



Neutral Citation Number: [2010] EWCA Civ 34

Case No: A3/2009/0827

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
(Mr. Justice Blackburne)
[2009] EWHC 616 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 February 2010

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE TOULSON

Between :

JML DIRECT LTD

**Claimant/
Appellant**

- and -

FREESAT UK LTD

**Defendant/
Respondent**

Mr. Robert Howe Q.C. and Mr. Mark Gay (Solicitor Advocate) (instructed by **DLA Piper LLP**) for the **appellant**

Mr. Tim Ward and Mr. Ben Lask (instructed by **BBC Commercial & Regulatory Legal Department**) for the **respondent**

Hearing dates : 13th January 2010

Approved Judgment

Lord Justice Moore-Bick :

Background

1. The background to these proceedings is described in full in the judgment of Blackburne J. The following summary, which is sufficient for the purposes of the present appeal, is drawn from the judge’s findings.
2. The respondent, Freesat UK Ltd, operates a digital multi-channel satellite television service by the name of ‘Freesat’ that is available at no charge to anyone who is willing to purchase the necessary receiving equipment. The appellant, JML Direct Ltd (“JML”), is a provider of television shopping channels. The programmes and other services available through Freesat are produced by broadcasting companies and are delivered from the studio to the viewer by third parties under separate agreements. Freesat’s own role is to produce and manage an electronic programme guide (“EPG”), which has led to its being classed as a broadcasting “platform” by the regulator, Ofcom.
3. The EPG is transmitted to the viewer’s home alongside television and other services. It contains programme information similar to that to be found in a television listings magazine and allows the viewer to navigate and select services by means of a remote control device. For this service Freesat charges in respect of each channel an initial registration fee of £1,500 and an annual fee of £30,000.
4. In the autumn of 2007 Freesat invited providers of radio and television channels to participate in the launch of its new service. On 19th November 2007 JML formally applied to have two of its shopping channels included on the Freesat platform from the date of its launch in 2008 and in February 2008 it entered into a contract with Freesat for the provision of specified EPG services in accordance with Freesat’s published Listing Policy. The contract expressly provided as follows:

“3. Provision of EPG Services

3.1 Freesat shall provide the EPG Services set out in Part A of Schedule 2 in respect of the Channel in accordance with the Listing Policy.

3.2 The Channel Provider shall comply with the obligations set out in Part B of Schedule 2

...

3.4 The Channel Provider recognises that it has no right or entitlement to any particular LCN and that LCNs are allocated by Freesat at its discretion in accordance with the Listing Policy.

...

10. Fault Handling

10.1 Freesat shall provide the EPG Services:

10.1.1 in accordance with all applicable laws and regulations (including, for the avoidance of doubt, the Ofcom Code); [and]

...

10.1.3 in accordance with the Listing Policy.”

5. The LCN (logical channel number) to which clause 3.4 referred is the channel number assigned to the service by Freesat and determines its position in the EPG.
6. The Listing Policy, to which clauses 3.1 and 3.4 referred, had been published by Freesat early in 2008. It contained, among other things, a description of the process by which Freesat intended to allocate LCNs in circumstances where applications for listing were received from more than one channel within the same genre. (Channels were to be listed in categories or ‘genres’ determined by the subject matter of the content.) A copy of the Listing Policy had been provided to JML together with the terms of the EPG agreement in response to its original application for listing. The material parts provided as follows:

“1. Introduction

1.1 This document states the policy of . . . Freesat . . . for the allocation of . . . EPG . . . numbers on the Freesat platform. After any such allocations have been made by Freesat, the EPG number continues to belong to Freesat and to be subject to its discretion and applicable policy.

...

2. EPG Listing Policy Objective

2.1 Freesat’s objective is to apply the Policy in such a way as it considers to be for the long-term benefit of the Freesat platform, to fulfil viewer expectations and in the interests of viewer convenience (in each case as determined by Freesat in accordance with this Policy).

...

5. Allocation of EPG Numbers within Genres

5.3 Where Freesat is considering the allocation of an EPG number to more than one channel at the same time it will take into account the following;

- (i) the applicability of sections 6 and 7 below to one or more channels;
- (ii) the date on which the Launch Application Form was received by Freesat;

- (iii) the date that the channel provider has entered into an EPG Agreement with Freesat;
- (iv) the intended launch date of the channel; and
- (v) viewer convenience and expectations.”

7. Section 6 was concerned with public service channels and is not material to the issues that arise on the appeal. Section 7, headed “Associated Channels and Reserved EPG Numbers”, provided, so far as material, as follows:

“7.1 Freesat considers that viewer convenience and expectations will be best served if channels which are Associated with another channel or other channels on the Freesat platform are more closely grouped together on the Freesat platform. It is Freesat’s intention that the Policy will operate over time to achieve this.”

It was common ground that JML’s two channels were “associated” for these purposes.

8. The Ofcom Code (“the Code”), to which clause 10 of the EPG Agreement referred, is the ‘Code of practice on electronic programme guides’ published by the communications regulator, Ofcom, pursuant to sections 310 and 316 of the Communications Act 2003. It provides, so far as material, as follows:

“Introduction

1. This Code sets out the practices to be followed by EPG providers:
 - a. to give appropriate prominence for public service channels;
 - b. to provide the features and information needed to enable EPGs to be used by people with disabilities affecting their sight or hearing or both; and
 - c. to secure fair and effective competition.

...

Fair, reasonable and non-discriminatory treatment

14. Ofcom has concluded that, in order to secure that the providers of EPGs licensed by Ofcom do not enter into or maintain any arrangements or engage in any practice that Ofcom considers would be prejudicial to fair and effective competition in the provision of licensed radio or television services or of connected services as defined in section 316 of the Act, EPG providers should comply with the provision set out in this section.

15. In particular, EPG licensees are required:
 - a. to ensure that any agreement with broadcasters for the provision of an EPG service is made on fair, reasonable and non-discriminatory terms;
 - b. to publish and comply with an objectively justifiable method of allocating listings. This does not preclude different methods - for example, objectively justifiable methods could include ‘first-come, first-served’, alphabetical listings, and those based on audience shares;
 - c. to refrain from giving undue prominence in any listing or display to a channel to which they are connected, except as required by the appropriate prominence provisions set out in paragraphs 2 to 4 above;

...”

9. Freesat allocated channel number 810 in its EPG to one of JML’s channels and channel number 809 to the other. As a result those channels were placed in tenth and eleventh positions in the list of shopping channels and neither therefore appeared on the first screen page of the shopping genre listing. That gave rise to a dispute between JML and Freesat over the way in which channels had been allocated and on 10th October 2008 JML issued proceedings seeking an order for specific performance or damages for breach of contract. Its case was that Freesat had acted in an arbitrary or irrational manner in allocating channels. In particular, it said that Freesat had failed to give sufficient or any weight to the “first come, first served” principle set out in paragraph 5.3(ii) of the Listing Policy, that it had applied criteria or had regard to factors that had not been published in the Listing Policy, that it had wrongly disregarded the date on which JML had entered into the EPG agreement and that it had subsequently added further channels higher up the EPG which had demoted JML’s channels even further. JML subsequently amended its case to include a claim for a declaration that the allocation was invalid and that Freesat was bound to carry out the listing process again in accordance with the terms of the contract.
10. It eventually became clear that when allocating channels within the shopping genre Freesat had given no weight to criterion (iii) (the dates on which the channel providers had entered into EPG Agreements) and had placed most weight on criterion (v) (viewer convenience and expectations). Moreover, in judging viewer convenience and expectations it had relied heavily on two kinds of material: audience ratings compiled by Broadcasters’ Audience Research Board Ltd (“BARB ratings”) and existing listings on the free digital platform, Freeview, neither of which had been mentioned in the Listing Policy. JML submitted that Freesat had acted in an arbitrary and irrational way in failing to apply its own published criteria and that its reliance on factors to which no reference had been made in the Listing Policy involved a breach of paragraph 15(b) of the Code. However, the judge rejected those arguments. He accepted that it was implicit in the contract that Freesat could not act in an arbitrary, irrational or capricious manner – that, indeed was common ground – but he held that, subject only to those constraints, the contract gave it a large measure of freedom to

decide how to allocate channels. He held that Freesat had not failed to take into account the dates of the EPG contracts, even though it had ultimately decided not to attach any weight to them, and he did not accept that the use of BARB ratings and Freeview listings as a means of judging viewer convenience and expectations involved a breach of the Code. He therefore dismissed the claim.

11. JML subsequently obtained permission from this court to pursue three grounds of appeal. The first and most important ground concerns paragraph 5.3(v) of the Listing Policy and the duties of Freesat under paragraph 15(b) of the Code. It was JML's case that the requirement contained in that paragraph to publish and comply with an objectively justifiable method of allocating listings obliged Freesat to identify in its Listing Policy all the factors on which its decision would be based and not to have regard to any factors other than those that it had published. The second raises the question whether Freesat did in fact fail to "take into account" the date on which EPG agreements were entered into as required by paragraph 5(iii) of the Listing Policy. The third is based on the judge's finding that Freesat disregarded the date of the EPG agreements for two reasons, one of which he described as "quite irrational".

(i) Failure to apply a published method of allocation

12. In a most able and attractive argument Mr. Robert Howe Q.C. for JML submitted that the essential purpose of the Code was to provide a framework of regulation designed to ensure transparency and to promote fair and effective competition. It follows, he submitted, that where one of the criteria which a platform operator chooses to publish is inherently vague and capable of being applied in a subjective way the scope for making use of it is very limited, indeed in most cases non-existent. He relied in support of this submission on the case of *Letting International Ltd v London Borough of Newham* [2008] EWHC 1583 (QB), 119 Con. L.R. 89, a decision on the meaning and effect of the Public Contracts Regulations 2006.
13. Like the judge, I think it is important to begin by reminding oneself that the claim in this case lies in private, not public law. The task facing the court, therefore, is to decide what the contract means and whether it has been broken. Public law concepts have no direct part to play in that exercise and it would be wrong to approach the construction of the contract on the assumption that the parties had them in mind or intended to adopt them.
14. Clause 3.4 of the EPG Agreement made it clear that Freesat was entitled to allocate channels at its discretion in accordance with the Listing Policy. I agree with the judge that the parties agreed that Freesat should have the right to exercise its own judgment in the matter, subject only to compliance with the Listing Policy and the implied obligation not to act in an arbitrary, irrational or capricious manner. Such an obligation is likely to be implicit in any commercial contract under which one party is given the right to make a decision on a matter which affects both parties whose interests are not the same: see the comments of Potter L.J. in *Horkulak v Cantor Fitzgerald* [2004] EWCA Civ 1287, [2005] ICR 402 (paragraph 30), to which the judge referred.
15. Central to Mr. Howe's case was the submission that the Code establishes the yardstick by which the Listing Policy is to be construed. In broad terms I think that is right, but that is only the starting point, since it is necessary to consider what the Code actually

requires. It is quite right to say that one of its objects is to secure fair and effective competition (paragraph 1), but paragraph 14 makes it clear that one of the principal objects the regulator had in mind was to ensure that providers of EPGs did not favour organisations in which they had an interest or to which they had some other commercial connection. Another was to ensure that free satellite services were at least as accessible to viewers as pay TV services without the need to purchase additional equipment. It is not surprising, therefore, that Freesat's Listing Policy (which has not been challenged by JML or Ofcom) identified as its objective the long-term benefit of the Freesat platform itself, the fulfilment of viewer expectations and the promotion of viewer convenience. Nor is it surprising that one of the published criteria by reference to which listings were to be allocated was viewer convenience and expectations.

16. In my view the regime governing the tendering and award of contracts by public bodies which is contained in the Public Contracts Regulations 2006, which in turn implement Directive 2004/18/EC, is not of great assistance in construing the Code. It is true, of course, that in each case there is a common interest in promoting transparency and free and fair competition, but the contexts in which the two instruments are intended to operate differ too greatly to make any analogy valuable. One important purpose of the Directive, as paragraph (2) of the preamble shows, was to promote the Treaty objectives of freedom of movement of goods and services and freedom of establishment and the principles of equal treatment, non-discrimination and transparency derived from them. The introduction of regulations to co-ordinate national procedures for public procurement in order to open them up to proper competition across the Community was considered to be an important step in promoting those principles. The Directive and the Regulations which implement them are detailed and designed to establish a procedure of a formal kind. The Code, by contrast, was designed to operate within a much less formal environment. It is not highly prescriptive and appears to be an example of what is sometimes called "light-touch" regulation.
17. In my view the first question for decision so far as the Code is concerned is whether a criterion framed in terms of 'viewer convenience and expectations' is expressed at too high a level of generality to satisfy its requirements. I do not think it is, because the whole tenor of the Code is such as to indicate that broad criteria will suffice, provided they comply with the requirement for an objectively justifiable method of allocating listings. The next question, therefore, is whether paragraph 5.3 of the Listing Policy meets that requirement. In my view it does, because the criteria, taken individually or together, represent a rational and objective set of factors by reference to which allocations are to be made. The weight to be given to each factor is left to Freesat, which must make its own judgment.
18. Mr. Howe was inclined to accept that the Listing Policy could be regarded as complying with the Code, but only if it were construed by reference to it, which would mean excluding from consideration any factors other than those expressly mentioned. That would preclude reliance on BARB ratings or Freeview listings to assess viewer convenience and expectations. It was for that reason that he submitted that a criterion worded in such vague terms was for all practical purposes of no value.
19. It will be apparent from what I have said about the Code itself that I am unable to accept that argument. If the Code required a detailed description to be published of the method by which listings would be allocated or the factors that would be taken

into account, it could easily have made that clear. Instead it simply calls for platforms to publish and comply with an objectively justifiable method of allocating listings. In my view, therefore, it is not necessary to apply a restrictive construction to paragraph 5.3 of the Listing Policy in order to render it compliant with the Code, since the Code itself imposes only broad constraints, leaving it to the individual platform to decide how to implement its published method of allocation. I agree with the judge, therefore, that it allows Freesat to assess viewer convenience and expectations by any rational method available to it. JML failed to persuade the judge that reliance on BARB ratings and Freeview listings for that purpose was irrational and there is no appeal against that part of his judgment. For these reasons this ground of appeal must fail.

(ii) *Failure to take into account the dates of the EPG Agreements*

20. This ground of appeal turns on a short point of construction, namely, what is entailed by the obligation in paragraph 5.3(iii) to take into account the date on which channel providers entered into EPG agreements with Freesat. Freesat admitted that, for reasons which related to the particular circumstances surrounding the initial round of agreements, it had decided to attach no weight at all to that criterion. Mr. Howe submitted that although it was for Freesat to decide how much weight should be attached to any individual factor, it was the intention of the parties that some weight should be attached to each of the five factors identified in paragraph 5.3 and that Freesat was therefore not entitled to disregard any of them altogether. It was therefore in breach of contract.
21. The main difficulty I have with Mr. Howe's submission is that, if correct, it would render the scope of the obligation very uncertain. If Freesat is obliged in all cases to give some weight to each and every factor, how much weight must it give any one of them in order to comply with its obligation? In my view it is inherently unlikely that parties to a contract of this kind intended to create such an ill-defined obligation. Moreover, when pressed in argument Mr. Howe felt constrained to accept that there might be circumstances in which Freesat would be entitled in the exercise of its discretion to give this factor no weight at all in the interests of ensuring fairness between applicants. An example that comes to mind might be the disruption of communications due to a postal strike. That being the case, the argument that some weight must be given to each factor in every case is unsustainable.
22. In my view these considerations point strongly to the conclusion that when they used the expression "take into account" in paragraph 5.3 the parties intended to mean no more than "have regard to" or "bear in mind" and did not intend to limit Freesat's discretion to attach to each factor such weight as seemed to it appropriate. This distinction between giving consideration to a matter and deciding to attach no weight to it is in my view one of common sense and capable of being well understood by commercial parties. In *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759 Lord Hoffmann said:

"The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the

planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.”

His remarks were, of course, made in the context of a case concerning the granting of planning permission to which the principles of public law apply, but the distinction which Lord Hoffmann there drew between having regard to a factor and attaching weight to it is one of principle. It is in my view equally valid in a case of this kind where a contract requires one party to take into account particular factors when making what is essentially an evaluative judgment.

23. I agree with the judge, therefore, that the contract in this case only required Freesat to give conscious consideration to each of the factors in paragraph 5.3 of the Listing Policy before deciding what, if any, weight to attach to it and that it was entitled to attach no weight at all to one or more of them if it had rational grounds for doing so. In a contract which, it is accepted, gave Freesat the right to decide how much weight to attach to each factor, subject only to a requirement to act rationally, that seems to me to be more in accord with commercial reality and business common sense than the construction put forward by Mr. Howe. The judge accepted that in this case there were rational grounds for Freesat’s decision to attach no weight to factor (iii) and there is no appeal against that part of his judgment. In my view this ground of challenge to his decision therefore fails. However, even if Freesat’s discretion was more circumscribed than I consider it to have been and it was entitled to attach no weight at all to one or more factors only if it was fair and reasonable in all the circumstances for it to do so, the judge did not find that it had acted unreasonably or unfairly; indeed, the whole tenor of his findings is to the contrary. Accordingly, this ground of appeal is not made out, even if a more generous view is taken of the contract than I consider appropriate.

(iii) Does one irrational ground invalidate the decision?

24. In the course of her evidence Freesat’s managing director, Ms Scott, made it clear that Freesat had ignored factor (iii) for two reasons: (a) because a significant number of channel providers who were seeking allocation of an EPG number for their channels with effect from the initial launch date of the new Freesat platform had difficulties with the EPG Agreement, which delayed the signature of their contracts; and (b) because Freesat had difficulty in identifying the date on which many of the Agreements were entered into. The judge was not persuaded that its decision was irrational insofar as it rested on the former ground, but he held it was irrational insofar as it rested on the latter.
25. Mr. Howe submitted that a decision based wholly or in part on irrational grounds was to be regarded as irrational and so involved a breach of contract. In support of that submission he drew our attention to the case of *R v Broadcasting Complaints Commission ex parte Owen* [1985] 1 Q.B. 1153. In that case an application was made by certain political parties to quash the decision of the Broadcasting Complaints Commission that it had no jurisdiction to consider their complaints about unfair

treatment in the amount of coverage they had received on certain political discussion programmes. The applicants also sought an order of mandamus directing the Commission to consider their complaint. Although it rejected the complaint on the grounds of lack of jurisdiction, the Commission expressed the view, in the purported exercise of its discretion, that even if it had had jurisdiction to entertain the complaint it would have been inappropriate for it to do so for various reasons, one of which was that it would have been unduly burdensome for it to perform a qualitative analysis of the various programmes in question.

26. The Divisional Court held that the burdensome nature of the task was irrelevant and not a factor that the Commission was entitled to take into account in exercising its discretion. Following the decision of Forbes J. in *R v Rochdale Metropolitan Borough Council ex parte Cromer Ring Mill Ltd* [1982] 3 All E.R. 761, the court held that, in cases where an irrelevant factor has had anything other than an insignificant or insubstantial influence over a decision of a statutory body, the decision will be quashed. However, it also confirmed that if several independent reasons for the decision are given which can be disentangled and it can be shown that the same decision would have been reached on the basis of the valid reasons, the court will not quash it.
27. *Ex parte Owen* concerned a decision of a statutory body and thus called for the application of public law principles. Here we are concerned with rights under a private contract. It is necessary, therefore, for JML to establish that Freesat was in breach of contract and, if it is to obtain any substantial relief, that it has suffered more than negligible harm as a result. With that in mind I think it is important to consider carefully exactly what JML bargained for. Mr. Howe submitted that it was entitled to a proper exercise by Freesat of its discretion. That is correct, but it is not the whole story. What JML actually contracted for was an EPG listing to be allocated by Freesat in accordance with a certain procedure. If JML could show that Freesat's decision to attach no weight to factor (iii) in the course of the allocation process had resulted from, or been significantly influenced by, some arbitrary, capricious or irrational consideration, that would be sufficient to constitute a breach of contract and one would then have to consider its consequences. Short of that, however, I do not think that any liability arises.
28. For my own part I am not persuaded that Freesat did commit a breach of contract in this case. This argument does not appear to have been advanced as a separate issue below and the judge did not deal with it directly. However, he did make quite extensive findings about the circumstances that led to Freesat's decision to place no weight on factor (iii) which in my view support the conclusion that the two grounds on which it was based were wholly independent. The judge described the difficulties surrounding the signature of the EPGs in terms that indicate quite clearly that in his view that was not only the primary basis for its decision but was sufficient in itself to lead Freesat to take that course. However, even if that were in doubt, I do not think that the judge's findings go so far as to establish that its decision was significantly influenced by the perceived difficulty in identifying the dates of the EPG contracts. JML is therefore unable to establish a breach of contract because it has failed to show that the decision to place no weight on factor (iii) was affected by any irrational or arbitrary factor. In these circumstances it is unnecessary to consider what would have been the consequences of any breach of contract of the kind suggested by JML.

29. For these reasons I would dismiss the appeal.

Toulson L.J.:

30. I agree.

The Master of the Rolls:

31. I also agree.