Decision of the ADVERTISING REGULATORY BOARD

Complainant	Colgate Palmolive Company and Colgate Palmolive (Ltd)
Advertiser	Bliss Brands (Pty) Ltd
Consumer/Competitor	Competitor - Breach
File reference	MAQ Soft – Stay-Soft
Outcome	
Date	

On 30 August 2019, the Directorate of the Advertising Regulatory Board issued a decision with respect to a complaint lodged by Colgate Palmolive Company jointly with Colgate Palmolive (Pty) Ltd ("Colgate"), against advertising by Bliss Brands (Pty) Ltd ("Bliss Brands") of its fabric conditioner labelled as "MAQ Soft".

Decision of 30 August 2019

The Complainant, Colgate, argued that the current MAQ packaging imitated its own Sta-Soft packaging and exploited the advertising goodwill it had established over the years. The Advertiser, Bliss Brands, denied these allegations, arguing that the complaint

effectively related to the presence of the generically descriptive word “Soft” on its packaging.

The Directorate dismissed the allegation that the Advertiser had exploited the Complainant’s advertising goodwill.

However, The Directorate held that the Advertiser’s sudden decision to use the word “Soft” was a marked departure from its earlier variant name “Boost”. The Directorate pointed out the similarities in style, placement, font and colouring of the word “Soft” on the Advertiser’s packaging, and concluded that this amounted to an imitation of the Complainant’s advertising concept.

The Advertiser was instructed to withdraw its advertising within the deadlines stipulated in the Code of Advertising Practice. In issuing this instruction, reference was made to the provisions of Clause 15.3 of the Procedural Guide which sets out the timeframes within which advertisers are expected to ensure compliance.

Breach allegation

In a letter dated 23 September 2019, the Complainant submitted that the Advertiser’s website and Facebook pages still actively promoted the packaging that had been ruled against. It referenced the Advertiser’s www.blissbrands.com website, and provided a list of URLs directing to 13 of the Advertiser’s Facebook posts.

Given the Code’s two-week deadline for withdrawal of online advertising (as stipulated in Clause 15.3.8 of the Procedural Guide), the Advertiser was expected to have removed such advertising by 13 September 2019. Yet, as recently as 22 September 2019, the examples referred to were still live. As such, the Advertiser should be found to have breached the ruling of 30 August 2019.

In addition, the Complainant requested a finding that the Advertiser should “pay the costs of Colgate, on the scale as between party and party in the High Court”.

Breach response

The Advertiser, through its attorneys Eversheds Sutherland, submitted that it had already begun the process of amending its packaging, and that all television commercials and print advertisements had been amended.

It added that its corporate website www.blissbrands.com relaunched on 23 September 2019 with updated advertising, and its www.maqhomecare.com website, which carried its new product packaging, launched on 2 September 2019. It was therefore unfair for the Complainant to suggest that the Advertiser was deliberately disregarding the ruling of 30 August 2019.

Turning to the Facebook examples offered by the Complainant, the Advertiser submitted that these were historical posts, some dating back a year. Failure to remove these was simply due to oversight during the process of reviewing and altering all current and imminent advertising. Steps were taken to remove these posts as soon as the breach allegation was received.

Breach decision

Having considered all the material before it, the Directorate of the ARB issues the following findings.

Request for a Cost Order

The Complainant argued, *inter alia*, that the Advertiser should be instructed to "pay the costs of Colgate, on the scale as between party and party in the High Court". The Advertiser has not addressed this point.

The first question that comes to mind is whether the ARB Directorate has the authority to issue such an order. In this regard, the provisions of the Code's Procedural Guide are instructive.

Clause 8.9 of the Procedural Guide, which briefly outlines the procedure to be followed in the event of an appeal against a Directorate ruling notes, *inter alia*, as follows:

> "The Chairperson of the Advertising Appeals Committee may, either at the conclusion of the First Appeal hearing or within a reasonable period thereafter, award the cost of the First Appeal against any or other of the parties, in such proportion as the Advertising Appeals Committee may determine".

Clause 12.6 of the Procedural Guide, which deals with appeals to the Final Appeal Committee (in the event of an appeal against a decision of the Advertising Appeals Committee), notes as follows:

> "The Chairperson of the Final Appeal Committee may, either at the conclusion of the appeal hearing or within a reasonable period thereafter, award the cost of the appeal against any one or other of the parties, on an applicable High Court Scale, or in such pro-portion as the Committee may determine".

It should be noted that these provisions cater for instances where an appeal has been lodged against a decision of the ARB Directorate, or against a decision of the Advertising Appeals Committee. It also expressly affords the Chairpersons of these respective appeal committees the discretion to issue a cost order.

As the current request is not pursuant to an appeal against an existing ARB ruling, these clauses do not apply.

Clause 16 of the Procedural Guide caters for instances where a Complainant refers a dispute to an independent expert for arbitration on the acceptability of evidence placed before the ARB. It allows for the ARB to recover the reasonable costs from both parties to the dispute. In short, it allows the ARB to force the parties to pay the independent arbitrator for his/her services.

Clause 16.3.7 of the Procedural Guide allows for a consultative process during which the ARB, in consultation with the arbitrator, shall "... either at the conclusion of the arbitration or within a reasonable period thereafter, award the cost of the arbitration against any one or other of the parties". Clause 16.3.8 allows for any party "... against whom no cost order is made ..." to recover its costs lodged with the ARB for the purpose

of such arbitration. Clearly this reference to issuing a "cost order" relates to the cost of the arbitration, and not a punitive cost order such as the one envisaged by the Complainant.

As the current decision is not pursuant to a request for arbitration in terms of the provisions of Clause 16 of the Procedural Guide, these provisions are not applicable.

In fact, there are no provisions within the Code of Advertising Practice that afford the Directorate any discretion to issue cost orders such as the one requested by the Complainant.

The Complainant's request for such a cost order can, accordingly, not be entertained.

Breach allegation

It should be noted that Clause 15.5 of the Procedural Guide instructs advertisers to withdraw offending advertising from any and all media in which it may appear, irrespective of whether or not the Complainant made specific reference to such examples.

The Complainant correctly noted that the Code affords advertisers two weeks to withdraw or appropriately amend online advertising (refer Clause 15.3.8 of the Procedural Guide). It added that the examples referenced in its breach allegation were available as recently as 22 September 2019, more than three weeks after the ARB ruling.

The Advertiser did not dispute this, but explained that its efforts were focussed on removing "current and planned" advertising, which included packaging, television advertising and print advertising. The Complainant's examples relate to old Facebook posts that were merely overlooked. However, as soon as the breach allegation was received, these posts were removed. Similarly, the material on www.blissbrands.com was updated on 23 September 2019.

It is worth noting that by the time the Advertiser submitted its response to this breach allegation, all the Facebook posts referred to by the Complainant had been removed.

Similarly, its www.blissbrands.com/laundry-care/ page no longer reflected the packaging that gave rise to the original dispute.

The Directorate has no compelling reason to reject the Advertiser's claim that these old posts were merely overlooked as its efforts were focussed on addressing "current and planned" advertising. The Directorate is also sympathetic to the fact that old Facebook posts would not be top of mind, as the Advertiser sought to comply with a far reaching decision. The fact remains, however, that the Advertiser, by its own admission, failed to give full effect to the ruling of 30 August 2019 by taking longer than the prescribed period of two weeks to remove the relevant advertising from its www.blissbrands.com and Facebook pages.

The Directorate therefore agrees that the Advertiser has breached the provisions of Clause 15 of the Procedural Guide (and by inference the ruling of 30 August 2019).

That being said, the Directorate is encouraged by the Advertiser's prompt removal of the examples submitted by the Complainant, and interprets this as an indication that the breach was inadvertent, rather than deliberate. No further sanction is therefore considered appropriate at this point.

The Advertiser is cautioned, however, to ensure that it removes any and all offending advertising as per the provisions of Clause 15.5 of the Procedural Guide.

The breach allegation is partially upheld, and the instructions to withdraw as issued in the Directorate's ruling of 30 August 2019 remain binding.