WASPA appeals panel
Complaint 16559/ 16659/ 17910

REPORT OF THE APPEALS PANEL

Date of face-to-face hearing: 30 May 2014.
Date of report:
WASPA Member: Buongiorno SA
Complaint Number: 16559 /16659 / 17910
Applicable versions: 11.6

Preliminary issues

1. This appeal, which was heard vive voce at an appeal hearing on 30 May 2014, can be split into two matters for the purposes of this decision. This report will therefore be split completely – first we will consider the matters of 16559 and 16659 together, and then separately, the matter of 17910.

2. We wish to take this opportunity to thank all the participants attending the hearing from the WASP and from WASPA for their co-operation and preparation for the day.

3. Argument for the WASP was presented by Adv Paul Farlam and comments on behalf of WASPA were presented by Mr Anthony Ekerold. We extend our thanks to both for their degree of preparedness.

4. All references to the Code are to version 11.6, the version that was binding on the parties at the time of the complaints.

Matters 16559 and 16659

Background

5. These two matters both involved complaints by the WASPA Media Monitor in relation to subscription services. The essence of both complaints was that the material in question creates an impression that the consumer is entering a competition when in fact they are subscribing to a service.

6. In both matters, the Media Monitor cited Clauses 11.2.2 and 11.2.3.

7. The adjudicator in these matters, in almost identical rulings, found with respect to Clause 11.2.3 that "Based on the information that has been placed before me, I am unable to find that, at the time the subscription process is concluded, a consumer would still be confused as to whether they were about to become subscribed to a subscription service".

8. The adjudicator went on to find the promotional material was in breach of Clause 11.1.1.

Appeal

9. The WASP lodged an appeal against these rulings in a letter dated 11 December 2014.

10. This letter identified 6 grounds of appeal as follows (we quote verbatim):

> *For the reasons set out below we would appeal the Current Complaints on the following grounds:*
>
> *1.1 Adjudication based on incorrect version(s) of the Code of Conduct that as/were not applicable to the Current Complaints;*
>
> *1.2 Audi alteram partem;*
>
> *1.3 No breach of the applicable version of Advertising Rules at the time of Current Complaints;*
>
> *1.4 The interpretation of section 11.1.1 is excessive and prejudices the SP;*
>
> *1.5 The sanctions imposed in each of the Current Complaints are unduly harsh and without any basis;*
>
> *1.6 The SP submits that it had complied with the Code of Conduct versions applicable to the Current Complaints and it is inappropriate for WASPA to insist that the SP complies with subsequent revised versions of the Code of Conduct which the SP:*

1.6.1 was not subjected to at the relevant time; and

1.6.2 was not privy to such interpretations at the relevant time; and

1.6.3 was not enforced against other SPs; and

1.6.4 further submits that WASPA did not have authority to impose on the SP or any other member at that time.

11. At the hearing, the written appeal was supplemented with further written submissions and with oral submissions. These will be considered to some extent below, as relevant.

Deliberations and finding

12. The first ground of appeal on which the Panel heard argument related to the question of whether the finding in terms of Clause 11.1.1 of the Code was procedurally fair; and whether, if it was found that this was not the case, the decision in terms of Clauses 11.2.2 and 11.2.3 could be revisited.

13. The panel heard little argument on the issue of whether the finding on Clause 11.1.1 was procedurally fair, as the Panel required little persuasion.

14. We are in agreement with the Appellant's submissions that WASPA is bound by the rules of natural justice, and that in particular the requirements of *audi alteram partem* must be met.

15. In a matter in which the complainant – in this case the Media Monitor – lodges a complaint in terms of particular clauses, those are the only clauses that are initially necessary for the respondent to the complaint to comment on, and those are the only clauses on which the adjudicator can fairly rule.

16. The Code states:

14.3.10. The adjudicator may ask the secretariat to request that the complainant, the member, or both, furnish additional information relating to the complaint. Specifically, the adjudicator may request that the member respond to any additional breaches of the Code of Conduct discovered during the investigation of the complaint, but which were not specified in the original complaint.

17. It is clearly the intention of the Code, in line with the principle of *audi alteram partem*, that in the event that the adjudicator wishes to go beyond the complaint and clauses before him or her, he or she must allow the respondent to the complaint a further opportunity to comment.

18. This is consistent with the finding made by the Appeal Committee in matters 15477, 15722, 16851, 16977, 17184 and 17236, where the Appeal Panel said:

> *To proceed with an analysis of whether a member breached provisions of the Code (or other regulatory framework) without affording the member an opportunity to review and respond to such allegations would result in a violation of the member's rights to the principles of due process and natural justice which include the principle of audi alteram partem.*

19. In the matter at hand, no such opportunity was granted in respect of Clause 11.1.1. **The finding in respect to Clause 11.1.1 was therefore procedurally unfair and is overturned**.

20. The question then arises as to whether:

- The adjudicator took a decision on Clause 11.2.2 and 11.2.3;
- That decision can be revisited by this Panel.

21. The Panel agreed that if the adjudicator had taken a decision on the clauses in question, then that decision could not be revisited on appeal as it was not the subject of the appeal.

22. Mr Farlam for the Appellant submitted that paragraph 7 of the adjudicator's decisions (quoted in paragraph 7 above), read with paragraph 1 of the decision, indicated that the adjudicator had, at least in his own mind, disposed with Clause 11.2.3 in its entirety.

23. The Panel was persuaded by this argument. Clause 11.2.3 is in essence a continuation of Clause 11.2.2 and we are therefore also of the opinion that the adjudicator had, at least in his own mind, disposed of Clauses 11.2.2 and 11.2.3 in their entirety.

24. As these clauses were considered and remain unchallenged, the finding must stand that there is no breach of Clauses 11.2.2 and 11.2.3.

25. Given the above, the sanctions set out in the adjudicator's reports in matter 16559 and 16659 are overturned in their entirety.

Matter 17910

Background

26. As with the above matters, the complaint in matter 17910 was lodged by the Media Monitor in respect of subscription services. Again, the issue revolved around a subscription linked to a competition.

27. However, the reach of the complaint was wider. The Monitor cited clauses 3.3.1, 4.1.12, 6.2.2, 11.1.1, 11.2.2, 11.2.6 and 11.5.2.

28. An Emergency Panel found breaches of Clause 4.1.2, 9.1.7, 11.1.1, 11.2.2, 11.2.3, 11.2.6 and 11.5.2.

29. The Adjudicator found breaches of Clauses 11.2.2 and 11.2.3, 9.1.7, 11.2.6, and 11.5.2.

Appeal

30. The appeal notice in this matter was shared with 16559 and 16659 above, and the grounds of Appeal are set out in paragraph 10 above. In this matter, there was a further submission, also dated 11 December 2013, relating to the fact that the Appellant believes the sanctions to be ultra vires.

Deliberations and findings

Clause 9.1.7 standing

31. The first matter that the Panel wishes to dispose of is the standing of Clause 9.1.7, which was introduced as a clause by the Emergency Panel. The question arises as to whether the same procedural fairness issue arises in relation to *audi alteram* as arose in relation to Clause 11.1.1 in matters 16559 and 16659. The Panel is of the opinion that there are two differentiating factors.

32. In the first place, this matter was heard by an Emergency Panel. After the Emergency panel has ruled, the WASP is afforded a further opportunity to comment. In this matter, the WASP in fact made 4 further submissions after the Emergency Panel ruled.

33. In the second place, and scrutinising the actions of the Emergency Panel itself in considering this clause, the Emergency panel is by its very nature urgent. It can therefore not avail itself of the luxuries available to an ordinary adjudicator in relation to Clause 14.3.10. The Panel makes its finding with full knowledge that there will be a further chance to respond.

34. This Appeal Panel will therefore consider Clause 9.1.7 as being before it. We will revert to this shortly.

Sanctions

35. The first issue that the Appellant raised in relation to this appeal at the hearing was the question of whether the sanctions in paragraph 1 and 2 of the sanctions section of the adjudication are ultra vires and excessive.

36. The sanctions in question are:

> *1. The WASPA Member is directed to immediately suspend all campaigns that use a promotional activity in association with an offer for a subscription service, and to submit it to the WASPA Media Monitor for review as contemplated in paragraph 2 below;*
> *2. For a period of 1 calendar year, the WASPA Member shall henceforth:*
> *a. Submit all new and amended campaign material contemplated in paragraph 1 above for review by the WASPA Media Monitor prior to public placement; and*
> *b. Implement all recommendations by the Monitor prior to public placement, to ensure compliance with the Code;*

37. Clause 14.4.2 of the Code deals with the adjudicator's powers in respect of sanctions:

> *14.4.2. For all other clauses of the Code, possible sanctions that may be imposed on a member found to be in breach of the Code of Conduct are one or more of the following:*
> *(a) a requirement for the member to remedy the breach;*
> *(b) a formal reprimand;*
> *(c) an appropriate fine on the member, to be collected by WASPA;*
> *(d) suspension of the member from WASPA for a defined period;*
> *(e) expulsion of the member from WASPA;*
> *(f) a requirement for the member to disclose the identity of any information provider found to be acting in breach of this Code of Conduct;*
> *(g) a requirement for the member to suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct;*
> *(h) a requirement to withhold a specified amount or portion of money payable by the member to the information provider.*

38. This Panel was persuaded by Mr Farlam's argument that this list is exhaustive. He argued that the word "possible" is meant to be interpreted as "permissible" and not as indicative of examples. He further argued that had the intention been to leave the list open ended, the drafters would have used a device such as "including but not limited to" in the clause.

39. **The Panel agreed with this argument, and finds that the sanctions set out in paragraphs 1 and 2 of the sanctions section of the ruling are *ultra vires*. They are therefore overturned in their entirety**.

Clause 11.1.1

40. We turn next to the standing of the ruling in respect of Clause 11.1.1, which is complicated. The Emergency Panel found the Appellant in breach of Clause 11.1.1. The Adjudicator failed to consider 11.1.1 at all.

41. We find, reluctantly, that at the moment when the Adjudicator failed to consider Clause 11.1.1, the Emergency Panel finding fell away, and the clause essentially was removed from the table. As much as we may wish to do so, the Appeal Panel cannot revive a clause that has not been revived by the Appeal.

42. **We are therefore unable to consider Clause 11.1.1.**

Clause 9.1.7

43. As stated above, we consider that the citing of Clause 9.1.7 by the Emergency Panel was consistent with the requirements of *audi alteram pertem*.

44. Clause 9.1.7 states:

> *9.1.7. Competition services and promotional material must not:*
> *(a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants;*
> *(b) exaggerate the chance of winning a prize;*
> *(c) suggest that winning a prize is a certainty;*
> *(d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.*

45. The problem with Clause 9.1.7 arose because the service was originally called "Win R7000". The Appellant conceded that naming the service "Win R7000" was an unfortunate error of judgement, and that the name was subsequently changed to Club Genio to avoid confusion.

46. The Appeal panel was not impressed by the fact that the name change only occurred after the Emergency panel hearing, and would therefore appear to have been under duress. Naming a service "Win R7000" does not inspire the Panel's confidence in the Appellant's *bona fides*.

47. That having been said, the breach of Clause 9.1.7 was not deliberate in the sense that it occurred as a result of the use of the service's name. This name has now been changed.

48. **We therefore find that there was technically no breach of Clause 9.1.7.**

Clauses 11.2.2 and 11.2.3

49. The relevant clauses read:

> *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.

11.2.3. Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be reasonably clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition.

50. Argument around the interpretation of this Clause hinged on 2 essential questions:
    - The meaning of the word “ancillary”
    - The nature of the test in Clause 11.2.3

51. Having considered the arguments put forward on Clause 11.2.3, the Panel is strongly of the view that the Clause sets out a two pronged test. The first question is whether it is reasonably clear to the customer that the promotional draw or competition is ancillary to the subscription service; the second and separate question is whether the process of joining the subscription service may not be disguised as an entry into a completion.

52. There are several factors that lend support to our approach.

53. The Appellant was at pains to remind the Panel that the Code is a legal instrument and must be interpreted according to the normal “interpretive mechanisms” applied to legal instruments. We agree with this submission, and have applied such principles to our interpretation of the clause.

54. In the first place, the two legs of the test are separated by the word “and”. Mr Farlam himself, in fact, pointed out that the word “and” is proceeded by a comma. The word “and” by its ordinary meaning means “as well as” or “and also this”. This is underlined by the use of a comma, which is an unusual construction of punctuation in conjunction with the word “and” and must therefore denote a particular intention of the drafters.

55. In the second place, a reading of the test as being a one pronged test renders the first part – “whether it is reasonably clear to the customer that the promotional draw or competition is ancillary to the subscription service” – superfluous. A court will

not easily decide that words contained in legislation are superfluous (see for example *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd 1993 4 SA 110 (A)*). We consider that the same principle applies to the Panel, and there is nothing before us to indicate that the intention of the drafters was that the words in this clause should be regarded as superfluous, or that the test that they create is inconsistent with the purpose of the Code. On the contrary, we believe that the two pronged interpretation is more consistent with the purpose of the Code which is stated in Clause 1.2:

The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services.

56. Finally, we are also reminded by the Appellant of the need for WASPA decisions to be consistent. In matter 11258; 11582; 11626; 13038 and 13039, the Appeal Panel said the following:

> A useful two-step enquiry to determine the so-called 'bundling' complaint was suggested by the Adjudicator in his or her Report to complaint 11862, the conclusion of which is cited with approval by the SP in this matter, to determine whether a breach of clause 11.2.2 has occurred. The Adjudicator says, in paragraph 14.4 of that Report: "*In considering whether subscription would be an independent transaction made with the requisite intention in a case where a competition or promotional draw is offered as an additional benefit to being a subscriber to the service, an adjudicator is required to decide whether: 14.4.1. it would be clear to that customer that the promotion draw or competition is "ancillary" to the subscription service, and 14.4.2. (whether) the subscription process has or has not been disguised as an entry into a competition.*"

57. We therefore regard the test set out in Clause 11.2.3 as two pronged.

58. We accept that the second prong is met – by the time the consumer actually subscribes to the service, they are aware that this is a subscription service.

59. The question before us is whether the first prong is met: is it reasonably clear to the customer that the promotional draw or competition is ancillary to the subscription service?

60. The Appellant presented argument around the word “ancillary”. The gist of the argument seems to be that the word “ancillary” does not import “the means by which something is or becomes supportive of the ‘main thing’” (ref paragraph 2.1.12 of the original Appeal document). In matter 11258; 11582; 11626; 13038 and 13039, the Panel conducted research on the meaning of the word ‘ancillary” and concluded:

> *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.*
> *5.14 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.*

61. There is nothing before us that justifies a deviation from this interpretation and approach. At the absolute least, the promotion of the competition and the subscription service must be on equal footing in all the material.

62. In the matter at hand the landing page displays a large invitation to “ANSWER QUESTIONS. GET THEM RIGHT. CLAIM YOUR REWARDS!”. There is a small “Subscription service R6/day” in the left corner of the advertisement, in a font considerably smaller and less legible than the competition offerings. We are also unpersuaded that the button saying “JOIN TODAY” is indicative of a subscription service that attracts a daily charge. We also take into consideration what Mr Fralam pointed out – that there is a lot going on on the page. This amplifies rather than mitigates the need to be clear in the communication of the subscription service.

63. The next page shows a woman holding cash and says, “get ur share of R365 000 weekly” (with an asterisk that seems to go to the statement “Available through the GENIO Rewards program. T&Cs apply”. The subscription information does appear three times on this page – and it is for this reason, *inter alia*, that we accept that

the subscriber does become aware that there is a subscription element. But the subscription information is communicated as a side issue to the main offer – to win a share of R365 000. The asterisk offers no clarification.

64. Finally, you arrive at a page saying “DONT (sic) MISS YOUR CHANCE*!” with the same asterisked reference. The second most prominent communication on this page is “PLUS EVERY WEEK SOMEONE WILL GET REWARDED*!”.

65. There is no doubt in our minds that the communication of the subscription is ancillary to the competition and not the other way around. We accept that the Appellant is trying to stand out in a competitive market but are unpersuaded that this warrants a clear breach of the Code.

66. **We therefore find a breach of Clause 11.2.3. and dismiss the appeal in this regard.**

67. The sanction given by the adjudicator in this matter is R50 000. We were sympathetic to some degree to the Appellant’s arguments that inconsistent rulings in various matters results in them being unclear on exactly where the line is drawn on this issue.

68. That having been said, we also see this as a problem only of the Appellant is trying to comply with the absolute minimum that it can get away with. There is absolutely no reason that the Appellant could not comply with **all** the rulings, putting itself well in the clear of the Code.

69. We were also somewhat unsympathetic to the fact that the material in question was still on the website (the Panel accessed same during the hearing) despite the finding in matter 11258; 11582; 11626; 13038 and 13039. This is again indicative of an application of decisions in the most absolutely narrow sense possible.

70. We uphold the sanction of R50 000 in respect of this breach.

Clause 11.2.6

71. The breach of Clause 11.2.6 relates to the formatting of the confirmation message. This perceived breach resulted out of the poorly chosen name “Win R7000”. The message did, in fact, comply with the clause.

72. **We therefore uphold the appeal in relation to Clause 11.2.6 and overturn the sanction.**

Clause 11.5.2

73. The breach of Clause 11.5.2 resulted from the adjudicator finding that the abbreviation “unsub” was unacceptable.

74. We do not agree with the adjudicator:

- “unsub” is not on the list of unacceptable abbreviations;
- “unsub” is in fact indicated as acceptable in Clause 11.6.2
- It would be clear to the consumer what “unsub” means.

75. We therefore uphold the appeal in relation to Clause 11.5.2 and overturn the sanction.

Appeal fees

76. While we consider that the breach of Clause 11.2.2 and 11.2.3 in matter 17910 is a serious matter, we nonetheless feel that the Appellant has enjoyed substantial success in this appeal. For that reason, we consider it appropriate to refund its appeal fees.