

WASPA appeals panel
Complaint 7498

REPORT OF THE APPEALS PANEL

Date: 31 January 2011

Appellant and Service Provider: Celerity Systems (BulkSMS)

Information Provider (IP): Payprofit

Complaint Number: 7498

Applicable versions: 7.4

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a complaint lodged on 31 August 2009, by an individual against Celerity Systems, the Service Provider (SP) and Payprofit, the Information Provider (IP).

1.2 The SP is appealing against the sanctions imposed, only in that it alleges that the sanctions should apply to the IP, and not to the SP.

1.3 The complaint relates to an advertisement for a competition.

1.4 The complaints, the findings of the Adjudicator, the IP's response to and appeal against the complaint, are fully recorded in the case files provided to this appeals panel, and as these are, or will be, publicly available on the WASPA website, they will not be repeated in full in this appeal panel's report.

2. CLAUSES OF THE CODE CONSIDERED

2.1 The following portions of the Code of Conduct (version 7.4) were considered in the original matter:

2.2 4.1.1. Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

2.3 4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

2.4 4.1.4. Members must make the terms and conditions of any of their services available to customers and potential customers, on request.

2.5 Clause 9 as a whole.

2.6 Clause 4.2.2 of the Advertising Rules (Version 2.3).

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR

3.1 Finding of the Adjudicator

The essence of the Adjudicator's finding was that: "What is, however, clear is that the correct terms and conditions relating to the "competition" were not provided on the web site link which was provided in the replying SMS. In addition the terms and conditions were never supplied to the complainant and it is not clear if the terms and conditions exist at all. It is, unsurprisingly, not acceptable for an IP and/or SP to allow a service to be flighted without the necessary terms and conditions and the IP has admitted as much in its communications."

Based on this, the Adjudicator found the SP in breach of "Clause 3.1.2" of the Code.

3.2 Sanctions

The relevant portion of the sanctions read:

It should be noted that at the time of the offence the IP was not a member of WASPA. As a result no sanctions can be levied on the IP.

As a result of the breach of clause 3.1.2 of the CoC I impose the following sanctions:

4.1. The SP is fined an amount of R5 000.00.

4.2. The IP is cautioned to ensure that it is aware of the advertising requirements relating to competitions and the requirements relating to the positioning and content of the terms and conditions relating thereto.

4. GROUNDS OF APPEAL

4.1 Grounds of appeal for complaint 7498

4.1.1 The IP's grounds for appeal are recorded (that is copied exactly as submitted, errors included) and paragraphed as follow:

In this, we wish to submit that this appeal is not against the merits of the decision nor the amount of the sanctions but to remedy a factual inaccuracy in the report which would mean that the sanction of a fine should be attached to PayPROFIT (the Information Provider (IP) in this matter) and not Celerity Systems.

We wish to highlight the following from the Adjudicator's Report:

1. The complaint was lodged with WASPA by the complainant on the 31st August 2009 (see item 1 under the section "Complaint" on page 1), and
2. "It should be noted that at the time of the offence the IP was not a member of WASPA. As a result no sanctions can be levied on the IP (see item 3 under the section Mitigation/Aggravation" on page 6).

However, according to our records, as correspondence received from PayPROFIT on the 6th August 2009, and confirmed by the WASPA Secretariat in correspondence on the 21st July 2010, PayPROFIT became a WASPA member on the 4th August 2009.

Accordingly, we wish to submit that PayPROFIT's membership with WASPA pre-dates Complaint #7498.

We therefore request that the Adjudicator's Report be amended to reflect:

1. The fact that the IP was a member of WASPA at the time of the offense.
2. That the sanction of the fine be attached to the IP and not the SP.

5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

5.1.1 The complaint was made on 31 August 2009. Version 7.4 of the Code, in use from 17 June 2009 to 13 October 2009, applies.

5.2 Error

5.2.1 The Adjudicator found the parties in breach of Clause "3.1.2" of the Code. Given the content of the complaint and decision, and the cited clauses of the Code, it appears that what was meant was Clause 9.1.4.

5.2.2 This is not, however, material to the appeal at hand as such. It does, however, have impact on the decision below and is therefore recorded.

5.3 Finding

5.3.1 The IP in this matter is not appealing the merits or amount of the sanction. It is only appealing the subject of the sanction on the basis that PayPROFIT was, in fact, a WASPA member at the time of the complaint. It therefore submits that the sanction should apply to the IP and not the SP.

5.3.2 The Appeals Panel therefore confines its decision to this aspect of the original ruling.

5.3.3 We have confirmed with the WASPA Secretariat that the IP became a WASPA member on 4 August 2009.

5.3.4 It is therefore correct that at the time of the complaint the IP was a member of WASPA.

5.3.5 We agree with the Appellant that, as such, the IP should take responsibility for the breach. However, we are not satisfied that this lets the SP off *any* responsibility for the breach.

5.3.6 The IP provided material that did not comply with the requirements of the Code. The SP accepted this material.

5.3.7 The Clause in question, being 9.1.4, reads:

Promotional material must clearly state any information which is likely to affect a decision to participate, including:

- (a) the closing date;
- (b) any significant terms and conditions, including any restriction on the number of entries or prizes which may be won;
- (c) an adequate description of prizes, and other items offered to all or a substantial majority of participants, including the number of major prizes;
- (d) any significant age, geographic or other eligibility restrictions;
- (e) any significant costs which a reasonable consumer might not expect to pay in connection with collection, delivery or use of the prize or item.

5.4 The SP could therefore have glanced at the material and immediately seen that it was non-compliant. It should not have accepted the material in that form.

5.5 We therefore find that both parties breached the clause in question. Given this, we order that PayPROFIT pay R3000,00 of the sanction, and Celerity Systems the remaining R2000,00.

5.6 We draw both parties attention to the provisions of the Consumer Protection Act and Code of Advertising Practice in relation to competitions, and caution them in relation to future advertising.

5.7 Given that the appeal resulted from an error on the part of the Adjudicator, the Appeal fee must be refunded in full.

5.8 The IP is given leave to appeal this decision within 5 days of receipt of this decision, in terms of the usual WASPA procedures. Such an appeal will be considered by an alternative Appeal Panel, and will be subject to the full appeal fee. This leave applies only to the IP, and is granted on the basis that the IP has not been given sufficient opportunity to comment on the Appeal submissions.