Neutral Citation No. [2014] NIQB 95

Ref:	**TRE9352**

Judgment: approved by the Court for handing down

*(subject to editorial corrections)**

Delivered:	**07/07/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BLAST 106 FOR JUDICIAL REVIEW

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TREACY J

Introduction

[1] No counsel were present on either side when judgment was delivered. After the conclusion of hearing on Friday the court received, as anticipated, a number of further affidavits as well as a number of emails passing between the parties. In light of this additional material the parties were asked if they had any further submissions to make. None were made.

[2] The applicant in this case is Blast 106 Ltd which is the company that controls Blast 106 Radio Station that operates under a Community Radio Licence granted by the Office of Communications ("Ofcom"). That licence is due to expire at midnight tonight, 7 July 2014.

[3] Following a leave hearing on Monday 30 June and due to the urgency of the matter a rolled-up hearing was held on Friday 4 July. Mr Ronan Lavery QC and Mr Justin Byrne appeared for the applicant. Mr Lavery who moved the Leave Application on Monday 30 June was unavailable for the rolled-up hearing which was very ably conducted by his junior counsel. Ms Gallafent QC of Blackstone Chambers appeared for the respondent Ofcom. I am grateful to all counsel for their helpful oral and written submissions. However, there is one aspect of the representation that I feel compelled to comment upon. I have already mentioned that the applicant's senior counsel was unavailable, due to holiday commitments, to conduct the rolled-up hearing. At the end of the hearing late of Friday afternoon the court announced that it would give its decision today, Monday 7 July at 10.00 am. Junior counsel for the applicant then indicated that he was also unavailable on Monday due to holiday commitments in America. Ms Gallafent then informed me that she was also unavailable on Monday due to some other court commitment in

England, not on Monday but on Tuesday. This is a quite unsatisfactory state of affairs since it meant that the court was deprived of any further assistance from counsel that might have been required arising from the judgment to be delivered today.

[4] This case was heard in the vacation as a matter of urgency to protect the interests of the parties. The court sat as required to guarantee that protection. I wish to emphasise that if counsel accept instructions in a case that requires to be heard as a matter of urgency during the vacation they must ordinarily, unless released by the court and with the agreement of their client, be available for the entirety of the case no matter how inconvenient that may be. I did not at the end of the day take any steps which would have impinged on long arranged family holidays but the court should not be placed in that predicament. As for Ms Gallafent, her non-attendance was said to be due to another court commitment on Tuesday. This also was unsatisfactory.

[5] The applicant seeks to challenge two decisions by Ofcom. First a decision dated 2nd June that Blast 106 was in breach of its licence for failing to provide a service in accordance with its key commitments ("the breach decision"). Secondly they challenge Ofcom's decision that it did not have the power to extend Blast's licence as it was not satisfied as to the likelihood of a contravention by Blast of a requirement imposed by virtue of Section 106 of the Broadcasting Act 1990. That was a decision made on 10 June 2014 and communicated to the applicant by letter dated 13 June 2014 ("the not extend decision").

[6] As a community radio station Blast 106 is required to deliver the key commitments which form part of its licence. The key commitments set out how the Station will serve its target community. The community to be served for Blast 106 is students living in greater Belfast from Queen's University, the University of Ulster and Belfast Metropolitan College and young people living, working or studying in greater Belfast. The character of the service is also set out and it states:

> "Blast 106 will establish a community owned student and youth radio station that will educate, inform, entertain and represent the entire student and youth community of Belfast. Programmes will be made by students and young people themselves and will reflect their tastes and interests."

[7] The Community Radio Amendment Order 2010 came into force on 22 January 2010. This legislation empowers Ofcom to extend community radio licences for one period of not more than 5 years. An application to extend the licence as operated by Blast 106 was made on 3 January 2014. In 2013 Ofcom carried out monitoring of the station to determine whether it was meeting its key commitments. Following a monitoring period of 3 days at the start of the academic term (28 - 30 January 2013) Ofcom found Blast 106 to be in breach of its licence for failing to provide a service in

accordance with its key commitments. That decision was dated 27 August 2013. Ofcom then carried out a further monitoring of the station between 4 and 6 February 2014. On 2 June 2014 Ofcom published its findings and stated that the applicant was:

> "Still not delivering a number of key commitments that are core to the station's ability to cater for its target community and deliver the required character of service".

[8] Ofcom concluded that Blast had failed to fulfil three key commitments namely:

(a) 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.

(b) 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.

(c) Music output will be very varied but will be directed to the tastes and interests of volunteers in the community served. The applicant made representations in respect of the breach findings as Ofcom had provided a preliminary view on 29 April 2014. These representations were sent on 13 May 2014.

[9] Following the breach decision Ofcom's Broadcast Licensing Committee met on 3 June 2014 and further on 10 June 2014 in order to consider the extension application in accordance with Section 253A(5) of the Communications Act 2003 which applies to Community Radio Licensees by virtue of the Community Radio Order 2004. Section 253A(5) provides that if on an application for an extension Ofcom are satisfied as to the matters mentioned in S253A(6) they must extend the period of the licence by such period authorised by S253A(2) as they think fit.
Sub-section 6 provides those matters are:

> (a) the ability of the licence holder to maintain the service for the period of the extension; and
>
> (b) the likelihood of a contravention by the licence holder of a requirement imposed by a condition included in the licence by virtue of Section 106 of the 1990 Act."

[10] The Broadcast Licensing Committee ("BLC") were not satisfied as to the second of these matters in S253A(6)(b). Section 106 of the Broadcasting Act 1990 states as follows:

> "A national or local licence shall include such conditions as appear to the authority to be appropriate for securing that the character of a licenced service, as proposed by the licence holder, when making his application, is maintained during the period for which the licence is enforced except to the extent that the authority consent to any departure on the grounds:
>
> (a) that it would not narrow the range of programmes available by way of independent radio services to persons living in the area or locality for which the service's licence is to be provided; or
>
> (b) that it would not substantially alter the character of the service."

[11] The BLC concluded that it was not satisfied in relation to the likelihood of a contravention by Blast 106 Ltd of the requirement imposed by condition 253A(6) and 106(1) of the Broadcasting Act 1990. That is to say that the character of the service would not be maintained by the applicant during the licence period. Ofcom sent a letter on 4 June 2014 stating that it was minded not to renew the licence but sought further representations. A response was sent by the applicant on 9 June 2014. Following receipt of those representations the BLC convened on 10 June 2014 and decided on that date not to extend the licence. That decision was communicated to the applicant by letter dated 13 June 2014.

[12] The grounds of challenge to the two impugned decisions are set out in the further amended Order 53 statement. In respect of both decisions the applicant complained of procedural unfairness in failing to properly consider requests for an oral hearing and that the decisions were Wednesbury unreasonable. In respect of the 2nd June breach decision the applicant complained of procedural unfairness by failing, inter alia, to monitor Blast 106's output over a sufficient period of time in order to provide a fair and balanced picture as to the music and speech content being broadcast by the applicant. The applicant also complained that following the breach decision Ofcom acted in a procedurally improper manner by failing to follow its own procedures under Sections 110-111 of the Broadcasting Act 1990 in particular by failing to invoke the sanctions procedure thereby denying the applicant important procedural safeguards. In respect of the 10th June decision not to extend the licence the applicant complained that the decision maker improperly took into account that the applicant had challenged and was intending to challenge the breach finding as being a factor as to whether the applicant would contravene future licence

conditions and the not to extend decision on the grounds that it was a breach of Ofcom's duties under Section 3(1) and Section 7 of the Communications Act 2003.

[13] The breach decision arose as a result of the 3 days of monitoring of the applicant's output between 4 and 6 February 2014 to see if it was complying with its licence conditions. On 29 April 2014 Ofcom provided the applicant with its preliminary view that it was in breach of its licence for failing to provide a service in accordance with its key commitments. The document also stated that given the breach was considered a repeated and ongoing contravention following the breach recorded in August 2013 the applicant was put on notice that Ofcom:

> "Will consider this case for the imposition of a statutory sanction."

By letter dated 13 May 2014 the applicant's solicitors made very detailed representations in opposition to the preliminary view. Unsurprisingly, given what was at stake for the applicant, they sought an oral hearing if Ofcom wished to proceed with its preliminary view. That request was never engaged with and Ofcom failed to respond to it. Ofcom, for example, did not come back to the applicant and enquire from it why, in their view, fairness required an oral hearing. They simply ignored the request and proceeded to make a finding of breach formally promulgated in the broadcast bulletin on 2 June 2014. That finding also concludes by putting the applicant on notice that Ofcom "will" consider the case for the imposition of a statutory sanction. That never happened. If Ofcom considers that a sanction may be appropriate there is a strict procedure to be followed to ensure due process set out in its published guidelines entitled "Procedures for the consideration of statutory sanctions in breach of broadcast licences". These procedures contain important safeguards for a licensee which in the events that happened were not in fact provided.

[14] Prior to the February 2014 monitoring exercise leading to the 2nd of June breach decision the applicant had applied for an extension to its licence. This was made on 3 January 2014. Ofcom's guidelines indicate that:

> "In most cases we expect to make a decision on an application for a licence extension within a month of receipt."

[15] In fact in this case the decision was not made until 5 months later. Had the licence application been determined in accordance with the normal timeframe it seems virtually inevitable that it would have had to have been granted since at that point no breach other than the 2013 breach (which did not attract any sanction) would have been established. Indeed, the monitoring itself commenced just over a month after the application for the extension and the results of that were not available until sometime later. The applicants were therefore arguably prejudiced by the delay in processing the extension application. If the licence extension had been granted and a breach meriting statutory sanctions was thereafter established

then the sanction procedures could have been activated in any event. The sanctions available include financial penalties, shortening or suspending a licence and revocation of a licence.

[16] Although there were a number of explanations put forward for the delay it appears that the timing of the decision not to extend was related to Ofcom wishing to await the outcome of the breach investigation. This is clear for example from paragraph 14 of Mr Close's second affidavit where he states:

> "It was necessary to investigate whether Blast was meeting its key commitments before considering the application to extend."

[17] Having made that point he then refers in his affidavit to the process and chronology of the breach investigation concluding with the impugned breach decision of 2 June. The very next day, 3 June 2014, the BLC met to consider the application to extend the licence. No manuscript minutes or notes of that meeting exist, the court was informed. On 4 June the applicant was informed that the BLC was minded to refuse the application to extend on the basis that it was not satisfied in relation to the likelihood of a contravention by the applicant of the requirement imposed by its licence principally on the basis of the two breach decisions of 27 August 2013 and 2 June 2014. The letter also refers to the fact that the BLC was made aware that the applicant had indicated through its solicitors that it intended to apply for a judicial review of the breach decision. The letter expressly acknowledged the potential seriousness of the decision that Ofcom was considering and gave the applicant until 13 June to make representations. Tim Garland, who chaired the BLC, took up this point at paragraph 11 saying that the BLC were mindful that the consequence of not extending would be that the licence would lapse on 7 July 2014. That is to say that the radio would then be shut down. Consequently, he says:

> "We wanted to ensure that the applicant had a proper opportunity to make representations on the minded to letter."

[18] On 9 June the applicant sent very extensive representations including representations supporting their licence extension from across the entire political spectrum of Northern Ireland and from all political parties. The applicant expressed concern that the minded to letter appeared to factor in the proposed application for a judicial review. BLC met on 10 June and refused to extend the applicant's licence. The grounds for the decision were communicated to the applicant by the letter of 13 June. In relation to the reference to the judicial review the letter of 13 June said as follows:

> "The BLC noted Blast's representation in relation to judicial review. My 4 June letter stated as a point of fact

> that the BLC was made aware that Blast had indicated via its solicitors that it intended to apply for judicial review in relation to the second breach decision. This was to inform Blast to ensure fairness of the information which was presented to the BLC. Blast is of course entitled to seek and act on legal advice. The intention to bring a judicial review based on that advice was not a factor in the BLC's minded to view and nor is it in its final decision. The BLC considered whether in light of the prospective judicial review it remained appropriate to consider the second breach decision and concluded that it was. The BLC also took into account that Blast continued to disagree that it had committed a breach and that this had some bearing on the prospect of it making changes to come into compliance but that is independent of the judicial review application. Blast had been clear it disagreed with Ofcom's interpretation of the key commitments regardless of the legal options it may or may not pursue."

[19] A similar point is repeated at paragraph 17 of Mr Gardam's affidavit. However, the manuscript notes of 10 June record the following:

> "The fact that they challenge the second breach shows that they had **no intention** of coming into compliance."[my emphasis]

[20] The respondent's counsel said that this note did not refer to the judicial review challenging the second breach but acknowledged that if did that that would betray a public law wrong. Plainly the entitlement to bring judicial review proceedings and the exercise of that entitlement was not relevant to the decision to be made by the respondent. In fact the only way of challenging the lawfulness of the breach decision would be by way of judicial review since there is no internal mechanism for appeal. Whilst the respondent's deponents disavow having taken the judicial review into account, I find the manuscript entry very troubling.

[21] The manuscript note refers to challenging the "second breach". On the face of it the note appears to be referring to an *established* breach, that is to say the second breach and a challenge to it. The only relevant challenge to the second breach at that point in time was the intimated judicial review. Even if I am wrong about this the mere fact someone has the temerity to challenge something, whether by way of judicial review or otherwise, when they bona fide believe the decision under challenge to be wrong, should not be regarded as demonstrating that they had no intention of coming into compliance. Indeed, such a serious allegation of bad faith on the part of the licence holder would not only have required compelling evidence but it would also have required that they be given the fullest opportunity of meeting such a serious allegation.

[22] Leaving that to one side for the moment I wish to return to the failure of the respondent to engage with the May request for an oral hearing. Before doing so however, I wish to make the obvious point that the breach decision and the decision not to extend had become inextricably linked if they had not always been so. The interests at stake in the not to extend decision were acknowledged by senior counsel for the respondent at paragraph 48 of her skeleton argument to be "clearly higher" than in the case of the breach decision. Notwithstanding the linkage between the two impugned decisions, Mr Close avers that he recused himself from involvement in the not extend decision because of his prior involvement in the breach decision. Despite the fact that the applicant's solicitor made a written request for an oral hearing in its letter of 13 May, Mr Close said at paragraph 44 of his first affidavit that he was not aware that the applicant had requested an oral hearing. Faced with the conflict between this averment and the terms of the letter of 13 May, Mr Close has now sworn a second affidavit saying that he read the letter of 13 May 2014 at the time it was received but had no recollection of the request when swearing its first affidavit. As previously pointed out Ofcom never corresponded with the applicant's solicitor about why the applicant's solicitors thought that fairness required an oral hearing.

[23] Whatever the reason for ignoring or overlooking the request the fact is that there was no conscientious engagement with it. Plainly Ofcom has a discretion whether to grant such a request. That discretion, involving a matter of considerable importance, was either not exercised at all or was not properly exercised. A decision was made not to proceed to consider sanctions in respect of the breach with all the attendant due process safeguards that that would have attracted contained in the guidance to which I have already referred. That meant that the only remaining process was then the consideration of the application to extend the licence. A provisional determination on that issue swiftly followed the breach decision of 2 June with the BLC provisionally deciding the following day on 3 June to refuse the application. Following receipt of the applicant's submissions on 9 June the BLC confirmed their decision on 10 June. Given the centrality of the second breach decision to BLC's deliberations it is unfortunate that the BLC were not aware, it would appear, of the unexamined outstanding request for an oral hearing in respect of the breach decision which was on any showing going to be central to its deliberations.

[24] In my view it was unfair for the breach decision and the no extend decision to have been taken without conscientious engagement with the request for an oral hearing. Furthermore, by analogy with Ofcom's usual procedure in relation to statutory sanctions under Section 110 of the Broadcasting Act 1990 there should have been a similar opportunity to make oral representations to the BLC before a final decision was taken on the application for an extension of its licence. Indeed, whilst not abandoning its position that natural justice did not require an oral hearing the respondent expressly acknowledged the validity of this point in its letter of 2 July 2004 where it stated:

> "Having regard to Ofcom's usual practice in relation to decisions as to statutory sanctions under Section 110 of the Broadcasting Act 1990 we can see that it is arguable that by analogy there should have been a similar opportunity to make representations before the BLC *before* a final decision was taken on your client's application for an extension of its licence."[My emphasis]

[25] In my judgment the effective revocation, without appropriate procedural safeguards commensurate to what was at stake, requires the court to quash the decision of the BLC not to extend the licence. I also consider that without such safeguards the decision is disproportionate. In the 2nd July letter the respondent offered an oral hearing but the timescale was scarcely realistic. In any event what was being offered was an oral hearing after, not before, a final decision had already been taken and before the same board whose decision is under challenge Furthermore, the period of notice is so short and the overall circumstances such as to question the utility and indeed the true purpose of any such exercise.

[26] Having regard to the above I quash the breach decision of 2 June and the not extend decision of 10 June. In order to protect the interests of all those involved and to ensure that the coincidence to timing does not serve to defeat the ends of justice I have given anxious consideration as to the form of relief that is now appropriate over and above the quashing of both impugned decisions. Since the applicant's licence is due to expire from midnight tonight the only way in which injustice, resulting from the respondent's public law wrongs, can be avoided is by requiring the respondent to extend the applicant's licence beyond 7 July 2014. Since the breach decision has been quashed the basis upon which the not extend decision was made is undermined. In the absence of a lawful breach decision I consider that the only proportionate decision was to extend the licence. Accordingly, the court requires the respondent to extend the applicant's licence on terms which reflect the usual practice for the granting of extensions. The court having been informed that the usual timescale was one of 5 years. The applicant will appreciate of course that if the second breach decision now proceeds to sanctions that there are a range of options at the disposal of Ofcom including financial penalties and revocation in accordance with the published guidance.

[27] Finally, the applicant also raised a number of other complaints about the impugned decision, in particular, they claimed that the 3 day monitoring period was unrepresentative and unfair. Since this is something which can be the subject of further representations at any oral hearing and in light of the fact that the decisions are being quashed on the grounds already adumbrated I do not consider that it is necessary for the court to say anything more at this point. I do however note that in an email dated 6 July from Ms Cosgrove to the applicant's solicitors, referring to the offer of an oral hearing, she pointed out that the applicant would be free to submit that material outside the 3 day monitoring period should also be taken in account.

[28] So for all those reasons both decisions are quashed and the respondent is required to extend the licence in the manner that I have indicated in the course of the judgment. Having regard to the outcome of the case it is clear that the applicant is entitled to their costs.