

WASPA APPEALS PANEL FINDINGS FOR COMPLAINT NO. 0326

STRIKE MEDIA

Appellant

9th of May 2007

DECISION

Background:

This is an appeal against a decision of the adjudicator in complaint 0326. The complaint itself stemmed from the receipt by a consumer of an SMS which read as follows:

“...congratulations, you have won a 19 piece knife set. Excluding postage and packaging R65.00...”

The complainant alleged that she had no prior commercial or other relationship with Homemark (the message originator / information provider). The complainant alleged that it was an unsolicited commercial message sent in contravention of clauses 3.1.2 and 5.3 of the WASPA Code of Conduct (“the Code”) and she also alleged that it amounted to an unfair business practice as defined by the DIT in <http://www.dti.gov.za/ccrd/ConsumerAlertMailOrderSelling.htm>.

The adjudicator’s ruling:

The adjudicator upheld the complaint and found that the Appellant had breached clauses 3.7.1, 4.2, 5.1.3, 5.1.5, 5.2.1, 5.3.1 and 5.3.2 of the Code. The adjudicator imposed a sanction of a fine of R5 000.00 for the sending of

unsolicited communications and a fine of R5000.00 in respect of the breach of privacy of the compliant.

Grounds of Appeal:

The Appellant denies breach of clauses 3.7.1, 4.2, 5.1.3, 5.1.5, 5.2.1, 5.3.1 and 5.3.2 of the Code.

The Appellant's grounds of appeal are as follows:

- **Ad point 1 of the appeal:** *Appellant not liable for breaches of clauses 5.1.3, 5.1.5 and 5.2.1 by the message originator*- it is alleged that the adjudicator erred in finding that the Appellant had breached these clauses of the Code as the Appellant argues that it was the information provider, as the originator of the message, that had breached these clauses of the Code.
- **Ad point 2 of the appeal:** *sending of spam, promotion of spam and failure to take reasonable measures to prevent spam* - it is alleged that the adjudicator erred in finding that the Appellant had sent spam, promoted the sending of spam and that it failed to take reasonable measures to prevent spam.
- **Ad point 3 of the appeal:** *breach of privacy* - it is alleged that the adjudicator erred in finding that the Appellant had breached the privacy of the compliant.
- **Ad point 4 of the appeal:** *severity of the sanction* – it is alleged that the sanctions imposed by the adjudicator are too harsh as the Appellant was not the message originator; this complaint was the first lodged against the Appellant; the Appellant is a small company making modest profits for each SMS that is sent; and in stead of imposing sanctions on the Appellant in term of clause 13.4 of the Code, the adjudicator should rather have issues a notice in terns of clause 13.5 of the Code to the information provider.

The final adjudication in this case follows:

This decision has been reached by a majority of the Appeals Panel.

Findings of the Appeals Panel and reasons

1. First ground of appeal: error in finding a breach of clauses 5.1.3, 5.1.5 and 5.2.1 by the Appellant-

The Appellant acknowledges that the information provider has breached these clauses of the Code; however, the Appellant is of the view that it should not be held responsible for such breaches.

The nub of the Appellant's argument seems to be that that the Appellant is not liable for the breaches of these clauses of the Code as it pertains to transgressions by the message originator. The Appellant correctly contends that Homemark is the "message originator" as contemplated by clause 2.13 of the Code. The Appellant argues that as clauses 5.1.3, 5.1.5 and 5.2.1 all pertain to transgressions by the message originator; the Appellant cannot be held liable for breaches of these clauses as it is not the message originator. The Appellant argues that as the information provider (i.e. the message originator) is bound by the Code it follows that the information provider should be held accountable for its transgression.

Members are accountable to WASPA for the rendering of services to customers in accordance with the Code. Members may either render services directly to customers or the services may be offered through information providers. The

Appellant is responsible for the information provider's adherence to the Code in accordance with clause 3.9 of the Code. Clause 3.9.1 provides that WASPA members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct. Furthermore, clause 1.6 of the Code makes provision for the applicability of the Code to non-members. The Appellant also annexed the terms and conditions that form the basis of its agreements with information providers. In terms of the Appellant's contractual provisions the parties agree that the standard terms and conditions are subject to the Code which is imposed on the parties by the industry association of WASPA (see clause 1(e) of the Strike Media Mobile Services Agreement). It is clear from the provisions of the Code, as well as its own contractual provisions, that the Appellant is responsible for any of the information provider's transgressions of the Code.

Although the Appellant conceded the breach of clauses 5.1.3, 5.1.5 and 5.2.1 of the Code, the correctness of the adjudicator's findings as far as these breaches are concerned will be reviewed. As far as the breach of clause 5.1.3 is concerned, the evidence is scant. In her complaint the complainant did not refer to the ability or inability to unsubscribe from the database. The adjudicator's ruling was not based on any fact but was based on an assumption. This finding should thus be set aside.

We now turn to consider the breach of clause 5.1.5 of the Code. The complaint centered on the fact that the message originator failed to identify the source from which the recipient's personal information was obtained. The recipient alleged that she had requested the message originator to provide her with the source from which her personal information was obtained but that representatives of the message originator were "rude and arrogant" and failed to provide her with the said details. Furthermore, the message originator also failed to respond to

Appellant's request for the details of the source of the recipient's details. In response to this aspect of the complaint the Appellant had noted that the recipient was either a "...bona fide record in their customer database either by referral or past purchase history". On appeal the Appellant failed to identify the source from which the recipient's personal information was obtained. The Appeals Panel has to conclude that the source of the information is unknown. This is clearly a breach of clause 5.1.5 of the Code.

As far as the breach of clause 5.2.1 is concerned, the Appeals Panel must decide whether the message in question was indeed spam. Any commercial message is considered unsolicited (and hence spam) unless (a) the recipient has requested the message; (b) the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so. The complainant alleged that the message was unsolicited and that she had no prior relationship with the message originator. Under the first ground of appeal it was established that neither the Appellant, nor the message originator could explain where the recipient's personal information was obtained from. The Appellant offered no evidence suggesting that the message originator had a prior commercial relationship with the recipient. It is thus clear that the message was neither requested, nor consented to. There is also no evidence of a direct and recent commercial relationship between the message originator and the recipient. The message the recipient received may thus unequivocally be characterised as spam.

Despite the conclusion that the message may indeed be regarded as spam, it should be noted that this clause defines when a message will be deemed to be spam, but it imposes no obligations. Clause 5.2.1 can therefore not be breached

but can only be used to determine whether other provisions of the Code have been breached.

In conclusion, The Appeals Panel rejects the Appellant's first ground of appeal, namely that it may not be held liable for the message originator's breaches of the Code.

The Appeals Panel sets aside the adjudicator's decision as far as the breaches of clauses 5.1.3 and 5.2.1 are concerned and confirms the adjudicator's decision as far as the breach of clause 5.1.5 is concerned.

2. Second ground of appeal: sending of spam, promotion of spam and failure to take reasonable measures to prevent spam

The first task in addressing the validity of this ground of appeal is to decide whether the message in question was indeed spam. Under the first ground of appeal above, it has been found that the message was indeed spam.

Clause 5.3.1 provides that members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose. Clause 5.3.2 provides that members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks. Clause 5.3.1 anticipates two different scenarios: firstly the situation where WASPA members themselves send unsolicited messages, and secondly the situation where other persons send such messages, using WASPA members' facilities. In the first scenario, the Code is clear: members must not send spam. In the second scenario the Code provides that members must not

promote the sending of spam by others and must take reasonable measures to ensure that their facilities are not used by others for the purposes of sending spam.

It was held above that the message that is the subject matter of this appeal should be regarded as an unsolicited communication or “spam”. The Adjudicator accepted the Appellant’s contention that it provided the messaging service on the message originator’s behalf. It must therefore follow that the adjudicator’s finding that the Appellant had breached the first part of clause 5.3.1 by sending spam is incorrect as the spam was sent by the message originator. It follows that the Appellant should also not be regarded as having breached clause 5.3.1 of the Code by promoting the sending of “spam”.

In the case of an information provider using a member’s facilities to send spam, the test for liability of the member is whether the member has taken “reasonable measures” to ensure that its facilities are not used for the sending of spam and, if the member followed the general provisions of clause 3.9 of the Code.

The next question to address is whether the Appellant took reasonable pre-emptive measures to prevent the sending of spam as required by the second part of clause 5.3.1. The Appellant has made the information provider subject to the WASPA Code by contract so it obliges its customers to comply with the Code as required by clause 3.9.1. The Appellant avers in its notice of appeal that it also binds information providers to its terms and conditions every time website credits are bought. The member’s terms and conditions explicitly prohibit the sending of spam. Clause 5.3.1 of the Code requires members to employ “reasonable measures” to ensure their system is not used for the sending of spam. The member has complied with the reasonable measures required by clause 5.3.1.

Clause 5.3.2 provides that members must provide a mechanism for dealing expeditiously with complaints about spam originating from their networks. Clause 3.9.2 provides that a member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.

The WASPA Code of Conduct is intended to provide a measure of self-regulation by members of the WASP industry and once a member is aware that the message originator has contravened of the Code, the member is obliged in terms of clause 3.9.2 to either suspend or terminate the services of the message originator. Unsolicited commercial messages are a source of great damage to the reputation of the WASP industry at present and clause 3.9.2 of the WASPA Code has provided the industry with a mechanism for reducing the number of unsolicited commercial messages sent. This mechanism exists in addition to the criminal procedures introduced by section 45 of the Electronic Communications and Transactions Act No. 25 of 2002. The ultimate success of any self-regulatory Code of Conduct depends on observance and peer enforcement by members. The Appeals Panel would regard members' suspension of the provision of services to message originators in terms of clauses 5.3.2 and 3.9.2 as an appropriate mechanism for dealing expeditiously with complaints about spam originating from such message originators.

However, as noted above, the Appellant only became aware of the complaint of spam that originated from its network once it was notified that a formal complaint had been lodged against it. The Appellant describes the steps taken after it became aware of the complaint and the alleged breach by the message originator in paragraphs 4.1 to 4.4 of its notice of appeal. The fact that the Appellant was only notified that the message originator had failed to comply with the provisions of clause 5.1.5 of the Code once the complaint escalated to a

formal procedure, effectively pre-empted the possible suspension of the message originator's services as required by clause 3.9.2. Furthermore, the Appellant's own mechanisms for dealing with complaints about spam (as indicated on its web site) was never put to use and can therefore not be found to be wanting.

Accordingly, the Appeals Panel sets aside the adjudicator's ruling that the Appellant had breached clauses 5.3.1 and 5.3.2 of the Code.

This ground of appeal is upheld.

3. Third ground of appeal: breach of privacy –

Insofar as the breach of privacy is concerned, the Appeals Panel does not regard the sending of an isolated unsolicited message to be an "unreasonable" invasion of a consumer's privacy especially when regard is had for the manner in which the right to privacy is framed in the constitution. The right to privacy in this context would include the right of a party not to have the privacy of her communications infringed. No evidence was put forward to support a finding that the Appellant had breached the provisions of clauses 3.7.1 or 4.2.2 of the Code by providing a service that resulted in the unreasonable invasion of privacy or by supplying or distributing the personal contact information of the recipient without her consent.

Furthermore, the original claim related to a contravention of clauses 3 and 5 of the Code. The Appeals Panel is of the opinion that the Adjudicator erred in failing to afford the Appellant an opportunity to respond to this additional alleged

contravention of clause 4.2.2 of the Code. Clause 13.3.8 of the Code provides that the adjudicator may request that the member respond to any additional breaches of the Code of Conduct discovered during the investigation of the complaint, but which were not specified in the original complaint. The adjudicator failed to follow these procedural guidelines and failed to offer the Appellant the opportunity to address these additional alleged breaches of the Code.

The Appeals Panel accordingly sets aside the adjudicator's decision that the Appellant had breached sections 3.7.1 and 4.2.2 of the Code.

This ground of appeal is upheld.

4. Fourth ground of appeal severity of the sanction –

The Appellant had argued that the sanctions imposed by the adjudicator are too harsh as the Appellant was not the message originator. The Appellant also argued that this complaint was the first lodged against the Appellant and that the Appellant is a small company making modest profits for each SMS that is sent. Lastly, the Appellant also argued that in stead of imposing sanctions on the Appellant in term of clause 13.4 of the Code, the adjudicator should rather have issued a notice in terns of clause 13.5 of the Code to the information provider.

The Appellant's argument that it was not responsible for breaches of the Code that related solely to the message originator has already been dealt with under the first ground of appeal and is thus irrelevant. The fact that this is the first complaint against the Appellant and the modesty of its profit margin is also

deemed to be irrelevant. Lastly, Appellant's suggestion that the adjudicator should rather have addressed a notice to the information provider in terms of clause 13.5 of the Code is also irrelevant. The purpose of such notification is to inform members of steps to be taken by the industry as a whole should an information provider persist in operating in breach of the Code.

This ground of appeal is rejected.

Decision

The Appeals Panel finds that the Appellant did not contravene clauses 3.7.1, 4.2, 5.1.3, 5.2.1, 5.3.1 and 5.3.2 of the Code. The findings of the adjudicator in this respect are accordingly set aside.

The Appeals Panel finds that the Appellant contravened clause 5.1.5 of the Code. The findings of the adjudicator in this respect are accordingly confirmed.

In conclusion, the appeal is upheld on some grounds and rejected in other respects. The findings of the adjudicator are accordingly amended.

The Appeals Panel modifies the sanction imposed by the adjudicator as follows: The Appellant is ordered to pay a fine of R2 000.00 in respect of the breach of clause 5.1.5 of the Code.

The Appellant must within five (5) days of the receipt of this decision suspend the services of the message originator for a period of no less than thirty (30) days. If the Appellant offers no WASP services to the message originator at the date of this decision, then this last sanction of suspension fall away. The suspension of services must be confirmed to the Secretariat in writing, if applicable.

Twenty five per cent (25%) of the appeals fee is to be forfeited.

The Appeals Panel

Dissenting Report:

I have read the decision of the majority of the Appeals Panel and am in agreement therewith save for the upholding of the Adjudicator's finding of a breach by the Appellant of section 5.1.5 of the Code of Conduct (version 4.3) and the imposing of a sanction in respect thereof.

The Appellant correctly contends that Homemark should be regarded as the **"message originator"** as defined in section 2.14 of the Code and as used in section 5.1.5. Homemark is therefore also an **"information provider"** as defined in section 2.12. The Adjudicator has noted that section 3.9.1 of the Code provides that members **"must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct"** however it is often not possible, especially where a member renders conduit messaging services, for a member to **"ensure"** that none of the services contravene the Code or that an information provider does not conduct itself in any manner that would amount to a breach of the Code.

Section 3.9.1 cannot be interpreted as imposing an impossible obligation on a member and it must, in my opinion, be construed as placing an obligation on the member to secure an appropriate contractual undertaking from an information provider that the information provider will conduct itself in conformance with the provisions of the Code. If an information provider breached such an undertaking, it would accordingly be in breach of its agreement with the member. In such circumstances, section 3.9.2 of the Code requires a member to suspend or terminate the rendering of services to that information provider.

Section 1.6 of the Code provides that “**some companies** [including information providers] **may be required to comply with the WASPA code by virtue of a contract... with one or more voting WASPA members**” (own emphasis) and that clauses in the Code “**that are binding on WASPA members shall be deemed to be binding on those companies, irrespective of whether or not those companies are members of WASPA**” (own emphasis). This section confirms that the obligation on an information provider to act in conformance with the provisions of the Code arises and exists as a contractual obligation between an information provider and a member. The crisp questions which result from the wording of the above provisions of the Code are, firstly, whether a non-member, by contracting with a member (and incorporating the provisions of the Code into any such contract) thereby assumes a direct obligation to WASPA and, secondly, whether the deeming provisions of section 1.6 read together with section 3.9.1 of the Code renders a member generally and strictly liable for the conduct of an information provider with whom it has contracted. Only the second question falls to be considered in this appeal.

There are three grounds for holding that the Code does not provide generally for strict liability of a member for the conduct of an information provider.

The first ground arises from considerations of reasonableness and fairness towards members where they act as mere conduits in the provisioning of messaging services. Members are simply not always in a position to reasonably prevent breaches of the Code by their customers and the Code expressly recognises this in the case of unsolicited commercial messages (i.e. “spam” in terms of section 5.2.1) and imposes an obligation on a member in terms of section 5.3.1 not send spam themselves, nor promote the sending of spam by others and to take “**reasonable measures**” to ensure that its services are not used by others for the sending of spam. Section 5 of the Code relates to commercial messaging generally and section 5.1 to sending of commercial

communications. Section 5.1.5, which section the member was found to have breached, and which finding the member has appealed, states:

“5.1.5. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient’s personal information was obtained.”

Section 5.1.5 expressly imposes an obligation on a message originator. Even if not expressly stated in the Code, it must logically be implied that the limitation of conduit liability that applies to the sending of unsolicited commercial messages by a message originator using a member’s services must apply equally where a message originator of a commercial communication fails to disclose the source of a message recipient’s information. To hold to the contrary would be illogical and irrational and would operate unreasonably and unfairly towards members.

The second ground arises from considerations of reasonableness and fairness to message originators and recipients. If members were held to be generally and strictly liable for all conduct of their customers they would be required to scrutinise all messages their customers transmit using their services, including the content thereof, in order to ensure that their customers do not breach the Code. This would amount to a gross violation of the right to privacy of communications of message originators and message recipients and would undermine the primary purpose of the Code which is to inspire the public’s confidence in the use of mobile services (section 1.2 of the Code).

The third ground exists as a consequence of the specific inclusion in the Code of section 13.5 which states as follows:

“13.5.1 If the adjudicator has determined that an information provider is operating in breach of the Code of Conduct, and the adjudicator is of the reasonable opinion that the information provider may persist in such breach, whether through the member against whom the complaint was lodged or another member, the adjudicator may instruct the secretariat to issue a notice to WASPA’s members.

13.5.2 The notice referred to in 13.5.1 must clearly identify the information provider and the relevant breach or breaches of the Code of Conduct, and must specify a date from which the notice applies.

13.5.3 Any member permitting the information provider to operate in breach of the Code of Conduct (in the same or substantially similar manner to that identified in the notice referred to in 13.5.1), after the date specified in the notice, will automatically be in breach of the same part or parts of the Code as the information provider. Such members will be subject to sanctions determined by the adjudicator in accordance with section 13.4, read in conjunction with section 13.3.11”. (Sections 13.4 and 13.3.11 suggest possible sanctions that may be imposed against a member taking into account previous offences).

If section 3.9.2 was interpreted as meaning that a member was taken to have breached the Code and be subject to sanction whenever an information provider acted in contravention of the Code, then section 13.5 would be entirely redundant. Such a redundancy should be presumed against. Section 13.5.3 can only have purpose and meaning if strict liability is not taken to generally arise by virtue of any other section of the Code. Section 3.9.2 is certainly capable of more than one meaning and any ambiguity must be resolved in a manner that is not inconsistent with the clear and unambiguous meaning of section 13.5.

From the information contained in the Adjudicator's report, it appears that the message originator did not have a recent prior commercial relationship with the recipient nor that the recipient had consented to the receipt of the message or use of her contact information. It also appears clear that the message originator was unable to disclose the source of her personal information. In the circumstances, it appears reasonable to assume that the message originator may have been making use of a compiled list of non-consenting message recipients and may persist in breaching the Code in the manner that it has.

I would accordingly uphold the appeal against the Adjudicator's finding of a breach by the Appellant of section 5.1.5 of the Code and I would substitute for the Adjudicator's decision a finding that the message originator had breached section 5.1.5 and direct the issuance by the Secretariat of a section 13.5.2 notice identifying the information provider (i.e. Homemark), identifying the sections breached by the information provider (i.e. 5.1.5) and notifying members that any member permitting the information provider to operate in breach of the Code in a substantially similar manner from the date of issue of the notice will be in breach of the same part of the Code and may be subject to sanctions determined in accordance with section 13.4 of the Code read with section 13.3.11.

20th of June 2007.