Adjudicator's Report

Complaint number	19580
Cited WASPA members	Buongiorno South Africa (0002)
Notifiable WASPA members	*na*
Source of the complaint	*Competitor*
Complaint short description	Competition not ancillary to offer
Date complaint lodged	*11 February 2013*
Date of alleged breach	Unknown
Applicable version of the Code	*12.1*
Clauses of the Code cited	*11.2.2* *11.2.3*

Related complaints considered	17657/17734/17894 16559/ 16659/ 17910
Fines imposed	*R10 000* – Clause 11.2.3

Is this report notable?	No
Summary of notability	na

Initial complaint

The complainant submitted that the material in question made a competition to win an iPhone the hook with which consumers are lured into a subscription service. The competition was not ancillary as required by the Code.

Member's response

The response in this matter was initially delayed while the parties awaited the outcome of the appeal in matter 17657/17734/17894.

On resolution of that matter, the WASP responded to the merits.
It firstly contended that the material was produced by an affiliate marketer and as such was not within its control or responsibility.

In the alternative, it contended that the material was not in breach of the cited clauses, and addressed detailed arguments on the clauses which will be canvassed below.

Clauses

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, all marketing and promotional material must make it 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.

Decision

Affiliate marketers

The issue of whether or not a WASP is responsible for the actions of its third party affiliate marketers is a topical and contentious one. The decisions coming out of WASPA currently suggest that the WASP is liable for the actions of the affiliate marketer (ref, for example, matters 26211, 26420, 26610, 26752).

While WASPs are quick to allege that the affiliate marketer acts in isolation and without approval, the reality is that the campaign in question is live and therefore must, to some extent, have been within the knowledge and control of the WASP.

When an entity chooses to act through an agent, it becomes liable for the actions of that agent. Any limitation of liability is between the entity and the agent and must be enforced at contract level. For the purposes of WASPA, the WASP offers a service that is accessed through material that it has allowed a third party to create. The liability for that material is therefore – from a WASPA perspective – that of the WASP.

I am therefore satisfied that the WASP in this matter is liable for the content of the material.

Clauses 11.2.2 and 11.2.3

The first consideration in this matter was, of course, whether the appeal for which this matter had been shelved has any impact on the outcome of this case.

That matter, 17657/17734/17894, was a consideration of the same or very similar material, but the appeal was based on clauses 4.1.2 and 9.1.7, as this was all that was under appeal. However, the adjudicator *a quo* in that matter found no breach of 11.2.2, which he/she considered it in relation to Clause 11.2.1 and did not consider Clause 11.2.3.

I firstly consider that the question of Clause 11.2.2 has therefore been considered in relation to this material, and for me to consider it again would be a case of “double jeopardy” as this is not a matter on appeal. I note, for purposes of clarity only, that I in any event agree with the finding in that matter in respect of Clause 11.2.2.

I am therefore charged with the issue of Clause 11.2.3.

In the Appeal matter of 16559/ 16659/ 17910, the Appeal Panel grappled with precisely the same issues as that currently before me, and found:

> *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.*
>
> *There are several factors that lend support to our approach.*
>
> *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.*
>
> *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.*
>
> *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.

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."*

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

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.

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?

The response on the merits from the WASP in this outlines the double subscription service, and I accept that this is a correct reflection of what occurred. I am persuaded that by the time that the consumer subscribed, they were aware that they were subscribing or should reasonably have been so. I therefore, like the Panel in the matter cited above, am persuaded that the second prong of the test is met.

The WASP goes on to say the following:

"B!SA accepts that this issue of compliance is not only about the process of joining the service but also the marketing and promotional material that precedes this stage. However . . . there were several clear indications that the service was a subscription service . . . No attempt was made to disguise the subscription service. . .".

This argument, however, still goes to the second prong of the test. The issue is not whether the subscription communication was there, it is whether the competition was ancillary to the subscription.

In matter 16559/16659/17910, the Panel said as follows:

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.

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.

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. . .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.

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*!".*

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.

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

I am of the opinion that the material at hand is on all fours with this matter. There is absolutely no doubt in my mind that the consumer would be aware that they were subscribing – if not right from the outset, then at least by the time they actually subscribed. However, the primary communication is at all stages around the competition. The first page states, “Join and you could win” and “The following prize could be yours”. The second page states “Get cool content, subscribe [hidden]” and then in much bolder font “Win a new iPhone”. What I consider most significant is that while one page does have an example of the “most popular” content, it is never actually clear from the material before me exactly what it is the consumer is subscribing to.

In this material, the primary communication is around the competition and the ancillary communication is the content subscription. This is in breach of Clause 11.2.3.

Sanction

While this is a serious breach of the Code, it is also mitigated by the fact that the subscriber was aware, by the time that they subscribed, that the process was one of subscription. It is also mitigated by the fact that some effort appears to have been made to clearly communicate this.

I am also mindful of the fact that the WASP has already been fined R100 000 in respect of the same/similar material by the adjudication *a quo* in matter 17657/17734/17894, which was upheld on appeal. However, the issues in that matter were different.

Given these factors, I fine the WASP R10 000 in respect of the breach of Clause 11.2.3.