

REPORT OF THE APPEALS PANEL

Date: 14 January 2010
Appellant (SP): Floodgate Agencies (trading as 34007)
IP: Clickatell
Complaint Number: 5299
Code Version: 6.2

1 INTRODUCTION TO THIS APPEAL

- 1.1 Complaint number 5299 was lodged by the WASPA Monitor on 28 November 2008. The complaint deals with a billboard advertisement for Kings Removal Company (the client) on the M3 leaving Cape Town which invited interested parties to send an SMS to a specific short code in order to receive a call back from Kings Removal Company.
- 1.2 The essence of the complaint was that the billboard advertisement did not display the cost of sending the SMS to the advertised short code, as required by the Code.
- 1.3 The adjudicator's decision was rendered against Clickatell (the IP), on 10 July 2009. The appeal, however, was lodged by Floodgate Agencies (the SP), trading as 34007, a SMS call back facility and affiliate member of WASPA. Although the adjudicator's decision refers to Clickatell (the IP) as the SP, Clickatell is the information provider of Floodgate Agencies, which under the Code correctly took responsibility as the actual SP in lodging the appeal on behalf of its IP. Clickatell will therefore be referred to as the "IP" in this appeal and Floodgate Agencies, the appellant, as the "SP".
- 1.4 The short code was in fact a premium-rated service.

2 RELEVANT INFORMATION

- 2.1 It should be noted that the initial complaint lodged by the WASPA Monitor on 28 November 2008 was only an informal complaint in terms of which the IP was presented with the opportunity to take remedial action.
- 2.2 During the period of more or less two weeks, the time from which the initial informal complaint was lodged until the escalation of the complaint to the status of formal, various email messages were exchanged between the WASPA Monitor, the WASPA complaints department, and the IP. The aim of these email messages was to facilitate the process of taking remedial action to the satisfaction of the WASPA Monitor in order to have the complaint resolved informally.

- 2.3 Although the IP claimed that attempts had been made by it and its client, Kings Removal Company, to rectify the non-compliant advertisement, which included painting over one digit from the short code on the advertisement (in the hopes that consumers would not send messages if they recognised that the short code was missing a digit), the remedial actions taken by the IP and its client, and the 'unacceptable period of time' it took to rectify the advertisement was not to the satisfaction of the WASPA Monitor. In particular this is because the IP advised WASPA that the client's right to the display would in any event end on 31 December 2008, which WASPA felt was simply too long to wait, while unsuspecting consumers continued to send messages to the short code advertised. It would appear that consumers even sent messages to the 4-digit short code.
- 2.4 The complaint was consequently escalated to a formal complaint on request of the WASPA Monitor on the 10th of December 2008 and was submitted for adjudication shortly thereafter.
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3 THE CODE

- 3.1 In the complaint the WASPA Monitor cited breach of clause 7.2.1.1 of the Advertising Rules which requires that advertisements for a service contain certain minimum pricing information.
- 3.2 In the subsequent adjudication the adjudicator also considered potential breaches of clauses 3.1.1 (professional and lawful conduct), 3.3.1 (members will not offer or promise services that they are unable to provide), 3.9.1 (SPs must ensure that the IP's services do not contravene the Code), 4.1.1 (honest and fair dealings with customers), 6.2.2 (advertisements must include full retail price of service) and 6.2.5 (price of service must be easily and clearly visible) of the Code of Conduct.
- 3.3 The adjudicator ultimately determined that the following clauses of the Code which are relevant for the purposes of this appeal were breached:
- 3.3.1 *3.1.1 Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.*
- 3.3.2 *6.2.2 All advertisements for services must include the full retail price of that service.*
- 3.3.3 *6.2.5 The price of a premium rated service must be easily and clearly visible in all advertisements. The price must appear with all instances of the premium number display.*
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4 DECISION OF THE ADJUDICATOR

- 4.1 The adjudicator gives a detailed account of the chain of events and correspondence between the WASPA Monitor and the IP (the SP according to the adjudicator's decision) which followed the lodging of the initial complaint.
- 4.2 Based on the chain of events and correspondence between the WASPA Monitor and the IP, the adjudicator states that a number of other issues also needed to be

considered apart from the initial complaint that the advertisement failed to contain the required pricing information. These issues include:

- 4.2.1 The fact that the service was according to the IP already terminated by September 2008 and that the IP therefore advertised a service which was no longer active.
- 4.2.2 Whether the IP acted in a manner that is consistent with its duties in terms of clauses 3.1.1 and 4.1.1 of the Code of Conduct after having been informed of the apparent breach of the Code.
- 4.3 In considering the abovementioned issues the adjudicator found the IP's initial response to the complaint to be 'unsatisfactory in the circumstances'. According to the adjudicator the IP not only failed to remove the advertisement after it became aware that the service was no longer active, but that the IP also showed a lack of urgency in remedying the breach which was prejudicial to members of the public whom were still charged for sending messages to a service that was no longer active and/or that never existed. The adjudicator stated that the existence of such circumstances were damaging to the Wireless Application Industry as a whole and undermined the purposes of the Code.
- 4.4 The adjudicator describes the first attempt to remove the prejudice caused to consumers by the advertisement, by only removing the last digit of short code as 'clumsy at best' and not removing the prejudice to consumers.
- 4.5 The adjudicator, without discussing any of the other mentioned potential breaches in detail, concludes by finding that clauses 3.1.1, 6.2.2 and 6.2.5 of the Code were breached.
- 4.6 Sanctions
 - 4.6.1 In considering the sanction the adjudicator states that the following two mitigating factors were taken into account in the determination of an appropriate sanction:
 - 4.6.1.1 The fact that the IP acted swiftly to remove the short code on the advertisement completely after becoming aware of the fact that the first attempt to remove the prejudice being caused to consumers was ineffective.
 - 4.6.1.2 The general co-operation provided by the IP.
 - 4.6.2 The adjudicator fined the IP R60 000.

5 GROUNDS OF APPEAL

- 5.1 The grounds of appeal were not submitted by the IP itself, but by Floodgate Agencies, trading as 34007, (the SP, the appellant in this appeal) a company to which the IP provides information services.
- 5.2 The SP introduces its grounds of appeal with an explanation of its business history and its business model which the panel notes but which is largely immaterial to this appeal.

- 5.3 The SP continues by referring in detail to the methods it employs in order to ensure compliance with the WASPA Code of Conduct. The panel notes these initiatives by the SP in so far as they serve as an indication of the SP's efforts to ensure its clients' adherence to the Code. These individual efforts by the SP of ensuring compliance with the Code are, however, not by themselves relevant to the outcome of this appeal and will therefore not be discussed here in detail.
- 5.4 The SP then states that it has no direct control over its client's marketing messages and that it would be difficult and impractical for it to stipulate the 'signing off' of the marketing bearing its short code before publication. The panel finds this somewhat contradictory.
- 5.5 Refreshingly so, the SP makes it clear that it does not dispute the facts of the complaint or adjudication against it, but states that it would like the opportunity to address the breaches of the Code in mitigation. To this end the SP addresses the specified breaches of the Code as follows:
- 5.5.1 The breach of clause 3.1.1. of the Code
- 5.5.1.1 The SP again explains in detail the lengths it goes to in order to ensure that its clients comply with the Code and that it believes that this serves by extension as an indication that it has done everything in its power to deal with the public which is served by its clients in a professional manner.
- 5.5.1.2 The SP then admits that the first attempt to rectify the advertisement by only removing the final digit of the short code was insufficient. In its defence the SP points out that its client that effected the initial change to the advertisement did not share its sense of urgency and also applied its own remedy. Furthermore the SP points out that the bill board advertisement is not its property and that it would not have the proper jurisdiction to affect any changes to the advertisement itself.
- 5.5.1.3 Lastly with regards the breach of clause 3.1.1 the SP brings to the attention of the panel that it is based in Johannesburg and not in Cape town where the advertisement was located and that it was not only unaware of the fact that WASPA had received a photograph of the remedy but that it did not have any physical involvement in applying the remedy.
- 5.5.2 The breach of clauses 6.2.2 and 6.2.5 of the Code
- 5.5.2.1 As was the case with the SP's explanation for the breach of clause 3.1.1 above the SP again refers to the actions it takes in order to ensure compliance by its clients, and specifically mentions its '34007 Call to Action' initiative which is artwork that is available for download on its website free of charge to all clients and which incorporates the costs of a SMS sent to the short code.
- 5.5.2.2 The SP continues by stating that it is difficult for it to enforce new WASPA regulations retrospectively, and that its client, Kings Removals, joined it as a client in September 2006, which was before the promulgation of clauses 6.2 of the Code. The SP explains that it is difficult to enforce changes to the Code because not only do its clients

not view the Code with the same fervour as the SP, but also that it has no real sanction over its clients.

5.5.2.3 The SP confirms that it sent an email to all its clients, which included Kings Removals, advising them of the change to the Code with regards to the new requirement to display SMS costs.

5.5.2.4 The SP further states that it immediately suspended the keyword after the WASPA complaint, and that a reply message was sent to members of the public advising them of the WASPA breach and that the SMS they had sent cost them R2.00. The SP also contacted every person who had sent a SMS to offer them King Removals' landline number.

5.5.2.5 According to the SP its client, Kings Removals, only received a total of 11 keyword activations, 6 of which were received after the WASPA complaint.

5.5.2.6 The SP points out that the complaint which forms the basis of this appeal was not lodged by a member of the public, but by the WASPA Monitor, and that no other complaint was lodged by a member of the public.

5.5.3 The SP although accepting responsibility for the sanctions issued, then presents the following facts to be considered by the panel in reaching its decision regarding sanction:

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| 1 | • | 34007 is a fee paying member of WASPA (timeously) in an effort to ensure we are compliant with good sms practise |
| | | • 34007 does everything in its power to ensure that clients comply with the WASPA Code of Conduct. |
| 2 | | • 34007 did everything possible to have the problem rectified by |
| the client. | | |
| | | • 34007 was unaware of the '1st attempt remedy' and is unaware of, and did not submit, the photographic evidence of such to WASPA. |
| | | • During the 24 month duration of the KINGS contract there were a total of 11 smses sent to the 34007 Keyword KINGS. Some or all of the activations may not have originated from this billboard at all but could have been as a result of other advertising done by the company in another media. (for example the activation on 29.7.09). We are willing to refund all those clients who smsed KINGS to 34007 |
| 0 | | • We ask that the fine should take into account that the members of the public who sent off smses were not prejudiced in any way and received the service they expected. |
| | | • This was not a formal complaint made to WASPA by a member of the public. |
| 1 | • | The total sms revenue earned by Floodgate from this KeyWord during the period was less than ten South African Rand. |

5.5.4 The SP in closing, points out that when its short code number was registered many of the 'rules' now applicable were not in place and that it has now subsequently joined WASPA as an affiliate member to ensure that it is in step with best practice and that it filters such practice through to its clients as soon as it is required.

6 FINDINGS OF THE APPEALS PANEL

- 6.1 The panel notes for the record the SP's explanation of its business history and business processes as presented in the 'Background' section of the SP's appeal document in so far as it serves as an indication of the SP's efforts to ensure compliance with the Code.
- 6.2 Regarding the SP's statement that it is difficult and impractical for it to stipulate the 'signing off' of the marketing bearing its short code before publication, the panel wishes to make it clear that it is not for this panel to render opinions regarding the internal business practices of WASPA members or the practicality of the obligations between SPs and IPs or their clients. This panel deals with breaches of the Code and in terms of the Code, SPs remain ultimately responsible for the actions of their IPs (and any "clients", and consequently, their IP's breaches of the Code, irrespective of how the internal relationships between the SPs and their IPs are structured. Similarly where a SP permits use of a short code by its client, then it must also require that client to comply with the Code it is bound by in relation to that short code, or assume responsibility for compliance itself.
- 6.3 We would like to commend the SP for taking responsibility of the actions of its client by not disputing the facts of the complaint.
- 6.4 Regarding the SP's grounds of appeal for the breach of clause 3.1.1. of the Code:
- 6.4.1 As in paragraph 6.1 above the panel notes all the efforts by the SP to ensure adherence to the Code.
- 6.4.2 We would again like to commend the SP for admitting that the first attempt to rectify the matter by the removal of the final number of the short code from the billboard was insufficient. With regard to the SP's further statements in its ground of appeal, as stated 5.5.1.2 above, the panel takes note of the perceived practical difficulties experienced by the SP. The fact remains, however, that the matter was not rectified to the satisfaction of the WASPA Monitor within the period of time before the complaint was escalated to a formal complaint – a period of time which the panel regards as more than reasonable. The SP is, in terms of the Code, ultimately responsible for the actions of its client and consequently in terms of this complaint for the rectification of the infringing advertisement.
- 6.4.3 The panel notes the fact that the SP is based in Johannesburg and that the advertisement was in Cape Town. Effecting the remedial actions to the advertisement to the satisfaction of the WASPA Monitor remains the SP's responsibility. Reasons given as to why the remedial actions taken were unsuccessful are only relevant between the SP, the IP and its 'client' and therefore largely irrelevant for this panel in deciding whether the Code was breached or not.
- 6.5 Regarding the SP's grounds of appeal for the breach of clause 6.2 of the Code.
- 6.5.1 The panel wishes to point out to the SP that section 6.2 of the WASPA Code of Conduct, which the SP avers came into effect some time after

September 2006, the time at which Kings Removals joined the SP as a client, already formed part of the very first version of the Code of Conduct (version 3.2) which was in force from the end of July 2005. Section 6.2 of the Code was therefore not a new WASPA regulation that needed to be enforced retrospectively.

- 6.5.2 The panel notes the fact that the SP suspended the keyword immediately after the complaint was submitted as well as the fact that the SP informed members of the public of the breach of the WASPA Code and provided them with their client's landline number, thereby providing the service envisaged.
- 6.5.3 The fact that only a total of eleven keyword activations were received is only relevant in so far as it serves as an indication of the limited harm caused to consumers and members of the public which we will take into account in considering an appropriate sanction.
- 6.5.4 The fact that the complaint was not lodged by a member of the public but by the WASPA Monitor is irrelevant in deciding whether the Code was breached and in determining the appropriate sanction.
- 6.6 Because of the fact that the SP's grounds of appeal as quoted in paragraph 5.5.3 above under the heading 'Appeal Request' are in essence repetition of the grounds of appeal already discussed – these grounds of appeal will not be discussed again in detail. The panel has carefully considered each of these 'facts' in reaching our decision.
- 6.7 We note the SP's plea for leniency in context of the fact that the SP admitted responsibility for the breach of the Code. The fact that the SP is a small company with limited financial resources is unfortunately not a factor which the panel can take into consideration in reaching our decision.
- 6.8 As stated in paragraph 6.5.1 above, section 6.2 of the Code which deals with the 'pricing of services' was already in force by July 2005 and therefore the SP's averment that 'these rules were not in place' when the SP registered its short code cannot be accepted.
- 6.9 As the SP itself admits, it is quite clear from the facts that clause 6.2.2 and 6.2.5 of the Code were breached. The panel confirms the decision of the adjudicator concerning the breaches of these two clauses of the Code.
- 6.10 Although an effort was made to have the infringing advertisement rectified, the remedial actions taken was not to the satisfaction of the WASPA Monitor. We find the Monitor's expectations and the time provided for by the Monitor regarding the rectification of the breach to be reasonable. We therefore concur with the adjudicator in finding that clause 3.1.1 of the Code had been breached.
- 6.11 In considering all the relevant facts, in particular the following: (i) that the IP did make some effort to remedy the situation, (ii) that the SP acted swiftly to remove the short code after becoming aware of the complaint, (iii) the generally co-operative attitude of the IP and the SP, (iv) that the SP openly and honestly took responsibility for the breach of the Code by the IP and its client, and (v) the fact that the actual harm caused by the breach was minimal, we find the adjudicator's sanction to be harsh. This should, however, not be

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interpreted to mean that we find the breaches of the Code not to be of a serious nature and we note that similar breaches of the Code under different circumstances could lead to substantial monetary and other appropriate sanctions.

- 6.12 The panel reduces the fine of R60 000 imposed by the adjudicator to R10 000 which amount is to be paid to WASPA within 5 days of delivery of this report.
- 6.13 The SP is ordered to refund all members of the public who sent the SMS 'KINGS' to the short code 34007. Proof of the refunds made must be submitted to WASPA within two weeks of the delivery of this report.
- 6.13 In terms of the Code this panel is obliged to consider the evidence provided to the adjudicator, the adjudicator's decision and the additional information provided by the SP with care. Even though the panel found the sanctions recommended by the adjudicator to be harsh the panel agrees with the adjudicator that the SP in fact did breach the Code. The appeal fee is therefore not to be refunded.