

**THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS
TRIBUNAL DECISION**

**Thursday 12 APRIL 2012
TRIBUNAL SITTING No. 97 / CASE 1
CASE REFERENCE: 05092**

Network operator: Elephant Talk Communications PRS U.K. Limited

**THIS CASE WAS BROUGHT AGAINST THE NETWORK OPERATOR
UNDER PARAGRAPH 4.4 OF THE CODE**

BACKGROUND

In November 2011, the Executive received two complaints from members of the public in relation to two telephone calls to the premium rate number 09117657650. The complainants advised that calls to the premium rate number had been made by employees of the complainants' businesses who were led to believe that they were returning the call of a prospective new client who could not hear them properly. This number and 09117657651 were purportedly being used for an 'Internet Technical Support' helpdesk service, provided by the Level 2 Provider Thomas Ferguson & Company and the Network operator, Elephant Talk Communications U.K. PRS Limited (the "**Network operator**").

The Executive raised seven potential breaches of the 12th Edition of the PhoneyPayPlus Code of Practice (the "**Code**") against "Thomas Ferguson & Company" and a Tribunal hearing was held on 29 March 2012. The Tribunal considered the evidence and made a finding of fact that "Thomas Ferguson & Company" and the contact name, "Thomas Ferguson" on the PhoneyPayPlus registration database were collectively an alias for the individual, Andrew Price. The Tribunal upheld all the breaches of the Code that were raised against the Level 2 Provider and imposed the following sanctions, (i) a formal reprimand, (ii) a fine of £10,000 and (iii) an order for refunds to be paid to complainants.

With respect to the Network operator the Executive was concerned that it had not taken adequate steps to ensure that its due diligence, risk assessment and control measures were effective. The Executive was particularly concerned as, with respect to risk assessment and control measures, the Network operator had stated that it had done nothing more than monitor call traffic. The Executive found no evidence of effective due diligence by the Network operator. It appeared that no efforts had been made to verify the identity of the Level 2 provider (including checks with Companies House), to review the Level 2 provider's breach history or to examine the service technical support scripts that the Level 2 provider would use for the service.

The Investigation

The Executive conducted this matter as a Track 2 Procedure investigation in accordance with paragraph 4.4 of the Code.

The Executive informed the Network operator of the nature of the complaints in an email dated 8 December 2011, and recommended immediate suspension of the premium rate numbers and service until further notice. The Executive also recommended that the revenue generated from the service since its commencement be voluntarily withheld. The Executive received confirmation of the suspension and withhold from the Network operator on 8 December 2012.

On 9 December 2011, the Executive notified the Network operator that a preliminary investigation was being conducted against their client Thomas Ferguson & Company. The Executive attached formal directions that required a formal response to this notification.

On 12 December 2011, the Network operator submitted its full response to the formal directions. This included an invoice from Thomas Ferguson & Company requesting that outpayment be made to an account in the name of "Mr A Price" at "Slovenska Sporitelna Bank". The Network operator also sent a follow-up email providing an email address used by "Thomas Ferguson" which included the name "Andrew Price".

On 20 January 2012, the Executive sent a preliminary investigation letter to the Network operator relating to compliance with their responsibilities under the Code. The Network operator was directed to provide information relating to any due diligence and risk assessment and control measures that had been taken in respect of Thomas Ferguson & Company and the service.

On 27 January 2012, the Network operator submitted its response to the preliminary investigation. On 16 March 2012, the Executive sent a formal investigation letter to the Network operator and raised the following potential breaches of the Code:

- Paragraph 3.1.3(a) – General Responsibilities;
- Paragraph 3.1.3(b) – General Responsibilities;
- Paragraph 3.3.1 – Contracts;
- Paragraph 3.3.3(b) – Contracts.

The Executive received a response from the Network operator on 22 March 2012.

The Tribunal made a decision on the alleged breaches raised by the Executive on 12 April 2012.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

Paragraph 3.1.3(a) (General Responsibilities)

"Network operators...must...assess the potential risks posed by any party with which they contract in respect of...the provision of premium rate services...and take and maintain reasonable continuing steps to control those risks"

1. The Executive submitted that the potential risks posed by Thomas Ferguson & Company in respect of the provision of premium rate services were not properly assessed by the Network operator. The Executive submitted that the Network operator had failed to assess key indicators that Thomas Ferguson & Company might be a high risk provider, including the fact that Thomas Ferguson & Company had not been active in the premium rate market before operating this service. The Network operator had also not considered a PhoneyPayPlus direction sent to all registered Network operators, including the Network operator, on 28 October 2011 which referred to Andrew Price in connection with two previous adjudications.

The Executive further submitted that the Network operator had failed to follow the PhoneyPayPlus Guidance Note on "Due diligence and risk assessment" and had not employed alternative methods to comply with the Code. The Executive submitted that the Network operator had also failed to conduct a due diligence search using the PhoneyPayPlus Registration Scheme.

The Executive also submitted that the Network operator had failed to assess the potential risks presented by Thomas Ferguson & Company in respect of the provision of premium rate services, had failed to take and maintain reasonable continuing steps to control those risks, and had therefore breached paragraph 3.1.3(a) of the Code.

2. The Network operator submitted that Thomas Ferguson had purported to be offering a technical helpdesk which would not receive a significant number of calls and accordingly the Network operator concluded that the risk of fraud or abuse was low.

The Network operator further submitted that, since being alerted to Thomas Ferguson & Company's fraudulent activity it had changed its due diligence measures in respect of actual and prospective clients. Due diligence was now undertaken on all new customers by two divisions within the Network Provider to eliminate the risk of any single point of failure. The finance department performed independent financial checks and the commercial department verified prospective and existing clients' information and this included carrying out checks on the PhonepayPlus registration scheme. Both the financial and the commercial departments reported to the Fraud Manager Europe, who was required to give approval before any new customer was accepted.

3. The Tribunal considered the evidence and found that the Network operator had failed to properly assess the risks posed by Thomas Ferguson & Company. The Tribunal noted that, notwithstanding its new risk assessment measures as described in its response to the alleged breach, the Network operator had, for the purposes of this case, done nothing more than monitor traffic to the premium rate number and this was not in any way an adequate means of risk assessment. The Tribunal also noted that the Network operator did nothing further to maintain continuing steps to control risks. The Tribunal accordingly concluded that the Network operator had contravened the Code by failing to comply with its obligations to assess the potential risks posed by Thomas Ferguson & Company in respect of the provision of premium rate services and to take and maintain reasonable continuing steps to control those risks. The Tribunal upheld the breach of paragraph 3.1.3(a) of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

Paragraph 3.1.3(b) (General Responsibilities)

"All Network operators...must...assess the potential risks posed by any party with which they contract in respect of...the promotion, marketing and content of the premium rate services which they provide or facilitate...and take and maintain reasonable continuing steps to control those risks."

1. The Executive submitted that the Network operator had failed to take any steps to ascertain how Thomas Ferguson & Company would promote the service. The Network operator was unable to provide the Executive with any evidence that it had asked Thomas Ferguson & Company how the service would be promoted, or sought or obtained copies of any material to be used by Thomas Ferguson & Company to promote the service.

The Executive submitted that the Network operator had therefore failed to both assess the potential risks posed by Thomas Ferguson & Company in respect of the marketing and content of the premium rate services being provided or facilitated, and had also failed to take and maintain reasonable continuing steps to control those

risks. The Executive submitted that the Network operator was accordingly in breach of paragraph 3.1.3(b) of the Code.

2. In response to the alleged breach, the Network operator repeated its submissions in respect of the breach of paragraph 3.1.3(a) of the Code. The Network operator submitted that it had categorised the services offered by Thomas Ferguson & Company as “low-risk”, and that since being alerted to the fraudulent activity it had overhauled its due diligence systems.
3. The Tribunal considered the evidence and concluded that the Network operator had failed to both assess the potential risks posed Thomas Ferguson & Company in respect of the promotion, marketing and content of the premium rate services which it provided or facilitated and had also failed take and maintain reasonable continuing steps to control those risks, in contravention of the Code. The Tribunal noted that no steps whatsoever had been taken by the Network operator to assess the risks associated with the marketing and promotion of the service. The Tribunal upheld the breach of paragraph 3.1.3(b) of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

Paragraph 3.3.1 (Contracts)

“All Network operators and Level 1 providers must perform thorough due diligence on any party with which they contract in connection with the provision of premium rate services and must retain all relevant documentation obtained during that process for a period that is reasonable in the circumstances.”

4. The Executive submitted that the Network operator had failed to comply with the PhonepayPlus Guidance Note on “Due diligence and risk assessment” and had not employed alternative methods to comply with the Code. The Executive submitted that although the Network operator claimed to have checked the Companies House register of companies, had it done so, the Network operator would have found that the company information provided by Thomas Ferguson & Company was false. The Executive submitted that had the Network operator checked the PhonepayPlus register, it would have seen that Thomas Ferguson & Company was registered as a sole trader and accordingly should not have had a company number. The Executive further submitted that verifying the address of a client purely by checking that the building existed on Google Earth, as the Network operator stated it had done, was a wholly inadequate means of verifying a client’s address. The Executive also noted that the Network operator had been unable to provide evidence that it had retained a copy of Thomas Ferguson’s proof of identification.

The Executive submitted that the Network operator had failed to both perform thorough due diligence on Thomas Ferguson & Company and retain all relevant documentation obtained during that process for a reasonable period. The Executive submitted that the Network operator was accordingly in breach of paragraph 3.3.1 of the Code.

5. In response to the alleged breach, the Network operator submitted that it had checked the Companies House register of companies, the PhonepayPlus register, and performed a Google Earth search of the address given by Thomas Ferguson & Company. The Network operator submitted that the applicable guidance did not prescribe the specific steps that needed to be taken to perform the necessary due diligence. The Network operator further submitted that it had adopted a risk based

approach in this instance and, because Thomas Ferguson & Company had been categorised as “low risk”, it had not performed any further due diligence processes.

The Network operator submitted that it had implemented a range of measures to improve its organisational processes. The Network operator now required certain information to be gathered prior to entering into a contract with a provider including requiring copies of each prospective client’s current entry in the Companies House register, the names and addresses of all owners and directors, and copies of all of the relevant persons’ passports or other legitimate and credible proof of identification.

6. The Tribunal considered the evidence and found that the Network operator had failed to perform thorough due diligence on Thomas Ferguson & Company and retain all relevant documentation obtained during that process. The Tribunal noted that the checks that did appear to have been undertaken by the Network operator did not amount to sufficiently thorough due diligence. The Tribunal noted that, had the Network operator checked the Companies House register of companies, it would have found that a different company was registered with the company number that was given by Thomas Ferguson & Company. The Tribunal upheld a breach of paragraph 3.3.1 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR Paragraph 3.3.3(b) (Contracts)

“...contracts must include provisions that pursuant to section 1 of the Contracts (Rights of Third Parties) Act 1999, PhoneyPayPlus may directly enforce the relevant term(s) of that contract.”

7. The Executive submitted that the contract entered into by Elephant Talk Communication (Europe) GmbH and Thomas Ferguson & Company on 6 October 2011 did not include provisions stating that, pursuant to section 1 of the Contracts (Rights of Third Parties) Act 1999 (the “**Act**”) PhoneyPayPlus could directly enforce the relevant term(s) of that contract. The Executive accordingly submitted that the Network operator had therefore breached paragraph 3.3.3(b) of the Code.
8. In response to the alleged breach, the Network operator submitted that, although the agreement entered into did not make explicit reference to the Act, it was drafted in accordance with and governed by Swiss law and contained provisions which would allow PhoneyPayPlus to enforce its rights.

The Network operator further submitted that the Network operator had now amended its standard contracts for prospective UK customers to include express wording which would provide PhoneyPayPlus with rights to enforce terms under the Act.

9. The Tribunal considered the evidence and found that the Network operator had not included in its contract with Thomas Ferguson & Company provisions that, pursuant to section 1 of the Act, allowed PhoneyPayPlus to directly enforce the relevant term(s) of that contract. The Tribunal noted that if the exact provisions stated in paragraph 3.3.3(b) of the Code were not included in the contract then this of itself amounted to a breach of the Code, regardless of whether or not alternative provisions in the contract served to confer rights on third parties. The Tribunal concluded that there had been a breach of paragraph 3.3.3(b) of the Code.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

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

Paragraph 3.1.3(a) – General Responsibilities

The initial assessment of paragraph 3.1.3(a) of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Network operator had failed to properly assess risks and take reasonable steps to control risks, which allowed a clearly fraudulent service to be operated to the detriment of the public.

Paragraph 3.1.3(b) – General Responsibilities

The initial assessment of paragraph 3.1.3(b) of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Network operator had failed to properly assess risks and take any steps to control risks, which allowed a clearly fraudulent service to be operated to the detriment of the public.

Paragraph 3.3.1 – Contracts

The initial assessment of paragraph 3.3.1 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Network operator had failed to develop and consistently use due diligence processes for clients, which allowed a clearly fraudulent service to be operated to the detriment of the public.

Paragraph 3.3.3(b) – Contracts

The initial assessment of paragraph 3.3.3(b) of the Code was **significant**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The Network operator had negligently failed to comply with a Code requirement.

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

Final Overall Assessment

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

- The Network operator had failed to either follow PhonepayPlus Guidance on adequate due diligence and risk assessment processes or to consider alternative methods to comply with the Code. In accordance with paragraph 4.8.1 of the Code the Tribunal considered this to be a serious aggravating factor.

- The Network operator failed to take notice of a Network Direction dated 28 October 2012 in which Andrew Price was referred to in connection with other upheld breaches of the Code.

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

- The Network operator responded promptly to the Executive's notice of the complaints and recommendations to suspend the service and withhold the revenue generated by it.
- The Network operator voluntarily provided the Executive with information which assisted the Executive to link the alias "Thomas Ferguson" with the individual Andrew Price.
- The Network operator has taken steps to improve its due diligence and risk assessment processes.

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

Sanctions Imposed

In making its decision, the Tribunal took into account the scale of the operation and the extent of the harm caused in the underlying case against the Level 2 Provider. The Tribunal considered the need to maintain high standards of compliance within the industry so as to maintain due diligence, good regulation and confidence in the industry. The Tribunal also considered the need for targeted sanctions to appropriately impact at the point in the value-chain that is most likely to ensure continued compliance with the Code.

Having regard to the above and all the circumstances of the case, the Tribunal decided to impose the following sanctions:

- A Formal reprimand; and
- A fine of £20,000

The Tribunal further recommended that the Executive issue a direction to the Network operator to provide documentary evidence of its new due diligence, risk assessment and control procedures.