

# **Ofcom Broadcast Bulletin**

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# Contents

Introduction	5
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## Notices of Sanction

<b>Paigham-e-Mustafa</b> <i>Noor TV, 3 May 2012, 11:00</i>	7
---	---

<b>Programme about the attack on Lieutenant-General Brar</b> <i>Sangat TV, 1 October 2012, 19:40</i>	8
---	---

<b>Global Khatm-E-Nabuwat Movement</b> <i>Takbeer TV, 9 June 2012, 22:00</i>	9
<b>Khatm-E-Nabuwat</b> <i>Takbeer TV, 3 July 2011, 22:00</i>	

## Standards cases

### In Breach

<b>Provision of recording</b> <i>ATN Bangla, 26 April 2013, 18:00</i>	10
--	----

<b>Hollyoaks</b> <i>Channel 4, 19 March 2013, 18:30</i>	12
--	----

<b>Associated Note to Broadcasters:</b> <b>Violence in pre-watershed programmes</b>	20
--	----

<b>Dave Kelly</b> <i>Radio City 96.7FM, 17 May 2013, 17:00</i>	21
---	----

<b>Clinic Matters</b> <i>Vox Africa, 18 January 2013, 20:30</i>	24
--	----

<b>Material Girl</b> <i>Klear TV, 17 and 18 February 2013, 19:30</i>	33
---	----

<b>Item for Free Mawlana Sayeedi Federation UK</b> <i>Bangla TV, 11 February 2013, 00:10 and 00:37</i>	40
---	----

<b>Maya Nigom</b> <i>NTV, 14 April 2013, 21:00</i>	47
<b>News</b> <i>NTV, 14 April 2013, 21:30</i>	

<b>Sponsorship of Idiots</b> <i>Channel Nine UK, 6 March 2013</i>	49
<b>Sponsorship of Power Voice 2012</b> <i>Channel Nine UK, 7 March and 18 April 2013</i>	

## **Weather**

*Ambur Radio, September 2012 to April 2013, various times* 54

## **Drivetime**

*Gravity FM, 18 and 19 April 2013, 16:00* 56

## **Advertising Scheduling cases**

### Note to Broadcasters

The positioning of advertising breaks within the broadcast of films 60

### In Breach

#### **Breach findings table**

*Code on the Scheduling of Television Advertising compliance reports* 61

### Resolved

#### **Resolved findings tables**

*Code on the Scheduling of Television Advertising compliance reports* 62

## **Broadcast Licensing Condition cases**

### In Breach

#### **Blast 106**

*Providing a service in accordance with 'key commitments':  
28, 29 and 30 January 2013* 64

## **Fairness and Privacy cases**

### Upheld

#### **Complaint by Ms D**

*The Hotel, Channel 4, 20 January 2013* 71

### Not Upheld

#### **Complaint by Mr John Barton Jayne**

*Cowboy Traders, Channel 5, 18 April 2012* 78

#### **Complaint by Ms Rachel Gray**

*Exposure: The British Way of Death, ITV1, 26 September 2012* 104

#### **Complaint by Mr Lynton Spence**

*Exposure: The British Way of Death, ITV1, 26 September 2012* 125

#### **Complaint by Mr Lee Hollywood**

*Exposure: The British Way of Death, ITV1, 26 September 2012* 138

<b>Complaint by Ms D</b> <i>Sunday Brunch, Channel 4, 27 January 2013</i>	151
<b>Complaint by Miss Karen Riley</b> <i>On-Air Announcement, Star Radio North East, 11 March 2013</i>	157
<b>Other Programmes Not in Breach</b>	162
<b>Complaints Assessed, Not Investigated</b>	163
<b>Investigations List</b>	173

## Introduction

Under the Communications Act 2003 (“the Act”), Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives<sup>1</sup>. Ofcom must include these standards in a code or codes. These are listed below. Ofcom also has a duty to secure that every provider of a notifiable On Demand Programme Services (“ODPS”) complies with certain standards requirements as set out in the Act<sup>2</sup>.

The Broadcast Bulletin reports on the outcome of investigations into alleged breaches of those Ofcom codes below, as well as licence conditions with which broadcasters regulated by Ofcom are required to comply. We also report on the outcome of ODPS sanctions referrals made by ATVOD and the ASA on the basis of their rules and guidance for ODPS. These Codes, rules and guidance documents include:

- a) [Ofcom’s Broadcasting Code](#) (“the 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.
- c) certain sections of the [BCAP Code: the UK Code of Broadcast Advertising](#), which relate to those areas of the BCAP Code for which Ofcom retains regulatory responsibility. These include:
  - the prohibition on ‘political’ advertising;
  - sponsorship and product placement on television (see Rules 9.13, 9.16 and 9.17 of the Code) and all commercial communications in radio programming (see Rules 10.6 to 10.8 of the Code);
  - ‘participation TV’ advertising. This includes long-form advertising predicated on premium rate telephone services – most notably chat (including ‘adult’ chat), ‘psychic’ readings and dedicated quiz TV (Call TV quiz services). Ofcom is also responsible for regulating gambling, dating and ‘message board’ material where these are broadcast as advertising<sup>3</sup>.
- 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 can be found on Ofcom’s website for [television](#) and [radio](#) licences.
- e) rules and guidance for both [editorial content and advertising content on ODPS](#). Ofcom considers sanctions in relation to ODPS on referral by the Authority for Television On-Demand (“ATVOD”) or the Advertising Standards Authority (“ASA”), co-regulators of ODPS for editorial content and advertising respectively, or may do so as a concurrent regulator.

[Other codes and requirements](#) may also apply to broadcasters and ODPS, depending on their circumstances. These include the Code on Television Access Services (which sets out how much subtitling, signing and audio description relevant

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<sup>1</sup> The relevant legislation is set out in detail in Annex 1 of the Code.

<sup>2</sup> The relevant legislation can be found at Part 4A of the Act.

<sup>3</sup> 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.

licensees must provide), the Code on Electronic Programme Guides, the Code on Listed Events, and the Cross Promotion Code.

**It is Ofcom's policy to describe fully the content in television, radio and on demand content. Some of the language and descriptions used in Ofcom's Broadcast Bulletin may therefore cause offence.**

## Notice of Sanction

### Noor TV

*Paigham-e-Mustafa, 3 May 2012, 11:00*

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#### Introduction

Noor TV is a digital satellite television channel that broadcasts programmes about Islam in a number of languages, including English, Urdu and Punjabi. It can be received in the United Kingdom, Europe, Africa, the Middle East and Asia. The licence for the Noor TV service is held by Al Ehya Digital Television Limited.

#### Summary of Decision

In its finding published on 17 December 2012 in issue 220 of Ofcom's Broadcast Bulletin<sup>1</sup>, Ofcom found that Al Ehya had seriously breached the Code by broadcasting material which was in breach of Rules 3.1 and 4.1:

Rule 3.1: "Material likely to encourage or incite the commission of crime or to lead to disorder must not be included in television or radio services".

Rule 4.1: "Broadcasters must exercise the proper degree of responsibility with respect to the content of programmes which are religious programmes."

Ofcom considered these to be very serious breaches of the Code. The broadcast of material likely to encourage crime or lead to disorder has the potential to cause significant harm. Further, the Licensee failed to have in place robust compliance procedures that could have prevented the material being broadcast.

In accordance with Ofcom's Penalty Guidelines, Ofcom decided it was appropriate and proportionate in the very serious circumstances of this broadcast to impose a financial penalty of **£85,000** on Al Ehya Digital Television Limited in respect of the Code breaches (payable to HM Paymaster General). In addition, Ofcom considered that the Licensee should be directed to broadcast a statement of Ofcom's findings in this case, on a date and in a form to be determined by Ofcom and be directed never to repeat this material on its service again.

The full adjudication is available at:

<http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/noor-tv.pdf>

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<sup>1</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb220/obb220.pdf>.

## Notice of Sanction

### Programme about the attack on Lieutenant-General Brar

*Sangat TV, 1 October 2012, 19:40*

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#### Introduction

Sangat TV is a general entertainment satellite broadcaster that broadcasts in English and Punjabi. It is based in Birmingham and broadcasts via the Eutelsat 28A - Sky UK satellite to the Sikh community. The licence holder for Sangat TV is Regis 1 Limited<sup>1</sup> ("the Licensee").

The sanction relates to a programme concerning an attack on the retired Indian army general, Kuldip Singh Brar, who led the controversial military operation against the Golden Temple at Amritsar in 1984. The attack took place on 30 September 2012 and was conducted on a London street by a number of Sikh extremists with knives. Lieutenant-General Brar survived the attack.

#### Summary of Decision

In its findings published on 21 January 2013 in Broadcast Bulletin 222<sup>2</sup>, Ofcom found that the programme contained material likely to encourage or incite the commission of crime. In particular, the programme contained statements from various contributors that Ofcom found were likely to encourage members of the Sikh community to take violent action against Lieutenant-General Brar, other members of the Indian armed forces who had taken part in Operation Bluestar in June 1984, or those who supported that military operation.

Ofcom found that the programme breached Rule 3.1 of the Code:

Rule 3.1: "Material likely to encourage or incite the commission of crime or to lead to disorder must not be included in television or radio services."

Ofcom considered these to be very serious breaches of the Code. The broadcast of material likely to encourage crime or lead to disorder has the potential to cause significant harm. Further, the Licensee failed to have in place robust compliance procedures that could have prevented the material being broadcast.

In accordance with Ofcom's Penalty Guidelines, Ofcom decided it was appropriate and proportionate in the circumstances to impose a financial penalty of **£30,000** on Regis 1 Limited in respect of the Code breach (payable to HM Paymaster General). In addition, Ofcom considers that the Licensee should broadcast a statement of Ofcom's findings in this case, on a date and in a form to be determined by Ofcom.

The full decision is available at:

<http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/regis1limited.pdf>

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<sup>1</sup> Licence TLCS-390, which was originally issued on 13 October 2000, was transferred to Regis 1 Limited on 24 March 2010. The name of the channel broadcast under the licence became Sangat TV on 3 August 2010. Previously, a series of teleshopping channels had operated under it.

<sup>2</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb222/obb222.pdf>

## Notice of Sanction

### Takbeer TV

*Global Khatm-E-Nabuwat Movement, 9 June 2012, 22:00;*

*Khatm-E-Nabuwat, 3 July 2012, 22:00*

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#### Introduction

Takbeer TV broadcasts religious and general entertainment content directed towards the Sunni Muslim community. It is broadcast mainly in Urdu and is available on the Sky satellite platform and internationally. The licence for Takbeer TV is held by Takbeer TV Limited ("TTVL" or "the Licensee").

#### Summary of Decision

In a finding published on 21 January 2013 in Broadcast Bulletin 222<sup>1</sup>, Ofcom found that TTVL had seriously breached the Broadcasting Code ("the Code") by broadcasting the material, which was in breach of Rules 4.1 and 4.2 of the Code:

Rule 4.1: "Broadcasters must exercise the proper degree of responsibility with respect to the content of programmes which are religious programmes."

Rule 4.2: "The religious views and beliefs of those belonging to a particular religion or religious denomination must not be subject to abusive treatment."

Ofcom found material in these programmes that subjected members of the Ahmadi community<sup>2</sup> and their beliefs to abusive treatment. Further, by subjecting members of the Ahmadi community to such treatment, the broadcaster did not exercise the proper degree of responsibility with respect to the content of either programme.

In accordance with Ofcom's Penalty Guidelines, Ofcom decided it was appropriate and proportionate in the circumstances of the broadcasts on 9 June and 3 July 2012 to impose a financial penalty of **£25,000** on Takbeer TV Limited in respect of the Code breaches (payable to HM Paymaster General). In addition, the Licensee was directed to broadcast a statement of Ofcom's findings in this case, on a date and in a form to be determined by Ofcom.

The full adjudication is available at:

<http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/takbeer.pdf>

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<sup>1</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb222/obb222.pdf>

<sup>2</sup> The Ahmadi community is a comparatively small Islamic movement. Founded by Mirza Ghulam Ahmad Qadiani, it grew out of mainstream Islam in the nineteenth century.

## Standards cases

### In Breach

#### Provision of recording

*ATN Bangla, 26 April 2013, 18:00*

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##### Introduction

ATN Bangla is a news and general entertainment channel broadcast in Bengali and serving a Bangladeshi audience. The licence for ATN Bangla is held by ATN Bangla UK Limited (“ATN Bangla” or “the Licensee”).

Ofcom received a complaint about a charity appeal broadcast in response to the collapse of a factory in Bangladesh two days earlier. The complainant questioned the validity of the appeal.

The Licensee was unable to provide Ofcom with a copy of the programme because its logging system had failed to record the station’s output. It provided a copy of a repeat of the programme shown on 28 April 2013.

Ofcom was satisfied that the appeal run by ATN Bangla was for a legitimate charity registered with the Charity Commission.

However, Ofcom considered the failure to provide the original recording requested raised issues warranting investigation under Conditions 11(2)(a) and (b) of ATN Bangla’s Television Licensable Content Service (“TLCS”) licence, which state that:

“(2) In particular, the Licensee shall:

- (a) make and retain or arrange for the retention of a recording in sound and vision of every programme included in the Licensed Service for a period of 60 days from the date of its inclusion therein; and
- (b) at the request of Ofcom forthwith produce to Ofcom any such recording for examination or reproduction...”

Ofcom therefore sought comments from ATN Bangla about why it was unable to comply with these Licence Conditions.

##### Response

ATN Bangla said that the recording for 26 April was not available because a failure in its compliance recorder meant it “did not record for that day”. The Licensee apologised for this technical error which occurred during the appeal.

ATN Bangla offered no further explanation about the nature of the technical problem or how it would take steps to ensure this incident is not repeated.

##### Decision

Under the Communications Act 2003, Ofcom has a duty to ensure that in each broadcaster’s licence there are conditions requiring the licensee to:

- to retain recordings of every programme broadcast, in a specified form and for a specific period after broadcast; and
- to comply with any request issued by Ofcom to produce such recordings.

These obligations are set out in Licence Conditions 11(2)(a) and (b) of the standard TLCS licence.

Breaches of Licence Conditions 11(2)(a) and (b) are serious because they impede Ofcom's ability to assess whether a particular broadcast raises potential issues under the relevant code or codes. In such circumstances, Ofcom's ability to carry out its statutory duties in regulating broadcast content may be affected.

In this case, Ofcom noted ATN Bangla had not retained and was unable to produce broadcast material requested by Ofcom. This is a clear breach of Licence Conditions (11)(2)(a) and (b).

Although the Licensee was able to provide a copy of the repeat broadcast two days later, Ofcom was concerned that ATN Bangla offered neither a satisfactory explanation as to why this incident occurred, nor made clear how it would remedy the situation to ensure it would not recur in future.

Ofcom considers the timely provision of material by licensees is an important aspect of the licensing system, which enables the effective regulation of broadcast services. Accordingly, Ofcom requires any failure of a compliance recording system to be addressed by licensees as a matter of urgency.

Ofcom expects ATN Bangla to ensure its compliance recording systems are suitably robust in future. In the event of further breaches of TLCS Licence Conditions 11(2)(a) and (b) by the Licensee, we will consider whether further regulatory action is necessary.

#### **Breaches of TLCS Licence Conditions 11(2)(a) and (b)**

## In Breach

### Hollyoaks

Channel 4, 19 March 2013, 18:30

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#### Introduction

*Hollyoaks* is a long running British television soap drama set in a fictional suburb of Chester called Hollyoaks. It features a large cast of characters primarily aged between 16 and 35. Its main target audience is teenagers and young adults. The programme is broadcast each weekday evening on Channel 4. *Hollyoaks* regularly deals with controversial storylines such as sexual abuse, domestic violence and drugs.

A complainant alerted Ofcom to a scene in this programme, in which one of the main characters was violently killed by a speeding train. The viewer considered this scene was unsuitable for broadcast before the watershed, particularly as children might have been watching.

The scene in question marked the conclusion of a long running revenge storyline between two characters: the former undercover policeman, Walker, and the former drug dealer, Brendan. Walker believed Brendan was responsible for the death of his brother Cam, who had died from taking drugs supplied by Brendan. This scene was broadcast at 18:54. From the point at which the characters first made physical contact with one another to the immediate aftermath of the train collision was one minute and nine seconds in duration.

In the build up to this final scene, the episode showed:

- the ongoing storyline of Walker targeting Brendan's friends and family (which had been developed in previous episodes), with Walker meeting another character at the grave of his dead brother and threatening to hurt the children of Brendan's partner Ste;
- Ste begging Brendan to: *"Get rid of Walker, whatever it takes"*;
- a car and motorbike chase with Brendan pursuing Walker at high speed ending with both characters on a railway line which runs along a very high viaduct; and
- Brendan walking towards Walker, as Walker announced: *"Welcome to the day of your reckoning."* The two characters then prepared to fight by taking off their coats and pulling up their sleeves.

The final scene of the programme consisted of a fight between two characters set to fast paced music. The groans of the actors, in response to the blows inflicted on one another, remained audible throughout. During the fight:

- Brendan charged at Walker, lifting him up and slamming him down backwards onto the railway sidings and punching him twice with force in the face;
- Walker got up and responded by approaching Brendan with a martial arts style arm chop into his torso and a kick;

- Brendan punched Walker in the torso and pushed him up against the railings at the side of the viaduct and punched him three times forcefully in the face;
- Walker manoeuvred himself out of this position and, with blood on his lips and running from his nose, turned and pushed Brendan's head through the railings. Walker then turned around and held Brendan's head in an arm lock and punched him in the torso;
- Brendan fell to the ground onto the train track and, on all fours, crawled slowly over the rails as Walker said *"This is for Cam"* and punched him again;
- Brendan reached the other side of the viaduct railings on his hands and knees and as he tried to stand Walker thrust Brendan so his back was against the railings, and said *"This is for everyone you have hurt"* and punched him hard in the face so he collapsed again;
- Brendan staggered up again and Walker pushed him to his feet, saying *"and this is from me"* before punching him with force in the stomach;
- Walker pinned a dazed and bloodied Brendan to the railings with his arm on his chest and his hand on Brendan's face. He said: *"I've left a little present for your family. A last minute parting gift that is going to tear their lives apart 'cos I am finally going to kill the name Brendan Brady"*;
- as Walker held him in this position, Brendan punched Walker in the stomach so he fell backwards, lost his balance and swayed backwards and forwards while standing on the railway track;
- a very brief shot of a fast approaching train was shown before Brendan pushed Walker backwards;
- Walker was then depicted screaming as he fell backwards on to the track and into the path of the train before the camera cut away to show the train passing by at high speed (there were no images of Walker being hit by the train or the after effects of the collision); and
- Brendan shouted in a stunned and shocked way, after the train had passed by, as the episode concluded.

Although the intention was clearly to show an intense fight between these characters, Ofcom particularly noted that, overall, where punches and kicks were exchanged the movements of arms, fists and legs were tightly edited to avoid showing any shots of the actual impact and the use of fast paced music gave the scenes a stylised tone. In addition, there were no images depicting the impact of the train as it hit Walker, or its aftermath.

Ofcom considered, however, that the cumulative effect of the violent fight scene taken together with Walker being hit by the train, broadcast well before the watershed, raised issues warranting investigation under the following rules of the Code:

Rule 1.3: "Children must...be protected by appropriate scheduling from material that is unsuitable for them."

Rule 1.11: "Violence, its after-effects and descriptions of violence, whether verbal or physical, must be appropriately limited in programmes broadcast before the watershed...and must also be justified by context."

We sought comments from Channel 4 ("the Licensee") as to how the material complied with these rules.

## Response

### Rule 1.3

Channel 4 explained that within the episode there was a build up to the final scene which established that Walker was going "to finally settle his score with Brendan." Walker had escaped police custody and was on the run, he was seen threatening Brendan's family and close friends and Brendan's partner Ste begged him to: *"Get rid of Walker, whatever it takes."*

The Licensee explained that this "tense" storyline had been running for approximately a year. This violent sequence therefore "represented the culmination of that storyline and...there was an expectation from viewers that there would be a dramatic end to such a complex tense relationship." In terms of the fight scene, this was to a certain extent "an inevitable consequence when taking into account the nature of the storyline which had been running for such a long time."

Channel 4 said discussions took place between the commissioning editor, legal and compliance and the production company to ensure this sequence complied with the Code. This included advice at the script stage, guidance on shooting the scene to ensure flexibility in the edit, and then viewing the rough cuts. The dialogue between the characters had been "crafted to ensure viewers were aware of what may lie ahead, when the two meet on the viaduct." For example Channel 4 pointed to Walker's greeting to Brendan: *"Welcome to the day of your reckoning."*

Channel 4 stated also that viewers were provided with pre-programme information. The previous episode had been flagged with a pre-show announcement, which stated:

*"Now on 4, Walker continues to intimidate Brendan and Seamus, with harsh consequences for all in Hollyoaks."*

This particular episode was preceded by the following information:

*"Hollyoaks now on 4, and Walker and Brendan showdown, with life changing consequences."*

This pre-programme information the Licensee said "served to clearly notify viewers that a dramatic, tense episode was on the way. The fight scene itself only appeared towards the final minutes of the programme (just before 7pm) where the content of both this episode and previous episodes had prepared viewers for a tense confrontation between the characters."

Channel 4 argued that the cumulative effect of this signposting, for the vast majority of viewers (given that Ofcom received only one complaint about the scene), indicated that "it was an effective and appropriate means of limiting the effect of the violence." Channel 4 further argued against Ofcom "relying too heavily on speculation with regard to whether or not children were watching unaccompanied or were less familiar

with characters, storylines and the editorial nature.” The Licensee added that *Hollyoaks* has been broadcast for several years, and that “it is more likely than not that people watching the programme would be familiar with the editorial nature and the characters” and, therefore, “the final showdown would not have been entirely unexpected.”

Channel 4 further argued that as the scene “drew only one complaint” from a potential audience of 1.2 million viewers this represented “a negligible percentage of the total viewing audience.” In the Licensee’s view to find this material in breach of the Code based on such “a tiny percentage of viewers” would be “an unreasonable and disproportionate restriction on Channel 4’s right to freedom of expression, and in terms of Rule 1.3 demonstrates that it is more likely than not that the relevant sequence was appropriately scheduled.”

#### Rule 1.11

Channel 4 stated that “the level of violence was appropriately limited through script and picture edits.” The context of “impending doom” was clear throughout the episode and regular viewers would not have been surprised by the actions of Walker and Brendan.

According to the Licensee, a number of factors had been taken into consideration in order to ensure that the violence was appropriately limited, without undermining the integrity of the show and the storyline for viewers, which had built up for the last year. Care was taken when shooting the scene to show that it was “a chaotic and perhaps dangerous place for them to be fighting and great caution was taken not to show too high a level of violence than is appropriate at this time of scheduling.” Certain edits were made to reduce the number of non-contact punches and sound levels were carefully monitored.

Channel 4 said the fight scene was positioned close to the end of the episode, after a lengthy and dramatic car and motorbike chase to the viaduct which indicated to viewers “that all may not end well for these characters.” The fight sequence itself “lasted only a minute and a half, therefore whilst it was sufficiently intense it did not dominate the programme in any way, appearing only at the very end of an episode which had a number of other storylines.”

In conclusion, Channel 4 stated that “the combination of the expectations of the audience with particular reference to the storyline, the composition of that audience, the time slot within which it appeared and the steps taken to reduce the violence shown in this scene, meant, in our view, that it was appropriately scheduled to ensure children were adequately protected from material which could be deemed unsuitable for them.”

#### **Decision**

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appears 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.

In reaching this decision, Ofcom has taken into account the fact that broadcasters have a right to freedom of expression which gives the broadcaster a right to transmit and the audience a right to receive creative material, information and ideas without interference from a public body, but subject to restrictions prescribed by law and

necessary in a democratic society. This is set out in Article 10 of the European Convention on Human Rights. Although broadcasters and viewers have this right, it is the responsibility of the broadcasters to ensure that the material they transmit is in accordance with the general law and the Code, in particular, in this case the rules to protect children from material which is unsuitable for them.

### Rule 1.3

Rule 1.3 requires that children must be protected by appropriate scheduling from material that is unsuitable for them. Appropriate scheduling is judged by a number of factors including: the nature of the content; the likely number and age range of the audience; the start and finish time of the programme; and likely audience expectations.

In considering the material, Ofcom took the view that a violent physical fight between two long standing adversaries in itself did not necessarily exceed the boundaries of acceptability for a pre-watershed drama such as *Hollyoaks*. Conflict and violence are a part of life and integral to many dramas, including those broadcast pre-watershed, and programme makers have the editorial freedom to include such content provided it complies with the Code. Ofcom's consideration here, in applying Rule 1.3, was whether the treatment of these scenes was appropriately scheduled and suitable for children who were available to view.

Ofcom first considered whether the material in this episode was suitable for children. While Ofcom acknowledges that *Hollyoaks* is a long running and well established drama aimed at a teenage audience and therefore regularly explores more adult issues and themes, it is nonetheless broadcast at a time when younger children are available to view and it attracts a considerable child audience.

This episode featured a particularly aggressive fight sequence, ending with one character being pushed into the path of an oncoming train and so to his violent death. The fight sequence itself was carefully edited not to show the actual point of impact of most of the numerous punches and kicks. However, it was clearly intended to leave viewers with the impression that both characters experienced violent punches to the head and the body, as was evident from the blood on their faces as a result of these blows, the impact sounds of the physical contact between the characters, and the groans and moans from the characters as a result of the violence.

Ofcom acknowledged Channel 4's view that, to some extent, the fight scene was limited in duration (in terms of time) and also in terms of showing shots of the impact of various physical blows.

Ofcom noted the pre-programme information which stated this was a "*showdown*" between the two characters "*with life changing consequences*." However in Ofcom's view this did not specifically indicate to viewers the exact nature of the scene.

There was also some signposting that a violent confrontation of some sort was likely in this episode. For example Ofcom noted:

- the editorial context, in that Brendan and Walker had been engaged in a long running feud and therefore regular viewers would have been aware of the storyline building up for over a year.

- there was some dramatic build up to the final scene, for example through the car and motorbike chase leading up to the two characters meeting for the “*day of reckoning*” on the train viaduct.
- the fight scene was positioned at the end of the programme and therefore regular viewers, having watched the scenes leading up to it and the pre-programme information, would have had some expectation of the anticipated “showdown” within the episode even if they were unaware of how the characters’ feud was finally to be concluded.

Ofcom’s consideration in applying Rule 1.3 in this case was whether the nature of the material was suitable for younger viewers, who were available to view at this time.

Ofcom noted the whole scene, while relatively limited in duration, was intense and fast paced and therefore its duration did not materially lessen its dramatic impact. In addition, given the dramatic ending to the scene, there was an obvious intention to shock the audience.

Ofcom accepted that the pre-programme information provided (see above) may have been helpful to a limited extent. It was not specific, however, and was not, in Ofcom’s opinion, sufficiently clear. For younger members of the audience, who may have been watching unaccompanied and who were not regular viewers of the long running soap, and their parents, the pre-programme information did not explicitly refer to any violence in the programme.

In Ofcom’s view, the signposting within the programme did not minimise sufficiently the cumulative impact of this aggressive and physical fight scene followed by the unexpected and shocking death of Walker in front of the train.

In this case it is Ofcom’s view that this scene was both violent and shocking and had the potential to distress younger viewers as well as raise concerns about the level of violence amongst parents watching with their children regardless of the editorial context presented or the signposting provided. For all these reasons Ofcom considered that it was unsuitable for children.

Ofcom then went on to consider whether this material was appropriately scheduled.

We have set out above in some detail the nature of the violent content in this programme that Ofcom considered unsuitable for children. Ofcom also assessed the nature of the violent scenes as part of its consideration of whether they were appropriately scheduled.

In summary, Ofcom’s view was that while the fight sequence was limited in duration it was intense and the climactic scene where Walker was pushed into the path of a speeding train was both shocking and unexpected.

In reaching our view in this case, Ofcom took into account research carried out in 2012 to establish whether parents had concerns about the watershed<sup>1</sup>. Of those parents who expressed concern about pre-watershed content, the most commonly expressed concerns were violence, sexually explicit content and offensive language. In addition, the genre of programming that caused most concern was soaps.

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<sup>1</sup> <http://stakeholders.ofcom.org.uk/binaries/research/tv-research/ofcom-for-parents/prewatershed-tv-programming.pdf>. See pages 2-3.

Channel 4 argued that *Hollyoaks* is a drama aimed at a teen audience and therefore the storyline and content would not have exceeded their expectations and the signposting would have been sufficient. BARB data for this episode indicated that the majority of children who watched this episode of *Hollyoaks* were younger children not teenagers. The data show that 15.7% (177,000) of the audience were children aged 4 to 15. Significantly, 114,000 of these were aged 4 to 9 (10% of the total audience). Further, while Ofcom noted Channel 4's argument that the violent scene was broadcast at the end of the episode, the BARB data indicate that this composition of the child audience remained consistent throughout the programme.

Ofcom noted Channel 4's view that our consideration of this case relied "too heavily on speculation with regard to whether or not children were watching unaccompanied or were less familiar with characters, storylines and the editorial nature." This is incorrect. Ofcom's concern in this case was whether the Licensee had scheduled the content appropriately to ensure that children were protected from unsuitable material. Given this edition of *Hollyoaks* was broadcast on a general entertainment channel at 18:30 when large numbers of young children were available to view, some of them unaccompanied, we did not consider that Channel 4 had done so.

Regular viewers of *Hollyoaks* are aware that this soap deals, on occasions, with tough, social issues and that it is aimed at a teen audience. This must be balanced, however, with the expectation that it will be suitable for children to view, particularly given the time that it is broadcast and the fact that significant numbers of young children are in the audience. Although pre-programme information and contextual signposting may guide viewers as to the nature of the material to follow, it is Ofcom's view that the information and context supplied in this case would not have prepared the significant number of younger viewers in the audience, or their parents, adequately for the violent, intense and shocking scenes which followed. Providing such information does not, in itself, mean that material is appropriately scheduled.

We noted Channel 4's arguments that Ofcom's investigation in this case followed one complaint and that, in terms of Rule 1.3, this demonstrated "it is more likely than not that the relevant sequence was 'appropriately scheduled'." However, the Licensee should be aware that although Ofcom takes account of the number of complaints it is not in any way determinative of whether the Code has been breached. Under its procedures Ofcom investigates as appropriate the potential issues under the Code raised by complaints, and not the complaints themselves. The Licensee also suggested that for Ofcom to record a breach of the Code in this case would be "an unreasonable and disproportionate restriction on Channel 4's freedom of expression." Ofcom disagreed. We have in this case scrupulously balanced the right to freedom of expression of both the Licensee and the audience against our statutory duty to protect the under eighteens. On the particular facts of this case, on balance, our view was that the need to protect young people from violent material outweighed the Licensee's right to freedom of expression, and that to record a breach of Rule 1.3 would not be disproportionate.

Ofcom acknowledged that the Licensee took steps in attempt to ensure that this sequence complied with the Code. These measures were however on balance insufficient. Ofcom concluded that cumulatively the violent content in this sequence exceeded viewers' expectations for a drama transmitted long before the watershed when young children were available to view and in this case were watching in large numbers. Ofcom, therefore, concluded that the episode was in breach of Rule 1.3.

### Rule 1.11

Rule 1.11 requires that violence must be appropriately limited before the watershed and must be justified by context.

Ofcom has set out in detail above the violence depicted in the final fight sequence. The sequence lasted in total just over one minute. It contained a series of violent punches and kicks, showed some of the bloody injuries the two men sustained during the fight, and culminated in one man being kicked in front of a train to a horrific death. The overall intention of the scene was clearly to show a violent fight as a climax to this long running storyline. Through shots of the characters' faces and of rapid sequences of punching arm movements to the face and torso of each adversary, the nature of the fight and its impact on the participants was very clearly implied even though close up shots of the points of impact were avoided. The overall effect was of a series of violent scenes which resulted in a powerful sequence.

Ofcom considered whether the violence in this scene was appropriately limited. We noted that individually many of the shots featuring the fighting were edited to avoid showing the impact of the majority of blows to the body, head and face. Further, given the tight editing, the fast paced series of movements and accompanying music, there was in Ofcom's view a certain stylised quality to the fight sequence which helped to a limited degree to lessen its impact. On the other hand, however, the characters were shown bloodied and groaning and the final scene was shocking and unexpected. Overall, therefore, Ofcom's opinion was that these factors were not sufficient to limit appropriately the level of violence depicted on screen.

We therefore went on to consider if the violence was justified by the context. Context here is judged by such factors as the likely number and age of the children in the audience, the editorial content of the programme, the time of broadcast, and the likely expectations of the audience.

Ofcom acknowledged that regular *Hollyoaks* viewers would have been aware of the circumstances surrounding this storyline and the nature of these characters and, given this context, a final dramatic and even fatal showdown between these two bitter rivals would not have been entirely unexpected. However, although *Hollyoaks* is not made specifically for children, the BARB data (set out above) indicated that this episode attracted a significant child audience, particularly in the 4 to 9 age group. For these reasons (and other relevant ones set out above under Rule 1.3 when concluding that the material was not appropriately scheduled), Ofcom's view was that this violent content was not justified by the context.

In summary, Ofcom's view was that the cumulative effect of the violence in the final scene was not sufficiently limited for this time of the evening, nor was it justified by context given that a significant number of younger children were viewing and available to view. Ofcom therefore concluded that this episode was in breach of Rule 1.11.

### **Breaches of Rules 1.3 and 1.11**

## Note to Broadcasters

### Violence in pre-watershed programmes

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Ofcom reminds television broadcasters of the need to ensure that all material broadcast pre-watershed which features violent scenes is appropriately limited. Broadcasters should consider whether individual acts of violence within a programme are suitable, as well as where the overall tone is malevolent, menacing and threatening, that this also remains suitably limited.

Given the lack of recent detailed studies specifically into viewers' attitudes to violence on television, Ofcom has commissioned new independent research on this subject. This research will further inform us about the level of concern about violence included in television programmes scheduled before and immediately after the watershed, and any areas of particular concern to viewers e.g. specific types of violence or genres of programme. The research should be complete this year and Ofcom plans to publish the results as soon as possible in 2014.

## In Breach

### Dave Kelly

*Radio City 96.7FM, 17 May 2013, 17:00*

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#### Introduction

Radio City is a local commercial station broadcasting in the Liverpool area. The licence for this service is held by Bauer Media (“Bauer” or “the Licensee”).

A complainant alerted Ofcom to an item on the show called “Neil or No Neil”. In this sequence the presenter had 25 boxes, each with a number from a telephone directory in the United States for a person whose first name began with the letter ‘N’. Listeners would select a box and then the presenter would call the corresponding telephone number with the aim of finding a man called Neil. The complainant was concerned about the treatment of one of the recipients of a call.

Ofcom noted the following sequence when the presenter, Dave Kelly, called a number and the telephone was answered by an elderly American woman:

Dave Kelly: *“Hello, is Neil there please?”*

American woman: *“Did you say Neil?”*

Dave Kelly: *“Yeah, Neil, yeah.”*

American woman: *“You have the wrong number.”*

Dave Kelly: *“Are you positive there’s definitely not a Neil there?”*

American woman: *“There’s nobody here but a Willis.”*

Dave Kelly: *“A Willis? What about first n –”* [woman terminates the call] *“Hello? She’s put phone down...I’m ringing her back though.”* [sound of number dialling] *“Willis. Did she mean last name Willis? That’s what they mean in America. They mean last name. I mean first – I’ll tell her.”*

[Call is answered after around 10 seconds]

American woman: *“Hello?”*

Dave Kelly: *“No need to put the phone down, love. We meant first name Neil, not last name Neil.”*

American woman: *“Do what?”*

Dave Kelly: *“First name Neil, not last name Neil. First name, N, E, –”* [woman terminates the call] *“Hello? She put the phone – is she having a laugh or what? Old people, they just don’t want to know do they? We’re going to ring her back again, and try and find Neil...”* [sound of number dialling].

Co-presenter: *"She's not answering you."*

Dave Kelly: *"Is it an answering machine?"*

Co-presenter: *"She knows it's you."*

[Call is answered after around 14 seconds]

American woman: *"Hello?"*

Dave Kelly: *"Hello? Your attitude stinks!"*

American woman: *"You sti –"* [Dave cuts her off]

Dave Kelly: *"Oooh! She was about to swear at me then wasn't she! She was about to swear. Can I just – I cut her off, right, just in case you're asking, before she said it, so don't complain."*

Ofcom considered the broadcast raised issues warranting investigation under Rule 2.3 of the Code, which states:

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

We therefore requested comments from the Licensee as to how this material complied with Rule 2.3.

## **Response**

The Licensee said that "Neil or No Neil" is one of the most popular features on Radio City and has been running for a couple of years. It explained that the calls are all pre-recorded with people in America well in advance, and there is no risk of individuals being identified by the audience in Liverpool. Bauer said there was no intention whatsoever to offend anyone taking part or listening to this feature, and that most of the recipients of calls "play along with the joke and enjoy the interaction and the feature usually comes across just as a 'bit of fun' between the presenter and the person on the other end of the phone."

Bauer said it did not believe that this item breached the Code, but considered however that it did not meet its own standards and "crossed the line from what is supposed to be a fun, light, tongue in cheek feature." Bauer had spoken to the presenter, who accepted that the item broadcast "didn't meet the brief", and emphasised that the feature would be ended if the presenter behaved inappropriately in future.

The Licensee offered its apologies for any offence caused and said that in future the pre-recorded material for this item will always be checked by a senior member of staff before broadcast.

## **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 "generally accepted standards" are applied so as to provide adequate

protection for members of the public from the inclusion of offensive and harmful material. This objective is reflected in Section Two of the Code.

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 programme 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; the likely size and composition of the potential audience; and the likely expectation of the audience.

When applying the requirement for a broadcaster to apply generally accepted standards in the context of potentially offensive behaviour in an entertainment programme, Ofcom must take into account Article 10 of the European Convention on Human Rights. This provides for the broadcaster's and audience's right of freedom of expression, which encompasses the right to hold opinions and to receive and impart information and ideas without interference by public authority. The broadcaster's right to freedom of expression is not absolute. In carrying out its duties, Ofcom must balance the right to freedom of expression on one hand, with the requirement in the Code to apply generally accepted standards.

The first telephone call was made to the recipient without any prior warning or agreement. She was clearly unaware of the nature of the call and who it was from. The woman chose to terminate the first call. The presenter called the woman back on two further occasions. She ended the second call abruptly because she did not wish it to continue. Nonetheless the presenter called her a third time, and when the woman became (understandably) irritated and angry, it was he who put the phone down saying "*Your attitude stinks!*" Ofcom's view was that his behaviour was intimidating and abusive and had the potential to cause offence.

Ofcom went on to consider if the broadcast of this material was justified by the context.

Ofcom noted that as part of its response the Licensee said that telephone calls for "Neil or No Neil" were pre-recorded with people in America and did not pose a risk of individuals being identified. However these points are not normally relevant when considering the protection of the public in general from harm and offence, as opposed to potential infringements of privacy.

As set out above, we considered that the presenter's treatment of the woman who answered the telephone became intimidating and abusive. These factors built up during this sequence to make it in Ofcom's opinion capable of causing a fairly high level of offence.

Ofcom noted the Licensee's response that the tone of "Neil or No Neil" is usually a good-humoured interaction, with recipients of calls playing along with the joke. We noted that the Licensee acknowledged that this call "felt more uncomfortable than usual" and that it had spoken to the presenter as a result. Consequently, we considered that the tone of the presenter and clear reluctance of the recipient of the call was likely to have exceeded audience expectations.

This material therefore breached Rule 2.3.

### **Breach of Rule 2.3**

## In Breach

### Clinic Matters

*Vox Africa, 18 January 2013, 20:30*

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#### Introduction

Vox Africa broadcasts general entertainment programming, aimed at an audience which it describes as “Pan-African”, in English and French. The service is available in the UK on the Sky digital platform. The licence is held by Vox Africa Plc (“Vox Africa” or “the Licensee”).

*Clinic Matters* is a situation comedy series in English, produced and set in Nigeria. The programme is set in a private hospital, and the main characters are: the doctor in charge; three nurses, Abigail, Theresa and Titi; and a cleaner, Biliki. These characters appear regularly throughout the series, but each episode contains a self-contained plot, dealing with a different theme. The tone of the series is generally comic, although the series sometimes includes serious or contentious issues.

On 18 January 2013, Vox Africa broadcast an episode of this programme entitled “*Same Sex*”. Ofcom was alerted to its content by a complainant who considered some of the material homophobic. We therefore requested a recording from the Licensee.

We viewed this episode of the programme and noted that its principal theme was homosexuality, as it is understood within the specific cultural context of Nigeria. There were a number of sequences in which the nurses discussed the issue, beginning with an account of the unwanted advances of a female roommate, given by a visitor to the hospital called Jane:

Titi: “*You mean she actually told you she wants you guys to start dating?*”

Jane: “*We went out on a lunch date as usual. While we were at it, saying everything how much she hated guys, and how she feels comfortable doing everything with a fellow lady. She asked me if I love her. Ignorantly, I said yes. She asked me to kiss her to prove it.*”

Titi: “*What!*”

Theresa: “*Can you imagine how disgusting this sound? Kissing a fellow lady?*”

Jane: “*That’s when it dawned on me that my kind friend is a lesbian.*”

Titi: “*This sounds really crazy to me. I mean, how does it feel falling in love with somebody of the same sex with you?*”

Theresa: “*One needs to be extremely careful. I mean gone are the days when you think it’s safe to trust persons of the same sex. This world is no longer the same.*”

Jane: “*I heard it’s often caused by inferiority complex and unpleasant childhood experience.*”

Theresa: *"Whatever is the cause, I think it's demonic."*

\* \* \*

Titi: *"How could any human being in his or her right state of mind prefer to have sexual intercourse with person of the same sex? I mean it's beyond the ordinary."*

Jane: *"Alas, the ungodly act is legalised in some parts of the world."*

Abigail: *"[Entering] What ungodly act is legalised in some parts of the world?"*

Jane: *"Good afternoon, Nurse Abigail."*

Abigail: *"Jane, how are you?"*

Jane: *"Fine. We're actually talking about homosexuality."*

Abigail: *"What about it?"*

Jane: *"I just discovered my roommate is a lesbian, and I was really disappointed."*

Abigail: *"Why were you disappointed? Because she's a lesbian and you're not?"*

Jane: *"Yes! Because I think it's an ungodly act."*

Abigail: *[Shrugging] "Your opinion."*

Theresa: *"And what is your own opinion?"*

Abigail: *"I feel we all have a right to love someone. And we also have a right to choose whom to love. It doesn't matter if a person of the same sex or the opposite sex. As long as the love is genuine. What? It's just my own opinion!"*

\* \* \*

Titi: *"How can you say that there is nothing wrong with homosexuality? How?"*

Abigail: *"It's my opinion. I just feel it doesn't matter whom you feel love for, as long as it's genuine."*

Theresa: *"You never cease to amaze me, Nurse Abigail. When I hear you talk at times, you make me think you're possessed or something."*

Abigail: *"Now you know the problem with both of you? You don't view issues from other angles. Learn to view issues from other perspectives and you find out that there's something right in what seems totally wrong."*

Theresa: *"And what is right about homosexuality?"*

Titi: *"Please answer."*

Theresa: *"Are you OK?"*

Abigail: *"I'm fine. I just don't share your view on the issue at hand. It's simple – we're all entitled to our own opinion."*

Titi: *"You have never shared a view on any issue. You always have your own wild, absurd, annoying and disgusting view on every issue!"*

This last sequence ended with the nurses almost coming to blows.

In between these sequences, *"Same Sex"* also featured a developing plotline concerning a patient at the hospital called Jessica. First, Jessica requested to receive care only from Abigail. Second, Abigail and Jessica bonded over their shared dislike of men. Third, Abigail and Jessica agreed to meet socially outside the hospital. In the final scene of the episode, Jessica made advances towards and attempted to force herself upon Abigail:

Jessica: *"What would you say if I asked you to be my girlfriend?"*

Abigail: *"Of course. We're friends already."*

Jessica: *"I mean special friends, someone you could love dearly and cherish."*

Abigail: *"Alright, special friends, to cherish, love dearly – no problem."*

Jessica: *"Thank you for being my special friend."*

Abigail: *"You're welcome, you're welcome. Can I go now?"*

Jessica: *"No sweetheart. Hold me please."*

Abigail: *"Alright. [She hugs Jessica.] I really do need to leave now. I have other patients I have to attend to."*

Jessica: *"Can I kiss you?"*

Abigail: [Shocked] *"Excuse me! You're joking, right?"*

Jessica: *"No, I'm not. I love you so much. OK, just kiss me..."*

Abigail: [Angry] *"Are you alright? What do you take me for?"*

Jessica: *"I'm sorry if I was too fast, OK? It's just that I want to express how I feel about you. OK, just hold me again..."*

Abigail: [Resisting] *"Girl, you must be out of your mind! Don't touch me. You think I'm a lesbian? Please, I am not a lesbian."*

Jessica: *"Yes, you are. OK, OK, just kiss me..."*

[Jessica attempted to force herself on Abigail. She grabbed her first around the waist and then by the back of her head. The struggle lasted approximately ten seconds.]

Abigail: [Resisting] *"I am not! Take your hands off me, I tell you, I am not."*  
[Screaming] *Help! Help! Help! Help! Help!*

[Titi and Theresa entered. Jessica and Abigail separated.]

Titi: *"I thought you said there is nothing wrong about this, so why are you screaming aloud?"*

The episode ended with this line, followed by a shot of a speechless and breathless Abigail.

Ofcom's view was that the material in these sequences raised potential issues under Rule 2.3 of the Code, which states:

"In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context. Such material may include, but is not limited to, offensive language, violence, sex, sexual violence, humiliation, distress, violation of human dignity, discriminatory treatment or language (for example on the grounds of age, disability, gender, race, religion, beliefs and sexual orientation). Appropriate information should also be broadcast where it would assist in avoiding or minimising offence."

We therefore requested comments from the Licensee as to how the content complied with this rule.

In order to assist us to understand better the context of the programme, and the likely expectations of its audience, Ofcom also requested recordings of other episodes in the series from the Licensee. Vox Africa supplied the following additional material: *"Community Development"*, *"Melt Down"*, *"Second Chance (Part 1)"*, and *"Second Chance (Part 2)"*. In summary, *"Community Development"* dealt with the theme of HIV/AIDS; *"Melt Down"* focused on the financial difficulties of the private hospital; and *"Second Chance"* was an extended episode dramatising the relationship difficulties between one of the nurses and her unfaithful fiancé. Ofcom noted that the extent to which the programme dealt with serious or contentious issues varied across the episodes, but the tone was generally comic, with much of the humour at the expense of one of the regular characters, Biliki, who was presented as rather 'old-fashioned' and narrow-minded. The three nurses, Abigail, Theresa and Titi, were generally portrayed as more progressive and understanding by comparison, although in all cases the characterisation was broad and exaggerated.

## Response

The Licensee stated that it was "totally against any form of discrimination" and "would not knowingly air homophobic content", adding that "Vox Africa promotes tolerance and equality for all communities in the UK and worldwide". As evidence of this claim, the Licensee explained:

"As a progressive Afrocentric channel and to cement our tolerance stance on gay issues, last year we produced a programme in our current affairs show, The Hotseat which explored the views of African society on homosexuality. As part of the debate, we invited 2 gay guests of Nigerian origin into the studio. We also had the gay activist, Linda Bellos on the phone and 1 guest of British origin on the phone, who was on the other side of the debate. As a result of the perceived balance of the contributors and the show, Vox Africa received comments that Vox Africa is pro-homosexuality. We believe all members of the global community have a voice which should be heard and tolerated."

The Licensee considered the material complied with the Code, and said it was not “Vox Africa’s intention to offend any party.” Regarding *Clinic Matters*, the Licensee emphasised that the programme is a “fictional sitcom” not a “non-fictional documentary”, and “is always and intended to be comedic”. The Licensee continued: “This particular episode...showed dialogue between a nurse who was pro-tolerance of gays and one who was not...in the context of people coming from a background where not all individuals were tolerant, given their different cultur[al] perspectives.”

Regarding the final scene, the Licensee maintained that the comedy consisted in the nurse being caught unawares by the advances of the patient:

“[We] do not believe it [i.e. the patient’s conduct] was portrayed as predatory and aggressive, it was more the case that the nurse did not see the advances from the patient coming, which being caught unawares shocked the nurse. This is a typical setting where a patient who was vulnerable felt she had been treated well by the nurse and had an inclination...that the nurse...[would] be interested in a relationship. This happens with heterosexuals as well and is not limited to homosexuals. Furthermore, due to the code of ethics which applies to nurse and patient, the nurse could not accept any advances from the patient and the shock [the] nurse expressed after realising...[that the patient was making] advances...could have resulted from this.”

In support of this last point, the Licensee referred to a similar storyline, in which a female patient made advances to a male doctor, in another episode of *Clinic Matters*. Vox Africa claimed: “[T]herefore...it is not only homosexuals being portrayed in that manner but heterosexuals as well[.]”

The Licensee said it “would expect our audience to understand the cultural context of the comedic characters in this episode”, and said that “the views expressed in the episode would appear at the least, very ordinary or we believe, progressive to the average Nigerian and would not be deemed in any way offensive to this audience.” Overall, the Licensee considered that the right balance had been struck between a serious issue and its comedic presentation.

## 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, which include providing adequate protection for members of the public from harmful and/or offensive material. This objective is reflected in Section Two of the Code. Article 10 of the European Convention on Human Rights, as incorporated in the Human Rights Act 1998, provides for the right of freedom of expression, including the right to impart and receive information and ideas without unnecessary interference by public authority. Ofcom has to balance the broadcaster’s and the audience’s right to freedom of expression against its duty to provide adequate protection for members of the public from potentially offensive material.

Rule 2.3 of the Code states that in applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context. The non-exhaustive list of examples of potentially offensive material includes discriminatory treatment or language on the grounds of sexual orientation. The meaning of context includes, but is not limited to: the editorial content of the programme; the service on which the material is broadcast; the likely size and composition of the potential audience; the likely expectations of the potential

audience; and the effect of the material on viewers who may come across it unawares.

Ofcom first considered whether the broadcast material was potentially offensive. We assessed two sections in the programme in particular: near the start of the programme where homosexuality was discussed between the nurses and a visitor to the hospital; and, the final scene of the episode, featuring the confrontation between Jessica and Abigail.

Ofcom's view was that the discussion of homosexuality between the visitor to the hospital and the nurses, and amongst the nurses themselves, contained a number of remarks that were capable of being highly offensive to homosexual people, for example:

Theresa: *"Can you imagine how disgusting this sound? Kissing a fellow lady?...One needs to be extremely careful. I mean gone are the days when you think it's safe to trust persons of the same sex. This world is no longer the same."*

Jane: *"I heard it's often caused by inferiority complex and unpleasant childhood experience."*

Theresa: *"Whatever is the cause, I think it's demonic."...*

Titi: *"How could any human being in his or her right state of mind prefer to have sexual intercourse with person of the same sex? I mean it's beyond the ordinary."*

Jane: *"Alas, the ungodly act is legalised in some parts of the world."*

In these sequences Theresa, Titi and Jane made a number of comments which could be interpreted as discriminatory on the grounds of sexual orientation, describing homosexuality variously as *"disgusting"*, *"demonic"* and *"an ungodly act"*. In addition, these sequences included: the claim that it was not *"safe to trust persons of the same sex"* in case they were homosexual; the suggestion that same-sex sexual attraction was indicative of not being in a *"right state of mind"*; and speculation that the *"cause"* of homosexuality might be an *"inferiority complex"* or an *"unpleasant childhood experience"*. In Ofcom's opinion in this sequence the use of discriminatory language on the grounds of sexual orientation was clearly capable of causing offence.

Ofcom considered that these comments should not be assessed in isolation. Account needed to be taken of the sequence which followed shortly afterwards when the nurses discussed homosexuality amongst themselves. During this discussion Abigail challenged the discriminatory attitude of the other nurses: *"You don't view issues from other angles. Learn to view issues from other perspectives and you find out that there's something right in what seems totally wrong."* She also presented an alternative opinion on homosexuality: *"I feel we all have a right to love someone. And we also have a right to choose whom to love. It doesn't matter if a person of the same sex or the opposite sex."* Theresa and Titi reacted angrily to these interventions, making statements such as: *"When I hear you talk at times, you make me think you're possessed or something"*; and *"You always have your own wild, absurd, annoying and disgusting view on every issue"*. While Jane, Titi and Theresa expressed homophobic attitudes, Abigail therefore balanced their views to a limited extent by her statements promoting tolerance.

We then assessed the final sequence in the programme containing the confrontation between Jessica and Abigail.

This sequence was described in detail above in the Introduction. In Ofcom's view, the intended comic effect of this sequence was predicated on the nurse who had expressed tolerant attitudes regarding homosexuality (Abigail) being made to appear foolish and ignorant. The import of this plot twist was summarised in the closing line, delivered by Titi: *"I thought you [Abigail] said there is nothing wrong about this [homosexuality], so why are you screaming aloud?"*

The effect of this sequence, in Ofcom's view, was that the editorial voice of the programme implicitly adopted a position on the preceding discussion about homosexuality, which tended to reinforce the more intolerant views, and indeed relied for its humour upon it being suggested they were justified, at the expense of the liberal-minded Abigail. This was exacerbated by the negative representation of homosexuality which the plot twist entailed, with a homosexual portrayed as predatory and aggressive. At the climax of the sequence, Jessica attempted to force herself on Abigail. She grabbed her first around the waist and then by the back of her head. The struggle lasted approximately ten seconds. Abigail resisted throughout, screaming for help, and was left speechless and breathless by the end. For these reasons, Ofcom also considered that this sequence had the potential to cause offence.

We therefore went on to assess whether the offence was justified by the context, taking account of the potentially offensive content when assessed as a whole. Ofcom noted first that this was a fictional situation comedy. The discriminatory language was spoken by characters in a drama, not for example in some form of 'reality' television or documentary. Even taking account of this point, however, in Ofcom's opinion the multiple uses of discriminatory language on the grounds of sexual orientation as outlined above were capable of causing considerable offence, which was not appreciably mitigated by Abigail's statements promoting tolerance. Indeed, her tolerant attitudes regarding homosexuality were made to appear foolish and ignorant, with implicit editorial approval for the supposed view that homosexuals are predatory and for the intolerant views towards homosexuality expressed by some characters in the programme.

Vox Africa disputed Ofcom's view that the portrayal was "predatory" and "aggressive". The Licensee argued: "[T]he nurse did not see the advances from the patient coming, which being caught unawares shocked the nurse...Furthermore, due to the code of ethics which applies to nurse and patient, the nurse could not accept any advances from the patient and the shock [the] nurse expressed after realising...[that the patient was making] advances...could have resulted from this." Ofcom disagreed. We considered that our description of the advances made by Jessica as "predatory" and "aggressive" was fair and reasonable. This was supported in our view by the length (around ten seconds) of the struggle and Jessica's persistence, exemplified by the following exchange:

Abigail: *"Please, I am not a lesbian."*

Jessica: *"Yes, you are."*

We also noted that Abigail's shocked reaction focused exclusively on the same-sex nature of Jessica's advances: *"Girl, you must be out of your mind! Don't touch me. You think I'm a lesbian?"* There was also no reference in the episode to the code of

ethics governing relations between nurse and patient, while the theme of homosexuality had been discussed extensively earlier, as set out in the Introduction.

In Ofcom's view, the Licensee's argument concerning the code of ethics governing relations between nurse and patient was unconvincing. We considered that it was highly unlikely that viewers would have understood that the nurse's reaction was a result of the requirements of a professional code of conduct.

With regard to the homophobic comments in the programme, Ofcom took account of the Licensee's arguments that it was legitimate in this programme to explore a range of views on homosexuality (which is a contentious issue in the specific cultural context of Nigeria); and that the discriminatory language was spoken by characters in a "fictional sitcom", with the intention of dramatising different cultural perspectives, and so should not necessarily be taken as representing the editorial voice of the programme.

In its representations to Ofcom, the Licensee cited a separate storyline in another episode of the series, in which a female patient made advances to a male doctor, claiming: "[T]herefore...it is not only homosexuals being portrayed in that manner but heterosexuals as well[.]" Further, Vox Africa explained how it had debated attitudes towards homosexuality in a current affairs programme, and received comments from viewers that its treatment of the issue was biased in favour of gay rights. Ofcom was not convinced that these other programmes were sufficiently linked to the broadcast under consideration in any way so as to mitigate any potential offence.

In reaching our decision in this case, we also assessed the additional four episodes of *Clinic Matters* supplied by the Licensee, and summarised in the Introduction, for the purpose of gaining a fuller understanding of the series and the likely expectations of its audience. We observed that *Clinic Matters* relies for its humour on broad and exaggerated characters, and occasionally deals with serious topics in a light-hearted way. We noted that one episode, "*Community Development*", for example, sought to dispel myths about the transmission of HIV/AIDS. In that episode, Biliki, the cleaner, believed that she might have been infected after shaking hands with somebody who was HIV positive. The three nurses, Abigail, Theresa and Titi, teased her for her ignorance, as she became more and more agitated, with intended comic effect. However, the three other episodes we assessed – "*Melt Down*" and "*Second Chance (Parts 1 and 2)*" – did not deal explicitly with any contentious issues. In general, within the additional episodes, Ofcom noted that the pervading narrative dynamic between the characters was that all three nurses (Abigail, Theresa and Titi) would have been likely to be perceived as being more progressive and understanding than the 'old-fashioned' and narrow-minded character, Biliki. However, in the episode under investigation, "*Same Sex*", by contrast, Abigail's liberal views on homosexuality were in conflict with the attitudes of Theresa and Titi. In light of these considerations, Ofcom concluded that, on balance, the audience for this programme would not have been likely to expect such a strongly negative treatment of the theme of homosexuality in an episode of this situation comedy. We also concluded that for viewers who came across the content unawares the level of discriminatory language would have gone beyond the likely expectations of a UK audience for content broadcast on any UK channel.

Ofcom had regard to the broadcaster's and audience's right to freedom of expression. Broadcasters should be able to deal with any subject (including for example homophobia) in situation comedy, provided they comply with the Code. It is acceptable under certain circumstances for comedy programmes to cause offence through the use of discriminatory language, particularly when spoken by fictional

characters in a dramatic situation. However, in doing so, broadcasters must ensure that any potential offence is justified by the context. In this case, we considered that the narrative voice adopted by *Clinic Matters* effectively endorsed homophobic views, and put forward a negative representation of homosexuality, without sufficient context being provided. Ofcom noted the Licensee's opinion of the likely expectations and attitudes of Nigerians watching this programme. Vox Africa is entitled in this service to reflect different perspectives appropriate to its global outlook, but it must also remain sensitive to cultural norms in the UK. The audience for this channel is likely to be relatively small and self-selecting. However, all content broadcast on licensed services in the UK must adhere to generally accepted standards. On balance, this content (a seriously negative representation of homosexuality) would in Ofcom's view have exceeded the expectations of many viewers and was not in keeping with generally accepted standards for a broadcast service in the UK.

In conclusion, Ofcom considers that the material in this programme assessed above appeared to endorse discriminatory treatment on the grounds of sexual orientation and was not justified by the context.

Therefore, this content was in breach of Rule 2.3.

### **Breach of Rule 2.3**

## In Breach

### Material Girl

*Klear TV, 17 and 18 February 2013, 19:30*

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#### Introduction

Klear TV is a UK digital satellite television channel that (according to its website) broadcasts “ethnic and mainstream programming” to an “Afro-Caribbean and European” audience. The licence for this channel is held by Millennium Media House Limited (“Millennium Media” or “the Licensee”).

On Sunday 17 February 2013 the Licensee broadcast a single drama entitled *Material Girl* which started at 19:30 and was of two and a half hours in duration. It was repeated the next night at the same time.

Ofcom received a complaint that the programme included scenes of an adult nature which the complainant did not consider to be appropriate for the time of transmission. The broadcast also contained commercial references that Ofcom considered potentially raised issues under the Code.

#### Appropriate scheduling

The programme was set in contemporary Africa and centred on the efforts of a young woman called Cassie to improve her standard of living by having sex for money with a series of wealthy men, and the consequences of her actions for her family and others close to her. In a related plot-line, Cassie’s sister Nicole had sex with an uncle for money to pay for their mother’s medical treatment.

At the conclusion of the programme, one of Cassie’s lovers, Greg, was stabbed and killed by thugs on the orders of Jayke, a government minister, who was also having a sexual relationship with Cassie.

Ofcom noted that the programme contained scenes of a sexual nature before the 21:00 watershed involving Cassie and Jayke, and Nicole and her uncle. Ofcom also noted that sex and prostitution were consistent themes throughout the programme.

Ofcom noted that the Licensee broadcast an audience warning notice at the beginning of the programme of ten seconds in duration, which read:

*“Parental Advisory Explicit Content. Parental Guidance is advised. This Programme may contain some mild violence, language or brief nudity. Some scenes may be unsuitable for young children.”*

The following pre-watershed scenes were of particular concern to Ofcom.

#### *Scene One*

At 19:31 immediately following the title sequence Jayke, dressed in a pair of underpants and a vest, was depicted lying face-up on a bed, while Cassie, who appeared naked except for a towel she was wearing to cover her body, sat at his feet massaging his legs. The scene contained the following exchange of dialogue:

Jayke: *"Baby, you something else. What a kind of performance. A man needs to be at his best to match you."*

Cassie: *"With the kind of money you are paying you deserve to be on Cloud Nine."*

Jayke: *"Well, I really was. You something else! Let's do this again soon."*

Cassie: *"In your court. You pay, you call, I dance".*

Jayke then handed Cassie a large bundle of bank notes from a briefcase that he retrieved from under the bed the two characters were lying on.

### *Scene Two*

In another scene, which was of approximately two minutes in duration and broadcast at about 20:06, Cassie and Jayke were depicted lying in bed together, covered by a duvet in such a way that both characters' bodies could be seen from the waist up. Jayke was bare-chested, and Cassie was wearing a bra-top. The scene, which contained no dialogue but was accompanied by a contemporary music soundtrack, was intercut with footage of Jayke's wife waiting anxiously at home for his return. Cassie and Jayke were shown, from various camera angles, embracing and passionately kissing each other on the lips, neck and bare shoulders.

Following this sequence, Jayke was depicted sitting in underpants and socks facing away from Cassie at the foot of the bed, while Cassie, who was covered by a bath towel, leant over him from behind, sensuously rubbing the palms of her hands over his bare chest and stomach. While she did this, Jayke, whose eyes were half-closed in an expression of pleasure, nestled his head into Cassie's neck and chest, and pulled handfuls of her hair across his face and into his mouth. Cassie was then depicted passionately kissing Jayke's bare neck, shoulders and arms.

### *Scene Three*

In a scene broadcast at approximately 20:19, Nicole was featured being pressurised by her Uncle James into having sex with him for money in order to pay for her mother's medical treatment:

Uncle: *"I will offer you twenty thousand Ghanaian Cedis, just enough for all your mother's problems, just one hour with me and your will be walking through that gate with twenty thousand Ghanaian Cedis. Think...!"*

Nicole: *"Uncle, why? Why do you want to do this to me? Is it because I came here for you to help save my mother's life you want to sleep with me? You're my uncle for Christ's sake, why?..."*

Uncle: *"...Nicole thirty thousand Ghanaian Cedis. Think! Be wise. If you walk through that door and your mother dies, you will have it hanging on your conscience that you had the opportunity to save her but you didn't. Nicole, what can you not do for your mother? What is sex, you give it out to other people for free, but now you cannot do it for your mother's sake. Nicole think..."*

This dialogue was followed by a sequence lasting approximately 45 seconds in which Nicole's uncle was depicted lying on top of Nicole in a bed. Although the couple were covered by a duvet, the couple's movements clearly indicated they were having sex. The sequence contained close-ups of Nicole's face (showing she was distressed and

crying) intercut with close-ups of her uncle's face shot from Nicole's point of view. This sequence was intercut with footage depicting Cassie's mother writhing in agony on a hospital bed.

Ofcom considered this material raised issues which warranted investigation. We therefore asked the Licensee how the content detailed above complied with the following rule of the Code:

Rule 1.3: "Children must also be protected by appropriate scheduling from material that is unsuitable for them."

### Commercial references

Ofcom also noted a sequence in the programme lasting two minutes in which Jayke, was shown sitting next to a table on which was placed a carton of a product branded Pure Joy Apple Juice. Jayke then proceeded to pour, drink, and then savour a glass of the apple juice.

Ofcom noted that the carton of juice was placed on a low table in the foreground of the shot (close to the camera) with the Pure Joy Apple Juice logo prominently and clearly displayed. We also noted that the Pure Joy Apple Juice logo remained in view throughout the duration of this sequence. After Jayke had picked up the carton, poured himself a glass of juice and drunk it, he then returned it to its prominent place on the table. After taking a sip of juice, the actor playing the Jayke adopted an expression of great enjoyment, exhaled a sigh of satisfaction, and looked with appreciation at the carton of juice.

We asked Millennium Media whether the programme had been subject to a product placement arrangement. The Licensee told Ofcom that to the best of its knowledge neither it, nor the programme producer, nor any connected person<sup>1</sup>, had received payment or other valuable consideration for the inclusion of the references to Pure Joy Apple Juice during the programme. The Licensee further explained that the employees responsible for acquiring and scheduling the programme on Klear TV had since been dismissed, and were therefore not "receptive to giving any further information beyond stating their distance from the producer of the film", and had "taken with them all information relating to this particular arrangement".

In view of the Licensee's comments, we did not consider it appropriate to investigate this matter under the rules relating to product placement. However, Ofcom 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

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<sup>1</sup> "Connected person" is defined in Part 1 of Schedule 2 of the Broadcasting Act 1990. This definition is reproduced in Appendix 1 of the Code.

- the manner in which a product, service or trade mark appears or is referred to in programming.”

## **Response**

### Appropriate scheduling

The Licensee stated that it had “taken note of the observations made by Ofcom and the complaint received”. It also stated that it had dismissed a number of employees connected with the broadcast of the programme in question, and that:

“Klear TV would like to issue a full apology for showing the film before the watershed...on both 17<sup>th</sup> and the repeat on 18<sup>th</sup> February.”

In its correspondence the Licensee did not provide details of any steps it had taken to comply the material before broadcast, or make any representations on how the material broadcast satisfied the requirements of the Code.

### Commercial references

The Licensee did not address Rules 9.4 and 9.5 directly. However, it apologised for the “oversight of the product appearing without censor on both 17<sup>th</sup> and 18<sup>th</sup> February”.

## **Decision**

Under the Communications Act 2003 (“the Act”), Ofcom has a statutory duty to set standards for broadcast content as appear to it to be best calculated to secure the standards objectives, including that “persons under the age of eighteen are protected”. This objective is reflected in Section One of the Code.

In addition the Act also requires Ofcom to set standards for broadcast content as appear to it best calculated to secure “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 Directive (“the 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 AVMS Directive requires that television advertising is limited to a maximum of 12 minutes in any clock hour.

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

### Appropriate scheduling

Rule 1.3 requires that: “Children must be protected by appropriate scheduling from material that is unsuitable for them.” Before the 21:00 watershed, material unsuitable for children should not, in general, be shown. Appropriate scheduling is judged by a number of factors including: the nature of the content; the likely number and age range of the audience; the time of the broadcast; and likely audience expectations.

Ofcom first considered whether the programme contained material shown before 21:00 which was unsuitable for children.

Ofcom noted that sex and prostitution were consistent themes throughout the programme, and that while it contained no nudity, the programme included scenes – shown before the watershed – that featured the characters before, during and after sex and discussing their sexual relations.

In Scenes One and Two (detailed above in the Introduction), Cassie and Jayke were depicted being intimate prior to or following sex (e.g. kissing each other on the neck, shoulders, and arms in a passionate manner; and Cassie sensuously rubbing Jayke's bare chest). In Scene One, Jayke also commented on Cassie's performance as a sexual partner.

In Scene Three, Nicole was featured having sex with her uncle for money. Although there was no nudity and the couple were covered by a duvet throughout the scene, it was clear throughout the scene, which lasted 45 seconds, that they were having sexual intercourse. In addition, Ofcom noted, Cassie's distress at having been coerced into having sex with her uncle was graphically depicted in this sequence by the repeated intercutting of close-ups of Cassie's tearful face with close-ups of her uncle's face.

Ofcom also noted that the dialogue in Scenes One and Three contained a number of clear and repeated visual and verbal references to themes of a sexual and adult nature, including references to prostitution. In Scene One, for example, Jayke said to Cassie, while she sensuously massaged his legs:

*"Baby, you something else. What a kind of performance. A man needs to be at his best to match you."*

Cassie replied:

*"You pay, you call, I dance".*

Jayke was also shown in Scene One giving Cassie a large bundle of banknotes – clearly in exchange for sex. In Ofcom's view the programme clearly contained material unsuitable for children. We therefore went on to assess whether the content had been appropriately scheduled.

Klear TV, which is aimed at an Anglo-African and Afro-Caribbean audience in the UK, broadcasts dramas, documentaries and political programmes, which, in Ofcom's view would appeal primarily to an adult audience. However, the Licensee's own website<sup>2</sup> does advertise "family entertainment" as one of the genres provided by Klear TV.

In Ofcom's opinion the sequence in Scene Three in particular broadcast at around 20:19 and which showed Nicole having sex with her uncle against her will had the potential to cause considerable distress to younger viewers and offence more generally. This was because the act of sex was depicted at some length (around 45 seconds) in a fairly graphic way with close ups of the faces of both the uncle and of Nicole during sexual intercourse, with Nicole in tears because she had been coerced. More generally in Ofcom's view the sexual themes in the programme ran throughout the broadcast from the beginning at 19:30 to the 21:00 watershed, and therefore

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<sup>2</sup> <http://www.kleartv.com/index.php/component/content/category/32-klear-tv>

cumulatively resulted in content which was clearly inappropriate to be scheduled at this time.

The Licensee, Millennium Media, does not participate in BARB's audience sampling research, so Ofcom was not able to obtain a figure for the number of children viewing the channel at the times the programme was broadcast. However, given that the programme was broadcast before the watershed on a general entertainment channel, Ofcom was of the view that there was nevertheless a likelihood of children being available to view this material at this time.

The fact that Klear TV is a general entertainment channel, coupled with the adult nature of the themes and strength of some of the visual content, meant that in Ofcom's opinion the broadcast of this material on Klear TV starting at 19:30 exceeded the likely expectations of the audience (and especially parents) for this service at this time.

The broadcast of the warning at the beginning of the programme indicated that the Licensee was aware that some of the material in *Material Girl* may be unsuitable for children. Ofcom however did not consider that the wording used in the warning (e.g. "brief nudity") adequately reflected the degree to which the material in the programme was of a sexual nature and thus unsuitable for children, and overall it was clearly insufficient to ensure the material was appropriately scheduled.

For these reasons the material was not appropriately scheduled.

Ofcom noted that the Licensee apologised for the broadcast of this programme before the watershed and stated that the people who had acquired and scheduled the programme had been dismissed. Nonetheless, we concluded this was a breach of Rule 1.3.

### Commercial references

Rule 9.4 requires that products, services and trade marks are not promoted in programming, while Rule 9.5 obliges broadcasters to ensure that undue prominence is not given in programming to a product, service or trade mark.

Rule 9.5 states 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. Ofcom's Guidance Notes on Section Nine<sup>3</sup> state:

"The level of prominence given to a product, service or trade mark will be judged against the editorial context in which the reference appears. A product that is integral to a scene may justify a greater degree of product exposure, for example shots of a car during a car chase scene. However, where a product is used as a set prop, care should be taken to avoid close-up or lingering shots".

Having reviewed the scene in question within the context of the wider narrative of the film, Ofcom accepted that it was editorially justifiable for a scene in which one of the programme's characters was depicted relaxing at home to contain brief, limited visual references to a brand of fruit juice. However, Ofcom noted that the product and its logo were displayed very prominently in the scene, and appeared to have been positioned so as to be the focus of the scene, without any apparent relevance to the storyline. Ofcom could find no editorial justification for this prominence, and therefore

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<sup>3</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section9.pdf>

concluded that Pure Joy Apple Juice was given undue prominence, in breach of Rule 9.5.

Ofcom also considered that the combined effect of the actor's prolonged expressions of enjoyment (including his sigh of satisfaction and the long appreciative glance at the product after his sip) amounted to promotion of the product. Ofcom therefore concluded that the references to Pure Joy Apple Juice within the programme also breached Rule 9.4.

**Breaches of Rules 1.3, 9.4 and 9.5**

## In Breach

### Item for Free Mawlana Sayeedi Federation UK

*Bangla TV, 11 February 2013, 00:10 and 00:37*

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#### Introduction

Bangla TV is a news and general entertainment channel broadcast in Bengali and serving a Bangladeshi audience. The licence for Bangla TV is held by Bangla TV (UK) Ltd ("Bangla TV" or "the Licensee").

A complainant drew Ofcom's attention to what appeared to be an advertisement placed on Bangla TV by a political protest group, the Free Mawlana Sayeedi Federation UK.

Mr Mawlana Sayeedi is Vice President of the Jamaat-e-Islami (or Jamaat) Party<sup>1</sup> in Bangladesh. He is awaiting execution following his conviction on 28 February 2013 on charges including murder, torture and rape by the International Crimes Tribunal (ICT) in Bangladesh.<sup>2</sup>

Ofcom noted two appearances of the item. The item was 20 seconds long, appeared during advertising breaks and was preceded both times by a short 'bumper' sequence saying, in English text, *"what's on – UK & Europe – what's on"*. On both occasions the item was immediately followed by spot advertising.

The images in the item consisted of a still photograph of Mr Sayeedi and Bengali text. The voice-over was in Bengali.

Ofcom obtained a translation of the item. In English it said:

*"A protest will take place demanding formation of an international tribunal under UN's supervision and release of internationally renowned Scholar Allama Delwar Hossain Sayeedi. Place: Altab Ali Park. Date and time: 11th of February, 4:00 pm. The event will be organized by Free Mawlana Sayeedi Federation UK."*

The complainant alleged that the item promoted a political body in breach of the ban on political advertising contained within the Communications Act 2003 ("the Act").

We sought the Licensee's comments on the terms under which the item had been included in its schedule. Bangla TV told us that no money or other consideration had been taken for the item's broadcast. The Licensee said that the item appeared in its free *'What's On'* slot and said it did not consider the item to have been advertising.

Taking into account the circumstances of the item's appearance, and in particular that it was not paid for, Ofcom took the view that it must be regarded as programming.

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<sup>1</sup> The Jamaat Party is the main Islamist party in Bangladesh, and is part of the opposition alliance in the Bangladesh Parliament.

<sup>2</sup> The ICT was set up by the current Bangladeshi Government in 2010 to investigate allegations of war crimes during the 1971 war in which Bangladesh obtained independence from Pakistan.

Accordingly, because it contained an apparently unmediated and uncontextualised message from the Free Mawlana Sayeedi Federation UK, we considered the item raised issues warranting investigation under the following rules of the Code:

- Rule 5.5 “Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service...This may be achieved within a programme or over a series of programmes taken as a whole.”
- Rule 9.1 “Broadcasters must maintain independent editorial control over programming.”
- Rule 9.2 “Broadcasters must ensure that editorial content is distinct from advertising.”

We therefore sought Bangla TV’s comments on how the items complied with the above rules.

## Response

The Licensee told us that the ‘*What’s On*’ slot publicised announcements about public meetings, events, sports and death notices. Bangla TV said that it did not charge for inclusion in the ‘*What’s On*’ slot.

The Licensee said that it did not consider this item to be an advertisement because it took no money for its transmission. Further, the Licensee argued that the item was a public service announcement.

Bangla TV said that The Free Mawlana Sayeedi Federation UK was not a political party and that:

*“Although Mawlana Sayeedi is a vice President of [the] Jaamat-e Islami [Party] of Bangladesh, he is also [a] well known religious leader, he has many followers and critics in the UK and Bangladesh, many like him as [a] religious leader irrespective of his political identity. The protest at Altab Ali Park on 11 February was organised to voice disagreement with [the] verdict of [the] International Crime Tribunal in Bangladesh.”*

The Licensee said further that, in the UK, there were many people who supported the ICT as well as those who were critical of it. Bangla TV said that supporters of the ICT also organised meetings and protests at Altab Ali Park to voice their views and that announcements of such meetings had also appeared in its ‘*What’s On*’ section at no charge.

The Licensee argued, therefore, that due impartiality was maintained, in line with Rule 5.5, because it did carry announcements from those on both sides of the argument. The Licensee submitted details of 40 items that had appeared between January and May 2013 in the ‘*What’s On*’ section. Among these items were broadly equal numbers of pro- and anti-ICT messages. Bangla TV also supplied translations of four of those items, which included material essentially opposing the position of the Free Mawlana Sayeedi Federation UK. The text of these four items is set out below:

- Item 1: *“Grand Public Solidarity meeting  
Demand higher punishment for Perpetrator of Crimes against Humanity  
during Bangladesh liberation war.*

[organiser, venue and date details].”

Item 2: *“On occasion of 42nd Bangladesh Independent day ‘Projonmo 71’ organize a Seminar on ‘Trial and Bangladesh Today’.*  
[organiser, speakers, venue and date details].”

Item 3: *“To implement the spirit of liberation war on the 1971 we formed an organization ‘Support Bangladesh’. The organization will work against all anti liberation organization and will work to organize all pro liberation forces in the UK.*  
[organiser details].”

Item 4: *“To demand higher punishment for Perpetrator of Crime against Humanity during Bangladesh liberation war 1971, ICT Support forum organize a public gathering...*  
[organiser, venue and date details].”

We asked the Licensee whether any information was given to viewers to make clear that ‘What’s On’ featured announcements reflecting a variety of viewpoints. Bangla TV did not provide any comments on this point.

Because content on its service had included opposing viewpoints, the Licensee asserted that Rule 9.1 had not been breached: it had maintained independent editorial control by the broadcast of both points of view.

As to Rule 9.2, Bangla TV said that the ‘What’s On’ section was distinctly identified and did not include commercials.

Finally, Bangla TV told us that it was a very small community satellite television channel which tried to be as inclusive as possible. It said that there were different groups and factions in its community, and argued that its service tried to accommodate as many opinions as possible without compromising its commitment to democracy, religious tolerance, social harmony and political impartiality.

In response to the Preliminary View, the Licensee said it understood Ofcom’s position and had already taken steps to prevent recurrence, having “stopped all Public Announcement of any political nature even by any community organizations.”

## Decision

Under the Act, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that the special impartiality requirements set out in section 320 of the Act are complied with. This standard is contained in Section Five of the Code. Broadcasters are required to ensure that the impartiality requirements of the Act are complied with, including that due impartiality is preserved on matters of political or industrial controversy and matters relating to current public policy (see above for the specific provisions).

Ofcom also has a statutory duty under the Act to ensure 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 Directive (“the AVMS Directive”) set out strict limits on the amount and scheduling of television advertising. The AVMS Directive also requires that advertising is distinguishable from other parts of the programme service: “Television advertising... shall be readily recognisable and distinguishable from editorial

content...and...shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means". The purpose of this distinction is to prevent viewers being confused or misled about the status and purpose of the material they are watching and to protect viewers from surreptitious advertising. It also prevents editorial content from being used to circumvent the restrictions on advertising minutage.

The AVMS Directive requirements are reflected in, among other Code rules, Rule 9.2, which requires that editorial content is kept distinct from advertising.

The Act also requires Ofcom to have regard to the "desirability of maintaining the independence of editorial control over programme content". This is reflected in Rule 9.1 of the Code.

Ofcom therefore considered the item's compliance with Rules 5.5, 9.1 and 9.2 of the Code.

#### Rule 5.5

This rule states:

"Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service...This may be achieved within a programme or over a series of programmes taken as a whole."

It is not Ofcom's role to question or investigate the validity of the political views expressed in a case like the current one, but to require the broadcaster to comply with the relevant standards in the Code. The Code does not prohibit broadcasters from discussing any controversial subject or including any particular point of view in a programme. To do so would be an unacceptable restriction on a broadcaster's freedom of expression.

However, the broadcaster's right to freedom of expression is not absolute. In carrying out its duties, Ofcom must balance the right to freedom of expression with the requirement in the Code to preserve "due impartiality" on matters relating to political or industrial controversy or matters relating to current public policy. Ofcom recognises that Section Five of the Code, which sets out how due impartiality must be preserved, acts to limit, to some extent, freedom of expression. This is because its application necessarily requires broadcasters to ensure that neither side of a debate relating to matters of political or industrial controversy and matters relating to current public policy is unduly favoured. Therefore, while any Ofcom licensee should have the freedom to discuss any controversial subject or include particular points of view in its programming, in doing so broadcasters must always comply with the Code.

In this case, Ofcom firstly had to ascertain whether the requirements of Section Five of the Code should be applied: that is, whether the content in this case was dealing with matters of political or industrial controversy and/or matters relating to current public policy. In this case, we noted that the item was a brief statement that alerted viewers of Bangla TV to the existence of a forthcoming protest meeting. Just because editorial content refers to political organisations or figures does not necessarily mean that the rules in Section Five are applicable. Furthermore, in judging the applicability of Section Five in any case, Ofcom will take into account the manner in which political issues are dealt with, and how they are presented within programming.

In this case, we considered that the item, although brief, clearly touched on matters of political controversy and public policy in Bangladesh; namely, a demand for the creation of a new tribunal supervised by the UN and the release of a prominent Jamaat Party politician, Mr Sayeedi.

We considered that these statements appeared to convey particular viewpoints on these controversial issues. In our view, the fact that the statements were presented as standalone pieces of editorial content articulating a single policy viewpoint would have helped to increase their likely effect on viewers, namely members of the Bangladeshi community in the UK and Europe.

Given the above, Ofcom therefore considered that this content dealt with matters of political controversy and matters relating to current public policy. Rule 5.5 was therefore applicable.

In assessing whether due impartiality has been preserved, the term “due” is important. Under the Code, it means adequate or appropriate to the subject and nature of the programme. Therefore, “due impartiality” does not mean an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented. Due impartiality may be preserved in a number of ways and it is an editorial decision for the broadcaster as to how it ensures due impartiality is maintained.

In this case, Ofcom considered that the item under consideration was a self-contained expression of specific viewpoints on particular matters of political controversy and matters relating to current public policy. The item did not contain any alternative views, which could be reasonably and adequately classed as critical or counter to those of The Free Mawlana Sayeedi Federation UK’s demand both for a new tribunal and for Mr Sayeedi’s release from custody.

As such we considered that the item, when examined alone, gave a one-sided view on such matters and did not contain any alternative viewpoints. We noted that the Licensee had said that it also carried material containing opposing viewpoints. However, on the basis of the information provided by the Licensee about four other items it had broadcast (as set out in the Response section above), Ofcom considered that that material also raised issues under Rule 5.5 of the Code. Ofcom concluded that such items taken together could not fulfil Rule 5.5’s requirement of due impartiality, for two reasons.

Firstly, the items were material apparently assembled and supplied by each interest and as such were not capable of providing the necessary balance and coverage over time expected by Rule 5.5. As independent and unco-ordinated statements that were placed in the schedule without having been commissioned by the Licensee, these items collectively could not be taken – unlike conventional, scheduled programming – to be a body of programming planned over time by the Licensee.

Secondly, we noted that all of the items referred to by the licensee, whether pro- or anti-ICT, contained calls to actions to meetings, protests or demonstrations, rather than discussion of a particular point of view. Consequently, it was our view that each item could only be viewed as a self-standing piece intended to promote a particular political interest. By their very nature, therefore, such items presented no opportunity for duly impartial consideration of a matter of political controversy.

In reaching our decision, we took account of the Licensee’s explanation that the item was a public service announcement. Ofcom recognises that broadcasters serving

particular communities will want to provide content that presents issues of topical interest to their target audience. In Ofcom's view, however, this cannot justify the inclusion of inherently partial items.

Given the above, Ofcom therefore concluded that the item complained of breached Rule 5.5. In addition, on the basis of the information provided by the Licensee, the other four items were also likely to have breached Rule 5.5.

### Rule 9.1

This rule states:

"Broadcasters must maintain independent editorial control over programming."

Ofcom was concerned that, in the absence of any editorial treatment, programme time had effectively been donated to a third party's interests. Where a political message is included in programming (generally in news or current affairs programming) it will usually be clearly contextualised – for example, to illustrate a political party's or pressure group's stance – labelled and included only as far as editorial justification allows. This last consideration will generally mean both that the item (advertisement, campaign video, etc) will not be shown in full, and that the programme will offer a clear explanation for the reason for its inclusion.

In Ofcom's view, by broadcasting an item that apparently reflected one political group's interests – whether by setting out its general aims or promoting one of its events – without any editorial context or analysis, Bangla TV had failed to maintain independent editorial control. Ofcom therefore concluded that Rule 9.1 had been breached by the inclusion of the item.

### Rule 9.2

This rule states:

"Broadcasters must ensure that editorial content is distinct from advertising."

The item was a self-standing message, of short duration, and containing a call to action, which was broadcast adjacent to an advertising break between programmes. As such, it strongly resembled an advertisement and was, in Ofcom's view very much more likely to be perceived by viewers as an advertisement than as a programme. In reaching this conclusion, Ofcom gave full consideration to the presence of the *What's On* 'bumpers' but considered these wholly insufficient to distinguish the item from advertising.

In view of the item's presentation within the Licensee's schedule Ofcom concluded that it was not distinct as programme material and that Rule 9.2 had been breached.

This case is of considerable concern to Ofcom. Under section 321 of the Act, political bodies are banned from advertising altogether on Ofcom licensed services (both TV and radio). This ban applies to political bodies from anywhere in the world. In the course of Ofcom's investigation Bangla TV did not seek to argue that it was unaware of the political nature of the organisation mentioned in the item. Further, Ofcom has reported previously on breaches of the prohibition on political advertising and

breaches of Section Five that concerned Bangladeshi political bodies and of which the Licensee ought to have been aware<sup>3</sup>.

Ofcom notes the steps taken by the Licensee to prevent recurrence in response to our Preliminary View. Ofcom is putting Bangla TV on notice that it will treat any similar future breaches by the Licensee as extremely serious, and that any future such breaches may be considered for the imposition of statutory sanctions.

### **Breaches of Rules 5.5, 9.1 and 9.2**

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<sup>3</sup> Advertisement for the Bangladesh Nationalist Party:  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb202/obb202.pdf>;

Advertisement for the Jatiya Party:  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb197/obb197.pdf>;

Advertisement by UK Jubo League:  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb221/obb221.pdf>;

I Focus:  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb224/obb224.pdf>;

## In Breach

### Maya Nigom

NTV, 14 April 2013, 21:00

### News

NTV, 14 April 2013, 21:30

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#### Introduction

NTV is a news and general entertainment channel that is broadcast in Bengali and serves the Bangladeshi community in the UK and Europe. The licence for NTV is held by International Television Channel Europe Limited (“ITCE” or “the Licensee”).

A viewer complained to Ofcom that an advertisement for businesses to book their participation in a forthcoming Mela<sup>1</sup> was scrolled onscreen throughout a late evening news broadcast.

Ofcom noted that the following was scrolled continuously in a banner towards the bottom of the screen throughout a 20 minute episode of the family drama serial, *Maya Nigom*, which started at 21:00 and the 21:30 *News*, which ended at 22:10:

*“Dear viewers, thank you very much for watching ntv. We would like to take this opportunity to wish everyone “Shuvo Noboborsho [Happy Bengali New Year]” from ntv family \*\*\* Announcement: Is there any news you want to get the world talking about? For your news coverage, text ntv news team now on: [mobile number] \*\*\* Stall, Trade fair Stand and Hot food at Restaurant Zone booking for Boishakhi Mela Victoria Park Sunday 12 May 2013 please call on: [landline number] Email: [email address] \*\*\* ”*

Although the banner was distinct from the programmes in which it was broadcast, Ofcom noted that the material in the banner contained both editorial (i.e. New Year wishes and a request for viewers to submit news items) and advertising (i.e. an invitation for businesses to book participation in Boishakhi Mela). We also noted that the amount of advertising broadcast during commercial breaks in the two clock hours between 21:00 and 23:00 appeared to contain the maximum amount of advertising permitted under COSTA, before this additional material was taken into account.

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

Rule 9.2 of the Code: “Broadcasters must ensure that editorial content is distinct from advertising.”

Rule 4 of COSTA: “...time devoted to television advertising and telesshopping spots on any channel in any one hour must not exceed 12 minutes...”

We asked ITCE for its comments as to how the content complied with these rules.

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<sup>1</sup> ‘Mela’ is a Sanskrit word often used in the Indian subcontinent to refer to gatherings, which can be religious, commercial, cultural or sport-related.

## Response

ITCE accepted it had made a mistake, and apologised, adding that the banner shown in *News* and *Maya Nigom* contained both editorial and an advertisement that the Licensee considered it “should have dealt [with] more cautiously.” ITCE added that “due to [a] shortage of proper expertise in [its] employees [it had] to keep on changing staff randomly.” The Licensee said a text file from the Boishakhi Mela Community Trust – for which NTV was media partner during the festival – had been sent directly to a new transmission control room operator, who had “put it through.”

ITCE said it had therefore “appointed [an] expert review team to check all the scrolls to be run on banners”, adding that it was “very serious about taking proper steps and checking every word before putting anything on the screen.”

## 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 rules in Section Nine of the Code and COSTA, among others, reflect this objective.

The EU Audiovisual Media Services Directive requires that advertising is kept distinct from other parts of the programme service and limits the amount of advertising a broadcaster can transmit. Rule 9.2 of the Code therefore requires that editorial content is distinct from advertising and Rule 4 of COSTA therefore limits, among other things, the amount of advertising and teleshopping spots that can be broadcast in any clock hour to 12 minutes.

In this instance, scrolled editorial (i.e. new year wishes and a request for viewers to submit news items) and advertising (i.e. an invitation for businesses to book participation in Boishakhi Mela) were broadcast onscreen in a single banner. ITCE had therefore failed to ensure editorial content was distinct from advertising, in breach of Rule 9.2 of the Code.

In each hour between 21:00 and 23:00 NTV broadcast 12 minutes of advertising in commercial breaks. In addition, it broadcast the scrolled advertisement (inviting businesses to book participation in Boishakhi Mela) throughout the 20-minute drama serial, *Maya Nigom* and the 40-minute 21:30 *News*. This amounted to 50 minutes between 21:00 and 22:00, and 10 minutes between 22:00 and 23:00.

Consequently, the amount of advertising shown by the Licensee was in excess of the 12 minute maximum permitted in each of the clock hours 21:00 to 22:00 and 22:00 to 23:00. This was in breach of Rule 4 of COSTA.

Ofcom welcomed the action the Licensee had taken in this instance to avoid recurrence. We were concerned, however, that the procedures the Licensee had had in place to ensure Code compliance had been inadequate and reminded NTV of the importance of ensuring its staff were able to comply content.

## Breach of Rule 9.2 of the Code Breaches of Rule 4 of COSTA

## In Breach

### Sponsorship of Idiots

*Channel Nine UK, 6 March 2013*

### Sponsorship of Power Voice 2012

*Channel Nine UK, 7 March and 18 April 2013*

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#### Introduction

Channel Nine UK is a general entertainment channel that is broadcast in Bengali and serves the Bangladeshi community in the UK and Europe. The licence for Channel Nine UK is held by Runners TV Limited ("Runners TV" or "the Licensee"). The channel re-transmits content from Channel Nine in Bangladesh.

A viewer was concerned that the following sponsorship credits around the drama series *Idiots* contained advertising messages:

#### OurTel

The credit consisted of the following:

- Visual: Symbols indicating OurTel's services of pinless calling, web calling, mobile top-up and SMS.
- On-screen text: *"Sponsored by OURTEL", "Call Bangladesh, India & Pakistan in low call rate", "Call: [number]", "www.ourtell.co.uk".*
- The credit also stated the company's address, two telephone numbers, fax number, email address and website address.
- Voiceover: *"Sponsored by OurTel".*

#### Red Claims

The credit consisted of the following:

- On-screen text: *"You may have been mis-sold Payment Protection Insurance (P.P.I.). We can help get back your premiums together with interest", "red claims getting back what is rightfully yours. Call us today on [telephone number]. Text PPI to [text number]. Standard rates apply. www.red-claims.com".*
- Voiceover: *"Sponsored by Red Claims".*

#### All In 1 Express

The credit consisted of the following:

- Visual: All in 1 Express logo.
- On-screen text: *"All in 1 Express. Only £1.80 per KG. BY SHIP ALL INCLUSIVE".* The company's address, two phone numbers and website address were provided.

Voiceover: *"Sponsored by All in 1 Express".*

The viewer was also concerned that the following sponsorship credits around the talent show *Power Voice 2012* contained advertising messages:

#### Travel Link

The credit consisted of the following:

On-screen text: *"TRAVEL LINK Worldwide Ltd. The travel professionals".* The company's address, phone number and website address were provided. The logos for the travel organisations ATOL and IATA<sup>1</sup> included.

Voiceover: *"Sponsored by Travel Link".*

#### Orchid

The credit consisted of the following:

On-screen text: *"Orchid".* The company's address, phone number and website address were provided. The Financial Services Authority's logo was included.

Voiceover: *"Sponsored by Orchid money transfer".*

#### Capital Solutions UK

The credit consisted of the following:

Visual/on-screen text: An image of the company's website which showed that it deals with financial products such as loans, mortgages. The text *"Find your Capital Solution today"* was clearly visible. On-screen text overlaid on the image of the website stated: *"Loans. Mortgage. Car Insurance. Debt Management. Utilities. Business Solutions".* The company's phone number and website address were also provided.

Voiceover: *"Sponsored by Capital Solutions UK".*

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

Rule 9.22: "Sponsorship credits must be distinct from advertising. In particular:

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

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<sup>1</sup> Air Travel Organisers' Licensing and The International Air Transport Association.

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

## Response

Runners TV stated that it depends on the content it receives from Channel Nine in Bangladesh and is “limited to the editorial within the content”. The Licensee had believed that sponsorship credits were counted towards advertising time and therefore thought that it could include advertising messages and calls to action.

The Licensee apologised for this “unintentional mistake” and confirmed that it had immediately replaced the credits with “Ofcom compliant credits”. Runners TV said that transmission staff have been asked to ensure compliance with Rule 9.22(a), and have been asked to read the rule thoroughly to avoid a future breach.

## 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 rules in Section Nine of the Code, among others, reflect this objective.

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

Rule 9.22(a) of the Code therefore requires that sponsorship credits broadcast around sponsored programmes must not contain advertising messages or calls to action, or encourage the purchase or rental of the products or services of the sponsor or a third party. The focus of the credit must be the sponsorship arrangement itself and references to the sponsor’s products, services or trade marks should be for the sole purpose of helping identify the sponsor and/or the sponsorship arrangement.

In particular, Ofcom’s published guidance on Rule 9.22(a) includes the following:

- “claims about the sponsor’s products/services (in particular those that are capable of objective substantiation) are likely to be considered as advertising messages and therefore should not be included in sponsorship credits. Examples include: claims about market leadership...the use of promotional language and/or superlatives to describe the sponsor and/or its products and services...”;
- “credits that contain direct invitations to the audience to contact the sponsor are likely to breach the Code”; and
- “if sponsorship credits contain contact details, these should be minimal”.

### OurTel

Ofcom considered the on-screen text: *“Call Bangladesh, India & Pakistan in low call rate”*, and *“Call: [number]”* were calls to action to use the sponsor’s service.

In addition, Ofcom considered the amount of contact information, i.e. the company’s address, two telephone numbers, fax number, email address and website address, exceeded the minimum information necessary to allow viewers to make initial contact with the sponsor.

The call to action and the excessive contact details caused the credit to breach Rule 9.22(a).

### Red Claims

Ofcom considered the on-screen text *“We can help get back your premiums together with interest”* and *“red claims getting back what is rightfully yours”* to be advertising messages which promoted the sponsor’s business.

Further, Ofcom considered the on-screen text: *“Call us today on [telephone number]”* to be a call to action to contact the sponsor.

The advertising messages and call to action caused the credit to breach Rule 9.22(a).

### All In 1 Express

The on-screen text: *“Only £1.80 per KG. BY SHIP ALL INCLUSIVE”* was a clear advertising message.

In addition, Ofcom considered the amount of contact information, i.e. the company’s address, two telephone numbers and website address, exceeded the minimum information necessary to allow viewers to make initial contact with the sponsor.

The advertising message and the excessive contact details caused the credit to breach Rule 9.22(a).

### Travel Link

Ofcom could find no editorial justification for the inclusion in the credit of the logos for the travel organisations ATOL and IATA which are standard in advertising for companies within the travel industry. The inclusion of such logos is not subject to any mandatory requirement and, in Ofcom’s view, served only to promote the impression of the sponsor being a reputable company. Ofcom therefore considered that the sponsorship credit had breached Rule 9.22(a) of the Code.

### Orchid

Ofcom could find no editorial justification for the inclusion in the credit of the Financial Services Authority’s logo. The inclusion of this logo is not subject to any mandatory requirement and, in Ofcom’s view, served only to promote the impression of the

sponsor being a reputable company.<sup>2</sup> Ofcom therefore considered that the sponsorship credit had breached Rule 9.22(a) of the Code.

### Capital Solutions UK

Ofcom considered that the text, “*Find your Capital Solution today*” which was clearly visible on the image of the sponsor’s website, was a call to action to use the sponsor’s services, in breach of Rule 9.22(a).

### Conclusion

Ofcom was concerned that in its response, the Licensee admitted that it was unaware that sponsorship credits must not contain advertising messages or calls to action, and was under the impression that credits could be counted towards advertising minutage.<sup>3</sup> As detailed above, a number of these credits contained calls to action and advertising messages which are prohibited by Rule 9.22(a). Ofcom has published a number of findings in relation to sponsorship credits in recent years, and has made abundantly clear the need for broadcasters to exercise care to ensure that credits do not contain advertising messages.

Ofcom expects the Licensee to take the necessary steps to ensure the compliance of its sponsorship credits and will continue to monitor this.

Ofcom noted the Licensee stated that it depends on the content it receives from Channel Nine in Bangladesh and is “limited to the editorial within the content”. Broadcasters are reminded that they are responsible for ensuring that all material they broadcast on services licensed by Ofcom complies with Ofcom codes.

### **Breaches of Rule 9.22(a)**

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<sup>2</sup> The Financial Services Authority (FSA) has been replaced by The Financial Conduct Authority (FCA) and The Prudential Regulation Authority. Ofcom understands from the FCA that firms it regulates are permitted to use the FSA logo on letter heads and electronic equivalents until 1 April 2014.

<sup>3</sup> We also have concerns about the amount of advertising broadcast on Channel Nine and we are investigating this issue separately.

## In Breach

### Weather

*Ambur Radio, September 2012 to April 2013, various times*

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#### Introduction

Ambur Radio is a community radio service providing music, news and information for Asian communities in the Walsall area. It broadcasts in English and a range of other languages. The licence for Ambur Radio is held by Ambur Community Radio Limited ("Ambur" or "the Licensee").

A listener complained to Ofcom that, after the news at 17:00 on 25 March 2013, a car insurance company, One Call, was promoted during a weather bulletin. The programme comprised the following, all of which took place over a rhythmic music bed:

Pre-recorded voice 1: *"Ambur Radio Weather."*

Pre-recorded voice 2: *"Attention all drivers, if you've had an accident, call One Call today, on [telephone number]."*

Presenter (live): *"The weather forecast on 103.6 FM Ambur Radio. Cold and mainly dry with strong easterly winds – cold and bitter easterly winds – causing drifting of snow, for most, with some sunny spells. And the temperature is minus one degree and gradually, throughout midnight, minus three degrees – very cold."*

We asked Ambur for information about this broadcast, including details of any commercial arrangement it had with One Call. The Licensee said that the promotion of One Call was a broadcast credit for the company's sponsorship of the weather bulletin. It added that the credit had been broadcast on Ambur Radio in two programmes each week (twice in each programme) since "late Summer 2012."

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

Rule 10.1: "Programming that is subject to, or associated with, a commercial arrangement must be appropriately signalled, so as to ensure that the commercial arrangement is transparent to listeners."

We therefore asked the Licensee for its comments as to how the content complied with Rule 10.1.

#### Response

The Licensee said it had removed the promotion from air as soon as the matter had been raised by Ofcom. It added that Ambur Radio had carried out additional training for members of its production team, to ensure all future sponsorship credits appropriately signalled the commercial arrangement in place with the relevant programme sponsor.

Ambur added that it had instigated procedures to ensure scripts reflecting commercial arrangements would be drafted and evaluated, and post production checks would be carried out by the Station Manager, prior to broadcast. The Licensee also said it had implemented further training for its volunteer presenters, including a review of Ofcom Code guidance, which would now take place annually.

## 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, among other rules, Rule 10.1 of the Code, which requires that programming subject to, or associated with, a commercial arrangement is appropriately signalled, so as to ensure the transparency of that arrangement.

A sponsorship agreement is a form of commercial arrangement, in which a third party has sought to associate itself with specific programming, with a view to promoting itself, by meeting some or all of the production costs. Sponsorship agreements are made transparent to listeners through sponsorship credits.

Radio broadcasters may promote brands, products and services in programming.<sup>1</sup> Although sponsorship credits commonly include the promotion of a sponsor, their primary purpose is to ensure that listeners are aware of the sponsorship agreement in place. As set out in our guidance to Rule 10.1, this is commonly achieved by telling listeners that the programming subject to the agreement is “sponsored by” or brought to them “with our friends at” or “in association with” the sponsor.

Ofcom noted that the announcement, “*Attention all drivers, if you’ve had an accident, call One Call today, on [telephone number]*” contained no such message. Although it was pre-recorded and highly promotional, which may have led some listeners to infer its broadcast was the subject of a commercial arrangement, the announcement did not clarify that Ambur had a sponsorship agreement with One Call.

Ambur therefore failed to signal appropriately programming subject to (i.e. the sponsorship credit) and programming associated with (i.e. the sponsored weather bulletins) a commercial arrangement, so as to ensure that the commercial arrangement was transparent to listeners, in breach of Rule 10.1 of the Code.

We therefore welcomed Ambur’s prompt removal of the announcement from its schedule, when we raised the matter, and the range of measures it then put in place to avoid recurrence.

## Breaches of Rule 10.1

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<sup>1</sup> Such promotions have been permitted on radio since December 2010 and are subject to the rules in Section Ten of the Code and, where they are subject to commercial arrangement, the UK Code of Broadcast Advertising.

## In Breach

### Drivetime

Gravity FM, 18 and 19 April 2013, 16:00

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#### Introduction

Gravity FM is a community radio service that provides news, information and entertainment for people in the Grantham area. The licence for Gravity FM is held by Gravity FM CIC (“Gravity” or “the Licensee”).

A listener complained to Ofcom that, at 17:20 on 18 April 2013, the presenter of *Drivetime* “read out a complete advertisement for Brittany Ferries” in the programme (i.e. outside a commercial break), when he said:

*“... The kids are in the car, the boot is full of everything you could possibly need; just a short drive to the port and you can relax and cruise in style. Now who wouldn’t want a stress-free holiday, where you can really enjoy yourselves from the moment you set off? Hop onboard Brittany Ferries, where your family holiday starts before you’ve even left the UK. With award winning service and excellent onboard facilities for all the family, you can sit back, unwind and enjoy the Brittany Ferries experience. There’s exclusive shopping, onboard cinemas, a fun kids’ zone and even spa treatments on certain sailings – so plenty to keep all the family entertained throughout your journey. Brittany Ferries can also offer you fantastic, fully equipped cottages in France and beautiful casas in Spain. Enjoy the freedom of having your car with you and explore the destination of your choice! Visit [www.brittany-ferries.co.uk](http://www.brittany-ferries.co.uk) for lots of ideas on May half-term and summer holiday trips, including up to 25% off selected cottages and 10% off casas.”*

The presenter went on to run the following competition:

*“If you’d like to enjoy a ‘Britain to Western France’ hamper full of tasty goodies from both countries, then answer to win: Which two countries do Brittany Ferries sail to? Is it (a) France and Spain; is it (b) France and Italy; or is it (c) France and Turkey?”*

The presenter then: provided listeners with details of how to enter the competition (by contacting the station); repeated the competition question; and stated when the competition would close.

We asked Gravity for information about this broadcast, including details of any commercial arrangement between it and Brittany Ferries. The Licensee explained that the ferry company had provided a “Britain to Western France luxury hamper” as a competition prize, in return for Gravity’s broadcast of “key points” – i.e. the scripted material in the first quote, above.

The Licensee also provided us with recordings of every broadcast reference to the competition, which it ran during its two hour *Drivetime* programme on 18 and 19 April 2013. Ofcom noted that, on a number of occasions, the broadcast competition had been run with no reference to either the “key points” or the prize having been provided by the ferry company. For example, at 16:55 on 19 April 2013, the presenter said:

*“...hopefully he [the manager of the radio station] will also pick a winner on this hamper competition as well, which we are going to resolve in about five or so minutes’ time. Which two countries do Brittany Ferries sail to? Is it (a) France and Spain; is it (b) France and Italy; or is it (c) France and Turkey? Give me your answer: [station telephone number], email [studio address], or text the word, ‘gravity’, followed by your message to [text short code]. We will have a winner, in five minutes’ time. Lines close at exactly five o’clock.”*

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

Rule 10.1: “Programming that is subject to, or associated with, a commercial arrangement must be appropriately signalled, so as to ensure that the commercial arrangement is transparent to listeners”.

We therefore asked the Licensee for its comments as to how the content complied with Rule 10.1.

## **Response**

Gravity noted that it “did not receive payment or direct reward for running the competition” from Brittany Ferries, “but felt the opportunity to win the prize would be of interest to some listeners.”

The Licensee added that, having reviewed the station logs, it accepted that the broadcast competition “fell short of the standards that would normally be expected in relation to signalling that the prize was donated by Brittany Ferries”, which Gravity conceded “was not specifically mentioned at any point.” The Licensee noted that its board had therefore “reviewed the station operating procedures and [will] now require all competitions to be approved in advance of broadcast by specific members of the station management team.” Gravity added that such content “will have a written script relating to both long and short references in broadcasts and this script will be produced using a template to ensure direct signalling in accordance with the recommended phrases used in the guidance to the Broadcast[ing] Code.”

Gravity stated that, although it considered this “an isolated lapse from [its] otherwise high standards,” it was also “in the process of arranging additional training for [its] volunteers in the requirements of the Broadcast[ing] Code to try and prevent any additional lapses in future.” However, Gravity said it was satisfied that, “although unacceptable, on this occasion no-one was actually misled as to the nature of the broadcast and listeners clearly made the link between the prize and its donor, Brittany Ferries,” as it considered the complainant had.

Nevertheless, the Licensee said its board took the matter “extremely seriously” and was “committed to implementing stringent safeguards” to prevent recurrence. In response to Ofcom’s Preliminary View, the Licensee added that it had implemented a policy of using different scripts for competitions where prizes were simply donated (and Gravity had therefore decided to run a broadcast competition) and those for which prizes were provided in return for the broadcast of specific material (e.g. commercial messages).

## **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, among other rules, Rule 10.1 of the Code, which requires that programming subject to, or associated with, a commercial arrangement is appropriately signalled, so as to ensure the transparency of that arrangement.

Ofcom noted Gravity said it “did not receive payment or direct reward for running the competition” from any third party. However, Section Ten of the Code states that “a commercial arrangement is a contract, or any other formal understanding, between a broadcaster...and a third party...”. Further, our general guidance to Section Ten explains that: “Programming that is subject to a commercial arrangement will...generally include payment and/or the provision of some other valuable consideration in return for a commercial reference...”.

Ofcom noted Gravity’s view that it had “[fallen] short of the standards that would normally be expected in relation to signalling that the prize was donated by Brittany Ferries.” We agree with the Licensee that the broadcast acknowledgment of a competition prize having been donated provides important information to the listener, clarifying that a third party’s involvement is the reason why it is being offered. However, in this instance, Ofcom considered that Brittany Ferries’ provision of a competition prize, because it was dependent on the broadcast of specific material promoting Brittany Ferries, had not been a donation by the company. Instead, we considered the prize represented valuable consideration made in return for Gravity’s broadcast statement of Brittany Ferries’ “key points”.

Gravity ran the competition a total of 11 times across two *Drivetime* shows. On five occasions it included references to Brittany Ferries’ “key points” (a commercial reference that we considered to be programming *subject to* a commercial arrangement) and on six occasions it did not (which Ofcom considered to be programming *associated with* a commercial arrangement).

#### Programming *subject to* a commercial arrangement

We noted that Gravity said it was satisfied that “no-one was actually misled”, as evidenced by the fact that the complainant had mistaken a commercial reference (i.e. Brittany Ferries’ “key points”, broadcast as programming) for an advertisement for Brittany Ferries. We accepted that, on the five occasions Brittany Ferries’ “key points” were broadcast, it was possible their highly promotional content may have led some listeners to infer their broadcast was the subject of a commercial arrangement. However, we consider the lack of any overt signalling to this effect meant the Licensee failed to clarify adequately the true nature of the material broadcast (i.e. that it was programming and not advertising).

#### Programming *associated with* a commercial arrangement

On the six occasions the presenter ran the competition without the commercial reference (i.e. without including Brittany Ferries’ “key points”), we considered listeners were unlikely to have realised the competition prize had been provided by a third party or that such provision had been made in return for the broadcast of Brittany Ferries’ “key points” at other times (i.e. in programming *subject to* a commercial arrangement).

Ofcom therefore considered the programming that was subject to a commercial arrangement (i.e. the competitions run with a commercial reference – Brittany Ferries’ “key points”) and the programming that was associated with a commercial arrangement (i.e. the competitions run without a commercial reference) were in breach of Rule 10.1.

We therefore welcomed the action taken by Gravity to prevent recurrence.

### **Breaches of Rule 10.1**

## Advertising Scheduling Findings

### Note to Broadcasters

#### The positioning of advertising breaks within the broadcast of films

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Rule 16(a) of the Code on the Scheduling of Television Advertising (“COSTA”) states that “films and news programmes may only include one advertising or teleshopping break for each scheduled period of at least 30 minutes.”

We wish to clarify how Rule 16(a) of COSTA applies when film broadcasts are interrupted by other editorial content (e.g. short news bulletins).

- Where interrupting editorial content is not a scheduled item, all advertising breaks broadcast after the start of the film and before it ends, **including those directly preceding or following the interrupting editorial content**, will be treated as internal breaks in the film for the purposes of enforcing Rule 16(a) of COSTA.
- Where interrupting editorial content is scheduled as a separate item, the film will consequently be divided into two or more separate scheduled items. Each item in isolation will be subject to Rule 16(a) of COSTA. This means that advertising breaks directly preceding or following the separately scheduled item will not be treated as internal breaks within the film.

## In Breach

### Breach findings table

*Code on the Scheduling of Television Advertising compliance reports*

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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
Aaj Tak	21 May 2013, 13:00	COSTA Rule 4	Ofcom noted, during monitoring, that the channel exceeded the permitted advertising allowance by 80 seconds.  <b>Finding: Breach</b>

## Resolved

### Resolved findings table

#### *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
Heart TV	13 June 2013, various times	COSTA Rule 4	<p>Ofcom received notification from the licence holder for Heart TV, Global Music Television Limited (“Global”) that it had exceeded the permitted advertising allowance on this date by a total of one minute and 50 seconds across seven clock hours.</p> <p>Global explained this had occurred due to human error in updating late changes to advertising logs.</p> <p>Global confirmed it was working to improve its software system by implementing an automatic flag to alert it in advance to any similar issues. Global explained that in the meantime it would no longer make manual changes to advertising logs.</p> <p><b>Resolved</b></p>
Really	19 June 2013, 14:00	COSTA Rule 4	<p>Ofcom received notification from the broadcaster that it had exceeded the permitted advertising allowance on this date by two minutes and 20 seconds.</p> <p>The licence holder for Really, UK Channel Management Limited (“UKTV”), explained the error occurred due to human error whereby the playout operator inadvertently updated a live schedule through a preview system.</p>

			<p>UKTV confirmed it was in the process of updating its system to prevent its live schedule being inadvertently updated in this way.</p> <p><b>Resolved</b></p>
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## Broadcast Licence Condition cases

### In Breach

#### **Blast 106**

*Providing a service in accordance with 'key commitments': 28, 29 and 30 January 2013*

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#### **Introduction**

Blast 106 is a community radio station in Belfast which has been broadcasting since July 2009. The station is owned and operated by Blast 106 Limited ("Blast" or "the Licensee").

Blast 106's 'key commitments' state that it is licensed to serve "Students living in Greater Belfast from Queens University, the University of Ulster and Belfast Metropolitan College and young people living, working or studying in greater Belfast." The 'key commitments' also require the station to develop its output over time to 80% music and 20% speech.

'Key commitments' form part of each community radio station's licence with Ofcom. They set out how the station will serve its target community and 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. Each year community radio stations are required to submit an annual report to Ofcom setting out how they are meeting these 'key commitments'.

In March 2012 Blast submitted its report for the year January to December 2011. It said that it was broadcasting content in a ratio of 90:10 music to speech in daytime. Ofcom wrote to the Licensee in August 2012 noting that it had begun broadcasting in 2009, and explaining that Ofcom expected it to be broadcasting in a ratio of 80:20 music to speech in daytime from autumn 2012 onwards.

We also received a number of enquiries alleging a lack of speech output directed at Blast 106's target community, and predominantly mainstream chart music rather than a more varied mix of genres, as required by Blast 106's 'key commitments'.

Ofcom requested recordings of Blast 106's output in November 2012. After monitoring this output we wrote to the Licensee saying we had concerns about the extent to which the station was meeting its 'key commitments', and that we considered it may be in breach of its licence. The Licensee responded explaining that the dates of the recordings Ofcom had selected to monitor had coincided with the installation of new technical equipment at the station, of which Ofcom had received prior notification, and therefore its output on those dates had not been typical.

Subsequently we requested recordings of Blast 106's output on 28, 29 and 30 January 2013 and assessed these. We considered that the amount of speech output, the inclusion of specific types of speech content, and the variety of music featured in this output raised issues warranting investigation under the following conditions of Blast 106's licence:

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”; and

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 Annex<sup>1</sup> so as to maintain the character of the Licensed Service throughout the licence period.”

Specifically, Blast 106’s ‘key commitments’ require that:

- Daytime output will initially typically comprise 90% music and 10% speech, developing over time to 80% music and 20% speech.
- Speech output will include debate and discussion on issues of specific interest and importance to students and young people locally, regionally, nationally and internationally. Blast 106 will provide local student news and coverage of student sports events. The station will produce documentaries and will cover developments in student politics.
- Blast 106 will provide local student news and student politics as they relate to and affect the local student community and will promote debate and discussion throughout, with programming that is interactive with the community served through phone-in, text-in, email and post.
- Music output will be very varied but will be directed to the tastes and interests of volunteers and the community served.

Ofcom therefore wrote to the Licensee to request its formal comments on its compliance with Conditions 2(1) and 2(4) in Part 2 of the Schedule to its community radio licence.

## Response

### Music to speech ratio

The Licensee submitted that its ‘key commitments’ applied to term time only, and that the recordings requested by Ofcom in late January started on 28 January 2013, the same date as the start of the new academic term at Queens University and University of Ulster “and it takes a while for the schedule to settle down again”. It argued that the content therefore did not reflect its typical output.

Blast acknowledged that Ofcom defines ‘daytime’ as 06:00 to 19:00 but argued that this time period was more relevant to commercial radio stations which, because of their wider broadcast area, would attract listeners travelling to and from work. It explained that its more restricted broadcast reach meant its audience was unlikely to listen before 07:30 to 08:00 and therefore Blast 106 only commenced its live output from 07:00. It also noted that its speech content was therefore significantly less in the first hour of this output, at an average of 5.8%, rising to 11.5% between 08:00 and 09:00, and 15.3% between 09:00 and 10:00.

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<sup>1</sup> The Annex sets out the radio station’s ‘key commitments’. Blast 106’s ‘key commitments’ in full can be found at:  
<http://www.ofcom.org.uk/static/radiolicensing/Community/commitments/cr140.pdf>

The Licensee submitted that, based on its own 'daytime' definition of 'live' output from 07:00 to 19:00, it had transmitted 89% music to 11% speech output. Although Blast said it did not "concede the definition of Daytime as starting at 6am", it accepted that, based on Ofcom's definition of 'daytime' it had not achieved its required music to speech ratio in the broadcasts in question, but again pointed to its view that this output was not typical.

Blast explained that it would now ensure that speech output is included between 06:00 and 07:00, and that this would be more than the 90:10 minimum ratio and would contribute to progressing to the 80:20 ratio required by its 'key commitments'. The Licensee added that it had experienced difficulty in recruiting a volunteer presenter for a three-hour period each afternoon and, as a result, the programme broadcast daily between 13:00 and 16:00 was pre-recorded and had little or no speech content.

### Speech output

In its correspondence with the Licensee, Ofcom had noted that three of the programmes it had monitored included speech content that was likely to be of interest to students and young people. The Licensee responded that Ofcom had therefore "conceded that we have met the legal standard of our key commitment". It said it therefore did not understand why Ofcom was investigating this aspect of its output, or querying, as we had done, why there had been no references to either of the two local universities or the local college during the period monitored. It pointed out that there was no such requirement in its 'key commitments' and that the "very essence of the station" was to be a part of the student body that was wholly independent of these academic institutions. Further, it argued that there was no quota or required proportion of speech output of interest to students and young people set out in its 'key commitments'.

The Licensee provided some evidence of such material being broadcast in the evening and late evening. It referred us to *The Lockin* (21:00 to 24:00), two programmes in the 19:00 to 21:00 slot, (which included interviews about the local music scene and gig guides, for example) and *The Clinic* (which included features about relationship problems and bullying, for example). It also referred to *The Jam* (16:00 to 19:00) which included news, sports news and entertainment news.

The Licensee said its fulfilment of the aspect of its 'key commitments' referring to coverage of student news, politics and sport was "not done on a minute by minute basis but rather across the year to allow for peaks and troughs of relevant material". It argued that student politics was most relevant in the second and third academic terms when elections were taking place, student sports was primarily a springtime focus, and student news and politics is "more generic general interest news and dependant on the receipt of press releases from the universities and students unions".

### Music output

Blast described itself as being "100% compliant with the wording (and indeed the spirit) of the key commitment". It stated that its output was varied, and accepted that some programming "may contain more chart music", but explained that this was required so that its output was directed to the tastes and interests of volunteers and the community it served, as required by its 'key commitments'. It pointed out that if its volunteers and community wanted 24 hour chart music then that is what it would have to provide to comply. However, it stressed the varied nature of the music it

provided, referring to other programming that featured varied music such as classic tracks, dance, urban, hip hop, indie, alternative and local music, for example “post-folk postjazz”.

## **Decision**

Community radio is licensed by Ofcom according to the requirements of the community radio legislation. It sets out five characteristics of community radio services, one being that “it is intended primarily to serve one or more communities (whether or not it also serves other members of the public)”.

The application for the Blast 106 service said “Belfast Student Radio [subsequently re-named as Blast 106] will serve a ‘community of interest’ i.e. students living in Greater Belfast from Queens University, the University of Ulster and Belfast Institute of Further & Higher Education” (the latter is now known as Belfast Metropolitan College).

Under the terms of the Broadcasting Act 1990 Ofcom is required to draw up appropriate licence conditions to secure the character of the service. For community radio services, an annex to the licence sets out the service’s ‘key commitments’. The proposals put forward in the licence application are used to draw up these ‘key commitments’.

In the case of Belfast Student Radio (now Blast 106), a reference to serving young people living, working or studying in Greater Belfast, as well as students, was added at the drafting stage. As a result, the ‘key commitments’ describe the target community as: “Students living in Greater Belfast from Queens University, the University of Ulster and Belfast Metropolitan College and young people living, working or studying in Greater Belfast”.

We noted the Licensee’s view that its ‘key commitments’ “apply to term time only”. However, the only commitment that specifies “during term-time” refers to the amount of ‘live’ (rather than pre-recorded) output that must be broadcast. No other commitments refer to any particular time of year. Therefore we do not accept Blast 106’s view that any of the ‘key commitments’ under investigation were only to required to be delivered during term time.

### Music to speech ratio

Blast 106’s ‘key commitments’ require 10% speech output in daytime rising to 20% over time. As noted above, we wrote to the Licensee in August 2012 and said we expected it to be broadcasting 20% speech in daytime output from autumn 2012. Our monitoring was conducted on output broadcast in January 2013 and so should have met the 20% requirement.

The key commitment setting out the required music to speech ratio refers to ‘daytime’ output, but does not define this period. Ofcom generally defines ‘daytime’ as 06:00 to 19:00.

Across the three days monitored Ofcom’s analysis of the output in ‘daytime’ showed the station was broadcasting 7.6% speech content from 06:00 to 19:00. (Speech content excludes advertising, programme/promotional trails, and sponsor credits.) We took into account the Licensee’s representations about how the ‘daytime’ period might be interpreted for its target student community. This produced the following results:

- 7.9% speech content from 07:00 to 19:00 hours; and
- 8.1% speech content from 08:00 to 19:00 hours.

We concluded that the Licensee was not broadcasting the amount of speech content in 'daytime' required by its 'key commitments'. We noted that Blast 106 is now actively seeking to increase the amount of speech it broadcasts in 'daytime'.

### Speech output

The 'key commitments' set out the types of speech to be included in the station's output and refer to a range of different speech topics as well as debate and discussion items. Our monitoring found that three specific programmes – *The Scene*, *Through the Wall* (and *The Clinic* assessed from November 2012 recordings) – each comprised more than 10% speech and reflected Blast's character of service. Some significant speech items, interviews for example, were included in each case. We noted that, on the basis of our correspondence about this programming, the Licensee argued that Ofcom had "conceded that we have met the legal standard of our key commitment". However, we do not agree with this interpretation of our comments.

The Licensee had also drawn Ofcom's attention to the introduction of a limited amount of new speech content in the form of sports, news and entertainment slots in *The Jam* on weekday afternoons. However, in our monitoring we found that the overall speech content of this programme remained low (the average daily speech content over the three-hour programme was: Monday 8.9%; Tuesday 9.5%; Wednesday: 8.9%).

Our monitoring of some evening programmes indicated that they carried speech content likely to be of interest to the target community. However these programmes amounted to a very small proportion of the station's total output.

Overall, we noted, particularly in 'daytime', that speech output mainly comprised presenter links to music with general news and sports bulletins. There was a lack of content with a student-focus, and of material that satisfied the two 'key commitments' specifically relating to speech material.

During the three days in January 2013 and two days in November 2012 when we monitored output, we heard no local student news, coverage of student sports events, documentaries, or coverage of student politics.

To illustrate this, we highlighted to the Licensee that, by way of example, there had been no references to either of the two local universities or the local college during the 40 hour period monitored. We accept that the Licensee is independent of these institutions. However, the primary target community is "students living in Greater Belfast from Queens University, the University of Ulster and Belfast Metropolitan". In addition we noted that the station has a governing Council of six members with (as stated in the 'key commitments') "at least one from each of the three academic institutions". As a result Ofcom considered it was reasonable to illustrate the lack of student-related speech in our monitoring by referring to a deficiency of news, information or other mentions of these institutions, their students' unions or societies, for example.

We noted that the Licensee pointed out that the 'key commitments' do not refer to a quota or set required level for student-related material in its speech output. We accept this. We also noted that Blast provided some evidence of its student-related speech output, namely *The Lockin* (21:00 to 24:00), and two weekly programmes in

the 19:00 to 21:00 slot, as well as *The Clinic* (also weekly 19:00 to 21:00) and *The Jam* (16:00 to 19:00). However, in Ofcom's view, a station should broadcast speech output directed at its primary target community throughout the day and evening, and this should not be most prevalent in programming outside of 'daytime', i.e. in this case, after 19:00.

We remain concerned that the small amount of speech that is broadcast in 'daytime' is very general in nature, and not specifically targeted at students in Belfast, i.e. the primary target community. In addition, some student-related speech items required by the 'key commitments' were not heard in the monitored output (local student news, coverage of student sports events, documentaries, coverage of student politics), nor has the Licensee provided convincing evidence that such material is being broadcast except at certain times of the year in response to particular events.

### Music output

We noted in our monitoring that Blast 106's 'daytime' music output appeared to be predominantly chart and dance music. Ofcom acknowledged that there are some programmes in the schedule that broadcast music of a greater variety (*The Scene*, broadcast on Mondays between 19:00 to 21:00; *Through The Wall*, broadcast on Wednesdays between 19:00 and 21:00; Thursday evening programming focussing on urban, and R&B, and weekend evenings on dance). However, Ofcom was concerned that it was only programmes broadcast in the evenings that featured a range of music genres. The 'key commitments' require that music output is very varied, but in 'daytime' we did not consider this to be the case.

We took into account the Licensee's submission that if its volunteers want the output to be dominated by chart music for example, then the station must broadcast this to be compliant with its 'key commitments', which state that "Music output will be very varied but will be directed to the tastes and interests of the volunteers and the community served." However, our interpretation of this 'key commitment', consistent with the original application for this service, is that the music output needs to be "very varied", but only within the context of the target community (i.e. students and young people). Therefore, we would not expect Blast 106 to provide "variety" in the sense of also providing older-leaning genres such as easy listening, classical, gold pop or classic rock, but we would expect to hear a variety of genres that have youth-appeal such as those outlined in Blast's licence application (e.g. indie rock, electronica, R&D, drum n' bass).

The second half of the 'key commitment' relating to music (that it will be "directed to the tastes and interests of volunteers and the community served") does not negate the requirement to be very varied, and the apparent contradiction within the requirement implied by the Licensee does not, in our view, exist.

Ofcom considered that its view was consistent with the original application for the licence, which stated: "Our research showed that students tend to have a rather eclectic taste in music and the station will reflect this while always trying to concentrate on local and student bands which the listeners have an opportunity to go and see live in the local area...Music genres will include rock, punk, jazz, electronica, R&B, D&B, Ska, Hip Hop etc".

## Conclusion

Blast 106's target community is: "Students living in Greater Belfast from Queens University, the University of Ulster and Belfast Metropolitan College and young people living, working or studying in Greater Belfast."

In the section on accountability to the target community, the 'key commitments' underline that "the primary focus of the station is the student community of Belfast Metropolitan College, University of Ulster and Queens University".

Ofcom expects all community radio stations to direct most of their programming at their primary target community, unless otherwise specified in their key commitments. A station that broadcasts material specifically related to the primary target community for a limited period only, or outside of peak listening times, does not appear to Ofcom to be operating within the spirit of the statutory requirements.

As set out above, we have taken into account the following matters:

- the combination in 'daytime' output of a high volume of music (more than 90%) with very little speech of specific relevance to the target community;
- a very modest amount of speech output of direct relevance and interest to the primary target community, broadcast in the evenings only;
- a lack of variety in the music output except in specialist programmes; and
- certain speech material not being featured in output for much of the year.

As a result, we have concluded that the Licensee is in breach of its licence for failing to provide a service in accordance with its 'key commitments'.

**Breach of Licence Conditions 2(1) and 2(4) in Part 2 of the Schedule to the community radio licence held by Blast 106 Limited (licence number CR140).**

## Fairness and Privacy cases

### Upheld

#### Complaint by Ms D

*The Hotel, Channel 4, 20 January 2013*

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#### Summary

Ofcom has upheld this complaint made by Ms D of unwarranted infringement of privacy in the programme as broadcast.

The programme was part of a series that followed the day to day running of the Grosvenor Hotel in Torquay. This episode looked at preparations for a “ladies night” to be held at the hotel and included footage of the event itself. Ms D, who attended the event, was filmed, and footage of her was subsequently shown in the programme as broadcast. Ms D had informed the programme makers before the broadcast of the programme that she did not wish to appear in it, and she had been given an assurance by the programme makers that she would not.

Ms D complained to Ofcom that footage of her was broadcast in the programme without her consent.

Ofcom’s decision is that Ms D had a legitimate expectation of privacy in relation to the inclusion of unobscured footage of her in the programme as broadcast from which she could be identified. First, Ofcom considered that there were elements of private information and personal sensitivity in attendance at an event such as this and acknowledged that an individual would not necessarily want that attendance disclosed in a television programme. Second, Ofcom found that any legitimate expectation of privacy, in this regard, was strengthened by the specific circumstances of this case, where Ms D had specifically refused consent to be included in the broadcast and where the programme makers had confirmed that she would not be. In these circumstances, the broadcaster’s right to freedom of expression did not outweigh Ms D’s right to privacy in relation to the footage of her broadcast in the programme. Ofcom considered therefore that Ms D’s privacy was unwarrantably infringed in the programme as broadcast.

#### Introduction

On 20 January 2013, Channel 4 broadcast an episode of *The Hotel*, a documentary series that followed the day to day running of the Grosvenor Hotel in Torquay. This episode looked at preparations for the hotel’s “ladies night” and the event itself, held on 11 August 2012. The programme showed the hotel staff making preparations for the event, including: organising food; promoting the event to guests and selling tickets; and hiring male strippers for the evening. The programme also included footage of the evening and some of the guests who attended the “ladies night”. On three occasions, footage was shown of the complainant, Ms D, who was shown with her face unobscured.

Ms D was first shown standing in the hotel’s car park, waiting with other women who had arrived for “ladies night”. At this point in the programme, the programme’s narrator said: *“It’s 7.30 and the doors are open for ladies night.”* The hotel’s events manager was then shown inviting the women into the hotel.

Ms D was next shown dancing in the hotel with other women to the Village People's song 'YMCA'. The programme said that *"300 women have turned up, ready for action"* and footage of a room full of women dancing was shown. Ms D was shown dancing in the background with a drink in her hand. A topless male waiter could be seen standing close by to her.

Following this footage, male strippers were shown in a hotel room preparing to perform, and they spoke about their experiences of stripping. One of the strippers stated:

*"Some women, they love to get out, they love to go and have a good time. It kind of lets them release their inner beasts maybe."*

Accompanying this statement was footage of women dancing at the event and, again, Ms D was shown, from a distance, dancing with other women on a stage. Women could be seen dancing and, again, a topless male waiter could be seen. At this point, another male stripper was shown saying:

*"Obviously they get annoyed with their husband at home, thinking, 'I'm fed up of watching you watch Top Gear, I'm going to go out and just watch someone give me a little windmill'."*

Later, the male strippers were shown performing on stage to cheering women. The hotel's owner stated:

*"Women show their true colours when they're in a pack. You wouldn't see gangs of men dressing very provocatively, screaming their heads off, going mad, would you, 'cause they're going to see some bits on stage."*

Following the broadcast of the programme, Ms D complained to Ofcom that her privacy was unwarrantably infringed in the programme as broadcast.

### **Summary of the complaint and the broadcaster's response**

Ms D complained that her privacy was unwarrantably infringed in the programme as broadcast because footage of her was included on three occasions, despite her having informed the programme makers that she did not want to appear in the programme and after her being informed by the programme makers that she would not be included.

Ms D said that, on the night of filming, she had been told by a "camera lady" to email the programme makers, with a photograph of herself attached, to inform them that she did not wish to appear in the programme. Ms D said that she followed these instructions and sent an email to the production company on 28 August 2012 with a photograph of herself so that she could be identified by the programme makers. She stated in her email that she did not want to be included in the programme. Ms D said that she received a response from the programme makers on the same day informing her that her email had been forwarded to the production team who would ensure that she would not appear in the programme. Despite this, footage of her was included in the programme as broadcast as described in the "Introduction" section above.

Ms D said that the inclusion of the footage of her had had a detrimental effect on her personal life and family relationships.

In response to Ofcom's Entertainment Decision in this case, Channel 4 said that once the production company and Channel 4 were made aware that footage of Ms D had been included in the programme despite her email, the production company called Ms D to apologise, and steps were taken immediately to remove the episode from all of Channel 4's broadcast platforms, including its On Demand service. It said that the master copy had also been amended and steps were taken to ensure that stills relating to the programme in which Ms D featured were not used by Channel 4.

Channel 4 explained that, at the time of filming, the cameras had been in clear sight of all the guests entering the room where the "ladies night" was being held. It said that the programme makers had been openly filming and that there were signs put up around the hotel indicating that this was the case. Channel 4 said that these signs included a statement to the effect that if a person did not want to be filmed or included in the broadcast programme, they should contact a named member of the production team (the guest liaison officer) on the telephone number provided or make themselves known to them.

Channel 4 said that it had filming protocols in place, one of which was a "Do Not Include protocol" ("DNI protocol"). This protocol set out for the programme makers the process of obtaining consent from contributors, including those who appeared in the background. It said that the DNI protocol requires contributors who do not want to be identified in the programme as broadcast to make themselves known to the guest liaison officer. The guest liaison officer then takes a note of the person's name and contact details and obtains a photograph of them so that they can be identified when editing to ensure that they have not been included in the programme at all, or their faces blurred, if they have been included. These details are then passed on to the relevant staff. Channel 4 said that relevant members of staff involved with this programme were aware of this protocol and knew the process that was to be followed for those who did not want to be filmed or included in the programme. Channel 4 said that photographs of staff and guests who did not want to be included in the programme were printed out and given to the relevant members of staff and put up on walls where the appropriate production staff would see them.

Channel 4 explained that, on 28 August 2012, the production company's main office received an email sent to its general enquiry email address from Ms D in which she requested not to be included in the programme. Ms D had attached a photograph of herself in order that she could be identified. Channel 4 said that this email was received by a receptionist at the production company, who was not a member of the production team and who was not familiar with or aware of the DNI protocol. The receptionist responded to Ms D stating that her request would be forwarded to the production team to ensure that she did not appear in the programme. Channel 4 said that relevant members of the production team were copied into the email. However, the photograph was not included in that email.

Channel 4 said that those of the production team who received Ms D's request (through the receptionist's email) assumed that Ms D had followed the DNI protocol procedure, which had been set out in the notice signs at the hotel on the night of filming, and that her details had been taken by the team on the night of the event and that this email correspondence was merely confirming this. In editing the programme, the production team only relied on the formal records and photographs that were taken and filed in accordance with the DNI protocol.

Channel 4 acknowledged that it was regrettable that a miscommunication had occurred between the programme makers and Ms D and that the inclusion of her in the programme as broadcast was "very unfortunate". It considered however that, in

any case, Ms D either did not have any legitimate expectation of privacy at all, or it was so severely limited in the circumstances that it was “almost negligible”. It argued that filming had taken place at a publicised event which was filmed openly as made clear by the cameras and the numerous filming notices around the hotel. Channel 4 highlighted the fact that Ms D was not named in the programme and that no other personal details about her were given. In addition, it said that Ms D was only shown very briefly dancing in the background and that she did not appear to indicate that she was uncomfortable with the fact that she was being filmed, nor was she shown engaging in any activity which would give rise to a legitimate expectation of privacy, or shown in what could be perceived as a “sensitive” situation.

Channel 4 pointed out that it was of paramount importance that any interference with a broadcaster’s right to freedom of expression must be proportionate. It stated that a DNI protocol was in place for the purpose of programme makers and broadcasters being able to reasonably, accurately and efficiently identify individuals who do not wish to be included in programmes. It said that the DNI protocol had proved successful and where individuals followed the protocol they were not included in the programme. It highlighted the fast paced and stressful nature of programme making and the necessity for clear protocols such as this to ensure clarity for all involved and the avoidance of situations such as what had occurred with Ms D. Channel 4 said that the right for broadcasters to show programmes without undue interference should outweigh the limited expectation of privacy in these circumstances.

In conclusion, Channel 4 said that as soon as the programme makers became aware of the issue, immediate steps were taken to remedy the situation. It immediately removed the episode from all Channel 4 platforms including its On Demand service, and the master copy was also amended to ensure that Ms D’s requests were satisfied.

### **Representations on Ofcom’s Preliminary View**

Ofcom prepared a Preliminary View that Ms D’s complaint should be upheld. In commenting on that Preliminary View, Ms D’s main points and those of Channel 4 (in so far as they were relevant to the complaint entertained by Ofcom) were, in summary, as follows.

Ms D stated that she was aware of other people who had attended the “ladies night” and had followed the same procedure as her, in requesting that she not be included in the programme, and they were not included in the programme. Ms D said that it should not have been assumed that she had followed the set DNI protocol. She said that because of this assumption, her request not to be included in the programme was not given due attention.

Ms D said that she was comfortable attending the ladies night and dancing in front of the cameras, in the knowledge that she had been given instructions by the “camera lady” detailing how to ensure she would not be included in the programme. She said that she therefore had no reason to avoid the cameras on the night of filming.

In summary, Channel 4 maintained its position that a DNI protocol was in place and, where adhered to, proved successful for many attendees of the ladies night who did not want to be included in the programme.

Channel 4 said that it was regrettable that, due to a combination of Ms D not following the DNI protocol and a miscommunication within the production team, Ms D was included in the programme against her wishes.

## 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, a transcript of it, and both parties' written submissions and supporting documents.

Ofcom considered Ms D's complaint that her privacy was unwarrantably infringed in the programme as broadcast because footage of her in which she was identifiable was included in circumstances where she had informed the programme makers that she did not wish to appear in it.

The individual's right to privacy has to be balanced against the competing rights of the broadcaster to freedom of expression. Neither right as such has precedence over the other, and, where there is a conflict between the two, it is necessary to focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate. This is reflected in how Ofcom applies Rule 8.1 of Ofcom's Broadcasting Code ("the Code"), which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

In assessing whether or not Ms D's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which she had a legitimate expectation of privacy in relation to the material broadcast. In doing so, Ofcom had regard to Practice 8.6 of the Code which states that, if the broadcast of a programme would infringe the privacy of a person, consent should be obtained before the relevant material is broadcast unless the infringement of privacy is warranted.

Ms D was shown on three occasions in the programme, as set out in the Introduction section above. Although the footage of her included in the programme was brief (approximately 10 seconds in total) and she was not the focus of the footage, her face was shown unobscured and her features were clearly visible. In Ofcom's view, Ms D was identifiable from the footage included in the programme, in particular to people who knew her.

Having established that Ms D was identifiable in the programme as broadcast, Ofcom considered whether there was something private and personal about attending a "ladies night" and, if so, whether Ms D could have a legitimate expectation of privacy in the footage of her attending the event.

Ofcom considered that objectively there is some sensitivity around a raucous ladies night event, which in this case was ticketed and included adult entertainment (male

strippers) and significant alcohol consumption, and attendance at it could therefore reasonably be regarded as private and personal to some extent. Ofcom acknowledged that an individual may therefore not necessarily want that attendance disclosed in a television programme. Ofcom further noted that the sensitivity and privacy of attending the event was in the complainant's view exacerbated due to the religious beliefs of her family.

Having established that Ms D had a legitimate expectation of privacy in attending the event, Ofcom then went on to consider whether Ms D could have legitimately expected that footage of her attending the event would not be broadcast without her consent. In the specific circumstances, Ofcom thought that this was the case, for the reasons set out below.

- The programme makers, in their approach to the event, themselves appeared to have recognised that certain individuals present at an event such as this might not want to be included in the programme as broadcast and therefore had put the DNI protocol in place.
- Ms D voiced her concerns about being included in the programme during the event and was given information by a camera operator about the steps she had to take to inform the programme makers that she did not want to be included; it was not disputed by Channel 4 in its submissions that the information given by the camera operator was not in line with the DNI protocol.
- Ms D followed this advice and sent an email to that effect to the production company relatively shortly after the event, attaching a picture of herself so that she could be identified; this was a proactive step by an attendee of the event to refuse consent to be included in the programme.
- A representative of the production company replied to the email in writing on the same day, and Ms D therefore assumed that her request would be dealt with and that she would be excluded from the programme as broadcast; in Ofcom's view, this was a reasonable assumption to make.

Ofcom noted from Channel 4's submissions that it accepted that Ms D had indicated to the programme makers (albeit not through the DNI protocol) that she did not want to be shown in the programme. It had said that, because of human error, the relevant members of staff at the production company had not received the photograph of her and therefore had assumed, wrongly, that Ms D was one of the people who had already spoken to them on the night of the event and followed the usual DNI protocol. The footage of Ms D was therefore mistakenly included in the programme.

Ofcom recognised that the inclusion of the footage was the result of human error. Nevertheless, it considered that Ms D had:

- taken steps during the event (and therefore at the time that filming was taking place), to make known her concerns about being included in the programme; this meant that there was no apparent reason as to why she should leave the event; in that respect, Ofcom did not accept Channel 4's submission that Ms D's expectation of privacy in the broadcast of footage of her was materially limited by the circumstances in which she was filmed (that is, in Channel 4's view, openly, without her making any objections at the time to being filmed); and

- subsequently, been given what she reasonably regarded as an unequivocal assurance in writing by the programme makers that she would not appear in the programme.

Ofcom considered that the responsibility for ensuring that Ms D's wish not to appear in the programme was adhered to lay with the programme makers. While the programme makers took steps to satisfy Ms D's requests once they had become aware of her concerns after the broadcast of the programme (Ms D emailed the programme makers on 1 February 2013 and received a response on 11 February 2013), Ofcom considered that overall this was not a sufficient remedy for the intrusion into her privacy given that the footage had already been broadcast on Channel 4.

In the circumstances of this case, Ofcom therefore considered that Ms D had a legitimate expectation of privacy in relation to the identifiable footage which was broadcast without her consent.

Ofcom then went on to consider the broadcaster's competing right to freedom of expression and the need for broadcasters to have the freedom to broadcast matters of public interest without undue interference.

Channel 4 did not put forward a public interest justification for the infringement of Ms D's privacy by including footage of her in the programme, and it acknowledged that a mistake had been made by the programme makers during the editing process. Channel 4 did, however, make clear that it was paramount that any interference with a broadcaster's right to freedom of expression must be proportionate. The DNI protocol had been put in place for the purpose of ensuring that individuals who did not want to be included in the programme were not, and it had proved to be a successful process where individuals followed this protocol. Channel 4 argued that, due to the fast paced and stressful nature of programme making, it was important that individuals follow protocols such as this to ensure clarity for all involved.

While Ofcom considers that the DNI protocol is a positive and responsible arrangement to have in place, the fact that it was not followed in this case cannot be attributed to Ms D. She had taken proactive steps to ask about the process in place to ensure that she would not be included in the broadcast and had been given inconsistent information by employees of the production company. Ofcom believes that Ms D took all reasonable steps to follow the advice she was given. It is therefore Ofcom's view that, in the particular circumstances of the case, on balance, the broadcaster's right to freedom of expression did not outweigh the complainant's legitimate expectation of privacy in the material.

Ofcom noted the comments made by Channel 4 in its representations on the Preliminary View, regarding the fact that Ms D did not follow the particular DNI protocol in place. However, based on the reasons set out above, Ofcom was not persuaded by Channel 4's representations that its decision should be changed.

In conclusion, Ofcom's decision is that Ms D's privacy was unwarrantably infringed in the programme as broadcast.

**Accordingly, Ofcom has upheld Ms D's complaint of unwarranted infringement of privacy in the programme as broadcast.**

## Not Upheld

### Complaint by Mr John Barton Jayne

*Cowboy Traders, Channel 5, 18 April 2012*

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#### Summary

Ofcom has not upheld this complaint of unjust or unfair treatment in the programme as broadcast and of unwarranted infringement of privacy made by Mr John Barton Jayne.

An edition of *Cowboy Traders*, a series which seeks to expose traders who have provided defective goods and services to the general public, focused on Breakaway Homes Limited, a holiday/retirement static mobile home company that sold homes in France and Spain to customers in the UK.

Ofcom found that:

- As regards the complaint of unjust or unfair treatment, Ofcom considered that the programme presented Mr Barton Jayne's side of the story and that the inclusion of a photograph of him did not result in any unfairness. The programme's representation of an attempt to interview Mr Barton Jayne was not unfair. Further, while the programme may have suggested that Mr Barton Jayne's activities might be further investigated by the Serious Fraud Office, it did not suggest that Mr Barton Jayne had in fact committed fraud. Ofcom therefore found that the programme was not unfair to Mr Barton Jayne.
- Mr Barton Jayne did not have a legitimate expectation of privacy in connection with obtaining filmed footage of a property included in the programme, as he stated he did not own the property and was not present at the property at the time at the time of the filming.
- Mr Barton Jayne did not have a legitimate expectation of privacy in relation to the inclusion of a photograph of him in the programme, because this image did not reveal any private or sensitive information about him and was available on a public page on Facebook.
- Mr Barton Jayne did not have a legitimate expectation of privacy in relation to the presenter obtaining information from the police about a telephone call made to the police, because Mr Barton Jayne had asserted that it was not him who had called the police.

#### Introduction

On 18 April 2012, Channel 5 broadcast an edition of *Cowboy Traders*, a series which seeks to expose traders who have provided defective goods and services to the general public. The programmes, presented by Mr Dominic Littlewood and Ms Melinda Messenger, focus on a particular individual or family who have been let down by a trader, and may also include other people who have been affected by the same trader.

This particular edition focused on Breakaway Homes Limited ("BHL"), a holiday/retirement static mobile home company that sold homes in France and Spain

to customers in the UK, and alleged that the company had taken *“huge sums of money from pensioners for homes that never arrived, in some cases leaving them reliant on family or the state for a place to live”*.

The programme included contributions from a number of couples who said they had bought mobile homes abroad for their retirement, but that the homes had never materialised. Mr and Mrs Joe and Linda Stewart told the programme that they had paid £51,250 to BHL for a mobile home, but that the company had *“folded”*, forcing them to return to the UK with nowhere to live. The programme explained that BHL had gone into *“liquidation”* before Mr and Mrs Stewart could pursue the matter through court proceedings.

Mr Littlewood was then shown investigating who was *“behind”* BHL and naming Mr Barton Jayne, referred to in the programme as *“John Jayne”*. Throughout the programme, Mr Littlewood was shown following up information on the *“trail”* of Mr Barton Jayne who the presenter described as a *“trader whose company took thousands from retirees for mobile homes that were never delivered”*. A photograph was shown of a man flanked by two young women. Mr Littlewood said: *“This must be our man – John Jayne of Breakaway Homes Limited – but this picture isn’t the only lead I have to go on”*.

The programme then introduced Mr and Mrs Thompson, who said that they had paid BHL £62,000 for a mobile home in Spain in 2007. The programme said that, although Mr Barton Jayne did not own the plot of land on which the mobile home would be situated, he took a fee for reserving the plot. The delivery of the mobile home had been planned for 2009, but BHL had gone into administration in 2008. The programme said that the couple had been reduced to living out of suitcases and that Mr Thompson had gone back to work to fund their eventual return to Spain.

The programme then showed Mr Littlewood travelling to France to speak to Mr Peter Jefferson-Green, who had lost thousands of pounds on a BHL mobile home that never arrived. Mr Littlewood said that Mr Jefferson-Green had discovered from BHL’s administrators that there were 33 other individuals who had been affected financially by BHL. Mr Jefferson-Green was shown saying: *“I despise the man [i.e. Mr Barton Jayne] now for what he’s done”*.

The programme included footage of a meeting the programme makers had set up with 21 of the 33 people affected by BHL going into administration<sup>1</sup>. The programme included contributions from some of the people in attendance and Mr Littlewood was shown making notes on a whiteboard. He said: *“By my reckoning, John Jayne took over £1 million from 33 individuals over a two-year period”*. Mr Littlewood was then shown *“tracking down”* BHL’s suppliers to work out what had happened to the money.

Later in the programme, Mr Littlewood was shown visiting the Monte Vista site<sup>2</sup> in Spain where, he said, Mr Barton Jayne had arranged for some of the mobile homes to be installed. The programme included a copy of the brochure describing what the site would be like after development. However, the programme stated that the site was strewn with rubbish and close to a main road. Mr Littlewood was shown

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<sup>1</sup> Mr Barton Jayne disputed that 21 individuals had attended this meeting and said only five individuals or couples had attended.

<sup>2</sup> A caravan/mobile home park.

speaking to a local farmer, who said that the site did not have planning permission for permanent residency, but only for use as a campsite.

Mr and Mrs Phil and Pam Reilly were then introduced on the programme and said that they had paid £92,000 to BHL, of which £29,000 was for the lifetime rent on the Monte Vista site. However, the programme said that the delivery of their mobile home was delayed by 10 months and that when they eventually moved in to it, the site was far from ready. The programme said that Mr Barton Jayne had given them the option of another plot elsewhere in Spain and had told the programme makers that Mr and Mrs Reilly had not suffered any financial loss and were happy where they were. However, Mr Littlewood said that Mr Barton Jayne had told Mr and Mrs Reilly to ask the owner of the site for a refund of their rental money, even though the site owner had told the programme makers that he had only received a portion of the money.

The programme then showed Mr Littlewood discussing the issue of planning permission with a man who appeared to be an official from the local town hall near the Monte Vista site. Mr Littlewood said that the site had never been allocated permission for permanent residents and that BHL had been marketing the site as ideal for retirement, but that nowhere in the brochure had it been stated that a person could not live there permanently.

In the final section of the programme, Mr Littlewood stated that the programme makers had written to Mr Barton Jayne requesting an interview. He said that Mr Barton Jayne had written several letters back in which he said he would be willing to speak to the programme makers “off camera” but had refused to meet with Mr Littlewood himself. Mr Littlewood then paraphrased a four page letter that Mr Barton Jayne had sent to the programme makers in which he addressed the allegations made about him in the programme. Mr Littlewood said that the letter indicated that Mr Barton Jayne had moved to France, but that Mr Littlewood hoped that *“this is a bluff”* and had asked his *“surveillance team to keep an eye on his UK address”*.

The programme included footage of Mr Littlewood and the programme makers knocking on the front and kitchen doors of a property in the UK the programme referred to as belonging to Mr Barton Jayne. Mr Littlewood commented on the Range Rover car parked on the property and its private number plate (which was obscured). Mr Littlewood was shown exploring the exterior of the building and commenting on the swimming pool area and the garden patio. The programme makers also included footage of someone filmed through a downstairs window.

Other footage included in the programme showed the police who had been called in response to the programme makers’ presence at the property. Mr Littlewood was heard asking one of the police officers who had made the call to them and the name *“John Barton James”* was heard over the police officer’s radio. The police were also shown calling the telephone number that had lodged the complaint and a telephone could be heard ringing from inside the house.

The relevant part of the programme featuring Mr Littlewood’s investigation into Mr Barton Jayne concluded with Mr Littlewood summing up Mr Barton Jayne’s responses to the allegations made in the programme.

## **Summary of complaint and the broadcaster’s response**

### **Unjust or unfair treatment**

Mr Barton Jayne complained that he was treated unjustly or unfairly in the programme as broadcast in that:

- a) Material facts were presented, disregarded or omitted in a way that portrayed Mr Barton Jayne unfairly. In particular, Mr Barton Jayne complained that:
- i) Despite losing his long-standing and highly successful business that he had run for nearly 30 years at the height of the recession in 2008 and having not had a business failure before that, Mr Barton Jayne said that the programme was broadcast in such a way that it portrayed him as “a rogue, a conman, a fraudster and a ‘Cowboy Trader’”.

Mr Barton Jayne said that BHL was placed into administration three years before the programme was made. However, Mr Littlewood implied directly that Mr Barton Jayne had committed fraud in that Mr Littlewood wanted to report him to the Serious Fraud Office (“SFO”).

In response, Channel 5 said that the programme makers spoke to 21 creditors of BHL whose lives had been adversely affected when the company went into administration and subsequently liquidation. The programme makers had also obtained information about the administration of BHL from the administrator’s report in January 2010 and from Mr Jefferson-Green who was on the creditors’ committee and spoke to the administrators. The programme makers also obtained information from a mobile home manufacturer that Mr Barton Jayne did business with and sought information from Mr Barton Jayne.

Channel 5 said that the programme makers took reasonable care to summarise the relevant information provided by Mr Barton Jayne in lengthy responses to the claims made on these issues in the programme.

In relation to the Monte Vista site, Channel 5 said that the programme makers obtained information from a local farmer about the planning situation and followed that up with a visit to the local authority. They also obtained a letter from the local authority confirming that there had never been residential planning permission for the site. Mr Barton Jayne’s responses to this information were also fairly included in the programme.

As regards the rent for life scheme at Monte Vista, Channel 5 said that the programme makers interviewed Mr and Mrs Reilly and fairly represented the information they received. Mr Barton Jayne’s responses were also fairly represented.

Channel 5 said that the programme referred to the fact that BHL had been a highly successful business and that it went into administration in December 2008. The exact length of time that Mr Barton Jayne had run his business was not directly relevant to viewers’ understanding of the point that BHL had been highly successful and that only a small percentage of customers were unhappy. It said that Mr Barton Jayne’s point that he had not had a business failure before was not relevant to the issues discussed in the programme and that there was no obligation to refer to this. Channel 5 said that, in any event, in December 2008 when BHL went into administration, Mr Barton Jayne had also been a director of another company, Breakaway Spain Limited (“BSL”). BSL owned land in Spain which Mr Barton Jayne had hoped to develop as a campsite for mobile homes. According to the administrators of BHL, BSL owed BHL £1,469,002 but could not repay BHL until the land was sold. BSL

was not a business success and its inability to repay BHL was one reason most creditors of BHL received no significant repayment in BHL's liquidation. Channel 5 said that the programme made it clear that Mr Barton Jayne had lost his business at the height of the recession and clearly reflected Mr Barton Jayne's view that the administration of BHL was the result of the recession.

Channel 5 said that the programme did not accuse Mr Barton Jayne of being a "conman" or a "fraudster" and never used those words. Nor did Mr Littlewood imply that Mr Barton Jayne had committed fraud. In an annotated transcript of the programme submitted in support of his complaint to Ofcom, Mr Barton Jayne highlighted comments that he felt insinuated this. However Channel 5 said that Mr Barton Jayne's interpretation was not that which viewers would have placed on the words.

Channel 5 acknowledged that the programme was one of a series about "cowboy" traders. The introduction made it clear that the series targets "*rogues and rip off merchants*" and that by referring to "*Cowboy Trader*" or "*rogues*" it meant "*dodgy traders of every description*" including "*reckless salesmen*". Channel 5 said that Mr Barton Jayne was included in the series because, notwithstanding the role of the recession in the collapse of BHL, information given to the programme makers by creditors of the company suggested that misleading and irresponsible business practices had also played a role. Channel 5 said that, in any event, the programme fairly reflected Mr Jayne's view that he is not a cowboy trader.

As regards points made by Mr Barton Jayne on his annotated transcript of the programme, Channel 5 said that the programme's references to him taking money from clients were innocuous and simply referred to the money received by the business in the course of its dealings with clients. It said that the reference, by the presenter, to the suggestion there may have been other reasons (beyond the administration) for Mr and Mrs Stewart not receiving their mobile home was subsequently borne out by Mr Barton Jayne's. Channel 5 said that Mr Barton Jayne confirmed that factors such as transport problems and problems with a manufacturer also played a part. Channel 5 said that the suggestion that Mr Barton Jayne took "*a bucket load of money*" was a fair description of the sum of over £1million owed to private creditors and the amount the people at a meeting shown in the programme had paid BHL, namely £273,000.

Channel 5 said that at no point was there any suggestion that funds had been misappropriated. The presenter's comment that none of the information Mr Barton Jayne had provided "*explains what he actually did with people's cash*" simply indicated that Mr Barton Jayne's responses did not fully and clearly explain what he had done with the money (over £750,000) paid to BHL by the 21 people the programme makers spoke to.

Mr Littlewood's statement (that Mr Barton Jayne had "*done the cruellest thing to all these people whose retirement dreams his company wrecked - he's retired to France*") did not infer that Mr Barton Jayne had misappropriated funds, but was meant to highlight the disparity between Mr Barton Jayne's position and that of some of his customers. Mr Barton Jayne had retired and now lived in France, whereas for example Mr and Mrs Stewart were not able to retire to France and ended up not owning a home at all. Similarly, when Mr Littlewood referred to seeing "*a nice new shaped Range Rover*" at the property the programme said was Mr Barton Jayne's, this was also intended

to highlight the disparity between Mr Barton Jayne's situation and that of some of his customers. Channel 5 said that these comments did not carry any inference of misappropriation of client's money.

When Mr Littlewood stated that he was going to give the evidence he had found about Mr Barton Jayne to the SFO, this was not an allegation that Mr Barton Jayne had committed fraud, merely that Mr Littlewood felt that Mr Barton Jayne should be investigated and should provide answers, given that he had not offered an explanation for why people who had paid money in advance did not receive their homes. It also said that there was evidence to suggest that Mr Barton Jayne had not placed orders for some people who had paid in full, although he denied this. Given that the sum of money owed to private creditors in the administration of BHL was over £1 million, the programme makers had passed on information to the SFO.

- ii) Mr Barton Jayne said he had unequivocally informed the programme makers that he had been the subject of an extremely thorough investigation by the Insolvency Agency, which cleared him of any wrongdoing. Mr Barton Jayne said that Mr Littlewood contradicted this in the programme, stating that it was untrue that he had been exonerated and that the Insolvency Agency would not have cleared him. Mr Barton Jayne said that this portrayal was unfair given that he had answered comprehensively every allegation that was made about him to the programme makers and had provided them supporting evidence where possible.

In response, Channel 5 said that the programme accurately represented Mr Barton Jayne's view that the Insolvency Service had absolved him of any wrongdoing and the Insolvency Service's position that it would not have told Mr Barton Jayne that he was completely exonerated. Channel 5 agreed that Mr Barton Jayne had given the programme makers very lengthy responses, but said that these responses did not comprehensively answer all the allegations satisfactorily and were supported by very little documentation.

- iii) Mr Barton Jayne said that representations and correspondence sent by him to the programme makers were either ignored or treated with contempt by being used against him rather than to represent a balanced view. Mr Barton Jayne also said that the programme makers should have contacted other available sources "to present fair and just treatment of the subject", for example: the administrator of BHL; the company accountants; mobile home dealers with whom BHL dealt with; happy BHL clients; and, personal and business contacts of Mr Barton Jayne who have provided written testimonials as to his good character and reputation. Mr Barton Jayne said that all this was ignored by the programme makers.

In response, Channel 5 said that both it and the programme makers spent many hours reading through and summarising dozens of pages of responses from Mr Barton Jayne, all of which were carefully and comprehensively represented in the programme where relevant. Channel 5 said that the programme pointed out instances where other evidence contradicted Mr Barton Jayne's statements, or where his statements did not fully explain matters. Channel 5 disputed Mr Barton Jayne's suggestion in his annotated transcript of the programme that Mr Littlewood's tone was mocking when explaining Mr Barton Jayne's responses. Channel 5 also said that Mr Barton Jayne was, on several occasions, given the opportunity to explain his position in a filmed interview, but declined to do so.

Channel 5 said that a large section of the programme was given over to Mr Barton Jayne's comments and explanations. The information he provided was not treated in a cursory or derisory manner and that the programme only cast doubt on the truthfulness of the information where there was a conflict of evidence.

Channel 5 said that it was correct that the programme makers did not contact the BHL administrators, as they were aware that the administrators would have been unlikely to give them any information due to data protection and client confidentiality. The programme makers were not able to speak to BHL's accountant as they were informed that the accountant that had looked after BHL had left the firm. In any event, the programme makers were aware that the accountant would have been unlikely to give them any information due to data protection and client confidentiality. Mr Barton Jayne neither offered the programme makers access to nor provided them with any evidence from the administrator or his accountants that he felt would have been relevant to his responses. The programme makers did, however, read and analyse all publicly available company records and insolvency documents.

Channel 5 said that the programme makers had contacted other mobile home dealers who had made negative comments about Mr Barton Jayne's business practices, but that these had not been included in the programme. The programme makers also contacted a number of manufacturers including Willerby (referred to above), Swift (who said they had no record of an order referred to by Mr Barton Jayne, did not offer Mr Barton Jayne credit and insisted on payment before releasing caravans to him) and Pemberton (who said that after June 2008 they realised BHL had a problem and stopped accepting orders from them and that their payment terms were always "payment up front").

Channel 5 said that Mr Barton Jayne did not put the programme makers in touch with or provide any testimonials from any of BHL's happy customers, despite numerous opportunities to do so, that the programme did represent his position that *"over the years, Breakaway sold over 5000 homes, and the small percentage of complaints only came at the end of its life"*. It would therefore have been clear to viewers that BHL had many customers who did not complain.

Channel 5 said that the programme makers received a testimonial to Mr Barton Jayne's character from his wife, reiterating information already given to them by Mr Barton Jayne and giving some private information about his health. It also received a letter from a lay preacher, the Reverend Steven Duddy, which was written to Mr Barton Jayne's friends, requesting them to write testimonials of his character. The programme makers never received any such testimonials. The programme makers examined both letters, but could not see any relevant information appropriate to include in the programme that was not covered elsewhere in Mr Barton Jayne's responses.

- iv) The programme's inclusion of a photograph of Mr Barton Jayne flanked by two young women portrayed him unfairly "as some kind of playboy". Mr Barton Jayne said that the two women in the photograph were the girlfriends of his two sons and it had been taken at the 21<sup>st</sup> birthday party of one of his sons.

By way of background to the complaint, Mr Barton Jayne said that the manner in which he was portrayed in the programme had the effect of damaging his character and reputation. He said that the use of a picture of him wearing a dinner jacket with “two glamorous blonde ladies” was deliberately selected to give the impression of someone living the good life whilst other people lost everything as a result of alleged fraudulent misappropriation of clients’ funds.

In response, Channel 5 said that there was no basis for Mr Barton Jayne’s reading that the photograph portrayed him unfairly “as some kind of playboy” and that the programme made no comment about him being a playboy.

It also said that the picture used was the only clear image of Mr Barton Jayne available to the programme makers. It said that it was in the public interest to identify Mr Barton Jayne, both to avoid him being confused with other people with similar names and because it was unclear whether he had in fact retired from the mobile home industry. It said that that the public would wish to know what Mr Barton Jayne looked like so they could avoid doing business with him if they wished. The other individuals in the photograph were blurred in the programme to preserve their anonymity.

Channel 5 said that any damage to Mr Barton Jayne’s character and reputation was only as a result of the fair and accurate representation of the facts and Mr Barton Jayne’s responses. Channel 5 said that it should also be noted that Mr Barton Jayne and BHL had already been the subject of a BBC investigative programme *Inside Out*, which was still available on the internet. Therefore many people would already be aware of Mr Barton Jayne’s association with BHL and so any damage would therefore be very limited.

- v) Bullying and threatening tactics were used by the programme makers in making the programme and the presentation of these tactics in the programme as broadcast was misleading and portrayed Mr Barton Jayne unfairly.

In response, Channel 5 said that the programme makers were nothing but professional and civil to Mr Barton Jayne, as reflected in all their correspondence with him. Mr Barton Jayne had used bullying tactics throughout, making threats, including possible legal action.

In relation to the attempt to interview Mr Barton Jayne, Channel 5 said that the programme makers knew that Mr Barton Jayne was at the house on 2 March 2012, because he was observed by their surveillance team. It was possible that Mr Barton Jayne left the property overnight on either the evening of 2 March 2012 or the following day, as they did not carry out surveillance on the property overnight. The programme makers were told by the police that it was Mr Barton Jayne who had called them on 4 March 2012 and when the police called the number from which the call to the police had been made the phone rang inside the house. Mr Jonathan Barton Jayne, Mr Barton Jayne’s son, was clearly not in the house, as he was filmed arriving at the scene later on. Channel 5 said that Mr Barton Jayne’s denial that he was present on this occasion was also included in the programme.

Channel 5 said that the programme gave a condensed but accurate depiction of the process the programme makers went through trying to get a satisfactory response from Mr Barton Jayne, namely that the programme makers had written to Mr Barton Jayne, who had responded several times,

but had not satisfactorily answered the core allegations. He had agreed to an interview off camera but said he was in France with no plans to return soon and the surveillance team had then seen him days later at his house in the UK. The programme makers concluded that Mr Barton Jayne was attempting to avoid giving them a satisfactory answer and had no intention of attending an interview off camera and therefore, as a last resort, the programme makers attempted to get an interview with Mr Barton Jayne at his house but failed to do so.

Channel 5 said that this process was accurately portrayed in the programme, and therefore it did not believe that the presentation of the “tactics” was misleading.

#### Unwarranted infringement of privacy

Mr Barton Jayne complained that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that:

- b) The programme makers drove two vehicles along his private drive and filmed the private areas of his property including the garden, tennis courts, swimming pool, and through a window into a room. This was despite being advised not to by his son before the filming occurred.

By way of background, Mr Barton Jayne said that the filming had terrified “a vulnerable relative” who was in the house at the time and scared his son and his partner who returned home to find the programme makers positioned around the house. Mr Barton Jayne said that his son had taken refuge in an outbuilding from where he called the police.

In response, Channel 5 said that on 24 February 2012, Mr Barton Jayne informed the programme makers that his home now belonged to his son. He asked the programme makers to respect the privacy of his son and his family by not visiting the property and said that no unauthorised vehicles were allowed on the farm. Mr Barton Jayne went on to state that he now lived in France and that he was therefore only a visitor when he was at his former home. On 28 February 2012, Mr Barton Jayne again emailed the programme makers and again referred to the property as his son’s farm.

Channel 5 said that, while it accepted that a person could have a legitimate expectation of privacy in relation to their home, it was clear from Mr Barton Jayne’s emails that he did not consider the property to be his home. He would therefore not have had a legitimate expectation of privacy in relation to the property.

In any event, Channel 5 said that there was nothing particularly private about the exterior of the property, which was visible from a public bridleway. It was also featured in the BBC’s *Inside Out* programme referred to above, there was a photograph of the property on the internet and a simple search for “John Barton Jayne Sussex” on the internet produced a detailed view of the property.

Channel 5 said that it did not believe that there was any footage filmed through a window into a room. Channel 5 said that if this element of the complaint related to the enhanced footage of a person seen at a window inside the house, then it accepted that a person in a private place would usually have a legitimate expectation of privacy. However, as Mr Barton Jayne had categorically denied

that he was inside the house at the time and stated that he was in France, Channel 5 said that his privacy could not have been infringed by the filming of this section of footage.

Channel 5 said that should Ofcom consider that Mr Barton Jayne had a legitimate expectation of privacy in relation to all or part of the filming which took place at Bentons Place Farm on 4 March 2012, Channel 5's view was that the filming was warranted in the public interest, for the reasons set out above where Channel 5 described the steps, considerations and reasons for attempting to doorstep Mr Barton Jayne.

Mr Barton Jayne also complained that his privacy was unwarrantably infringed in the broadcast of the programme in that:

- c) Footage of his property was included in the programme without his permission.

As set out in the response to head b) above, Channel 5 said that it was clear that the property was not Mr Barton Jayne's home and that he did not therefore have a legitimate expectation of privacy in relation to it. In any event, what the property looked like was something that was already in the public domain, as set out in response to head b) above.

Channel 5 said that, if Ofcom considered that Mr Barton Jayne had some expectation of privacy in relation to the property, the broadcast of the footage of Mr Littlewood's attempts to speak to Mr Barton Jayne was warranted in the public interest.

- d) A photograph of Mr Barton Jayne was shown in the programme without his permission.

Channel 5 said that it did not consider that there was a legitimate expectation of privacy in relation to the mere disclosure of a person's image. As the photograph of Mr Barton Jayne merely disclosed what he looked like and did not disclose any information of a personal or sensitive nature or show him in an embarrassing situation, Channel 5 said that it did not consider that he had a legitimate expectation of privacy in relation to the broadcast of the photograph.

Channel 5 said that it was apparent that Mr Barton Jayne was aware that the photograph was being taken and had consented to being photographed. While Mr Barton Jayne may not have expected the photograph to have featured in a television programme, it disclosed nothing about his appearance that would not be apparent to members of the public who saw him going about his business and nothing more than was apparent from the photograph of Mr Barton Jayne which appeared in the BBC's *Inside Out* programme. The photograph disclosed no significant information in respect of which Mr Barton Jayne had a legitimate expectation of privacy.

In any event, Channel 5 said that the photograph of Mr Barton Jayne was already in the public domain. The programme makers obtained the photograph from a public Facebook page (albeit the page has now had its privacy settings altered).

Channel 5 said that, if Ofcom took the view that Mr Barton Jayne had a legitimate expectation of privacy in relation to the photograph and that his privacy was infringed by the inclusion of the photograph in the programme, its inclusion was warranted in the public interest. It was important for the programme to identify Mr

Barton Jayne to viewers so that there could be no confusion with anyone with the same or similar name. It was also important for viewers to be able to recognise Mr Barton Jayne as it was unclear whether he had retired from the mobile home industry and it was in the public interest for viewers to know what he looked like so that, if they wished to, they could avoid doing business with him.

- e) Footage of the programme's presenter obtaining from the police the identity of the person who had apparently called them was included in the programme.

By way of background, Mr Barton Jayne said the programme showed Mr Littlewood asking one of the police officers who had reported the incident to them and it was claimed that it was Mr Barton Jayne who had done so. In fact, this was incorrect and it was Mr Barton Jayne's son who had called the police.

In response, Channel 5 said that it did not agree that Mr Barton Jayne's privacy was unwarrantably infringed by the inclusion of footage in the programme which disclosed that Mr Barton Jayne had called the police. As Mr Barton Jayne alleged it was his son and/or a relative who called the police to the property, even if it could be said that an individual had a legitimate expectation of privacy in relation to their identity when calling the police, it would be his son and/or the relative who would have such an expectation of privacy. Channel 5 said that even Mr Barton Jayne had a legitimate expectation of privacy in this respect, it was warranted to broadcast the footage in the public interest.

### **Representations on Ofcom's Preliminary View**

Ofcom prepared a Preliminary View in this case that Mr Barton Jayne's complaint of unjust or unfair treatment should be upheld in part, but his complaint of unwarranted infringement of privacy should not be upheld. In its Preliminary View, Ofcom provisionally concluded that the cumulative effect of the comments made about Mr Barton Jayne in the programme and Mr Littlewood's reference to providing "evidence" to the SFO gave the impression to viewers that Mr Barton Jayne had engaged in fraudulent activities.

In commenting on the Preliminary View, Mr Barton Jayne submitted a considerable amount of material to Ofcom. Ofcom considered all this material but noted that many of his further representations were not relevant to the issues raised by the entertained complaint. Ofcom sets out below only the main points made by Mr Barton in his submissions on the Preliminary View that were directly relevant to the complaint responded to by the broadcaster and considered by Ofcom.

Mr Barton Jayne's and Channel 5's representations were, in summary, as follows.

#### **Mr Barton Jayne's representations**

Mr Barton Jayne said that inasmuch as his complaint has only been partially upheld in the Preliminary View, it did not alter the fact that Ofcom acknowledged that he had been unfairly treated. Mr Barton Jayne said that his reputation was of the highest importance to him and his family.

Mr Barton Jayne said that the conclusion of Ofcom's Preliminary View could only be based upon the evidence available and on its understanding of relevant allegation and statements portrayed in the programme. In certain respects, Ofcom only had the information that appeared in the programme and/or was subsequently provided to it by Channel 5, but that this was often misleading and inaccurate. Mr Barton Jayne

said it was quite understandable and reasonable that there were features of the Preliminary View that he could not agree with and needed to comment upon.

Mr Barton Jayne said that he had never been a “cowboy trader”, a “rogue”, a “rip off merchant”, a “dodgy tradesman”, or a “reckless salesman”. He said that he refuted any allegation against him of this nature and bitterly resented the suggestion that he might be described as being in such a category. However, he said that such allegations were made, intentionally and aggressively in the programme, which was unfair and unbalanced. Mr Barton Jayne said that the very title of the programme prejudged him. He said that it may have been a different matter had the programme set out to establish whether or not he was a “cowboy trader”, but it did not. The programme started by characterising him as a “cowboy trader” and, according to Mr Barton Jayne, sought to entertain viewers by establishing its case in a very one-sided way.

### Channel 5's representations

In relation to head a) i) of Mr Barton Jayne's complaint that Ofcom had upheld in the Preliminary View (i.e. that the programme unfairly gave the impression that Mr Barton Jayne had engaged in fraudulent activities), Channel 5 said that it was important to consider the context in which Mr Littlewood's comments were made (see head a) iii) of the “Decision” section below for the full comments made in the programme). It said that Mr Littlewood's reference to the SFO was made after he had failed to interview Mr Barton Jayne at the UK address and so had been unable to seek his response to the unanswered questions. It said that Mr Littlewood was clearly frustrated that he had been unable to obtain answers from Mr Barton Jayne and thought that the police, or in this case the SFO, might have more luck. There was certainly no allegation made that Mr Barton Jayne was guilty of, or *“had been engaged in activities that were dishonest and even fraudulent”*. At its highest, Channel 5 said that Mr Littlewood had expressed his opinion that from the information set out in the programme and from the other enquiries made by the programme makers, he considered that there were sufficient grounds for the authorities to investigate what had occurred.

In addition, Channel 5 said that Mr Littlewood's suggestion was immediately followed in the programme by a summary of Mr Barton Jayne's responses to the programme maker's enquiries, including that he had not acted improperly in any way and had been absolved of any wrongdoing by the Insolvency Service.

Channel 5 said that Mr Littlewood was entitled to express his opinion that there were sufficient grounds for the authorities to investigate. Mr Barton Jayne's responses were included and it considered that viewers had sufficient information to decide whether they agreed or disagreed with Mr Littlewood.

In relation to the references that Mr Barton Jayne had done well for himself, the mansion and *“new shaped Range Rover”*, Channel 5 said that these references were made by Mr Littlewood to highlight the disparity between Mr Barton Jayne's circumstances and those of some of his customers. The references did not suggest or encourage viewers to believe that Mr Barton Jayne had been engaged in activities that were dishonest or fraudulent. It said that the references were put into context by the inclusion in the programme of information provided by Mr Barton Jayne about his own financial situation.

Channel 5 said that it would have been apparent to viewers from the information provided by Mr Barton Jayne that the company had in the past been very successful,

selling over 5,000 homes (which would account for the house and car), but that in the last two years of the company's existence he had put substantial sums of money into the business and taken nothing out, leaving him as the company's biggest creditor.

In the circumstances, Channel 5 said that it did not consider that these references would have encouraged the impression that Mr Barton Jayne had been engaged in activities that were dishonest or fraudulent.

Channel 5 also said that the references in the programme to a "*Europe wide search*" and to the programme being "*on the trail of a trader whose company took thousands from retirees...*" (and referred to in Ofcom's Preliminary View) were likely to have given viewers the impression that Mr Barton Jayne had been hiding in France and evading taking responsibility for his company's failings. In fact, Channel 5 said that although he was not willing to be interviewed on camera, he had engaged in lengthy correspondence with the programme makers from the address they believed was his home address. It was evident from this, said Channel 5 that the programme makers did not have to track him down as the programme suggested.

Channel 5 said that the "*Europe-wide search*" referred to the visits Mr Littlewood had made to France and Spain to find information, and did not refer to a search for Mr Barton Jayne. In addition, it said that the reference to being "*on the trail of a trader*" in the context in which it was made did not refer to efforts to track down Mr Barton Jayne, but clearly related to the initial investigation, rather than any search for the trader.

Channel 5 said that at no point did the programme give the impression that Mr Barton Jayne had been hiding in France and evading taking responsibility for his company's failings. Quite the contrary, in fact the programme made clear that it was checking Mr Barton Jayne's claim to be in France with no immediate plans to return to the UK to be interviewed. It was for that reason that Mr Barton Jayne's UK address was "staked out" by the programme makers and the programme subsequently made clear that for a number of reasons it believed he was in the UK. It was stated in the programme that the programme makers believed Mr Barton Jayne might have tried to mislead them by stating he was in France with no immediate plans to return to the UK, but it was clear that the programme makers were aware of Mr Barton Jayne's UK address and had no difficulty in locating it.

### **Representations on Ofcom's first Adjudication**

Having considered the representations made by each of the parties above, Ofcom issued its first Adjudication (which was not published) to the parties on 24 April 2013. Ofcom decided in the first Adjudication to uphold in part the complaint in line with the view that it had initially taken in the Preliminary View.

Channel 5's and Mr Barton Jayne both made representations on the first Adjudication. These are set out in summary below.

#### **Channel 5's representations**

Channel 5's representations were received on 26 April 2013. The broadcaster said that the meaning that Mr Barton Jayne was guilty of fraud was incapable from arising from the programme and that to find otherwise would be inconsistent with relevant case law. It said that such a precedent would cause serious difficulties for programme makers producing broadcasts of this type and would have ramifications which would affect a range of broadcasters, not just Channel 5.

### Mr Barton Jayne's representations

Mr Barton Jayne made representations on 29 April 2013, 3 May 2013 and 7 May 2013, both in relation to Channel 5's representations of 26 April 2013 and on the first Adjudication. Mr Barton Jane said that the programme did give the impression that he had engaged in fraudulent activities and that this was unfair since he had not. He said this impression was created by Mr Littlewood's comments about referring him to the SFO which he said were clearly intended to imply that he had committed fraud, the references to his house and car, and the instances in the programme which implied he had benefited from "taking money" from clients. Mr Barton Jayne said that he had not committed fraud and, if he had, the Insolvency Agency would have elevated their enquiry to the SFO which they did not.

In relation to the case law cited by Channel 5, Mr Barton Jayne said that this did not have any relevance to, or bearing upon, Ofcom's decision in this case. He said that whether or not Channel 5 intended to cast him as a fraudster did not affect the clear impression given by the programme that he had "engaged in fraudulent activities".

Mr Barton Jayne added that programmes of this nature were not of benefit to the public.

Finally, Mr Barton Jayne made some comments on factual accuracy in relation to the Adjudication, to which Ofcom took due regard.

### **Decision**

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

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

In reaching its Decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast, a transcript of it and written submissions and supporting material from both parties including their representations on Ofcom's Preliminary View and first Adjudication.

### Unjust or unfair treatment

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 head a) of complaint detailed below.

- a) Ofcom first considered Mr Barton Jayne's complaint that material facts were presented, disregarded or omitted in a way that portrayed him unfairly in the programme as broadcast.

When considering this head of complaint, Ofcom had regard to whether the portrayal of Mr Barton Jayne 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 outlined in Practice 7.9 of the Code).

The Code recognises the importance of freedom of expression and the need to allow broadcasters the freedom to broadcast matters of a genuine public interest. However, in presenting material that could be regarded as amounting to significant allegations, reasonable care must be taken not to do so in a manner that does not cause unfairness to individuals or organisations. In this particular case, Ofcom considered that it was in the public interest for the programme to investigate and report on the allegations such as those covered in the programme against Mr Barton Jayne but that this needed to be consistent with the requirements of the Code.

- i) Ofcom first considered the complaint that despite Mr Barton Jayne losing the long-standing and highly successful business that he had run for nearly 30 years at the height of the recession in 2008 and having not had a business failure before that, Mr Barton Jayne said that the programme was broadcast in such a way that it portrayed him as "a rogue, a conman, a fraudster and a 'Cowboy Trader'".

Mr Barton Jayne said that BHL was placed into administration three years before the programme was made but that Mr Littlewood implied directly that Mr Barton Jayne had committed fraud and that Mr Littlewood wanted to report him to the SFO.

Ofcom first noted the format of the programme. The story of BHL was introduced by explaining the situation of one of the couples who had not received the mobile home they had paid BHL for, other similar cases were shown and the programme makers pursued the person identified as the programme's "cowboy trader", in this case Mr Barton Jayne, to obtain a response. Mr Barton Jayne's case was made by Mr Littlewood summarising his written responses, as Mr Barton Jayne declined to give an 'on camera' interview for the programme. Ofcom took the view that the programme raised legitimate concerns about the serious problems that had clearly been encountered by some of BHL's clients, in particular those who had paid in full for their mobile homes a significant period before BHL went into administration and about Mr Barton Jayne's as the person in charge of the business BHL. In Ofcom's view it was reasonable and in the public interest for the programme to investigate the reasons for the failure of BHL, Mr Barton Jayne's handling of the problems and the impact on clients of the company.

Ofcom then considered whether Mr Barton Jayne was portrayed as "a rogue, a conman, a fraudster and a 'Cowboy Trader'". Ofcom noted that the programme opened with Mr Littlewood saying:

*"Rogues and rip off merchants beware. We're on a new mission, clamping down on dodgy traders of every profession".*

He later referred to "...bringing Britain's Cowboy Traders a world of pain". He referred to Mr Barton Jayne several times in the programme as "the cowboy". Ofcom took the view that, in terms of the actual words used in the programme, Mr Barton Jayne was specifically referred to as a "cowboy" and as one of the "rogues", "rip off merchants" and "dodgy traders" that the

programme was investigating. Ofcom noted this is normally how the subjects of *Cowboy Traders* programmes are depicted, and that Channel 5 appeared to accept in its submissions that this was how Mr Barton Jayne was portrayed in the programme and that was how the programme makers intended to portray him. Ofcom noted that in his further submissions Mr Barton Jayne said that he had never been what he described as for example a “cowboy trader” or a “reckless salesman”. He said that he refuted any allegation against him of this nature and bitterly resented the suggestion that he might be described in this way. Ofcom noted statements made in the programme such as *“we’re investigating a company [BHL] that took huge sums of money from pensioners for mobile homes that never arrived”* and *“we’re on the trail of a trader [Mr Barton Jayne] whose company took thousands from retirees for mobile homes that were never delivered”*. These facts were not disputed. The exact reasons why pensioners, retirees and others had lost large sums through giving Mr Barton Jayne’s company their savings might be the subject of discussion. However, it was a matter of fact that these investors did lose considerable sums of money in this way and suffered financial hardship as a result. It was therefore a legitimate matter of journalistic investigation for the programme to look into Mr Barton Jayne’s business practices, and not unfair or unjust to describe him on occasions as a “cowboy” in a series entitled “Cowboy Traders”.

Ofcom noted that Mr Barton Jayne also complained of the programme depicting him as a “conman” or “fraudster”. Channel 5 denied that the programme portrayed Mr Barton Jayne as a “conman” or “fraudster” and said that these words were not used in relation to him.

Ofcom noted that during the course of the programme the programme makers attempted to confront Mr Barton Jayne at a property which they believed he was resident in order to put to him some of the concerns that had been raised. Mr Littlewood was seen approaching the property and knocking on the door. Mr Littlewood commented that *“someone’s done very well for himself”* pointing to the swimming pool, tennis courts and *“new shaped”* Range Rover at the property. Following this, the police arrived at the property and confirmed that *“the informant”* who had called them was John Barton Jayne. Following a brief conversation with the police officers, Mr Littlewood said:

*“I hate not getting my man but the meeting with the boys in blue has given me an idea. He’s ruined a lot of people’s retirement dreams. I’m gonna give all the evidence I’ve found out about him to the Serious Fraud Office and I hope to return the favour”.*

Immediately after this comment, Mr Littlewood reflected Mr Barton Jayne’s position in commentary stating:

*“John Jayne said that he is not a Cowboy Trader and has not acted improperly in any way. He denies there were as many as 33 unhappy clients but says he wrote to all affected clients explaining how extremely sorry and upset he was that they had lost their money because of the recession. Over the years he says Breakaway sold over 5000 homes and a small percentage of complaints only came in at the end of its life. He says he did everything he could to save it, borrowing £750,000 against his own home, injecting additional capital into the business, trying to sell off land he owned in Spain and not taking any money out for himself in the final two years before Breakaway collapsed. He told us it was not him at*

*the property when I visited but an elderly relative, and that it was his son who contacted the police. He also told us an investigation by the Insolvency Service has absolved him of any wrong doing – but I've checked with them and they say they would not have said this".*

Earlier in the programme Mr Littlewood had explained that Mr Barton's Jayne's position was that:

*"He thought his business was going well, with record numbers of people booking inspection trips to look at homes in 2008. But cash flow problems caused by customers not being able to sell their own homes in the recession meant he was forced into administration leaving him the biggest creditor. He blames manufacturers who withdrew their credit facilities and called in payments for his downfall...He also blames other things for why various people's homes didn't arrive on time, including major third party transport problems, customers being indecisive or deferring delivery dates until after the company had folded, issues with specification, discontinuation of models, problems with the manufacturers and issues with the removal of a tree stump".*

In the supporting material provided to Ofcom with his complaint, Mr Barton Jayne highlighted a number of extracts from the programme which he said implied during the course of the programme that he had committed fraud. Mr Barton Jayne said that the following statements implied fraudulent receipt of money:

*"we're investigating a company [BHL] that took huge sums of money from pensioners for mobile homes that never arrived".*

And:

*"we're on the trail of a trader [Mr Barton Jayne] whose company took thousands from retirees for mobile homes that were never delivered".*

He added that the following statement resulted in an inference that there was inappropriate or fraudulent activity:

*"Joe and Linda [Mr and Mrs Stewart] not getting their home could be explained by the company they bought from going into administration, but I suspect there could be other reasons".*

Mr Barton Jayne also complained that the picture of him wearing a dinner jacket with "two glamorous blonde ladies" was deliberately included to give the impression of someone living the good life whilst other people lost everything as a result of alleged fraudulent misappropriation of clients' funds. When the programme makers attempted to interview Mr Barton Jayne at home, Mr Littlewood commented on a "nice new shaped Range Rover" parked at the property and observed that "...someone's done very well for himself. Huge pond, nice, swimming pool, tennis courts, lovely". Mr Barton Jayne felt that this was clearly intended to suggest that he had done very well at the expense of others.

However, Ofcom also noted that during the course of the programme Mr Littlewood did refer to the recession and questioned what role this had played in the administration of BHL in 2008. Mr Littlewood said:

*“Deb and Bill [customers of BHL] told me John Jayne’s company went into administration in December 2008 – so are they...just unlucky victims of a company that hit hard times. I need to dig a little deeper...”*

Further, Ofcom noted the following statement later in the programme:

*“I want to work out if all these people not getting homes was just the unfortunate result of a company going under in the recession, or whether there were other reasons, untoward or not”.*

Ofcom noted that these statements, along with the Mr Barton Jayne’s statement as set out above, clearly indicated that the recession may have played a part in the business’ difficulties. As a whole the programme made clear to viewers Mr Barton Jayne’s position regarding the effect of the recession on his business, and this was reinforced by the two statements set out above, which questioned what effect the recession had had on the business.

Taking the programme as a whole, Ofcom does not consider that Mr Littlewood’s reference to passing the “evidence” to the SFO suggested that Mr Barton Jayne had, in fact, committed fraud. Rather, it suggested that there were questions about BHL activities and its collapse, over and above the effect of the recession on the business or Mr Barton Jayne’s specific explanations that, in its opinion, should be investigated by the SFO. Such factors included that: some customers had paid BHL in full for mobile homes nearly a year before the company went into administration but had not received their homes; a supplier of BHL had not received six orders which customers said that they had placed before the company went into administration; and, an official with responsibility for planning in Spain denied that BHL had permission to build on a site that the company was marketing and selling to customers.

Further, Ofcom did not consider that the comments made about Mr Barton Jayne’s purported wealth, or that the picture of him used in the programme, would necessarily or even been likely to have led viewers to perceive him as being involved in fraud. The portrayal of Mr Barton Jayne’s wealth in the programme may have been understood in the context of his many successful years in business, rather than as a result of fraud. This was made clear to viewers in Mr Barton Jayne’s statement in which he said *“Over the years...Breakaway sold over 5000 homes and a small percentage of complaints only came in at the end of his life”*. Ofcom considered that it was also legitimate for the programme to juxtapose the purported lifestyle of Mr Barton Jayne against those of his customers who, the programme explained, had lost considerable sums due to the collapse of BHL and in some cases, had resulted in their being made homeless.

Ofcom considered that there was no unfairness to Mr Barton Jayne in this respect.

- ii) Ofcom next considered Mr Barton Jayne’s complaint that he had unequivocally informed the programme makers that he had been the subject of an extremely thorough investigation by the Insolvency Agency, which cleared him of any wrongdoing. Mr Barton Jayne said that Mr Littlewood contradicted this in the programme, stating that it was untrue that he had been exonerated and that the Insolvency Agency would not have cleared him.

Mr Barton Jayne said that this portrayal was unfair given that he had answered comprehensively every allegation that was made about him to the programme makers and had provided them supporting evidence where possible.

As regards the programme's reference to an investigation by the Insolvency Service, Ofcom noted that when summarising Mr Barton Jayne's written responses in the programme, Mr Littlewood said that:

*"He also told us that an investigation by the Insolvency Service has absolved him of any wrong doing – but I've checked with them and they say they would not have said this".*

Ofcom noted that in correspondence with the programme makers prior to the broadcast, Mr Barton Jayne referred on a number of occasions to his conduct as a director of BHL having been "thoroughly investigated" by the Insolvency Service and having been "completely exonerated of any wrongdoing". In support of his complaint to Ofcom, Mr Barton Jayne provided a copy of a letter from the Insolvency Service, which stated that "...the Secretary of State does not propose to take proceedings against you pursuant to Section 6 of the Company Directors Disqualification Act 1986 in connection with the affairs of the above named company [Breakaway Homes Ltd]". The letter referred to the fact that Mr Barton Jayne's conduct in relation to BHL may be taken into account should there be a future investigation of his conduct as a director of any other company which entered insolvent liquidation, administrative receivership or administration. In support of its response to the complaint, Channel 5 submitted part of an email from the programme makers to the Insolvency Service, enquiring about Mr Barton Jayne's statement that he had been "completely exonerated". The Insolvency Service responded, stating that "we would not have told Mr Jayne that he was 'completely exonerated'".

In Ofcom's view, neither the letter from the Insolvency Service to Mr Barton Jayne nor the email to the programme makers gave any detail as to the reasons for the decision not to disqualify Mr Barton Jayne. Neither document said that Mr Barton Jayne had been "absolved of any wrong doing". Equally, it was also clear that the further enquiries conducted by the Insolvency Service had not resulted in disqualification proceedings being taken against Mr Barton Jayne by the Insolvency Service.

In these circumstances, Ofcom took the view that the programme's brief summary of the Insolvency Service's enquiries and the correspondence relating to it conveyed to a sufficient degree Mr Barton Jayne's position and that of the programme makers and that viewers would have been in the position to reach their own conclusions on the issue. Ofcom found, therefore, that there was no unfairness to Mr Barton Jayne in this respect.

The complaint that Mr Barton Jayne was unfairly portrayed given that he had answered comprehensively every allegation that was made about him and had provided supporting evidence to the programme makers where possible is dealt with under head a) iii) below.

- iii) Ofcom then considered the complaint that representations and correspondence Mr Barton Jayne sent to the programme makers were either ignored or treated with contempt by being used against him rather than to represent a balanced view. Mr Barton Jayne also said that the programme

makers should have contacted other available sources “to present fair and just treatment of the subject”, for example: the administrator of BHL; the company accountants; mobile home dealers with whom BHL dealt with; happy BHL clients; and, personal and business contacts of Mr Barton Jayne who have provided written testimonials as to his good character and reputation. Mr Barton Jayne said that all this was ignored by the programme makers.

As regards the complaint that representations and correspondence Mr Barton Jayne provided to the programme makers were ignored or treated with contempt, Ofcom noted that having said that Mr Barton Jane had declined to meet him for an ‘on camera’ interview, Mr Littlewood summarised written material that Mr Barton Jayne had provided to the programme makers, saying:

*“He has written us very lengthy letters so I’m gonna paraphrase here. In fact this one’s four pages long. Now listen to this. I have checked and verified that every home ordered by a client for delivery in 2008, now he’s underlined that, was indeed ordered from the manufacturer or a dealer. So what about those six homes that the manufacturer said weren’t ordered from them? Where did they come from? John Jayne says homes were often sourced from dealers who would keep a manufacturing slot open on payment of a deposit, but he says all the homes in question were ordered direct from the manufacturer. He has all the acknowledgements and evidence proving that all orders were placed. Well that’s a bit odd because I have spoken to those manufacturers and they haven’t got any record of those orders at all. Very fishy. John Jayne sent us those order numbers but no evidence that they relate to the homes that we’re talking about. He said he thought his business was going well, with record numbers of people booking inspection trips to look at homes in 2008. But cash flow problems caused by customers not being able to sell their own homes in the recession meant he was forced into administration leaving him as the biggest creditor. He blames manufacturers who withdrew their credit facilities and called in payments for his downfall. But I don’t understand why this would stop him delivering homes that had been paid for in full. Months and in some cases years before his company went under. They also say that delivery problems were the reason Jan Taylor’s home didn’t arrive. He also blames other things for why various people’s homes didn’t arrive on time, including major third party transport problems, customers being indecisive or deferring delivery dates until after the company had folded, issues with specification, discontinuation of models. Problems with the manufacturer and issues with the removal of a tree stump. But none of this explains what he actually did with people’s cash. He had £48,000 of their money. Still to this day, 2012, they have never received anything. He says he hasn’t been to Monte Vista since 2008 and there was never any asbestos, debris or rubbish of any kind when Breakaway were involved. He said anything undesirable on the site today has nothing to do with him. He also says he only ever sold two people rent for life there. His company never marketed it as being complete or residential and customers knew that the site was under development when they bought into the scheme. He claims the site was going to get permission to be developed into the idyllic resort advertised in his brochure – but permission was withdrawn. He says, technically you can’t actually get official permission to live all year round on a mobile home site in Spain – but plenty of people do and many of his customers*

*continue to live happily on other sites. No client has ever been required to leave a site or declined permission to live there all year round”.*

Ofcom further noted that near the end of the programme, having failed to secure an interview with Mr Barton Jayne, Mr Littlewood said:

*“John Jayne said that he is not a Cowboy Trader and has not acted improperly in any way. He denies that there were as many as 33 unhappy clients but says he wrote to all affected clients explaining how extremely sorry and upset he was that they had lost their money because of the recession. Over the years he says Breakaway sold over five thousand homes and a small percentage of complaints only came in at the end of its life. He says he did everything he could to save it, borrowing seven hundred and fifty grand against his own home, injecting additional capital into the business, trying to sell off land he owned in Spain and not taking any money out for himself in the final two years before Breakaway collapsed. He told us it was not him in the property when I visited but an elderly relative, and that it was his son who contacted the police. He told us an investigation by the Insolvency Service has absolved him of any wrong doing – but I’ve checked with them and they say they would not have said this”.*

Ofcom noted that Mr Barton Jayne was invited on a number of occasions by the programme makers to take part in a recorded interview for inclusion in the programme, but declined to do so. He had informed the programme makers that his disinclination was because he did not believe this would result in a fair reflection of his side of the story being included in the programme. Ofcom considered that in the absence of such an interview, it was reasonable for the programme makers to include the summary of Mr Barton Jayne’s written contribution as set out above.

In Ofcom’s view, Mr Littlewood’s presentation of Mr Barton Jayne’s responses summarised sufficiently accurately the significant points Mr Barton Jayne made in extensive correspondence with the programme makers, provided viewers with sufficient information regarding those responses and did so in a fair manner.

As regards Mr Barton Jayne’s point that the programme makers failed to contact other, positive, sources for information, Ofcom took the view that the question of sources was an editorial matter for the programme makers and, in this respect, considered that the programme included to a sufficient degree both sides of the story.

Ofcom considered that there was no unfairness to Mr Barton Jayne in this respect.

- iv) Ofcom next considered the complaint that the programme’s inclusion of a photograph of Mr Barton Jayne flanked by two young women portrayed him unfairly “as some kind of playboy”. Mr Barton Jayne said that the two women in the photograph were the girlfriends of his two sons and it had been taken at the 21<sup>st</sup> birthday party of one of his sons.

Ofcom noted that the programme did not refer to Mr Barton Jayne as a “playboy” and that there was no commentary about the photograph in the programme. Ofcom considered that viewers were likely to have noted that the

picture of Mr Barton Jayne, in which he was wearing a dinner jacket and appeared to be at a celebration, contrasted with the footage of BHL clients who had not received their homes and added to the image presented of him as someone who had done very well whilst clients of his company had, according to the programme, suffered. However, given the absence of any commentary specifically relating to the photograph, Ofcom did not consider that its inclusion in itself resulted in any unfairness to Mr Barton Jayne.

Ofcom considered that there was no unfairness to Mr Barton Jayne in this respect.

- v) Ofcom considered the complaint that the programme makers used bullying and threatening tactics in making the programme and that the presentation of these tactics in the programme as broadcast was misleading and portrayed Mr Barton Jayne unfairly.

Ofcom noted that Mr Barton Jayne did not specify what he meant by bullying and threatening. However, in its view, the correspondence between Mr Barton Jayne and the programme makers was conducted in a professional and courteous manner. Therefore, in considering this element of the complaint, Ofcom considered the tactics Mr Barton Jayne referred to was the manner in which the programme makers attempted to interview him at the property featured in the programme.

Ofcom noted that Mr Barton Jayne and the programme makers had communicated in writing extensively, but that the programme makers felt that Mr Barton Jayne had not answered all the allegations, for example the questions of why people who had paid in full sometime before BHL had gone into administration had not received their mobile homes and why one manufacturer said it had no knowledge of orders that Mr Barton Jayne said he had placed. Ofcom also noted that Mr Barton Jayne had offered an off camera interview but stated that he was in France with no immediate plans to return to the UK. The programme makers had put a surveillance team on what they believed was his property in the UK and believed they had seen him there. In these circumstances, Ofcom took the view that it was reasonable for the programme makers to endeavour to conduct an interview with Mr Barton Jayne and to approach him at the property they believed was his (although, as set out under heads b) and c) below, both he and his son had informed them that the property did not belong to Mr Barton Jayne any longer).

Ofcom also took the view that the programme accurately portrayed the chain of events above that led up to the attempt to interview Mr Barton Jayne at the property.

Subject to the concerns set out at head a) i) above, Ofcom considered that the approach to Mr Barton Jayne and the presentation of this in the programme were reasonable in the circumstances.

Ofcom considers therefore that there was no unfairness to Mr Barton Jayne in this respect.

Having considered each of the individual elements to head a) of Mr Barton Jayne's complaint above, Ofcom has decided that the complaint of unjust or unfair treatment should not be upheld.

### Unwarranted infringement of privacy

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

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

- b) Ofcom first considered the complaint that Mr Barton Jayne's privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that the programme makers drove two vehicles along his private drive and filmed the private areas of his property including the garden, tennis courts, swimming pool, and through a window into a room. This was despite being advised not to by his son before the filming occurred.

By way of background, Mr Barton Jayne said that the filming had terrified "a vulnerable relative" who was in the house at the time and scared his son and his partner who returned home to find the programme makers positioned around the house. Mr Barton Jayne said that his son had taken refuge in an outbuilding from where he called the police.

In considering this part of the complaint, Ofcom had regard to Practice 8.5 of the Code, which states that any infringement of privacy in the making of a programme should be with the person's consent or be otherwise warranted.

In order to establish whether or not Mr Barton Jayne's privacy was unwarrantably infringed in connection with obtaining material included in the programme, Ofcom first assessed the extent to which he had a legitimate expectation of privacy in the circumstances in which the property was filmed.

Ofcom takes the view that a person can have a legitimate expectation of privacy in relation to filming on their private property. Ofcom noted Channel 5's response, in particular that: the exterior of the property was visible from the public bridleway; the property featured on the BBC's *Inside Out* programme; and pictures of the exterior of the property are readily accessible via the internet. Ofcom also noted that the material obtained did not reveal any discernible images of the inside of the property.

In addition, Ofcom noted that although in his complaint Mr Barton Jayne referred to the property as his, in correspondence with the programme makers<sup>3</sup>, Mr Barton Jayne stated that the property at which the programme makers filmed actually belonged to his son, that he now lived in France and that he was not present at the time of the programme makers' visit to the property.

Ofcom took the view that, given the nature of the material obtained, given Mr Barton Jayne's statements to the broadcaster that the property did not belong to him and that he was not present at the property at the relevant time, Mr Barton

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<sup>3</sup> In an email of 24 February 2012, Mr Barton Jayne stated that "The Farm now belongs to my son and is private property".

Jayne did not have a legitimate expectation of privacy in connection with the obtaining of the material which was included in the programme. Given this conclusion, it was not necessary for Ofcom to consider whether any intrusion into Mr Barton Jayne's privacy in connection with the obtaining of material included in the programme was warranted.

Ofcom therefore found that there was no unwarranted infringement of Mr Barton Jayne's privacy in connection with the obtaining of material included in the programme.

Ofcom then considered the complaint that Mr Barton Jayne's privacy was unwarrantably infringed in the broadcast of the programme.

- c) Ofcom considered the complaint that footage of Mr Barton Jayne's property was included in the programme without his permission.

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

In considering whether Mr Barton Jayne's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which he had a legitimate expectation of privacy in relation to the broadcast of footage of the property in the programme.

Ofcom takes the view that a person can have a legitimate expectation of privacy in relation to the broadcast of footage of their private property. As set out under head b) above, Ofcom noted that although in his complaint Mr Barton Jayne referred to the property as his, in correspondence with the programme makers, Mr Barton Jayne stated that the property at which the programme makers filmed actually belonged to his son and that he now lived in France.

In addition, as set out under head b) above, Ofcom noted the nature of the material broadcast was not of a private nature being readily accessible via the internet.

In these circumstances, Ofcom took the view that Mr Barton Jayne did not have a legitimate expectation of privacy in relation to the broadcast of footage of the property. Given this conclusion it was not necessary for Ofcom to consider whether any intrusion into Mr Barton Jayne's privacy in the broadcast was warranted.

Ofcom found that Mr Barton Jayne's privacy was not unwarrantably infringed in the programme as broadcast in this respect.

- d) With respect to the complaint that a photograph of Mr Barton Jayne was shown in the programme without his permission, Ofcom had regard to Practice 8.6 as set out under head c) above.

Ofcom first examined whether Mr Barton Jayne had a legitimate expectation of privacy in relation to the use of the photograph in the programme. It did so with reference to its view under decision head a) iv) above.

Ofcom first noted that the photograph clearly identified Mr Barton Jayne. In addition, Ofcom took into account that the photograph showed Mr Barton Jayne with two other people (whose faces were obscured) and that they appeared to be celebrating. In Ofcom's view, although the photograph may well have contributed to the impression that Mr Barton Jayne had done well financially, in contrast with some of his clients, it did not disclose any private or sensitive information about Mr Barton Jayne. More importantly, Ofcom also noted Channel 5's position that the programme makers obtained the photograph from a publicly accessible page on the social networking site, Facebook. The photograph was therefore, in Ofcom's view, in the public domain at the time it was used in the programme.

Ofcom took the view that there could be circumstances in which the use of material obtained from the internet and already available to the public may give rise to a legitimate expectation of privacy. The simple fact of material appearing on the internet does not mean a broadcaster does not have to consider the requirements of Section Eight (privacy) of the Code. However, in the particular circumstances of this case, and taking into account all the factors set out above, Ofcom considered that Mr Barton Jayne did not have a legitimate expectation of privacy in relation to the photograph.

Taking the factors set out above into account, Ofcom considered that Mr Barton Jayne did not have a legitimate expectation of privacy in relation to the broadcast of this photograph. Given this conclusion it was not necessary for Ofcom to consider whether any intrusion into Mr Barton Jayne's privacy in the broadcast was warranted.

Ofcom therefore considered that Mr Barton Jayne's privacy was not unwarrantably infringed in the programme as broadcast in this respect.

- e) Ofcom then considered the complaint that footage of the programme's presenter obtaining from the police the identity of the person who had apparently called them was included in the programme.

By way of background, Mr Barton Jayne said the programme showed Mr Littlewood asking one of the police officers who had reported the incident to them and it was claimed that it was Mr Barton Jayne who had done so. In fact, this was incorrect and it was Mr Barton Jayne's son who had called the police.

In considering whether Mr Barton Jayne's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which he had a legitimate expectation of privacy in the circumstances in which Mr Littlewood obtained from the police the identity of the caller.

Ofcom noted that the presenter asked one of the police officers at the property who had made the call to the police. The police radio confirmed it was "*John Barton Jayne*".

Ofcom takes the view that a person could have a legitimate expectation of privacy in relation to the broadcast of details provided to police officers. Ofcom noted Mr Barton Jayne's assertion that it was not him who had called the police, but that it was his son. In these circumstances, Ofcom took the view that Mr Barton Jayne did not have a legitimate expectation of privacy in relation to the broadcast of the information as to who had made the call to the police. Given this conclusion, it was not necessary for Ofcom to consider whether any intrusion into Mr Barton Jayne's privacy in the broadcast was warranted.

Ofcom found that Mr Barton Jayne's privacy was not unwarrantably infringed in the programme as broadcast in this respect.

**Accordingly, Ofcom has not upheld Mr Barton Jayne's complaint of unjust or unfair treatment in the programme as broadcast and of unwarranted infringement of privacy in connection with the obtaining of material included in the programme and in the programme as broadcast.**

## Not Upheld

### Complaint by Ms Rachel Gray

*Exposure: The British Way of Death, ITV1, 26 September 2012*

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#### Summary

Ofcom has not upheld this complaint of unjust or unfair treatment and unwarranted infringement of privacy made by Ms Gray.

On 26 September 2012, ITV broadcast an edition of its current affairs series *Exposure*. This edition, entitled *The British Way of Death*, looked at the consolidation of the funeral industry in the UK and filmed undercover at two funeral parlours. One was Gillman Funeral Service (referred to in the programme as “Gillman’s” and owned by Funeral Partners Limited) in south London. The programme included footage filmed undercover there which illustrated the way in which some deceased individuals were treated and included footage of a member of staff who referred to pretending to suffocate one dead person by putting a shopping bag over his head and to another incident where two members of staff referred to a deceased individual as “*Chelsea scum*”. The programme also raised concerns about the levels of service received by customers of Gillman’s.

Ms Gray (who works for Gillman’s) complained that she was treated unfairly in the programme and that her privacy was unwarrantably infringed in the obtaining and broadcast of the footage.

Ofcom found that:

- The undercover footage of Ms Gray was adequately subtitled and any small inaccuracies in the subtitles that accompanied her voice did not materially change the sense of her statements and therefore did not alter viewers’ perceptions of her in a way that was unfair.
- The footage of Ms Gray was edited fairly in that it was an accurate reflection of the unedited footage and the broadcaster took reasonable care that the material facts were not presented, disregarded or omitted in a way that was unfair to Ms Gray.
- Ms Gray had a legitimate expectation of privacy in the obtaining of the material in that she would not expect to be filmed surreptitiously in her place of work. In this case the public interest in obtaining the footage outweighed Ms Gray’s legitimate expectation of privacy. Therefore, Ms Gray’s privacy was not unwarrantably infringed in connection with the obtaining of the material included in the programme.
- Ms Gray had a legitimate expectation of privacy in relation to the broadcast of the footage shown of her. In this case, the public interest in broadcasting the material, in order to show the disrespect to the deceased demonstrated by Ms Gray, and the inadequacy of the service provided at a considerable sum by Gillman’s, outweighed Ms Gray’s expectation of privacy. Therefore, Ms Gray’s privacy was not unwarrantably infringed in the programme as broadcast.

## Introduction and Programme Summary

On 26 September 2012, ITV1 broadcast an edition of its current affairs series *Exposure*, entitled *The British Way of Death*. This programme examined the British funeral industry and queried whether or not the public's trust in the services provided by funeral directors was misplaced. In particular, the programme's introduction stated that it had gone undercover to "*reveal disturbing changes*" taking place in the unregulated funeral industry, including what it described as "*disrespect to the bereaved and families, racism, [and] bodies left to decompose*". The programme explained that although most funeral directors appeared to be family run businesses, about 40 per cent of the funeral industry is now owned by four companies which prefer to trade using the old family business names.

One such business was Gillman Funeral Service ("Gillman's") which has branches in south London and Surrey. The programme explained that Gillman's had previously been an independent funeral business, but had been sold two years previously to Funeral Partners Limited ("FPL") who own over seventy funeral directors in the UK. One of ITV's reporters, who was referred to in the programme as "Tom", was employed as a casual worker with Gillman's and secretly filmed his experiences over a period of several months.

The complainant, Ms Rachel Gray, was a member of staff with whom Tom worked. Ms Gray, described in the programme as one of three staff members who had an industry related qualification, was shown in the programme carrying out a number of mortuary related tasks. These included embalming, dressing the bodies of the deceased for viewing by relatives and having to manage decomposing bodies that could not be refrigerated. Other members of staff were shown assisting Ms Gray and their conversations, which were secretly filmed and recorded, were included in the programme. The programme questioned the appropriateness of the tone and content of some of these conversations, and of some of Ms Gray's actions. Specifically Ms Gray was seen placing a shopping bag over the head of one deceased individual and referring to this act as "*Marks and Suffocation*". She was also seen jokingly singing to the tune of the song "*Big Spender*" as she undressed one deceased person and referring to another as "*Chelsea scum*". Ms Gray also raised concerns in the programme about: the levels of staffing at Gillman's and the apparent inadequacy of the facilities where she worked; whether understaffing had led to too few coffin bearers attending funerals and was seen commenting that this was "*not on*"; her inability to dress the deceased in clothes provided by their relatives because Gillman's were understaffed and she had not been provided with an assistant; about the facilities at Gillman's and specifically that there were not enough fridges available to refrigerate the deceased (the programme showed that this led to some bodies decomposing and Ms Gray was shown attempting to mask the resulting smell).

Later in the programme, Mr Philip Greenfield, the Chief Executive of FPL was interviewed and commented directly on some of Ms Gray's comments and actions. He described some of her behaviour as "*totally unacceptable*" and language as "*completely and utterly abhorrent*" and that it "*goes against our guidelines*".

Ms Gray was shown unobscured in the programme and her voice was heard. She was also referred to by her first name.

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

## Summary of the complaint and the broadcaster's response

### Unjust or unfair treatment

Ms Gray complained that she was treated unjustly or unfairly in the programme as broadcast in that:

- a) Ms Gray said that not only was the fact that she was secretly filmed damaging enough, but that the manner in which it was edited in the programme resulted in her being unfairly portrayed. In particular, Ms Gray said that the audio accompanying the secretly filmed footage did not match the subtitles put on screen.

In response, ITV said that the programme examined the funeral industry in Britain and questioned whether it deserved the public's trust. Part of the programme featured branches of the funeral directors, Gillman's, which was now part of a wider company, FPL. Using covert footage recorded by an undercover reporter working at Gillman's, ITV said that the programme exposed examples of disrespect by staff towards the bereaved and the deceased, and bodies being left in non-refrigerated conditions in warm weather. The programme also explored whether Gillman's quality of service had changed since ceasing to be an independent funeral business.

ITV added that Ms Gray worked as an embalmer at Gillman's and was shown carrying out various tasks at work and a number of her conversations with her work colleagues were broadcast in the programme. ITV said that Gillman's and FPL promised the bereaved that they would deal with their deceased loved ones with respect and integrity to the highest professional standards. ITV stated that the programme questioned the appropriateness of some of Ms Gray's conduct as part of its investigation of the service provided by her employers.

In relation to Ms Gray's specific complaint that the programme was edited in a way that portrayed her unfairly, ITV pointed to various sequences in the programme in which Ms Gray appeared which it said demonstrated occasions where the deceased and bereaved were not treated with respect and integrity to the highest professional standards.

ITV said that in one sequence, Ms Gray was shown placing a shopping bag over the head of a dead person and stated *"I might have to suffocate him, just for the craic...Marks and Suffocation [in reference to the shopping bag]"*. ITV said that the producers of the programme interviewed Mr Greenfield, the Chief Executive of FPL (which was also broadcast in the programme). In relation to this incident, ITV said that Mr Greenfield stated that the use of a shopping bag in this way was *"totally unacceptable"* and that the language used by Ms Gray and her colleagues was *"completely and absolutely abhorrent"*. ITV said that in its view, most members of the public would agree with Mr Greenfield's comments.

ITV stated that Ms Gray was also shown removing the clothes of a deceased individual and, to the amusement of her colleague, started to sing a version of the song *"Big Spender"*, which ITV stated was a well known striptease song. It said that Ms Gray and her colleague commented on the deceased having a *"gross"* blackhead and her colleague suggested that the family should *"suck it...with a straw"*. ITV pointed out that Mr Greenfield described the behaviour as *"completely inappropriate and it goes against our guidelines. We would never, never condone it"*.

ITV said that Ms Gray was depicted in the programme referring to another deceased person as “*Chelsea scum*”. It stated that Mr Greenfield said he would not tolerate such comments and that they “*have no place in our business*”. ITV further noted that in the unedited footage Ms Gray commented that the deceased’s boots should not go in the coffin as they were “*too good for him*”, although these comments were not broadcast. ITV stated that other members of Gillman’s staff were apparently uncomfortable with this conversation.

ITV said that later in the programme Ms Gray was shown discussing clothes that had been supplied by the family for the deceased and explained that because she had no assistant, she did not have the time to dress the deceased. The programme explained that the clothes were simply deposited into the coffin in a bag. ITV stated that Gillman’s promised, as part of their professional service, to dress the deceased; and that Mr Greenfield in his interview was clear that Ms Gray’s practice was unacceptable and denied that the funeral parlour was understaffed. ITV stated that, in its view, Ms Gray’s behaviour was “wholly unprofessional and callous” whether or not the business was understaffed.

Ms Gray was also shown in one sequence in the programme in which staff complained that dead bodies had begun to decompose due to a combination of broken fridges and hot weather. Ms Gray was shown commenting on the smell and attempting to mask it with perfume. ITV said this sequence reflected Ms Gray’s complaint to the undercover reporter that she did not have enough time to stop a particular body “*leaking*”. ITV said that the condition of the corpses was clearly a matter in the public interest and that given that Ms Gray was identified elsewhere in the programme, it was not unfair to identify her as being involved in the attempt to mask the poor condition of the body.

ITV said that Ms Gray had not stated in what way the sequences in which she featured were unfair to her. ITV said that it was clear from the relevant unbroadcast material that in the case of each of the sequences set out above, the footage had not been edited in a way that was unfair to her.

ITV said that Ms Gray had not provided any particulars in relation to the complaint that the audio accompanying the secretly filmed footage did not match the subtitles on the screen. ITV added that given the nature of the conversation, where people often talk over each other and natural asides are mumbled, it can be confusing to include precise verbatim subtitles. However, ITV submitted that the subtitles fairly reflected what was being said and that, where any audible or irrelevant words were omitted, it was not to any material extent such that it would result in any unfairness to Ms Gray.

ITV stated that all the matters disclosed in the covert filming were put to Ms Gray’s employers prior to the broadcast, and that her employer would have made the relevant named individuals aware of this filming in the course of their own subsequent internal investigation. ITV said that the behaviour exhibited by Ms Gray and others in the programme was condemned by Mr Greenfield on behalf of the company and that Ms Gray did not contact ITV directly prior to the broadcast of the programme.

#### Unwarranted infringement of privacy

- b) Ms Gray complained that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that she was secretly filmed without her permission.

In response, ITV said that given the nature of the investigation it was necessary to film covertly. ITV said that *prima facie* evidence was gathered by the programme makers from confidential sources with connections to Gillman's which demonstrated, among other things, that: poor service was provided; staff members were not properly trained; and, there was a callous treatment of the deceased. ITV said that the reporter who subsequently worked for Gillman's worked for a week before commencing the filming, during which time it became apparent that the information received from those sources was correct.

ITV said that because there was sufficient *prima facie* evidence it gave permission for the programme makers to film covertly prior to recording in accordance with its established procedures and Section Eight (Privacy) of Ofcom's Broadcasting Code. ITV said that it was reasonable to suspect that covert filming would produce further evidence in the public interest and that in an investigation of this kind, undercover filming was necessary for the credibility and authenticity of the programme.

ITV said that had permission been sought from Ms Gray to film her openly, it would clearly have been unlikely that she would have behaved in the manner that the covert filming revealed.

- c) Ms Gray also complained that her privacy was unwarrantably infringed in the programme as broadcast in that secretly filmed footage of her was broadcast in the programme without her consent. Ms Gray said that neither her face, nor her voice was obscured in the programme as broadcast and her name was used.

In response, ITV said that having obtained this material it was clear from the covert footage that it did provide evidence that standards of service and behaviour of certain staff at Gillman's fell below that expected by the public and it was in the public interest to expose these failings in the programme. ITV said that, in accordance with its procedures, the footage to be included in the programme was carefully considered before permission was granted by ITV for it to be included in the programme as broadcast.

ITV said that the disrespectful and, at times, callous attitude of Ms Gray towards the deceased and their families in the course of her employment exhibited in the covert filming included in the programme could not be explained merely by her claim that there were insufficient staff (which was nevertheless reflected fairly in the programme) or by the requirements of her employers. ITV considered that Ms Gray's behaviour therefore warranted her being identified in the programme.

ITV said that insofar as Ms Gray may have had any expectation of privacy in the circumstances of filming, and insofar as her privacy may have been infringed by the covert filming, and by the subsequent broadcast of that footage, it was clearly warranted in the public interest. Given that there was a clear public interest in the broadcast of the footage, ITV said it was entitled to broadcast this footage without Ms Gray's consent.

### **Representations on Ofcom's Preliminary View**

Ofcom prepared a Preliminary View in this case that Ms Gray's complaint should not be upheld. In commenting on that Preliminary View, in summary Ms Gray's main points and ITV's response (directly relevant to the complaint responded to by the broadcaster and considered by Ofcom) were as follows.

### Ms Gray's representations

Ms Gray said that she never taunted any deceased person directly, personally or physically. She added that she did not jeopardise any deceased person in the care of Gillman's, cause harm, or inappropriately present or mishandle them.

Ms Gray said that she never "attempted to suffocate" a deceased person and that she used the shopping bag because there was a lack of "ashes bags", a product which is used to protect the clothing and caskets from cosmetic products. Ms Gray denied that she referred to a deceased person as "*Chelsea scum*" and this was taken out of context and not directed at the deceased.

Ms Gray added that "black humour goes hand in hand with this trade" and that she went out of her way in front of the undercover reporter to keep the mood "high and jovial" as she was concerned about his age and the nature of the work he was being exposed to. Ms Gray said that she would not have been "as loud a character or even as outspoken" if she had known she was being filmed.

Ms Gray said that when she sang the tune "*Big Spender*" as she undressed one deceased person, this was in reference to a burlesque act she had previously performed and not directed at the deceased. Ms Gray said that whether it was professional or not, it was "not a concern of Ofcom or ITV", but was for her employer and colleagues to judge.

Ms Gray explained that all deceased persons are sprayed with perfume supplied by the family. This was misinterpreted in the programme that stated that she was trying to mask the smell of a "leaking" (i.e. decomposing body). Ms Gray said that the body she was seen spraying with perfume was different to the deceased person shown at the funeral where the widow was seen commenting on the smell from the casket. She added that a "leak" from a body could be caused by a variety of different conditions and that the treatment of the deceased at Gillman's did not raise issues of public health. Ms Gray stated that to her recollection no bodies decomposed due to the exceptional heat. Further, Ms Gray said that there was no proof that the deceased were not dressed in the clothes provided by the families.

Ms Gray said that despite ITV's assertion that the undercover reporter worked for a week before commencing filming, the programme contained footage which was taken from the second day that the reporter worked at Gillman's.

Ms Gray added that she was not dismissed from her position at Gillman's nor stripped of her qualification by the British Institution of Embalmers. Ms Gray said that her privacy was unwarrantably infringed and that she had the right to carry out her work without questioning the motives of those around her.

### ITV's representations

ITV said that in relation to the placing of the shopping bag over the head of one deceased person, from the unedited footage it was clear that Ms Gray had used the shopping bag and stated that she was "*sick of using these ashes bags*". It added that Mr Greenfield made clear in his interview the purpose of the bags (i.e. to protect clothing and the casket from makeup) and that appropriate bags were available to Ms Gray and that he was "horrified to hear" that a shopping bag was used for this purpose.

The broadcaster stated that Ms Gray's reference to the song "*Big Spender*" while undressing a body was disrespectful and was contextualised by the commentary which noted that a certain amount of "*gallows humour*" was, perhaps, understandable.

ITV said that in its view, the comment "*Chelsea scum*" was directed at the young deceased Chelsea supporter and that the footage spoke for itself on this point. It added that Mr Greenfield stated in his interview that Gillman's employees should act "*at all times...as if they are in the presence of the family*". ITV said that many people would be horrified to know that their deceased relatives were looked after in this way – a view it said that was also expressed by Mr Gray's employer.

In relation to Ms Gray's representations that there was no proof she did not dress bodies in the clothes provided by their relatives, ITV said that the footage showed Ms Gray's position at the time of filming which was that she had no time and no assistant to undertake the dressing of the deceased.

ITV also stated that it and the undercover reporter believed that the body Ms Gray was shown spraying with perfume was contained in the casket shown at the funeral (on which the widow commented on the smell). It added that it appeared from the unedited footage that the deceased was referred to by name on both occasions.

The broadcaster said that contrary to Ms Gray's claim, the undercover reporter did start work at Gillman's one week before he started filming.

## 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.

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 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. It also viewed the unedited material provided by ITV and read a transcript of it. Ofcom also took careful consideration of the representations made by Ms Gray and the broadcaster in response to being given the opportunity to comment on Ofcom's Preliminary View on her complaint (which was not to uphold). While Ofcom had attentive regard to all of Ms Gray's and the broadcaster's comments in finalising this decision, it concluded that the further points raised by the parties did not materially affect the outcome of the complaint.

### Unjust or unfair treatment

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

- a) Ofcom first considered Ms Gray's complaint that not only was the fact that she was secretly filmed damaging enough, but that the manner in which it was edited in the programme resulted in her being unfairly portrayed. In particular, Ms Gray said that the audio accompanying the secretly filmed footage did not match the subtitles put on screen.

In considering this part of the complaint, Ofcom had regard to Practices 7.6, 7.9 and 7.14 of the Code. Practice 7.6 states that when a programme is edited, contributions should be represented fairly. Practice 7.9 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. Practice 7.14 states that broadcasters or programme makers should not normally obtain or seek information, audio, pictures or an agreement to contribute through misrepresentation or deception. (Deception in this context includes surreptitious filming or recording.) This Practice also states that it may be warranted to use material obtained through misrepresentation or deception without consent if it is in the public interest and cannot reasonably be obtained by other means.

Ofcom examined the parts of the programme in which Ms Gray contributed to the programme and noted that footage of Ms Gray featured in a sequence of clips that preceded the programme credits. Each of the comments made by Ms Gray in this sequence featured in longer sequences later in the programme. For the sake of clarity, Ofcom considered each of the sequences in which Ms Gray contributed to the programme under separate bulleted points as set out below.

- Ms Gray was first featured in the programme in relation to a staff meeting which was held by the branch manager Mr Moyes, who was sometimes referred to in the programme as "Merv". Ofcom observed in particular the following exchange (Ofcom has marked in bold certain words where there were differences between what was said by Ms Gray and the subtitles):

Merv: *"Couple of things what the company's thinking about doing are community projects. What's been a success is one day a week we send a member of staff to hold a bingo at the nursing home and apparently that's brought in huge amounts."*

Ms Gray: *I'll be a bingo caller, bring it on! I won't defend **them** but I'll [inaudible].*

Merv: *One afternoon, you buy a cheap bingo set and apparently all these old girls and boys love it in the nursing home, and the idea is when they die, they may use Gillman's, I don't know.*

Narrator: *Despite the healthy income, staff complain that funerals are now regularly undermanned and Merv isn't allowed to hire more full time employees.*

Ms Gray: *When these men are on their funerals, and four men turn up to carry a casket. That's not on, it's really not on.*

Merv: *Trying to get casual staff around here Rachel is difficult.*

Ms Gray: *[If] we're having a problem with casuals then is it easier not to get another full time staff member in?*

Merv: *He [the FPL regional manager] will not employ full time bearers at all. But I can have four or five casuals, as many casuals as I want.*

Ms Gray: *But we've not **got** the casuals.*

Merv: *I can't do full time at all at the moment.*

Ms Gray: *But it doesn't look the same **[as]** old school Gillman. We used to be six men on a coffin".*

Ofcom carefully considered this exchange and noted that although Ms Gray was not shown in this sequence, her voice was heard and she was referred to by name. Ofcom noted that in the subtitles, the word "them", as highlighted above was transcribed as "it" on the screen and the word "I'll" was omitted from the subtitles. Ofcom also noted that: the highlighted "if" above appeared in the subtitles, but was not spoken by Ms Gray; the word "got" was transcribed as "getting"; and, the word "as" was added to the subtitles but was not spoken by Ms Gray.

Ofcom considered that these small differences between what was said and the subtitles that appeared on screen concerning this exchange did not materially and adversely change the sense of what Ms Gray had said in a way that could reasonably be regarded as being unfair to her.

Although Ms Gray was not seen in this sequence, she was referred to by name and her voice could be heard. As she appeared unobscured later in the programme, Ms Gray's identity would have been clear to viewers. Taking account of this exchange, Ofcom considered that viewers would have understood that Ms Gray's comments about the bingo calling to have been made in a jocular fashion and to have been clarified by her statement that she would not defend such a practice. Ofcom considered also that it was likely that viewers would have understood that, in this exchange, Ms Gray was raising issues about staffing levels at Gillman's. Ms Gray's comments were reinforced later in the programme when footage of a funeral was shown in which four pall bearers complained about the weight of a coffin which they said should have had six bearers. One of the men remarked that he had injured his shoulder and knee as a result of the weight and would have to seek medical attention as a result.

In Ofcom's view, viewers would have understood that Ms Gray's comments raised legitimate concerns about the health and safety of her colleagues in the context of a staff meeting. Ofcom considered that the inclusion of these comments in the programme as broadcast was unlikely to have materially and adversely altered viewers' perceptions of her in a way that was unfair or unjust.

- Shortly after the above footage was broadcast, the narrator stated that Gillman's: *"promise they will act with respect, integrity and always to the highest professional standards"*. Footage of the company's website was shown in the programme to demonstrate these claims. Ofcom compared the following exchange with the programme as broadcast (comments that were not included in the programme are highlighted in bold):

Male colleague: *"Has he got make up on?"*

Ms Gray: *Yeah, he does indeedy.*

Male colleague: *So you don't want to get it all over the pillow innit?*

Ms Gray: *No, I might have to try and suffocate him...*

Narrator: *To protect the make up job, they cover the deceased's head with a plastic shopping bag.*

Ms Gray: *...just for the craic. **I wonder if we've got another bag because I'm sick of using these ashes bags. Oh there we go.***

Male colleague: *You're going to use a good one from Marks.*

Ms Gray: *Yeah M&S all the way. Marks and Suffocation!"*

Ofcom recognises that broadcasters have the right to select and edit material, as long as they do so in a way that does not cause unfairness. Having reviewed the unedited material as set out above, Ofcom did not consider that the omission of Ms Gray's additional comments about why she had chosen to use the shopping bag would have been likely to have materially and adversely changed viewer's perceptions of her. In Ofcom's view, the comments did not appear to conform to Gillman's publicly stated aims of integrity and respect for the deceased and the unedited material did not alter the sense of what Ms Gray had said. Ofcom considered that what was broadcast in the programme was an accurate representation of what Ms Gray had said in the filming.

Ofcom noted that towards the end of the programme the clip of Ms Gray referring to *"Marks and Suffocation"* was repeated and that Mr Greenfield was asked to comment on this. Mr Greenfield described Ms Gray's behaviour as *"totally unacceptable"* and that her language was *"completely and utterly abhorrent"*. Ofcom considered that it was clear from these comments that Ms Gray's behaviour was not consistent with generally accepted professional standards and did not comply with the stated policies of the organisation she worked for. Further, Ofcom noted that Ms Gray's reason for not using the ashes bags provided (as stated in the unedited footage) was because she was *"sick of using"* them rather than there being a lack of ashes bags as stated in her representations.

In the circumstances, Ofcom therefore considered that the manner in which the footage was edited and included in the programme was not unfair or unjust to Ms Gray.

- Ofcom noted that in the next sequence featuring Ms Gray, the narrator explained that Ms Gray was one of three employees at Gillman's who had an *"industry related qualification"*. The narrator noted that *"she claims to be overworked, and has to rely on whichever unskilled worker happens to be around"*. Ms Gray was then shown undressing the deceased and having the following conversation with a colleague, referred to in the programme as "Lee". (Ofcom has assessed this material against the unedited footage. The footage that was not broadcast is highlighted in bold).

Ms Gray: *"Has she [the deceased] got clothes on? Yeah, hang on, we need to strip her first. Dun dun der dun [Singing to the tune of "Big Spender"] The minute she walked in the mortuary. I could tell...*

Lee: [Laughing] *Oooh, what are you like? What are you like?*

Ms Gray: *One of a kind, mate<sup>1</sup>, **awarded so by the judge.***

Tom: ***By the what?***

Ms Gray: ***The judge.***

Tom: ***Right.***

Ms Gray: ***Now, can you roll her bum to you so I can stick it under there?***

Lee: *Oooh, hello!*

Ms Gray: *Thank you. [inaudible]*

Lee: *I'm sure she will.*

Lee: *Dirty old thing [not subtitled]*

Ms Gray: ***Now take the rest of the arm out first. Mind her skin, she's going to get [inaudible].***

Lee: ***Oh yeah. Horrible stuff. Woops.***

Ms Gray: ***There we go. Right now.*** [not subtitled]

Lee: *Come on sweetheart, get your arse up".*

Ms Gray then commented on the deceased's "gross" blackhead which she removed. Lee suggested that the deceased's family could *"suck it...[makes sucking noise] with a straw"*.

Ofcom noted that the narrator then stated that *"with such a grim job, some gallows humour is understandable, but at Gillman's, this all too easily slips into disrespect."*

Ms Gray and Lee were then shown referring to a different dead individual as *"Chelsea scum"*.

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<sup>1</sup> This is subtitled as *"I'm fine mate"* in the programme as broadcast.

Ofcom again carefully considered the subtitling in this sequence of the film and noted, as set out above, that although it appeared to Ofcom that Ms Gray actually said she was *“one of a kind”* (the sound on the footage was unclear due to the nature of the undercover filming) it was subtitled as *“I’m fine”*. Ofcom took the view that subtitling the statement as *“I’m fine”* rather than *“one of a kind”* was unlikely to have made a difference to the sense of the exchange and that viewers’ perceptions of Ms Gray would not have been materially and adversely altered as a result. Therefore, Ofcom considered that there was no unfairness to Ms Gray in this regard.

Ofcom next considered whether the unedited material which was not included in the programme as broadcast would have changed the sense of this exchange. Having carefully examined the footage that preceded and followed these exchanges, as well as considering the additional footage that was not included as set out above, Ofcom considered that the additional footage did not change the sense of Ms Gray’s comments as broadcast and therefore viewers’ perceptions of her would have been unlikely to have been materially altered in a way that was unfair to her.

Ofcom noted that ITV contextualised some of the comments made by Ms Gray through the narrator stating that the nature of such a job would mean that understandably employees may indulge in some *“gallows humour”*, but that the narrator clearly indicated that referring to the deceased as *“Chelsea scum”* was disrespectful.

Ofcom also took account of Ms Gray’s representations that her reference to the song *“Big Spender”* was not directed at the deceased. However, as set out above, Ms Gray referred directly to having to *“strip”* the deceased and then sang *“the minute she walked in the mortuary”*. In Ofcom’s view, this indicated clearly that Ms Gray’s comments were directed at the deceased. Ofcom also considered Ms Gray’s representation that her comment *“Chelsea scum”* was not aimed at a deceased person. Again, Ofcom’s view was that the footage indicated that her comment was directed at the deceased and its opinion on this point was reinforced by her comment made shortly afterwards (and not broadcast) that the deceased’s boots were *“too good for him”*.

A section of the sequence above was repeated later in the programme and Mr Greenfield was asked to comment on it. He said that comments such as those set out above would not be tolerated and that the earlier comments about the blackhead were: *“completely inappropriate and it goes against our guidelines. We would never, never condone it.”* In relation to Ms Gray and her colleagues calling the deceased *“Chelsea scum”*, Mr Greenfield said the comments: *“have no place in our business and I will not tolerate them”*. Ofcom considered it was clear that Ms Gray’s comments did not meet the company’s stated policy of acting with *“respect, integrity and the highest professional standards”* and that the comments of the company’s Chief Executive reinforced this.

In relation to this sequence, Ofcom took the view that neither the incorrect subtitling, the editing of the undercover footage nor the omission of the comments noted in the broadcast resulted in any unfairness to Ms Gray.

- Ofcom noted that later in the programme, the narrator explained that as part of the service, FPL *“promise to dress the deceased in any clothes families provide”* and footage of the website was shown in the programme that

demonstrated this promise. Ms Gray was then shown in the programme stating that *“we won’t dress her unless we have the time”*. Ms Gray went on to say that the reason for this was the fact that she had no assistant. Ofcom observed, in particular, the following (the sections which were not broadcast are highlighted in bold):

Ms Gray: ***“After screwing all these [coffins] down yesterday they then bought the clothes in.***

Tom: ***Did the family bring those in?***

Ms Gray: ***Yeah. Pwoh.***

Tom: ***So what? Do we, do we have to unscrew [the coffin]?***

Ms Gray: ***Yeah, just lay them in.***

Tom: *Do you have to dress them?*

Ms Gray: *No, I won’t dress them, I’ll just lay it out where they belong, you know. [inaudible] Invariably it’s time.*

Tom: *Do they [the family of the deceased] want him dressed or...?*

Ms Gray: *Well, it’s more a sign of respect. That these are his clothes and we put it in them<sup>2</sup> type thing rather than, you know, even if they think he’s in them.*

Narrator: *The clothes are just dumped into the coffins, in the bags they arrived in”.*

Ofcom again carefully considered the unedited material and noted that the broadcaster had included and broadcast earlier in the sequence Ms Gray’s comments that she did not dress the deceased due to the constraints on her time and the fact she did not have an assistant. Ofcom therefore considered that viewers would have understood that Ms Gray believed due to the time pressure of her job and the understaffing in the business that she was not able to dress the deceased.

Ofcom did not consider the small change in the subtitling from “them” to “there” altered the sense of Ms Gray’s comments in any material way and that viewers’ perceptions of her were unlikely to have been materially and adversely altered by it. Ofcom also took account of Ms Gray’s representations that there was no “proof” that the deceased were not dressed in the clothes provided by their relatives. Ofcom considered that the footage showed that Ms Gray had stated unequivocally that *“we won’t dress her unless we have the time”* which showed this practice was not undertaken at Gillman’s. The unedited footage, as set out above, also showed clearly that clothes were brought in by families but that Ms Gray did not dress the deceased in them.

Ofcom noted that later in the programme Mr Greenfield was asked about the practice of not dressing the deceased and a clip of Ms Gray stating *“until B\*\*\* [name bleeped in the broadcast] gives me an assistant I won’t be doing any*

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<sup>2</sup> The word “them” is spoken by Ms Gray, but the word “there” was subtitled on screen.

*dressing*” was repeated. Mr Greenfield described this as “*not acceptable practice and if it happens, it will be stopped*”. Mr Greenfield also stated in this interview that in his view Gillman’s was not understaffed and that staffing levels were: “*greater than when we acquired it*”. It is important to note that it is not Ofcom’s role to establish whether Ms Gray or Mr Greenfield’s claims about staffing levels at Gillman’s were justified or not, but to determine whether, in broadcasting the allegations, the broadcaster took reasonable care not to present, disregard, or omit material facts in a way that was unfair to Ms Gray.

Ofcom considered that the broadcaster had chosen a clip of Ms Gray which illustrated her reason for not dressing the deceased, i.e. that she was overworked and did not have time to fulfil this role, and viewers would have understood her comments in this context.

Ofcom therefore considered that in relation to this sequence, the broadcaster had taken reasonable care to ensure that the material was fairly edited and the material facts were not presented in a way that was unfair to Ms Gray.

- Ofcom noted that Ms Gray was shown later in the programme commenting on the lack of space in the mortuary due to some fridges being unavailable. Ofcom noted the following exchange in the programme as broadcast:

Ms Gray: *“There’s no space, I’m gonna have to move this one [i.e. a dead body] on to the wash table then start embalming the ones you’ve bought in today. But what am I supposed to do with the ones you’ve bought in today? I’ve no more fucking surface.*

Male

colleague: *When are they going to get them fridges up and running?*

Ms Gray: *This is what I need to speak to Merv about...*”.

The narration explained that due to the lack of fridges some of the bodies had started to decompose, and explained that the weather had been exceptional hot. The narrator explained:

*“One body has a condition that means it keeps leaking fluid. A good embalmer, with plenty of time, can fix it. But Rachel says she is overworked and the heat is making things much worse”.*

Ms Gray then commented:

*“They’re all leaking lately, it’s fucking horrible. It must be the weather, they’re breaking down quicker...It doesn’t smell too good”.*

Ms Gray was then shown spraying perfume to try and mask the smell. The programme then showed the funeral of the deceased in which his widow commented on the smell. In her representations, Ms Gray stated that this was, in fact, a different deceased person and that the programme’s commentary implied that she was not a “*good embalmer*”. Ms Gray added that she had not sprayed the perfume to mask any smell, but that perfume was routinely provided by the families of the deceased. In its representations, ITV said it was its belief that the footage of Ms Gray spraying perfume was onto the same deceased that the widow later commented on. Further, Ms

Gray said that her frustration demonstrated in this footage was not that the deceased were “rotting or going off”, but that her working shift had become longer.

Ofcom noted that Ms Gray’s dialogue from the sequence above was taken from a series of clips filmed over two different days (i.e. 31 May and 8 June 2012), although in Ofcom’s view viewers would have perceived Ms Gray’s comments to have been about one incident rather than over an extended period of time.

Ofcom next considered the nature of Ms Gray’s comments and noted that in the programme as broadcast they were made in the context of a section of the programme which sought to illustrate the poor conditions that some dead bodies were kept in and the effect of these conditions on them. In Ofcom’s view, the programme was clear about Ms Gray’s position on this issue, from Ms Gray’s dialogue stating that she had “*no more fucking space*” and would have to talk to her manager “*Merv about it*” and also from the narration (in which it was clearly explained that Ms Gray’s position was that she was “*overworked*” and the time was not available to her to stop the leaking fluids from the body).

Ofcom considered that although Ms Gray’s comments filmed over a period of time may have been perceived by viewers to have been about one incident, this did not result in any unfairness to Ms Gray as their perception of her would not have been adversely and materially altered as a result of this editing. In relation to whether Ms Gray had or had not sprayed perfume on the deceased whose widow commented on the smell, it is important to note that it was not Ofcom’s role to establish as fact whether it was the same deceased. Instead, its role was to decide whether this incident was presented fairly in the programme. In Ofcom’s view, whether or not the deceased shown in these instances was the same individual, this would not have adversely and materially altered viewers’ perception of Ms Gray. This was because she had been filmed and was subsequently shown engaging in other conduct during the course of the filming described by her employer as “completely and utterly abhorrent”.

In Ofcom’s view, Ms Gray’s comments as set out above reflected the concerns she had about the conditions she was working in and would have been understood as such by viewers. Ofcom also did not consider that the programme’s commentary implied that Ms Gray was not a “*good embalmer*”, but instead explained Ms Gray’s position that she was “*overworked*”. Ofcom therefore considered that the material had been edited in a way that was fair to Ms Gray and the material facts were not presented in a way that was unfair to her.

Having assessed each of the instances in which Ms Gray featured in the programme separately and together in the context of the programme as a whole, Ofcom considered that Ms Gray’s comments were reflected fairly in the programme. Ofcom took account of the minor differences between the subtitling and the words spoken by Ms Gray and considered that Ms Gray’s contributions were reflected fairly in the programme and that the differences did not result in unfairness to her. Ofcom also considered that Ms Gray’s contributions were edited in a fair manner and that the material which was omitted from the programme did not alter the sense of her contribution in the programme as broadcast.

Ofcom also considered whether the deception of the programme makers in filming Ms Gray surreptitiously was warranted by the public interest and whether it could not reasonably be obtained by other means. Examples of public interest 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. Ofcom considered that Ms Gray's comments about the deceased, as set out above, highlighted misleading claims, for example regarding the dressing of the deceased which Gillman's stated they would do. Ms Gray's comments about the deceased, for example calling one dead person "*Chelsea scum*" also highlighted the disrespectful way that some staff treated the deceased and went against Gillman's stated policy to treat the dead with respect and integrity. Ms Gray's comments about the inadequacy of the storage facilities for the dead also raised important concerns about the levels of service the customers of Gillman's received. Ofcom took the view that such material could not have been reasonably obtained by other means as staff would have been unlikely to act in such a manner if they were aware they were being filmed, and noted that Ms Gray confirmed in her representations that she would not have acted in the same manner if she was aware she was being filmed.

Ofcom found that the broadcaster had taken reasonable care to ensure that the material facts were not presented, disregarded or omitted in a way that was unfair or unjust to Ms Gray and that the deception of the undercover filming was warranted.

#### Unwarranted infringement of privacy

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

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

- b) Ofcom considered Ms Gray complaint that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that she was secretly filmed without her permission.

In considering this part of the complaint, Ofcom had regard to Practices 8.5 and 8.13 of the Code. Practice 8.5 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. Practice 8.13 says that surreptitious filming should only be used where it is warranted. Normally, it will only be warranted if: there is a *prima facie* evidence of a story in the public interest; there are reasonable grounds to suspect that further material evidence could be obtained; and, it is necessary to the credibility and authenticity of the programme.

In considering whether Ms Gray's privacy was unwarrantably infringed in connection with the obtaining of material included in the programme, Ofcom first assessed the extent to which Ms Gray had a legitimate expectation of privacy in the circumstances in which she was filmed, i.e. surreptitiously by an undercover reporter. As stated in the Code, "legitimate expectations of privacy will vary

according to the place and nature of the information, activity or condition in question". When considering the extent to which a person has a legitimate expectation of privacy, Ofcom has regard to a number of factors which are set out below.

Ofcom noted that the filming took place at a funeral home, which was Ms Gray's work place and that Ms Gray was not aware that she was being filmed surreptitiously. Ofcom observed that Ms Gray was filmed working in her capacity of an embalmer. Ofcom took account of the fact that, although the nature of her work was sensitive, the content of what Ms Gray said about her own life was not particularly sensitive or confidential. However, it was clear from what she said that Ms Gray considered herself to be speaking in the company of colleagues and therefore spoke freely and openly. Ofcom further noted that Ms Gray was working in a place which was not accessible to the general public and that the nature of her job, an embalmer, afforded her an expectation of privacy in relation to being filmed at work without her knowledge.

Taking into account all the factors above, Ofcom considered that Ms Gray did have a legitimate expectation of privacy while at her workplace and discussing matters with colleagues. However, Ofcom also took account of Ms Gray's disrespectful language and behaviour towards the deceased, and inappropriate conduct while fulfilling her professional role working at a funeral parlour (as set out in head a) above), and considered that this reduced Ms Gray's expectation of privacy correspondingly.

Having found that Ms Gray had a legitimate expectation of privacy, albeit limited, in these circumstances, Ofcom went on to consider whether it was warranted to infringe Ms Gray's privacy.

Ofcom considered whether, in particular, it was warranted to film surreptitiously in accordance with Practice 8.13. The Code states that "warranted" has a particular meaning. It means that, where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why, in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. 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.

Ofcom noted the circumstances which preceded the programme makers' decision to surreptitiously film at Gillman's, which were set out by ITV in its submissions provided to Ofcom, and it took into account that ITV stated that evidence from a confidential source at Gillman's had revealed that: there were widespread inefficiencies in the company; a poor service was provided; staff were not properly trained; and, there was "callous treatment of the deceased". In addition, Ofcom also took account of ITV's submissions which stated that surreptitious filming was necessary because it considered it highly unlikely that Ms Gray would have acted in the same way, had she have known she was being filmed.

Ofcom considered that there was a genuine public interest in the programme makers' decision to act on the information which they had received (prior to ITV granting permission to film surreptitiously) because there was a reasonable likelihood that surreptitious filming would uncover information and evidence relating to the poor quality in the provision of funeral services, often at

considerable cost, performed at a sensitive time when people using the services are feeling vulnerable and upset at their bereavement. Ofcom acknowledged that some of the behaviour which the programme makers had been told of could only have been corroborated by the use of surreptitious filming.

Ofcom also noted that the undercover reporter had worked for a week without filming and that his experience in that week substantiated the information ITV had received from its confidential sources. In her written representations, Ms Gray disputed that this was the case, while ITV maintained in its written representations that the undercover reporter had worked for a week without filming surreptitiously. Ofcom acknowledged that there was a dispute of fact in relation to when filming actually took place. However, it considered the period of time that the undercover reporter had worked without filming was not to be determinative in this case. Therefore, given the nature of undercover filming and that in the particular circumstances of this case it involved the reporter working in a funeral parlour, it was therefore necessary for the broadcaster to film a number of members of staff including Ms Gray.

Ofcom recognised that Ms Gray was a junior employee within the organisation but, given the nature of the undercover filming, also recognised that the broadcaster could not discriminate between the levels of employees within the organisation that the undercover reporter filmed in the course of his employment at Gillman's. In addition, Ofcom had regard to the broadcaster's point that Ms Gray would have acted differently had she been aware that she was being filmed, and therefore undercover filming was necessary for the authenticity and credibility of the programme. This was later confirmed by Ms Gray in her written representations.

On balance and given all the factors set out above, Ofcom considered that the broadcaster's right to freedom of expression and the public interest in the subject matter of the filming and the public interest in programme makers gathering material on a matter of public interest without being unduly constrained, outweighed Ms Gray's expectation of privacy in the obtaining of material in these circumstances.

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

- c) Ofcom next considered Ms Gray's complaint that secretly filmed footage of her was broadcast in the programme without her consent. Ms Gray said that neither her face nor her voice was obscured in the programme as broadcast and her name was used.

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

Ofcom first considered whether Ms Gray had a legitimate expectation of privacy in relation to the material broadcast in which she was named and featured in the programme. In considering the extent to which a person had a legitimate expectation of privacy, Ofcom has regard to a number of factors, which includes

the circumstances in which an individual was filmed and the context in which the footage was subsequently used.

Ofcom took into account the circumstances in which Ms Gray was filmed, as set out above under head b). Ofcom also took account of what was broadcast in the programme, as set out in head a) above. Ms Gray was observed in the programme acting in a manner that was disrespectful to the deceased, raising concerns about the practices of the business and specifically the levels of understaffing. Ms Gray was under the impression that she was talking to a colleague in an area of the business that was not accessible to the general public.

Ofcom therefore considered that she had a legitimate expectation of privacy in the material broadcast. However, Ofcom also took account of Ms Gray's disrespectful language and behaviour towards the deceased, and inappropriate conduct while fulfilling her professional role working at a funeral parlour (as set out in head a) above), and considered that this reduced Ms Gray's expectation of privacy correspondingly.

Ofcom observed from the programme that Ms Gray's first name was used in the programme, her face was unobscured and her workplace was also identified. Ofcom also took into consideration that the programme makers had written to Mr Greenfield, the Chief Executive of FPL (the owners of Gillman's) prior to the transmission of the programme to inform him of the allegations made in the programme and to ask for the relevant employees to be notified of the intention to broadcast the footage. Ofcom noted from ITV's statement that it had not received any correspondence from Ms Gray prior to the broadcast of the programme but it was also not clear to Ofcom whether Ms Gray had been told by her employers prior to the broadcast whether she would appear in the programme.

Since Ms Gray did not consent to surreptitiously filmed footage of her being shown in the programme, Ofcom went on to consider whether it was warranted to infringe Ms Gray's privacy by broadcasting the footage of her in the programme.

As set out in head b) above the Code states that "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.

Ofcom again took into account the parts of the programme in which Ms Gray appeared which were set out in head a) above. The premise of the programme was to expose the way that deceased people at a funeral parlour were treated by those who worked there, and that Ms Gray's contributions served to illustrate the way that the dead were treated and the employee's attitudes towards the deceased.

In particular, Ofcom noted that Ms Gray covered the head of one dead person in a plastic bag and referred to this as "*Marks and Suffocation*" and that she sang the words "*the minute she walked in the mortuary*" to the tune of "*Big Spender*", whilst undressing a deceased individual. Ms Gray also referred, along with another colleague to a dead person as "*Chelsea scum*". Ofcom considered that most viewers would not regard Ms Gray's behaviour and comments during these incidents to be consistent with Gillman's stated policy of acting with "*respect, integrity and always to the highest professional standards*".

In Ofcom's opinion very few members of the public would be aware of what happened in a funeral parlour at a time that would undoubtedly be very distressing for the bereaved. It also raised important concerns, in Ofcom's view, about whether the actions of those who worked for Gillman's were consistent with its public image and the promises it made to families who paid at times considerable sums for its funeral services.

Ofcom took the view that the inclusion of surreptitiously filmed footage of Ms Gray in the programme also served to illustrate the concerns of other members of staff about the levels of staffing, the wellbeing of staff members and the inadequacy of the facilities in which they worked. In particular, Ofcom noted the concerns that Ms Gray made in the staff meeting about how coffins were being carried by four bearers, when that they had previously been six and the practice was "*not on*". This was illustrated later in the programme when one bearer complained of injuries he sustained by carrying a coffin, which he said should have had four bearers instead of six. Ms Gray also raised complaints about the staffing levels in relation to her duties and explained that she was unable to dress the deceased in clothes provided by relatives of the dead person because she did not have the time due to her workload. Gillman's website promised that it would dress the deceased in this way if requested, so this complaint served to illustrate that the company were not abiding by its promises to the public. Ofcom noted too that Ms Gray raised concerns about the lack of available fridges<sup>3</sup> in which to store the deceased people and that she was unable to do a proper job embalming one dead body which had begun to "leak" because she did not have adequate time. Again, Ofcom considered that these issues raised important issues in relation to the treatment of the dead and served to illustrate the level of services the customers of Gillman's received for the sometimes considerable fees charged.

As set out in head b) above, the individual's right to privacy has to be balanced against the competing rights of the broadcaster's to freedom of expression. Neither right 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 right.

Ofcom carefully balanced Ms Gray's right to privacy in the broadcast of her remarks and actions in the programme with the broadcaster's right to freedom of expression and the audience's right to receive the information broadcast without unnecessary interference. Ofcom came to the view that there was a public interest in ITV broadcasting Ms Gray's comments about and conduct towards some of the deceased, because they served to illustrate the disrespectful way in which they were treated. Ofcom considered that it was important for the public to be aware how their dead relatives, friends and acquaintances were treated, particularly when considering the impression given by the business that it was "family" oriented. Ofcom recognised that Ms Gray was a junior member of staff at Gillman's. One of the aims of the programme was to expose the business practises of the wider corporate entity i.e. FPL. But it was also to demonstrate any inappropriate conduct or behaviour of FPL's employees including those at a funeral parlour like Gillman's. Ofcom considered that given the repeated, inappropriate nature of Ms Gray's conduct in a professional capacity while working at Gillman's the broadcaster's decision to broadcast her face unobscured was warranted.

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<sup>3</sup> In her representations, Ms Gray stated that she had not raised concern about the lack of available fridges. However, in the footage Ms Gray stated that she would have to speak to her manager about the lack of fridges.

Likewise in relation to the footage in which Ms Gray raised concerns about the lack of staff and facilities, Ofcom considered that the inclusion of her comments served to illustrate the standards of service that the families of the deceased were receiving and raised important concerns about the health and safety of employees and the inadequate refrigeration of decomposing bodies. Ofcom took the view that given that Ms Gray was identified making comments and exhibiting behaviour that was disrespectful to the deceased it was reasonable for the broadcaster to identify her in sections in which she was raising concerns about the business practices of Gillman's.

On balance and given all the factors set out above, Ofcom considered that in the circumstances of this case the broadcaster's right to freedom of expression and the public interest in the subject matter of the programme, and the public interest in programme makers gathering material on a matter of importance to many people without being unduly constrained, outweighed Ms Gray's expectation of privacy in the broadcast of the material.

Ofcom's decision therefore is that there was no unwarranted infringement of privacy in the broadcast of the material in these circumstances.

**Accordingly, Ofcom has not upheld Ms Gray's complaint of unjust or unfair treatment and unwarranted infringement of privacy in connection with the obtaining of material included in the programme and in the programme as broadcast.**

## Not Upheld

### Complaint by Mr Lynton Spence

*Exposure: The British Way of Death, ITV1, 26 September 2012*

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#### Summary

Ofcom has not upheld this complaint of unjust or unfair treatment and unwarranted infringement of privacy made by Mr Spence.

On 26 September 2012, ITV broadcast an edition of its current affairs series *Exposure*. This edition, entitled *The British Way of Death*, looked at the consolidation of the funeral industry in the UK and filmed undercover at two funeral parlours. One was Gillman Funeral Service (referred to in the programme as “Gillman’s” and now owned by Funeral Partners Limited) in south London. The programme included footage filmed undercover there which illustrated the complaints of some members of staff about the manner in which Gillman’s were trying to create new business and what staff complained was cost cutting by the company. The programme also raised concerns about the levels of service customers of Gillman’s received and showed footage of the disrespectful way in which some members of staff treated the deceased.

Mr Spence (who works for Gillman’s) complained that he was treated unfairly in the programme and that his privacy was unwarrantably infringed in the obtaining and broadcast of the footage.

Ofcom found that:

- The broadcaster took reasonable care that the material facts were not presented, disregarded or omitted in a way that was unfair to Mr Spence in that viewers would have understood that Mr Spence’s comments represented his concerns about the manner in which the business operated and distinguished him from the practices of other members of staff.
- Mr Spence had a legitimate expectation of privacy in the obtaining of the material in that he would not expect to be filmed surreptitiously in his place of work. In this case, the public interest in obtaining the footage outweighed Mr Spence’s legitimate expectation of privacy. Therefore, Mr Spence’s privacy was not unwarrantably infringed in connection with the obtaining of the material included in the programme.
- Mr Spence had a legitimate expectation of privacy in relation to the broadcast of the footage shown of him. In this case, the public interest in broadcasting the material, in order to show the dubious business practices of Gillman’s and staff disquiet about these practices outweighed Mr Spence’s expectation of privacy. Therefore, Mr Spence’s privacy was not unwarrantably infringed in the programme as broadcast.

#### Introduction and Programme Summary

On 26 September 2012, ITV1 broadcast an edition of its current affairs series *Exposure*, entitled *The British Way of Death*. This programme examined the British funeral industry and queried whether or not the public’s trust in the services provided

by funeral directors was misplaced. In particular, the programme's introduction stated that it had gone undercover to "*reveal disturbing changes*" taking place in the unregulated funeral industry, including what it described as "*disrespect to the bereaved and families, racism, [and] bodies left to decompose*". The programme explained that although most funeral directors appeared to be family run businesses, about 40 per cent of the funeral industry is now owned by four companies which prefer to trade using the old family business names.

One such business was Gillman Funeral Service ("Gillman's") which has branches in south London and Surrey. The programme explained that Gillman's had previously been an independent funeral business, but had been sold two years previously to Funeral Partners Limited ("FPL") who own over seventy funeral directors in the UK. One of ITV's reporters, referred to in the programme as "Tom", was employed as a casual worker with Gillman's and secretly filmed his experiences over a period of several months.

The programme stated that it had observed through undercover filming "*disrespect towards the bereaved and the dead*". For instance, the programme showed one member of staff covering the head of a deceased individual in a plastic shopping bag and describing the act as "*Marks and Suffocation*", another member of staff referred to a different dead person as "*Chelsea scum*". The programme also showed that clothes brought in by relatives to dress their loved ones were sometimes placed in coffins in the plastic bags they had arrived in, rather than being used to dress the deceased. In the programme, staff said that this was done as there was insufficient staff and time to dress the dead. The programme said that this was against Gillman's stated policy of dressing the deceased with suitable clothes provided by their relatives. The programme also showed a member of staff racially abusing the widow of a dead man, who commented on the widow being able to smell the body of her late husband (due to body decomposition), by commenting to other colleagues "*They're like animals, they got a good sense of smell*".

The complainant, Mr Lynton Spence, was a member of staff with whom Tom worked. One of the issues discussed in the programme was that many of the members of staff that were employed before the "*take over*" were increasingly unhappy about some of the tasks they were being asked to do. Secretly filmed footage was then shown of a number of men in what appeared to be a locker room. While all the faces of the men in the room were obscured, their voices could be heard. In response to a suggestion made by Gillman's branch manager Mr Moyes in a staff meeting shown earlier in the programme that employees might take it in turns to host a weekly bingo session at an elderly care home in order to promote the business, the following was said:

*"It's a load of bollocks, that fucking bingo shit. Imagine that! They want you to...anything that promotes bringing in the dead, we'll do it".*

The same voice was then heard to respond to a concern that staff had about being asked to do jobs that should be undertaken by professional tradesmen:

*"You've got a leaking roof, and you send Gary up there to fix it. Get a fucking roofer you tight \*\*\*\* [bleeped]...you've got millions. That's what makes me laugh, they've got millions, but they want to send the cheapest option".*

This voice, which was unobscured, was that of Mr Spence, who was also seen in the secretly recorded footage. Mr Spence was not named in the programme and his face was obscured.

Following the broadcast of the programme, Mr Spence, complained to Ofcom that he was treated unjustly or unfairly in the programme and that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme and in the programme as broadcast.

## **Summary of the complaint and the broadcaster's response**

### Unjust or unfair treatment

Mr Spence complained that he was treated unjustly or unfairly in the programme as broadcast in that:

- a) The programme did not make it clear that he was not part of the misconduct featured in the programme. Mr Spence said that by being included in the programme he was portrayed unfairly as being "guilty by association" with those who had been engaged in misconduct [i.e. the misconduct of other members of staff secretly filmed and shown in the programme].

In response, ITV said that the programme examined the funeral industry in Britain and questioned whether it deserved the public's trust. Part of the programme featured branches of the funeral directors Gillman's, which was now part of a wider company, FPL. ITV explained that one of the issues examined in the programme was whether Gillman's quality of service had changed since ceasing to be an independent funeral business. ITV said that some staff were unhappy about aspects of their work and the tasks they were being asked to perform, about an insufficient number of pall bearers being made available to carry coffins at funerals and about understaffing and "penny pinching" generally. ITV said that it was in this context that the footage of the complainant (in which his identity was obscured) was shown.

ITV said that the branch manager had raised the prospect of the company hosting bingo evenings at homes for the elderly for the purpose, as it was apparent in the staff meeting, of bringing in additional business.

ITV added that later in the programme Mr Greenfield, the chief executive of FPL suggested that the branch manager had presented this "community project" to staff in an inappropriate manner which had sounded like *"some kind of bribery"*. ITV said that it was clear that some staff members at Gillman's were not happy with what they had been told about this and about what they were now being asked to do, generally.

ITV stated that Mr Spence was then heard criticising the bingo proposal and expressing concern about the nature of the jobs he and his colleagues had been asked to undertake. ITV said that this sequence did not disclose any misconduct on the part of the speaker, but did provide evidence of the disquiet amongst some staff members about the current management practice of the business. ITV said that the programme did not suggest that all members of staff behaved in the same appalling way as those who were clearly identified in the programme and certainly did not suggest or imply that the complainant was guilty of such behaviour.

ITV added that the words of the complainant broadcast in the programme did not associate the misconduct with Mr Spence. Rather, Mr Spence's comments expressed his disquiet, dissatisfaction and perhaps even anger at the current practices at Gillman's. ITV said that far from implying Mr Spence was "guilty by

association”, the programme included these sequences to show that some staff members were concerned at the current practices. It stated that the disquiet and dissatisfaction expressed by staff, including Mr Spence, was reflected fairly in the programme, and that the programme did not suggest he was “guilty by association”. ITV said that there had therefore been no unfairness to the complainant in the programme as broadcast.

#### Unwarranted infringement of privacy

- b) Mr Spence complained that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that he was filmed without his permission.

In response, ITV said that given the nature of the investigation it was necessary to film covertly. ITV said that *prima facie* evidence was gathered by the programme makers from confidential sources with connections to Gillman’s which demonstrated, among other things, that: poor service was provided; staff members were not properly trained; and, there was a callous treatment of the deceased. ITV said that the reporter who subsequently worked for Gillman’s worked for a week before commencing the filming, during which time it became apparent that the information received from those sources was correct.

ITV said that because there was sufficient *prima facie* evidence it gave permission for the programme makers to film covertly prior to recording in accordance with its established procedures and Section Eight (Privacy) of Ofcom’s Broadcasting Code. ITV said that it was reasonable to suspect that covert filming would produce further evidence in the public interest and that in an investigation of this kind, undercover filming was necessary for the credibility and authenticity of the programme.

ITV stated that given the above, it therefore followed that Mr Spence along with other Gillman’s employees featured in the programme were necessarily filmed without their permission.

- c) Mr Spence also complained that his privacy was unwarrantably infringed in the programme as broadcast in that footage of him was broadcast in the programme without his consent. Although his face was obscured, Mr Spence said that his voice was not disguised.

Mr Spence said that he was identifiable from the footage shown in the programme and has been recognised by family and friends. As a consequence of the broadcast of programme, Mr Spence said that he has been abused in the street.

In response, ITV said that footage featuring the complainant provided clear evidence of material in the public interest, namely the standards of service provided to the public by Gillman’s and staff disquiet about that service and that it was, therefore, editorially justified in being included in the broadcast. ITV said that careful consideration was given to the competing interests of freedom of expression and the complainant’s privacy in this regard. ITV said that the programme had due regard for the complainant’s privacy by obscuring his features in the footage including him that was included in the programme.

ITV said that the programme did not suggest that all members of staff behaved in the “same appalling way” as those who were clearly identified were seen to be

doing, and certainly did not suggest or imply that the complainant was guilty of such behaviour.

ITV said that any friends and family that recognised Mr Spence's voice would also have been likely to already know where he worked. It added that family or friends who knew where Mr Spence worked and recognised his voice would also have seen that he did nothing in the programme that could reasonably be said to amount to any kind of misconduct. ITV said it was sorry to learn that the complainant said he had been abused in the street since the broadcast of the programme. ITV added that it was clear that Gillman's was the subject of much local anger and resentment following transmission and that this, of itself, might serve to illustrate the public interest in the programme. ITV said that it was likely that all employees of Gillman's, regardless of whether they were identified, anonymised (as was Mr Spence), or not featured at all in the programme, are likely to have experienced this public resentment to some degree.

### **Representations on Ofcom's Preliminary View**

Ofcom prepared a Preliminary View in this case that Mr Spence's complaint should not be upheld. Mr Spence and ITV did not submit any representations on Ofcom's 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 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.

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 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.

### **Unjust or unfair treatment**

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

- a) Ofcom considered Mr Spence's complaint that the programme did not make it clear that he was not part of the misconduct featured in the programme. Mr Spence said that by being included in the programme he was portrayed unfairly as being "guilty by association" with those who had been engaged in misconduct

[i.e. the misconduct of other members of staff secretly filmed and shown in the programme].

In assessing this part of the complaint, Ofcom had regard to 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.

In order to consider Mr Spence's complaint, it was necessary for Ofcom first to take account of the wider context of the programme and examine the wrong doing which was reported in it. Ofcom noted that the programme highlighted Gillman's: *"promise they will act with respect, integrity and always to the highest professional standards"*. This was stated on Gillman's website, which was shown in the programme as broadcast. Further, Mr Greenfield, the Chief Executive of FPL which owned Gillman's, in his interview later in the programme stated that:

*"We stress to all of our people that at all times they should act as if they are in the presence of the family. This is the personal control we ask them to apply to themselves"*.

Ofcom noted that the undercover filming showed a number of incidents where it appeared that Gillman's promise was not demonstrated by the behaviour of its staff. Some examples which, in Ofcom's view, were typical of the behaviour depicted in the programme included an incident in which a female member of staff covered the head of a dead man with a shopping bag and stated: *"I might have to try and suffocate him, just for the craic...Marks and Suffocation* [referring to the shopping bag]. Two members of staff referred to a deceased as *"Chelsea scum"* and whilst applying gel to the body of a dead woman another member of staff stated: *"just get yourself a nice little handful [of gel]...I've got the titties"*. A member of Gillman's staff was shown racially abusing a bereaved widow at the funeral of her husband. The programme also demonstrated that clothes brought in by relatives to dress the deceased were sometimes placed in coffins in plastic bags and that staff complained that there was insufficient staff to dress the dead.

During the course of the programme, members of staff complained about understaffing at Gillman's. Footage of a funeral was shown in the programme in which four pall bearers complained about the weight of a coffin which they said should have had six bearers. Ofcom noted that one of the men remarked that he had injured his shoulder and knee as a result of the weight and would have to seek medical attention as a result. Staff also complained that the facilities were inadequate, specifically that there were not enough fridges to refrigerate the deceased which resulted in some bodies decomposing for a period of time. Ofcom noted that Mr Greenfield was interviewed about the behaviour and language used by the staff at Gillman's later in the programme. He described some of the language used as: *"completely and utterly abhorrent...these sort of comments have no place in our business and we will not tolerate them"*. He said that the practice of placing clothes in coffins was *"not acceptable...it will be stopped"* and described the racist comments as: *"abhorrent, it is against everything we stand for"*. Ofcom noted that Mr Greenfield denied that there was understaffing at Gillman's.

Ofcom next examined the section of the programme in which Mr Spence appeared. It noted that Mr Spence's contribution formed part of a sequence in which the branch manager of Gillman's, Mr Moyes, made a suggestion in a staff

meeting that in other branches of Gillman's they had successfully increased business by introducing bingo events at local nursing homes. In the programme Mr Moyes stated:

*"Couple of things what the company's thinking about doing are community projects. What's been a success is one day a week we send a member of staff to hold a bingo at the nursing home and apparently that's brought in huge amounts...One afternoon, you buy a cheap bingo set and apparently all these old girls and boys love it in the nursing home, and the idea is when they die, they may use Gillman's, I don't know".*

Shortly after this exchange, Mr Spence was shown with his face obscured standing behind a punch bag in what appeared to be a locker room while the narrator explained that:

*"Many of the staff worked at Gillman's before the takeover and they are increasingly unhappy about what they are being asked to do".*

Mr Spence was then seen walking towards the camera with his face obscured saying:

*"It's a load of bollocks, that fucking bingo shit. Imagine that! They want you to...anything that promotes bringing in the dead, we'll do it".*

The narrator then stated:

*"They claim they are expected to do jobs that professional tradesmen should be doing".*

Mr Spence was not in shot of the camera at this point, but could be heard to state:

*"You've got a leaking roof, and you send Gary up there to fix it. Get a fucking roofer you tight \*\*\*\* [bleeped in the programme]...you've got millions. That's what makes me laugh, they've got millions, but they want to send the cheapest option".*

Ofcom noted that Mr Spence's voice was not disguised in the programme.

Later in the programme, Mr Greenfield was asked by the programme's reporter to comment on Mr Moyes' suggestion about using bingo events to increase business. Ofcom took into account in particular the following exchange:

Mr Greenfield: *"Funeral Directors are local businesses. Funeral Directors live in the community, they are of the community and it is perfectly appropriate that they should engage in community activity. Mr Moyes' [the branch manager] suggestion that this is some way of bribery is completely wrong.*

Reporter: *I don't think he suggests bribery, I think he just says that it's brought in huge amounts of business...He's very honest about the motives behind these bingo nights.*

Mr Greenfield: *The motives are you are in the community; you give something back to the community.*

Reporter: *So Mr Moyes has misunderstood the reasons for...*

Mr Greenfield: *Mr Moyes is representing this in a rather jocular and inappropriate manner*".

Ofcom considered that Mr Spence's comments raised his concerns about the way Gillman's was conducting its business activities and expressed his disapproval of Mr Moyes sentiment and condemned it as a business practice that *"anything that promotes bringing in the dead, we'll do it"*. Ofcom noted too that Mr Greenfield himself condemned the way in which Mr Moyes had presented the proposal by saying that he had done so in an *"inappropriate manner"*.

Ofcom also noted Mr Spence's second comment, in which he complained that a member of staff had been asked to do the jobs of a professional tradesman in order, as he saw it, to save money and his more general observation that Gillman's *"want to send the cheapest option"*. Ofcom considered that this comment mirrored the concerns of other staff members regarding understaffing and complaints that they did not have time to complete tasks, such as dressing the dead.

Ofcom considered that it was likely that viewers would have understood that Mr Spence's comments in the programme demonstrated his concerns about the business practices at Gillman's and that he condemned the manner in which they operated. Ofcom therefore did not consider that Mr Spence could reasonably be perceived by viewers to be "guilty by association" by his inclusion in the programme as his comments clearly distanced him from the inappropriate behaviour of some of his colleagues (who had been shown being disrespectful and racist), by the fact he was condemning the way the company operated. Ofcom considered that the inclusion of Mr Spence's comments in the programme was unlikely to have materially or adversely altered viewers' perceptions of him in a way that was unfair.

Ofcom also noted that Mr Spence's face was obscured, whereas the faces of those in the programme who were complicit in wrongdoing were shown unobscured. Ofcom took the view that this, in a small way, also distinguished Mr Spence from those who were shown behaving inappropriately in the programme.

Having assessed each of the instances in which Mr Spence featured in the programme separately and together in the context of the programme as a whole, for the reasons set out above, Ofcom considered that the broadcaster had taken reasonable care to ensure that the material facts were not presented, disregarded or omitted in a way that is unfair to Mr Spence.

#### Unwarranted infringement of privacy

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

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

- b) Ofcom considered Mr Spence's complaint that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that he was filmed without his permission.

In considering this part of the complaint, Ofcom had regard to Practices 8.5, 8.9 and 8.13 of the Code. Practice 8.5 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. Practice 8.9 says that the means of obtaining material must be proportionate in all the circumstances, and in particular to the subject matter of the programme. Practice 8.13 says that surreptitious filming should only be used where it is warranted. Normally it will only be warranted if: there is a *prima facie* evidence of a story in the public interest; there are reasonable grounds to suspect that further material evidence could be obtained; and it is necessary to the credibility and authenticity of the programme.

In considering whether Mr Spence's privacy was unwarrantably infringed in connection with the obtaining of material included in the programme, Ofcom first assessed the extent to which Mr Spence had a legitimate expectation of privacy in the circumstances in which he was filmed, i.e. surreptitiously by an undercover reporter. As stated in the Code, "legitimate expectations of privacy will vary according to the place and nature of the information, activity or condition in question". When considering the extent to which a person has a legitimate expectation of privacy, Ofcom has regard to a number of factors which are taken into account below.

Ofcom noted that the filming took place at a funeral home, which was Mr Spence's work place, and that Mr Spence was not aware that he was being filmed surreptitiously. Ofcom took account of the fact that, although the nature of the work Mr Spence was involved in was sensitive, the content of what Mr Spence said about his own life was not particularly sensitive or confidential. However, it was clear from what he said that Mr Spence considered himself to be speaking in the company of colleagues and therefore spoke freely and openly. Ofcom further took into account that Mr Spence was working in a place which was not accessible to the general public and that the nature of his job could reasonably be taken to afford him an expectation of privacy in relation to being filmed at work without his knowledge.

Taking into account all the factors above, Ofcom considered that Mr Spence did have a legitimate expectation of privacy while at his workplace and discussing matters with colleagues.

Having formed the view that Mr Spence had a legitimate expectation of privacy in these circumstances, Ofcom went on to consider whether it was warranted to infringe Mr Spence's privacy.

Ofcom considered whether, in particular, it was warranted to film surreptitiously in accordance with Practice 8.13. The Code states that "warranted" has a particular meaning. It means that where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. 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.

Ofcom noted the circumstances which preceded the programme makers' decision to surreptitiously film at Gillman's, which were set out by ITV in its submissions provided to Ofcom, and it took into account that ITV stated that evidence from a confidential source at Gillman's had suggested that: there were widespread inefficiencies in the company; a poor service was provided; staff were not properly trained; and, there was a "callous treatment of the deceased".

Ofcom considered that there was a genuine public interest in the programme makers' decision to act on the information which they had received because there were reasonable grounds to believe that surreptitiously filming would uncover information and evidence relating to the claims of poor quality in the provision of funeral services, often at considerable cost, performed at a sensitive time when people using the services are feeling vulnerable and upset at their bereavement. Ofcom acknowledged that some of the behaviour which the programme makers had been told of could only have been corroborated by filming staff undercover. Ofcom also noted that the undercover reporter had worked for a week without filming and that his experience in that week substantiated the information ITV had received from its confidential sources. Given the nature of undercover filming and that in the particular circumstances of this case it involved the reporter working in a funeral parlour it was therefore necessary for the broadcaster to film a number of members of staff including Mr Spence. Ofcom also considered that the means of obtaining the material was proportionate given the genuine public interest in investigating the issues which were raised by the broadcaster's research and the private nature of the funeral industry.

On balance and given all the factors set out above, Ofcom considered that the broadcaster's right to freedom of expression and the public interest in the subject matter of the filming and the public interest in programme makers gathering material on a matter of public interest without being unduly constrained, outweighed Mr Spence's expectation of privacy in the obtaining of material in these circumstances.

Ofcom therefore found that there was no unwarranted infringement of Mr Spence's privacy in connection with the obtaining of material included in the programme.

- c) Ofcom next considered Mr Spence's complaint that his privacy was unwarrantably infringed in the programme as broadcast in that footage of him was broadcast in the programme without his consent. Although his face was obscured, Mr Spence said that his voice was not disguised. Mr Spence said that he was identifiable from the footage shown in the programme and has been recognised by family and friends. Mr Spence said that he has been abused in the street since the broadcast of the programme.

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

Ofcom first considered whether Mr Spence had a legitimate expectation of privacy in relation to the material broadcast in which his voice was heard and he could be seen with his face obscured. In considering the extent to which a person had a legitimate expectation of privacy, Ofcom has regard to a number of factors,

which includes the circumstances in which an individual was filmed and the context in which the footage was subsequently used.

Ofcom took into account the circumstances in which Mr Spence was filmed, as set out in head b) above. Ofcom also took account of what was broadcast in the programme, as set out in head a) above. Mr Spence was observed in the programme raising concerns about the manner in which the business was operating and what he saw as cost cutting by the company. It appeared to Ofcom that Mr Spence was under the impression that he was talking to colleagues in an area of the business, i.e. a locker room, which Ofcom assumed not to be accessible to the general public. Ofcom therefore considered that he had a legitimate expectation of privacy in the material broadcast.

Ofcom observed from the programme that Mr Spence's name was not used and his face was obscured. However, Ofcom noted that Mr Spence's place of work was identified and his voice was not altered. In the supporting material to his complaint form Mr Spence also noted that his height and build were clearly distinguishable, and that because footage of his hands was shown his skin colour was distinguishable. Ofcom considered that Mr Spence had been identifiable from the footage of him included in the programme, despite his face being obscured and not being named.

Taking all these factors into account, Ofcom considered that Mr Spence had a legitimate expectation of privacy in the material broadcast which was obtained by surreptitious filming.

Since Mr Spence did not consent to surreptitiously filmed footage of him being shown in the programme, Ofcom went on to consider whether it was warranted to infringe Mr Spence's privacy by broadcasting the footage of him in the programme.

As set out in head b) above the Code states that "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.

Ofcom again took into account the parts of the programme in which Mr Spence appeared which were set out in head a) of the Decision above. The premise of the programme was to expose the way that deceased people at a funeral parlour were treated by those who worked there, and that the programme included contributions from other employees that illustrated the disrespectful way in which some of the dead were treated. The programme also set out the inadequate facilities, including the lack of proper refrigeration for bodies and the fact that Gillman's publicly stated promise to dress the deceased in clothes provided by their relatives was not always honoured.

Ofcom noted that Mr Spence's comments highlighted concerns amongst some staff about the methods of recruiting new business into the funeral business and a more general concern that: *"anything that promotes bringing in the dead, we'll do it"*. Mr Greenfield also condemned the way in which the branch manager Mr Moyes had described the bingo proposal saying he had done so in an *"inappropriate manner"*. Ofcom also considered Mr Spence's concerns about cost cutting by the business and its use of untrained staff to do the work of professional tradesmen. Mr Spence's comments illustrated his concern that Gillman's *"want to send the cheapest option"* and that this was further supported

later in the programme, for example by staff who complained that there were inadequate numbers of men sent to carry a heavy coffin.

Ofcom considered that programmes such as *Exposure* which aim to expose misleading practices and wrongdoing of individuals and businesses play an important role in examining issues that are in the public interest. In this particular edition of the programme, Mr Spence's comments raised some genuine issues of concern about some ways in which Gillman's was conducting its business and the service it provided to its customers. In Ofcom's view, in order for the programme to illustrate staff disquiet at how some practices had changed since the takeover by FPL, Mr Spence's testimony was an important facet which explained to viewers how the consolidation of the industry had altered the manner in which the business operated and which was manifest in some of the dubious practices set out in head a) above.

Ofcom next took account of Mr Spence's assertion that he was identifiable from the footage in the programme and that, as a consequence, he had been recognised by family and friends and had been abused in the street since its broadcast. Ofcom also took into account ITV's submission that it had due regard for Mr Spence's privacy by obscuring his face in the footage of him which was included in the programme as broadcast. However, Ofcom noted that Mr Spence's voice remained unobscured which led, according to Mr Spence, to him being recognised.

Ofcom considers that it is important however for broadcasters to consider carefully the possible adverse repercussions for individuals (who have not been involved in wrong doing) that can result from broadcasting surreptitiously filmed footage of them without their consent.

In relation to any possible repercussions that Mr Spence may have suffered as to his employment as a result of the comments being broadcast, Ofcom noted that Mr Spence's criticism of the bingo event proposed by Mr Moyes' was later reiterated in comments from the CEO of Gillman's, Mr Greenfield, who agreed that Mr Moyes had represented the proposal in an "*inappropriate manner*". Given that such a senior figure within the company had substantively agreed with Mr Spence's criticism about the incident, Ofcom did not think it was reasonably foreseeable that Mr Spence would face censure by his employers for such a remark. Similarly, Ofcom concluded that Mr Spence's comment that Gillman's "*want to send the cheapest option*", could not have reasonably resulted in disciplinary action given that, whilst raising an issue that was in the public interest, the nature of the comments was to do with the quality of service the public received and did not significantly criticise his employer.

In relation to any wider possible repercussions that Mr Spence may have suffered as a result of the broadcast of his comments, Ofcom noted that Mr Spence did not set out whether the abuse he had received in the street was as a result of the specific comments he had made which were broadcast in the programme, or whether this was due to the more general association of him being known as an employee of Gillman's within the community. Ofcom noted that, as set out in detail in head a), Mr Spence was depicted in the programme condemning certain aspects of the way the company operated and was not in any way shown himself engaging in, or approving of, the wrongdoing demonstrated by some of his colleagues. Ofcom therefore considered that any abuse that Mr Spence unfortunately received could not have been reasonably foreseeable to the broadcaster.

Further, Ofcom recognises that in certain circumstances there may be a public interest in featuring the surreptitiously filmed testimony of identifiable individuals who may help to expose wrongdoing or inappropriate behaviour but do not themselves engage in or approve of such wrongdoing or inappropriate behaviour. Ofcom recognises that a balance must be made, in the circumstances of a particular case, between the competing rights of the broadcaster's and audience's freedom of expression against the individual's right to privacy. Taking all these factors into account, Ofcom therefore weighed Mr Spence's right to privacy in the broadcast of his remarks in the programme against the broadcaster's right to freedom of expression and the audience's right to receive the information broadcast. In this particular case, Ofcom considered that the testimony of employees such as Mr Spence who were not involved in the dubious practices shown in the programme was important to show the disquiet among staff about the way the business operated. Ofcom considered that, in the circumstances of this particular case, it was important not only that the testimony of those who took part in these dubious practices be included in the programme, but also that expressions of discontent by other staff members played an important role in establishing the authenticity and credibility of the programme. In this context, Ofcom considered that there was a sufficient public interest justification for including Mr Spence's comments in his own voice and that it was proportionate to do so.

Therefore, on balance and given all the factors referred to above, Ofcom concluded that the broadcaster's freedom of expression and the audience's right to receive information and ideas without interference, in the circumstances of this particular case outweighed the legitimate expectation of privacy that Mr Spence had in relation to the broadcast of surreptitiously filmed footage of him without his consent.

Ofcom therefore found that Mr Spence's privacy was not unwarrantably infringed in the broadcast of the material in these circumstances.

**Accordingly, Ofcom has not upheld Mr Spence's complaint of unjust or unfair treatment and unwarranted infringement of privacy in connection with the obtaining of material included in the programme and the programme as broadcast.**

## Not Upheld

### Complaint by Mr Lee Hollywood

*Exposure: The British Way of Death, ITV1, 26 September 2012*

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#### Summary

Ofcom has not upheld this complaint of unjust or unfair treatment and unwarranted infringement of privacy made by Mr Hollywood.

On 26 September 2012, ITV broadcast an edition of its current affairs series *Exposure*. This edition, entitled *The British Way of Death*, looked at the consolidation of the funeral industry in the UK and filmed undercover at two funeral parlours. One was Gillman Funeral Service (referred to in the programme as “Gillman’s” and now owned by Funeral Partners Limited) in south London. The programme included footage filmed undercover there which illustrated the way in which some of the deceased individuals were treated with disrespect and included footage, for example of a member of staff who referred to one dead body as a “dirty old thing” and another where two members of staff referred to another dead body as “Chelsea scum”. The programme also raised issues about the levels of service received by customers of Gillman’s.

Mr Hollywood (who at the time of the undercover filming worked for Gillman’s) complained that he was treated unfairly in the programme and that his privacy was unwarrantably infringed in the obtaining and broadcast of the footage.

Ofcom found that:

- The undercover footage of Mr Hollywood was adequately subtitled and any small inaccuracies in the subtitles did not materially change the sense of his statements and therefore did not alter viewers’ perceptions of him in a way that was unfair.
- The footage of Mr Hollywood was edited fairly in that it was an accurate reflection of the unedited footage and the broadcaster took reasonable care that the material facts were not presented, disregarded or omitted in a way that was unfair to Mr Hollywood.
- Mr Hollywood had a legitimate expectation of privacy in the obtaining of the material in that he would not expect to be filmed surreptitiously in his place of work. In this case, the public interest in obtaining the footage outweighed Mr Hollywood’s legitimate expectation of privacy. Therefore, Mr Hollywood’s privacy was not unwarrantably infringed in connection with the obtaining of the material included in the programme.
- Mr Hollywood had a legitimate expectation of privacy in relation to the broadcast of the footage shown of him. In this case, the public interest in broadcasting the material, in order to show the disrespect to the deceased demonstrated by Mr Hollywood outweighed Mr Hollywood’s expectation of privacy. Therefore, Mr Hollywood’s privacy was not unwarrantably infringed in the programme as broadcast.

## Introduction and Programme Summary

On 26 September 2012, ITV1 broadcast an edition of its current affairs series *Exposure*, entitled *The British Way of Death*. This programme examined the British funeral industry and queried whether or not the public's trust in the services provided by funeral directors was misplaced. In particular, the programme's introduction stated that it had gone undercover to: "*reveal disturbing changes*" taking place in the unregulated funeral industry, including what it described as "*disrespect to the bereaved and families, racism, [and] bodies left to decompose*". The programme explained that although most funeral directors appeared to be family run businesses, about 40 per cent of the funeral industry is now owned by four companies which prefer to trade using the old family business names.

One such business was Gillman Funeral Service ("Gillman's") which has branches in south London and Surrey. The programme explained that Gillman's had previously been an independent funeral business, but had been sold two years previously to Funeral Partners Limited ("FPL") who own over seventy funeral directors in the UK. One of ITV's reporters, referred to in the programme as "Tom" was employed as a casual worker with Gillman's and secretly filmed his experiences over a period of several months.

The complainant, Mr Lee Hollywood, was a member of staff with whom Tom worked. Mr Hollywood, described in the programme as an "*unskilled worker*", was shown in the programme assisting another member staff, "Rachel" who had "*industry related qualifications*". The pair were shown undressing the body of a woman and Rachel sang the words "*the minute she walked in the mortuary*" to the tune of "*Big Spender*", whilst undressing a deceased individual. Mr Hollywood was seen laughing at these comments and while trying to move the dead woman he stated "*come on sweetheart, get your arse up*".

Mr Hollywood and Rachel then discussed extracting a "*blackhead*" from the deceased woman and Mr Hollywood was shown saying that the family could suck it with a straw and made a sucking sound. Later in the programme, Mr Hollywood and Rachel were both shown referring to another deceased person as "*Chelsea scum*" because the dead person was a supporter of Chelsea Football Club.

Later in the programme, Mr Philip Greenfield, the Chief Executive of FPL was interviewed and commented directly on some of Mr Hollywood's comments and actions. He described some of Mr Hollywood's comments as "*completely inappropriate*" and that it "*goes against our guidelines*".

Mr Hollywood was shown unobscured in the programme and his voice was heard. He was also referred to by his first name.

Following the broadcast of the programme, Mr Hollywood complained to Ofcom that he was treated unjustly or unfairly in the programme and that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme and in the programme as broadcast.

## Summary of the complaint and the broadcaster's response

### Unjust or unfair treatment

Mr Hollywood complained that he was treated unjustly or unfairly in the programme as broadcast in that:

- a) The manner in which the secretly filmed footage of him was edited in the programme resulted in him being unfairly portrayed. In particular, Mr Hollywood said that the audio accompanying the secretly filmed footage did not match the subtitles put on screen.

In response, ITV said that the programme examined the funeral industry in Britain and questioned whether it deserved the public's trust. Part of the programme featured branches of the funeral directors, Gillman's, which was now part of a wider company, FPL. Using covert footage recorded by an undercover reporter working at Gillman's, ITV said that the programme exposed examples of disrespect by staff towards the bereaved and the deceased, and bodies being left in non-refrigerated conditions in warm weather. The programme also explored whether Gillman's quality of service had changed since ceasing to be an independent funeral business.

ITV added that Mr Hollywood was an employee at Gillman's and was shown carrying out various tasks at work and a number of conversations with his work colleagues were broadcast in the programme. ITV stated that the programme questioned the appropriateness of Mr Hollywood's conduct as part of the investigation of the service provided by his employers.

In relation to the specific complaint that the manner in which Mr Hollywood's contribution was edited portrayed him unfairly, ITV said that the footage broadcast in the programme showed a clear display of disrespect by Mr Hollywood to the dead and to their families. ITV said that the producers of the programme interviewed Mr Greenfield (the Chief Executive of FPL) and he was asked about Mr Hollywood's conduct in that interview which was also broadcast. ITV said that Mr Greenfield apologised for the behaviour of his employees and said that it was behaviour that he would never condone. ITV said that the unedited footage clearly showed that the sequences broadcast in the programme were not edited unfairly. Further, it said that the unedited material demonstrated further poor conduct in that there were additional inappropriate comments made by Mr Hollywood.

ITV said that Mr Hollywood had not provided any further particulars with regard to his complaint that the audio accompanying the secretly filmed footage did not match the subtitles on the screen. ITV said that given the nature of the conversation, where people often talk over each other and natural asides are mumbled, it can be confusing to include precise verbatim subtitles. However, ITV submitted that the subtitles fairly reflect what was being said and that, where any audible or irrelevant words are omitted, it was not to any material extent such that would result in any unfairness to Mr Hollywood.

ITV stated that all of the matters disclosed in the covert filming were put to the complainant's employers prior to broadcast, and they clearly would have made the relevant named individuals aware of this filming in the course of their own subsequent internal investigation. The behaviour exhibited by Mr Hollywood and others in the programme was condemned by Mr Greenfield on behalf of the company, and ITV said that Mr Hollywood did not contact ITV directly prior to the programme being broadcast.

### Unwarranted infringement of privacy

- b) Mr Hollywood complained that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that he was secretly filmed without his permission.

In response, ITV said that given the nature of the investigation it was necessary to film covertly. ITV said that *prima facie* evidence was gathered by the programme makers from confidential sources with connections to Gillman's which demonstrated, among other things, that: poor service was provided; staff members were not properly trained; and, there was a callous treatment of the deceased. ITV said that the reporter who subsequently worked for Gillman's worked for a week before commencing the filming, during which time it became apparent that the information received from those sources was correct.

ITV said that because there was sufficient *prima facie* evidence it gave permission for the programme makers to film covertly prior to recording in accordance with its established procedures and Section Eight (Privacy) of Ofcom's Broadcasting Code. ITV said that it was reasonable to suspect that covert filming would produce further evidence in the public interest and that in an investigation of this kind, undercover filming was necessary for the credibility and authenticity of the programme.

ITV said that had permission been sought from Mr Hollywood, it would clearly have been unlikely that he would have behaved in the manner that the covert filming revealed.

- c) Mr Hollywood complained that his privacy was unwarrantably infringed in the programme as broadcast in that he did not give his permission to be shown or named in the programme.

In response, ITV said that having obtained this material it was clear from the covert footage that it did provide evidence that standards of service and behaviour of certain staff at Gillman's fell below that expected by the public and it was in the public interest to expose these failings in the programme. ITV said that, in accordance with its procedures, the footage to be included in the programme was carefully considered before permission was granted by ITV for it to be included in the programme as broadcast.

ITV said that Mr Hollywood was shown unobscured in the programme and was referred to by name. ITV added that the covert filming included in the programme displayed a disrespectful and at times callous attitude by Mr Hollywood towards the bereaved and their families in the course of his employment. ITV said that this behaviour could not be attributed to the working practices or requirements of his employers. ITV said that it considered this behaviour therefore warranted Mr Hollywood being identified in the programme. Insofar as Mr Hollywood may have had any expectation of privacy in the circumstances of filming and the subsequent broadcast of that footage, ITV argued that it was clearly warranted in the public interest.

ITV said that given the clear public interest in the broadcast of footage, ITV said therefore entitled to broadcast this footage without Mr Hollywood's consent.

## **Representations on Ofcom's Preliminary View**

Ofcom prepared a Preliminary View in this case that Mr Hollywood's complaint should not be upheld. In commenting on this Preliminary View, ITV made a factual clarification in relation to the phrase *"it's alright we'll shut the lid"* which Ofcom has reflected in its final decision below. Mr Hollywood did not submit any representations on Ofcom's 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 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.

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 reaching its final 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. It also viewed the unedited material provided by ITV and read a transcript of it. Ofcom also had regard to the factual clarification made by ITV in response to the Preliminary View.

### **Unjust or unfair treatment**

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

- a) Ofcom first considered Mr Hollywood's complaint that the manner in which the secretly filmed footage of him was edited in the programme resulted in him being unfairly portrayed. In particular, Mr Hollywood said that the audio accompanying the secretly filmed footage did not match the subtitles put on screen.

In considering this part of the complaint, Ofcom had regard to Practices 7.6 and 7.9 of the Code. Practice 7.6 states that when a programme is edited, contributions should be represented fairly. Practice 7.9 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 examined the parts of the programme in which Mr Hollywood appeared and noted that footage of Mr Hollywood featured in a sequence of clips that preceded the programme credits. Each of the comments made by Mr Hollywood in this sequence featured in longer sequences later in the programme. For the

sake of clarity, Ofcom considered each of the sequences in which Mr Hollywood appeared in the programme under separate bulleted points as set out below.

- Mr Hollywood was described by the narrator as being an “*unskilled worker*” and it was explained that Rachel, an embalmer, had to rely on the help of unskilled staff, such as Mr Hollywood as she “*claims to be overworked*”. Rachel was then shown undressing the deceased and having the following conversation with Mr Hollywood. Ofcom has considered this material against the unedited footage (comments which were not broadcast are highlighted in bold):

Rachel: *“Has she [the deceased] got clothes on? Yeah, hang on we need to strip her first. Dun dun der dun [Singing to the tune of “Big Spender”] The minute she walked in the mortuary. I could tell....*

Mr Hollywood: [Laughing] *Oooh, what are you like? What are you like?*

Rachel: *One of a kind mate<sup>1</sup>, **awarded so by the judge.***

Tom: ***By the what?***

Rachel: ***The judge.***

Tom: ***Right.***

Rachel: ***Now, can you roll her bum to you so I can stick it under there?***

Mr Hollywood: *Oooh, hello!*

Rachel: *Thank you. [inaudible]*

Mr Hollywood: *I’m sure she will.*

Mr Hollywood: *Dirty old thing [not subtitled]*

Rachel: ***Now take the rest of the arm out first. Mind her skin she’s going to get [inaudible].***

Mr Hollywood: ***Oh yeah. Horrible stuff. Woops.***

Rachel: ***There we go. Right now. [not subtitled]***

Mr Hollywood: *Come on sweetheart, get your arse up”.*

Rachel then commented on the dead woman’s “gross” blackhead which she removed. Mr Hollywood suggest that the deceased’s family could “suck it...[makes sucking noise] *with a straw*”.

Ofcom carefully considered the subtitling in the sequence and noted that Rachel’s comment that she was “one of a kind” was subtitled as “*I’m fine*”. Ofcom did not consider that this small difference concerning this exchange could have materially and adversely affected viewer’s perceptions of Mr

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<sup>1</sup>This is subtitled as “*I’m fine mate*” in the programme as broadcast.

Hollywood. Ofcom also did not consider the fact that Mr Hollywood's comment, in which he referred to the dead woman as *"dirty old thing"*, was not subtitled, was unfair to him as it did not change the sense of the exchange in a way that would have meant viewers' perceptions of him were materially and adversely affected. There was therefore no unfairness to Mr Hollywood in this regard.

Ofcom next considered whether the unedited material which was not included in the programme as broadcast would have changed the sense of this exchange. Having carefully examined the footage that preceded and followed these exchanges, as well as considering the additional footage that was not included as set out above, Ofcom considered that the additional footage did not change the sense of Mr Hollywood's comments as broadcast and therefore viewers' perceptions of him would have been unlikely to have been materially altered in a way that was unfair or unjust to him.

Ofcom noted that a section of the sequence above was repeated later in the programme and that Mr Greenfield was asked to comment on it. He said that comments such as those set out above would not be tolerated and that the comments about the blackhead were: *"completely inappropriate and it goes against our guidelines. We would never, never condone it"*.

In relation to this sequence, Ofcom concluded that neither the incorrect subtitling nor the editing of the undercover footage resulted in any unfairness to Mr Hollywood as a result of the manner in which it was presented in the programme.

- Shortly after this exchange the narrator stated: *"with such a grim job, some gallows humour is understandable but at Gillman's this all too easily slips into disrespect"*. In the programme Mr Hollywood then remarked on a dead person, saying: *"he's a Chelsea supporter...scummer"*. Although Mr Hollywood used the word *"scummer"*, the word *"scum!"* was subtitled on screen. Ofcom considered that this small change of the derogatory word in the subtitling from *"scummer"* to the derivative *"scum"* did not change the sense of Mr Hollywood's comments in any significant way that viewers' perceptions of him were unlikely to have been materially and adversely altered by it.

Immediately following this, the following exchange appeared in the programme. Ofcom has considered this against the unedited material (the footage which was not broadcast in the programme is highlighted in bold below):

Mr Hollywood: ***"So every time you check a body, yeah?"***

Tom: ***Yeah.***

Mr Hollywood: ***Out here, you have to make sure the door's shut.***

Tom: ***The door's shut, yeah. Right, yeah yeah. We don't want the public seeing.***

Mr Hollywood: ***You don't let any people, we don't anyone to see what we're doing and whatever*** [inaudible].

Tom: ***Yeah.***

Mr Hollywood: ***Tom's checked it as well. To make sure its*** [inaudible].

Male Colleague: *It's alright we'll shut the lid.*

Mr Hollywood: *Chelsea scum.*

Rachel: *Chelsea scum.*

Male Colleague: *Don't say that Lee.*

Mr Hollywood: *Well, he is".*

Ofcom considered whether the inclusion of the audio of the phrase "*it's alright we'll shut the lid*" which appeared in the programme as broadcast, though it was inaudible to Ofcom in the unedited footage provided by ITV, changed the sense of the exchange. In its representations, ITV said that the phrase did appear, albeit indistinctly. In any event, Ofcom took the view that this phrase was a description of what was taking place, i.e. that the lid of the coffin was being drilled on and that Mr Hollywood's following comments were not in any way affected by the inclusion of this phrase. There was, therefore, no unfairness to Mr Hollywood in this regard.

Ofcom next considered whether the unedited material which was not included in the programme as broadcast would have changed the sense of the exchange. Having carefully examined the footage that preceded and followed these exchanges, as well as considering the additional footage that was not included as set out above, Ofcom considered that the additional footage did not change the sense of Mr Hollywood's comments and therefore viewers' perceptions of him would have been unlikely to have been materially and adversely altered in a way that was unfair to him.

Mr Greenfield was also asked to comment later in the programme in relation to Mr Hollywood and his colleague calling a dead individual "*Chelsea scum*", Mr Greenfield said the comments: "*have no place in our business and I will not tolerate them*". Ofcom also noted that earlier in the programme, the narrator stated that Gillman's: "*promise they will act with respect, integrity and always to the highest professional standards*". Footage of the company's website was shown in the programme to demonstrate these claims. Ofcom considered that it was clear that Mr Hollywood's comments did not meet the company's stated policy of acting with "*respect, integrity and the highest professional standards*" and that the comments of the company's Chief Executive included in the programme reinforced this.

Ofcom also noted that the narrator made it clear that some behaviour of those featured in the programme slipped "*into disrespect*" and that the programme was condemning Mr Hollywood's comment as disrespectful. Ofcom considered that calling the deceased "*Chelsea scum*" was disrespectful and that viewers would perceive it as such.

Therefore, in relation to this sequence, Ofcom considered that neither the inclusion of the additional material, the editing of the undercover footage, nor the omission of the comments noted in the broadcast resulted in any unfairness to Mr Hollywood.

Having assessed each of the instances in which Mr Hollywood featured in the programme separately and together in the context of the programme as a whole, Ofcom considered that in each of the sequences set out above Mr Hollywood's comments were reflected fairly in the programme. Ofcom took account of the minor differences between the subtitled words and the words spoken by Mr Hollywood and concluded that Mr Hollywood's contributions were reflected fairly in the programme and that any differences did not result in any unfairness to him. Ofcom also considered that Mr Hollywood's contributions were edited in a fair manner and that the material which was omitted from the programme did not alter the sense of his contribution in the programme as broadcast. Ofcom therefore found that the broadcaster had taken reasonable care to ensure that the material facts were not presented, disregarded or omitted in a way that was unjust or unfair to Mr Hollywood.

### Unwarranted infringement of privacy

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

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

- b) Ofcom considered Mr Hollywood's complaint that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that he was secretly filmed without his permission.

In considering this part of the complaint, Ofcom had regard to Practices 8.5 and 8.13 of the Code. Practice 8.5 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. Practice 8.13 says that surreptitious filming should only be used where it is warranted. Normally, it will only be warranted if: there is a *prima facie* evidence of a story in the public interest; there are reasonable grounds to suspect that further material evidence could be obtained; and, it is necessary to the credibility and authenticity of the programme.

In considering whether Mr Hollywood's privacy was unwarrantably infringed in connection with the obtaining of material included in the programme, Ofcom first assessed the extent to which Mr Hollywood had a legitimate expectation of privacy in the circumstances in which he was filmed, i.e. surreptitiously by an undercover reporter. As stated in the Code: "legitimate expectations of privacy will vary according to the place and nature of the information, activity or condition in question". When considering the extent to which a person has a legitimate expectation of privacy, Ofcom has regard to a number of factors which are set out below.

Ofcom noted that the filming took place at a funeral home, which was Mr Hollywood's work place, and that Mr Hollywood was not aware that he was being filmed surreptitiously. Ofcom took account of the fact that, although the nature of the work Mr Hollywood was involved in was sensitive, the content of what Mr Hollywood said about his own life was not particularly sensitive or confidential.

However, it was clear from what he said that Mr Hollywood considered himself to be speaking in the company of colleagues and therefore spoke freely and openly. Ofcom further noted that Mr Hollywood was working in a place which was not accessible to the general public and that the nature of his job afforded him an expectation of privacy in relation to being filmed without his knowledge.

Taking into account all the factors above, Ofcom considered that Mr Hollywood did have a legitimate expectation of privacy while at his workplace and discussing matters with colleagues. However, Ofcom also took account of Mr Hollywood's disrespectful language and behaviour towards the deceased, and inappropriate conduct while fulfilling his professional role working at a funeral parlour (as set out in head a) above), and considered that this reduced Mr Hollywood's expectation of privacy correspondingly.

Having formed the view that Mr Hollywood had a legitimate expectation of privacy in these circumstances, albeit limited, Ofcom went on to consider whether it was warranted to infringe Mr Hollywood's privacy.

Ofcom considered whether, in particular, it was warranted to film surreptitiously in accordance with Practice 8.13. The Code states that "warranted" has a particular meaning. It means that where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. 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.

Ofcom noted the circumstances which preceded the programme makers' decision to surreptitiously film at Gillman's, which were set out by ITV in its submissions provided to Ofcom, and it took into account that ITV stated that evidence from a confidential source at Gillman's had suggested that: there were widespread inefficiencies in the company; a poor service was provided; staff were not properly trained; and, there was a "callous treatment of the deceased". In addition, Ofcom also took account of ITV's submissions which stated that surreptitious filming was necessary because it considered it highly unlikely that Mr Hollywood would have acted in the same way, had he known he was being filmed.

Ofcom considered that there was a genuine public interest in the programme makers' decision to act on the information which they had received prior to ITV granting permission to film surreptitiously because there was a reasonable likelihood that surreptitious filming would uncover information and evidence relating to the poor quality in the provision of funeral services, often at considerable cost, performed at a sensitive time when people using these services are feeling vulnerable and upset at their bereavement. Ofcom acknowledged that some of the behaviour which the programme makers had been told of could only have been corroborated by the use of surreptitious filming. Ofcom also noted that the undercover reporter had worked for a week without filming and that his experience in that week substantiated the information ITV had received from its confidential sources. Given the nature of undercover filming and that, in the particular circumstances of this case, it involved the reporter working in a funeral parlour it was therefore necessary for the broadcaster to film a number of members of staff including Mr Hollywood.

Ofcom also recognised that Mr Hollywood was a junior employee within the organisation but, given the nature of the undercover filming, also recognised that the broadcaster could not discriminate between the levels of employees within the organisation that the undercover reporter filmed in the course of his employment at Gillman's. Ofcom also had regard to the broadcaster's representation that Mr Hollywood would have acted differently had he been aware that he was being filmed and therefore undercover filming was necessary for the authenticity and credibility of the programme.

On balance and given all the factors set out above, Ofcom considered that the broadcaster's right to freedom of expression and the public interest in the subject matter of the filming and the public interest in programme makers gathering material on a matter of public interest without being unduly constrained, outweighed Mr Hollywood's expectation of privacy in the obtaining of material in these circumstances.

Ofcom therefore found that there was no unwarranted infringement of Mr Hollywood's privacy in connection with the obtaining of material included in the programme.

- c) Ofcom next considered Mr Hollywood's complaint that his privacy was unwarrantably infringed in connection with the material broadcast in the programme as he did not give his permission to be shown or named in the programme.

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

Ofcom first considered whether Mr Hollywood had a legitimate expectation of privacy in relation to the material broadcast in which he was named and featured in the programme. In considering the extent to which a person had a legitimate expectation of privacy, Ofcom has regard to a number of factors, which includes the circumstances in which an individual was filmed and the context in which the footage was subsequently used.

Ofcom took into account the circumstances in which Mr Hollywood was filmed, as set out under head b) above. Ofcom also took account of what was broadcast in the programme, as set out in head a) above. Mr Hollywood was observed in the programme acting in a manner that was disrespectful to the deceased on a number of occasions. Mr Hollywood was under the impression that he was talking to a colleague in an area of the business that was not accessible to the general public. Ofcom therefore considered that he had a legitimate expectation of privacy in the material broadcast.

However, Ofcom also took account of Mr Hollywood's disrespectful language and behaviour towards the deceased, and inappropriate conduct while fulfilling his professional role working at a funeral parlour (as set out in head a) above), and considered that this reduced Mr Hollywood's expectation of privacy correspondingly.

Ofcom observed from the programme that Mr Hollywood's first name was used in the programme, his face was unobscured and his workplace was identified. Ofcom also took into consideration that the programme makers had written to Mr Greenfield, the Chief Executive of FPL (the owners of Gillman's) prior to the transmission of the programme to inform him of the allegations made in the programme and to ask for the relevant employees to be notified of the intention to broadcast the footage. Ofcom noted from ITV's statement that it had not received any correspondence from Mr Hollywood prior to the broadcast of the programme but it was also not clear to Ofcom whether Mr Hollywood had been told by his employers prior to the broadcast whether she would appear in the programme.

Since Mr Hollywood did not consent to surreptitiously filmed footage of him being shown in the programme, Ofcom went on to consider whether it was warranted to infringe Mr Hollywood's privacy by broadcasting the footage of him in the programme.

As set out in head b) above the Code states that "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.

Ofcom again took into account the parts of the programme in which Mr Hollywood appeared which were set out in head a) above. The premise of the programme was to expose the way that the deceased people at a funeral parlour were treated by those who worked there, and that Mr Hollywood's contributions served to illustrate the way that the dead were treated and the employee's attitudes towards the deceased.

In particular, Ofcom noted that Mr Hollywood referred to one dead woman as a "*dirty old thing*" and whilst trying to move the body, jokingly exclaimed "*come on sweetheart, get your arse up*". Mr Hollywood also referred to another deceased as "*Chelsea scum*". Ofcom considered that most viewers would not regard Mr Hollywood's behaviour and comments during these incidents to be consistent with Gillman's stated policy of acting with "*respect, integrity and always to the highest professional standards*".

In Ofcom's opinion very few members of the public would be aware of what happened in a funeral parlour at a time that would undoubtedly be very distressing for the bereaved.

As set out in head b) above, the individual's right to privacy has to be balanced against the competing rights of the broadcaster's to freedom of expression. Neither right 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 right.

Ofcom carefully balanced Mr Hollywood's right to privacy in the broadcast of his remarks and actions in the programme with the broadcaster's right to freedom of expression and the audience's right to receive the information broadcast without unnecessary interference. Ofcom came to the view that there was a public interest in ITV broadcasting Mr Hollywood's comments about and conduct towards some of the deceased, because they served to illustrate the disrespectful way that they were treated. Ofcom considered that it was important for the public to be aware how their dead relatives, friends and acquaintances were treated, particularly when the impression given by the business was that it was "family"

oriented. Ofcom recognised that Mr Hollywood was a junior member of staff at Gillman's. One of the aims of the programme was to expose the business practises of the wider corporate entity i.e. FPL. But it was also to demonstrate any inappropriate conduct or behaviour of FPL's employees including those at a funeral parlour like Gillman's. Ofcom considered that given the inappropriate nature of Mr Hollywood's conduct in a professional capacity while working at Gillman's the broadcaster's decision to broadcast his face unobscured was warranted.

On balance and given all the factors set out above, Ofcom considered that in the circumstances of this case the broadcaster's right to freedom of expression and the public interest in the subject matter of the programme, and the public interest in programme makers gathering material on a matter of importance to many people without being unduly constrained, outweighed Mr Hollywood's expectation of privacy in the broadcast the material.

Ofcom therefore found that there was no unwarranted infringement of privacy in the broadcast of the material these circumstances.

**Accordingly, Ofcom has not upheld Mr Hollywood's complaint of unjust or unfair treatment and unwarranted infringement of privacy in connection with the obtaining of material included in the programme and in the programme as broadcast.**

## Not Upheld

### Complaint by Ms D

*Sunday Brunch, Channel 4, 27 January 2013*

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#### Summary

Ofcom has not upheld this complaint of unwarranted infringement of privacy in the programme as broadcast made by Ms D.

The magazine programme *Sunday Brunch* included as a studio guest Mr Mark Jenkins who was the owner and manager of the Grosvenor Hotel in Torquay, which was the focus of another Channel 4 series, *The Hotel*. This episode of *Sunday Brunch* included a still image of footage from *The Hotel* shown for about three seconds. It showed in the foreground the hotel's events manager wearing an amusing hat, and behind him in the background a group of people at some form of event at the hotel. The group of people included the complainant, Ms D, who was shown in profile. She had informed the programme makers before the broadcast of *The Hotel* episode in which she featured that she did not wish to appear in *The Hotel*. Ms D had been given an assurance by the programme makers in writing before the broadcast that she would not appear in it.

Ms D complained to Ofcom that a still image of her taken from *The Hotel* programme was broadcast in the *Sunday Brunch* programme without her consent.

Ofcom's decision is that Ms D did not have a legitimate expectation of privacy in relation to the inclusion of the unobscured still image of her in the programme as broadcast. Although Ms D was likely to have been identifiable by those who knew her well, the still image of her was not shown in the context of anything which could reasonably be regarded as private or personal. The purpose of the image was to show an employee of the hotel, the events manager, whom Mr Jenkins was talking about during the programme, and the focus of the picture was the events manager. Ofcom considered therefore that Ms D's privacy was not unwarrantably infringed in the programme as broadcast.

#### Introduction

On 27 January 2013, Channel 4 broadcast an edition of *Sunday Brunch*, a magazine programme. The programme's guests included Mr Mark Jenkins, the owner and manager of the Grosvenor Hotel in Torquay. Mr Jenkins was shown being interviewed about another Channel 4 programme, *The Hotel*, whilst demonstrating how to cook a cake. He was asked about the hotel's events manager "Christian" and responded:

*"Um, Christian, well you'll see in the programme. Christian is just a nightmare. There's no other word for him".*

At this point in the programme, a still image taken from footage included in an episode of *The Hotel*, broadcast a week earlier on 20 January 2013, was shown for approximately three seconds.

The still image shown on *Sunday Brunch* included a close up of the events manager "Christian" with his arms raised and wearing a pink builder's hat. Behind him in the

background was a group of about ten people enjoying themselves at some form of event at the hotel. Ms D was part of that group and her face was unobscured.

By way of background, *The Hotel* was a documentary series that followed the day to day running of the Grosvenor Hotel. The episode from which the still image had been taken had looked at preparations for a “ladies night” at the hotel and the event itself, held on 11 August 2012, and included some footage of Ms D.

Following the broadcast of the *Sunday Brunch* programme, Ms D complained to Ofcom that her privacy was unwarrantably infringed in the programme as broadcast.

### **Summary of the complaint and the broadcaster’s response**

Ms D complained that her privacy was unwarrantably infringed in the programme as broadcast because a still image of footage of her, taken from *The Hotel*, was included. This was despite her having informed the programme makers of *The Hotel* that she did not want to appear in the original programme featuring the “ladies night” and despite her being informed that she would not be included.

Ms D said that, on the night she attended the “ladies night” at the Grosvenor Hotel, she had been told by a “camera lady” to email the programme makers, with a photograph of herself attached, to inform them that she did not wish to appear in the programme, *The Hotel*. Ms D said that she followed these instructions and sent an email to the production company on 28 August 2012 with a photograph of herself so that she could be identified by the programme makers. She had stated in her email that she did not want to be included in the programme. Ms D said that she received a response from the programme makers on the same day informing her that her email had been forwarded to the production team who would ensure that she would not appear in the programme. Despite this, footage of her was included in *The Hotel* as broadcast, and the still image of her was included in *Sunday Brunch* as broadcast.

Ms D said that the inclusion of the footage of her in the programmes had had a detrimental effect on her personal life and the relationship she had with her father due to his religious convictions.

In response to Ofcom’s Entertainment Decision in these cases, Channel 4 explained the background to the circumstances which had given rise to the complaint. It said that once the production company and Channel 4 were made aware that footage of Ms D had been included in the programme, *The Hotel*, and subsequently the still image appeared on *Sunday Brunch*, despite her email, the production company called Ms D to apologise, and steps were taken immediately to remove the episode of *The Hotel* from all of Channel 4’s broadcast platforms, including its On Demand service. The still image in the *Sunday Brunch* episode which included Ms D was also removed. It said that the master copy of the programme had also been amended and steps had been taken to ensure that still images in which Ms D featured would not be used by Channel 4.

Channel 4 explained that, at the time of filming, the cameras had been in clear sight of all the guests entering the room where the “ladies night” was being held. It said that the programme makers had been openly filming and that there were signs put up around the hotel indicating that this was the case. Channel 4 said that these signs included a statement to the effect that if a person did not want to be filmed or included in the broadcast programme, they should contact a named member of the production team (the guest liaison officer) on the telephone number provided or make themselves known to them.

Channel 4 said that it had filming protocols in place, one of which was a “Do Not Include protocol” (“DNI protocol”). This protocol set out for the programme makers the process of obtaining consent from contributors, including those who appeared in the background. It said that the DNI protocol requires contributors to identify themselves to the guest liaison officer. The guest liaison officer then takes a note of the person’s name and contact details and obtains a photograph of them so that they can be identified when editing to ensure that they have not been included in the programme at all or their faces blurred, if they have been included. These details are then passed on to the relevant staff. Channel 4 said that relevant members of staff involved with this programme were aware of this protocol and knew the process that was to be followed for those who did not want to be filmed or included in the programme. Channel 4 said that photographs of staff and guests who did not want to be included in the programme were printed out and given to the relevant members of staff and put up on walls where the appropriate production staff would see them.

Channel 4 explained that, on 28 August 2012, the production company’s main office received an email sent to its general enquiry email address from Ms D in which she requested not to be included in the programme, *The Hotel*. Ms D had attached a photograph of herself in order that she could be identified. Channel 4 said that this email was received by a receptionist at the production company, who was not a member of the production team and who was not familiar with or aware of the DNI protocol. The receptionist responded to Ms D stating that her request would be forwarded to the production team to ensure that she did not appear in the programme. Channel 4 said that relevant members of the production team were copied into the email. However, the photograph was not included in that email.

Channel 4 said that those of the production team who received Ms D’s request (through the receptionist’s email) assumed that Ms D had followed the DNI protocol procedure, which had been set out in the notice signs at the hotel on the night of filming, and that her details had been taken by the team on the night of the event and that this email correspondence was merely confirming this. In editing the programme, the production team only relied on the formal records and photographs that were taken and filed in accordance with the DNI protocol.

Channel 4 acknowledged that it was regrettable that a miscommunication had occurred between the programme makers and Ms D and that the inclusion of her in the programme as broadcast was “very unfortunate”. It considered however that, in any case, Ms D either did not have any legitimate expectation of privacy at all, or it was so severely limited in the circumstances that it was “almost negligible”. It argued that filming had taken place at a publicised event which was filmed openly as made clear by the cameras and the numerous filming notices around the hotel. As regards the broadcast of the still image, Channel 4 highlighted that Ms D was not named in the programme and that no other personal details about her were given. In addition, it said that Ms D was only shown in the background of the still image, and that in the image she was not shown engaging in any activity which would give rise to a legitimate expectation of privacy, or shown in what could be perceived as a “sensitive” situation. In any event, Channel 4 said that the still image shown during *Sunday Brunch* was broadcast so briefly that in its view it was impossible to identify Ms D.

Channel 4 pointed out that it was of paramount importance that any interference with a broadcaster’s right to freedom of expression must be proportionate. It stated that a DNI protocol was in place for the purpose of programme makers and broadcasters being able to reasonably, accurately and efficiently identify individuals who do not wish to be included in programmes. It said that the DNI protocol had proved

successful and where individuals followed the protocol they were not included in the programme. It highlighted the fast paced and stressful nature of programme making and the necessity for clear protocols such as this to ensure clarity for all involved and the avoidance of situations such as what had occurred with Ms D. Channel 4 said that the right for broadcasters to show programmes without undue interference should outweigh the limited expectation of privacy in these circumstances.

In conclusion, Channel 4 said that, as soon as the programme makers became aware of the issue, immediate steps were taken to remedy the situation. This was achieved by immediately removing the clip of the still image from the episode of *Sunday Brunch* on all Channel 4's platforms including its On Demand service, and ensuring that no still from the programme featuring Ms D would be used again by Channel 4.

### **Representations on Ofcom's Preliminary View**

Ofcom prepared a Preliminary View that Ms D's complaint should not be upheld. Ms D made representations in response. Ofcom considered these carefully but it appeared to Ofcom that these submissions were relevant to her separate privacy complaint about *The Hotel* rather than *Sunday Brunch*, did not address the issues set out in the *Sunday Brunch* complaint as entertained, and therefore did not persuade Ofcom to change its Preliminary View.

Channel 4's representations likewise only seemed to relate to Ms D's privacy complaint about *The Hotel*.

### **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 recordings of the programmes as broadcast, both *The Hotel* and *Sunday Brunch*, a script of the programme *The Hotel*, and both parties' written submissions and supporting documents.

Ofcom considered Ms D's complaint that her privacy was unwarrantably infringed in the programme, *Sunday Brunch*, because a still image of footage of her, taken from *The Hotel*, and in which she was identifiable, was included in the programme as broadcast. This was in circumstances where she had informed the programme makers of *The Hotel* that she did not want to appear in the original programme.

The individual's right to privacy has to be balanced against the competing rights of the broadcaster to freedom of expression. Neither right as such has precedence over the other, and, where there is a conflict between the two, it is necessary to focus on the comparative importance of the specific rights. Any justification for interfering with

or restricting each right must be taken into account and any interference or restriction must be proportionate. This is reflected in how Ofcom applies Rule 8.1 of Ofcom's Broadcasting Code ("the Code"), which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes must be warranted.

In assessing whether or not Ms D's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which she had a legitimate expectation of privacy in relation to the material broadcast. In doing so, Ofcom had regard to Practice 8.6 of the Code which states that, if the broadcast of a programme would infringe the privacy of a person, consent should be obtained before the relevant material is broadcast unless the infringement of privacy is warranted.

In considering Ms D's complaint, Ofcom also had regard to Practice 8.10 of the Code 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.

Ms D was shown very briefly (approximately three seconds) in a still image of footage included in the programme, as set out in the "Introduction" section above. The focus of the still image was the events manager, Christian, in the foreground facing the camera with his hands raised. Ms D was in the background behind the events manager at the front of a group of around ten people. She was shown turned to the left in profile and looking out of the picture. Although shown only briefly, in Ofcom's view, it was arguable that Ms D was likely to have been identifiable from the still image by those who knew her well.

Having established that Ms D was identifiable in the programme as broadcast, Ofcom considered whether Ms D could have a legitimate expectation of privacy in the still image of her and that it would not be broadcast without her consent. In that respect Ofcom had regard to its Adjudication concerning the broadcast of the episode of *The Hotel* on 20 January 2013 which showed preparations for the hotel's ladies night and the event itself, including footage of the complainant who attended the event. In that case, Ofcom considered that Ms D had a legitimate expectation of privacy in relation to the footage of her attending an event of such nature, and that given the circumstances of that case she could have legitimately expected that such footage of her attending the event would not be broadcast without her consent. In coming to this decision, Ofcom took particular note of the facts surrounding Ms D's correspondence with the programme makers asking them not to include any footage of her filmed at the "ladies night" in the relevant episode of *The Hotel* and obtaining confirmation that led her to assume, reasonably, that her request would be met.

On examining the footage of the still image of Ms D included in *Sunday Brunch*, Ofcom considered that the circumstances of this broadcast could be distinguished from the broadcast of *The Hotel* episode for the following reasons:

- Whereas it was clear from the broadcast of *The Hotel* that Ms D attended a raucous ladies night event (where male strippers were present and alcohol was extensively consumed), which could reasonably be regarded as private and personal to some extent and attendance at which she did therefore not necessarily want disclosed on television, this was not apparent from the broadcast of a still image in the present programme.

- The image in question was shown in the context of a very brief discussion in *Sunday Brunch* about the events manager of the Grosvenor Hotel who was depicted in the foreground of the still image. The purpose of the image was solely to focus on and show the events manager, whom Mr Jenkins was talking about during the programme. There was no mention whatsoever of the “ladies night” sequence in the episode of *The Hotel* from which the still image was taken, or the atmosphere and activities at, or people who participated in, that event.
- Therefore, in this context, the still image by itself did not reveal any conduct or actions by Ms D that could reasonably or objectively be regarded as being private or sensitive in nature.

On that basis, Ofcom concluded that Ms D did not have a legitimate expectation of privacy concerning the very brief broadcast of the still image from *The Hotel* shown on *Sunday Brunch*.

Having decided on the particular facts of this case that Ms D did not have a legitimate expectation of privacy, Ofcom did not need to go on to consider the complaint any further, including the broadcaster’s right to freedom of expression.

Ofcom’s decision is therefore that Ms D’s privacy was not unwarrantably infringed in the programme as broadcast.

**Accordingly, Ofcom has not upheld Ms D’s complaint of unwarranted infringement of privacy in the programme as broadcast.**

## Not Upheld

### Complaint by Miss Karen Riley

*On-Air Announcement, Star Radio North East, 11 March 2013*

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#### Summary

Ofcom has not upheld this complaint made by Miss Karen Riley of unjust or unfair treatment in the announcement as broadcast.

Ms Riley complained about an announcement on this service. Ms Riley was a former employee of Star Radio North East ("Star Radio"), who had joined a competitor radio station, TFM Radio. She complained that the announcement was unfair to her because it referred to her (although it did not name her) and suggested that Miss Riley's departure from Star Radio had been "*no great loss*" because "*she didn't sell anything*".

Ofcom's decision is that, although the comments may have been personally hurtful to Miss Riley, they were unlikely to affect listeners' understanding of Miss Riley in a way that was unfair to her.

Ofcom was concerned however that Star Radio had broadcast an announcement which included comments of a personal nature that were hurtful and offensive to Miss Riley, and considered that it was inappropriate for the broadcaster to have used its position to make such comments on-air about Miss Riley.

#### Introduction

On 11 March 2013, Star Radio broadcast an on-air announcement relating to a rival local radio station, TFM Radio. The announcement consisted of a male presenter's recorded voice, interspersed with clips of archive audio footage from television programmes and films:

Presenter: *"We'd like to thank TFM. You think you just poached one of our staff..."*

Clip 1, male voice: *Clearly they have chosen the hot chick with the nice 'taters.*

Presenter: *...but no great loss, 'cause... She didn't sell anything.<sup>1</sup> [Sound effect] Please keep your hands off Debbie –*

Clip 2, male voice: *Wow, I've never seen one individual do so much to a breast.*

Presenter: *...but feel free to try Gillian...[Sound effect] 'cause everyone else has.*

Clip 3, young boy: *Get down! We can do this the easy way or we can do it dog style.*  
[voice of character from *South Park*]

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<sup>1</sup> Miss Riley has stated to Ofcom that for the reasons set out below these three references to "*one of our staff*", "*the hot chick*" and "*She didn't sell anything*" referred to her.

Presenter: *Ahem. This is Star*”.

Following the broadcast of the above announcement, Miss Karen Riley complained to Ofcom that she was treated unjustly or unfairly in the announcement as broadcast.

### **Summary of the complaint and the broadcaster’s response**

Miss Riley complained that she was treated unjustly or unfairly in the broadcast material in that she was referred to in a derogatory manner, as an unnamed former employee of Star Radio, in the announcement aimed at a rival local radio station, TFM Radio. Miss Riley said that she felt that this could damage her professional reputation and might adversely affect her future employment prospects.

By way of background, Miss Riley said that at the time the announcement was made, she had recently moved from a job in sales at Star Radio to a similar job with TFM Radio. Miss Riley stated that she was the only member of staff to have done so at around that time and was therefore identifiable as the unnamed former employee referred to in the announcement to people who knew her personally and to members of the local radio community.

In response to the complaint, Star Radio said that the announcement was not aimed at Miss Riley. It said that Miss Riley was not named in the announcement and that the announcement was not intended to cause Miss Riley distress. Star Radio explained that there was fierce rivalry between itself and its competitor, TFM Radio, and that in the past few years there had been a significant movement of staff between the two radio stations. It said that Miss Riley had joined Star Radio on 1 February 2013 and had resigned six weeks later to take up a job at TFM Radio.

Star Radio said that the announcement was an example of the ongoing rivalry that existed between the two stations and was specifically aimed at TFM Radio. It said that any distress caused to Miss Riley was unintentional and explained that as soon as it had become aware of the offence caused it had apologised to her. Star Radio said that the day after the announcement was broadcast both its Managing Director and Programme Director had apologised to Miss Riley in telephone conversations.

Star Radio said that, in any case, the announcement could not have resulted in unfair treatment of Miss Riley because the statements made in it were true and fair. Further, it said that Star Radio did not seek a response from Miss Riley about the comments made in the announcement because it was TFM Radio that was the object of the announcement and that it did not consider that TFM Radio required the opportunity to respond.

Star Radio acknowledged that some people may have identified Miss Riley as the former staff member referred to in the announcement (i.e. by reference to “*one of our staff*”, “*the hot chick*” and “*She didn’t sell anything*”). However, it said that it did not consider that there was a case of unfair treatment for it to answer because Miss Riley was not the focus of the announcement and was not mentioned by name. Star Radio also pointed out that the announcement was broadcast only once.

Star Radio said that it had taken the matter seriously and had acted immediately to review its policies and procedures to ensure a similar situation did not arise again. In its response to the complaint, Star Radio outlined to Ofcom its procedure for clearing sponsorship credits, promotional trailers and station identifiers. It also said that a refresher course on Ofcom’s Broadcasting Code had been arranged for the programming team and freelance staff.

## Representations on Ofcom's Preliminary View

Ofcom prepared a Preliminary View that Miss Riley's complaint should not be upheld. In response, Miss Riley stated that the announcement was created and broadcast specifically to be understood by those in the "industry", rather than by the general public. Miss Riley reiterated that the statement made in the announcement "...*she didn't sell anything*" was untrue and that she was identifiable to colleagues throughout the industry as the person referred to.

Star Radio did not submit any representations on Ofcom's 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 announcement as broadcast, and both parties' written submissions.

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. It also considered whether the reference to Miss Riley in the announcement was consistent with the broadcaster's obligation to ensure that the material facts were not presented, disregarded or omitted in a way that is unfair to an individual or organisation, as outlined in Practice 7.9.

In assessing the complaint, Ofcom noted the content of the announcement and, in particular, the comments made in it that Miss Riley identified as relating to her:

Presenter: *"We'd like to thank TFM. You think you just poached one of our staff..."*

Clip 1, male voice: *Clearly they have chosen the hot chick with the nice 'taters.*

Presenter: *...but no great loss, 'cause... She didn't sell anything. [Sound effect] Please keep your hands off Debbie –"*

Ofcom first considered whether Miss Riley was identifiable from the comments made in the announcement. In its response to Ofcom, Star Radio stated that: "...the announcement was clearly aimed at a rival local radio station, TFM Radio. The announcement was clearly not aimed at Miss Riley, as evidenced by the fact that she was not named within it...". Ofcom considered, however, that the announcement clearly referred to a former employee of Star Radio who had recently been "*poached*"

by TFM Radio and that, by the use of the wording “...*the hot chick with the nice taters*”, the former employee was female. While the former employee was not identified by name in the announcement, in Ofcom’s view, Miss Riley had been rendered identifiable, at least to those who knew her well, by the information disclosed in the announcement, namely, that she had recently left her job in the sales team at Star Radio and had joined TFM Radio, and, was the only member of Star Radio’s staff to have done so at that time.

Ofcom also took the view that the commercial radio industry is relatively small and that, within a specific geographical location (in this case north east England), it is likely that individuals working at one commercial radio station would be known to others working in the same industry in that area. In light of these factors, and taking into account the relatively small size of the sector of the industry concerned, Ofcom considered that, in the context of comments specifically linked to a former female employee of Star Radio who had recently moved to TFM Radio, Miss Riley was made identifiable to at least some listeners as the individual referred to in the announcement.

Having established that Miss Riley was identifiable in the announcement as broadcast, Ofcom next considered whether Miss Riley was portrayed unfairly.

Ofcom noted that the announcement was jovial in tone and consisted of a male presenter’s recorded voice, interspersed with clips of archive audio footage from television programmes and films. However, despite its light-hearted nature, Ofcom considered that the comments made in the announcement relating to Miss Riley had the potential to be hurtful and offensive to Miss Riley. Ofcom took the view that the comments were insensitive to Miss Riley and had been made by Star Radio in the context of a deliberate attempt to taunt its rival local radio station TFM Radio. Ofcom considered that it was highly inappropriate for Star Radio to use its position as a broadcaster to make such comments about Miss Riley in order to make disparaging remarks about a rival station. In particular, Ofcom had regard to the statement: “...*but no great loss, 'cause...She didn't sell anything*” and whether this might adversely affect listeners’ opinions of Miss Riley and her professional sales ability in a way that was unfair to her.

As previously noted, Ofcom’s view was that it was likely that some listeners who knew Miss Riley well could identify her as the unnamed former employee referred to in the announcement. Taking into account the use of clips from television programmes and films and, in Ofcom’s view, the crude and juvenile language of the announcement itself, the announcement was not likely to be interpreted by listeners as serious but light-hearted and jovial in tone. Within this context Ofcom’s view was that it was unlikely that listeners would consider the comments made to be a serious and true reflection of Miss Riley and her professional capabilities.

Ofcom also noted that the announcement, which was approximately 28 seconds in length, was broadcast only once, and at a time (16:32 hours) according to Star Radio, of relatively low listener numbers. Given the brevity of the announcement and the fact that it was not repeated, this would have limited the number of listeners who had heard the announcement. This in turn, would have severely limited the number of listeners who may have been able to identify Miss Riley from having heard the announcement.

For these reasons Ofcom considered, therefore, that the comments made in the announcement were unlikely to be perceived by listeners in a way that would

materially and adversely change any existing perceptions they already held about Miss Riley and her professional capabilities so as to be unfair to her.

Ofcom noted the comments made by Miss Riley in her representations on the Preliminary View as set out above. With regards to her comments about the announcement being intended for those in the industry (i.e. the local radio community in the north east of England) and her being identifiable, Ofcom considered that it had taken account of all relevant factors and that they were addressed in the Preliminary View. Ofcom considered that Miss Riley's comments did not alter its view on her complaint.

Ofcom was concerned that Star Radio had broadcast an announcement which included comments of a personal nature that were hurtful and offensive to Miss Riley, and considered that it was inappropriate for the broadcaster to have used its position to make such comments on-air about Miss Riley. However, having taken the above factors into account, Ofcom was satisfied that no unfairness to Miss Riley had resulted from the particular comments broadcast.

**Accordingly, Ofcom has not upheld this complaint of unjust or unfair treatment in the announcement as broadcast made by Miss Riley.**

## Other Programmes Not in Breach

Up to 12 August 2013

Programme	Broadcaster	Transmission date	Category
Acupressure Show	Sikh Channel	16/05/2013	Harm
Advertising minutage	ARY News		Advertising minutage
Advertising scheduling	ESPN Classic	04/05/2013	Advertising scheduling
Frances and Friends	Sonlife	21/06/2013	Religious/Beliefs discrimination/offence
Let's Do Lunch... With Gino and Mel	ITV	01/07/2013	Harm
Round Table	Bangla TV	09/02/2013	Due impartiality/bias

## Complaints Assessed, not Investigated

### Between 23 July and 12 August 2013

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	No. of complaints
"More Music Variety" slogan	Heart FM	Various	Materially misleading	1
118118 Sponsorship	Various	Various	Outside of remit / other	1
118118.com's sponsorship of movies on ITV	ITV	Various	Generally accepted standards	1
118118.com's sponsorship of movies on ITV	ITV2	08/07/2013	Generally accepted standards	1
3D/HD coverage of Wimbledon	BBC Red Button HD	Various	Outside of remit / other	1
8 Out of 10 Cats Does Countdown	Channel 4	26/07/2013	Animal welfare	2
8 Out of 10 Cats Does Countdown	Channel 4	26/07/2013	Disability discrimination/offence	1
8 Out of 10 Cats Does Countdown	Channel 4	26/07/2013	Generally accepted standards	1
8 Out of 10 Cats Does Countdown	Channel 4	29/07/2013	Animal welfare	1
A Very British Ramadan	Channel 4	11/07/2013	Religious/Beliefs discrimination/offence	1
A Very British Ramadan (trailer)	Channel 4	06/07/2013	Religious/Beliefs discrimination/offence	1
Aasmah Mir	LBC 97.3FM	09/07/2013	Due accuracy	1
Advertisements	Crime and Investigation Network	Various	Advertising minutage	1
Advertisements	Movie Mix	Various	Advertising minutage	1
Advertisements	Rishtey	Various	Advertising minutage	1
Advertisements	Sony Movie Channel	Various	Advertising minutage	1
All Star Family Fortunes	ITV	03/08/2013	Outside of remit / other	1
Any Questions	BBC Radio 4	10/08/2013	Disability discrimination/offence	1
Aunt Bessies sponsorship credit	ITV	28/07/2013	Scheduling	1
Badults	BBC 3	04/08/2013	Offensive language	1
Barbie Princess Charm School	Nick Jr. 2	02/08/2013	Scheduling	2
Bargain Hunt	BBC 1	28/07/2013	Outside of remit / other	1
Bargain Hunt	BBC 1	08/08/2013	Gender discrimination/offence	1
BBC News	BBC 4	08/08/2013	Outside of remit / other	1
BBC News	BBC News Channel	22/07/2013	Outside of remit / other	1
BBC News	BBC News	02/08/2013	Outside of remit / other	1

	Channel			
BBC News	BBC Online	N/A	Outside of remit / other	1
BBC News 24	BBC News 24	30/05/2013	Due impartiality/bias	1
BBC News at One	BBC 1	22/07/2013	Outside of remit / other	1
BBC News at One	BBC 1	25/07/2013	Generally accepted standards	1
BBC News at One	BBC 1	29/07/2013	Generally accepted standards	1
BBC News at One	BBC 1	30/07/2013	Scheduling	1
BBC News at One	BBC 1	02/08/2013	Outside of remit / other	1
BBC News at Six	BBC 1	26/07/2013	Outside of remit / other	1
BBC News at Ten	BBC 1	24/07/2013	Generally accepted standards	1
BBC News at Ten	BBC 1	29/07/2013	Generally accepted standards	1
BBC News at Ten	BBC 1	29/07/2013	Outside of remit / other	1
BBC News at Ten	BBC 1	02/08/2013	Outside of remit / other	1
BBC News at Ten	BBC 1	08/08/2013	Generally accepted standards	1
Big, Hot and Fresh Hits	The Box	10/07/2013	Nudity	1
Births Deaths and Marriages	Radio 4	15/07/2013	Generally accepted standards	1
Botched Up Bodies	Channel 5	29/07/2013	Generally accepted standards	1
Breakfast	BBC 1	23/07/2013	Product placement	1
Breakfast	BBC 1	24/07/2013	Outside of remit / other	1
Breakfast	BBC 1	31/07/2013	Outside of remit / other	1
Britain and Ireland's Next Top Model	Sky Living	18/07/2013	Animal welfare	1
Britain and Ireland's Next Top Model	Sky Living	20/07/2013	Animal welfare	1
Britain and Ireland's Next Top Model	Sky Living	21/07/2013	Harm	1
Call to Prayer	Channel 4	N/A	Outside of remit / other	51
Call to Prayer (trailer)	Channel 4	02/08/2013	Religious/Beliefs discrimination/offence	1
Call to Prayer (trailer)	Channel 4+1	03/08/2013	Religious/Beliefs discrimination/offence	1
Capital Breakfast	Capital Manchester	22/07/2013	Race discrimination/offence	1
Celebrity MasterChef	BBC 1	02/08/2013	Gender discrimination/offence	1
Channel 4 News	Channel 4	23/07/2013	Generally accepted standards	1
Channel 4 News	Channel 4	05/08/2013	Due impartiality/bias	3
Channel 4 News	Channel 4	07/08/2013	Due impartiality/bias	1
Channel 4 News	Channel 4	07/08/2013	Generally accepted standards	1
Channel 4 News	Channel 4	07/08/2013	Outside of remit / other	2
Channel 4 Weather	Channel 4	24/07/2013	Religious/Beliefs discrimination/offence	1
Channel 4 Weather	Channel 4	31/07/2013	Religious/Beliefs discrimination/offence	1

Channel ident	ITV2	13/07/2013	Violence and dangerous behaviour	1
Channel promotion	Channel 5	08/08/2013	Generally accepted standards	1
Channel promotion	ITV2	14/07/2013	Violence and dangerous behaviour	1
Channel promotion	UMP Movies	06/07/2013	Outside of remit / other	1
Charity appeal advertisements	Various	Various	Outside of remit / other	1
Charlie's Angels	Channel 5	14/07/2013	Scheduling	1
Child Genius	Channel 4	11/06/2013	Outside of remit / other	1
Child Genius	Channel 4	25/06/2013	Generally accepted standards	2
Christian O'Connell Breakfast Show	Absolute Radio	16/07/2013	Religious/Beliefs discrimination/offence	1
Cliftonville v Glasgow Celtic	BBC 2 Scotland / Northern Ireland	17/07/2013	Generally accepted standards	13
Come Dine with Me	Channel 4	24/07/2013	Disability discrimination/offence	4
Comedy Store	Comedy Central Extra	18/07/2013	Sexual orientation discrimination/offence	1
Coronation Street	ITV	22/07/2013	Generally accepted standards	1
Coronation Street	ITV	22/07/2013	Promotion of products/services	1
Coronation Street	ITV	26/07/2013	Generally accepted standards	1
Coronation Street	ITV	26/07/2013	Materially misleading	1
Coronation Street	ITV	26/07/2013	Race discrimination/offence	1
Coronation Street	ITV	29/07/2013	Generally accepted standards	1
Coronation Street	ITV	29/07/2013	Race discrimination/offence	1
Coronation Street	ITV	29/07/2013	Under 18s in programmes	1
Coronation Street	ITV	02/08/2013	Generally accepted standards	1
Coronation Street	ITV	Various	Generally accepted standards	1
Coronation Street	ITV2	30/07/2013	Race discrimination/offence	1
Coronation Street/Emmerdale	ITV	Various	Generally accepted standards	1
Count Arthur Strong	BBC 2	30/07/2013	Offensive language	1
Daybreak	ITV	23/07/2013	Outside of remit / other	1
Daybreak	ITV	09/08/2013	Animal welfare	1
Deal or No Deal	Channel 4	18/07/2013	Offensive language	1
Diaries of a Broken Mind	BBC 3	17/07/2013	Generally accepted standards	1
Die Hard with a Vengeance	BBC 1	29/06/2013	Violence and dangerous behaviour	1
Doctor Who	BBC 3	02/08/2013	Generally accepted standards	1
Dogging Tales	More 4	01/08/2013	Generally accepted standards	1

Dragons' Den	BBC 2	11/08/2013	Generally accepted standards	2
E! News	E! HD	01/08/2013	Scheduling	1
Elementary	Sky Living	20/07/2013	Scheduling	1
Embarrassing Bodies	Channel 4	Various	Generally accepted standards	1
Emmerdale	ITV	12/07/2013	Generally accepted standards	1
Emmerdale	ITV	25/07/2013	Offensive language	1
England v Scotland (trailer)	STV	09/08/2013	Generally accepted standards	1
F1: Grand Prix Qualifying	BBC 1	27/07/2013	Outside of remit / other	1
Films	Various	Various	Offensive language	1
Fool Britannia	ITV	04/08/2013	Race discrimination/offence	1
Foxy Bingo's sponsorship of The Jeremy Kyle Show	ITV	17/07/2013	Sexual material	1
Foxy Bingo's sponsorship of The Jeremy Kyle Show	ITV	Various	Generally accepted standards	2
Foyle's War	ITV3	04/08/2013	Outside of remit / other	1
Game of Thrones	Sky Atlantic	03/06/2013	Violence and dangerous behaviour	1
Gavin and Stacey	Gold	23/07/2013	Offensive language	1
Gavin and Stacey	Gold	25/07/2013	Offensive language	1
Gavin and Stacey	Gold	02/08/2013	Offensive language	2
Gigglebiz	CBeebies	11/08/2012	Outside of remit / other	1
Greg James	BBC Radio 1	24/07/2013	Disability discrimination/offence	1
Halfords' sponsorship of Happy Motoring on Dave	Dave	20/07/2013	Generally accepted standards	1
Halfords' sponsorship of Happy Motoring on Dave	Dave	Various	Generally accepted standards	1
Hell's Kitchen	ITV2	31/07/2013	Violence and dangerous behaviour	1
Holby City	BBC 1	21/05/2013	Generally accepted standards	1
Holby City	BBC 1	30/07/2013	Materially misleading	8
Holby City	BBC 1	06/08/2013	Generally accepted standards	1
Holby City	BBC 1	06/08/2013	Offensive language	1
Hollyoaks	Channel 4	31/07/2013	Sexual orientation discrimination/offence	1
Hollyoaks	E4	31/07/2013	Scheduling	1
Honda's sponsorship of Documentaries on 4	Channel 4	07/08/2013	Violence and dangerous behaviour	1
Horror Season promotion	5*	27/07/2013	Scheduling	1
How to Get a Council House	Channel 4	08/08/2013	Due accuracy	1

How To Look Good Naked	Sony TV	16/07/2013	Nudity	1
Human Hands Fundraising Appeal	Ummah Channel	21/07/2013	Charity appeals	1
I Love My Country	BBC 1	03/08/2013	Gender discrimination/offence	1
I Love My Country	BBC 1	03/08/2013	Outside of remit / other	1
Iain Dale standing in for Nick Ferrari at Breakfast	LBC 97.3FM	22/07/2013	Crime	1
I'm Spazticus (trailer)	Channel 4	05/08/2013	Disability discrimination/offence	1
I'm Spazticus (trailer)	Channel 4	08/08/2013	Disability discrimination/offence	1
I'm Spazticus (trailer)	Channel 4	08/08/2013	Generally accepted standards	1
I'm Spazticus (trailer)	Channel 4	10/08/2013	Disability discrimination/offence	1
I'm Spazticus (trailer)	E4	08/08/2013	Disability discrimination/offence	1
I'm Spazticus (trailer)	E4	09/08/2013	Generally accepted standards	1
Irresistible	BBC 2	04/08/2013	Under 18s in programmes	1
ITV News at Ten and Weather	ITV	15/07/2013	Generally accepted standards	1
ITV News Calendar	ITV Yorkshire	02/08/2013	Due impartiality/bias	1
James Dundoon	Pirate FM	28/07/2013	Generally accepted standards	1
James Max	LBC 97.3FM	17/07/2013	Generally accepted standards	1
James O'Brien	LBC 97.3FM	17/07/2013	Generally accepted standards	1
James O'Brien	LBC 97.3FM	17/07/2013	Religious/Beliefs discrimination/offence	1
Jeff Randall Live	Sky News	23/07/2013	Generally accepted standards	1
Jeremy Vine	BBC Radio 2	26/07/2013	Offensive language	1
Just Eat sponsorship credit	Dave	14/07/2013	Generally accepted standards	1
Land of the Pharaohs	BBC 2	07/08/2013	Generally accepted standards	1
Let's Do Lunch with Gino and Mel	ITV	22/07/2013	Generally accepted standards	1
Let's Do Lunch with Gino and Mel	ITV	23/07/2013	Generally accepted standards	1
Let's Do Lunch with Gino and Mel	STV	15/07/2013	Race discrimination/offence	1
Long Lost Family	ITV	08/07/2013	Fairness	1
Married to the Job	ITV	01/08/2013	Scheduling	1
Married to the Job	ITV	08/08/2013	Scheduling	1
Marrying Mum and Dad	CBBC	12/08/2013	Generally accepted standards	1
Marrying Mum and Dad	CBBC	n/a	Generally accepted standards	1
Mrs Brown's Boys	BBC 1	Various	Offensive language	1

My Daughter the Teenage Nudist	More 4	08/08/2013	Generally accepted standards	1
Mystic Service	Psychic Today	01/07/2013	Materially misleading	1
National Lottery Update	BBC 1	26/07/2013	Outside of remit / other	1
New Tricks	BBC 1	30/07/2013	Race discrimination/offence	1
News	Various	22/07/2013	Outside of remit / other	1
News	Various	06/08/2013	Outside of remit / other	1
News Bulletin	Star FM (Cambridge)	14/07/2013	Due accuracy	1
News, Sport, Weather	Sky News	23/07/2013	Race discrimination/offence	1
Newsnight	BBC 2	11/07/2013	Outside of remit / other	20
Nick Ferrari's Review of the Week	LBC 97.3FM	01/08/2013	Race discrimination/offence	1
Nothing to Declare	Sky Living	23/07/2013	Offensive language	1
Only Fools and Horses	BBC 1	31/07/2013	Offensive language	1
Only Fools and Horses	BBC 1	09/08/2013	Offensive language	1
Petrol Bombs and Peace: Welcome to Belfast	BBC 3	05/08/2013	Outside of remit / other	12
Pointless	BBC 1	05/08/2013	Outside of remit / other	1
Portrayal of presenters driving	Various	Various	Harm	1
Praise and Grumble	BBC Radio Stoke	02/08/2013	Outside of remit / other	1
Premier League Asia Trophy	Sky Sports 1	27/07/2013	Race discrimination/offence	1
Press Preview	Sky News	20/07/2013	Due impartiality/bias	1
Press Preview	Sky News	28/07/2013	Generally accepted standards	1
Programming	At The Races	16/06/2013	Materially misleading	1
Programming	Key 103 FM	01/07/2013	Competitions	1
Programming	RT	n/a	Outside of remit / other	1
Programming	Sonlife	10/07/2013	Sexual orientation discrimination/offence	1
Programming	The Vault	25/07/2013	Scheduling	1
Promotion of BT Sports Channel	BT Sport	21/07/2013	Promotion of products/services	1
QI	Dave	14/07/2013	Offensive language	1
Ramadan Diaries	Channel 4	10/07/2013	Generally accepted standards	1
Ramadan Diaries	Channel 4	11/07/2013	Generally accepted standards	1
Ramadan Diaries	Channel 4	25/07/2013	Religious programmes	1
Ramadan Reflections	Channel 4	15/07/2013	Religious/Beliefs discrimination/offence	1
Randy Cunningham 9th Grade Ninja	Disney XD	13/07/2013	Offensive language	1
Regional News and Weather	BBC 1	24/07/2013	Outside of remit / other	1
Regional News and	BBC 1	25/07/2013	Outside of remit / other	1

Weather				
Rick Clarke	Capital Radio	02/08/2013	Scheduling	1
River City	BBC 1 Scotland	06/08/2013	Drugs, smoking, solvents or alcohol	1
Run	Channel 4	15/07/2013	Violence and dangerous behaviour	1
Run	Channel 4	16/07/2013	Violence and dangerous behaviour	1
Run	Channel 4	17/07/2013	Generally accepted standards	1
Samurai Head Hunters	Yesterday	12/07/2013	Scheduling	1
Scott Mills	BBC Radio 1	06/08/2013	Sexual material	1
Scrubs	E4	03/08/2013	Race discrimination/offence	1
Seann Walsh World	Comedy Central	20/07/2013	Disability discrimination/offence	1
Secret Dealers	ITV	22/07/2013	Competitions	1
Sexters	Channel 5	22/07/2013	Sexual material	1
Shane O'Connor	BBC Coventry and Warwickshire	18/07/2013	Age discrimination/offence	1
Sketchorama	BBC Radio 4	07/08/2013	Generally accepted standards	1
Skins	E4	29/07/2013	Generally accepted standards	2
Sky News with Colin Brazier	Sky News	08/08/2013	Generally accepted standards	1
Sky News with Dermot Murnaghan	Sky News	12/08/2013	Generally accepted standards	1
Sky News with Kay Burley	Sky News	08/08/2013	Generally accepted standards	1
Sky Sports Ashes	Sky Sports Ashes	19/07/2013	Generally accepted standards	1
Sky Sports HD Promotion	Sky Sports	16/07/2013	Materially misleading	1
Sky Sports News	Sky Sports News	04/08/2013	Materially misleading	3
Sky Sports News	Sky Sports News	Various	Materially misleading	1
Southcliffe	Channel 4	05/08/2013	Disability discrimination/offence	1
Southcliffe	Channel 4	05/08/2013	Generally accepted standards	3
Southcliffe	Channel 4	n/a	Outside of remit / other	2
Station ident	Classic FM	Various	Materially misleading	1
Station ident	Sunrise Radio	24/07/2013	Outside of remit / other	1
Steve Allen	LBC 97.3FM	31/07/2013	Race discrimination/offence	1
Storage Wars: Texas	History	23/07/2013	Animal welfare	1
Storage Wars: Texas	History	24/07/2013	Animal welfare	1
Storm Night	Storm	04/07/2013	Participation TV - Misleadingness	1
Summer Rock Carnage	Kerrang	23/07/2013	Scheduling	1
Sun, Sea and A&E	Pick TV+1	10/07/2013	Scheduling	1
Sun, Sex and Suspicious Parents	Dave	20/07/2013	Scheduling	1

(trailer)				
Sunday Brunch	Channel 4	28/07/2013	Generally accepted standards	1
Sunday Morning Live	BBC 1	04/08/2013	Outside of remit / other	1
Sunday Politics	BBC 1	14/07/2013	Outside of remit / other	1
Sunrise	Sky News	14/07/2013	Animal welfare	1
Sunrise	Sky News	01/08/2013	Drugs, smoking, solvents or alcohol	1
Teleshopping	DM Digital	28/07/2013	Outside of remit / other	1
Terror in the Skies	Channel 4	05/07/2013	Materially misleading	1
The Alan Brazil Sports Breakfast	Talksport	01/08/2013	Sexual orientation discrimination/offence	1
The Alan Brazil Sports Breakfast	Talksport	06/08/2013	Generally accepted standards	1
The Americans	UTV	27/07/2013	Generally accepted standards	1
The Antiques Roadshow	Yesterday	23/07/2013	Advertising minutage	1
The Ashes 2013	Sky Sports 1	12/07/2013	Generally accepted standards	1
The Big Bang Theory	E4	18/07/2013	Scheduling	1
The Fall	BBC 2	03/06/2013	Violence and dangerous behaviour	1
The Greatest Shows on Earth	Channel 4	17/06/2013	Violence and dangerous behaviour	5
The Hotel Inspector Returns	Channel 5	01/08/2013	Offensive language	1
The Jeremy Kyle Show	ITV	30/07/2013	Generally accepted standards	1
The Magic Breakfast Show	Magic 1548 AM	02/07/2013	Scheduling	1
The Mentalist	Channel 5	09/08/2013	Offensive language	1
The News Quiz	BBC Radio 4	26/07/2013	Offensive language	1
The News Quiz	BBC Radio 4	26/07/2013	Religious/Beliefs discrimination/offence	1
The News Quiz	BBC Radio 4	Various	Outside of remit / other	1
The Ricky Gervais Show	E4 +1	31/07/2013	Offensive language	1
The Sheriffs are Coming	BBC 1	31/07/2013	Outside of remit / other	1
The Simpsons	Channel 4	05/08/2013	Scheduling	1
The Today Programme	BBC Radio 4	07/08/2013	Race discrimination/offence	1
The Top 10 Show	Livingit	20/07/2013	Materially misleading	1
The Town the Travellers Took Over	Channel 5	01/07/2013	Materially misleading	1
The White Queen	BBC 1	28/07/2013	Generally accepted standards	1
The Wright Stuff	Channel 5	10/07/2013	Generally accepted standards	4
The Wright Stuff	Channel 5	16/07/2013	Due impartiality/bias	1
The Wright Stuff	Channel 5	22/07/2013	Generally accepted standards	1
The Wright Stuff	Channel 5	23/07/2013	Generally accepted standards	2

The Wright Stuff	Channel 5	24/07/2013	Due impartiality/bias	1
The Wright Stuff	Channel 5	25/07/2013	Generally accepted standards	1
The Wright Stuff	Channel 5	02/08/2013	Generally accepted standards	1
The Wright Stuff	Channel 5	07/08/2013	Generally accepted standards	1
The Xfm Breakfast Show with Jon Holmes	XFM London	23/07/2013	Generally accepted standards	1
This Morning	ITV	15/07/2013	Religious/Beliefs discrimination/offence	1
This Morning	ITV	N/A	Harm	1
Tipping Point	ITV	22/07/2013	Competitions	1
Tipping Point	ITV	24/07/2013	Outside of remit / other	1
Tipping Point	ITV	N/A	Undue prominence	1
Tom and Jerry	Boomerang	24/07/2013	Scheduling	1
Tonight: Coming to the UK?	ITV	01/08/2013	Race discrimination/offence	2
Top Gear	BBC 2	21/07/2013	Generally accepted standards	5
Top Gear	BBC 2	28/07/2013	Outside of remit / other	3
Top Gear	BBC 2	28/07/2013	Sexual material	1
Top Gear	BBC 2	04/08/2013	Generally accepted standards	1
Top Gear	BBC 2	04/08/2013	Offensive language	10
Top Gear	BBC 3	01/08/2013	Generally accepted standards	1
Top Gear	Dave	25/07/2013	Offensive language	1
Top of the Lake	BBC 2	13/07/2013	Animal welfare	1
Twenty20 Cricket	Sky Sports Ashes	06/08/2013	Offensive language	1
Twitter and Facebook references	BBC	Various	Promotion of products/services	1
Twitter and Facebook references	Various	Various	Product placement	1
Ultimate Warfare (trailer)	Quest	16/07/2013	Generally accepted standards	1
Undercover Boss	Channel 4	29/07/2013	Outside of remit / other	1
Undercover Boss	Channel 4	06/08/2013	Gambling	1
UTV Website	n/a	n/a	Outside of remit / other	1
Various trailers	Channel 5	Various	Scheduling	1
Veet Easywax's sponsorship of ITV2 Daytime	ITV2	05/08/2013	Generally accepted standards	1
Waterloo Road	BBC 1	04/07/2013	Violence and dangerous behaviour	1
Why Don't You Speak English?	Channel 4	23/07/2013	Materially misleading	1
Why Don't You Speak English?	Channel 4	23/07/2013	Race discrimination/offence	1
Why Don't You Speak English?	Channel 4	30/07/2013	Privacy	1
Why Don't You Speak English?	Channel 4	Various	Race discrimination/offence	1

Wild Shepherdess with Kate Humble	BBC 2	27/07/2013	Scheduling	1
World Matchplay Darts Live	Sky Sports 1	25/07/2013	Offensive language	1
World's Craziest Police Pursuits	5*	09/07/2013	Generally accepted standards	1
WWE Payback promotion	Sky Box Office	12/06/2013	Materially misleading	1
Your Face Sounds Familiar	ITV	20/07/2013	Offensive language	3
Your Face Sounds Familiar	ITV	03/08/2013	Generally accepted standards	1
Your Face Sounds Familiar	ITV	03/08/2013	Sexual material	2
You've Been Framed!	ITV	03/08/2013	Harm	1
Zakat Conference	CHSTV	17/06/2013	Promotion of products/services	1
Zane Lowe	BBC Radio 1	30/07/2013	Generally accepted standards	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 25 July and 14 August 2013.

<b>Programme</b>	<b>Broadcaster</b>	<b>Transmission date</b>
Daybreak	ITV	05/06/2013
Discussion on Hajj	ATN Bangla	03/05/2013
Discussion on Hajj	ATN Bangla	17/05/2013
Emergency Bikers	Channel 5	24/04/2013
For The Win	Information TV	26/07/2013
Golf in Cornwall	Information TV	27/07/2013
How To Plan For Your Retirement	Showcase TV	28/07/2013
ITV Calendar News	ITV Yorkshire	07/06/2013
Myra Hindley: The Untold Story	Channel 5	24/07/2013
News	Russia Today	05/08/2013
Panorama	BBC 1	03/06/2013
Programming	Noor TV	Various dates
Provision of Recordings	Controversial TV	
Rugby Sevens	BT Sport 1	03/08/2013
Sex and the City	Comedy Central Extra	29/06/2013
Tobacco Kills ... give it up	Information TV	27/07/2013
Watchdog	BBC 1	22/05/2013
Your Opinions	Sikh Channel	30/04/2013

**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/>.