

**WASPA APPEAL PANEL FINDINGS FOR COMPLAINT NO #0002 #0011
#0026 #0037 #0058**

INTEGRAT (PTY) LTD

FIRST APPELLANT

GOZOMO INC

SECOND APPELLANT

30th of May 2006

DECISION

Background:

Following adjudication against Integrat (Pty) Ltd, the Appellant lodged an appeal (1st Appellant). The Information Provider (Gozomo) lodged a separate appeal (2nd Appellant).

This appeal relates to a breach of the *Wireless Application Service Providers' Association Code of Conduct* (version 3.2, dated 28 June 2005) (the "Code") by Integrat (Pty) Ltd ("Integrat"), a wireless application service provider ("SP") and first appellant in this matter and Gozomo Inc ("Gozomo"), an information provider ("IP") and second appellant in this matter. Integrat is a member of WASPA. Gozomo has subsequently joined WASP as an associate member but was not a member at the time that the complaint was lodged.

The appeal concerns certain advertisements for subscription services that were allegedly bundled with specific content services. The advertisements appeared in various magazines, namely *People* on 2 September 2005 (complaint #0002), on 23 September 2005 (complaint #0011) and 28 October 2005 (complaint #0026); and *You* on 8 September 2005 (complaint #0037) and 8 October 2005 (complaint #0058).

The original complaints alleged that these advertisements were placed in breach of the following clauses of the code:

-  Section 9: (*Competition*), specifically clauses 9.1.4 and 9.1.5 which prescribe what information must be made available when a competition is run.
-  Section 11.1 (*Manner of subscription*), specifically clause 11.1.2, which states that, "[a]ny request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service."

The Adjudicator's ruling also alluded to a breach of clause 11.1.4 of the Code, which was not part of the original complaints. This clause states that:

“[c]ustomers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.”

The Adjudicator’s ruling:

The Adjudicator ruled against Integrat and Gozomo and found that the Appellants had breached clause 11.1.2 and 11.1.4 of the Code in respect of all five complaints (namely #000complaints 2, #0011, #0026, #0037 and #0058). The Adjudicator also found that there had been a breach of clause 9.1 in relation to complaint #0011. The Adjudicator imposed sanctions in respect of all the breaches, and specifically directed Integrat to ensure that Gozomo refrained from further breaching clauses 11.1.2 and 11.1.4 within 45 days after the publication of the Adjudicator’s findings, failing which Integrat was required to terminate its relationship with Gozomo. The Adjudicator also ordered Integrat to pay a fine of R52 500 for breaching clauses 9 (*Competition*) and 11 (*Subscription services*) of the Code.

The grounds of appeal:

The Appellants claim that the Adjudicator’s ruling was incorrect for a number of reasons. In summary, the grounds of appeal are as follows:

1. *Error of interpretation* – it is alleged that the Adjudicator interpreted clause 11.1.2 of the Code incorrectly. This is the crux of the appeal. The Appellants argue that the Adjudicator erred by finding that this clause of the Code requires a request for a subscription service to be unbundled from a request for specific content on the basis that this is not clear from the text of the Code. The Appellants claim that the Adjudicator relied upon the interpretation of this clause that was given in a non-binding WASPA advisory (the “advisory”) which attempted to expand upon the meaning of clause 11 of the Code for the purpose of facilitating compliance on the part of WASPA members. The Appellants are of the view that the advisory extends beyond the scope of the prohibition in the code.
2. *Failure to apply the mind* – the Appellants claim that the Adjudicator failed to fully examine all the advertisements mentioned in the complaints. They specifically claim that the advertisement to which complaint #0037 relates is fundamentally different to the other advertisements as no specific item of content is linked to a specific keyword.
3. *Bias* – the Appellants allege that the Adjudicator was not impartial as he indicated in his findings that subscription services remain a contentious issue within WASPA and that he had previously commented on this issue.
4. *Consideration of complaints that were not part of the original complaint* – it is alleged that the Adjudicator erred by finding that there had been a breach of clause 11.1.4 of the Code, which was not part of the original complaint. The Appellants argue claim that they were

prejudiced as a result, because they were not given the opportunity to refute the alleged breach of clause 11.1.4 in their responses to the complaint.

5. *Ultra vires* – it is alleged that the Adjudicator imposed sanctions which are beyond the scope of his powers in the Code. Specifically, it is alleged that the Adjudicator erred in ordering Integrat to dictate the format of future advertisements for subscription services to Gozomo, failing which to terminate its contract with Gozomo on the basis that clause 13.4 does not allow for the Adjudicator to direct an SP to take action against an IP in this way.
6. *Severity of the sanction* – it is alleged that the Adjudicator imposed a sanction that was too severe, and failed to take mitigating factors into account. The Appellants also claim that it was inappropriate for the Adjudicator to have imposed a fine for breaching clause 9 (*Competition*), as remedial steps were immediately taken as soon as they were notified of the breach. The Appellants do not dispute that they breached clause 9, only that the sanction was too harsh.
7. *Failure to consider other laws* – it is alleged that the Adjudicator erred in failing to take national and constitutional law into account
8. *Failure to respond in a reasonable period of time* – it is alleged that the Adjudicator erred in failing to respond to the complaints within a reasonable time.
9. *State of mind* – it is alleged that the Adjudicator erred in considering the Appellants’ “state of mind” as advanced in their arguments, which the Appellants claim is irrelevant.

Findings of the appeals panel and reasons

1. *First ground of appeal – error in interpretation*

The question that the first ground of appeal raises, and that we have been called upon to decide, is whether clause 11.1.2 of the Code prohibits Members from tying an offer for a customer to sign up for a subscription service with a specific item of content. The exact wording of this clause states:

“Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service.”

The advisory attempts to clarify the meaning of clause 11.1.2 and other issues. The relevant part of the advisory states in relation to clause 11.1.2:

“A request from a subscriber to join a subscription service may **not** be bundled with a request for specific content. It must be an independent transaction. For example, “*This picture is an example [of a] funny picture. To subscribe to the daily funny picture, SMS FUNPICS to 12345*”, does not bundle any particular

content with a subscription service. However, “*To get this picture, SMS FUNPICS to 12345. You will be subscribed to the daily funny picture*”, is an offer bundling a subscription service with a specific item of content (the picture in the advert), and is thus not allowed.”

The Appellants correctly point out that the advisory does not form part of the Code and therefore is not binding on WASPA members, and is merely meant to serve as an interpretational guide.

At all times, reference must be had to the actual wording of the Code itself, which is binding on WASPA members. The Appeals Panel has therefore interpreted the meaning of clause 11.1.2 with reference to the Code alone.

Two requirements must be met in order to comply with clause 11.1.2, namely:

- First, a transaction for subscription services must be an independent transaction.
- Second, customers must subscribe to a subscription service with the specific intention of subscribing to that service.

The Appellants have argued that the meaning of clause 11.1.2 is vague. Their concerns stem from the fact that this clause does not stipulate what the comparator should be for determining whether a transaction is “independent” – in particular, whether the independence of a request for a subscription service must be ascertained by its independence from requests for other subscription services or by its independence from requests for specific items of content.

Clause 11.1.2 is not as clear as it should be. The interpretation of this clause is complicated by the fact that the text of clause 11.1.2 does not specifically refer to content. The ordinary grammatical meaning of words must be followed. Where the grammatical meaning of the words is unclear the words must be interpreted in light of their immediate linguistic context. The wider legal context may also be determined by referring to internal sources (the Code, especially clause 11.1) and external sources. The meaning of clause 11.1.2 becomes apparent if it is read in context with the rest of clause 11.1, especially the heading of clause 11.1 (“*Manner of subscription*”) and clause 11.1.4. Clause 11.1.4 provides that customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. It becomes clear that clause 11.1.2 prohibits the subscription service from being dependent on the ordering of content and that the customer must be specifically intent on subscribing to a subscription service and not the ordering of content.

The second part of clause 11.1.2 also makes it clear that an offer to customers to sign up for a subscription service should not mislead customers to believe that they are subscribing to anything other than a subscription service. We are therefore of the view that clause 11.1.2 prohibits requests for subscription services from being dependent on requests for specific items of content.

The advertisements to which complaints #0002, #0011 #0026 and #0058 relate all required customers to put in a request for specific content first, whereupon they would be subscribed to a subscription service that would deliver similar content in future. We find this practice to be in contravention of clause 11.1.2 of the Code..

As Appellant correctly pointed out in the second ground of appeal, far as the subscription services referred to in complaint #0037 are concerned, that independent subscription services are offered. The nature of the service is indicated, but specific content is not offered. This service offering is not in breach of Clause 11.1.2.

The Appeals Panel rejects these grounds of appeal as far as complaints #0002 #0011 #0026 and #0058 are concerned.

The Appeals Panel upholds these grounds of appeal as far as complaint #0037 are concerned.

2. ***Second ground of appeal – failure to apply the mind***

The Appellants allege that the Adjudicator erred by failing to fully investigate all the advertisements. We are of the view that the Adjudicator did not apply his mind to all the advertisements in question. The advertisement to which complaint 37 relates is materially different to the advertisements to which the other complaints relate as it contains no codes for specific content.

The Appeals Panel upholds this ground of appeal.

3. ***Third ground of appeal – bias***

The Appellants argued that the Adjudicator was not impartial on the basis that he remarked in his findings that subscription services remain a contentious issue within WASPA.

The mere fact that the Adjudicator indicated that the issue is controversial does not automatically imply that that he has prejudged the issue. In fact, we are of the view that this rather indicates that the Adjudicator fully appreciated the complexity of the issues he had to make a ruling on.

The Appeals Panel rejects this ground of appeal.

4. ***Fourth ground of appeal – consideration of complaints that were not part of the original complaint***

The Appellants allege that the Adjudicator should not have found that there was a contravention of clause 11.1.4 of the Code, as this did not form part of the original complaint, and the Appellants accordingly did not have the chance to respond to this allegation in their response to the complaint.

In our view, the Adjudicator erred in finding that there had been a contravention of clause 11.1.4. Clause 13.3 of the Code specifically requires the respondent to the complaint to respond to the complaint. In our view, this implies the right to respond to all allegations that make up the complaint. This is also a requirement of the Promotion of Administrative Justice Act 3 of 2000 (the “AJA Act”), which enshrines the right have a right to administrative action that is lawful, reasonable and procedurally fair. Core elements of procedural fairness include adequate notice of the nature and purpose of the administrative action and a reasonable opportunity to make representations (see specifically s3(2)(b)(a) and s3(2)(b)(b) of the AJA Act).

The Appeals Panel therefore upholds this ground of appeal.

5. ***Fifth ground of appeal – the sanction is ultra vires the code***

The Appellants have argued that certain aspects of the sanction imposed by the Adjudicator were *ultra vires* the Code (i.e. not permitted by the Code). In particular, the Appellants claim that the Code does not empower the Adjudicator to direct SPs to require their IPs to comply with a ruling of the Adjudicator or to direct SPs to terminate their relationship with a particular IP who contravenes a ruling of the Adjudicator.

Clause 13.4.1 of the Code empowers the Adjudicator to impose sanctions on WASPA members, which include the imposition of fines, and the suspension / expulsion of members from WASPA, amongst other things. Clause 13.4.2 empowers the Adjudicator to advise the relevant mobile network operators to take certain specified steps against WASPA members. However, clause 13.4 does not expressly empower the Adjudicator to direct members who are SPs to enforce compliance on the part of IPs who are not members of WASPA.

Nevertheless, we believe that it is implicit in the Code that non-member IPs must comply with the rulings of the Adjudicator, where the Adjudicator finds that there has been a breach of the Code, or risk the termination of their contractual relationship with their SP. This much is clear from clause 3.9 of the Code, which states:

“Information providers

- 3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.
- 3.9.2. The member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.”

The Appeals Panel therefore rejects this ground of appeal.

6. ***Sixth ground of appeal – severity of the sanction***

The first Appellant claims that the penalty imposed on the second Appellant was unduly harsh as the Appellants immediately took remedial action when they became aware of the breach.

The Code was developed over a long period of time and adopted in June 2005. The two-month hiatus period between the adoption of the Code and its implementation was sufficient to enable members to comply.

The Appeals Panel rejects these grounds of appeal.

7. ***Seventh ground of appeal – failure to consider other laws***

The second Appellant claims that the Adjudicator erred in failing to take national and constitutional law into account. In particular, the second appellant alleges that the Adjudicator failed to deal with the common law right of fair competition in his judgement or to apply the principles of natural justice. The basis of this ground of appeal is unclear. With respect to the application of legal instruments other than the Code, it is beyond WASPA’s powers to enforce the law. WASPA’s powers are dictated by the four corners of the Code and the WASPA constitution. Moreover, only the courts may enforce the common law.

The Appeals Panel rejects this ground of appeal.

8. ***Eighth ground of appeal – failure to respond in a reasonable period of time***

The second Appellant claims that the Adjudicator erred in failing to respond to the complaints within a reasonable period of time.

The relevance of this point as a ground of appeal is unclear. It cannot have any impact or bearing on the outcome of this decision.

The Appeals Panel rejects this ground of appeal.

9. ***Ninth ground of appeal – state of mind***

The meaning and importance of the Adjudicator's reference to the Appellants' state of mind is unclear. The relevance of this point as a ground of appeal is also unclear. It cannot have any impact or bearing on the outcome of this decision.

The Appeals Panel rejects this ground of appeal.

Decision

We find that the Appellant contravened clause 11.1.2 of the Code in relation to complaints #0002 #0011 #0026 and #0058. This aspect of the Adjudicator's ruling is therefore confirmed.

We find that the Appellant contravened clause 9.1 of the Code in relation to complaint #0011. This aspect of the Adjudicator's ruling is therefore confirmed.

We find that the Appellant did not contravene clause 11.1.2 of the Code of Conduct in relation to complaint #0037. This aspect of the Adjudicator's ruling is therefore overturned.

The Adjudicator erred by finding that the Appellants breached clause 11.1.4 of the Code without first giving them a response to refute this allegation. This aspect of the Adjudicator's ruling is therefore overturned.

The Appeals Panel disagrees with the sanction imposed by the Adjudicator. The SP is ordered to pay a fine of:

🚩 R8 000.00 for breaching clause 11.1.2 of the Code in respect of complaints #0002 #0011 #0026 and #0058, being a total of R32 000.00.

🚩 R2 500.00 for breaching clause 9.1 of the Code in respect of complaint #0011;

Being a grand total of R34 500.00.

THE APPEALS PANEL

31st of May 2006