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Introduction

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives[1], Ofcom must include these standards in a code or codes. These are listed below.

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

a) Ofcom's Broadcasting Code ("the Code"), which, can be found at: http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/.

b) the Code on the Scheduling of Television Advertising ("COSTA") which 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 and product placement on television (see Rules 9.13, 9.16 and 9.17 of the Code) and all commercial communications in radio programming (see Rules 10.6 to 10.8 of the Code);
- '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[2].

The BCAP Code is at: 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.

[1] The relevant legislation is set out in detail in Annex 1 of the Code.

[2] BCAP and ASA continue to regulate conventional teleshopping content and spot advertising for these types of services where it is permitted. Ofcom remains responsible for statutory sanctions in all advertising cases

Notice of Revocation

Licence number: **TLCS-1211**
Service name: **Press TV**
Licensee: **Press TV Limited**

Introduction

Press TV Limited held a Television Licensable Content Service ("TLCS") licence under the Broadcasting Act 1990 for the television service Press TV ("the Licensed Service").

The Communications Act 2003 ("the Act"), the Broadcasting Act 1990 ("the 1990 Act") and the Broadcasting Act 1996 require that any person who provides a television service in the UK must be authorised to do so under a licence granted by Ofcom or another appropriate European regulatory authority. Under section 13(1) of the 1990 Act it is a criminal offence to provide a television service without a licence.

Under section 362(2) of the Act, the provider of the service for the purposes of holding a licence is the person with general control over which programmes are comprised in the service[1].

Ofcom's "Guidance regarding the 'provider of a broadcasting service' and 'sub-letting of capacity' dated 21 May 2010[2] states that Ofcom considers:

> "a person will normally have general control if that person exercises effective control over the selection of programmes that comprise the service and their organisation into a programme schedule. It is that person who will normally be treated as being the provider of the service and who will need to hold a broadcasting licence authorising its provision."

Condition 29(2)(a) of all TLCS Licences provide that Ofcom may revoke the licence by notice in writing served on the Licensee and talking effect from the time of service if Ofcom is satisfied that the Licensee has ceased to provide the Licensed Service and it is appropriate to revoke the Licence.

Decision

In the course of correspondence and meetings with Ofcom, statements made by Press TV Limited about the operation of the Licensed Service failed to satisfy Ofcom that the Licensee had general control over which programmes and other services were comprised in the Licensed Service. Ofcom therefore concluded that Press TV Limited had ceased to provide the Licensed Service in accordance with section 362(2) of the Act and that, accordingly, it was appropriate to revoke TLCS Licence

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[1] Section 362 (2) state "the person with general control over which programmes and other services and facilities comprised in the service (whether or not he has control of the content of the individual programmes or the broadcasting or distribution of the service)".

[2] The full guidance regarding the licensing position of the provider of the service can be found at http://licensing.ofcom.org.uk/binaries/tv/service-provider.pdf

1211 under Condition 29(2)(a) of that Licence and section 238(4) of the Communications Act 2003. The Licence was revoked on 20 January 2012.

Revocation of the Licence under Condition 29(2)(a) of the Licence and section 238(4) of the Communications Act 2003.

Standards Findings

In Breach

Exposure: Gaddafi and the IRA

ITV1, 26 September 2011, 22:35

Introduction

Exposure: Gaddafi and the IRA was a current affairs programme which investigated the financial and military links between the former Libyan leader, Colonel Gaddafi, and the Irish Republican Army ("IRA"). ITV Broadcasting Limited ("ITV") was responsible for compliance of the programme on behalf of the ITV network for ITV1.

A total of 26 viewers alerted Ofcom to two pieces of footage shown within the programme, which viewers considered were misleading:

- footage, labelled *"IRA Film 1988",* which was described in the programme as film taken by the IRA of IRA members attempting to shoot down a British Army helicopter in June 1988. Viewers said that this footage was in fact material taken from a video game; and

- footage of police clashing with rioters in Northern Ireland, described in the programme as being of a riot in the Ardoyne area of Belfast in July 2011. Viewers said that, due to the type of police riot vehicles shown in the footage, the footage must have been of an earlier riot.

Ofcom considered the above material raised issues warranting investigation under Rule 2.2 of the Code, which states:

> "Factual programmes or items or portrayals of factual matters must not materially mislead the audience".

We therefore sought ITV's comments as to how this material complied with this Rule.

Response

ITV said that the programme had included footage intended to portray two real events: the IRA ground attack on a British Army helicopter in June 1988; and clashes between rioters and police in Belfast in July 2011. However, ITV apologised for the fact that in each case the "wrong footage" was used to illustrate these two events. ITV added that both "mistakes were the result of human error and not an intention to mislead viewers. In both cases, steps were taken to verify the content of the footage used but unfortunately these did not reveal the errors".

ITV explained the compliance steps it had taken in relation to each piece of footage.

<u>Footage of the 1988 IRA attack on a British Army helicopter</u>
According to ITV, the programme was aiming to use footage of "a genuine incident", which had been included in an episode of the investigative journalism programme *The Cook Report*. The episode in question was *Blood Money*, originally broadcast on 12 June 1989, which contained film taken by the IRA, of IRA members attempting to shoot down a British Army helicopter in June 1988.

ITV described the sequence of events which led to a piece of footage from the internet being included by mistake in *Exposure: Gaddafi and the IRA*, rather than the footage from the 1989 episode of *The Cook Report*:

- at the start of the production process, the programme director viewed the *Cook Report* footage contained in the *Blood Money* programme;

- production staff tried to source "a fuller and better version" of the *Cook Report* footage, rather than the edited version of the *Cook Report* footage which had appeared in the 1989 *Bloody Money* episode;

- during the editing process, roughly eight weeks after he viewed the *Cook Report* footage, the programme director viewed footage from the internet (which showed ground troops firing at a helicopter with a heavy machine gun), which "he mistakenly believed…to be a fuller version of the footage used in the *Cook Report"*. ITV said that: "Although there were clear differences between the two pieces of footage, his memory over the ensuing period of time let him down and led him to believe it was the same footage";

- the programme director included the internet footage in the programme in the "mistaken belief" that it was "the original and fuller version of the IRA footage in the *Cook Report* programme, but always intend[ed] to source the original tape at some point". However, the original source material was not available;

- according to ITV "regrettably at no point did [the programme director] ever view the internet footage and the *Cook Report* footage at the same time to verify the internet footage";

- ITV said that there was no watermark or copy protection marked on the internet footage to indicate its source as being a video game when viewed by ITV staff. Rather, the internet footage was labelled at the time as follows:

  > *"a Provisional IRA unit of the South Armagh Brigade shoot down a British Army helicopter near Silverbridge. The attack happened on the 23rd of June 1988. Also included is a news report on the incident - in it the reporter states that this was the first time the IRA shot down a British helicopter - this is incorrect as one had been shot down on the 17th February 1978 near Jonesborough in south Armagh, killing the side-door gunner Iain Corden-Lloyd".*

  The Licensee maintained that following the broadcast of the programme in this case, the internet clip, when visited, now shows the following on-screen message while the internet clip is playing:

  > *"this video is just a recreation of what supposedly happened in Silverbridge…23 June 1988".*

  ITV said that this message "appears to have been added at a later date" and that "its staff who had viewed the internet footage after the error was identified were adamant the message had appeared later".

- according to ITV, during the production process, the authenticity of the internet footage "was questioned by an ITV Compliance team member, who

raised some concerns about the sound effects and pictures in the clip with the producer" and asked if the internet footage "really did depict" the shooting down of the British Army helicopter in June 1988. This reflected a standard compliance procedure whereby in cases where "it is felt there are elements of any archive material that raise questions about its authenticity or provenance", checks are made. In this case, the programme producer assured the compliance team member that the internet footage was of the 1988 incident and had been used in the 1989 episode of the *Cook Report*; and

- in conclusion, the Licensee said that the assurances given by the production staff to the ITV Compliance team member, as to the provenance of the internet footage were accepted by the Compliance team member "in good faith". However, despite these assurances "in fact neither the producer nor the director ever cross-checked the internet footage with the *Cook Report* footage. They ascribe this failure to do so to the pressure they were under in meeting the deadline for the programme's completion, delivery and broadcast".

ITV said that "regrettably" the internet footage was not cross-checked and verified by the production staff as being the *Cook Report* footage.

The final result of this series of events was that the internet footage used in the programme was not the *Cook Report* footage but footage from the computer game 'Arma 2'.

ITV said that this incident "was purely a case of human error. It was not ITV's intention to mislead viewers and the use of the wrong footage was in no way deliberate".

Footage of July 2011 Belfast Riot

ITV said that "although the incident referred to in the programme (the July 2011 riot in the Ardoyne area of Belfast) did happen, the footage used to illustrate it was incorrect. The footage used was of an earlier riot, not the riot in 2011".

ITV said that during the production process, the programme producer had requested footage of the July 2011 Ardoyne riot from a local historian "who has supplied footage to various broadcasters in the past", and who, therefore, the producer considered to be a trustworthy source. However, the historian provided footage of an "earlier riot" that had occurred in the Ardoyne area of Belfast several years before 2011. Due to a "miscommunication" between the producer and the historian "the discrepancy between the July riot and the [riot footage] supplied was not discovered, and the clip of the earlier riot remained in the programme". ITV said that "this mistake was the result of human error and not a deliberate attempt to mislead viewers".

In summary, ITV said that as soon as it became aware of the two instances of incorrect footage in the programme it: apologised to viewers who contacted ITV directly about these matters; and removed the programme from the ITV Player service.

Improvements to its compliance

The Licensee outlined various improvements to its compliance procedures to ensure that "similar errors do not occur in future":

- a requirement on producers of current affairs programmes to complete an "Archive Source List form, which will detail the date and source of all archive footage used, how it is described by the source and how it is described in the programme";

- the issuing of guidance to ITV's news, current affairs and factual teams and commissioners on the "particular compliance issues associated with sourcing material from the internet"; and

- changes to the ITV compliance training programme for production teams on the issue of "trust in television" to include "the errors made in [this programme]…as examples of the importance of the care required in sourcing and verifying third party material, in order to avoid inadvertently misinforming the viewer".

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content which it considers best calculated to secure a number of standards objectives. One of these objectives is that generally accepted standards must be applied to broadcast content to provide adequate protection for members of the public from harmful and/or offensive material.

Rule 2.2 of the Code states that: "Factual programmes or items or portrayals of factual matters must not materially mislead the audience".

Ofcom noted that this programme was a serious current affairs programme which documented the financial and military support given by Colonel Gaddafi to the IRA.

<u>Footage of the 1988 IRA attack on a British Army helicopter</u>
The programme said that the armaments supplied by Colonel Gaddafi greatly enhanced the IRA's operational capability. For example, at one point the programme commentary stated:

> "*With Gaddafi's heavy machine guns, it was possible to shoot down a helicopter, as the terrorists' own footage of 1988 shows".*

The programme then included footage, labelled on-screen as *"IRA Film 1988",* which appeared to show ground troops firing at and hitting a helicopter with a heavy machine gun. This footage however was the material that ITV confirmed was in fact taken from the internet and whose source was the video game 'Arma 2'.

<u>Footage of July 2011 Belfast Riot</u>
Later in the programme it was stated that the programme had received reports that Colonel Gaddafi continued to fund militant Irish Republican groups, even after the IRA had ceased military operations. During this segment of the programme, the riot footage was shown showing police clashing with rioters, accompanied by the following commentary:

> *"Belfast in July of this year* [2011]*: the simmering tension that divides communities is still explosive. This riot was sparked by a Protestant march in a Catholic neighbourhood. Such situations are the breeding grounds for potential new militants".*

This archive film was not however footage of the riot that had taken place in the Ardoyne area of Belfast in July 2011, but of a riot that had taken place several years earlier in the Ardoyne area of Belfast.

Rule 2.2
There were therefore two examples in this programme where archive footage did not depict the historic events that the programme claimed. With each example viewers were led to believe that the archive film was genuine: in one case, the internet footage was marked on screen *"IRA Film 1988"*, and in the other while the riot footage was being shown the commentary referred to *"This riot..."*.We therefore considered that viewers were misled.

Ofcom went on to consider whether – as required by Rule 2.2 – viewers were "**materially** misled" [emphasis added]. The Guidance to Rule 2.2 underlines that it is "designed to deal with content that **materially misleads the audience so as to cause harm or offence** [emphasis in original]" and not "with issues of inaccuracy in non-news programmes." The Guidance also states that "Whether a programme ... *"materially"* misleads an audience so as to cause harm or offence depends on a number of factors such as the editorial context, the nature of the misleading material and, above all, either what the potential effect could be, or what actual harm or offence has occurred."

Programme makers and broadcasters of factual television must ensure that where historical and political events are being presented, viewers can trust the information they are being given. This fundamental obligation is particularly important in the case of news and current affairs programmes, or programmes of an investigative nature. The audience is likely to place a higher degree of trust in the broadcaster's editorial integrity in this kind of factual programming.

In this case the programme used footage that purported to be of actual historic events to make serious points in relation to the IRA, and Irish Republicanism more generally. However, the footage of both the shooting down of the helicopter and of the riot was not authentic in the first instant or accurate in the second but viewers were misled to believe that it was.

In reaching our decision, we took into account that, arguably, the potential harm caused in this particular case was limited, because: neither real event which the footage purported to represent was central to the narrative of the documentary; and both real events had already been widely reported, and in the case of the footage of the video game, had been in the public domain for many years. In addition, both pieces of footage were not purporting to make new or significant allegations against particular organisations or individuals.

However, we considered that these factors were not sufficient mitigation in this case, and that there is a fundamental requirement that broadcasters must not materially mislead the audience over the content of serious factual programming such as *Exposure: Gaddafi and the IRA*.

In previous cases, breaches of the Code that resulted in the audience being misled have always been considered by Ofcom to be amongst the most serious that can be committed by a broadcaster, because they go to the heart of the relationship of trust between a broadcaster and its audience. This is particularly pertinent when it involves a public service broadcaster, as in the case here.

We noted that according to ITV both mistakes in this case were the result of human error, and that some steps were taken to verify the content of the footage used. However, apart from the way ITV says the internet footage was labelled, the specific steps taken by the programme makers were unclear, and we were greatly concerned that ITV and the programme makers failed to take sufficient measures to authenticate the two separate pieces of archive film footage. There were significant and easily identifiable differences between the footage of the attack on the helicopter included in the 1989 *Cook Report* and the footage taken from the internet from the video game 'Arma 2'. Given these marked differences, we were very surprised that the programme makers believed the footage of the helicopter attack was authentic, and we were particularly concerned that ITV failed to double-check the video game internet footage against the footage from the *Cook Report*, despite the concerns over the internet footage expressed by the ITV Compliance team. In summary, we considered that there were clear deficiencies in the steps taken by both production and compliance staff for sourcing and verifying the archival content of the helicopter attack in this programme.

Further, we are concerned that ITV did not make adequate checks on the provenance of the riot footage. It is not sufficient for a broadcaster or programme maker to rely on footage provided by a third party source, on the basis that that source had previously supplied other broadcasters with archive footage, and fail to confirm the details of archive film provided.

We take into account that ITV: apologised; removed the programme from its catch-up video-on-demand service; and, has now put in place various changes to its compliance procedures to ensure such incidents do not happen in future.

However, the viewers of this serious current affairs programme were misled as to the nature of the material they were watching. In the circumstances, this represented a significant breach of audience trust, particularly in the context of a public service broadcaster. As such, Ofcom considered the programme to be materially misleading, in breach of Rule 2.2.

Ofcom was particularly concerned by this compliance failure by ITV. We do not expect any issues of a similar nature to arise in future.

Breach of Rule 2.2

In Breach

Provision of recordings

ARY News, 2 August 2011, 15:00
ARY Entertainment, 20 October 2011, 23:10

Introduction

ARY News and ARY Entertainment, broadcast on the Sky platform, are television channels aimed at an Urdu speaking UK audience[1]. The licences for these channels are held by ARY Network Ltd ("ARY Network" or "the Licensee").

ARY News, 2 August 2011

A viewer alerted Ofcom to a programme broadcast on ARY News on 2 August 2011 which the complainant believed to contain material that incited racial hatred.

On 23 September 2011, Ofcom requested a recording of the programme from the Licensee in order to assess the complaints. However, the recording of ARY News that ARY Network supplied was of such poor audio quality that Ofcom was unable to assess the material as broadcast.

ARY Entertainment, 20 October 2011

Ofcom also received a complaint about potentially misleading information regarding personal grooming products in a programme broadcast on ARY Entertainment on 20 October 2011.

On 28 October 2011, Ofcom requested a recording of the programme from the Licensee. However, ARY Network was unable to supply a recording because of a fault with recording equipment.

Paragraph 76 of Ofcom's Guidance Notes for a Television Licensable Content Service licence ("TLCS") application, advises all applicants that:

> "The licensee must retain, or arrange for the retention of, recordings of everything included in the licensed service for a period of 60 days. If Ofcom requests a copy of any recording, the licensee must provide this forthwith. **Recordings must be of a standard and in a format which allows Ofcom to view the material as broadcast.** [Emphasis added]. The licensee must also (where possible) provide Ofcom with scripts or transcripts of any material included in the service."

Condition 11 of a TLCS licence states:

> "11(1) The Licensee shall adopt procedures acceptable to Ofcom for the retention and production of recordings in sound and vision of any programme which is the subject matter of a Standards Complaint".
>
> 11(2) In particular the Licensee shall:

[1] Since the date of this broadcast ARY News has been renamed ARY World.

(a) Make and retain or arrange for the retention of a recording in sound and vision of every Licensed service for a period of 60 days from the date of its inclusion therein; and

(b) At the request of Ofcom forthwith produce to Ofcom any such recording for examination or reproduction."

Ofcom considered that both cases raised issues under Licence Condition 11(1) and (2) (Retention and production of recordings) of the TLCS licence held by ARY Network.

We therefore sought comments from the Licensee under Condition 11(1) and (2). With regard to the recording of ARY News, we referred to the requirement set out in paragraph 76 the TLCS Guidance Notes to provide a recording of broadcast quality.

Response

ARY News, 2 August 2011

The Licensee said it "always provide quality recording[s] to OFCOM as and when required." However, it apologised for the quality of the recording of the broadcast on 2 August and said that it had asked its technical team "to look into this issue and rectify it at earliest." No further response was received from the Licensee.

ARY Entertainment, 20 October 2011

The Licensee explained that a technical malfunction had affected its recording systems for 20 October, and that while the issue had been rectified, it was unable to provide a recording for the date complained of.

Decision

Condition 11 of a TLCS licence requires that the Licensee shall "adopt procedures acceptable to Ofcom for the retention and production of recordings in sound and vision of any programme which is the subject matter of a Standards Complaint". The TLCS Guidance Notes for Licence Applicants (Paragraph 76) in turn set out that these recordings must be "of a standard and in a format which allows Ofcom to view the material as broadcast."

ARY News, 2 August 2011

Ofcom noted that the Licensee failed to supply a recording of sufficient quality in terms of sound for us to assess the material as broadcast. We were also concerned that the Licensee failed to provide any explanation for the poor quality of this recording or how it intended to ensure that future recordings supplied to Ofcom will be of broadcast quality. Consequently, ARY Network Ltd was in breach of Condition 11 of its Licence for failing to have acceptable procedures in place to provide recordings of broadcast quality.

Ofcom takes extremely seriously allegations that broadcast content has incited racial hatred. In circumstances where Ofcom is prevented from assessing material of this nature because the relevant content is not provided by the licensee, we would normally consider further regulatory action. However, in this case, Ofcom was able to view a simulcast of the material as broadcast on another of its licensed services.

Ofcom was able to satisfy itself that the material in question did not raise any potential issues concerning incitement to racial hatred.

ARY Entertainment, 20 October 2011

Owing to a "technical malfunction", the Licensee was also unable to provide a recording of the programme broadcast on ARY Entertainment on 20 October. Ofcom is therefore recording a further breach of Condition 11 of ARY Network Ltd's licence for failing to retain and provide Ofcom with a recording of this material.

These failures by the Licensee to meet the requirements of Condition 11 are serious and significant breaches of ARY Network's Ltd licence because they resulted in Ofcom being unable to fulfil its statutory duty properly to assess and regulate broadcast content in this case.

Ofcom is putting the Licensee on notice that if there are any further breaches of Condition 11 concerning services whose licences are held by ARY Network Ltd, Ofcom will consider further regulatory action.

Breaches of Licence Condition 11

In Breach

Bluebird Live

Sport XXX Girls (Channel 967), 28/29 August 2011, 23:45 to 00:45
Sport XXX Girls (Channel 967), 29 August 2011, 02:45 to 03:45
Sport XXX Girls (Channel 967), 3/4 September 2011, 23:45 to 00:45

Bluebird 40+

Northern Birds (Channel 954), 29 August 2011, 22:50 to 23:25

Introduction

Bluebird Live and *Bluebird 40+* are segments of interactive 'adult chat' advertising content broadcast on the licensed services Sport XXX Girls and Northern Birds. These services are broadcast on Sky Channels 967 and 954 respectively. The services are freely available without mandatory restricted access and are situated in the 'adult' section of the Sky electronic programme guide ("Sky EPG"). Viewers are invited to contact onscreen presenters via premium rate telephony services ("PRS"). The female presenters dress and behave in a sexually provocative way while encouraging viewers to contact the PRS numbers.

The licences for Sport XXX Girls and Northern Birds are held by Satellite Entertainment Limited ("SEL" or "the Licensee"). SEL is therefore responsible for the compliance of the *Bluebird Live* and *Bluebird 40+* content broadcast on its services.

A complaint alerted Ofcom to the level of sexual content in the material listed above. Ofcom therefore viewed this content.

1. *Bluebird Live*, Sport XXX Girls, 28/29 August 2011, 23:45 to 00:45
The female presenter was wearing a light blue one piece costume which consisted only of a thin strip of fabric between her legs which covered her vagina but resulted in her outer genital area being exposed. During the broadcast she lay with her legs wide open to camera gently thrusting her hips forward and stroking her upper inner thigh area. Given that this shot of the presenter with her legs wide open remained onscreen for the majority of this broadcast, the material was both invasive and prolonged.

2. *Bluebird Live*, Sport XXX Girls, 29 August 2011, 02:45 to 03:45
The presenter wore only a pink lace thong and was filmed with a hand held camera. Throughout the broadcast there were various prolonged and intrusive images filmed, extremely close up and for a duration of time, from directly behind the presenter's buttocks and also between her wide open legs. While being filmed in these positions she thrust her buttocks and hips towards the camera revealing her outer genital area and anal detail.

3. *Bluebird Live*, Sport XXX Girls, 3/4 September 2011, 23:45 to 00:45
The female presenter was wearing only a thin white and red thong. For the majority of this broadcast she was positioned on all fours with her buttocks to camera. While in this position her anal and outer genital areas were clearly visible. Given these shots had a duration of several minutes and were in sufficient close up to show anal and outer genital detail they were both prolonged and intrusive.

4. *Bluebird 40+*, Northern Birds, 29 August 2011, 22:50 to 23:25
The presenter wore a black leather look thong composed of a thin strip of fabric only covering her vagina and so revealing her outer genital area. During the broadcast she lay on her back with her legs wide open to camera, and while in this position she gently thrust her hips backwards and forwards. Some particularly intrusive images followed, filmed at close range, when her outer genital area was visible for a prolonged period. In this position she massaged and stroked around her outer genital area.

Ofcom considered this material raised issues warranting investigation under Rule 4.2 of the BCAP Code, which states that:

> "Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards."

Ofcom asked SEL to provide comments on how the above broadcasts complied with BCAP Code Rule 4.2.

Response

In summary, SEL denied that any of the material in the clips was in breach of "internal or external compliance guidelines". SEL commented on some of the advertising content as follows.

1. *Bluebird Live*, Sport XXX Girls, 28/29 August 2011, 23:45 to 00:45
SEL denied that the presenter's outer genital area was exposed, saying that it was covered by her garment. The Licensee also denied that these were prolonged or intrusive images, and asked for further clarification about what Ofcom considered to be "invasive" about the material.

2. *Bluebird Live*, Sport XXX Girls, 29 August 2011, 02:45 to 03:45
SEL said there were no prolonged images in the sequence with the potential to cause offence, and asked for Ofcom's clarification as to how the images were intrusive and prolonged.

3. *Bluebird Live,* Sport XXX Girls, 3/4 September 2011, 23:45 to 00:45
The Licensee said that the presenter's garment was "clearly covering her genitals", and that for most of the sequence the model was on her stomach with the camera focussing on her face; therefore, SEL failed to see how these images could be in breach of the BCAP Code.

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 has a duty to set such standards for the content of programmes as appear to it best calculated to secure the standards objectives, one of which is that "the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented". This standards objective is reflected in the rules set out in the BCAP Code.

Since 1 September 2010 all PRS-based 'daytime chat' and 'adult chat' television services have no longer been regulated as editorial content but as long-form

advertising i.e. teleshopping. From that date the relevant standards code for such services became the BCAP Code rather than the Broadcasting Code.

The BCAP Code contains rules which permit 'adult chat' services to be advertised (and so broadcast) within prescribed times and on free-to-air channels that are specifically licensed by Ofcom for that purpose. When setting and applying standards in the BCAP Code to provide adequate protection to members of the public from serious or widespread offence, Ofcom must have regard to the need for standards to be applied in a manner that best guarantees an appropriate level of freedom of expression in accordance with Article 10 of the European Convention of Human Rights, as incorporated in the Human Rights Act 1998. However, the advertising content of 'adult chat' services has much less latitude than is typically available to editorial material in respect of context and narrative. A primary intent of advertising is to sell products and services, and consideration of acceptable standards will take that context into account.

Rule 4.2 of the BCAP Code provides that: "Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards."

On 27 July 2011 Ofcom published revised guidance on the advertising of telecommunications-based sexual entertainment services and PRS daytime chat services[1]. This clearly sets out what Ofcom considers to be acceptable to broadcast on these services post-watershed.

For example this guidance explicitly states that 'adult chat' broadcasters should at no time:

- broadcast invasive shots of presenters' bodies. Ofcom cautions against physically intrusive, intimate shots of any duration; and against less intrusive shots that may become unacceptable by virtue of their being prolonged; and

- broadcast anal, labial or genital areas or broadcast images of presenters touching their genital or anal areas either with their hand or an object.

Ofcom has also made clear in a number of published decisions the type of material that is unsuitable to be broadcast in adult interactive chat advertisements without mandatory restricted access[2]. In particular, Ofcom has highlighted in previous published breach decisions relating to this Licensee, and others operating in the adult PRS chat market, examples of where material has been found to be intrusive, invasive or prolonged. Ofcom notes that the Licensee has not previously requested clarification of the intrusive, invasive or prolonged nature of the content it has broadcast and which Ofcom has found in breach of the BCAP Code.

Ofcom considered the following broadcasts in respect of BCAP Code Rule 4.2:

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[1] "Ofcom guidance on the advertising of telecommunications-based sexual entertainment services and PRS daytime chat services" dated 27 July 2011. See: http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/bcap-guidance.pdf

[2] For example:

- *Elite Nights*, Elite TV and Elite TV 2: http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb179/
- *Bluebird TV*: http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb174/
- *Dirty Talk Live*: http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb171/

- *Bluebird Live*, Sport XXX Girls, 28/29 August 2011, 23:45 to 00:45
- *Bluebird Live*, Sport XXX Girls, 29 August 2011, 02:45 to 03:45
- *Bluebird Live*, Sport XXX Girls, 3/4 September 2011, 23:45 to 00:45
- *Bluebird 40+*, Northern Birds (Channel 954), 29 August 2011, 22:50 to 23:25

In Ofcom's view the sexual images included in these broadcast were strong and capable of causing offence, and some intrusive and prolonged. In all cases the broadcasts included material that is clearly inconsistent with Ofcom's guidance. For example:

1. *Bluebird Live*, Sport XXX Girls, 28/29 August 2011, 23:45 to 00:45
The female presenter was wearing an outfit that did not adequately cover her genital area and, while she was positioned with her legs wide open to camera, there were prolonged and intrusive images of her exposed genital area.

2. *Bluebird Live*, Sport XXX Girls (Channel 967), 29 August 2011, 02:45 to 03:45
The presenter wore a thong that did not adequately cover her genital or anal area. As she was filmed with a hand held camera, in a close up position behind the presenter's buttocks and between her legs, the images of her genital and anal area were extremely intrusive and prolonged.

3. *Bluebird Live*, Sport XXX Girls, 3/4 September 2011, 23:45 to 00:45
The presenter was wearing a thong that did not adequately cover her genital and anal areas resulting in these areas being clearly exposed when she was positioned with her buttocks to camera. The images were prolonged and intrusive.

4. *Bluebird 40+*, Northern Birds, 29 August 2011, 22:50 to 23:25
The presenter's thong did not adequately cover her outer genital area and while she was positioned on her back with her legs wide open to camera there were very intrusive and prolonged images.

Ofcom noted that in conjunction with those images the presenters performed various other actions including: stroking their bodies; gyrating their hips; and thrusting their buttocks so as to mime sexual intercourse. The combination of these images and actions resulted in the material being of a strong sexual nature. The examples highlighted above at 1. to 4. included images that are not permitted in 'adult chat' broadcast advertisements that are freely available without mandatory restricted access.

Under BCAP Code Rule 4.2 in order to assess whether serious or widespread offence was caused against generally accepted standards, Ofcom took into account whether appropriate scheduling restrictions were applied to this content. Ofcom noted that this content was broadcast well after the watershed and that viewers generally expect on all channels that stronger material will be shown after the 21:00 watershed. Ofcom also took account of the fact that the channels are positioned in the 'adult' section of the Sky EPG and that viewers tend to expect the broadcast of stronger sexual material on channels in this section of the EPG than on other channels in other sections.

However, in this case, given that the content included prolonged and frequent scenes of a strong sexual nature, the location of the channel in the adult section of the EPG was not sufficient to ensure serious or widespread offence against generally accepted standards was not caused. This was regardless of the fact the content was shown between the hours of 22:50 and 03:45.

Ofcom concluded that relevant scheduling restrictions were not applied so as to ensure that the material which was broadcast was not capable of causing serious or widespread offence against generally accepted moral, social or cultural standards. Specifically, this material should not have been broadcast within the context of 'adult chat' advertising content that was freely available without mandatory restricted access.

Therefore Ofcom found this material in breach of Rule 4.2 of the BCAP Code.

Ofcom has recently imposed a sanction on the Licensee for a number of serious and repeated breaches of the BCAP Code[3], which led to the imposition of a financial penalty totalling £130,000. These present contraventions of the BCAP Code by SEL are another example of very poor compliance by the Licensee. In the circumstances, Ofcom is considering what further regulatory action is appropriate.

Breaches of BCAP Code Rule 4.2

[3] "Sanction: Decision by Ofcom" dated 20 December 2011. See: http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/satellite-entertainment-ltd.pdf

In Breach

Superior Interiors with Kelly Hoppen

Channel 5, 1 November 2011, 20:00

Introduction

Superior Interiors with Kelly Hoppen was a weekly interior design programme that featured a viewer competition to win kitchen appliances.

The competition was a simple draw (i.e. there was no question to answer) for which viewers could register their entries by phone or text, charged at premium rate, or by post (the free-entry route). The following caption was displayed on screen when the competition was announced:

> *"Win up to £10,000 worth of*
> *home appliances*
>
> *"Call 09…*
> *text HOME to 81…*
>
> *"Or post your name and phone number to*
> *HOME 1, P.O. Box 75…*
>
> *"Calls cost £1.53 from a BT landline; other networks vary and mobiles will cost considerably more. Texts cost £1.50 + standard network rate. Lines close at midday 1st November 2011 and 3 days later for postal. To decline marketing texts end SMS with NO INFO. Entries received after the competition closes will not count but may be charged. Rules and winners: channel5.com/win"*

The voiceover included all this information except for the premium rate entry closing time, about which it said:

> *"…Lines close at midday on the date shown on screen…*"

Ofcom received complaints from three viewers who noted that, given the programme was broadcast at 20:00, the premium rate entry into the competition had already closed at the time of broadcast (i.e. eight hours before the programme started).

Ofcom considered the case raised issues warranting investigation under the following Code rules:

Rule 2.13 "Broadcast competitions … must be conducted fairly"; and

Rule 2.14 "Broadcasters must ensure that viewers … are not materially misled about any broadcast competition…".

We therefore sought comments from Channel 5 Broadcasting Limited ("Channel 5" or "the Licensee") with regard to these rules.

Response

Channel 5 said *Superior Interiors with Kelly Hoppen* was a series of programmes that comprised five episodes, which had been scheduled for weekly broadcast from 27 September 2011 to 25 October 2011. It added that a broadcast competition, for which the premium rate entry closed at midday on 1 November 2011, had been created for the series ("the series competition").

The Licensee said that, for legal reasons, the broadcast of episode three of this series was postponed and re-scheduled for broadcast on the evening of 1 November 2011 and, as the series competition would have closed by the time it was broadcast, a new competition was run for this episode, with an identical prize. This new competition opened in the evening of 1 November 2011 (i.e. when it was broadcast) and closed at midday on 8 November 2011. The Licensee added that the graphic for the new competition was checked and signed off in line with its usual procedures.

Channel 5 said that, "normally, when a competition closes, the graphic becomes unavailable for insertion into a programme" but "unfortunately, due to human error on this occasion, the closing date for [the series] competition … was incorrectly recorded on [Channel 5's] system" and its graphic therefore remained available. The Licensee added that this graphic was then inserted into episode three in error and "the programme as broadcast therefore wrongly stated that the [new] competition closed at midday on 1 November 2011 (i.e. eight hours before the programme was broadcast)."

Channel 5 said its Customer Services team had been alerted to the error by seven viewers on the morning of 2 November 2011, after which the Licensee had carefully considered whether to proceed with the new competition and, if it did proceed, how to carry this out. It noted that:

- entry to both competitions was by premium rate telephone and SMS routes, and by post;
- the telephone and SMS numbers for entry to both competitions were the same; and
- the telephone and SMS entry routes had closed (correctly, for the series competition) at midday on 1 November 2011 and had re-opened in the evening (correctly, for the new competition).

Channel 5 therefore concluded that "neither telephone nor SMS entrants to either competition would have been adversely affected by the error and viewers wishing to enter could do so." Nevertheless, the Licensee recognised a potential problem with postal entries, as the promoted address for entry into the series competition had been *"Home 1"*, while the address for entry into the new competition was supposed to have been *"Home"*.

Channel 5 therefore noted that, as the series competition graphic (featuring the postal address *"Home 1"*) appeared in the delayed broadcast of episode three, viewers wishing to enter the new competition by post would have entered it using the wrong address. It also noted that, as postal entries for the series competition closed on 4 November 2011 and it could also expect to receive the first postal entries for the new competition on 3 November 2011, postal entries received on 3 and 4 November 2011 (all of which would have been addressed to the same address – 'Home 1')

could have been either final entries for the series competition or entries for the new competition.

The Licensee acknowledged that it would not have been possible for it to determine which postal entries were intended for which competition or to identify all entries that were intended for the series competition but received late (i.e. after 4 November 2011). It noted that a total of 553 postal entries were received on 3 and 4 November 2011 ("the overlap entries"). It therefore considered the fairest way forward was to enter all the overlap entries into both competitions, adding that postal entries for the series competition "had not tailed off as they usually do and were still coming in at the rate of approximately 300 a day." Assuming, therefore, that half of the overlap entries may have been intended for each competition, Channel 5 said that it decided to enter them all into both competitions. Channel 5 explained that this would only have a relatively small impact on the overall number of entrants into the competitions. The Licensee calculated that "276 more entries into each competition represented 0.65% of total entries (including all overlap entries) into [the series] competition … and 3.37% of total entries (including all overlap entries) into [the new] competition."

Channel 5 said it "takes its obligations with regard to all its competitions extremely seriously and regrets the error that occurred on this occasion" adding that it had "already taken steps to ensure that the competition closing dates entered onto the system are checked for accuracy more frequently." The Licensee stated that it was "also considering what further steps could be taken to tighten procedures in the future, including making competition graphics unavailable for insertion after the last scheduled broadcast, rather than the closing date of the competition, and/or improving the naming requirements for the graphics files uploaded."

Channel 5 accepted that "the broadcast of the wrong graphic on 1 November 2011 may have deterred some viewers from entering [the new competition]", but noted that "all those who attempted to enter were able to do so and suffered no financial loss as a result of the error." The Licensee therefore regretted that "some confusion may have been caused", and said it had apologised to the seven viewers who had contacted its Customer Services team. However, it considered that "[the new competition] was conducted fairly and that viewers were not materially misled or adversely affected by the error."

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure certain standards objectives, one of which is "that generally accepted standards are 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 offensive and harmful material".

This is reflected in, among other things, Rule 2.13, which requires that broadcast competitions are conducted fairly, and Rule 2.14, which serves to prevent such competitions from misleading the audience in such a way as to cause material harm, such as financial loss.

In this instance, a competition (i.e. the new competition) was broadcast but the caption for a previous competition (i.e. the series competition) was screened in error.

Ofcom agreed with Channel 5 that viewers may therefore have been confused by the new competition, as broadcast on 1 November 2011. However, any viewers who

decided to enter it (by phone, text or post) were (correctly) registered for its draw. Further, while some viewers may have chosen not to enter the competition because an incorrect (early) phone/text entry closing time was broadcast, Ofcom considered that they would have been unlikely to take any action on the basis of this information and therefore not suffered any material harm.

No viewer was materially misled by the new competition, which was not therefore in breach of Rule 2.14 of the Code.

However, Ofcom noted the Licensee's observation that:

- postal entries for the new competition, sent in response to its broadcast on 1 November 2011, would have been addressed to 'Home 1' – the same address that was used for the series competition;

- 553 postal entries addressed to 'Home 1' were received on 3 and 4 November 2011 – the postal service delivery days following the broadcast of the new competition, when postal entries for it could have been received but while the series competition was still open for similar entries; and

- all 553 (overlap) entries could have been intended for either the new competition or the series competition.

Ofcom also noted that Channel 5 had decided to continue with the new competition, on the basis that including all overlap entries in both the series and new broadcast competition draws would have a relatively small impact, given the overall number of entrants into each.

Nevertheless, on the evidence of the established postal entry pattern for the series competition, Channel 5 had calculated that erroneous entries were likely to have comprised only 0.65% of over 42,000 total entries in the series competition and 3.37% of over 8,000 total entries in the new competition. The Licensee's decision to include all 533 overlap entries in each competition therefore had the effect of disadvantaging all legitimate entrants in both the series competition and the new competition by slightly reducing their chances to win.

Further, Ofcom noted that postal entries intended for the series competition but received late (i.e. after 4 November 2011), should have been ignored but would have been addressed to 'Home 1' and therefore entered into the new competition, as if posted in response to its broadcast on 1 November 2011.

We therefore considered that the new competition was conducted unfairly, in breach of Rule 2.13 of the Code.

Further, as every entrant into the series competition had been similarly disadvantaged (in having their chances to win slightly reduced) by the action Channel 5 took to progress the new competition (after its first broadcast), the series competition was also in breach of Rule 2.13.

Ofcom therefore welcomed the action taken by Channel 5 to avoid recurrence. However, in Broadcast Bulletin 189[1], Ofcom stated that we expected no recurrence by the Licensee of "a similar compliance issue involving basic elements of a premium

[1] See Ofcom Finding regard *Fifth Gear* (Resolved), at:
http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb189/obb189.pdf

rate viewer competition such as question checking." Ofcom considers that Channel 5's failure to comply with Rule 2.13 of the Code in this instance raises a similar compliance issue. In both cases the Licensee appeared unable to produce and apply adequate compliance processes concerning the provision of accurate information on screen when conducting broadcast competitions. Ofcom will therefore consider further regulatory action in the event of any similar compliance issues concerning future broadcast competitions on Channel 5.

Breaches of Rule 2.13

In Breach

Nokia Lumia channel sponsorship of Channel 5, 5* and 5 USA

Channel 5, 5 and 5 USA, 26 October 2011 to 2 November 2011, various times*

Introduction

Ofcom noted that brief channel branding sequences within Channel 5, 5* and 5 USA's advertising breaks had carried channel sponsorship credits in the form of the name and branding of Nokia's new Lumia phone model. These brief items – 'advertisement separators' or 'break flashes' – displayed Channel 5's logo and the Nokia Lumia name and sometimes the Nokia Lumia branding, but gave no indication of the nature of these references to Nokia Lumia, in particular whether the flashes were in fact sponsorship credits.

Ofcom considered this raised an issue warranting investigation under Rule 9.19 of the Code which states:

> "Sponsorship must be clearly identified by means of sponsorship credits. These must make clear:
>
> a) the identity of the sponsor by reference to its name or trade mark; and
> b) the association between the sponsor and the sponsored content".

We therefore sought comments from Channel 5 Broadcasting Limited ("Channel 5" or "the Licensee") on how this content complied with this rule.

Response

The Licensee confirmed that whole channel sponsorship arrangements for the channels Channel 5, 5* and 5 USA had been agreed with Nokia in association with its Nokia Lumia product.

As part of the arrangement both longer (20 second) channel 'idents' and shorter (approximately half a second) 'break flashes' carried the Nokia Lumia name and branding. Copies of the items were made available to Ofcom by the Licensee.

The idents all contained text saying "Channel Sponsor Nokia Lumia". The break flashes displayed only the name Nokia Lumia.

The Licensee said that it had carefully considered whether the flashes "could be used to support the idents in conveying the sponsorship message", mindful that "flashes are not widely used in the UK for sponsorship or brand identity". Channel 5 said that, because of the flashes' short duration, an oral sponsorship message could not be used and a message in text would also have been difficult to read.

Therefore, the Licensee said, "instead of including a written or oral message, we concluded that the association between Nokia Lumia and Channel 5 could be further demonstrated by showing the Channel 5 logo and the Nokia Lumia logo on screen at the same time." The text given in the idents would, Channel 5 said, have reminded viewers of the association between Nokia Lumia and Channel 5 which was clearly

described in the idents which are broadcast at the beginning of programmes and therefore always precede the broadcast of the flashes.

The Licensee said that in its view, “the association between Nokia Lumia and Channel 5 would have been obvious to viewers”. Further, Channel 5 considered that the very few viewers who might have seen the flashes but not the idents would have been unlikely to mistake the flashes for advertising as they included no encouragement to purchase goods, pricing information or product demonstration.

Channel 5 acknowledged that, if viewed in isolation, it could be concluded that the flashes breached Rule 19.9. However, it viewed such a conclusion as a technical or overly strict reading of the rule, or both, that would not be consistent with the spirit and intention of Rule 19.9 or the rules on sponsorship in general. It argued that the “overwhelming majority” of viewers would have seen the flashes in the context of also having seen the longer idents in which there was a clear message that Nokia Lumia was the channel sponsor.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, two of which are that “the unsuitable sponsorship of programmes included in television and radio services is prevented” and that “that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with”.

The EU Audiovisual Media Services Directive requires that viewers must be clearly informed of the existence of sponsorship arrangements by means of sponsorship credits. The Directive also limits the amount of advertising a broadcaster can transmit and requires that advertising is distinguishable from other parts of the programme service.

Rule 9.19 of the Code plays an important role in fulfilling these objectives by ensuring that sponsorship credits disclose the presence of sponsorship and the identity of the sponsor – so making known to the viewer a commercial relationship between the channel, programme and sponsor – and by helping to ensure that the credits themselves are distinct from spot advertisements, the amounts and distribution of which are carefully limited in law, as outlined above.

While recognising Channel 5’s arguments, in particular that the channel sponsorship relationship would over a relatively short time be apparent to viewers from the longer idents, it is nevertheless the case that <u>all</u> sponsorship credits must comply with Rule 9.19.

Where commercial exposure can be achieved for a sponsor, as it was in the flashes by using branding and the Nokia Lumia name, the material must in every case make clear the sponsorship arrangement. If an item cannot be made compliant with the rules, i.e. it is too brief for text or audio to convey the necessary sponsorship relationship, the item should not be used as a sponsorship vehicle.

Breach of Rule 9.19

In Breach

Sponsorship of Laugh Laugh

Sun Music, 6 September 2011, 21:00

Introduction

Sun Music is a Tamil general entertainment and music video channel. The licence for the channel is held by Sun TV Network Europe Limited ("Sun TV" or "the Licensee").

On 6 September 2011, a programme called *Laugh Laugh* was broadcast. The programme had four sponsors: Jos Alukkas (jeweller); Ramraj (clothing retailer); VCare Shikakkai Paste (hair product); and Aachi Gulab Jamun (food product). Each sponsor was identified by a separate sponsorship credit of between 3 and 5 seconds in duration before and after the programme and entering and leaving commercial breaks.

The sponsorship credit for VCare Shikakkai Paste consisted of the following:

Image:	Two pack shots of VCare Shikakkai Paste
On-screen text:	*"VCare Shikakkai Paste. Lasts for 20 washes. For Trade Enquiries, Call* [telephone number]*"*
Voiceover:	*"VCare Shikakkai Paste"*

Ofcom considered the material raised issues warranting investigation under Rule 9.22(a) of the Code, which states:

> "Sponsorship credits broadcast around sponsored programmes must not contain advertising messages or calls to action. Credits must not encourage the purchase or rental of the products or services of the sponsor or a third party. The focus of the credit must be the sponsorship arrangement itself. Such credits may include explicit reference to the sponsor's products, services or trade marks for the sole purpose of helping to identify the sponsor and/or the sponsorship arrangement."

We therefore sought Sun TV's comments under this rule.

Response

Sun TV informed Ofcom that it works meticulously to ensure that the content it broadcasts is compliant with the Code. It stated that in this case, the sponsorship credit was broadcast as a result of human error which occurred due to "a changeover of personnel at that time." It assured Ofcom that the appropriate disciplinary action had been taken and that it is confident in the procedures it has in place to ensure compliance with Rule 9.22(a) of the Code.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives,

one of which is that “the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with”.

The EU Audiovisual Media Services (AVMS) Directive limits the amount of advertising a broadcaster can transmit and requires that advertising is distinguishable from other parts of the programme service. Sponsorship credits are treated as part of the sponsored content and do not count towards the amount of airtime a broadcaster is allowed to use for advertising. To prevent credits effectively becoming advertisements, and therefore increasing the amount of advertising transmitted, broadcasters are required to ensure that sponsorship credits do not contain advertising messages.

Rule 9.22(a) of the Code therefore requires that sponsorship credits broadcast around sponsored programmes must not contain advertising messages or calls to action, and that credits must not encourage the purchase or rental of the products or services of the sponsor or a third party.

In this case, the sponsorship credit contained two advertising messages: a claim that the product *“Lasts for 20 washes”;* and a call to action to encourage trade sales, i.e. *“For Trade Enquiries, Call [telephone number]”.*

Ofcom noted the Licensee’s explanation that this credit was broadcast as a result of human error. Ofcom also noted that this credit was one of four different credits broadcast around the programme and was the only one which raised issues under the Code. However, as the credit contained two advertising messages, Ofcom found it breach of Rule 9.22(a) of the Code.

Breach of Rule 9.22(a)

In Breach

The Xtra Factor

ITV2, 20 November 2011, 21:45

Introduction

The Xtra Factor was the ITV2 companion show to the ITV1 singing contest, *The X Factor*. The programme was presented by Caroline Flack and Olly Murs, and included discussion of the contest's latest developments.

In this particular broadcast, viewers were able to contact the judges of *The X Factor* (who were in the studio) and ask questions. A young viewer from Glasgow was connected via webcam and asked Gary Barlow a question. When he responded, Gary Barlow suddenly stopped and said:

> *"Hello, what's going on here?"*

The web link with the viewer was then shown again, briefly revealing that she had held up a handwritten note to camera, which said:

> *"Download Olly's new single "Dance With Me Tonight"…".*

Later in the programme, the presenters had the following conversation:

Caroline Flack:	*"…and can I just say, how amazing were the guest performances tonight on ITV1?"*
Olly Murs:	*"So good. Rebecca was brilliant and Rihanna, well, she's always good."*
Caroline Flack:	*"Yeah, it was good. Olly, you've also got a new single out – at the minute – when are you performing on the show?*
Olly Murs:	*"I'm performing next weekend – yeah. You know, I'm not into all this plugging. There's too much plugging tonight on the show – you know what I mean…".*
Caroline Flack:	*"Interesting…".*
Olly Murs:	*"It's not my cup of tea…".*

As Olly Murs continued, crew members held two large bright green placards in shot (one behind Olly Murs and one next to Caroline Flack), both of which stated:

> *"DANCE WITH ME TONIGHT OUT NOW".*

Caroline Flack then interrupted Olly Murs, and said, to a background of the newly-released track:

> *"Is that your single playing as well, right now?"*

Olly Murs responded:

> *"I don't know what you're talking about – I genuinely don't!"*

The presenters then introduced Jedward (the twin brothers and singers, John and Edward Grimes), who ran into shot carrying one of the placards, as one of them called out;

> *"Dance With Me Tonight – out now! … I'm dancing tonight on the screen…".*

A crew member also briefly waved the other placard in shot.

The presenters then mentioned the release of new singles by Jedward and Kelly Rowland (a judge on *The X Factor*), to which one of the brothers responded:

> *"Olly, it's crazy, we didn't know our single was out the same day as your single – it's crazy!"*

Caroline Flack responded:

> *"What a coincidence!"*

Later in the interview, spoof letters from viewers were voiced, to which the Grimes brothers responded to, as 'agony aunts'. The letters were also shown on-screen. The text of the final letter stated:

> *"I am one of the UK's biggest pop stars with boyish good looks and a sensational haircut. With the music industry being so tough, I have recently gone to extreme lengths to promote my music. I've even been on Loose Women. Am I doing the right thing?"*

The letter was signed, "Molly Burs", and contained a PS, which stated:

> *"I have a new single called Dance with Me Tonight – out now. Buy it please."*

The Grimes brothers responded:

> *"That guy is totally awesome … and he's got the same song as you!"*

Two viewers were concerned that the programme was used as a platform to promote Olly Murs' newly-released single.

Ofcom also noted that the presenters had made a humorous passing reference to the release of Olly Murs' new single in *The Xtra Factor* on the previous evening.

Channel Television Ltd. ("Channel TV" or "the Licensee"), which complied the programmes on behalf of the ITV Network for ITV1 and ITV2, confirmed that no references to Olly Murs' new single, 'Dance With Me Tonight' had been broadcast in return for payment or any other valuable consideration.

Ofcom therefore considered this case raised issues warranting investigation under the following Code rules:

Rule 9.4: "Products, services and trade marks must not be promoted in programming"; and

Rule 9.5: "No undue prominence may be given in programming to a product, service or trade mark. Undue prominence 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".

We therefore sought Channel TV's comments on how the broadcast of *The Xtra Factor* on 20 November 2011 complied with the above rules.

Response

Channel TV said that the *The Xtra Factor* was light-hearted and afforded "a welcome opportunity for judges and contestants alike to 'let off steam' after the rigours of the live ITV 1 competition shows." It added that viewers were encouraged to interact with the programme and celebrity guests were invited to share their opinions of the contest. The Licensee said that presenter Olly Murs "first came to public notice when he took part in the 2009 series of *The X Factor* and [had] subsequently embarked upon a successful career as a solo artist."

Channel TV noted that, while a brief reference to the release of Olly Murs' new single and album had been made during the previous broadcast of *The Xtra Factor* (on 19 November 2011), neither had been named.

The Licensee said that the programme on 20 November 2011 contained "several unscripted and unexpected references to Olly's musical career", the first of which occurred during the first part of the show, when a viewer's hand-made sign showing the name of Olly Murs' song was screened. Channel TV explained that, while the sign had not initially been visible to the home audience, the viewer's webcam link was visible to the studio audience, who began to laugh. The Licensee added that the programme therefore "cut quickly to the onstage screens to show … viewers what had caused their laughter." It said that "the brief shot of the sign was included only as long as was deemed appropriate to let … viewers 'in on the joke' – less than three seconds in all."

To add further context, Channel TV also noted that, "later in the same section of the show", Caroline Flack produced an Olly Murs 2012 calendar, a photograph from which was displayed, "to much hilarity from the judges and studio audience and not a little embarrassment from Olly himself."

Channel TV considered that "the scripted references to Olly's single release towards the end of the programme were in keeping with the irreverent tone of the show." It said "there was a clear editorial justification for mentioning the release of his song, given his role as presenter of *The Xtra Factor* and his personal experience of life as an X Factor contestant", quoting Ofcom's published guidance to Rule 9.4 of the Code, which states: "It is common for celebrity guests … to refer to their latest venture…".[1]
The Licensee considered that "these scripted remarks, being brief, editorially justified and humorous in execution, were appropriately limited."

[1] Ofcom's guidance to Section Nine of the Code can be found at:
http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section9.pdf

Channel TV noted the reference to Olly Murs' intended appearance on *The X Factor*, his mock humility, the crew responding to it by producing placards (which stated, *"DANCE WITH ME OUT NOW"*) and Caroline Flack then asking, *"Is that your single playing as well, right now?"* The Licensee described the overall effect of this material as "somewhat silly, but good natured, and not excessively promotional for the single, informing the viewers of the release of Olly's single whilst maintaining an irreverent tone, very much in keeping with the 'zoo' format of *The Xtra Factor*."

With regard to the interview with Jedward, Channel TV described the brothers' entrance as being "in their usual boisterous fashion", with John Grimes bringing one of the placards back on set unscripted. The Licensee considered it regrettable that "a crew member, unprompted, chose to wave the other placard in shot briefly", but noted that this was immediately corrected by the floor manager.

Channel TV said that that John Grimes' remark on the co-incidence of Jedward's and Olly Murs' single being released on the same day was unscripted and unprompted, noting that Olly Murs "did not take the opportunity to discuss his single further, as one might expect him to do, had 'promotion' of his single been his, or the show's, aim."

The Licensee considered the final reference to Olly Murs' career (in a spoof letter) was "again entirely humorous in intention and in execution." It described the joke as "clearly on Olly, combining a light-hearted and affectionate dig at his personal appearance ... and making fun of his 'day job' as a recording artist and the *extreme lengths* he'd had to go to in support of his single - '*I've even been on Loose Women*'."

Channel TV therefore considered that all the references (scripted and unscripted) to Olly Murs' new single were "editorially appropriate and non-promotional." While it appreciated "that the cumulative effect of these references combined may have given [the] complainants the impression that the show was attempting to 'promote' Olly's single", the Licensee noted that "the single was not seen, although it was heard briefly" and "no 'professional' posters or official publicity materials were displayed (the placards were obviously home-made)." It considered that the "overwhelmingly humorous and satirical context of this element of the show would be seen as genially daft, rather than an attempt, either intentionally or inadvertently, to be promotional."

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure specific standards objectives, one of which is "that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with."

Article 19 of the EU Audiovisual Media Services (AVMS) Directive requires, among other things, that television advertising is kept visually and/or audibly distinct from programming.

The purpose of this is to prevent programmes becoming vehicles for advertising and to protect viewers from surreptitious advertising. Further, Article 23 of the Directive requires that television advertising is limited to a maximum of 12 minutes in any clock hour.
The above requirements are therefore reflected in, among other Code rules, Rules 9.4 and 9.5, which prohibit both the promotion and undue prominence of products, services or trade marks in programming.

It is common for presenters in chat shows – including companion shows such as *The Xtra Factor* – to refer to the latest venture of a celebrity guest featured in the programme. Similarly, reference is sometimes made to a presenter's latest venture by a guest and/or a fellow presenter. Whatever the scenario, any such reference is often made in relation to an artistic work, such as an autobiography or a recently released music track or film, and it is usually relatively brief. There are many circumstances in which this type of reference is clearly editorially justified, for instance when a guest is being introduced to the audience or they are being interviewed about their latest work. Nevertheless, the more commercial the venture and the more prominent the references to it within a programme, the greater the risk that such references may appear to be, in effect, promotional selling messages in breach of Rule 9.4, or unduly prominent in breach of Rule 9.5, or both.

In this instance, numerous references were made to the release of Olly Murs' latest single. This followed a brief, scripted, light-hearted passing reference in *The Xtra Factor* on the previous evening (19 November 2011), which Ofcom had considered both editorially justified and non-promotional.

Ofcom noted that, in *The Xtra Factor* on 20 November 2011, some references to Olly Murs' new single, 'Dance With Me Tonight', and its release, were scripted, while others were not. Further, we noted that Channel TV acknowledged the cumulative effect of such references may have given some viewers (i.e. the complainants) the impression that the show was attempting to promote the track. Ofcom considered this was the case and noted that it was precisely what Rules 9.4 and 9.5 of the Code aim to prevent.

It is the Licensee's responsibility to ensure that any references to commercial products, services or trade marks are appropriately limited, so as not to become unduly prominent.

Ofcom acknowledges that unexpected situations may arise in the case of a live broadcast but expects Licensees to brief presenters and guests about the limits of what they can discuss in this area, especially if a reference (or references) to a product, service or trade mark is intended. The fact that some (or all) references to a commercial product may be unscripted, unintentional, humorous and/or spontaneous, does not necessarily prevent them from becoming unduly prominent or promotional for the product concerned.

Numerous audible and visual references were made to Olly Murs' single, and its release, during the programme, which included placards that contained the promotional message, "DANCE WITH ME TONIGHT OUT NOW", which appeared to have been produced specifically for the broadcast and were presented repeatedly (albeit briefly) in an apparently uncontrolled way.

Taken together, Ofcom considered that the extent and cumulative effect of the references to Olly Murs' music track and its release were unduly prominent for the product, in breach of Rule 9.5 of the Code. Further, the promotional messaging used on the placards and the extent and cumulative effect of the references more generally to the single and its release clearly promoted it, in breach of Rule 9.4 of the Code.

Breaches of Rules 9.4 and 9.5

In Breach / Not in Breach

The X Factor
ITV1, various dates, 20:15
The X Factor Results
ITV1, various dates, 20:00
The Xtra Factor
ITV2, 29 October 2011, 21:45

Introduction

The 2011 singing contest, *The X Factor*, featured four judges including Tulisa Contostavlos – a member of the hip hop group, N-Dubz.

At the beginning of some of *The X Factor* and *The X Factor Results* shows, Tulisa performed a personal greeting when the judges were introduced onstage to the audience. This comprised Tulisa first thrusting forward her right forearm, which presented a tattoo stating: "*The Female Boss"*, and then winking at the audience.

The Xtra Factor was the ITV2 companion show to *The X Factor* and *The X Factor Results*. The programme included discussion of the contest's latest developments.

The broadcast of *The Xtra Factor* on 29 October 2011 included a feature about the launch of Tulisa's perfume and her personal greeting. Tulisa had launched her new perfume called 'TFB by Tulisa' on 26 October 2011.

The presenters of *The Xtra Factor*, Caroline Flack and Olly Murs, introducing the feature as follows:

Caroline Flack:	*"Changing the subject, but still talking about you, your perfume, 'The Female Boss', came out this week, and I've been wearing it all day by the way."*
Tulisa:	*"Have you?"*
Olly Murs:	(To Caroline Flack:) *"I wondered why you were smelling so nice."* (To Tulisa:) *"Your perfume isn't the only thing that's been catching on* – [the presenters thrust their right forearms forward, to camera] *Yes!"*
Caroline Flack:	*"Yes, everybody, and I mean everyone has been getting involved with the Tulisa 'Female Boss' salute! So here are some pictures of the public doing it."*

A selection of viewers' photographs was then broadcast, after which Olly Murs introduced footage showing a selection of Tulisa's personal greetings, taken from the current series of *The X Factor*, by saying:

"And it doesn't end there – take a look at this, Tulisa!"

A selection of television celebrities was then shown, mimicking Tulisa's personal greeting.

Eleven complainants objected to Tulisa's salute on *The X Factor* and *The X Factor Results* on the basis that the wording of her tattoo – i.e. "The Female Boss" – promoted her perfume. We also received a complaint that the discussion during *The Xtra Factor* promoted Tulisa's perfume.

Channel Television Ltd. ("Channel TV" or "the Licensee"), which complied the programmes on behalf of the ITV Network for ITV1 and ITV2, confirmed that the references to Tulisa's perfume had not been broadcast in return for payment or any other valuable consideration.

Ofcom therefore considered this case raised issues warranting investigation under the following Code rules:

Rule 9.4 "Products, services and trade marks must not be promoted in programming";

and

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

We sought Channel TV's comments as to how the broadcast complied with these rules.

Response

Channel TV said that Tulisa had "become known for greeting the studio audience and viewers of *The X Factor* by winking, and simultaneously raising her forearm to display her tattoo, (which reads The Female Boss in handwriting script) when she is introduced alongside the other judges at the start of each live show", adding that "the concept of a 'signature move' is a familiar one to viewers of *The X Factor*" and citing Cheryl Cole's "mock salute to the audience", which it said "Simon Cowell also adopted … towards the end of the 2010 series."

The Licensee said that Tulisa had several tattoos of personal significance and this particular one was "several years old." It added that 'The Female Boss' was the nickname she had been given by her N-Dubz band mates, which they had used since the group's inception and which had subsequently been used by her fans. The Licensee noted that, in a recent interview, Tulisa had told a journalist that presenting her tattoo had always been her trademark move and 'The Female Boss' had always been her nickname.

Channel TV said that, when a perfume company approached a celebrity to endorse a 'signature' scent, it was "common practice … for the name of the fragrance to be in some way connected with that celebrity, or to be evocative of that celebrity." It then cited numerous examples, including: Peter Andre's fragrance, 'Mysterious Girl'; Mariah Carey's, 'M'; Bruce Willis' 'Bruce Willis for Men'; Leona Lewis', 'Leona Lewis for Women'; and David and Victoria Beckhams' range of fragrances for men and women, branded 'Beckham'.

The Licensee noted that the perfume endorsed by Tulisa was called 'TFB by Tulisa', not 'The Female Boss', adding that the design of its 'TFB' logo used a graffiti-style font similar to that used for the band name, N-Dubz, rather than the handwriting script of her tattoo.

Channel TV did not therefore consider Tulisa's "tongue in cheek … greeting to the audience" in *The X Factor* or *The X Factor Results* promoted 'TFB by Tulisa' or gave the product undue prominence. Further, it noted that she performed this "signature greeting" on *The X Factor* well before the release of the perfume.

The Licensee noted Ofcom's published guidance in relation to Rule 9.4 of the Code, which states: "It is common for celebrity guests … to refer to their latest venture". Channel TV suggested that "the brief, single mention of the launch of Tulisa's perfume *in The Xtra Factor* was appropriately limited" and also noted that the presenter, Caroline Flack, did not name the fragrance correctly, "referring to it as 'The Female Boss', thus reducing any possible promotional benefit." Channel TV also noted that Tulisa did not correct her, which it argued might have been expected of her if she had wanted to promote it. The Licensee considered that Olly Murs' remark to Caroline Flack (i.e*. "I wondered why you were smelling so nice"*) was "flirtatious light-hearted banter, and not intended to be promotional for the perfume." It noted that "the product itself was not on set" and "the brief and non-promotional mention of the launch of the perfume was followed by a short VT…"

Channel TV said that "the … purpose of this segment of the show was to display the still photos (sent in by viewers, unsolicited) of parodies of Tulisa's 'greeting' arm salute, and to lead into the humorous VT featuring various celebrity parodies of this." With regard to the celebrities, it noted that "in most cases there [was] nothing written on their arms, whilst on others' a 'personal message' to Tulisa [was] visible." The Licensee also noted that Tulisa explained that she only performed her greeting when she wore short sleeves, as long sleeves covered her tattoo.

In conclusion, Channel TV said it considered this entire section of *The Xtra Factor* "was light-hearted, a bagatelle designed to lighten the mood of the judges and the studio audience", noting that tensions from *The X Factor* or *The X Factor Results* – shown immediately before on ITV1 – were sometimes carried over into *The Xtra Factor* and needed to be diffused, as "*The Xtra Factor* is a celebratory show, not a competitive show, and this is reflected in the tone of the chat and the items featured."

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure specific standards objectives, one of which is ""that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with."

Article 19 of the EU Audiovisual Media Services (AVMS) Directive requires, among other things, that television advertising is kept visually and/or audibly distinct from programming.

The purpose of this is to prevent programmes becoming vehicles for advertising and to protect viewers from surreptitious advertising. Further, Article 23 of the Directive requires that television advertising is limited to a maximum of 12 minutes in any clock hour.

The above requirements are therefore reflected in, among other Code rules, Rules 9.4 and 9.5, which prohibit both the promotion and undue prominence of products, services or trade marks in programming.

The X Factor and *The X Factor Results*
Ofcom considered that Tulisa's salute, which clearly presented the words, *"The Female Boss"* on screen, did not promote, or give undue prominence to Tulisa's perfume, which we noted has a different name – i.e. 'TFB by Tulisa'. This material was therefore not in breach of the Code.

The Xtra Factor
It is common for presenters in chat shows – including companion shows such as *The Xtra Factor* – to refer to the latest venture of a celebrity judge or guest featured in the programme. This is often an artistic work such as an autobiography, a new music track or a film, and the reference is usually relatively brief. There are many circumstances in which this type of reference is clearly editorially justified, for instance when a guest is being introduced to the audience or they are being interviewed about their latest work. Nevertheless, the more commercial the venture and the more prominent the references to it within a programme, the greater the risk that such references may appear to be, in effect, promotional selling messages in breach of Rule 9.4, or unduly prominent in breach of Rule 9.5, or both.

It is the Licensee's responsibility to ensure that any references to commercial products, services or trade marks are appropriately limited, so as not to become unduly prominent.

Ofcom acknowledges that unexpected situations may arise in the case of a live broadcast but expects Licensees to brief presenters and guests about the limits of what they can discuss in this area.

In the case of *The Xtra Factor* on 29 October 2011, the presenters made reference to the release of Tulisa's perfume, to introduce the subsequent feature concerning her salute, which was presented as her "signature greeting" on *The X Factor* and *The X Factor Results*.

We noted that Tulisa's perfume is called 'TFB by Tulisa', but that one of the presenters wrongly referred to the perfume as, *"your perfume, 'The Female Boss'"*. After this, the other presenter not only endorsed the product (i.e. *"I wondered why you were smelling so nice."*) but then observed that both Tulisa's perfume and her salute were *"catching on."*

Ofcom considers that this gave undue prominence to her perfume – a commercial product – in breach of Rule 9.5 of the Code. Further, in this instance, Ofcom considered that, in light of the undue prominence given to the product by the sequence as a whole and, in particular, Olly Murs' endorsement of it, the sequence appeared to promote Tulisa's perfume, in breach of Rule 9.4 of the Code.

***The X Factor*, ITV1, various dates, 20:15**
***The X Factor Results*, ITV1, various dates, 20:00**
Not in Breach

***The Xtra Factor*, ITV2, 29 October 2011, 21:45**
Breaches of Rules 9.4 and 9.5

Resolved

The X Factor

ITV1, 22 October 2011, 20:00

Introduction

A total of 13 complainants alerted Ofcom to an error in a viewer competition in this edition of the well-known ITV1 talent show.

Several programmes in this series included competitions that invited viewers to participate by answering a multiple choice question. Entrants had to submit their answer – a), b), or c) – via premium rate ("PRS") telephone calls, text message ("SMS") or 'red button' (for cable and satellite viewers). Calls were charged at a maximum of £1.03 from a BT line, text messages at £1 plus users' standard network rate and £1 for red button users. Free entry was also available via ITV's website.

The competition in the programme on 22 October 2011 was presented to viewers with footage of a performance of a song from last year's series of *The X Factor*. The footage was then abruptly cut, and viewers were asked what the next word in the lyrics of that song had been. The three answer options were then listed both on screen and by a voiceover, as follows:

a) Food
b) Love
c) Respect

Immediately after this was shown, information about the entry routes was then shown on screen and the answer options were listed again. However, in this second graphic, the corresponding letter to each answer had changed to:

a) Love
b) Respect
c) Food

Ofcom considered the matter raised issues warranting investigation under the following Code rule:

Rule 2.14 "Broadcasters must ensure that viewers and listeners are not materially misled about any broadcast competition or voting".

Ofcom therefore sought comments from Channel Television ("Channel TV" or "the Licensee"), which complied the programme on behalf of the ITV Network for ITV1.

Response

The Licensee acknowledged that "there was a significant error in the competition".

Channel TV said that *The X Factor's* competition scripts and graphics are agreed in advance by itself, the programme's production company and ITV Interactive. It explained that a "fine cut" version of the competition promotion (excluding the voiceover) is then produced. Once this version has been approved, the voiceover is

recorded and added to produce the final version. Approval is given to the final version before broadcast.

Channel TV said after initial approval of the "fine cut", the production company "made some changes to the graphics" which "required the entire competition slates to be re-done and it was during this process that the error was introduced." Channel TV said that it was "not advised that these changes had been made."

The Licensee explained that when approving the final version of the competition promotion, it was "expecting the only change to the previously agreed version to be the addition of the final voice over" and "did not therefore, notice the error." Channel TV added that the production company made a further unrelated change on the day the programme was broadcast but again, this alteration was not communicated and only the production company was involved in this final approval process.

The Licensee said that upon discovery of the error after the broadcast, it "took immediate action to prevent the incorrect competition being shown again – the competition entry mechanics were closed off preventing any further entries; the late night repeat on ITV2 was amended to remove the competition and the competition was dropped from the ITV2 show, *The Xtra Factor."* Channel TV said that an explanation that the competition had been cancelled was also displayed on the programme's website – this also included details of the various refund strategies in place. During the following evening's results show, presenter Dermot O'Leary apologised for the error and advised viewers that refunds were available. Channel TV said that competition was re-launched the following week and "to ensure complete separation from the previous, incorrect, version…a new number for telephone entries, and a new SMS short code were introduced."

Channel TV said it was able to automatically refund entrants who were BT customers and other telephone entrants were contacted directly "to enable refund cheques to be produced." Viewers entering via the red button had their entry cancelled (on cable platforms) or were contacted by ITV Interactive to arrange a refund (on satellite platforms). SMS entrants were sent a message advising them of the situation and how to claim a refund. The Licensee added that "viewers have been offered the opportunity to donate the cost of entry to a charity…should they wish to do so instead of having their entry fee refunded."

Following the incident, Channel TV said it had now implemented new procedures which require the original sign-off of the "prize element" of the promotion to be completed "at least 48 hours before transmission". Any further changes "must be clearly notified to all three sign-off parties to ensure that they are reviewed in detail". Additionally, the final approved version is "played in full during dress rehearsal and so it is viewed by everyone in the gallery one further time" before going to air.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that "generally accepted standards are 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 offensive and harmful material".

These objectives are reflected in, among other rules, Rule 2.14, which serves to prevent such competitions from misleading the audience in such a way as to cause material harm, such as financial loss.

Ofcom noted that all three possible answers to the competition question had different corresponding options when displayed on screen for a second time. Consequently, there was a possibility that entrants paid a premium rate to submit an answer that was different to the one they had intended and may therefore have been included or excluded incorrectly in the prize draw as a result.

Ofcom concluded that viewers could therefore have been materially misled by this competition.

Broadcasters will be aware that in recent years Ofcom has published numerous findings about the conduct of audience competitions. We have made clear repeatedly that we expect broadcasters to exercise the utmost care in these circumstances, particularly when viewers are invited to pay a premium rate to participate. Therefore, we were concerned that this error arose from a lack of communication between the Licensee and the production company involving the promotion of a PRS.

However, Ofcom noted Channel TV's actions to address both the impact of the incident and the likelihood of a recurrence. In particular, we noted:

- the swift action taken by the Licensee to close entry routes (thereby mitigating harm to viewers), remove the promotion from future programming and post information about the situation on the programme's website;

- the comprehensive and proactive refund procedures put in place to ensure that entrants were not financially disadvantaged, irrespective of the entry method or provider used;

- the use of different PRS numbers when the competition was relaunched the following week; and

- the revision of the process in which the Licensee approves promotion of viewer competitions.

Ofcom also noted Channel TV's good compliance record in the area of broadcast competitions.

While Ofcom does not expect further errors in the Licensee's broadcast competition promotions, in light of these circumstances, we regard the matter as resolved.

Resolved

Resolved

This Morning

ITV1, 7 October 2011, 10:45

Introduction

This Morning is ITV1's weekday morning topical magazine programme which is hosted on a Friday by presenters Eamonn Holmes and Ruth Langsford.

This programme featured an item at 10:45 about a survey which reported that one third of Britons do not know the location of the three largest cities in the UK. Studio guest Jonathan Wilkes said he believed that he was in that third because he thought Manchester was one of the three. Eamonn Holmes responded incredulously:

> *"what are you ... retarded? Don't be stupid, don't be stupid ... if you follow football, which you do, you know from the league tables ... where everywhere is".*

Several viewers contacted the broadcaster directly to complain about Eamonn Holmes using the word "retarded" and, following the commercial break, he made the following on screen apology at 11:10:

> *"Very good to see you again. Sorry to the three or four of you who have got in touch this morning because I have used the word retarded during the newspaper review – and you seem to take it personally...or you seem to say that I am insulting all sorts of people who have all sorts of conditions. I used it as a term...that someone...so, I don't know what you would use instead of the word – but obviously I would never want to do that – cause any sort of offence for that and having done so much work – particularly, there is this the man who has an autistic child, who says that somehow I have insulted his child, so I really hope it hasn't. I certainly wouldn't use it in that context but sorry if that caused you offence sir. I'll get your name and address in a moment and reply to you."*

A complainant alerted Ofcom to the use of the word *"retarded"*. Ofcom considered the word was capable of causing offence and raised potential issues under Rule 2.3 of the Code, which states:

> "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context."

Ofcom therefore asked ITV Broadcasting Limited ("ITV" or "the Licensee"), who complied the programme on behalf of the ITV Network for ITV1, to provide comments on how this broadcast complied with the above rule of the Code.

Response

ITV explained that as soon as the production team became aware of viewers' concerns it had sought compliance advice and acted upon this advice by broadcasting an on-air apology as soon as practical. The Licensee said that in his apology, Eamonn Holmes explained that he had not intended any offence and apologised if any had been caused. ITV stated the apology was "heartfelt and

reflected the upset and genuine surprise he felt at some viewers having been offended or having interpreted his intention in using the term as denigrating people with mental health conditions, for example those with autism". The Licensee explained that subsequent to the apology, the majority of comments received by the broadcaster expressed support for him.

ITV said it had discussed the incident with Eamonn Holmes directly and while he accepted that "he made a poor choice of words" his comment was in no way intended to denigrate or make light of mental health conditions. Indeed, ITV noted that Eamonn Holmes supported charities that focused on mental health issues and he "strongly" rejected any suggestion that he would ever be intentionally offensive to people with mental health conditions.

ITV accepted that the word "retarded" did have the potential to cause offence. However, in the context of a spontaneous reaction made during a live discussion programme, the Licensee did not consider it exceeded generally accepted standards. Insofar as any offence was caused, ITV said it took "rapid and effective steps to mitigate that offence" by broadcasting a prompt apology. ITV considered the apology was appropriately worded to convey Eamonn Holmes', and the Licensee's, sincere regret for any offence caused.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that "generally accepted standards" are applied so as to provide adequate protection for members of the public from the inclusion of offensive and harmful material.

These standards are reflected in Section Two of the Code. In particular under Rule 2.3 broadcasters must ensure that material which may cause offence is justified by the context.

In applying Rule 2.3, Ofcom must have regard to the need for standards to be applied "in the manner that best guarantees an appropriate level of freedom of expression". The Code is drafted in accordance with Article 10 of the European Convention of Human Rights, as incorporated in the Human Rights Act 1998, which is the right of a broadcaster to impart information and ideas and the right of the audience to receive them without unnecessary interference by public authority.

Ofcom recognises that generally accepted standards, particularly in relation to offensive or discriminatory language, change over time. Therefore, when deciding whether or not broadcasters have applied generally accepted standards, we take account of relevant research.

Ofcom's most recent research into audience attitudes towards offensive language published in 2010[1] indicated that the words "retard" or retarded" were considered by many participants to be "strong language" and derogatory terms related to disabled people. Many did not think that it was acceptable to use these words on television, because they single out people in society and can be extremely harmful and upsetting. However, when used in a certain context, for example when said in a light

[1]Audience attitudes towards offensive language on television and radio, August 2010 http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf, pp.116-119

hearted way, some of the participants considered that the words had changed in meaning over time and therefore could be used to mean “silly” or “stupid”. Other participants still did not think it was acceptable to use these words at all regardless of context.

Ofcom acknowledges that “retard” or “retarded” can be very offensive words as they have the potential to single out a minority group in society. In this case, Ofcom noted that Eamonn Holmes used the word “retarded” to describe Jonathan Wilkes in response to his admission that he did not know where Manchester was on a map of Britain. Eamonn Homes followed up the description immediately with the phrase *“don’t be stupid, don’t be stupid”*. We noted the context within which the word was used – a light-hearted reference to Mr Wilkes’ lack of geographical knowledge – and the Licensee’s assurance that it was not Mr Holmes’ intention to use the word in a derogatory way to describe people with learning difficulties. However, in our view, this use of the word “retarded” could have been interpreted by some as suggesting that Mr Wilkes’ limited knowledge was akin to a learning disability. The use of the word “retarded” in this instance was clearly capable of causing offence.

Broadcasters may be able to justify the use of language and material which the audience may find offensive. Therefore, in applying the Code, any potential offence caused by the use of a word such as “retarded” depends upon the context in which it is used.

Ofcom therefore went on to consider any contextual factors which might have limited the potential for offence in this particular instance. Ofcom took account of the fact that *This Morning* is a live programme, and the comment made by Eamonn Holmes was clearly unscripted and made in response to a spontaneous situation. However, on balance and in the circumstances of this particular case, Ofcom considered that this was insufficient context to justify the offence that the word “retarded” was capable of causing to the audience.

Ofcom, however, took account of Eamonn Holmes’ broadcast of a personal apology as soon as practicable after the subsequent commercial break, in which he stated that he had not intended to cause any offence. On balance, Ofcom considered this case to be resolved.

Resolved

Not In Breach

Ricky Gervais: Science

Channel 4, 14 October 2011, 22:35

Introduction

Ricky Gervais: Science was a programme featuring a stand-up show by the comedian Ricky Gervais. This post-watershed programme focussed on Ricky Gervais's outspoken thoughts on a variety of topics including racism, fame, obesity, religion and language.

At one point during his routine, Ricky Gervais referred to the singer Susan Boyle, and he made the following remark:

> *Look at Susan Boyle. If you can. Fucking hell! Jesus Christ. Oh. Shocking. Be fair though, 'cause usually in the music industry it's all about image isn't it, you can't just have a great voice and a great talent... but I don't think she'd be where she was today if it wasn't for the fact that she looked like such a fucking mong.*

The comedian then proceeded to debate with an imaginary complainant who might object to his use of the word "mong" on television:

> *"He said 'mong'".*
> *Yeah he did. Yeah.*
> *"You can't say 'mong'".*
> *You can. It's fucking easy. It's one of the easiest words to say, it's like* [mouths the word while he says it] *'mong', it's like, you just need lips, 'mo...', even mongs can say it, that's part of the beauty of the word.*

He went on to state that:

> *…even if they do ban me from the telly, I'll just go around and shout 'mong' through their window. I care about it that much. It's just words, and there is no better word to describe Susan Boyle. When...When she first came on the telly, right? When she first came on the telly, I went, 'Is that a mong?' You all did! You all did! And you're meant to. Like the judges hadn't planned that. Didn't they! They knew it in rehearsal. They knew that was going to happen. They knew the headline was going to be 'Oh! Voice of an angel, face of a mong'....*

Ricky Gervais then explained that his use of the term was distinct from its connotations as a pejorative term for a person with Down's Syndrome[1], saying:

> *I don't mean she has Down's Syndrome, by the way. No! No that would be offensive. That word doesn't mean that any more. It's far removed from that. We don't use that word to describe that condition.*

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[1] "Mong" is listed in the current online version of the Oxford English Dictionary as: "(mongoloid) *offensive* having Down's syndrome".

He went on to talk about how language and the meaning of words change, with the imaginary complainant first asking:

> *"What about the derivation?"*

To which Gervais replied:

> *Never mind the derivation. Words change. When I came out here tonight, I called you all 'cunts', remember? That used to be an insult, but now it's a term of endearment. So....words change. Okay. Let's get on with it.*

Ofcom received three complaints about Ricky Gervais's comments. They concerned his repeated use of the word "mong", which complainants regarded as offensive because of its derogatory association with Down's Syndrome.

Ofcom considered that this use of the word "mong" raised potential issues warranting investigation under Rule 2.3 of the Code, which states:

> "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context... Appropriate information should also be broadcast where it would assist in avoiding or minimising offence."

We therefore asked Channel 4 (or "the Licensee") to comment on how this broadcast complied with this rule.

Response

Channel 4 said that the material included in programme complied with Rule 2.3 of the Code because any offence was justified by the context.

Channel 4 stated that "in the context of a late night Channel 4 comedy programme featuring a comic well known for his controversial humour, viewers would have understood that Ricky Gervais [would use] a variety of language to express himself and [he] experiments with language on the edge of what is acceptable." Channel 4 stated that Ricky Gervais was looking to "demonstrate the versatility of language and the importance of contextualising words", rather than cause offence. Channel 4 said that "the joke was immediately contextualised by Ricky Gervais himself" when he denied that he was referring to Down's Syndrome, and the broadcaster pointed to the statement he made shortly afterwards:

> *"...Words change. When I came here tonight I called you all 'cunts', remember? That used to be an insult, but now it's a term of endearment. So words change. Okay."*

Channel 4 commented that "Ricky Gervais's humour was rooted in the explanation of how language evolves and how the word can be used as a term of endearment thereby condemning the original interpretation and mocking people who censor the use of the word altogether."

It pointed out that after talking about "mong", Ricky Gervais had gone on to talk about the evolution of other controversial words in his routine. Channel 4 submitted that the joke was not directed at Susan Boyle as having a disability but "...at those who refuse to acknowledge that the meanings of words can adapt over time".

Furthermore, the Licensee stated that it had not been Ricky Gervais' intention to cause offence. It pointed to explanations of the joke Gervais had given subsequently in an interview, on his Twitter feed and in the press where he had stated that: "...the term is now commonly used to refer to someone who is very stupid or idiotic". "The modern use of the word mong means 'dopey' or 'ignorant'". "It's even in modern slang and urban dictionaries".

Channel 4 said that "Ricky Gervais's stand up show *Science* follows a rich tradition of alternative Channel 4 comedies such as *Brass Eye*, *Star Stories*, *Ali G* and *Frankie Boyle*, which push boundaries and do not shy away from challenging subject matters", and that viewers would likely know what to expect from a Ricky Gervais comedy routine. It stated that Ricky Gervais "has a well-known reputation for his acerbic comedic style, therefore, audiences would have been well aware of his comedic style and tone with his previous stand up *Animals*, *Politics* and *Fame* shown on Channel 4 within the last three years."

Channel 4 commented that it was part of its remit to produce material which demonstrates "innovation, experiment and creativity in the form and content of programmes". It added that "Channel 4 takes its statutory remit seriously and we pride ourselves on giving artists creative freedom to express themselves on a channel whose viewers have an expectation that we will push boundaries and take risks." It said that "inherent in the nature of Channel 4's comedy output is the fact that we regularly broadcast stand-up comedy from controversial artists", and that "Channel 4 should... not be deterred from taking editorial risks, which is a central component of its statutory remit." Channel 4 also stated that it "is renowned for its innovative disability programming schedule and has a great tradition of including disability in its comedy output, from *Brass Eye* through *Phoenix Nights*, *Max and Paddy*, *I'm Spazticus* to *Cast Offs*."

The Licensee then explained the measures it took in broadcasting this material to ensure it complied with the Code and other reasons why it considered the material to be justified by context.

Channel 4 referred to the late start time of broadcast, which was 22:35. It said that "Channel 4 has traditionally broadcast challenging comedy content in this slot" and that "the offence inherent in a joke of this nature was reduced by the programme's late night scheduling". There was also a warning at the start of the programme:

> "*Right now though, I'll get my science kit for girls. It's Ricky Gervais at the Hammersmith Apollo. There's strong language and adult humour.*"

Channel 4 regarded this warning as "clear and unambiguous".

The Licensee said that the broadcast of stand-up comedy from controversial artists "often involves fine judgment calls at senior editorial and legal levels, always taken in good faith and with appropriate vetting procedures in place." It said that "this involves a process of intelligent assessment of content, especially with someone like Ricky Gervais, to decide where the line should be drawn, taking into account editorial justification and consideration of our legal and regulatory requirements. This programme, in accordance with Channel 4's procedures, was referred up to and approved at senior editorial level."

Channel 4 also defended the broadcast of Ricky Gervais's comments on the grounds of freedom of expression. It said that "all broadcasters including Channel 4 will broadcast programmes that might well offend some members of its audience at some

stage. Equally there are members of the audience, often in considerably higher numbers, who are not offended and welcome such challenging material." It considered that it was Ricky Gervais's right "to explore the evolution of words whether or not we agree or disagree with his interpretation", and that Channel 4 had given Ricky Gervais "a platform to explore the contemporary use of the word "mong" in a comedic context". While Channel 4 denied that Ricky Gervais's comments were meant to label Susan Boyle as having a disability, it said that "Channel 4 would never shy away from allowing comedians the freedom to express themselves", and that "disability should not be off-limits for comedy." Ricky Gervais's comments, Channel 4 said, "challenge censorship in a world where people shy away from words which are deemed to be unacceptable in modern society."

Decision

Under the Communications Act 2003, 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. One of those standards is that "generally accepted standards" are applied so as to provide adequate protection for members of the public from the inclusion of offensive and harmful material.

These standards are reflected in Section Two of the Code. Broadcasters are required under Rule 2.3 to ensure that material which may cause offence is justified by the context.

In performing its duties, Ofcom must have regard to the need for standards to be applied "in the manner that best guarantees an appropriate level of freedom of expression". The Code is drafted in accordance with Article 10 of the European Convention of Human Rights, as incorporated in the Human Rights Act 1998, which is the right of a broadcaster to impart information and ideas and the right of the audience to receive them without unnecessary interference by public authority.

In reaching a decision in this case, Ofcom acknowledged the paramount importance attached to freedom of expression in broadcasting. In particular, broadcasters must be permitted to enjoy the creative freedom to explore controversial and challenging issues and ideas, and the public must be free to view and listen to those issues and ideas, without unnecessary interference. The Code sets out clear principles and rules which allow broadcasters freedom for creativity, and audiences freedom to exercise viewing and listening choices, while securing the wider requirements in the Act.

Ofcom took into account that there is a long history on British television of broadcast comedy tackling difficult issues and deliberately pushing at boundaries of contemporary taste, particularly when broadcast well after the watershed. In accordance with the fundamental right to freedom of expression, the Code does not prohibit broadcast content from referring to any particular topic, subject or group of people.

Importantly, acknowledging the importance of freedom of expression, Ofcom does not prohibit the use of any word after the watershed. Broadcasters may be able to justify the broadcasting of language and material which the audience may find offensive. There is significant room for innovation, creativity and challenging material within comedy programming, although broadcasters do not have *unlimited* licence in terms of offensive material.

Rule 2.3 of the Code requires that potentially offensive material is justified by the context in which the material is broadcast. Therefore the questions for Ofcom in reaching a decision in this case were: first, to establish whether the material in question was offensive; and, if so, secondly, to determine whether Channel 4 had ensured that it had applied generally accepted standards by justifying the broadcast of that material by the context.

Ofcom has commissioned two sets of research into audience attitudes towards offensive language on television and radio. Our 2005 research[2] found that a number of people were unaware of the word "mong", and many said it was inoffensive, but after discussion saw its potential to be offensive and discriminatory towards disabled people, similar to the word "retard".

In our 2010 research[3], many people were not aware of the meaning of "mong" as derived from "mongoloid", which is listed in the current online version of the Oxford English Dictionary as: "(mongoloid) *offensive* having Down's syndrome"[4]. The participants in the research who were aware of this meaning of "mong" believed it was offensive and considered it should be grouped with "retard" as it is used to relate to disabled people and in their opinion is often used in an offensive, derogatory manner.

Ofcom is aware however that "mong" has other meanings and associations to some people, for example as an abbreviation for "mongrel"[5].

Ofcom is aware that the meanings of words change over time. While our research suggests that some people are not aware of the meaning of the word "mong" as associated with Down's Syndrome, it also demonstrates that the word "mong" clearly has the potential to cause considerable offence to those who are aware of the association.

We therefore assessed how the word was used in this case. We noted in particular that at the start of this part of his routine, Ricky Gervais used the word "mong" in the context of a number of specific references to Susan Boyle's physical appearance, as set out below:

> *Look at Susan Boyle. If you can. Fucking hell! Jesus Christ. Oh. Shocking...*
>
> *…I don't think she'd be where she is today if it wasn't for the fact that she looked like such a fucking mong...*
>
> *When she first came on the telly, I went, 'Is that a mong?' You all did! You all did! And you're meant to. Like the judges hadn't planned that. Didn't they! They knew it in rehearsal. They knew that was going to happen. They knew the headline was going to be 'Oh! Voice of an angel, face of a mong'...*

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[2] "Language and Sexual Imagery in Broadcasting: A Contextual Investigation"; September 2005; http://stakeholders.ofcom.org.uk/binaries/research/radio-research/language.pdf

[3] "Audience attitudes towards offensive language on television and radio"; August 2010; http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf

[4] http://oxforddictionaries.com/definition/Mongoloid

[5] http://oxforddictionaries.com/definition/mong

In noting the potential offensiveness of the word through the imaginary complainant, Gervais also made a specific reference to the physical abilities required to say the word "mong":

> *"He said 'mong'".*
> *Yeah he did. Yeah.*
> *"You can't say 'mong'".*
> *You can. It's fucking easy. It's one of the easiest words to say, it's like* [mouths the word while he says it] *'mong', it's like, you just need lips, 'mo...', even mongs can say it, that's part of the beauty of the word.*

Ofcom considered that these references to physical appearance and abilities would have led some viewers to believe that Ricky Gervais was using the word "mong" intentionally to refer to Down's Syndrome in a derogatory way.

We therefore concluded that this material clearly had the potential to cause offence, and went on to consider whether this was justified by the context as required by Rule 2.3.

Ricky Gervais's use of the word "mong" was as part of a stand-up comedy routine. In this routine, the comedian was exploring the interpretations and meanings of certain provocative words, examining the changes in their associations over time, with a focus on his assertion that the word "mong" had lost its derogatory association with Down's Syndrome. This involved Ricky Gervais evoking the word's offensiveness to some extent, and challenging the relationship between the offence and the word itself. Ofcom considered, therefore, that the nature and focus of the routine provided a clear editorial context for his use of the term.

Ricky Gervais went on to explain his use of the word by saying that he was not using the word "mong" to mean that Susan Boyle had Down's Syndrome, which he acknowledged would be offensive (*"We don't use that word to describe that condition"*).

However, we also noted that, in discussing how the use of words evolves, Ricky Gervais took a dismissive stance to the link between the word "mong" and Down's Syndrome, in particular the derivation of the word from "mongoloid". The imaginary complainant asked:

> *"What about the derivation?"*

To which Gervais replied:

> *Never mind the derivation. Words change...*
>
> *...Words change. Okay let's get on with it. No-one wants to be here all night.*

Further, we noted that Ricky Gervais gave a further example about how the meaning of words changes by saying:

> *When I came here tonight I called you all 'cunts', remember? That used to be an insult, but now it's a term of endearment. So words change. Okay.*

In Ofcom's view, while this clearly drew the focus of the routine on to the subject of how words change, thereby potentially minimising the offence, it was nevertheless clearly also done in a tongue-in-cheek way. This may have caused some viewers to

question his assertion that he had not used either the words “cunt” or “mong” in an intentionally offensive way.

However we considered that the degree of offensiveness was reduced to some extent by many in the audience knowing Ricky Gervais’ reputation for acerbic, controversial and challenging humour, and understanding that Ricky Gervais was likely to have been being knowingly disingenuous when he said the word “mong” was no longer linked with Down’s Syndrome, and that the word “cunt” was now *“a term of endearment”*. Ofcom considered that the material would not have exceeded viewers’ expectations for Ricky Gervais’s type of humour.

Ofcom also had regard to the fact that Channel 4 is a public service broadcaster with a unique statutory remit to broadcast a range of high quality and diverse programming, and this may include programming that is provocative and controversial. This programming should in particular: demonstrate innovation, experiment and creativity in the form and content of programmes; appeal to the tastes and interests of a culturally diverse society; and, exhibit a distinctive character[6].

We noted that the programme began at 22:35, more than an hour and a half after the watershed, and that therefore most viewers of the programme would have been expecting stronger and more challenging content. The programme was also preceded by an episode of the comedy panel show *8 Out of 10 Cats,* known for its adult and sometimes offensive humour. The late scheduling of the programme, and its late night comedy context on Channel 4, meant that the majority of the audience was likely to expect the exploratory and subversive bent of the programme in general and of Ricky Gervais’ humour in particular.

We also took into account that Channel 4 brought the challenging nature of the content to the attention of viewers with a warning at the start of the programme, which stated that it would contain *“strong language and adult humour”.*

We therefore concluded that several aspects of this content had the potential to cause considerable offence. However, on balance, this potential offence was justified by the context of this provocative comedy routine challenging the evolution of words, as broadcast with a warning as part of a late night comedy show on Channel 4. Channel 4 therefore applied generally accepted standards, and the broadcast of Ricky Gervais’ comments was not in breach of Rule 2.3.

Ofcom takes this opportunity to remind all broadcasters that its recent 2010 research shows that the word “mong” has the potential to be highly offensive to many people, and so broadcasters should take great care with its use.

Not in Breach of Rule 2.3

[6] Section 265(3) of the Act

Advertising Scheduling Findings

In Breach

Advertising minutage

Zing, 16 October 2011, 17:00

Introduction

Rule 4 of the Code on the Scheduling of Television Advertising ("COSTA") states: "time devoted to television advertising and teleshopping spots on any channel in any one hour must not exceed 12 minutes."

During monitoring of licensees' compliance with COSTA, Ofcom noted that on 16 October 2011 Zing transmitted 1 minute and 4 seconds more advertising than the amount permitted in a single clock hour.

Ofcom therefore sought comments from the Licensee ("Zee TV") under Rule 4 of COSTA.

Response

The Licensee explained that the extra minutage was due to a change in scheduled programmes, and that the commercials from the 16:00 clock hour were moved to the 17:00 clock hour as a result of a "programme duration mismatch".

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content which it considers are best calculated to secure a number of standards objectives. One of these objectives is that "the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with".

Articles 20 and 23 of the EU Audiovisual Media Services (AVMS) Directive set out strict limits on the amount and scheduling of television advertising. Ofcom has transposed these requirements by means of key rules in COSTA. Ofcom undertakes routine monitoring of all of its licensees' compliance with COSTA.

In this case, Ofcom found that the amount of advertising broadcast by Zing was in breach of Rule 4 of COSTA.

This compliance failure follows previous breaches recorded by Ofcom covering a series of minutage overruns on Zing[1]. In those cases, Zee TV had provided

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[1] Ofcom Broadcast Bulletin 194
http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb194/obb194.pdf
Ofcom Broadcast Bulletin 188
http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb188/obb188.pdf
Ofcom Broadcast Bulletin 173
http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/817960/issue173.pdf
Ofcom Broadcast Bulletin 158

assurances to Ofcom that adequate procedures had been implemented to minimise the risk of a recurrence.

Ofcom is particularly concerned that despite these previous assurances by Zee TV, its revised procedures have not proved sufficiently robust to prevent further breaches of COSTA. Ofcom will proceed to consider further regulatory action in the event of future incidents of this nature.

Breach of Rule 4 of COSTA

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http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb158/Issue158.pdf

In Breach

Breach findings table

Code on the Scheduling of Television Advertising compliance reports

Rule 17 of COSTA stipulates the maximum number of internal breaks programmes (other than those exceptions in Rule 15) may contain:

Scheduled duration of programme (on non-PSB channels)	**Number of breaks**
< 26 minutes	One
26 – 45 minutes	Two
46 – 65 minutes	Three
66 – 85 minutes	Four
86 – 105 minutes	Five
106 – 125 minutes*	Six

*for every additional 20 minutes of programming, a further break is permitted.

Channel	**Transmission date and time**	**Code and rule / licence condition**	**Summary finding**
Clubland TV	10 August 2011, 23 August 2011, 3 September 2011, 4 September 2011	COSTA Rule 17	Ofcom noted, during monitoring, that on four occasions the 60 minute programme *Clubland's Blue Zone* contained four internal advertising breaks – one more than permitted by Rule 17 of COSTA. **Finding: Breaches**

Fairness and Privacy Cases

Not Upheld

Complaint by Mrs Jennifer Johnstone

Newsnight, BBC2, 22 June 2011

Summary: Ofcom has not upheld this complaint of unfair treatment and unwarranted infringement of privacy made by Mrs Jennifer Johnstone.

The programme included a report on Theta Healing, a type of faith healing and included secretly filmed footage of Mrs Jenny Johnstone providing a Theta healing session to an undercover researcher who had pretended that she had been diagnosed with cervical cancer.

In summary, Ofcom found as follows:

- The programme did not result in unfairness to Mrs Johnstone in respect of her complaint that it claimed that: she "worked for Theta healing", was a faith healer, was a member of a cult, exploited cancer patients and was a charlatan and a criminal.

- The secretly filmed footage of Mrs Johnstone was not unfairly edited and she was given an appropriate and timely opportunity to respond to the allegation of wrongdoing made about her in the programme.

- The intrusion into Mrs Johnstone's privacy in connection with the obtaining of material included in the programme was warranted by the public interest.

- There was no unwarranted infringement of Mrs Johnstone's privacy in the programme as broadcast because the intrusion into Mrs Johnstone's privacy was warranted by the public interest and she did not have a legitimate expectation of privacy with regard to the disclosure of where she lived.

Introduction

On 22 June 2011, BBC2 broadcast an edition of its weekday current affairs programme, *Newsnight.* This edition of the programme included a report on faith healing and, in particular, on a technique known as Theta healing. At the beginning of the report, the presenter said: *"the theory is that healers can create positive brainwaves that can cure illnesses including cancer and HIV".* The report included secretly filmed footage of an undercover reporter visiting Mrs Jennifer Johnstone and explained that Mrs Johnstone practised Theta healing from her home in Warrington. During this footage the programme explained that the reporter had pretended to have been diagnosed with cervical cancer and had asked Mrs Johnstone what she could do for her. The footage then showed Mrs Johnstone talking about a number of occasions when she had cured clients' cancers through Theta healing.

The report said that some of this footage had been shown to Professor Edzard Ernst of the University of Exeter, whom it said had twenty years experience of conducting clinical trials into alternative medicine. In particular, he was shown watching footage of Mrs Johnstone saying: *"there was a baby who I worked with over the telephone and the cancer in his stomach just disappeared".* When asked by the reporter what

he thought of this claim, Professor Ernst replied: *"I think that it is most irresponsible, even criminal, I would say to make claims of that nature. They are not supported by any type of evidence and therefore she's breaking the law"*. He also said: *"They give themselves a veneer of science*. *It's still nonsense though".*

The report indicated that there had been fifty clinical trials into faith healing and that Professor Ernst had found that, while it might make people feel better, it did not cure illnesses. In addition, Professor Ernst was shown saying that there was a danger that people who went to faith healers would remain untreated and might die.

The report said that there were 600 Theta healers in the UK and included footage of a man who had gone to one of these healers and now regretted it. It looked at the work of Ms Vianna Stibal - whom it said was the founder of Theta healing – and tried to interview her. It also included an interview with a representative of the Terrence Higgins Trust[1] who characterised anyone who said that they could use brainwaves to make HIV disappear and charged for such a service as a *"charlatan"*.

The report ended with footage of the reporter on the street outside Mrs Johnstone's Theta healing practice (which was located within her home). This footage included the name of the street where she lived. The reporter said that Mrs Johnstone would not give the programme an interview and that in response to being asked why she claimed she could cure cancer when there was no evidence that her Theta healing worked, Mrs Johnstone had replied that *"there was no point in her trying to prove that she had cured a baby of stomach cancer because we just wouldn't believe her"*.

Following the broadcast of the programme, Mrs Johnstone complained to Ofcom that she was treated unjustly or unfairly in the programme as broadcast and that her privacy was unwarrantably infringed in connection with the making of the programme and in the programme as broadcast**.**

The Complaint and the BBC's response

The details of Mrs Johnstone's complaint are set out below, followed by the BBC's responses on particular points.

In its reply however, and before responding to Mrs Johnstone's specific heads of complaint, the BBC made some general points. The BBC said that the report was not about Mrs Johnstone, but was one in which she served as an illustrative instance, and that not every critical comment in the item could be taken as referring directly to her. The BBC said that the criticisms of Mrs Johnstone were confined to her claim to be able to cure cancer (or, as she put it, to *"create the conditions"* in which patients were able to cure themselves), claims which it said amounted to the same thing, given that Mrs Johnstone's intervention as a Theta Healer was indispensible in securing the cure.

<u>Unjust or unfair treatment</u>

In summary, Mrs Johnstone complained that she was treated unjustly or unfairly in the programme as broadcast in that:

a) The programme unfairly included claims or implications about her, none of which were true.

[1] The Terrence Higgins Trust is the leading HIV and sexual health charity in the UK.

In particular, Mrs Johnstone said that the programme claimed or implied that:

i) She "worked for Theta Healing" (Mrs Johnstone said no such organisation existed).

In response, the BBC said that the report made no mention of a "Theta Healing…organisation", and did not claim or suggest that Mrs Johnstone worked for such an organisation. Rather, it described her as a Theta healer and as *"one of Theta's followers"*. The BBC said that both these descriptions were justified by Mrs Johnstone's explicit claims during the course of her consultation with the report's researcher ("the researcher") and on her own website at the time of transmission, and were also implicit in her public email address which has the suffix: @thetahealinguk.com

The broadcaster added that the phrase "Theta Healing", and variants of it, as well as references to the supposed distinction between healing people and creating the conditions in which they can heal themselves, occurred frequently in pages taken from Mrs Johnstone's website when the report was in preparation (copies of these pages were provided to Ofcom).

By way of example, the BBC said the page of Mrs Johnstone's website entitled "Theta DNA Healing", indicated that: "Theta DNA Healing is a new and inspirational system of mind re-programming <u>that you can integrate into your therapy practice</u> with amazing results" (BBC's emphasis).

The BBC said that the description in the programme of Mrs Johnstone as *"one of Theta's followers"* was justified by the frequent references to Theta on her website as well as by the section of her website outlining a course she offered called: "Manifesting and Abundance". The broadcaster observed that the course was described as follows:

> "This is a new Theta hands-on workshop that has been introduced by Vianna. In this two day workshop you learn to connect to your ability to create abundance in your life and to manifest whatever you want. You will identify and eliminate the beliefs that block you from this innate ability. You will learn the secrets of Vianna on how to manifest and will be able to use them in your everyday life to start creating the life that you want the easy way."

In reply to the BBC's response and Ofcom's preliminary view on this aspect of her complaint, Mrs Johnstone said that on the day following the broadcast of the programme the BBC website said: "Jenny Johnstone works for Theta Healing, a group of faith healers who claim to be able to cure cancer".

In summary, the BBC said in response that it knew of no BBC website which stated that Mrs Johnstone "works for Theta Healing" and that the statement she quoted appeared to be from a caption to an item uploaded onto YouTube.

ii) She was a faith healer.

In reply, the BBC said that "faith healer" was a capacious term which encompassed a spectrum ranging from those who claim to heal on the basis of faith in their god to those who claim to deploy a scientific method which in fact requires assent to a particular belief system as a condition of efficacy.

It said that Mrs Johnstone appeared to be somewhere on this spectrum and argued that this was clear from her secretly-recorded session with the researcher (a transcript of which was provided to Ofcom). The BBC said that in answer to the researcher's question about how Theta healing works (in curing cancer), Mrs Johnstone stressed that "you have to kind of believe that that's possible", explained that "we create things out of our belief systems", and insisted that it would help if the researcher changed her beliefs. The broadcaster also said that later, Mrs Johnstone made it clear that any therapeutic effect of Theta healing was conditional on faith in the proposition that the researcher could heal herself: "I'll scan you, I'll go in and look at it [i.e. at the researcher's cervical cancer] and then we'll see…but I want to make sure the beliefs are OK first, 'cause otherwise they'll block it". The BBC also said that, in answer to the researcher's enquiry about the worst case of cancer which she had healed or caused to disappear, Mrs Johnstone replied "Well of course I haven't made it disappear. God's made it disappear. But I've asked". The broadcaster added that this was a formula which might be uttered by any self-proclaimed faith healer in the Charismatic Evangelical tradition.

iii) She belonged to a cult.

In response to this part of the complaint, the BBC said that there was no suggestion in the report that Theta healing constituted a cult although it was suggested that it rests on propositions which are without scientific validation. It added that the term "faith healer" does not of itself imply membership of a cult.

iv) She exploited cancer patients.

The BBC said that it was clear from the secretly recorded consultation with the researcher that Mrs Johnstone claimed to be able to intervene in a way which resulted in the virtually instantaneous disappearance of cancer – and (as heard in the item) that she regarded it as "one of the easier things to tackle". The broadcaster said that Mrs Johnstone had not disputed that she charged for this service. It also said that in its view her charges were not trivial (£60, in the case of the researcher). The BBC argued that given that there was no scientific basis for supposing Ms Johnstone's interventions to be efficacious, the fact that she charged for her services had the effect of exploiting her clients financially, irrespective of whether she acted in good faith or fraudulently.

In reply to the BBC's response and Ofcom's preliminary view on this aspect of her complaint, Mrs Johnstone said, in summary, that she had never advertised that she could help cancer patients and that while she had seen some (probably five) clients who had cancer they had come to her for emotional issues. Mrs Johnstone added that the people she had spoken of to the researcher who had got better from cancer were not clients but friends whom she had not charged. She also said that her actions, notably trying to refer the researcher to another more conveniently located Theta healer, were not those of a person set on taking as much money as possible from a vulnerable cancer patient.

In summary, the BBC said in response that despite not advertising that she could help patients with cancer when contacted by one of the programme makers Mrs Johnstone appeared to offer to treat cancer. The BBC also said

that unedited recording of Mrs Johnstone's conversation with the researcher contradicted her account of having seen very few clients with cancer and of not treating those people for that condition. Specifically the BBC observed that the unedited recordings included the researcher asking Mrs Johnstone: "Have you ever had anyone who's come with anything similar to me or not?" and Mrs Johnstone replying: "Yeah, a lot of cancers" and of Mrs Johnstone subsequently being asked "And have you ever had any success with any of them?" and replying "Yes, er, absolutely. So, but, I mean, it's not me that heals. You heal yourself". The BBC also said that the programme did not indicate that Mrs Johnstone was "set on taking as much money as possible" from cancer patients but that it correctly stated that on the occasion of the researchers visit she took money for purporting to cure cancer and included her claim to have dealt with "a lot of cancers".

v) She was a charlatan and a criminal.

In reply, the BBC said that the report did not suggest that Mrs Johnstone was a charlatan in the sense of knowingly engaging in pretence, or even raise the question of whether or not she acted in good faith. The BBC acknowledged that the report suggested that Mrs Johnstone and other Theta healers make claims which are in fact bogus, and that Professor Ernst said in the report that Mrs Johnstone's claim to have intervened successfully by telephone in the case of a baby with stomach cancer was *"most irresponsible, even criminal"*. However, it argued that these suggestions were legitimate. The BBC added that it is illegal under the Cancer Act 1939 for faith healers or similar to claim they can cure cancer, and such claims are punishable by a fine on the first conviction, with the option of a custodial sentence on subsequent convictions.

In reply to the BBC's response and Ofcom's preliminary view on this aspect of her complaint, Mrs Johnstone said, in summary, that Professor Ernst was no longer a professor but an emeritus professor having retired early from Exeter University after an investigation into professional misconduct and that he was well-known for his campaign to shut down all complementary therapies. She also suggested that the programme had not interviewed Cancer UK[2] because it supported the use of faith healing.

In summary, the BBC said in response that when Professor Ernst was interviewed he had announced his plan to retire but was still working full-time and that he was not systematically hostile to complementary therapies. Rather when he started his research in 1993 it was in the hope (which proved unfounded) that he would be able to substantiate the claims of a range of complementary therapies. The BBC indicated that Cancer UK (which Ofcom again understands to be a reference to Cancer Research UK) declined to be interviewed for the programme because it did not wish to give publicity to a therapy it considers to be bogus and that although the charity takes the view that faith healing may make some people feel better about their cancer, the charity's webpage cited by Mrs Johnstone said: "scientific evidence does not support healing as a treatment for cancer".

[2] In light of her subsequent reference to a page from the website of Cancer Research UK Ofcom understands that Mrs Johnstone was referring to Cancer Research UK (the well-known cancer charity) rather than Cancer UK which is a website that aims to provide an overview of and gateway to UK based resources for people with cancer.

b) Mrs Johnstone complained that the footage of her (which was secretly filmed) was unfairly edited. In particular, Mrs Johnstone said that only four minutes out of a total of seventy-five minutes of footage was shown in order to give a biased and misrepresentative portrayal of her; the information she provided was extracted by persistent and specific questioning by the reporter masquerading as a needy and frightened client; and, all the occasions when Mrs Johnstone told the undercover reporter that she must take up her doctor's appointments and explained what to expect from the session were edited out.

In response, the BBC said that the issue was not whether the extracts shown represented the consultation in its entirety. Rather, it argued that these extracts demonstrated the key issue: that Mrs Johnstone claimed, through the practice of Theta healing, to be able to intervene in a way which resulted in the cure of cancer.

The broadcaster added that the bulk of the consultation was devoted to the question of the researcher's supposed cancer, Mrs Johnstone's speculations about what caused it (which centred mainly on the concept of "lack of self-esteem as a woman") and Mrs Johnstone's efforts to facilitate its cure by Theta healing. This was demonstrated by the sound track of the unedited recording and in the transcript of the programme as a whole.

With regard to Mrs Johnstone's complaint that the information she provided was extracted by persistent and specific questioning, the BBC said that the researcher simply asked Mrs Johnstone: "Have you ever had anyone who's come with anything similar to me or not?" [i.e. cervical cancer], after which Mrs Johnstone made claims of success in creating the conditions to cure cancer and gave supporting instances. The BBC argued that it was clear from the unedited recordings that this was a topic on which Mrs Johnstone was scarcely reluctant to be drawn.

The BBC contested Mrs Johnstone's claim that all the occasions when she told the undercover reporter that she must take up her doctor's appointments were edited out. The BBC said that there were no such occasions and that instead Mrs Johnstone displayed little enthusiasm for the medical profession. (The BBC included several quotations from the unedited recording in its response to support its position on this matter.) The broadcaster also said that the closest Mrs Johnstone came to advising the researcher to take up her doctor's appointments was when she said:

> "Well, it would be really good if they could test you again before they do anything" (which the BBC argued Mrs Johnstone said in the expectation that the tests would show that the cancer had disappeared);
>
> and, later: "If it were me, I think I'd just hedge my bets".

In reply to the BBC's response and Ofcom's preliminary view on this aspect of her complaint, Mrs Johnstone said, in summary, that the transcript of the unedited footage could not be complete because the session she gave the researcher was at least 75 minutes long while the transcript covers 63 minutes and because she recalled telling the researcher "You absolutely must go back to your doctor". But this comment is not in the transcript provided by the BBC.

In summary, the BBC said in response that, as is evident from the continuity between the four sections of the transcript, the original source is a single

continuous recording and that Mrs Johnstone did not make the above comment during her session with the researcher.

c) Mrs Johnstone said that she was not given an opportunity to view the programme so that she could make an informed comment on it.

The BBC responded to heads c) and d) of Mrs Johnstone's complaint together (see head d) below).

d) Mrs Johnstone complained that she was not given an appropriate and timely opportunity to respond to the claims made about her in the programme. Mrs Johnstone said that: some weeks after the footage of her was recorded the reporter called to invite her to be interviewed; she asked the reporter to email her the questions and told her that she would "think about it"; but, despite the reporter's protestations to the contrary she (Mrs Johnstone) did not receive this email. Mrs Johnstone also said that when she subsequently gave the programme an interview over the telephone the reporter became very aggressive and bullying.

The BBC said that it was neither usual nor (in most cases) necessary to give the subject(s) of comment in a programme the opportunity to preview the relevant section of the programme concerned in order to ensure fair treatment. The broadcaster argued that in this case it was necessary to give Mrs Johnstone the relevant information about the item to be broadcast and a timely opportunity to respond, and that the programme makers did so.

The BBC said that it believes that the email (with questions about the claims made by Mrs Johnstone during her session with the researcher) which Mrs Johnstone requested was sent to her but, given that it no longer had a full record of the researcher's "Sent" emails, it acknowledged that it was possible that it was not sent to the correct address and that Mrs Johnstone did not receive it.

However, the BBC also said that Ms Adams (the reporter) succeeded in contacting Mrs Johnstone by telephone on 14 June 2011, at least a week prior to the expected transmission of the report (and, in the event, nine days before its actual transmission).

The BBC said that the purpose of the call was not to conduct an interview but to invite Mrs Johnstone to provide either an interview or a statement. (A copy of the transcript of this conversation, which was recorded for note-taking purposes, was provided to Ofcom). The BBC argued that during this conversation the reporter made clear to Mrs Johnstone that it was her claims in relation to the curing of cancer which would be featured in the programme, and that Mrs Johnstone's response indicated that she had already anticipated that these would be the subject of criticism and had made up her mind that she would offer no interview or statement.

The BBC added that – although the complaint that the reporter "became very aggressive and bullying" in the course of the call had no bearing on whether or not Mrs Johnstone was treated fairly in the programme – it did not, in any case, accept this description of the reporter's conduct of the call. The broadcaster said that the recording of the call showed that the reporter was somewhat disconcerted by Mrs Johnstone's refusal to provide any kind of response to the programme makers and that her conduct of the latter part of the call reflected her sense of the importance of ensuring that Mrs Johnstone understood the

consequences of her position, as well as perhaps an element of exasperation – which, the BBC said, was understandable in the circumstances. (The BBC offered to provide Ofcom with a copy of the recording if it considered this aspect of the complaint to be relevant to its determination on the issues of fairness.)

In reply to the BBC's response and Ofcom's preliminary view on this aspect of her complaint, Mrs Johnstone said, in summary, that she accepted that the BBC contacted her before the broadcast of the programme and offered her an opportunity to comment. However, she questioned why her request to correspond with the programme makers in writing was not granted.

In summary, the BBC said in response that, Mrs Johnstone had overlooked the fact that the transcript of her telephone conversation with the reporter records the reporter making the following comments to Mrs Johnstone: "We wouldn't say you weren't available, we'd say you refused to do an interview. Or would you like to give us a statement, then in that case, with have to have more time to consider it if you feel like you're being under pressure? [sic]" and "Would you like us to put this in, to resend this email so that it's categorically there and then you therefore put a statement?" and finally "You made these claims and we're giving you one week to make a statement".

e) The report was biased and did not include any alternative evidence or views.

The BBC said that Ofcom's concern in this matter was not with bias but with any unfairness to the claimant which might have arisen out of a less than impartial treatment of a controversial topic - in this instance Theta healing. It said that it was debatable whether Theta healing falls within the description of controversial topics to which due impartiality should apply but, even if it did, Mrs Johnstone would have no more standing in relation to unfairness than any other Theta practitioner or advocate of Theta. The BBC also said that the claims Mrs Johnstone made in relation to cancer certainly did not fall within this description.

The BBC indicated that, as the originator and principal promoter of Theta healing, Ms Stibal might have special standing in respect of the presentation of Theta healing, but noted that she declined to provide an interview, or any comment, after repeated requests.

The BBC added that given that there is no "evidence" for the claims of Theta healing which the programme might have included other than Ms Stibal's assertions (and those of her followers), the provision of an opportunity to comment to Ms Stibal exhausted any requirement of impartiality which might apply to a treatment of the topic, and thereby disposed of any question of consequential unfairness to Mrs Johnstone.

<u>Unwarranted infringement of privacy</u>

In summary, Mrs Johnstone complained that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that:

f) The undercover reporter gained entry to her home by lying and then secretly filmed a highly intimate and confidential process.

In response, the BBC accepted that the secret filming within Mrs Johnstone's home involved some infringement of her privacy, although it said that the degree of infringement was limited by the fact that her home was also her place of work

and added that it is the client, not the therapist, who has a legitimate expectation of confidentiality. However, the BBC also said that the limited infringement of Mrs Johnstone's privacy in the making of the programme was warranted by public interest considerations.

The BBC said that the programme makers had visited the websites of dozens of Theta healers and had telephoned a number of them, including Mrs Johnstone. They had then sought, and were granted, permission from an editorial supervisor, to secretly record any who had made what appeared to be offers to treat cancer. The BBC repeated its observation that such offers by such persons constitute offences under the Cancer Act 1939, with the possibility of imprisonment for second and subsequent offences and argued that there was a public interest in exposing claims and practices, such as those made by Mrs Johnstone, which might well lead vulnerable and impressionable people to neglect or defer potentially life-saving medical treatment.

g) Mrs Johnstone complained that footage of her working in her home in a very private situation was broadcast without her consent. This footage included the interior and exterior of her home and clearly showed her address.

The BBC said that given that the footage in question demonstrated that Mrs Johnstone did make the kind of claims in relation to cancer which the programme makers' research had led them to expect, the same public interest justification applies to the use of this footage in the programme as to the filming itself. The BBC again acknowledged a degree of infringement of Mrs Johnstone's privacy, albeit limited for the reasons given above, in showing the interior of her home. The broadcaster however argued there was no infringement of Mrs Johnstone's privacy in showing the exterior of her home or in identifying the address. It added that Mrs Johnstone publicised the address in many locations on the internet, including directories of Theta healers and her own website, and that her home was where she invited clients and conducted much of her business.

In reply to the BBC's response and Ofcom's preliminary view on this aspect of her complaint, Mrs Johnstone said, in summary, that while she accepted that it could be said that there was a public interest in looking at the issues surrounding Theta healing, revealing her address and showing the exterior of her home infringed more of her privacy than was necessary in order to serve that public interest. She said that the fact that she had "revealed" her address [i.e. via internet listings for her business] was not relevant and that although the information on her website was in the public domain she remained in control of it. She added that if the programme had been broadcast without her address she could have removed her contact details from the website and thereby insulated herself.

In summary, the BBC said in response that it concurred with Ofcom's Preliminary View that Mrs Johnstone did not have an expectation of privacy with regard to the broadcast of the footage of the exterior of her home or of her address.

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 connection with the obtaining of material in, 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, both parties' written submissions and a recording and transcript of the unedited footage.

Unjust or unfair treatment

When considering complaints of unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of Ofcom's Broadcasting Code ("the Code"). Ofcom had regard to this Rule when reaching its decision on the individual heads of complaint detailed below.

a) Ofcom first considered the complaint that the programme unfairly included claims or implications about Mrs Johnstone which were untrue.

   In considering this part of the complaint, Ofcom had regard to Practice 7.9 which 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.

   Ofcom assessed each element of the programme that Mrs Johnstone complained resulted in unfairness to her.

   i) Ofcom considered first the complaint that the programme claimed Mrs Johnstone "worked for Theta Healing" when no such organization existed.

      Ofcom noted that the report was introduced by the reporter who said:

      "Faith healers have been around even longer than snake oil salesmen. Now they're throwing in something that sounds like science and calling it Theta Healing…The theory is that healers create positive brainwaves that can cure illnesses including cancer and HIV".

      She also said:

      "Well there are now more than 20,000 faith healers operating in the UK but of course not all of them do it for the money but Theta Healers usually charge by the hour. Some of them work here in Harley Street, but others just from their front rooms".

      The reporter then explained that the programme had *"sent an undercover researcher to Warrington to see Jenny Johnstone"* after which footage of Mrs Johnstone talking to one of the programme's researchers was shown.

Ofcom also noted that during this footage the reporter made the following comments about Mrs Johnstone: *"She's one of Theta's followers. She charges £30 for a telephone call or £400 for a course in the basics".*

In Ofcom's opinion, viewers would have understood this section of the programme to have indicated that Mrs Johnstone worked as a Theta healer from her own home and on her own behalf and that she charged for this work.

Ofcom observed that Mrs Johnstone did not dispute that she worked as a Theta healer from her home and charged for this work within her complaint, and that the unedited footage of Mrs Johnstone's consultation with the researcher and the pages from Mrs Johnstone's website provided by the BBC within its response (one of which listed the costs of the courses she ran), made it clear that this was the case.

In light of these factors, Ofcom found that the programme did not result in unfairness to Mrs Johnstone in respect of her complaint that it claimed she "worked for Theta Healing".

ii) and iii)

Ofcom next considered together Mrs Johnstone's complaints that the programme claimed Mrs Johnstone was a faith healer and that she belonged to a cult.

Given the reporter's introductory comments (as set out under head a) i) of the Decision above) Ofcom considers that the programme claimed that as a practitioner of Theta Healing Mrs Johnstone's work came under the umbrella of faith healing.

Ofcom considers that it is likely that the majority of viewers would have understood the term "faith healing" to indicate the curing of illness or disease by means of faith or belief in a supernatural power which usually relates to a particular deity, or particular deities.

Ofcom observed that the section of the report looking at Ms Vianna Stibal, the founder of Theta Healing, showed footage of Ms Stibal talking about her work and saying: "You're actually slowing your brain down and connecting to God".

In addition, Ofcom recognised that on several occasions during her conversation with the researcher Mrs Johnstone spoke of the beliefs or belief system on which the curing of the researcher's pretended cancer by Theta Healing would work. Mrs Johnstone then explained to the researcher that God had made disappear the worst case of cancer with which she had previously dealt.

Given that Mrs Johnstone worked as a Theta healer and that she made the role of belief (and God) in her work as a Theta healer clear to the researcher, Ofcom concluded the indication that her work as a Theta healer came under the umbrella of faith healing did not result in unfairness to Mrs Johnstone.

Ofcom understands the term "cult" to indicate a specific system of religious worship, a sect devoted to such a system or an intense interest or devotion to a person, idea or activity which is deemed to govern such a system.

Ofcom recognised that the report said that Mrs Johnstone was "a follower of Theta" and that Ofcom had already concluded that the report indicated that Theta Healing came under the umbrella of faith healing.

However, Ofcom did not consider that the report either stated or implied that followers of Theta or Theta healers (including Mrs Johnstone) were members of a sect devoted to a particular religious belief system or displayed an intense interest or devotion to a person, idea or activity which was deemed to govern such a system. In particular, the report did not indicate any specific connection between Mrs Johnstone, or indeed any other practitioner of Theta healing, and the founder of Theta healing, Ms Vianna Stibal.

Therefore, Ofcom concluded that the programme did not claim that Mrs Johnstone belonged to a cult.

In light of the factors noted above Ofcom found that the programme did not result in unfairness to Mrs Johnstone in respect of her complaint that it claimed she was a faith healer and that she belonged to a cult.

iv) and v)

Ofcom considered together the complaints that the programme claimed Mrs Johnstone exploited cancer patients and that she was a charlatan and a criminal.

Ofcom recognised that there is a dispute between the parties regarding the efficacy of Mrs Johnstone's work as a Theta healer. However, it is important to note that Ofcom's role is not to establish conclusively from the programme, or the submissions and supporting material, whether or not Mrs Johnstone was able to cure cancer through her work; but rather to address the question of whether the programme portrayed facts, events, or individuals in a way that was unfair to Mrs Johnstone.

In relation to both these complaints, Ofcom observed that the introduction to the report (as set out under head a) i) of the Decision above) linked faith healers to the tradition of *"snake oil salesman"* and said that they (faith healers) were now applying the language of science and *"calling it Theta Healing"*. The introduction also indicated that the claim made by Theta healers, that they could cure illnesses such as cancer and HIV by creating positive brainwaves in the sufferer, was a *"theory"*.

The report also included footage of Mrs Johnstone saying *"There was a baby I'd worked on over the telephone and from one day to the next the cancer in his stomach had just disappeared"*, as well as of her claiming to have successfully intervened in the cases of several other people with different types of cancer who were then cured. In particular, Ofcom noted that Mrs Johnstone was shown explaining that she did not heal the people she treated, but created the conditions in which they could heal themselves and that in the course of responding to the researcher's further questioning on this matter Mrs Johnstone said: *"I mean cancer in many ways is one of the easier things"*.

In addition, Ofcom noted that the report included Professor Ernst making the following comment after he had watched Mrs Johnstone's claim about having worked on a baby over the telephone whose stomach cancer disappeared: *"I*

think that it is most irresponsible, even criminal, I would say to make claims of that nature. They are not supported by any type of evidence and therefore she's breaking the law". Professor Ernst also said: *"They give themselves a veneer of science*. *It's still nonsense though"* and that the danger of going to faith healers to cure disease is: *"that you remain untreated, most cancers are very treatable these days, and that you'd actually die because of listening to these people".*

After the section looking at Mrs Johnstone, the report showed parts of an interview with a man who had spent around £1200 on treatment from a Theta healer and who now regretted doing so. The reporter introduced this section of the report by saying: *"But Jenny's not the only Theta Healer, there are more than 600 in the UK and when we talked to others we heard similar pseudo scientific claims"*. The man was shown saying he had *"wasted money and time… missed two years of proper medical treatment. There was never any suggestion I should go back to my doctor, which is what I needed to do"* and that he was *"ill and needed to be cured* [and] *desperate".*

Ofcom also observed that at the end of the report, the reporter was shown in the road outside Mrs Johnstone's home saying: *"Well this is where Jenny Johnstone treats her patients so we wanted to come and ask her why she was still charging people, claiming she could cure their cancer when there's absolutely no evidence whatsoever that it works. She said there was no point in her trying to prove that she'd cure a baby of stomach cancer because we just wouldn't believe her".*

In Ofcom's opinion, viewers would have understood the report to have said that Mrs Johnstone claimed to be able to cure cancer through her work as a Theta healer (and had given specific examples of having done so, on two occasions after only one Theta healing session - one of which was conducted remotely via the telephone). Viewers would also have understood that Mrs Johnstone charged for her work as a Theta healer and that the programme proposed that there was no scientific evidence to prove the claims of Theta healers, including Mrs Johnstone, that by using brainwaves they had created conditions by which people with serious illnesses like cancer or HIV had been cured.

Ofcom also considered that viewers would have understood Professor Ernst's comments to indicate that, in his view, Mrs Johnstone's claim that a baby with stomach cancer was cured after she gave him a Theta healing session was very irresponsible and possibly even criminal given that there was no scientific evidence to support her claim.

In considering whether it was unfair for the programme to include these claims about Mrs Johnstone's work as a Theta healer, Ofcom looked at the source of the information on which they were based.

Ofcom noted that Professor Ernst is a recognised authority on alternative medicine who, as the report made clear, has carried out numerous clinical trials. The fifty clinical trials into faith healing which had been carried out in the UK showed that treatment of this nature did not result in cures for disease.

Ofcom also recognised that, as the BBC noted in its response, it is illegal for faith healers to claim to be able to cure cancer.

Ofcom considered that these points amounted to a reasonable foundation for the claims in the report that Theta healing did not result in the curing of people with cancer or HIV (including the claims relating to by Mrs Johnstone in this regard), and for the inclusion of Professor Ernst's opinion that Mrs Johnstone's claim that a baby had been cured of stomach cancer after she gave a Theta healing session over the phone was very irresponsible and possibly even criminal.

As noted in the Decision at head a) i) above, Ofcom had already recognised that Mrs Johnstone's website indicated that she charged for her services as a Theta healer and that she had not disputed this in her complaint.

In addition, Ofcom noted that the report showed Mrs Johnstone responding to the researcher's question about her success with previous clients who had cancer by saying *"Yeah absolutely. But I mean it's not me that heals, you heal yourself. But I create the conditions"*, and stating that *"Science can't prove it, you know, it's a quantum physics"*. The report also made clear, in Ofcom's view, that Mrs Johnstone disputed the programme's position that she had not cured the baby of stomach cancer and considered that there was no point in her trying to convince the programme makers that Mrs Johnstone had done so because they would not believe her. Given the inclusion of these comments, Ofcom considered that viewers would have been able to draw their own conclusions with regard to Mrs Johnstone's work as a Theta healer and its efficacy in the full knowledge of Mrs Johnstone's position on these matters.

Taking these factors into account, Ofcom considered that the programme makers took reasonable care to satisfy themselves that the programme did not present, disregard or omit material facts, with regard to the portrayal of Mrs Johnstone's work as a Theta healer with people suffering from cancer.

With regard to Mrs Johnstone's complaint that the report claimed she was a charlatan, Ofcom noted that the last section of the report (which looked at the work of the founder of Theta healing) said, *"One of Vianna's biggest claims is that Theta Healing can make HIV disappear"*. It also showed a representative of The Terrence Higgins Trust making the following comment in response to the idea that brainwaves can cure HIV:

"I think that it is dangerous to say things like that. I also think it is a false claim and I think if someone is taking money for that then I would like to see them investigated by the correct consumer regulators. The fact is we've seen charlatans of this kind all the way down through the HIV epidemic, but those charlatans are more dangerous than ever now that we have effective treatment and yet she is saying that you can do that with brainwaves. I'm sorry that's bullshit in plain layman's terms".

In Ofcom's view, this comment indicated that the representative from The Terrence Higgins Trust considered that anyone who said that they could use brainwaves to make HIV disappear and charged for such a service was a charlatan.

In light of the fact that Mrs Johnstone was not shown saying she could use brainwaves to cure HIV (and, having noted from the unedited footage, that she did not make such a claim during her consultation with the researcher),

Ofcom did not consider that the characterisation as a charlatan was applied specifically to Mrs Johnstone by the report.

However, even if some viewers had understood the report to have implied that Mrs Johnstone was a "charlatan", given that the report made it clear to viewers that this characterisation reflected the opinion of the representative of The Terrence Higgins Trust and that Mrs Johnstone disputed the position of the report with regard to the efficacy of her work, Ofcom did not consider that Mrs Johnstone was treated unfairly in this respect.

In light of all the factors noted above, Ofcom found that the programme did not result in unfairness to Mrs Johnstone in respect of her complaint that it claimed she exploited cancer patients and that she was a charlatan and a criminal.

b) Ofcom next considered Mrs Johnstone's complaint that the footage of her (which was secretly filmed) was unfairly edited.

Mrs Johnstone complained that the programme included just four minutes of a seventy-five minute recording in order to give a biased and misrepresentative portrayal of her. However, in considering this head of complaint, Ofcom was not concerned with the number or length of comments made by Mrs Johnstone (and subsequently included in the programme). Rather Ofcom sought to determine whether the programme makers followed the requirement, set out under Practice 7.6 of the Code, that "when a programme is edited, contributions should be represented fairly". In doing so, Ofcom noted that following this practice will not necessarily avoid a breach of this section of the Code (Rule 7.1) and that failure to follow this practice will only constitute a breach where it results in unfairness to an individual or organisation in the programme.

Ofcom considered that the programme as broadcast indicated that Mrs Johnstone had made the following claims or comments to the researcher when she was filmed secretly:

- Mrs Johnstone was able to cure cancer through her work as a Theta healer and had done so on several occasions (including one when she had cured a baby of stomach cancer through a single Theta healing session conducted remotely via the telephone).
- The success she claimed for her work in curing cancer rested on her intervention to create the conditions in which a sufferer healed themselves with the help of God[3].
- In her view science could not be used to prove that the success she claimed in curing people with cancer was due to Theta healing.

The editing of a programme is an editorial matter for the broadcaster and it was not necessary for the BBC to have restated the entirety of Mrs Johnstone's position or reflected every strand of comment she made in order to avoid unfairness to her.

[3] Ofcom recognised that Mrs Johnstone believed (and had explained to the researcher) that through her work as a Theta Healer she created the conditions which enabled cancers to be cured. However, given that in each of the examples Mrs Johnstone gave to the researcher her intervention as a Theta healer was required before the cure of the specific cancer could be effected, Ofcom considered that Mrs Johnstone had in fact claimed to be able to cure cancer through her work as a Theta healer.

Having assessed the unedited recording and transcript of the researcher's consultation with Mrs Johnstone, Ofcom noted that during the consultation Mrs Johnstone indicated that the researcher's supposed cervical cancer was linked to her psychological state and notably her lack of self esteem which in turn resulted from her previous experiences.

Ofcom also noted that Mrs Johnstone suggested that the researcher could, with her help, use her brain to "solve the problem" (i.e. the cervical cancer) and also explained that Theta healing worked in curing cancers "because your immune system will just change, or your cells will just change... once you decide on a subconscious level ... and release the programmes that created it... it can un-create itself, you know". Mrs Johnstone also spoke to the researcher about a woman whom she said had been diagnosed with cervical cancer, had a history of being sexually abused and who "did work on herself and forgave them all and forgave herself for it happening... and when she went back to the hospital it had just gone". In addition, Mrs Johnstone said it was possible to heal oneself and it was "possible for cancer to heal spontaneously" and gave examples of specific cases in which people she had treated, including a baby with stomach cancer and a man with bowel cancer, had found that that the cancers had gone after a single Theta healing session.

In Ofcom's opinion, this unedited footage showed Mrs Johnstone willingly explaining her beliefs about how Theta healing functioned to the researcher. In particular, Mrs Johnstone gave examples of cases in which she said people with cancer who had had Theta healing from her subsequently found they were cured, and Mrs Johnstone did so with little prompting other than a request from the reporter for examples of her previous success in dealing with people with cancer.

With regard to Mrs Johnstone's complaint that the occasions when she told the researcher that she must take up her doctor's appointments were edited out, Ofcom noted that the unedited footage included several exchanges between Mrs Johnstone and the researcher about doctors and medical treatment. These ranged from Mrs Johnstone acknowledging the researcher's assumed fear of surgery and seeking to deal with it through Theta healing to an instance in which Mrs Johnstone said that a woman she knew who had breast cancer did not need chemotherapy, but was having it because she felt that she needed to be punished. Mrs Johnstone did indicate that sometimes medical treatment was useful, for example if one had been in car accident, and that she "wasn't totally against them [i.e. doctors] because they have a part to play". However, Ofcom also observed that at a point when she was giving Theta healing to the researcher Mrs Johnstone said "Can I take away [the idea that] "I have to do what the doctors say?"...because when the doctors say oh well, you know, this is the diagnosis, we tend to obey them". She then told the researcher that some people having been told by a doctor that they would live for certain period duly ensured that they only lived for that period.

In addition, at the end of the Theta healing session, Mrs Johnstone asked the researcher when she was going back to her doctor and said that she should "hedge her bets" by having surgery for cervical cancer. However, this was just after Mrs Johnstone had said that it would be good if the doctors tested the researcher again before doing anything (seemingly in the expectation that they would find that after the healing session the cancer had gone).

Having made these observations, and taking into account both parties further representations, Ofcom's concluded that during the consultation Mrs Johnstone did not tell the researcher that she must take up her doctor's appointments.

Taking into account all of the factors noted above, Ofcom concluded that the secretly filmed footage of Mrs Johnstone's consultation with the researcher was not unfairly edited. This was because the report included the key elements of this consultation (i.e. that she had said that she could and had used Theta healing on people with cancer who were subsequently cured, that Mrs Johnstone had told the researcher that Theta healing worked through her creating the conditions for healing, and that in her view science could not be used to prove that Theta healing worked), and because the report neither included nor omitted footage which was likely to have materially affected viewers' opinions of Mrs Johnstone in a way that was unfair to her.

Ofcom therefore found that Mrs Johnstone was not treated unfairly in this respect.

c) and d)

Ofcom considered together Mrs Johnstone's complaints that she was not given an opportunity in advance to view the programme so she could make an informed comment on it, and that she was not given an appropriate and timely opportunity to respond to the claims made about her in the programme.

The BBC acknowledged that Mrs Johnstone was not given an opportunity to view and comment on the programme prior to its broadcast. However, Ofcom noted that the Code placed no requirement on the programme makers to give Mrs Johnstone an opportunity to do so unless she was a contributor to the programme whom they had specifically agreed to allow to preview and comment upon the programme prior to its broadcast. Given that this was not the case, Ofcom found no unfairness to Mrs Johnstone in respect of this aspect of her complaint.

In considering head d) of this complaint, Ofcom took particular account of Practice 7.11 of the Code which 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.

As noted above, Ofcom considered that the report said that Mrs Johnstone had claimed to be able to cure cancer through her work as a Theta healer (and had given specific examples of having done so) when there was no scientific basis for these claims and that, in Professor Ernst's opinion, Mrs Johnstone's claim to having cured a baby of stomach cancer over the telephone was very irresponsible and might well have been criminal.

Ofcom considered that these comments in the programme constituted a specific allegation of wrongdoing on the part of Mrs Johnstone i.e. she had made claims to be able to cure cancer when there was no scientific evidence to support her claims and that she might have acted illegally by doing so.

As noted in the Decision at head a) iv) and v), Ofcom also found that the programme makers had a reasonable foundation for including the claims made in the report about Theta healing, including those that related to Mrs Johnstone.

However, given the serious nature of the allegation of wrongdoing made against Mrs Johnstone, Ofcom considered that, in accordance with practice 7.11 of the Code, the programme makers were required to offer her an appropriate and timely opportunity to respond to the claims being made about her.

Ofcom noted that some weeks after the undercover footage was filmed and before the programme was broadcast, the programme makers telephoned Mrs Johnstone to invite her to be interviewed regarding the claims which would be made about her in the programme, that she asked the programme makers to email her their questions so she could "think about it" and that Mrs Johnstone complained that she did not receive this email. (Although the broadcaster believes the programme makers sent this email it could no longer prove this was the case and therefore acknowledged that Mrs Johnstone might not have received it).

However, on 14 June 2011 one of the programme makers called Mrs Johnstone again and during this conversation (a transcript of which was provided to Ofcom) the programme maker explained that the programme (about which Mrs Johnstone was clearly already aware) would be broadcast early the following week, i.e. in one week's time. The reporter wanted to give Mrs Johnstone a chance to respond to the points about her which the programme makers planned to include in the programme. In particular, the programme maker sought Mrs Johnstone's response regarding her claim to have had success treating lots of cancers through Theta healing, her claim that cancers can be caused by toxic emotions and her claims to have cured a baby with stomach cancer and a man with bowel cancer.

Mrs Johnstone declined to be interviewed or to respond to the points above over the phone. She also indicated that she did not have sufficient time to contact her clients prior to the planned broadcast and that she believed the programme would "rubbish" her anyway. Ofcom also noted that subsequently Mrs Johnstone: explained that she did not cure cancer but facilitated the healing of the person with cancer; said that her clients cured of cancer may not want to give testimonials regarding her work; and, affirmed her claim that she had worked on a baby with stomach cancer over the phone and on a man with bowel cancer and they had both been cured.

With regard to the time given to Mrs Johnstone in which to respond, Ofcom noted that the programme makers initially contacted Mrs Johnstone some weeks prior to the broadcast and then contacted her again (a week prior to the planned broadcast) to give her a second opportunity to be interviewed or to comment on the claims which would be made about her in the programme.

In light of the observations noted above, Ofcom found that Mrs Johnstone was given an appropriate and timely opportunity to respond to the allegations made about her in the programme as broadcast.

Given that Mrs Johnstone chose not to respond to the allegation of wrongdoing made about her Ofcom did not go on to consider whether her response was represented fairly, as required by Practice 7.6 of the Code. However, Ofcom did observe that, as noted in the Decision at head a) above, the programme made it clear that Mrs Johnstone disputed the position of the report with regard to the efficacy of her work.

Given its conclusion that Mrs Johnstone was offered a timely and appropriate opportunity to respond to the programme as broadcast Ofcom found that she was not treated unfairly in this respect.

e) Ofcom considered Mrs Johnstone's complaint that she was treated unfairly in that the report was biased and did not include any alternative evidence or views.

Ofcom observed that the report was clearly critical of Theta healing. However the report: included comments which Ms Stibal, the founder of Theta healing, had made about Theta Healing and its effect on disease (notably HIV); made clear to viewers that it had given Ms Stibal an opportunity to respond to the criticisms made of Theta healing in the report (which was refused); and, included Mrs Johnstone's own claims about the efficacy of Theta healing as well as her view that science could not be used to prove that Theta healing worked.

Ofcom also noted that, as set out in the sections of the Decision above, it had found that: Mrs Johnstone was not treated unfairly with regard to each of the elements in the programme about which she complained; the footage of her included in the programme was not unfairly edited; and, she was given an appropriate and timely opportunity to respond to any claims of wrongdoing made about her in the programme and that, despite her refusal do so, the programme ensured that her position was made clear to viewers; and therefore that she was not treated unfairly in this respect.

In light of these factors, Ofcom found that the programme did not result in unfairness to Mrs Johnstone in respect of her complaint that the report was biased and did not include any alternative evidence or views.

Unwarranted infringement of privacy

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights 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.

f) Ofcom considered the complaint that Mrs Johnstone's privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that the reporter gained entry to her home by lying and then secretly filmed a highly intimate and confidential process.

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 Johnstone'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 Johnstone was filmed secretly as she gave a Theta healing consultation to a researcher who pretended that she had been diagnosed with cervical cancer and that the filming took place in Mrs Johnstone's home. The filming took place in a room where Mrs Johnstone worked (i.e. where she invited clients to undergo Theta healing). The unedited footage of this consultation included no information about Mrs Johnstone other than that which related to her practice as a Theta healer. This secretly filmed footage showed Mrs Johnstone welcoming the researcher and guiding her through a hallway into a room where she conducted a Theta healing session. The majority of this footage showed Mrs Johnstone in this room against the background of a plain wall and a ceiling. In light of these observations and given that Mrs Johnstone advertised her business as a Theta healer on the Internet and was willing to discuss her practice and her beliefs about how it works (and to say that she had successfully treated people with cancer using Theta healing) to a person posing as a client, Ofcom considers that none of this footage included information which Mrs Johnstone would not be willing to impart to members of the public seeking her services.

Nonetheless, having taken the factors noted above into account, Ofcom concluded that Mrs Johnstone had a legitimate expectation of privacy with regard to the recording of her consultation with the researcher because it took place within her home and without her knowledge or consent (i.e. surreptitiously). However, this expectation was limited by the fact that while the filming took place in a room in Mrs Johnstone's home this was also a location to which Mrs Johnstone regularly invited members of the public to receive Theta healing sessions and no information of a personal nature to Mrs Johnstone was recorded.

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

In this context "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[4].

With regard to both Practice 8.5 and 8.13 Ofcom observed that Mrs Johnstone did not give consent for the filming of her conversation with the researcher. However, Ofcom also noted that in its response the BBC said that prior to recording this footage the programme makers had assessed Mrs Johnstone's website and telephoned her regarding the services she offered and had sought

[4] 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.

and gained permission from an editorial supervisor to secretly record any Theta healers who appeared to claim to be able to treat cancer.

In addition, Ofcom recognised that (as noted above) it is illegal for faith healers to claim that they can successfully treat cancer, and observed the BBC's argument there was a public interest in exposing claims and practices (such as those made by Mrs Johnstone) which might well lead vulnerable and impressionable people to neglect or defer potentially life-saving medical treatment.

In light of these observations Ofcom considered that the programme makers had *prima facie* evidence of a story in the public interest, and reasonable grounds to suspect that further material evidence could be obtained prior to filming Mrs Johnstone in the circumstances outlined above. Ofcom also considered that, given that it is illegal for faith healers to claim that they can successfully treat cancer, the BBC was able to demonstrate that the secret recording of Mrs Johnstone was in the public interest, and that this public interest outweighed Mrs Johnstone's limited expectation of privacy because the secret recording of this footage subsequently enabled the broadcaster to provide a direct first hand example of a Theta healer claiming to able to cure cancer.

For these reasons, Ofcom concluded that the intrusion into Mrs Johnstone's privacy was warranted.

Ofcom's decision is therefore that there was no unwarranted infringement of Mrs Johnstone's privacy in connection with the obtaining of material included in the programme.

g) Ofcom considered the complaint that Mrs Johnstone's privacy was unwarrantably infringed in the programme as broadcast in that it included footage of her working in her home in a very private situation without her consent and footage which showed the interior and exterior of her home and her address.

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 also 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.

As set out at decision head f) above, Ofcom considered that Mrs Johnstone had a legitimate, albeit limited, expectation of privacy with regard to the footage of her consultation with the researcher. Therefore, Ofcom considered that the inclusion of sections of this footage in the programme as broadcast intruded into Mrs Johnstone's legitimate expectation of privacy.

Ofcom next went on to consider whether the intrusion into Mrs Johnstone's privacy in this regard 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.

With regard to Practice 8.6, Ofcom observed that Mrs Johnstone did not give consent for the broadcast of the material in question (i.e. the filming of her conversation with the researcher). However, with regard to both Practice 8.6 and 8.14 we also noted the BBC's position that there was a strong public interest in exposing claims and practices (such as those made by Mrs Johnstone) which

might well lead vulnerable and impressionable people to neglect or defer potentially life-saving medical treatment.

In Ofcom's view the inclusion in the report of a direct illustration of a Theta healer claiming to be able to cure cancer served the public interest. This was because this illustration helped materially to impress upon viewers that individuals, like Mrs Johnstone, were charging clients to cure life threatening diseases when there is no scientific evidence to prove their claims of success and in circumstances where undergoing such treatment can delay or even prevent clients from securing appropriate medical treatment. Given this Ofcom considers that the BBC demonstrated that serving the public interest in this manner in the circumstances of this case outweighed Mrs Johnstone's expectation of privacy in relation to the broadcast of this material.

It therefore concluded that the intrusion into Mrs Johnstone's privacy by the broadcast of the surreptitious recording of her in these particular circumstances was warranted.

Ofcom then turned to Mrs Johnstone's complaint that the programme included her address.

In considering this element of Mrs Johnstone's complaint Ofcom took particular account of Practice 8.2 of the Code which states that information which discloses the location of a person's home or family should not be revealed without permission, unless it is warranted.

Ofcom observed that the reporter introduced the section of the report featuring Mrs Johnstone by saying *"We sent an undercover reporter to Warrington to see Jenny Johnstone"* and that this was followed by footage of Mrs Johnstone opening her front door and welcoming the researcher. This footage included an image of the house number on Mrs Johnstone's front door. Ofcom also observed that the end of the report included footage of the reporter on the street outside Mrs Johnstone's home, and that this footage included the name of the street on which Mrs Johnstone lived. In Ofcom's view the cumulative effect of these two sections of footage was to disclose the location of Mrs Johnstone's home.

In order to establish whether or not Mrs Johnstone's privacy was unwarrantably infringed in the broadcast of the programme, in this respect Ofcom assessed the extent to which she had a legitimate expectation of privacy with regard to the disclosure of the location of her home.

Ofcom noted that Mrs Johnstone did not consent to the disclosure of the location of her home in the programme. However, it also noted that the relevant footage was filmed in a public place (i.e. the street outside Mrs Johnstone's property) and that it was shown because it was also the location of Mrs Johnstone's Theta healing practice (which was the focus of this section of report). In addition, Ofcom observed that Mrs Johnstone's address was widely publicised on the Internet via sites listing her services as a Theta healer. Ofcom therefore concluded that Mrs Johnstone did not have a legitimate expectation of privacy with regard to the inclusion of this footage in the programme.

In light of its conclusions regarding Practices 8.2, 8.6 and 8.14 Ofcom found that there was no unwarranted infringement of Mrs Johnstone's privacy in the programme as broadcast.

Accordingly, Ofcom has not upheld Mrs Johnstone's complaint of unfair treatment and unwarranted infringement of privacy in connection with the obtaining of material included in the programme and in the programme as broadcast.

Not Upheld

Complaint by Mrs Yan Polcwiartek

Cowboy Builders, Channel 5, 14 July 2011

Summary: Ofcom has not upheld this complaint of unfair treatment and unwarranted infringement of privacy made by Mrs Yan Polcwiartek.

This episode of the series *Cowboy Builders* featured three families from Nottingham who had hired Mrs Polcwiartek to carry out building work in their homes. All three families criticised the standard of work and the programme showed the state that their houses had been left in. The presenters commented on the work and resolved to confront Mrs Polcwiartek and to start repairing the houses.

Mrs Polcwiartek complained to Ofcom that she was treated unfairly in the programme as broadcast and that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme and in the programme as broadcast.

In summary, Ofcom's decision is as follows:

- Material facts had not been presented, disregarded or omitted in a way that was unfair to Mrs Polcwiartek.

- Mrs Polcwiartek did not have a legitimate expectation of privacy in relation to information acquired in connection with the obtaining of material included in the programme.

- Mrs Polcwiartek did not have a legitimate expectation of privacy in relation to the information that was about her that was broadcast in the programme.

Introduction

On 14 July 2011, Channel 5 broadcast an edition of *Cowboy Builders*, a programme which seeks to expose builders who leave jobs they have undertaken incomplete or defective. The programme's presenter, Mr Dominic Littlewood, and his co-presenter, Ms Melinda Messenger, visited Mr and Mrs Lone and their sons, Faraz and Sohail, at the family's home in Nottingham to discuss *"the incredible story of our first cowgirl builder".*

The programme explained that the family had put their trust in *"a female builder"*, but after five months they were left with *"a devastated wreck with walls ripped out with no electricity, water or heating"*. Footage of the house in this state was broadcast. According to the programme, this led to the family moving out of the house as it was *"unbearable"* and too cold. In addition, the programme explained that the situation was made worse by the fact that the builder had now *"vanished"*.

While discussing the state of the house and the impact it had on the family, Mr Littlewood asked what the builder's name was to which Faraz Lone stated: *"Yan Polcwiartek, she's Chinese"*. Mr Littlewood responded to this by saying:

> *"…so I am looking for a Chinese female builder with a Polish surname; this should be interesting"*.

Mr Littlewood revealed that Faraz and Sohail Lone had mentioned that *"Yan was the boss and that she employed a team of Chinese builders"*. Mr Littlewood also asked Faraz and Sohail Lone to recall some of the *"excuses"* Mrs Polcwiartek used. One of the brothers stated that when they handed over the last payment, Mrs Polcwiartek had said that it was Chinese New Year and that the builders needed the money to celebrate. Mr Littlewood interjected at this point to ask what month it was that she had stated this and they replied that it was around late September. Mr Littlewood explained to the brothers that Chinese New Year was in February. Following this conversation, Mr Littlewood stated in the commentary that he was:

> *"asking* [his] *surveillance team to keep an eye on the address that the brothers have for Yan".*

The programme went on to visit another two families in Nottingham, the Raza family and the Lachman family, where Mrs Polcwiartek was also responsible, so the programme claimed, for incomplete and unsafe building works to their houses. Both families made reference to payments requested by Mrs Polcwiartek for Chinese New Year despite the fact that the requests were made around late September. In relation to this point, Mr Littlewood said in the commentary:

> *"How many New Years does Yan think the Chinese have? She's used that line on all three Nottingham families then left them all in the lurch"*.

Mr Littlewood was shown visiting builders' merchants to enquire on the whereabouts of a *"Chinese female builder* [called] *Yan Polcwiartek".* One of the merchants stated that Mrs Polcwiartek had talked to him about *"going to Shanghai"*. Mr Littlewood was then shown driving to a house after receiving a *"new lead"* on an address stated on an invoice he had seen from Mrs Polcwiartek. Mr Littlewood knocked on the door of the house and the person living there spoke through a window, but they were not visible and said that they did not understand him. Following this exchange, Mr Littlewood said that he thought that the people living there were Chinese and were Mrs Polcwiartek's builders. He then stated:

> *"Game on, I may have just found one of the worker bees. Now I just need their Queen".*

As the programme investigated further into Mrs Polcwiartek's whereabouts, Mr Littlewood discovered through an internet search that Mrs Polcwiartek had applied for planning permission on a number of properties, some of which were owned by Mrs Polcwiartek herself. With this information, Mr Littlewood visited some of the properties with the aim of gathering more information on Mrs Polcwiartek. One of the properties featured in the programme was an old chapel and Mr Littlewood asked a neighbour living nearby about Mrs Polcwiartek. The neighbour stated that Mrs Polcwiartek had bought an old bank near Wainfleet in Lincolnshire, to which Mr Littlewood commented that maybe this was where Mrs Polcwiartek *"stashed the Lone family money".*

After visiting a few more properties owned by Mrs Polcwiartek, the programme showed Mr Littlewood receiving a phone call from a member of the "surveillance team" who confirmed a sighting of Mrs Polcwiartek at one of the addresses which was based in Sleaford, Lincolnshire. After this, Mr Littlewood was shown posting a letter, which he explained was an invitation for Mrs Polcwiartek to respond formally to the allegations which were to be made in the programme.

The programme then included footage from a filmed meeting between Mrs Polcwiartek and Mr Littlewood. During the meeting, Mrs Polcwiartek revealed that the reason she had quit the three building jobs in Nottingham was because threats had been made to her. Mrs Polcwiartek responded to allegations that she left homes *"destroyed"* by stating that they were not destroyed but *"incomplete"*. Mrs Polcwiartek also stated that she had been under pressure from the families to complete the work *"cheaply"*. In response to some of the specific issues with her building work that Mr Littlewood raised, Mrs Polcwiartek stated that it was difficult to oversee what the people she had employed to carry out the work were doing all the time. Just before leaving the meeting, Mrs Polcwiartek asked to speak to Mr Littlewood with the camera switched off. However, the filming continued and Mrs Polcwiartek was heard saying to Mr Littlewood that she was not happy that she would be on television.

At the end of the programme, the following text was shown:

> *"Yan Polcwiartek, of Helpringham, Lincolnshire, trades or has traded as Allington Developments Ltd. Neither she nor her company have any connection to companies with the same or similar names elsewhere in the UK."*

Following the broadcast of the programme, Mrs Yan Polcwiartek complained to Ofcom that she was treated unjustly or unfairly in the programme as broadcast and that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme and in the programme as broadcast**.**

Summary of the Complaint and broadcaster's correspondence

Unjust or unfair treatment

In summary, Mrs Polcwiartek complained that she was treated unjustly or unfairly in the programme as broadcast in that:

a) Material facts were presented, disregarded and omitted in a way that was unfair to Mrs Polcwiartek and portrayed her unfairly. In particular, Mrs Polcwiartek said that:

- The programme portrayed Mrs Polcwiartek as "a fugitive who took money and then ran off to China."

  In response, Channel 5 said that the programme makers had received information that Mrs Polcwiartek may have gone to Shanghai, but that as their investigation proceeded they discovered that Mrs Polcwiartek had many property interests in the UK and that she was still undertaking building work in other parts of the country. Channel 5 said that anyone watching the programme would have been aware of the programme makers' initial concerns but that as the programme went on, they would have been left in no doubt that that was not the case and in fact, far from running away from the programme makers' investigation, Mrs Polcwiartek had attended an interview with Mr Littlewood which was broadcast in the programme.

- Mrs Polcwiartek complained that the presenter and the production team had known all along where she lived but carried on the pretence of having to "find" her. In fact, Mrs Polcwiartek said that she was contacted about the programme on 28 March 2011 and that she had responded to the producer the next day and that she had made no attempt to hide or avoid anyone.

In response Channel 5 said that at the time, programme makers were trying to establish Mrs Polcwiartek's whereabouts, as far as they knew, they had no idea she was being investigated by them. Channel 5 said that research for the programme started in October 2010 and the programme makers had been provided with an address in Sleaford, Lincolnshire by the Lone family. They were also informed by the Lone and Raza family that it was difficult to make contact with Mrs Polcwiartek at the address provided and that Mrs Polcwiartek frequently went to London and talked about businesses in Poland and France. Channel 5 said that the programme makers undertook internet and Land Registry searches and became aware of a number of other properties in the name of Mrs Polcwiartek and/or her husband or her company, Allington Developments Limited. Further research made the programme makers aware that Mrs Polcwiartek was working at a property in Hertfordshire which also seem to corroborate with information provided by the Lone family. Following all the research, Channel 5 said that the programme makers decided that the best address to correspond with Mrs Polcwiartek was the Sleaford address and therefore the first letter was sent on 28 March 2011 to that address which outlined the allegations that were intended to be included in the programme and inviting her to the interview. Channel 5 maintained that although the Sleaford address was the address provided by the programme makers at the outset by the Lone family, the search for Mrs Polcwiartek was no pretence.

- Mrs Polcwiartek said that the programme alleged that a letter was sent on 11 April 2011 asking for an interview *"after tracking her down"*. However, Mrs Polcwiartek said that she had already confirmed to the programme makers on 6 April 2011 that she would attend an interview on 12 April 2011.

  In response, Channel 5 said that they could not find any reference to the date 11 April 2011 in the programme. Channel 5 stated that the first invitation was sent on 28 March 2011, a further request was sent on 5 April 2011 and a final request was sent on 8 April 2011. Mrs Polcwiartek had telephoned programme makers on 29 March 2011 and 6 April 2011 and then had attended the interview with Mr Littlewood on 12 April 2011.

- Mrs Polcwiartek said that the chapel that the presenter visited which had windows boarded up seemed to imply that this was something to do with her and portrayed the chapel as another example of "cowboy builder's work" that had left a ruined family. However, this had nothing to do with any of the families shown in the programme.

  Channel 5 stated in response that the programme made it clear that Mrs Polcwiartek had owned the chapel in 2003 and that she had sold it six years ago and had bought an old bank in Wainfleet. As a result, Channel 5 said that it would have been clear to viewers that Mrs Polcwiartek had been the owner and that this was not a situation which had "left a ruined family" as Mrs Polcwiartek has maintained. Further, Channel 5 said that the fact that programme stated that Mrs Polcwiartek had sold the chapel six years ago made it unlikely that any viewer would have concluded that the boarded up windows were something to do with her.

  Channel 5 said that although the chapel had nothing to do with the families in the programme, the footage was included because of the information provided by the neighbour which had led the programme makers to old bank that Mrs Polcwiartek owned and rented out. Channel 5 said that this

information was of relevance first, as part of the hunt for Mrs Polcwiartek's address and secondly because the ex-Lloyds bank formed part of a property portfolio that the programme makers discovered Mrs Polcwiartek owned. In addition, Channel 5 said that the including evidence of Mrs Polcwiartek's property interests was important because when interviewed by Mr Littlewood, she indicated that if she had done wrong, she would be happy to pay for it but that she did not have any money and could not afford to pay them back. Mr Littlewood had indicated in the programme that he knew that she could afford to pay, but Mrs Polcwiartek said that the properties were mortgaged and continued to say that she could not afford to pay money back to the homeowners.

- Mrs Polcwiartek said that the properties that she had bought had no connection to any of the families shown in the programme but the programme alluded to Mrs Polcwiartek having acquired the properties on the back of *"stashed money from customers"*.

  Channel 5 said that the programme explained that the Lone family had paid Mrs Polcwiartek £36,000 of their life savings out of a £41,600 quote for building work to their home, but that Mrs Polcwiartek had disappeared with their money and leaving the work incomplete. The Lone family and the programme makers thought that Mrs Polcwiartek had received considerably more money than the work undertaken at the Lone's home was worth, so when Mr Littlewood discovered that she owned an old bank, he made a joke that perhaps that was where she had stashed the Lone's money. Further, Channel 5 said that given that the old bank had been purchased many years before the Lone family had paid money to her, viewers were unlikely to have concluded that she purchased the property with their money either.

- Mrs Polcwiartek said that the presenter visited a house which she rented out to students, but in the programme this was portrayed as a "hide-out" for builders working for Mrs Polcwiartek.

  Channel 5 said in response that the programme did not suggest that the property was a "hide-out" for Mrs Polcwiartek's builders, or indeed that there was any need for her builders to hide. As the programme explained, it was an address that Mrs Polcwiartek had used on an invoice. Channel 5 said that the programme makers had also discovered through a search of the Land Registry that the property was owned by Mrs Polcwiartek and her husband. Further, Channel 5 said that Mr Littlewood did not state in the programme as a matter of fact that Mrs Polcwiartek's builders were living there, but was expressing his opinion as to whom he thought was living there.

- Mrs Polcwiartek said that no positive aspects of the building work were shown despite the fact that in one of the cases the building was nearly complete and in spite of the fact that a large amount of brick work and windows were put up for a very low budget.

  In response, Channel 5 said that the homeowners featured in the programme did not have positive comments to make about Mrs Polcwiartek's work and that Mrs Polcwiartek had even apologised on camera for the misery she had caused homeowners and agreed that she would not do any more building work. In addition, Channel 5 stated that the nature of the *Cowboy Builders* programmes is to investigate builders who have let down their customers.

Further, Channel 5 stated that the programme included Mrs Polcwiartek's statement that the Lone family's home was nearly complete and that work had been taken on for a very low budget.

- Mrs Polcwiartek said that the programme makers and the presenter failed to take account of the fact that the buildings were incomplete and that painting and plastering were still to be carried out.

  Channel 5 said that in response, the programme made it very clear that the Lone and Raza family homes were left incomplete by Mrs Polcwiartek and that painting and plastering was still to be carried out.

- Mrs Polcwiartek said that the programme only featured negative stories and was centred on the three families in Nottingham over a period of six months, despite the fact that Mrs Polcwiartek has been in the building business for over 10 years.

  Channel 5 said that in response, the programme made clear that the aim of the programme was to discover why Mrs Polcwiartek had left three families "in the lurch" in September 2010. Further, the programme did not suggest at any time that she had been in the building trade for many years because the programme makers did not have any evidence to suggest that she had. Mrs Polcwiartek was given the opportunity to provide the programme makers with any information that she wanted to be included in the programme. Channel 5 said that at no point in her interview with Mr Littlewood or in her email dated 1 June 2011, did Mrs Polcwiartek mention that she had been in the building business for over 10 years.

Unwarranted infringement of privacy

In summary, Mrs Polcwiartek complained that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that:

b) The presenter requested information about Mrs Polcwiartek by visiting the home she rented out to tenants and asking them for information about her.

   Channel 5 said in response that the programme makers did visit the property rented out by Mrs Polcwiartek, however as shown in the programme, they were not able to ask the occupants about Mrs Polcwiartek's business and her whereabouts. Channel 5 said that Mrs Polcwiartek would not have had a legitimate expectation that people would not approach the front door and knock on it. Further, even if she did have a legitimate expectation, Channel 5 said that making such enquiries was warranted. Channel 5 said that at the time the programme makers had received complaints from three families in Nottingham and that the programme makers were attempting to investigate Mrs Polcwiartek, her whereabouts and were carrying out legitimate enquiries in that respect.

c) The presenter disclosed information about Mrs Polcwiartek and her business to the builder's suppliers.

   By way of background, Mrs Polcwiartek stated that the business relationship she had with the suppliers was now damaged as a result of the presenter disclosing information about her to them.

Channel 5 said in response that the programme makers visited the two builder's merchants featured in the programme in an attempt to find out where Mrs Polcwiartek was and whether she was still undertaking building work. Channel 5 said that the programme makers did not disclose any private information about Mrs Polcwiartek or her business and that they merely asked them if they could shed any light on what a female, Chinese builder called "Yan Polcwiartek" was up to now.

In summary, Mrs Polcwiartek also complained that her privacy was unwarrantably infringed in the programme as broadcast in that:

d) The programme broadcast her name, the name of her company and her car.

By way of background, Mrs Polcwiartek stated that she lives with her family who are of mixed ethnicity in a community of a small village and as a result, her family is easily identifiable.

Channel 5 said in response that Mrs Polcwiartek did not have a legitimate expectation of privacy with regard to the disclosure of her name or the name of her business, Allington Developments Limited. in the programme as broadcast. Channel 5 said that the programme makers' searches confirmed that the details of Mrs Polcwiartek's company appeared on planning applications and in connection with properties registered at the Land Registry and were registered at Companies House. Channel 5 also stated that Mrs Polcwiartek knew she was being filmed for the programme and knew the allegations that were to be made about her and her company. Channel 5 said that granting Mrs Polcwiartek anonymity would have defeated the object of the programme and would not have been in the public interest.

Channel 5 said that in relation to Mrs Polcwiartek's car, brief footage was included in the programme as broadcast, but that the number plate was not legible. It was not considered by Channel 5 that Mrs Polcwiartek had a legitimate expectation of privacy in relation to the footage broadcast of her car. Channel 5 also stated that no reference was made in the programme to Mrs Polcwiartek's family or children.

e) The information concerning Mrs Polcwiartek's business interests and the location of her properties was broadcast, even though this was not relevant to the programme.

Channel 5 said in response that in relation to the chapel that she owned in 2003, the old bank in Wainfleet and the land in Chatteris, Cambridgeshire that Mrs Polcwiartek did not have a legitimate expectation of privacy in relation to her interests or the location of these properties as this information was in the public domain. Further, Channel 5 said that even if there was such an expectation, it was warranted for it to be included in the programme as part of the programme makers search for a correct and up-to-date address for Mrs Polcwiartek. In addition, Channel 5 said that it was also in the public interest to demonstrate that Mrs Polcwiartek had a significant property portfolio in order to prevent the public being misled by her statements that she had no money to pay back the families in Nottingham.

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 unjust or 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 a recording of the programme as broadcast and transcript, both parties' written submissions and the unedited footage of the programme.

When considering complaints of unjust and unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of Ofcom's Broadcasting Code ("the Code"). Ofcom had regard to this Rule when reaching its decisions on the individual heads of complaint detailed below.

a) Ofcom first considered Mrs Polcwiartek's complaint that she was treated unfairly in the programme as broadcast in that material facts were presented disregarded and omitted in a way that portrayed her unfairly.

   When considering this head of complaint, and the individual sub-heads of complaint below, Ofcom had regard to whether, in accordance with Practice 7.9 of the Code, reasonable care was taken by the broadcaster to satisfy itself that material facts had not been presented, disregarded or omitted in a way which was unfair to Mrs Polcwiartek.

   Ofcom recognises that while programme makers and broadcasters have editorial discretion over what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether in each sub head of the complaint, material facts had been presented fairly.

   Ofcom considered the following sub-heads of complaint in order to reach an overall decision as to whether Mrs Polcwiartek was portrayed unfairly in the programme as broadcast.

i) Ofcom considered the complaint that the programme portrayed Mrs Polcwiartek as a fugitive who took money and then ran off to China.

   Ofcom noted the following exchange between Mr Raza and Mr Littlewood in the programme:

Mr Raza: *"She said it was Chinese New Year, she said the builders need money, so you need to give me a thousand pounds today. And I said no way are you getting that thousand pounds. This was probably about 2 days before she left.*

Mr Littlewood: *What month did she walk off?*

Mr Raza: *Six months ago.*

Mr Littlewood: *Right which would have been September?*

Mr Raza: *September yeah*.

Mr Littlewood: *Chinese New Year is in February, I hear exactly the same story in the last house I was at as well…..So Yan disappeared from both jobs in September 2010. And the Razas have told me of a third house she was working on at the same time.*

Mr Littlewood: *Himat Lachman hired Yan in May 2010 to build a rear extension and landscape his garden, he paid the full quote of twenty one and a half thousand pounds. But in late September Yan disappeared with the job unfinished."*

Ofcom also noted that the following part of the programme was focussed on the "search" for Mrs Polcwiartek. The programme included a section with Mr Littlewood speaking to some builders merchants *"to see if they can shed any light on what she's up to now"* and it was in this particular section of the programme where a merchant stated that he remembered *"her talking about going to Shanghai"*.

Ofcom took the view that, taken in isolation, the commentary and exchange between Mr Raza and Mr Littlewood had the potential to leave viewers with the impression that Mrs Polcwiartek had taken money and then disappeared. However, it also considered that such a possible impression had to be assessed in light of the fact that Mrs Polcwiartek was seen later in the programme, attending an interview in person with Mr Littlewood where she was able to explain her position. Further, the fact that Mr Littlewood was seen visiting addresses in the UK and that there was no other reference to Mrs Polcwiartek being in Shanghai or China in the programme, would have also in Ofcom's view, made it clear to viewers that any possibility that Mrs Polcwiartek had fled to China was corrected.

Therefore, for the reasons given above, Ofcom considered that the broadcaster had taken reasonable steps to satisfy itself that material facts had not been presented in a way that was unfair to Mrs Polcwiartek.

ii) Ofcom considered the complaint that the presenter and the production team had known all along where Mrs Polcwiartek lived, but carried on the pretence of having to "find" her. Mrs Polcwiartek said that she had made no attempt to hide or avoid anyone.

Ofcom noted the following exchange between Mr Littlewood and a neighbour in the programme:

Mr Littlewood: *"I've got one last address to check out. But the most important thing is it was most recent, end of last year. Two months after she walked out of the Nottingham jobs, Yan put in a planning application for work on someone else's property in Borehamwood, North London…..But Yan and her team of Chinese builders are nowhere to be seen. There's definitely building work going on. No-one is here today though. Right, let's try some of her neighbours. No-one's in but I've left a few notes and a neighbour has called me back. Can she confirm who the builders are? Have you seen the people who are doing the work?*

Neighbour: *Um, there's a lady and then the rest are all men and she seems to sort of lead the gang.*

Mr Littlewood: *Is she Chinese?*

Neighbour: *Yes she is.*

Mr Littlewood: *That sounds like Yan. So she is still building. But there is a catch.*

Neighbour: *I haven't seen them around for, I would say 6 weeks maybe.*

Mr Littlewood: *I've got to catch up with her before she ruins any more lives. Where is Yan? She's got me running around I'm telling ya, I'm earning me money"*.

Ofcom considered that it was clear the above exchange in the programme suggested that it was difficult to establish Mrs Polcwiartek's whereabouts and, possibly, that Mrs Polcwiartek did not wish to be easily located. A substantial part of the programme was devoted to "finding" Mrs Polcwiartek, with a number of possible locations in the U.K being considered, which was stated in the programme by Mr Littlewood as *"a long list of addresses spanning six counties, all linked to Mrs Polcwiartek"*.

Ofcom went on to consider what information the programme makers had available to them at the time of making the programme.

Ofcom noted the letter from the programme makers dated 28 March 2011 which was addressed to Mrs Polcwiartek's home address in Lincolnshire. Channel 5 also confirmed to Ofcom that most of the filming for the programme, including the section referenced above, took place on 19 and 20 March 2011, which was before they had received any response from Mrs Polcwiartek. Ofcom also took into consideration Channel 5's statement that the families they had spoken to had found it difficult to contact Mrs Polcwiartek and that she had discussed other businesses and jobs in different countries and parts of the UK. Ofcom also noted that the programme makers had conducted independent research to verify what the families had told them.

Taking all the above factors into consideration, Ofcom concluded that since programme makers were unable to conclusively determine Mrs Polcwiartek's address at the time of filming, the programme reflected accurately the situation at the relevant time of filming. Therefore Ofcom considered that the broadcaster had

taken reasonable steps to ensure that material facts had not been presented in a way that was unfair to Mrs Polcwiartek.

iii) Ofcom considered the complaint that the programme alleged that a letter was sent on 11 April 2011 asking for an interview "after tracking her down". However, Mrs Polcwiartek had already confirmed to the programme makers on 6 April 2011 that she would attend an interview on 12 April 2011.

Ofcom noted the following comment made by Mr Littlewood in the programme:

> *"My team have spotted Yan in Sleaford, Lincolnshire. Now I've confirmed her location, I will formally invite Yan to respond to allegations against her…..Well this is a turn up for the books. The very next day, Yan accepted my request for an interview."*

Ofcom observed that the above comment followed on from the earlier part of the programme where Mr Littlewood was shown trying to establish Mrs Polcwiartek's whereabouts. Ofcom noted that there was no reference to 11 April 2011 or any other date in this section of the programme. It was also apparent from the letters between the programme makers and Mrs Polcwiartek, that Ofcom had been provided with, that confirmation of Mrs Polcwiartek's attendance at the interview on 12 April 2011 was given in a telephone conversation between the programme makers and Mrs Polcwiartek by phone on 11 April 2011.

In light of the above factors, Ofcom considered that viewers were likely to conclude that once Mr Littlewood had "established" Mrs Polcwiartek's address and requested an interview, Mrs Polcwiartek responded immediately by accepting the request for interview *"the very next day"*. In Ofcom's view, this was clearly reflected in the programme.

Therefore, for the reasons given above, Ofcom considered that the broadcaster had taken reasonable steps to satisfy itself that material facts had not been presented in a way that was unfair to Mrs Polcwiartek.

iv) Ofcom next considered the complaint that the chapel that the presenter visited, which had windows boarded up, seemed to imply that this was something to do with Mrs Polcwiartek and portrayed the chapel as "another example of cowboy builders work that had left a ruined family". However Mrs Polcwiartek said this had nothing to do with any of the families shown in the programme.

Ofcom noted the following exchange in the programme:

Mr Littlewood: *"If I have a snoop around I might find out what Yan has been up to. I'm starting in Old Leake, Lincolnshire. This is it. What are you doing here Yan. Yan owned this property in 2003. And an old Victorian Chapel closed up, boarded up, but nothing's happened on it, why not*?

Neighbour: *Hi*

Mr Littlewood: *Luckily one of the neighbours is on hand to help. He remembers Yan, but he says he hasn't seen her since she sold the chapel six years ago*.

Neighbour: *Last I heard she'd moved, bought an ex-Lloyds bank at Wain…a place called Wainfleet. Did you hear anything about that*?

Mr Littlewood: *Don't know that one.*

Neighbour: *That's where she went from here.*

Mr Littlewood: *Wain….where's Wainfleet?*

Neighbour: *Oh you haven't heard of Wainfleet?*

Mr Littlewood: *No, is it in Lincolnshire.*

Neighbour: *God, it's only about 15 mile up the road."*

Ofcom noted that the inclusion of the reference to the chapel followed the preceding section of the programme which focused on the "search" for Mrs Polcwiartek. Ofcom considered that in the context of Mr Littlewood's "search" for Mrs Polcwiartek, the chapel was a possible lead as to her current whereabouts. This was highlighted by the fact that the conversation between Mr Littlewood and the neighbour was confined to trying to determine Mrs Polcwiartek's location. Further, Mr Littlewood's description of the chapel being *"boarded up"* was, in Ofcom's view, no more than a passing query in relation to what Mrs Polcwiartek may be doing with the chapel and where she might be. There was no further mention in the programme into the reasons for the chapel being boarded up and it was unlikely, in Ofcom's opinion, that viewers would have come to the conclusion that the chapel was "another example of cowboy's builder work."

Therefore, for the reasons given above, Ofcom considered that the broadcaster had taken reasonable steps to satisfy itself that material facts had not been presented in a way that was unfair to Mrs Polcwiartek.

v) Ofcom considered the complaint that the properties that Mrs Polcwiartek had bought had no connection to any of the families shown in the programme, but the programme alluded to Mrs Polcwiartek having acquired the properties on the back of *"stashed money from customers"*.

Ofcom noted the following comment made by Mr Littlewood in the programme:

"I found the old bank, maybe this is where Yan stashed the Lone family money. Let's see what I can find out. But there's no sign of her here. It turns out however, that she's renting it out to tenants so, Yan's not just a builder, she's a landlady as well".

Ofcom observed that this comment was made after Mr Littlewood had been given information that Mrs Polcwiartek had bought an *"ex-Lloyds bank in Wainfleet"* (as set out in sub-head iv) above) and Mr Littlewood had made his way to Wainfleet to "find" Mrs Polcwiartek. Although Ofcom acknowledged that this comment may have caused offence to Mrs Polcwiartek, we considered that as there was no further discussion of how she had acquired the properties, Ofcom considered it likely that most viewers would have taken the comment to be light hearted in nature, especially when taking into consideration the nature of the programme, Mr Littlewood's presentation style and the fact that he prefaced his comment with

"maybe". Ofcom therefore considered that viewers would not have taken the comment seriously.

Therefore Ofcom did not consider that the programme alluded to Mrs Polcwiartek having acquired the properties on the back of "stashed money from customers". Consequently, Ofcom was satisfied that the broadcaster had taken reasonable steps to satisfy itself that material facts had not been presented in a way that was unfair to Mrs Polcwiartek.

vi) Ofcom considered the complaint that the presenter visited a house which Mrs Polcwiartek rents out to students but in the programme this was portrayed as a "hide-out" for builders working for Mrs Polcwiartek.

Ofcom noted that from the programme that Mr Littlewood visited a property but could not get any information about Mrs Polcwiartek from the people living there because they did not understand Mr Littlewood. Ofcom also noted the following commentary made by Mr Littlewood:

> *"Whoever it is that lives there, didn't wanna answer the door at all and was Chinese. My vibes are, I think they're her builders. Game on, I may have just found one of the worker bees, now I just need their Queen"*.

Ofcom noted that this section of the programme formed part of the narrative which featured the "search" for Mrs Polcwiartek as discussed in sub-head ii) above. Ofcom also noted that earlier in the programme, Mr Littlewood had discussed Mrs Polcwiartek with the Lone family and had been told that Mrs Polcwiartek had *"employed a team of Chinese builders"* and that it was difficult to communicate with the builders because they *"spoke in Chinese"*.

Ofcom considered that, in light of what Mr Littlewood had found out from the Lone family, namely that Mrs Polcwiartek had a team of builders that were Chinese, he had come to the conclusion that the address was where "her builders" were now living. Ofcom also considered that viewers were likely to have taken Mr Littlewood's comments to be the result of this information and his own speculation and this was highlighted by the use of the phrase "my vibes are". In light of this, Ofcom did not consider most viewers would have taken Mr Littlewood's assumptions to be a fact and particularly when the programme did not refer further to whether or not the house in question is a "hide-out" for Mrs Polcwiartek's builders. We also noted that the house was at no point referred to by using the word "hide-out" or similar for Mrs Polcwiartek's builders.

Consequently, Ofcom considered that broadcasters had not presented material facts in a way that was unfair to Mrs Polcwiartek.

vii and viii)

Ofcom next considered the complaint that no positive aspects of the building work were shown despite the fact that in one of the cases the building was nearly complete and in spite of the fact that a large amount of brick work and windows were put up for a very low budget. Ofcom also considered the complaint that the programme makers and presenter failed to take account of the fact that the buildings were incomplete and that painting and plastering were still to be carried out.

In Ofcom's view, sub-heads vii) and viii) of the complaint raised similar issues because they both concerned Mrs Polcwiartek's complaint that the programme did not take into account the fact that many aspects of the building work were still to be completed. It therefore considered these heads of complaint together.

Ofcom noted the following in the programme:

Mr Littlewood: *"….does it give you the right…carte blanche right to take people's money, destroy their houses and disappear?*

Mrs Polcwiartek: *I did not destroy their houses.*

Mr Littlewood: *Well let me show you pictures, is that not destroyed?*

Mrs Polcwiartek: *That's not destroyed*

Mr Littlewood: *Are you happy with the way you left that?*

Mrs Polcwiartek: *But that's incomplete.*

Mr Littlewood: *Now that job was £41,000. They gave you £36,320 of that, there's only five grand left, so don't dare tell me that's because of that amount of money that's why you left that job.*

Mrs Polcwiartek: *I cut bill from like forty five down to thirty, that they was they, they pressurising me to, to do cheap, cheap, cheap….."*

In Ofcom's view, the above commentary reflected Mrs Polcwiartek's position that she felt under pressure because she was being asked to complete work for what she considered to be a low budget. In addition Mrs Polcwiartek also stated that the work was *"incomplete"* in response to Mr Littlewood's comments that she had *"destroyed"* the properties.

Ofcom considered that the three families featured in the programme did not specify any positive aspects of the building work carried out by Mrs Polcwiartek. Ofcom also acknowledged Channel 5's submission that the premise of the programme is to try to assist homeowners who have "been let down by builders" and therefore positive aspects in relation to other work she had carried out was not relevant to the particular cases featured in the programme

In light of the points above, viewers would have taken into account Mrs Polcwiartek's position of the matter as well as the three families that had been featured in the programme. Ofcom therefore considered that the broadcaster had taken reasonable care to satisfy itself that material facts had not been presented, disregarded or omitted in a way that was unfair to Mrs Polcwiartek.

Unwarranted Infringement of Privacy

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcasters 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.

b) Ofcom considered the complaint that, Mrs Polcwiartek's privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that the presenter requested information about Mrs Polcwiartek by visiting the property she rented out to tenants and asking them for information about her.

Ofcom had regard to Practice 8.5 of the Code which states that any infringement of privacy in the making of the programme should be with the person's and/or organisation's consent or be otherwise warranted.

Ofcom also had regard to Practice 8.9 of the Code which stated that the means of obtaining material must be proportionate in all the circumstances and in particular to the subject matter of the programme.

Ofcom first considered whether visiting the home which Mrs Polcwiartek rents out to tenants, in order to obtain further information in relation to her whereabouts, was proportionate in the circumstances and in particular to the subject matter of the programme. Ofcom noted that: the programme makers had had difficulty in locating Mrs Polcwiartek as detailed in sub-head ii) of the Decision; Mr Littlewood had been able to locate the address of the property because, according to Mr Littlewood, it had been *"put down on an invoice"* by Mrs Polcwiartek; and, the programme was concerned with addressing the three families' complaints about Mrs Polcwiartek. Therefore it was incumbent on the programme makers to try to establish Mrs Polcwiartek's whereabouts so that she could answer the allegations which the families had made in the programme. Taking all these factors into consideration, Ofcom considered that since the address had already been made public by Mrs Polcwiartek and the subject matter of the programme concerned alleged wrong-doing by Mrs Polcwiartek, the means of obtaining material was proportionate in these particular circumstances.

In considering whether or not Mrs Polcwiartek's privacy was unwarrantably infringed in connection with the obtaining of material included in the programme, Ofcom considered the extent to which Mrs Polcwiartek had a legitimate expectation of privacy in relation to the information that the programme makers sought at the house. As noted above, the primary aim of the programme makers was to establish where Mrs Polcwiartek was.

Ofcom noted from the programme that the only information that Mr Littlewood sought from the persons living in the property was information which could assist him in finding out Mrs Polcwiartek's current location. However, this information could not be obtained as the person living in the property was not able to understand Mr Littlewood.

Ofcom took into consideration the fact that the address of the property which Mrs Polcwiartek rented out to tenants, had been stated in on an invoice and that because of this, Mr Littlewood was able to visit that property. Ofcom also considered that the property in question was on a public street and access to the

house did not appear to be restricted in any way. Ofcom also noted the following exchange in the programme:

Mr Littlewood: *"I've been given a new lead. One of the addresses that Yan put down on an invoice is a property on the other side of town. Right that's the one. Let's see if anyone is willing to talk*.

Man: [*subtitles] What are you looking for?*

Mr Littlewood: *Um, I'm looking for there's, there's someone using this address*.

Man: [subtitles] *Nobody living here, I don't know, sorry I don't understand you.*

Mr Littlewood: *Right."*

Ofcom observed that the questions which were asked by Mr Littlewood were to establish who was living at the address and that this information was not obtained in any event. Ofcom also noted that there was nothing private about what was divulged either between Mr Littlewood and the person living at the house. When taking into account all of these factors, Ofcom did not consider that there was anything private about the address which Mr Littlewood visited or the information which Mr Littlewood sought from the persons living at that address.

Taking all the above factors into account, Ofcom considered that Mrs Polcwiartek did not have a legitimate expectation of privacy in relation to the information the programme makers obtained in connection with the obtaining of material included in the programme. Having found that Mrs Polcwiartek did not have a legitimate expectation of privacy, Ofcom did not go on to consider whether or not it was warranted.

c) Ofcom considered the complaint that Mrs Polcwiartek's privacy was unwarrantably infringed in connection with the obtaining of material included in the programme by disclosing information about Mrs Polcwiartek and her business to the builders' suppliers.

Ofcom had regard to Practice 8.5 of the Code which states that any infringement of privacy in the making of the programme should be with the person's and/or organisation's consent or be otherwise warranted.

Ofcom also had regard to Practice 8.9 of the Code which stated that the means of obtaining material must be proportionate in all the circumstances and in particular to the subject matter of the programme.

Ofcom first considered whether it was proportionate in the circumstances and in particular to the subject matter of the programme, for the presenter obtain information about Mrs Polcwiartek by visiting a builders' suppliers. As noted in head b) above, the presenter was trying to establish Mrs Polcwiartek's location and therefore Ofcom acknowledged that the reason for visiting the builders' suppliers was to *"see if they can shed any light on what she's up to now."* Ofcom considered that a builders' merchants would be an obvious source of information for anyone wanting to know where a local builder may be. As stated in head b) above, Ofcom considered that the subject matter of the programme meant that it was imperative that the programme makers were able to establish conclusively

where Mrs Polcwiartek was. When taking all these factors into account, Ofcom considered that the means of obtaining material was proportionate in the circumstances.

Ofcom considered the extent to which Mrs Polcwiartek had a legitimate expectation of privacy in relation to the information about her and her business that was disclosed to the builders' suppliers. Firstly, it was not clear to Ofcom what information Mrs Polcwiartek was referring to. However in light of the information that was available by the parties to the complaint, it appeared to Ofcom that the only information which was disclosed to the builder's suppliers (which was also broadcast in the programme) was the fact that Mrs Polcwiartek was a *"Chinese female builder"* called *"Yan Polcwiartek"* and the builder's supplier said that he thought that she had spoken about *"going to Shanghai"*. Ofcom considered that in her capacity as an employer in the building trade, Mrs Polcwiartek's name would have been known to people who were either working in the building trade or who, as customers, had contracted Mrs Polcwiartek to carry out building work. Therefore, Ofcom considered that disclosing Mrs Polcwiartek's name in relation to her work in the building trade, did not in Ofcom's view give rise to a legitimate expectation of privacy. Ofcom also noted that nothing of a personal or sensitive nature which would be considered private was discussed or revealed by either the programme makers or the builder's merchant.

Taking all the above factors into account, Ofcom considered that Mrs Polcwiartek did not have a legitimate expectation of privacy in relation to the information which was discussed and disclosed by the presenter and the builder's merchant respectively during the making of the programme.

Having found that Mrs Polcwiartek did not have a legitimate expectation of privacy in these circumstances, Ofcom did not go on to consider whether it was warranted.

d) Ofcom considered the complaint that Mrs Polcwiartek's privacy was unwarrantably infringed in the programme by the broadcast of her name, her company and her car.

Ofcom also took into consideration Practice 8.6 of the code which states that if the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

Ofcom first considered to what extent Mrs Polcwiartek had a legitimate expectation of privacy in relation to her name, company name and footage of her car being broadcast in the programme.

Ofcom noted that the programme referred to Mrs Polcwiartek's full name (Yan Polcwiartek) throughout the programme. Ofcom also noted that a passing reference to Mrs Polcwiartek's company, *"Allington Developments Limited"* was made in the programme. Ofcom also noted that the programme makers had found references to Allington Developments Limited through internet searches; on planning applications and that the company was registered at Companies House.

In relation to Mrs Polcwiartek's name and the name of her company being broadcast in the programme, Ofcom took into account that Mrs Polcwiartek's name was broadcast in connection with the work she had carried out in her

capacity as an employer in the building trade. Ofcom also took into account Channel Five's statement that Mrs Polcwiartek's name and that of her company were made available through "simple internet searches". Taking this into account, Ofcom considered that, in the absence of any further detailed information about Mrs Polcwiartek and her company which may in certain circumstances attract a legitimate expectation of privacy, nothing more was broadcast in the programme than what was already available in the public domain.

When considering whether Mrs Polcwiartek's had a legitimate expectation of privacy in relation to footage of her car being broadcast in the programme, Ofcom took into account that the footage of Mrs Polcwiartek's car that was broadcast was brief and had been filmed as Mrs Polcwiartek arrived at the interview with Mr Littlewood. Ofcom also noted that the number plate of the car was not visible in the broadcast. Ofcom considered that the footage of the car did not reveal anything private about Mrs Polcwiartek.

Taking all the above factors into account, Ofcom considered that Mrs Polcwiartek did not have a legitimate expectation of privacy in relation to her name, name of her company and footage of her car being broadcast in the programme.

Having found that Mrs Polcwiartek did not have a legitimate expectation of privacy in these circumstances, Ofcom did not go on to consider whether consent was required before broadcasting the material or whether it was warranted.

e) Ofcom considered the complaint that the information concerning Mrs Polcwiartek's business interests and the location of her properties was broadcast, even though this was not relevant to the programme.

Ofcom first considered the extent to which Mrs Polcwiartek had a legitimate expectation of privacy in relation to her business interests and locations of her properties being broadcast in the programme.

Ofcom noted the following in the programme:

Mr Littlewood: *"If I have a snoop around I might find out what Yan has been up to. I'm starting in Old Leake, Lincolnshire. This is it. What are you doing here Yan? Yan owned this property in 2003. And an old Victorian Chapel closed up, boarded up, but nothing's happened on it, why not*?

Neighbour: *Hi*

Mr Littlewood: *Luckily one of the neighbours is on hand to help. He remembers Yan, but he says he hasn't seen her since she sold the chapel six years ago*.

Neighbour: *Last I heard she'd moved, bought an ex-Lloyds bank at Wain…a place called Wainfleet. Did you hear anything about that*?

Mr Littlewood: *Don't know that one.*

Neighbour: *That's where she went from here."*

Ofcom also noted that later in this section, Mr Littlewood made the following comment:

> *"And it turns out her company owns a few properties in the nearby town as well. It's clear that this cowgirl is a shrewd business woman who's built herself a small property empire."*

Ofcom acknowledged Channel 5's statement that the addresses of the properties owned by Mrs Polcwiartek were accessible to the public through the Land Registry. Ofcom also assessed Mrs Polcwiartek's complaint that these properties were not relevant to the programme.

Ofcom considered that: whilst the properties may not have been directly relevant to the programme, details about them were already in the public domain through the Land Registry; and the programme simply disclosed the fact that Mrs Polcwiartek owned such properties. Further, Ofcom observed that the exact location of the properties could not be discerned from the programme and in the absence of any additional information about the properties; there was nothing private about disclosing the fact that she owned such properties.

Taking all these factors into account, Ofcom considered that Mrs Polcwiartek did not have a legitimate expectation of privacy that the programme would not broadcast Mrs Polcwiartek's business interests and location of the properties. Having found that Mrs Polcwiartek did not have a legitimate expectation of privacy in these circumstances, Ofcom did not go on to consider whether any infringement was warranted.

Accordingly, Ofcom has not upheld Mrs Polcwiartek's complaint of unfair treatment and unwarranted infringement of privacy in either the connection of obtaining material included in the programme or in the broadcast of the programme.

Not Upheld

Complaint by Mr Warren Skyers

Traffic Cops: Running on Empty, *BBC1, 23 June 2011*

Summary: Ofcom has not upheld Mr Warren Skyers' complaint of unwarranted infringement of privacy in connection with the obtaining of material included in the programme and in the programme as broadcast.

This series looks at the work of traffic police around the country. This edition included footage of Mr Warren Skyers being questioned and searched by police officers while handcuffed after being detained by the police who suspected him of "drink-driving" whilst riding a motorbike. Mr Skyers complained to Ofcom that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme and in the programme as broadcast.

Ofcom found that Mr Skyers had a legitimate expectation of privacy in the circumstances; however the public interest in filming and subsequently broadcasting footage showing the work of the police outweighed Mr Skyers' expectation of privacy. Therefore, Mr Skyers' privacy was not unwarrantably infringed in connection with the obtaining of material included in the programme or in the programme as broadcast.

Introduction

On 23 June 2011, the BBC broadcast an edition of the series *Traffic Cops* on BBC1. The series follows the work of traffic police around the country and the various situations that they deal with. This edition, entitled *Running on Empty*, included incidents of violent behaviour and road traffic offences.

One such incident involved the complainant, Mr Warren Skyers, who was spotted by a police officer at the shop counter of a petrol garage buying cigarettes. The footage included in the programme showed the police officer driving onto the garage forecourt and observing that Mr Skyers *"looks pissed as a fart"*. The police officer described in interview that the staff in the shop said they thought Mr Skyers had been drinking. The police officer said that he saw Mr Skyers sitting on a motorbike smoking and thought that his behaviour displayed nervousness, as *"no one with common sense"* would smoke on a petrol garage forecourt. The programme then showed the police officer driving away from the garage and then being overtaken by Mr Skyers. The police officer gave chase, but Mr Skyers did not stop.

During the pursuit, the police officer contacted the police control room to report the incident and described Mr Skyers as *"a mixed race male wearing a helmet"*. Eventually, Mr Skyers evaded the police officer by taking the motorbike "off-road" and riding over fields. The police officer was then shown back at the garage shop watching CCTV footage of Mr Skyers without his helmet on. The programme's narrator commented that a number of sightings of a man on a motorbike had been reported by other police patrols and that Mr Skyers was eventually detained after being found hiding in a back garden.

Mr Skyers, who had tried to disguise his appearance by wearing a hooded top over his motorbike jacket, was shown handcuffed and being questioned and searched by the police officers. The programme said that Mr Skyers maintained that it was a case of mistaken identity, but the police officer confirmed that he recognised Mr Skyers'

face from seeing him in the garage shop. The police officer was then shown in interview talking about Mr Skyers:

> *"He was a bit of a naughty boy back in the day. He then took the right path and the last we heard he was going around local schools speaking to youngsters how to stay out of local gangs and not get involved in crime and, obviously, be good at school and do your education. So, yeah, that's what he was doing. Clearly he's forgotten the message about practise what you preach"*.

Towards the end of the part of the programme featuring Mr Skyers, one of the police officers was heard to say *"Right Mr Skyers, let's go"*, while escorting Mr Skyers to the police car.

The programme concluded by stating that:

> *"The biker's cigarettes turned out to be rather expensive – a £300 fine was added to his late night shopping bill for drink-driving and failing to stop for police. His licence was also taken away for 12 months".*

Mr Skyers was referred to by his last name by a police officer in the programme and footage of his face was shown unobscured. Mr Skyers' voice was also heard in the programme.

Following the broadcast of the programme, Mr Skyers complained to Ofcom that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme and in the programme as broadcast**.**

Summary of the complaint and the broadcaster's response

a) Mr Skyers complained that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that he was not advised that the film was being made or that it would be shown.

   The BBC said in response that it believed that the making of the programme did not unwarrantably infringe Mr Skyers' privacy. It said that, while Mr Skyers was not told why he was being filmed by the programme makers, he was filmed in public areas or areas to which the public had ready access, for example a garage forecourt and a public thoroughfare, where he would have a legitimate expectation of privacy only in relation to behaviour which was in some way private.

   The BBC said that it believed there to be a strong public interest in programmes like *Traffic Cops* which showed the work of the police, and which relied in large part on the ability of the camera operator to film without interruption and without stopping filming in order to obtain consent. In this instance, the BBC said that Mr Skyers' arrest had happened relatively quickly and that the circumstances had offered no opportunity for the camera operator to explain his presence. It was also the case, the BBC said, that despite being aware of the camera, Mr Skyers had made no objection to the filming and asked no questions about it.

   The BBC said that Mr Skyers was shown to be breaking the law in failing to stop for the police and by driving while intoxicated and that any expectation of privacy he might have had would be significantly reduced by his actions.

The BBC said that if Ofcom considered that Mr Skyers' privacy had been infringed in the making of the programme, the BBC would argue that the public interest in this case outweighed his right to privacy. In particular, the BBC said that it would consider that the illegal actions for which he was subsequently found responsible satisfied the definition of "public interest" as including the protection of public health or safety and the disclosure of incompetence that affects the public.

b) Mr Skyers also complained that his privacy was unwarrantably infringed in the programme as broadcast in that the programme included footage of him and his face unobscured and disclosed his name without his permission being obtained. He said that the outcome of his court case for "drink-driving" was also revealed without permission. Mr Skyers said his face was shown unobscured, while other people's faces were obscured in the programme.

By way of background to his complaint, Mr Skyers said that his employers had seen the programme and, although he was not required to hold a driving licence for his work, he was facing disciplinary action for gross misconduct as a direct result of the programme. Mr Skyers said that he was likely to lose his job for something totally unrelated to his work. He also said that he had been punished by the court and that he accepted responsibility for "a foolish lapse", but that it was inappropriate to be further punished for entertainment purposes.

In response, the BBC said that there could be no expectation of privacy in respect of the outcome of a trial, which was in the public domain and that those convicted of offences could not expect anonymity in that connection. In relation to footage included in the programme which showed Mr Skyers' face, and in which his name was briefly mentioned by the arresting officer, the BBC said that any invasion of his privacy resulting from the broadcast of the programme was warranted by the strong public interest considerations involved.

The BBC said that Mr Skyers was found to have driven while intoxicated and had attempted to evade arrest, both of which actions constituted matters relating to the protection of public health and safety and affected the public. It said that there was a strong public interest in understanding the work of the police in managing such incidents. The BBC also said that Mr Skyers was not the only person featured in the programme whose face was shown unobscured and that other people shown included a man who had been arrested for "drink-driving". However, the two people's identities were obscured in the programme for reasons relating to their arrests and subsequent court cases.

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 connection with the obtaining of material included in, 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 Ofcom's view, the individual's right to privacy has to be balanced against the competing rights 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 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.

In reaching its decision, Ofcom considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and written submissions from both parties.

a) Ofcom considered the complaint that Mr Skyers' privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that he was not advised that the film was being made or that it would be shown.

   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 consent or be otherwise warranted.

   In considering whether or not Mr Skyers' privacy was unwarrantably infringed in the making of the programme, Ofcom first considered the extent to which he could have legitimately expected that he would not be filmed in the circumstances.

   Ofcom noted from the footage included in the programme that Mr Skyers was filmed being pursued by the police while riding his motorbike, and again after he had been detained by the police and was being questioned by them while being handcuffed. He was also filmed being put into the back of a police car. It appeared to Ofcom from the footage included in the programme that Mr Skyers had been filmed openly by the programme makers and that they had not concealed the fact that they were filming him and his involvement with the police. However, Ofcom also took the view that the programme makers had filmed Mr Skyers while he was in a vulnerable state and in a situation that was sensitive.

   Ofcom then assessed whether the programme makers had secured Mr Skyers' consent for the footage of him to be filmed. Ofcom noted from the BBC's submission that the events involving Mr Skyers had happened relatively quickly and had offered the programme makers no opportunity to inform him of their presence. Ofcom therefore considered that the programme makers did not obtain Mr Skyers' consent to film him.

   Taking these factors into account, and in particular the sensitive nature of the situation and the absence of consent, Ofcom considered that the filming of Mr Skyers in these circumstances was intrusive and that he would have had a legitimate expectation that he would not be filmed for a television programme.

   Ofcom went on to consider the broadcaster's competing right to freedom of expression and the need for broadcasters to have the freedom to gather information and film incidents in making programmes without undue interference. In this respect, Ofcom considered whether there was sufficient public interest to

justify the intrusion into Mr Skyers' privacy by filming him in the particular circumstances.

Ofcom considered that there is a significant public interest in the work of the police and similar organisations being featured and examined in broadcast programmes: for example, showing the varied and often difficult incidents experienced by police officers in their work; developing the public's understanding of the range of situations dealt with by the police, for example, "drink-driving" and failing to stop for the police; and drawing viewers' attention to the dangers and results of this type of behaviour.

In the particular circumstances of this case, Ofcom considered that the programme makers were not in a position to obtain Mr Skyers' prior consent to filming, but that there was a genuine and significant public interest in filming the material without having secured his prior consent. Ofcom takes the view that it would be undesirable, ordinarily, for programme makers to be unduly constrained in circumstances such as these, where they would be unable to obtain consent, because it could not be gained from those involved prior to filming taking place (for example, while an arrest is taking place).

Having taken into account all the factors above, Ofcom considered that, on balance, the broadcaster's right to freedom of expression and to receive information and ideas without interference, in these particular circumstances, outweighed Mr Skyers' expectation of privacy. Ofcom therefore found that there was no unwarranted infringement of Mr Skyers' privacy in connection with the obtaining of material for inclusion in the programme.

b) Ofcom considered the complaint that Mr Skyers' privacy was unwarrantably infringed in the programme as broadcast in that the programme included footage of him and his face unobscured and disclosed his name without his permission being obtained as was the outcome of his court case for "drink-driving".

In considering this 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.

In considering whether or not there had been an unwarranted infringement of Mr Skyers' privacy in the programme as broadcast, Ofcom first considered the extent to which Mr Skyers could have legitimately expected that the footage of his involvement with the police would not be broadcast without his consent.

In relation to Mr Skyers' complaint that the outcome of his court case for "drink-driving" was disclosed without his permission, Ofcom took the view that information relating to a criminal conviction and sentence is not a private matter. Court proceedings are a matter of public record and the public nature of the operation of the courts is an integral of the principle of open justice (unless formal reporting restrictions are in place). For this reason, Ofcom concluded that Mr Skyers did not have a legitimate expectation of privacy in relation to the disclosure in the broadcast of his criminal conviction and sentence. In relation to this particular piece of information, Ofcom considered that Mr Skyers' prior consent for it to be broadcast was not required., Having found that Mr Skyers did not have a legitimate expectation of privacy in relation to the outcome of his court case, it was not necessary for Ofcom to consider whether any intrusion into Mr Skyers' privacy was warranted.

With regard to Mr Skyers' complaint that his face was shown unobscured and his name was disclosed in the programme without his permission being obtained, Ofcom noted that some of the footage included in the programme had been obtained from CCTV footage taken of Mr Skyers inside the garage shop when he purchased cigarettes. The programme also included footage taken by the programme makers from the police car in pursuit of Mr Skyers on his motorbike and of him being been detained in handcuffs and being questioned by the police officers before being put into the back of a police car. Ofcom noted that this footage was unobscured and that Mr Skyers' face was clearly visible. During this footage, Ofcom noted that one of the police officers was heard to say in the programme *"Right Mr Skyers, let's go"* when escorting him to the police car. In these circumstances, Ofcom took the view that the footage of Mr Skyers showed him in a vulnerable state and in a sensitive situation.

Ofcom noted that at the end of the programme, the commentary confirmed that Mr Skyers was convicted as follows:

> *"The biker's cigarettes turned out to be rather expensive – a £300 fine was added to his late night shopping bill for drink-driving and failing to stop for police. His licence was also taken away for 12 months"*.

Ofcom also noted that Mr Skyers' last name was disclosed in the programme and that his face was shown unobscured and his voice was heard. Ofcom considered therefore that Mr Skyers was identified from the footage included in the programme.

Taking all the factors above into account, Ofcom considered that Mr Skyers had a legitimate expectation that footage of his involvement with the police would not be broadcast to a wider audience in a television programme without his consent.

Having found that Mr Skyers had a legitimate expectation of privacy in that the footage of him would not be broadcast to a wider audience, Ofcom assessed whether his consent had been secured before the footage was broadcast. Ofcom noted from the submission of the parties that there was no suggestion that Mr Skyers' consent was sought or obtained by the programme makers prior to broadcast. On this basis, Ofcom considered that Mr Skyers' consent to broadcast the footage of him and disclose his name prior to broadcast was not obtained.

Ofcom then went on to weigh the broadcaster's competing right to freedom of expression and the public interest in examining the work of the police and the audience's right to receive information and ideas without unnecessary interference. In this respect, Ofcom considered whether, in the circumstances there was a sufficient public interest to justify the intrusion into Mr Skyers' privacy.

Ofcom recognises that there is genuine public interest in broadcasting programmes of this nature. However, it should not be assumed by broadcasters that a public interest justification will exist in all circumstances for all broadcasts of a particular programme of this type. Broadcasters and programme makers must consider whether it is appropriate to identify individuals who feature in such programmes (e.g. someone who is questioned, detained, arrested, or charged). Regard should be given to, for instance, the actions of the individual, what details about the individual are to be featured, and any public interest justification for breaching any expectation of privacy the individual may have. For example, there may be difference between broadcasting the name and unobscured face of an individual who is subsequently found guilty of a criminal offence and broadcasting

details of someone who is subsequently not charged with a criminal offence, or someone who is acquitted, or someone who is interviewed as a possible witness. Broadcasters must also have regard to when a programme is broadcast and that they should periodically review repeat broadcasts of programmes such as *Traffic Cops* in this light. For instance, where at the time of the original broadcast, the public interest in revealing the identity, conviction and sentence of an individual may have outweighed the individual's expectation of privacy, the balancing exercise may produce a different result when undertaken some time later taking account all the relevant circumstances of when the programme is repeated.

In the circumstances of this particular complaint, Ofcom took account of: the difficulty the police officers experienced in trying to detain Mr Skyers, who had evaded capture by the police before being apprehended after attempting to disguise his appearance; the fact that Mr Skyers was convicted of criminal offences (a matter of public record), one of which – "drink-driving" – involved potential danger to himself and the public; and, this being the first broadcast of this episode after Mr Skyers' conviction.

As already explained above, Ofcom considered that there is a significant public interest in the work of the police and similar organisations being featured and examined in broadcast programmes. With particular focus on the circumstances of this case, Ofcom concluded that there is a significant public interest in showing the varied and often difficult incidents experienced by police officers in their work, developing the public's understanding of the range of situations dealt with by the police, for example, "drink-driving" and failing to stop for the police, and highlighting for viewers the dangers and results of this type of conduct.

Ofcom therefore concluded that the broadcaster's right to freedom of expression and to receive and impart information and ideas without interference in these particular circumstances, outweighed Mr Skyers' expectation of privacy in relation to the broadcast of unobscured footage of him and the disclosure of his last name in the programme without his consent. Ofcom found there was no unwarranted infringement of Mr Skyers' privacy in the programme as broadcast.

Accordingly, Ofcom has not upheld Mr Skyers' complaint of unwarranted infringement of privacy in connection with the obtaining of material included in the programme and in the programme as broadcast.

Not Upheld

Complaint by Mr Mark Lyons

Meridian Tonight (Regional News), ITV1, 10 June 2011

Summary: Ofcom has not upheld this complaint made by Mr Mark Lyons of unwarranted infringement of privacy in the broadcast of the programme.

One of the news items featured in the programme reported on a shooting that took place in Crawley in Sussex. The programme included footage that purported to show the outside of the house where the shooting was said to have occurred. However, the house that was actually shown in the programme belonged to the complainant, Mr Lyons. Mr Lyons had no connection to the shooting other than that he happened to live next door to where the shooting actually occurred. The broadcaster admitted that the programme had mistakenly broadcast footage of the wrong house.

Ofcom's decision is that Mr Lyons did not have a legitimate expectation of privacy in relation to his house being shown in the programme. The footage that was broadcast did not identify either directly or indirectly the location of Mr Lyons' home and there was nothing private revealed in the programme.

Introduction

On 10 June 2011, ITV1 broadcast an edition of its regional news programme, *Meridian Tonight*. One of the items reported that three men had been sentenced to *"a total of 65 years"* for conspiracy to murder. The item stated that the men had travelled to Crawley in Sussex and had shot the victim as he answered his front door. The item also included footage of the house where it said the shooting had taken place. Wide-angled footage of the house and the street was shown, in addition to close-up footage of the front of the house. No information regarding the location of the house or who lived there was given, other than the fact that it was in Crawley.

Following the broadcast of the programme, Mr Mark Lyons, whose house was included in the broadcast footage, complained to Ofcom his privacy was unwarrantably infringed in the programme as broadcast**.**

Summary of the complaint and the broadcaster's response

In summary, Mr Lyons complained that his privacy was unwarrantably infringed in the programme as broadcast in that his house was shown in the programme when the item had nothing to do with him.

In particular, Mr Lyons said that the report had featured his house and not the house where the shooting occurred, which was next door. Mr Lyons said that the report could be used to harm him by someone who saw the report and held a grudge against the victim. By way of background, Mr Lyons said that seeing the report caused anxiety to both himself and his family.

In response, ITV said that the showing Mr Lyons' house in the report, which lasted for roughly four seconds, was due to a misunderstanding about the scene of the crime that was made on the day of the report. ITV stated that a local paper had also made the same mistake when reporting the story.

ITV said that, following a conversation it had had with Mr Lyons' father after the broadcast, it agreed to remove the footage from the next news bulletin, its archive system, and its website. ITV added that Mr Lyons' father had asked for an on-air apology and correction to be broadcast, but had also requested that footage of his son's house not be used as part of it. ITV said it considered it impossible to make a meaningful correction without using the footage of Mr Lyons' house.

ITV said that, while it regretted any distress which may have arose from the mistake, it did not consider that the error led to an unwarranted infringement of Mr Lyons' privacy since no information about him was made public in the report. ITV stated that neither the house number nor the street name were shown or mentioned and that the registration numbers of the cars parked in the street were illegible. ITV said that there was nothing in the report to indicate exactly where the house was, and who lived in it or next to it. Therefore, in ITV's view, Mr Lyons' privacy was not infringed by the report.

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 unjust or unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes broadcast 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 and a transcript of the programme as broadcast, and both parties' written submissions.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcasters 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.

In considering Mr Lyons' complaint that his privacy was unwarrantably infringed in the programme as broadcast in that his house was shown in the programme when the item had nothing to do with him, Ofcom had regard to Practice 8.2 and Practice 8.6 of the Code. Practice 8.2 states that information which discloses the location of a person's home or family should not be revealed without permission, unless it is warranted. Practice 8.6 states that if the broadcast of a programme would infringe the privacy of a person then their consent should be obtained before the relevant material is broadcast, unless the infringement is warranted.

In considering whether or not Mr Lyons' privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which he had a legitimate expectation that the footage of the outside of his home would not be broadcast and disclosed to a wider audience without consent.

Ofcom noted that the programme's presenter stated that a shooting had taken place in *"Crawley"*. It also noted that the news item included wide-angled footage of the street where the shooting took place and close-up footage of Mr Lyons house which was shown for approximately four seconds. Ofcom observed that no street name, door number or anything else which could have identified the exact location of the house was shown in the footage. Ofcom also observed that the footage appeared to have been filmed on a public street, which was easily accessible to people passing by.

Ofcom acknowledged Mr Lyons' complaint that seeing footage of his home on the programme in relation to a shooting which had nothing to do with him had caused him and his family distress. Ofcom also acknowledged that ITV accepted that the footage shown of Mr Lyons house was broadcast by mistake and that it recognised that the footage shown was therefore inaccurate. However, Ofcom considered that the news item only stated that the shooting had occurred in *"Crawley"* and that the accompanying footage did not reveal any other information which either directly or indirectly identified the house as Mr Lyons' home or which disclosed a more accurate location, other than the fact that the house was in Crawley. In Ofcom's view, the footage included in the report showed nothing more than the outside of a house that did not display any discernable or identifiable features (other than those familiar with Mr Lyons' house, such as family or friends) and that there was no information in the broadcast footage that could be regarded as being either private or sensitive in nature. In these circumstances, Ofcom considered that the broadcast of the footage in the programme did not give rise to a legitimate expectation of privacy.

Therefore, taking all the factors above into account, Ofcom did not consider that Mr Lyons had a legitimate expectation of privacy in relation to broadcast of the footage of his house without consent. Given this conclusion, it was not necessary for Ofcom to consider whether Mr Lyons prior consent was required and whether any intrusion into Mr Lyons' privacy was warranted.

Accordingly, Ofcom's decision is that Mr Lyons' complaint of unwarranted infringement of privacy in the broadcast of the programme should not be upheld.

Other Programmes Not in Breach

Up to 3 January 2012

Programme	Broadcaster	Transmission Date	Categories
EastEnders	BBC 1	10/11/2011	Violence and dangerous behaviour
Programming	ATN Bangla UK	17/08/2011	Charity appeals
Programming	Iqra TV	22/08/2011	Charity appeals
The X Factor	ITV1	26/11/2011	Product placement

Complaints Assessed, Not Investigated

Between 20 December 2011 and 3 January 2012

This is a list of complaints that, after careful assessment, Ofcom has decided not to pursue because they did not raise issues warranting investigation.

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
606	BBC Radio 5 Live	10/12/2011	Violence and dangerous behaviour	1
2 Girls 1 Guy	Real Radio North West	n/a	Outside of remit / other	1
5 News at 5	Channel 5	21/12/2011	Outside of remit / other	1
8 Out of 10 Cats	Channel 4	23/12/2011	Drugs, smoking, solvents or alcohol	1
8 Out of 10 Cats	Channel 4	23/12/2011	Generally accepted standards	5
8 Out of 10 Cats	Channel 4	23/12/2011	Race discrimination/offence	1
Absolutely Fabulous	BBC 1	25/12/2011	Product placement	1
Advertisements	ITV1	n/a	Advertising scheduling	1
Alan Brazil Sports Breakfast	Talksport	22/12/2011	Race discrimination/offence	2
Alan Carr: Chatty Man	Channel 4	25/12/2011	Generally accepted standards	1
Alan Carr: Chatty Man	Channel 4	27/12/2011	Generally accepted standards	1
Alan Carr: Chatty Man	Channel 4	27/12/2011	Outside of remit / other	1
Animal Shelf	CITV	14/12/2011	Harm	1
Babestation Daytime	Get Lucky TV	19/12/2011	Sexual material	1
Bathstore's sponsorship of Modern Family	Sky	n/a	Generally accepted standards	1
BBC Ceefax	BBC Ceefax	n/a	Outside of remit / other	1
BBC News	BBC	25/12/2011	Outside of remit / other	1
BBC News	BBC	n/a	Outside of remit / other	1
BBC News	BBC 1	20/12/2011	Generally accepted standards	1
BBC News	BBC News Channel	27/12/2011	Generally accepted standards	1
BBC News	BBC News Channel	30/12/2011	Generally accepted standards	1
BBC News at Six	BBC 1	21/12/2011	Outside of remit / other	1
BBC News at Six	BBC 1	22/12/2011	Violence and dangerous behaviour	1
BBC News at Six	BBC 1	23/12/2011	Due accuracy	1
BBC News Channel	BBC News Channel	15/12/2011	Generally accepted standards	1
BBC Various	BBC	n/a	Outside of remit / commercial references	1
BBC World Service	BBC World Service	12/12/2011	Outside of remit / other	1
Big Fat Quiz of the Year 2011	Channel 4	27/12/2011	Generally accepted standards	2

Big Fat Quiz of the Year 2011	Channel 4	27/12/2011	Offensive language	1
Bill Bailey: Dandelion Mind	Channel 4	24/12/2011	Generally accepted standards	1
Black Mirror (trailer)	Channel 4	29/11/2011	Generally accepted standards	1
Black Mirror (trailer)	Channel 4	03/12/2011	Scheduling	1
Black Mirror: The National Anthem	Channel 4	04/12/2011	Advertising scheduling	1
Black Mirror: The National Anthem	Channel 4	04/12/2011	Generally accepted standards	163
Bluebird TV	The Adult Channel	13/12/2011	Nudity	1
Boulton and Co	Sky News	23/12/2011	Generally accepted standards	1
Breakfast	BBC 1	21/12/2011	Outside of remit / other	1
Britain's Favourite Christmas Songs	Channel 5	25/12/2011	Offensive language	1
British Comedy Awards 2011	Channel 4	16/12/2011	Generally accepted standards	1
Bruno	Channel 4	18/12/2011	Generally accepted standards	1
Capital Breakfast with Johnny and Lisa	Capital FM	24/11/2011	Scheduling	1
Carry on Christmas	Channel 5	27/12/2011	Generally accepted standards	1
Celebrity Juice	ITV2	20/12/2011	Age discrimination/offence	1
Celebrity Juice	ITV2	22/12/2011	Gender discrimination/offence	1
Channel 4 News	Channel 4	19/12/2011	Generally accepted standards	1
Coast	BBC 2	12/12/2011	Generally accepted standards	1
Coronation Street	ITV1	09/12/2011	Animal welfare	1
Coronation Street	ITV1	19/12/2011	Drugs, smoking, solvents or alcohol	1
Coronation Street	ITV1	19/12/2011	Generally accepted standards	1
Coronation Street	ITV1	19/12/2011	Outside of remit / other	1
Coronation Street	ITV1	26/12/2011	Materially misleading	1
Coronation Street	ITV1	n/a	Product placement	1
Crack Magic	4Music	08/12/2011	Harm	1
Daybreak	ITV1	15/12/2011	Generally accepted standards	1
Daybreak	ITV1	20/12/2011	Competitions	1
Daybreak	ITV1	23/12/2011	Materially misleading	1
Deal or No Deal	Channel 4	18/12/2011	Generally accepted standards	1
Dermot O'Leary	BBC Radio 2	10/12/2011	Drugs, smoking, solvents or alcohol	1
Desperate Scousewives	E4	19/12/2011	Materially misleading	1
Doctor Who	BBC 1	25/12/2011	Generally accepted standards	1
Don't Tell The Bride	Really	11/12/2011	Offensive language	1

Drivetime	Talksport	22/12/2011	Generally accepted standards	9
EastEnders	BBC 1	15/12/2011	Drugs, smoking, solvents or alcohol	1
EastEnders	BBC 1	19/12/2011	Offensive language	1
EastEnders	BBC 1	20/12/2011	Generally accepted standards	1
EastEnders	BBC 1	20/12/2011	Outside of remit / other	2
EastEnders	BBC 1	25/12/2011	Race discrimination/offence	1
EastEnders	BBC 1	29/12/2011	Materially misleading	1
EastEnders	BBC 1	01/01/2012	Generally accepted standards	2
EastEnders	BBC 1	01/01/2012	Outside of remit / other	1
Emmerdale	ITV1	25/12/2011	Generally accepted standards	1
Emmerdale	ITV1	25/12/2011	Materially misleading	2
Emmerdale	ITV1	29/12/2011	Race discrimination/offence	1
FA Cup 2nd Round	ITV1	04/12/2011	Generally accepted standards	1
Fast Freddie, the Widow and Me	ITV1	27/12/2011	Disability discrimination/offence	2
Free Running - Art In Motion	Eurosport 2	28/12/2011	Outside of remit / other	1
Frozen Planet	BBC 1	07/12/2011	Materially misleading	5
Gavin and Stacey	BBC 1	22/12/2011	Violence and dangerous behaviour	1
Gordon's Christmas Cookalong Live	Channel 4	25/12/2011	Drugs, smoking, solvents or alcohol	1
Hacker Time	CBBC	11/12/2011	Violence and dangerous behaviour	1
Hana's Helpline	Channel 5	20/12/2011	Offensive language	1
Hancock	Channel 5	18/12/2011	Advertising scheduling	1
Hancock	Channel 5	18/12/2011	Offensive language	1
Harry Potter and the Philosopher's Stone	ITV1	02/01/2012	Offensive language	1
Harveys' sponsorship of Coronation Street	ITV1	n/a	Generally accepted standards	1
Him and Her	BBC 3	18/12/2011	Religious/Beliefs discrimination/offence	1
Home for the Holidays	Channel 4	18/12/2011	Generally accepted standards	1
Home for the Holidays	Channel 4	23/12/2011	Generally accepted standards	1
Imagination Movers	Disney Junior	13/12/2011	Disability discrimination/offence	1
ITV News and Weather	ITV1	15/12/2011	Generally accepted standards	1
Jack and the Beanstalk	ITV2	19/12/2011	Sexual material	1
Jamie's Christmas with Bells On	Channel 4	24/12/2011	Offensive language	2
Jo Brand's Big Splash	Dave	19/12/2011	Offensive language	1
John Bishop's Britain	BBC 1	27/12/2011	Outside of remit / other	1
Jools' Annual	BBC 2	31/12/2011	Generally accepted	1

Hootenanny			standards	
Keys and Gray Show	Talksport	21/12/2012	Generally accepted standards	1
Lapland	BBC 1	24/12/2011	Generally accepted standards	2
Life's Too Short	BBC 2	17/11/2011	Generally accepted standards	9
Life's Too Short	BBC 2	23/11/2011	Generally accepted standards	2
Life's Too Short	BBC 2	24/11/2011	Generally accepted standards	19
Life's Too Short	BBC 2	01/12/2011	Generally accepted standards	1
Little England	ITV1	05/12/2011	Competitions	1
Live Four Nations Final	Sky Sports 2	19/11/2011	Race discrimination/offence	1
Looney Tunes Show	Cartoon Network	11/12/2011	Violence and dangerous behaviour	1
Loose Women	ITV1	20/12/2011	Sexual material	1
Lorraine	ITV1	20/12/2011	Offensive language	1
Lost Christmas	BBC 1	18/12/2011	Animal welfare	1
May the Best House Win	ITV1	15/12/2011	Offensive language	1
Michael Buble: Home for Christmas	ITV1	18/12/2011	Promotion of products/services	1
Michael McIntyre's Comedy Roadshow	BBC 1	25/12/2011	Generally accepted standards	1
Midsomer Murders	ITV1	19/12/2011	Violence and dangerous behaviour	1
Midsomer Murders	ITV1	28/12/2011	Generally accepted standards	1
Miss Arab London 2011	Al Alamia TV	29/10/2011	Outside of remit / other	1
My Big Fat Gypsy Christmas	Channel 4	13/12/2011	Sexual orientation discrimination/offence	3
My Transsexual Summer	Channel 4	08/11/2011	Due accuracy	1
My Transsexual Summer	Channel 4	08/11/2011	Transgender discrimination/offence	1
My Transsexual Summer	Channel 4	15/11/2011	Harm	1
News, Sport, Weather	Sky News	11/12/2011	Due impartiality/bias	1
Oh No It Isn't. . . The News Quiz	BBC Radio 4	31/12/2011	Offensive language	1
Only Fools and Horses	BBC 1	14/12/2011	Offensive language	1
Only Fools and Horses	BBC 1	30/12/2011	Offensive language	1
Pantomines	ITV2	20/12/2011	Generally accepted standards	1
Poirot	ITV1	26/12/2011	Advertising minutage	1
Press Preview	Sky News	29/12/2011	Gender discrimination/offence	1
Promotion for Digital Switchover	Various TV	n/a	Materially misleading	1
Promotion for sports coverage	BBC 1	28/12/2011	Materially misleading	1
Promotion for TV Licensing	BBC	n/a	Outside of remit / other	1

Rastamouse	CBeebies	22/12/2011	Generally accepted standards	1
Regional News and Weather	BBC 1	21/12/2011	Outside of remit / other	1
River Cottage	Channel 4	02/01/2012	Animal welfare	1
Road Wars	Pick TV	24/12/2011	Offensive language	1
Scrooge	Channel 5	24/12/2011	Outside of remit / other	1
Shipwrecked: The Island	Channel 4	18/12/2011	Gender discrimination/offence	1
Sky News	Sky News	30/12/2011	Due accuracy	1
Sky Sports Goals on Sunday	Sky Sports 1	18/12/2011	Voting	4
Sky World News	Sky News	14/12/2011	Generally accepted standards	1
Sorority Girls	E4	12/12/2011	Generally accepted standards	1
Sports Personality of the Year 2011	BBC 1	22/12/2011	Gender discrimination/offence	1
Stand by Me	5*	27/12/2011	Offensive language	1
Stella (trailer)	Sky1	18/12/2011	Scheduling	1
Steve Allen	LBC 97.3FM	09/12/2011	Generally accepted standards	1
Steve Berry Show	Talksport	31/10/2011	Crime	1
Strictly Come Dancing	BBC 1	17/12/2011	Voting	1
Strictly Come Dancing	BBC 1	n/a	Generally accepted standards	2
Strictly Come Dancing: It Takes Two	BBC 2	09/12/2011	Sexual orientation discrimination/offence	1
Studio Al Alamia and Follow Me programs	Al Alamia TV	n/a	Outside of remit / other	1
Sure's sponsorship of Sky Sports News	Sky Sports News	n/a	Materially misleading	1
Susan Boyle: An Unlikely Superstar	ITV1	27/12/2011	Generally accepted standards	1
The Channel 4 Mash Up	Channel 4	02/01/2012	Generally accepted standards	5
The Devil's Own	Sky1	17/12/2011	Generally accepted standards	1
The Film Programme	BBC Radio 4	15/12/2011	Offensive language	1
The Food Hospital	Channel 4	13/12/2011	Due accuracy	1
The Hits Radio	The Hits Radio	18/12/2011	Outside of remit / other	1
The Inbetweeners Top Ten Moments	Channel 4	23/12/2011	Animal welfare	1
The Jonathan Ross Show	ITV1	23/12/2011	Outside of remit / other	6
The Nativity	BBC 1	25/12/2011	Offensive language	1
The One Show	BBC 1	23/12/2011	Generally accepted standards	2
The Royal Bodyguard	BBC 1	26/12/2011	Disability discrimination/offence	1
The Royal Bodyguard	BBC 1	26/12/2011	Product placement	1
The Ultimate Fishing Show	Quest	19/12/2011	Animal welfare	1
The Untold Tommy	Channel 4	28/12/2011	Generally accepted	1

Cooper			standards	
The West Country Tonight	ITV1 West Country	22/12/2011	Race discrimination/offence	1
The World's Strangest UFO Stories	Discovery Science	23/12/2011	Generally accepted standards	1
The Wright Stuff	Channel 5	14/12/2011	Generally accepted standards	1
This is England '88	Channel 4	15/12/2011	Generally accepted standards	1
Top of the Pops 2	BBC 2	24/12/2011	Outside of remit / other	1
Trailer for SPL	Sky Sports 2	24/12/2011	Generally accepted standards	1
Trailer for Gordon's Christmas Cookalong Live	Channel 4	15/12/2011	Generally accepted standards	1
Trailer for Gordon's Christmas Cookalong Live	Channel 4	16/12/2011	Generally accepted standards	1
Trailer for Gordon's Christmas Cookalong Live	Channel 4	19/12/2011	Generally accepted standards	1
Trailer for Gordon's Christmas Cookalong Live	Channel 4	20/12/2011	Generally accepted standards	1
Trailer for Gordon's Christmas Cookalong Live	Channel 4	22/12/2011	Generally accepted standards	1
Trailer for Gordon's Christmas Cookalong Live	Channel 4	n/a	Generally accepted standards	1
Trailer for Gordon's Christmas Cookalong Live	More 4	17/12/2011	Generally accepted standards	1
Various	Various TV and Radio	20/12/2011	Outside of remit / encouraging antisocial behaviour	1
Various TV programmes	BBC	n/a	Outside of remit / other	1
Vicky Cristina Barcelona	Channel 4	10/12/2011	Generally accepted standards	1
Westlife: For the Last Time	ITV1	31/12/2011	Offensive language	1
Who Wants to be a Millionaire	ITV1	19/12/2011	Competitions	1
Wretch 32 "Traktor"	Channel AKA	02/12/2011	Offensive language	1
Wonga.com's sponsorship of Channel 5 drama	Channel 5	n/a	Age discrimination/offence	1
Wonga.com's sponsorship of Channel 5 drama	Channel 5	n/a	Generally accepted standards	1
Wonga.com's sponsorship of Channel 5 drama	Channel 5	n/a	Sponsorship	1
World Darts Champion 2012	Sky Sports 2	22/12/2011	Gender discrimination/offence	1
World's Greatest Bodyshock	E4	17/12/2011	Generally accepted standards	1

Would I Lie To You?	Dave	14/12/2011	Offensive language	1
Young Dracula	CBBC	06/12/2011	Scheduling	1
You've Been Framed!	ITV1	11/12/2011	Animal welfare	1
You've Been Framed!	ITV1	27/12/2011	Generally accepted standards	4
Zaika He Zaika	DM Digital	12/11/2011	Promotion of products/services	1

Investigations List

If Ofcom considers that a broadcast may have breached its codes, it will start an investigation.

Here is an alphabetical list of new investigations launched between 5 and 18 January 2012.

Programme	Broadcaster	Transmission Date
Angie Greaves	Magic	7 December 2011
Bits n Bytes	Channel S	10 December 2011
Dispatches: Landlords from Hell	Channel 4	5 December 2011
Martin Archer	Kiss 100	7 December 2011
Political Advertising	NTV	27 November 2011
Sister Ruby	Radio Asian Fever	17 August 2011
Sky News	Sky News Channel	25 November 2011
STV News at Six (Glasgow)	STV	28 November 2011
Vampire Diaries	TV6	18 November 2011

It is important to note that an investigation by Ofcom does not necessarily mean the broadcaster has done anything wrong. Not all investigations result in breaches of the Codes being recorded.

For more information about how Ofcom assesses complaints and conducts investigations go to: http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/standards/.

For fairness and privacy complaints go to: http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/fairness/.