

IN THE PHONEPAYPLUS TRIBUNAL

CASE REF: 14491

BETWEEN:

PHONEPAYPLUS LIMITED

Executive

-and-

MOBJIZZ LIMITED

Respondent

ADJUDICATION BY CONSENT ("CONSENT ORDER")

Introduction

1. This consent order shall relate to the matter under PhonepayPlus case reference 14491, and the oral hearing listed for 19 and 20 November 2013, requested by the Respondent.
2. This consent order is made following admissions of liability by the Respondent for the breaches set out in the Executive's Statement of Case attached as a schedule to this Consent Order.
3. This order further sets out the agreement of the parties in respect of the sanctions to be imposed on the Respondent and the administrative charges to be paid. The agreed sanctions and administrative charges have been approved by a legally qualified member of the Code Compliance Panel pursuant to paragraph 3.16(d) of Annex 2 to the PhonepayPlus Code of Practice (twelfth edition) ("the Code").

Agreed Sanctions

4. The sanctions hereby agreed by the parties are:
 - a. a penalty of £150,000;
 - b. a formal reprimand; and
 - c. a requirement that the Respondent refund any consumers affected by any of the admitted breaches and who claim a refund, for the full amount spent by them on any of the relevant services, 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.

Administrative Charges


5. The Respondent shall pay the legal and administrative charges incurred by PhonepayPlus in relation to this case up to the sum of £25,000.

Payment of fine and administrative charges

6. The fine and administrative charges are to be paid within 28 days of the date of this Order, subject to any alternative payment arrangements which may be agreed between the parties.

Oral Hearing date and liberty to apply

7. For a period of three months from the date of this Consent Order, the Executive shall be at liberty to present evidence to the Tribunal for it to determine whether it may wish to impose a sanction under paragraph 4.8.2(f) or (g) of the Code. The Respondents shall have the opportunity to make representations on whether the Tribunal should do so. This shall be without prejudice to the procedure set out in paragraph 4.8.6 of the Code.
8. The oral hearing dates of 19 and 20 November 2013 shall be vacated.



David Cockburn (Chair)
On behalf of the Oral Hearing Tribunal
20 December 2013

BETWEEN:

PHONEPAYPLUS LIMITED

Executive

- and -

MOBJIZZ LTD

(“ML”)

Respondent

EXECUTIVE’S STATEMENT OF CASE

Introduction

1. The case that the Executive raises against ML is closely connected to a further case raised against another Level 2 provider, Peekaboo Investments Ltd (“PIL”) and this Statement of Case should be read in conjunction with the Executive’s Statement of Case in relation to PIL of even date.
2. Between 24 October 2012 and 13 March 2013, the Executive received 67 complaints about 2 services (together, the “ML Services”) operating on 6 shortcodes.

3. The ML Services all provided access to pornographic videos and, in one service, the ability to “rate” women appearing in such videos. The videos were accessed from and on mobile phones with internet access. The ability to access the ML Services was charged and this charging was done by the sending of reverse billed text messages. A fuller description of the ML Services appears below.
4. The ML Services were originally provided by PIL before being transferred to ML.
5. It appears that PIL and ML have the same personnel and operate from the same building. In particular (or at least), they share Jack Cresswell and Christian Amicabile as directors and/or key personnel. It was Mr Cresswell who signed the contract to run the PIL Services with the Level 1 Provider in this case: IMImobile Limited (**Annex 4**). The transfer of the 2 services IMImobile hosted from PIL to ML happened by way of a novation agreement between PIL and ML, with IMImobile as a party, effective from 9 October 2012 (at **Annex 9**). The novation agreement was signed by Mr Amicabile

The Services

6. As mentioned above, the ML Services comprised 2 services. They were: Service 1, a subscription service whereby videos were accessed by paying a weekly subscription of £4.50 (this service resulted in 21 complaints), and, Service 2, a pay per video service whereby videos were accessed by paying £4.50 for each video and women could be rated for £1.50 (this service resulted in 55 complaints).
7. The ML Services operated on shortcodes 69011, 69023, 69024, 69030, 89069 and 89269.
8. The Executive was able to monitor Services 1 and 2 following its novation to ML.
9. The Appendix to this Statement of Case sets out a summary of the Level 2 Providers, the services, the monitoring available for each service, and, the breaches the Executive raises.

10. On the basis above, it is the Executive's contention that the Services operated in the following ways.

Service 1

Promotion

11. At the time of the Executive's monitoring, where a consumer undertook a Google search for the term "*porn*", one of the first links that appeared was for the website "*www.pornhub.com*".

12. Where a consumer clicked on that link he was directed to the Pornhub website which contained pornographic content and, at the top of the page, offered a number of 'buttons'. These included "*videos*", "*categories*" and "*live sex*". One of these buttons was entitled "*HD Premium*".

Operation

13. Where a consumer pressed the HD Premium button, a dialogue box appeared that stated:

"Download for free your Android app"

There was then a button entitled "*DOWNLOAD*" and a button entitled "*cancel*".

14. Where a consumer then pressed the cancel button, a further page appeared with the words

"FREE APP DOWNLOAD

Discover a new way to enjoy XXX vids on your Android phone!"

There was then a button entitled "*DOWNLOAD*" and some further text stating

“Download this app now for free and always have your favourite videos at the touch of a button.”

There was then a button entitled “*CLICK HERE*” and some further text stating

“to go straight to the videos”

15. Where the consumer pressed the “*CLICK HERE*” button, a further page appeared which stated

“Get access to vids!”

There was then a large “18” rated symbol followed by the text

“Subscribe for £4.50 a week”

There was then a button entitled “*CLICK HERE*”, followed by text stating

“and text the word OK to 69030 to confirm your age & join to view the site”

16. Where the consumer pressed the “*CLICK HERE*” button, the consumer was taken to their phone’s text messaging facility, with a blank text automatically prepared to be sent to 69030.
17. Where the consumer sent a text stating “*OK*”, three text messages were then received from 69030. These messages contained links for further adult websites and no pricing information. However, they were charged at £4.50 each.
18. The screenshots from the monitoring of the service webpage show the working of Service 1 at **Annex 2**.

Service 2

19. Service 2 was promoted in the same manner as Service 1. However, monitoring was done by the Executive with the search term “*adult porn*”. Again, one of the first links that appeared was for the website www.pornhub.com.
20. However, after entering the Pornhub website and pressing the HD Premium button, a different page opened (the “Homepage”). The Homepage was obviously framed by the screen of the mobile phone handset i.e. the entirety of what could be seen of the Homepage at any one time on the handset screen. The entirety of the Homepage was not visible at any one time on the handset screen.
21. The first screen that appeared on the opening of the Homepage (the “Homescreen”) was entitled with a large logo stating “*Pornhub*” at the top of it. The Homepage appeared to have a number of thumbnail pictures depicting pornographic videos listed. Each thumbnail had a description of the video, various other icons and a link to access the video. If the consumer scrolled down, more such thumbnails appeared.
22. Where the consumer scrolls down, past the thumbnails and to the bottom of the Homepage, there was text stating

“Terms and conditions. This is an adult service, it will cost £4.50 to watch a video and £1.50 to rate a video. 18+ only – You must have the bill payer’s permission before using this service. Depending n the device you are using, you may be able to download and keep the videos to watch again, but with others you will be charged for each time you wish to view. Service Provider Mobjizz PO Box 39822 LONDON WC1N 3XX. Helpline 0330 660 1029 (calls to)3 numbers are included in your network minutes, exclusions may apply). We reserve the right to contact individuals with occasional promotions. By visiting this site, you agree to opt-in for promotional material from Peekaboo and our third-party clients. To opt-out from promotions text STOP ALL to 69024. All persons depicted in the videos on the site are over the age of eighteen.”

23. Where a consumer chose to scroll up from the title “*Pornhub*”, i.e. **above** the Homescreen, further terms and conditions (the “Top Small Print”) revealed themselves. That text stated

“18+ only. It costs £4.50 to download/watch a video and £1.50 to rate. It’s free to browse the site (operator data charges apply). By using this site you consent to receiving free SMS promotions from Mobjizz and selected third party. To opt out see the bottom of this page. Mobjizz. Help: 0330 660 1029”

24. When the Executive clicked on one of the links, the video did not appear but three text messages were received at a total charge of £4.50 which stated

“We hope you enjoyed it. Mobjizz – Helpline 03306601029”

“Thanks for watching a video.”

“[promo] For filthy chat with the FBook girls go to <http://chatnc.psbvid.net>”

25. The screenshots from the monitoring of the service webpage show the working of Service 2 are at **Annex 2**.

The Breaches

Rule 2.2.5

26. Outcome 2.2 of the Code provides

“That consumers of premium rate services are fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made.”

Rule 2.2.5 of the Code provides

“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.”

27. With regard to Service 2, as stated in paragraph 22, if a consumer did not scroll up above the title of the Homescreen, or, to the bottom of the Homepage, they would get no pricing information whatsoever regarding the accessing of the videos that were linked on the Homepage.
28. As stated above, there would, in the normal course of things, be no reason for a consumer who is presented with a screen to scroll *up*. The natural presumption would be that the screen presented is the entirety of the page unless something on the screen rebutted that presumption. With regard to the bottom of the Homescreen, there was reason to scroll down as there were clearly more videos linked. However, there was no reason to scroll to the bottom of the Homepage as there were no more videos there, simply small print. Further the pricing information required by rule 2.2.5 was obscured in small print.
29. The words of the standard Android application installation screen cannot be relied upon by ML as fulfilling the obligation to provide pricing information because: it did not contain any actual pricing information regarding the services, it was not prominent, and, it was not clear or proximate to the means of access to the service. Thus it did not satisfy the terms of Rule 2.2.5.
30. Therefore, the pricing information cannot, on any basis, be described as prominent, clear, legible, visible or proximate to the means of access to the service: the links to the videos.
31. The complaints at Annex 1 bear this allegation and this analysis of the Services out.

Rule 2.3.2

32. Outcome 2.3 of the Code provides

007456/0524/001160159/Ver.01

“That consumers of premium rate services are treated fairly and equitably.”

33. Rule 2.3.2 of the Code provides

“Premium rate services must not mislead or be likely to mislead in any way.”

34. However, the Executive raises this distinct allegation because the structure of the entirety of Service 2, not just the positioning of the pricing information, renders that Service utterly misleading.

35. With regard to Service 2, the placing of the Top Small Print above the title of the Homescreen required an action on the part of PIL (or a gross lack of monitoring, it does not appear to be in dispute that the placing of the Top Small Print was done deliberately, albeit the motive for doing so is in dispute), it did not happen by accident. As such it misled and that is in itself sufficient to breach Rule 2.3.2.

36. Therefore, these are promotional structures that mislead. The Executive goes further and says that, on a balance of probabilities, these were structures deliberately designed to mislead.

37. It is the Executive’s submission that if this allegation is wrongly conflated with the allegation of breach of Rule 2.2.5 then justice will not have been done. If every breach of Rule 2.2.5 led to a breach of Rule 2.3.2, the Code would have done away with one of those rules. The two rules attack two different mischiefs. It is likely that where the mischief in Rule 2.3.2 is made out then an allegation that Rule 2.2.5 will also have been made out but not *vice versa*. This is a classic case of pricing information being obscured by design and not mere omission. As such, a clear breach of Rule 2.3.2 is made out by the Services.

38. The complaints at **Annex 1** evidence this alleged breach and support this analysis of the Services.

Rule 2.3.3

007456/0524/001160159/Ver.01

39. Outcome 2.3 of the Code provides

“That consumers of premium rate services are treated fairly and equitably.”

40. Rule 2.3.3 of the Code provides

“Consumers must not be charged for premium rate services without their consent. Level 2 providers must be able to provide evidence which establishes that consent.”

41. With regard to Service 2; 21 complaints were received regarding this Service. From these complaints, the Executive put a number of MSISDNs of complainants to PIL. These MSISDNs were: 07 [REDACTED], 07 [REDACTED], 07 [REDACTED], 07 [REDACTED], and, 07 [REDACTED]. This was done on 26 February 2013 (**Annex 5**).

42. On 7 March 2013, ML responded by stating that a third party verification service was used to establish consent. When the Executive contacted a third party verification service that was used by ML, it confirmed that, at the time of the alleged breaches, all the verifier could do was to provide a *“once-per-day snapshot of their various brands”*.

43. PhonepayPlus Guidance on ‘Privacy and consent to charge’ (the “Guidance”, Appendix 18) provides factors that could demonstrate “robust” verification of consent. These include, for example, a record being taken of the opt-in, and data being time-stamped in an appropriately secure web format.

44. The Guidance is illustrative of how consent can be demonstrated and the nature of such demonstration. It is the Executive’s case that consideration of the Guidance demonstrates that ML could not demonstrate consent to anywhere near a satisfactory degree.

45. However, even without referring to the Guidance, it stands to reason that a once-per-day snapshot does not demonstrate consent to charge in any satisfactory way.

46. The total of 55 complaints received regarding Service 2 (at **Annex 1**) demonstrate, on a balance of probabilities, that consent to charge was not obtained. Not only does this offend the first limb of Rule 2.3.3, it also demonstrates that ML was reckless as to whether consent to charge was being obtained. The structure of its service was such that ML did not ask of itself whether consent to charge by consumers was being obtained robustly or otherwise.

Rule 2.3.11

47. Outcome 2.3 of the Code provides

“That consumers of premium rate services are treated fairly and equitably.”

48. Rule 2.3.11 of the Code provides

“Where the means of termination is not controlled by the consumer there must be a simple method of permanent exit from the service, which the consumer must be clearly informed about prior to incurring any charge. The method of exit must take effect immediately upon the consumer using it and there must be no further charges to the consumer after exit except where those charges have been legitimately incurred prior to exit.”

49. The Executive received a complaint regarding MSISDN 07 [REDACTED] (the “Complainant’s MSISDN”). The complainant and the message log provided

“Transcript of Text: U are subscribed to XXX vids a £4.50 per week until you send stop to 69011. Help 03306601029. Click <http://vod.jzzvod.com?MzcxNzUzNzMxNDQ3&cz=fbredirect> to enjoy! Stop code has been sent which responds with a message saying I am not subscribed. I am however still receiving these messages and being charged!

Summary of Complaint: I have tried to unsubscribe from this service as the texts state and even tried other numbers to unsubscribe from website forums

but to no avail. They are persisting in texting me and charging me after I have opted out. These charges have doubled my monthly bill almost from £25 to £42. I am not sure what website they have come from but must have entered my mobile number somewhere or this has been apssed on from another site. The messaegs are being sent every sunday evening around 10pm and cost £1.50 each. My last bill totalled £42.10 wil a normal bill ranging from £27 - £29 without these messages. I have already accrued extra charges for my next bill of £4.50 from alst sundays texts which do not seem to have any way of stopping. Please advise. Many thanks.”

Punctuation as in orginal

50. The Executive was supplied with a message log for the Complainant’s MSISDN (contained in **Annex 10**). It could be seen that a keyword was sent to shortcode 69024 on 25 November 2012. The complainant then received a free subscription initiation message followed by three chargeable messages (at a total cost of £4.50). The content of the initiation message was:

*“U are subscribed to XXX Vids at £4.50 per week until you send **STOP to 69011** [emphasis added by Executive]. Help: 03306601029. Click <http://vod.jzzvid.com?m=MzcxNzUzNzMxNDQ3&cz=fbredirect> to enjoy!”*

Following receipt of the above initiation message the user sent ‘STOP’ on 25 November 2012 to shortcode 69011, as directed to do so in the initiation message.

51. The initiation message appeared to inform the complainant of the wrong shortcode to send his ‘STOP’ message to.

52. After sending his ‘STOP’ message, the complainant received the following message from shortcode 69011:

“FreeMsg STOP received. There are no active subscriptions for this number.”

53. Therefore, despite sending the ‘STOP’ message, on 2 December 2012 the complainant received further subscription service charges of £4.50 and two subscription reminder messages. The content of the reminder messages were

*“U are subscribed to XXX Vids for £4.50 per week until you send **STOP to 69011**. Helpline: 03306601029. Click <http://vod.jzzvod.com?m=MzcxNzUzNzMxNDQ3&cz=fbredirect> to watch your weekly XXX VIDS.”*

*“U are subscribed to XXX Vids at £4.50 per week until you send **STOP to 69011**. Help: 03306601029. Click <http://vod.zijmob.com?m=MzcxNzUzNzMxNDQ3&cz=fbredirect> to enjoy!”*

Emphasis added

54. Following receipt of the above reminder messages the complainant sent a further ‘STOP’ message on 2 December 2012 to shortcode 69011, as directed to do so in the reminder messages. After doing so the user received the following message from shortcode 69011:

“FreeMsg STOP received. There are no active subscriptions for this number.”

On 9 December 2012 received further subscription service charges of £4.50.

55. The Executive received a complaint regarding MSISDN 07 [REDACTED] (the “Second Complainant’s MSISDN”). The complainant and the message log (in **Annex 11**) provided

“Service Description...I have text STOP ALL only to have a reply saying im not subscribed to this Website!!!...”

56. It could be seen that a keyword was sent to shortcode 69024 on 24 November 2012. The user then received a free subscription initiation message followed by three chargeable messages (at a total cost of £4.50). The content of the initiation message was:

*“U are subscribed to XXX Vids at £4.50 per week until you send **STOP to 69011**.
Help: 03306601029. Click
<http://vod.jzzvid.com?m=OTQwMDY4OTY5NDQ3&cz=fbredirect> to enjoy!”*

Emphasis added

57. Following receipt of the above initiation message the second complainant sent ‘STOP’ on 24 November 2012 to shortcode 69011, as directed to do so in the initiation message. After doing so the second complainant received the following message from shortcode 69011:

“FreeMsg STOP received. There are no active subscriptions for this number.”

58. Following receipt of the ‘STOP’ message confirmation the second complainant received further subscription service charges of £4.50 on 1, 8, 15, 22, 29 December 2012, 5 and 12 January 2013.

59. The means of termination of this service is not controlled by the consumer as the service charges on a subscription basis, therefore there must be a simple method of permanent exit from the service, which the consumer must also be clearly informed about prior to incurring any charge. By advising the consumer of the wrong service opt out shortcode within the subscription initiation message and subscription reminder messages the consumer was obviously not clearly informed of the method of exit for this service and could not effect an exit from the service.

60. In light of the above, the Executive submits that a breach of rule 2.3.11 of the Code has occurred in respect of Service 1, and therefore the provider has failed to meet Code outcome 2.3.

Conclusion

61. The circumstances of these breaches, as set out above, make them very serious.

62. It is in the nature of premium rate services that their one-off and relatively small cost means that consumers that have been victims of breaches may not complain. Therefore, a number of complaints (and sometimes, in this case, corroboration by Executive monitoring) regarding a service is indicative that more have been victims. This is particularly so when it comes to pornographic services such as the ones at issue here.

63. It is the Executive's submission that this calls for the harshest penalties.

Bates Wells Braithwaite

22 July 2013

Appendix

	Service 1 (Subscription Service)	Service 2 (Pay Per View Service)	Service 3 (Video on Demand Service using app)	Breaches
Run by ML? (Executive monitoring conducted?)	Yes (Yes)	Yes (Yes)	No (N/A)	2.2.5 (pricing – Service 2), 2.3.2 (misleading – Service 2), 2.3.3 (consent to charging – Service 2), and, 2.3.11 (means of termination – Service 1)
Run by PIL? (Executive monitoring conducted?)	Yes (No)	Yes (No)	Yes (Yes)	2.2.5 (pricing – Services 2 & 3), 2.3.2 (misleading – Services 2 & 3), 2.3.3 (consent to charging – Services 1, 2 & 3), and, 3.4.1 (registration)

