Appeal Panel's Report

Complaint/s on appeal	12488
Appellant/s	Buongiorno SA
Date appeal lodged	2014-01-24
Appeal decision date	2014-12-04
Relevant Code version	10
Clauses considered	4.1.1, 11.1.1, 11.2.2, 11.2.3
Relevant Ad Rules version	Not considered for the purposes of this appeal report
Ad Rules clauses	Not applicable
Related cases considered	The appeal decision regarding complaints 11258, 11582, 11626, 13038 and 13039 ("the 11258 appeal decision[1]"); The appeal decision regarding complaints 15477, 15722, 16851, 16977, 17184 and 17236 ("the 15477 appeal decision[2]")

1. Parties

1.1. The Appellant is Buongiorno SA ("the Appellant").

2. Issues raised on appeal

2.1. The Appellant has appealed against the decisions on the following grounds:

[1] http://old.waspa.org.za/code/download/11258_appeal.pdf
[2] http://old.waspa.org.za/code/download/15477_appeal.pdf

2.1.1. “the adjudicator’s decision making process was tainted by fundamental procedural flaws and was therefore irregular; and/or

2.1.2. “the adjudicator made incorrect findings on the merits; and/or

2.1.3. “the adjudicator and the Secretariat failed to adhere to the principles laid in terms of ‘double jeopardy’; and/or

2.1.4. “the sanctions imposed by the adjudicator were grossly unreasonable in the circumstances”.

2.2. This appeal was lodged around the same time as appeals against decisions regarding complaints 11258, 11582, 11626 and 11863 which were decided and reported as the 11258 appeal decision.

2.3. Many of the issues raised in this appeal were dealt with in the 11258 appeal decision so we have referred to portions of that report in this report where appropriate.

2.4. Procedural concerns

2.4.1. The Appellant included the following procedural concerns in its grounds for appeal against the adjudicator’s decision in 12488:

2.4.1.1. a failure to apply the Promotion of Access to Justice Act (“PAJA”), alternatively the principles of natural justice, specifically the right to a fair hearing; and

2.4.1.2. failure to observe the double jeopardy principle by referring this complaint to adjudication where substantially similar complaints were already referred to adjudication.

2.5. Substantive appeals

2.5.1. The Appellant appealed against findings on the basis of clauses 4.1.1, 11.1.1, 11.1.2 and 11.2.3 of the Code.

2.5.2. Finally, the Appellant argued that the adjudicator’s suspended fine of R20 000 was “no longer relevant” given that the particular campaign was no longer running.

3. Appeal Panel's Decision

3.1. Procedural concerns - fair hearing

3.1.1. The question of PAJA's application to WASPA's adjudication process was addressed in the 11258 appeal decision and we refer to the appeal panel's decision on that question.

3.1.2. Both the 11258 appeal decision and the 15477 appeal decision affirmed that the principles of natural justice govern WASPA adjudications and, in particular, that members are entitled to a fair hearing by adjudicators. Where members are not afforded a fair hearing, decisions taken against them may be set aside on the basis that they are procedurally irregular.

3.1.3. In this matter, the complaint filed against the Appellant cited clauses 4.1.1, 11.1.1, 11.2.2 and 11.2.3 as clauses which the complainant alleged the Appellant's campaign breached.

3.1.4. The adjudicator confined him/herself to these clauses in the adjudicator's findings.

3.1.5. The Appellant raised a concern that the adjudicator "presume[d]" that the complainant's reference to bundling in the complaint invoked clause 11.2.2 of the Code. The Appellant contended that this "presumption cannot be made without further investigation" using the mechanism provided in clause 14.3.10 of the Code.

3.1.6. The Appellant argued that it could not "substantively answer the allegations regarding bundling without having further detail as to precisely what the complainant is referring to" in its response to the complaint.

3.1.7. The Appellant argued further, at paragraph 55.2 of its appeal submissions, that –

> *It is in making this initial - with respect incorrect - presumption which ultimately, we submit, led to a finding that our client was in breach of the Code. Our client has therefore been found to be in breach of the Code - and subsequently sanctioned on a mere presumption made by the adjudicator. The adjudicator should and could have utilised section 14.3.10 of the Code (version 10) to ascertain the actual ground for the Complainant's grievances(s) - making "presumptions" unnecessary.*

Presumptions, without factual support, cannot form the basis for an adverse finding. In not utilising this section of the Code the adjudicator has, by his/her actions, has proceeded incorrectly and prejudiced our client. On this basis alone the adjudicator's decision should be set-aside.

3.1.8. Clause 11.2.2 of version 10 of the Code states the following:

11.2.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.

3.1.9. This clause has frequently been used to address the phenomenon known as "bundling". It was also specifically cited in the complaint and considered by the adjudicator. The Appellant addressed the allegation that its campaign breached clause 11.2.2 of the Code in its response to the complaint (in addition to clauses 4.1.1, 11.1.1 and 11.2.3).

3.1.10. It is somewhat disingenuous for the Appellant to argue that it was sanctioned as a result of a "mere presumption" made "without factual support" where the link between the term "bundling" and clause 11.2.2 appears plain.

3.1.11. The Appellant was afforded an opportunity to respond to the complaint, took advantage of this opportunity and the adjudicator confined him/herself to the alleged breaches of the Code which the complaint raised. In the circumstances, we dismiss this aspect of the Appellant's appeal which appears to touch on the Appellant's contention that it was not afforded a fair hearing.

3.2. Procedural issues - double jeopardy

3.2.1. The 11258 appeal decision addressed this issue in some detail and its salient points regarding double jeopardy were reiterated in the 15477 appeal decision which includes the following:

This issue arises in this matter where the Appellant was found to have breached the Code using similar campaigns and in similar respects. The Appellant's contention is that sanctioning the Appellant for each breach in respect of each campaign, given the overlap, constitutes "double

jeopardy" or "duplication of charges". The First Appeal panel dealt with this issue and found itself trying to strike a balance between dealing with multiple, and yet substantially similar, complaints in a manner that did not result in a "double jeopardy" situation and yet still hold the Appellant (and enable adjudicators to similarly hold other members) accountable for repeated breaches of the Code using similar campaigns and mechanisms. The solution the First Appeal panel opted for was drawn from the so-called "Various TIMwe" appeal which was decided in May 2012. This solution, while imperfect, may help reduce the likelihood of "double jeopardy" and strike the balance the First Appeal panel was aiming for:

> *Ideally as many complaints as possible lodged against the same service within a particular period of time should be considered together, by the same adjudicator. The number of complaints can then be viewed by the adjudicator as an aggravating circumstance in consideration of sanction, rather than numerous sanctions being imposed by two or more adjudicators for what is in essence the same breach.*

3.2.2. The "First Appeal panel" was the appeal panel that produced the 11258 appeal decision.

3.2.3. Complaints 11258, 11582 and 11626 were lodged on 2010-11-30, 2011-01-11 and 2011-01-14, respectively. Complaint 12488 was lodged two and a half months after complaint 11626, on 2011-03-29.

3.2.4. While similar complaints should be grouped together and referred for adjudication together in order to avoid a double jeopardy situation, we question the Appellant's assertions that the Secretariat ought to have exercised its discretion to refer complaint 12488 to a formal adjudication in light of complaints which arose more than two months beforehand.

3.2.5. The Appellant's reasoning suggests that once complaints arise regarding a campaign, no further complaints regarding that or similar campaigns should reach adjudication, even if these further complaints are lodged some time after the initial complaint. This is not a feasible assertion because, if abused, it would give members who operate in bad faith a license to repeat infringing campaigns on the

basis that the double jeopardy principle would preclude any further complaints against them being adjudicated.

3.2.6. Even where members operate infringing campaigns in the good faith, yet mistaken, belief that their campaigns meet the Code's requirements, this reminder from the 15477 appeal decision is worth repeating:

> *Members should, however, bear in mind the sheer volume of complaints and a variety of seemingly similar and yet factually distinguishable complaints which adjudicators, operating with limited resources, must consider to when adjudicating decisions.*

3.2.7. The Appellant's argument that the double jeopardy principle necessitated that complaint 12488 not be referred for formal adjudication given its apparent similarities to complaints 11258, 11582 and 11626 in these circumstances must fail. The double jeopardy principle can't be a license to arbitrarily conduct potentially infringing services.

3.3. Substantive appeal - clause 4.1.1

3.3.1. The Appellant raised concerns about the adjudicator's comments regarding this clause of the Code:

> *In respect of the allegations made in terms of section 4.1.1, the adjudicator states that he/she does not feel that this particular section needs to be dealt with in great detail. However, he/she still intimates that a claim of dishonesty could be made against our client, and holds the opinion that an ordinary customer could be misled by the service offering (page 13 of the Record).*

3.3.2. The adjudicator stated the following in his/her report:

> *Although an argument could be posed that the SP was not honest with their customers, I do not feel that this particular section needs to be dealt with in any great detail save to say that I feel an ordinary consumer of the type to which this service would apply could be mislead by the service offering.*

3.3.3. Aside from stating that the absence of reasons for the adjudicator's conclusions deprives the Appellant of a basis to refute it and expressing its belief that the adjudicator's comments are defamatory, the Appellant did not offer any arguments refuting the adjudicator's finding on this clause and this aspect of the Appellant's appeal fails.

3.4. Substantive appeal - clause 11.1.1

3.4.1. The Appellant challenged the adjudicator's finding on this clause on the following basis at paragraph 57 of the Appellant's submissions:

> *However, he/she "feels" that the subscription service was not displayed in the required "prominent manner" (page 14 of the Record). That being the case, our client is found to be in breach of section 11.1.1 of the Code.*
>
> *The adjudicator provides no constructive guidance as to how he/she reaches his/her finding, or how, in his/her view, our client should display the requisite information in a prominent manner. With all due respect, "feelings" are not a good enough reason for making such a finding.*
>
> *The fact that it is a "subscription service" appears on the banner and on the landing page in the requisite format and font size required by the Code and Advertising Rules. Promotional material, including the rewards programme, is clearly and specifically identified. In sum, the content and manner of presentation meet the Code's requirement and the adjudicator's finding is, with respect, plainly wrong. We add that our client is gravely concerned that adjudications are being made by adjudicators who appear, with respect, not to know or understand the provisions of the Code.*
>
> *Furthermore the promotion of the reward programme, as well as references to such programme's Terms and Conditions, is clearly indicated and accessed through the use of the asterisk (a known tool for references to terms and conditions).*

3.4.2. The adjudicator's findings, in full, are as follows:

> *I feel that the SP has breached this section. Although the SP correctly points out that at all times (save in the instance of what appears to be an*

honest omission of an asterisk which omission, for the purpose of this case and due to it having been corrected, I have ignored) the services is stated as being a subscription service, I do not feel that this is done in a prominent manner as required.

3.4.3. The 15477 appeal decision analyses this clause in the context of versions 11.0 and 11.6 of the Code in some detail from pages 6 to 12 and, on page 10, provides the following guidance:

> *The purpose of the prominence of the subscription services is to alert the consumer to the potential cost in a manner that would not be easily overlooked. As a result the caveat subscriptor rule is not an appropriate test. Rather, adjudicators should prefer the more recent approach of the Consumer Protection Act in ensuring that important or unusual terms are highlighted and drawn to a consumer's attention.*
>
> *We consider the cost of the subscription to be a very important aspect of the service and this aspect must always be highlighted. The requirement to highlight the fact that this is a subscription service and what the cost of the subscription service is, is emphasised by chapter 9 of the Advertising Rules (version 2.3).*
>
> *We consider the –*
>
> *1. position,*
>
> *2. size, and*
>
> *3. colouring*
>
> *of the text informing a consumer to be important when deciding whether the text is sufficiently prominent to comply with clause 11.1.1 of the Code as read with chapter 9 of the Advertising Rules.*

3.4.4. Although this guidance was given in the context of a discussion about the adequacy of published subscription pricing information, the general comments about what “prominence” amounts to are applicable to whether the subscription nature of a service is “prominent”.

3.4.5. The relevant definition of prominent, as found on www.oxforddictionaries.com, is "Situated so as to catch the attention; noticeable".

3.4.6. The question before this panel is therefore whether the communication around the subscription service is situated so as to catch the attention, and noticeable?

3.4.7. We find that it is not. However the Appellant may choose to remedy this lack of prominence, the information must be communicated with sufficient prominence that a reasonable consumer would inevitably notice the fact that the consumer is about to subscribe to a subscription service. This is not the case in this matter.

3.4.8. This aspect of the appeal must also fail.

3.5. Substantive appeal - clauses 11.2.2 and 11.2.3

3.5.1. We agree with the adjudicator that it is appropriate to deal with these two clauses of the Code together.

3.5.2. The Appellant referred to the adjudicator's report in complaint 11863 and cited various extracts from that report as support for its assertions:

> *The adjudicator is of the view that the reasonable customer would, when clicking on the confirm button on the subscription confirmation webpage, have an understanding o f the fact that he or she was joining a subscription service which was charged at R3 per day. The adjudicator accepts that this intention may not be present when interacting through the banner advert and the initial promotional page, but holds that the intention required by section 11.2.2 would be present at the critical time when the customer takes the last positive step prior to being subscribed (our underlining)*

3.5.3. The adjudicator in this present matter stated the following:

> *I have dealt with section 11.2.2 and 11.2.3 together, the one being the exception to the rule of the other. Once again, although the SP alleges that they state that the obtaining of an iPhone is part of a loyalty and reward programme associated with the subscription service I do not feel that in all (or in fact in any) instance this has been clearly expressed. The entire campaign looks and feels like a competition to get an iPhone and not a*

subscription service and as such I feel the general tenor of it is that of subscribe to this service and win an iPhone which in my view falls foul of the requirements of section 11.2.2 and 11.2.3. Whilst the SP quite correctly points out that it is permissible to use a loyalty or reward programme as a legitimate marketing tool I feel it is not utilised sufficiently clearly to avoid it being contrary to the Code.

3.5.4. The 11258 appeal decision deals with these two clauses and the apparent relationship between a subscription service and promotional competition by examining the requirement that a promotional draw or competition be "ancillary to the subscription service":

On the first enquiry, regarding whether a promotional draw is 'ancillary', it is useful to consider the meaning of this term. We annex to this report the leading information from the top five results to a Google search for the query 'Dictionary ancillary'. In our understanding, the word 'ancillary' clearly means something that is 'in support of, rather than, the main thing'.

In the context of a promotional draw which forms a part of a subscription service extended by a Service Provider and which is subject to clauses 11.2.2 and 11.2.3 of the Code, it must be accepted that the term 'ancillary' implies that a potential customer must be enticed firstly with the contents of the subscription service, sweetened secondly by the promotional draw.

This is necessarily an objective enquiry considering the presentation of the offer, and which precedes the question of the potential customer's subjective 'intent' to sign up for the subscription service.

In other words, even if the potential customer has formally indicated consent by complying with an acceptable opt-in sign-up procedure, a breach of clauses 11.2.2 and 11.2.3 is possible where the presentation of the offer does not clearly indicate that the promotional draw is ancillary to the subscription service offering.

Stated differently, a legally-compliant sign-up process does not of itself preclude a breach of clauses 11.2.2 and 11.2.3 of the Code, on the grounds that the promotional draw is not ancillary to the subscription service.

3.5.5. We agree with the adjudicator that it was not "clear to the customer that the promotional draw or competition is ancillary to the subscription service" and dismiss the Appellant's appeal against the adjudicator's findings in respect of clauses 11.2.2 and 11.2.3 of the Code.

3.6. Sanctions ruling

3.6.1. The adjudicator's sanctions, after finding the Appellant had breached the Code, were the following:

> *Due to the fact that the SP has attempted to comply with the Code I have been lenient in my sanctioning of their behaviour.*
>
> *I fine the SP R20 000 to be suspended in total for a period of 3 months to allow the SP to comply with the request set out below. Should the request not be complied with the fine will be payable immediately to WASPA.*
>
> *I request that the SP modify all of the marketing in connection to this campaign so as to properly comply with the Code. Inter alia I would expect that it is made clearer that this is a subscription service. This must be done in a manner that is prominent so as not to be disguised by the potential to obtain a reward. Furthermore, the fact that the iPhone is a possible reward offered to people who both subscribe to the service and also join the loyalty or reward programme must be made clearer and should state at a minimum that the mere signing up to the subscription service does not enter you into a draw for the iPhone.*
>
> *The campaign must be withdrawn immediately on receipt of this adjudication pending such amendments being effected. Confirmation of the withdrawal must be sent to WASPA within 48 hours of this adjudication report being received.*

3.6.2. The Appellant contended that these sanctions, which comprise a suspended fine and requirements that the Appellant comply with the Code, were "grossly unreasonable in the circumstances".

3.6.3. We disagree and find the sanctions reasonable in the circumstances. The sanctions imposed are not excessive relative to similar sanctions imposed for similar infringements of the Code and the adjudicator mitigated the effect of the

sanctions by suspending subject to similar infringements taking place within a 3 month time period.

3.7. Conclusions

3.7.1. Ordinarily the sanctions would be enforced in the event appeals against them fail. That said, this appeal has been pending since 2011 and we do not believe that it would be equitable to impose the adjudicator's sanctions given that so much time has passed and it would be unrealistic to require the Appellant to satisfy the conditions of the suspended sanction in respect of a discontinued campaign.

3.7.2. Accordingly our conclusions are as follows:

3.7.2.1. The Appellant's appeals against the adjudicator's rulings in complaint 12488 are dismissed;

3.7.2.2. The Appellant forfeits its appeal fee to the WASPA Secretariat; and

3.7.2.3. Although the Appellant is unsuccessful in these appeals, we instruct the Secretariat not to apply the adjudicator's sanctions as doing so would not be equitable given the time that has passed since this appeal was lodged.