

WASPA APPEALS PANEL FINDINGS FOR COMPLAINT NO #0091

WIRELESS WARRIORS t/a Sexy Mobile

APPELLANT

3rd of November 2006

DECISION

Background:

Following adjudication against Wireless Warriors (Pty) Ltd, the Appellant lodged an appeal.

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 Wireless Warriors, a wireless Information Provider ("IP") and Appellant in this matter. The Appellant recently became a member of WASPA.

The secretariat initiated a complaint against the Appellant in accordance with the instructions of the Adjudicator. The Adjudicator considered that there were prima facie breaches of clauses 8.1.3 and 8.2.1 of the Code of Conduct in respect of services offered by the IP through the Appellant. The breaches relate to the provision of adult services. The following clauses of the Code were deemed to have been breached:

8. Adult services

8.1 Required practices

8.1.3. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult services. Explicit confirmation of a user's age must be obtained prior to the delivery of an adult service.

8.2. Prohibited practices

8.2.1. Adult services must not contain references that suggest or imply the involvement of children.

The Adjudicator's ruling:

The Adjudicator ruled against the Appellant and found that the Appellant had breached clause 8.1.3 of the Code by not taking sufficient steps to ensure that only persons of 18 years of age or older have access to adult services. The Adjudicator ruled that the Appellant had not obtained explicit confirmation of users' age prior to the delivery of adult services by means of MMS1 and

SMS1. With regard to the possible breaches of clause 8.2.1 of the Code the Adjudicator found that the Appellant's use of the keywords "school girls" and "school" in MMS2 suggested and implied the involvement of children in relation to an adult service.

The Adjudicator imposed sanctions in respect of all the breaches, and the SP was ordered to pay a fine of R25 500 for breaching clauses 8.1.3 of the Code. In respect of the breach of clause 8.2.1 of the Code the SP was ordered to terminate all services of the IP in accordance with clause 3.9.2 of the Code for a period of one calendar month and to pay a fine of R100 000.00.

Grounds of Appeal:

The Appellant denies breach of clauses 8.1.3 or 8.2.1 of the Code. The Appellant's grounds of appeal are as follows:

- **Ad point 1 of the Appeal:** *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.
- **Ad point 2 of the Appeal:** *Severity of the sanction* – it is alleged that the Adjudicator imposed a sanction that was entirely at the Adjudicator's discretion; that there is no procedure in place which clearly defines the fines payable to WASPA for the infringement of the Code; that the fine was determined in an arbitrary fashion and that it was issued out of context in relation to other fines imposed which have had a greater negative effect on the market.
- **Ad point 3 of the Appeal:** *Reference to "Naughty school girls" suggested or implied the involvement of children in adult services.* – it is alleged that the Adjudicator's conclusion that the terms "school" and "school girls" are both associated with persons under the age of 18 was based on an assumption but was not based on facts; the adjudicator failed to explore the meaning of the term "Naughty school girls" within the context of the adult industry; no images of persons under the age of 18 was delivered; applying the same logic as applied by the Adjudicator "babe" or "babes" would also imply the involvement of infants in the delivery of adult services.
- **Ad point 4 of the Appeal:** *Failure to verify user's age prior to the delivery of an adult services* – the Appellant argues "reasonable steps" are not defined in clause 8.1.3 of the Code; to explicitly prove that a user is over the age of 18 would be almost impossible, save from requiring users to present himself in person, along with confirmation of his mobile number and identification number. that the marketing was done within "closed marketing channels" on E-TV DURING the watershed hours provided for ADULT advertising; clear indications that the service is intended for adults only were visible on the television ads in question; SMS marketing were only done to persons that responded to the television advertisement.

The final adjudication in this case follows:

Findings of the appeals panel and reasons

1. *First ground of appeal – failure to respond in a reasonable period of time*

The 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 question whether the Code was in fact breached or on the question whether the sanctions imposed were appropriate. This ground of appeal is thus irrelevant to the outcome of this decision.

The Appellant argues that time limits should be imposed for the adjudication of complaints. The Appellant also claims that it had terminated services with the IP subsequent to receiving the report of the Adjudicator regarding complaint #24, and has no recourse to recover outstanding fines or sanctions imposed by WASPA. Clause 3.9 clearly states that Members should ensure that information providers do not contravene the Code. The severance of the Appellant's relationship with the IP subsequent to a previous adjudication is not relevant to the Appeals Panel's task at hand. The Appellant has lodged this appeal and the Appellant must comply with any sanctions imposed by the Appeals Panel in respect of complaint #0091.

The Appeals Panel's function is limited to decide whether the Code has been breached and if the Appeals Panel upholds the Adjudicator's decision, the sanctions imposed by the Adjudicator should be reviewed. The issues raised by the Appellant under this first ground of appeal are of an administrative manner and should be raised in the correct industry forums.

The Appeals Panel rejects this ground of appeal.

2. *Second ground of appeal – severity of the sanction*

The Appellant's view that there is no procedure in place which clearly defines the fines payable to WASPA for the infringement of the Code is noted. The need for the development of a structured list of fees for the contravention of the Code falls beyond the scope of the Appeals Panel's functions should be raised in the correct forum.

The Appellant claims that the penalty imposed for the contravention of clause 8.2.1 was arbitrary and out of context in relation to other fines that have been imposed and which have had a greater negative effect on the market. The Appeals panel agrees that in comparison to other fines that have been imposed by WASPA Adjudicators, the fine of R100 000.00 for a contravention of clause 8.2.1 is excessive.

The Appeals Panel upholds this ground of the appeal.

3. ***Third ground of appeal – involvement of children in adult services***

The Appellant's ground of appeal that the Adjudicator failed to explore the meaning of the term "Naughty school girls" within the context of the adult industry has merit. The Adjudicator and the Appellant both exhaustively explored the grammatical meaning of the terms "school", "schoolgirl" and "girl". However, the crux of the matter is whether the use of the term within the specific context of the MMS2 text may be said to imply or suggest the involvement of children in relation to an adult service. These terms must be interpreted in light of their immediate linguistic context.

The immediate linguistic context concerns "hot blonds", "porn stars", "sluttish friends" and "hot clips of girls doing it". In the MMS2 text numerous references to "girls" and "new girls" may also be found. Although use of the term girl could, if used in another context, imply or suggest the involvement of a child, it is not the case in the context of the MMS2 message. In the same manner the use of the phrase "naughty school girl" and the term "school" girl could, if used in another context, imply or suggest the involvement of a child, but it is not the case in the context of the MMS2 message. The Appellant correctly pointed out that if the Adjudicator's logic was followed "babe" or "babes" would imply the involvement of infants in the delivery of adult services. The Appellant noted that the "schoolgirl theme" is a known fetish and a term commonly used in pornographic web sites and the adult industry.

Based on normal adult-industry standards the use of the term "school girl" and/or references to "school" or "school girl" cannot, of itself, be said to imply or suggest the involvement of children. If WASPA wishes to impose different standards on its Members, it should do so in an explicit manner.

This ground of appeal is upheld.

4. ***Fourth ground of appeal – failure to verify age before delivery of an adult service***

The Appellant argued that "reasonable steps" are not defined in clause 8.1.3 of the Code and to explicitly prove that a user is over the age of 18 would be almost impossible. However, the Adjudicator held that the IP's indication in **MMS2** that the service is intended for adults was compliant with clause 8.1.3 of the Code. This clearly refutes Appellant's arguments.

The Appellant argues that all advertising material was aired DURING the watershed hours where adults were the recipients of the advertising material. The Appellant argued that in these television advertisements every reasonable step had been taken to ensure that people under the age of 18 do not have access to the content. The Appellants did not address the Adjudicator's concerns, namely the failure to indicate the nature of the service in the **SMS1** and **MMS1** examples.

As noted above, the Adjudicator held that the IP's indication in **MMS2** that the service is intended for adults was compliant with clause 8.1.3 of the Code. The same age-verification steps were found lacking in **SMS1** and **MMS1**. Clause 8.1.3 of the Code clearly requires explicit confirmation of a user's age **prior to the delivery of an adult service**. The fact that television advertisements indicated that the services are of an adult nature cannot be regarded as explicit age verification prior to the delivery of the service for two reasons. First, the two events are too remote to qualify as being "prior to the delivery of" and secondly, an explicit act on behalf of the user indicating that he is older than 18 is required.

This ground of appeal is rejected.

5. ***Additional information: Appeals fee***

On the 24th of April 2006 it was decided by a general meeting of WASPA that from the 1st of May 2006 Members will be charged an upfront fee of R10 000.00 for the lodging of an Appeal. The Appellant informed the WASPA secretariat in an e-mail communication dated the 24th of May 2006 that it would not pay the appeals fee as it was of the opinion that had the Adjudicator dealt with the complaint in a speedily manner the appeal would have been lodged prior to the 24th of April 2006. On the 6th of June 2006 the Appellant lodged the appeal without paying the upfront appeals fee.

The Appeals Panel is of the view that the Appellant's argument that the Adjudicator's alleged tardiness in finalising the adjudication is sufficient reason to refuse to pay the appeals fee is unjustified and baseless. Furthermore, the Appellant's conduct in refusing to pay the appeals fee undermines the WASPA dispute resolution process and is in conflict with the Appellant's obligation to conduct itself professionally as is required by clause 3.1.1 of the Code.

Members should not be able to proceed with the lodging of an appeal if they arbitrarily refuse to pay the upfront appeals fee due to perceived prejudicial circumstances. This would in itself increase the WASPA secretariat's administrative burden and would defeat the very purpose for introducing the appeals fee, namely to reduce the number of appeals, especially frivolous appeals.

The Appeals Panel is of the view that the WASPA secretariat should in future require Members to pay the appeals fee before any appeal may be processed by the WASPA secretariat and adjudicated upon by the Appeals Panel..

Decision

We find that the Appellant contravened clause 8.1.3 of the Code in relation to complaint #0091 and this aspect of the Adjudicator's ruling is therefore confirmed.

We find that the Appellant did not contravened clause 8.2.1 of the Code in relation to complaint #0091. This aspect of the Adjudicator's ruling is therefore overturned.

The Appeals Panel does not agree with the sanction imposed by the Adjudicator. The Appellant complied with the requirements of clause 8.1.3 as far as MMS2 is concerned but not as far as MMS1 and SMS1 are concerned. The fact that at least some of the adult services complied with the age verification requirement should be taken into account in judging the fairness of the fine imposed.

The Appellant is ordered to pay the following amounts to the WASPA secretariat:

The Appellant is ordered to pay a fine of R10.000.00 for breaching clause 8.1.3 of the Code in respect of MMS1 and SMS1.

The Appellant is ordered to pay the appeals fee of R10 000.00. The appeals fee is forfeited.

THE APPEALS PANEL

6th of November 2006