

Ofcom Broadcast Bulletin

**Issue number 216
22 October 2012**

Contents

Introduction	4
--------------	---

Standards cases

Decision

Breach of Licence Condition 17(1) Aden Live Licence No. TLCS 1498 (“the Licence”)	5
--------------------------------------------------------------------------------------------------------------	---

In Breach

The Buzz <i>Phonic FM, 10 August 2012, 11:55</i>	7
Thousand Pound Thursday competition <i>Northsound 2, Clyde 2, Tay AM, Forth 2, and Westsound, various dates</i>	10
Sunday Brunch <i>Channel 4, 12 August 2012, 10:00</i>	13
The Hotel Inspector <i>Channel 5, 5 July 2012, 21:00</i>	19
Programming <i>Takbeer TV, 9 June 2012, 11:35</i>	23
Provision of recording <i>Sky1, 8 July 2012, 20:00</i>	26
 <u>Resolved</u>	
The Wright Stuff <i>Channel 5, 17 August 2012, 09:15</i>	28
Got to Dance <i>Sky1, 4 March 2012, 18:00</i>	30
Prometheus promotion <i>Channel 4, 29 April 2012, 21:10</i>	33

Advertising Scheduling cases

In Breach

Breach findings table <i>Code on the Scheduling of Television Advertising compliance reports</i>	38
------------------------------------------------------------------------------------------------------------	----

Resolved

Advertising minutage

Dave, 19 June 2012, 12:00 39

Resolved findings table

Code on the Scheduling of Television Advertising compliance reports 41

Broadcast Licence Condition cases

In Breach

Breach of licence condition

OnFM, community radio service for Hammersmith, west London, 7 September 2012 to present 42

Fairness and Privacy cases

Not Upheld

Complaint by Mr Harbinder Panesar on his own behalf and on behalf of Mrs Caroline Panesar, Miss Anysha Panesar and Mr and Mrs Panesar's son (a minor)

X Ray, BBC1 Wales, 13 and 20 February 2012 45

Complaint by Mr Andrew Pilley

Radio 5 Live Investigates, Radio 5 Live, 22 April 2012 66

Complaint by Miss Csilla Patachich

Scanning & Konsekvens (Truth and Consequences), TV3, 16 November 2011 82

Complaint by Ms Abegail Williams

Befarmaeed Shaam, Manoto 1, 27 December 2011 98

Complaint by Dr Waney Squier

Silent Witness, BBC1, 15 and 16 April 2012 112

Other Programmes Not in Breach 120

Complaints Assessed, Not Investigated 121

Investigations List 126

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 objectives¹, 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 advertising².

The BCAP Code is at:

<http://www.bcap.org.uk/Advertising-Codes/Broadcast-HTML.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

Standards cases

Decision

Breach of Licence Condition 17(1) Aden Live Licence No. TLCS 1498 (“the Licence”)

Introduction

Dama (Liverpool) Limited (“Dama”) holds the licence for Aden Live, a general entertainment service broadcast in Arabic.

On 8 May 2012, Ofcom imposed statutory sanctions on Dama for serious breaches of the Code¹. In the Sanction Decision, Ofcom stated that:

94. “...in the absence of representations relating to the Preliminary View, Ofcom is directing the Licensee to provide information to Ofcom (details of which will be determined by Ofcom), including about the Licensee’s compliance procedures and arrangements in order to satisfy Ofcom that they are appropriate, and is asking the Licensee to attend a meeting with Ofcom to explain and discuss the same.”

Ofcom wrote to Dama on 25 July 2012, enclosing a Direction to provide specified information to Ofcom no later than Friday 10 August 2012. Ofcom requires this information in order to determine whether Dama is providing the Aden Live service in accordance with section 362(2) of the Communications Act 2003, whether it falls under UK jurisdiction for the purposes of directive 2010/13/EU (the Audiovisual Media Services Directive) and whether it is complying with its obligations as a licensee.

Under Condition 17(1) of the Licence, Dama is obliged to comply with any direction given by Ofcom in respect of any matter, subject or thing for which a direction is, in the opinion of Ofcom, appropriate, having regard to any duties which are or may be imposed on it, or on Dama as the Licensee, by or under the relevant UK legislation, international obligations or codes and guidance.

Dama has not complied with the Direction.

Consequently, on 19 September 2012, Ofcom provided to Dama its Preliminary View that Dama is in breach of Condition 17(1) of the Licence and that this is a serious breach of Condition 17(1). Dama was given 10 working days to provide any representations it wished to make in response to this provisional view. Dama did not provide any representations.

¹ Sanction Decision 75(12): http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/Aden_Live_sanctions_decisio1.pdf.

In the Sanction Decision, Ofcom decided: (1) to impose on Dama a financial penalty of £10,000; and (2) to direct Dama to broadcast a statement of Ofcom’s findings.

Decision

Dama has failed to comply with a direction to provide specified information to Ofcom by no later than Friday 10 August 2012. Dama is therefore in breach of Condition 17(1) of the Licence.

This is a serious breach of Licence Condition 17(1) because, without the information, Ofcom cannot carry out its statutory duties to assess whether Dama is providing the Aden Live service in accordance with section 362(2) of the Communications Act 2003, whether it falls under UK jurisdiction for the purposes of directive 2010/13/EU (the Audiovisual Media Services Directive) and whether it is complying with its obligations as a licensee.

The Licensee is put on notice that Ofcom is considering the imposition of a statutory sanction in this case which may include revocation of the Licence.

Breach of Licence Condition 17(1)

In Breach

The Buzz

Phonic FM, 10 August 2012, 11:55

Introduction

Phonic FM is a community radio station based in Exeter, playing a broad range of music and speech. The licence for this service is held by Exeter Community Radio Ltd ("the Licensee").

A complainant alerted Ofcom to the use of offensive language in the music track *Road To Joy* by the band Bright Eyes broadcast at approximately 11:55am on a Friday during the school summer holidays.

On assessing the material Ofcom noted the appearance of the word "fuck" in the following lyric:

"Well I could have been a famous singer if I had someone else's voice, but failure's always sounded better, let's fuck it up boys, make some noise".

Ofcom considered the material raised issues warranting investigation under Rules 1.14 and 2.3 of the Code:

Rule 1.14: "The most offensive language must not be broadcast...when children are particularly likely to be listening (in the case of radio)."

Rule 2.3: "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context...".

Ofcom therefore requested comments from the Licensee about how the programme material complied with these rules.

Response

The Licensee admitted that it had breached the Code on this occasion and apologised for any offence that the offensive language may have caused to listener. It confirmed that presenters would receive additional training to make them more aware of the compliance framework regarding offensive lyrics and language,

The Licensee said that most presenters on Phonic FM have "no access to material with 'radio edits' and therefore have to produce their own edits for broadcasting". Further, the Licensee said that an increasing amount of urban, drum and bass, reggae and contemporary rock contains language which could be considered offensive, and is commonly released without including language warnings. The station said that all its presenters are volunteers mostly operating without producers, and they are constantly reminded to be vigilant about the risk of broadcasting offensive language at times when children are particularly likely to be listening.

The Licensee said that on this occasion the presenter was not the regular host of the show, and usually presented in the evening, but was standing in at fairly short notice. It said that while presenters have specific instructions about the course of action to take in the event of a breach of station rules, on this occasion, coming to the end of

the show in question, the presenter had no chance to redress the offence by offering an apology.

Decision

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, including that “persons under the age of eighteen are protected” and 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 objectives are reflected in Sections One and Two of the Code.

Rule 1.14

Rule 1.14 states that the most offensive language must not be broadcast on radio when children are particularly likely to be listening. Ofcom research on offensive language¹ clearly notes that the word “fuck” and other variations of this word are considered by audiences to be among the most offensive language.

The Code states that the phrase “when children are particularly likely to be listening” particularly refers to “the school run and breakfast time, but might include other times”. Ofcom’s guidance on offensive language in radio² notes that:

“For the purpose of determining when children are particularly likely to be listening, Ofcom will take account of all relevant information available to it. However, based on Ofcom’s analysis of audience listening data, and previous Ofcom decisions, radio broadcasters should have particular regard to broadcasting content at the following times:...

- between 06:00 and 19:00 at weekends all year around, and in addition, during the same times from Monday to Fridays during school holidays”.

The broadcast of the words “let’s fuck it up boys” in a music track at 11:55am on a Friday during school holidays was therefore in breach of Rule 1.14 of the Code.

Rule 2.3

Rule 2.3 requires broadcasters to ensure that the broadcast of potentially offensive material must be justified by the context. Ofcom therefore considered first whether the language in this song was potentially offensive; and, if so, whether the offence was justified by the context. Context includes for example: the editorial content of the programme, the service on which it is broadcast, the time of broadcast and the likely size and composition of the potential audience and the likely expectation of the audience.

As stated above, Ofcom’s research on offensive language indicates that the word “fuck” is considered by audiences to be among the most offensive language.

¹ Audience attitudes towards offensive language on television and radio, August 2010 (<http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf>)

² Ofcom Guidance, Offensive language on radio, December 2011 (<http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/offensive-language.pdf>)

Therefore, Ofcom considered that the use of the word clearly had the potential to cause offence to the audience.

Ofcom went on to assess the context. We note that our guidance on offensive language in radio states (regarding Rule 2.3) that: “Ofcom’s 2010 audience research found that in general, listeners do not expect to hear strong language during the day on radio.... In reaching any decision about compliance with the Code, Ofcom will take into account the likely audience expectations of a particular radio station at the time of broadcast.”

In our opinion the majority of listeners to a community radio station playing a broad range of music and speech at this time of day do not expect programmes to contain the most offensive language. As a result the broadcast of this language was not justified by the context.

The broadcast of this language was therefore in breach of Rule 2.3 of the Code.

Breaches of Rules 1.14 and 2.3

In Breach

Thousand Pound Thursday competition

Northsound 2, Clyde 2, Tay AM, Forth 2, and Westsound, various dates

Introduction

Northsound 2, Clyde 2, Tay AM, Forth 2 and Westsound are local commercial radio stations that broadcast across Scotland. They are owned by Bauer Media Group ("Bauer Media").

Since February 2012, each station has invited listeners to enter the weekly "Thousand Pound Thursday" competition during both local programming and broadcasts that are networked across the five stations.

Listeners were asked to submit their answer to a multiple choice question via premium rate text message charged at £1 plus users' standard network rate. A winner was selected at random from a pool of all correct entrants after each week's competition had closed.

The £1,000 prize was delivered in person by one of the presenters of the stations' networked programming. This was often referred to by the presenter when the competition was being promoted on air, for example:

"Tell us where you're texting from and I could be knocking on your door with a grand in my hand tonight"

Ofcom received a complaint from a Northsound 2 listener who said that the competition's promotion made no reference to the fact that it was run over a network of five stations. The complainant said that this and the delivery method of the prize gave the false impression that the competition could only be entered by listeners in the local area of each particular station.

Ofcom considered the material raised issues warranting investigation under Rule 2.15 of the Code.

Rule 2.15 "Broadcasters must draw up rules for a broadcast competition or vote. These must be clear and appropriately made known. In particular, significant conditions that may affect a viewer's or listener's decision to participate must be stated at the time an invitation.

Ofcom therefore asked Bauer Media for its comments on how the competition's promotion complied with this rule.

Response

Bauer Media said that it follows strict compliance procedures when setting up and running text competitions. It explained that this particular competition was the first network competition across its AM stations in Scotland and as such, human error led to its normal compliance procedures not being adhered to.

Bauer Media said that when planning the competition, it contacted its text system supplier for advice on compliance. Bauer Media stated that the text system supplier

had advised that it did not need to state on air that the competition was Scotland-wide and therefore, the competition went to air without this specific information.

Bauer Media said this was “an isolated incident in an otherwise compliant operation” and that at no time did it intend to mislead listeners. It added that the presenter responsible for delivering the prize does not disguise the fact that his particular show broadcasts over a number of stations. Bauer Media therefore maintained that listeners would not be under the impression that the presenter was local to any particular station.

However, Bauer Media acknowledged that it could be misinterpreted that the competition is local to each station. It said that, to avoid any further confusion, it has updated all competition promotions to include references to the fact they are conducted across a number of networked stations.

Bauer Media reiterated that it was never its intention to hide the number of stations which ran this competition and added that it was conducted fairly.

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 standards objectives, including “that generally accepted standards are applied to the contents of ... radio services so as to provide adequate protection for members of the public from the inclusion in such services of ... harmful material.”

This is reflected in part by Rule 2.15 of the Code, which requires, among other things, that broadcasters “draw up rules for a broadcast competition”, “make them...clear and appropriately made known” and, in particular, state “significant conditions that may affect a...listener's decision to participate...at the time an invitation to participate is broadcast.”

For competitions to be run fairly, listeners should be given sufficient information to enable them to decide whether or not to participate. When run simultaneously on various local services, competitions can result in participation being spread wider (i.e. beyond the local area) than might be obvious to listeners in any one location.

Ofcom's Guidance to Rule 2.15 makes clear that where a competition is run simultaneously across a number of stations, e.g. a radio network, and the main prize is not awarded by each local/regional service, we would normally expect that it has to be made clear that other services are participating. The guidance also advises that this should be done both on air and in any written rules, whenever the competition or its results are run.

In this case, Ofcom considered the fact that the competitions were being run across the network of five stations to be a significant condition that may have affected listeners' decisions to participate. Without any information about the competitions being run over the five stations, listeners would have entered unaware that they were competing against a significantly larger number of people and therefore would have had a lower chance of being selected to win the prize than they were likely to have anticipated.

Furthermore, stating on air that the presenter would hand deliver the prize was likely to have unintentionally added to the impression that the competition was being conducted locally.

Ofcom accepted that Bauer Media did not seek to mislead its audience. However, Ofcom was particularly concerned that Bauer Media had sought and acted upon compliance advice from its text system supplier which directly contradicted Ofcom's guidance to Rule 2.15. Responsibility for complying with Ofcom's codes is the responsibility of the licensee. Furthermore, we also noted that listeners paid a premium rate to enter these competitions. Ofcom has made it abundantly clear on a number of occasions that it expects licensees to exercise particular caution when inviting their audiences to pay premium rates to participate in broadcast competitions.

The promotion of these broadcast competitions on all five stations was in breach of Rule 2.15.

Breaches of Rule 2.15

In Breach

Sunday Brunch

Channel 4, 12 August 2012, 10:00

Introduction

Sunday Brunch is a two and a half hour lifestyle magazine programme presented by Tim Lovejoy and Simon Rimmer. The series features a range of celebrity guests, recipe demonstrations and interviews as well as a number of other lifestyle oriented items.

This particular episode contained an interview with three British Military Fitness (“BMF”) representatives which lasted approximately six and a half minutes.¹ The item covered: the success of BMF since it launched in 1999; how it started; why people attend the classes; and the level of fitness required. During the item two of the BMF representatives and both presenters wore t-shirts that clearly featured the British Military Fitness logo. The third BMF representative wore a t-shirt with a hi-visibility bib and therefore no branding could be seen on her t-shirt.

Ofcom noted the following exchange during the item:

Presenter: *“British Military Fitness which is an amazing success story isn’t it?!”*

BMF representative: *“Yeah, we started out in ‘99 and we had three people come to the first session – within two years we had 2,000 members and now we’ve got over 20,000 members training in over 120 parks across the UK. Amazingly 75 per cent of those have come from word of mouth referrals because we find once people have tried it, they love it so much they want to bring all their friends down.”*

Shortly after, Ofcom noted the following exchange:

Presenter: *“Is it expensive?”*

BMF representative: *“No it’s not. We offer great value. Prices start from around 31 pounds a month but we’ve got a range of membership options.”*

Presenter: *“And how many times can you do it for that? As many times as –”*

BMF representative: *“We have unlimited options – so you can go any park, train as often as you want. But anyone can come down for a free trial at any point without obligation, and we’ve actually put together a special offer for Sunday Brunch viewers that they can find via your website.”*

¹ British Military Fitness provides outdoor fitness classes led by former members of the armed forces, who hold military or civilian fitness qualifications.

The BMF representatives then demonstrated four of the exercises and the two presenters attempted them.

At the end of the item, one of the presenters stated, “Now you can go to our *Sunday Brunch Scrapbook* to find out more about *British Military Fitness*”, which was accompanied by an on-screen graphic which stated, “channel4.com/sundaybrunch”.²

A viewer was concerned that the BMF item appeared to be an advertisement for the service.

Channel 4 (or “the Licensee”) confirmed to Ofcom that neither it, the programme producer, nor any person connected with either³, received payment or other valuable consideration for the inclusion of the references to BMF during the programme, and that therefore the references had not been subject to any product placement arrangement.

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

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

Rule 9.5: “No undue prominence may be given in programming to a product, service or trade mark. 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 asked the Licensee for its comments as to how the material detailed above complied with Rules 9.4 and 9.5.

Response

Channel 4 stated that, prior to the start of the series, arrangements were made between Channel 4 Commissioning, the Legal and Compliance team and the production company to ensure that team members were briefed on legal and compliance issues arising from the Code and the Channel 4 Live Programme protocol.

Channel 4 explained that in March 2012, the Legal and Compliance team gave a presentation to members of the production team and gave a separate presentation to the two presenters. As *Sunday Brunch* is a new series for Channel 4, in addition to an on-going Commissioning presence, Channel 4 programme lawyers attend non-broadcast studio rehearsals to understand where legal and compliance issues might arise and how best to deal with them. In the week leading up to the broadcast of an episode of *Sunday Brunch*, the Commissioning Editor, the production company and where necessary, the programme lawyer, liaise to discuss planned items and guests.

² The Scrapbook is part of Channel 4’s website which allows users to store details of recipes, stockists and expert advice related to items covered in its lifestyle programmes including *Sunday Brunch*.

³ “Connected person” is defined in Part 1 of Schedule 2 of the Broadcasting Act 1990.

The Licensee said that a draft script is circulated for comment and any specific elements of each show that may require legal and compliance advice are discussed. Since the series began, a Commissioning Editor has been present in the studio for all episodes. In addition, a programme lawyer attended the studio for the first four weeks of live recordings, and subsequently has viewed every live broadcast on transmission and has been available on the telephone to give advice where necessary.

Channel 4 said that the BMF item was referred to Channel 4 Commissioning and the Legal and Compliance team for specific advice. It was decided that there was editorial justification for an item on BMF. Further, it was agreed that the BMF guests could wear their t-shirts as the branding was not particularly prominent but as long as care was taken to ensure that there were no lingering, close-up shots of the branding and that verbal references to BMF were kept to a minimum.

Channel 4 said that it had considered that a discussion about what is involved in the BMF classes generally and the demonstration of the exercises was editorially justified. However, it accepted that the references to the “*special offer*” and “*free trials*” could be construed as promotional and the two presenters wearing BMF t-shirts could give BMF undue prominence beyond what may be editorially justified. The Licensee stated that “despite this, there were processes in place to try to ensure compliance with the Code and that due to circumstances, this instance fell outside the usual compliant standards” of this series.

The Licensee continued that with regards to the presenters wearing BMF t-shirts, it considered it was justifiable that they would be wearing some form of appropriate attire for exercising as they were going to be attempting some of the exercises. However, it was intended that they would be wearing a bib (like the one the female BMF representative was wearing) which would have obscured the BMF branding completely. Channel 4 said that due to the heat in the studio, the presenters took off their bibs just before the item began. The Executive Producer immediately recognised the potential for the BMF branding on the t-shirts to be given undue prominence and instructed the cameras to avoid, as much as possible, showing the branding. The presenters were also instructed not to make any more verbal references to BMF. The Commissioning Editor who was present was also in touch with the programme lawyer who agreed with the advice in the circumstances. Channel 4 said that this instruction was “predominantly adhered to with only one further verbal mention to conclude the item.” With regards to the BMF representatives wearing BMF t-shirts, Channel 4 submitted that as they were going to be doing an exercise demonstration it was editorially justified to allow them to wear the uniform they would normally wear while doing the exercises – much in the same way that any sportsperson would wear appropriate attire.

With regards to the reference made by one of the BMF guests to a “*special offer for Sunday Brunch viewers*”, Channel 4 said that the reference was referred up to the Legal and Compliance team prior to broadcast and the advice given was that it would be too promotional to make a specific mention to any offer, although viewers could be invited to the Channel 4 website for more information about BMF. Prior to the programme going to air, in accordance with production protocol, all of the guests were briefed by a member of the production team about appearing on television (e.g. not using offensive language) and specifically the BMF representatives were briefed about not being allowed to promote BMF and were advised that they were not allowed to mention the offer. However, one of the BMF representatives proceeded to mention the offer in the live broadcast. Channel 4 submitted that one of the presenters, Tim Lovejoy immediately moved the discussion on by asking another BMF representative “*Were you in the forces?*” This action was in accordance with

Channel 4 Live Programme protocol and reflected the briefings that had been given to the presenters about what to do in such a situation.

The Licensee stated that after the broadcast, the Commissioning Editor discussed events internally with the Channel 4 Head of Formats and a meeting was held with the production company. It was accepted by all that it was unfortunate that the one of the BMF representatives had gone against the briefing given and that the presenters removed their bibs. Although advice was sought and given specifically about the item prior to broadcast, it was agreed that the process for signing off items on the series would be reviewed and that steps should be taken to ensure a similar situation does not arise in the future. These measures include compliance refreshers for the production team, including briefing guests and also the presenters on the importance of compliance, as well as a more thorough to clearing items appearing on the programme.

Channel 4 said that it accepted and regretted that there were instances in the episode which may have crossed the line in terms of undue prominence and promotional references. However, it considered that reasonable and appropriate measures were taken at the time to try to avoid such lines being crosses, and that it is clear that Channel 4 and the production company take these issues seriously.

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 reflected in, among other rules, Rules 9.4 and 9.5 of the Code, which prohibit products, services or trade marks being promoted or given undue prominence in programming.

There is often sufficient editorial justification for references to products and services in programmes to avoid concerns arising under Section Nine of the Code. However, the more prominent the references to the product or service within a programme, the greater the risk that they 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 broadcaster’s responsibility to ensure that any references to commercial products or services are appropriately limited so as not to become unduly prominent.

In this case, Ofcom accepted that there was editorial justification for an item on BMF during this magazine-style programme. Ofcom also acknowledged that Channel 4 had implemented a range of pre-transmission compliance measures to avoid references to BMF being promotional and/or unduly prominent. These included

Channel 4's programme lawyers being present at the programme rehearsal, having oversight of the script and providing compliance briefings to the presenters and guests, including specifically informing the BMF representatives not to promote the company and not to refer to the special offer. It was unfortunate that despite these procedures the guests and presenters did not appear to have followed the briefings they were given.

Ofcom noted that two of the three BMF representatives had BMF logos on their t-shirts, which it considered to be editorially justified given that they were representing the company. We also noted that the two presenters were also wearing t-shirts with BMF logos on them. We noted Channel 4's submission that the presenters had removed their high-visibility bibs before the item had begun due to the heat in the studio, revealing the logos. Channel 4 had also submitted that the Executive Producer, recognising that the logos might lead to the undue prominence of BMF, had taken action to minimise this, by requesting that camera angles were altered and the avoidance of close-up shots of the logos on the presenters' t-shirts, as well as instructing the presenters not to refer verbally to BMF for the remainder of the interview.

Ofcom noted that the item then began with a very positive discussion about the success of BMF, in which the BMF representative conveyed details about the number and growth of its membership and the fact that the majority of referrals were by 'word of mouth', again highlighting the success of BMF's approach:

Presenter: *"British Military Fitness which is an amazing success story isn't it?!"*

BMF representative: *"Yeah, we started out in '99 and we had three people come to the first session – within two years we had 2,000 members and now we've got over 20,000 members training in over 120 parks across the UK. Amazingly 75 per cent of those have come from word of mouth referrals because we find once people have tried it, they love it so much they want to bring all their friends down."*

In Channel 4's submission it had stated that when one of the BMF representatives referred to the special offer, one of the presenters, Tim Lovejoy, immediately moved the discussion on by asking another BMF representative *"Were you in the forces?"* Channel 4 explained that this action was in accordance with Channel 4 Live Programme protocol and reflected the briefings that had been given to the presenters about what to do in such a situation. However, Ofcom noted that, a few moments before this, the same presenter had initiated the following exchange about the cost of the classes which was likely to lead to a promotional, or at the very least, a positive response from the BMF representative about the price of the service:

Presenter: *"Is it expensive?"*

BMF representative: *"No it's not. We offer great value. Prices start from around 31 pounds a month but we've got a range of membership options."*

Despite the already promotional nature of the conversation, rather than moving the conversation on to another subject, the presenter went on to ask for further information regarding the cost of the classes:

Presenter: *“And how many times can you do it for that? As many times as –”*

BMF representative: *“We have unlimited options – so you can go any park, train as often as you want. But anyone can come down for a free trial at any point without obligation, and we’ve actually put together a special offer for Sunday Brunch viewers that they can find via your website”*

Undue prominence can arise from the inclusion in a programme of a reference to a product, service or trademark and/or from the manner in which the reference is made. In this case, Ofcom considered that there was likely to have been editorial justification for some of the references to BMF (for example, the BMF logos on the representatives’ t-shirts and some of the discussion about the company and its approach).

However overall we judged that there was insufficient editorial justification for the extent and number of references to BMF in the item as detailed above. We were concerned, in particular, by the way in which the discussion gave the BMF representatives the opportunity to convey in a positive light details about their company’s growth, success, and the prices charged to consumers, with relatively less focus on the exercises involved. Ofcom therefore concluded that the item as a whole gave undue prominence to BMF, in breach of Rule 9.5 of the Code.

Ofcom also considered that the overall effect of the item was to promote BMF. The specific references to the success of BMF, the cost of its classes, the no obligation free trial and the special offer on the *Sunday Brunch* programme website, clearly promoted the company, in breach of Rule 9.4 of the Code.

We noted that Channel 4 took steps to try to prevent undue prominence arising but we considered that these measures were insufficient to prevent the item as a whole from being promotional for BMF and providing the company with undue prominence.

Ofcom acknowledges that unexpected situations may arise during live broadcasting. We also welcome the fact that since the broadcast, the Licensee has improved its compliance procedures for signing off items for the series, such as compliance refreshers for the production team, including briefing guests and also the presenters on the importance of compliance, as well as a more thorough approach to clearing items appearing on the programme.

Breaches of Rules 9.4 and 9.5

In Breach

The Hotel Inspector

Channel 5, 5 July 2012, 21:00

Introduction

This programme included a competition offering viewers the chance to win a holiday to the Maldives. The competition was described in voiceover as follows:

“Would you like to jet off to the stunning Maldives for a 7 night stay of luxury and relaxation?”

We’re giving you and a friend the chance to win an unforgettable getaway to this natural haven, courtesy of Hilton Maldives Iru Fushi Resort & Spa.

You’ll enjoy a full board stay at this luxury five star resort to relax and unwind by the infinity pool and enjoy a pampering session at the resort spa, the largest in the Maldives.

And for those who wish to be more adventurous, we’ll include a luxurious sunset cruise.”

The description was accompanied by video footage of the resort and location.

Ofcom considered the manner in which the prize was described raised potential issues warranting investigation under Section Nine of the Code (Commercial References in Television Programming).

In correspondence with Ofcom, Channel 5 (or “the Licensee”) confirmed that the prize provision had not been subject to a product placement arrangement¹.

Ofcom considered the case raised issues warranting investigation under Rule 9.5 of the Code, which states:

“No undue prominence may be given in programme 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 comments from Channel 5 as to how the presentation of the prize complied with this rule.

¹ Product placement is defined as the inclusion in a programme of, or of a reference to, a product, service or trade mark where the inclusion is for a commercial purpose, and is in return for the making of any payment, or the giving of other valuable consideration, to any relevant provider or any person connected with a relevant provider, and is not prop placement.

Response

Channel 5 advised that it purchased the Maldives trip from a prize provider the channel had used since early 2011 and that part of the prize was donated by the Hilton Iru Fushi. The Licensee said that the decision to purchase the prize was made on the basis that it would provide the best fit for the programme, as the channel was looking for desirable five star hotels in varying locations, and the Maldives, with its renowned beaches and warm climate, was considered a good option.

Channel 5 continued that the prize provider had also provided the channel with information the provider had considered to be relevant to the competition, including a description and footage/images of the resort. Channel 5 stressed that it was under no obligation to include this material in the programme.

Channel 5 informed Ofcom that it required prize providers to provide footage and/or images of prizes to be used in competitions. It said that this is because it can be difficult to obtain high quality material and the prize provider usually had footage or images that could be used for the purpose of producing broadcast competition material.

In respect of the voiced description of the prize, Channel 5 stated that the script was drafted by a member of its commercial partnerships team. In drafting the script the team member drew on the information provided in the prize proposal and on other research, for example internet research. For the purpose of ensuring compliance with the Code, the Licensee said that the commercial partnerships team followed guidance set out in the Independent Producers Handbook². Channel 5 recognised that the handbook was not a substitute for the Code or its accompanying guidance, but it considered that it provided a framework for what could be considered to be an acceptable number of commercial references in a broadcast competition. The Licensee believed that it was therefore useful to work within that framework for the purposes of consistency.

Channel 5 said that it provided a copy of the script to the prize provider so that factual matters could be checked but comments on editorial matters were not sought from the provider. The script was then provided to a Channel 5 content adviser to check that it was compliant with the Code.

The Licensee provided Ofcom with details of queries raised by the content adviser and subsequent amendments made to the script.

Channel 5 said that, when drafting a script, it aims to strike a balance between describing accurately the main attributes of a prize without promoting or giving undue prominence to any product, service or trade mark. It continued that the editorial justification for including a description of a prize in a competition is that it assists viewers to decide whether or not they wish to enter a competition. Channel 5 recognised that the amount of detail that can be given about a prize needs to be carefully balanced so that it provides viewers with sufficient information to make an informed decision about whether to incur the cost of entering the competition.

To generate interest in competitions, the Licensee said it attempts to choose prizes that will be appealing to the audience watching the particular programme. It said that it then considers what it is about the prize that viewers would want to know about, or need to know about, and it includes that information in the competition.

² www.independentproducerhandbook.co.uk/

In this case, as the prize was a holiday at a resort on an island, Channel 5 believed the audience would want to know about the resort. In drafting the script, the Licensee said it was careful to describe the main attributes of the resort in a non-promotional way and not to give any products undue prominence.

Channel 5 argued that the references to the resort being “luxury” and of a five star standard were acceptable because it was appropriate to inform viewers of the standard of accommodation. As regards the references to the resort’s features, such as the infinity pool and “*a pampering session at the resort spa*”, Channel 5 said these were attributes of the prize that it believed entrants would be interested in knowing were included. Similarly, Channel 5 argued that the information that for those “*...who wish to be more adventurous, we’ll include a luxurious sunset cruise*” was intended to flag to viewers that there were more adventurous aspects to the prize.

In summary, Channel 5 considered that the information given in the programme and the images/footage used were editorially justifiable and not unduly prominent.

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.”

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

This requirement is reflected in, among other rules, Rule 9.5 of the Code, which prohibits products, services or trade marks being given undue prominence in programming. Rule 9.5 notes that 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.”

As noted by Channel 5, descriptions of prizes can help audiences decide whether or not to enter a competition. Ofcom therefore accepts that there is likely to be editorial justification for references to the brand of a prize or its main features. However, prize descriptions should not sound or look like advertisements. References to the attributes of a prize should be limited to those major features likely to influence a prospective entrant’s decision to take part. Competitions should never be, or appear to be, created for the purpose of promoting a product or service.

In this case Ofcom accepted that there was sufficient justification for providing details about the key features of the prize e.g. the name and type of destination, the rating of the resort, the board basis, the type of holiday, and the inclusive extras such as the spa session and cruise.

However, we considered that the repeated use of the word “luxury” (or “luxurious”) and the superlative reference to the size of the resort’s spa went beyond what was

justified by the editorial requirements of the piece. In Ofcom's view the overall tone of the material was more akin to advertising than editorial. Ofcom therefore concluded that the programme gave undue prominence to the resort included in the prize.

Breach of Rule 9.5

In Breach

Programming

Takbeer TV, 9 June 2012, 11:35

Introduction

Takbeer TV's programming includes Islamic programmes, current affairs and general entertainment programmes, broadcast mainly in Urdu. Takbeer TV is available on the Sky digital satellite platform. The licence for the channel is held by Takbeer TV Limited ("Takbeer TV" or "the Licensee").

The channel broadcasts a live feed of the Dawn News channel owned by Aurora Broadcasting Services (Private) Limited T/A Dawn News Urdu, based in Karachi, Pakistan.

The *Dawn News Bulletin* which began on this date at 11:35 was followed at 12:00 by an hour-long political discussion programme called *Target Point*. At 12:34 the programme was interrupted by a four minute *Dawn News Bulletin*.

For a period of approximately 20 minutes across all three programmes, an on-screen graphic, which showed the latest score in the Pakistan against Sri Lanka cricket match, intermittently appeared in the bottom left-hand corner of the screen.

During the graphic's appearance on screen, it stated for a period of seven seconds:

"PAK VS SL
SL [the score]
OVERS [number of overs]"

It then changed to state: "*Shell HELIX Motor oils*" for three seconds before reverting back to the updated score in the format set out above.

A viewer was concerned that the cricket score appearing in this on-screen graphic was sponsored by Shell Helix Oil and was present for an extended period.

Takbeer TV confirmed to Ofcom that under an agreement with Dawn News Urdu, it is permitted to downlink and re-broadcast programmes it has acquired from Dawn News Urdu. However, Takbeer TV confirmed that, in terms of the UK's product placement legislation, Dawn News Urdu is not a 'connected person', and Takbeer TV had not received any payment or other valuable consideration for the inclusion of the references to Shell Helix Oil during the programming and therefore the references had not been subject to any product placement arrangement in the UK.¹

Ofcom considered that the reference in the programmes to "*Shell HELIX Motor oils*" appeared to the viewer to be a sponsorship credit for the cricket score which was overlaid on the programming.

¹ "Connected person" is defined in Part 1 of Schedule 2 of the Broadcasting Act 1990.

Ofcom therefore considered the material raised issues warranting investigation under Rule 9.22(b):

“Sponsorship credits broadcast **during programmes** must not be unduly prominent. Such credits must consist of a brief, neutral visual or verbal statement identifying the sponsorship arrangement. This can be accompanied by only a graphic of the name, logo, or any other distinctive symbol of the sponsor. The content of the graphic must be static and must contain no advertising messages, calls to action or any other information about the sponsor, its products, services or trade marks.”

We therefore asked the Licensee for its comments as to how the content detailed above complied with Rule 9.22(b).

Response

Takbeer TV stated that it regularly acquires live and recorded programmes from overseas which it does not produce or commission. Therefore it said that to comply with Ofcom codes “these programmes are strictly monitored” and any commercial elements are edited or removed where necessary before being broadcast.

Takbeer TV explained that this incident occurred during a live feed from a foreign news channel and therefore the channel had a limited ability to address the undue prominence given to Shell Helix Motor Oils. However, the Licensee acknowledged that notwithstanding the fact that the content was a live feed from abroad, it was still responsible for ensuring that the content as broadcast on Takbeer TV was compliant with the Code.

Takbeer TV explained that on this occasion the member of staff responsible for complying the material had to leave the office due to a personal emergency and his replacement was unable to take over immediately. The Licensee apologised for this error and said that it would ensure that its monitoring systems are further improved so that such incidents can be avoided in future.

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.”

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 of the Code therefore requires that sponsorship credits must be distinct from advertising. Further, Rule 9.22(b) of the Code requires that sponsorship credits broadcast during programmes must not be unduly prominent. The rule also requires that such credits consist of a brief, neutral visual or verbal statement identifying the

sponsorship arrangement, accompanied by only a static graphic of the name, logo, or any other distinctive symbol of the sponsor. In addition, sponsorship credits during programmes must not contain advertising messages or calls to action, or any other information about the sponsor or its products.

During one hour and 30 minutes of content (which included advertising breaks), the sponsorship credit for “*Shell HELIX Motor oils*” intermittently appeared for a period of approximately 20 minutes across all three programmes. At one point it was on-screen continuously for approximately ten minutes.

Sponsorship credits broadcast during programmes should not be intrusive. In this case, Ofcom judged that the frequency and duration of the credits provided the sponsor with greater prominence than was necessary to inform the audience of the sponsorship arrangement.

Ofcom acknowledged that this was a live feed from a foreign news channel and therefore the Licensee had a limited ability to address the undue prominence. As made clear in Ofcom’s guidance to Section Nine of the Code, where such circumstances arise, we still expect broadcasters to take reasonable steps to determine whether the broadcast of such programming contains commercial references and to take appropriate action to ensure compliance.

In this case, Ofcom considered the extended appearance of the credit to be unduly prominent. In addition, the sponsorship credit did not identify the sponsorship arrangement, in breach of Rule 9.22(b) of the Code.

Breach of Rule 9.22(b)

In Breach

Provision of recording

Sky1, 8 July 2012, 20:00

Introduction

Ofcom was contacted by the Advertising Standards Authority (“the ASA”) as it had attempted to obtain a recording from BSkyB (“Sky” or “the Licensee”) in relation to a complaint about advertising which Sky had been unable to provide.

Since May 2004, Ofcom has contracted out the regulation of advertising content to the ASA. Under this co-regulatory approach, the ASA has regulatory responsibility for enforcing the requirements of the BCAP Code (with some limited exceptions) but Ofcom has regulatory responsibility for ensuring that, in the case of broadcast advertising, licensees comply with the terms of their licence. This includes the provision of recordings to the regulators.

Given Sky was unable to provide the recording when requested, Ofcom considered the case raised issues warranting investigation under Condition 11(2)(b) of Sky’s Television Licensable Content Service (TLCS) licence, which states that:

“11 (2) In particular the Licensee shall:

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

Ofcom therefore sought comments from Sky about why it was unable to comply with this Licence Condition.

Response

Sky said it apologised “unreservedly for this failure” as it recognised this was a “very serious matter”. The Licensee said one of the set top boxes which records Sky’s output failed, leading to an interruption in the off air recording for Sky1. The Licensee explained that this meant that 83 minutes of the channel’s transmission, from 19:09 to 20:32, was not recorded.

Sky said it “takes its regulatory responsibilities seriously, and appreciates the seriousness of this failure.” As a result, the Licensee said it has reviewed its current off air recording systems and made a number of changes to its systems, including the replacement of existing equipment to more reliable set top boxes, and increased monitoring of the off air recording system by staff to quickly identify any issues.

Sky said it wanted to assure Ofcom it had “investigated this issue thoroughly and implemented changes and upgrades to ensure that we can comply with all our obligations going forward.”

Decision

Under the Communications Act 2003, Ofcom has a duty to ensure that in each broadcaster’s licence there are conditions requiring that the licensee retains recordings of each programme broadcast in a specified form and for a specific period

after broadcast; and to comply with any request by Ofcom to produce such recordings.

Under Licence Condition 11(2)(b) Licensees are required to provide recordings. Failure by a licensee to provide the correct recordings when requested by Ofcom, or in this case the ASA, is a serious and significant breach of Licence Condition 11(2)(b) of Sky1's licence.

Breaches of Condition 11(2)(b) are potentially serious because they impede a regulator's ability to assess whether a particular broadcast raises potential issues under the relevant codes. This can therefore affect Ofcom's ability to carry out its statutory duties in regulating broadcast content.

In this case, a breach of Licence Condition 11(2)(b) of Sky1's licence occurred, although we note the improvements Sky has now said it has made to its off air recording systems.

Breach of TLCS Licence Condition 11(2)(b)

Resolved

The Wright Stuff

Channel 5, 17 August 2012, 09:15

Introduction

The Wright Stuff is a daytime magazine programme broadcast live in weekday mornings on Channel 5. The host and a panel of three guests discuss a range of topics and viewers are invited to participate via telephone, email or text message. A complainant alerted Ofcom to the broadcast of offensive language in this broadcast.

The programme featured a discussion about a High Court decision which ruled that it would be unlawful for a patient with locked-in syndrome to be given help to end his life. Viewers were asked their opinion on the outcome of this case and assisted suicide in general.

During the discussion, a female caller said she blamed the medical profession and claimed that there were ways of “*getting out*” of locked-in syndrome by “*nutrition and developing neural pathways*”. She then went on to make the assertion that people do not suffer from multiple sclerosis in warm climates:

“you don’t get MS in northern...sorry, in sunny climates so it’s a vitamin D and calcium deficiency”

Panellist Huey Morgan responded as follows:

“Listen to me, I have a friend who has just been diagnosed with MS and he lives in Los Angeles and it is pretty freakin’ sunny there so, next caller. Next fucking caller.”

Mr Morgan promptly apologised to viewers for his bad language, and programme presenter also apologised at the beginning of the subsequent programme segment.

Ofcom considered the material raised issues warranting investigation under Rule 1.14 of the Code, which states:

“The most offensive language must not be broadcast before the watershed...”

Before reaching a Preliminary View in this case, Ofcom did not consider it necessary to seek comments from Channel 5 Broadcasting Limited (“the Licensee”) as to how it complied the programme with this rule. The Licensee was given an opportunity to comment on Ofcom’s Preliminary View.

Response

The Licensee confirmed it had no representations to make on the Preliminary View.

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 “persons under the age of eighteen are protected”. This objective is reflected in Section One of the Code.

Rule 1.14 of the Code states that “the most offensive language must not be broadcast before the watershed...”. Ofcom research on offensive language¹ notes that the word “fuck” and similar words are considered by audiences to be amongst the most offensive language. The use of the word “fucking” in this programme broadcast before the watershed was therefore a clear breach of Rule 1.14.

However, in this particular case Ofcom noted the personal resonance that the topic had with Huey Morgan and his swift apology to mitigate any offence caused by his reaction to the caller. We also noted the presenters’ apology later in the programme. Taking these factors into account, Ofcom considers this matter resolved.

Resolved

¹ Audience attitudes towards offensive language on television and radio, August 2010 (<http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf>)

Resolved

Got to Dance

Sky1, 4 March 2012, 18:00

Introduction

Got to Dance is a dance contest broadcast on Sky1. A panel of judges select which acts participate in a series of semi-finals. In each semi-final, viewers are invited to vote for their favourite act. The two acts with the most votes in each semi-final progress to the final. The final comprises two public votes: one to decide on the final three acts and after a final performance, a second vote to determine the winner.

For the 2012 series of *Got to Dance*, viewers could vote via telephone, red button service or a downloadable smartphone application. Telephone and red button voters were charged at five pence per vote. Users of the smartphone application could purchase a bundle of 14 votes for 69 pence once a week for use during any voting period in the series. The first voting period began in the first of five weekly semi-finals broadcast on 29 January 2012.

It came to Ofcom's attention that the smartphone application had to be withdrawn as a means of voting in the final, broadcast on 4 March 2012. Therefore, viewers who had purchased bundles of votes with the intention of using them in the final were unable to place their vote.

Ofcom considered the matter raised issues warranting investigation under Rule 2.14 of the Code.

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

We therefore asked BSkyB Broadcasting Limited ("Sky" or "the Licensee") how the programme complied with this rule.

Response

Sky said that each method of voting was fully checked for capability and functionality during rigorous and thorough testing procedures which began several weeks before the series went to air and throughout its duration. Platform checks were carried out within an hour before the broadcast of each programme. Additionally, Sky said it formulated a contingency plan for each method in the event of failure including plans for conveying reimbursement information to viewers and pre-approved graphics to visually enforce a verbal explanation of any changes.

Sky said that all methods of entry were successfully employed for all five semi-finals of the series and routine tests were completed on 1 and 2 March and the afternoon of 4 March. However, the third party operator of the voting application reported that there was a technical problem with the voting platform approximately 10 minutes before the live broadcast of the final. Users of the application were therefore prevented from buying or placing votes and instead received a "timed-out" notification when attempting to connect to the service.

Sky explained that it became clear that the voting application required repair. Given that there was insufficient time to test the robustness of a repaired system, it decided to permanently withdraw the application for the live final. It added that once this decision had been made, all references to the voting application planned for the programme were removed, and on-screen graphics and host Davina McCall directed viewers to the website for refund information. At the same time, the *Got to Dance* interactive team also set up an interim information feed on the website explaining the situation and advising viewers requesting a refund to check back the following day for further details. This information was also repeated in continuity announcements around repeat broadcasts of the final during the following week.

Sky calculated that 22,838 votes purchased by 1,836 individuals were unused as a result of this problem. Its third party operator attempted to contact the 306 people who responded to the offer of a refund. Out of these 306 people, 17 were refunded and 135 requested the money to go to charity; the remaining 154 were either unreachable or did not make a valid claim.

Sky said that after further analysis, it discovered that the application failure was caused by a 'denial of service' attack from several foreign unrelated hosts. This attack flooded the system and forced the safety mechanism to block all requests to access the voting platform. Sky said that it was concerned that the attack may have been an attempt to target and manipulate voting figures. However, its third party operators provided data which indicated the attack was not advanced enough to get past the system's security settings and merely had the intention of blocking usage. Further, Sky provided usage percentages for each method of voting in the semi-finals which indicated that the incident would not have significantly impacted on the final results.

Sky pointed out that votes were charged at approximately five pence each, irrespective of the entry method and, as such, were not classed as 'premium rate'.

The Licensee rejected any suggestion that viewers had been misled. It argued that "to mislead", one must intentionally or negligently induce a course of action by the affected person which one knows (or should know) will result in outcomes contrary to that person's legitimate expectations and this was a "totally incorrect/inappropriate characterisation of the matter at hand."

Sky added that as per normal procedure, the online store where votes could be purchased was closed two hours before the transmission of the live show and that at this time all of its systems were operating normally. It said that there was no reason or ability to foresee that there would be any kind of failure before or during the final at the time the bundles were being sold to the public. Therefore, Sky said that, "there could have been no "misleading" of viewers at the time the votes were actually sold." It also considered that it had been absolutely transparent by relaying immediate refund information to avoid any confusion whatsoever.

The Licensee said that the virus attack randomly selected complex systems across the web to bombard and disrupt and was not therefore, the result of negligence or oversight on its part. Sky added that the firewalls in place "did their job in so much as they prevented the virus from manipulating any voting figures". Sky also questioned what steps it could have reasonably taken to prevent such an attack given its complex nature.

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 broadcast competitions and voting from misleading the audience in such a way as to cause material harm, such as financial loss.

Ofcom noted that audience voting via smartphone applications is a relatively new concept. Nevertheless, broadcasters are responsible for ensuring that audience voting systems are robust. In this case, the failure and subsequent withdrawal of the application meant that a significant proportion of viewers who had responded to the programme’s invitation to purchase votes were unable to use votes they had already paid for.

While Ofcom acknowledged that votes were not charged at premium rate, it noted that votes were only available to purchase in bundles of 14 at a charge of 69 pence. Therefore, viewers who had purchased votes solely for use in the final were charged the equivalent of a premium rate but were nevertheless unable to use any of those votes. Ofcom accepted that Sky had not intended to mislead viewers in any way. Nevertheless, the effect of the invitation to purchase votes and the subsequent failure of the application was that viewers were materially misled.

We took into account the various testing phases undertaken by Sky and its third party operator prior to the series and each individual broadcast. We also recognised that the application’s failure was due to a malicious external attack rather than an error on the part of Sky or the third party operator.

We also noted Sky’s swift action to withdraw the application from use and provide details of how users could obtain a refund. Taking these factors into account, Ofcom considers the matter resolved.

In recent years Ofcom has published numerous findings concerning audience competitions and voting. Paid-for interaction remains a highly sensitive area in which Ofcom expects broadcasters to exercise extreme care. Ofcom takes this opportunity to remind all broadcasters that they should inform Ofcom as soon as they become aware of any potential issues under the Code in this area.

Resolved

Resolved

Prometheus promotion

Channel 4, 29 April 2012, 21:10

Introduction

In advertising breaks during an episode of *Homeland*, Channel 4 transmitted two pieces of content about the film *Prometheus*.

The first began with a full-screen Channel 4 logo, and the channel's continuity announcer saying:

"Now on Channel 4, from the acclaimed director of Gladiator, Bladerunner and Alien, we bring you a worldwide exclusive. Here is the new trailer of Ridley Scott's Prometheus and we'd love to know what you think. Send your tweets to #areyouseeingthis and you might see them on screen in the next break. And so here it is".

This was followed by the *Prometheus* film trailer.

Following the trailer, a black screen that included a Channel 4 logo and the text '#are you seeing this' was shown in the broadcaster's typical typeface, accompanied by the following which was also voiced by the channel's continuity announcer:

"Now tell us what you think at #areyouseeingthis. See a selection of your tweets live on screen in the next break. Prometheus in cinemas June 1st book your tickets now for the movie event of the year".

In the following advertising break a number of viewer 'tweets' were displayed that referred to the trailer and film in a positive way, for example:

- *"Prometheus is shaping up to be the best film of the year"*
- *"Awesome cast, fantastic director. Can't wait"*
- *"Prometheus looks beautiful, intelligent, flawless, inspiring and proper scary".*

These were followed by the Channel 4 continuity announcer saying:

"Ridley Scott is back to the genre he defined and we are massively excited about it. Prometheus in cinemas June 1st. Book your tickets now".

Ofcom received a complaint about the material from a viewer who was concerned that it "totally confuses the viewer about whether they are watching an impartial continuity announcement or a paid advertisement".

European legislation¹ requires television advertising to be readily recognisable as such and distinct from editorial material. These requirements are enforced through rules set out in Ofcom's Broadcasting Code, its Code of Scheduling of Television Advertising ("COSTA") and Rule 2.1 of BCAP's UK Code of Broadcast Advertising ("the BCAP Code").

¹ See further explanation of the regulatory framework set out in the Decision section of this Finding.

In this case, Ofcom considered that the material raised issues warranting investigation under Rule 11 of COSTA, which states:

“Broadcasters must ensure that television advertising and teleshopping is readily recognisable and distinguishable from editorial content and kept distinct from other parts of the programme service. This shall be done by optical (including spatial) means; acoustic signals may also be used as well.”

We therefore asked Channel 4 (or “the Licensee”) for its comments on how this material complied with this rule.

Response

Channel 4 advised that the material was advertising, broadcast in commercial airtime. As such, both advertisements were cleared in advance by Clearcast² to ensure that the film trailer was sufficiently distinct from editorial content. The Licensee said that Clearcast did not advise it of any concerns or recommend any steps or edits, with regard to possible confusion between advertising and editorial, under Rule 2.1 of the BCAP Code³.

Channel 4 continued that it had taken further additional steps to ensure compliance with Rule 11 of COSTA. These included a black screen broadcast immediately after the programme end of part, followed by a Channel 4 ident with a white background, which included a graphic of the name of the programme “*Homeland*”. Channel 4 said that these devices were included in order to create no doubt in the viewer’s mind that this was the end of a programme part and to indicate clearly the start of the advertising break.

Channel 4 believed that there was a clear contrast between the channel ident and the start of the advertising break. It said that the advertisement itself had a completely different tone, look and feel, with a blue and purple themed background, fibre optic lights and a cinematic, dramatic feel. The content was specifically commissioned for the advertisement and had the same style and tone of other iconic Channel 4 advertising premieres, in order to distinguish it from editorial content.

In addition, the Licensee considered the voiceover, played during commercial airtime, clearly introduced the advertising break stating:

“Now on Channel 4, from the director of Gladiator, Bladerunner and Alien, we bring you a worldwide exclusive. For the first time ever, here is the new trailer of Ridley Scott’s ‘Prometheus’ and we really want to know what you think. Send your tweets to #areyouseeingthis. See a selection of your tweets live on screen live in the next break and so here it is.”

Channel 4 took the view that the reference to the “new trailer” of a film from a critically acclaimed film director, and the reference to “*you might see it* [viewer’s tweets] *in the next break and so here it is*”, would have made it clear to viewers that

² Clearcast is the broadcasting industry body that assesses television advertising on behalf of broadcasters in advance of transmission.

³ Rule 2.1 of the BCAP Code states: “Advertisements must be obviously distinguishable from editorial content, especially if they use a situation, performance or style reminiscent of editorial content, to prevent the audience being confused between the two. The audience should quickly recognise the message as an advertisement”.

the material was advertising and not editorial content. The Licensee believed that viewers would have understood the role of the trailer as an advertising device for the film and this was further reinforced by the use of stylised visuals.

Channel 4 stated that the film trail was shown in full and featured other common traits of an advertisement, such as the branding of the film studio (21st Century Fox), the film distributors branding, and the clear graphic “*in cinemas 1st June*” and “*book now*”. This footage was followed by the voiceover “*Now tell us what you think at #areyouseeingthis. See a selection of your tweets live on screen in the next break. Prometheus in cinema June 1st, book your tickets now for the movie event of the year*” over a graphic of the Channel 4 logo with footage of the film’s spaceship behind the ident. The Licensee contended that it would have been clear to viewers, from the wording and the tone of the voiceover, that this was advertising, and not editorial content.

Channel 4 also noted that the distinct Channel 4 ident with a white background was used again after the end of the advertisement, to clearly indicate the advertising break was over, before the programme, *Homeland*, continued.

Channel 4 said that the later, follow-up advertising break adopted the same principle of a second of black screen after the programme part ended, followed by the Channel 4 ident with a white background, which included the name of the programme *Homeland*. This indicated the end of editorial material which, Channel 4 believed, clarified in the viewer’s mind that this was an end of the programme part and the start of an advertising break.

The Licensee stated that the second advertisement was also cleared by Clearcast. Again, it included a Channel 4 logo but had footage of the film in the background. The voiceover said “*thanks for your tweets about Prometheus, here’s what you’ve got to say*”, with various tweets shown on screen overlaying what was clearly film footage. The Licensee said that all tweets on screen were approved by a Clearcast representative, who was present during the transmission of the live advertising break.

Channel 4 continued that the advertisement ended with a typical advertising call to action, “*Ridley Scott is back to the genre he defined and we are massively excited about it, Prometheus in cinemas June 1st, book your tickets now*”, before a black screen with the Channel 4 logo was shown, in order to indicate the end of the advertisement. The remainder of the advertisements in the commercial break were then broadcast.

In addition to the above points, Channel 4 noted that when BCAP had revised its Television Advertising Code in 2010 it had removed a requirement that “In ambiguous cases, advertisements must be identified as such on screen”. Further Channel 4 pointed to the fact that the BCAP Code no longer includes a prohibition on people featuring in editorial material also appearing in advertising adjacent to the editorial material. The Licensee also pointed out that neither of the advertisements were scheduled on its Electronic Programme Guide, as programmes would be.

Taking into account all of the above factors, Channel 4 did not believe that the advertisements breached Rule 11 of COSTA.

While maintaining this view, Channel 4 said that the recent changes in the BCAP Code, from which the express requirement for a caption stating “This is an advert” has been removed, could lead to possible confusion over what exactly is required to be done, especially when there is a potential issue or question about adequately

distinguishing between editorial and advertising time. In view of this, Channel 4 had subsequently taken it upon itself to introduce the following policy in order to prevent this issue reoccurring:

- it had put in place internal procedures to ensure final sign-off of similar advertisements is by the Legal and Compliance department, in addition to Clearcast approval.
- similar advertisements will feature a caption stating, "*This is a Channel 4 advertising premiere*", or something similar at the start, to avoid any potential confusion.
- it will ensure that any Channel 4 announcer who features as a voiceover on the advert is not working on a particular channel on any day that the advert is broadcast on that channel, in order to further help prevent any possible confusion.

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 kept distinct from other parts of the programme service.

These requirements are reflected in Ofcom's Code of Scheduling Television Advertising, which contains rules that limit the amount of advertising a broadcaster can show, and its Broadcasting Code, which requires advertising to be readily recognisable as such; and prohibits surreptitious advertising. As highlighted by Channel 4, the BCAP Code also requires advertising to be distinct from editorial.

In this case, Ofcom accepts that there was unlikely to be doubt in viewers' minds that the scheduled programme *Homeland* had been interrupted for a break. However, we consider that the presentation style of the 'Prometheus' material risked confusing viewers in respect of its status.

While breaks between programmes generally contain advertising, they also regularly contain non-advertising content such as programme trailers and other broadcaster related material. In some cases, short programme items - such as news updates - are also inserted during programme breaks. Therefore, simply because material appears in a break between programmes is not sufficient to identify it as advertising.

Ofcom noted that the first advertisement contained elements likely to be recognised by viewers as advertising, such as the film trailer, the film release date and the call to action to viewers to go and see the film. However, these were accompanied by other elements that Ofcom considers viewers would more usually associate with editorial content, such as:

- the channel's logo, which was displayed prominently during the beginning of the advertisement;
- the distinct voice of the channel's continuity announcer;
- in addition to the use of the Channel 4 logo, language that suggested the channel's ownership and endorsement of the material e.g. "*Now on Channel*

4", "*we bring you a worldwide exclusive*" and "*we'd love to know what you think*"; and

- the call to action to viewers (in the channel's own typeface) to submit, to the channel, their views on the content.

Many of these elements were also present in the second advertisement, which contained viewers' opinions on the trailer shown in the first advertisement. In Ofcom's view, such viewer interaction is more commonly associated with television programmes than with advertising.

Additionally, Ofcom noted that the viewer tweets shown in the second advertisement were wholly positive about the film. Ofcom recognises that, in the context of advertising, statements about the advertised product are expected to be promotional. However, we consider that the status of the material was ambiguous and therefore it may have been unclear to viewers whether they were viewing a selection of tweets selected for editorial reasons by Channel 4 or for advertising purposes.

For the reasons set out above, Ofcom is concerned about the degree to which the material was recognisable as advertising.

However, in view of the subsequent steps taken by Channel 4 to ensure similar presentations provide greater clarity as to their advertising nature - in particular the Licensee's decision to include a caption clearly stating that such material is advertising - we consider the matter resolved.

Resolved

Advertising Scheduling cases

In Breach

Breach findings table¹

Code on the Scheduling of Television Advertising compliance reports

Rule 4 of the Code on the Scheduling of Television Advertising (“COSTA”) states:

“... time devoted to television advertising and teleshopping spots on any channel must not exceed 12 minutes.”

Channel	Transmission date and time	Code and rule / licence condition	Summary finding
5*	11 August 2012, 13:00	COSTA Rule 4	Ofcom was notified by 5* that it exceeded the permitted hourly allowance by two minutes on the date and time specified. Finding: Breach

¹ This issue of the Broadcast Bulletin was amended after its original publication to include this decision. It was not published at the time due to an administrative error.

Resolved

Advertising minutage¹

Dave, 19 June 2012, 12:00

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.”

UK Gold Services Limited (“UKTV” or “the Licensee”) notified Ofcom that on 19 June 2012, 15 minutes and 30 seconds of advertising were transmitted in the 12:00 clock hour on Dave, therefore exceeding the amount permitted by Rule 4 of COSTA.

Ofcom considered the case raised issues warranting investigation in respect of Rule 4 of COSTA.

Response

UKTV said that the incident was a result of human error.

The Licensee explained that when testing a new Republic of Ireland advertisement feed, it became necessary to delete and re-append the Dave schedule. However, it said that the appended schedule “had an under-run” causing it to automatically jump forward to the next commercial break, omitting a programme segment. It added that by the time this was rectified and the programme was back on air, the same commercial break had played out again bringing the schedule back to the correct time. However, this resulted in an overrun of three minutes and 30 seconds (the length of the commercial break that was repeated) in this particular clock hour.

The Licensee said that because this occurred towards the end of a clock hour, there was no time to drop a commercial break to ensure that Dave did not exceed its hourly limit. However, the Licensee explained that a later commercial break of equivalent duration to the overrun was dropped to mitigate the impact of the incident.

Preliminary View

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 its licensees’ compliance with COSTA.

¹ This issue of the Broadcast Bulletin was amended after its original publication to include this decision. It was not published at the time due to an administrative error.

Whilst noting that a three minute and 30 second overrun is significant, Ofcom took into account the following factors:

- the Licensee promptly notified Ofcom of the incident; and
- the Licensee voluntarily dropped a commercial break of equivalent length on the same day.

Under the circumstances, Ofcom considers the matter resolved.

Resolved

Resolved

Resolved findings table¹

Code on the Scheduling of Television Advertising compliance reports

Rule 4 of the Code on the Scheduling of Television Advertising (“COSTA”) states:

“... time devoted to television advertising and teleshopping spots on any channel must not exceed 12 minutes.”

Channel	Transmission date and time	Code and rule / licence condition	Summary finding
Gold	31 August 2012, 22:00	COSTA Rule 4	<p>UKTV notified Ofcom that due to human error appending a schedule its service Gold exceeded the permitted advertising allowance on this date by 2 minutes and 10 seconds.</p> <p>UKTV confirmed that relevant staff had been reminded of the need for extreme care when appending schedules. It also confirmed that on 26 September 2012 it dropped 2 minutes and 10 seconds of advertising on a like-for-like slot to compensate for the overrun.</p> <p>Resolved</p>

¹ This issue of the Broadcast Bulletin was amended after its original publication to include this decision. It was not published at the time due to an administrative error.

Broadcast Licence Condition cases

In Breach

Breach of licence condition

OnFM, community radio service for Hammersmith, west London, 7 September 2012 to present

Introduction

OnFM is a community radio station licensed to provide a service for Hammersmith, with a particular focus on the Irish population as well as other ethnic groups. It started broadcasting on 28 May 2008. The licence is held by OnFM Limited ("the Licensee").

Community radio licences are granted for a five-year period and broadcasting a service on the frequency assigned to it, as well as providing other outputs (such as opportunities for volunteers) described in the licence, is required throughout the licence period.

On 12 September 2012 a station volunteer contacted Ofcom to inform us that the service had ceased broadcasting on FM on Friday 7 September. The volunteer believed that the transmitter had been switched off by the landlord of the transmission site due to an unpaid bill. Later the same day (i.e. 12 September) the station director confirmed by email that the station was not broadcasting.

On 18 September Ofcom emailed the Licensee to ask what steps had been taken to recommence FM broadcasts. On 19 September the station director replied explaining that the break in transmission was as a result of some financial difficulty and an unpaid bill. She said the Licensee was urgently addressing the need to secure the necessary funding to solve the situation.

She said "to come off air without warning was a shock to all. I could do nothing to avert it whilst I was out of the country, unfortunately. I have relayed a message to all programme teams to be ready to come back on air as early as this week and they are very keen to do so. However, realistically, it may take several weeks."

She added, "I would like to agree a deadline with Ofcom of three months to get back on air fully. This is thought to be a reasonable time to find a solution that puts the radio station in a stronger financial position, and one that means this situation never arises again."

Ofcom was not able to agree to a three month cessation in broadcasting, as it is a condition of the licence that a service is provided throughout the five-year licence period.

In view of the fact that the service had ceased broadcasting on 7 September, had not yet resumed and appeared unlikely to be in a position to resume broadcasting very soon, on 19 September Ofcom wrote to the Licensee to ask how it was complying with the following two conditions in its licence relating to the delivery of its service. We noted that the Licensee had already sent us information in its letter of 19 September, and invited it to make further representations if it wished. The two licence conditions are:

1. Condition 2(1) contained in Part 2 of the Schedule to the licence, which states that:
“The Licensee shall provide the Licensed Service specified in the Annex* for the licence period.”
2. Condition 2(4), contained in Part 2 of the Schedule to the licence, which states that:
“The Licensee shall ensure that the Licensed Service accords with the proposals set out in the Annex¹ so as to maintain the character of the Licensed Service throughout the licence period.”

Response

The Licensee spoke with a member of Ofcom’s community radio licensing team on 28 September and emailed on 3 October to keep Ofcom apprised of its progress. On 4 October the Licensee responded to our letter. The station director said she “had hoped that we would have resumed transmission by now”. “I have been in touch with representatives of the antenna site again today and it may be possible for us to go back on air next week.”

With regard to the station’s financial difficulties she said that “the break in transmission was not only the result of the tighter economic conditions all radio stations have been hit by, but also because our full antenna bill could not be met when an arrangement for part payments of an undercharging was withdrawn. I was on holiday just at the time this needed negotiation.” “The timing was very unfortunate. However, payment was my responsibility and one I am able to discharge next week.”

With regard to fund-raising, she said that “some progress has been made this week”.

Decision

By ceasing to provide its licensed service on its FM frequency, 101.4 MHz, from 7 September 2012, the Licensee was in breach of licence Conditions 2(1) and 2(4) in Part 2 of the Schedule to the community radio licence. Ofcom has therefore formally recorded this breach of its licence by OnFM Limited.

A station volunteer notified Ofcom five days after OnFM ceased broadcasting. We note that the station director was abroad at the time, but that she emailed confirmation that the station was not on-air.

The station had stopped broadcasting as a result of the action of a third party (the transmitter site landlord) because a bill had not been paid. It appears that the landlord’s actions may have been foreseeable and avoidable. While we sympathise with a Licensee that experiences financial difficulties, it is the responsibility of a Licensee to manage its affairs so that the service it is licensed to deliver continues to be provided.

¹ The annex sets out the radio station’s ‘key commitments’. The key commitments include a description of the programme service, social gain (community benefit) objectives (such as training provision), arrangements for access for members of the target community, opportunities to participate in the operation and management of the service, and accountability to the community. OnFM’s key commitments can be found here <http://www.ofcom.org.uk/static/radiolicensing/Community/commitments/cr074.pdf>

We also note that in the station director's absence abroad there did not appear to be anyone at the station able to deputise and deal with such an emergency. As a result Ofcom was not informed of the situation for five days and no progress towards resolving the situation was made while the station director was away.

In its response the Licensee has not set out a clear plan or timetable to re-commence the service. The Licensee says that a number of avenues are being explored, that some progress is being made in fund-raising, and that it hopes the station will commence broadcasting soon but no firm date has been given for broadcasts to resume.

The Licensee did not specifically state whether 'off-air' activities included in the licence (as set out in the Licensee's key commitments) are being delivered. These include 'social gain' (such as training programmes) and access to and participation in the service (volunteering opportunities, for example). However, as no output is being produced, it seems unlikely that a full range of off-air key commitment activities are being delivered. This is to the potential disadvantage of the target community.

As OnFM has not resumed broadcasting its licensed service since 7 September 2012, this breach by the Licensee is continuing. Provision by a Licensee of its licensed service on the frequency assigned to it is the fundamental purpose for which a community radio licence is granted. Ofcom has a range of duties in relation to radio broadcasting, including securing a range and diversity of local radio services which are calculated to appeal to a variety of tastes and interests, and the optimal use of the radio spectrum. These matters find expression in, or are linked to, the licence condition requiring the provision of the specified licensed service. Where a licensed service is not being provided in accordance with the licence, none of the required community radio programme output is provided. In addition, choice for listeners is reduced.

It is a duty placed upon Ofcom to ensure optimal use is made of the electromagnetic spectrum. The non-provision of its licensed radio service by OnFM Limited is not optimal use of that radio spectrum.

Ofcom has formally notified the Licensee that we are considering these licence contraventions for the imposition of a statutory sanction in light of their seriousness and ongoing nature.

Breach of Licence Conditions 2(1) and 2(4) in Part 2 of the Schedule to the community radio licence held by OnFM Limited (licence number CR074).

Fairness and Privacy cases

Not Upheld

Complaint by Mr Harbinder Panesar on his own behalf and on behalf of Mrs Caroline Panesar, Miss Anysha Panesar and Mr and Mrs Panesar's son (a minor)

X Ray, BBC1 Wales, 13 and 20 February 2012

Summary: Ofcom found that this complaint of unfair treatment and unwarranted infringement of privacy in connection with the obtaining of material in and in the programme as broadcast made by Mr Harbinder Panesar should not be upheld.

The programmes included a report and follow-up looking at car warranties sold by Motorcare Warranties and Motorcare Elite, businesses which, prior to their bankruptcy, were owned and managed by Mr Panesar. The programmes, which alleged that some of the warranties sold by the two companies (jointly referred to in the programme as “Motorcare”) were “worthless”, included footage of Mr Panesar’s property and of a ‘doorstep’ interview with him.

Ofcom found that:

- The programme did not result in unfairness to Mr Panesar in that the programme makers took reasonable care in presenting the material facts in relation to the payment for his daughter’s party and in relation to the allegations made about the business practices of Motorcare.
- Neither Mr Panesar’s privacy nor that of his family was unwarrantably infringed by either the recording or broadcast of footage of their home.
- While Mr Panesar had a legitimate expectation of privacy with regard to the ‘doorstep’ interview with him, the intrusion into his privacy by the recording and subsequent broadcast of this footage was warranted by the public interest.
- Mr Panesar did not have a legitimate expectation of privacy with regard to the information that he had been declared bankrupt and therefore his privacy was not unwarrantably infringed by the disclosure of that information in the first programme.
- Miss Panesar did not have a legitimate expectation of privacy with regard to the footage of her originally broadcast in an edition of *My Super Sweet 16* on MTV and re-used in these programmes and therefore her privacy was not unwarrantably infringed in this respect.

Introduction

On 13 February 2012 BBC1 Wales broadcast an edition of its consumer affairs programme *X Ray*. This edition featured a report about car warranties sold by two companies called Motorcare Warranties Limited (“Motorcare Warranties”) and Motorcare Elite Limited (“Motorcare Elite”). The companies, which are now in liquidation, were owned by Mr Harbinder Panesar.

The introduction to the programme included footage of Mr Panesar accompanied by the following commentary: *“On tonight’s programme: This man sold worthless car warranties costing hundreds of pounds - we ask him why...”*.

The report opened with footage from a television programme called *My Super Sweet 16* which was originally broadcast on the MTV channel in 2009. This footage showed Mr Panesar’s daughter, Anysha (then aged 14), talking about her family’s wealth and planning for and enjoying what appeared to be an expensive fifteenth birthday party. At the end of this footage, Mr Panesar was shown watching his daughter as she was riding a pony with the following accompanying commentary:

“These pictures come from a cable TV show where rich teenagers get a party to die for. The family here are the Panesars from the Vale of Glamorgan and the cash comes from dad, Harby Panesar. But where did the money come from?”.

The reporter then said that four years ago Mr Panesar set up a company called Motorcare Elite (having formerly taken over a company called Motorcare Warranties from his father-in-law). The programme said that *“the company sold warranties to car dealers who then sold them on to their customers – offering peace of mind in case the car broke down”*.

The report subsequently looked at the experience of three individuals (a man and a couple) who had purchased Motorcare warranties when they bought a car from a dealer. The programme said that when these individuals tried to claim money back for subsequent car repairs, they had no success. They found that Motorcare had *“gone out of business”* and that the underwriter named in their respective warranties, Alpha Insurance, either had a record that payment had already been made to the party concerned by Motorcare or had not actually provided insurance to cover their Motorcare warranty.

During this section of the programme, the reporter said that: *“Alpha Insurance say they have evidence of other customers [of Motorcare] in the same situation”* as the man who was told that there was a record that payment had been made to him; and that *“they [Alpha Insurance] have never provided insurance for ‘life of ownership’ warranties”* - the type of Motorcare warranty which the couple shown in the programme purchased.

Later in the report, the reporter said that although many of Motorcare’s warranties mentioned a company called Belmonte Limited within the section of the warranties on insurance underwriters, Belmonte Limited itself said that it had *“never had a contract with Motorcare”*. The reporter also said that *“when you look closely, you see that the actual insurance underwriters are London-based Marine and General Insurance”*. The reporter added that the programme had been unable to *“find any trace of this company”*, but that Mr Panesar had told the programme that the company was based in Kazakhstan.

The programme then showed further footage of Mr Panesar and his daughter at her birthday party, which was accompanied with the following commentary: *“While Motorcare boss Harby Panesar was issuing these policies, he was living the dream spending a reported £20,000 on his daughter’s party”*.

The reporter explained that the Financial Services Authority (“the FSA”) was investigating Motorcare and had warned its customers that *“their policies may be worthless”* before saying that because Motorcare’s policies were sold through more than 400 garages *“there must be thousands of people who could be out of pocket”*.

She added that *“Harby Panesar says he is unable to speak to us because of the FSA investigation”*.

The final section of the report indicated that although Motorcare was no longer trading and that Mr Panesar had been declared bankrupt, he was *“still living in his luxury home”*. This section of the report included footage of the reporter approaching Mr Panesar and speaking to him as he walked his dogs and as he went through the gates to his home. During this footage, the reporter asked Mr Panesar why he had *“been selling worthless warranties?”* and why he had *“been making up the names of underwriters on your policies?”*.

The edition of the *X Ray* programme broadcast on 20 February 2012 included a “follow-up” to this story in which two more people who had bought Motorcare warranties spoke about their experience of trying to claim money on these policies. This edition again included the footage of Mr Panesar watching his daughter ride a pony (taken from *My Super Sweet 16*) and some of the footage of the reporter questioning Mr Panesar outside his home.

Following the broadcast of the programme, Mr Harbinder Panesar (whom Ofcom understands is known as “Harby”) complained to Ofcom that he, his wife (Mrs Caroline Panesar), their daughter (Miss Anysha Panesar) and their son (who is a minor) were treated unjustly or unfairly in the programmes as broadcast and that their privacy was unwarrantably infringed in connection with the obtaining of material included in the programmes and in the programmes as broadcast.

Summary of the complaint and broadcaster’s response

The details of Mr Panesar’s complaint are set out below, followed by the BBC’s responses on particular points.

The BBC also made the following general points before responding to Mr Panesar’s specific heads of complaint. The BBC said that the two reports examined the business dealings of the complainant who had been found by a court to be a dishonest businessman¹ and who, over a number of years, had accumulated considerable wealth through the sale of motor warranties. The BBC also said that many purchasers of these warranties were unable to recover payment for repairs to their vehicles and, when Mr Panesar’s company went out of business, many other warranties were found not to be underwritten by the underwriters named on the policy documents. It added that at the date of its response Mr Panesar was awaiting sentence on charges relating to these practices². The broadcaster added that Mr

¹ In December 2010 Templeton Insurance Limited (for which Motorcare Warranties Limited had been acting as an agent) made several successful claims against Motorcare Warranties and its directors (<http://www.bailii.org/ew/cases/EWHC/Comm/2010/3113.html#>).

In March 2012 Mr Panesar and Mr Anthony Thomas (Caroline Panesar’s father) were both found to be in contempt of court in that they carried out acts which constituted a wilful interference with the administration of justice in particular the freezing injunction granted earlier by Nelson J. on 8 July 2008 (<http://www.bailii.org/ew/cases/EWHC/Comm/2012/795.html>).

² On 19 July 2012 Mr Panesar and Mr Thomas were sentenced (subject to appeal) to nine months and four months imprisonment respectively for launching a new company (Motorcare Elite) in defiance of court orders: <http://www.bbc.co.uk/news/uk-wales-south-east-wales-18918698>.

Panesar is also subject to an investigation by the Financial Services Authority (“the FSA”) and thousands of his customers seem likely to have lost money.

Unjust or unfair treatment

In summary, Mr Panesar complained that he was treated unjustly or unfairly in the programmes as broadcast in that:

- a) The programme insinuated that he had inappropriately used his company’s finances to fund his daughter’s party, but this was totally untrue.

Mr Panesar said that his wife had funded the party and that the party had been booked and paid for by the date (August 2008) he had set up his company, Motorcare Elite. Mr Panesar added that this was evident because the filming of the footage included in *My Super Sweet 16* started months before it was originally broadcast in 2009 on MTV. He also said that at least one of the warranties referred to in the programme was purchased two years after the date of the party.

In response, the BBC said that the programme did not state or suggest that Mr Panesar had “inappropriately used his company finances” to fund his daughter’s party and that the reference to his daughter’s party was simply to illustrate the wealth that Mr Panesar and his family enjoyed. It acknowledged that that the comment that *“While Motorcare boss Harby Panesar was issuing these policies he was living the dream ... spending a reported £20,000 on his daughter’s party”* suggested a clear connection between Mr Panesar’s business dealings and his wealth but said that at no time was there any suggestion that company finances had been *“inappropriately used”* or that Mr Panesar spent anything other than his personal wealth on the party.

The BBC added that there was evidence to suggest that Mr Panesar’s wife did not pay for the party, as Mr Panesar claimed she had in his complaint.

Specifically, it said that:

- In an email to the BBC on 13 February 2012 Mr Panesar said that his daughter’s party “...was not paid by any revenue received from the business, we were compensated by National Grid for overhead lines...this money was used for the party”. The broadcaster said that the use of the word “we” suggests that the money used to fund the party was – in part, at least – Mr Panesar’s.
- In a recorded phone conversation with programme producer on the same day Mr Panesar gave two different accounts of how the party was funded.

Initially he said:

“You said earlier that I used my money to pay for her part...It wasn’t the business. I paid for that. You can see that on the email I sent you”.

Later he said:

“I...we received money from National Grid that paid for the party”.

- The *My Super Sweet 16* programme about Mr Panesar's daughter's birthday, which was presented by Miss Panesar herself, presented Mr Panesar as the source of gifts to his daughter and showed Miss Panesar saying that that her party was "*going to take all my dad's money and all my mum's attention*". The BBC said that Mr Panesar did not take up the opportunity he was given by the programme makers to correct any factual inaccuracies in either the *My Super Sweet 16* programme or a newspaper article in *Media Wales*, that set out further details of the costs of the celebration, which quoted Mrs Panesar as its source.

It also said that even if the party had been funded entirely by Mrs Panesar, this would not have created a seriously inaccurate impression that would have been unfair to Mr Panesar because any wealth enjoyed by Mrs Panesar was also derived (at least in part) from the Motorcare businesses. The original company was set up by her father and she was company secretary of both Motorcare Warranties and the successor to it, Motorcare Elite.

The BBC said that regardless of Mr Panesar's claim that the party was in large part paid for prior to the establishment of Motorcare Elite (a claim which it did not consider could be relied upon) Mr Panesar had been running its predecessor company Motorcare Warranties, since 2004 and therefore his claim that income from his business could not have been used to fund the party because the company was only set up in August 2008 had no basis.

The BBC added that the claim that Motorcare Elite was a new company set up in August 2008 (and distinct from the original company – Motorcare Warranties Ltd) was rejected as a fiction by the High Court.

Lastly, the broadcaster said that the dispute regarding the age of the warranties discussed in the programme was not material to the complaint because the programme made it clear, at an early stage, that Mr Panesar had been involved with Motorcare since 2004 and in any event one of the cases featured, that of a driving instructor whose policy dated back to 2006 and was issued by Motorcare Warranties Ltd.

- b) Mr Panesar was unfairly portrayed in that the programme included footage of him being "hit with a barrage of questions [which] he was unable to answer" and unfairly accused him of failing to answer questions and making up details of the warranties sold by his company.

In response, the BBC said that the questions put to Mr Panesar were fair and reasonable and gave him an opportunity to respond to the serious allegations being made by the programme about his business activities. It said that Mr Panesar was not unable to answer them but rather did not wish to for fear that honest answers would give further credence to those allegations.

The broadcaster added that Mr Panesar did in fact answer some of the questions put to him, although it argued that his answers were misleading and that there was persuasive evidence that he had made up the names of underwriters on his policies. In particular, the BBC said that although Mr Panesar had confirmed to the reporter who questioned him that a company called Belmonte had been underwriting his policies, Belmonte itself had told the programme makers that it had not underwritten policies for Motorcare Elite.

Unwarranted infringement of privacy

In summary, Mr Panesar complained that his privacy and that of his wife and their daughter and son was unwarrantably infringed in connection with obtaining of material included in the programme in that:

- c) Footage of the family home and grounds was recorded without consent. By way of background, Mr Panesar said that his property boundaries were overstepped by the film crew on two occasions and that filming without consent took place on at least one occasion during which his wife and children had been at home.

In response, the BBC said that Mr Panesar's wealth was a central feature of this report because, the evidence suggested, it derived from the proceeds of two businesses which dishonestly obtained large sums of money from customers for motor warranties which were worthless. It said that given this, gathering visual evidence as to the family's lifestyle in order to corroborate the allegations being made by the programme was warranted.

The broadcaster said that the filming undertaken by the programme makers at Mr Panesar's home (as distinct from the re-used footage from *My Super Sweet 16*) was carefully limited to that required to provide a sense of Mr Panesar's lifestyle and did not represent any unnecessary intrusion onto his property.

On the first occasion that filming took place (1 February 2012) the film crew remained outside the gates of the property filming pieces to camera and gathering general shots. Filming took place during school hours; there was no indication that anyone was at home; the crew was not approached by anyone from the house and was not asked to stop filming. The BBC said that it filmed from a public road and did not require Mr Panesar's consent to do so.

On the second occasion (9 February 2012) the presenter was filmed approaching Mr Panesar on the public highway and asking him questions. When she accompanied him across the paved entrance leading to the gates of his house asking him questions he did not demur. When he went through the gates she went to accompany him further and took a step through the gateway. At this point Mr Panesar asked her to step back which she did. The crew continued filming from the paved area outside the gates until Mr Panesar indicated that this too was his property. At that point the crew withdrew to the public road. The broadcaster said that it did not believe that consent from Mr Panesar was required for this filming.

It added that no other members of Mr Panesar's family were filmed and the crew guarded against any possible breach of the privacy of other members of his family in that it waited until the school bus had left the village before approaching the Panesar property.

The broadcaster argued that, in any event, any breach of privacy involved in the gathering of this material was insignificant (particularly given the considerable exposure on the MTV programme to which Mr Panesar had already consented – see response to head e) below for further details); limited to what was necessary to adduce evidence as to his lifestyle; and, warranted in that it provided an evidential basis for the observations made in the programme about his lifestyle and the likely link to his dishonest business activities.

In summary, Mr Panesar complained that his privacy was unwarrantably infringed in connection with obtaining of material included in the programme in that:

- d) Mr Panesar was accosted by a reporter and film crew as he entered the gates to his property. This incident of 'doorstepping'³ was not warranted because he had previously written to the programme saying that he was not unwilling to be interviewed but he was unable to do give an interview because the FSA prevented him from discussing the investigation it was making into his company.

In response, the BBC said it did not believe that Mr Panesar's privacy was unwarrantably infringed by being by being asked questions as he walked on a public road where he would have enjoyed only a very limited expectation of privacy. The broadcaster observed that Practice 8.11 of the Code states that 'doorstepping' for factual programmes should not take place unless a request for an interview has been refused or it has not been possible to request an interview, or there is good reason to believe that an investigation will be frustrated if the subject is approached openly, and it is warranted to doorstep.

It said that the programme makers wrote to Mr Panesar on 17 January 2012 outlining the allegations being made against his company and setting out the evidence they had about his personal wealth (a copy of this letter was provided to Ofcom). Mr Panesar responded to this letter on 23 January 2012 indicating that he noted its contents but that "due to the restrictions imposed on me by a governing authority, [he would] be unable to answer any of the allegations raised". On 25 January 2012 the producer wrote back to Mr Panesar to ask him to identify the governing body which had imposed restrictions on him and to explain the nature of these restrictions. Mr Panesar did not respond to this request so the programme makers sought to establish if there were any restrictions which would prevent him speaking to them. They contacted the liquidator of Motorcare Elite (who was also Mr Panesar's Trustee in Bankruptcy) who said he was not aware of any restrictions upon Mr Panesar that would stop him from responding to the programme's questions. The liquidator suggested that the "governing authority" to which Mr Panesar was referring was likely to be the FSA. The programme makers contacted the FSA who said that while they do ask individuals under investigation not to talk to the press they have no powers to prevent them from doing so. On that basis the programme-makers concluded that Mr Panesar was not legally constrained from speaking to them and was using this supposed constraint in an attempt to avoid answering legitimate questions about his activities.

The BBC said that this position was supported by the fact that after the doorstep, Mr Panesar did respond to some of the issues which had been raised.

On Friday 10 February 2012 – the day after the doorstep – Mr Panesar went to BBC Broadcasting House in Cardiff and met by the producer and the series producer. The BBC acknowledged that during this meeting Mr Panesar handed over a letter from the FSA which requested that he "should not discuss or disclose details of the investigation with any party..." but repeated its view that this request had no legal force. The broadcaster added that, in any case, the questions the programme makers put to Mr Panesar did not relate to the details of FSA investigation itself but to the way in which he ran his businesses and

³ 'doorstepping' is the filming or recording of an interview or attempted interview with someone, or announcing that a call is being filmed or recorded for broadcast purposes, without any prior warning.

would certainly not have prevented him from correcting the factual inaccuracies he now claims are contained in the MTV programme featured in the report and the *Media Wales* article from which figures for the expenditure on his daughter's party were drawn.

The BBC also said that during a series of telephone calls on 13 February 2012 – some of which were recorded – Mr Panesar discussed in detail his relationship with various insurance underwriters.

It added that the programme did not say, as claimed by Mr Panesar, that he was unwilling to be interviewed but that *"Harby Panesar says he's unable to speak to us because of the FSA investigation"* which we believe accurately reflected his position at the time.

The broadcaster also said that after the first report was broadcast the programme makers contacted Mr Panesar about further complaints about his warranties and he responded with an email (16 February 2012) which went into considerable detail about all the cases put to him.

The BBC argued that the points noted above indicated that Mr Panesar did not genuinely feel constrained in speaking about the allegations being made in the programme and that his claim to be constrained was a pretext to avoid answering questions other than when it suited him to do so. It added that the doorstep was warranted by the public interest in investigating consumer issues such as that raised by the activities of Mr Panesar's businesses; that it was conducted on the basis that Mr Panesar was avoiding responding to the allegations against him; and that in the circumstances in which it took place Mr Panesar would have enjoyed only a very limited expectation of privacy.

In summary, Mr Panesar complained that his privacy and that of his wife and their daughter and son was unwarrantably infringed in the programme as broadcast in that:

- e) Footage of the family home and grounds was broadcast without consent. By way of background Mr Panesar said that his work and home life had always been separate.

In response, the BBC repeated its argument that footage of Mr Panesar's home was shown only to the extent necessary to give evidence of the lifestyle he enjoyed, as a result (at least in part) of the dishonest activities of his business. It also said that showing footage of Mr Panesar's home was not an infringement of his privacy because he had previously allowed his home to be filmed extensively – inside and outside – for the MTV programme *My Super Sweet 16* and for this footage to be broadcast on that programme. The BBC said that in doing this Mr Panesar had placed his home and his lifestyle in the public domain. It added that in its view Mr Panesar had no reasonable expectation of privacy regarding the re-use of the footage in the *X Ray* programmes given that it served exactly the same purpose as that to which it was originally put in the MTV programme, namely to give an indication of Mr Panesar's wealth.

The BBC also said that no new details about the family home were provided in the *X Ray* programmes, and argued that given her role as company secretary at both Motorcare companies Mrs Panesar shared some fiduciary responsibility for dishonest practices at the companies.

- f) The location of Mr Panesar's home was disclosed in the programme.

The BBC said that the property's address was not identified and the programme solely indicated that the property was in the "*Vale of Glamorgan*". It also said that during a telephone conversation between Mr Panesar and the producer on the day of the first broadcast Mr Panesar indicated that he was content with the description of the location of the property which was subsequently used in the programme (i.e. that it was restricted to name of the area in which it was located).

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

- g) Footage of Mr Panesar being questioned by the reporter, which was gained through 'doorstepping', was broadcast without Mr Panesar's consent.

The BBC said that the broadcast of this interview was justified because it met the requirements of the Code for conducting a 'doorstep' interview.

- h) The programme disclosed the information that Mr Panesar had been declared bankrupt.

The BBC said that the fact of Mr Panesar's bankruptcy was a matter of public record and therefore the disclosure of this information in the programme could not have infringed his privacy.

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

- i) Footage of Miss Anysha Panesar (when she was aged 14), which was originally broadcast in *My Super Sweet 16 in 2009* on MTV, was included in the programme without consent.

In response, the broadcaster said that it did not need Ms Panesar's consent to use footage from this programme as it was still in the public domain because all of the footage was openly available via *iTunes*. The BBC added that the programme contained no negative comments about Miss Panesar and no suggestion that she had done anything wrong.

The BBC also said that that in the three years since the material was first broadcast Miss Panesar had lived her life in public and noted that the biography section of her website⁴ referred to the MTV programme and gave details of some of her subsequent appearances in the public eye.

The BBC therefore considered that Ms Panesar did not have a reasonable expectation of privacy with regard to the MTV footage. It argued however that, if Ofcom considered that she did have any such expectation, it was minimal and the inclusion of this footage in the *X Ray* programme was warranted because it was in the public interest to illustrate the extensive wealth of the family behind the Motorcare businesses (which were known to have operated dishonestly) given the financial hardship that Mr Panesar's businesses inflicted on many of their customers.

⁴ (<http://anyshapanesar.com/appearance.php>)

Representations on Ofcom's Preliminary View

Ofcom prepared a Preliminary View in this case that Mr Panesar's complaint should not be upheld. Neither Mr Panesar nor the BBC commented on that Preliminary View.

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 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 an unedited recording of the 'doorstep' interview with Mr Panesar.

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. 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.

- a) Ofcom first considered Mr Panesar's complaint that he was treated unjustly or unfairly in the programmes as broadcast in that the programmes insinuated that he had inappropriately used his company's finances to fund his daughter's party, but that this was totally untrue.

Ofcom observed that the report opened with footage from a television programme called *My Super Sweet 16* which had originally been broadcast on the MTV channel in 2009. This footage showed Mr Panesar's daughter, Anysha (then aged 14), talking about her family's wealth and planning for and enjoying what appeared to be an expensive fifteenth birthday party. At the end of this footage in the BBC report, Mr Panesar was shown watching his daughter as she rode a pony with the following accompanying commentary:

"These pictures come from a cable TV show where rich teenagers get a party to die for. The family here are the Panesars from the Vale of Glamorgan and

the cash comes from dad, Harby Panesar. But where did the money come from?”.

The report then turned to a consideration of Mr Panesar’s former businesses Motorcare Warranties and Motorcare Elite (both now in liquidation) which it said *“sold warranties to car dealers who then sold them on to their customers – offering peace of mind in case the car broke down”*. It claimed that some of the policies sold by the Motorcare businesses were *“worthless”* and included testimony from individuals who had tried to claim money back for car repairs. They found however that the underwriter named in their warranties, Alpha Insurance, either had a record that payment had been made to the party concerned by Motorcare or had not actually provided insurance to cover the Motorcare warranty in question.

The report also included further footage of Mr Panesar and his daughter at her birthday party, which was accompanied with the following commentary: *“While Motorcare boss Harby Panesar was issuing these policies, he was living the dream spending a reported £20,000 on his daughter’s party”*.

A follow-up report in the subsequent edition of *X Ray* broadcast on 20 February 2012, which also included some images from the *My Super Sweet 16* programme, was introduced with following comment: *“Now last week we brought you the story of Motorcare Elite which provided breakdown warranties on used cars. The company was run by Harby Panesar from the Vale of Glamorgan – who flaunted his wealth on TV back in 2009 in a cable TV show about his daughter’s birthday party”*.

In Ofcom’s opinion, viewers would have understood these sections of the programmes to have indicated that Mr Panesar paid for his daughter’s birthday party and that he was able to do so because his car warranty business had made him a wealthy man. Ofcom considered that neither programme had said or implied that Mr Panesar had inappropriately used his company’s finances to fund his daughter’s party, but rather indicated that he had chosen to use his wealth derived from his business to pay for an expensive party for his daughter.

Ofcom recognised that there was a dispute between the parties about whether Mrs Panesar, rather than Mr Panesar, had paid for the party. However, it should be noted that Ofcom’s role is not to establish precisely who had paid for the party but rather to determine whether, in broadcasting the claim that Mr Panesar had paid for it, the programme makers took reasonable care not to present, disregard or omit material facts in a way that was unfair to him.

Ofcom observed that the source of the claim in question was the following comment (made by Miss Panesar about her party in the *My Super Sweet 16* programme): *“It’s going to take all my Dad’s money and all my Mum’s attention”*. It also noted that when the programme makers invited Mr Panesar to correct any factual errors he found in either the *My Super Sweet 16* programme or in an article about the party published by *Media Wales* (which quoted Mrs Panesar as its source) he made no corrections.

We also observe that Mrs Panesar was a director of both Motorcare Warranties and Motorcare Elite and that Motorcare Warranties was originally founded by her father.

In light of these observations Ofcom considered that the programme makers had a reasonable basis on which to include the claim that Mr Panesar had paid for his daughter's party.

In his complaint Mr Panesar said that the party had been booked and paid for before he set up Motorcare Elite in August 2008 and therefore money from that business could not have been used to pay for the party. He also said that at least one of the individuals shown in the first programme had bought a car warranty two years after the date of the party.

With regard to these aspects of the complaint Ofcom observed that at least some part of the Panesar family's wealth derived from the Motorcare car warranty businesses (Motorcare Elite and Motorcare Warranties). In addition, the first programme made it clear that prior to setting up Motorcare Elite in 2008 Mr Panesar had taken over the running of Motorcare Warranties from his father-in-law in 2004. In this context, Ofcom also noted that, as the BBC set out in its response, in a recent court case brought against Motorcare Warranties, Motorcare Elite and their directors (i.e. Mr and Mrs Panesar and the members of Mrs Panesar's immediate family - all of whom sat on the boards of both businesses), Mr Justice Eder found that Motorcare Elite had been set up to take over the business previously operating under the name Motorcare Warranties and that they were in effect one continuous business. Also while one of the individuals in the first programme had purchased a warranty after the date of the party, at least one other had purchased her Motorcare warranty two years prior to the party.

Given that: the programme made it clear that Mr Panesar managed the successive Motorcare businesses since 2004; the businesses both sold car warranties and shared the same directors; and, that the programme included at least one individual who purchased a warranty some time prior to the party, Ofcom does not consider that the programmes' implication that the money which was used to pay for the party was derived from Motorcare (i.e. Motorcare Warranties and Motorcare Elite) at a time when it had sold warranties which were "*worthless*" resulted in unfairness to Mr Panesar.

In addition, even if Mrs Panesar, rather than Mr Panesar had paid for the party, given her involvement in the business managed by her husband and set up by her father and given that the wealth of her family appeared to derive to some considerable degree from the business, this discrepancy would not have had a material and adverse effect on viewers' perception of Mr Panesar.

Taking account of the factors above into account, Ofcom concluded that the programme makers took reasonable care with material facts in relation to the inclusion of the claim that Mr Panesar paid for his daughter's birthday party and that the way in which the programme presented him with regard to this matter would not have resulted in unfairness to Mr Panesar. Ofcom's Decision was therefore that there was no unfairness to Mr Panesar in this respect.

- b) Ofcom then considered Mr Panesar's complaint that he was unfairly portrayed in the programmes as broadcast in that they included footage of him being "hit with a barrage of questions [which] he was unable to answer" and unfairly accused him of failing to answer questions and making up details of the warranties sold by his company.

Ofcom observed that at the end of the first programme Mr Panesar was shown being asked questions by a reporter about his business practices as he walked his dogs along a lane through the gates to his home. During this footage, the reporter asked Mr Panesar why he had *“been selling worthless warranties?”* and why he had been *“making up the names of underwriters on your policies?”* Mr Panesar briefly denied the claims being made about him before indicating that *“all the answers would be given to the authorities”*. The reporter also asked Mr Panesar: *“Have you got nothing to say to your customers?”* He responded that he didn’t *“at this point”* but *“when the time is right I will”*.

Immediately prior to this section of the first programme the reporter said *“Harby Panesar says he is unable to speak to us because of the FSA investigation”* (i.e. an investigation into policies sold by Motorcare which was referred to earlier in the report).

The second programme included a brief section of the footage of Mr Panesar being questioned by the reporter as he walked his dogs home along with the above exchange about if and when Mr Panesar would speak to his customers.

With regard to Mr Panesar’s complaint that he was hit with a “barrage of questions” which he was unable to answer, Ofcom noted that the circumstances in which the interview was conducted meant that there was limited time for the reporter to ask questions⁵ and, as a result, she asked questions in quick succession. Nonetheless, the footage broadcast showed Mr Panesar providing a response to each question asked and therefore Ofcom considered that he had been provided with a sufficient opportunity to answer. While some of Mr Panesar’s responses did not address the substance of the question asked, Mr Panesar’s position that he was constrained from answering questions by the on-going FSA investigation was clearly communicated to viewers. In the first programme, the reporter explained that Mr Panesar had told them he was *“unable to speak to us because of the FSA investigation”*. In addition, Mr Panesar’s response that he would be providing answers to “the authorities” was part of the broadcast interview. Ofcom therefore considered that there was no unfairness in the conduct of the broadcast interview.

With regard to Mr Panesar’s complaint that the programmes unfairly accused him of failing to answer questions, Ofcom noted that the reporter actually commented in the first programme that Mr Panesar was *“not quite so happy when it came to answering our questions”* and in the second programme that *“he was less happy to be on telly when we asked why some of his policies had turned out to be worthless”*.

Ofcom considered that these comments were a fair reflection of the thrust of Mr Panesar’s answers and his demeanour during the broadcast interview. Given the nature of the questions asked, Ofcom acknowledged that Mr Panesar’s reaction to the interview was to some extent understandable. Nevertheless, we considered the interview with Mr Panesar outside his house was justified for the reasons set out below in the assessment of Mr Panesar’s privacy complaint. In addition, we observed, as noted above, that Mr Panesar’s reason for repeatedly declining to provide substantive responses, namely his view that the FSA investigation prevented him doing so, and his assertion that he would do so *“when the time is right”* was communicated to the viewers. Taking these

⁵ The justification for those circumstances is considered in the assessment of Mr Panesar’s privacy complaint below.

considerations into account, Ofcom found that there was no unfairness in the reporter's comments about Mr Panesar's willingness to answer questions.

Finally, in relation to Mr Panesar's complaint that the programmes had unfairly accused him of making up details of the warranties sold by his company, Ofcom understood this to refer to the interviewer's question as to why he had been *"making up the names of underwriters on your policies?"* Ofcom recognised that that there was a dispute between the parties about the truth of this allegation. Ofcom observed that the source of the claim in question included the testimony of customers who had purchased Motorcare warranties and the initial findings of the FSA investigation into Motorcare policies. Ofcom also noted that prior to the broadcast Alpha Insurance had told the programme makers that, despite being listed as the underwriters on a specific life of ownership warranty sold by Motorcare, it had never provided this kind of insurance to any company. In addition, a second insurance company, Belmonte Limited, which was mentioned within the section of the Motorcare warranties on insurance underwriters told the programme makers that it had never provided insurance to Motorcare.

Ofcom considered that this information provided the programme makers with a reasonable basis for the inclusion of the claim that the names of underwriters on some policies sold by Motorcare had been made up.

Ofcom therefore found that there was no unfairness to Mr Panesar in this respect.

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.

- c) Ofcom considered Mr Panesar's complaint that his privacy and that of his wife and their daughter and son was unwarrantably infringed in connection with obtaining of material included in the programme, in that footage of the family home and grounds was recorded without consent.

By way of background, Mr Panesar said that his property boundaries were overstepped by the film crew on two occasions and that filming without consent took place on at least one occasion during which his wife and children had been at home.

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.

In order to establish whether or not the privacy of Mr Panesar and his family was unwarrantably infringed in this respect, Ofcom first assessed the extent to which they had a legitimate expectation of privacy in respect of the footage of their home that was filmed.

The footage in question comprised several images of the Panesar family house and gardens recorded by the programme makers (as distinct from the images of the house drawn from the *My Super Sweet 16* programme). This footage was confined to exterior shots of the property (one view of the house from across a field and several somewhat closer views of the house and gardens) and accorded with the BBC's description of the film crew filming pieces to camera and gathering general shots from the public highway.

While Ofcom recognised that within his complaint Mr Panesar had said that on one occasion filming without consent took place at a time during which his wife and children had been at home, we noted that the BBC had said that: on the first occasion it filmed there was no indication that anyone was at home; the crew was not approached by anyone from the house and was not asked to stop filming; and that the unedited footage of the 'doorstep' interview (i.e. the second occasion when filming took place) included no images of any member of Mr Panesar's family, other than himself, or of the interior of his house.

We also noted that on both occasions that filming took place the programme makers said they took steps to ensure that they did not film Mr and Mrs Panesar's children by filming either during school hours or after the school bus had left the village. In addition, we observed that the property (including views of the interior of the house) had been included in an edition of *My Super Sweet 16* on MTV originally broadcast in 2009. This was broadcast with Mr Panesar's consent and is still freely available for the general public to view via the internet.

Ofcom considered that the complainants may have had an expectation of privacy in relation to the footage of the Panesar family home, since this is likely to be the focal point of their private life. However, in light of all the factors noted above (notably that the programme makers recorded only general shots of the property's exterior from the public highway; there was no evidence of any one other than Mr Panesar at home; and, care was taken to film during school hours), we considered that any expectation of privacy on the part of the complainants in relation to this footage was very limited.

Having formed the view that Mr Panesar and his family may have a limited legitimate expectation of privacy in relation to the footage of their home filmed by the *X Ray* programme makers, albeit very limited, Ofcom went on to consider whether the filming of that footage without consent 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 privacy⁶.

Ofcom observed that the BBC argued that Mr Panesar's wealth was a central feature of the programme because, the evidence suggested, it derived from the proceeds of two businesses which dishonestly obtained large sums of money from customers for motor warranties which were worthless. Given this, we

⁶ 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.

considered that gathering visual evidence as to the family's lifestyle in order to corroborate the allegations being made by the programme was warranted.

In this context we noted that one of the contributors to the first programme specifically mentioned the financial hardship he had suffered when he had to pay for car repair bills which he had thought were covered by his Motorcare insurance policy. He said *"I was £675 out of pocket. It was just after Christmas – I've got two kids in the house – which is a dear time of year. I was in and out of work."* He was also shown saying *"It makes me very angry to think I actually work for a living to try to earn money and there is people like him [Mr Panesar] out there who's actually taking money off working class people who's actually worked for a living."* In addition, during the follow-up programme another contributor (who had bought life-of-ownership warranties for her driving school cars but found that at least one of them was invalid) talked about how she had really needed the warranties as they were *"going to keep our vehicles running and... help pay for some of what can be quite expensive repairs."*

Given the inclusion of descriptions of Mr Panesar's wealth in the programme and the fact that individuals who had bought policies sold by his companies were shown discussing the financial implications of their having found that these policies were invalid, Ofcom concluded that the infringement into the limited expectation of privacy of Mr Panesar and his family by the recording of the footage of their home in the circumstances described above was warranted. This was because the recording of this footage subsequently enabled the programme to include first-hand evidence of the lifestyle enjoyed by Mr Panesar and because (as set out in heads d) and g) below) it allowed the programme makers to secure (and thereafter to broadcast) an interview with Mr Panesar about his business practices - actions which Ofcom concluded were in the public interest.

Ofcom therefore found that to the extent there was an infringement of the Panesar family's privacy by the filming of the family home, that infringement was warranted by the public interest, given the nature of the shots taken and the care exercised in relation to the timing of the filming.

- d) Ofcom then considered Mr Panesar's complaint that his privacy was unwarrantably infringed in connection with obtaining of material included in the programme in that he was accosted by a reporter and film crew as he entered the gates to his property.

Mr Panesar said this incident of 'doorstepping' was not warranted because he had previously written to the programme saying that he was not unwilling to be interviewed but he was unable to give an interview because the FSA prevented him from discussing the investigation it was making into his company.

In considering this head of complaint, Ofcom took into account Practices 8.5, 8.9 and 8.11 of the Code. Practice 8.5 says that any infringement of privacy in the making of a programme should be with the person's and/or organisation's consent or be otherwise warranted. Practice 8.9 states that the means of obtaining material must be proportionate in all the circumstances and in particular to the subject matter of the programme. Practice 8.11 says that 'doorstepping' for factual programmes should not take place unless a request for an interview has been refused or it has not been possible to request an interview, or there is good reason to believe that an investigation will be frustrated if the subject is approached openly, and it is warranted to doorstep.

Ofcom first assessed the extent to which Mr Panesar had a legitimate expectation of privacy at the time he was interviewed outside his house.

Part of the filming of the 'doorstepped' interview was conducted in the public lane close to Mr Panesar's house, while he walked his dogs and continued while he walked across a paved driveway leading to his front gate and as he walked through it. While we recognise that much of the interview took place on the public highway, Mr Panesar was in the course of his domestic life at the time – walking his dogs - and returned to his family home at the conclusion of the interview. Our view is that Mr Panesar had a legitimate expectation of privacy at the time that he was approached for the interview, although limited to the extent he was filmed on the public highway.

Having formed the view that Mr Panesar had a legitimate expectation of privacy, Ofcom went on to consider whether the intrusion into Mr Panesar's privacy by doorstepping him was warranted.

'Doorstepping' is the filming or recording of an interview or an attempted interview with someone without prior warning and is a legitimate means for programme makers to obtain interviews in certain circumstances. However, it should not take place unless Practice 8.11 has been followed. In considering whether the infringement of Mr Panesar's privacy was warranted, Ofcom therefore assessed whether this was the case.

Ofcom observed that the programme makers wrote to Mr Panesar on 17 January 2012 to request an interview with him but, as noted in the Decision at head b) above, he replied that he could not respond to due to the restrictions imposed by a governing authority. However, after sending a further letter asking the identity of the governing body in question and the nature of the restrictions placed upon Mr Panesar (to which they received no response), the programme makers then approached the liquidator of Motorcare Elite, and subsequently the FSA, to find out if there were any such restrictions which would prevent Mr Panesar from speaking to them. In light of the FSA's response that although it asks individuals under investigation not to talk to the press it has no powers to prevent them from doing so, the programme makers considered that Mr Panesar was not legally constrained from speaking to them and was using this supposed constraint in an attempt to avoid answering legitimate questions about his activities. They therefore filmed the 'doorstepped' interview with him.

Ofcom noted the material the programme makers had gathered about the car warranties sold by Mr Panesar's Motorcare business prior to filming this interview including: the information that the names of the underwriters in some of the policies were false or misleading; the extent of the losses incurred by individuals who had found that for various reasons warranties they had purchased in good faith were invalid; and the widespread nature of the FSA investigation into the policies sold by Motorcare. We also noted that although Mr Panesar initially stated that he could not answer any questions put to him about his business due to the FSA investigation he did so - both during the 'doorstep' interview and in a series of telephone conversations with the programme makers afterwards.

Ofcom took into account all these factors, and in particular, that: the programme makers had sought but been refused an interview by Mr Panesar; and, the programme makers had ascertained that Mr Panesar was not prohibited in any way by law from talking to them about the warranties sold by Motorcare and therefore had a reasonable basis for concluding that he was avoiding responding

to the allegations against him. Ofcom therefore took the view that the conducting of a 'doorstep' interview with Mr Panesar was in the public interest. A number of very serious allegations had been made about the business practices of Motorcare, and the interview enabled the programme makers to further their journalistic investigation into those practices and Mr Panesar's link to them, and subsequently to include this material within the broadcast and thereby enable viewers to draw their own conclusions on these matters.

As noted, much of the interview was conducted on the public highway. Although at one point the reporter questioning Mr Panesar followed him through his gate onto his property, she retreated immediately upon being asked to do so, and that filming subsequently continued from the paved driveway until the film crew were asked to step back to the public highway (which they did). Ofcom considered, in the circumstances, that the approach to Mr Panesar and filming of him outside his home did not cause significant annoyance, distress or embarrassment.

Therefore, Ofcom found that there was no unwarranted infringement of Mr Panesar's privacy in connection with obtaining material included in the programme in this respect.

- e) Ofcom next considered Mr Panesar's complaint that that his privacy and that of his wife and their daughter and son was unwarrantably infringed in the programme as broadcast in that footage of the family home and grounds was broadcast without consent.

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 or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted. It also had regard to Practice 8.10 which states that broadcasters should ensure that the re-use of material, i.e. use of material originally filmed or recorded for one purpose and then used in a programme for another purpose or used in a later or different programme, does not create an unwarranted infringement of privacy. This applies both to material obtained from others and the broadcaster's own material.

For the reasons set out under head c) above, Ofcom considered that Mr Panesar and his family may have had an expectation of privacy in relation to the footage of their family home that was broadcast but that any such expectation was very limited.

Having formed the view that Mr Panesar and his family may have had a limited expectation of privacy in relation to the footage of their home which was broadcast, Ofcom went on to consider whether any intrusion into their privacy as a result of the broadcast of this material was warranted.

Ofcom observed that the BBC argued that Mr Panesar's wealth was a central feature of the programme because it appeared that it derived from the proceeds of businesses he had run and which had sold car warranties which were worthless. The broadcaster also said that this footage provided an evidential basis for the observations made in the programme about Mr Panesar's lifestyle and the likely link to his business activities.

In this context we again noted the inclusion in the programme of testimony from individuals who had experienced financial hardship as a result of purchasing

Motorcare warranties which were found to be invalid (see head c) above for details).

Given the inclusion of descriptions of Mr Panesar's wealth in the programme and the fact that individuals who had bought policies sold by his companies were shown discussing the financial implications of their having found that these policies were invalid, Ofcom concluded that the infringement into the limited expectation of privacy of Mr Panesar and his family by the broadcast of the footage of their home which was recorded in the circumstances described above was warranted. This was because the inclusion of this footage in the programme allowed viewers to see first-hand evidence of the lifestyle enjoyed by Mr Panesar and of his reactions to questions about his business practices.

The programme also showed footage of Mr Panesar's property (including views of the interior of the house) which was originally broadcast in an edition of *My Super Sweet 16* on MTV in 2009.

Ofcom observed that this footage was broadcast with Mr Panesar's consent and is still freely available for the general public to view via the internet.

Given these factors Ofcom considered that neither Mr Panesar nor his family had a legitimate expectation of privacy in relation to this footage in the programmes as broadcast. In light of this conclusion, the re-broadcast of the footage was not an infringement of their privacy.

Taking into account all of the factors noted above, Ofcom found that there was no unwarranted infringement of Mr Panesar's privacy or that of his family as a result of the inclusion of footage of their home in the programmes as broadcast.

- f) Ofcom considered Mr Panesar's complaint that that his privacy and that of his wife and their daughter and son was unwarrantably infringed in the programme as broadcast in that the location of their home was disclosed in the programme.

In considering this head of complaint, Ofcom had regard to Practice 8.2 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 noted that while the programme did indicate that Mr Panesar lived with his family in the Vale of Glamorgan neither the footage of the property nor the commentary indicated either the house name/number or the name of the street on which it is located. Therefore, Ofcom concluded that the location of Mr Panesar's property was not disclosed in the programme.

Therefore, Ofcom found that there was no unwarranted infringement of Mr Panesar's privacy or that of his family in this respect..

- g) Ofcom next considered Mr Panesar's complaint that that his privacy was unwarrantably infringed in the programme as broadcast in that footage of his being 'doorstepped' was broadcast without consent.

In considering this head of complaint, Ofcom again 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 or organisation, consent should be obtained before the relevant material is broadcast.

Ofcom has already concluded that the intrusion into Mr Panesar's privacy by the recording of a 'doorstepped' interview with him was warranted by the public interest in enabling the programme makers to investigate Motorcare business practices and Mr Panesar's link to them. Given this we also consider that any intrusion into Mr Panesar's privacy as a result of the broadcast of footage of this 'doorstepped' interview was warranted by the public interest in enabling the broadcaster to expose the allegedly misleading claims made by Motorcare and allowing viewers to see Mr Panesar's response to the allegations put to him.

Therefore, Ofcom found that there was no unwarranted infringement of Mr Panesar's privacy in the programme as broadcast in this respect.

- h) Ofcom considered Mr Panesar's complaint that that his privacy was unwarrantably infringed in the programme as broadcast in that the programme disclosed that he had been declared bankrupt.

Ofcom had regard to Practice 8.6 of the Code in assessing this head of complaint.

In considering whether or not Mr Panesar's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which he could have a legitimate expectation of privacy in relation to the information about his bankruptcy.

As noted above during the first programme the reporter described Mr Panesar as having been "*declared bankrupt*". She also said that "*the Motorcare money machine had hit the buffers*". Accordingly we consider that the programme did disclose the information that Mr Panesar was bankrupt.

Ofcom recognised that Mr Panesar might have preferred the programme not to have broadcast the fact that he was bankrupt. However, given that this information was a matter of public record following bankruptcy proceedings, Ofcom did not consider that he had a legitimate expectation of privacy with regard to this information. Given this, the disclosure of this information was not an infringement of his privacy.

Therefore, Ofcom found that there was no unwarranted infringement of Mr Panesar's privacy in the programme as broadcast in this respect.

- i) Ofcom finally considered Mr Panesar's complaint that Miss Anysha Panesar's privacy was unwarrantably infringed in the programmes as broadcast in that they included footage of her originally broadcast in *My Super Sweet 16* in 2009 without consent.

In considering this head of complaint, Ofcom again took account of Practices 8.6 as well as Practice 8.10 of the Code. Practice 8.10 states that broadcasters should ensure that the re-use of material, i.e. use of material originally filmed or recorded for one purpose and then used in a programme for another purpose or used in a later or different programme, does not create an unwarranted infringement of privacy. This applies both to material obtained from others and the broadcaster's own material.

In considering whether or not privacy of Miss Panesar's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered

the extent to which she could have a legitimate expectation of privacy in relation to the footage of her originally broadcast in an edition of *My Super Sweet 16*.

Ofcom observed that this footage was first broadcast by MTV in 2009 with Mr Panesar's consent (as Miss Panesar was a minor at the time). We also observed that this footage is still freely available for the general public to view via the internet and that Miss Panesar herself mentions it on a page of her website listing her media appearances.

Taking into account these factors, and in particular the free and continued availability to the general public of the footage in question, Ofcom considered that Miss Panesar did not have a legitimate expectation of privacy in regard to the footage in question. Given this conclusion, the re-broadcast of the footage was not an intrusion into her privacy.

Ofcom therefore found that there was no unwarranted infringement of Miss Panesar's privacy in regard to the inclusion of this footage in the programmes as broadcast.

Accordingly, Ofcom found that Mr Panesar's complaint of unfair treatment and of unwarranted infringement of privacy in connection with the obtaining of material in and in the programme as broadcast should not be upheld.

Not Upheld

Complaint by Mr Andrew Pilley

Radio 5 Live Investigates, Radio 5 Live, 22 April 2012

Summary: Ofcom found that this complaint of unjust or unfair treatment made by Mr Andrew Pilley should not be upheld.

The programme included an investigation into the business practices of a company called Commercial Energy Limited (“Commercial Energy”), a brokerage firm that negotiates energy contracts for small business customers. It also looked at “*possible links*” between Commercial Energy and Mr Andrew Pilley who owns an energy supply company called Business Energy Solutions (“BES”) and is the Chairman of Fleetwood Town Football Club.

Ofcom found that:

- Mr Pilley was not treated unfairly in the programme as broadcast in that the programme makers took reasonable care in presenting the material facts in relation to the allegations made about Mr Pilley in the report and the programme included a fair representation of the responses which were given to criticisms included in the programme on Mr Pilley’s behalf.
- Mr Pilley was given an appropriate and timely opportunity to respond to the claims made about him in the programme.

Introduction

On 22 April 2012, the BBC’s Radio 5 Live broadcast an edition of its consumer affairs programme *5 Live Investigates*. The programme included an investigation into the business practices of a company called Commercial Energy Limited (“Commercial Energy”), a brokerage firm that negotiates energy contracts for small business customers. The presenter, Mr Adrian Goldberg, introduced the programme by saying:

“Tonight, shocking tactics, the electricity broker caught by us conning people into signing energy deals that are costly and unnecessary...but who is behind these rogue energy traders? We explore possible links to the Chairman of Fleetwood Town”.

Mr Goldberg went on to name the Chairman of Fleetwood Town Football Club (“Fleetwood Town”) as “*Andy Pilley*” and said that, notwithstanding Mr Pilley’s denial of any connection to Commercial Energy, staff at the company believed that he was their boss.

During the investigation into Commercial Energy, a reporter on the programme said that there was evidence that some telesales staff there were “*bamboozling and lying to win customers*”.

The programme reported on how the owner of a business called Maxitrak (which had signed up to a new energy contract through Commercial Energy) said that rather than negotiating the best energy deal for his company, Commercial Energy had organised a deal which was more expensive than the emergency tariff offered by his former supplier. The owner of Maxitrak explained that the new contract was with a

company called BES (Business Energy Solutions) which, the programme said, was owned by Mr Pilley.

The programme also included covert recordings of staff at Commercial Energy. In one of these recordings, a telesales employee was heard telling a potential client company that he was calling to register energy meters. The programme said that there was no legal requirement to register energy meters in the UK, but that Commercial Energy used this technique in order to elicit the meter numbers of the companies it called to check if the company had an existing energy contract.

The programme also said that Commercial Energy *“usually but not always push you towards a contract with Business Energy Solutions... which is run by... Andy Pilley”* before adding that Mr Pilley had told the programme that *“there is nothing wrong with a broker wanting any of its suppliers to grow”*.

The programme subsequently indicated that rather than *“scouring the market”* for the best deals for its customers, some telesales staff at Commercial Energy made up false comparative prices *“to push customers in the direction of their preferred suppliers including BES”*. It added that this technique of making up false comparative prices (as well as the detail that it was a practice led by the senior sales staff) was explained to new staff during training. Covert recordings of staff were included in the programme to illustrate these points.

Another contributor to the programme was heard saying that staff at Commercial Energy had misrepresented themselves by indicating to her that they were calling from British Gas and thereby deceived her into signing up for a new contract.

The programme said that Mr Pilley *“spends time at the offices of Commercial Energy”* and that some sales staff described him as *“the big boss”* and spoke of company outings and financial incentives arranged for them by Mr Pilley. This section of the programme included a covert recording of a training session at Commercial Energy during which the member of staff conducting the training said that Mr Pilley owned Commercial Energy, BES and Fleetwood Town.

The programme explained that Mr Pilley had declined an offer of an interview and sections of a statement were read out which Mr Pilley’s solicitor had sent to the BBC in response to the claims being made about him in the programme.

Following the broadcast of the programme, Mr Stephen Lister of Heatons LLP, Mr Pilley’s solicitors, complained to Ofcom that Mr Pilley was treated unjustly or unfairly in the programme as broadcast.

Summary of the complaint and broadcaster’s response

The details of Mr Pilley’s complaint are set out below, followed by the BBC’s responses on particular points.

In summary, Mr Lister complained that Mr Pilley was treated unjustly or unfairly in the programme as broadcast in that:

- a) Mr Pilley was presented unfairly in the programme in that:
 - i) The programme alleged that Mr Pilley controlled Commercial Energy (either financially or otherwise) notwithstanding the fact that he is neither a shareholder nor a director of that company.

In response, the BBC said that the programme's investigation was prompted by research which found that high levels of complaints had been made to consumer organisations (notably Blackpool Trading Standards and Consumer Focus¹) about some energy brokerage companies.

The BBC said that the programme clearly stated that it was not claiming that Commercial Energy was controlled by Mr Pilley and on a number of occasions made it clear that Mr Pilley had denied any link to the company. It also said that the programme stated that Mr Pilley was not listed as a director or shareholder in the company.

The BBC acknowledged that, notwithstanding the inclusion of the points noted above, the programme also pointed out that there was considerable and cogent corroborative evidence of some connection between the company and Mr Pilley. It said that Mr Pilley sublet part of the Commercial Energy's premises and spent time in its offices. He admitted that he provided perks and bonuses for staff at the company. He was also a director of the energy supplier BES which received many referrals from Commercial Energy.

The BBC said that the secret recordings undertaken for the programme provided further evidence of Mr Pilley's links to Commercial Energy. It said that "Danielle", the person described as a junior employee by the complainant, was actually the person who met the programme's undercover journalist and other new recruits on their first day and briefed them about the company. She told them she had worked there for four years (although Commercial Energy was not established until 2010). Mr Lee Goulding (aka Mr Lee Qualter) also came into the meeting room on that first day and told the new recruits that Danielle was someone who "knows everything about electric and gas". It was Danielle who showed the new recruits a presentation which included a slide with logos of Fleetwood Town, Commercial Energy, and BES and explicitly made a connection between Mr Pilley and these companies. The BBC added that before starting work, the undercover journalist was interviewed by a female employee named Kirsty who met him at Darwin Court (the address where Commercial Energy was based) and took him to Mr Goulding's office to fill in an application form which was clearly headed "Commercial Energy". During the course of their secretly recorded conversation, Kirsty made several comments linking Commercial Energy with Mr Pilley and/or the businesses in which he had an established interest, i.e. Fleetwood Town and BES.

In addition, although the job taken by the undercover journalist had been advertised as being with Commercial Energy, he and the other new recruits were presented with three identical contracts for Commercial Energy, BES and Fleetwood Wanderers Limited trading as Fleetwood Town (copies of which were supplied to Ofcom). The BBC said that when asked by the undercover journalist "how come we're signing up for Fleetwood Wanderers?", Danielle first sought advice on how to respond and then said "...the boss owns three separate companies...so it has to be shared between... it's exactly the same contract, it's just... obviously it just got to come out of all the companies that's its companies... Yeah, he owns here and Fleetwood Town Football Club so the way it's paid obviously it comes out of all three".

¹ Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland.

- ii) The programme alleged that Mr Pilley was often seen on the premises of Commercial Energy but failed to broadcast the explanation that Commercial Power (a company in which Mr Pilley owns a majority shareholding and of which he is a director) sublets part of its premises to Commercial Energy.

In response, the BBC said that this explanation was not included in any of Mr Pilley's responses to the programme's enquiries and the undercover reporter saw no evidence of Commercial Power being located at Darwin Court. Mr Pilley's link to Commercial Energy was corroborated by the fact that Commercial Energy also has premises at Unit 7, Metropolitan Business Park, Blackpool and used this address in its contracts of employment. This address was also the business address that Mr Pilley recently used on documents submitted to Companies House. In addition, the BBC said that a "source" at Commercial Energy told the programme that sales staff there understood Mr Pilley to be their boss and that he (i.e. the "source") had, like the undercover reporter, signed three contracts when he first began working for Commercial Energy in September 2011 for Commercial Energy, Commercial Power and Fleetwood Town.

- iii) The programme failed adequately to distinguish between the respective roles of BES and Commercial Energy thereby implying that Mr Pilley controlled Commercial Energy and was therefore responsible for any alleged "mis-selling" of energy contracts.

The BBC said that the programme made a clear distinction between brokers and energy suppliers and between BES and Commercial Energy, and that this was particularly the case in its presentation of the story of a customer who tried to cancel a contract with BES, but was told the contract had been taken out with Commercial Energy and that BES could do nothing about it. It also said that at an early stage the reporter spelt out the brokers' role, with a specific reference to Commercial Energy. In particular, the BBC said that when representing Mr Pilley's statement, the reporter made the position absolutely explicit:

Reporter: *"He [Mr Andrew Pilley] is not listed at Companies House as being linked to Commercial Energy. He issued us with a statement through his lawyer. He strongly denies that he – or BES – have any financial interest in Commercial Energy or any control over its operations. He accuses us of a lack of understanding of the way the energy market operates. And he said that all brokers who deal with the company have to act in accordance with its code of conduct."*

Presenter: *Yes - but what about the fact that staff who we've heard recorded seemed to think that Mr Pilley owned Commercial Energy? Some referred to him – we've heard it – as the 'big boss'.*

Reporter: *Well Mr Pilley's lawyer says it's not surprising that he is regarded in this way. He says he's an important man in the energy market. As the director of BES and another energy company he deals with more than 80 brokers and is responsible - in his lawyer's words – for encouraging best practice. The statement says – and I quote directly – "The fact that he may be referred to as the 'big boss' within Commercial Energy does not mean that he is acknowledged literally as their boss"."*

- iv) The programme failed to broadcast Mr Pilley's position (as set out in his statement) that, notwithstanding its independence from Commercial Energy, BES sought to impose its own regulatory framework upon Commercial Energy in order

to protect customers and required the sales personnel at Commercial Energy to adhere to a script which would have made “mis-selling” impossible.

In response the BBC said that the programme made this point clearly within the reporter’s representation of Mr Pilley’s response to the claims made about him (see extract from programme set out in head a) iii) above). However, the BBC added that while Mr Pilley’s position on these matters was represented, it was evident from some of the conversations that were secretly recorded and from the script used for training sales staff at Commercial Energy that best practice was not required of them. The script failed to guard against mis-selling by not requiring the Commercial Energy caller to say that they were a broker. Instead, it told them to say that they were “...*calling from Commercial Energy meter registrations*” which, created a strong likelihood that the customer would believe they were being called by some official body. It told them to say that “*I am going to register your meters today for you*” when there was and is no requirement to register meters. The script also failed to make clear that the broker can only search part of the market and obtain quotes from a limited number of suppliers. The broker was then told to say, “Now I have all the information I am going to go away and have a look into the supply and see what rates are available to you in your area... is there any particular supplier you want to register with or is it just the best?”.

- v) The programme sought to establish a link between Mr Pilley, BES and Fleetwood Town and Commercial Energy when there was no significant evidence that such a link could be implied. By way of example, Mr Lister said that the programme indicated that Commercial Energy’s offices were located between Blackpool and Fleetwood when this was quite untrue and included a number of gratuitous references to Fleetwood Town.

In response, the BBC set out a range of evidence which it said strongly suggested a link between BES, Commercial Energy and Commercial Power. This evidence included:

- Companies House records which showed that the sole director of Commercial Energy was Mr Lee Qualter – who is also known as Mr Lee Goulding – and that Mr Pilley, the majority shareholder of BES and Commercial Power, was co-director, with Mr Goulding, of two dissolved companies.
- Online job advertisements apparently for both Commercial Power and Commercial Energy with very similar or exactly the same details including telephone numbers, company history and the wording in general.
- Testimony from a source inside one of the brokerage companies describing questionable sales techniques.

The BBC added that Mr Pilley was a prominent figure in sporting circles in the North West and beyond, by virtue of his position with Fleetwood Town. It also said that BES and Commercial Power, Mr Pilley’s companies, were two of the club’s main commercial sponsors and that the latter had made loans of more than £4.3 million to Fleetwood Town. The BBC said that Mr Pilley’s name would have been familiar to many Radio 5 Live listeners who would have been puzzled had the programme not mentioned the fact of his chairmanship of the club. The broadcaster added that the connection was also mentioned because, as noted above, one of the contracts for services that workers were asked to sign was with Fleetwood Town, and sales staff working at Commercial Energy were introduced to the connection with Fleetwood Town by the company’s trainer, Danielle, who

said it was one of their connected companies. Moreover, the programme's undercover journalist was told about sales incentives events held at Fleetwood Town, which was confirmed in the statement provided to the programme on behalf of Mr Pilley on 20 April 2012.

The BBC said that the programme did not say that Commercial Energy's offices were between Blackpool and Fleetwood, but in fact it said that "*Commercial Energy operates out of an industrial unit half way between Blackpool and Fleetwood in Lancashire*". The BBC said that this was an accurate description of the location of Darwin Court, where the Commercial Energy sales operation was based, and that it was included to give listeners a sense of the geography of the story rather than to make a gratuitous reference to the football club.

- vi) The presenter used a tone of incredulity throughout the relevant section of the programme thereby expressing his disbelief of the points made by Mr Pilley in his statement of response.

In response, the BBC said that the programmes' presenter, Mr Goldberg, had an individual and conversational style appropriate to the network and very familiar to the audience. Mr Goldberg did not adopt an unusually incredulous tone in relation to Mr Pilley, and it was a matter of fact that he placed considerable emphasis on Mr Pilley's denials of any connection with Commercial Energy. The BBC said that there was no difference in his presentational tone during this item and that used in later parts of the programme or in other editions of *5 Live Investigates*.

- vii) The programme made the unwarranted suggestion that Mr Pilley was not a 'Fit and Proper Person' under Football Association ("the FA") rules and used innuendo to suggest that the FA should investigate Mr Pilley on this basis.

The BBC said that the programme did not suggest that Mr Pilley was not a "fit and proper person", nor did it suggest – either explicitly or implicitly – that the FA should investigate him. At one point, Mr Goldberg said that if Mr Pilley was linked to Commercial Energy it would "*all be rather embarrassing for Football League new boys Fleetwood Town*" for the reason that Commercial Power had made substantial loans to the Club. In any case, the reporter again responded immediately with an unequivocal statement of Mr Pilley's position that "*...as we've heard Andy Pilley is adamant he doesn't run Commercial Energy and isn't responsible for any mis-selling on their part*".

- b) The programme makers failed to give Mr Pilley an appropriate and timely opportunity to respond to the claims the programme made about him.

On behalf of Mr Pilley, Mr Lister said that although the programme (broadcast on 22 April 2012) had been in preparation for some time, the programme makers gave Mr Pilley just over three working days in which to respond to the claims being made about him. The programme makers sent a letter dated 13 April 2012 to Mr Pilley which informed him of the plan to broadcast the programme, set out a number of detailed allegations about him, and invited him to give an on-air interview or to submit a statement in response by 19 April 2012. Mr Lister added that due to engagements related to his football club (Fleetwood Town) Mr Pilley did not receive this letter until 16 April 2012. Mr Lister said that despite the difficulties involved in meeting this deadline he sent a statement on behalf of Mr Pilley in response to the programme makers claims on 19 April 2012. Mr Lister also said that he subsequently received an email, sent at 16:52 hours on 19 April 2012, which set out further allegations against Mr Pilley and required a response

by noon the next day (i.e. 20 April 2012). Mr Lister said that although he managed to respond to the follow-up email by 15:28 hours on 20 April 2012 it was only good fortune which enabled him to elicit Mr Pilley's response to by this time.

Mr Lister said that the BBC acknowledged in its email of 19 April 2012 that it had made covert recordings at Commercial Energy. He added that given the existence of these recordings the programme makers must have been aware that they intended to make these further allegations against Mr Pilley when they sent their initial letter to him and therefore these allegations should have been included in that letter.

In response, the BBC said that the programme makers' first approach to Mr Pilley was a letter sent on 13 April 2012 setting out in considerable detail the issues under investigation which the programme sought to put to Mr Pilley. This allowed almost five working days (plus the weekend) for his response which provided sufficient time for a response to issues with which he would be familiar in his day-to-day role as an energy supplier and as someone whose company, he said, tried to impose its own regulatory framework on its independent brokers. The BBC said that Mr Pilley would also have been familiar with some of the issues through earlier coverage in 'The Daily Mail', referred to in the letter from Mr Lister of 19 April 2012. The BBC said that this initial letter laid out in detail all the areas that might potentially be dealt with in the programme, including questions about links Mr Pilley might have with Commercial Energy. It set out clearly the suggestion to Mr Pilley that Commercial Energy was one of a number of companies which "are in effect controlled by you" and that "you are regularly on the premises from which some of these companies operate". The BBC said the letter also stated that:

"The programme is also likely to look at:

- The relationship between you, the companies above and Fleetwood Wanderers Ltd, including the provision of funding to the latter and whether you are a fit and proper person to run a football club.
- Your relationship with Lee Goulding, also known as Lee Qualter, and his role in the companies.
- The contractual relationship that salespeople have with Commercial Energy Ltd, BES Ltd and Fleetwood Wanderers Ltd..."

The BBC acknowledged that the programme makers did not disclose, at that stage, that they had obtained secretly-recorded evidence about Commercial Energy because it was simply not relevant to the substance of the issues. It argued that if Mr Pilley was responding in good faith, his response would not have been affected by knowledge that the programme had secretly recorded evidence.

The BBC said that given the clarity and detail with which the issues under consideration – misrepresentation and mis-selling by Commercial Energy staff – were set out, it would have been apparent that the matter had been thoroughly researched and reasonable to expect Mr Pilley to respond on that basis.

The BBC said that on 19 April 2012, when the programme makers received the complainant's response to their initial letter, it became clear that Mr Pilley was not

prepared to respond to the allegations in an interview, and that his response to the question of connections with Commercial Energy was to suggest that the BBC had confused this company with another of his companies, Commercial Power. At that point, the programme makers felt it was important to provide Mr Pilley with the opportunity to respond specifically to some of the secretly-recorded comments of employees at Commercial Energy. However, no substantive allegation was put to him at this stage and in particular he had already been asked about his relationship with Commercial Energy in the letter sent to him by the programme makers on 13 April 2012.

Representations on Ofcom's Preliminary View

Ofcom prepared a Preliminary View in this case that Mr Pilley's complaint should not be upheld. Neither Mr Pilley nor the BBC commented on that Preliminary View. However, the BBC did respond to a query from Ofcom about an apparent contradiction in the broadcaster's statement regarding whether or not Commercial Power operated from premises at Darwin Court near Blackpool. The BBC acknowledged that Commercial Power owned the Darwin Court building and that the company operated from it up until 2010, i.e. the same period complaints were being received about the Commercial Power by consumer groups. However, it said that when the programme's informant worked at Darwin Court (over a few days in March and April 2012) there was no evidence of Commercial Power's presence such as might explain Mr Pilley's visits to the premises. The BBC added that this was because by this period Commercial Energy had effectively supplanted Commercial Power as a broker and that this explained Mr Pilley's presence.

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 in such services.

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

In reaching its Decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and transcript and both parties' written submissions (including pre-broadcast correspondence between the broadcaster and the complainant). Ofcom also took careful account of the BBC's clarification of its statement with regard to Mr Pilley's presence at Darwin Court.

When considering complaints of unjust or 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 Mr Pilley was unfairly portrayed.

In considering this part of the complaint, Ofcom had regard to Practice 7.9 of the Code 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. It also took account of Practice 7.6 which states that when a programme is edited, contributions should be represented fairly.

Ofcom assessed each element of the programme that Mr Lister complained had resulted overall in the unfair portrayal of Mr Pilley.

- i) The programme alleged that Mr Pilley controlled Commercial Energy (either financially or otherwise) notwithstanding the fact that he is neither a shareholder nor a director of that company.

Ofcom noted that the programmes' presenter, Mr Adrian Goldberg, introduced the programme by saying:

"Tonight: shocking tactics - the electricity broker caught by us conning people into signing energy deals that are costly and unnecessary...but who's behind the rogue energy traders? We explore possible links to the owner of Fleetwood Town, newly promoted to the Football League".

On two occasions the presenter said that the programme had tried to understand why *"some staff at Commercial Energy think that Andy Pilley, the chairman at newly-promoted Fleetwood Town think that he's their boss when he says he isn't"*. The presenter then asked a reporter, who had been looking into Commercial Energy, what she had found out about who controlled Commercial Energy. The reporter said:

"Well, it is a bit of a mystery really Adrian. Companies House records show that a Mr Lee Qualter is the director. He also goes by the name of Lee Goulding and he's in charge of sales at Commercial Energy. But our evidence suggests that there's another person closely linked with Commercial Energy and that's multi-millionaire businessman Andrew Pilley. He's also the chairman of Fleetwood Town football club – as you've said recently promoted to the Football League.... He is a director of the energy supply company - Business Energy Solutions or BES. As we've heard they are often recommended to customers by the salespeople at Commercial Energy. But he strenuously denies any financial interest in Commercial Energy."

The presenter observed that *"it might be confusing to some of our listeners because Business Energy Solutions or BES is the energy supplier involved in the two cases of mis-selling that we've heard about tonight"*. To which the reporter added: *"Yes. And although Mr Pilley says he's not in charge at Commercial Energy - the staff there seem to think otherwise. And some describe him as the 'big boss'"*.

A discussion between the presenter and a second reporter who had posed as a new recruit at Commercial Energy in order to secretly record conversations with staff about the way the company operated ("the undercover reporter") followed.

During this discussion, Ofcom noted that the undercover reporter said that Mr Pilley had spent time at the offices of Commercial Energy and that during a

presentation one of the trainers, Danielle, who said she had worked for the company for four years, had spoken about *“a business relationship between Mr Pilley, the various energy companies and Fleetwood Town FC”* and that other members of staff (including one in a senior position) had told him *“about the various incentives and bonuses he [Mr Pilley] offers”*. The programme included the following comments made by the trainer and a senior member of staff which were secretly recorded during the training session.

Trainer: *“What you see on here... Fleetwood Town is what Andy, Andy Pilley, is the director here. He owns Commercial Energy, Commercial Energy is linked to Fleetwood Town – obviously they’re [inaudible] BES, he’s got shares in them as well. So it’s all linked together yes? Andy is linked with all of these and that’s where.... This is the cycle of money that it all goes round, OK?”*

Staff member: *“Andy as well – the big boss – Pilley – we have a quarterly do. So he takes us all to Fleetwood and gives you a free bar. All afternoon, there’s a band on, buffet, everything like that. Probably like once a month he will do like a day where every time you get a deal you go and choose an envelope. Now the envelopes range from £5 to £50 to free breakfast to do - you know what I mean? To get you going in incentives. Andy does do things like that, you know to try and give you a bit of incentive”.*

Given the inclusion of the comments set out above, Ofcom takes the view that listeners would have understood that the programme was indicating that there was evidence to suggest that Mr Pilley controlled Commercial Energy. Ofcom observed that this claim was based on the first-hand testimony of several members of staff at Commercial Energy, a number of whom were secretly recorded linking Commercial Energy with Mr Pilley and/or his other businesses, BES and Fleetwood Town. There was nothing to suggest that this testimony was not credible, given that it was recorded secretly and in circumstances where the staff in question would have had no reason not to be candid. The claim was also based upon the facts that: in addition to having its sales unit at Darwin Court, Commercial Energy also had premises at Unit 7, Metropolitan Business Park, Blackpool, an address which Mr Pilley had recently used on documents submitted to Companies House; and, both the undercover reporter and a “source” at Commercial Energy had signed three contracts when they had began working for Commercial Energy: one for Commercial Energy, one for Commercial Power and one for Fleetwood Town. In Ofcom’s view, this evidence provided the programme makers with a reasonable basis for broadcasting in the programme the claim that there was evidence to suggest that Mr Pilley controlled Commercial Energy.

The programme makers sought Mr Pilley’s response (which was provided by his solicitor) to the allegations made in the programme and his response was summarised in the programme (see Decision at head b) below for details). Ofcom took the view that the presentation of the summary of Mr Pilley’s response to the allegation that he controlled Commercial Energy would have left viewers in no doubt that he was not listed as a director of Commercial Energy, and that he denied that either he or his company, BES, had any financial link to or control over Commercial Energy. Ofcom considered that, given the inclusion of these comments, listeners would have been able to draw their own conclusions with regard to this matter relating to Mr Pilley’s position.

Taking the above factors into account, Ofcom considered that the broadcaster had taken reasonable steps when presenting this material not to do so in a way that portrayed Mr Pilley unfairly.

- ii) The programme alleged that Mr Pilley was often seen on the premises of Commercial Energy but failed to broadcast the explanation that Commercial Power sublets part of its premises to Commercial Energy.

In response to a question from the presenter about Mr Pilley's relationship with Commercial Energy, the undercover reporter said: *"Well Mr Pilley does spend time at the offices of Commercial Energy"* [i.e. Darwin Court]. The programme did not indicate that this was because one of Mr Pilley's other companies, Commercial Power, sublet part of these premises.

Ofcom noted that in its response to this complaint the BBC said that the undercover reporter saw no evidence of Commercial Power being located at Darwin Court. However, within this same response the BBC also said that in contrast to the situation in 2009, in the year to April 2012 most complaints about energy contracts made to consumer bodies in the area were not about Commercial Power but about another company, Commercial Energy, operating from the same premises at Darwin Court, Blackpool. In addition, Ofcom took account of the fact that neither of the statements submitted to the programme makers prior to the broadcast (in response to the claims the programme planned to make about Mr Pilley) indicated that Commercial Power sublet part of its Darwin Court premises to Commercial Energy, or that this might account for Mr Pilley's presence there.

Notwithstanding these observations, it is Ofcom's view that, given the inclusion in the programme of the claim that there was evidence to suggest that Mr Pilley controlled Commercial Energy (a claim for which Ofcom concluded the programme makers had a reasonable basis) and the repeated references to his denials of this claim, the omission of the information that one of Mr Pilley's companies, Commercial Power, sublet premises to Commercial Energy did not, in itself, lead to the report being unfair to Mr Pilley.

- iii) The programme failed adequately to distinguish between the respective roles of BES and Commercial Energy thereby implying that Mr Pilley controlled Commercial Energy and was therefore responsible for any alleged "mis-selling" of energy contracts.

Ofcom noted that at the beginning of the programme the reporter said:

"Well there are estimated to be up to 500 independent energy brokers in the UK. They arrange deals on behalf of business users who, after all, are often too busy to arrange the deals and search the market for themselves. Commercial Energy are significant players in this market. As you've already said Adrian, they [Commercial Energy] claim to provide the biggest brokering service to small businesses that there is".

She also said:

"If a business moves into a new building and doesn't have a contract for gas or electricity in place, they can end up on a really expensive one, what's called an emergency tariff. And that's the same if their existing contract has expired and they haven't done anything to renew it. So Commercial Energy

rings businesses in this position and says it can arrange a new deal with savings of up to 40 per cent. The problem is that our evidence shows that some telesales staff at Commercial Energy are bamboozling and lying to win customers - and some of the people who've signed up have ended up on more costly contracts".

The programme then included an interview with the owner of a business called Maxitrak (which had signed up to a new energy contract through Commercial Energy), who said that rather than negotiating the best energy deal for his company, Commercial Energy had organised a deal which was more expensive than the emergency tariff offered by his former supplier. He explained that the new contract was with a company called BES. The programme said that BES was owned by Mr Pilley.

The programme stated that Commercial Energy *"usually, but not always, push you towards a contract with Business Energy Solutions or BES which is run by Fleetwood Town's chairman Andy Pilley. Through his lawyers, Mr Pilley says there's nothing wrong with a broker wanting any of its suppliers to grow - and he insists BES is a legitimate business with proper checks and balances"*.

When asked by the presenter what was wrong with this, the reporter said:

"Well nothing - if BES does offer the best deal. Commercial Energy should be scouring the market for the most competitive prices - our evidence shows that's not happening. And some telesales staff are even making up false comparative prices to push customers in the direction of their preferred suppliers, including BES".

As noted in the Decision at head a) i) above the presenter also said that *"Business Energy Solutions or BES is the energy supplier involved in the two cases of mis-selling that we've heard about tonight"*, and the reporter subsequently reiterated Mr Pilley position that he did not control Commercial Energy.

In light of these observations (and those set out in the Preliminary View at head a) i) this of complaint), Ofcom considered that the programme included a clear explanation that Commercial Energy was an energy broker, the business of which was to search for the best energy deals available to its potential customers, and that BES was an energy supplier. Ofcom also considered that listeners would have understood that Mr Pilley owned and operated BES and that, although the programme claimed there was evidence to suggest that he controlled Commercial Energy, he strongly denied both this claim and the claim that he was responsible for any mis-selling by Commercial Energy.

For these reasons, Ofcom concluded that there was no unfairness to Mr Pilley in this respect.

- iv) The programme failed to broadcast Mr Pilley's position (as set out in his statement) that: BES, notwithstanding its independence from Commercial Energy, sought to impose its own regulatory framework upon Commercial Energy in order to protect customers; and required the sales personnel at Commercial Energy to adhere to a script which would have made "mis-selling" impossible.

Ofcom considered that the extracts from the programme quoted in the Decision at heads a) i) and iii) made it clear that the report alleged that Commercial Energy

had mis-sold energy contracts, and in particular, that it had sold contracts for supply from BES when BES was not the cheapest option available to the client. In addition, secret recordings of sales staff at Commercial Energy included in the programme indicated that they implied, falsely, that they: had called potential clients to register their meters; denied that they were calling from an energy broker; and, routinely made-up false comparative prices.

However, Ofcom observed that not only did the programme repeatedly state that Mr Pilley denied that he controlled Commercial Energy (or was responsible for any alleged mis-selling on its part), it also explained that in response to the claims in the programme, Mr Pilley's lawyer had said that *"all brokers who deal with the company [i.e. BES] have to act in accordance with its code of conduct"* and that Mr Pilley *"deals with more than 80 brokers and is responsible...for encouraging best practice"*.

In Ofcom's view, therefore, it would have been clear to listeners that Mr Pilley's view was that all the brokers who sold BES contracts, including Commercial Energy, had to adhere to its code for the selling of energy contracts and that this code constituted best practice. Ofcom concluded that there was no unfairness to Mr Pilley in this respect.

- v) The programme sought to establish a link between Mr Pilley, BES and Fleetwood Town and Commercial Energy when there was no significant evidence that such a link could be implied. By way of example, Mr Lister said that the programme indicated that Commercial Energy's offices were located between Blackpool and Fleetwood when this was quite untrue and included a number of gratuitous references to Fleetwood Town.

Ofcom noted that on a number of occasions the programme indicated that as well as owning BES, Mr Pilley was the chairman of Fleetwood Town. In addition, as has already been considered at head a) i) of the Decision, the programme also indicated that there was evidence to suggest that Mr Pilley controlled Commercial Energy.

The question of whether or not to mention Mr Pilley's chairmanship of Fleetwood Town was an editorial matter for the programme makers and the broadcaster to make prior to the broadcast of a programme. However, broadcasters must ensure that material facts are not presented in the programme in a way that results in unfairness to an individual or organisation.

Ofcom recognised that Fleetwood Town, and Mr Pilley as its chairman, would have been familiar to listeners to Radio 5 Live given that it is a news and sports service which includes extensive coverage of league football at all levels. We also considered that there was a reasonable basis for the inclusion in the programme of the claim that Mr Pilley controlled Commercial Energy (see head a) i) of the Decision above). Given this and the repeated inclusion of Mr Pilley's denials of this claim included in the programme, Ofcom concluded that the inclusion of references to Mr Pilley, BES and Fleetwood Town in the context of a report looking at alleged mis-selling by Commercial Energy did not result in unfairness to Mr Pilley.

Ofcom observed that the parties disagreed about whether or not Darwin Court, the office from which Commercial Energy ran its sales operation, was located between Blackpool and Fleetwood. However, it considered that the location of this office (regardless of its accuracy) would have had no material impact on

listeners' impressions of Mr Pilley that could be reasonably considered as creating unfairness to him in the programme.

- vi) The presenter used a tone of incredulity throughout the relevant section of the programme thereby expressing his disbelief of the points made by Mr Pilley in his statement of response.

Ofcom considered that the presenter, Mr Goldberg, had an individual style of presentation which was conversational in tone and that his established presentational persona was that of "a man of the people" who championed consumer rights. In Ofcom's opinion the style of presentation Mr Goldberg used during the section of the report on Commercial Energy (including during the references to Mr Pilley's response to the claims made about him) was consistent with the approach he used during the rest of the programme in which other topics were discussed. Mr Goldberg's presentation style would clearly have been familiar to regular listeners to the programme. Ofcom therefore considered that the presenter had not used any materially different style of presenting solely in connection with Mr Pilley.

For these reasons, Ofcom concluded that Mr Pilley was not treated unfairly in respect of the tone of voice used by Mr Goldberg during the report.

- vii) The programme made the unwarranted suggestion that Mr Pilley was not a 'Fit and Proper Person' under FA rules and used innuendo to suggest that the FA should investigate Mr Pilley on this basis.

The presenter said:

"I mean if Andy Pilley was linked to the running of Commercial Energy, it would all be rather embarrassing for Football League new boys Fleetwood Town wouldn't it? They've had loans of more than £4 million from his business empire".

In Ofcom's view, this comment indicated that, in Mr Goldberg's opinion, the reputation of Fleetwood Town might suffer if Mr Pilley, its chairman and one of its major sponsors, was found to be linked with Commercial Energy given his ownership of energy supply company BES.

The initial letter from the programme makers to Mr Pilley setting out the claims which the programme planned to make about him (see head b) below for details) said that "the programme is also likely to look at the relationship between you, the companies above [i.e. Commercial Energy, BES and Commercial Power] and Fleetwood Wanderers Ltd, including the provision of funding to the latter and whether you are a fit and proper person to run a football club". However, the programme did not either state or imply that Mr Pilley was not a fit and proper person to chair Fleetwood Town. Nor did it make any reference to the FA or suggest that Mr Pilley should be investigated by the FA. In addition, as set out in the Decision at head b) below, the programme repeatedly made clear Mr Pilley's denial of any formal links to Commercial Energy.

Taking account of all of these factors, Ofcom's Preliminary View is that Mr Pilley was not treated unfairly in this respect.

Having considered all these sub-heads separately, Ofcom also had regard to the evidence that the programme included a number of extracts and references to the

statements provided to the programme makers by Mr Pilley's solicitor (see head b) below). Taking account of all these factors, Ofcom found that overall Mr Pilley was not unfairly portrayed, and so not treated unjustly or unfairly, in this programme.

- b) Ofcom then considered the complaint that the programme makers failed to give Mr Pilley an appropriate and timely opportunity to respond to the claims the programme made about him.

In considering this head of 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 at head a) of the Decision above, Ofcom noted that the report said that there was evidence to suggest that Mr Pilley controlled Commercial Energy (an energy broker which the programme said sold a high proportion of energy supply contracts from BES, a company which was owned and operated by Mr Pilley). The programme also indicated that staff at Commercial Energy had mis-sold energy contracts, notably from BES. Ofcom considered that these claims amounted to an allegation of wrongdoing on the part of Mr Pilley. As was also noted above, Ofcom concluded that the programme makers had a reasonable foundation for including these claims in the programme. However, given the serious nature of the allegation of wrongdoing made against Mr Pilley, in accordance with practice 7.11 of the Code, it was incumbent upon the programme makers to offer Mr Pilley an appropriate and timely opportunity to respond to the claims being made about him.

Ofcom noted that on 13 April 2012 the programme makers sent a letter to Mr Pilley in which they set out, in specific detail, the nature of the claims the programme intended to make regarding mis-selling at Commercial Energy and the programme makers' belief that Commercial Energy was one of a number of companies which were controlled by Mr Pilley. The letter explained that the plan was to broadcast the programme on 22 April 2012 and indicated that the programme makers would like to interview Mr Pilley about these allegations "at a mutually agreeable time, but by no later than midday on Thursday 19 April 2012". It noted too that the programme makers asked Mr Pilley to provide a statement in response by the same deadline if he did not wish to be interviewed.

Mr Pilley's solicitor said that Mr Pilley did not receive this letter until 16 April 2012 but that he sent a statement on behalf of Mr Pilley in response to the programme makers' claims on 19 April 2012. On 20 April 2012, Mr Lister also sent a response (on behalf of Mr Pilley) to a follow-up email (sent at 16:52 hours 19 April 2012) from the programme makers.

Mr Lister indicated in Mr Pilley's complaint that the programme makers had allowed insufficient time for Mr Pilley to respond to the claims made about him. However, Ofcom noted that despite not receiving the initial letter from the programme makers until 16 April 2012, Mr Pilley still had four working days prior to the planned broadcast of the programme in which to respond and that, in any case, Mr Lister had sent an initial statement in response to these claims on 19 April 2012.

The programme makers did not reveal to Mr Pilley that the programme had secretly recorded conversations with staff at Commercial Energy until it sent its follow up email on 19 April 2012. However, Ofcom noted that this email did not

include any new allegations about Mr Pilley and Mr Pilley's alleged link to Commercial Energy, rather it sought clarification on what the programme makers regarded as inconsistencies between the initial response sent on behalf of Mr Pilley and the information gathered by the undercover reporter during his time working at Commercial Energy.

In deciding whether in this case the opportunity given to Mr Pilley to respond was appropriate and timely, Ofcom took into account whether, given the nature of the questions put to him, it was reasonable to expect him to respond in the time allowed. In light of the fact that Mr Pilley was given at least four working days to answer questions about his long-established role as an energy supplier and his alleged links to specific companies, and the fact that Mr Pilley's solicitors did, in fact, submit a response to the BBC's queries, Ofcom considered that he was given sufficient time to respond to the claims *5 Live Investigates* planned to make about him.

Ofcom also noted that a summary of Mr Pilley's response was included in the programme. In particular, the programme stated that, in response to its investigation, Mr Pilley said that *"He [Andrew Pilley] is not listed at Companies House as being linked to Commercial Energy...he strongly denies that he - or BES - have any financial interest in Commercial Energy or any control over its operations [and that he] is adamant he doesn't run Commercial Energy and isn't responsible for any mis-selling on their part"*.

In addition, the programme stated that Mr Pilley's solicitor responded to the claims made about Mr Pilley by saying that given Mr Pilley was *"an important man in the energy market"* it was *"not surprising"* that some staff at Commercial Energy seemed to think that he owned the company and *"the fact that he may be referred to as the 'big boss' within Commercial Energy does not mean that he is acknowledged literally as their boss"*. The programme also included Mr Lister's response to the claim that Mr Pilley arranged bonuses and social functions for staff at Commercial Energy. Specifically, listeners were told that Mr Lister: had accused the programme of *"trying to distort the true picture"*; said that *"arranging incentives and bonuses is commonplace throughout the energy industry"*; and, added that, *"All businesses take contacts, suppliers and customers out for lunches, dinners or drinks. We are sure journalists do likewise. There is nothing wrong in this..."*.

In light of these observations and taking into account the factors noted above, notably the detailed nature of the initial letter from the programme makers and the fact that the follow-up did not include any new allegations of wrongdoing, Ofcom concluded that Mr Pilley was given an appropriate and timely opportunity to respond to the claims made about him in the programme.

Ofcom therefore found that there was no unfairness to Mr Pilley in this respect.

Accordingly, Ofcom found that Mr Pilley's complaint of unjust or unfair treatment in the programme as broadcast should not be upheld.

Not Upheld

Complaint by Miss Csilla Patachich

Scanning & Konsekvens (Truth and Consequences), TV3, 16 November 2011

Summary: Ofcom has not upheld this complaint of unjust and unfair treatment and unwarranted infringement of privacy in the obtaining of material included in the programme and in the broadcast of the programme.

An episode of TV3's series *Truth and Consequences* investigated allegations about the treatment of tenants living in accommodation known as Adelsogarden at Stockholm in Sweden. The accommodation is managed by Miss Csilla Patachich. The programme was based on a report by the Swedish Tenant's Association ("HGF") and a former guest at Adelsogarden.

Miss Patachich 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.

In summary Ofcom found as follows:

- Material facts were not presented in a way that was unfair to Miss Patachich.
- Miss Patachich was not given a "timely" opportunity to respond to the allegations in the programme, however this did not result in any unfairness to Miss Patachich in the programme as broadcast.
- Filming of Miss Patachich at Adelsogarden was not an unwarranted infringement of her privacy, as the investigation was warranted in the public interest.
- Miss Patachich's privacy was not unwarrantably infringed in the broadcast of allegations made in the programme because she did not have a legitimate expectation of privacy in relation to these allegations.

Introduction

Viasat Sweden is a Swedish satellite television channel licensed in the UK by Ofcom, whose licence is held by Viasat Broadcasting Limited ("Viasat"). On 16 November 2011, it broadcast an edition of *Scanning & Konsekvens* (which means "Truth and Consequences" when translated from Swedish into English).

The programme was broadcast in Swedish and Ofcom was provided with an English translation of the programme by the broadcaster. The translation was sent to the complainant who confirmed that the translation was an accurate reflection of the content of the programme. Ofcom has based this Preliminary View on this English translation in conjunction with the programme as broadcast.

This episode, presented by Miss Jennifer Strid, investigated "*two of Stockholm's worst landlords*", one of whom was said to be Miss Csilla Patachich. One of the contributors interviewed in the programme was Mr Jonas Wiklund, the "*Chief of department at the social services in Spanga, in Tensta (Sweden)*", who stated that

people often turned up at his offices when they had “*nowhere to live*” and that it was the job of his department to “*start looking for a solution*”.

Miss Strid then spoke about Adelsogarden, a private block of flats owned by Miss Patachich. The narrator stated that:

“Sometimes the solution might be the lesser of two evils. The former hostel Adelsogarden in Ekero, outside Stockholm, is one of the accommodations that the social services in Spanga, Tensta, chooses to place people in. The farm [sic] is not built for the purpose of permanent residence. During one inspection, the city’s tenants association found, among other things dangerous electrical installations, unhygienic kitchen and bathroom areas, as well as inadequate heating. But the biggest issue was the threatening and condescending attitude towards the tenants”.

This sequence was accompanied by footage of the outside of Adelsogarden and photographs of a dirty stove, exposed electrical wiring and Miss Patachich.

The programme also featured an interview with an Adelsogarden tenant, “*Peter*”, who had been “*placed at Adelsogarden by social services*”. Peter described the living conditions at Adelsogarden and stated that his room was “*six square metres*”, that the “*walls were dirty*” and that the property had numerous electrical outlets which were exposed and a danger to people living there. In relation to Miss Patachich, Peter said:

“When I first moved there she seemed to be very nice - almost overly nice. And then it became evident that if people didn’t do what she wanted, if they complained - then she’d do anything such as threatening and saying that they were abusing drugs or alcohol or committing crimes”.

Peter claimed that he had recorded one of his confrontations with Miss Patachich, and this recording was broadcast in the programme. Miss Patachich was heard to say “*I can get rid of who I want...I can exchange you all, I don’t need you*”. Peter also stated that Miss Patachich would “*do things like removing doors [and] trying to freeze people out*” and, on one occasion, Peter said that she had thrown rubbish back into a flat of one of the tenants. Peter was asked why he continued to stay at Adelsogarden and he replied that he had no choice as he had no other place to go.

After explaining that the programme makers had “*on numerous occasions tried to get in touch with Csilla Patachich to get a comment*”, Miss Strid was shown approaching Miss Patachich and putting a number of allegations to her. In relation to the allegation about removing a door to freeze tenants out, Miss Patachich said that the tenant in question “*had no right to live there*”. Ms Patachich said that the accusation that she threw rubbish into the tenants’ flats was a “*lie*”.

Miss Patachich was shown stating that she wanted to show Miss Strid something and they were shown walking towards the self-contained flats in Adelsogarden. Miss Patachich knocked on a door and, when no one answered, opened the door herself with a key. Miss Strid asked Miss Patachich whether she could just go in to the flat and whether she was showing “*respect by going into someone’s flat*”. Miss Patachich explained that the person who lived there had not “*paid for three months*” and asked Miss Strid to take a look inside. However, Miss Strid and the camera operator remained outside the flat and stated that Miss Patachich had “*no right to go into a tenant’s flat*” and could be found guilty of trespassing. At the end of the interview with Miss Patachich, the narrator stated that:

“Despite the fact that the social services are aware of the problems, they keep placing people at Adelsogarden”.

The Complaint and Viasat’s response

Unjust or unfair treatment

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

- a) Material facts were presented, disregarded or omitted in a way that was unfair to Miss Patachich (see sub-heads below for details).

By way of background, Viasat said that in preparing the investigation into Adelsogarden, the programme makers referred to material produced by the Hyresgastforeningen Region Sweden (“HGF”), a tenants’ association based in Sweden. Viasat said that one of the tenants at Adelsogarden asked the HGF to help him approach Miss Patachich, whom he felt was not listening to or resolving his complaints. The HGF went to Adelsogarden to investigate his complaint and found the premises to be unhygienic and, in some instances, a dangerous environment for tenants. Photographs of the conditions taken during the investigation were used in the programme to highlight the living conditions at Adelsogarden and the programme makers interviewed both Miss Patachich and a representative and lawyer from the HGF.

Miss Patachich made the following specific complaints under this head of complaint:

- i) The programme included false statements about Adelsogarden. For example, it stated that: the property was dangerous to live in; a kitchen was unhygienic; and that there was a lack of heating supply. In addition, footage and clips of her property that were broadcast in the programme were incomplete and incorrect. Some of the photographs, such as the photograph of an electrical box that had been removed, were tampered with by the programme makers and the programme had mixed up images taken from Wenngarn (another property featured in the programme which was not connected to Miss Patachich) with Adelsogarden. One of the photographs which showed mould in the property was a fake.

In summary and in response, Viasat said that the production company had reviewed all the material used in the programme to verify the authenticity of the photographs and confirmed that there was no mix-up with the photographs and that those indicated as coming from Adelsogarden during the programme were in fact taken there.

Viasat denied that one of the photographs used was a fake and said that the programme utilised photographs taken and submitted in a report prepared by the HGF’s legal representatives. Viasat said that it had no reason to believe that HGF would use a fake photograph for its reports and legal applications.

- ii) The programme incorrectly referred to Adelsogarden as a “former hostel”, when it was a hotel, and referred to the people living there as “tenants” when in fact they were hotel guests. In addition, the HGF was mentioned in the programme even though Adelsogarden had no connection to this association.

In summary and in response, Viasat said that Adelsogarden's own website described it as a hostel for leisure activities and temporary accommodation.

- iii) The programme made absurd accusations in stating that Miss Patachich threw rubbish into her tenants' flats. Further, the programme stated that she lacked empathy with tenants and failed to take notice of the sort of tenants she had. She said that many of the tenants were placed at Adelsogarden by the local government because they had problems looking after themselves in their own homes.

In summary and in response, Viasat said that a former tenant had made the accusation that Miss Patachich threw rubbish into her tenant's flat and provided photographs of her actions. Viasat said that Miss Patachich's responses to the accusations were broadcast in the programme.

- iv) Miss Patachich said that Peter (a former tenant) was unreliable and lied in the programme by saying that he had no choice but to stay at Adelsogarden and saying that his room was only six square metres in size. However the broadcaster still featured his contribution in the programme.

By way of background, Miss Patachich said that the HGF, which she described as a non-profit private association, had commissioned a lot of the material used in the programme and the programme was nothing more than a piece of propaganda for the HGF.

In summary and in response, Viasat confirmed that some of the people at Adelsogarden were placed there by local government authorities responsible for finding accommodation for "vulnerable" members of society, like Peter. However, Viasat said that this did not justify the assertion that Peter was unreliable. Peter had been a tenant at Adelsogarden from July 2010 to July 2011 and, although he had financial difficulties, Viasat did not regard him as an unreliable source of information. Viasat said that the opinion of the HGF, as set out in their report, was that Miss Patachich had a derogatory view of the tenants placed at Adelsogarden and that this view was further evidenced in Miss Patachich's interview.

Viasat said that they interviewed another tenant who had become a member of HGF because of Miss Patachich's actions towards him. The programme included his description of how Miss Patachich took away a door to his room and left the room without a door overnight.

Viasat denied that HGF had commissioned a lot of the material used in the programme and said that the programme formed part of a series entitled *Scanning & Konsekvens [Truth and Consequences]* which focussed on the reporting of social injustices in all areas of life and was not limited to the topic of housing or landlords. While it was correct that the programme included material collected by HGF, the association had no influence over the programme and Viasat maintained editorial control over the content of the programme.

- b) Miss Patachich complained that she was not given an appropriate and timely opportunity to respond to the allegations made in the programme. Miss Patachich said that the programme lied when it stated that the programme makers had tried to approach her on several occasions.

In summary and in response, Viasat said that during the making of the programme, the production company had tried to contact Miss Patachich twice. When she did not respond to their efforts, the production company went to Adelsogarden in an effort to interview Miss Patachich and obtain her comments. The programme makers made one last effort to interview and get Miss Patachich's comments on the subject matter. They also made one last effort prior to arriving at Adelsogarden but once again, failed to get a response.

Unwarranted infringement of privacy

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

- c) The programme makers entered her private property without her permission and filmed there.

In summary and in response, Viasat said that they had tried to get Miss Patachich's response to the allegations made in the programme, as outlined above in their response to head b) above. In light of the investigative nature of the programme and the seriousness of the allegations being made, the production company felt strongly that it was in the public interest to get Miss Patachich's comments. They went to the reception at Adelsogarden and asked Ms Patachich if she wished to respond to the allegations. She consented to an interview on camera and the production company therefore continued filming with her cooperation.

In summary, Miss Patachich complained that her privacy was unwarrantably infringed in the programme as broadcast in that:

- d) The "lies and serious accusations" in the programme "trampled down a [her] family's personal life" because they lived at Adelsogarden, as well as running it as a business.

By way of background, Miss Patachich said that because of the "lies" broadcast in the programme, her family felt threatened by the reprisals they had suffered and it had affected her personal life and that of her family.

In summary and in response, Viasat said that the programme was a fair and accurate portrayal of the living conditions at Adelsogarden, incorporating the views of former tenants, a tenants' union and of the owner/manager. Viasat said that it did not intend to cause suffering or distress to Miss Patachich, but that the nature and content of the programme was sufficiently in the public interest to broadcast the programme.

Representations on Ofcom's Preliminary View

Ofcom prepared a Preliminary View in this case that Miss Patachich's complaint should not be upheld. Ofcom reviewed the comments made by Miss Patachich in response but a number of the points she made repeated those already set out above and taken account of in the Preliminary View (and Ofcom's decision below). However, Miss Patachich did make some additional points, and provided Ofcom with a copy of unedited footage of the interview between her and the presenter of the programme (in Swedish). Ofcom needed to have this material checked and translated as necessary, and then provided to the broadcaster so it had an opportunity to comment.

A summary of the additional points made by Miss Patachich is set out below:

- with respect to the allegations in the programme made by “Peter”, Miss Patachich said that he did not, in fact, want to leave Adelsogarden. This was because he liked living there;
- in relation to allegations that the kitchens and bathrooms were unhygienic, Miss Patachich said that it was the guests themselves who did not keep the rooms clean and who did not let the cleaners in to clean the rooms. Further, since the group of people who are placed at Adelsogarden are often vulnerable, they required a different type of accommodation;
- the programme stated that Miss Patachich removed the doors of her guests’ rooms, but Miss Patachich said that the doors had been removed and taken for repair due to one of the guests kicking down a door and engaging in criminal activity. However this was not mentioned in the programme;
- Miss Patachich stated that when the programme makers came to Adelsogarden, she asked them to show her the mould which was supposedly growing in the rooms, but this comment of hers was not shown in the programme;
- when Miss Patachich said that she wanted to show the programme makers a room where a guest resided, she had written permission to go into this particular guest’s room. However the programme makers did not show this in the programme.

In response Viasat:

- re-iterated its statement that it undertook careful research before filming the programme and used evidence from legitimate and legally endorsed sources;
- stated, with reference to the unedited footage which Miss Patachich provided, that it had compared this material with the material broadcast in the programme and submitted that the recordings were identical; and
- said that the unedited footage did not, in its view, substantiate the claims that Miss Patachich had been treated unfairly or that the material had been edited unfairly.

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 in programmes included in such services.

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

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

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

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and transcript, and both parties' written submissions (which included the recording of the unedited footage provided by Miss Patachich.)

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 Miss Patachich's complaint that she was treated unfairly in the programme, in that material facts were presented, disregarded or omitted in a way that was unfair to her.

When considering this head of complaint, and the individual sub-heads of complaint below, Ofcom took account of Practice 7.9 of the Code, which states 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 an individual or organisation. 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 relation to 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 Miss Patachich was portrayed unfairly in the programme as broadcast.

- i) Ofcom considered the complaint that the programme included false statements about Adelsogarden. For example, it stated that: the property was dangerous to live in; a kitchen was unhygienic; and that there was a lack of heating supply. In addition, Miss Patachich complained that footage and shots of her property that were broadcast in the programme were incomplete and/or incorrect; and that some of the photographs, such as the photograph of an electrical box that had been removed, had been tampered with by the broadcaster or faked (a photograph showing mould in the property). Also, Miss Patachich said that the broadcaster had mixed up images taken from Wenngarn (another property featured in the programme which was not connected to Miss Patachich) with Adelsogarden.

Ofcom noted that the photographs used and some of the allegations made in the programme were based on the report by the HGF (the "Report"). Other allegations were made by Peter, the former Adelsogarden tenant. In particular, Ofcom noted the following passage from the Report:

"At inspections we have observed deficiencies in the ventilation, dangerous electrical installations, deficient fire protection, unhygienic kitchen-and wet spaces, kitchen equipment, too low temperature in the flats, the water is too cold and constant power cuts."

Ofcom observed that Miss Patachich denied a number of these allegations in the programme and in particular noted the following exchange:

Presenter: *"Supposedly you have done that (thrown rubbish into people's flats) when someone has made a complaint to the Tenant's Association."*

Miss Patachich: *They're not telling the truth, they're lying.*

Presenter: *So they're lying.*

Miss Patachich: *Of course. They're lying and the tenant's Association is lying too."*

Ofcom's role is not to determine whether the allegations made against Miss Patachich were in fact true or not, but whether the programme makers had taken reasonable steps to satisfy themselves that material facts were not presented in a way that was unfair to Miss Patachich and Adelsogarden. Ofcom considered that the programme makers had sourced the basis for the allegations made in the programme on the Report and had accurately reflected those allegations in the programme. Ofcom also took into account that HGF's lawyer had been interviewed, along with Miss Patachich. As set out above and in sub-head iii) of the Decision, Miss Patachich had provided her view that she considered the allegations made in the programme to be lies. Therefore Miss Patachich's stance in relation to the allegations made in the programme was made unequivocally clear to viewers. Consequently, Ofcom considered that all sides of the dispute were accurately reflected in the programme.

Taking all of the above into consideration, Ofcom was of the view that the programme makers had acted responsibly in presenting these material facts in a way that was fair to Miss Patachich.

- ii) Ofcom next considered the complaint that the programme incorrectly referred to Adelsogarden as a "former hostel", when it was a hotel and referred to the people living there as "tenants" when in fact they were hotel guests. In addition, Miss Patachich complained that HGF was mentioned in the programme even though Adelsogarden has no connection to the Tenant's Association.

Ofcom noted the programme's commentary in respect of Adelsogarden, which stated:

"The former hostel Adelsogarden in Ekero outside Stockholm, is one of the accommodations that the social services in Spanga, Tensta, chooses to place people in".

Ofcom also noted the following exchange later in the programme:

Presenter: *"I don't want to go into someone else's home unannounced"*

Miss Patachich: *It's not a home, it's a hotel. I'm allowed to go into the flat, if I suspect that something is not as it should (be).*

Presenter: *Do you think you can just go in...?*

Miss Patachich: *He hasn't paid for 3 months, so I can go in.*

Presenter: *Are you really showing respect by going into someone's flat?*

Miss Patachich: *Come and have a look.*

Presenter: *This doesn't feel worthy, Csilla. Do you think it is ok to just go in like that?*

Miss Patachich: *Yes, it's ok. It's a hotel".*

Ofcom also noted that the front page of Adelsogarden's website, gave the following description:

"Adelsogarden is a tourist attraction. Adelsogarden lodgings are for leisure activities/temporary accommodation. We have personnel 24 hours a day. The Lodgings were renovated in 2004 and are under constant renewal".

Ofcom noted that the programme referred to Adelsogarden as a *"former hostel"* and therefore it was clear to viewers that Adelsogarden was no longer a hostel. Throughout the programme, Adelsogarden was referred to as *"flats"* and *"homes"* and therefore Ofcom considered these to be generic references, rather than intending to be an exact description of Adelsogarden. In addition, Miss Patachich stated in the programme that Adelsogarden was a hotel and therefore if there was any such misunderstanding about Adelsogarden, it was clarified by Miss Patachich.

Ofcom noted Miss Patachich's complaint that the programme was incorrect in describing the "guests" as "tenants" and making references to the HGF in the programme. However, Ofcom considered that the description of Adelsogarden in the programme made it clear that it was accommodation in which social services sometimes placed people and it was therefore made clear in the programme that this was not part of a traditional landlord and tenancy arrangement.

In any event, Ofcom did not consider that the description of the type of accommodation at Adelsogarden was material to the programme. The essential components of the programme were the allegations concerning the property and Miss Patachich's management of Adelsogarden, which were reported by people who had stayed there and subsequently investigated by HGF, as presented in the programme. Therefore, in Ofcom's view, the description of the type of accommodation offered at Adelsogarden was not material to the programme and would not have materially and adversely affected viewers' understanding of Miss Patachich in a way that was unfair to her.

- iii) Ofcom next considered the complaint that the programme made absurd accusations in stating that Miss Patachich threw rubbish into her tenants' flats. Further, the programme stated that she lacked empathy with tenants and failed to take notice of the sort of tenants she had. She said that many of the tenants were placed at Adelsogarden by the local government because they have problems looking after themselves in their own homes.

Ofcom noted that one of the contributors to the programme, Peter, who had been placed at Adelsogarden, stated the following in the programme:

"One of the tenants had done something wrong, when disposing of rubbish. As I understood it, the rubbish was thrown back into the flat".

Ofcom further noted the following exchange in the programme:

Presenter: *"There's been a few criticisms aimed at you as a landlord. I was wondering what you have to say with regards to that."*

Miss Patachich: *Of course I am listening. Who's the tenant?*

Presenter: *You have allegedly removed outer doors, for instance, from people's flats.*

Miss Patachich: *I asked you, who's the tenant?*

Presenter: *I don't want to mention any names. We've spoken to former tenants. There's mould in the flats.*

Miss Patachich: *Show me.*

Presenter: *Supposedly you threw rubbish into people's flats.*

Miss Patachich: *Both are lies, regarding the mould and the rubbish".*

Ofcom then observed the following in the programme:

Presenter: *"These (tenants) are human beings we're talking about, and they need respect and empathy from you."*

Miss Patachich: *They should place them at the Royal Castle or in a flat that is completely perfect. I have respect and empathy but not an unlimited amount. Is that so difficult to understand? It's not infinite nor for an infinite amount of time. They have to move out of here when they become a disturbance that they can't live here anymore. That's the way it is".*

Ofcom took into account that: the allegation that Miss Patachich had thrown rubbish back into former tenants' flats was made by a former guest at Adelsogarden, who had provided the programme makers with photographic evidence; and that these allegations were put to Miss Patachich in the programme as broadcast and Miss Patachich's response, as set out above, made her position unequivocally clear to viewers that she considered many of the allegation to be "*lies*". As stated in sub-head ii) above, the programme also stated that social services often placed people at Adelsogarden and that some of the people were more vulnerable members of society.

Taking the above factors into consideration, Ofcom took the view that the programme reflected both Peter's allegations and Miss Patachich's response that they were "*lies*". In addition, Ofcom considered that the description of Adelsogarden as being a place where social services placed people and Miss Patachich's comment that "*they have to move out of here when they become a disturbance*" would have highlighted to viewers that some of the issues at Adelsogarden may also have been due to the guests that were staying there.

Ofcom therefore considered that the programme makers had taken reasonable steps to satisfy itself that these material facts had been presented in a way that was fair to Miss Patachich.

- iv) Ofcom next considered the complaint that the programme featured former tenant Peter who, according to Miss Patachich, was unreliable and lied in the programme by saying that he had no choice but to stay at Adelsogarden and saying that the room was only six square metres in size.

Ofcom noted the following in the programme:

Presenter: *"In July 2010, Peter was placed at Adelsogarden by the social services in Spanga, Tensta. What kind of living [accommodation] were you offered there?"*

Peter: *A room with bed and then a shared toilet, kitchen and shower.*

Narrator: *So you had to share with the other tenants?*

Peter: *Yes with six other people.*

Narrator: *How big was your room?*

Peter: *My room was 6 square meters".*

Further in the programme, Ofcom also noted the following:

Presenter: *"Realistically he [Peter] had no place to go, so he had to put up with that. Even though she took away doors, even though you had mould and dripping pipes in your room, you stayed there for a year?"*

Peter: *I didn't have a choice. Absolutely no choice at all. I was placed there, that's where I was to stay".*

Ofcom noted that, according to Miss Patachich, Peter was unreliable and lied in the programme. However Ofcom also considered that Peter had stayed at Adelsogarden and was therefore entitled to give his account of his experience, and that the issues raised by Peter were material to the matters being discussed in the programme. Ofcom also had regard to the fact that it would have been clear to viewers that Miss Patachich denied a number of the allegations, as set out in sub-head ii) above. Ofcom took the view that the programme makers had interviewed and included contributions from the three main people concerned with the subject matter of the programme, namely the HGF, Peter and Miss Patachich.

In light of these factors, Ofcom considered that the programme reflected all sides of the allegations and that viewers would have been able to reach their own conclusions on the dispute. Consequently, Ofcom considered that material facts had been not presented in a way that was unfair to Miss Patachich.

Ofcom's decision therefore, is that there was no unfairness to Miss Patachich in these respects.

- b) Ofcom next considered the complaint that Miss Patachich was not given an appropriate and timely opportunity to respond to the allegations made in the programme. Miss Patachich said that the programme lied when it stated that they had tried to approach her on several occasions.

In considering this head of complaint, Ofcom had regard to Practice 7.9 of the Code as set out at head a) above. Ofcom also had regard to 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.

Ofcom noted that in the programme the presenter stated that the programme makers had:

“On numerous occasions tried to get in touch with Csilla Patachich to get a comment, but it’s been pointless. So we decide to head out to Adelsogarden to talk to her”.

Ofcom considered that the allegations made in the programme (and as set out in head a) above) were of a serious nature and could reasonably be considered as amounting to allegations of wrong doing, or at least, significant allegations. Therefore, it was incumbent on the programme makers to give Miss Patachich an “appropriate and timely opportunity” to respond to the allegations as set out in Practice 7.11 of the Code.

Ofcom went on to consider whether Miss Patachich was given such an opportunity to respond to the allegations made in the programme.

Ofcom noted first that the meaning of “doorstepping” set out in the Code is the “filming or recording of an interview...with someone, or announcing that a call is being filmed or recorded for broadcast purposes, without any prior warning” (see Practice 8.11). Ofcom considers that doorstepping has the potential to create unfairness to contributors because of the lack of opportunity afforded to them to consider serious allegations and the potential impression it can give to viewers about a complainant who has to be approached in this manner. Consequently, Ofcom expects broadcasters to be able to demonstrate the procedures they followed in deciding to doorstep the particular contributor to confirm that it was justified in the circumstances. Ofcom noted Viasat’s position that the programme makers had tried on at least two occasions to get in contact with Miss Patachich before filming her at Adelsogarden; and Miss Patachich’s position that the programme makers had not contacted her prior to filming her.

Ofcom asked TV3 to provide further information on the efforts they had made to contact Miss Patachich. TV3 supplied a recording of the attempted phone calls that were made by the programme makers to Miss Patachich. In addition, TV3 also stated that they had to exercise caution when deciding to contact Miss Patachich because tenants had raised concerns of being threatened with eviction in the event that Miss Patachich discovered that they had spoken to media representatives. Further, TV3 said that they had also been informed by tenants that there was a significant risk of Miss Patachich disappearing if TV3 contacted her too early when making this programme.

Ofcom watched the recording of the attempted phone calls and took into account the submissions made by TV3 in relation to this particular point. Ofcom noted that TV3 said that five attempts were made by the programme makers to call Miss Patachich and that all these attempts were made on the day of filming. Ofcom observed that on each attempt, the programme makers were unable to get hold of Miss Patachich and on each occasion, the call went through to her voicemail after a few rings. The programme makers did not leave a message at any point, but instead decided to visit Miss Patachich at Adelsogarden.

While Ofcom noted TV3's statement that the investigation would have been frustrated if they would have contacted Miss Patachich too early, we did not consider that there was sufficient evidence against Miss Patachich to suggest that she was so highly unlikely to respond positively to an offer to be interviewed that it justified the doorstepping approach to her. We also noted that the phone calls were made on the day of filming and that there were no alternative methods of contact used to contact Miss Patachich. When taking these factors into account, Ofcom did not consider that Miss Patachich had been provided with a timely opportunity to respond to the allegations made in the programme.

Ofcom went on to assess whether any unfairness resulted in the programme, following the doorstepping of Miss Patachich.

Ofcom noted the following in the programme:

- Presenter: *"Hi, my name is Jenny and I'm from the investigative TV-programme "Truth and Consequences". We're doing a story on Adelsogarden.*
- Miss Patachich: *Yes. O.K.*
- Presenter: *There's been a few criticisms aimed at you as a landlord. I was wondering what you have to say with regards to that?*
- Miss Patachich: *Of course, I am listening. Who's the tenant?*
- Presenter: *You have allegedly removed outer doors, for instance, from people's flats.*
- Miss Patachich: *I asked you, who's the tenant?*
- Presenter: *I don't want to mention any names. We've spoken to former tenants. There's mould in the flats.*
- Miss Patachich: *Show me.*
- Presenter: *Supposedly you threw in rubbish...*
- Miss Patachich: *That's a lie.*
- Presenter: *Into people's flats.*
- Miss Patachich: *Both are lies. Both regarding the mould and the rubbish. Regarding the removal of the door, he was supposed to have moved. He had no right to live there".*

Ofcom noted that, despite not being given any advance notification about the programme, Miss Patachich appeared to have engaged willingly with the presenter to answer the allegations levelled against her. In particular, at one point in the programme, Miss Patachich took the presenter of the programme to one of the properties at Adelsogarden with the intention of showing her inside this accommodation. It appeared to Ofcom that Miss Patachich took advantage of the opportunity of an interview with the programme makers to give her response to the accusations which were made in the programme and this impression was strengthened in Ofcom's view by the unedited footage of this interview which

Miss Patachich provided. Notwithstanding the fact that the programme makers could not justify the assertion made in the programme that they had tried to “*get in contact with Csilla Patachich on several occasions*”, many viewers would have noted Miss Patachich’s eagerness to answer the points made and her general co-operation with the interview. Therefore, Miss Patachich’s willingness to answer the allegations made in the programme, would have, in Ofcom’s view, signalled to viewers that she was not being evasive and was not avoiding any opportunity to respond to the allegations.

While the programme makers did not, in Ofcom’s view, give Miss Patachich a “timely” opportunity to respond, it was an appropriate opportunity which Miss Patachich used to voice her opinion on the matters raised in the programme. It appeared to Ofcom that Miss Patachich was not materially disadvantaged by not being given a timely opportunity to respond to the concerns raised in the broadcast.

Taking all the above factors into account, Ofcom’s view was that in these particular circumstances, there was no unfairness to Miss Patachich in the programme as broadcast.

Ofcom’s decision therefore is that there was no unfairness to Miss Patachich in this respect

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.

- c) Ofcom considered the complaint that Miss Patachich’s privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that the programme makers entered her private property without her permission and began to film there.

In considering this 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 or be otherwise warranted. Ofcom also had regard to Practice 8.11 of the Code which states that doorstepping for factual programmes should not take place unless a request for interview has been refused or it has not been possible to request an interview or there is good reason to believe that an investigation will be frustrated if the subject is approached openly, and it is warranted to doorstep. However, normally broadcasters may, without prior warning interview, film or record people in the news when in public places.

In considering whether or not Miss Patachich’s privacy was unwarrantably infringed in connection with the obtaining of material included in the programme, Ofcom first considered the extent to which Miss Patachich had a legitimate

expectation of privacy that programme makers would not enter her property without her permission and film there.

Ofcom noted that the programme makers filmed their approach to Adelsogarden. They then filmed what appeared to be the reception area of Adelsogarden, where Miss Patachich was standing behind a desk. Miss Patachich was putting her coat on and proceeded to walk outside with the programme makers as they discussed the allegations made in the programme.

Adelsogarden provided accommodation for members of the public who needed a place to stay on a temporary basis. However, Ofcom did not consider that Adelsogarden was a public place. Therefore Miss Patachich had a legitimate expectation of privacy in relation to being filmed for the purposes of a television programme in a location which was her home in addition to being a business residence. Ofcom also took into account that the programme makers had “doorstepped” Miss Patachich (as set out in head b) above) and therefore Miss Patachich was not aware that she was going to be filmed until the programme makers arrived at Adelsogarden.

Taking these factors into account, Ofcom took the view that Miss Patachich did have a legitimate expectation of privacy that programme makers would not proceed to film her at Adelsogarden for the purposes of the television programme.

We then went on to consider whether Miss Patachich gave her consent to be filmed. Ofcom noted that Miss Patachich did not expressly consent to the filming. However Miss Patachich engaged with the presenter by answering the allegations that were put to her and did not appear to object to being filmed. In addition, as stated in head c) above, Miss Patachich seemed to use the opportunity to present her own stance in relation to the allegations which were made against her. Therefore Ofcom took the view that Miss Patachich had consented to being filmed and having reached this conclusion, it was not necessary for Ofcom to consider whether any infringement of her privacy was warranted.

In these circumstances, Ofcom concludes that there was no unwarranted infringement of Miss Patachich’s privacy in connection with the obtaining of material included in the programme as broadcast.

- d) Ofcom finally considered the complaint that Miss Patachich’s privacy was unwarrantably infringed in the programme as broadcast in that the programme broadcast “lies and serious accusations” in the programme and “trampled down a [her] family’s personal life” because they lived at Adelsogarden and ran it as a business. By way of background, Miss Patachich said that because of the “lies” broadcast in the programme, her family felt threatened by the reprisals they had suffered and it had affected her and her family’s personal life.

In considering whether Miss Patachich’s privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which Miss Patachich had a legitimate expectation of privacy that the allegations would not be broadcast in the programme.

Ofcom noted that Miss Patachich’s complaint was confined to the “lies” and “accusations” broadcast in the programme and the effect of doing so on her family, rather than any footage of her that was broadcast in the programme. As

previously set out, the programme broadcast a number of allegations in the programme (as set out in head a) of the Decision) and included Miss Patachich's response to the majority of the allegations. Ofcom considered that these allegations concerned the manner in which Miss Patachich ran the business and treated the guests who stayed at Adelsogarden, a business which was open to members of the public as well as for referrals. The comments made were the opinions and experiences of the people who had lived there and based on an investigation made by the HGF, which is a tenants' union. The programme only concerned Miss Patachich's management of Adelsogarden, rather than anything connected with her personal or family life. Ofcom therefore considered that in the circumstances of this case, the allegations made in the programme were not matters which gave rise to a legitimate expectation of privacy.

Having found that Miss Patachich did not have a legitimate expectation of privacy in relation to the allegations made in the programme, it was not necessary to consider whether any infringement into Miss Patachich's privacy was warranted.

Ofcom therefore considers that there was no unwarranted infringement of privacy in the broadcast of the programme.

Accordingly Ofcom has not upheld Miss Patachich's complaints of unjust or unfair treatment in the programme as broadcast or unwarranted infringement of privacy in connection with the obtaining of material included in the programme or in the programme as broadcast.

Not Upheld

Complaint by Ms Abegail Williams

Befarmaeed Shaam, Manoto 1, 27 December 2011

Summary: Ofcom has not upheld this complaint of unfair and unjust treatment in the programme as broadcast made by Ms Abegail Williams.

Befarmaeed Shaam is a Farsi language version of the well-established format of *Come Dine With Me*, a programme in which contestants take turns to host a dinner party in a competition to win a £1,000 prize. This edition of the programme featured the final dinner party attended by four contestants, one of whom was the complainant, Ms Abegail Williams. After this final dinner party, Ms Williams and another contestant scored the most and equal number of points and shared the prize money. Throughout the programme, the contestants were shown commenting on each other and their hosting and culinary skills. The programme's narrator also provided a "running commentary" during the programme.

Ms Williams complained to Ofcom that she was treated unjustly and unfairly in the programme as broadcast.

Ofcom found that Ms Williams' contribution was not edited unfairly in the programme as broadcast and that the broadcaster had taken reasonable care to satisfy itself that the material facts were not presented unfairly, omitted or disregarded in a way that portrayed Ms Williams unfairly in the programme as broadcast.

Introduction

Manoto 1 is a London based television service providing general entertainment programming for the Persian speaking community. It can be received throughout the UK. Marjan Television Network ("MTN") holds Ofcom's licence for this television service.

On 27 December 2011, MTN broadcast on its channel, Manoto 1, an edition of *Befarmaeed Shaam*,¹ a programme in which contestants took turns to host a dinner party in a competition to win a £1000 prize. The programme was broadcast in Farsi, the main Persian language. Each guest scored the dinner parties, and the contestant with the most points was awarded the prize after the final dinner party. This edition featured the final dinner party attended by the four contestants, one of whom was the complainant, Ms Abegail Williams. After this final dinner party, Ms Williams and another contestant, Majid, both scored the same, highest number of points and therefore shared the prize money. The other two contestants were called Mohsen and Shahram.

Throughout the programme, the contestants were shown commenting on each other and their hosting and culinary skills. The programme's narrator also provided a "running commentary" during the programme. As the programme was broadcast in Farsi, an independent English translation was obtained by Ofcom. Towards the end of the programme, the following remarks were made by the programme's narrator in

¹ *Befarmaeed Shaam* follows the well-established format of the *Come Dine With Me* programme.

relation to Ms Williams who won the competition jointly with the other contestant, Majid:

Narrator: *"Give a nice round of applause for the winners. Well done!"*

Ms Williams: *I give one point to Shahram tonight because he prepared nothing interesting other than the dessert.*

Narrator: *Wow, what a person you are!*

Ms Williams: *I think we deserved it and even this morning when I was asked who the winner would be, I said that I think that the winner is either me or Majid, but I never guessed that it would be both of us.*

Narrator: *Are you happy now that you came first? While giving one point only? [to Shahram]"*.

After further comments from the other contestants, the programme's narrator concluded the programme by saying:

"Abegail [Williams], can you really take that money while you gave only one point to Shahram? I hereby announce to the viewers that Mohsen was meant to be the worst contestant this week, but with the one point that Abegail gave to Shahram she became this week's worst contestant. However, Mohsen shares this title with her, and the rest is up to you to choose".

Following the broadcast of the programme, Ms Williams complained to Ofcom that she was treated unjustly and unfairly in the programme as broadcast.

Ofcom provided a copy of its independent English translation of the programme to the complainant because the comments made by the programme's narrator, which were central to Ms Williams' complaint, did not appear in the translated transcript. Ms Williams then provided Ofcom with her own translation into English. This differed in some respects from the independent English translation already obtained by Ofcom and it highlighted content that was apparently missing from the independent translation. In light of Ms Williams' queries about the translation and the fact that the complaint relies on the accurate translation of the narrator's comments, Ofcom commissioned a second independent translation of the relevant part of the programme. The independent translator was provided with Ms Williams' points on the original translation. As a result, the independent translator produced a revised English translation of the comments made in the relevant part of the programme by the narrator, and it is this translation that is set out above.

Ofcom has based this decision on the revised and independent English translation. It has also relied on the translated transcripts of the unedited material provided by the broadcaster.

Summary of the complaint and broadcaster's response

In summary, Ms Williams complained that she was treated unjustly or unfairly in the programme as broadcast in that the programme was edited in such a way as to portray Ms Williams unfairly. In particular, Ms Williams complained that:

- i) Ms Williams' comments justifying the scores she gave to the other contestants and her comments relating to an incident in which another contestant racially

abused her, were omitted from the broadcast. Ms Williams said that in the absence of these comments, viewers were left with only what was broadcast to make a judgement about her.

Ms Williams said that unlike other programmes where contenders are provided with the opportunity to give their justifications for the scores they give, her comments were cut out in the broadcast version of the programme. She also said that the very last contender (i.e. Shahram) had racially abused her on the third night of the competition. The next morning, Ms Williams said that she spoke to the programme makers on camera and commented about the incident: “...I’m appalled to see someone living for so long in such multicultural and diverse city as London still expressing racially motivated and offensive views towards another fellow citizen...”. Ms Williams said that in the absence of these crucial comments, viewers were inevitably left to base their judgement only upon what was broadcast.

- ii) She was portrayed unfairly by the programme’s narrator as someone who was solely motivated by money.
- iii) The narrator’s presentation of her scoring was misleading and unfounded. Ms Williams said that both she and Majid had both scored 20 points and that on the final evening, Majid and Mohsen had scored Shahram a total of nine points between them out of a possible 20 points. Ms Williams said therefore that even if she had scored Shahram 10 points, he would have only scored a total of 19 points and still would have not won.

In response, and before addressing the particular elements of Ms Williams’ complaint of unjust or unfair treatment, Wiggin LLP, the legal representatives responding to the complaint for MTN, said that the programme was the Persian version of the entertainment programme *Come Dine With Me* and had been produced and subsequently broadcast since August 2010. Apart from the participants speaking in Farsi, the programme followed the same format as *Come Dine With Me* whereby contestants take it in turns to prepare and host a dinner for their fellow guests. Contestants give their opinions on the host’s menu in the morning. The host is then filmed preparing the meal. The contestants are then filmed at the host’s home at the evening meal. At the end of each evening, the guests rate the performance of their host and award a mark out of 10, with the winner being the person with the most points at the end of the week who receives a cash prize of £1000. Wiggin LLP said that the programmes are narrated by an irreverent and sarcastic narrator, who makes tongue-in-cheek and humorous comments about the hosts’ cooking prowess, décor of the contestant’s homes, hosting abilities and behaviour towards other contestants.

By way of background, Wiggin LLP said that the programme is broadcast in the UK and is watched by Farsi speakers in London, but that its principal audience is in Iran. It explained that Iran is ethnically diverse, and includes Turks, Kurds, Baluchis, Arabs, Turkmen and Lurs. Iranian Turks (of which mention is made in the programme subject to the complaint - also known as Iranian Azeris, and Persian Azerbaijanis) live mainly in the north west of Iran. Wiggin LLP said that hospitality and politeness (“T’aarof”) are absolutely fundamental for Iranians and that showing generosity, politeness and displaying welcoming behaviour is considered a reflection of good character. It said that gamesmanship and self-interest are generally considered unattractive traits. Wiggin LLP said that MTN considered that it was important that the programme was considered with such cultural issues in mind.

Wiggin LLP said the following on behalf of MTN in response to the particular sub-heads of Ms Williams' complaint:

- i) In response to Ms Williams' complaint that her comments justifying the scores she gave and comments relating to an incident in which she was racially abused by another contestant, Wiggin LLP said that the only justification that Ms Williams gave for awarding Shahram a score of one point was that *"he prepared nothing interesting other than the dessert"*. Wiggin LLP said that the format of the programme dictated that the contestants' comments justifying scores were filmed following the meal at the time when each contestant was giving the host a score. It said that Ms Williams' complaint suggested that her comments from the morning of the filming (i.e. before the Shahram's meal at his home) should have been included. Wiggin LLP said that to have included these comments would not have fitted with the format of the programme. Furthermore, the comments that Ms Williams made during the morning of the filming comprised of commentary on Shahram's character and her response when asked about how she intended to score Shahram that evening and, in particular, whether the score she would give him would be influenced by her feeling towards him. She remarked:

"I didn't like what he did in general, but I'm not going to vote with that in mind... Tonight when I go there, I'm not bothered about what happened or what his personality is like... I'm only going to mark him on what kind of a host he is, what kind of a host he is tonight and the food he cooks".

Wiggin LLP said that it was clear from this that Ms Williams had no intention of justifying her score on the basis of her view of Shahram's character. By Ms Williams' own assertion, the comments were not intended to justify the score that she awarded Mr Shahram. In light of this (and assuming that the format of the programme would have allowed it) Wiggin LLP said that the inclusion of Ms Williams' comments about Shahram's character would have been redundant. Wiggin LLP said that at the end of each evening during the filming period, the programme makers followed a standard format of asking the contestant: what score they wished to give; the reason why; and, finally asked them to hold up the score card and explain their reasons. On all previous evenings, Ms Williams had been forthcoming with justifying the scores she was awarding. In relation to Shahram's evening, Ms Williams was asked what score she was giving to Shahram, she was asked to explain the reason why twice and both times Ms Williams justified the score by saying that *"apart from the dessert, his other foods [sic] were not interesting"*. When Ms Williams was given the opportunity by the programme makers to justify her score twice and asked to explain further, she chose not to justify her score further. Wiggin LLP said that Ms Williams then had an opportunity to justify the score more fully when she was asked to hold up the card with the number and explain her reasons.

In relation to the incident in which Ms Williams said she was "racially abused", Wiggin LLP said MTN categorically denied that a racist incident occurred during the filming of the programmes. It said that MTN had reviewed the translated transcript of the third and fourth episodes and all unedited footage of these episodes, and had not found one incident in which racial abuse was directed towards her. It said that Ms Williams did not approach the programme makers about a racist incident or any other incident. Wiggin LLP said that Ms Williams had become quite familiar with the programme makers and had approached them about other matters quite confidently. It said that MTN only became aware of this particular claim after her complaint to Ofcom.

Wiggin LLP said that MTN had found that the contestants made references and jokes about the regions of Iran from where the other contestants came. The group contestants openly discussed their regional background, in particular that two of the contestants (i.e. Ms Williams and Majid) referred to themselves as “Turks” and the other two (i.e. Shahram and Mohsen) referred to themselves as “Tehranis” or “Parsis”. These regional references were light-hearted jests about the idiosyncrasies and traits of about people of different regions that are well established in the Iranian community and not intended to be malicious, in the same way as they are used about people from different towns and cities in the UK. It said that throughout filming, Ms Williams did not object to any of these regional references or express her distaste for them at any point.

In response to Ms Williams’ claim that the exclusion of a particular comment that she was *“appalled to see someone living for so long in such multicultural and diverse city as London still expressing racially motivated and offensive views towards another fellow citizen...”*. Wiggin LLP said that MTN had not been able to find those specific words in the footage. However, it did find some references to “multiculturalism”, in particular when Ms Williams was discussing Shahram with the programme makers on the fourth and final day of filming:

“I didn’t like him at all...can I just add...Specially because he lives in London, London is a multi-cultural city, people from all over the world live in London, every colour, every language, every race, black, white, yellow, Chinese, from everywhere, they’re from everywhere over here. If while living here he still hasn’t learnt, in a place like London where everyone has to respect each other, respect each other’s race, colour...I’m not saying that my race is perfect and doesn’t lack anything, I’m not saying I’m a Turk don’t say anything to me. I am very proud of it, I’ll say it in front of the camera I am a Turk, but if, I was saying, if in somewhere like London which is so multicultural, he hasn’t learnt to show respect...and we are compatriots too, we are not from two different countries. If he hasn’t learnt this, I really feel sorry for him”.

Wiggin LLP said that this comment was made almost immediately before the comments in which Ms Williams effectively stated that she would score Shahram on his cooking and hosting skills and not on the basis of his behaviour on the previous evening. It was therefore reasonable that MTN did not include these comments in the programme as broadcast as they were not relevant.

In response to Ms Williams’ claim that the exclusion of these comments left viewers with only what was broadcast to make a judgement about her, Wiggin LLP said as these comments reflected Ms Williams’ thoughts the previous evening, they did not support the score that she later awarded that evening and Ms Williams expressly stated that she would score Shahram in accordance with his performance. There was, therefore, no reason for them to be included as reasons for the score that she awarded that evening. MTN said that Ms Williams’ claims that her “comments justifying the scores she gave were omitted from the broadcast programme as were her comments relating to an incident in which another contestant racially abused her” and that “in the absence of these comments, viewers were left with only what was broadcast to make a judgement about her” had no merit.

- ii) In response to Ms Williams’ complaint that “she was portrayed unfairly by the programme’s narrator as someone who was solely motivated by money”, Wiggin LLP said that the words complained of by Ms Williams, and on which this inferential meaning was drawn, were not expressly stated in her complaint. It said

that MTN assumed for the purpose of this response that Ms Williams was saying that because the narrator was critical of her win, it meant that her behaviour was motivated by the desire to receive the prize money. Wiggin LLP said that that meaning was strained, and not one that MTN believed was a natural and ordinary meaning of the narrator's words. If the meaning of the narrator's words was that Ms Williams entered into gamesmanship, MTN considered the words of the narrator to have been fair and true. MTN repeated that Ms Williams had consistently scored the other contestants low. It also said that she had appeared overly keen to draw attention to the mistakes of her fellow contestants, and had demonstrated that she was thinking about tactical scoring during the course of the programme and had a desire to win. In the circumstances, Wiggin LLP said that the narrator's comments were a fair comment on Ms Williams' behaviour.

- iii) In response to Ms Williams' complaint that the narrator's presentation of her scoring was "misleading and unfounded", Wiggin LLP said that the narrator's role was pivotal to the format of the programme, providing acerbic, tongue-in-cheek and humorous asides. It said that Ms Williams was already familiar with the format of the programme before she agreed to take part and would have known that it was likely that she would be criticised by him and that such criticism was unlikely to be complimentary. It was common for contestants during the filming period to make reference to the narrator and how he might comment on something they have said or done, as Ms Williams did in this programme. Wiggin LLP said that it was relevant that Ms Williams was not singled out for criticism in this particular episode by the narrator, but that critical comments were made about all of the contestants.

In relation to the comments made by the narrator that: *"...Now we have two people on 20 points and one on 16. Well that's the way they've marked Shahram, it's not possible for him to be first"*, Wiggin LLP said that they needed to be considered in context. It said that the comments were made after Majid had given Shahram four points and Mohsen five points. That statement was correct, as it was then impossible for Shahram to win the competition regardless of how Ms Williams voted on the final day (save that actually the scores were 18, 20 and 20 for Shahram, Majid and Ms Williams respectively, not 16, 20 and 20 as stated in the programme). Viewers would not have been misled by that statement.

Wiggin LLP said that the narrator's remark *"What! Really?"* was said after Ms Williams had given her score of just one point to Shahram. It was a very low score, which Ms Williams justified, when required to do so on camera, by saying that *"apart from his dessert there was nothing else that interesting at his dinner"*. She gave no other explanation for her scoring.

Wiggin LLP said that the comments made by the narrator that followed (*"wow, what a person you are!"*) were clearly his conclusion that the fact that Ms Williams won was related to low the scores that she had given on every night. It was not just the result of her single mark for Shahram, but she had been consistently ungenerous, giving Mohsen just four points on the first night, when she had described him as a very good host. Majid too was awarded just five points despite Ms Williams saying *"it was good, but... it was very, very good"* and remarking on the *"huge effort"* that he had made.

Wiggin LLP said that the narrator's comments were reflective of Ms Williams' behaviour throughout and were also fair when the comments made by Ms Williams when giving her scores are considered. Ms Williams was very critical in her comments of others when summarising to camera her reasons for her score,

despite often having made positive remarks to the programme makers prior to filming. Furthermore, Wiggin LLP said that Ms Williams would not have known at the time she was voting that her mark was, in effect, irrelevant. She would have known, however, that giving a low score would increase her chances of winning. Her score of one point was given in the belief and with the intention that it would affect the overall result. Wiggin LLP said that MTN therefore rejects Ms Williams' complaint in relation to the presentation of her scoring.

Representations on Ofcom's Preliminary View

Ofcom prepared a Preliminary View in this case that recommended that Ms Williams' complaint should not be upheld. In commenting on that Preliminary View, Ms Williams' main points and those of Wiggin LLP (insofar as they were relevant to the complaint entertained by Ofcom) were, in summary, as follows.

Ms Williams said that, despite the broadcaster's great effort to twist the truth, she had managed to extract traces of material that seemed to have been craftily edited out. She said that in the unedited material of the third night of the competition, a joke about the Turks was told during an otherwise ordinary dinner table conversation.

Ms Williams said that although Mohsen insisted on telling a joke about a Turk, there was not a single mention of a Turk in the version of the joke contained in the material provided to Ofcom. The joke itself did not make any sense, even though it ended in laughter. Ms Williams said that Mohsen could be heard clearly mimicking a Turkish accent. Ms Williams said that if the missing parts of the joke were included, it made sense of the joke, and it became apparent that there has been a deliberate attempt by MTN to cut this particular bit out.

In response to Ms Williams' comments, Wiggin LLP said that MTN had confirmed that nothing in any transcripts, translations or footage of the programme has been edited or deleted. It said that, in investigating Ms Williams' allegations, MTN instructed the translator (previously used in relation to preparing the unedited footage already provided to Ofcom) to revisit the footage and translations relating to the incident identified by Ms Williams. Wiggin LLP said that the translator said that: "Overall there was nothing I noticed that was either incorrectly translated or omitted from the transcript" and that there was "nothing that would in any way effect the clarity, precision and authenticity of the transcript and the translation".

MTN considered that it was material to Ofcom's assessment of Ms Williams' complaint that Ms Williams actively participated in making comments about other contestants throughout the four episodes of the series. MTN provided to Ofcom a non-exhaustive list of Ms Williams' participation in such comments in its response. MTN asked Ofcom to take into consideration that Ms Williams made a number of references to the national and regional origins of individuals herself.

MTN pointed out that Majid, a fellow contestant from the same region of Iran as Ms Williams, had no issue with the regional references made, and when asked about this issue on the fourth day, he accepted Shahram's comments as jokes without malicious intent. MTN asked Ofcom to take into consideration that a fellow Turk had not been offended by the comments about which Ms Williams had complained.

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 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 transcript of the programme as broadcast and both parties' written submissions.

When considering complaints of unfair and unjust 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 sub-heads of complaint detailed below.

Ofcom first considered Ms Williams' complaint that the programme portrayed her unjustly or unfairly in that material facts were presented, disregarded or omitted in a way that was unfair to her.

When considering this part of the complaint, Ofcom had regard to whether the portrayal of Ms Williams was consistent with the broadcaster's obligation to ensure that material facts had not been presented, disregarded or omitted in a way which was unfair to him (as set out in Practice 7.9 of the Code).

Ofcom considered each of the specific sub-heads to Ms Williams' complaint separately in order to reach an overall view as to whether or not she was portrayed unfairly in the programme as broadcast.

- i) Ofcom first considered Ms Williams' complaint that her comments justifying the scores that she gave to the other contestants had been omitted from the broadcast programme as had comments she had made relating to an incident in another contestant racially abused her.

In relation to this particular sub-head of complaint, Ofcom not only took account of Practice 7.9 (as outlined above) but also Practice 7.6 which states that when a programme is edited, contributions should be represented fairly.

Ofcom recognises that programme makers and broadcasters must have the freedom to select and edit material from interview footage of a contributor for inclusion in a programme and that this is an editorial decision for the programme makers and broadcaster to make. However, in editing such material, broadcasters must ensure that it is done in a manner that represents the contribution fairly. Therefore, Ofcom considered whether or not Ms Williams' comments justifying the scores she gave and comments in relation to an incident in which another contestant racially abused her were omitted and whether the omission created unfairness to her.

Ofcom first considered Ms Williams' complaint that her comments justifying the scores she gave to the other contestants were omitted from the programme as broadcast. It is important to note that although Ms Williams has referred to the

scores she gave “to the other contestants”, her complaint, as entertained by Ofcom, relates only to the final episode of the programme series. Therefore, Ofcom’s consideration of this is limited to the scoring that took place in this episode.

Ofcom understood from the complaint and the material submitted to it by Wiggin LLP on behalf of the broadcaster, that Ms Williams had spoken to the programme makers in the morning of the day of the filming of Shahram’s dinner party and, importantly, before the meal and before she attended Shahram’s home. Ms Williams was presented with the menu for Shahram’s meal and was asked how she intended to score him later and whether her score would be influenced by her feelings towards him. This, it appeared to Ofcom, was a reference to a difference of opinion expressed between Ms Williams and Shahram at the previous evening’s dinner party. Ofcom noted from the unedited material the following comments made by Ms Williams in response to how she would score Shahram:

“I didn’t like what he did in general, but I am not going to vote with that in mind...Tonight when I go there, I’m not bothered about what happened or what his personality is like...I’m only going to mark him on what kind of host he is, what kind of host he is tonight and the food he cooks”.

These comments made by Ms Williams were clearly given before Shahram’s dinner party had taken place. For this reason, Ofcom considered that to have included these comments in the programme as part of her justification for the score that she eventually gave Shahram would have been irrelevant given the established format of the programme structure.

Ofcom then noted the broadcast comments made by Ms Williams after Shahram’s meal:

“I give one point to Shahram tonight because he prepared nothing interesting other than the dessert”.

The unedited footage filmed on the evening of Shahram’s dinner party also demonstrated that Ms Williams was asked by the programme makers for her score for Shahram and her reasons for it. Ms Williams stated that “apart from the dessert, his other foods were not interesting”. When asked to give further reasoning for her scoring, Ms Williams did not offer any further explanation to justify awarding Shahram one point.

Ofcom took the view that, while Ms Williams’ contribution was edited, the footage that was included in the programme reflected her reasons for scoring Shahram in the manner she did and that her justification (i.e. that Shahram prepared nothing of interest other than the dessert) was presented accurately and as being an expression of her own opinion of Shahram’s dinner party.

Taking all the factors referred to above into account, Ofcom considered that the edited interview footage of Ms Williams reflected her justification for scoring Shahram in the way she did and that the omission of her comments made prior to Shahram’s dinner party did not mislead viewers in a way that created unfairness to her.

Ofcom went on to consider Ms Williams’ complaint that the programme omitted her comments in relation to an incident in which another contestant had racially abused her.

Ofcom noted from Wiggin LLP's submission on behalf of the broadcaster that it denied that a "racist incident" had taken place during the filming of the four episodes to the programme series. In particular, the incident was alleged to have taken place on the penultimate evening to Shahram's dinner party. It noted too that Wiggin LLP said that the broadcaster had been unaware that Ms Williams had alleged that a racist incident had occurred until it was notified of her complaint by Ofcom. Ofcom was provided with unedited footage and translated transcripts of the two episodes relevant to this element of the complaint.

From examining the material submitted by the parties, it appeared to Ofcom that the incident that Ms Williams seemed to be referring to occurred on the evening before Shahram's dinner party because when, prior to Shahram's dinner party, Ms Williams provided her comments on the third evening, she commented that she had been upset by remarks about "Turks" made by Shahram the previous evening. Ofcom noted that the contestants had commented about each other's ethnicity and cultural traditions (Ms Williams and Majid are "Turks" while Shahram and Mohsen are "Parsi"), though it appeared from the translated transcripts of the unedited material that the all the contestants had engaged in the discussion, which appeared light-hearted in tone with none of the contestants appearing to be offended at the time.

During the course of the evening of Shahram's dinner party, a discussion began about which country the contestants would choose to live in. Ms Williams said that she would choose the UK and went on to explain her reasons why. Earlier that day, when Ms Williams was talking alone to the programme makers and giving her comments on the previous evening, she said:

"I didn't like him at all...can I just add...Specially because he lives in London, London is a multi-cultural city, people from all over the world live in London, every colour, every language, every race, black, white, yellow, Chinese, from everywhere, they're from everywhere over here. If while living here he still hasn't learnt, in a place like London where everyone has to respect each other, respect each other's race, colour...I'm not saying that my race is perfect and doesn't lack anything, I'm not saying I'm a Turk don't say anything to me. I am very proud of it, I'll say it in front of the camera I am a Turk, but if, I was saying, if in somewhere like London which is so multicultural, he hasn't learnt to show respect...and we are compatriots too, we are not from two different countries. If he hasn't learnt this, I really feel sorry for him".

Ofcom noted that Ms Williams had made these remarks just before she stated to the programme makers that she would only score Shahram on his hosting skills and the food he cooked and that his behaviour would not influence her score (see above).

Ofcom considered that there was little doubt about the strength of feeling Ms Williams harboured for Shahram and the views that he had expressed during the course of the competition. However, the comments that Ofcom understood to have been the root of Ms Williams' dislike of Shahram, namely those about ethnicity and cultural differences, were not included in the version of the episodes broadcast. Ofcom considered that to have included Ms Williams' comments about Shahram would have been referencing something that the viewers had no knowledge of and therefore would have lacked context and relevance. For this reason alone, Ofcom considered that Ms Williams' comments would have been immaterial or extraneous for the purposes of the programme as broadcast.

Ofcom took note of Ms Williams' suggestion that MTN had edited the unedited material of the third night of the competition provided to Ofcom and that any such editing was denied by the broadcaster. Ofcom also took note of the original translator's confirmation to the broadcaster that nothing material from the unedited content was, in his opinion, omitted or incorrectly translated. Ofcom was not in a position to determine whether or not the material referred to had been materially edited in the manner suggested by Ms Williams. However, it was clear to Ofcom (as already indicated in its decision above) that the unedited material showed that all the contestants had engaged in discussion about regional and ethnic differences, which appeared to be light-hearted in tone and did not cause any obvious offence to the contestants at the time. For these reasons, Ofcom considered that the points raised by Ms Williams did not amount to grounds that caused us to alter our original decision not to uphold her complaint.

Taking these factors into account, and given that Ms Williams had expressly told the programme makers that she would not score Shahram on his personality but only on his hosting and cooking skills, Ofcom took the view that the broadcaster had exercised its editorial judgement reasonably by not including her comments about Shahram and that this omission did not mislead viewers in a way that created unfairness to her.

- ii) Ofcom then considered Ms Williams' complaint that she was portrayed unfairly by the programme's narrator as someone who was solely motivated by money.

Ofcom noted that Ms Williams did not specify in her complaint which particular comments made by the programme's narrator portrayed her as being motivated by money. However, having carefully read the translated transcript of the programme, Ofcom took note of the following remarks made by the narrator towards the end of the programme in reaction to Ms Williams and Majid who had both won the prize:

Narrator: *"Give a nice round of applause for the winners. Well done!"*

Ms Williams: *I give one point to Shahram tonight because he prepared nothing interesting other than the dessert.*

Narrator: *Wow, what a person you are!*

Ms Williams: *I think we deserved it and even this morning when I was asked who the winner would be, I said that I think that the winner is either me or Majid, but I never guessed that it would be both of us.*

Narrator: *Are you happy now that you came first? While giving one point only? [to Shahram]"*.

After a few further comments from the other contestants about the outcome of the competition and the contestants toasting and congratulating each other, the narrator commented:

"Abegail, can you really take that money while you give only one point to Shahram? I hereby announce to the viewers that Mohsen was meant to be the worst contestant this week but with the one point that Abegail gave to Shahram she became this week's worst contestant. However, Mohsen shares this title with her, and the rest is up to you to choose".

Ofcom noted from Wiggin LLP's submission on behalf of the broadcaster and the supporting material submitted that it was apparent that Ms Williams had understood the nature and format of the programme, including the role of the narrator, when consenting to participate in it. The extracts of the translated transcripts of the previous programmes and of the unedited material provided to Ofcom and the complainant by the broadcaster in turn showed that Ms Williams understood that she was taking part in a competition and that everyone in it has to try and win. Wiggin LLP also made reference in its submission to episode two of the programme in which Ms Williams referred to the narrator (Mr Toghrol): "I know when Mr Toghrol does the voiceover for this programme he will point out every mistake we make".

Ofcom noted that the programme, which is primarily an entertainment programme, used a format that was well-established and that viewers would have been likely to have understood that the role of the narrator was clearly intended to provide a light-hearted and critical commentary on the contestants, their cooking, and their relationships with each other. The style of the commentary and the comments made by the narrator were, at times, cutting and satirical, but it was clear from the manner in which they were presented that the remarks did not purport to be a serious comment on the true character or personality of the contestants featured in the programme.

In this context, Ofcom took the view that the comments made by the narrator relating to Ms Williams jointly winning the prize money were not indicative, necessarily, of a suggestion that she was "solely motivated by money". On a natural reading of the translated transcript of the comments, a more reasonable understanding of the narrator's comments would be that he was alluding to Ms Williams' competitiveness and her tactical scoring of Shahram with one point.

Ofcom acknowledged that the style of the narrator's comments had the potential to cause offence to the particular contestants they were directed towards. However, Ofcom took the view that it was more than likely, given the well-established format of the programme that viewers would have understood that the narrator's intended purpose was to provide light-hearted, albeit mostly uncomplimentary, opinion and comment throughout the programme to entertain viewers. Ofcom considered that it was within this context that the narrator's comments were made, and that the remarks were not intended to be taken as a serious critique of Ms Williams or her behaviour in the programme and that viewers would have been left in a position to make up their own mind out what her motives may or may not have been.

Taking these factors into account, Ofcom concluded that Ms Williams was not portrayed in a manner which resulted in unfairness to her.

- iii) Finally, Ofcom considered Ms Williams' complaint that the narrator's presentation of her scoring was misleading and unfounded. In particular, Ms Williams said that both she and Majid had both scored 20 points and that on the final evening, Majid and Mohsen had scored Shahram a total of nine points between them out of a possible 20 points. Ms Williams said therefore that even if she had scored Shahram 10 points, he would have only scored a total of 19 points and still would have not won.

Ofcom noted the comments made by the narrator in relation to Ms Williams' scoring of Shahram:

“...Now we have two people on twenty points [i.e. Ms Williams and Majid] and one on 16² [i.e. Mohsen]. Well, that’s the way they’ve marked Shahram, it’s not possible for him to be first”.

And,

“Abegail can you really take that money while you gave only one point to Shahram?”.

Ofcom also noted Ms Williams’ comments in relation to her scoring of Shahram, which was shown in the programme before the narrator’s comment above:

“I gave one point to Shahram tonight because he prepared nothing interesting other than the dessert”.

From the submission provided to it on behalf of the broadcaster by Wiggin LLP, Ofcom noted that Ms Williams had scored none of the other contestants any more than five points out of a possible 10 points. It also noted that Mohsen had, in fact, scored a total of 18 points and not “16” as stated in the programme. In any event, Ofcom considered that it was unequivocal from the excerpts from the programme set out above, that Ms Williams scored Shahram with one point. It was also clear from the same excerpts that the narrator had correctly stated that she had given “*only one point to Shahram?*”. The narrator’s comments were made against the backdrop of Ms Williams’ consistently low scoring of the other contestants, culminating in the award of one point to her competitor on the final night of the competition. In Ofcom’s view, viewers were unlikely to have misunderstood from the comments made by the narrator what Ms Williams scored Shahram, given that the programme had already shown her own comments and reason for scoring Shahram in the manner she had and that they would have been aware that she was a consistently low scorer.

As already detailed in sub-head ii) above, Ofcom considered that the programme’s format was well-established and that viewers and contestants alike would have been aware of the particular style and nature of the narrator’s commentary throughout the programme. Taken in this context, Ofcom took the view that the narrator’s intended purpose was to provide light-hearted, albeit mostly uncomplimentary, opinion and comment throughout the programme and that his remarks were not intended to be taken as a serious critique of Ms Williams.

Given the factors above, Ofcom considered that the narrator’s comments were not misleading in a way that portrayed Ms Williams unfairly.

Having considered each of the sub-heads of the complaint made by Ms Williams that the programme was edited in such a way as to portray her unfairly, Ofcom concluded that, overall, the broadcaster had taken reasonable care to satisfy itself that the material facts (as specified in the sub-heads of complaint above) were not presented, omitted or disregarded in a way that portrayed her unfairly. Ofcom also considered that Ms Williams had actively participated in the programme and engaged with the other contestants throughout in a manner which demonstrated that she understood its nature and format: namely, that they would be given opportunities to express themselves and provide personal opinions about the other contestants, their food and their homes, and that the programme’s narrator would provide an irreverent and

² Mohsen had, in fact, scored a total of 18 points and not 16 as stated in the programme.

sarcastic commentary throughout. Taken in this context, Ofcom concluded that the broadcaster had presented her contribution in a way that represented her behaviour fairly and in a manner that would enable viewers to reach their own conclusions on her contribution to the programme.

Accordingly, Ofcom has not upheld Ms Williams' complaint of unjust and unfair treatment in the programme as broadcast.

Not Upheld

Complaint by Dr Waney Squier

Silent Witness, BBC1, 15 and 16 April 2012

Summary: Ofcom has not upheld this complaint of unjust and unfair treatment made by Dr Waney Squier.

BBC1 broadcast a two part episode of its long established crime drama series *Silent Witness*. The programmes included a character called Dr Helen Karamides, a paediatric neuropathologist. The programme showed Dr Karamides giving expert evidence in relation to “shaken baby syndrome” and later being accused of retaining tissue from dead children. She later admitted to this in a video she made before she committed suicide.

Following the broadcast of the programme, the complainant, Dr Squier, complained to Ofcom that she was treated unjustly and unfairly in the programme as broadcast in that the character in the drama was based on her and was recognised as being based on her.

In summary Ofcom found that: while there may have been similarities between the character in the programme and Dr Squier there were also numerous differences, the programme was clearly fictional; and the significant departures in the plot line from Dr Squier’s life would have signalled to viewers that this was not an accurate portrayal of her or any other person who shared similar characteristics, and was not intended to be a true depiction of her. Therefore, Ofcom considered that there was no unfairness to Dr Squier in the programme as broadcast.

Introduction

On 15 and 16 April 2012, BBC1 broadcast a two part episode in its *Silent Witness* crime drama series, which included a storyline concerning “shaken baby syndrome”. One of the characters in the drama was “Dr Helen Karamides”, a paediatric neuropathologist, who believed that there were often a number of other explanations for a number of deaths of babies that her professional colleagues considered were the result of “shaken baby syndrome”. She was shown giving expert evidence that was contrary to the opinions of the majority of experts in the case which featured in the drama, in which a parent was alleged to have shaken her baby, who later died. Later in the programme Dr Karamides was accused of retaining brain tissue from infants without parental consent. She was subsequently found dead in her home, having taken her own life. Dr Karamides had left a video recording in which she admitted that she had retained some brain tissue, explaining the difficulties in asking parents to consent to retaining brain tissue when a baby had just died.

Following the broadcast of the programmes, Dr Waney Squier, a paediatric neuropathologist, complained to Ofcom that she was treated unjustly or unfairly in the programme as broadcast.

Summary of the Complaint and the broadcaster’s response

In summary, Dr Squier complained that she was treated unjustly or unfairly in the two part programme as broadcast in that she was unfairly portrayed through the character of Dr Karamides. Dr Squier said that Dr Karamides was based on her and

that the storyline portrayed her unique professional circumstances in some detail, but deviated from the truth with respect to the accusation of retaining baby brain tissue for research without parental permission. As such action would be gross professional misconduct and a criminal offence, Dr Squier said that this portrayal was unfair to her, professionally damaging, likely to have an adverse effect on her reputation and cast doubt on her integrity.

By way of background, Dr Squier said that while she appreciated the programme was fictional, the parallels with her own career and the events of her professional life over the last three years were too close to have been accidental. She said the accuracy of those parallels reflected very careful research. She said that the world of paediatric neuropathology was a very small one and that her work, namely expert evidence in “shaken baby syndrome” cases, attracted media and public attention. She said that the character of Dr Karamides had been recognised as being based on her by people who knew her both personally and professionally.

Dr Squier also said that she was contacted by the BBC Pronunciation Unit in July 2011 with reference to a “forthcoming *Silent Witness* episode”. She was told that she would be contacted by email prior to the broadcast of the programmes, but that there had been no further contact.

Dr Squier said that the conclusion to the storyline, with the character committing suicide, was disturbing to her and her friends and was extremely painful and distressing to her daughters and close family.

In summary and in response, the BBC said that Dr Squier was not identified by name in the programme and that the character of Dr Karamides was not based on Dr Squier. The BBC added that *Silent Witness* was a long-standing crime drama with an established audience, who would have been aware that they were watching a work of fiction. The depiction of a character who may have certain professional similarities to (but also distinct differences from) Dr Squier was in keeping with the legitimate exercise of freedom of expression by the BBC. Additionally, the BBC said that because Dr Squier was not identified by name and because the character she believed portrayed her was different from her in a number of important respects, it was even less likely that viewers’ perceptions and opinions of Dr Squier might have been altered and that there could have been any unfairness to her as a result of the drama.

The BBC referred to a number of differences between Dr Squier and the character of Dr Karamides: Dr Karamides was portrayed carrying out forensic pathology post-mortems, whereas Dr Squier’s professional role has an emphasis on research and she is not on the register of Home Office Forensic Pathologists; Dr Squier has a family and is 20 years older than Dr Karamides, who was depicted as single; their names were not just different but were ethnically distinct; Dr Karamides was clearly shown to live in London, whereas Dr Squier is based in another location; Dr Karamides was depicted as having illegally retained brain tissue samples, whereas, although a similar complaint has been made against Dr Squier, she, unlike Dr Karamides, had been completely exonerated of any wrongdoing. The BBC also said that a major part of Dr Karamides’ character focused on her lengthy professional relationship with a serial killer, a narrative which had no parallel in Dr Squier’s history. Finally, the BBC said that any similarity between Dr Squier and Dr Karamides based on a common view of “shaken baby syndrome” was not unique because there were two other practicing UK female pathologists who share Dr Squier’s views on that topic.

The BBC said that Dr Squier had asserted that there were parallels between her professional career and that of Dr Karamides but had not specified what those might be. However, whether there were parallels or not, the BBC said that mere points of similarity were not enough to support a claim that the character was based on Dr Squier and the fact that there were major points of difference should be enough to establish that the character was not based on her. The BBC stated that there was nothing in the depiction of the character of Dr Karamides which would warrant the conclusion that it was based on Dr Squier.

The BBC said that the Pronunciation Unit had contacted Dr Squier prior to the broadcast to seek clarification as to the pronunciation of her name. The BBC said that this was because at one stage in the production process, it was intended, in the interests of verisimilitude, to mention by name in the programme some actual experts in the field, Dr Squier being one of them. Dr Squier was contacted by the Pronunciation Unit because the pronunciation of her name was not obvious, unlike with other experts the programme makers had in mind. However the BBC said that it would be wrong to infer from this enquiry that the intention was to base the character of Dr Karamides on Dr Squier. In the event, it was simply decided not to include any names of real experts in the programme.

Representations on Ofcom's Preliminary View

Ofcom prepared a Preliminary View in this case that Dr Squier's complaint should not be upheld. In commenting on that Preliminary View, Dr Squier's solicitor made the following points on behalf of Dr Squier and the BBC's responses (directly relevant to the complaint responded to by the broadcaster and considered by Ofcom) were, in summary, as follows.

In summary, Dr Squier's solicitor said that the description of similarities between Dr Squier and the character of Dr Karamides, which Ofcom described in its Preliminary View, was inaccurate and that there were more similarities than those which were noted by Ofcom in its Preliminary View. Dr Squier's solicitor stated that the similarities were as follows:

- Dr Squier and Dr Karamides were both female paediatric neuropathologists. Dr Squier is the only female paediatric neuropathologist in the UK;
- Dr Karamides calls herself "*a pathologist who specialises in brain development*". The broadcast goes on to state that "*Helen Karamides has done more work on the infant brain than almost anyone in this country*". Dr Squier has published more than any other currently active female neuropathologist in the UK on this topic;
- Dr Karamides and Dr Squier both give expert evidence in court in relation to shaken baby syndrome;
- both doctors are subject to adverse judicial comment. In 2009 Dr Squier was criticised by Mrs Justice King. In the programme Dr Karamides is also criticised by a female judge;
- Dr Karamides is accused of illegally retaining tissue samples. In 2010, Dr Squier was reported to the Human Tissue Authority by the Metropolitan Police;
- Dr Karamides is the subject of a campaign against her by the establishment. Dr Squier has also been the target of a campaign against her by the establishment (in the form of the Metropolitan Police and others) to discredit her and/or to undermine her evidence;
- both doctors are the subject of complaints to their professional bodies; and

- the nature of the research undertaken by Dr Karamides and Dr Squier is very similar. The conclusions drawn by Dr Karamides and Dr Squier are essentially identical. In the programme the character “Leo” describes a hypothesis which was proposed in 2003 and supported by Dr Squier. In addition Dr Karamides also gives an accurate representation of the thrust of Dr Squier’s research.

In addition Dr Squier’s solicitors stated that Dr Squier’s professional role does not have an emphasis on research, as stated by the BBC. Dr Squier’s professional role is diagnostic and her research is pursued in time outside of her professionally paid route.

Dr Squier’s solicitor said that the number of similarities, as set out above, were by any standards specific and substantive and added that it would be extraordinary for a programme of any kind to feature a character with an identical name. Further Dr Squier’s solicitor said that the use of a fictional name is not a significant difference when taking into consideration the overwhelming similarities. He stated that the approach taken by Ofcom was in complete contrast to defamation actions where the issue of identification is regularly considered. In such cases identification can be established where, on the evidence, an ordinary sensible person would draw the inference that the words complained of referred to the claimant. For these purposes an ordinary sensible person can include people with knowledge of special circumstances provided that the statements were published to such persons.

Dr Squier’s solicitor stated that in relation to the alleged specific differences, given the areas of expertise and the roles of both Dr Squier and Dr Karamides, the fact that one carries out forensic pathology post mortems and one does not, is not a difference which would register with any reasonable viewers. Dr Squier’s solicitor also said that the BBC’s statement on this point was factually inaccurate. There was no reference to the character of Dr Karamides being on the Home Office list and most forensic autopsies on children are done by a forensic pathologist who is on the Home Office list together with a paediatric pathologist who is not. The brain is usually referred to a specialist neuropathologist who is usually not on the Home Office list. This is exactly Dr Squier’s role, as a specialist diagnostic paediatric. Dr Squier is fully employed by the NHS as a diagnostic neuropathologist. Dr Squier’s professional role does not have an emphasis on research as stated by the BBC. Dr Squier’s research is carried out over and above her NHS role. This is a further factual error which, Dr Squier’s solicitor said, has been relied on by Ofcom.

Dr Squier’s solicitor added that given the extent of the similarities, the very fact that Dr Karamides illegally retains brain tissue samples, exhibits evidence of chronic alcoholism, is subsequently found guilty of professional misconduct and then commits suicide, results in the unfairness and harm to Dr Squier because the similarities between them are so significant. These distinctions are not reasons to find that there would be no harm at all and are in fact the cause of the harm. Dr Squier’s solicitor said that these views are significantly bolstered by the fact that a number of Dr Squier’s friends and professional colleagues have been sufficiently struck by the clear similarities between Dr Karamides and Dr Squier to have concluded that Dr Karamides’ character was based on Dr Squier. Dr Squier received a number of communications to this effect. Dr Squier’s solicitor also offered to provide witness statements from individuals who watched the programme to demonstrate this. He said that this fundamentally undermines the conclusion Ofcom made in its Preliminary View which was that it was unlikely that viewers would make a link between the fictional character of Dr Karamides and Dr Squier. Mr Smith said that this was not a case of noting similarities but instead of viewers forming the opinion that the character of Dr Karamides was based on Dr Squier.

BBC's response to Mr Smith's representations

In summary the BBC said that Dr Squier's solicitor's response was concerned wholly with the degree of similarity between the character of Dr Karamides and Dr Squier. However, as submitted in the BBC's earlier statement above, the fact that the programme was a work of fiction, part of a well-established drama series and where the audience would have understood the fictional nature of the piece, and because the depiction of a character who may have enjoyed the certain professional similarities to (but also distinct from) Dr Squier was in keeping with the legitimate exercise of freedom of expression by the BBC. The BBC said that it agreed with Ofcom's provisional determination that it is the dissimilarities rather than the similarities which are significant in adjudicating this complaint. The BBC added that the response from Dr Squier's solicitor ignored the longer list of differences which were enumerated in the BBC's initial response and taken into account by Ofcom. These differences include the fact that Dr Karamides is portrayed as dying, having committed suicide. Secondly, in relation to the point that there is no reference in the programme to Dr Karamides being on the Home Office list, notwithstanding the fact that the *Silent Witness* Series is actually about Forensic Pathologists, Dr Karamides is shown in the programme carrying out an autopsy alone on a dead adult, which she could only do if she was a licensed Forensic Pathologist. However Dr Squier's solicitor disagreed with this point and stated that any pathologist may do an autopsy without being on the Home Office list as a "licensed forensic pathologist". The BBC said that this was quite different from Dr Squier's status as a paediatric neuropathologist, who on occasion accompanies a licensed Home Office pathologist conducting post mortems involving only children.

The BBC said that Dr Squier's solicitor's response only addressed the possible similarities between the character of Doctor Karamides and Dr Squier but did not address either the point that the programme is simply a work of fiction and understood by its audience to be such, or that the significant differences between Dr Squier and Dr Karamides guard against the possibility that an impression might be given that the character of Dr Karamides is a representation of Dr Squier. The BBC said that it is inevitable that any fictional character will bear similarities with someone who happens to be pre-eminent in the field. However, the BBC said that this did not mean that the fictional character is necessarily based upon a real person who happens to be pre-eminent in that field.

The BBC added that while they did not believe that the complaint should be adjudicated on the basis of the extent of similarity between Dr Squier and Dr Karamides, they challenged some of the similarities adduced by Mr Smith, on behalf of Dr Squier, as follows:

- the BBC said that it is not the case that there are "very few" pathologists in the United Kingdom. In fact there are more than 40, of whom about a quarter are forensic pathologists. There are five female pathologists, excluding Dr Squier. However Dr Squier's solicitor disagreed with this point and maintained that Dr Squier is the only female neuropathologist to have specialised and gained specific expertise in paediatric neuropathology. Dr Squier's solicitor added that there are many pathologists in the UK and approximately 60 neuropathologist but none of these pathologists or neuropathologists have been forensically trained or are on the Home Office List;
- other female neuropathologists have given evidence to court and some of them have given evidence for the defence in such cases, as Dr Karamides did in the programme;

- Dr Squier is not the only expert in the field who claims to have been the target of a campaign against her as other female neuropathologists and pathologists have also made similar claims. In addition, Dr Squier is not the only expert in this field to have been the subject of complaints to their professional bodies, as other female pathologists have also been the subject of such complaints. However, Dr Squier's solicitor stated that this point was incorrect because Dr Squier is the only female neuropathologist in the UK to have claimed to be the target of a campaign against her.

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 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 and a transcript of the programme as broadcast, and both parties' written submissions.

Ofcom considered Dr Squier's complaint that she was treated unjustly or unfairly in the programmes as broadcast in that she was unfairly portrayed through the character of Dr Karamides. Dr Squier said that Dr Karamides was based on her and that the storyline portrayed her unique professional circumstances in some detail, but deviated from the truth with respect to the accusation of retaining baby brain tissue for research without parental permission. As such action would be gross professional misconduct and a criminal offence, Dr Squier said that this portrayal was unfair to her, professionally damaging, likely to have an adverse effect on her reputation and cast doubt on her integrity.

Ofcom noted that Dr Squier said, by way of background, that while she appreciated the programmes were fictional, the parallels with her own career and the events of her professional life over the last three years were too close to have been accidental. She said the accuracy of those parallels reflected very careful research. She said that the world of paediatric neuropathology was a very small one and that her work, namely expert evidence in "shaken baby syndrome" cases, attracted media and public attention. She said that the character had been recognised as being based on her by people who knew her both personally and professionally.

In considering this complaint, Ofcom had regard to Practice 7.10 of the Code which states that programmes – such as dramas and factually based dramas – should not portray facts, events, individuals or organisations in a way which is unfair to an individual or organisation.

Ofcom viewed the two relevant parts of this *Silent Witness* programme, which featured various regular characters and also the character Dr Karamides. Ofcom noted that Dr Karamides appeared in the programme in her capacity as a neuropathologist, giving expert evidence in court on her views in relation to shaken baby syndrome. In the drama Dr Karamides' evidence conflicted with that of other expert witnesses and at the culmination of the fictional trial the judge stated that she

did not agree with Dr Karamides' expert evidence, which the judge considered to be "*baseless and quite possibly misleading*". Following the trial, members of the press were seen outside the court asking Dr Karamides if she would now be resigning following the judgment. Ofcom noted that a substantial part of both episodes focused on a fictional serial killer, Mr Arthur Mears, and the hope that he would reveal the locations of a number of victims he had killed but in relation to whom he had not been charged with murder. Dr Karamides was seen visiting Mr Mears in his prison cell and developing a relationship with him. At the beginning of the second episode, Dr Karamides' colleagues were shown watching a video of Dr Karamides which she had made in which she admitted retaining tissue samples from dead infants. Dr Karamides was then shown committing suicide by taking a number of pills with alcohol and was subsequently shown dead.

Ofcom took into account Dr Squier's submission that people who knew her personally or professionally recognised the character of Dr Karamides as being based on her. In addition, it had regard to the further submissions made by Dr Squier's solicitor that "friends and professional colleagues have been sufficiently struck by the clear similarities between Dr Karamides and Dr Squier to have concluded that Dr Karamides' character was based on Dr Squier". Ofcom also had regard to the BBC's submissions that the character was not based on Dr Squier and that the Pronunciation Department had contacted Dr Squier because the BBC had initially intended to mention some "real" names of professionals in the area of "shaken baby syndrome" and wanted to confirm the pronunciation of her name.

Ofcom recognises that programme makers and writers frequently undertake detailed research in preparation for many drama programmes of all types. This is both to foster creative ideas and to make elements of the broadcasts more realistic and credible, and so more entertaining and exciting for audiences. As a result, many drama programmes will feature characters, plots and situations which have certain similarities to real events and individuals. It is consistent with the editorial freedom of broadcasters and the proper exercise of the right to freedom of expression that broadcasters and script writers should be free to research real individuals and events to inspire fictional work which is to be broadcast – provided the broadcaster avoids unjust or unfair treatment of real individuals or organisations in broadcast programmes. In Ofcom's view there is only likely to be a possibility in a broadcast drama of unjust or unfair treatment of real individuals or organisations, if an ordinary viewer would reasonably draw the inference that: a particular character was clearly intended to depict, or was very closely based, on a real person; and that the character was portrayed in such a way that an ordinary viewer would draw material and unfair inferences about that real person.

Ofcom noted the nature of *Silent Witness*, namely a long established, fictional crime series which uses gritty story lines combined with the use of dramatic effects and music. In common with most other similar programmes and indeed most drama, this series does not specifically state whether any particular episode is based on or even loosely based on particular people or events. Therefore, Ofcom considers that it is clear to viewers from the outset that this series is purely fictional, with any elements having certain similarities to real individuals or events included for the purposes of making the programme more believable and dramatic.

Ofcom observed that there were a number of similarities between the character of Dr Karamides and Dr Squier, as set out by Dr Squier's solicitor in his representations above. These similarities were more numerous than those Ofcom listed in its Preliminary View. However, as submitted by the BBC in their response and considered previously by Ofcom in its Preliminary View, there were also significant differences: for example, Dr Karamides in the drama obviously has a very different

name to Dr Squier, and is portrayed as single and about 20 years younger than Dr Squier. Dr Karamides was depicted as having illegally retained brain tissue samples, whereas, although a similar complaint has been made in the past against Dr Squier, she (unlike Dr Karamides) had been completely exonerated of any wrongdoing. Further Dr Karamides developed a relationship with a serial killer and committed suicide following an admission that she had retained tissue from dead children.

Ofcom took into account that there were a number of similarities between Dr Squier and the character Dr Karamides, although it also acknowledged that the extent of those similarities was disputed by the BBC. These similarities were such that it was possible that some viewers, especially those might be familiar with Dr Squier, might believe that to some extent the character of Dr Karamides was based on Dr Squier. This did not mean however that Dr Squier was unjustly or unfairly treated in the programme.

There were very significant differences between Dr Karamides and Dr Squier (such as Dr Karamides' relationship with a serial killer and her subsequent suicide). In Ofcom's opinion, taking into account all the circumstances, an ordinary viewer would not reasonably draw the inference that Dr Karamides was clearly intended to depict, or was very closely based, on Dr Squier. Further, Ofcom's view is that the character of Dr Karamides was not portrayed in such a way that an ordinary viewer would draw material and unfair inferences about Dr Squier. This was partly because viewers would know that *Silent Witness* is an established drama series; but also because those elements of the character of Dr Karamides (which had the potential to cause unfairness to any real individual Dr Karamides might reasonably be seen to depict) were ones which bore no resemblance to Dr Squier.

In these circumstances, while there were similarities between the character of Dr Karamides and Dr Squier, Ofcom considered that any potential unfairness to Dr Squier, could only arise if viewers were to conclude reasonably that the portrayal of the character in question in the drama was intended to be a true and accurate depiction of a real person and if that portrayal was likely to alter viewers' opinions of Dr Squier in a manner that was unfair.

As set out above, Ofcom considered that it would have been very clear to the audience that the plot, characters and storyline were all fictitious, particularly in light of the dramatic departures in the storyline concerning Dr Karamides. While some viewers who knew Dr Squier personally and/or professionally may have noted similarities between her and the character of Dr Karamides, Ofcom did not consider that they could reasonably conclude that the character of Dr Karamides was an accurate reflection of the experience, life and views of Dr Squier.

Ofcom's decision therefore is that there was no unfairness to Dr Squier in the programme as broadcast.

Accordingly Ofcom has not upheld Dr Squier's complaint of unjust and unfair treatment in the programme as broadcast.

Other Programmes Not in Breach

Up to 1 October 2012

Programme	Broadcaster	Transmission Date	Categories
Bhangra Top 10	Panjab Radio	30/03/2012	Religious/Beliefs discrimination/offence
EastEnders	BBC 1	31/08/2012	Violence and dangerous behaviour
Hollyoaks	E4	26/06/2012	Violence and dangerous behaviour
Frontline Police	Channel 5	10/09/2012	Materially misleading
Frontline Police	Channel 5	10/09/2012	Materially misleading

Complaints Assessed, Not Investigated

Between 18 September and 1 October 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
"Dead End" competition	Radio Tay AM	29/08/2012	Competitions	1
11th Hour with Waseem Badami	ARY World	25/09/2012	Outside of remit / other	1
999: What's Your Emergency?	Channel 4	10/09/2012	Nudity	1
999: What's Your Emergency?	Channel 4	13/09/2012	Generally accepted standards	1
A Touch of Frost	ITV3	19/09/2012	Religious/Beliefs discrimination/offence	1
Advertisements	Various	n/a	Advertising scheduling	1
Basement Jerxx	Somer Valley FM	15/08/2012	Offensive language	2
BBC 6 Music (trailer)	BBC Radio 2	n/a	Outside of remit / other	1
BBC News	BBC News Channel	20/09/2012	Generally accepted standards	1
BBC TV News, Sky News	BBC 1, BBC News, Sky News	n/a	Due impartiality/bias	1
Ben 10	S4C Digital	17/09/2012	Violence and dangerous behaviour	1
Boulton and Co	Sky News	21/09/2012	Generally accepted standards	1
Breakfast	BBC 1	25/09/2012	Generally accepted standards	1
Breakfast	BBC 1	27/09/2012	Outside of remit / other	1
Breakfast Show with Barbara Lowe	Chorley FM 102.8	07/09/2012	Competitions	1
Celebrity Juice	ITV2	27/09/2012	Generally accepted standards	1
Channel 4 News	Channel 4	18/09/2012	Privacy	9
Classic FM News	Classic FM	12/09/2012	Due accuracy	1
Come Dine with Me	Channel 4	19/09/2012	Religious/Beliefs discrimination/offence	1
Come Dine with Me	Channel 4	20/09/2012	Transgender discrimination/offence	1
Coronation Street	ITV1	17/09/2012	Generally accepted standards	2
Coronation Street	ITV1	24/09/2012	Product placement	1
Coronation Street	ITV1	26/09/2012	Transgender discrimination/offence	1
Coronation Street	ITV1	26/09/2012	Product placement	1
Coronation Street / Emmerdale / Eastenders	ITV1 / BBC 1	n/a	Gender discrimination/offence	1
Deal or No Deal	Channel 4	17/09/2012	Race discrimination/offence	2

Digital on-screen graphics	Sky Sports / Freeview	n/a	Outside of remit / other	1
Dinotopia	SyFy Channel	08/09/2012	Outside of remit / other	1
Dispatches	Channel 4	17/09/2012	Due impartiality/bias	3
Double Your House for Half the Money	Channel 4	18/09/2012	Generally accepted standards	1
E! News	E!	26/09/2012	Offensive language	1
EastEnders	BBC 1	15/03/2012	Under 18s in programmes	1
EastEnders	BBC 1	10/09/2012	Generally accepted standards	1
EastEnders	BBC 1	18/09/2012	Generally accepted standards	1
EastEnders	BBC 1	21/09/2012	Materially misleading	1
EastEnders	BBC 1	n/a	Under 18s in programmes	1
Eddie Stobart: Trucks and Trailers	Channel 5	n/a	Materially misleading	1
Emmerdale	ITV1	17/09/2012	Scheduling	1
Exposure	ITV1	03/10/2012	Outside of remit / other	1
Family Guy	BBC 3	03/09/2012	Violence and dangerous behaviour	1
Family Guy	BBC 3	04/09/2012	Violence and dangerous behaviour	1
Family Guy	BBC 3	05/09/2012	Violence and dangerous behaviour	1
Family Guy	BBC 3	22/09/2012	Generally accepted standards	1
Food Unwrapped	Channel 4	17/09/2012	Scheduling	1
Football - Blackburn Rovers vs Middlesbrough	Sky Sports 1	n/a	Outside of remit / other	1
Football League - Live	Sky Sports 1	21/09/2012	Outside of remit / other	1
Grand designs	Channel 4	19/09/2012	Generally accepted standards	1
Holby City	BBC 1	18/09/2012	Offensive language	1
Holby City	BBC 1	18/09/2012	Scheduling	1
Hollyoaks Later	E4	17/09/2012	Religious/Beliefs discrimination/offence	1
Hollyoaks Later	E4	20/09/2012	Generally accepted standards	3
Horrible Histories	BBC 1	17/09/2012	Disability discrimination/offence	1
Hotel Inspector	Channel 5	10/07/2012	Nudity	1
I'm Spazticus	Channel 4	19/08/2012	Disability discrimination/offence	9
I'm Spazticus	Channel 4	20/08/2012	Disability discrimination/offence	4
I'm Spazticus	Channel 4	21/08/2012	Disability discrimination/offence	2
I'm Spazticus	Channel 4	22/08/2012	Disability discrimination/offence	3
I'm Spazticus	Channel 4	09/09/2012	Disability discrimination/offence	2
ITV News and Weather	ITV1	27/09/2012	Generally accepted standards	1

ITV News at Ten and Weather	STV	18/09/2012	Due accuracy	1
Jimmy and the Whale Whisperer	Channel 4	23/09/2012	Offensive language	1
Joop's sponsorship of True Blood	FZ	24/09/2012	Sexual orientation discrimination/offence	1
Kevin Mccloud's Man Made Home	4seven	24/09/2012	Offensive language	1
Khatem-e-Numbwat	Takbeer TV	09/09/2012	Religious/Beliefs discrimination/offence	1
Meet the Foxes	Blighty	08/09/2012	Animal welfare	1
Mermaids: The Body Found	Animal Planet	19/09/2012	Materially misleading	1
Mermaids: The Body Found	Animal Planet	30/09/2012	Materially misleading	1
Mission to Mars: A Horizon Special	BBC 4	19/09/2012	Generally accepted standards	1
Monkey Life	Channel 5	25/09/2012	Offensive language	2
Mount Pleasant	Sky Living	05/09/2012	Offensive language	1
Mrs Biggs	ITV1	12/09/2012	Offensive language	1
Mrs Biggs	ITV1	12/09/2012	Under 18s in programmes	1
My Parents are Aliens	CITV	17/09/2012	Scheduling	1
Newsnight	BBC 2	20/09/2012	Religious/Beliefs discrimination/offence	2
NHS News feature	BBC News 24	27/09/2012	Outside of remit / other	1
Only Connect	BBC 4	17/09/2012	Product placement	1
Panorama	BBC 1	17/09/2012	Religious/Beliefs discrimination/offence	1
Paralympic Games 2012	Channel 4	03/09/2012	Advertising scheduling	1
Paralympic Games 2012	Channel 4	08/09/2012	Advertising minutage	1
Paralympic Games 2012 Tonight: Swimming, Wheelchair Basketball and Table Tennis	Channel 4	30/08/2012	Advertising scheduling	10
Paralympics	Channel 4	02/09/2012	Advertising minutage	1
Perry and Louise at Breakfast	Signal 1	20/09/2012	Due impartiality/bias	1
Phones 4U's sponsorship of Films on 4	Channel 4	30/09/2012	Generally accepted standards	1
Press Preview	Sky News	17/09/2012	Outside of remit / other	1
Programming	4Music	12/09/2012	Generally accepted standards	1
Programming	BBC	n/a	Outside of remit / other	1
Programming	BBC channels	n/a	Outside of remit / other	1
Programming	Various	n/a	Religious/Beliefs discrimination/offence	1
Programming	ViewAsia	n/a	Generally accepted standards	1
Radio XL	Radio XL	n/a	Religious/Beliefs discrimination/offence	1
Random Acts	Channel 4	20/09/2012	Under 18s in programmes	6

Red Light Babes	Red Light 4	12/09/2012	Participation TV - Offence	1
Report on 1984 Anti Sikh Genocide Case by Advocate HS Phoolka	The Sikh Channel	11/09/2012	Religious/Beliefs discrimination/offence	1
Risky Business	Sky Modern Greats	19/12/2011	Nudity	1
Sam and Mark's Big Wind Up	BBC 1	17/09/2012	Offensive language	1
Sangat TV	Sangat TV	16/07/2012	Generally accepted standards	1
Scotland Tonight	STV	12/09/2012	Generally accepted standards	1
Shades Blinds' sponsorship of Loose Women	STV	06/09/2012	Gender discrimination/offence	1
Sikh Channel	Sikh Channel	09/09/2012	Religious/Beliefs discrimination/offence	1
Simon Bates Breakfast Show	Smooth Radio	21/09/2012	Generally accepted standards	1
Sports coverage	n/a	n/a	Outside of remit / other	1
Steve Allen	LBC 97.3 FM	17/09/2012	Generally accepted standards	1
Studio 66	TV1	25/09/2012	Sexual material	1
STV News at Six	STV	14/09/2012	Due impartiality/bias	11
Switch (trailer)	ITV1	22/09/2012	Scheduling	2
Switch (trailer)	ITV2	27/09/2012	Scheduling	1
Talk Talk's sponsorship of The X Factor	ITV1	15/09/2012	Under 18s in programmes	2
The Alan Brazil Sports Breakfast	Talksport	28/09/2012	Race discrimination/offence	1
The Alan Titchmarsh Show	ITV 1	19/09/2012	Materially misleading	1
The British (trailer)	Sky Atlantic	18/09/2012	Materially misleading	1
The Departed	More4	31/08/2012	Scheduling	1
The Hotel Inspector	5*	13/07/2012	Sexual orientation discrimination/offence	1
The Jeremy Vine Show	BBC Radio 2	18/09/2012	Outside of remit / other	1
The Sikh Reporter	Sikh Channel	28/07/2012	Religious/Beliefs discrimination/offence	1
The Sweeney	ITV4	09/09/2012	Violence and dangerous behaviour	1
The Terror Fab Show	Swindon Community Radio 105.5 FM	17/08/2012	Offensive language	1
The Valleys (trailer)	MTV Base	14/09/2012	Race discrimination/offence	1
The Wright Stuff	Channel 5	12/09/2012	Disability discrimination/offence	1
The Wright Stuff	Channel 5	01/10/2012	Offensive language	1
The X Factor	ITV1	22/09/2012	Generally accepted standards	4
The X Factor USA	ITV2	27/09/2012	Advertising scheduling	1
This Morning	ITV1	19/09/2012	Outside of remit / other	1
This Morning	ITV1	20/09/2012	Generally accepted standards	2

This Morning	ITV1	28/09/2012	Generally accepted standards	1
Today	BBC Radio 4	25/09/2012	Generally accepted standards	1
Tony Livesey	BBC Radio 5 Live	04/09/2012	Disability discrimination/offence	1
Top Gear	BBC 1	25/09/2012	Generally accepted standards	1
Two Jews on a Cruise	BBC 2	29/02/2012	Religious/Beliefs discrimination/offence	1
UEFA Europa League Live	ITV4	20/09/2012	Race discrimination/offence	3
Wake Up Africa	Voice of Africa Radio	12/09/2012	Outside of remit / other	1
Watchdog	BBC 1	19/09/2012	Due impartiality/bias	2
William and Kate: The South Seas Tour	ITV1	23/09/2012	Outside of remit / other	3
Wonga.com's sponsorship of Red or Black	ITV1	n/a	Outside of remit / other	2
Youth Show	Sangat TV	15/07/2012	Religious/Beliefs discrimination/offence	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 4 and 17 October 2012.

Programme	Broadcaster	Transmission Date
Adventure Time	Cartoon Network	30 September 2012
Celebrity Juice (Trailer)	ITV1, ITV2 and ITV4	Various
Dispatches: Undercover Hospital	Channel 4	11 April 2011
East Midlands Today	BBC East Midlands	7 September 2012
Fox News	Fox News	28 September 2012
Heart Breakfast	Heart FM	1 October 2012
My Babysitter's a Vampire	Disney Channel	27 September 2012
Station ident	Jack FM Oxfordshire	4 October 2012
Storm Night	Storm	29 September 2012
Styled To Rock	Sky Living	3 September 2012
The Hoarder Next Door	Channel 4	17 May 2012
The X Factor	ITV1	6 October 2012
Tim Shaw's The Wrong Show	Radio Aire	23 September 2012
UK Border Force	Pick TV	17 January 2012
Various	Northern Birds, SportxxxGirls, Essex Babes and LivexxxBabes	Various

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/>.