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27 September 2012	
Information provider	Churchcastle Limited
Service provider	BCH Digital Ltd
Information provider location	
Service provider location	
Service type	Competition word searches

Adjudication Details

Thursday 27 September 2012
CASE REFERENCE: 06776

Level 2 provider: Churchcastle Limited
Type of service: Word search competitions

Level 1 provider: BCH Digital Ltd

Network operator: Oxygen8 Limited and Cable & Wireless UK Limited

**THIS CASE WAS BROUGHT AGAINST THE LEVEL 2 PROVIDER
UNDER PARAGRAPH 4.4 OF THE CODE**

BACKGROUND

Since September 2011, PhonepayPlus received 15 complaints regarding a premium rate competition service (the “**Service**”) operated by the Level 2 provider Churchcastle Limited on numerous 090 and 0871 numbers. The Service consisted of word search puzzle competitions, which consumers had to complete in order to enter into premium rate prize draws for large cash prizes, or to obtain items of jewellery.

The Level 2 provider initially promoted the Service by placing full page advertisements, which contained a word search, in newspapers and magazines (**Appendices A and B**). Consumers were required to complete the word search to identify the missing word(s). They were then required to call a premium rate number to submit their answer(s) via an automated, pre-recorded message. The message did not contain pricing information; merely a direction to see the “notice sheet”. The competitions either consisted of single or multiple stages.

After completing the initial word search competition, complainants were sent highly personalised direct mail marketing which informed them of the result of their first entry (i.e. that their entry would be entered into a prize draw) and/or promoted additional stages of the same competition and/or a new competition (**Appendix C**).

The cost of entering the competitions varied between 10p per minute from a BT landline for initial promotions of stages (0871 numbers) to £1.53 per minute from a BT landline (090 numbers). The length of calls varied from just under three minutes to six minutes and 55 seconds. In order to claim additional “matching” items of jewellery or enter additional competitions, consumers were required to stay on the call for an extended or additional period of time.

All complaints related to elderly consumers, the majority of whom were over 80 years old, and were made by concerned relatives. The complainants raised a number of concerns regarding the size, visibility and readability of the pricing information, “bill shock”, misleading promotions (including the poor quality of jewellery items) and the large volume of highly personalised direct mail marketing promotions. In addition, a number of complainants stated that in their opinion the Service took advantage of elderly people who were vulnerable because of their age. Executive monitoring of the Service supported the concerns raised by complainants.

Between December 2010 and May 2011, the Level 2 provider was the subject of two Fast Track and one Track 1 Complaint Resolution procedures. The Track 1 procedure resulted in the creation of a formal compliance action plan, which was signed by the Level 2 provider on 9 May 2011. The action plan contained specific actions in relation to pricing and competition requirements.

The Investigation

The Executive conducted this matter as a Track 2 procedure investigation in accordance with paragraph 4.4 of the PhonepayPlus Code of Practice (12th Edition) (the “**Code**”).

The Executive sent a breach letter to the Level 2 provider on 3 August 2012. A revised breach letter was sent to the Level 2 provider on 31 August 2012. Within the revised breach letter the Executive raised the following potential breaches of the Code:

- Rule 2.3.10 - Vulnerable groups
 - Rule 2.2.5 - Pricing
 - Rule 2.3.2 - Misleading
- Paragraph 4.2.4 - Conceal or falsify information

The Level 2 provider responded on 17 September 2012. On 27 September 2012, and after hearing informal representations from the Level 2 provider, the Tribunal reached a decision on the breaches raised by the Executive.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

Rule 2.3.10

“Premium rate services must not seek to take advantage of any vulnerable group or any vulnerability caused to consumers by their personal circumstances.”

1. The Executive noted that the Service was initially promoted in various national and regional newspapers and magazines, which appealed to a wide demographic of people. However, all of the complaints received by PhonepayPlus related to elderly consumers. In addition, the Executive noted that the majority of winners’ testimonials provided by the Level 2 provider were from elderly consumers. Examples of testimonials included:

“I won’t send a photo as **I’m 86..**”

“...it will come in handy as it is **my wife and I 60th anniversary** in May..”

“I’m over the moon, it will help my pension out as i’m 74...”
“...At my age, **I’m 85** I have to take it easy...”
“...not bad for a **76 year old pensioner...**”
“It is the first time in my **72 years** that I have won...”
“...it will make a huge difference to our lives as **my husband and i are both pensioners..**”
“...i’m about to become **79 years** on 21 November!!...”

The Executive submitted that the testimonials were an accurate and proportionate reflection of the general age range of consumers who participated in the Service. Further, the Executive asserted that the promotions appealed to the elderly and that as a result of the demographic of the winners and complainants, the Level 2 provider was aware of the risk of a vulnerable group, namely the elderly, being taken advantage of.

The Executive submitted that the elderly were taken advantage of for the following reasons.

Reason 1: Nature and effect of the secondary promotions

The Executive stated that there is a general expectation that where a service is promoted, or particularly attractive, to a particular age group, the provider should consider the particular needs and difficulties that the age group may experience and their particular circumstances when promoting its service. This includes an obligation to ensure that any promotional material is clearly understandable to those who read it, and that all information required for the purposes of making a fully informed decision to enter into a premium rate service, is easily accessible and understandable.

i. Promotions were done in such a way that the elderly were likely not to be aware of the cost of entering the secondary promotion competitions

The Executive noted that pricing information contained within the Level 2 provider’s promotions was positioned in the terms and conditions in a very small font.

In addition, the Executive noted that physical and mental difficulties are common amongst the elderly. Common difficulties include, but are not limited to, problems with eyesight, hearing, confusion and communication.

For example, complainant accounts included:

“...my mum is very hard of hearing - which is good for them as it means

bigger profits!!!...”

“My mother is 95 and got bone cancer and hard of hearing...”

“She was certainly misled. At 95, and **her eyesight is failing** so she saw the crosswords as a challenge and entered...”

The majority of complaints reported that they had been unaware that they had used a premium rate service and/or had not seen, or had experienced difficulties reading the small size of the pricing information. For example, the complainants stated:

“...From then on the **small print becomes decidedly smaller almost requiring a magnifying glass to read it**. Then the scam come into it, the telephone costs are £10 to make an entry...”

“I foolishly did not read the small print (I couldn’t it was so small)..By the way, we are now in our 80’s...”

“I didn’t know I was being charged for the calls they don’t tell you....”

“I find the writing is too small for me to see...”

“They just send more word searches for you to phone your answers on the premium rate lines which are in very small print and a unsuspecting [sic] person would phone on a land line and its £9.40 each time.”

Consequently the Executive asserted that the non-prominent pricing information in a very small font was not sufficient for a Service that was either promoted and/or particularly attractive, to the elderly. As a result, the Level 2 provider had taken advantage of a vulnerable group.

ii. A number of elderly complainants did not know about premium rate charges

The Executive submitted that the elderly may be more subject to confusion than other sections of society. As a result, the elderly are less likely to appreciate the higher costs associated with premium rate telephone calls.

The Executive asserted that, where a particular group is vulnerable to confusion regarding the costs incurred via premium rate services, providers must ensure that they take all necessary steps to clearly inform consumers of

pricing information. Such steps must also take account of the specific characteristics of any vulnerable group. The Executive submitted that the Level 2 provider failed to take any steps to protect the elderly despite its knowledge that they were the main (or a significant) user group, and that they were vulnerable.

Accordingly, the Executive submitted that the Level 2 provider's secondary promotions sought to take advantage of a vulnerable group.

Reason 2: The Level 2 provider's failure to respond to issues raised and recommendations during prior informal procedures concerning the Service

The Executive noted that the two Fast Track and one Track 1 compliance procedures conducted between 2010 and 2011 occurred as a result of the receipt of a number of complaints, the majority of which concerned the elderly. However, despite the recommendations and advice provided by PhonepayPlus during the Fast Track and Track 1 procedures, the Level 2 provider continued to promote the Service as before. The Executive submitted that this demonstrated the Level 2 provider's failure to adhere to advice designed to ensure consumers were fully informed of all key information. The Executive further asserted that the Level 2 provider had been put on notice that elderly members of the public were particularly vulnerable to the unclear pricing within promotional material. Yet the Level 2 provider continued to use promotional material without making the recommended changes, thereby taking advantage of a vulnerable group.

The Executive's conclusions

The Executive asserted that the elderly are vulnerable as a result of their age. In addition, it submitted that the Level 2 provider was aware that a significant number of participants in the Service were elderly, yet it failed to take steps to address their specific needs and ensure that key information was accessible, clear and easily understood. The Executive asserted that the Level 2 provider failed in its responsibility to ensure its promotional materials did not take advantage, or seek to take advantage, of the vulnerability of elderly people as a group.

As a result of the reasons set out above, the Executive submitted that rule 2.3.10 of the Code had been breached.

2. The Level 2 provider vigorously denied the breach of rule 2.3.10 of the Code.

Targeting the elderly

In informal representations, the Level 2 provider stated that it did not collect or have any information relating to the demographics of Service users.

Further, in its response to the breach letter the provider submitted that if it had sought to take advantage of the elderly, its adverts would not have been in the national press, but in press which the elderly were more likely to read.

It added:

“Our adverts most certainly would not be in ‘Metro’, the daily newspaper targeted to tube commuters, and one of our most frequently used publications. We have clear confirmation from our media buyer that not only 73% of our advertising spend is on National Newspapers (which of course cannot be said to target the elderly in particular), but also of the fact that our media buyer has in no way received a brief to target the elderly market.”

Not adjusting our materials to cater for our customers of which the majority are supposedly elderly

The Level 2 provider accepted that there is a higher propensity for the elderly to become more confused and stated, “a logical consequence of this is that many of our complaints involve the Elderly”. However, it denied that the majority of those using the Service were elderly. Specifically, the provider stated:

“Firstly, many of our winners are NOT selected randomly (PPP should be very familiar with this fact) - they are a result of 100% skill competitions as opposed to randomly drawn winners. Simply put, our winners are not representative of our average customer. They are representative of our most dedicated and skilful customers – a tiny segment of our database. Secondly, winner’s testimonials originate from a self-selected group. Supplying testimonials are optional and many winners do NOT provide testimonials – only our most conscientious and most traditional winners provide testimonials in the form of a written letter sent by post. Our winner’s testimonials are reflective of a certain type of person from within our list of winners, and NOT representative of our average winner let alone our average customer. Not only are these accusations from the Executive pure

speculation, they are based on proven factual inaccuracies.”

The Level 2 Provider also provided a short single paged document which it stated was an ‘Independent Age Demographic Analysis on the age demographic of Churchcastle Customer Database’ their customers, which produced a clear conclusion This document stated that its analysis had concluded that the majority of Churchcastle Customers were under 65 years old.

The Level 2 provider’s failure to respond to issues raised and recommendations during prior informal procedures concerning the service

The Level 2 provider accepted that physical and mental difficulties are more common amongst the elderly, but stated that the logical consequence of this is that the elderly are more likely to be confused in general.

The Level 2 provider stated:

“As such, it is no surprise that our two Fast Track procedures and one Track 1 procedure were initiated as a result of complaints including elderly members of the public. The fact that PhonepayPlus decided to initiate the second fast track procedure in reaction to one particular complaint from the relative of a 91 year old as opposed to initiating it in reaction to a complaint from another age group does not mean that we “sought in full knowledge to take advantage of the vulnerable elderly group”. Once again all the Executive have done here is remind us that there is a propensity for the Elderly to become more confused than the norm and as consequence some of our complaints involve the elderly (the Executive has not sought to establish what precisely is “elderly” and appear to have adopted an unreasonably broad definition).”

In addition the Level 2 provider stated that it believed the vast majority of its customers, including the elderly, found the promotions straight forward and user friendly. The provider stated that this was evidenced by the fact that less than 0.01% of callers ever complained. The Level 2 provider added that it was very important to point out that the introductory voice message to the Service clearly stated:

“[B]y staying on this line you are agreeing that you have read and fully understood the cash challenge competition contents and terms as printed on

your puzzle sheet. You are confirming that you have the permission from the bill payer to make the call...”.

The Level 2 provider asserted that any caller incapable of hearing and understanding the message would subsequently have been incapable of registering their answers and the call would have been terminated. The provider stated that this was clear evidence that all callers agreed that they had read and fully understood the competition terms and conditions (including the cost of entry), and had received an additional reminder that the call would have been billed. The provider submitted that if someone had not read the terms and conditions, they had a hard copy version to refer back to (which was positioned directly beneath the phone number).

Further, the Level 2 provider stated:

“The Executive mention our competitions involve “increased premium rate charges for subsequent stages of the competition”. We must point out that they crucially omit the fact that subsequent stages of the competition do not require a premium rate call and this is clearly stated in the body copy of the letter, both front and back, as well in the terms and conditions. In fact, we have over 35,000 entries (a substantial portion of competition entries) who have successfully followed instructions to enter via the free postal route this year alone.

“How is the number of competition offers we send out relevant to the accusation that we target the elderly? We provide two forms of opt outs from receiving further competitions and believe the overall volume of direct mail received after responding to one of our competitions is commensurate with industry standards.”

3. The Tribunal considered the evidence and noted the Level 2 provider’s detailed written and oral responses. The Tribunal found, considering the evidence as a whole, that the Service was particularly attractive to the elderly and that the elderly had made up a significant number of users. The Tribunal considered that the personal nature of the direct marketing promotions and style of the jewellery items would have been particularly appealing to older consumers. As a result of the particular allure of the Service to the elderly, the Tribunal found that on the balance of probabilities the elderly were more likely to use the Service and/or enter the additional stages. The Tribunal noted that the Level 2 provider had been alerted to the use of the Service (if it was not aware before) by the elderly and the elderly’s specific vulnerability

as a result of the three complaint resolution procedures. The Tribunal noted that the Level 2 provider was given advice to take specific steps, which had they been taken would have ensured the elderly were not taken advantage of (for example by ensuring that pricing information was prominent, proximate to the premium rate number and did not require close examination).

However, on the evidence the Level 2 provider had not taken the steps advised by the Executive. Consequently, the Tribunal concluded that, on the balance of probabilities, the Level 2 provider had knowingly taken advantage of a vulnerable group and upheld a breach of rule 2.3.10 of the Code.

Decision: Upheld

ALLEGED BREACH TWO

Rule 2.2.5

“In the course of any promotion of a premium rate service, written or spoken or in any medium, the cost must be included before any purchase is made and must be prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means of access to the service.”

1. The Executive submitted that the Level 2 provider was in breach of rule 2.2.5 for the following reasons.

Print promotions

The Executive submitted that the Level 2 provider was fully aware of its obligations in relation to pricing.

The Executive noted that the Level 2 provider had been subject to two Fast Track and one Track 1 complaint resolution procedure. As part of the Track 1 procedure the Level 2 provider signed an action plan. The action plan contained detailed instructions in relation to pricing. Specifically, the action plan stated:

“Our assessment is that the pricing is not acceptably prominent, or proximate enough to the access number. In addition the consumer should be clearly and prominently informed of how long they will need to call for. They are informed of both only in the small print.”

The Executive also brought a large amount of correspondence with the Level

2 provider regarding pricing to the Tribunal's attention.

The Executive noted that pricing information was not prominent and/or proximate to the premium rate number in a number of the Level 2 provider's promotions (**Appendix A**). In most cases it was contained in the terms and conditions in a very small font, albeit often capitalised.

In other promotions pricing was displayed in a box next to the premium rate number. In one promotion pricing information was worded, "Calls cost £1.53 per min and 5mins 55secs" (**Appendix B**). The Executive asserted that this wording was a loose and unclear description of the cost of the Service. The word "and" had no relevance to the length of the call, and was therefore not easy to understand and was likely to cause confusion. Furthermore, the Level 2 provider had previously agreed specific wording for its promotions with the Executive.

Direct mail marketing promotions

The Executive noted that pricing information in all the Level 2 provider's direct mail marketing promotions was only provided within the lengthy terms and conditions away from the premium rate number.

The Executive noted that rule 2.2.5 and the Guidance relating to pricing is applicable equally to print and direct marketing promotions.

As a result of the above, the Executive submitted that pricing information in the promotions was not prominent, visible or proximate to the premium rate number and therefore rule 2.2.5 of the Code had been breached.

2. The Level 2 provider denied the breach.

The Level 2 provider accepted that it had corresponded with the Executive and received compliance advice in relation to its pricing on promotional material. The Level 2 provider asserted that the compliance advice was limited to a specific service and at no point was the jewellery service (run independently and with different personnel) ever mentioned or referenced by PhonepayPlus, nor was there any effort afforded by PhonepayPlus to clarify that advice was to apply to all of the different services and promotional types. The provider stated that so far as it was aware there were no complaints or issues received or raised by PhonepayPlus regarding the jewellery service.

“Therefore it wasn’t until the service was criticised in March 2012 that we voluntarily changed our pricing information with immediate effect. It should also be noted that all cash competition adverts published since our meeting with PPP have adhered strictly to the advice received from PhonepayPlus...Lastly, we find it worth noting that the pricing information presented in example one [**Appendix A**] did earlier pass regulatory scrutiny.”

In relation to **Appendix B**, the Level 2 provider stated that:

“The comparison made in the breach letter between our pricing information published...the suggested pricing information is misleading. Part of our pricing information was left out of this comparison by the Executive, for some reason, and it makes our pricing info seem drastically different from the recommended text....The pricing information published actually said “Calls cost £1.53 per min and 5mins 55sec. Network Extras apply.” The only material difference in our pricing information published and the suggested wording was the omission of the word “last”. This omission can be proven as a one off design error...Furthermore, we strongly disagree with assertions made by the Executive regarding our knowledge of “the exact wording” and sub sequential failure to comply. We received written confirmation from PPP on the 30th of June 2011 that the following wording, as criticised above, is sufficient: “Calls cost £1.53 per min and last 6min 15sec. Network extras apply”.”

Direct mail marketing promotions

The Level 2 provider accepted that it had been fully aware of its obligations regarding the provision of pricing information since at least December 2010. The Level 2 provider asserted that it complied with the compliance advice received from the Executive but that it was:

“...[N]ever informed that this advice had changed for our direct mail marketing promotions and submit that if PPP had decided to change their pricing information requirements the following year that we should have been informed that the advice received for our Direct Mail promotions in December 2010 was no longer valid. The lack of clarity afforded by PPP when broadly using the term “service” combined with unannounced changes in pricing information requirements from 2010 to 2011 are significant to this case.”

In relation to the provision of pricing information on connection to the

Service, the Level 2 provider stated that the introductory voice message to the Service stated that by staying on the line consumers agreed that they had read and fully understood the cash challenge competition contents and terms as printed on the puzzle sheet.

The Level 2 provider submitted that the fact consumers stayed on the line was clear evidence that they had agreed that they had read and fully understood the competition terms and conditions (including the cost of entry) and that consumers had also received an additional reminder that the call would be billed.

3. The Tribunal considered the evidence and noted the Level 2 provider's detailed written and oral responses. The Tribunal found that the pricing information displayed in a small font, albeit in capital letters, in the terms and conditions was not prominent, visible or proximate to the premium rate telephone number. In relation to the wording displayed in the promotion in **Appendix B**, the Tribunal found that the phrasing used to display the pricing information was not sufficiently detailed to give consumers the information that is required by the Code. The Tribunal noted that a significant number of complainants commented that they were unaware of the cost of participating in the Service. On the balance of probabilities, the Tribunal concluded that this was as a result of non compliance with rule 2.2.5, the Guidance relating to pricing and the specific instructions contained in the action plan dated May 2011. Accordingly, the Tribunal upheld a breach of rule 2.2.5.

Decision: Upheld

ALLEGED BREACH THREE

Rule 2.3.2

“Premium rate services must not mislead or be likely to mislead in any way.”

1. The Executive submitted that the overall nature of the Service, including the promotional material was misleading, or likely to have misled, consumers into participating in the Service for the four reasons set out below.

Reason 1: Jewellery prizes

During the investigation, the Level 2 provider stated that it purchased its jewellery items from a supplier based in the USA. The Executive noted that the supplier's website stated that its items had “high perceived value” and, “Suggested Retail Values at 10 to as much as 30 times the manufactured

cost”. The Executive noted that the website also offered a service on “How to drive sales”. Some of the tactics headlined included “Countdown” (creating a sense of urgency/ having limited stock) and “Back end up sell” (offering matching pieces). The Executive asserted that the Level 2 provider’s jewellery promotions appeared to have used these or similar potentially misleading marketing tools to entice consumers.

Creating a sense of urgency

The Executive noted that the Level 2 provider’s jewellery promotions included the opportunity to obtain items such as pendants and bracelets.

Each jewellery item was heavily promoted with a large picture and descriptive text/captions pertaining to the quality and limited availability of the product. The Executive submitted that the use of phrases such as “secured a consignment” and, “We are ready to ship a [name of jewellery item] to each reader . . .who solves the puzzle below by midnight,” created an expectation that there was limited availability, and that a consumer was likely to infer that s/he must respond quickly to the promotion. However, despite the above phrases, the Executive found that a jewellery item promoted with the words “secured a consignment” in a promotion in December 2011 was also promoted three months later in a direct mail marketing promotion with the caption header, “Strictly limited time jewellery item – eight hundred only”. Without evidence to the contrary, the Executive disputed that the availability of the jewellery was restricted and asserted that consumers were misled, or likely to have been misled, in relation to the availability of the jewellery.

Actual quality of the jewellery

The Executive obtained three items of jewellery that were offered by the Level 2 provider as part of the Service: a “Sapphire and Diamond Pendant”, a “Jubilee Diamond Crown Pendant” and a “Sapphire Bracelet”.

The Executive referred to the print promotion for the “Genuine Diamond Jubilee Crown Pendant”, which stated,

“To celebrate the Queens Diamond Jubilee, Spenser and Mayfair are delighted to have secured a consignment of the most royal of precious gem; the diamond, set in Royal Jubilee Crown shaped pendant with chain. These special pendants, dispatched in a luxurious black satin pouch. . . .Contains a genuine Diamond.”

However, the terms and conditions stated, “Each pendant has been set with a genuine small diamond”.

The Executive closely examined the pendant and found a small diamond set in the middle of the pendant. The diamond was of poor quality, very small and could barely be seen amongst the imitation diamonds. The Executive also observed that the pendant was generally of low quality. The pendant was delivered in a pouch which was described as “luxurious black satin”. In reality the pouch was made of a poor quality material which had a rough velvet-like appearance and was lined with black plastic.

The Executive asserted that consumers were misled or likely to have been misled by the description of the jewellery and pouch, the urgency with which they needed to respond and/or statements regarding the limited availability of the items.

Reason 2: Deadlines

The Executive noted that all of the word search puzzle promotions had heavily promoted deadlines that urged consumers to enter the Service immediately or “miss out”. Some of the deadlines were promoted with words such as “IMMEDIATE DEADLINE” in a stamp-like font. However, in reality the actual deadline was several days away. In one example, a promotion stamped “immediate deadline” and received by a consumer on 13 January 2012 had an actual deadline of 19 January 2012. The Executive submitted the use of phrasing stating “immediate deadline” when in reality there was limited time pressure was misleading, or likely to have misled, consumers.

Reason 3: Direct mail marketing congratulatory letter (page 1)

The Executive monitored an initial print promotion which required consumers to identify the missing answer within a word search puzzle to win a prize. After completing the word search, an “official” letter congratulating the entrant and promoting another multi-stage word search competition was received. This promoted an “additional” prize that was identical to the original prize and also related to finding a missing TV show within a word search. The Executive noted that initially the “letter” made reference to an “additional” £8,500 prize, but later referenced just “£8,500” (which could be either the original prize or the additional prize). The Executive asserted that the “letter” was misleading, or likely to have misled consumers as the

wording, prize amount and theme (TV Shows) were similar, if not identical, to the original promotion entered. The Executive asserted that this could cause confusion in relation to what exactly the consumer had or could participate in.

Reason 4: Direct mail marketing congratulatory letter (page 2)

The Executive also noted that the “letter” promotion for the multi-stage competition identified above contained lengthy and confusing terms and conditions. The Executive asserted that the manner in which the multi-stage competition was promoted, (as part of a congratulatory message) and its complex and lengthy terms and conditions was misleading, or likely to mislead consumers.

The Executive accordingly submitted that for the four reasons outlined above rule 2.3.2 of the Code had been breached.

2. The Level 2 provider strongly denied that it was in breach of rule 2.3.2.

Reason 1: Jewellery prizes Creating a sense of urgency

The Level 2 provider stated that it strongly objected to the links made between its marketing material and that found on its supplier’s website. The provider asserted that the supplier manufactured bespoke items of jewellery for it and all communications were made via an account manager. The provider added that it did not consult its supplier’s website for jewellery purchases or marketing advice, and that items found on the supplier’s website (and referenced within the report) were not identical to their items, “and in some cases actually miss the most valuable component e.g. the Diamond!”

In addition the Level 2 provider asserted that the:

“[R]eality is that we purchase consignments of jewellery which are specific in nature, limited in quantity and can take up to 6 months to obtain. These consignments are then allocated to specific adverts and Direct Mail pieces of which response must be strictly monitored. The response for any particular advert or mail piece is unknown meaning we must put our own quantity limit on our materials. Failure to do this will result in more correct entrants than jewellery items available and as previously stated there is no magic instant access supply of jewellery to reward our correct entrants with. We will be forced to refund these entries. We would also like to point out that we are

not only entitled to have a deadline for our competitions, but are required to.

We believe a deadline of midnight tonight is acceptable... In the circumstances, the phrases referred to by the Executive are completely truthful, and in no way misleading. Further, we make no suggestion that a consignment is “rare” – a term speculatively and unreasonably introduced by the Executive.”

Actual quality of the jewellery

In relation to the quality of the jewellery the Level 2 provider stated:

“We note that much of the Executives argument is based on their highly subjective opinion on the quality of our jewellery, so we would like to draw your attention to the opinion of an actual Gemologist with over 35 years of experience. You will see that our jewellery is genuine and exactly as described. We refer to the 4-carat Sapphire Pendant discussed by the Executive... and refer the Tribunal to compare the advert description with the independent jewellery appraisal [provided]... We are a little confused by this section as to the exact accusation being made by the Executive. We have included all the information required. We are also surprised to see the Executive making statements such as “had consumers been aware of what the actual pendant looked like they would not have entered into the service to obtain it”. We submit that if consumers read the headline of the advert they would have seen the large image of the pendant displaying exactly what the pendant looks like. Even if there was no image present (which there is) this would be pure speculation and totally unfounded.

“Furthermore, not only do we provide a large clear image of the jewellery item to be received, but we provide accurate and detailed descriptions of the item including dimensions, types of gemstones contained in the setting and gemstone sizes. Please refer to the advert for these detailed descriptions.

“We would also like to point out that during this investigation the Executive have made big mistakes when referring to jewellery items that they find on the supplier’s website and have claimed they are identical to our own... The majority of our jewellery items are bespoke items manufactured especially to our specific requirements and as such are generally not available via the supplier’s website.”

Reason 2: Deadlines

The Level 2 provider stated that it was entitled to enforce deadlines to aid in the management of its competitions. It added that the nature of direct mail marketing promotions was that it was unable to predict when a mailing piece would arrive with the entrant. The provider asserted that for obvious reasons it was most important to ensure the mailing piece arrived with the entrant before the deadline and:

“[A]lthough you have named one instance where somebody received a letter dated 13th of Jan, meaning they probably received the letter on the 16th of Jan or later, there most certainly were thousands of people who received this letter no earlier than 1 or 2 days before the deadline. In any case, we have presented the actual deadline along with the text “Immediate Deadline” so there is clearly no misleading deadline or false sense of urgency as the deadline is plainly and clearly there for all to see. We question what the Executive considers is an immediate deadline in this context.”

Reason 3: Direct mail marketing congratulatory letter (page 1)

The Level 2 provider strongly disagreed that there could be any confusion as to which promotion the £8,500 referred to, as the consumer was told that they had entered the primary draw and then, “You now qualify for our ‘Advanced Contest’ and the chance to win an additional £8,500.” The Level 2 provider commented that it was, “at a total loss as to how we could be any clearer than this”.

Reason 4: Direct mail marketing congratulatory letter (page 2)

The Level 2 provider stated that the terms and conditions were, “precise, accurate and mean exactly what they say” and asserted that:

“The Executive have made a huge leap by trying to combine sections of our T&Cs and speculating on how entrants could interpret this to mean a premium rate call is required for all stages. It seems the Executive have chosen to ignore the 2 clear statements, within the main body copy on each side of the letter, informing the responder that their entry can be accepted via post. As previously stated, we have had over 35,000 entries (a substantial portion of competition entries) who have successfully followed instructions to enter via the free postal route this year alone... The Executive have also ignored the statement in the main body copy of the letter informing entrants that this is a multi stage competition with the text “further puzzles will be required to find an outright winner”. The Executive have also highlighted a

section of our T&Cs in bold and labelled them “unclear”; disturbingly they have reproduced this section erroneously giving the impression our wording is unclear when in-fact this is due to a PPP error in reproduction.”

The Level 2 provider added that if an entrant was confused, it had provided both a contact address and phone line for them to contact its dedicated customer services team who could answer any questions. However, the provider did not accept that a more complex arrangement was, by virtue of this fact, “misleading” for the purposes of the Code.

Finally, the Level 2 provider stated that it had submitted a “very similar” promotion to the Executive in December 2010 but, “at no point were we ever alerted to the fact that our terms and conditions were confusing”.

4. The Tribunal considered all the evidence, including comments made by the complainants, and examined the Level 2 provider’s detailed oral and written responses. The Tribunal noted that in its informal representations the Level 2 provider stated that it bought jewellery items in large quantities from its supplier. It was also noted that no evidence had been provided to support the assertion that the jewellery was in any way “bespoke” or that availability was as “limited” as suggested in promotional material, despite that information being available to the Level 2 provider. The Tribunal found that, taking into consideration the nature and wording of the promotions, consumers were misled, or likely to have been misled. For example the use of the words “urgent” and “rare” were likely to have misled consumers into thinking that the promotions were truly limited and that they were required to act more quickly than was actually necessary. The Tribunal inspected three items of jewellery, the “Sapphire and Diamond Pendant”, the “Jubilee Diamond Crown Pendant” and the “Sapphire Bracelet”, and made a comparison between the description given in promotional material and the actual items. The Tribunal found that, on the balance of probabilities, the quality of the jewellery had been misrepresented and, as a result, consumers had been, or were likely to have been, misled. The Tribunal commented that, had a more realistic description of the jewellery been included in promotions, consumers may not have chosen to participate given the costs involved. The Tribunal reviewed the promotion referred to by the Executive in reasons 3 and 4 and found it to be confusing and misleading for the reasons advanced by the Executive. Accordingly, the Tribunal upheld the breach of rule 2.3.2 for the four reasons advanced by the Executive.

Decision: UPHELD

ALLEGED BREACH FOUR

Paragraph 4.2.4

“A party must not knowingly or recklessly conceal or falsify information, or provide false or misleading information to PhonepayPlus (either by inclusion or omission).”

1. The Executive stated that on 19 April 2012 it had made a direction to the Level 2 provider to provide, “...documentary evidence of your purchase of the 800 ‘Genuine 4-carat Sapphire and Diamond Pendants.’” The Level 2 provider responded on 26 April 2012 and provided a document which purported to be a “Certificate of Authenticity” from the supplier, which showed that 5000 (not 800) “genuine and sapphire diamond pendants” were purchased in August 2011. On 27 June 2012, the Executive issued a second direction to the Level 2 provider to provide the requested information. The Executive noted that the “Certificate of Authenticity” was not documentary evidence of purchase. Specifically “invoices” evidencing the purchase of the “genuine 4-carat Sapphire” and additional jewellery items that had been identified were requested. The Level 2 provider responded by submitting a “Certificate of Authenticity” dated 3 July 2012, from the supplier, certifying that 5000 “Diamond crown pendants” were purchased from them. In addition, an “Appraisal” form to the “N.Y diamond and jewellery appraisal service” was submitted in relation to the “Sapphire and Diamond Pendant”.

The Executive submitted that the documents provided were not invoices, i.e. they did not contain any information regarding the cost of the jewellery items. Consequently the Level 2 provider had not provided the requested information. As a result, the Executive had to conduct its own research into the approximate price per unit of the jewellery items in order to test the veracity of the complainant’s accounts that they had been misled in relation to the quality of the jewellery (amongst other reasons).

Accordingly, the Executive submitted that the Level 2 provider had knowingly or recklessly concealed information by omission contrary to paragraph 4.2.4 of the Code.

2. The Level 2 provider denied the breach. Specifically, the provider

submitted that it had responded appropriately to the directions and did not receive, “any direct statement,” that the documents it had provided were not acceptable documentary evidence. The Level 2 provider commented that:

“...[I]t is only now upon reading the Executive’s reasons above that we have become aware that the real information desired by the Executive was the price per unit. This information was never requested nor mentioned. We submit that this potential breach would have been avoided had the Executive either been clear about the information they wanted in the first place, OR been clear (a simple sentence would suffice) that our documentary evidence was not acceptable documentation to verify purchase.”

Although not relevant to the breach of paragraph 4.2.4, in its response to the revised breach letter the Level 2 provider raised a number of concerns regarding, “[the] biased nature and factual inaccuracies,” within the breach letter and case report. Specifically, the provider asserted that the Executive had added its own emphasis to a number of the appendices which had the effect of, “insinuating our promotions are a scam,” and that this was evidence that the investigation was not impartial. Further, amongst other points the Level 2 provider stated that, there was a free postal entry route to a significant number of its competitions, which was clearly and repeatedly publicised within in direct mail promotions.

3. The Tribunal considered the evidence and noted the Level 2 provider’s response and found that the Level 2 provider had not provided the requested information on two occasions. The Tribunal noted that the Level 2 provider had submitted that it only became aware of “the real information” required by the Executive on reading the breach letter and considered that, if this was the case, the Level 2 provider should then have provided the requested information. The Tribunal noted that the Level 2 provider had not provided this information either to the Executive or the Tribunal. Therefore, the Tribunal concluded that the Level 2 provider knowingly or recklessly concealed information by its omission. Accordingly, the Tribunal upheld a breach of paragraph 4.2.4 of the Code.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

The Tribunal's initial assessment of the breaches of the Code was as follows:

Rule 2.3.10 – Vulnerable groups

The initial assessment of rule 2.3.10 of the Code was very serious. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The Service leveraged vulnerable consumers in order to generate an income.
- The Service had the purpose of generating high revenues and did so through intentionally or recklessly misleading promotions.
- The nature of the breach and the scale of the Service were likely to have severely damaged consumer confidence in premium rate services.

Rule 2.2.5 - Pricing

The initial assessment of rule 2.2.5 of the Code was very serious. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The Service leveraged vulnerable consumers in order to generate an income.
- The Service had the purpose of generating high revenues and did so through intentionally or recklessly misleading promotions.
- The nature of the breach and the scale of the Service were likely to have severely damaged consumer confidence in premium rate services.

Rule 2.3.2 - Misleading

The initial assessment of rule 2.3.2 of the Code was very serious. In determining the initial assessment for this breach of the Code the Tribunal applied the following criteria:

- The Service leveraged vulnerable consumers in order to generate an income.
- The Service had the purpose of generating high revenues and did so through intentionally or recklessly misleading promotions.
- The nature of the breach and the scale of the Service were likely to have

severely damaged consumer confidence in premium rate services.

Paragraph 4.2.4 – Conceal or falsify information

The initial assessment of paragraph 4.2.4 of the Code was serious. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Level 2 provider repeatedly failed to supply information within its possession which limited the scope of the investigation and/or would have had a regulatory benefit if provided.

The Tribunal's initial assessment was that, overall, the breaches taken together were very serious.

Final Overall Assessment

In determining the final overall assessment for the case, the Tribunal took into account the following two aggravating factors:

- The Level 2 provider failed to follow Guidance on, "Promotions and promotional material (including pricing)".
- The Level 2 provider signed a Track 1 action plan on 9 May 2011, which included a specific instruction to, "Ensure written pricing information is easily legible, prominent, and horizontal and presented in a way that does not require close examination". Further, the Level 2 provider was told that, "Pricing information must be clear and prominent". However, some promotional material continued to have pricing information that was neither prominent nor proximate post May 2011. Consequently, the Tribunal was satisfied that the breaches continued after the Level 2 provider became aware of them.

The Tribunal took into consideration the following mitigating factor:

- The Level 2 provider asserted that it had fully or partially refunded some consumers.

The Level 2 provider's revenue in relation to the Service was within the range of Band 1 (£500,000+).

Having taken into account the aggravating and mitigating factors the Tribunal concluded that the seriousness of the case should be regarded overall as **very serious**.

Sanctions Imposed

The Tribunal noted that whilst the revenue considered was limited to the time period between September 2011 and July 2012, it was very significant. The Tribunal considered the powers that were available and took into account the necessity for a proportionate and targeted sanction given all the circumstances of this case. The Tribunal concluded that the only proportionate outcome was a fine at the very top end of the available range.

The Tribunal considered imposing a bar or prohibition, however, the potential effect on the Level 2 provider's business (and revenue) would have been severe and disproportionate. Having regard to all the circumstances of the case, the Tribunal decided to impose the following sanctions:

- A formal reprimand;
 - A direction to remedy the breaches;
 - A fine of £800,000; and
- A requirement that the Level 2 provider must refund all complainants who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

Appendix A- Print promotion dated 3 December 2011:



Appendix B- Print promotion published in the Metro newspaper on 20 June 2012:

FREE METRO 20 JUNE 2012

Diamond Jubilee Commemorative Special!

**“We are ready to ship a genuine
Diamond Jubilee Crown
Pendant to each reader...
...who solves the puzzle
below by Midnight Tonight!”**



**REGISTER CORRECT ANSWERS BEFORE MIDNIGHT TONIGHT AND YOU WILL
BE AWARDED WITH A GENUINE DIAMOND JUBILEE CROWN PENDANT
CALL NOW 0906 190 0348**

Appendix C: An example of a direct mail marketing promotion received by complainants:

**HAVE A
HAPPY
EASTER**



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Dear Mr [REDACTED]

To keep you entertained over the Easter break I've set you an Easter challenge - An answer's correct in a maximum 40,000 words

Use [REDACTED] your Easter challenge to follow. Scan our three sets of words that have been hidden in the grid for you to find. (You'll need a pen or pencil to be marking from the grid. The more words of length 5, meaning words for a chance at winning 50,000)

Use [REDACTED] you also hidden for 2,000 hidden words need using the words at given time. Write out in the Finding the word is not essential, but a real brain challenge for you.

Please note: words found are listed alphabetically - so you will have to look carefully!

P	O	U	S	U	O	R	G	O	D	E	N	T	S	E	S	T	S	E
M	I	S	I	L	S	G	I	V	I	O	R	O	S	Z	E	S	I	
N	O	S	M	W	E	I	S	I	O	K	O	E	Z	A	A	A	A	
J	A	N	O	O	T	W	I	R	O	R	T	O	J	Z	O	R	W	
P	O	S	O	O	A	A	A	S	T	O	T	O	S	I	W			
N	O	I	I	O	O	I	O	O	O	O	O	O	O	O	O	O	O	
V	O	I	O	W	O	W	O	O	O	O	O	O	O	O	O	O	O	
A	V	O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	
L	A	S	T	O	O	O	O	O	O	O	O	O	O	O	O	O	O	
A	T	O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	
R	O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	
N	O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	
O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	
J	W	R	O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	
I	O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	

SET 1 SET 2 SET 3

5 LETTER 6 LETTER 7 LETTER

WATERMELON CARROT BANANA

APPLE PINEAPPLE MANGO

ORANGE LEMON CHERRY

PEACH PLUM APRICOT

GRAPE PEAR DATE

We [REDACTED] the 50,000 word grid will be delivered on Wednesday, the 17th of April.

Please ensure your address can be reached early before midnight, Sunday, the 16th of April.

For to confirm your prize address: [REDACTED]

[REDACTED] you may register your address with us 0796 664 6182*

Wishing you a happy Easter
Warm regards
Anna Thompson

ps. Prize delivered immediately
after Easter - Wednesday 17th April

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