IN THE INDEPENDENT APPEALS BODY

BETWEEN:

TRANSACT GROUP (HOLDINGS) LIMITED

Appellant

- and –

PHONEPAYPLUS LIMITED

Respondent

DECISION

Introduction

1. This is an appeal against the decision of the Oral Hearing Tribunal ("OHT") dated 16 July 2010.

2. On 29 October 2009 a Tribunal had held that Transact was in breach of the Code, and it imposed a fine of £250,000 together with a formal reprimand.

3. Transact then applied for an oral hearing, which took place on 2 and 3 June 2010.

4. The OHT found that Transact Group (Holdings) Limited ("Transact") was in breach of a number of provisions of the Phonepayplus Code of Practice (11th Edition, April 2008) ("the Code"):

   (1) Transact was in breach of paragraph 5.2 of the Code because the promotion of the services in question was unlawful.

   (2) Transact was in breach of paragraph 5.4.1(a) of the Code because the promotional material in question was misleading.

(3) Transact was in breach of paragraph 5.4.1(b) of the Code because the services took unfair advantage of circumstances which made consumers vulnerable.

(4) Transact was in breach of paragraph 5.7.1 of the Code because clear pricing information was not provided to users prior to them incurring a charge.

(5) Transact was in breach of paragraph 5.8 of the Code because the identity of the service provider was not clearly stated.

(6) Transact was not in breach of Paragraph 5.12 of the Code.

(7) Transact was in breach of paragraphs 7.3.3(a) and (b) of the Code because the services were virtual chat services but no £10 spend reminders were sent to any users.

(8) Transact was in breach of paragraphs 7.12.4 (a) to (f) of the Code because users did not receive a subscription initiation message containing the information required by these paragraphs of the Code.

(9) Transact was in breach of paragraph 7.12.5 of the Code because suitable subscription reminders were not sent to users.

5. The Tribunal's decision as to the sanctions to be applied as a result of the breaches of the Code is as follows:

(1) Formal reprimand.

(2) A Fine of £167,959.

(3) Refunds for the full amount spent by complainants who claim them, unless there is good cause to believe that such claims are not valid.

(4) A 6 month prohibition on Transact Group (Holdings) Ltd, whether acting as Service Provider or Information Provider, being involved in or contracting for any premium rate text chat services with or without an element of dating.

(5) If Transact intends to resume text chat services following expiry of the prohibition it must, no earlier than 8 weeks and no later than 4 weeks before the end of the prohibition, take further compliance advice from the Executive on (a) the validity of the opt-ins it holds in relation to such services and (b) the promotion of such services, and implement that advice to the satisfaction of the Executive prior to commencing those services.

(6) A 6 month bar on all premium rate services operated or promoted by Transact Group (Holdings) Ltd, whether acting as Service Provider or Information Provider, on shortcodes **80988, 80877, 80848 and 69991** suspended for 3 months to allow Transact to promptly seek compliance advice on (a) the use of opt-ins for the services operating on those shortcodes and (b) the promotion of those services. Unless such advice is implemented to the satisfaction of the Executive within 3 months of the date of this Decision, the bar will take immediate effect.

6. The costs order made was that Transact was required to pay the "administrative charge" under paragraph 8.12 of the Code:

(1) The costs of the Tribunal; and

(2) 50% of the costs of the Executive.

The scope of the appeal

7. The sanctions other than the fine had already been implemented by the time of the oral hearing, and accordingly the only substantive aspect of the OHT's decision which Transact wished to appeal was the fine of £167,959.

8. In addition Transact wished to appeal the costs order made below.

The test on appeal

9. Paragraph 1.1 of Annex 2 of the Code states as follows:

> "Appeals may be made on the following grounds:
> - the disputed decision was based on error of fact
> - the disputed decision was wrong in law, or
> - the Tribunal exercised its discretion incorrectly in reaching its decision."

Grounds of Appeal

10. Transact submitted that the OHT (Grounds of Appeal para 50):

(1) Misdirected itself in law as to which party bore the burden of proof in the proceedings.

(2) Reached certain factual conclusions which, had it been properly applying the burden of proof, it would not have been open to the OHT to reach.

(3) Imposed sanctions that it should not have imposed.

Burden of proof

11. This was described in Transact's skeleton argument as the "principal" ground of appeal.

12. Transact submits that (1) the OHT directed itself that the legal burden is, in effect, a shifting burden, and (2) the burden of proof rested on the Executive throughout, and to suggest otherwise was a "fundamental error".

13. The OHT had stated the following:

> "6. Because the Executive has no formal investigative powers, where all relevant information is retained within the service provider's control the

Tribunal regards it as absolutely fundamental that the service provider be completely transparent in co-operating with any investigation by the Executive. In these circumstances any lack of transparency would tend to undermine the entire regulatory process. The Tribunal therefore regards any attempt to mislead it or the Executive as extremely serious. The Tribunal equally regards any deliberate lack of co-operation, or failure to provide relevant information, as being very serious.

7. In determining the facts in this case the standard of proof is the balance of probabilities, **the legal burden being on the party who asserts any issue**. It is also common sense that where allegations of fraud or deception are made, then the evidence must be cogent and compelling.

8. However the Tribunal is also mindful of the fact that the Executive in many instances will not be in a position to obtain the relevant evidence or compel its production. This may of course also apply to the Respondent service provider. Thus, whereas the legal burden of proof may well remain with the party asserting, the evidential burden of proof could fall upon the party holding the relevant information. Where information has deliberately been withheld, the Tribunal may, if appropriate, draw adverse inferences against the withholding party." (emphasis added)

14. Counsel for Phonepayplus submitted a copy of Halsbury's Laws, Volume 11, Civil Procedure, which states as follows:

"(v) Burden and Standard of Proof

769. Meaning and general incidence of the burden of proof. There are at least two distinct senses in which burden of proof is used, and clarity over which sense is relevant at any given time is essential.

The legal burden (or the burden of persuasion) is a burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case, or persuading the tribunal of the correctness of a party's allegations...

The evidential burden (or the burden of adducing evidence) requires the party bearing the burden to produce evidence capable of supporting but not necessarily proving a fact in issue; the burden rests upon the party who would fail if no evidence at all, or no further evidence, as the case may be, was adduced by either side...

770. Incidence of the legal burden. The legal burden (or the burden of persuasion) of a proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular

> allegation, the burden lies upon the party for whom the substantiation of that particular is an essential of his case...
>
> 772. Exceptions to the normal rules regarding incidence of a burden of proof. ...Where the truth of a party's allegation lies peculiarly within the knowledge of his opponent, the burden of disproving it often lies upon the latter, but there is no general rule of law to this effect. There is authority contrary to this exception, but it certainly exists and has frequently been applied by the courts."

15. Counsel for Transact did not disagree that this was an accurate statement of the law.

16. It is clear that the legal burden of proof lies on the Executive to prove the facts underlying alleged breaches of the Code, and that this remains constant throughout the case.

17. However if the Respondent has a positive case on the facts which it wishes the OHT to accept (as opposed to simply putting the Executive to proof of its case), it is free to put that case – and the burden of proving it lies on the Respondent.

18. The OHT is then called upon to find the relevant facts, and then exercises its judgment as to whether any, or all, of the alleged breaches are found to be proved, on the balance of probabilities.

19. It is then open (but not mandatory) for a Respondent to make submissions relating to mitigation, and to call evidence in support of those submissions. The legal burden of proof for this aspect of the proceedings lies on the Respondent.

20. In this case it was the Executive which asserted that the Respondent was in breach of the Code. Applying the OHT's principle that the legal burden lies on the party who asserts any issue, as far as the OHT were concerned, the legal burden lay on the Executive to prove the facts underlying alleged breaches of the Code.

21. There is no support for Transact's allegation that the OHT directed itself that the legal burden was in effect a shifting burden, or that Transact bore the legal burden of disproving the facts underlying the alleged breaches.

22. Nor did the OHT suggest that the legal burden of proving the facts underlying the alleged breaches lay on Transact.

23. The IAB therefore considers that the OHT did not err in relation to the burden of proof.

24. However, the position in relation to mitigation differs.

25. It was specifically put to Counsel for Transact that the burden of proving mitigation lies on he who seeks to mitigate. Counsel did not demur.

The Tribunal's Findings

26. The IAB reminds itself that (1) this is an appeal from the body which heard live evidence, and (2) it has not had the benefit of hearing live evidence itself. It must therefore be cautious in reaching factual conclusions which differ from those of the OHT, and in particular the credibility of the witnesses.

Transact/Transact Group

27. The OHT stated the following at paragraph 14:

> "14. There has been a regrettable lack of clarity concerning the overlap between Transact and Transact Group Limited. It is a matter of record that they shared the same directors and had the same address in Great Shelford, Cambridge. Transact's website still states that Transact Group Limited is the data controller for Transact for the purposes of the Data Protection Act 1988[1]. There is unarguably a close degree of factual connection between the companies, even if they are legally separate entities. For reasons that will be expanded upon below, the Tribunal does not accept that the 'corporate veil' will extend so as to shield the actual knowledge of the directors of Transact from Transact Group Limited. They had the same controlling mind. Any submission by Transact that there was no real connection between the two companies would need to be supported by evidence. No such evidence was adduced at the hearing.
>
> ...
>
> Relationship with Transact Group Limited

[1] http://www.transactgroup.net/PrivacyPolicy.aspx

86. The Tribunal finds that Transact and Transact Group Limited were companies whose existence overlapped, whose directing and controlling minds were identical, and who shared the same premises and people. There is certainly no suggestion that these companies had different employees, different coding systems, used different gateways or were in any way independent."

27. In its Statement of Case dated 16 March 2010 before the OHT Transact had stated the following:

> "120. As for points 4 – 5[2], on a strict interpretation basis, the Respondent has had no prior breaches of the Code. However, should the Tribunal consider that prior breaches of companies that the Directors have been involved in be taken into account then the overall compliance record over their 21 years of operation and the respective business volumes as outlined in annex 1 and 2 respectively should be taken into account."

28. Annex I lists a total of 8 cases including the instant appeal. The earliest decision listed is 28 February 2006.

29. By the time of the oral hearing Transact had dropped any reference to a "strict interpretation", instead submitting that "[t]he recent history of breaches prior to the instant matters is almost entirely attributable to Mr Simes" (para 12(iii)).

30. It is clear that the Appellant's submission that "at no time did the appellant seek to hide behind the corporate veil nor seek to give nor seek to give the impression that Transact was anything other than a successor company" is factually incorrect.

31. The IAB therefore considers that the OHT were entitled to make the comments as set out above.

Number of Complaints

32. Transact assert that none of the complainants in the illustrative examples gave live evidence. However there was no need to call them, for the veracity and content of

[2] "4. The past record of the party in breach for breaches of this nature;
5. The past record of the party in breach in relation to breaches of the Code"

their complaints was not disputed. Even if they had been disputed, it was a matter for the Executive to decide whether to call them; nor do Transact assert that they requested that the witnesses were made available for cross examination.

33. Transact also state that to describe the number of complaints received by the Executive as "at least" 103 is inaccurate, for the number received was in fact exactly 103. This was not disputed by Executive, but the IAB does not consider the complaint to be material, given that (1) there must have been those who were affected by breaches of the Code who did not complain, as found by the OHT, and (2) there must have been an unstated number of complaints made direct to Transact.

The email from Mr. Maguire

34. Transact submit that the OHT was wrong (and had erred in fact) to find that Mr. Szemelka had not "deliberately doctored e-mails from Mr Maguire". The allegation was that, although Mr. Maguire agreed that it was possible to charge as soon as the user attempts access to the service. This fact was later agreed by Mr. Peak. The allegation made was that the part of the opinion which stated that the charging logic might not be initiated until the user has consented to the charge on the WAP pages had not been transmitted; Mr. Maguire specifically asked that this alternative scenario should be considered when utilising the information provided.

35. This was an ambitious claim, containing a serious allegation of fraud on the part of a trusted employee of a Regulator. The obligation on Counsel to obtain and put forward sufficient evidence of such an allegation before it can properly be made is a relatively heavy one.

36. It does not appear to have been disputed that it was possible that the charging logic did not present itself until the user consented; the question put to Mr. Maguire was whether it was possible that the charging logic was initiated before the user consented, to which the answer was in the affirmative, and agreed to by Mr. Peak.

37. Mr. Szmelka was cross-examined and gave an explanation of his conduct. The OHT concluded that he was a reliable witness who was forthright, and gave his answers honestly and openly (para 83).

38. The IAB has not heard the oral evidence, and considers that the OHT was entitled to reach its findings on Mr. Szmelka's evidence.

39. It was suggested orally that the withholding of the conditions of disclosure of the opinion of Mr. Maguire had not been complied with, and had not been made known to Transact, and this deprived Transcript of a potential line of cross examination of Mr. Simes.

40. Mr. Simes was never called to give evidence; and it is difficult to see how the information which Mr. Szmelka withheld could have assisted in his cross examination.

The Tribunal's approach to the Appellant's witnesses

41. The Tribunal stated as follows:

> "84. The Tribunal was less impressed with the evidence given by Transact's witnesses. In particular it found Mr Peak's answers to be unsatisfactory and the manner in which he answered his questions to be defensive. It also finds that Transact did not come to the hearing with the transparency that it should have. It failed to call any technical evidence from person involved in 'correcting' Mr S's code, any evidence to verify its internal systems, any independent evidence to justify its revenue figures or, indeed, disclose its accounts or provide the source material from which its revenue figures were derived.
>
> 85. However the Tribunal does not reject all of Transact's evidence, since some of it was unchallenged under cross-examination or in the evidence. The Tribunal, as stated above, has determined all the issues on the balance of probabilities."

42. Transact criticises the OHT for considering finding unsatisfactory its failure to file evidence on (1) technical evidence from the person involved in 'correcting' Mr. S's

code, (2) any evidence to verify its internal systems, (3) any independent evidence to justify its revenue figures, (4) the disclosure of its accounts, and (5) provision of the source material from which its revenue figures were derived.

43. The IAB considers that Transact have made a number of submission on mitigation, and that all of the matters referred to in paragraph 84 of the OHT decision were potentially relevant to mitigation, on which Transact bore the legal burden of proof.

44. Accordingly, the OHT were entitled to criticise Transact for failing to provide such evidence, and were entitled to draw adverse inferences from that failure.

Transact's Responsibility

45. Transact submits that the OHT were not entitled to make the factual findings which it did in paragraphs 93 – 102 of the decision.

46. Specifically the OHT found that (1) there was a complete and catastrophic lack of control by Transact over their technical systems, (2) Transact had wholly inadequate technical systems in place and a near non-existent to compliance, and (3) there was actual and serious culpability on the part of Transact as well as the admitted corporate responsibility.

47. Transact submits that:

a. Mr. S was the company's compliance officer.

b. Transact did not know and could not have known that the person who had been entrusted to safeguard its enterprise was in fact sabotaging it from within.

c. Transact was unaware that there was a problem until alerted thereto by the Executive in August 2009 – so the description of their failure to check and remedy matters following S's departure as an "appalling failure".

d. The evidence was that there was a defective gateway in Hong Kong, not that there was an "apparently" defective one.

48. The IAB is reminded that this appeal is not a full rehearing, and that the OHT had the benefit of hearing oral witness evidence before coming to its conclusions. The IAB considers that the OHT were entitled to reach the factual findings it came to in paragraphs 93 – 102.

49. It is difficult to understand why Transact could not have known that Mr. S was not in fact doing his job effectively, especially given his employment on 27 August 2005, and the number of times Transact had been in breach of the Codes since then.

50. Mr. S left at the end of May 2009/early June 2009 and yet when the Executive contacted Transact in August 2009 Transact were unaware of the breaches of the Code. In those circumstances it is readily comprehensible how that failure can be described as "appalling".

51. The gateway in Hong Kong was accepted as defective; its description as "apparently" defective is slightly vague, but does not disclose an error of law, let alone a material error of law.

Findings re opt-ins

52. The criticisms made by the Appellant are as follows:

a. The OHT was not entitled to make the following findings:

i. There was no source data which showed from where the information provided by Transact was derived – at [103].

ii. Transact was criticised for failing to take any more steps to provide independent verification of the opt-ins (at [104]).

iii. The record of complainants was accepted at [105].

iv. Transact's information was found to be not evidence of opt-ins, but merely assertion (at [110]).

The errors were said to have arisen from misdirection as to the burden of proof, and also a failure to understand the Appellant's evidence.

b. The Appellant was entitled to rely upon a soft opt – in.

53. As to paragraph 52 (a) above, the reasons given why the OHT was not entitled to make such findings were (1) the Tribunal's misdirection as to which party bore the burden of proof, and (2) a failure to understand or recollect properly the evidence which was actually given, namely (a) it was not said through counsel but by Mr. Peak that Transact had "attempted to contact at least one network operator", and (b) material presented by Transact is evidence, not mere "assertion".

54. The IAB considers that the OHT was entitled to make the findings recorded at paragraph 52(a) above, and there was no misdirection as to burden of proof. Further, there was no material error in understanding the Appellant's evidence.Who gave the evidence that Transact had attempted to contact at least one network operator (which the tribunal accepted) does not defect the OHT's criticism that Transact failed to take any further steps to further verify the alleged opt-ins. When the OHT construed the evidence submitted as "assertion", this was a reference to the weight placed on such evidence, upon which the OHT was entitled to make a judgment.

55. Regulation 22 of the *Privacy and Electronic Communications (EC Directive) Regulations 2003* states as follows:

"Use of electronic mail for direct marketing purposes

22.—(1) This regulation applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers.

(2) Except in the circumstances referred to in paragraph (3), a person shall neither transmit, nor instigate the transmission of, unsolicited communications

for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender.

(3) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where—

(a) that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;

(b) the direct marketing is in respect of that person's similar products and services only; and

(c) **the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing,** at the time that the details were initially collected, **and, where he did not initially refuse the use of the details, at the time of each subsequent communication**.

(4) A subscriber shall not permit his line to be used in contravention of paragraph (2)." (emphasis added)

56. The provisions under Regulations 22(3) are known as a "soft opt-in".

57. Although the Appellant submitted that all of the messages contained a "STOP" message, the OHT concluded at [107] – [108] that the message logs showed that WAP push promotional messages did not provide the recipient with a simple means of refusing further marketing, and on that basis Transact could not rely on a soft opt-in.

58. The Appellant submitted that the OHT had misunderstood its evidence, which was that marketing messages were sent to their own customer services number as a simple means of refusing their use of the contact details in marketing.

59. However this submission did not address the requirement that a simple means of refusal be given to each recipient in Regulation 22(3)(c) "at the time of each subsequent communication".

60. The Appellant also made reference to guidance from the Information Commissioner's Office on the use of the third party opt-ins. However that guidance simply sets out the wording of Regulation 22(3) without adding to it. In any event it is difficult to see how such guidance can derogate from the plain words of the Regulation.

The Investigation by the Executive

61. The first point made by Transact is that the OHT erred in "failing to have regard to the role of S" in that it was "entirely plausible" that S was responsible for the "error" which resulted in Transact's systems failing to send out the required free messages.

62. The OHT found as a fact that Mr.S did alter the code in the manner that has been suggested [89] and also [92] that "there is no evidence to implicate Mr Swayne and Mr Peak in any wrongdoing that may have been undertaken by Mr S", and accepted Mr. Peak's explanation of the reason why Transact's logs did not record the failure to send out the required free messages [116 – 7].

63. Thus the first point is not understood: the OHT accepted Mr. Peak's explanation of how the error had occurred.

64. Transact's second point is that the Tribunal were not entitled to describe Mr. Peak's evidence as "assertion". Again, when the OHT construed the evidence submitted as "assertion", this was a reference to the weight placed on such evidence, upon which the OHT was entitled to make a judgment. It is difficult to see where this potential criticism could lead, given that the Tribunal did in fact accept Transact's "assertion", in the absence of contrary evidence.

65. A third point is made by Transact: that the Tribunal were not entitled to treat Transact's failure to support its assertion with expert evidence or underlying data as relevant to sanction. As stated previously, the IAB considers that there was a burden of proof on Transact in relation to mitigation – and the precise reason why Transact's systems had failed causing the failure to send STOP messages could have been relevant to mitigation.

66. In any event, the IAB finds that there has been an error of law in the Tribunal's approach to sanction, as stated below, and as such has reconsidered the proper sanction.

The Website Evidence

67. The OHT found that there was a deliberate attempt to mislead on the part of Mr. Peak, based on an attempt to show that other services were run from shortcode 69991, which was not in fact true.

68. It was not disputed that there were in fact no other services run from shortcode 69991.

69. The IAB considers that the Tribunal was entitled to find that the representations made by Mr. Peak was deliberate, having heard oral evidence from him.

70. Transact now submit that there was other cogent website evidence supported by independent Google analytical statistics that were much more material to the case in question.

71. Those statistics do not go to whether or not the representations made by Mr. Peak were deliberate, but to whether or not the deception (if it was that) by Mr. Peak was serious.

72. The IAB considers that any form of deception in relation to questions from the Executive is potentially very serious – for there is an obligation on those regulated by the Code of Practice to cooperate with the Executive.

73. Transact also submit that there was no basis for the Tribunal's finding that there was no cogent evidence that other services were advertised on the shortcodes in question through print media. Even if this is correct, it does not derogate from the finding of deception, and appears to be a peripheral matter.

The Revenue Information

74. Transact had been asked for the total revenue which was generated across the shortcodes in relation to the WAP push promoted services.

75. The figure submitted by Transact was £167,959. However the raw data underlying that figure was not supplied, for instance accounts.

76. The Tribunal made a finding that "at least" £167,959 was generated by the shortcodes in question. It also did not accept Transact's evidence that of the £167,959 generated only £17,000 was retained within Transact. However it made no positive finding as to how much was in fact retained within Transact.

77. Transact makes the submission on appeal that the figures in question were reached by the Tribunal in error, due to a misdirection as to burden of proof.

78. The IAB has held that there was no misdirection as to burden of proof.

The Breaches

79. Transact alleges that the provision of a customer service number was sufficient to comply with the Regulations. This point has been dealt with at paragraphs 55 – 59 above.

Sanction

80. The Tribunal carefully went through the Phonepayplus Sanctions Guide, giving a non-exhaustive list of the factors relevant to the impact of the breach, and then going on to consider aggravating and mitigating factors.

81. The OHT commented on the following factors in particular as being relevant to the impact of the breach:

    a. <u>The revenue generated by the service.</u> The Executive submitted that the entirety of the revenue generated by the shortcodes in question should be taken into account – not just that generated by the relevant services. This was

estimated at £1 million. Transact drew attention to the fact that the wrongly generated sums were £1,746 ie 1.04% of the revenue generated from the relevant services across the four shortcodes, and Transact's share was £1,119.20 ie 0.67%. The OHT found that the relevant revenue figure was "at least £167,959 ie the total revenue generated from the relevant services across the four shortcodes. The OHT was "far from satisfied" that this was the totality of the revenue generated.

b. Actual consumer or societal harm. The OHT found that there had been clear and serious consumer harm.

c. The loss of confidence of consumers in premium rate services. This was found to be highly likely amongst those users who were affected.

82. Aggravating factors were found to be as follows:

a. Continuation of the breach after the party in breach has become aware of the breach or been notified of the breach by Phonepayplus. The OHT noted that complaints continued to be made after June 2009 and continued into September 2009. The Tribunal found that this was indicative of a wholesale technical failure and non-existent attitude to compliance.

b. Incomplete, inaccurate or false information supplied by a party in breach as part of a defence. The OHT drew attention to what it described as "the serious deceit" by Mr. Peak of the website information, which it found was "a serious attempt to manipulate and mislead the Executive and this Tribunal".

c. Failure to cooperate with the Phonepayplus investigation. The OHT found that Transact had only nominally cooperated with the investigation, having provided inadequate opt-in information, incorrect call logs, only disclosed the fact that there was a defective gateway in Hong Kong very late in the day, has not called evidence from anyone who had had the opportunity to scrutinise Transact's source code, has not served a copy of its accounts, or disclosed any of the raw material from which it produced the figures representing its revenue.

d. The past record of the party in breach for breaches of this nature. It was noted that Transact Group Limited suffered sanctions for near-identical breaches in 2008, and that the companies were identical in everything (including having the same directors and employees) apart from legal title. However the Tribunal went on to state that it would bear in mind that they were two separate legal entities.

e. The past record of the party in breach in relation to breaches of the Code.

f. The fact that the breaches occurred after the publication of sanctions warnings on similar services. The Tribunal noted that this must have been a problem, for there had previously been express sanctions warnings relating to concealed subscriptions services.

83. The OHT commented as follows on mitigation:

a. The extent to which any breach was caused, or contributed to, by circumstances beyond the control of the party in breach. The OHT did not accept that S was beyond Transact's control, for he was an employee, and he was only allowed to act as he did due to the complacent attitude to compliance demonstrated by Transact.

b. The extent to which the party in breach has taken steps in advance to identify and mitigate external factors and risks that might result in breach. S's actions went unchecked after the 2008 fines were levied. A thorough risk assessment and due diligence process should have been carried out after the 2008 fines. Transact also did nothing when complaints continued to be received in January 2009.

c. The extent and timeliness of any steps taken to end the breach in question and to remedy the consequences of the breach. The Tribunal did not accept that steps had been taken to remedy the breaches.

d. The steps taken, or planned, by the party in breach to prevent future breaches of the Code. The Tribunal saw no evidence that Transact's due diligence procedures had been improved. However it chose to assume this factor in Transact's favour, for unexplained reasons.

e. The extent to which the party in breach has cooperated with, and supported the purpose of, the Phonepayplus investigation.

84. The Tribunal also accepted that prior to Mr. S joining there had been no other breaches for failure to comply.

85. The Tribunal concluded that the current breaches were "Very Serious", as had the Code Compliance Panel.

86. The IAB notes that the Sanctions Guide describes the powers of the Tribunal for Very Serious contraventions to be up to £250,000 per contravention; and in this case there were 8 contraventions. Thus the maximum fine in theory could have been £2 million.

87. The Code Compliance Panel had thought that the relevant revenue figure was £500,000+, and considered that a fine of £250,000 as well as a Formal Reprimand and for the refund of claims were appropriate.

88. The Executive submitted that a fine of £750,000 was justified, to demonstrate that Phonepayplus regulation depends on service providers being open and honest with the regulator.

89. Transact did not state a specific sum for the appropriate fine.

90. The OHT, having found that the relevant figure for revenue for like services across the four shortcodes was £167,959, decided to substitute a fine of £167,959. However there was no explanation of how that figure was arrived at as being the appropriate fine.

91. The OHT also imposed a six month prohibition on Transact Group (Holdings) Ltd as Service Provider or Information Provider in relation to premium rate chat services, a requirement for further compliance advice to be taken from the Executive, and a six month bar on all premium rate services operated or promoted by Transact on the four shortcodes (suspended for three months), in addition to the other sanctions imposed by the Code Compliance Panel.

92. As previously stated, all sanctions apart from the fine have been carried out – hence the fine is the only live issue. It is fortunate that on an application made by the Appellant following the lodging of the appeal, the IAB suspended, on terms, the various sanctions pending the outcome of this appeal. If there had not been this suspension and, had the appeal substantive merit, the delay could have led to an injustice. It is hoped that, in future, appeals can be dealt with more expeditiously where there is a potential risk of injustice.

93. As to the fine, the IAB finds that although the OHT stated the factors going to the seriousness of the breach, and aggravating and mitigating factors, instead of then deciding what a proper figure would be taking all of those matters into account, it appears to have selected the revenue for the relevant services (£167,959) as the most important factor above all else. The IAB reaches this conclusion reluctantly, for it is clear that the OHT approached its task with great care and thoroughness. However the IAB is driven to the conclusion that the OHT elevated the revenue figure for the relevant services on the four shortcodes above all other factors by the fact that precisely the same figure was chosen for the fine.

94. This constitutes a material error of law.

95. Transact submit that the fine imposed by the OHT was excessive, given the lack of awareness of S's duplicity until after he left Transact's employment, the steps it had taken to remedy the breaches (unchallenged evidence that all of the technical failings had been rectified, as recorded in a letter dated 3 September 2009), and disbelieving the Tribunal's assertion that it would assume that Transact had improved its due diligence procedures.

96. It also emphasised the fact that there were only 103 complaints from January – October 2009, most had been refunded, and the small amount of revenue generated from the 103 complainants across the four shortcodes. However the IAB does not consider that 103 complaints is an insignificant number.

97. The IAB considers that it may be material, in setting an appropriate fine, to consider the overall revenue generated by a particular legal entity (or even a number of linked legal entities) – not just the revenue generated by the services which have been found not to comply with the Code,

98. The reason for this is that deterrence is an important objective of sanctions, and a different level of fine may be appropriate for a company whose turnover is £10 million per year than one whose turnover is £10,000 per year, even if the same revenue has been wrongfully generated in both cases by breaches of the Code.

99. Further, the previous history of similar breaches, and the presence or absence of steps taken to avoid similar breaches, will often be of particular importance. In this case a largely identical entity, Transact Group, had been found to be liable for very similar failings to the present case on 11 September 2008, and despite that had committed the breaches found by the OHT and upheld by the IAB. Transact Group had also been liable for a number of other breaches in the recent past. Strangely the levels of sanction had not tended to increase between cases, despite the lengthening breach history and despite there having been explicit recognition of the breach history.

100. Against this background, the submissions put forward by the Appellant in favour of a smaller fine do not carry significant weight.

101. For these reasons, and taking into account the circumstances of this case (including in particular paragraphs 96 – 101 above), the IAB considers that the appropriate level of fine is £220,000.

Costs

102. The OHT had ordered Transact to pay 50% of the costs of the Executive. It was reduced from 100% because of the very high levels of costs incurred by the Executive, and also the fact that significant time was spent dealing with S's evidence, and there was no good reason why he had not been called to give evidence.

103. The Appellant submitted below that each party should bear its own costs, and to share equally the costs of the OHT.

104. It is difficult to conclude that the Appellant "won" the hearing below, for although the fine was reduced by over £80,000, it incurred significant additional sanctions including suspensions which may have had an important effect on the way in which Transact conducted its business.

105. The IAB considers that costs are in the (wide) discretion of the OHT, and that there was no error of law in the costs order below.

106. Further, the appeal to the IAB has resulted in the fine being increased.

107. For that reason, Transact must pay the costs of the Respondent and the cost of the provision of the Tribunal that are summarily assessed at £17,500 and £10,000 respectively, those sums to include VAT.

21 June, 2011

Derek Holden

Chair, Independent Appeals Body