Appeal Panel Report

Complaint number	**#26066**
Appellant	Cellfind (Pty) Limited
Adjudication report date	
Date appeal lodged	2015-07-03
Appeal decision date	
Appeal short description	The appellant appealed against an adjudicator's decision on the basis that clause 3.7 was incorrectly invoked to infer responsibility for a customer's breach of the Code.
Applicable version of the Code	13.6
Clauses of the Code cited	3.4, 3.7
Related complaints considered	No other complaints considered
Appeal decision summary	The appellant failed to demonstrate that it took “reasonable steps” to ensure its customer's compliance with the Code. As a consequence, it is liable for its customer's breach of the Code

	under clause 3.4 of the Code.
Is this appeal report notable?	Notable
Summary of notability	This report considers the scope of clause 3.4 in the context of service provider member liability for member customers' non-compliance with the Code.

The appeal

The appellant lodged an appeal against the adjudicator's report on a fairly narrow ground. The adjudicator found the appellant responsible for a non-compliant campaign conducted by the appellant's customer ("the customer") on the basis of clause 3.7 of the Code.

The appellant argued that while the customer ceased to be a WASPA member by the time the complaint was adjudicated, the customer was, in fact, a customer at the time the offending campaign was conducted. As a consequence, the appellant argued, the adjudicator ought not to have ruled against the appellant on the basis of clause 3.7. The appellant's core argument is set out in paragraphs 2, 3, 4 and 5 of its appeal submissions.

Sections of the Code considered

Version 13.6 of the Code of Conduct is applicable to this appeal.

> ***Customers who are also WASPA members***
>
> *...*
>
> *3.4. A member is not liable for any breaches of this Code of Conduct resulting from services offered by a customer, if that customer is also a member of WASPA, provided that the member can demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct.*
>
> ***Customers who are not WASPA members***

...

3.7. A member is liable for any breaches of this Code of Conduct resulting from services offered by a customer, if that customer is not also a member of WASPA. If the member can demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct, this must be considered as a mitigating factor when determining the extent of the member's liability for any breaches.

The issues and analysis

We have two questions to consider:

1. Was the appellant responsible for the customer's breach of the Code?
2. If the answer to question 1 is "yes", what is the appropriate basis for holding the appellant responsible for the customer's breach?

The first step is to establish whether the campaign that formed the subject matter of the complaint breached the Code's provisions? The next step was to establish who was liable? Usually the second step flows from the first but, in this matter, the facts were somewhat more complicated.

The facts are time sensitive. As the adjudicator explained in paragraphs 12, 13 and 14 of the adjudicator's report –

On 21 January 2015, a complaint was duly filed by WASPA against the IPrelating to the campaign in question. An Emergency Panel procedure was duly followed and a report issued to the IP on 28 January 2015, instructing the IP to inter alia cease and desist from conducting the SMS promotional campaign.

On 5 February 2015 and subsequent to the Emergency Panel Report being issued, the IP cancelled their membership with WASPA, resulting in the matter being unable to proceed to adjudication because WASPA lacked jurisdiction to enforce any further sanctions against the IP.

Notwithstanding the fact that the IP did not continue with the campaign and it has since been withdrawn, WASPA elected to enforce its rights by re-issuing the complaint against the SP.

In other words, the customer was a WASPA member when the campaign was conducted and ceased being a member when the Secretariat initiated complaint 26066 against the appellant.

Both clauses 3.4 and 3.7 contemplate situations where primary responsibility for non-compliant campaigns being attributable in the provider conducting the campaign and ancillary responsibility being attributable to the WASPA member in the appellant's position as a service provider.

There are two differences between clauses 3.4 and 3.7:

1. Under 3.4, the campaign operator can be held accountable by WASPA as a member and, under 3.5, the campaign operator falls outside WASPA's jurisdiction so the emphasis shifts to the service provider member.

2. Under clause 3.4, the service provider member **is not liable** for the campaign operator's non-compliance with the Code, provided the service provider member "can demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct". On the other hand, a service provider member **is liable** for the campaign operator's non-compliance although it can mitigate the extent of its liability if it "can demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct".

The appellant appears to accept that the customer's campaign breached the Code. It is, however, challenging the finding that it is liable for the customer's breach.

The adjudicator incorrectly considered clause 3.7 when assessing the appellant's possible responsibility for the customer's non-compliant campaign. Clause 3.7 ought not have been applicable given that the customer was a WASPA member at the time the offending campaign was conducted.

Instead the adjudicator ought to have considered clause 3.4 which also changes the analysis the adjudicator ought to have conducted. The default position under clause 3.4 is that the service provider member (in this case, the appellant) is "not liable for any breaches of this Code of Conduct

resulting from services offered by a customer" (in this case, the customer) provided that the appellant can demonstrate that it has "taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct".

The appellant indicated that it takes steps to ensure that it reviews non-WASPA members' campaigns to ensure their compliance with the Code[1] although, when it comes to WASPA members, it takes a different approach[2]:

> *If it has been established that a Customer is in fact a member of WASPA this, for the average reasonable aggregator, would suffice as being a reasonable step to ensure that that customer's messages will, in fact, be WASPA compliant at all relevant times.*

The appellant commented further on what it could reasonably have been expected to do where its customer was a WASPA member:

14. *It would be impossible and unreasonable to expect of a member to check all messages being sent out at all relevant times.*

15. *The reasonable average aggregator cannot be expected to foresee that a member customer will not comply with the provisions of the code. Non-compliance by a member customer should therefore be viewed as the exception and not the rule.*

16. *Secondly, we respectfully have to disagree with the Adjudicator's finding that "It would have been a simple exercise for the SP to check that these requirements were being met before the campaign became active"2 (our emphasis)*

17. *The Adjudicator, in erroneously applying what seems to be a subjective test, implies that there rests an obligation on a member, in the code, that such a member must interrogate their member customer (or its client) and obtain information from that customer which may be proprietary to that customer or which may be protected by confidentiality agreements. It is unreasonable to expect of a member to not only run its own business, but to also be intertwined in and administer the business affairs of its customers (and their clients). This*

1 At paragraph 12 of the appellant's appeal submissions

2 At paragraph 13

course of action will have an adverse effect on any commercial relationship and members will undoubtedly suffer prejudice as a result.

Whether requiring a service provider member to review all messages that pass through its systems is unreasonable is to be determined largely on a case by case basis. We disagree with the highlighted portion of the appellant's submissions, in particular. Service provider members are not necessarily required to interrogate their customers' confidential information. They are required to take reasonable steps to ensure their customers conduct compliant campaign and this may include reviewing campaign messages to ensure they are compliant. Those campaign messages could not possibly constitute confidential information given that they are intended to be distributed publicly.

As we pointed out above, clause 3.4 absolves the appellant of responsibility for the customer's breach if the appellant can demonstrate that it too reasonable steps to ensure the customer's compliance with the Code. The appellant, in its submissions to the Secretariat during the adjudication process indicated what it considered to be “reasonable steps”:

Cellfind has taken all reasonable steps to ensure that RMCS complies with the code of conduct as set out by WASPA. The fact that RMCS held an official membership reassured Cellfind in considering reasonable steps to comply. We believe Cellfind has conducted in a professional manner and acted supportive with regards to rectifying the breach at hand.

In other words, the “reasonable steps” the appellant took were to satisfy itself that the customer was a WASPA member. The appellant did not demonstrate any further steps it took to ensure the customer conducted itself consistently with the Code's requirements.

Clause 3.4's requirement that a service provider member “demonstrate that [it has] taken reasonable steps” is a requirement that service provider members take proactive steps to ensure compliance with the Code. Such steps may include moderating message templates for customers' campaigns or taking other proactive steps to ensure compliance before campaigns go live and beyond simply confirming that a customer is a WASPA member.

In our view, the appellant did not “demonstrate that [it took] reasonable steps to ensure that [the] customer [provided] services in a manner consistent with the requirements of this Code of Conduct”.

Decision

We find that the appellant failed to discharge the onus imposed on its by clause 3.4 sufficiently to absolve it of responsibility for the customer's non-compliance with the Code. We therefore dismiss the appeal.

The appellant forfeits its appeal fee.