

# **Ofcom Broadcast Bulletin**

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## Introduction

The Broadcast Bulletin reports on the outcome of investigations into alleged breaches of those Ofcom codes and licence conditions with which broadcasters regulated by Ofcom are required to comply. These include:

- a) Ofcom's Broadcasting Code ("the Code"), the most recent version of which took effect on 28 February 2011 and covers all programmes broadcast on or after 28 February 2011. The Broadcasting Code can be found at:  
<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>.

Note: Programmes broadcast prior to 28 February 2011 are covered by the version of the Code that was in force at the date of broadcast.

- b) the Code on the Scheduling of Television Advertising ("COSTA") which came into effect on 1 September 2008 and contains rules on how much advertising and teleshopping may be scheduled in programmes, how many breaks are allowed and when they may be taken. COSTA can be found at:  
<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/advert-code/>.

- c) certain sections of the BCAP Code: the UK Code of Broadcast Advertising, which relate to those areas of the BCAP Code for which Ofcom retains regulatory responsibility. These include:
- the prohibition on 'political' advertising;
  - sponsorship (see Rules 9.16 and 9.17 of the Code for television broadcasters);
  - 'participation TV' advertising. This includes long-form advertising predicated on premium rate telephone services – most notably chat (including 'adult' chat), 'psychic' readings and dedicated quiz TV (Call TV quiz services). Ofcom is also responsible for regulating gambling, dating and 'message board' material where these are broadcast as advertising<sup>1</sup>; and
  - the imposition of statutory sanctions in advertising cases.

The BCAP Code can be found at:

[www.bcap.org.uk/The-Codes/BCAP-Code.aspx](http://www.bcap.org.uk/The-Codes/BCAP-Code.aspx)

- d) other licence conditions which broadcasters must comply with, such as requirements to pay fees and submit information which enables Ofcom to carry out its statutory duties. Further information on television and radio licences can be found at: <http://licensing.ofcom.org.uk/tv-broadcast-licences/> and <http://licensing.ofcom.org.uk/radio-broadcast-licensing/>.

Other codes and requirements may also apply to broadcasters, depending on their circumstances. These include the Code on Television Access Services (which sets out how much subtitling, signing and audio description relevant licensees must provide), the Code on Electronic Programme Guides, the Code on Listed Events, and the Cross Promotion Code. Links to all these codes can be found at:

<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/>

It is Ofcom's policy to describe fully the content in television and radio programmes that is subject to broadcast investigations. Some of the language and descriptions used in Ofcom's Broadcast Bulletin may therefore cause offence.

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<sup>1</sup> BCAP and ASA continue to regulate conventional teleshopping content and spot advertising for these types of services where it is permitted.

## Standards cases

### In Breach

#### Saturday Night Special

Noor TV, 13 November 2010, 21:00

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#### Introduction

Noor TV is a general entertainment and Islamic education channel broadcast on the Sky platform. The channel is aimed at Muslims living in Europe.

*Saturday Night Special* mainly consisted of a presenter taking calls from viewers<sup>1</sup> who donated money to the channel in return for prayers for themselves or for their relatives.

A complainant was concerned that the programme exploited the audience by encouraging viewers to donate money to Noor TV in return for the channel arranging special prayers inside Prophet Muhammad's mosque in Medina<sup>2</sup>. The complainant noted that many of the callers who donated money asked for prayers to be made to assist with their medical, financial and personal problems.

The Code permits broadcasters to transmit appeals for donations to make programmes or fund their service subject to certain specified criteria.

Having viewed the broadcast material, Ofcom had several concerns about Noor TV's appeals in relation to the following rules of the Code<sup>3</sup>:

- Rule 2.1: "Generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material."
- Rule 2.2: "Factual programmes or items or portrayals of factual matters must not materially mislead the audience."
- Rule 4.6: "Religious programmes must not improperly exploit any susceptibilities of the audience."
- Rule 10.3: "Products and services must not be promoted in programmes. This rule does not apply to programme-related material."
- Rule 10.15: "Broadcasters may broadcast appeals for donations to make programmes or fund their service. The audience must be told of the purpose of the donation and how much has been raised as a result of the appeal. All donations must be separately accounted for and used for the purpose for which they were donated."

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<sup>1</sup> A local rate telephone number was used.

<sup>2</sup> Medina is the second holiest city in Islam, and the burial place of the Islamic Prophet Muhammad.

<sup>3</sup> The September 2010 Code was in force at the time of the broadcast.

The material that raised issues under the above rules is summarised below:

Appeals for funds in return for prayers/"special gift" – Rules 2.1, 4.6 and 10.15

The presenter appealed to viewers to make donations to the channel on the basis that they would be rewarded through prayers made for or on behalf of the donor. The presenter encouraged viewers to pay Noor TV money for these prayers and viewers or their relatives would enjoy improved health, wealth or success as a result. Having viewed the programme and the pledges made by viewers during it, Ofcom calculated that a total of £7,670, €200 and 3,500 Norwegian krone was pledged by viewers in return for prayers. The following are examples of the presenter's appeals, with the key points underlined:

Presenter: *"Allah willing you will experience this. Sponsor the live transmission from the holy Medina and then see how your fate will change; Praise Allah; you will see with your own eyes."*

\*\*\*\*\*

Presenter: *"Please see that the Noor TV account number keeps running on scroll on the screen. Note that number and deposit the money in the bank. When you will deposit the money, phone us and tell us and your name will be sent to holy Medina for inclusion in prayers. May Allah reward you for this and grant you health and security."*

\*\*\*\*\*

Caller: *"I want to give £25."*

Presenter: *"Allah willing. May Allah reward you. May Allah grant you peace and security dear sister."*

Caller: *"My grandfather is very ill and please pray for him."*

Presenter: *"Allah will recover his health. Allah will recover his health for the sake of the heavenly court of the Pure Prophet."*

\*\*\*\*\*

Caller: *"Salam alaykum. I give £25 for my daughter; please pray for her."*

Presenter: *"May Allah grant security to your daughter. May Allah improve her fate. May Allah improve her fate. I pray for those daughters who haven't yet found their right match for wedding, if there is some restriction in their fate, I hope and wish that for the sake of the daughter of our Pure Lord - the most prominent lady among all women - may Allah open up their fates. Allah will surely improve their fates. My dear sisters! Take part in today's transmission whole heartedly and the Pure Allah will never disappoint you. I say this with full certainty and confidence that the Pure Allah will surely be kind to you. He is kind and he loves these great persons [Muhammad and the caller's daughter] very much and if He will not do it for their sake, then for whose sake He will do it? We get all we have only by the grace of these great persons."*

\*\*\*\*\*

Presenter: *"Sirs, I was speaking to you about those ten fortunate ones, praise Allah, our target has been met as ten people donated £1,000 each for the sake of the illustrious face of our Lord. The Pure Allah will grant you many*

*successes. Your fates are about to brighten up. Allah willing. Allah willing. I am not saying this for nothing. There was a special secret behind it which, Allah willing, in your service, I would just say that you have made a beautiful arrangement of gathering special privileges from the heavenly court of our Lord."*

Ofcom further noted that for those viewers who donated £1,000, as well as prayers, the presenter promised to send them a "special gift" of earth from the Holy Land and the tomb of Prophet Muhammad. During the programme 20 viewers pledged £1,000 each in return for prayers and the "special gift". For example:

Presenter: *"I want to tell all those brothers who have offered £1,000 each to give us their numbers because I, this humble man, would like to send them a gift which is the earth from the holy tomb of our Lord, whom Allah praises and protects. May you be blessed by this; it is a special gift for you. Our perfect sheikh will send this special gift of the earth from the holy tomb of our Lord, whom Allah praises and protects. Allah willing. All those brothers and sisters who have donated £1,000 each, it is a special gift for you which Noor TV is presenting to honour you. We will send this special gift of the earth from the holy tomb of our Lord."*

The licence holder for the service Noor TV is Al Ehya Digital Television Limited ("the broadcaster"). Ofcom requested the broadcaster's comments on how the above appeals complied with Rules 2.1 and 4.6 of the Code (as detailed above). Ofcom also requested the broadcaster's comments with regards to Rule 10.15 of the Code (as detailed above on pages 4 to 5) as well as documentary evidence to demonstrate that the donations were separately accounted for and used for the purpose they were intended and that viewers had been informed about how much was raised as a result of the appeal.

#### Donations made to the Mohiuddin Trust website – Rules 2.2 and 10.15

Ofcom noted that at one point in the programme a caller asked the presenter whether it was possible to make an online donation to Noor TV. The presenter responded: *"You can pay online on [www.mouhiuddintrust.org.uk](http://www.mouhiuddintrust.org.uk). You can also donate on the Mohiuddin Trust website."*

Ofcom asked the broadcaster to explain:

- i) the nature of the Mohiuddin Trust and to provide details of any relationship or arrangement between it and Noor TV;
- ii) why viewers were directed to the Mohiuddin Trust's website to make donations to Noor TV, rather than Noor TV's website; and
- iii) how Noor TV ensured that all monies donated by its viewers via the Mohiuddin Trust website in response to the channel's appeal for funds were correctly identified and transferred to Noor TV for the purpose of funding Noor TV's programming.

The broadcaster explained that when the presenter directed viewers to the Mohiuddin Trust website, it was *not* to make contributions to Noor TV (further details are set out below, in the Response section).

Ofcom considered that the broadcast did not make clear that the money donated would not be received by Noor TV. Ofcom therefore requested the broadcaster's

comments in with regards to Rules 2.2 and 10.15 of the Code (as detailed above on pages 4 to 5).

#### References to a DVD during the programme – Rule 10.3

During the programme, the presenter encouraged viewers to buy a DVD for which a trailer was also shown. The presenter made the following encouragements to viewers to buy the DVD:

Presenter: *“It took us four years of hard work to prepare this programme. It is a very special programme. Please make sure you buy it. I personally request that you buy it. It has two benefits; its price is £15. Fifty per cent, that is £7.50 will go towards your contribution to Noor TV’s broadcasts from Medina. You will be continuously rewarded for this in the heavens. The remaining £7.50 – the holy month in which the Prophet’s birthday is celebrated is about to come. Allah willing. Allah willing, my Lord, our blessings and peace be upon him, because of whose grace Allah has granted us all the good things of life, the remaining £7.50 will be spent towards the broadcasts of the programmes about the birthday of the Prophet...”*

Presenter: *“You can order it by logging on to [www.islamicmovies.co.uk](http://www.islamicmovies.co.uk) or you can note our phone number from the running advert on the screen and call us”.*

Presenter: *“Viewers! We have 80 year old photos of holy sites of Medina, we have prepared a film, a historical film. If you want to order it the price of the film is £15. It has been publicised many times in our transmission in our adverts. I want to say, it’s price is £15. Out of this £7.50 will go towards your contribution to Noor TV’s, this transmission. The remaining £7.50.... We show from the whole world, via live transmission, recorded programmes, and this money will be used in purchasing those programmes”.*

Ofcom requested the broadcaster’s comments on how the above references to the DVD complied with Rule 10.3 of the Code which states that “Products and services must not be promoted in programmes.”

#### **Response**

##### Appeals for funds in return for prayers/“special gift” – Rules 2.1, 4.6 and 10.15

The broadcaster stated that the presenter was “thrust into running this programme without script at extremely short notice” and “there is no doubt that the presenter clearly got carried away in what he was saying.”

When asked for formal comments in respect of Rule 2.1 of the Code (generally accepted standards), the broadcaster replied “we have already made it quite clear that Noor TV accepts that the susceptibilities of the audience were not properly dealt with.”

In response to Ofcom’s requests, the broadcaster stated that it “must accept the fact that matters set out by the presenter may have misled the audience.” With regard to the promise of a “special gift” for viewers who donated £1,000, the broadcaster said that the special gift referred to was not from Noor TV and that none of the funds received by Noor TV related to this special gift. The broadcaster also conceded a failure to adhere to Rule 4.6, making a similar statement to its statement in relation to

Rule 2.1 that it “clearly understands and admits that...the susceptibilities of the audience were not properly dealt with.”

In order to assess compliance with Rule 10.15, Ofcom requested documentation from the broadcaster to demonstrate that (a) the donations were separately accounted for, (b) the donations were used for the purpose for which they were donated and, (c) viewers had been informed about how much had been raised as a result of the appeal.

In respect of the particular requirement under Rule 10.15 that the audience is informed of how much had been raised as a result of an appeal for funds, the broadcaster stated: “the personnel who were responsible for this broadcast have all been dismissed and the current management believe that in a subsequent programme the Medina contributions were set out in a programme so that the audience knew what it was.” The broadcaster said it was unable to provide a copy of the programme because “the current management are not the past management and since Noor TV broadcast 24 hours, the idea of trawling through 24 hour broadcasting over a period of time to find the appropriate mention is clearly an unacceptable request”.

To consider whether the broadcaster had failed to adhere to the requirements under Rule 10.15 that all donations must be separately accounted for and used for the purpose for which they were donated, the broadcaster provided bank statements covering the period 29 October to 18 November 2010, which contained both card and cash transactions into the account. It said that it was unable to indicate on those bank statements which of the payments into the account were as a result of the specific appeal for funds on 13 November 2010, because “donations are made in the mosque and banked subsequently without particular reference as to a specific appeal”. It added that “Noor TV is always appealing for funds both in the field and generally. The whole TV Station is funded entirely by voluntary subscription.”

In its initial response to Ofcom’s request for comments, the broadcaster stated that “as a result of that appeal...from card payments a total sum of £3,375.00 was received by Noor TV”. However, in a subsequent response it stated that “card payments can be identified but...not all promises are honoured and the Station can only tell you that the maximum amount promised was £3,375.00” and “it is clear maximum the TV Station could have received is £3,375.00 and it cannot be justified that the TV Station has even had that”.

Noor TV was unable to separately account for all donations relating to the promise of a “special gift” of earth from the Holy Land to viewers who donated £1,000. The broadcaster commented that the special gift referred to was not from Noor TV and “no one at Noor TV knew that this comment or promise was to be made. None of the funds received by Noor TV related to this special gift. This appears to have been part of the presenter’s own particular promotion.” The broadcaster explained that it does not know whether any amounts of £1,000 were donated in return for a special gift, but stated that no monies in respect of the “special gift” were received by Noor TV.

The broadcaster commented that a large number of pledges were not honoured and indicated that this may be a possible reason for the discrepancy between the amount of money which appeared to be raised during the appeal and the amount of money Noor TV maintain was actually raised. Specifically, the broadcaster stated there were no entries in the Noor TV bank account relating to pledges made in Euros or Norwegian krone during the programme and that the likely reason for this was that the pledges were not honoured.



Ofcom requested the broadcaster explain how the funds had been applied in order to ascertain whether the funds had been used for their stated purpose and to supply documentary evidence in support of such explanation. The broadcaster informed Ofcom that the link used to broadcast from Medina “costs about £25,000 a year” and this was the first time that Noor TV had asked for contributions “for this particular live broadcast.” In a subsequent response, the broadcaster said the “the funds were to assist with the additional costs in connection with the Medina link which meant [employing] additional staff who have to download the link and play out through the system. The broadcaster stated it could not provide the requested documentation, because “there is...not an invoice as such”. The broadcaster said that if Ofcom “felt it relevant”, it could go through the staff payment records to find the additional staff salaries, but that it would not be easy “to identify staff salaries as such in general terms.”

#### Donations made to the Mohiuddin Trust website – Rules 2.2 and 10.15

Ofcom sought explanations from the broadcaster as to:

- i) the nature of the Mohiuddin Trust and details of any relationship or arrangement between it and Noor TV;
- ii) why viewers were directed to the Mohiuddin Trust’s website to make donations to Noor TV, rather than Noor TV’s website; and
- iii) how Noor TV ensured that all monies donated by its viewers via the Mohiuddin Trust website in response to the channel’s appeal for funds were correctly identified and transferred to Noor TV for the purpose of funding Noor TV’s programming.

In response, the broadcaster informed Ofcom that Noor TV and the Mohiuddin Trust are separate legal entities which work closely together. The Mohiuddin Trust is a registered charity of which Pīr Sahib is the chairman. Pīr Sahib is also the main director of the broadcaster. The broadcaster explained that the Mohiuddin Trust “utilises Noor TV for its funds advertising.”

The broadcaster said that when the presenter directed viewers to the Mohiuddin Trust website, it was not to make contributions to Noor TV. It explained that “viewers do not always like to make donations to the running of the TV channel but are prepared to make charitable donations to the Mohiuddin Trust whose spiritual leader is often seen on Noor TV.”

The broadcaster further commented that “it is clear that the appeal for funds is outside the rules.”

#### References to a DVD during the programme – Rule 10.3

Ofcom invited the broadcaster’s comments on how references to the DVD complied with Rule 10.3 of the Code (Products and services must not be promoted in programmes).

The broadcaster stated it was in total agreement with Ofcom’s view that the DVD was promoted during the programme.

#### Further representations

The broadcaster maintained that the presenter of the programme has been dismissed as a result of this investigation.

The broadcaster expressed regret that the incident on 13 November 2010 arose and claimed that it would not have arisen had staff other than the dismissed presenter (and a manager who had also been dismissed) known what was going to happen.

The broadcaster informed Ofcom that it had implemented a “new methodology of instruction to staff” and dismissed those involved in the broadcast of the programme. Ofcom did not receive any details of either the new methodology or the dismissals.

## **Decision**

Under the Communications Act 2003 (“the Act”), Ofcom has a statutory duty to require the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material. Ofcom also has a duty to set such standards for the content of programmes as appear to it best calculated to secure the standards objectives, including that: “generally accepted standards” are applied so as to provide adequate protection for members of the public from the inclusion of harmful material; “broadcasters exercise the proper degree of responsibility with respect to the content of programmes which are religious programmes”; and that “religious programmes do not involve any improper exploitation of any susceptibilities of the audience for such a programme.”

These standards are contained in the Code. Broadcasters are required to comply with the rules in Section Two of the Code so as to provide adequate protection for members of the public from harmful material; and Section Four of the Code to ensure that religious programmes do not improperly exploit any susceptibilities of the audience (see above for the specific provisions).

In addition to the protection of the audience from harm, one of the fundamental principles of European broadcasting regulation is that advertising and programming (that is editorial content) must be kept distinct. This is set out in Article 19 of the Audiovisual Media Services (AVMS) Directive which is in turn reflected in the Code rules for commercial references in television programming. The purpose of this is to prevent programmes becoming vehicles for advertising and to protect viewers from surreptitious advertising.

### Appeals for funds in return for prayers/”special gift” – Rules 2.1, 4.6, 10.15

As appeals for funds offer a limited exemption to the restrictions imposed on the amount of advertising a broadcaster can transmit, viewers should not be invited to make a donation in return for anything other than to make programmes or the provision of the service.

Further, as stated in Ofcom’s published guidance notes<sup>4</sup>, appeals for funds should not improperly exploit any susceptibilities of the audience. Ofcom considers that vulnerable people, such as those experiencing financial or emotional difficulties, may be unduly encouraged to give donations. In particular, Ofcom considers it unacceptable to persuade viewers to donate money on the basis of inducements such as a offering a prayer for or on behalf of the donor; the promise of better health; or that a religious figure will create further wealth for donors or take particular care of donors.

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<sup>4</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/812612/section10-tv.pdf>

In this case, the presenter offered prayers which would be made on the caller's behalf in the Holy City of Medina. For example:

Presenter: *"Allah willing you will experience this. Sponsor the live transmission from the holy Medina and then see how your fate will change; Praise Allah; you will see with your own eyes."*

\*\*\*\*\*

Caller: *"I want to give £25."*

Presenter: *"Allah willing. May Allah reward you. May Allah grant you peace and security dear sister."*

Caller: *"My grandfather is very ill and please pray for him."*

Presenter: *"Allah will recover his health. Allah will recover his health for the sake of the heavenly court of the Pure Prophet."*

In addition, the presenter offered a "special gift" of earth from the Holy Land to those viewers who donated £1,000. For example:

Presenter: *"Sirs, I was speaking to you about those ten fortunate ones, praise Allah, our target has been met as ten people donated £1,000 each for the sake of the illustrious face of our Lord. The Pure Allah will grant you many successes. Your fates are about to brighten up. Allah willing. Allah willing. I am not saying this for nothing. There was a special secret behind it which, Allah willing, in your service, I would just say that you have made a beautiful arrangement of gathering special privileges from the heavenly court of our Lord."*

We noted that the broadcaster had accepted that "the susceptibilities of the audience were not properly dealt with".

In Ofcom's view, the inducements which were made in this programme, i.e. the receipt of a "special gift" for a donation of £1,000, or the offer of a prayer that would improve the donor's health, wealth, success or good fortune carried the risk that susceptible members of the audience may have been persuaded to donate money to Noor TV when they would not otherwise have done so. In particular, the appeal focused heavily on religious beliefs, which Ofcom considered had created an additional risk that susceptible viewers would have been more likely to make donations than they otherwise would have done. Ofcom therefore found the programme in breach of Rule 2.1 (generally accepted standards) and Rule 4.6 (religious programmes must not improperly exploit the susceptibilities of the audience).

Ofcom was extremely concerned that Noor TV had not separately accounted for the donations viewers had made as a result of the appeal for funds, as required by Rule 10.15.

Further, and as a result of the donations not being separately accounted for by Noor TV, the broadcaster was unable to provide satisfactory documentary evidence of: i) how much was raised as a result of the appeal for funds, or indeed whether any donations at all had been received in return for the "special gift"; and ii) documentary evidence of what the funds raised as a result of the appeal were used for. Therefore Noor TV did not provide evidence to demonstrate that the funds had been used for the purpose for which they had been donated, as required by Rule 10.15.

In addition, the broadcaster could not provide any assurances or evidence in the form of a recording that the audience had been informed of how much had been raised as a result of the appeal, also as required by Rule 10.15.

When Ofcom asked Noor TV to provide a recording to demonstrate that the audience had been told how much the appeal had raised, as Noor TV suggested had been the case, the broadcaster said that it was under new management who had not been involved in the broadcast in question. The broadcaster also stated that it considered “the idea of trawling through 24 hour broadcasting over a period of time to find the appropriate mention is clearly an unacceptable request”. In Ofcom’s view, the broadcaster should have had sufficient compliance procedures in place to meet its obligations under its Ofcom licence. Ofcom was concerned by the broadcaster’s response on this issue as it appeared to demonstrate to Ofcom that Noor TV was not taking its compliance obligations seriously.

Ofcom concluded that donations that viewers had made to Noor TV as a result of the appeals for funds had not been separately accounted for. The broadcaster was unable to demonstrate whether the funds had been used for the purpose for which they had been donated. The broadcaster was also unable to demonstrate whether the audience had been told how much had been raised as a result of the appeal. The appeal was therefore in breach of Rule 10.15 of the Code.

#### Donations made to the Mohiuddin Trust website – Rule 2.2 and 10.15

During appeals for funds, viewer donations can be sought solely for the purpose of funding a particular programme, or a broadcasting service overall. When transmitting appeals for funds, broadcasters should ensure that the audience is told about the purpose of the appeal for which they are soliciting donations.

In this case, viewers were informed that the money they donated during the programme would fund Noor TV’s programming:

Presenter: *“May I take this opportunity to request the viewers to cooperate with us, as you did in the last programme, and take subscriptions for Noor TV in order to support the live transmission from the Holy City of Medina.*

One caller asked if it was possible to donate online.

Presenter: *“How much did you donate?”*

Caller: *“£50. £50 for our Pure Lord and £50 for Bi Bi Amina. I wanted to ask if these could be paid online?”*

Presenter: *“Certainly. You can pay online [www.mohiuddintrust.org.uk](http://www.mohiuddintrust.org.uk). You can also donate on the Mohiuddin Trust website. Alternatively, you can phone in on Noor TV reception and pay by debit or credit card. Allah willing, I shall arrange for this as well that you are able to pay on the Noor TV website.”*

Ofcom was extremely concerned that although viewers were told that their donations were for the purpose of funding Noor TV’s programming, the funds donated via the Mohiuddin Trust website, were not in fact received by Noor TV and therefore were not used for their stated purpose.

As detailed above, the broadcaster stated that “viewers do not always like to make donations to the running of the TV channel but are prepared to make charitable donations to the Mohiuddin Trust whose spiritual leader is often seen on Noor TV”. However, the sole purpose of an appeal for funds by the broadcaster must be to fund the channel. Ofcom considered that it was not made clear to viewers that money donated via the Mohiuddin Trust website would not be received by Noor TV.

Ofcom considered this to be a clear and serious breach of Rule 2.2 (factual programmes or items or portrayals of factual matters must not materially mislead the audience) and Rule 10.15 (the audience must be told of the purpose of the donation).

#### References to a DVD during the programme – Rule 10.3

The broadcaster admitted that the DVD was promoted during the programme.

Ofcom noted that the presenter promoted the DVD, for example he said, *“please make sure you buy it”* and *“you can order it by logging on to [www.islamicmovies.co.uk](http://www.islamicmovies.co.uk) or you can note our phone number from the running advert on the screen and call us.”*

The DVD was clearly promoted, in breach of Rule 10.3 of the Code.

#### Conclusion

These are extremely serious breaches of the Code, which had the potential to cause financial harm to viewers, particularly to vulnerable viewers.

The broadcaster had claimed that the presenter in question was responsible for the breaches, and stated that this individual had since been dismissed. Ofcom was concerned that the broadcaster provided no detailed evidence of any compliance procedures it had in place, or has since introduced, to demonstrate that it had taken responsibility for meeting its obligations under its Ofcom licence.

The Licensee is put on notice that the breaches in this case are being considered for the imposition of a statutory sanction.

#### **Breaches of Rules 2.1, 2.2, 4.6, 10.3 and 10.15**

This finding was amended after its publication on 20 June 2011 to correct a factual inaccuracy.

## In Breach

### Tafheem Al Masyal

*Takbeer TV, 17 October 2010, 02:00, 18 December 2010, 17:30, 8 January 2011, 17:45, 29 January 2011, 18:00, and 26 March 2011, 16:30*

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#### Introduction

Takbeer TV broadcasts religious and general entertainment content mainly in Urdu, and is available on cable and satellite platforms. *Tafheem al Masyal* is a religious discussion programme, during which viewers are invited to call in and put their questions on Islamic religious matters, to a presenter and guest presenter in the studio. The licence for Takbeer TV is held by Channel S World Limited ("Takbeer TV").

Between October 2010 and January 2011 Ofcom received 267 complaints about five editions of *Tafheem Al Masyal* broadcast on: 17 October 2010 ("the 17 October programme"); 18 December 2010 ("the 18 December programme"); 8 January 2011 ("the 8 January programme"); 29 January 2011 ("the 29 January programme"); and 26 March 2011 ("the 26 March programme"). 263 of the complaints we received were in relation to the 18 December programme.

We noted that complainants were from the Ahmadiyya religious community. This is a comparatively small Islamic movement founded by Mirza Ghulam Ahmad Qadiani that grew out of mainstream Islam in the nineteenth century, whose followers believe themselves to be true Muslims. Followers of Mirza Ghulam Ahmad are known as Ahmadis or Qadianis or Ahmadiyya. Complainants considered that the programmes variously: consisted of abusive content about Ahmadis and Mirza Ghulam Ahmad; or incited hatred and violence towards the Ahmadiyya community.

Ofcom employed the services of an independent translator, a native Urdu speaker, to translate extracts from the five programmes and produce a transcript of the content from the original Urdu. We cite a selection of the translated comments made during the broadcasts to illustrate the tone and content of the programmes complained of (however, the programmes were considered in full and in context):

#### 17 October programme:

A caller: "[the Ahmadis] *use the word 'respected for their prophet but he does not deserve the title 'respected'... they have no wisdom*". In response, the presenter replied: "*Well said Mr. Shakir, you have said it very beautifully*";

A caller: "*The Qadianis have nothing but lies*". In response the presenter replied: "*This was a beautiful talk washed by Tausar and Tasneen*<sup>1</sup>. *Thank you for your sentiments of kindness and love for us. This has encouraged us further*";

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<sup>1</sup> Streams in Paradise.

- A caller: *"The chief of Mirzais<sup>2</sup>, Masrur Ahmad<sup>3</sup>, the hell-bound... our Sunnite group says these are stupid and non-believers";*
- A presenter: *"The Mirzais have insulted many prophets. It is an ordinary thing for them, because he [the Ahmadi prophet] himself used to drink [i.e. alcohol]"; and*
- A presenter: *"Everyone knows that this came out of [Mirza Ghulam Ahmad]'s dirty mind... This was his polluted mind spewing such words...";*
- A presenter: *"Ahmadis are non-Muslims, apostates, and hypocrites"; and*
- A presenter: *"[Mirza Ghulam Ahmad] died in a stinking and dirt-ridden place. His life ended in a toilet which was filthy and stinking but he was impudent about things which are more sublime than the heavens, made fragrant by the presence of the Holy Prophet".*

18 December programme:

- A presenter: *"We are inviting the audience to see that [Mirza Ghulam Ahmad's] deeds are below the dignity of a human... and it is difficult to accept him as a decent person let alone a prophet";*
- A presenter: *"To hide one's own lies, one invites others to lie; to hide one's own sins, one invites others to commit sins; drug addicts want others to use drugs; likewise, because Mirza Sahib was fond of doing marriages, so he started a campaign aimed at encouraging people to do several marriages";*
- A presenter: *"Women used to press [Mirza Ghulam Ahmad]'s legs, serve him, all night long. This is not allowed in Islam; he cannot be called a civilised man let alone a Muslim which is a high degree of status, and much above that is the status of a prophet";*
- A presenter: *"[Mirza Ghulam Ahmad's] relatives called him treacherous, cunning, and a thief... [the Ahmadis] try to link this liar with the leader of all prophets, Prophet Muhammad";*
- A presenter: *"Mirza Sahib is a liar...he is a dajjal<sup>4</sup> according to the sayings of Prophet Muhammad";*
- A caller: Referred to Ahmadis as "accursed" and said: *"[the Ahmadis] know [Mirza Ghulam Ahmad] was a liar and yet they call him a prophet though he was not a decent person and these people are misled"; and*
- A caller: *"these [Ahmadis] who are calling you and debating with you are accursed liars".*

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<sup>2</sup> Derogatory term for Ahmadis.

<sup>3</sup> The present leader of the Ahmadiyya community.

<sup>4</sup> Ofcom understands "*Dajjal*" to be an offensive term, equivalent to the term 'anti-Christ' in Christianity.

### 8 January programme:

A presenter: *"In our last programme, a Qadiani friend had asked some questions. Though these questions were not related to the nonsense spoken by Mirza Ghulam Ahmad Qadiani, his lies, his cunning and deceit, and his false claim to prophet hood, still I would like to answer these questions";*

A presenter: *"His followers say [Mirza Ghulam Ahmad] was a prophet but we say he was a 'Dajjal'... Ghous Azam<sup>5</sup> was a saint but [Mirza Ghulam Ahmad] was the chief 'Dajjal'; and*

A presenter: *"We have been telling about [Mirza Ghulam Ahmad's] lies in the past but today we will focus specially on these. We will tell you about his lies".*

### 29 January programme

A presenter: *"As to what is the punishment of apostasy in Ahmadis, we can discuss it with them only if we have a link with them. Among Muslims, the penalty for apostasy is death. An apostate deserves to be killed but the right to implement this penalty is the prerogative of an Islamic government. An individual or a party does not have this prerogative. An Islamic court, Islamic government, a Qazi<sup>6</sup> can implement this penalty or make a decision about it".*

Ofcom began an investigation into the material in the programmes referred to above that had been broadcast between October 2010 and March 2011, and considered whether the programmes referred to above raised issues under Rule 3.1 of the Code, which states that:

*"Material likely to encourage or incite the commission of crime or to lead to disorder must not be included in television or radio services".*

For the reasons set out in the Decision, we did not consider that there was a breach of Rule 3.1. However, we asked the Licensee how it complied with Rule 4.2 of the Code which states that:

*"The religious beliefs of those belonging to a particular religion or religious denomination must not be subject to abusive treatment".*

Ofcom was sufficiently concerned about this content to ask the Licensee to attend a meeting on 6 April 2011 to explain its compliance arrangements. At this meeting Takbeer TV apologised for any offence that had been caused by the above programmes. The broadcaster also outlined the various improvements it had put in place in relation to its compliance processes (as outlined in the Response section below). In addition, it provided Ofcom with a copy of a Code of Conduct that had been signed by Takbeer TV and a number of other Muslim television broadcasters.

Having received further complaints about the programme broadcast on 26 March 2011, Ofcom decided after the compliance meeting of 6 April 2011 to ask the

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<sup>5</sup> A holy person revered by certain members of the Islamic faith.

<sup>6</sup> Islamic judge.



Licensee how this material also complied with Rule 4.2 before reaching a final decision.

26 March programme:

- A caller: *"I think there is no need to take questions from these stupid and illiterate people [i.e. Ahmadis]"*.
- A caller: *"These kind of callers [i.e. Ahmadis] are wasting your time and the precious time of this programme. You and Mr. Sialvi have proved from their own book that they are following a wrong man – Mirza Ghulam Ahmad. Please tell them, in the light of Qur'an and Hadith what is going to happen to them, to people who follow such men, when they will go to their graves and what will happen to them later when they will burn in hellfire. Please tell them, in the light of the Qur'an and Hadith what will be their punishment"*.
- A presenter: *"[The Ahmadis] are crying because they know what their punishment will be. They know what is going to happen to them. They obtained visas to come here, they dramatized their situation and applied for asylum and they came here, and they are cashing in from the event that happened in Lahore<sup>7</sup>. Thousands of events like this happen in Pakistan every day, our madrassas, our scholars, our people are victims of cruelty and terrorism but our Sunni community does not make that a basis to apply for asylum. The event of Lahore is actually a cause of joy for them because they had 500 to 600 visas suspended all over the world and the Lahore event helped them get through as they say: 'Life is extremely difficult for us in Pakistan; see how much cruelty we face'"*.

According to Section Four of the Code, a "religious programme" is one "which deals with matters of religion as the central subject, or as a significant part, of the programme". In Ofcom's opinion these four broadcasts were clearly religious programmes.

## **Response**

In initial sets of comments concerning the programmes broadcast between October 2010 and January 2011, Takbeer TV said that "We deeply regret any offence caused to any of our viewers and unreservedly apologise for the same". It also outlined a number of steps it had taken in response to the complaints: relevant channel staff had been "severely reprimanded and formally disciplined" and given updated training on the Code; additional training was being given to all presenters and producers on the Code and their obligations under it; and the channel had appointed "a bi-lingual Quality Controller...who will take responsibility to oversee programme quality and output to prevent any such incidences occurring again".

The broadcaster asked for a number of factors to be taken account by Ofcom in reaching its decision in this case. These included the following: the fact that Takbeer TV is a not for profit Channel "which has been primarily created to offer social programming to largely uncatered for parts of the community"; in endeavouring to cater for its audience on a range of issues Takbeer TV "wish to do this in a way that

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<sup>7</sup> This is a reference to the attacks on two Ahmadi mosques in Lahore which took place on 28 May 2010, and in which it is reported that 86 people were killed.

fully respects all cultures, religions and beliefs”; and the fact that Takbeer TV is “a very new Channel and suffer[s] from lack of resources and experience...We hope that we will very soon be in a position where we have much better controls over both our programme making and quality of output”.

In conclusion, the broadcaster said that “Sadly, the words of a few people have damaged the reputation of our Channel and this seems to have been particularly so as they were ‘live’ programmes”.

Following the broadcast of the 26 March programme, Takbeer made the following further points: *Tafheem Al Masyal* had been “discontinued indefinitely since early April 2011”; the lead presenter of the programme had been suspended and “is no longer appearing on our Channel”; and “We do not intend to deal with any of the specific issues raised [i.e. relating to the Ahmadiyya community] that have caused controversy in respect of these complaints in any future programmes and have advised our presenters to avoid the same.” The broadcaster added that through the various steps it had taken, it was “confident that we will not receive any future complaints of this nature”.

## **Decision**

Under the Communications Act 2003 (“the Act”), Ofcom has a statutory duty to require the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material. Ofcom also has a duty to set such standards for the content of programmes as appear to it best calculated to secure the standards objectives, including that: “material likely to encourage or incite the commission of crime or lead to disorder is not included in television or radio services”; “broadcasters exercise the proper degree of responsibility with respect to the content of programmes which are religious programmes”; and “religious programmes do not involve any abusive treatment of the religious views and beliefs of those belonging to a particular religion or religious denomination”.

Broadcasters are required to comply with the rules in: Section Three of the Code to ensure that programmes do not incite crime or lead to disorder; Section Four of the Code to ensure that religious programmes do not involve any abusive treatment of religious views or beliefs (see above for the specific provisions).

In reaching this decision Ofcom has taken careful account of the right to freedom of expression, as set out in Article 10 of the European Convention on Human Rights. Article 10 provides for the right of freedom of expression, which provides the right to transmit and receive creative material, information and ideas without interference from a public body. Applied to broadcasting, Article 10 therefore protects the broadcaster’s right to transmit material as well as the audience’s right to receive it as long as the broadcaster ensures compliance with the Rules of the Code and the requirements of statutory and common law.

In investigating the serious concerns raised by the majority of the complainants in relation to incitement to hatred and subjecting the Ahmadi religion to abusive treatment, Ofcom reviewed the wider context in which the comments in these programmes were made.

In terms of the editorial content, Ofcom noted that the programmes consisted of presenters receiving and responding to telephone calls from viewers in which callers asked questions relating to Islamic religious issues and doctrine. A number of

questions related to the Ahmadi faith, and we noted that telephone calls were received from both Ahmadis and non-Ahmadis alike. We considered that the comments made by both viewers and presenters during these programmes, as set out above, were made in the context of religious programmes broadcast on a channel which is aimed at a Muslim audience.

Ofcom considered whether the programmes: incited hatred and/or violence against the Ahmadiyya community; and subjected the Ahmadi faith to abusive treatment.

### Incitement

Rule 3.1 of the Code states that:

“material likely to encourage or incite the commission of crime or to lead to disorder must not be included in television and radio service”.

The Rule is concerned with the likelihood of the encouragement or incitement of crime. In this case Ofcom therefore assessed whether generally references to the Ahmadiyya community in the programmes would be understood within a context that would be likely to encourage a crime of hatred or violence, or lead to disorder. In deciding this Ofcom focussed in particular on whether the actual comments as they were presented contained a direct or implied call to action which would be likely to encourage or incite the commission of crime or lead to disorder.

Ofcom is mindful of the long established tension between some members of mainstream Muslim groups and the Ahmadi movement which has resulted in a number of documented examples of intolerance, persecution and oppression against members of the Ahmadiyya community. Ofcom noted the various comments and statements made in the programme by the presenters and callers which were perceived by complainants to either incite hatred or violence against the Ahmadis or were critical of, or abusive towards, the Ahmadiyya community. A number of illustrative examples are set out in the Introduction.

In considering Rule 3.1 we are required to address the likelihood of the commission of a crime, in this case a hate crime, against an Ahmadi follower. In particular, we have considered whether the references in the programmes included a direct or indirect call to action that would have encouraged Muslims to take violent or criminal action against the Ahmadiyya because of their beliefs.

We recognised that overarching tone of almost all of the various comments identified above were clearly critical of the Ahmadiyya community, its beliefs and its founder. However, Ofcom believed that these criticisms, in themselves would not, on a reasonable view, have been likely to: encourage or incite the commission of a crime against any existing or named group (e.g. harm or prejudice against members of the Ahmadiyya community) or an attempt to lead viewers to disorder; or clearly advocate any potentially criminal action.

Notwithstanding the above, we did consider whether the following statement by a presenter during the 29 January programme, could be construed as a form of incitement:

*“As to what is the punishment of apostasy in Ahmadis, we can discuss it with them only if we have a link with them. Among Muslims, the penalty for apostasy is death. An apostate deserves to be killed but the right to implement this penalty is the prerogative of an Islamic government. An*

*individual or a party does not have this prerogative. An Islamic court, Islamic government, a Qazi can implement this penalty or make a decision about it”.*

We considered this statement to have been potentially offensive. However, we considered that the speaker in this case made clear his belief that only an Islamic court, Islamic Government or Islamic judge (“Qazi”) would have the ability to determine whether someone was an apostate, and not individuals. He also did not openly say that members of the Ahmadiyya community should be subject to the death penalty, but rather was setting out his view about the potential treatment of apostates by the appropriate Islamic authorities. Given this context, we considered that this particular individual was not advocating that, or inciting, private individuals to kill apostates, but rather was expressing his view that the death penalty could be an appropriate sanction for apostasy to be carried out by the appropriate governmental or judicial institutions.

Given the above, we considered the programmes were not in breach of Rule 3.1 of the Code.

#### Abusive treatment

Rule 4.2 of the Code requires that:

“The religious views and beliefs of those belonging to a particular religion or religious denomination must not be subject to abusive treatment.”

The above requirement comes directly from section 319(6)(b) of the Act.

The Code provides scope for the followers of one religion to engage in religious debate with, or criticise, other religions provided they comply with the Code, and in particular the general requirements for religious programmes set out in Section Four. It is therefore Ofcom’s view that the theme of these programmes, namely a ‘phone-in’ programme in which viewers asked questions based on religious themes, was clearly a legitimate theological discussion for a religious programme. As such, within this editorial context, it would also be legitimate to discuss the Ahmadiyya movement and critique the differences in their teachings on prophethood compared to mainstream Islam. Such an approach is rooted in the broadcaster’s and the audience’s right to freedom of expression. However, the Code requires that if programmes engage in this sort of debate the material broadcast should not include comments and references which might reasonably be considered to subject the religious views and beliefs of the Ahmadiyya religion to abusive treatment.

When considering “abusive treatment” in religious programmes under Rule 4.2, Ofcom would consider if the material included statements which sought to revile, attack or vehemently express condemnation towards another religion without sufficient justification by the context. The Code does not prohibit legitimate criticism of any religion or its founder, but such criticism must not spill over into pejorative abuse.

We considered that during the programmes, there were a number of statements made by the presenters and by members of the audience that could be classed as being derogatory and abusive references specifically about the Ahmadiyya community and its founder, Mirza Ghulam Ahmad. Examples of these references are laid out in the Introduction.

In particular, Ofcom noted that during the programmes, members of the Ahmadiyya community were variously labelled as: “*stupid*”, “*non-believers*”, “*illiterate*”, and “*accursed liars*”. We also noted that many statements were made that were highly critical and derogatory of the Ahmadi founder, Mirza Ghulam Ahmad. The Code, and in particular Section Four of the Code relating to religious programmes, does not prohibit criticism about the founder of any religion, or any other venerated persons associated with particular religions. However, the Code does not permit sustained and repeated derogatory references, with no contextual justification, to such persons. In addition, Ofcom also the various other comments set out in the Introduction to this finding.

Given the above, it was Ofcom’s view that the use of such terms and references when taken together amounted to “abusive treatment” of the religious views and beliefs of members of the Ahmadiyya community.

We had concerns about how the presenters in the programmes interacted with various viewers who contacted the programmes by telephone. The Code does not prohibit presenters disagreeing or agreeing with the views expressed by viewers who choose to interact with live programmes. However, it is Ofcom’s view that, at times the presenters featured in the programmes failed to exercise a proper degree of moderation or fairness, when handling the telephone calls from viewers. Ofcom noted that viewers could have perceived the conduct of the presenters as condoning the abusive references about the Ahmadiyya community and its founder, and being dismissive towards the Ahmadi callers who contacted the programmes. For example, we noted the following examples:

A caller:           *“[the Ahmadis] use the word ‘respected for their prophet but he does not deserve the title ‘respected’... they have no wisdom”.*

In response, the presenter replied: *“Well said Mr. Shakir, you have said it very beautifully”,*

A caller:           *“The Qadianis have nothing but lies”.*

In response. The presenter replied: *“This was a beautiful talk washed by Tausar and Tasneen. Thank you for your sentiments of kindness and love for us. This has encouraged us further”,*

If the presenters had moderated the programmes and put the discussion into a wider context in a more fair and effective manner they could have contributed towards lessening the impact of the abusive treatment presented in these programmes.

Ofcom welcomes the broadcaster’s apology and the steps it has taken to ensure that going forward such programmes are fully compliant with the Code. However, given the points set out above Ofcom considers that the broadcaster was clearly and seriously in breach of Rule 4.2. Ofcom therefore assessed whether to consider the Licensee for a statutory sanction but we decided on balance not to do so. This decision had regard to all the relevant circumstances of this case, but principally the immediate acknowledgement that the complaints were justified and the various measures the Licensee took to further improve compliance. The Licensee is put on notice however that any further breaches of the Code in this area will lead to Ofcom considering a statutory sanction.

We advise all broadcasters producing religious programmes to ensure that, when discussing the views and beliefs of either followers of the same religion or followers of other religions, they ensure those views and beliefs are not subject to abusive treatment.

**Breach of Rule 4.2**

## In Breach

### Cross-promotion for Channel 5 Free Bingo

Channel 5, 25 January 2011, 14:15

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#### Introduction

A viewer complained that a 30-second promotion for a free-to-play online bingo game offered by Channel 5 was misleading.

The complainant objected that the promotion claimed that players could win cash prizes but that on visiting the website to register she found that the prizes are given in the form of High Street vouchers.

On viewing the material we noted that it contained the following audio:

*"Hello, if you haven't already signed up for today's free bingo at five.tv...what are waiting for? Sign up now at five.tv/freebingo. There are real cash prizes and it's absolutely free to play. The fun starts at two".*

Under Ofcom's rules 'broadcasting-related services' may be promoted by television broadcasters outside programmes. These items are known as cross-promotions and do not count towards the daily allowance of advertising time. Cross-promotions are for most purposes regulated under a specific Ofcom Cross-promotion Code ("the Cross-promotion Code")<sup>1</sup> and, in respect of their content, under Ofcom's Broadcasting Code.

Since cross-promotions seek to promote broadcasting-related services, they may contain claims about those services to enable the viewer to make an informed decision about the service in question. Therefore, where relevant, cross-promotions must comply with the rules in the BCAP Broadcast Advertising Standards Code ("the BCAP Code"). In particular Ofcom has stated publicly<sup>2</sup> that this will be the case where, for instance, if the issue of misleadingness arises.

For this reason Ofcom sought comments from Channel 5 under Rules 3.1 and 3.2 of the BCAP Code. These rules say:

Rule 3.1: "Advertisements must not materially mislead or be likely to do so".

Rule 3.2: "Advertisements must not mislead consumers by omitting material information. They must not mislead by hiding material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner.

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<sup>1</sup> The Cross-promotion Code is available at:  
<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/cross-promotion/>

<sup>2</sup> Ofcom has put on record that it will apply the TV Advertising Code to cross-promotions where appropriate – see paragraphs 7.27 and 7.28 of the Ofcom Regulatory Statement Review of the cross-promotion rules, available at:  
<http://www.ofcom.org.uk/consult/condocs/promotion/statement/statement.pdf>

Material information is information that consumers need in context to make informed decisions about whether or how to buy a product or service. Whether the omission or presentation of material information is likely to mislead consumers depends on the context, the medium and, if the medium of the advertisement is constrained by time or space, the measures that the advertiser takes to make that information available to consumers by other means”.

## **Response**

Channel 5 told us that cash prizes had originally been offered on its online bingo service, but from 13 December 2010, this was no longer the case. Winners from that date would instead receive vouchers that could be used at a variety of High Street retailers.

The broadcaster had amended the website to make clear that prizes were now issued in the form of vouchers. Among other changes, an online explanatory video was edited specifically to refer to vouchers.

However, Channel 5 said that due to human error the reference to cash prizes was not removed from the television cross-promotion. Channel 5 apologised for this error and stressed that on being alerted to the problem it had stopped broadcasting the cross-promotion and had removed the reference to cash prizes for future broadcasts.

## **Decision**

Ofcom noted the apology and the steps taken by Channel 5 to correct the cross-promotion. However, having watched the cross-promotion, viewers would have expected to be able to win a cash prize on the Channel 5 online bingo service, when in fact only high street vouchers were available. We therefore concluded that the item had been misleading in its unamended form.

The material was therefore in breach of the BCAP Code's provisions on misleadingness.

## **Breaches of BCAP Code Rules 3.1 and 3.2**



## In Breach

### Psychic TV Teleshopping Feature

*Big Deal, 11 March 2011, 21:30 to 22:00*

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#### Introduction

A viewer objected that this teleshopping feature offering psychic readings to viewers contained claims of efficacy and accuracy for the psychics' abilities, which is prohibited by the UK Code of Broadcast Advertising ("the BCAP Code").<sup>1</sup>

Readings are charged for by premium rate telephone services (PRS) and credit cards.

In September 2010 new Ofcom rules came into force with the effect that channels and content predicated on the promotion of PRS services ("participation television") became subject to the BCAP Code. Because channels of this sort make direct offers to the public and are 'long-form', they are classified as teleshopping.

This half-hour feature was therefore a teleshopping 'window'.<sup>2</sup>

At the same time that the new Ofcom rules came into force, the revised BCAP Code allowed PRS-based live and personalised psychic services on channels licensed for that purpose (previously the BCAP Code had prohibited such services).<sup>3</sup>

In permitting this category of advertising the BCAP Code places certain restrictions on it.

Rule 15.5.2 requires that:

"Advertisements for personalised and live services that rely on belief in astrology, horoscopes, tarot and derivative practices are acceptable only on channels that are licensed for the purpose of the promotion of such services and are appropriately labelled: both the advertisement and the product or service itself must state that the product or service is for entertainment purposes only".

Rule 15.5.3 requires that:

"Advertising permitted under rule 15.5 may not:

- Make claims for efficacy or accuracy;
- Predict negative experiences or specific events;

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<sup>1</sup> The BCAP Code is available at: <http://bcap.org.uk/The-Codes/BCAP-Code.aspx>

<sup>2</sup> Teleshopping 'windows' must be a minimum of 15 minutes long: see COSTA, which can be found through the link given in paragraph b) of the Introduction to the Bulletin.

<sup>3</sup> Ofcom, not the ASA, is responsible for the regulation of psychic and other "participation TV" services: see paragraph c) of the Introduction to the Bulletin.

- Offer life-changing advice directed at individuals – including advice related to health (including pregnancy) or financial situation;
- Appeal particularly to children;
- Encourage excessive use”.

Ofcom viewed the material that had been complained about. Various statements were made by the presenter, by psychics and in text messages sent by viewers.

Viewers’ messages were displayed in text on screen, including the following:

*“anon: Holly u were spot on phil cancer as u predicted on tues, amazing! When do u see nxt contact & is there a future? Thanks x”;*

*“FEEDBACK: I had a text reading from holly, firstly I can not stress how comforting and lovely this ladies voice is, she is very detailed and spot on. Cupcake (28) Ireland”;*

*“FEEDBACK: WOW WOW WOW!! Just had the quickest most detailed reading with this wonderful Jannette-Anne!! I only had a few minutes. IrishLady”;* and

*“Anne you told me 1 year ago that I would end up with the man with initial R, blue eyes, fair hair!! I found it so hard to believe back then but as time goes on, your predictions all happen. Pree”.*

Other text was displayed on screen (which did not appear to have been provided by a viewer). It said:

*“Manalix will provide accurate and sensitive advice on your life issues, such as love, relationships, career moves, spiritual healing or direction in your life. Option 4”.*

Among the comments made by the presenter and by psychics in the studio were these:

Presenter: *“...all of our psychics have been vetted and checked: they’ve all got years of experience behind them”.*

Psychic: *“Love to speak to sceptics!*

Presenter: *I’m sure there’s a few tonight.*

Psychic: *Oh, I’ve converted a few definitely in my time...at least you get reaction out of a sceptic cos they go “you couldn’t possibly know that!” I did a reading for a guy, OK, who was up a mountain, doing spiritual work, completely closed off, protection, not speaking to anybody, not seeing anybody, for like 21 days, and I gave him a message about the song he was singing on the top of the mountain.*

Presenter: *You’re joking!*

Psychic: *And that’s what he said: ‘You cannot know that’. I said, ‘I can’”.*

- Presenter: *"...she's also gonna validate; so for any sceptics out there, 'validations' are pieces of evidence to prove to you that we're actually linked into you. So this could be something like your cat's name or what you've been doing today, or you might have recently dyed your hair – the psychic will pick up on that. It's gonna be a piece of information that nobody could possibly have known, like a song that you were just singing..."*
- Presenter: *"You might have broken up with your partner because there's somebody else out there who's your soulmate. Well, we can find out when you're gonna meet them, what their name is, who they're around – all of that information on the phones..."*
- Psychic: *"Our job is to prove to you without making it [indistinct] that our job is real, and the way we do this is by giving you little snippets of proof, little "how could they know that?" moments that, you know, we are linked in, tuned in, with you..."*
- Presenter: *"And of course, if anybody leaves us feedback, texts in feedback, for any of our psychics today we will prioritise that for you. If you've had a reading and somebody got something right for you let us know. We don't know we've got it right unless you let us know."*

A constantly scrolling text banner contained various information including call costs and a statement that the content was for *"entertainment purposes only"*.

Ofcom considered that this material raised issues under Rules 15.5.2 and 15.5.3, as set out above. Therefore we sought comments from the broadcaster in respect of these rules.

## **Response**

Generally, Big Deal said that it assumed Ofcom was concerned that the comments highlighted were in some way exploitative and harmful. The broadcaster did not directly give a view on the point.

Big Deal stressed the regular scrolling message explaining that the material was for entertainment purposes only and that the programme content *"...is entertaining to many as Ofcom's own research amply demonstrates."*

The broadcaster sought to distinguish the comments made by viewers that were displayed by text from the comments made by the presenter and psychics. It told us, *"Many of the comments relate to viewer feedback. That feedback is provided by individual viewers and is not created by or for the programme."* The broadcaster stated that the feedback was, in its view, a distinct element that did not form part of the teleshopping.

The broadcaster said further that it believed *"...viewers have a right to express their feelings about the programme and that it is entertaining for other viewers to see and hear what they have to say. Viewer feedback is a widely used form of entertainment on other non-psychic teleshopping channels, such as QVC."*

Again in this respect, the broadcaster said that, *"Viewer comments are the comments of the viewer, not of the programme. The programme does not write or say those*

comments. They are not made by the viewer in return for payment. They are aired by the programme to enhance the entertainment value afforded by the programme and not for the purpose of making a profit.”

Stressing its view that the viewers’ text messages cannot be regarded as being part of the teleshopping, Big Deal described them as “independent feedback”. Further, it told us that “Teleshopping is a hybrid form of advertising. Within the meaning of the BCAP Code it is the making of a direct offer for the supply of services in return for payment ie: in this context the programme promotes the services of the Psychic presenters and the payment is the payment for a premium rate call.”

Big Deal stated that great care is taken by the programme presenter to ensure that viewers are familiar with the manner in which the service operates, and that this is important to help avoid any misunderstanding “...as to the manner in which the programme operates and serves to enhance the value the viewer derives from their viewing experience.”

More generally, Big Deal maintained that the teleshopping does not make any claims for efficacy or accuracy. The broadcaster said that the viewers’ comments are statements of fact made independently.

As to the presenter, the broadcaster said that she “...goes out of her way, as does the programme generally, to stress that the Psychic’s are focused on positivity. Most certainly they do not predict negative experiences or events. They provide guidance and not advice, being alert to the need to comply with BCAP Rule 15.5.3.”

Big Deal stated that the experience of the psychics was carefully vetted to ensure that the broadcaster could satisfy itself as to their experience and suitability. Further, “It is relevant to the trust that should exist between the viewer and the programme that the viewer is given information regarding each Psychic’s background.”

The broadcaster explained that it is in the nature of what the psychics do that they should “connect” with the viewer. In this respect it pointed out that Hazel Lee (a psychic) stated “*it’s all about energy and we kind of pick up on your energy and what’s going on with you right now*”.

Big Deal said that it received very few complaints about the psychic teleshopping and that the channel Psychic TV itself has an impeccable record. The broadcaster understood that Ofcom also receives very few “genuine” viewer complaints.

It said further that it conducted regular, continuous and stringent training of presenters, psychics and production staff, and carried out regular reviews and reporting to ensure the highest standards are met.

It was, therefore, of great concern and surprise to Big Deal that Ofcom should have received numbers of genuine viewer complaints. Big Deal questioned whether the complaints come from genuine viewers or from industry complainants. [As indicated at the start of this Finding and as was made clear to the broadcaster, one complaint was received.]

The broadcaster was also concerned that no guidance had been published by Ofcom about psychic material.

However, Big Deal said that, in light of Ofcom's recent decision regarding Psychic TV<sup>4</sup>, it had taken action to remove viewer feedback from the content. It did not, though, abandon its views on viewer feedback, in line with the submission made in this case.

## Decision

The BCAP Code's prohibition on claims of efficacy or accuracy in advertising for psychic services serves an important purpose. In tandem with the requirement that such services must make clear that they are intended for entertainment only, the rule seeks to ensure that these practices are not presented as in any way dependable or based on any reliable evidence.

In this case, Ofcom first considered whether the advertising had contained claims of efficacy or accuracy, and then sought to establish whether the service had made clear that it was intended for entertainment purposes only.

Ofcom did not accept Big Deal's argument about the nature of the material included in the service. Irrespective of any value or benefit that consumers might derive from this service, Ofcom considered that the broadcaster had featured a number of examples of customer 'feedback' which clearly amounted to claims of both accuracy and efficacy. For example: *"Holly u were spot on..."*, *"...she is very detailed and spot on..."*, *"...your predictions all happen..."*

Where consumers comment favourably on a product or service in advertising the comments are advertising claims. Such claims are generally known as testimonials and are subject to the provisions of the BCAP Code just like any other claim included within advertising.

Further, the presenter and psychics themselves made unambiguous claims and assurances about the accuracy and efficacy of the readings. For example,

*"...all of our psychics have been vetted and checked: they've all got years of experience behind them".*

*"...she's also gonna validate; so for any sceptics out there, "validations" are pieces of evidence to prove to you that we're actually linked into you. So this could be something like your cat's name or what you've been doing today, or you might have recently dyed your hair – the psychic will pick up on that. It's gonna be a piece of information that nobody could possibly have known, like a song that you were just singing..."*

*"You might have broken up with your partner because there's somebody else out there who's your soulmate. Well, we can find out when you're gonna meet them, what their name is, who they're around – all of that information on the phones..."*

Ofcom was therefore of the view that the claims in the customer testimonials were further emphasised by these repeated claims made by the presenter and psychics.

Broadcasters in this field must ensure that they avoid the inclusion of claims, explicit or implied, for the efficacy or accuracy of psychic practices. This will require that

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<sup>4</sup> In Bulletin 180, available at:

<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb180/obb180.pdf>

presenters, guests and anyone else working on the channel take care to stay away from this area, and that there is no inclusion of testimonials or similar customer comments given by callers.

Avoiding such claims also extends to not allowing on air any comment, whoever makes it, that could be understood to be an indication of efficacy or accuracy, including spontaneous comments from customers who might be speaking on air. The material included in this advertising featured a number of claims of efficacy and accuracy for the psychic services that were being promoted, and was therefore in breach of Rule 15.5.3 of the BCAP Code.

Ofcom then turned to consider the advertising against the requirements of Rule 15.5.2. We noted that the broadcast content was labelled on air as being for entertainment purposes. However, in view of the fact that the material featured repeated claims of efficacy and accuracy in breach of Rule 15.5.3, as set out above, Ofcom judged that these claims contradicted the purpose of the mandatory labelling of this material as being merely entertainment. Therefore Ofcom also found the advertising in breach of Rule 15.5.2.

As to the need for guidance, we do not believe that Rule 15.5.2 requires elaboration for it to be easily understood. Nevertheless, for the avoidance of any doubt we take this opportunity to make clear that any suggestion at all in psychic advertising that the services offered are able to provide viewers with anything more than merely entertainment and generalised advice is likely to raise issues under the BCAP Code.

Breaches of these rules are potentially serious because they may result in consumer harm. Ofcom puts Big Deal on notice that should compliance issues of this type arise in future, it will be likely to consider the imposition of statutory sanctions.

#### **Breaches of Rules 15.5.2 and 15.5.3 of the BCAP Code**

## In Breach

### Central Tonight

ITV1 (Central), 2 May 2011, 18:00

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#### Introduction

*Central Tonight* is ITV Central's half-hour early evening local news programme.

During the broadcast on 2 May, the presenter introduced a short report by saying:

*"The boating season on the Midlands canal and river network is well and truly upon us and now is one of the busiest times of the year, but when boats break down, what should be a relaxing break can turn into something much more dangerous..."*

A reporter continued:

*"Boating is a relaxing way to get around – that is, until things go wrong. When they do, a firm based in Stafford are ready to respond. River Canal Rescue are ten years old this month and describe themselves as "the AA of the waterways" – they're the only company in the country offering breakdown cover for boaters – except breaking down on the water is a bit trickier than on the motorway."*

The Managing Director of River Canal Rescue ("RCR") then explained the nature of company's service by saying:

*"If you are out on a river and your boat engine fails then what can happen is that you are left adrift on a river and that can lead to all sorts of problems – sometimes people don't carry life jackets, it can mean your boat actually becomes wedged by a bridge – and we usually liaise with the fire brigade and the ambulance service to make sure that lives are not put at risk, but then it's our job to actually rescue the boat."*

A little later, the reporter added:

*"Although River Canal Rescue are based here in the Midlands, they have more than 400 engineers on call across the country, covering three thousand miles of waterway, twenty-four hours a day."*

An RCR engineer then said:

*"If a member needs something, then generally we'll do our best to provide it – so, anything from taking stuff off props that people can't get off, rescuing on rivers – If it's something that no one else can do, generally we're the ones that people call to have a go."*

Just before the end of the feature, an RCR member said:

*"There's usually something during a season that goes wrong, but at least you know that, wherever you are, they're a phone call away, so you can relax in the knowledge that somebody that knows what they're doing will be out and sort your problem out for you."*

A viewer complained to Ofcom that the news item was a “blatant advert” for RCR.

ITV Central told Ofcom that the feature had not been broadcast in return for payment or other valuable consideration, adding that “all costs incurred in producing the report were paid by ITV.” Ofcom therefore asked the broadcaster for its comments on the complainant’s concern, with regard to the following Code rules:

Rule 9.4 “Products, services and trade marks must not be promoted in programming.”

Rule 9.5 “No undue prominence may be given in programming to a product, service or trade mark...”

## **Response**

ITV Central said that the report originated from an email its news room had received from RCR at the end of March, which said the local company was celebrating its 10<sup>th</sup> anniversary and explained “their heritage and the work they do.” The broadcaster added: “The bank holiday period at the end of April is one of the busiest times on the waterways, and the canals in the Midlands form a major part of the leisure and tourism in the region, narrowboating being a popular pastime there. For these reasons, the Central News team thought a story about narrowboating, the safety issues it can raise and the unique work a local company does in this area would be of interest to its viewers.” ITV Central also detailed a number of programmes, produced by various television and radio broadcasters, that had featured RCR over recent years.

With regard to Rule 9.4 of the Code, which prohibits the promotion of products and services in programmes, ITV Central did not consider references to RCR to have been promotional, “in the context of the programme and the report.” It said that, “although the report referred to the company’s 10 year anniversary, the number of engineers it employs and the mileage of waterways they cover, these were presented very much as facts about the company, as opposed to selling points of its service.”

While the broadcaster admitted that “the report did contain some positive comments from a customer about RCR’s services ... positive references are not necessarily promotional under rule Rule 9.4”. It considered that, in this instance, such references “were consistent with viewer expectations of what was essentially a report about the unique work of a local company”.

ITV Central noted that the report did not contain “superlative language, details of cover, services or prices or a clear “sell” of RCR’s services.”

With regard to Rule 9.5, which prohibits the undue prominence of products and services in programmes, the broadcaster considered that its references to RCR in the news bulletin were editorially justified and not presented in a manner that made them unduly prominent, as it considered the report to be “a story about a popular leisure pursuit that was both topical and of relevance to viewers in the Central region.” It added that the report “focussed on the unique work of a company based in the Central region”, concluding that “there was therefore a strong editorial justification not only for including the report in the programme, but also for focussing on the work of RCR in that report.”



ITV Central said its news team had been mindful of Code requirements concerning commercial references on television and a number of edits had been made “to reduce the number of times RCR and its logo were referred to and to ensure that information given about the company was factual”, not promotional.

The broadcaster considered the inclusion in the report of RCR “employees talking about their work, reference to the services offered by the company and some visual reference to the company’s name and logo” as “entirely natural” and editorially justified. It acknowledged that such references to RCR “may have been prominent”, but did not consider them *unduly* prominent, as they had not concerned such things as “the cover offered by RCR, the price of its cover, guaranteed response times or other elements of the services offered.”

In conclusion, ITV Central considered the report “came across as a story about an interesting and unique service offered by local company, as opposed to advertising or promotion for that company.”

## Decision

One of the fundamental principles of European broadcasting regulation is that advertising and programming (i.e. editorial content) must be kept distinct. This is set out in Article 19 of the Audiovisual Media Services (AVMS) Directive, which is reflected in Section Nine (Commercial references in television programming) of the Code. The purpose of this distinction is to prevent programmes becoming vehicles for advertising and to protect viewers from surreptitious advertising.

Rule 9.5 not only prohibits the undue prominence of a product, service or trade mark in programming but notes that it “may result from:

- the presence of, or reference to, a product, service or trade mark in programming where there is no editorial justification; or
- the manner in which a product, service or trade mark appears or is referred to in programming.”

The celebration of a unique local business’s tenth anniversary may provide editorial justification for a report in a local news programme, especially where it is associated with a popular local leisure activity, such as boating. In this instance, however, Ofcom does not consider that the report merely addressed “narrowboating, the safety issues it can raise and the unique work a local company does in [the] area”, as ITV Central’s news team intended.

Ofcom considers that visual references to RCR’s name and logo were appropriately limited and we accept that the report did not refer to the featured company in superlatives or provide significant detail of its cover or its prices. Nevertheless, we noted that, having established RCR as “*the AA of the waterways*” and “*the only company in the country offering breakdown cover for boaters*”, the reporter later added that “*...River Canal Rescue ... have more than 400 engineers on call across the country, covering three thousand miles of waterway, twenty-four hours a day*”, shortly after which an RCR customer offered her personal endorsement of the company – i.e. “*There’s usually something during a season that goes wrong, but at least you know that, wherever you are, they’re a phone call away, so you can relax in the knowledge that somebody that knows what they’re doing will be out and sort your problem out for you.*”

These comments appeared to us to be typical of those generally used for promotional purposes (e.g. in advertisements). Given the brevity of the report, together with the nature of the above comments, Ofcom considered it promoted RCR's services in programming, in breach of Rule 9.4 of the Code.

Further, even though the locally-based business's tenth anniversary may have provided some editorial justification for being a news item, the report itself appeared principally to promote RCR, given the manner in which the above references to it were made. These references were therefore unduly prominent in programming, in breach of Rule 9.5 of the Code.

#### **Breaches of Rules 9.4 and 9.5**

## Broadcast Licence Condition cases

### In Breach

#### Breach of Licence Condition

*Brick FM*

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This decision was originally published on 9 June 2011.

#### Introduction

Brick FM is a community radio station providing a service for the people of St Boswells, Newton St Boswells and the surrounding area in the Scottish Borders. It has been on air since January 2008 and the output is presented by volunteers. The licence is held by Brick FM Ltd [the licensee].

The station's licence includes as an annex a 'key commitments' document which sets out what the radio station is required to broadcast (which is based on the promises made by the station in its original application for the licence).

Ofcom has been corresponding with Brick FM Ltd since January 2010 regarding the station's broadcast output and its compliance with its 'key commitments' following a complaint from a listener. After writing to the licensee regarding the concerns raised at that time we were initially satisfied with the station's response. However in late March of that year we received a second complaint regarding output broadcast by the station; specifically, the amount of live output being broadcast as part of the service on a specified day.

The station's 'key commitments' require that "the service will typically be live for at least 10 hours per day". We therefore wrote to Brick FM Ltd on 26 March 2010 asking for their comments on the complainant's assertion that all output broadcast on 18 March 2010 was pre-recorded and appeared to have been made some time ago. We asked the station to provide recordings of the output broadcast on the day specified by the complainant; 18 March 2010. The station was asked to respond to us with the requested recordings and comments by 9 April 2010.

We did not receive the recordings or comments by the deadline; after liaison with the station we agreed a week's extension and received the recordings on 19 April. However, the licensee did not provide comments on the specific issues we raised. We contacted the licensee at this stage to point out that the comments supplied were not sufficient and that further information was required.

The station responded the next day and told us that on the specified day a presenter was off ill and that there was "typically over 8 hours of live" on that day, 18 March. We also found that, after listening to the recordings of the output provided, it was difficult to assess whether the station's 'key commitments' in other respects were being delivered.

In April last year we therefore requested further recordings of output from the station in order to assess the station's compliance with its 'key commitments'. On this occasion we requested that the licensee 'signpost' its output indicating how and when certain 'key commitments' (which we specified) were delivered. The station was given a deadline of 12 May 2010 to comply. We did not receive the recordings and supplementary information from the station by the deadline and on 18 May we

wrote to the station formally, indicating that the licensee may be in breach of its licence. Consequently, we received the requested recordings and information from the station by the end of that month.

We listened to the recordings provided by Brick FM Ltd and considered the accompanying information in some detail. Our analysis at that stage concluded that the recordings and accompanying signposting information were inadequate to enable us to properly assess whether the station was delivering against its 'key commitments'.

We therefore asked the station to supply further recordings and information in August 2010 on the basis that we had not been able to verify, from the information previously submitted, that the station's output complied with its 'key commitments'. We did not receive recordings from the licensee until November, because of what it said were technical difficulties. However, these recordings were again unsatisfactory as they were unmarked, no dates or times of broadcast were provided and no supplementary information was provided. The recordings were therefore returned to the licensee, and we reiterated that we required recordings signposting specific 'key commitments' (which were outlined again) and that the material should be adequately labelled with dates and times of broadcast. The station was given a final deadline of 2 December 2010.

The licensee said it had sent the recordings and accompanying information to us in mid-December 2010. However, by late January 2011 we had not received this and the licensee was found in breach of its licence for failing to provide recordings and information. This breach was recorded in the Broadcast Bulletin published on 21 February 2011<sup>1</sup>.

The failure by Brick FM Ltd to provide the requested recordings of output and other information left us still unable to assess whether the licensee is delivering against its 'key commitments'. In March 2011 we therefore again requested recordings for two specified days of output on Brick FM. We asked for the recordings to be supplied as broadcast and qualified this by saying that the recordings should be supplied as the listener would have heard the output on the specified days. We selected the dates Wednesday 23 February 2011 and Saturday 26 February 2011. We also asked that the station supply a schedule of what was broadcast over these two days. The recordings were supplied by the required deadline.

Our monitoring of the output provided on this occasion led us to believe that Brick FM was not delivering a number of its 'key commitments'. Brick FM's licence requires that "output will typically comprise 75% music and 25% speech" and "the service will typically be live for at least 10 hours per day".

In the output we listened to, less than 25% of the output was speech; we found that the programmes were predominantly comprised of music. With regard to live output, we found in particular that two programmes that the station had indicated were broadcast live appeared to be repeats of previously broadcast programmes, and as a result less than 10 hours of live output was broadcast. (On a disc containing output broadcast on Wednesday 23 February 2011, the Kilted Jock's programme, listed as live on the schedule provided by Brick FM, referred to New Year's celebrations as recent and wished listeners a Happy New Year throughout the show. Dave the Brick's show, on the same disc of output broadcast on Wednesday 23 February 2011

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<sup>1</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb176/issue176.pdf>

and listed as live, referred throughout the programme to the previous weekend's Halloween party (Halloween is on 31 October.)

The station's licence also requires that "Brick FM will provide a platform for discussion and the expression of opinion via live, daily phone-ins." We found no evidence that discussion and expression of opinion was being catered for at all.

Consequently, Ofcom again wrote to the licensee on 15 April 2011, to ask how it considered its output complied with the licence requirements set out above. Condition 2(4), contained in Part 2 of the Schedule to the licence, states that:

"The Licensee shall ensure that the Licensed Service<sup>2</sup> accords with the proposals set out in the Annex so as to maintain the character of the Licensed Service throughout the licence period."

## Response

With regard to the proportion of speech output broadcast the licensee said that "most programmes contain speech and we have programmes which are 100% speech on an average week this percentage would be exceeded."

The licensee said that the station broadcast live output for 10 hours per day on average and that the two programmes that we highlighted as not appearing to have been broadcast live were in fact broadcast live and were spoof programmes: "Kilted Jock" was taking the Michael by saying and referring to New Year. I wished him a Happy New Year as I had not seen him since last year and we had phone calls as people thought he had lost his marbles. It was all just a bit of fun. Also, my own programme ['Dave the Brick'] about a Halloween Party. There was no party and it was all part of my imaginative mind. I have made at least 2 other programmes on the same theme and often refer to this in other broadcasts. I make a number of programmes each week but I make daft programmes every week. Most are about local people and happenings. Some dead and some alive and sometime have fantasy guests like Saddam Hussein, Bin Laden [sic]. These programmes were made live on this date."

With regard to providing a platform for discussion and the expression of opinion, the licensee says that "the people who make the programmes are give [sic] a platform and a chance to express an opinion. People are given an opportunity to phone the station and make there [sic] own programmes and express an opinion".

## Decision

Ofcom has been in correspondence with this licensee for over a year with regard to the provision of its 'key commitments'. During this time, neither in correspondence received from the licensee nor in the recordings we have listened to, have we found sufficient evidence that the 'key commitments' are being fully delivered. In our most recent correspondence, referred to in this finding, we told the licensee that we were concerned about the lack of speech material, live output, and daily phone-ins.

Ofcom did not feel that the representations made by the licensee provided sufficient evidence that it was delivering the amount of speech, live output or daily phone-ins set out in its licence.

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<sup>2</sup> The service that the station is licensed to provide, as described in its 'key commitments'

With regard to its speech output, although the licensee has said that it is providing 25% speech output as part of the service and that some programmes consist of 100% speech, no evidence has been supplied to demonstrate this and Ofcom's own monitoring of output broadcast on Brick FM has not found this to be the case.

Our concerns about live programming in particular go beyond the two specified programmes referred to above. Other programmes listened to as part of this monitoring of the station's output, and listed as live by the station, did not include any indication that they were broadcast live, such as references to current news items or local 'what's on' information, dates, or even time-checks by presenters. Although the licensee has said that the two specified programmes were spoof programmes, no further evidence has been supplied regarding their broadcast date.

In addition, previous correspondence with the licensee has indicated that Brick FM appears to include in its definition of live output some recorded programming which it broadcasts 'as live' and that the station repeats some output, apparently regarding this as part of its live output commitment because it was originally broadcast live. It appears that the licensee's definition of live output does not correlate with what Ofcom would generally define as live; that is, programming that is broadcast at the same time as it is being made. (We accept that some live programmes may include some pre-recorded material, such as short features.) Therefore, we believe that the station's provision of live output is considerably less than it is reporting, and less than what is required by its licence (as set out in the 'key commitments').

Although Brick FM Ltd says that its programmes provide a platform for discussion and the expression of opinion, our monitoring of its output has not found examples of this. Further to this, the station's 'key commitments' require it to provide daily phone-in opportunities as part of its service and we have not found this to be the case in the programmes listened to as part of our monitoring.

We concluded that on each of the two days in respect of which recordings were provided, Brick FM Ltd was not providing the service as described in its 'key commitments', and was therefore in breach of the licence condition referred to above. Ofcom has therefore formally recorded this breach by the licensee.

Community radio stations are, under the terms of The Community Radio Order 2004, defined as local radio stations provided primarily for the good of members of the public or for a particular community, rather than primarily for commercial reasons. They are also required to deliver social gain, be run on a not-for-profit basis, involve members of their target communities and be accountable to the communities they serve.

Any organisation applying for a community radio licence is required to set out proposals as to how it will meet these various statutory requirements. If it is awarded a licence, its proposals are then included in the licence so as to ensure their continued delivery. As referred to above this part of a community radio station's licence is known as the 'key commitments', and it is designed to ensure that each community radio station continues to provide the service for which it has been licensed.

We are continuing our dialogue with the licensee regarding its general compliance with its licence conditions and with its 'key commitments' and will monitor its output

again in due course. The licensee has been put on notice that continued non-compliance with its key commitments may result in further regulatory action being taken.

**Breach of Licence Condition 2(4) in Part 2 of the Schedule to the community radio licence held by Brick FM Ltd (licence number CR135)**

## In Breach

### Breach of Licence Condition

#### *Radio Sandwell*

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This decision was originally published on 9 June 2011.

#### Introduction

Radio Sandwell is a community radio station licensed to provide a service for the African Caribbean community and other residents of West Bromwich and the surrounding area of Sandwell. It has been on air since May 2010 and the output is presented by volunteers. The licence is held by Sandwell African Caribbean Development Agency Limited ("the Licensee").

A Radio Sandwell listener contacted Ofcom at the beginning of March 2011 to inform us that the station did not appear to be broadcasting. A few days later we had a call from another listener to say that the station appeared to be transmitting pre-recorded material only.

Consequently, we wrote to the station to seek its comments. The licensee assured us that there had been "no break in the Station's broadcasting and Radio Sandwell continues to broadcast and provide a valuable service to the community of Sandwell."

At the end of March, Ofcom engineers attended Radio Sandwell's transmission site as part of routine monitoring and found that the station appeared to be transmitting all of its output from a laptop linked to the transmitter (rather than from a studio). This laptop was running a software programme that appeared to be playing pre-recorded output only.

The station's licence includes as an annex a 'key commitments' document which sets out what the radio station is required to broadcast (which is based on the promises made by the station in its original application for the licence). This includes a requirement to provide ten hours of live output a day.

We wrote to the Licensee on 30 March 2011 to ask how Radio Sandwell was meeting its key commitments. We also asked for recordings of output broadcast on two specified days. The station was given two weeks in which to provide the recordings and the information requested; that is, by 13 April 2011.

The Licensee did not comply with our request for recordings and for information by the stipulated deadline. We therefore wrote again to the Licensee and asked it for its comments with regard to Licence Condition 8(2)(b) and Licence Condition 9(1)(d) contained in Part 2 of the Schedule of the licence which state:

"The Licensee shall:

- 8 (2) (a) make and retain, for a period of 42 days from the date of its inclusion therein, a recording of every programme included in the Licensed Service together with regular time reference checks."



(b) at the request of Ofcom forthwith produce to Ofcom any such recording for examination and reproduction.”

and

“The Licensee shall:

- 9 (1) (d) [provide] such information as Ofcom may reasonably require for the purpose of determining the extent to which the Licensee is providing the Licensed Service to meet the objectives and commitments specified in the Community Radio Order 2004”

## **Response**

The Licensee did not seek to contest that it had failed to provide the recordings and information by the required deadline.

The Chairman of the licence-holding company, to whom we had written, said he was out of the country on business and returned to the UK two days before the deadline given for recordings and information. He said that he “sought to action your email as requested but circumstances prevented me from so doing although I had every intention of responding as requested by the stipulated timescale.”

## **Decision**

It is a licence condition that licensees provide recordings of output and information so that Ofcom may carry out its regulatory functions.

The Licensee, Sandwell African Caribbean Development Agency Limited, failed to supply the recordings and information required in a timely fashion. This is a serious and significant breach of Conditions 8(2) and 9(1) of its licence to broadcast and should there be any similar contraventions, Ofcom may consider further regulatory action.

The Licensee has now provided the recordings requested by us in March. We are continuing our dialogue with the Licensee regarding its general compliance with its licence conditions and with its key commitments.

**Breach of Licence Condition 8(2) and 9(1) contained in Part 2 of the Schedule to the community radio licence held by Sandwell African Caribbean Development Agency Limited (licence number CR176)**

## Fairness and Privacy cases

### Upheld

#### **Complaint by Mrs Gwen Weir made on her behalf by Mr Andy Weir**

*BBC Spotlight, BBC1 South West and BBC South Today, BBC1 South, 28 June 2010*

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**Summary:** Ofcom has upheld Mrs Gwen Weir's complaint of unfair treatment and her complaints of unwarranted infringement of privacy.

Two news reports followed Mr John Higgins as he visited Newquay, prior to the inquest into the death of his 16 year old son as a result of falling from a cliff in the town. Mr Higgins was pursuing his campaign to try to stop underage drinking among young people celebrating the end of their exams. Both reports included a section in which Mr Higgins was shown meeting and speaking with Mrs Weir and her husband, Mr Andy Weir, in front of their hotel, "Goofys", followed by Mr Higgins' reflections on that meeting.

In summary, Ofcom found the following:

- Mrs Weir's conversation with Mr Higgins as presented in the reports was unfairly edited in that it did not reflect Mrs Weir's position as expressed in her full conversation with Mr Higgins; and in light of this and the introductory comments in both reports (but in particular in the *BBC South Today* report) she was unfairly portrayed in the programmes as broadcast. Ofcom did not uphold an additional aspect of the fairness complaint that footage of Mrs Weir used in the programme was unfairly edited in that it misrepresented an earlier meeting between Mr Higgins and Mr Weir.
- Mrs Weir's privacy was unwarrantably infringed in both the making and the broadcast of the programme in that:
  - audio of her was recorded and broadcast without her knowledge and consent;
  - there was no justification for the recording; and
  - any public interest in broadcasting Mrs Weir's comments to illustrate concerns raised by many local business people did not outweigh her legitimate expectation of privacy in relation to the broadcast of this material.

#### **Introduction**

On 28 June 2010, BBC1 South West and BBC1 South broadcast their respective nightly regional news programmes, *BBC Spotlight* and *BBC South Today*. Each programme included a report on the findings of an inquest into the death of a teenager, Paddy Higgins, who died from injuries resulting from falling from a cliff in Newquay after he had been out celebrating the end of his GCSE exams in June 2009.

Both *BBC Spotlight* and *BBC South Today* also included a report in which Mr John Higgins, Paddy Higgins' father, visited Newquay to talk to people about the growing

trend for teenagers to celebrate in the town; the ease with which they could access alcohol and the dangers therein; the steps which were being taken to deal with the problem; and, the effect on the local community.

In this part of each programme, Mr Higgins was shown meeting and speaking with Mrs Weir and her husband, Mr Andy Weir, in front of their hotel, "Goofys", and later reflecting on that meeting.

Mr Weir complained to Ofcom that his wife was treated unfairly in the programmes as broadcast and that her privacy was unwarrantably infringed in both the making and broadcast of the programmes.

## **The Complaint**

### **Mrs Weir's case**

- a) In summary, Mr Weir complained that Mrs Weir was treated unfairly in the programmes as broadcast in that:

The footage of Mrs Weir used in the programmes was unfairly edited in that it misrepresented an earlier meeting between Mr Higgins and Mr Weir and gave the impression that Mrs Weir was critical of Mr Higgins' actions.

By way of background, Mr Weir added that the presenter's comments at the start of the *BBC South Today* report, in conjunction with the deception employed in obtaining the recording of Mrs Weir, suggested that the programme deliberately misrepresented Mrs Weir to support the angle it wished to portray.

- b) In summary, Mr Weir complained that Mrs Weir's privacy was unwarrantably infringed in the making of the programmes in that:

The reporter surreptitiously continued to record audio of Mrs Weir when he had indicated that he would not do so.

By way of background, Mr Weir explained that he alone had agreed to being filmed while being interviewed by Mr Higgins; that following the conclusion of the interview Mr Higgins and the reporter had stayed to chat with him and his wife but that the reporter had stopped filming. The reporter had subsequently started to film again but had said "don't worry about me, I'm just taking some wide shots for editing" and "there won't be any sound".

- c) In summary, Mr Weir complained that Mrs Weir's privacy was unwarrantably infringed in the programmes as broadcast in that:

The programme included surreptitiously recorded audio of Mrs Weir.

### **The BBC's case**

The BBC said that during both reports Mr Higgins was shown in conversation with Mr Weir outside Goofys (Mr and Mrs Weir's hotel). Images were then included of Mr Higgins in conversation with Mrs Weir together with audio of comments she had made regarding Paddy Higgins' death and the effect that media coverage of this and other incidents had had on their business. On leaving the hotel Mr Higgins had addressed the camera and described his response to Mrs Weir's comments.

In summary the BBC responded to the complaint of unfair treatment as follows:

- a) The BBC responded to the complaint that the footage of Mrs Weir in the programmes was unfairly edited in that it misrepresented the earlier meeting between Mr Higgins and Mr Weir and gave the impression that Mrs Weir was critical of Mr Higgins' actions as follows.

The BBC said that the relevant section of the reports did not purport to represent the earlier meeting between Mr Higgins and Mr Weir, so there was no basis for saying that the earlier meeting was *misrepresented*. The only reference to that meeting in this part of the reports was a brief line in the script which described the earlier meeting as having gone well. The BBC argued that the commentary made a clear distinction between the meeting between Mr Higgins and Mr Weir and the later conversation with Mrs Weir.

The BBC said that the full transcript of the discussions between Mr and Mrs Weir and Mr Higgins showed that Mrs Weir expressed strong opinions on the negative publicity Newquay had attracted following Paddy Higgins' death and other events and the impact on her business. The BBC said that the programmes gave an accurate reflection of Mrs Weir's perspective on those matters. Mrs Weir expressed her opinion in untransmitted footage that such stories contributed to a general decline in the reputation of the town and that businesses like her own had been critical of how the stories were reported. Mr Higgins had then, also in untransmitted footage, explained his campaign and his position:

Mr Higgins: I mean do you understand, do you understand what my issue was though? 'Cause I mean I got a lot of reactionary things from Cornwall who, from Newquay, people just thought I was slagging off Newquay because I never was. I never said anything specifically on Newquay.

Mrs Weir: No, but the media probably made it look like it.

The BBC said that later in the reports Mr Higgins described his feelings about Mrs Weir's comments, making clear that he was not critical of her position and considered it "fair enough", given that her livelihood and that of her husband was at stake. The BBC also said that, in his comments after the conversation with Mr and Mrs Weir, Mr Higgins had referred to an unrecorded conversation with Mrs Weir, before the recorded interview with Mr Weir, in which she described her feelings about the negative publicity and referred to "that twat Paddy (who) fell off a cliff". The BBC said that, while Mr Higgins accurately reflected the substance of Mrs Weir's comments, he chose to soften the terms in which she had expressed her views, substituting the word "prat" for "twat".

The BBC said that this substitution, coupled with Mr Higgins' acknowledgement that Mrs Weir may not have known who he was, would have served to ensure that Mrs Weir was not depicted as entirely insensitive to the feelings of a bereaved parent.

The BBC then responded to the concerns raised about the way the report on *BBC South Today* was introduced.

The BBC said that the introduction to the report included the following line:

*“But as Joe Campbell discovered, his efforts [Mr Higgins’] are not going down well with everyone in the resort”.*

This was intended to convey the general flavour of the response that the BBC’s reporter and Mr Higgins had received throughout the weekend, namely that not everyone in Newquay welcomed the attention the resort had received, the negative impact on livelihoods and the debate it had provoked. The BBC said that, while the line was not intended to refer particularly to Mrs Weir, it did offer a fair reflection of her comments, notably the strong concern she had expressed about the impact of the negative coverage Newquay had received, a significant proportion of which resulted from Mr Higgins’ campaign. In light of this, if viewers had understood this introduction to refer particularly to Mrs Weir, rather than to the town and its businesses as a whole, they would not have been misled as to her position as a result.

In summary the BBC responded to the complaints of unwarranted infringement of privacy in the making and broadcast of the programme as follows:

- b) The BBC first responded to Mrs Weir’s complaint that her privacy was unwarrantably infringed in the making of the programmes in that the reporter surreptitiously continued to record audio of her when he had indicated that he would not do so.

It accepted that Mrs Weir was not aware that the audio of her was being recorded, as, in response to a question from Mr Higgins the reporter had said that, at that point he was filming without sound. However, the BBC said that while the reporter’s comments about what he was doing at that particular point, namely filming general views of the property, including shots of Mrs Weir and others, may have given rise to the assumption that subsequent conversation would not be recorded, his comments did not amount to a guarantee that what was said would not be reported upon or was “off the record”. The BBC added that the camera was inadvertently left recording while being put on the ground and that therefore, although the recording was surreptitious in the sense that the person recorded did not know that it had taken place, there was no decision to record surreptitiously and therefore no justification could be articulated for such a decision.

- c) The BBC then responded to Mrs Weir’s complaint that her privacy was unwarrantably infringed in the broadcast of the programmes in that they included surreptitiously recorded audio of her.

The broadcaster argued that, notwithstanding the fact that the audio was inadvertently recorded surreptitiously and that therefore no justification could be made for the recording of this audio, the broadcast of the material was justified by the strong public interest in the views expressed by Mrs Weir. The BBC said that Mrs Weir’s comments represented a significant strand of opinion on a question of great interest to audiences, namely the attitudes of business owners to matters of public safety and personal responsibility in a town which had experienced two deaths due to cliff falls and to the negative publicity the town had received about public order and drunkenness amongst young people. It also said that while compiling their reports Mr Higgins and the reporter spoke to many local business people who complained of being unfairly damaged by the publicity surrounding the death but who had all been reluctant to express those views on the record or on camera. The BBC argued that, in the context of news reports in which a bereaved father sought to establish for himself how the town had reacted to the

circumstances of his son's death and what, if anything, had changed as a result, Mrs Weir's comments were highly relevant. The recording of Mrs Weir offered valuable first hand evidence of a view which would otherwise have been difficult to capture.

The BBC suggested that the circumstances in which Mrs Weir made her comments were such that her expectations of privacy might be considered limited, in that, prior to the camera being turned on, Mrs Weir had expressed frank opinions of Mr Higgins' son and his actions, saying "that twat Paddy fell off a cliff...". She had also expressed her views on the impact that such events and coverage of them had on her business directly to Mr Higgins, who she knew to be investigating these issues for a BBC report. Furthermore, Mrs Weir was present and within earshot during the interview with her husband, who had known for some time what the focus of the report would be.

The BBC argued that in light of these factors it was reasonable to assume that Mrs Weir was aware that Mr Higgins and the reporter had been conducting an interview for broadcast purposes and may not have been entirely unaware of what it was that they were reporting on.

The BBC said that Mrs Weir made her comments to Mr Higgins within the hearing of a man she knew to be a BBC reporter, as well as several others sitting outside her place of business, in an area which might be considered semi-public. Even if her comments had not been recorded, the reporter would, in any case, have included them in the reports as reported speech, because they represented a significant strand of opinion which was otherwise not being expressed openly.

#### **Mr Weir's comments on the BBC's statement**

- a) In response to the BBC's statement on the complaint of unfair treatment, Mr Weir said that when Mr Higgins finished interviewing him Mrs Weir asked the people present, whom she assumed were BBC journalists, including Mr Higgins, why they were taking such a negative view of Newquay and whether they planned to show any of the good points. During this conversation something Mrs Weir said prompted one of the guests to say "then some twat fell off a cliff". Mrs Weir echoed the comment, saying "yes, some prat falls off a cliff" and Mr Higgins interrupted to say "I'm Paddy's father". Mr Weir said that apologies were made and the conversation continued.

Mr Weir said that he assumed that the reporter's claim in both reports that Mr Higgins presence touched a nerve with Mrs Weir referred to the incident above, but that it was the presence of someone she believed was a BBC journalist that touched a nerve with Mrs Weir, as she was not aware of Mr Higgins' identity at that time.

With regard to the introduction to the report on *BBC South Today*, Mr Weir said that as there was no indication in the programme that Mr Higgins' efforts were "*not going down well*" during any of the conversations he was shown having prior to his visit to Goofys and that given that the meeting with Mr and Mrs Weir was introduced with the reporter's claim that "*his presence touches a nerve with Andy's wife*", viewers would have understood the report to be claiming that Mrs Weir resented Mr Higgins' campaign to stop under-age drinking because of the damage it was doing to her business.

Mr Weir said that this was unfair in that it was followed by a fictitious exchange constructed to substantiate the claim in the broadcasts that Mr Higgins efforts were *“not going down well with everyone in the resort”*.

He said that Mrs Weir’s comments were taken out of context, were shown out of order and in one instance a substitution was made mid sentence. He added that Mrs Weir had stated on five occasions that her issue was not with Mr Higgins’ son or the media attention surrounding his death but rather with the generally bad press which Newquay had received and that one of Mrs Weir’s statements clarifying the nature of her concern should have been included in the broadcasts.

- b) As regards the complaint of unwarranted infringement of privacy in the making of the programme, Mr Weir said that, prior to the recording, Mr Higgins asked if he could “bin” his microphone at that point and the reporter said that there was no need as he was “not recording for sound”. The reporter had then placed the camera on the floor, pointing at the wall. Mr Weir said that there was also no evidence of any overt means to record the conversation, such as pen and paper.

Mr Weir said that the recording of the conversation took place on private property and out of earshot of general public, while the hotel guests were eating their breakfast. The conversation included a discussion of family and private lives and of other cliff falls.

Given these factors, Mr Weir argued that Mrs Weir had a legitimate expectation of privacy when the surreptitious recording commenced. He said that the reporter acknowledged this on the day in that he later approached Mr Weir, as could be seen in the unedited footage, to inform him that he was about to film “wide shots for editing” before he picked up his camera.

Mr Weir said that the BBC’s statement made it clear that the broadcaster had much to gain from surreptitiously recording the material. He also argued that his analysis of the unedited footage immediately before, during and after the recording took place, notably the fact that during the recording the camera was on the ground at the reporter’s feet and was totally still, indicated that the footage was recorded deliberately rather than this being an unusual, yet highly convenient, incident that occurred unintentionally.

Mr Weir also said that his view that the footage was recorded deliberately was strengthened by the fact that the reporter’s “wide shots for editing” focused on the conversation between Mr Higgins and Mrs Weir, rather than the conversation between Mr Higgins and Mr Weir, despite the purpose of the visit having been an interview between Mr Higgins and Mr Weir. Mr Weir said that this strongly suggested that the reporter was aware that the previous recording had taken place, was aware of its content and was taking shots to accompany the surreptitiously recorded audio.

- c) Mr Weir then commented on the BBC’s statement in response to the complaint of unwarranted infringement of Mrs Weir’s privacy in the broadcast.

Mr Weir said that, while viewers might have found Mrs Weir’s comments interesting, there was nothing in her comments as broadcast, namely her challenging someone she thought was a reporter about the media’s unfair portrayal of Newquay and the following discussion with Mr Higgins, that had any bearing on public safety and that therefore there was no justification for broadcasting them.

Mr Weir also said that the unedited footage suggested that Mr Higgins supported Mrs Weir's view that Newquay had been unfairly portrayed by the media. He said that, in any case, the inclusion of Mrs Weir's comments had been unnecessary because, as the unedited transcript showed, Mr Weir had already discussed the unfair portrayal of Newquay by the media with Mr Higgins, albeit not in such candid terms as Mrs Weir later did.

### **The BBC's response to Mr Weir's comments**

- a) As regards the complaint of unfair treatment, the BBC argued that Mrs Weir having mistaken Mr Higgins for a reporter would not have resulted in the description in the reports of her reaction to his presence being inaccurate.

The BBC said that even if viewers had understood the comment that Mr Higgins' efforts were "*not going down well*" as referring to Mrs Weir, rather than the general flavour of the response he had found in the town, given the context of the rest of the report, they would not have concluded that Mrs Weir did not support Mr Higgins' campaign to reduce underage drinking but rather that she was concerned about the negative publicity for Newquay, which she considered to be unfair and undeserved.

The BBC said that, although Mr Weir's submission made it clear that Mrs Weir had made efforts to distance herself from her earlier critical comments about Paddy Higgins' death and to assure Mr Higgins that it was "not about Paddy", several of her comments indicated that the negative publicity attracted by Paddy Higgins' death was indeed an area of concern for her. Although she had not criticised Mr Higgins or his actions directly, Mrs Weir had used the phrase "some prat/twat falls off a cliff" to him in the context of the impact that the death and the resulting publicity had had on the town and on her business.

The BBC noted Mr Weir's claim that Mrs Weir did not say "some twat fell off a cliff", but rather "some prat falls off a cliff", echoing a comment made by a guest. It said that Mr Higgins believed Mrs Weir said "twat" rather than a "prat", but accepted the possibility that he was mistaken. The BBC said that whichever word Mrs Weir had used, her comment had the effect of appearing to criticise Paddy Higgins for his actions and to point to his death as a key moment in the problems that Newquay had faced.

The BBC said that Mrs Weir's comments, as edited, gave a fair and accurate summary of her position as expressed to Mr Higgins and that it was not necessary for the reports to have included Mrs Weir's comments that her issue was not with Paddy Higgins and that she had no issue with the media attention surrounding his death in order to avoid unfairness to her.

The BBC said that Mrs Weir's comments on the day gave the clear impression that she was concerned about the media attention following Paddy Higgins' death. She put forward, in untransmitted footage, a chronology of the publicity received by Newquay in which June, the month of Paddy Higgins' death, was a turning point. She said that the media "probably...made it look like" Mr Higgins was attacking Newquay specifically and that that was "the slant" of coverage at that point. She said:

"After that the media for Newquay, nothing to do with Paddy, changed, you see, so that was the first incident and then there was, the focus changed".



She went on to say that media coverage since “had nothing to do with Paddy, that was just the start. They’ve got base, they’ve got focus, maybe”. She had discussed with Mr Higgins the fact that this was a social problem faced all over Britain and noted that Newquay had nonetheless been focused upon “probably due to Paddy...”

The BBC argued that the untransmitted footage showed that, while Mrs Weir may have felt the media furore following Paddy Higgins’ death was disassociated from Paddy Higgins himself, she regarded the incident as a catalyst for the negative publicity which followed. The BBC said that, taken as a whole, the reports made clear that Mrs Weir was principally concerned with negative media coverage of Newquay and that, while she may have preferred that Mr Higgins did not consider her comments as an attack on him or a criticism of his son, a significant part of the coverage about which she was concerned was generated by Mr Higgins following his son’s death.

The BBC said that Mr Higgins considered that the reports fairly described his conversation with Mrs Weir and provided statements from him to this effect.

- b) As regards the complaint of unwarranted infringement of Mrs Weir’s privacy in the making of the programme, the BBC reiterated that no guarantee was given that, after the reporter had said he was not recording for sound, anything which was said would be “off the record” and that it would therefore have been open to him to have quoted from anything said after this point.

The BBC noted that, while stating that Mrs Weir’s conversation with Mr Higgins took place on private property, out of earshot of the general public, Mr Weir had shown that any expectation of privacy was diminished as the conversation took place in the presence of guests in a communal dining area adjacent to the street. The BBC said that neither the fact that family matters and other cliff falls were discussed nor the fact that the reporter later informed Mr and Mrs Weir that he was about to start filming “wide shots for editing” made it reasonable for them to conclude that Mrs Weir’s conversation would not be reported upon.

- c) As regards the complaint that Mrs Weir’s privacy was unwarrantably infringed in the broadcast, the BBC reiterated its position that there was a significant public interest in the attitudes of business owners in Newquay, such as Mrs Weir, to matters of public safety and personal responsibility.

The BBC said that Mrs Weir’s unrecorded comments about Paddy Higgins suggested that she felt it was his folly that led to his death and that it followed that she was somewhat sceptical of the extent to which such accidents were the responsibility of business owners in Newquay. The BBC said that, given that reports had shown Mr Higgins’ considering the arguments for personal and parental responsibility in relation to underage drinking, as well as the position of local authorities and business associations Mrs Weir’s comments were highly relevant and of great public interest.

The BBC acknowledged that Mr Weir would have preferred that his comments were used, rather than those of his wife, but said that Mrs Weir’s comments offered a valuable insight into a position which would otherwise have proved difficult to capture and that nothing in Mr Weir’s interview offered the same level of insight into a view which many held but none would express on the record.

## Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

Where there appears to have been unfairness in the making of the programme, this will only result in a finding of unfairness, if Ofcom finds that it has resulted in unfairness to the complainant in the programme as broadcast.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included recordings of the programmes as broadcast and of the unedited footage recorded at Mr and Mrs Weir's hotel, transcripts of this material<sup>1</sup> and both parties' written submissions.

## The Programmes

On 28 June 2010, BBC1 South West and BBC1 South broadcast their respective nightly regional news programmes, *BBC Spotlight* and *BBC South Today*. Each programme included a report on the findings of an inquest into the death of a teenager, Paddy Higgins, who died from injuries resulting from falling from a cliff in Newquay after he had been out eating and drinking alcohol to celebrate the end of his GCSE exams in June 2009.

Both *BBC Spotlight* and *BBC South Today* also included a report in which Mr John Higgins, Paddy Higgins' father, visited Newquay to talk to people about the growing trend for teenagers to celebrate in the town; the ease with which they could access alcohol and the associated dangers that resulted; the steps which were being taken to deal with this problem; and, the effect on the local community.

In each report, Mr Higgins was shown meeting and speaking with Mrs Weir and her husband, Mr Andy Weir, in front of their hotel, "Goofys", and later reflecting on that meeting.

Alongside these images the reports included the following introductory commentary:

*"John is meeting surfer and hotelier Andy Weir, all goes well at first but his presence touches a nerve with Andy's wife".*

Both reports then showed some wide shot images of Mrs Weir talking to Mr Higgins over which were edited some remarks of Mrs Weir:

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<sup>1</sup> Along with his comments on the BBC first submission Mr Weir provided Ofcom with an amended version of the transcript of the unedited footage which included several sections of conversation which the transcript of the same provided by the BBC had indicated were either inaudible or were solely background chatter. In its response the BBC accepted the clarifications and amendments that Mr Weir had made to the unedited transcript but said that they did not alter its position with regard to this complaint.

*“There was a week last year when Paddy did die that it was a lot of not that nice vibe in town, wasn’t there...”*

*.... all our £100,000 investment in this place was (bleep), great. I’m sorry; I didn’t know you’re Paddy’s dad [Ofcom noted that the last two words were barely audible]...”*

After this section of the reports, Mr Higgins was filmed by himself addressing the camera and he said:

*“Their livelihoods depend on it and, you know for them, they didn’t know who I was in fairness, or some of them didn’t, and they said some prat falls off a cliff and that’s fair enough. I can understand they don’t know Paddy they don’t know the full story behind it, how it happened, and there are some things that Patrick did that were wrong”.*

### *Fairness*

- a) Ofcom first considered the complaint that footage of Mrs Weir used in the programmes was unfairly edited in that it misrepresented the earlier meeting between Mr Higgins and Mr Weir and gave the impression that Mrs Weir was critical of Mr Higgins’ actions.

Ofcom noted that, by way of background, Mr Weir said that the presenter’s comments at the start of the *BBC South Today* report, in conjunction with the deception employed in obtaining the recording of Mrs Weir, suggested that the programme deliberately misrepresented Mrs Weir to support the angle it wished to portray.

In considering this part of the complaint, Ofcom took account of Rule 7.1 of the Ofcom Broadcasting Code (“the Code”), which provides that broadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes. Ofcom also paid particular regard to Practices 7.6 of the Code. Practice 7.6 states that when a programme is edited, contributions should be represented fairly. Following this practice will not necessarily avoid a breach of this section of the Code (Rule 7.1). However, failure to follow this practice will only constitute a breach where it results in unfairness to an individual or organisation in the programme.

Ofcom examined the programmes as broadcast and the unedited footage recorded at Mr and Mrs Weir’s hotel.

It noted that both programmes followed Mr Higgins as he visited Newquay in the days before the inquest into his son’s death to pursue his campaign to try to stop underage drinking among young people celebrating the end of their exams. Both introduced the relevant section of the reports by showing images of Mr Higgins talking to Mr Weir in the front garden of his hotel alongside the following comment:

*“John is meeting surfer and hotelier Andy Weir, all goes well at first but his presence touches a nerve with Andy’s wife”.*

With regard to the complaint that the footage of Mrs Weir used in the programmes was unfairly edited in that it misrepresented the earlier meeting between Mr Higgins and Mr Weir, Ofcom noted that other than the introductory

reference to Mr Higgins' meeting with Mr Weir having gone well, which was shown prior to footage of Mrs Weir, none of the footage in the reports related to Mr Weir's earlier conversation with Mr Higgins. It also noted that neither the complaint itself nor the unedited transcript of the recording of the conversation between Mr Higgins and Mr Weir indicated that the programmes' characterisation of this meeting as having gone well was either unreasonable or unfair to Mrs Weir. Ofcom therefore considered that the footage of Mrs Weir included in the programme did not misrepresent the earlier meeting between Mr Higgins and Mr Weir. Further, in Ofcom's view, the representation of this earlier meeting in the programme could not have resulted in unfairness to Mrs Weir because she did not participate in and was not referred to in this earlier conversation. Ofcom therefore did not uphold this aspect of the complaint.

Ofcom then turned to the second aspect of this head of complaint: that the footage of Mrs Weir used in the programmes was unfairly edited because it gave the impression that Mrs Weir was critical of Mr Higgins' actions.

#### Reports, as broadcast

Ofcom assessed the material broadcast in the two reports which related to or could be seen to relate to Mrs Weir's attitude towards Mr Higgins or his son. The reports showed Mr Higgins' visit to Mr and Mrs Weir's hotel which was introduced with the comment about the meeting between Mr Higgins and Mr Andy Weir having gone well but Mr Higgins' *"presence touch[ing] a nerve with Andy's wife"*.

The *BBC Spotlight* report then showed some wide shots of Mrs Weir speaking to Mr Higgins while sitting in the front garden of the hotel with a couple of other people. The audio which was edited to accompany this footage was as follows:

Mrs Weir: *"There was a week last year when Paddy did die that it was a lot of not that nice vibe in town wasn't there? I think".*

Mrs Weir: *"And that was the end of us."*

Mr Higgins: *"Kicked in the teeth".*

Mrs Weir: *"All our £100,000 investment in this place was (bleep) great. I'm sorry; I didn't know you're Paddy's dad [the last two words were barely audible]..."*

Mr Higgins: *"No, it's alright. Uhm. Yeah".*

Ofcom observed that the relevant section of the *BBC South Today* report was identical, except that it omitted the words from *"I think"* to *"kicked in the teeth"*

This exchange was immediately followed by Mr Higgins standing by himself on the street and saying to the reporter:

*"Their livelihoods depend on it and, you know, for them they didn't know who I was, in fairness, or some of them didn't know and they said "yes, some prat falls off a cliff..." and that's fair enough. I can understand. They don't know Paddy, they don't know the full story behind it and how it happened and there were some things that Patrick did that were wrong".*

Ofcom observed that the *BBC South Today* presenter introduced the report by noting that Mr Higgins had:

*“...spent the weekend in Newquay campaigning to try to stop underage drinking among end of exam revellers but as Joe Campbell discovered, his efforts are not going down well with everyone in the resort”.*

Ofcom considered that in light of the inclusion of the initial comment that Mr Higgins’ *“presence touches a nerve with Andy’s wife”* in both reports, viewers of the broadcasts would have understood from the beginning that Mrs Weir was in some way unhappy with Mr Higgins’ presence or views. In this context, Ofcom noted Mr Weir’s specific concern about the inclusion of the comment that Mr Higgins’ *“efforts are not going down well with everyone in the resort”* in the presenter’s introduction to the report on *BBC South Today*. Ofcom considered that in the absence of any other example in the *BBC South Today* report in Newquay of opposition to, or unhappiness with, Mr Higgins’ campaign or views, and in conjunction with the comment about Mr Higgins’ presence touching a nerve with Mrs Weir, the presenter’s introductory comment would have strengthened viewers’ perception that Mrs Weir was unhappy with Mr Higgins and indicated that she resented his campaign to stop under-age drinking.

In addition, Ofcom considered that the various brief and separate elements of Mrs Weir’s conversation with Mr Higgins which had been edited together in the two reports indicated the following: Mrs Weir believed that the feeling about Newquay after Paddy Higgins died was very negative and that this negative feeling, which she associated with Paddy Higgins, had led directly to the £100,000 which she and her husband had made in their business being wasted and she was angry about this outcome. Ofcom also considered that this section of both reports, when taken together with Mr Higgins’ acknowledgment that some of the people to whom he had just been speaking *“didn’t know who I was”* (see paragraph below for further details), indicated that when Mrs Weir started speaking to Mr Higgins she had not known his real identity, and particularly that he was Paddy Higgins’ father.

In Ofcom’s opinion Mr Higgins’ comments in the street on his meeting with Mr Weir and, especially, with Mrs Weir (in light of the inclusion of both images and audio of her conversation with him and the focus on her opinion in this section of the reports) would have led viewers of the reports to draw the following conclusions: Mr Higgins recognised the importance of Newquay’s reputation to Mr and Mrs Weir as people running a local business dependent on tourism. He also understood why Mrs Weir had expressed anger at the fact that the town’s reputation had been damaged in the wake of his son’s death even, to the extent of Mrs Weir having referred to his son as a “prat” who fell off a cliff given that, as he acknowledged, *“they didn’t know who I was, in fairness, or some of them didn’t know”*. Ofcom considered that due to the inclusion of Mrs Weir’s apology to Mr Higgins in the reports and his follow on comment about *“their [i.e. Mr and Mrs Weir’s] livelihood”*, it was likely that viewers would have concluded that it was Mrs Weir who had made this comment about his son’s death to him. Viewers would also have understood that Mr Higgins acknowledged that Mrs Weir had not known that he was Paddy Higgins’ father when she made this comment.

#### Unedited footage

Ofcom then assessed the unedited footage of the conversation between Mrs Weir and Mr Higgins (which only recorded the audio of the conversation and not any

corresponding images of the conversation) and the amended transcript of this footage agreed by both parties.

We observed that Mrs Weir made several comments that related to the existence and effect of negative media coverage of Newquay during the year preceding the broadcast.

In particular we noted that:

- in response to Mr Higgins' explanation that he had not been "slagging off Newquay" Mrs Weir said "No but the media probably made it look like it" ... "that's the slant isn't it?";

- a few moments later Mrs Weir and Mr Higgins exchanged the following comments:

Mrs Weir: "But it wasn't just the media on Paddy at that time though that's the other problem"...

Mr Higgins: "...but [I] was the only one of the parents of the four people who got hurt or killed that, er, was prepared to say anything..."

Mrs Weir: "but after that the media for Newquay, nothing to do with Paddy, changed you see, so that was the first incident and then, there was, the focused changed".

Mr Higgins: "Yeah"

Mrs Weir: "So it was nothing to do with Paddy in the end, then it was the stags and hens, then it was this, then it was that";

- in response to Mr Higgins noting that many of the reports that were published around the time of his son's death had already been written but that his death "just gave you an extra angle to use" Mrs Weir said: "Our problem hasn't been the summer, our problem has been the Winter. The media over the winter. Everything in the media this winter, nothing to do with Paddy, has been negative". Mrs Weir went on to say "But that's got nothing to do with Paddy, that was just the start. They've got base, they've got focus maybe";
- Mrs Weir acknowledged that Mr Higgins had taken the actions he had following his son's death in order "to stop it from happening again all over" and that as he had said it was the "same all over Britain" and observed that it (i.e. under-age drinking) is "a social issue";
- after a discussion of the four accidental falls which had occurred at Newquay over a period of three weeks including that of Paddy Higgins Mrs Weir said "But also there were no stabbings here, there were no murders here, there were no shootings here..." Mr Higgins acknowledged this and observed that everything they had filmed the previous night in Newquay "was positive because the police were doing the right thing, they approached us right. People were having fun and it was fun. I've seen far worse at home";
- in response to Mr Higgins' observation that underage drinking was an issue across Britain, Mrs Weir said "And been based on Newquay probably due to

Paddy but at that time other children also died in other parts of Britain but Newquay ... was the focus because it's fun, it's everything";

- a minute later Mrs Weir said "I'm sorry ... I didn't know you're Paddy's dad"; Mr Higgins said "No its alright, Uhm Yeah" and Mrs Weir said "It's really horrible" and a few moments later Mrs Weir said: "There was a week last year when Paddy did die that it was a lot of not that nice vibe in town wasn't there I think? We'd never, we didn't go out cause were, we do get sixteen year olds I love them but I'm here...";
- following a discussion about the way in which the town council's website promoted Newquay as "the party place for young people" and Mr Higgins' indicating his belief that given that the mayor of Newquay was involved in the drinks trade he had not taken the campaign against under-age drinking seriously enough, Mrs Weir and Mr Higgins exchanged the following comments:

Mr Higgins: "I'm sorry if it's [i.e. his campaign] hurt the place cause I never wanted to do that"

Mrs Weir: "Nah, I don't think it has. I think it..."

Mr Higgins: "I was here at 18 myself, you know."

Mrs Weir: "...it was the turn."

Mr Higgins: "Yeah"

Mrs Weir: "Because March, April, May we were in the top ten of best things to do summer holiday activities, top 100 in The Times we were number three, Newquay was number three. So from that in the April and then throughout June we were everywhere as the best place to come to, not for drinking, for surfing, resting, relaxing and we'd started a little transformation. And that was the end of us."

Mr Higgins: "Kicked in the teeth"

Mrs Weir: "All out £100,000 investment in this place was shit. Great. We don't want..."

Mr Higgins: "I'm sure it's not lost"

Mrs Weir: "... stags. We love groups but we don't want the horrible... we don't want those people. We don't get them and we wouldn't have them".

In assessing the unedited conversation between Mr Higgins and Mrs Weir, Ofcom noted that the audio of Mrs Weir used in the reports was recorded surreptitiously (see the Decisions at heads b) and c) below for further details). Therefore Mrs Weir was unaware that her conversation with Mr Higgins was being recorded.

Ofcom observed that there was a dispute between the parties regarding whether or not Mrs Weir had known that Mr Higgins was Paddy Higgins' father when she was talking to him. However, in its view the unedited recording of this

conversation indicated that she did not know who he was until some way into the conversation, and that when she became aware of his identity she apologised to him.

### Conclusions

Ofcom considered that taking into account the elements of each report as broadcast viewers of each report would have concluded that Mrs Weir resented Mr Higgins' presence. Viewers of the report on *BBC South Today* would also have considered that Mrs Weir resented Mr Higgins' campaign to stop under-age drinking because of the damage it was doing to her business. In particular, both reports indicated that Mrs Weir associated Paddy Higgins' death with the negative feeling in the town which had directly resulted in the waste of the £100,000 investment in their business which she and Mr Weir had made and that she was angry at this outcome. In Ofcom's opinion viewers of the two reports would also have: inferred that at some point in the conversation Mrs Weir had referred to the death of Paddy Higgins in front of his father by saying "some prat who fell from a cliff"; understood that Mrs Weir had not known that Mr Higgins was Paddy Higgins' father when she made this comment; and recognised that Mr Higgins understood Mrs Weir's anger at what she considered a waste of the £100,000 investment in their business due to the negative feeling which had resulted from Paddy Higgins' death.

Ofcom compared the unedited conversation between Mr Higgins and Mr Weir with the relevant sections of the two broadcasts. In doing so it observed that in his submissions on this complaint Mr Weir indicated that he thought that the editing of Mrs Weir's comments amounted to "a fictitious exchange" in that her comments were taken out of context and were shown out of order and because Mrs Weir's concern was not Mr Higgins' son or the media attention surrounding his death but rather with the generally bad press which Newquay had received.

The editing of a programme is an editorial matter for a broadcaster. However, broadcasters must ensure that the programme as broadcast does not result in unfairness to an individual or organisation.

Ofcom observed that both of the reports used three separate sections of Mrs Weir's unedited conversation with Mr Higgins; that they were edited together in a different order to that in which they had been spoken; and, that the distinct sections were edited together to create the impression of one section.

Ofcom then went on to consider whether the way in which the conversation between Mrs Weir and Mr Higgins was shown in the programme, fairly reflected Mrs Weir's position as expressed in her full unedited conversation with Mr Higgins and whether any other aspects of the relevant section of the reports resulted in unfairness to Mrs Weir.

It was not necessary for the broadcaster to have restated the entirety of Mrs Weir's position regarding the actions of Mr Higgins in the two reports in order to avoid unfairness to her. However, as set out in Practice 7.6 of the Code, when a programme is edited contributions should be represented fairly.

In Ofcom's view Mr Higgins' reflections on his meeting with Mr and Mrs Weir, included in both reports, would have softened any negative impression which viewers might have taken of Mrs Weir from the reports because he expressed his clear understanding of their position as it was represented in the reports, and



specifically Mrs Weir's anger at what she viewed as the waste of the £100,000 investment in their business. Ofcom also considered that viewers might have surmised that Mrs Weir had referred to Paddy Higgins as "a prat who fell from a cliff" in front of his father. Nonetheless, given that the parties agreed that she did make a comment of this nature in front of Mr Higgins and that the reports indicated that when Mrs Weir initially spoke to Mr Higgins she had not known that he was Paddy Higgins' father (and that when she became aware of his identity she apologised to him), Ofcom did not consider that this particular aspect of the reports would have resulted in unfairness to Mrs Weir.

However, in Ofcom's view the programmes as broadcast did not fairly represent Mrs Weir's position as expressed in her unedited conversation with Mr Higgins. In particular, the reports unfairly gave the impression that Mrs Weir was unhappy about Mr Higgins' presence at her hotel and in the case of the *BBC South Today* report that she was critical of his campaign against underage drinking, when actually she understood the purpose of his campaign was "to stop it [i.e. the accidental death of a young person celebrating his or her exams] from happening again all over". Ofcom also considered that the reports unfairly indicated that Mrs Weir blamed the death of Paddy Higgins for what she considered to be the wasted investment in her business, rather than reflecting her view that from June 2009 the media deliberately gave Newquay an unfairly negative press; and that while the media might well have used the death of Paddy Higgins as the basis for this negative coverage it was actually quite separate from this incident.

In summary, Ofcom concluded that the footage of Mrs Weir in the programmes did not misrepresent the earlier meeting between Mr Higgins. However, taking into account the factors noted in the preceding paragraph, Ofcom concluded that Mrs Weir's conversation with Mr Higgins as presented in the reports was unfairly edited in that it did not fairly reflect Mrs Weir's position. In light of this and the introductory comments in both reports (but in particular in the *BBC South Today* report) Mrs Weir was unfairly portrayed in the programmes as broadcast. Ofcom has therefore found that Mrs Weir was treated unfairly in this respect.

### *Privacy*

Ofcom then considered Mrs Weir's complaints that her privacy was unwarrantably infringed in the making and the broadcast of the programmes.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing right of the broadcaster to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of Ofcom's Broadcasting Code ("the Code") which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

- b) Ofcom considered the complaint that Mrs Weir's privacy was unwarrantably infringed in the making of the programme in that the reporter surreptitiously continued to record audio of her when he had indicated he would not do so.

In considering this head of complaint, Ofcom had regard to Practice 8.5 of the Code which states that any infringement of privacy in the making of a programme

should be with the person's and or organisation's consent, unless it is warranted. Ofcom also had regard to Practice 8.13 of the Code. Practice 8.13 states that surreptitious filming or recording should only be used where it is warranted. Normally, it will only be warranted if:

- there is *prima facie* evidence of a story in the public interest; and
- there are reasonable grounds to suspect that further material evidence could be obtained; and
- it is necessary to the credibility and authenticity of the programme.

In order to establish whether or not Mrs Weir's privacy was unwarrantably infringed in this respect, Ofcom first assessed the extent to which she had a legitimate expectation of privacy in respect of the recording of this material.

Ofcom observed that Mrs Weir was recorded talking to Mr Higgins while she was on her own property and that she was in the front garden of that property, which was located next to the public highway. It also observed that she was speaking to both guests of her hotel and at least one BBC journalist and that a conversation between her husband and Mr Higgins had been filmed just prior to the conversation in question.

The BBC accepted that the recording was surreptitious in the sense that Mrs Weir was unaware she was being recorded but stated that the camera had been inadvertently left recording. Ofcom noted Mr Weir's belief that the footage was recorded deliberately, but, in the absence of any evidence to indicate that this was the case, Ofcom accepted the broadcaster's statement that the recording was inadvertent.

Ofcom noted the BBC's position that the reporter's comment that he was not recording for sound did not equate to a guarantee that no subsequent conversation would be recorded and that Mrs Weir was speaking "off the record". However, Ofcom considered that in the circumstances outlined above it was reasonable for Mrs Weir to have assumed that her conversation with Mr Higgins was not being recorded.

Having taken the factors noted above into account, Ofcom concluded that Mrs Weir had a legitimate expectation of privacy with regard to the recording of her conversation with Mr Higgins. This expectation was limited to some degree by the location where the conversation took place and the fact that Mrs Weir was aware that she was speaking to both hotel guests and at least one BBC journalist and that she knew that a conversation between her husband and Mr Higgins had been filmed just prior to her conversation with Mr Higgins.

Ofcom therefore considered that the recording of this audio during the making of the programme intruded into Mrs Weir's legitimate expectation of privacy. It then went on to consider whether this intrusion was warranted.

With regard to privacy "warranted" has a particular meaning. It means that where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why, in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster

should be able to demonstrate that the public interest outweighs the right to privacy<sup>2</sup>.

With regard to Practice 8.5, Ofcom observed that Mrs Weir did not give consent for the recording of her conversation with Mr Higgins and that in its response to the complaint the BBC acknowledged that as no deliberate decision was made to record this material no justification could be articulated for such a decision. Ofcom therefore considered that the BBC was unable to demonstrate that it was in the public interest for it to have intruded into Mrs Weir's privacy by recording her conversation or that any public interest which might have been served by this intrusion outweighed her right to privacy. In light of these factors Ofcom concluded that the intrusion into Mrs Weir's privacy in making of the programme as a result of the recording of her conversation with Mr Higgins was not warranted.

With regard to Practice 8.13, Ofcom noted that, although the BBC did question whether Mrs Weir had a legitimate expectation of privacy in the circumstances in which the recording took place, it did not seek to demonstrate why in the particular circumstances of this case any intrusion into Mrs Weir's privacy as a result of surreptitiously recording audio of her was justified. Rather, the BBC said that given that in its view there was no decision to record surreptitiously – either deliberately or inadvertently - no justification could be articulated for such a decision.

As noted above, Ofcom accepted that the recording was inadvertent rather than deliberate. However, in light of the broadcaster's position that no justification could be articulated for this inadvertent action, Ofcom considered that the surreptitious filming was not warranted in line with Practice 8.13 as set out above. For these reasons, the intrusion into Mrs Weir's privacy was not warranted.

Given its conclusions in relation to both Practice 8.5 and 8.13 Ofcom upheld the complaint that Mrs Weir's privacy was unwarrantably infringed in the making of the programme.

- c) Ofcom went on to consider the complaint that Mrs Weir's privacy was unwarrantably infringed in the programme as broadcast in that it included surreptitiously recorded audio of her.

In considering this head of complaint, Ofcom had regard to Practice 8.6 of the Code which states that if the broadcast of a programme would infringe the privacy of a person, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted. Ofcom had regard to Practice 8.14 of the Code which states that material gained by surreptitious filming or recording should only be broadcast when it is warranted.

In order to establish whether or not Mrs Weir's privacy was unwarrantably infringed in this respect, Ofcom first assessed the extent to which she had a legitimate expectation of privacy in respect of the broadcast of audio of her conversation with Mr Higgins.

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<sup>2</sup> Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public.

As set out at decision head b) above, Ofcom considers that Mrs Weir had a legitimate, albeit limited, expectation of privacy during her conversation with Mr Higgins.

Therefore, the Ofcom considers that the inclusion of the footage in the programme, as broadcast, intruded into Mrs Weir's legitimate expectation of privacy.

In light of this Ofcom went on to consider whether this intrusion into Mrs Weir's privacy was warranted.

As noted above, in order to justify an infringement of privacy as warranted, a broadcaster should be able to demonstrate why in the particular circumstances of the case, it is warranted and if the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy.

With regard to Practice 8.6, Ofcom observed that Mrs Weir did not give consent for the broadcast of the material in question (i.e. the recording of her conversation with Mr Higgins). However, with regard to both Practice 8.6 and 8.13 we also noted the BBC's position that there was a strong public interest in Mrs Weir's views in that they represented a significant strand of opinion on a question of great interest to audiences, namely the attitudes of business owners to matters of public safety and personal responsibility in a town which had experienced two deaths due to cliff falls and much negative publicity regarding public order and drunkenness amongst young people.

The BBC's argued that even if the programmes had not included the audio of this conversation it would have been open for them to have reported upon the views Mrs Weir expressed. However, in Ofcom's view the issue of whether or not it was open for the programmes to have reported on Mrs Weir's conversation was distinct from the matter being considered here, namely whether or not Mrs Weir's privacy was unwarrantably infringed by the broadcast of the audio of this surreptitiously recorded conversation.

Ofcom recognised that the reporter had spoken to many local business people who complained of being unfairly damaged by the publicity surrounding Paddy Higgins' death, all of whom had been reluctant to express those views on the record or on camera. Ofcom also recognised that Mrs Weir had a legitimate expectation of privacy with regard to broadcast of the surreptitiously recorded audio of her conversation with Mr Higgins, although this expectation was limited to some degree.

In Ofcom's view the inclusion in these reports of a direct illustration of the concerns of many local business people about the impact on Newquay of Paddy Higgins' death (and specifically the negative sentiments it raised about the area) served the public interest to some extent by making viewers aware of this strand of opinion. However, on the facts of this case, and in particular taking into account the fact that the audio broadcast was recorded surreptitiously, Ofcom considers that the BBC has not demonstrated that serving the public interest in this manner in the circumstances of this case outweighed Mrs Weir's expectation of privacy in relation to the broadcast of this material.

It therefore concluded that while Mrs Weir's expectation of privacy with regard to the broadcast of her conversation with Mr Higgins was limited, the intrusion into

her privacy by the broadcast of the surreptitious recording of audio of her in these particular circumstances was not warranted.

Given its conclusions in relation to both Practice 8.6 and 8.14 Ofcom found that Mrs Weir's privacy was unwarrantably infringed in the programmes as broadcast.

**Accordingly, Ofcom has upheld Mrs Weir's complaint of unfair treatment and has upheld her complaint of unwarranted infringement of privacy in both the making and broadcast of the programme.**

## Not Upheld

### Complaint by Mr Shamus Dewaine

*The Ferret*, ITV1 Wales, 1 November 2010

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**Summary:** Ofcom has not upheld this complaint of unfair treatment and unwarranted infringement of privacy made by Mr Shamus Dewaine.

ITV Wales broadcast an edition of its consumer affairs programme *The Ferret* in which a report about an attic conversion that Mr Dewaine had undertaken for Mrs Brenda Hooper was included.

Mr Dewaine complained that he was treated unfairly and that his privacy was unwarrantably infringed in the programme as broadcast.

In summary, Ofcom found that:

- Mr Dewaine was not treated unfairly in the programme as broadcast in that the programme makers took reasonable care with material facts in relation to the allegations made about Mr Dewaine in the report, gave him an appropriate and timely opportunity to respond to these allegations and the programme included a full and fair representation of Mr Dewaine's response to those allegations;
- In light of the public facing nature of his business and the fact that he had carried out work for Mrs Hooper Mr Dewaine did not have a legitimate expectation of privacy with regard to the broadcast of his name in the context of Mrs Hooper's claims about his work in the programme. Therefore, his privacy was not unwarrantably infringed in the programme as broadcast in respect of the inclusion of this information.
- Mr Dewaine had a legitimate expectation of privacy with regard to the broadcast of information about his medical condition (although this expectation was somewhat limited by the circumstances in which this information was given). However, Ofcom considered that it was reasonable for the broadcaster to have concluded that Mr Dewaine had given consent for the broadcast of this information; that not including this information would have been unfair to Mr Dewaine; and, that this information served the public interest by enabling viewers to reach a more fully informed opinion on the claims made about the quality of Mr Dewaine's work. In light of these factors Ofcom found that the inclusion of this information in the programme was warranted and therefore that his privacy was not unwarrantably infringed in this respect.

### Introduction

On 1 November 2010, ITV1 Wales broadcast an edition of *The Ferret*, its consumer affairs programme. The programme featured a complaint by Mrs Brenda Hooper about an attic conversion Mr Shamus Dewaine had undertaken for her. Mrs Hooper said that she had told Mr Dewaine that she only had a budget of £6,500 for the work, which he had told her was "*plenty*". However, Mrs Hooper said she had paid Mr Dewaine a total of £7,326 and:

*“I haven’t even got the job I asked for. I asked plain and simple for a good job for good money and I’ve got a cobbled job”.*

The programme included footage of the unfinished work and the presenter said that it had been more than two months since Mrs Hooper had seen Mr Dewaine, that she didn’t want him back, that she was now paying another builder £7,000 to finish the job and that she planned to sue Mr Dewaine for the money. The presenter also said that the work contravened Building Regulations and that Mrs Hooper could be prosecuted if she failed to take steps to rectify the work.

The presenter said that Mr Dewaine had told the programme makers that he had informed Mrs Hooper that the work would not conform to Building Regulations because of the angle of the staircase and that she had been happy to go ahead. He accepted that the stair treads were too thin, but said they were not finished. He said that he had never walked away from a job and that he understood that mistakes had to be rectified but that he was being treated for cancer, was not in the right state to do an interview and needed breathing space before returning to finish the job.

This section of the programme concluded with Mrs Hooper saying:

*“I was hoping that if nothing else you can make sure he doesn’t do it to anyone else in Pembrokeshire”.*

Mr Dewaine complained to Ofcom that he was treated unfairly in the programme as broadcast and that his privacy was unwarrantably infringed in both the making and broadcast of the programme.

## **The Complaint**

### **Mr Dewaine’s case**

In summary, Mr Dewaine complained that he was treated unfairly in the programme as broadcast in that:

- a) He was not given an opportunity to take part in the programme to defend himself.

By way of background, Mr Dewaine said that he was suffering from cancer and so was unable to take part in the programme. He told ITV that he was unwell and was having chemotherapy, but they still went ahead and broadcast the programme.

- b) He was portrayed unfairly in the programme in that, contrary to the impression created by the programme:

- He had never ripped anyone off in his life and had invited the programme makers to view all the quotes he gave for the job.
- There was no unfair play on his part.
- He had done the job to the best of his ability and to Mrs Hooper’s satisfaction.
- He had told Mrs Hooper that he could not return to finish the job because he had been diagnosed with cancer at the age of 33 and his whole life fell apart.

In summary, Mr Dewaine complained that his privacy was unwarrantably infringed in the programme as broadcast in that:

- c) It included his name in connection with Mrs Hooper's complaint.
- d) It disclosed that he was suffering from cancer.

### **ITV's case**

In summary, ITV responded to Mr Dewaine's complaint that he was unfairly treated as follows:

- a) ITV denied that Mr Dewaine was not given an opportunity to take part in the programme and said that in a letter dated 4 October 2010 one of the programme's reporters had outlined the allegations being made about Mr Dewaine and specifically invited Mr Dewaine to contact him to give his side of the story. ITV said that Mr Dewaine responded by telephone on 8 October 2010 and that at the end of that conversation the reporter explained to Mr Dewaine that ITV would take his comments during the call as his response and would include them in the programme. Later the same day the reporter sent an email to Mr Dewaine in which he summarised the response he had given on the telephone and asked if he wanted to add anything. ITV said that a second email was sent to Mr Dewaine on 12 October 2010 asking for comments on some specific points raised by Mrs Hooper but not covered in Mr Dewaine's earlier verbal response. Mr Dewaine was asked to respond to this second email by 15 October 2010. ITV said that Mr Dewaine's side of story and his responses to Mrs Hooper's allegations were adequately and fairly represented in the programme.

With regard to whether Mr Dewaine had a right to appear in the programme, ITV said that it appreciated and sympathised with the fact that Mr Dewaine did not feel well enough to be interviewed at the time the programme was being made. However, it said that there was a legitimate consumer issue at the heart of this story. It also argued that it was under no obligation to offer Mr Dewaine an interview or to delay the broadcast until he was well enough to provide one and that therefore it was not unfair to him to have broadcast the story without including one.

- b) In response to the complaint that Mr Dewaine was portrayed unfairly in the programme as broadcast, ITV said that the programme showed the story as having two distinct and conflicting sides. The broadcaster also said that it had taken steps to verify Mrs Hooper's account where possible (notably by assessing her correspondence with Pembrokeshire Council's planning team regarding compliance/non-compliance with the Building Regulations and her handwritten accounts of payments to Mr Dewaine). However, it acknowledged that, in common with other building disputes of this type, there was little documentary evidence relating to the problems Mrs Hooper said she had encountered during the project. It said that the programme gave Mr Dewaine an appropriate and timely opportunity to respond to the allegations being made by Mrs Hooper (as set out under ITV's response at head a) above) and included a fair and accurate summary of his responses to those allegations.

Taking Mr Dewaine's specific points in relation to his complaint that he was portrayed unfairly in turn ITV responded as follows:



- *He had never ripped anyone off in his life and had invited the programme makers to view all the quotes he gave for the job.*

ITV said that the programme did not include an allegation that Mr Dewaine had “ripped off” Mrs Hooper. It said that she was shown claiming that Mr Dewaine had increased his original quote and that, despite paying him over £7000, she had been left with a “cobbled job” and not “the job I asked for” and explaining that she had asked another builder to complete the project. However ITV said that the programme did not imply that Mr Dewaine had sought to deceive or cheat Mrs Hooper. ITV also acknowledged that Mr Dewaine had offered to show the programme makers his written quotation but neither he nor Mrs Hooper had been able to provide one and Mrs Hooper maintained that she had not received a written quotation from Mr Dewaine despite requesting one.

- *There was no unfair play on his part.*

ITV said that there was clearly a dispute between Mr Dewaine and Mrs Hooper regarding whether or not he was guilty of “unfair play” towards her but the programme reflected both sides of this dispute. It also said that, despite knowing Mrs Hooper’s allegations, Mr Dewaine did not raise the issue of “unfair play” in his response to the programme. Rather he: explained some of the problems he had encountered on the project; said he had “never walked away from a job”; said that he understood mistakes need to be rectified; and, said that he intended to return to finish the job. ITV added that these points were included in both the email sent to him with a summary of his response, which he had not contested, and the programme.

- *He had done the job to the best of his ability and to Mrs Hooper’s satisfaction.*

ITV said that Mr Dewaine did not include these points in his response [on the telephone] and argued that, on the contrary, he had acknowledged that there were “mistakes”, given reasons for the problems and said he would rectify them. The broadcaster added that Mr Dewaine also claimed that Mrs Hooper was aware the project design might not comply with Building Regulations and was happy to proceed with the work on that basis. It said that this point (as well as the others noted above) was included in the in the summary of Mr Dewaine’s responses which it sent to him and the programme.

- *He had told Mrs Hooper that he could not return to finish the job because he had been diagnosed with cancer at the age of 33 and his whole life fell apart.*

The broadcaster said that the reporter had asked Mr Dewaine in correspondence to respond to Mrs Hooper’s allegation that he had walked away from the project after telling her that a window contractor had let him down and that following this she had had difficulty contacting him. It said that while Mr Dewaine had told the reporter about his cancer he had not suggested that he had told Mrs Hooper about his ill-health or that this was the reason he could not complete the project. ITV said that this was the main reason Mr Dewaine gave to the reporter for the non-completion of the work and that in order to be fair to him the programme referred to his cancer and his position on the effect it had had on his completion of the work and his ability to give an interview.

In summary, ITV responded to Mr Dewaine's complaint that his privacy was unwarrantably infringed in the programme as broadcast as follows:

- c) ITV first responded to the complaint that Mr Dewaine's privacy was unwarrantably infringed in that his name was included in the programme in connection with Mrs Hooper's complaint about his work.

ITV argued that Mr Dewaine did not have a legitimate expectation of privacy with regard to the disclosure of his name in the programme. It said that he had a public-facing business and that his name, address and telephone number were in the public domain, as they were listed in several online business directories. The broadcaster also said that, even if Mr Dewaine did have an expectation of privacy regarding disclosure of his name, it was warranted for the programme to have included this information, given that the purpose of the programme was to highlight consumer issues that members of the public had encountered with specific businesses and tradesmen. Granting those tradesmen anonymity would defeat the object of the programme and not be in the public interest. ITV argued that there was clearly a public interest and consumer concern at the heart of this particular story, namely the dispute over the agreed price, the non-completion of the building project, its non-compliance with Building Regulations and fears about the safety of the unfinished work space.

- d) ITV then responded to Mr Dewaine's complaint that his privacy was unwarrantably infringed in that the programme disclosed that he was suffering from cancer.

The broadcaster said that Mr Dewaine clearly had a legitimate expectation of privacy regarding his medical condition as this was information which someone might wish to remain private. However, it argued that in the circumstances of this case that expectation was significantly reduced because he volunteered this information in the context of his response to the allegations being made by Mrs Hooper and in the knowledge that the programme was seeking a statement intended for broadcast from him; at no point did he say that he did not want his cancer to be referred to in the programme even when he was given an opportunity to comment on the reporter's email summaries of his response to Mrs Hooper's allegations, both of which reflected his statement that he had cancer.

ITV argued that, in any event, any infringement of Mr Dewaine's privacy in this respect was warranted in that it had understood that he had consented to the programme disclosing his cancer as the reason he was unable to complete the building work or give an interview. ITV also reiterated its view that in light of the fact that Mr Dewaine's illness was (on his own account) the main reason the work had not been completed it would have been unfair to him not to have included this information in the programme and therefore its disclosure was warranted.

## **Decision**

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the

principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and transcript and both parties' written submissions including the pre-broadcast correspondence between the parties.

### *Unjust or unfair treatment*

a) + b)

In Ofcom's view the complaints at heads a) (that Mr Dewaine was not given an opportunity to take part in the programme and to defend himself) and b) (that Mr Dewaine was portrayed unfairly in relation to a series of points made about him in the programme) were linked in that they both related to the perception which viewers of the programme might have taken of Mr Dewaine. It therefore considered these heads of complaint together.

In considering these heads of Mr Dewaine's complaint Ofcom took account of Rule 7.1 of the Ofcom Broadcasting Code ("the Code"), which provides that broadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes. Ofcom also considered Practices 7.6, 7.9 and 7.11 of the Code. Practice 7.6 provides that when a programme is edited, contributions should be represented fairly. Practice 7.9 provides that before broadcasting a factual programme, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to the individual or organisation and that anyone whose omission could be unfair to an individual or organisation has been offered an opportunity to contribute. Practice 7.11 states that if a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond.

Ofcom observed that at the beginning of the relevant report the presenter said that *"Brenda" had "asked Shamus from Milford Haven to build a bedroom in the attic for the two grandchildren she is bringing up. Now, she paid Shamus the money but there's no way that young Kieran and Tyler can sleep up top yet"*. The programme added that *"a neighbor recommended a builder called Shamus Dewaine, so she gave him a ring"*; said that the children were aged eight and four; and, showed Mrs Hooper explaining that Mr Dewaine came to her house to look around and take measurements. Mrs Hooper explained that having looked around Mr Dewaine said *"Oh yeah, brilliant job, you know you can lose your airing cupboard but the stairs can go up there, windows here, fire doors there, I'll get building regs. in, fine"*. Mrs Hooper also said that she told Mr Dewaine that she had a budget of only £6,500; that she was *"not looking for a cheap job"* but that if it was going to cost more she would have to wait until her parents' house sold; and, that less than a week later Mr Dewaine called her to say *"no that was going to be plenty"*, so she went ahead with the work.

The presenter said *"Brenda says Shamus told her he spent £900 on [the] staircase but it turned out not to be enough"* and Mrs Hooper was shown saying that she gave Mr Dewaine the money for it, but received a call from him the next day in which he said *"Oh, a bit of a hitch, building regs. have said they want heavier wood than I'd accounted for. So, it's £500 more"*. Mrs Hooper explained that she had asked Mr Dewaine for a copy of the email from building regulations and that two days later he had come back to her saying: *"Mm, perhaps it was my mistake. We'll go halves on it. I'll take £250 off the labour, y'know, and you owe me an extra two-fifty"*.

Ofcom observed that Mrs Hooper said that she had paid Mr Dewaine £7,326 and that the reporter responded: *"So you went £800 over budget in a sense"* and that she agreed. When asked what she had got for her money Mrs Hooper said: *"I haven't even got the job I asked for, Chris. I asked plain and simple for a good job for good money and, I've got a cobbled job"*.

The presenter said that *"the charges for extra work continued but Brenda was still worried about the safety of her grandchildren"*. Mrs Hooper then said that her four year old grandson could *"come off that landing"* and that she had paid Mr Dewaine £365 to put in an open balustrade in order to deal with this concern. The presenter said *"things got worse for Brenda. Shamus claimed the original deal was for eight and half thousand pounds and asked for more money. It's been more than two months now since Brenda's seen anything of him"*. Mrs Hooper then described the disruption that the unfinished job had caused her particularly given that the period since Mr Dewaine had left the job coincided with the school holidays.

In addition, Ofcom observed that the presenter said that the programme makers had contacted Mr Dewaine and he responded that *"he [had] told Mrs Hooper the work would not conform to building regulations because of the angle of the staircase and she was happy enough to go ahead"* and that he *"accepts that the treads on the stairs are too thin but they are not finished"*. The presenter then quoted Mr Dewaine, saying: *"I've never walked away from a job, he said. I understand that mistakes have got to be rectified. He also says he is being treated for cancer every other day in Singleton Hospital, Swansea, he's not in the right state to do an interview, and needs a breathing space before returning to finish the job"*.

The presenter explained that Mrs Hooper did not want Mr Dewaine to finish the job; that she had paid another builder £7000 to finish the job; and that she planned to sue Mr Dewaine for the money. He also said that Mr Dewaine had said that he would sue Mrs Hooper for the outstanding money owed to him before adding: *"Brenda's had to borrow money to pay for a new builder, she felt she had no choice, Pembrokeshire's building control surveyor says the work does contravene building regulations and Mrs Hooper could be prosecuted if she fails to take steps to rectify it"*.

The final extract of the interview with Mrs Hooper showed her saying that she had lost £7,326. When asked what she would like the programme to do, she responded *"if nothing else you can make sure that he doesn't do it to anyone else in Pembrokeshire"*. The presenter ended the report by saying *"This is one dispute that looks as if it won't easily be settled"* and promising to let the audience know the outcome.

In Ofcom's opinion viewers of this report would have understood that:

- Mrs Hooper had asked Mr Dewaine to convert her attic for use as a bedroom for two young children and told him that her budget for this work was £6,500;
- the stair treads put in by Mr Dewaine were too thin and did not meet building regulation requirements and, that replacing or upgrading them involved an extra cost of £500 which initially Mr Dewaine wished to pass on in its entirety to Mrs Hooper (and which they subsequently agreed to split between them);
- the job had gone over budget and that Mrs Hooper had paid Mr Dewaine an additional £826;
- Mrs Hooper was unsatisfied with the job;
- in particular she was worried about the safety of the job as regards the lack of the balustrade for which she had paid Mr Dewaine £365;

- Mr Dewaine had told Mrs Hooper that the original cost agreed was £8500 and asked her for the outstanding money;
- at the time of the programme the job was unfinished and it had been two months since Mr Dewaine had worked on it;
- Pembrokeshire Building Control had confirmed that the job did not meet building regulations and that Mrs Hooper could be prosecuted if she did not take steps to resolve the problem; and
- Mrs Hooper had borrowed £7000 to pay another builder to do the work needed, planned to sue Mr Dewaine for this money and wanted the programme to ensure that Mr Dewaine was not able to deal with other customers in the area as he had with her.

Ofcom also considers that it would have been clear to viewers that Mr Dewaine:

- considered that he had warned Mrs Hooper that the work would not conform to building regulations because of the angle of the staircase and that she had agreed to go ahead on that basis;
- acknowledged that the stair treads were too thin but said that the job was not yet finished;
- asserted that he had never walked away from a job and acknowledged that mistakes had to be rectified but that given that he was receiving very regular treatment for cancer he needed some time before he could return to the job; and
- because of his cancer he was not able to give the programme an interview.

In the context of the claims made about Mr Dewaine in the programme Ofcom looked at the four specific points which he complained were unfair to him. Ofcom recognised that there was a dispute between the parties about these matters. However, it should be noted that Ofcom's role is not to establish whether or not Mr Dewaine had acted as he complained the programme claimed he had but rather to determine whether, in broadcasting any such claims, the programme makers took reasonable care not to present, disregard or omit material facts in a way that was unfair to him. Ofcom's role is also to assess whether any claims included in the programme about Mr Dewaine constituted serious allegations of wrongdoing or incompetence and, if so, whether it was incumbent upon the broadcaster to offer him an opportunity to respond in order to avoid unfairness, and, if so, whether such an opportunity was given and if any response was presented fairly.

As regards the four points made by Mr Dewaine under head b) of his complaint, Ofcom noted that the programme did not specifically state that Mr Dewaine had "ripped off" Mrs Hooper; that his conduct towards her indicted "unfair play"; that he had not done the job to the best of his ability; or, that he had not told Mrs Hooper that he could not return to the job because he had been diagnosed with cancer. However, in Ofcom's opinion the programme did claim that Mr Dewaine had charged Mrs Hooper more than the agreed price; left an uncompleted job which did not meet building regulation requirements and which was unsafe for Mrs Hooper's grandchildren; continued to ask for further payment; and, that Mrs Hooper was unsatisfied with job and had felt forced to borrow £7,000 in order to get the job completed. Ofcom also considered that the programme indicated that Mr Dewaine had left the job for two months without contacting Mrs Hooper and she was having difficulty contacting him.

In considering whether it was unfair for the programme to make these claims, Ofcom observed that the sources of the claims made about Mr Dewaine were the

information supplied to the programme makers by Mrs Hooper and the presenter's own inspection of the attic and the stairs leading to it.

In Ofcom's view there is no reason to suggest that Mrs Hooper was not a credible witness regarding the contract she had made with Mr Hooper and her contacts with him throughout their contractual relationship. Ofcom noted that ITV had acknowledged that there was little documentary evidence relating to the contract and dispute between Mrs Hooper and Mr Dewaine. However, Ofcom also observed that, as well as Mrs Hooper's account, the programme makers had at their disposal the presenter's inspection of the attic and stairs and the opinion of Pembrokeshire's building control survey team regarding whether the work undertaken by Mr Dewaine met building regulations. In addition, Mr Dewaine's was offered an opportunity to respond to the claims which the programme planned to make about him and his position (as set out in his telephone conversation with and emails to a member of the programme making team) on these matters was represented in the programme. In particular, Ofcom observed that the programme made clear that Mr Dewaine accepted that the stair treads were too thin and that the work did not meet building regulations (the opportunity to respond will be considered in more detail below). In light of these factors Ofcom considered that the programme makers took reasonable care with material facts in relation to the claims made about Mr Dewaine in this report.

Ofcom then went on to consider whether it was incumbent upon the broadcaster to offer Mr Dewaine an appropriate and timely opportunity to respond to any claims made, and, if so, whether it gave such an opportunity and if any response was presented fairly.

Ofcom considered the claims in the programme constituted allegations of wrongdoing or incompetence and that therefore it was incumbent upon the programme makers to offer Mr Dewaine an appropriate and timely opportunity to respond to the allegations which would be made about him in the programme.

Ofcom noted that Mr Dewaine complained that he was not given an opportunity to take part in the programme to defend himself. In Ofcom's view the broadcaster's submission on this complaint (both the copy of its initial letter to Mr Dewaine – see below for further details – and its written response) indicated that, although Mr Dewaine had not been explicitly offered an on-camera interview, the programme makers would have been happy to give him an opportunity to take part in the programme by means of an interview had he felt well enough to do so. In this context, Ofcom noted that Practice 7.11 of the Code requires that where an allegation of wrongdoing, incompetence or other significant allegation is being made in a programme, those concerned "should normally be offered an appropriate and timely opportunity to respond". The Code does not define the precise nature of such an opportunity and, in Ofcom's opinion, while such an opportunity may be given via an on-camera interview, there is no requirement on broadcasters to fulfil this requirement by means of an on-camera interview. Ofcom also noted that, in its response to the complaint, the broadcaster said that, in order to be fair to Mr Dewaine, the programme referred to his cancer and his position on the effect it had had not only on his completion of the work but also his ability to give an interview<sup>1</sup>.

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<sup>1</sup> Practice 7.12 of the Code provides that where a person approached to contribute to a programme chooses to make no comment or refuses to appear in a broadcast, the broadcast should make clear that the individual concerned has chosen not to appear and should give their explanation if it would be unfair not to do so.

Ofcom observed that Mr Dewaine was sent a letter (dated 4 October 2010) by a reporter working on the programme, which set out Mrs Hooper's claims (notably that she had paid him £7,326 rather than £6,500; that the work was badly done, unfinished and did not meet building regulations; that Mrs Hooper had safety concerns; that Mr Dewaine, was now asking for a further £2,000 to finish the job; and that Mrs Hooper was having difficulty contacting him). The letter explained that Mrs Hooper had given an interview and informed Mr Dewaine that "we (i.e. the programme makers) would like to hear your side of the story". On 8 October 2010 Mr Dewaine responded to this letter by telephone and later the same day the reporter emailed him a summary of the responses he had given, including the following:

- Mr Dewaine had told Mrs Hooper from the start that the work would not conform to building regulations due to the angle of the staircase, that in order to rectify this he would have had to move a door and Mrs Hooper had said it was alright not to move it;
- he accepted that the stair treads were too thin but they needed to be finished;
- he had never walked off a job and if Mrs Hooper would bear with him he would talk to her and then rectify any mistakes;
- he had been "put off" completing the work after being threatened by Mrs Hooper's son;
- he was suffering from cancer and was undergoing chemotherapy every other day and was therefore not able to take part in an interview and needed breathing space before returning to finish the job; and
- he was talking to a solicitor with a view to taking Mrs Hooper to court for the outstanding money he was owed by her.

The reporter again asked Mr Dewaine to account for the dispute about the £6,500 which Mrs Hooper said Mr Dewaine quoted for the job, the £7,326 she had paid him and the apparent request for a further £2,000. He also asked if Mr Dewaine had any further comments in relation: to Mrs Hooper's claim that the building inspector told her that the structure would have to be taken down and replaced; her concerns about safety; and her difficulty in contacting him.

Another email was sent to Mr Dewaine on 12 October 2010, with further details of Mrs Hooper's claims. On 13 October 2010 Mr Dewaine emailed and said he was shocked that Mrs Hooper felt this badly; invited the programme makers to see the original quotation he had given her; offered to meet her when he was feeling better; said that he did not take being threatened by her son lightly. He also asked the reporter to tell Mrs Hooper that he had no intention of ripping people off. Mr Dewaine sent a second email response on 18 October 2010 and said he understood that Mrs Hooper must be feeling hard done by but that she had agreed to the hand written quotation he had given her; reiterated the point about his health being the reason he had not finished the job; and, again discussed being threatened by Mrs Hooper's son.

In light of the observations noted above, Ofcom considered that Mr Dewaine was given an appropriate and timely opportunity to respond to the allegations made about him in the programme as broadcast.

Ofcom then went on to consider whether Mr Dewaine's responses to the allegations made about him were represented fairly in the programme as required under Practice 7.6 of the Code.

As noted above, Ofcom considers that it would have been clear to viewers that in relation to these allegations Mr Dewaine's position was that:

- he had warned Mrs Hooper that the work would not conform to building regulations because of the angle of the staircase and that she had agreed to go ahead on that basis;
- the stair treads were too thin but that the job was not yet finished;
- he had never walked away from a job and that mistake had to be rectified but given that he was receiving very regular treatment for cancer he needed some time before he could return to the job.

In addition, Ofcom again observed that the programme clearly indicated that, in response to Mrs Hooper's threat to sue him for the money she had paid him, Mr Dewaine had threatened to sue Mrs Hooper for money which he said she still owed him.

In Ofcom's view the relevant comments included in the programme gave a full and fair reflection of the responses to the allegations made about Mr Dewaine. They included all of the pertinent points made in his verbal and written responses. In particular, the programme specified Mr Dewaine's position regarding building regulations in relation to the work he had undertaken and made clear that he acknowledged that mistakes had been made and that the work was incomplete. It also indicated his willingness to return to rectify these mistakes and finish the work and included his explanation that he could not do so at present due the regular treatment he was receiving for cancer.

In light of the factors noted above, Ofcom concluded that:

- the programme makers took reasonable care with material facts in relation to the claims made about Mr Dewaine in this report;
- the programme included claims about Mr Dewaine which constituted allegations of wrongdoing or incompetence and therefore it was incumbent on the broadcaster to offer him an appropriate and timely opportunity to respond and Mr Dewaine was given such an opportunity and availed himself of it; and
- a full and fair representation of Mr Dewaine's response to the allegations made about him was included in the programme.

Therefore Ofcom found no unfairness to Mr Dewaine in respect of his complaints that he was not given an opportunity to take part in the programme to defend himself and he was unfairly portrayed in the programme as broadcast.

### *Privacy*

Ofcom went on to consider the heads of Mr Dewaine's complaints of unwarranted infringement privacy in the broadcast of the programme.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing right of the broadcaster to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.



This is reflected in how Ofcom applies Rule 8.1 of the Code which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes must be warranted. Ofcom also had regard to Practice 8.6 of the Code which states that if the broadcast of a programme would infringe the privacy of a person, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

- c) Ofcom considered Mr Dewaine's complaint that his privacy was unwarrantably infringed in that the programme included his name in connection with Mrs Hooper's complaint.

Ofcom first assessed the extent to which Mr Dewaine had a legitimate expectation of privacy in respect of the particular material that was broadcast.

Ofcom observed that the programme included the complainant's forename and surname as "*Shamus Dewaine*"; said that he was from Milford Haven and explained that had worked on an attic conversion for that Mrs Brenda Hooper in Roch, Pembrokeshire.

Ofcom noted that Mr Dewaine's building and decorating business was a public-facing one and that his name, address and telephone number were listed in several online business directories and were therefore in the public domain. Ofcom also observed that the name of Mr Dewaine's business is Shamus Dewaine Painting and Decorating. It also noted that his dealings with Mrs Hooper were not private but were in his capacity as a public facing builder and decorator.

In light of these factors, Ofcom does not consider that Mr Dewaine had a legitimate expectation of privacy in relation to the inclusion of his name in the programme in the context of Mrs Hooper's complaint. Ofcom therefore found that his privacy was not unwarrantably infringed by the inclusion of this information in the programme as broadcast.

- d) Ofcom considered Mr Dewaine's complaint that his privacy was unwarrantably infringed in that the programme disclosed that he was suffering from cancer.

Ofcom first assessed the extent to which Mr Dewaine had a legitimate expectation of privacy in respect of the particular material that was broadcast.

Ofcom observed that the programme included the presenter's explanation that, in response to the claims made about him, Mr Dewaine "*also says he is being treated for cancer every other day in Singleton Hospital, Swansea, he's not in the right state to do an interview, and needs a breathing space before returning to finish the job*".

In Ofcom's opinion the Mr Dewaine had a legitimate expectation of privacy regarding his medical condition as this was information which someone might wish to remain private. However, that expectation was reduced because he volunteered this information to the journalist from *The Ferret* in the context of his response to the allegations being made by Mrs Hooper.

Ofcom considers that the inclusion of the information about Mr Dewaine's medical condition in the programme as broadcast, infringed his legitimate expectation of privacy even though this expectation was reduced.

In light of this Ofcom went on to consider whether this intrusion into Mr Dewaine's privacy was warranted.

In order to justify an infringement of privacy as warranted, a broadcaster should be able to demonstrate why in the particular circumstances of the case, it is warranted and if the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy.

With regard to Practice 8.6, Ofcom observed that ITV argued that it had understood that Mr Dewaine had consented to the programme disclosing his cancer as the reason he was unable to complete the building work or give an interview. It also argued that in light of the fact that Mr Dewaine's illness was (on his own account) the main reason the work had not been completed it would have been unfair to him not to have included this information in the programme and therefore its disclosure was warranted.

Ofcom noted that Mr Dewaine telephoned a reporter working for the programme on 8 October 2010 in order to respond to Mrs Hooper's claims, as set out in the reporter's letter dated 4 October 2010. This letter explained that the reporter was a journalist on *The Ferret*, set out Mrs Hooper's claims about Mr Dewaine's work; said that the programme intended to include an interview with Mrs Hooper; and told Mr Dewaine "we would like to hear your side of the story". Ofcom observed that ITV said that during the conversation Mr Dewaine told the reporter that he was suffering from cancer and was undergoing chemotherapy every other day and was therefore not able to take part in an interview and needed breathing space before returning to finish the job. The reporter included this information in his follow up email to Mr Dewaine, who did not question this or any other aspect of the summary of his response prior to the broadcast. In this context, Ofcom also observed that Mr Dewaine sent two emails to the reporter with additional responses to Mrs Hooper's claims.

Taking account of the factors noted above, it is Ofcom's view that, prior to telling the reporter on the telephone that he had cancer, was receiving chemotherapy for it, was unable to give an interview and needed breathing space before returning to complete the job, Mr Dewaine would have understood: the nature of the programme; the fact that he was being asked to comment on his contractual relationship with Mrs Hooper; and the fact that any comment he might make could well be reflected in the programme as broadcast.

In Ofcom's opinion, given the particular circumstances of this case, it was reasonable for the broadcaster to have concluded that Mr Dewaine had given consent for the information that he was suffering from cancer and that this was the reason he had not completed the work on Mrs Hooper's property to be included in the programme. Ofcom also accepts ITV's assertion that in this circumstance it would have been unfair for it not to have reflected the main reason that Mr Dewaine had not done the work (on his own account) in the programme in some way. In addition, Ofcom considered that the inclusion of this information in the programme served the public interest in that it enabled viewers who had seen Mrs Hooper's claims about the quality of the work provided by Mr Dewaine to also hear Mr Dewaine's side of the story and therefore reach a more fully informed opinion on this matter.

In light of these considerations it is Ofcom's view that ITV has demonstrated that serving the public interest in this manner, particularly in light of its reasonable

conclusion that it Mr Dewaine had given it consent to include the information about his medical condition, outweighed his expectation of privacy in relation to the broadcast of this material.

It therefore concluded that the intrusion into Mr Dewaine's privacy (the expectation of which was somewhat limited) through the broadcast of the information about his medical condition in these particular circumstances was warranted.

Ofcom therefore found that his privacy was not unwarrantably infringed by the inclusion of this information in the programme as broadcast.

**Accordingly, Ofcom has not upheld Mr Dewaine's complaint of unfair treatment and unwarranted infringement of privacy in broadcast of the programme.**

## Other Programmes Not in Breach

Up to 30 May 2011

Programme	Transmission Date	Broadcaster	Categories	Number of complaints
24 Hours in A&E (trailer)	various	Channel 4	Generally accepted standards	9
4thought.tv	13/05/2011	Channel 4	Generally accepted standards	1
5 News	19/05/2011	Channel 5	Due accuracy	1
A Very Dangerous Doctor	12/05/2011	Channel 4	Due impartiality/bias	9
Above Suspicion	12/05/2011	ITV3	Generally accepted standards	1
Arthur Smith's Balham Bash	18/05/2011	BBC Radio 4	Offensive language	1
Aviva sponsors ITV Drama Premiers	15/05/2011	ITV1	Generally accepted standards	1
Aviva sponsors ITV Drama Premiers	n/a	ITV1	Generally accepted standards	1
BBC News	13/05/2011	BBC 1	Generally accepted standards	1
BBC News	14/05/2011	BBC News Channel	Generally accepted standards	1
BBC News	20/05/2011	BBC 1	Generally accepted standards	1
BBC News update	13/05/2011	BBC 1	Generally accepted standards	1
Being... N-Dubz in America and Beyond	17/04/2011	Channel 4	Scheduling	3
Bigotry, Bombs and Football	18/05/2011	BBC 1 Scotland	Race discrimination/offence	2
Boulton and Co	09/05/2011	Sky News	Sexual material	2
Boulton and Co	18/05/2011	Sky News	Generally accepted standards	1
Britain's Got Talent	07/05/2011	ITV1	Disability discrimination/offence	5
British Academy Television Awards	22/05/2011	BBC 1	Sexual material	1
Campus	10/05/2011	Channel 4	Religious/Beliefs discrimination/offence	1
Channel 4 News	10/06/2010	Channel 4	Due impartiality/bias	1
Channel Promotion	various	Comedy Central	Harm	10
Chart Show	22/05/2011	Capital FM	Sexual material	1
Clyde 1 Sport	16/05/2011	Clyde 1	Materially misleading	1
Coronation Street	16/05/2011	ITV1	Generally accepted standards	2
Coronation Street	20/05/2011	ITV1	Disability discrimination/offence	1
Coronation Street	29/04/2011	ITV1	Generally accepted standards	1
Coronation Street	13/05/2011	ITV1	Disability discrimination/offence	1
Coronation Street	05/05/2011	ITV1	Generally accepted standards	1

Daybreak	27/05/2011	ITV1	Race discrimination/offence	1
Derren Brown: Miracles for Sale	25/04/2011	Channel 4	Religious/Beliefs discrimination/offence	7
Diagnosis Live From the Clinic	25/05/2011	Channel 4	Nudity	8
Diagnosis Live from the Clinic (trailer)		Channel 4	Generally accepted standards	78
Dispatches: Lessons in Hate and Violence	14/02/2011	Channel 4	Due impartiality/bias	20
Doctors	21/07/2010	BBC 1	Offensive language	1
EastEnders	13/05/2011	BBC 1	Generally accepted standards	1
Eddy Stobbs Trucks	20/05/2011	Channel 5	Animal welfare	1
Emmerdale	16/05/2011	ITV1	Generally accepted standards	1
Emmerdale	26/05/2011	ITV1	Disability discrimination/offence	1
F1: Grand Prix	22/05/2011	BBC 1	Harm	2
Fifth Gear	20/05/2011	Channel 5	Sexual material	1
Fight for Your Right Revisited	07/05/2011	Channel 4	Generally accepted standards	1
Fighting Talk	07/05/2011	BBC Radio 5 Live	Generally accepted standards	1
Film4 trailer	11/05/2011	E4	Scheduling	1
Glee	21/05/2011	E4+1	Offensive language	1
Gordon's Great Escape	16/05/2011	Channel 4	Animal welfare	6
Grand Designs	20/05/2011	More4	Offensive language	1
Hamari Devrani	19/05/2011	Star Plus	Offensive language	1
Hip Hop M1x with Charlie Sloth	30/05/2011	BBC Radio 1 Xtra	Race discrimination/offence	1
Hunting Britain's Most Wanted	19/05/2011	Channel 4	Race discrimination/offence	1
Hunting Britain's Most Wanted	19/05/2011	Channel 4	Violence and dangerous behaviour	1
In the Night Garden	25/05/2011	CBeebies	Nudity	1
ITV News	26/05/2011	ITV1	Generally accepted standards	1
ITV News	23/05/2011	ITV1	Violence and dangerous behaviour	1
John Bishop's Britain	21/05/2011	BBC 1	Violence and dangerous behaviour	1
Joop sponsorship of NCIS	various	FX	Sexual material	2
Lion Man	29/04/2011	Sky1	Scheduling	1
Live Ford Football Special	14/05/2011	Sky Sports 2	Offensive language	3
Live Premiership Rugby	14/05/2011	Sky Sports 1	Violence and dangerous behaviour	1
Loose Women	20/05/2011	ITV1	Generally accepted standards	1
Loose Women	16/05/2011	ITV1	Race discrimination/offence	2
Loose Women	24/05/2011	ITV1	Gender discrimination/offence	1
Loose Women	05/05/2011	ITV1	Disability	1

			discrimination/offence	
Misbehaving Mums to Be	13/05/2011	BBC 3	Offensive language	1
NCIS	07/05/2011	Channel 5	Generally accepted standards	1
News	13/05/2011	Capital FM	Generally accepted standards	1
Newsbeat	21/04/2011	BBC Radio 1	Sexual material	4
People Do the Funniest Things	07/05/2011	ITV1	Race discrimination/offence	1
Poms in Paradise	18/05/2011	ITV1	Offensive language	1
Pornography: a Secret History of Civilisation	10/05/2011	Yesterday	Sexual material	1
Programme promotion	08/05/2011	Kanal 5	Generally accepted standards	1
Programme trailer	18/05/2011	Dave	Generally accepted standards	1
Scott and Bailey (trailer)	15/05/2011	ITV1	Offensive language	1
Sing If You Can	21/05/2011	ITV1	Generally accepted standards	2
Sing If You Can	14/05/2011	ITV1	Animal welfare	1
Sky News	16/05/2011	Sky News	Generally accepted standards	3
Something for the Weekend	22/05/2011	BBC 2	Animal welfare	1
SPL Hearts v Celtic	11/05/2011	Sky Sports 1	Religious/Beliefs discrimination/offence	4
Stargate Universe	23/05/2011	Sky1	Advertising/editorial separation	1
Station promo	n/a	KLFM 96.7	Materially misleading	1
The Apprentice	25/05/2011	BBC 1	Harm	1
The Big Questions	15/05/2011	BBC 1	Race discrimination/offence	10
The Breakfast Show	04/04/2011	Reading 107 FM	Competitions	1
The Chris Moyles Show	21/04/2011	BBC Radio 1	Sexual material	1
The Chris Moyles Show	11/05/2011	BBC Radio 1	Race discrimination/offence	1
The Eurovision Song Contest 2011 Final	14/05/2011	BBC 1	Product placement	1
The Eurovision Song Contest 2011 Final	14/05/2011	BBC 1	Offensive language	3
The Gadget Show	16/05/2011	Channel 5	Nudity	1
The Graham Norton Show	13/05/2011	BBC 1	Disability discrimination/offence	1
The Hotel	15/05/2011	Channel 4	Offensive language	3
The Hunks	10/05/2011	Sky Living	Sexual orientation discrimination/offence	1
The Jeremy Kyle Show	24/05/2011	ITV2	Materially misleading	1
The Million Pound Drop Live	13/05/2011	Channel 4	Competitions	3
The Million Pound Drop Live	21/05/2011	BBC 3	Generally accepted standards	1
The Million Pound Drop Live	20/05/2011	Channel 4	Materially misleading	2
The One Show	05/05/2011	BBC 1	Offensive language	1

The Shadow Line	12/05/2011	BBC 2	Animal welfare	4
The Simpsons	25/05/2011	Channel 4	Under 18s - Coverage of sexual and other offences	1
The Vanessa Show	26/05/2011	Channel 5	Race discrimination/offence	1
The Vanessa Show (trailer)	19/05/2011	Channel 5	Sexual material	1
The Wright Stuff	17/05/2011	Channel 5	Sexual orientation discrimination/offence	1
This Morning	17/05/2011	ITV1	Sexual material	1
This Morning	n/a	ITV1	Premium rate services	1
This Morning	18/05/2011	ITV1	Animal welfare	1
Three in a Bed	26/05/2011	Channel 4	Sexual orientation discrimination/offence	1
Top Gear	20/05/2011	Dave	Offensive language	1
TV Licensing Advert	16/05/2011	BBC 1	Harm	1
TV Licensing Advert	15/05/2011	BBC 1	Harm	1
Vaardhat	01/03/2011	Aaj Tak	Generally accepted standards	1
Warship	16/05/2011	Channel 5	Offensive language	1
Watchdog	19/05/2011	BBC 1	Materially misleading	1
Waterloo Road	11/05/2011	BBC 1	Generally accepted standards	1
Waterloo Road	n/a	BBC 1	Harm	1
Weather Forecast	24/05/2011	BBC Radio 4	National/regional/local issues	1
Would I Lie to You	21/05/2011	Dave	Offensive language	1