

Freesat Free to Decide ~

JML Direct Ltd v Freesat UK Ltd [2009]

EWHC 616

April 2009

A decision of the High Court has clarified the extent of discretion enjoyed by a regulated undertaking operating subject to a regulatory code.

Introduction

In May 2008, the BBC and ITV launched "Freesat", a new service offering multi-channel digital satellite TV on a "free-to-air" basis. This case concerned the allocation of Electronic Programme Guide ("EPG") numbers by Freesat to the TV channels appearing on its service. An EPG is an on screen television programme guide used by digital TV systems. It allows viewers to navigate and select the available channels via a remote control. An EPG number determines a channel's relative position in the EPG.

"JML", a provider of TV shopping channels, claimed that Freesat had, in breach of contract, failed to comply with its own EPG Listing Policy ("the Listing Policy") and the Ofcom EPG Code ("the Ofcom Code") in allocating EPG numbers. As a result, JML claimed, its channels had been listed lower down the EPG than they should have been, and were thus less likely to attract viewers.

In dismissing JML's claim, Mr Justice Blackburne considered, not only the requirements of Freesat's Listing Policy and the Ofcom Code, but also the law as to the scope of a discretion conferred by contract. His judgment confirms that a contractual discretion is to be scrutinised in a manner similar to the discretion afforded to decision makers under public law principles. It also provides valuable analysis of the interaction between contractual and regulatory obligations.

Legal Framework

In February 2008, the parties had entered into contractual arrangements (“EPG Agreements”) under which Freesat agreed to list two of JML’s channels in its EPG and, for that purpose, to allocate EPG numbers to those channels. The contract required Freesat to allocate EPG numbers in accordance with the Listing Policy and the Ofcom Code. It also provided that numbers would be allocated at Freesat’s discretion.

The Listing Policy stated that Freesat’s overall objective was to apply the Policy “in such a way as...to fulfil viewer expectations and in the interests of viewer convenience”. The key provision was section 5.3, which stated that, when considering the allocation of EPG numbers to several channels at the same time, Freesat would take into account a number of criteria including: (a) the date on which a channel’s launch application form was received (5.3(ii)); (b) the date on which the channel provider entered into an EPG Agreement with Freesat (5.3(iii)); and (c) viewer convenience and expectations (5.3(v)).

The Ofcom Code, which Freesat was also obliged to comply with by virtue of its licence under the Broadcasting Act 1990, set out the practices to be followed by EPG providers. It required such providers, among other things, to “publish and comply with an objectively justifiable method of allocating listing”.

As to the scope of Freesat’s contractual discretion, the Judge held that Freesat was obliged, not only to take into account the criteria at section 5.3, but, as a matter of contractual implication, “to do so in a rational manner”. The concept of “irrationality” in this context did not import some objective standard of reasonableness but was used in a sense analogous to the public law concept of *Wednesbury* unreasonableness: see *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116. This meant that there had to be a “genuine and rational, as opposed to empty or irrational, exercise of discretion”: see *Horkulak v Cantor Fitzgerald* [2004] EWCA Civ 1287.

The Alleged Breaches

The Judge considered four breaches of contract alleged by JML.

First, it was claimed that, on Freesat’s own evidence, it had allocated EPG numbers in a “haphazard, slipshod and highly subjective” way, thereby breaching the requirement in the Ofcom Code to apply an “objectively justifiable method of allocating listing”. The Judge rejected this claim on the facts. Recognising the discretion afforded to Freesat under the EPG Agreement, the Judge said that whether he would have approached the matter in the same way was “beside the point”.

Second, JML alleged that Freesat had disregarded criterion 5.3(iii) (the date on which a channel provider had entered into the EPG Agreement), either in error or by a deliberate but irrational decision. The Judge held that, notwithstanding the contractual context, the question could be decided by reference to well-established public law principles. Accordingly it was, in principle, open to Freesat to attach no weight to a criterion, provided it had “given consideration to” it, and its decision was not irrational. Applying those principles, the Judge accepted that Freesat had taken a conscious decision to attach no weight to this criterion, and concluded that its principal reason for doing so (namely that some channel providers had experienced difficulties with the EPG Agreement) could not be characterised as irrational.

Third, JML argued that Freesat had introduced two new “sub-criteria” under criterion 5.3(v) (viewer convenience and expectations), by having regard to (a) viewing figures published by the Broadcaster’s Audience Research Board (“BARB”); and (b) whether a channel was listed on “Freeview”, another “free-to-air” multi-channel digital TV service (Freeview is broadcast via a terrestrial system, rather than by satellite). Freesat had allocated higher positions in its EPG to those channels that appeared in the BARB data and on Freeview. This was, said JML, either impermissible in principle, as these “sub-criteria” were not published in the Listing Policy, or irrational in the circumstances.

As to the impermissibility argument, the Judge noted that, given the unspecific terms of criterion 5.3(v), the scope for applying the criterion at all was, on JML's case, non-existent. This argument wrongly assumed, however, that the Ofcom Code compelled a "tightly drawn statement" of the circumstances in which the criterion could be applied. On the contrary, the Code merely required Freesat to publish and comply with an objectively justifiable method of allocating listings. This was, in his judgment, exactly what the Listing Policy achieved; it was therefore open to Freesat, when applying 5.3(v), to decide what evidence it would examine and what weight it would attach to that evidence.

Consequently, JML could only succeed on this ground if it was irrational for Freesat to have had regard to the BARB data and the Freeview listing. The Judge rejected this argument on its facts. Recognising Freesat's margin of discretion, he concluded that "It is perfectly possible to disagree with that approach by Freesat ... But that was pre-eminently a matter for Freesat to decide. It certainly cannot be described as irrational".

Fourth, JML contended that Freesat had further contravened the Ofcom Code by treating criterion 5.3(v) as an overriding objective whilst watering down or ignoring altogether other express criteria. The Judge dealt with this allegation briefly. He held that it went to the weight that Freesat was entitled to attach to the criterion, and that there was nothing in it to justify a finding that Freesat had exceeded the discretion afforded to it by the EPG Agreement.

Comment

The judgment serves as a useful illustration of the way in which the courts scrutinise the exercise of a discretion conferred by contract, both where the undertaking concerned is subject to regulatory obligations, and more generally. It confirms that the discretion enjoyed under contract is a broad one, even where the undertaking is subject to a regulatory code such as the Ofcom Code. In this case, whilst the Court drew upon public law principles it ultimately respected the allocation of freedom of action, and risk, represented by the terms of the contract between the parties.

Tim Ward and Ben Lask were instructed by the BBC on behalf of the successful Defendant.