Appeal Panel's Report

Complaint/s on appeal	24294
Appellant/s	WhyPlay Interactiva SL (IP)
Appeal decision date	15 February 2016
Relevant Code version	12.4
Clauses considered	11.6.2
Relevant Ad Rules version	Not considered for the purposes of this appeal
Ad Rules clauses	Not applicable

1. This appeal

1.1. The Appellant is WhyPlay Interactiva SL ("the Appellant"). The Appellant has appealed against the adjudicator's finding that it breached clause 11.6.2 of the Code. The adjudicator ruled as follows:

"Reminder ur subscribed to Cazually. 1 New undates waiting. Click http://bzm.tv.s/1839512102 to read cost R7/day help?0105002341. To unsub sms stop to 37918".

In my view, and due to the exacting requirements of 11.6.3 the reminder message does not comply with the Code in that it has this text between the name of the service and the cost: Click http://bzm.tv/s/1839512102 to read.

It also breaches 11.1 of the Advertising Rules which sets out this as the template for the reminder messages and states that no other characters may be included."

2. The original complaint and background to this appeal.

2.1 The case file containing the documents relevant to this appeal is rather substantial in nature. Considering that the Report of the Adjudicator contains verbatim accounts of the documents submitted by the complainant and the appellant, as well as the fact that the majority of the issues discussed in the documents are not relevant to this appeal it is unnecessary to again provide a record of these documents in this appeal report. We will therefore limit our report to the only two issues relevant to this appeal namely; (1) whether the appellant breached clause 11.6 of the Code and; (2) the averment by the complainant that the records (logs) provided by the appellant as 'proof of subscription' were "falsified."

2.2 In the initial complaint the complainant stated that he did not opt into the appellant's 'Cazually' service and also accused the appellant of sending 'spam'.

2.3 Based on records (logs) provided by the appellant proving that the required double opt in process was followed and that a 'previous commercial relationship' existed the Adjudicator found that the appellant was not in breach of clauses (and sub-clauses) 5.2; 11.2 and 11.3 but only that the appellant was in breach of clause 11.6 due to the fact that the reminder message sent to complainant was not in the prescribed format.

3. The appellant's appeal.

3.1 In its appeal document the appellant states that it does not agree with the conclusion of the adjudicator regarding the format of the reminder message and that the message adheres to the layout as required by the Code.

3.2 According to the appellant: "The sentence "1 New updates waiting. Click http://bzm.tv/s/1839512102 to read" is actually the [*content/service description*] required by the Code of Practice V12.4, clause 11.6.4.

It is a fact that deleting such sentence from our Reminder message, actually the message layout would have been in blatant breach of the code. It would not be considered as providing the right information to the user. In fact, as per clause 11.6.4 "*The content/ service description must be text describing the content, promotion or service* (…)."

3.3 The appellant further points out that there was a discrepancy between version 12.4 of the Code and the Advertising Rules due to the age of the Advertising Rules. The appellant states:

"The layout of the reminder message as per article 11.1 of the Advertising Rules (dated 2008), does not comply with the requirements stated by clause 11.6 of the WASPA Code of Practice V12.4 (dated 26/06/2013), being that actually the message layout of the Advertising Rules does not begin with the word "Reminder", which was a mandatory requirement of the Code of Practice, and do not contain a content/service description in it.

The above-mentioned situation was due to the age of the Advertising Rules and the discrepancies between the same and the further Code of Practice versions. The new Code of Practice V13.1 has finally harmonized both the rules and eased the interpretation of the Reminder message disclosure layout".

4. The complainant's further submission to the appeals panel

4.1 In his submission to panel the complainant repeats some of the averments he made in previous submissions and correspondence between himself and WASPA and between himself and the appellant.

4.2 The complainant in his submission states:

"I find it highly disingenuous that Casually is calling into question my honesty.

We can prove that we were not in Durban on the date in question.

We have proved that the IMEI number NEVER used any data on the MTN network. The records provided by Mira / Casually are false.

What more is there to prove. Mira / Casually are liars and they have perpetuated fraud.

I believe that the records provided by ourselves have purposefully been glossed over.

Your first point of the ruling is as follows.

5.2.1, 5,2.2 and 5.2.3: Without alleging fraud and manufacturing of records I find no breach.

What exactly is meant by this point?

I actually did allege fraud and manufacturing of records, as the information provided is patently incorrect.

It seems that WASPA is making every effort to cover their 'members' backsides.

And I say this because with every revision of your code of conduct, points are changed making it more and more difficult for the public to protect themselves from predatory companies like Mira and Casually."

5. The panel's decision

5.1. We deal firstly with the issue of the reminder message and whether the appellant breached clause 11.6 of Code as determined by the original adjudicator.

5.2 In essence we need to decide whether the sentence "1 New updates waiting. Click http://bzm.tv/s/1839512102 to read" can reasonably be regarded as a valid "content/service description" as required by the Code. We agree with the appellant that the other parts of the reminder message are compliant and will we therefore not analyse the other elements.

5.3 Clause 11.6.4 of the Code is clear and even provides examples of what is meant by "content/service description". The clause reads: "The content/service description must be text describing the content, promotion or service (e. g. "tones" or "poems"). The text must not be worded in a way that attempts to deceive or mislead the customer from the purpose of the reminder which is to inform the user that they are subscribed to a service".

5.4 Though we cannot say what the appellants' subjective motive was for including the sentence "1 New updates waiting. Click http://bzm.tv/s/1839512102 to read", and therefore whether it was inserted to "deceive or mislead", we are of the opinion that objectively speaking the insertion of the sentence defeats the purpose

of the message. The sentence "1 New updates waiting. Click http://bzm.tv/s/1839512102 to read" is not in our view a valid "content/service description" and we therefore agree with adjudicator that the appellant is in breach of Clause 11.6 of the Code.

5.5 The appellant raises a valid point in suggesting that there was a disparity between the Code of Conduct version 12.4 and the Advertising Rules of which the most recent version was published back in 2008. We therefore did not take the Advertising Rules into account in reaching our decision but based our decision on the wording of the Code alone. It should be noted that it has always been the position of the WASPA Code of Conduct that if there is a conflict between the Advertising Rules and the WASPA Code of Conduct then the Code of Conduct will prevail.

5.6. The appellant's appeal against the finding that it breached clause 11.6 of the Code is therefore dismissed.

5.7 Turning to the averment by the complainant that the records (logs) provided by the appellant as 'proof of subscription' were "falsified." The complainant has repeated this allegation numerous times in the documents exchanged between the parties and between himself and WASPA.

5.8 The adjudicator stated that "Without alleging fraud and manufacturing of records I find no breach." In his submission to this panel the complainant asked in reaction to this statement by the adjudicator the following question; "What exactly is meant by this point?". This panel is in exactly the same position as the adjudicator and will for the benefit of the complainant endeavour to explain the position. We can only decide a matter on the evidence and the documents before us. The appellant submitted the logs of the transactions as is required by the Code in order prove that valid subscription took place. We are not in a position to investigate as the case would be with a forensic audit and must we take the logs submitted to us on face value. We cannot conclude that logs were falsified on the mere allegation made by a complainant.

5.9 Contrary to the complainant's view that "[I]t seems that WASPA is making every effort to cover their 'members' backsides" the mandate of this panel (who are independent and impartial) is to render objective and fair decisions. In order to be fair we need to believe that all parties to a complaint act in good faith in the absence of proof to the contrary. Alleging that the appellant falsified its logs and thereby committed the very serious and criminal act of committing fraud without any substantiating evidence to that effect is not objective, just or fair and not something we would (or the adjudicator could) consider doing.

5.10 In this regard we would for the benefit of the complainant share our view on the allegation made by the complainant that the appellant's logs must have been falsified because one (or more) of the interactions between the complainant's handset and the appellant's systems was "routed" through a server in Durban which the complainant insists he did not visit during the time of the relevant "interaction". Without repeating in detail the very technical exposition provided by the complainant of how interactions with his handset are routed or repeating the appellant's similarly technical reply we would like to mention that in our understanding of how information is routed through the Internet and networks that it is entirely possible that the interaction between the complainant's handset and the servers of the appellant could have been routed through a server located in a geographical area in which the complainant was not present. We have also

consulted with experts on Internet systems and networks who confirmed this. Again without any more details or information than that before us we cannot make a finding that the appellant's records were "falsified".

5.11 The complainant's allegation of "fraud" is in the absence of further proof similarly dismissed.

5.12 We regard the fine of R10 000 for the breach of clause 11.6 as reasonable and the sanction therefore stands.

5.13 In the event that the relevant subscription service is still active and the reminder message has not been changed in order to comply with section 11.6 of the Code the second sanction regarding the R5000 to be held in abeyance must be complied with as stated by the adjudicator. If the service is not active anymore this sanction is irrelevant.

5.14. The complainant has 5 days after this appeal report is communicated to him in which to accept the appellant's good faith offer of a refund of all the monies deducted. The appellant will have no obligation in terms of the adjudication of this particular complaint to refund the complainant after the 5 day period.

5.15 The appeal fee is forfeited and will not be refunded to the appellant.