

Tribunal meeting number 183 / Case 2

Case reference: 87232
Case: Prohibition of an associated individual

THIS CASE WAS BROUGHT AGAINST THE ASSOCIATED INDIVIDUAL UNDER PARAGRAPH 4.8.7 OF THE CODE

BACKGROUND

i) Summary relating to Mr Martyn Gallagher

The Tribunal was asked to consider imposing a prohibition against Mr Martyn Gallagher pursuant to paragraph 4.8.2(g) of the 13th edition of the PhonepayPlus Code of Practice (the “**Code**”).

The case related to an adjudication against the Level 2 provider New SMS Media Limited (the “**Level 2 provider**”) (29 October 2015, case reference: 81837), which concerned breaches of the sanctions imposed by an earlier Tribunal (23 July 2015, case references: 29396), and non-payment of the associated administrative charges. The case on 23 July 2015 concerned adult and glamour video subscription services operated by the Level 2 provider (the “**Service**”). In that adjudication, the Level 2 provider was found to have not treated consumers fairly and equitably (as an application used to market the Service suppressed service messages), to have charged consumers without holding evidence of their consent, and to have marketed the Service by sending a WAP marketing text to consumers without their consent.

On 29 October 2015, the Tribunal instructed the Executive to initiate the process which may lead to the prohibition of Mr Gallagher pursuant to paragraph 4.8.2(g) of the Code.

The Tribunal considered the following evidence in full:

- The Tribunal decisions against the Level 2 provider dated 23 July 2015 and 29 October 2015;
- Extracts from the Companies House database in respect of the Level 2 provider, including notifications of appointment of Mr Gallagher as a director, and notification of appointment of a liquidator;
- Contracts signed by Mr Gallagher for the Level 2 provider dated 4 April 2013 and 11 December 2013;
- Correspondence between the Executive and the Level 2 provider, including with Mr Gallagher;
- An extract from the PhonepayPlus registration database identifying Mr Gallagher as director of the Level 2 provider;
- Correspondence between the Executive and the Level 2 provider post –23 July 2015; and
- Proof of service of the prohibition letter by post and email on Mr Gallagher and the Level 2 provider.

The Executive conducted this matter in accordance with paragraph 4.8.7 of the Code. On 12 May 2016, the Tribunal reached a decision regarding the imposition of a prohibition on Mr Gallagher.

Preliminary Issue - Service

The Tribunal noted that the Executive had sent notification of a potential prohibition to Mr Gallagher, and the Level 2 provider on 18 April 2016 but it did not receive a response.

Though the Tribunal noted that Mr Gallagher had last corresponded directly with the Executive on 16 May 2014 to state that “I am no longer involved in this market”, the Tribunal also noted Mr Martyn Gallagher had, on 18 December 2015, signed minutes to authorise appointment of liquidators for the Level 2 provider.

The Tribunal heard that the prohibition letter had been sent to the registered office address of the Level 2 provider prior to liquidation. The Tribunal heard that the original breach letters would also have been posted to the Level 2 provider’s registered office address at the time of sending. The Tribunal heard that the prohibition letter had been sent to the liquidator’s address, which was signed for on 19 April 2016, together with a covering note stating that, although they were not required to take any further action, the Executive would ask them to forward the letter to Mr Gallagher. The Tribunal heard that the prohibition letter had also been sent by post to the address for Mr Gallagher as recorded in 2013 on the Level 1 provider’s due diligence file for the Level 2 provider. The Executive confirmed they had had no response from the liquidator, and they had not spoken to them by telephone.

The Tribunal examined the proof of service of the prohibition letter, including signed-for postal delivery receipts in respect of the Level 2 provider’s registered address and two last known addresses for Mr Martyn Gallagher (one of which had been signed for by a “Gallacher”), and evidence that the emailed version of the prohibition letter sent only to the director’s email address as registered with PhonepayPlus had been sent and attachments downloaded.

The Tribunal was satisfied, in accordance with paragraph 4.8.7 of the Code, that the Executive had made all reasonable attempts to notify Mr Gallagher and the relevant parties in writing of the prohibition proceedings.

ii) Relevant Code provisions

- Paragraph 4.8.2(g) of the Code states:

“The Tribunal can apply a range of sanctions depending upon the seriousness with which it regards the breach(es) upheld.... Having taken all relevant circumstances into account, the

Tribunal may impose any of the following sanctions singularly or in any combination in relation to each breach as it deems to be appropriate and proportionate...

(g) prohibit a relevant party and/or an associated individual found to have been knowingly involved in a serious breach or series of breaches of the Code from providing, or having any involvement in, any premium rate service or promotion for a defined period.”

- Paragraph 5.3.9 of the Code states:

“Associated individual’ is any sole trader, partner or director or manager of a premium rate service provider, anyone having day to day responsibility for the conduct of its relevant business and any individual in accordance with whose directions or instructions such persons are accustomed to act, or any member of a class of individuals designated by PhonepayPlus”.

- Paragraph 4.8.7 of the Code states:

“If a Tribunal considers that it may wish to make a prohibition under sub-paragraph 4.8.2(f), 4.8.2(g) or 4.8.2(h) in respect of any associated individual, PhonepayPlus shall first make all reasonable attempts to notify the individual concerned and the relevant party in writing. It shall inform each of them that any of them may request an opportunity to make informal representations to the Tribunal and of the right of any of them (or PhonepayPlus itself) to instead require an oral hearing”.

SUBMISSIONS AND CONCLUSIONS

1. The Executive submitted that the following evidence indicated that Mr Gallagher was an associated individual knowingly involved in a series of breaches of the 12th and 13th Editions of the PhonepayPlus Code of Practice (the “Code”), in respect of the adjudications of 23 July 2015 and 29 October 2015 against the Level 2 provider.

Adjudication on 23 July 2015 - case reference 29396

On 23 July 2015, the Tribunal adjudicated against the Level 2 provider.

Between 13 June 2013 and 2 September 2014, PhonepayPlus received 46 complaints from consumers in relation to the Service. The majority of the complainants stated that they had received unsolicited, reverse-billed text messages but that they had not engaged with the Service. In addition to this, concerns regarding an application used to promote the Service were uncovered as a result of a blog article by the anti-virus vendor Kaspersky Labs. Samples were provided to the PhonepayPlus Research and Market Intelligence team, which identified concerns regarding the operation of the application that appeared to utilise a form of malware that suppressed the receipt of Service messages.

The Executive had asserted that the Level 2 provider had acted in breach of rule 2.3.1 of the Code, as the Application for the Service suppressed service messages. The Executive had submitted that the suppression of messages resulted in consumers who engaged with the Application not being aware that they had been subscribed to the Service or that they were incurring weekly charges.

Further, the Executive had asserted that the Level 2 provider had acted in breach of rule 2.3.3 of the Code for the following reasons:

- 1) Consumers did not give valid consent to being charged as clicking any part of the screen on the Application automatically initiated a subscription; and
- 2) The Level 2 provider had not provided evidence to establish that complainants who had entered the Services through Wireless Application Protocol (“WAP”) opt-in had consented to be charged.

Further, the Executive had asserted that the Level 2 provider had acted in breach of Code Rule 2.4.2 as it had purchased marketing lists from third parties who had not obtained consumers’ hard opt-in to be contacted. Accordingly, the Level 2 provider had contacted consumers by sending a WAP marketing text message without their consent.

The Tribunal upheld the following breaches of the Code:

- Rule 2.3.1 – Fair and equitable treatment
- Rule 2.3.3 – Consent to charge
- Rule 2.4.2 – Consent to market

The Tribunal determined that the seriousness of the case overall was very serious and imposed the following sanctions:

- a formal reprimand;
- a warning that if the Level 2 provider fails to demonstrate that it has robust verifiable evidence of consumer’s consent to charge in the future it should expect to receive a significant penalty;
- a fine of £200,000;
- a requirement that, within three months of the Level 2 provider re-commencing trading, the Level 2 provider submit to a compliance audit of its procedures for ensuring consumers provide valid consent to be charged and that it has robust verifiable evidence of that consent, the recommendations of the audit must be implemented within a period defined by PhonepayPlus, the audit must be conducted by a third party approved PhonepayPlus and the costs of such audit must be paid by the Level 2 provider; and

- a requirement that the Level 2 provider must refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, 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

In addition to the above sanctions, the Tribunal recommended that the Level 2 provider pay 100% of the administrative costs incurred by PhonepayPlus.

Adjudication on 29 October 2015 - Case reference 81837

The Tribunal adjudicated against the Level 2 provider for non-compliance with the sanctions imposed by the Tribunal on 23 July 2015 and non-payment of the associated administrative charge.

The Tribunal upheld the following breaches of the 13th Code:

- Paragraph 4.8.5 (b) – Failure to comply with a sanction
- Paragraph 4.10.2 – Non-payment of an administrative charge

The Tribunal concluded that both breaches were very serious. The Tribunal determined that the seriousness of the case overall was very serious and imposed the following sanctions:

- a formal reprimand; and
- a prohibition on the Level 2 provider from providing, or having any involvement in any premium rate service for a period of five years, starting from the date of publication of the decision, or until payment of the fine and original and instant administrative charges, whichever is the later.

In addition to the above sanctions, the Tribunal recommended that the Level 2 provider pay 100% of the administrative costs incurred by PhonepayPlus.

Associated individual knowingly involved in a serious and/or series of breaches of the 12th Code

The Executive noted that Mr Gallagher was the sole director of the Level 2 provider from the date of incorporation of the company on 27 January 2011 until 18 December 2015 at least, when the company entered into voluntary liquidation. This had been confirmed by Companies House reports.

Accordingly, the Executive asserted that as a result of Mr Gallagher's role as the sole director of the Level 2 provider, he was an associated individual of the Level 2 provider in accordance with the definition in paragraph 5.3.9 of the Code when breaches, including very serious breaches of the Code, were upheld by the Tribunal on 23 July 2015 and 29 October 2015.

The Executive asserted that, for the purposes of paragraph 4.8.2(g) of the Code, the evidence gathered further demonstrated that the associated individual, Mr Gallagher, was knowingly involved in a series of serious and very serious breaches of the Code which were upheld by Tribunals on 23 July 2015 and 29 October 2015.

23 July 2015 – Case reference 29836

The Executive asserted that, as the sole director of the Level 2 provider, Mr Gallagher was, at the time the very serious breaches of the Code occurred, exclusively responsible for oversight of the company affairs and ensuring that the company was properly managed.

The Executive noted that Mr Gallagher was also the sole shareholder of the Level 2 provider, and accordingly had a personal interest in the company in addition to his fiduciary duty to ensure that all commercial activities, including the operation of premium rate services, were conducted in compliance with the law and regulatory obligations.

Further, when considering that Mr Gallagher was the sole director of the Level 2 provider, the Executive asserted that it was highly unlikely that he would have been unaware of the non-compliant manner in which the Service was operating. The Executive particularly noted that, during the period of Mr Gallagher's directorship, key business actions and decisions of the Level 2 provider, which led to the launch and operation of the non-compliant premium rate Service, were taken. The Executive noted Mr Gallagher, as a sole director of the Level 2 provider, actively participated in the following:

- i) The signing of a Gateway Agreement between the Level 1 and Level 2 provider for the provision of services (signed on behalf of the Level 2 provider by Mr Gallagher on 4 April 2013); and
- ii) The signing of a novation agreement between the Level 2 provider and another Level 2 provider (the "**New Level 2 provider**") (signed on behalf of the Level 2 provider by Mr Gallagher on 11 December 2013).

In addition to the above, the Executive noted Mr Gallagher was listed as the responsible person on the PhonepayPlus Registration Scheme for the entirety of the relevant period.

The Executive further asserted that, during Mr Gallagher's directorship, key events occurred which would have alerted him to the fact that the Level 2 provider was likely to be operating a non-compliant Service:

- i) PhonepayPlus received 46 complaints regarding the Service and notified the Level 2 provider of each complaint during Mr Gallagher's directorship, the earliest being on 13 June

2013. The Executive noted that out of the 46 complaints, 40 were received by PhonepayPlus prior to the novation of the Service to the New Level 2 provider; and

- ii) PhonepayPlus issued a number of requests for information regarding the Service following ongoing receipt of the above complaints. Whilst the responses received by the Executive appeared to be sent by another individual, the Executive submitted that as director, Mr Gallagher ought to have been reasonably aware of these complaints.

The Executive noted that it had no evidence of any action taken by Mr Gallagher to address the issues raised by PhonepayPlus during his directorship. The Executive accordingly submitted that Mr Gallagher was aware that his company was likely to be operating a non-compliant Service, but did not take any action to rectify the issues and continued to allow the Service to operate without alteration despite the ongoing regulatory action by PhonepayPlus and the influx of complaints.

In addition to the above, the Executive noted that the Level 2 provider had submitted a detailed response to a preliminary direction dated 7 November 2013, and that Mr Gallagher was copied into this correspondence demonstrating he had a thorough knowledge of the Service under investigation and was knowingly involved in the production of the features that were in breach of the Code. In that response were included the following statements.

In relation to the alleged breach of paragraph 2.4.2 of the Code, the Level 2 provider explained that marketing lists were purchased for the purpose of advertising the Service:

“The MSISDNs that have been passed onto us that originate from voices services are promoted on television. Our clients strictly adhere to guidelines set out by PhonepayPlus and Ofcom/BCAP. Attached is an example of the terms and conditions promoted on television that detail their marketing policy.”

Notwithstanding the above comment in which the Level 2 provider asserted that consumers had consented to receive promotions, the Tribunal on 23 July 2015 found that consumers had not in fact provided consent in compliance with rule 2.4.2 of the Code. Accordingly the Executive asserted that Mr Gallagher, as director of the Level 2 provider, was knowingly involved in the marketing process which was later found to be in breach of the Code.

Further, with respect to the second part of the breach against the Level 2 provider with respect to rule 2.3.3 of the Code, in the same correspondence, the Level 2 provider was asked to provide evidence of robust verification of consent to charge for specific consumer MSISDNs. The Level 2 provider stated:

“As detailed above, pinchecked was integrated and activated on 22 July 2013, however the MSISDNs detailed above fall outside this period with the exception of one MSISDN which was opted-in via MO in August.”

The Executive noted that, despite the Level 2 provider's assertions to the contrary, at no stage was data relating to the WAP opt-in complainants held by a third party, nor was there any evidence that it was held in a way which means it categorically could not have been tampered with since creation.

On this basis the Executive submitted that as a sole director of a company operating premium rate services in the UK, Mr Gallagher would have been aware of the requirements of the Code and ought to have taken measures to ensure that evidence of consumer opt-in to the Service was robustly verifiable by a third party.

The Executive therefore submitted that, with respect to the breaches of rules 2.4.2 and 2.3.3 of the Code, Mr Gallagher was fully aware of the method in which the Service was operated but failed to take adequate measures to ensure that both rules of the Code were satisfied. On this basis, and having taken into account the above arguments concerning Mr Gallagher's fiduciary duties, the Executive asserted that Mr Gallagher was knowingly involved in the breaches of rules 2.4.2 and 2.3.3 of the Code.

29 October 2015 - case reference 81837

The Executive noted that throughout the underlying case 29396, the Executive issued various directions for information to the Level 2 provider. On 16 May 2015, Martyn Gallagher on behalf of the Level 2 provider notified the Executive that it was no longer operating in the market and all future correspondence should be sent to the New Level 2 provider.

The Executive sent a breach letter to the Level 2 provider on 26 June 2015. The Executive did not receive a response to the breach letter but it was signed for at the Level 2 provider's registered address.

Following the Tribunal, on 23 July 2015 the Executive sent the Level 2 provider a formal notification of the outcome of the adjudication (to the same address as the breach letter) in relation to the Level 2 provider's non-compliance with sanctions which included an invoice for payment of the £200,000 fine to be made within seven calendar days. The deadline for compliance with the fine sanction passed without PhonepayPlus receiving payment.

On 17 August 2015, the Executive issued the Level 2 provider with a reminder that the payment of the invoices was outstanding and overdue. The Level 2 provider failed to respond.

During the Tribunal of 29 October 2015 the Tribunal considered the confirmations of delivery of the breach letter by post and email to the Level 2 provider, and was satisfied that the Executive had made all reasonable attempts to inform the Level 2 provider of the proceedings. On 29

October 2015, the Tribunal reached a decision on the breaches raised by the Executive. The Level 2 provider was notified of the Tribunal's decision on 11 November 2015 but failed to respond.

Notwithstanding the fact that the Level 2 provider went into liquidation on 18 December 2015, the Executive asserted that, at the time the breaches of paragraphs 4.8.5(b) and 4.10.2 of the Code occurred (i.e. on 14 August 2015, when the fine and administrative charge that was payable following conclusion of case ref: 29396 became overdue), Mr Gallagher was responsible for ensuring that the Level 2 provider (i) adhered to sanctions imposed against it by the Tribunal on 23 July 2015, and (ii) paid the resulting administrative charge. The Executive asserted that this was further supported by the fact that Mr Gallagher attended the General Meeting of New SMS Media Ltd in his capacity as Chairman in order to pass the special resolution to voluntarily wind up the company (this being evidenced by Mr Gallagher's signature appearing on the document for the minutes of this General meeting).

The Executive accordingly submitted that, as demonstrated in the above evidence, Mr Gallagher was knowingly involved in the non-payment of the fine and administrative charge, which ultimately resulted in two further very serious breaches of the Code occurring and being upheld by a Tribunal on 29 October 2015.

2. Mr Gallagher did not provide a response to the notification of potential prohibition.
3. The Tribunal considered the Code and all the evidence presented to it.

The Tribunal found that, in accordance with paragraph 5.3.9 of the Code, Mr Gallagher was an associated individual for the reasons raised by the Executive. The Tribunal noted that Mr Gallagher had failed to engage with the Executive, but nevertheless as sole director at all relevant times, Mr Gallagher had the responsibility for decisions on compliance with the Code, and sanctions, including whether to pay fines and administrative charges. The Tribunal found that, for the reasons raised by the Executive, Mr Gallagher was knowingly involved in a series of very serious breaches of the 12th and 13th Code, which were upheld against the Level 2 provider on 23 July 2015 and 29 October 2015.

Sanction

The Tribunal considered the facts of the case, and in particular the number of very serious breaches with which Mr Gallagher was knowingly involved as an associated individual and the sanctions applied, the manner in which Mr Gallagher had failed to engage with the Executive, and the amounts outstanding pursuant to sanctions.

In accordance with paragraph 4.8.2(g) of the Code, the Tribunal decided to prohibit Mr Gallagher from providing, or having any involvement in, any premium rate service for a period of five years from the date of publication of this decision.

Administrative charge recommendation:

100%