

Determination

Subject: disputed direct debit for Internet access; dispute about the TIO's jurisdiction

Date of Determination: November 2006

Decision accepted by the complainant

Circumstances of the Complaint

This complaint relates to the validity of Internet access charges, dishonour and administrative fees as well as Court fees totalling \$249.81, which the Internet Service Provider claims the complainant is liable to pay.

The complaint was first brought to the TIO on 4 October 2005 by the complainant. He wrote that he agreed to a six month contract with the ISP on 21 April 2004 for the provision of Internet access. He advised that he became aware of the offer via the Internet and paid the ISP for the full six months' access up-front, pursuant to the offer. It is the complainant's claim that the offer made by the ISP was for the provision by the ISP of Internet access for a term of six months at \$4.90 per month.

He claims to have believed that the contract with the ISP was due to expire on 21 October 2005. The complainant asserts that he sent a facsimile to the ISP on 14 September 2005 requesting it to cancel the service. The ISP replied by email to the complainant's facsimile, refusing to action the complainant's request and stating he was required to give one month's notice prior to disconnection and noting that the mode of communication he had used to disconnect the service was unacceptable. The ISP advised the complainant that he was required to complete a particular notification form called a Cancellation Request Notice ("disconnection form") before the ISP would action his disconnection request, pursuant to clauses 20 and 48 of the terms and conditions governing the relationship between the ISP and the complainant.

The complainant claims not to have received this email and disconnection form as the ISP sent its reply to an email address that has never been in use by the complainant. This is despite the complainant providing the ISP, in his facsimile of 14 September 2005, his correct contact details, including his preferred email address. Consequently, the complainant did not complete and submit the requisite disconnection form. The ISP unsuccessfully attempted to direct debit the amount of \$58.46 on 5 September 2005 and sent a letter to the complainant on this date advising that a further attempt would be made to debit \$68.46 (\$10 late payment fee added) the following week on 12 September 2005. It is not clear why the ISP attempted to debit the complainant's account in this amount, when it is apparent that the complainant's six month Internet contract was not due to expire until a couple of months later.

The ISP has not responded to the specific questions posed by the TIO during the course of its investigation.

On 8 November 2005, the ISP advised the TIO that legal proceedings had been instituted in the Magistrate's Court and that therefore the TIO had no jurisdiction to investigate the complaint.

The Complainant's Perspective

The complainant claims that he should not be held liable to pay an additional six months worth of Internet access fees totalling \$59.40. Furthermore, he disputes the validity of other

charges being claimed by the ISP in its email dated 10 October 2005 including \$125 for an alleged breach of clause 58 of the ISP's SFOA for taking his complaint to the TIO, late payment charges in the amount of \$20 and dishonour fees totalling \$70.

He bases his claim on the following:

1. He paid an up-front amount \$29.40 for the provision of six months Internet access with the ISP.
2. The ISP attempted to charge him an additional six months worth of access fees despite the earlier contract term not having expired.
3. He provided sufficient written notice to the ISP to disconnect the Internet service when he faxed his disconnection request to the ISP on 14 September 2005.
4. The requisite disconnection notice form was not completed by him because the ISP sent the form to an email address not used by the complainant, despite the complainant providing his contact details, including his email address, in his fax of 14 September 2005.

The ISP's perspective

The ISP maintains that the complainant is liable for the outstanding balance of \$249.81 (pursuant to the copy of the Statement of Claim provided to the TIO) regarding the complainant's Internet account. Furthermore, the ISP refutes that the TIO has jurisdiction to investigate this complaint. It bases its claims on the following:

1. The ISP's terms and conditions, which were agreed to by the complainant when he entered into the contract for the provision of Internet services, relevantly provide that if the complainant wishes to cancel or disconnect his service, he must do so in writing, giving at least one calendar month notice and completing and submitting to the ISP a requisite disconnection form, available from the ISP's website.

The complainant did not submit the disconnection form, which was provided to him in an email from the ISP.

2. The complainant agreed to a minimum twelve month contract, not a six month contract.
3. The complainant is liable for 2 x \$35 Dishonour fees pursuant to clause 34 of the ISP's terms and conditions due to the unsuccessful debits made by the ISP.
4. The complainant is liable for 2 x \$10 Administrative fees pursuant to clause 35 of its terms and conditions which is a fee for late payments of over 14 days.
5. The complainant is liable for an additional six months worth of Internet access (in addition to the six months worth of access already paid by the complainant at the commencement of the contract) amounting to \$59.40 (6 x \$9.90).
6. The complainant is liable for an additional charge of \$125, a fee charged pursuant to clause 54 of the ISP's terms and conditions for bringing the dispute to the TIO before the ISP had an opportunity to resolve same.
7. The Statement of Claim, which the ISP asserts supports its position that the matter has been listed before the Magistrate's Court and that therefore, the TIO no longer has jurisdiction to investigate this complaint.

The TIO's Assessment

The TIO's assessment of the complainant's liability for the disputed charges involves weighing up a number of competing considerations. In doing so the TIO takes into account the law, what is good industry practice, and what is fair and reasonable in all the circumstances.

(a) Does the TIO have jurisdiction to investigate this complaint?

Under clause 4.3(j) of the TIO Constitution, the functions of the TIO do not extend to complaints relating to matters which are being, or which have been, considered by any court or tribunal. The ISP claims that the TIO does not have jurisdiction to investigate this complaint due to the ISP having issued legal proceedings against the complainant. In support of this claim the ISP has produced a copy of a document which is described as a 'Plaint and Action for Small Debt' pursuant to the Magistrates Court Act. The TIO has considered this document and has identified a number of discrepancies as follows:

- (1) There is no plaint number;
- (2) There is no court signature or stamp;
- (3) The dates of claim have been manually altered.

The TIO was in receipt of a number of other complaints where the ISP had claimed that the TIO had no jurisdiction to investigate due to the ISP having issued legal proceedings against the complainants. As there were similar discrepancies in the documentation presented to the TIO in those cases, the Ombudsman wrote to the ISP on 16 November 2005 formally requesting the ISP to supply verifiable evidence that court proceedings had been commenced prior to the date of TIO involvement in each case. The ISP has failed to respond to this request.

The TIO has contacted the complainant and he has advised that he has not received any documents from the court. The TIO also made enquiries with the Magistrates Court where the ISP claims to have issued the proceedings. The TIO has been advised by the court registrar that there is no record of any proceedings being commenced by the ISP in its civil list and there is no record of any proceedings against a defendant with the complainant's name in its civil list.

In light of the above, the TIO does not believe that the ISP has established its claim that the TIO does not have jurisdiction to investigate this complaint.

(b) What is the nature of the contract that exists between the ISP and the complainant? Is it written or verbal? What are the terms and conditions attached to this agreement, including the term of the agreement?

In support of its claims the ISP has relied upon the terms and conditions of the contract it asserts exists between the ISP and the complainant. The copy of the terms and conditions provided to the TIO are effective from 15 January 2005. The terms and conditions supplied by the ISP are generic. That is, the terms and conditions do not appear to specifically relate to the complainant. The ISP has not provided evidence of an agreement or contract that specifies information such as the plan that was agreed to, the term of the contract, the customer's name and other details or any signature to indicate acceptance of the terms and conditions by the customer.

The investigation has centred on the validity, notification and reasonableness of the ISP's terms and conditions and whether they bind the complainant. In this regard, the TIO has considered all documentation lodged by both parties to this dispute. The TIO notes that the

ISP has never provided a formal response to the questions posed by the TIO in its investigation, other than to assert that the TIO has no jurisdiction to investigate the complaint on the grounds that legal proceedings have already commenced.

The complainant's initial email to the TIO dated 4 October 2005 included an email from the ISP in which it demanded that the complainant pay \$92.14 "as per the agreed and signed terms and conditions..." The TIO has never sighted nor been provided with a copy of the allegedly signed terms and conditions, other than the ISP's generic terms and conditions (referred to above). Additionally, in an email dated 11 October 2005 the complainant advised the TIO that he would "like to see a copy of the agreement that I apparently signed as I don't have one..."

The material before the TIO indicates that there was an agreement as money was paid and services rendered. However, the exact terms of this verbal agreement are unclear due to the parties differing versions of event. Discrepancies in agreed terms and conditions are regularly clarified by reference to and reliance upon written agreements. Whilst the ISP has claimed that the complainant agreed to, signed and accepted its terms and conditions it has failed to produce any signed agreement. It is the complainant's position that he never signed any such agreement.

The ISP has refused to participate in the dispute resolution or provide evidence to support its position. In these circumstances, the TIO accepts the complainant's version of events that he agreed to a contract for the provision of Internet access for a period of six months only.

(c) Notice of Disconnection

In absence of clearly definable terms and conditions, the TIO defers to the 'standard of reasonableness'. It is the complainant's claim that the contract was due to expire on 21 October 2005 and that he provided the ISP with almost one month's prior notice of his intention to cease using the Internet service. It is the TIO's view that the complainant has shown that he provided the ISP with reasonable notice of his intention to cease the service when he sent an email to it on 14 September 2005. Accordingly, any charges on the account incurred after 21 October 2005 have not been reasonably or validly incurred by the complainant and should be waived.

DETERMINATION

For the above reasons, I hereby determine that the ISP should cease demanding payment from the complainant in the amount of \$249.81. So as to be clear, the TIO determines that any amount regarding the Internet account in the complainant's name shall be waived in full and no further demands be made for such money.

This action should be completed within 14 days of the TIO providing the ISP with a completed TIO Release Form signed by the complainant.

**Simon Cleary
Deputy Ombudsman**

November 2006