

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

Thursday 29 MARCH 2012
TRIBUNAL SITTING No. 96 / CASE 2
CASE REFERENCE: 04321

Level 2 provider & area: Andrew Price (also known as Thomas Ferguson,
trading as Thomas Ferguson & Company)
London and/ or Bratislava (Slovakia)

Level 1 provider & area: n/a

Network operator: Elephant Talk Communications PRS UK Ltd London

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

BACKGROUND

In November 2011, the Executive received two complaints from members of the public in relation to telephone calls made by employees of their businesses to the premium rate number 09117657650.

The employees both received telephone calls from an individual posing as a potential client, who stated his name was “*John Flowers*” and that he was calling from a company called “*Alex James Holdings*”. In both calls, “*John Flowers*” then claimed that he could not hear properly, and asked to be called back on the premium rate number. When the employees made the return call to the premium rate number, charges were incurred.

The premium rate numbers 09117657650 and 09117657651 were allocated to the PhonepayPlus registered Level 2 provider, Thomas Ferguson & Company to provide “Internet Technical Support”, under a contract with the Network operator, Elephant Talk Communications PRS UK. Ltd (‘Elephant Talk’). The numbers appeared to have been misused to generate revenue by misleading employees of United Kingdom based businesses into dialling them without being aware that premium rate charges would be incurred.

The Executive considered that there are reasonable grounds to believe that this was not an isolated incident by the individual(s) responsible for the registered provider, Thomas Ferguson & Company.

The Executive considered that there was good reason to believe that the provider, Thomas Ferguson & Company, and specifically the contact name provided to PhonepayPlus, “Thomas Ferguson,” has been used as an alias by Andrew Price. From searches undertaken by the Executive on the Companies House website it appeared that Thomas Ferguson & Company (registered with PhonepayPlus under company number 04672556) was not registered at Companies House. The entity that was registered under this company number was Thomas Ferguson Print Finishers Ltd., which was dissolved on 13 May 2008. The Executive had written to the address provided to PhonepayPlus with Thomas Ferguson & Company’s registration, 138 Kensington Church Street W8 4BN, and received a reply which confirmed that Thomas Ferguson had no connection with that address. Elephant Talk also confirmed that “A Price” was the name on the bank account in Slovakia into which outpayments for this service were due to be paid.

The Executive also considered that there was good reason to believe that Andrew Price had used two further aliases to operate premium rate numbers previously. The providers 'Phillip Marshall & Company' and 'John Hamilton & Company' were found to have committed very serious breach of the PhonepayPlus Code of Practice (11th Edition, amended April 2008) by a previous Tribunal for operating premium rate numbers in a similar manner to the facts in this case. Specifically, both of these previous investigations found that outpayments had been made to "A Price" and into the same Slovakian bank account that Thomas Ferguson & Company had requested payment to be made by Elephant Talk.

The Investigation

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

The Executive wrote to Thomas Ferguson & Company on 16 January 2012 at the address given in its PhonepayPlus registration and gave it the opportunity to provide an explanation of how their service operated. No response to this letter was received. The Executive made numerous further attempts to contact Thomas Ferguson & Company at the same address and using alternative contact details.

The Executive believed that this service contravened the PhonepayPlus Code of Practice 12th Edition (1 September 2011) (the "**Code**") and raised the following potential breaches of the Code:

- Rule 3.1.1(c) - General Responsibilities;
- Rule 3.4.12(a) – Registration;
- Rule 2.2.1(a) – Transparency and Pricing;
- Rule 2.2.5 – Transparency and Pricing;
- Rule 2.3.2 – Fairness;
- Rule 2.4.2 – Privacy; and
- Rule 3.1.4 - General Responsibilities.

The Tribunal made a decision on the alleged breaches raised by the Executive on 29 March 2012.

SUBMISSIONS AND CONCLUSIONS

Finding of Fact in relation to the Executive's specific concern

The Tribunal considered the evidence and concluded in conjunction with its deliberations of the potential breach of Rule 3.1.1(c) of the Code that the trading name of "Thomas Ferguson & Co" and the contact name, "Thomas Ferguson" on the PhonepayPlus registration database were collectively an alias for the individual named Andrew Price. This finding was based on the fact that the proceeds of the service were paid into a Slovakian bank account in the name of Mr Andrew Price. The Tribunal concluded that it was entitled to assume that the Slovakian bank had carried out adequate due diligence at the time of opening the account, and therefore, Mr Andrew Price was the individual who was responsible for the scam service at the centre of this case.

ALLEGED BREACH ONE

Rule 3.1.1(c) (General Responsibilities)

“All Network operators, Level 1 and Level 2 providers must ensure PhonepayPlus regulation is satisfactorily maintained by taking all reasonable steps to prevent the evasion of, and not to undermine, the regulation of premium rate services.”

1. The Executive submitted that when registering with PhonepayPlus on 3 September 2011, as required by the Code, Andrew Price gave the false name “Thomas Ferguson” and the information of a fictitious company, Thomas Ferguson & Company, which was not registered at Companies House. The Executive submitted that the address provided with that registration, 138 Kensington Church Street W8 4BN, was deliberately inaccurate. The Executive submitted that when registering, false information was provided to conceal the true identity of the individual responsible for operating the premium rate services. The Executive submitted that Andrew Price had therefore breached Rule 3.1.1(c) of the Code.
2. Andrew Price did not respond to the breach raised.
3. The Tribunal considered the evidence and concluded that Andrew Price (also known as Thomas Ferguson) had failed to provide accurate information when registering with PhonepayPlus with a view to evading and/or undermining the regulation of premium rate services. The Tribunal upheld the breach of Rule 3.1.1(c) of the Code. The Level 2 provider had consequently failed to satisfy Outcome 3.1 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

Rule 3.4.12(a) - Registration

“Level 2 providers must provide to PhonepayPlus relevant details (including any relevant access or other codes) to identify services to consumers and must provide the identity of any Level 1 providers concerned with the provision of the service.”

1. The Executive submitted that Andrew Price trading as ‘Thomas Ferguson & Company’ failed to provide PhonepayPlus with relevant details to identify its services to consumers. The Executive submitted that Andrew Price has therefore breached of rule 3.4.12(a) of the Code.
2. Andrew Price did not respond to the breach raised.
3. The Tribunal considered the evidence and concluded that relevant details had not been provided to PhonepayPlus to identify Andrew Price’s (also known as ‘Thomas Ferguson’) services to consumers. The Tribunal upheld the breach of Rule 3.4.12(a) of the Code. The Level 2 provider had consequently failed to satisfy Outcome 3.4 of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

Rule 2.2.1(a) (Transparency and Pricing)

“Promotional material must contain the name (or brand if part of the name) and the non-premium rate UK contact telephone number of the Level 2 provider of the relevant premium rate service except where otherwise obvious”

1. The Executive submitted that the telephone calls to consumers made by the individual who introduced himself as “John Flowers” from “Alex James Holdings” constituted promotional material for a premium rate service as defined by paragraph 5.3.29 of the Code. The Executive submitted that the name given, “John Flowers” from “Alex James Holdings”, was not the name of the Level 2 provider, Andrew Price trading as Thomas Ferguson & Company, nor had a non-premium rate UK contact telephone number given. The Executive submitted that Andrew Price had therefore breached Rule 2.2.1(a) of the Code.
2. Andrew Price did not respond to the breach raised.
3. The Tribunal considered the evidence and concluded the name and a non-premium rate UK contact number of the Level 2 provider had not been contained in the promotional material. The Tribunal upheld the breach of Rule 2.2.1(a) of the Code. The Level 2 provider had consequently failed to satisfy Outcome 2.3 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR
Rule 2.2.5 (Transparency and Pricing)

“In the course of any promotion of a premium rate service, written or spoken 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 accessing the service.”

1. The Executive submitted that due to the misleading nature of the promotion, it was unlikely that any cost information was provided to consumers before they returned calls to the premium rate number. It was submitted that in this case, the ‘purchase’ was making the return call as instructed to the premium rate number. The Executive submitted that Andrew Price trading as ‘Thomas Ferguson & Company’ had therefore breached Rule 2.5.5 of the Code.
2. Andrew Price did not respond to the breach raised.
3. The Tribunal considered the evidence and concluded that the cost was not included in the promotion of the premium rate service. The Tribunal upheld the breach of Rule 2.5.5 of the Code. The Level 2 provider had consequently failed to satisfy Outcome 2.5 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE
Rule 2.3.2 (Fairness)

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

1. The Executive submitted that the consumers only dialled the premium rate number after being requested to do so by “John Flowers” from “Alex James Holdings”, who was posing as a potential client. The Executive submitted that no indication was given that the contact number given for “John Flowers” was a premium rate number. The Executive submitted that Andrew Price had therefore breached Rule 2.3.2 of the Code.

2. Andrew Price did not respond to the breach raised.
3. The Tribunal considered the evidence and concluded that the service was an outright scam which was designed to mislead consumers by tricking them into calling a premium rate number. The Tribunal accordingly upheld the breach of Rule 2.3.2 of the Code. The Level 2 provider had consequently failed to satisfy Outcome 2.3 of the Code.

Decision: UPHELD

**ALLEGED BREACH SIX
Rule 2.4.2 (Privacy)**

“Consumers must not be contacted without their consent and whenever a consumer is contacted the consumer must be provided with an opportunity to withdraw their consent...”

1. The Executive submitted that the two complaints received by PhonepayPlus had been in respect of ‘cold calls.’ It was submitted that the two businesses that received the calls did not provide express consent to Andrew Price contact them. The Executive submitted that Andrew Price had therefore breached Rule 2.4.2 of the Code.
2. Andrew Price did not respond to the breach raised.
3. The Tribunal considered the evidence and concluded that the phone calls made by Mr Andrew Price posing as “Mr John Flowers” were clearly unsolicited. On this basis, consumers had been contacted without their consent and the Tribunal accordingly upheld the breach of Rule 2.4.2 of the Code. The Level 2 provider had consequently failed to satisfy Outcome 2.4 of the Code.

**ALLEGED BREACH SEVEN
Rule 3.1.4 - General Responsibilities**

“All Network operators, Level 1 and Level 2 providers must act on any direction, instruction, notice or request for information given by PhonepayPlus in pursuance of its duties as a regulator. When PhonepayPlus specifies a timeframe for action or response that timeframe must be adhered to or an extension promptly requested in writing setting out clear reasons. Any such extension will only be granted in exceptional circumstances.”

1. The Executive submitted that on 16 January 2012, the Executive issued a formal ‘direction’ under the Code to Thomas Ferguson & Company in a preliminary investigation letter, to provide information and documents in response to the PhonepayPlus preliminary investigation.

The Executive also submitted that Andrew Price trading as Thomas Ferguson & Company had not provided any response to the Executive’s preliminary investigation letter and therefore failed to act on a direction given by PhonepayPlus in pursuance of its duties as a regulator within the set timeframe or at all. The Executive submitted that Andrew Price had therefore breached Rule 3.1.4 of the Code.

2. Andrew Price did not respond to the breach raised.
3. The Tribunal considered the evidence and concluded that Andrew Price (also known as ‘Thomas Ferguson’) had failed to act on a direction given by PhonepayPlus in pursuance of its duties as a regulator. The Tribunal upheld the breach of Rule 3.1.4

of the Code. The Level 2 provider had consequently failed to satisfy Outcome 3.1 of the Code.

Decision: UPHELD

SANCTIONS

Initial Overall Assessment

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

Paragraph 2.2.1(a) (Transparency and pricing)

The initial assessment of paragraph 2.2.1(a) of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The service was designed with the intention not to provide customers with adequate knowledge of the service or the costs associated with it.

Paragraph 2.2.5 (Transparency and pricing)

The initial assessment of paragraph 2.2.5 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The service was designed with the intention not to provide customers with adequate knowledge of the service or the costs associated with it.

Rule 2.3.2 (Fairness)

The initial assessment of paragraph 2.3.2 of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The service was designed with the intention not to provide customers with adequate knowledge of the service or the costs associated with it.

Rule 2.4.2 (Privacy)

The initial assessment of paragraph 2.4.2 of the Code was **moderate**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The breach was capable of inflating revenue streams relating to the service.

Rule 3.1.1(c) (General Responsibilities)

The initial assessment of paragraph 3.1.1(c) of the Code was **very serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The breach demonstrated fundamental non-compliance with the Code in respect of the services being a scam which could undermine public confidence in premium rate services.

Rule 3.1.4 (General Responsibilities)

The initial assessment of paragraph 3.1.1(c) of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The service was designed with the intention not to provide customers with adequate knowledge of the service or the costs associated with it.

Rule 3.4.12(a) (General Responsibilities)

The initial assessment of paragraph 3.1.1(c) of the Code was **serious**. In determining the initial assessment for this breach of the Code the Tribunal applied the following criterion:

- The service was designed with the intention not to provide customers with adequate knowledge of the service or the costs associated with it.

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 aggravating factors:

- The service was designed so as to not give any value to the consumer;
- The service was designed to evade regulation and frustrate the regulatory process;
- Andrew Price had failed to co-operate with the investigation or the Tribunal; and
- Andrew Price, appeared to have previously traded as Philip Marshall & Company and John Hamilton & Company, and therefore been involved in very serious previous breaches of the Code (case references 01225 and 01220).

There were no mitigating factors.

The revenue in relation to this service was in the low range of band 6 (£1-5,000).

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

Sanctions Imposed

Having regard to all the circumstances of the case, including the revenue of the service, the Tribunal decided to impose the following sanctions:

- A Formal reprimand (4.8.2b);
- A fine of £10,000; and
- A requirement that refunds be paid to all consumers who claim a refund, for the full amount spent by them for the service, 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.