The Level 2 provider commented on the photographs of the vehicle obtained by the Executive from the Service Facebook webpage. It had no explanation for the apparent lack of pricing information on the rear window of the vehicle but accepted that the cost of the Service did not appear to be on the rear of the vehicle. It drew similarities with other branded vehicles and stated that the purpose of the vehicles was not to induce engagement with a service. It was the representatives of the Service who would encourage use of the Service. The Level 2 provider clarified that copies of the wristband design provided to the Tribunal were the approximate size of the actual wristband.

Finally, the Level 2 provider stated that it had maintained an open dialogue with the Executive through written correspondence and attendance at meetings. It remained committed to “good corporate citizenship”. However, it stated that the Executive had failed to communicate with it for a few months before it received the breach letter and expressed its surprise with the way the matter had been dealt with.

3. The Tribunal considered the evidence and submissions before it. The Tribunal noted the definition of a promotion at paragraph 5.3.29 of the Code and concluded that the Service website, the vehicle, the wristbands and the Facebook event photographs came within the definition of a “promotion”, as they directly or indirectly encouraged the use of the Service.

The Tribunal noted that between 28 May 2013 and August 2013, the Level 2 provider had used SMS messages to promote the Service which led consumers to a promotional webpage. The Tribunal found that any consumers who viewed the webpage on a computer screen would not have seen pricing information for the Service. The Tribunal considered the photographs of the vehicle that the Executive had obtained from the Level 2 provider's Facebook webpage. It found that, on the balance of probabilities, between 14 June 2013 and 22 August 2013, there had not been any pricing information for the Service on the vehicle. The Tribunal commented that even if there had been pricing information on the rear window of the vehicle, as asserted by the Level 2 provider, it would not have been proximate to the means of access to the Service and therefore a breach of rule 2.2.5 of the Code. The Tribunal further found that the pricing information on the rear of the wristband was not proximate to the means of access to the Service. The Tribunal noted the amendments the Level 2 provider had made to the wristbands on 23 August 2013 but commented that the pricing information was still very small in comparison to the larger font size used for the means of access to the Service and accordingly the pricing information was not sufficiently prominent. The Tribunal noted that the wristbands were not used after 17 October 2013. The Tribunal found that the photographs of events that appeared on the Service Facebook webpage did not contain the cost of the Service. Accordingly and for all the reasons asserted by the Executive, the Tribunal upheld a breach of rule 2.2.5 of the Code.

Decision: UPHELD

SANCTIONS

Initial overall assessment

The Tribunal's initial assessment of the breach of the Code was as follows:

Rule 2.2.5 – Pricing prominence and proximity

The initial assessment of rule 2.2.5 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The breach had a detrimental impact directly and indirectly on consumers and undermined consumer confidence in premium rate services.

The Tribunal's initial assessment was that, overall, the breach of the Code was **serious**.

Final overall assessment

In determining the final overall assessment for the case, the Tribunal took into account the following two aggravating factors:

- The Level 2 provider had not paid sufficient attention to the numerous previous adjudications concerning the display of pricing information.
- The Level 2 provider had been the subject of a previous adjudication relating to the promotion of the same Service in February 2013. Although that adjudication concerned a different provision of the Code, the Tribunal found that the Level 2 provider should have been more alert to potential issues that could result in non-compliance with the Code.

In determining the final overall assessment for the case, the Tribunal took into account the following four mitigating factors:

- The Level 2 provider stated that it had a “no quibble” refund policy and asserted refunds had been provided to the complainants.
- The Level 2 provider had taken steps in advance to identify and mitigate risks that might result in a breach by:
 - Engaging advisers to provide compliance advice.
 - Reformating the Service website and seeking compliance advice in April 2013.
 - Implementing a new text service alert to obtain age verification for consumers.
 - Implementing spend warnings to guard against excessive use.
 - Operator training to proactively monitor consumer engagement.
- The Level 2 provider had taken steps to remedy the breach upon being notified by the Executive. The Level 2 provider implemented changes to the pricing information on the webpage, the vehicle, the wristbands and the Facebook event page thereby potentially reducing consumer harm. The vehicle and wristbands had not been used since 17 October 2013.
- The Level 2 provider had proactively engaged with PhonepayPlus by requesting and attending meetings and engaging in correspondence.

The Level 2 provider’s relevant revenue in relation to the Service was in the range of Band 1 (£500,000+).

Having taken into account the aggravating and mitigating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **significant**.

Sanctions imposed

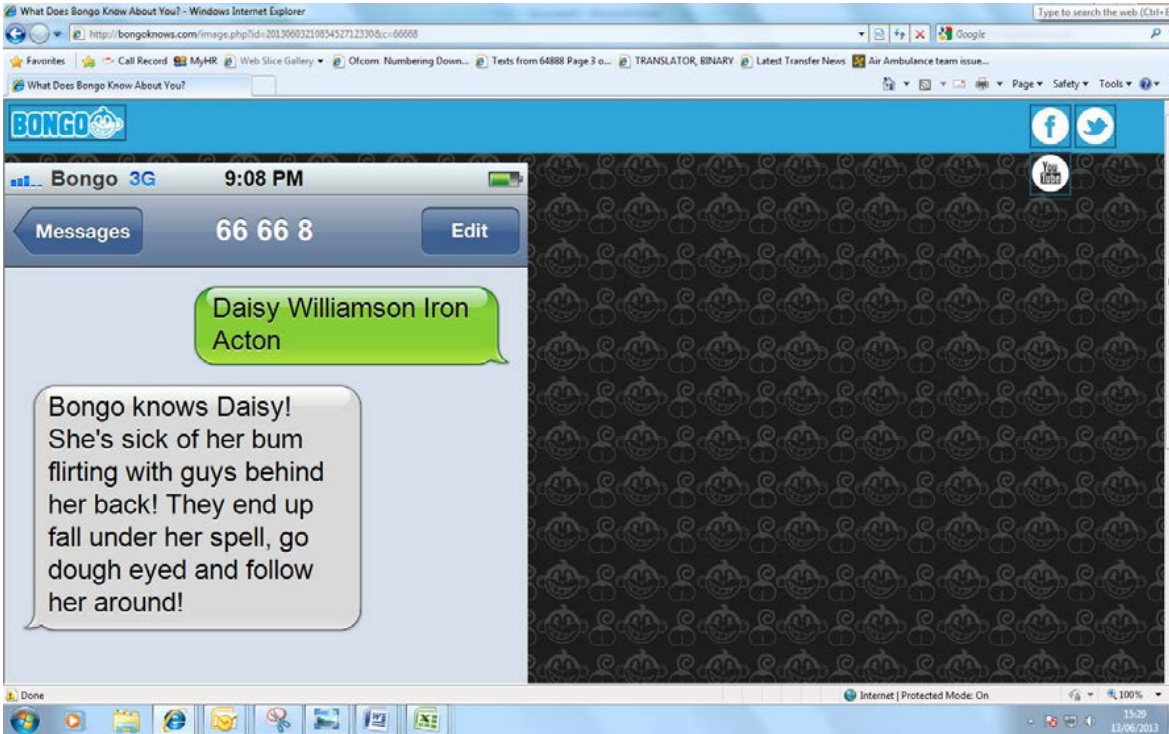
Having regard to all the circumstances of the case, the Tribunal decided to impose the following sanctions:

- a formal reprimand;
- a fine of £70,000 ;and
- a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

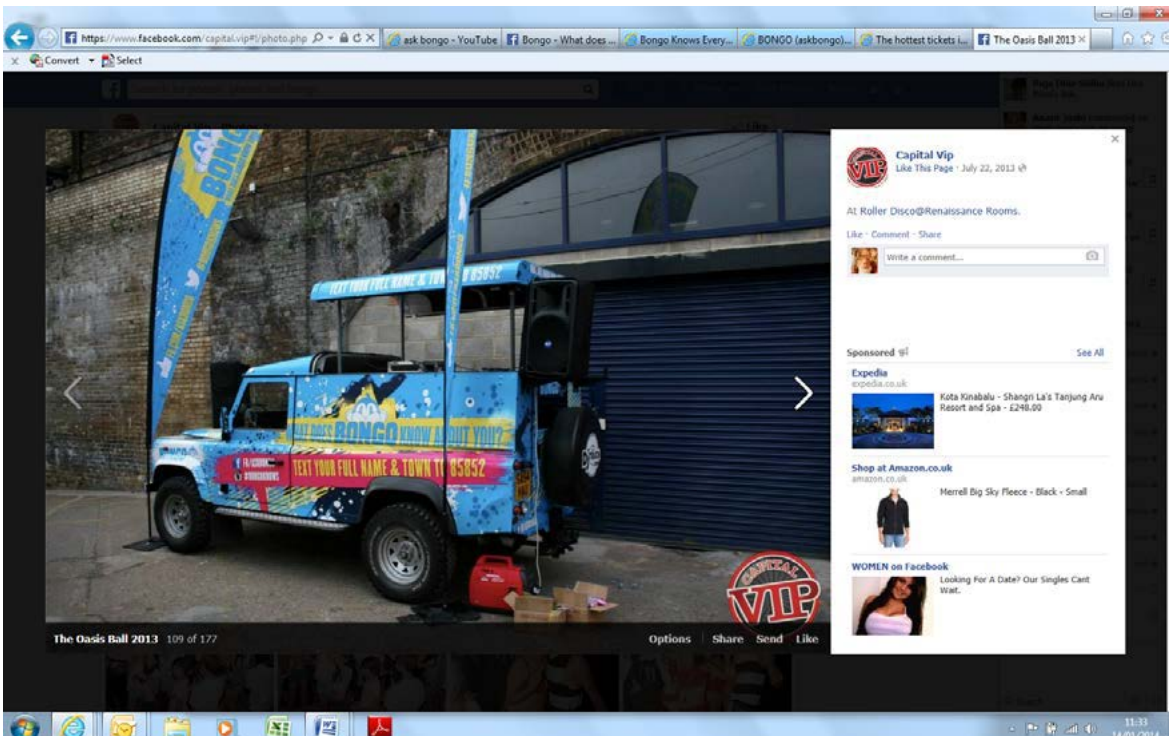
The Tribunal had regard to the fact that the fine imposed is above the guideline level set out in the Investigations and Sanctions Procedure for a breach with a seriousness rating of significant. Nevertheless, it concluded that the fine was fair and proportionate in all the circumstances of this case having regard in particular to the level of the Service revenue and breach history.

Appendices

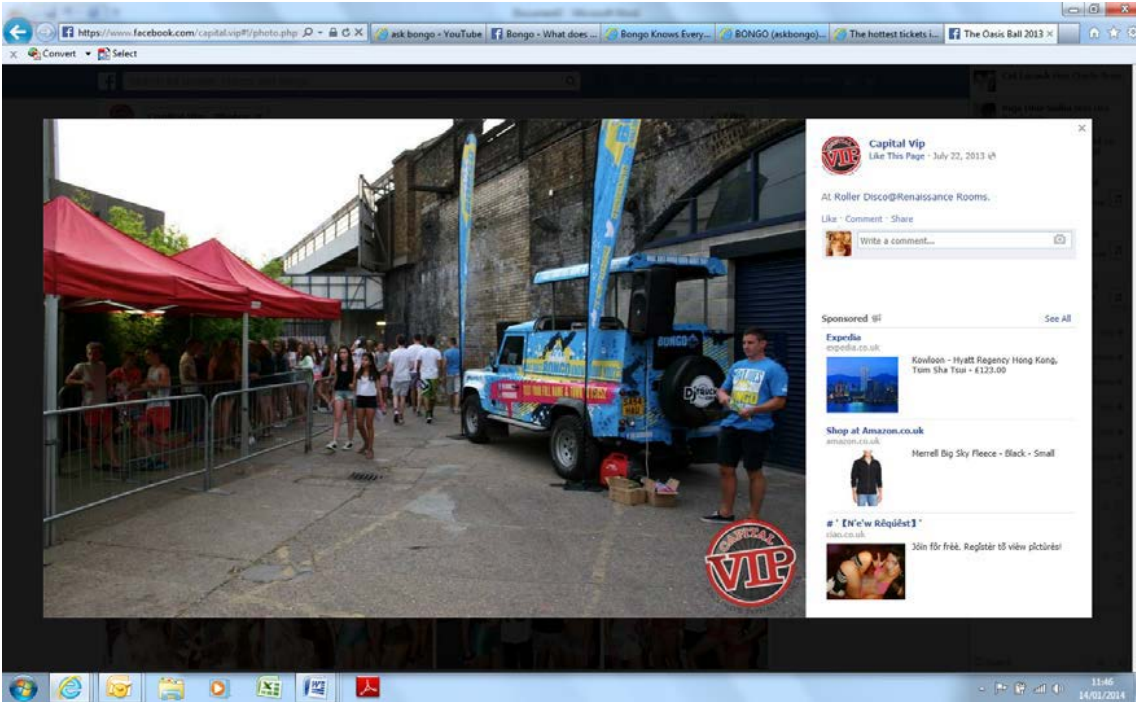
Appendix A - A screenshot of a Service webpage containing an image of a mobile screen image with an example SMS message conversation with the Service:



Appendix B - A photograph of the vehicle promotion displayed on the Service Facebook webpage:



Appendix C - A photograph of the promotional vehicle obtained from the Service Facebook webpage:



Appendix D - A photograph of the promotional vehicle taken by an employee of PhonepayPlus:



Appendix E - A photograph of the rear of the promotional vehicle post 22 August 2013 provided by the Level 2 provider:



Appendix F - A copy of the design of the wristband prior to 23 August 2013 (not the actual size):

The front



The rear

