

TIO Determination – 10 July 2013

(De-identified for publication)

Background

In August 2011, the Consumer became a customer of the Provider for landline and ADSL services, after his former provider ceased to trade.

In February 2012, the Consumer moved and asked to relocate his landline service. He was informed that he would have to pay a fee of \$184.90 to relocate the service. The service was relocated on 20 February 2012. On 13 September 2012, the Consumer paid \$184.90.

In May 2012 the Consumer transferred his service to a new provider. The Provider invoiced the Consumer for a \$220 early termination fee. The Provider says that the Consumer is liable for the fee of \$220 for disconnecting his service within a fixed term contract period.

Complaint

The Consumer says:

- when he became a customer of the Provider, it was on the basis of a month-to-month contract. No fixed term was agreed
- the contract was a verbal one. He did not sign and was not given any copy of a written agreement
- no mention was made of any termination fee in February 2012, when he asked to relocate the service, but he was subsequently billed an “early termination cost” when he transferred services, and
- he was not under any contractual obligation to pay the fee and also disputes owing any further amounts to the Provider.

The Provider’s response to the complaint

The Provider says in response:

- the Consumer agreed to a fixed term plan for \$99.95 per month at the time he relocated his services

- he agreed that if he cancelled the service prior to the expiry of the fixed term, he would be charged an early termination fee of \$220, and
- the fee is set out in the terms and conditions for the service and is enforceable under section 479 of the Telecommunications Act.

Issues in dispute

1. What terms were agreed as to the term of the contract and any fees for termination?
2. Is the Consumer liable to pay the Provider any amount in relation to the termination of the service? If so, how much should he pay?

Investigation

I have reviewed information provided by the Consumer and the Provider, in addition to information sourced from the Provider's website.

I have considered the law, good industry practice and what is fair and reasonable in the circumstances.

1. What terms were agreed as to the term of the contract and any fees for termination?

There is no dispute that there was an agreement between the Consumer and the Provider that the Provider would provide landline and ADSL services. This agreement came about after the Consumer's former provider ceased to trade. This agreement began in August 2011, and continued after the service location was changed in February 2012.

Was there a written agreement?

The Provider has provided a copy of its Standard Application Form for Internet and Broadband Services, which I have reviewed.

The application form does provide that all services have a 12 month term and that a fee applies if the services are terminated earlier.

The fees listed on the form include:

- ADSL Connection fee of \$120 (payable once)
- ADSL Churn fee of \$88 (payable once), and
- ADSL Cancellation fee of \$199 (for termination within 12 months).

The form also refers the applicant to the Provider's Terms of Service on its website.

I accept that if the Consumer had signed this form to request connection of the service, or during the relocation of the service, then he would have agreed to pay the fees set out in it, to the extent that he changed or terminated his service within the applicable period.

However, if the Consumer was not given this form, then he could only be charged those fees if they were disclosed to him in some other way and he agreed to them.

The Consumer says that he was never asked to sign a written application or contract.

The Provider said in an email to the Consumer dated 14 May 2012:

“I have checked our records and note that you did not complete a Connection form (sic) showing you accept our Terms and Conditions of service however this is not required as under the Telecommunications Act of 1997 (section 479) it states that on use of the service you agree to our Terms and Conditions”.

In verbal advice to the TIO of 1 February 2013, the Provider stated that there was a written contract but it had been “thrown out”.

Have regard to the information available to the TIO, I am not satisfied that there is evidence to show that the Consumer made a written application for a service from the Provider, or that he signed or was ever sent the application form which provided for a fixed term with a fee payable for early termination. There is no other evidence in writing of an agreement.

On balance, therefore, I think that there was no written agreement between the Consumer and the Provider.

Was there a verbal agreement?

Both parties refer to a telephone conversation in August 2011 in which they discussed the Consumer becoming a customer and they have given their accounts of what was discussed. The information provided to the TIO indicates that the Consumer’s previous provider had ceased to trade and the Provider was approached by its wholesale provider to ask if it would take on the Consumer’s service.

I understand that the Provider called the Consumer to discuss transferring his service to the Provider. The Provider advises that there is no call recording of that conversation.

The Consumer told the TIO that the Provider agreed that the service provided by the Provider would be on a month-to-month contract with no minimum period and no termination fee. He has also advised that, when

relocating the service in February 2012, there was no mention of a termination fee.

There is some written evidence about what happened in February 2012, when the service was relocated. This is an email from the Provider to the Consumer advising that services had been ordered, and the costs of moving the services. There are no other relevant and contemporaneous written, recorded or other materials

The Provider has provided different explanations as to the nature of any contract with the Consumer:

- On 14 May 2012, the Provider sent an email to the Consumer which said (in part), "All services with [the Provider] come with a minimum term of connection (like all Internet providers). Your original connection to us was without contract because you were rescued' from DSM Connect

... [When you relocated the service] this was a 'new service' ... then a new term applies ..."
- On 10 July 2012, the Provider told the TIO Investigations Officer handling the complaint that when the Consumer transferred from his former service provider, he was on a month-to-month plan. The Provider stated that when the Consumer moved address he entered a new contract, and he was told that if he left within six months a termination fee would apply. There is no call recording or customer care note of this advice.
- On 16 August 2012, the Provider sent an email to the TIO explaining the background to the Consumer's transfer to the Provider. He explained that the Consumer's former provider was to be closed and that the Consumer was "given the option to transfer to [the Provider] network with no churn or transfer fee's (sic) no contacts (sic) on a new plan fee of \$99.95 per month for Line Rental and ADSL service (plus any call costs)."
- On 11 September 2012, the Provider sent an email to the TIO saying, "... I was the person that spoke with [the Consumer] and I remember telling him about the costs of minimum terms. ... The fee of \$220 as an early termination IS PAYABLE as a contract existed with [the Consumer] to provide a service."

I note here that the Provider's own "Internet Application Form" notes provides that all services have a 12 month term.

I have closely considered the information provided. My view is as follows:

- At the time when the Consumer was first transferred to the Provider in August 2011, there was no verbal agreement for a fixed term for the services. Nor was any advice provided about an early termination fee. This is consistent with the advice of the Consumer, and at least some of the advice of the Provider.
- At the time the service was relocated in February 2012, there was no verbal agreement for a term contract with a fee for early termination between the parties. Nor was advice provided about an early termination fee. Reasons for this view include the following:
 - this view is consistent with what the Consumer has told the TIO
 - there is no customer care note, audio recording or other record of a term contract between the Consumer and the Provider, or of the Consumer being advised of an early termination fee. In this respect, I note the following TIO position statements:
 - *Early Termination Fees for Fixed Term Contracts* states that “suppliers must make it clear when giving point of sale advice and in the contract that a fee will apply if the contract is terminated early. The supplier should also make clear how much the fee will be ...”
 - *Information Provided During a Sales Transaction* states that providers are well placed to record and store comprehensive records of the information they provide to consumers during a sales transaction. These should be retained for a reasonable period – for example, until the end of the contract period for a fixed term contract.
- The obligation is on the Provider to demonstrate that the Consumer agreed to an early termination fee, as the Provider is best placed to produce any record of a verbal agreement if one exists.
- There is conflicting information provided by the Provider about the nature of the agreement or agreements between the Provider and the Consumer.

What is the effect of the Standard Form of Agreement?

The Provider says that the Consumer is liable for a \$220 termination fee, because section 479 of the Telecommunications Act 1997 provides that the Consumer became bound by the Provider’s Terms and Conditions of Service when he commenced using the service.

Section 479 says (so far as is relevant):

....

(2) *The terms and conditions on which the goods or services are supplied are:*

(a) *so far as the provider and the person agree on the terms and conditions on which the goods or services are supplied—the agreed terms and conditions; and*

(b) *if the provider and the person do not agree on terms and conditions, but terms and conditions are set out in a standard form of agreement that:*

(i) *is formulated by the provider for the purpose of this section; and*

(ii) *relates to the goods or services; and*

(iii) *is in force at the time of the supply;*

the terms and conditions so set out, so far as they are applicable to the supply of the goods or services.

The effect of section 479 is that the terms of the supply of a carriage service are those agreed between the parties, or if there is no agreement, but terms are set out in a standard form of agreement ("SFOA"), by the terms of the SFOA in force at the time of supply.

There are a number of issues with the Provider's contention:

- First, it does not appear a summary of the SFOA was given to the Consumer, as required by the Telecommunications (Standard Form of Agreement Information) Determination 2003, or that the SFOA was otherwise brought to the Consumer's attention. Given this, it may be unfair for the Provider to rely on any SFOA term that provided for an early termination fee.
- Second, the SFOA does not have any provision dealing with minimum contract terms or fees for early termination. In particular, clauses 5.3, 5.4 and 11.1, to which particular attention was drawn, do not deal with either of these matters.

These matters mean that the SFOA does not provide a basis on which to levy an early termination fee.

2. Is the Consumer liable to pay the Provider any amount in relation to the termination of the service?

Given the above reasoning, my view in this matter is as follows:

- at no time was the Consumer in a fixed term contract for the supply of telecommunication services
- the Consumer was not informed about, and was not aware of, any possible early termination fees that may apply to his service, and
- the Provider had no contractual or other right to claim a termination fee of \$220 from the Consumer.

Preliminary view

For the reasons set out above, the TIO formed the view that the Consumer is not liable to the Provider for any early termination fee and that his account with the Provider should be considered paid in full.

This Preliminary View was sent to the Consumer and to the Provider. Both were advised that they could accept or reject the Preliminary View.

The Consumer accepted the Preliminary View.

The Provider advised that it did not accept the Preliminary View and that it would continue action to collect the amount in dispute. However, the Provider did not provide any further information or explain why it considered the Preliminary View to be wrong.

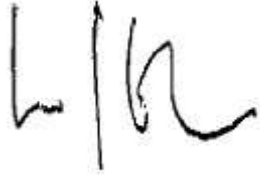
Determination

For the reasons set out above, and having regard to the law, good industry practice, and what is fair and reasonable in all the circumstances I am of the view that the Consumer is not liable to the Provider for any early termination fee, the appropriate outcome to this complaint is for the Provider to close the Consumer's account as paid in full.

Accordingly, I DIRECT the Provider to complete the following action within 14 days of the TIO providing to it a Confirmation of Resolution signed by the Consumer:

- make any necessary adjustment to the Consumer's account to reflect that it is paid in full, and
- forward to the Consumer a final account, statement or other written communication to evidence that that no amount is outstanding to the Provider, and that the account is paid in full.

I also DIRECT that the Provider take no further debt collection or credit management action in respect of the Consumer's account.

A handwritten signature in black ink, appearing to read 'S. Cohen', with a vertical line separating the first and last names.

.....
Simon Cohen
Ombudsman

10 July 2013