

TIO Decision – 26 November 2018

(De-identified for publication)

This document sets out my Decision for a complaint from the Consumer about the Provider.

Directions

Based on the information given to me, I DIRECT the Provider to

- cancel the contracts set up on the Consumer's account in December 2017; and
 - waive all charges associated with those contracts.
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Background

This decision relates to two mobile contracts that were added to the Consumer's account on 26 December 2017.

The Complaint and the Provider's Response

The Consumer's Complaint

The Consumer complained that on 26 December 2017, the Provider added two services to their account without consent. The consumer disputes liability to pay all charges associated with the two services.

The Consumer says on 6 November 2017, they entered into a contract over the telephone for a mobile phone for their child's friend (**third party**) to use. The service number for the contract is xxxx xxx xxx. The Consumer is not disputing liability for this contract.

The Consumer says they were not aware of, and did not consent to, the two contracts entered into on 26 December 2017. The Consumer believes the third party may have:

- overheard the personal identification number (**PIN**) during the telephone call made on 6 November 2017; and
- fraudulently added the services to the consumer's account.

The Provider's Response

The Provider says the contracts entered into on 26 December 2017 are valid. The Provider claims all charges associated with those contracts from the Consumer.

In response to my Proposed Resolution for this complaint dated 28 August 2018, the Provider provided a copy of its telephone recording for the call that took place on 6 November 2017.

The Provider says in that call, the Consumer set up the account, including the PIN, in the presence of the third party. The Provider says the recording supports its view the Consumer did not keep the PIN securely and that the Consumer supplied it to another person openly.

The Provider accepts that the devices the subject of the new contracts entered into on 26 December 2017 were delivered to a third party at an address different to that of the Consumer. However, the Provider maintains it complied with its privacy policy and the contracts are valid.

The Consumer's response to new evidence

My office shared the telephone recording with the Consumer and asked for a response.

The Consumer told my office:

- they did not intentionally share their PIN with the third party; and
- they moved to another part of the house, away from the third party, when giving personal information to the Provider.

Reasons

The reasons for my decision are:

- On the balance of probabilities, I am satisfied the Consumer took sufficient steps to protect their PIN. This is because:
 - The Consumer did not share the PIN with the third party willingly
 - the Provider took personal information and the PIN knowingly in the presence of the third party
 - The Consumer was not aware the third party knew the PIN and used it to sign up for more services
 - The third party did not have implied authority to add services to the Consumer's account.

The Consumer did not share the PIN willingly

I am satisfied the Consumer did not share their PIN willingly.

The Consumer told my office they moved rooms in their home to prevent the third party hearing personal information including the PIN. The Consumer says they did not intentionally allow the third party access to the PIN. I have listened to the recording of the call provided by the Provider.

During the first part of the telephone call, the third party asks the Provider representative about plan and device options. I am satisfied this part of the call takes place in speaker mode and the Consumer is present. This is because of the background noise, and the Consumer's participation in the call¹.

The Provider representative asks the third party who the account holder is to be. The third party replies the account is to be in the name of *'my [parent]'*.

The Provider representative asks the third party to place the call on *'speaker mode'* so that the representative could *'talk to you [the third party] as well as your [parent]'*². From this time onwards, the call is between the Consumer and the Provider representative. The Consumer went on to give the Provider personal details and consented to the Provider conducting a credit check.

The Consumer says the consumer walked into another room in the house for this part of the call. The Consumer acknowledges however, that the only way the third party would have gained access to the consumer's PIN was by overhearing this part of the conversation.

The telephone recording is consistent with the Consumer's version of events. There is little background noise while the personal information is shared. I cannot hear any evidence of another person being present during this part of the conversation. The Consumer paused when creating the PIN, which suggests they gave careful consideration when setting it up.

This does not mean the third party was not present, or that the Consumer was aware or reckless to whether the third party was present.

However, in the absence of evidence to the contrary, I find it is more probable than not, the Consumer took steps to protect their personal information and PIN by moving to another part of the house when this part of the call took place.

¹ At approximately 9:21 in the call recording.

² At approximately 9:04 in the call recording.

The Provider took personal information and the PIN openly

The Provider asked the Consumer to give their personal information and set up a PIN in the presence of the third party.

As set out above, the Provider asked the third party to put the telephone call on speaker mode so that the representative could speak to both the third party and the Consumer.

The Provider told the Consumer they needed to set a four digit pin '*for security purposes*' to '*access their account in the future*'.³ The Provider went on to repeat the PIN to the Consumer and told the consumer that without the PIN, the Provider would not be '*able to give you any account related information*'.⁴

The Provider did not warn the Consumer about giving the personal information in the presence of the third party. The Provider asked the Consumer to participate in the phone call after directing the third party to put on speaker mode. The Provider then repeated the PIN in that context. The Consumer was not told to change the PIN to protect it.

The Provider did not tell the Consumer the PIN could be used to add services to the account and increase credit exposure. The Provider merely said the PIN would be necessary for the Consumer to access or enquire about the Consumer's accounts in the future.

In the circumstances of this complaint, it would have been fair and reasonable for the Provider to tell the Consumer to protect the PIN including by making sure the third party could not overhear the consumer when it was set up. It would also have been fair and reasonable for the Provider to explain the consequences of not protecting a PIN. It did not do so.

The Consumer was not aware the third party knew their PIN and used it to sign up for more services

I am not satisfied the Consumer was aware the third party overheard the PIN and used it to sign up for the two new services.

During the telephone call made by the third party on 26 December 2017, the third party changed the contact email address for the account and the delivery address for the devices.

Until the fraud occurred, the Consumer was not aware the third party knew the PIN, or that the third party used it to sign up for additional services. Upon becoming aware, the Consumer reported the matter to the Provider and to the Police, as was appropriate.

³ At approximately 11:31 of the call recording.

⁴ At approximately 11:55 of the call recording.

The third party did not have implied authority

The Consumer would be liable for the third party's conduct if the Consumer had authorised the third party to act as their agent. I am not satisfied the Consumer gave the third party actual or implied authority to act as their agent and enter into a contract with the Provider.

Agency describes a relationship where an authority is granted in favour of one person to create a legal relationship between another person (a principal) and a third party.

The Consumer did not give the third party authority to take steps on their behalf with the Provider. The Provider has not argued that this was the case.

The Provider says by not protecting their PIN, the Consumer is bound by the third party's actions. I take this to mean the Provider thinks the third party had implied authority to bind the Consumer because the third party knew the Consumer's PIN.

The holding out of authority by an agent, in this case, the third party, is not sufficient to establish authority. The fact the third party knew the PIN does not mean an agency was created.

It is the conduct of the principal, in this case the Consumer, which is critical to establishing agency. For the reasons set out above, in the circumstances of this complaint, the Consumer was not reckless as to maintaining the security of their PIN. I do not consider the Consumer has taken any actions that prevent the Consumer from denying that the third party had authority to bind them.

Accordingly, the steps taken by the third party cannot bind the Consumer.

Final comments

For the reasons set out above, the information in the call recording from 7 November 2017 does not change my view of the fair and reasonable outcome to this complaint.

The facts of this complaint are unfortunate. It appears both the Consumer and the Provider have been victims to the behaviour of the third party.

On balance, the Provider was better equipped with the opportunity to protect its position than the Consumer, and it did not do so.

Accordingly, it is my view that the Consumer is not liable under the December 2017 contracts and the Provider ought to:

- cancel those contracts; and
- waive all charges associated with those contracts.

Judi Jones
Telecommunications Industry Ombudsman