



Neutral Citation Number: [2006] EWCA Civ 1036

Case No: A3/2005/2476

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION (Commercial Court)
MR JUSTICE COOKE
[2005] EWHC 2267 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2006

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE JACOB
and
LORD JUSTICE NEUBERGER

Between :

UNIVERSAL STUDIOS INTERNATIONAL BV
- and -
FLEXTECH RIGHTS LTD

Appellant

Respondent

Mr Mark Barnes QC and Mr Stephen Bate (instructed by **Messrs Harbottle & Lewis**) for
the **Appellant**

Mr Michael Driscoll QC and Mr Dominic Chambers (instructed by **Messrs Wiggin LLP**)
for the **Respondent**

Hearing dates : 23rd and 24th May 2006

Judgment

Lord Justice Neuberger :

1. This is an appeal, brought with the permission of Moore-Bick LJ, from a decision of Cooke J who, in a full and careful judgement, decided certain preliminary points arising out of an agreement executed on 20 October 1998 (“the 1998 Agreement”) between Universal Studios International BV (“Universal”) and Flextech Rights Limited (“Flextech”).

The Factual Background

2. I can take the factual background substantially verbatim direct from the judgment below. I shall not indicate the small alterations made in what is in essence directly lifted from the judgment.

“1. Universal is a Dutch company, part of the Universal Studios Group, and is the international licensor of the television programmes, The Jerry Springer Show (“Jerry Springer”) and Maury Povich (“Maury Povich”). Flextech is a company incorporated in England which acquired broadcasting rights for various satellite TV channels including Living TV in respect of some of these programmes.

2. Both “Jerry Springer” and “Maury Povich” are talk shows named after their respective hosts. They are made primarily in the US for a US audience but have been licensed for broadcasting in many countries around the world. Flextech broadcast “Jerry Springer” on Living TV from 1995 to 1998 under a series of one year licenses, the last of which (“the 1997 Agreement”) was dated 12th August 1997 although its terms were negotiated well into 1998 and it was only finally executed in May and October of that year.

3. In April 1998, Universal invited bids for licenses for future seasons of “Jerry Springer” and “Maury Povich”. Universal wanted a “run of series” deal for “Jerry Springer” which meant that the licensee would acquire rights and pay for them as long as the shows were broadcast nationally in the US. The basic commercial terms were agreed with Flextech for this by 6th May 1998 and thereafter negotiations took place until an agreement was executed on 20th October 1998 (“the 1998 Agreement”). Under that agreement, Flextech was licensed to show programmes for each calendar year – i.e. from 1st January - from the 1998/1999 US broadcast season (which ran from 1st September to 30th August) and thereafter for the run of both the “Jerry Springer” and “Maury Povich” series.

4. Whilst, at that time “Maury Povich” had no track history, “Jerry Springer” was well known and had attracted both controversy and complaints because of its confrontational nature, the topics discussed in it and the conduct of the host, the guests and the audience. Both the nature of the issues discussed

and the treatment of them were, it appears, designed to be sensational, to shock and, its critics would say with considerable justification, to exploit the unfortunate, degenerate and the perverse, and to pander to the baser instincts of humanity with material of a salacious nature. There was therefore scope for conflict with the Independent Television Commission (“ITC”) which produced a programme code (“the ITC Code”) which regulated the type of material which could not be shown at all, which could only be shown after 9 o’clock at night and which could only be shown in term time during the day (not in school holidays- “NSH”).

5. The ITC described “Jerry Springer” in its August 1998 ruling on a complaint over one show in April 1998 in the following way:

“This controversial US talk show is renowned for its outrageous guests and their shock revelations. The subject matter often consists of emotional problems of a kind which are outside most people’s experience, discussed in a way which is less restrained than in equivalent UK produced shows. The programmes are sometimes rowdy and raucous, and the participants often appear to be playing up to the camera, with or without the encouragement of the host, Jerry Springer, himself.

In the view of the ITC, there is a role for programmes which cover and discuss difficult social and emotional issues, and some editions of “Jerry Springer” have provided compelling viewing. There has been some public debate, however, about the exploitative aspects of the show. The participants are frequently drawn from the poorer segments of American society, and invited to parade their faults and misfortunes for public entertainment. Many are inarticulate and unable to make a proper case for themselves. Frequently, guests resort to persistent verbal abuse or physical violence. This is sometimes described as ‘victim’ entertainment.”

6. By a letter of 30th December 2002, Lovells, Flextech’s solicitors wrote to Universal stating that the contents of “Jerry Springer” had significantly changed over the years, despite the fact that the parties had agreed that the programme would remain substantially similar in form and substance to the 1997/1998 US season, that this constituted a breach of the 1998 Agreement and that Flextech was dissolving the 1998 Agreement “as per 1st January 2003” on the basis of Article 6:245 of the Dutch Civil Code. (It is common ground between

the parties that the 1998 Agreement was governed by Dutch law).

7. Universal disputes the validity of this dissolution and maintains that the 1998 Agreement continues in full force and effect and that it is entitled to license payments due in respect of programmes supplied prior to the purported dissolution and in respect of payments which fall due under the Agreement on an instalment basis until the conclusion of the run of the series.

8. On 13th July 2004, it was ordered that the Court determine as preliminary issues all those issues set out in the List of Issues agreed by the parties, excluding those relating to evaluation of the content of the individual episodes of “Jerry Springer” and “Maury Povich” and some other limited issues as set out in the Court’s Order.”

The 1998 Agreement

3. I turn to the provisions of the 1998 Agreement which are relevant for the purposes of this appeal. The 1998 Agreement began with the following words:

“This shall confirm the agreement (“Agreement”) entered into as of this day of 1998 by and between Flextech Rights Limited (“Flextech”) and Universal Studios International BV (“Universal”) with respect to Universal granting Flextech the right to exhibit the television series “Jerry Springer” and “Maury Povich” (each a “Program” and collectively the “Programs”) on the following terms and conditions:”

There then followed certain provisions of which only some are relevant.

4. By clause 3 of the 1998 Agreement, the rights granted to Flextech by Universal were the exclusive television rights in Great Britain “with respect of the licensed episodes of the programs” for the “license period”. This was defined in clause 4(v) (as subsequently amended) as being successive calendar years from 1 January 1999.
5. Clause 4 of the 1998 Agreement was in these terms:

“4. PROGRAMS:

(a) “Jerry Springer”

Each episode of each Licensed Season of the Program shall primarily feature Jerry Springer as the host and shall be similar in content and overall production value to the episodes in the 1997/1998 US broadcast season. For the purpose of this clause, “primarily” shall mean that occasionally a guest host may appear in the show instead of Jerry Springer in the event of illness or similar event.

(i) Licensed Seasons

Commencing with the 1998/1999 US broadcast and continuing thereafter on a run-of-the-series basis (meaning each and all subsequent broadcast seasons during which the Programs are broadcast in the US...).

...

(iii) Number of episodes Per Licensed Season

195 original episodes plus (to be selected or approved by Flextech) 65 repeat episodes of that season's or, with Universal's approval, any previous season's episodes; provided that, if more (or less) than 195 original episodes are produced in a particular season then the number of original episodes, the number of repeat episodes for such season being licensed by Flextech shall be adjusted accordingly (with the number of repeat episodes being adjusted so that, when added to the original episodes for the particular season, the total number of licensed episodes for such season equals 260) provided however that if the number of original episodes is less than 130 then at Flextech's election either:

-The number of permitted transmissions of the original and/or the repeat episodes shall be increased in compensation; or,

-The total number of licensed episodes decreased proportionately (so that the number of repeats is equal to the number of original episodes) in which event the total License Fee shall be decreased proportionately and the Payment Schedule adjusted.

(iv) Permitted Number of Transmissions Per Licensed Episode

3 transmissions for each original episode; 3 transmissions for each repeat episode.

...

(vi) License Fee Per Hour

\$25,000 per hour for each of the original and repeat hour-long episodes for the 1998/1999 season; the per hour License Fee shall increase

by 5% (on a compounded basis) for each subsequent season of the Program licensed under this Agreement.

(vii) Total License Fee for 1998/1999 Season

\$6,500,000

6. Clauses 7 and 8 of the 1998 Agreement were, so far as relevant, in these terms:

7. DELIVERY/RETURN OF MATERIALS

(a) Delivery

Delivery of physical/promotional materials for the programs to Flextech shall take place at least one month prior to the start of the relevant license period....

8. EDITING

Flextech shall not (other than to conform with scheduling requirements and to ensure compliance with the ITC regulations) edit, dub or modify the Programs without the prior written consent of Universal.....Flextech agrees that Flextech shall only exhibit episodes from the Program in their entirety in the form delivered by Universal to Flextech in compliance with all instructions furnished by Universal to Flextech in connection therewith.....”

7. Clause 12 of the 1998 Agreement incorporated the terms of the earlier 1997 Agreement, referred to by the Judge in paragraph 2 of his judgment, but only insofar as they did not conflict with the terms of the 1998 Agreement. Those terms included a rider (“Rider 8”) to the following effect:

“8. ...[Flextech] may make minor cuts in the films hereunder in order to conform to time segment requirements, governmental laws or regulations, or to [Flextech’s] broadcasting policy on program content existing at the proposed date of broadcasting by [Flextech] and applicable where relevant to other programming broadcast on the Station. [Flextech] shall not be required to transmit any picture which does not conform to such policy.

In the event of such non-conformance, and if such non-conformance is not the subject of correction by cuts as hereinbefore provided, [Flextech] shall promptly advise [Universal]. In such event [Universal] shall deliver a substitute film if available, in the same series, which shall be deemed to be one of the films hereunder. If no film is available, the number of films to be delivered and paid for hereunder shall be

reduced by one and the last instalment shall be correspondingly reduced.”

8. Although the 1998 Agreement and these proceedings relate to “Maury Povich” as well as “Jerry Springer”, it is common ground that the resolution of the issues relating to the latter programme will conclusively determine the outcome of these proceedings in relation to both programmes. Accordingly, I shall say no more about “Maury Povich”.

The preliminary issues

9. In summary, there were two main types of issue between the parties. The first was whether, and in what respect and to what extent, Universal was in breach of any of its obligations under the 1998 Agreement. The second was whether, in the light of any breaches which were established, Flextech was entitled to determine (or, in Dutch law, to “dissolve”) the 1998 Agreement, as it purported to do in its letter of 30th December 2002, referred to in paragraph 6 of the judgment below.
10. After statements of case had been exchanged, the parties agreed that it would be convenient to have certain preliminary issues determined with a view to limiting the argument, the evidence, and therefore the costs, of the proceedings. (Hence the order referred to in paragraph 8 of the judgment below). To that end, the parties agreed a list of issues (on the assumption that certain allegations contained in Flextech’s Defence were correct), and it was those issues which came before Cooke J for determination.
11. The central dispute between the parties turned essentially on the terms of clause 4(a) of the 1998 Agreement (“clause 4(a)”), and in particular the stipulation that each episode of “Jerry Springer” in each licensed season was to be “similar in content and overall production value to the episodes in the 1997/1998 US broadcast season”. According to Flextech, this provision was breached in relation to many of the episodes of the 2001/2002 season, and the breach entitled it to dissolve the 1998 Agreement, as it did by the letter of 30th December 2002.
12. The parties identified a large number of preliminary issues said to be relevant in this connection. Most of those issues were determined by the Judge, albeit that some of them were agreed, and others were considered by the Judge to be inappropriate for determination at the preliminary stage. The preliminary issues which have been pursued before us are rather more limited. The first and main set of issues before us concern the meaning and effect of the opening part of clause 4(a), which in practice extends to most of the principal issues before the Judge. The second set of issues, which are more circumscribed, involve two points concerning the effect of Rider 8, each of which could cut across some of the clause 4(a) issues. Accordingly, any conclusion I reach on the clause 4(a) issues must be potentially subject to reconsideration after I have considered the Rider 8 issues.
13. The hearing of the preliminary issues took place over six days, and judgment was handed down, very creditably, within two weeks. The hearing was a more complex affair than might have been expected because the 1998 Agreement was governed by Dutch law. Accordingly, the Judge had to determine the applicable principles governing the interpretation of the 1998 Agreement, and, because those principles involve a potentially more wide ranging investigation of the evidence than they would

have done under English law, he received quite extensive factual evidence, in respect of which he had to resolve conflicts, before turning to the preliminary issues.

14. Apart from permitting a more wide-ranging inquiry into the parties' discussions and actions, both before and after the contract falling to be interpreted had been entered into, there were two other relevant features of Dutch law which the Judge identified. First, like English law, Dutch law, not surprisingly, provides that the wording of the contract "must be given prominence" on issues of interpretation. Secondly, Article 6.245 of the Dutch Civil Code ("Article 6.245") provides that the failure of one party to a contract, such as the 1998 Agreement, entitles the other party to set aside the contract, unless the failure, because of its special nature or minor importance, does not justify that course. As the Judge said, issues of fairness and reasonableness arise in this connection under Dutch law.

The assumed facts upon which the preliminary issues were determined

15. For the purpose of the determination of the preliminary issues by the Judge, certain facts and matters pleaded in Flextech's Defence were assumed to be correct. Those facts and matters included the following:

“26. ...Particulars of the episodes of [“Jerry Springer”] ...which breached the express and/or implied terms of the 1998 License Agreement were given to [Universal] by [Flextech] in writing in October and November 2002 (letters from [Flextech] to [Universal] dated 21 October 2002 and 15 November 2002). Full particulars of the episodes of [“Jerry Springer”] in question, and the basis on which they breached the express and implied terms of the 1998 License Agreement, are set out in Schedule 1 attached to this Defence.

27. In summary, [Flextech] will say that whereas [“Jerry Springer”] in 1997/98, ...essentially constituted mainstream viewing suitable for broadcast during the daytime, the episodes of both programmes deteriorated from season to season, with the result that by the 2001/02 season the vast majority of the episodes contained content which was wholly unsuitable for daytime viewing and which did not comply with the ITC Code. Particulars of the unacceptable content of the programmes of [“Jerry Springer”] are set out in Schedule 1 attached to this Defence.

28. So, as regards [“Jerry Springer”], in the 1997/98 season out of a total of 194 new episodes, 61 episodes had compliance problems in that 15 episodes could not be broadcast at all because of their content (which could not be cured by editing) and 46 episodes could, after a process of editing, be broadcast but only after 2100 hours. A total of 134 episodes were suitable for broadcast at any time. By contrast, in the 2001/2002 season, out of a total of 190 new episodes, 176 episodes had compliance problems in that 41 episodes could not be broadcast at all because of their content (which could not

be cured by editing), 102 episodes could, after a process of editing, be broadcast but only after 2100 hours, and 33 episodes could not be broadcast during the school holidays prior to 2100. Only 14 episodes were suitable for broadcast at any time.

30. As a result of the facts and matters set out above, in the 2001/02 season: -

- (1) [Flextech] was unable to broadcast at all a total of [41] of the episodes; and
- (2) [Flextech] did not have enough new episodes of the programmes to broadcast prior to 2100 hours; and
- (3) [Flextech] was forced to rely more heavily on showing repeat episodes of the programmes...”

16. Attached to the Defence (at least in the Bundle prepared for trial) were two schedules. Schedule 1 (referred to at the end of paragraph 27 of the Defence) was concerned with the 2001/2002 series. It set out, in tabular form, each episode of that series, identifying its title, Flextech’s synopsis (between 50 and 150 words), the original “certification” (determined by Flextech who purportedly applied the standards of the ITC Code), Flextech’s review of its original certification, and the reason for the certification. As an example, I take episode six (chosen because it is less outré than average, and has a short synopsis and a change of certification), which was entitled “Cheaters’ Bazaar”. The synopsis was:

“Phil reveals that he is gay and is only sleeping with Tiffany to get close to her boyfriend Danny. Tami reveals to her boyfriend Mike that she has been prostituting herself with their mutual friend Jason in order to pay the bills. Kelly reveals that she has been cheating on her husband Mike with his best friend.”

The original certification was “2100”, i.e. only to be shown after 9.00 pm, but, on review, this was changed to “NSH”, i.e. it could be shown at any time outside school holidays, but not before 9.00 pm during school holidays. The “Reason for Certification” was recorded as:

“Adult themes of infidelity and prostitution but detail not too explicit or the specifics not dwelt on. The grievances are aired and solutions are offered. Upon review it was decided that it was possible to edit the extreme elements of the stories (language and more risqué comments) to enable NSH certification.”

17. Schedule 2 was identical in format, and contained the same information in relation to each episode of the 1997/1998 series. However, unlike schedule 1, schedule 2 was not referred to in the Defence, or even in the further information of the Defence provided by Flextech pursuant to a request from Universal.

18. If one aggregates each of the certifications after review in the two schedules, one arrives (more or less) at the figures summarised in paragraph 28 of the Defence. Of the 194 episodes in the 1997/1998 series, a total of 61 had compliance problems, which, in the case of 15 were so serious as to render them untransmissible, i.e. incapable of complying with the ITC Code. For the 190 episodes of the 2001/2002 series, the equivalent figures were 176 and 41 respectively.

The meaning and effect of clause 4(a) of the 1988 Agreement

Introductory

19. The principal issue which the Judge determined, and which is now before us, centres on the meaning of the words “similar in content” in clause 4(a). In that connection, the question which the parties agreed was to be put before the Judge was rather broad, namely “the true construction under Dutch law of the relevant express terms of the 1998 [Agreement]”. Similarly, the declaration which the parties agreed (and which Cooke J accepted) should reflect his decision on this issue (and on all the other preliminary issues) was rather broad, namely that the 1988 Agreement was to be interpreted in accordance with the judgment handed down by the Judge.
20. Such broad formulations may help to explain why a not inconsiderable proportion of the argument on this issue before us was given over to arguing what each party had, or had not, contended below, and even to arguing precisely what was being contended by each party before us. Such disputes are, save perhaps on the question of costs, at best arid and at worst misleading, because they are irrelevant to the central issue, and they risk distracting attention from it.
21. As mentioned above, the disputes as to the meaning of clause 4(a) are to be resolved by reference to Dutch law. To a greater extent than under English law, the actions of the parties and the negotiations leading up to the execution of the contract, and the actions of the parties subsequent to the execution, can, in principle, be relied on as an aid to construction. However, it appears to me that, at least on the Judge’s view of the evidence and its effect, in this case the applicable approach is (save possibly in a couple of relatively small and ultimately irrelevant respects) in practice much the same as that in English law. This is because of the Judge’s conclusions as to the effect of the evidence. After discussing the testimony about the negotiations leading up to the execution of the 1998 Agreement, he said, in paragraph 79 of his judgment, that the “word ‘content’ was....settled [on] without [the parties] ever defining what was meant by it”. He also said that he “was satisfied...that no restrictive meaning was placed on the word ‘content’ by the parties in the context of their discussion and that no agreement was reached on any limited or specific definition or meaning of it”.
22. For present purposes, the important feature of clause 4(a) is that it requires “[e]ach episode” of the US 2001/2002 season to be “similar in content” (and in “overall production value”) to “the episodes in the 1997/1998 US broadcast season”. Although this clause must, of course, be construed as a whole in the context of the 1998 Agreement and its factual and commercial matrix, it has, at least for present purposes, two particularly significant features. First, each episode of the 2001/2002 series is to be compared with the totality of the episodes of the 1997/1998 series. Secondly, each episode of the later series must be similar in content to those of the earlier series. Particularly on the latter aspect, the discussion before us, and apparently before the

Judge, concentrated on the word “content”. However, as the Master of the Rolls said during argument, it is more appropriate to focus on the expression “similar in content”.

The rival contentions

23. At their most extreme, the contrast between the parties’ respective arguments on this point before Cooke J could not have been more stark. Flextech’s case was that the comparison of the 1997/1998 series with the 2001/2002 series on the basis summarised in paragraphs 26 to 30 of, and schedules 1 and 2 to, the Defence (as set out in paragraphs 15 to 18 above), effectively established (a) that many of the episodes in the latter series were, contrary to clause 4(a), not “similar in content” to the episodes (taken as a whole) of the earlier series, and (b) that the dissimilarity was sufficiently substantial and applied in the case of a sufficiently large number of the episodes of the later series to justify the determination of the agreement. By contrast, Universal’s case was that anything which bore on compliance with the ITC Code could not fall within the concept of “content” for the purposes of clause 4(a), and that accordingly the facts and matters relied on in paragraphs 26 to 30 of, and schedules 1 and 2 to, the Defence were irrelevant.
24. By the time that the argument before us had concluded, each party may have refined its case somewhat, although ultimately I think each adhered to its respective position taken below. Given the way in which clause 4(a) is expressed and the nature of the dispute which has arisen, it is not surprising that the issue has caused some problems. No doubt, it would have been difficult to articulate or to agree satisfactorily, when drafting the 1998 Agreement, either the sort of considerations the parties had in mind as to what constituted “content”, or a yardstick for assessing similarity. Accordingly, as is not unusual in commercial negotiations, the parties agreed a form of words, which, while a potential recipe for uncertainty and litigation, enabled them to achieve a mutually acceptable contract. (I should add that this is not intended to be an adverse criticism; such a basis for agreement is inherently comprehensible; indeed, in most cases, it is justified by events, in that not even the threat of litigation arises).
25. The case advanced before us by Mr Driscoll QC, who appeared with Mr Chambers for Flextech, can be summarised in four propositions. (1) Anything in an episode was part of its “content” (other than technical matters such as methods of filming, types of film etc, which would be within the expression “production value”). (2) For the purposes of clause 4(a), one has to compare the totality of the content of an episode of the 2001/2002 series with the totality of the content of all the episodes of the 1997/1998 series. (3) The questions of (a) whether a particular episode of the 2001/2002 series is “similar in content” to the episodes of the earlier series, and (b) whether the extent of the overall dissimilarity justified Flextech dissolving the 1998 Agreement are ultimately questions of fact, and an appellate court should not interfere with the trial judge’s decision on such questions unless he has gone wrong in principle. (4) The Judge was right, or at least entitled, to conclude that, if they are made good at the final hearing, the facts summarised in paragraphs 14 to 16 above establish that a large number of the episodes of the 2001/2002 series were not “similar in content...to the episodes in the 1997/1998 [series]”, and that Flextech was accordingly entitled to dissolve the 1998 Agreement.

26. Mr Driscoll summarised the effect of these two schedules as establishing that many of the episodes in the 2001/2002 series had a number of features which, were not present in any (or else were present in only very few) of the episodes of the 1997/1998 series. In particular, there was far more nudity, a change in the nature of the audience participation, which involved chanting offensively or obscenely, the use of a so-called “Jerry cam”, which, as I understood it, involved filming people off-stage without their knowledge resulting in more sexually explicit material, and there were episodes filmed out of the studio, in a Caribbean hotel.
27. Mr Barnes’s argument before us was substantially as recorded by the Judge in paragraph 102 of the judgment below, namely that:

“By the words ‘similar in content’, the parties meant only that the show would remain the same type of show – that is to say a show hosted by Jerry Springer with the same look, feel and style, dealing with shocking subject matter in a confrontational manner. It was the shock factor, the salacious content and the confrontational nature of the show which (at least initially) distinguished it from others, provided its appeal and constituted its content for the purpose of the clause...”

28. At times during the submissions, I did wonder whether there was a great deal between the parties. Indeed, if one compares the summary of Flextech’s case in paragraph 25 above with the Judge’s formulation of Universal’s case in paragraph 102 of his judgment, there does not immediately appear to be an enormous gulf of principle between the parties. However, as was clear from the notice of appeal, and from Mr Barnes’s argument, it has remained Universal’s case that compliance with the ITC Code was simply irrelevant, and that the contents of the schedules to the Defence as summarised in paragraphs 26 to 30 thereof were unhelpful, indeed inadmissible, on the issue of similarity of content under clause 4(a). Similarly, Mr Driscoll adhered to the four points identified in paragraph 25 above, of which the fourth is obviously the most controversial.
29. I turn, then, to the questions which need to be addressed in relation to the proper interpretation of clause 4(a). I shall begin with the meaning of the words “similar in content”, which was the issue which was concentrated on in argument before us, and which requires the most analysis. I will then turn to the effect of comparing one episode of the 2001/2002 series with all the episodes of the 1997/1998 series. I will then discuss the Judge’s conclusion that Flextech was entitled to dissolve the 1998 Agreement as it purported to do. To some extent these three aspects overlap, but, especially in the light of the way in which the argument proceeded, it appears to me to be convenient to consider them sequentially. Finally on this aspect, there is a pleading point to consider.

“Similar in content”

30. As a matter of ordinary language, in order to determine whether an episode of a later series is “similar in content” to the episodes of a previous series, one would expect to consider everything that is in the later episode with everything in the earlier episodes. The word “content” in relation to an episode of a television series, as in relation to a book, a film or a magazine article, naturally means what is in (i.e. everything that is

in) the episode, or book, film or article. It would thus include, among other things, the format, the nature and detail of the subject-matter, the manner of presentation (e.g. prepared or impromptu, judgmental or dispassionate, academic or vulgar), the degree and nature of contribution by, and interaction between, presenter, participants, and audience, the language used (sophisticated or basic, foul or polite, etc).

31. It would, of course, be wrong to assume that each such factor is of equal weight when assessing similarity. Different programmes have different qualities, and a feature of great importance to one programme may have no, or no significant, part to play in another programme, so that a change in that feature may very well render an episode of the former programme dissimilar from what went before, but the same change may not begin to have that effect for the latter programme. In relation to “Jerry Springer”, it may well be that the factors which were emphasised by Mr Barnes, or by Mr Driscoll, constituted some (or, for all I know, even all) the important features of the programme. That, however, is a matter for later agreement or argument.
32. Similarity of content is, in my view, a question of fact, albeit not of primary fact; it is more a question of inference from primary facts, a Jury question, as the Master of the Rolls put it in argument. Accordingly, it is very much a question for the fact-finding tribunal, which in this case will (in the absence of a settlement) be the judge at the final hearing. It is therefore right to make it clear that even a change in an important feature, or indeed in more than one important feature, may not result in a sufficient dissimilarity of content. Equally a combination of changes in a number of less important features could result in dissimilarity. It is important to emphasise this, because the trial Judge should not be put in a position where he has to worry about the precise effect of words in this judgment, when his ultimate duty is to apply the words of the 1998 Agreement. The role of the court at this stage is to give as much helpful guidance as possible, but, in relation to the point raised on this appeal, it would be unhelpful if we tried to be prescriptive.
33. Mr Barnes relied on various points to justify giving a narrower meaning to the concept of “content” in clause 4(a). I shall take his first three points together. First, he relied on the fact that there is no express or implied obligation on Universal to ensure that episodes supplied under the 1998 Agreement complied with the ITC Code. Secondly, Mr Barnes drew attention to the fact that no question of compliance with the ITC Code was raised by Flextech in negotiations (even though they knew of potential problems in that connection). Thirdly, he said that the only references to the ITC Code and other regulations in the 1998 Agreement were in clause 8 and Rider 8.
34. There is no question, I accept, of Universal being in breach of contract simply because of an episode, or even a large number of episodes (indeed, I suppose, all episodes), of a series being untransmissible because it or they failed to comply with the ITC Code (or could only be shown at certain times under that Code). The risk under the 1998 Agreement in that connection lay (subject to any frustration or similar argument in Dutch law) with Flextech. As the Judge put it in paragraph 41 of his judgment, it “was a matter for the broadcaster (Flextech) to ensure compliance with regulatory provisions such as the ITC Code.” Indeed, in paragraph 123, he went on expressly to reject Flextech’s contention (not repeated before us) that there was an implied term in the 1998 Agreement in favour of Flextech as to the compliance or transmissibility of the episodes supplied under the contract.

35. However, it is a non-sequitur to say that the facts relied on in paragraphs 26 to 30 of, and schedules 1 and 2 to, the Defence are therefore irrelevant or inadmissible. The fact that a substantial increase in the proportion of non-compliant, and therefore untransmissible, episodes (and in the number of episodes which could only be shown at limited times) is not in itself capable of breaching the 1998 Agreement does not mean that it may not be relied on as evidence of dissimilarity of content, which would be a breach of clause 4(a). There is no reason in law, let alone in logic, why compliance or non-compliance with the ITC Code should not be evidence of at least aspects of content. That is all the more true where, as here, the stated reasons for non-compliance of untransmissible (and restrictedly transmissible) episodes are part of the evidence, and are based on what one would characterise, as a matter of ordinary English, the contents (or aspects of the content) of those episodes. As the Judge pointed out in paragraph 16, and again in paragraph 39, of the judgment, there is no suggestion that the standards laid down by the ITC Code had become stricter, or indeed that they have changed in any relevant respect, since 1998.
36. Fourthly, Universal contended that, on the Judge's construction of clause 4(a), there would be a conflict with clause 8 and the first part of Rider 8, whereas there would be no such conflict if clause 4(a) was interpreted so as not to extend to any aspect of an episode which impinged on compliance with the ITC Codes. I do not accept that contention any more than the Judge did. Clause 8 and Rider 8 do indeed make reference to compliance with regulations such as the ITC Code, but only in order to permit Flextech to edit episodes to achieve compliance. If an episode, which would otherwise be non-compliant, could reasonably be edited so as to render it compliant, then it seems to me that Flextech could not rely on it as a non-compliant episode. As I understood Mr Driscoll's argument, as supported by the way in which the two Schedules to the Defence are drafted, that was accepted by Flextech. This fourth argument therefore, like Universal's first three arguments, confuses the issue. While the extent of non-compliance in the case of many of the 2001/2002 episodes cannot be relied on *per se* to establish dissimilarity of content, it does not follow that the extent of such non-compliance cannot be relied on as evidence of such dissimilarity.
37. A fifth argument in this connection on behalf of Universal (which is an argument which would not have been open, even in principle, if English law was applicable) was that Flextech's expressed concern in the negotiations leading up to the 1998 Agreement was that "Jerry Springer" would become less controversial and "edgy", not more so. It was because of that concern that the requirement of similarity with the episodes in the 1997/1998 series was included in clause 4(a). The Judge rejected that as a reason for giving the word "content" in clause 4(a) an artificially limited meaning, for two reasons. First, he considered that the nature of the discussions was insufficient to deprive the word of its natural meaning. Secondly, he took the view that Universal's case was illogical. As he put it in paragraph 108 of his judgment, "[i]f the '*softening*' of the programme was apt to be a change in content, then so also, of necessity, would a '*hardening*'".
38. Both points made by the Judge appear to me to be sound. The fact that a provision is included in a contract because of a concern expressed by one of the parties does not by any means lead to the conclusion that it was included to deal only with that concern. Indeed, as already mentioned, the Judge expressly found that "no restrictive meaning was placed on the word 'content' in the context of their discussion"

(paragraph 79 of the judgment). Further, I can see no satisfactory answer to the Judge's point as to the illogicality of Universal's contention as explained in paragraph 108 of the judgment.

39. Sixthly, Universal relied on the fact (which would certainly not be relevant on interpretation if English law were applicable) that Miss Tennant of Flextech did not invoke any reliance on clause 4(a) for quite a time after the proportion of non-compliant episodes increased significantly over the 1997/1998 series. This argument was dismissed by the Judge, on the basis that Miss Tennant was "looking for pragmatic solutions which she considered to be still available" (judgment, paragraph 99). Indeed, in the preceding paragraph of his judgment, the Judge said that such an attitude was, in the general run of cases, by no means unusual, and, in this case, a practical position to take as the problem which had arisen was "capable of solution". In any event, as Mr Driscoll pointed out, there is no evidence of Miss Tennant ever having considered the terms of the 1988 Agreement. In these circumstances, I do not consider that there is anything in this sixth point.

Comparing an episode with an earlier series of episodes

40. It is clear that clause 4(a) requires a comparison between individual episodes of the various series the subject of the 1998 Agreement – in this case the 2001/2002 series – and effectively all the episodes of the 1997/1998 series, for the purpose of considering similarity of content. That might seem a little surprising until one considers the alternatives. Selecting one episode of the earlier series as the benchmark, or even trying to agree a selection of episodes of the earlier series for that purpose, would have been difficult and unsatisfactory. Agreeing a verbal description of the desired content of the new episodes, or of the content of the 1997/1998 episodes, would have been, I suspect, even more difficult and more unsatisfactory. I mention this because it appears to me to help assess the nature of the comparison exercise which the parties had in mind.
41. In paragraph 113 of his judgment, Cooke J said that what the parties intended was "a broad comparator against which each of the episodes" delivered under the 1998 Agreement could be assessed. He went on to say that these episodes were "not to be the same but merely similar which requires an evaluation of content which is a question of fact and degree." I agree. This can be criticised as imprecise and, indeed, somewhat woolly, but that results from the comparison exercise which the parties agreed, although it is only fair to add that, as indicated above, it is hard to conceive of a more satisfactory comparison exercise which could have been realistically achievable.
42. Mr Barnes contended before us, as he did before Cooke J, that the fact that an episode of the 2001/2002 season was non-compliant with the ITC Code (or only transmissible after 9.00 pm) cannot be relevant for clause 4(a) purposes, as a number of the episodes of the 1997/1998 series were non-compliant (and a further number were only transmissible after 9.00 pm). This argument is tantamount to saying that an episode delivered under the 1998 Agreement will only be even capable in principle of failing to satisfying clause 4(a) in a particular aspect, if that aspect is not shared by any one of the 194 episodes of the 1997/1998 series. On this basis, once Universal could show that the aspect is shared by a single one of the 1997/1998 episodes, any breach of clause 4(a) based on that aspect would have to fail *in limine*.

43. The Judge rejected this contention, and I agree with him. Flextech might have argued with almost equal force the converse extreme view, namely that an episode of the 2001/2002 series will potentially infringe clause 4(a) unless it has no features other than ones which are shared by all 194 episodes of the 1997/1998 series. The Judge said this in paragraph 116 of his judgment:

“If the material which formed the basis of certification was such as to give rise to an increased number of untransmissible, non-compliant or restricted viewing [episodes], then, although the comparison is to be made between an individual episode in the [2001/2002] season, and the range of broadcasts in the [1997/1998] season, and there might be little difference between the content of the [individual episode] as compared with one particular [episode] of the [1997/1998] season, a comparison against the sweep of [episodes] in the [1997/1998] season can be made by comparing the number of offending [episodes] in the [2001/2002] season as against those in the [1997/1998] season. Each episode [of the 2001/2002 season] must be taken by way of comparison with the general run of [episodes] in the [1997/1998] season and not with the worst of such [episodes].”

These observations could, but should not, be read as treating non-compliance or untransmissibility as constituting aspects of “content” (which would be wrong), as opposed to evidence of “content” (which appears to me correct). On that latter basis, I would agree with what the Judge said in that passage.

44. As Jacob LJ said during the argument, this conclusion, although rather imprecise in its effect, appears to relate rather well to the issue of whether, if there were some episodes of the 2001/2002 series which were dissimilar in content from the 1997/1998 series, Flextech was entitled to dissolve the 1998 Agreement as it purported to do. As one might expect, the Dutch law relating to the right to determine a contract for breach, as embodied in Article 6.245, does not appear to be that different from the law of this country. It would thus appear likely that, if Flextech establishes that some of the episodes of the 2001/2002 series were indeed dissimilar in content from the “general run” (to use the Judge’s expression) of the 1997/1998 episodes, the validity of its consequent claim to determine the 1988 Agreement would depend on the total number of such dissimilar episodes and the extent, manner and consequences of the dissimilarity, viewed in relation to the 2001/2002 series as a whole as well as in relation to the individual episodes.
45. Again, I should emphasise that the observations in the last paragraph should not be treated as the last word on the topic. However, it is fair to say that the observations appear to derive some support from the Judge’s explanation of the way in which Article 6.245 is to be applied. Further support for those observations appears to me to come from another passage (to which I will refer again a little later) at paragraphs 127 to 129 of the judgment. In that passage, where the Judge was considering the question of whether Flextech was entitled to determine the 1998 Agreement, as it had purported to do, he particularly made reference to the number of non-compliant episodes of the 2001/2002 series (compared with the total of the 1997/1998 series), and the consequences of non-compliance, as relevant factors.

My conclusions so far

46. My conclusions so far are therefore as follows. First, a comparison by reference to the compliance, or degree of compliance, with the ITC Code is admissible, and, indeed, relevant, evidence on the issue of similarity of content. The fact that an aspect of an episode goes to compliance does not in any way prevent it being within the ambit of the “content” of the episode, either as a matter of ordinary language or for the purposes of clause 4(a). Further, the fact that some of the episodes of the 1997/1998 series were non-compliant does not invalidate this point, although it certainly is not irrelevant to the issue of similarity of content: on the contrary, it is a point upon which Universal can properly rely.
47. Secondly, the weight to be given to non-compliance, either in relation to the question of whether a particular episode of the 2001/2002 series infringed clause 4(a), or in relation to the question of whether there was a sufficiently large number of non-compliant episodes to assist in justifying Flextech’s dissolution of the 1998 Agreement, is very much a matter for the judge who determines the final issues between the parties. It is of questionable value for a court to indicate at this stage (when the accuracy of the assumed facts is not admitted by Universal, and when Universal will very probably wish to rely on further facts) what weight, is to be given to the issue of non-compliance with the ITC Code (as set out in paragraphs 26 to 30 of, and schedules 1 and 2 to, the Defence), when determining whether an episode complies with clause 4(a), and whether Article 6.245 entitled Flextech to dissolve the 1998 Agreement.
48. Accordingly, it appears to me that the Judge approached the issues of infringement of clause 4(a) and of Flextech’s right to dissolve the 1998 Agreement on the correct basis as a matter of law. I therefore agree with the first three of the points I have attributed to Mr Driscoll in paragraph 25 above. I now turn to the fourth point, namely that there were episodes of the 2001/2002 series which infringed clause 4(a) and that Flextech was consequently entitled to dissolve the 1998 Agreement.

Flextech’s entitlement to dissolve the 1998 Agreement on the assumed facts

49. Having agreed with the first three of Mr Driscoll’s points, as summarised in paragraph 25 above, which, as mentioned, accord with the Judge’s conclusions, I do not accept his fourth point. Mr Driscoll’s contention was that, on the assumed facts, Flextech established, or would establish, that there were numerous episodes of the 2001/2002 series which breached clause 4(a), and that, as result, it was entitled to determine, or dissolve, the 1998 Agreement.
50. It appears that Cooke J took the same view. He said in paragraph 127 of his judgment that the “large difference in the number of [episodes] which were non-compliant, untransmissible or available only for restricted viewing” “could only” lead to the conclusion that “the content of the 2001/2002 [episodes] did not conform to the general level of those of the 1997/1998 season”. Using terminology referable to Article 6.245, the Judge went on to say, in the same paragraph, that, if “the contents of a significant number of the 2001/2002 [episodes] depart from the benchmark with regulatory impact of that kind, in no way could the breach be considered minor or of a special nature”. In other words, he appears to have decided that, if the facts alleged in the relevant passages of the Defence were made out at trial, Flextech would have

established breach of clause 4(a), and, indeed, a sufficient degree of breach to justify the dissolution of the 1998 Agreement. Any doubt about whether the Judge meant to go this far is, I think, put to rest by the subsequent paragraph of the judgment, albeit that it is expressed in slightly Delphic terms.

51. I have two problems about this conclusion, both of which stem from the fact that the hearing before Cooke J proceeded on the basis of the assumed facts as set out in the Defence. These assumed facts are not admitted by Universal. Further, they are almost certain not to be the only facts raised at the final trial, relating to the question of the similarity of content of the relevant episodes. The former aspect speaks for itself. As to the latter aspect, two examples should suffice.
52. First, it may be that, after hearing fuller evidence, it transpires that a large number of the episodes of the 1997/1998 series were very close to being non-compliant in some way, or that a large number of the 2001/2002 series episodes were only just the wrong side of compliant. If that were the case, it might well render it more difficult to establish that many of the episodes of the latter series breached clause 4(a), at least on the basis that Flextech currently put its case.
53. Secondly, the contents of many of the episodes of the two series may have many more aspects than those contained in the brief synopses and reasons for certification contained in the schedules to the Defence. It does not appear that Cooke J saw any of the episodes; unfortunately for the trial judge, it is inevitable that he will have to watch a number (probably many) of the episodes of the two series in question. He will therefore have a much fuller (and therefore, almost inevitably, a somewhat, perhaps a substantially, different) assessment of the contents of many of the episodes than is possible at this stage. It is almost inevitable that this would affect one's perception of whether at least some of the individual episodes of the 2001/2002 series were similar in content to the totality of the episodes of the 1997/1998 series.
54. The first problem I have with the Judge's conclusion in paragraph 127 of his judgment is that at best it would be of no use to the parties and the court at the final hearing, and at worst it would be positively unhelpful. The ultimate questions for determination at trial will be whether (a) a number of the episodes of the 2001/2002 series were dissimilar in content from the 1997/1998 series, and (b) a sufficient number of the episodes were sufficiently dissimilar to justify Flextech dissolving the 1998 Agreement. Those determinations will involve identification of all the salient facts, and the drawing of inferences and reaching conclusions which, to a substantial extent, will involve a degree of value judgment. The two questions ultimately involve questions of fact and not of law, as already mentioned.
55. Cooke J's conclusion in paragraph 127 of his judgment could only have been reached on the assumptions that (a) all the facts alleged in paragraphs 26 to 30 of, and schedules 1 and 2 to, the Defence, and (b) no other facts relating to the content of the episodes of the 1997/1998 series and the 2001/2002 series, or even glosses on the alleged facts, are established. On that limited basis, it seems to me that, even if the Judge's conclusion was one he was entitled to reach, it could not be helpful. As I have said, it is inevitable that those alleged facts will not by any means be the only facts before the trial judge, and indeed it is very unlikely that all the alleged facts will be made out at trial. It can scarcely be helpful to those involved in the final hearing to

have a binding determination on the two ultimate issues at stake on a different factual basis from that which is established at trial.

56. If such a determination stands, the parties at trial will either ignore it or they will take it into account. If they ignore it, the determination will have proved to be useless. If they do not ignore it, they will argue about whether the combination of additional facts, rejected alleged facts and glosses on the alleged facts established at trial justify a departure from Cooke J's conclusion on the two issues. That cannot be a sensible course to adopt: the correct course must be to argue the issues by reference to the facts established at trial.
57. Quite apart from this, there is a second (connected) problem with the Judge's conclusion in paragraph 127 of his judgment. It does not appear to me to have been legitimate in principle to determine whether individual episodes of the 2001/2002 series were similar in content to the totality of the 1997/1998 series episodes, let alone whether the dissimilarity was sufficient to justify dissolution, simply on the basis of the case pleaded in the Defence. It must be necessary for the judge who determines such issues to see at least some of the episodes of the two series (although I would strongly encourage the parties to agree a sensible basis upon which the trial judge can reach a conclusion on the two ultimate issues without having to view anything like the totality of all the episodes of both series).
58. Given the conceptual breadth of what is involved in the words "similar in content" as explained above, it cannot be appropriate to determine that issue purely by reference to what is alleged in the Defence. After all, as I have emphasised, the allegations in the Defence really amount to a summary of the facts from which the court will be asked to infer that clause 4(a) has been breached and that dissolution can be claimed: the actual "content" of the episodes can only be appreciated from viewing them.
59. It could be argued that the Judge was nonetheless justified in adopting the approach that he did, because the parties had agreed that he should take that course, and that if, for instance, the trial judge was invited to take a similar course he could do so. However, at this preliminary stage, where no facts are agreed, and where a trial is inevitable (unless the parties agree terms), it was open to the Judge to refuse to determine the issues he decided in paragraph 127 of his judgment, and he should have done so, in my opinion. The basis upon which he was being asked to proceed was so artificial and so unsatisfactory that he should have declined to adopt it. I note that he effectively took that course in relation to one or two other (more minor) issues that he was asked to determine. It is only fair to the Judge to add that, in deciding this issue and all the other issues he decided, he was doing his best to assist the parties in getting the most out of the hearing before him.

The pleadings

60. Mr Barnes argued that it would not be open to Flextech, when contending that clause 4(a) had been breached or that the 1998 Agreement had been validly dissolved, to rely on any facts other than those alleged in paragraphs 26 to 30 of, and schedule 1 to, the Defence.
61. So far as schedule 2 to the Defence is concerned, I do not consider that point to be well-founded. It is true that that schedule, unlike schedule 1, was neither attached to,

nor referred to in, the Defence. It was apparently served some time later, and, at least on the basis of what we were told, it was not then expressly linked to the Defence or to any other pleading or court document.

62. Nonetheless, I consider that it should be treated as incorporated into the Defence. First, it is clear from the wording of clause 4(a) itself, and from the way in which Flextech put its case at the beginning of paragraph 27 and of paragraph 28 of the Defence, that a comparison of the episodes of the 2001/2002 series with those of the 1997/1998 series was required. Schedule 1, relating as it did to the later series alone, would therefore have been self-evidently insufficient without a document such as schedule 2, which carried out the same exercise for the earlier series. A reasonable person in the position of Universal, when receiving schedule 2, would therefore have appreciated its purpose. Any serious doubt about this would have been put to rest by the fact that schedule 2 is headed on each page “Schedule 2 to the Defence”.
63. Secondly, Cooke J appears clearly to have proceeded on the basis that schedule 2 was part of Flextech’s pleaded case, being part of the assumed facts for the purpose of the preliminary issues which he had to determine. For example, in paragraph 115 of his judgment, he stated that he was proceeding “on the assumption that the synopsis of the contents of the [episodes] in the schedules to the Defence are correct as well as the certification”. That was clearly a reference to schedule 2 as well as to schedule 1. There is no question of any appeal by Universal against that approach.
64. I consider, however, that Mr Barnes was on stronger ground when he contended that Flextech could not rely on any matters not alleged in paragraphs 26 to 30 of, and schedules 1 and 2 to, the Defence (or any further information provided in connection therewith). Subject to any application to amend, and subject to what I say in the next two paragraphs, that must be correct. I do not have any reason to think that Flextech wishes to rely on other facts, but, if it did, it would have to apply to amend its Defence. If there were an application to amend, it would have to be dealt with on its merits.
65. However, this does not mean that it will not be open to Flextech to rely on any aspect of the actual content of the episodes of the two series other than what is summarised in the two schedules. As I have said, it is obvious that the trial judge will have to watch some of the episodes (and I repeat my comment on the desirability of the parties agreeing some sort of sampling arrangement), in order to decide the central issues between the parties. It is equally obvious that the whole of the actual content of the episodes of the two series is relied on by Flextech. The purpose of paragraphs 26 to 30 of, and schedules 1 and 2 to, the Defence is to identify the main features (including the reasons for untransmissibility or limited transmissibility) of each episode from Flextech’s perspective.
66. Under the CPR, the purpose of the Defence in a case such as this is, at least in the present sort of connection, to give, in a clear and digestible form, a fair view of the defendant’s case. While neither party should be taken by surprise at trial, statements of case should not be too detailed and complex. It is perhaps less helpful than is sometimes thought to say that pleadings should not contain evidence or argument, not least because an allegation of fact is often, in practice, also at least part of the argument or evidence of the party relying on it. However, the need for conciseness in statements of case is important. In the case of the claim form and the particulars of

claim, it is expressed in terms in CPR rr 16.2(1)(a) and 16.4(1)(a), and while there is no such explicit requirement for a Defence in CPR r. 16.5(2)(b), it is implicit.

The two issues relating to Rider 8

67. The effect of the first part of Rider 8 was to entitle Flextech to make “minor cuts” in episodes to enable, inter alia, compliance with regulations such as the ITC Code, and to make it clear that Flextech was not obliged show an episode which infringed such regulations. The second part of the Rider applied where, even with such cuts, an episode could not be made to comply with the ITC Code or similar regulations. In that event, Universal was to provide “a substitute film if available”, and, if there was no substitute available, the number of episodes to be delivered by Universal, and the Licence Fee paid by Flextech, were each to be reduced. The two remaining issues on this appeal raised by Universal both relate to the second part of Rider 8.

Does Rider 8 preclude alleging that untransmissible episodes breach clause 4(a)?

68. Mr Barnes contended that the terms of the second part of Rider 8 were mandatory, so that any episode which was untransmissible because it did not comply with the ITC Code (even after any permitted cutting) was to be treated as taken out of the ambit of the 1998 Agreement, on the basis either that it was to be replaced by a substitute, or that it was to result in a reduction in the License Fee. Accordingly, he said, any such episode was effectively excluded from founding the basis of a claim for infringement of the provisions of clause 4(a).

69. The Judge rejected this submission essentially on the ground that the second part of Rider 8 did not cut across the effect of clause 4(a). He also considered that the benefit afforded by the second part of the Rider to Flextech in the case of an episode which was untransmissible represented an alternative remedy to its right to dissolve under Article 6.245, and that, in Dutch law, as in English law, a party with alternative remedies for a breach could elect between remedies.

70. I agree with the Judge’s view that the provisions of Rider 8 did not impinge on the operation of clause 4(a) in the way in which Mr Barnes contended. As a matter of language, the terms of the clause appear to apply to every “episode” of a series, and not merely to an episode which can be screened without infringing the ITC Code or other regulations. That interpretation is supported by the way in which other provisions of the contract, and in particular, clause 4(a)(iii), are worded. The notion that clause 4(a) should apply to all the episodes of the series which have been shown in the United States also accords with commercial common sense. It would seem very unlikely that the parties would have envisaged that there could not be a breach of clause 4(a) if, say, only 20 of the 190-odd episodes of a series could not be shown owing to non-compliance with the Code.

71. Mr Barnes’s argument nonetheless has some linguistic and conceptual force in the sense that it can be said that the closing sentence of Rider 8 should be read as saying that, if an episode is untransmissible due to compliance problems, it should be treated as removed from the ambit of the 1998 Agreement, on the basis that it will no longer be an “episode” or a “licensed episode” within the meaning, and hence the scope, of that contract. However, it appears to me that the argument runs into difficulties, first, in relation to episodes which are transmissible but only at restricted times (i.e. which

can only be shown after 9.00 pm generally or outside school holidays under the ITC Code), and, secondly, in terms of commercial common sense.

72. Episodes which are transmissible subject to restrictions would not be excluded from the ambit of the 1998 Agreement on Mr Barnes's argument, as they do not fall within the second part of Rider 8. It would seem absurd if such episodes could be taken into account when considering breaches of clause 4(a), whereas episodes which are likely to be more controversial, and would have a more substantial effect on Flextech's commercial interests (namely those which are simply not transmissible) could not be. It would also appear remarkable if Universal could avoid the consequences of clause 4(a) by reference to Rider 8 where a programme was untransmissible because of compliance problems, but not where it was untransmissible for any other reason such as poor quality or being of purely parochial interest.
73. Rider 8 can be given sensible effect, in my view, in one of two ways. First, while it would have the effect which Mr Barnes contends, namely to remove an untransmissible episode (for which no substitute is provided) from the calculations in provisions such as clause 4(a)(iii), it does not apply to clause 4(a), i.e. the opening words of clause 4. Alternatively, despite its mandatory words, it is clearly intended to provide protection for Flextech, and it should therefore be treated as an optional remedy, rather than an automatic mandatory provision. Such a concept is very familiar in English law: forfeiture clauses in leases routinely are expressed in terms which, literally construed, would suggest that, on any breach of the tenant's covenants, the lease automatically determines, and yet they are always interpreted as conferring a remedy for the landlord of which he can avail himself if he wants. So far as I am aware, there is no reason to think that Dutch law is any different. Indeed, the Judge's conclusion on this issue plainly proceeds on the basis that he thought Dutch law was the same.
74. Quite apart from this, as Mr Driscoll pointed out, Rider 8 was part of the 1997 Agreement, whose provisions were only incorporated into the 1998 Agreement insofar as they did not conflict with its terms, and the 1997 Agreement contained no provision equivalent to clause 4(a). For the reasons just given, I would take the view that, even if Mr Barnes's submission was otherwise right, it should be rejected on the basis that Rider 8 was, at least for present purposes, in conflict with the provisions of the 1998 Agreement. In summary, the second part of Rider 8 would cut across the benefits of the rights granted to Flextech by clause 4(a) to such an extent as to be in conflict with that clause.
75. The fact that this latter approach would result in a conflict between clause 4(a) and Rider 8 is not, despite Mr Barnes's argument to the contrary, supportive of his case on the meaning of "content" in clause 4(a). The parties clearly envisaged that there could be conflicts between the terms of the 1998 Agreement, such as clause 4(a), and the terms of the 1997 Agreement, such as Rider 8, and they therefore expressly provided for it. That plainly means that the normal rule, that one tries hard to avoid construing two clauses of a contract so as to avoid conflict, does not apply.

Does Rider 8 permit the substitute episode to be a repeat?

76. The dispute between the parties in this connection is whether, in the event of an episode being untransmissible because of compliance problems, the second part of

Rider 8 permits Universal to deliver a “substitute” which is a repeat of a previous episode (as Universal argued) or whether (as Flextech contended) it had to be an original, i.e. a new, episode. The Judge concluded that Flextech was right, essentially for two reasons. First, as a matter of impression and of ordinary English, an episode was not a “substitute” for an original episode if it was not itself an original. Secondly, clause 4(a)(iii) contained safeguards in favour of Flextech so far as repeats were concerned (namely it had the right to “select.. or approve..” repeats thereunder, and it had an election once the number of originals fell below 130). The absence of any such safeguards in the Rider accordingly suggested that it did not extend to repeats.

77. What at any rate initially appeared to be Mr Barnes’s strongest argument against this conclusion was based on the wording of clause 7 of the 1998 Agreement. If read literally, that clause makes it very difficult to see how the Rider would work in practice if the Judge was right. If all the episodes of a series had to be delivered before the start of the British season, it would be a little difficult to see how an original episode could be found to substitute a non-compliant one. However, when Mr Driscoll objected to this argument on the basis that it had not been raised below, and said that it was based on a false understanding of the facts, Mr Barnes took instructions. He then, very properly, accepted that clause 7 did not represent the factual position at any time – i.e. under the 1997 Agreement or under the 1998 Agreement. In both cases, the episodes for each series were delivered in batches. This was inevitable as they were being filmed as the US season (which largely overlapped with the British season) progressed. Accordingly, despite the literal wording of clause 7, the conclusion reached by the Judge on this issue would have been workable.
78. In these circumstances, it appears to me not only that Mr Barnes’s case based on clause 7 of the 1998 Agreement must be rejected, but that there is a further argument to support the Judge’s conclusion. That argument rests on the words “if available”. As Mr Driscoll said, this qualification would have been otiose if the substituted episode could have been a repeat: there would inevitably have been plenty of repeats available. However, if a substitute was required to be a new episode, the possibility of such an episode being unavailable would have been a reality; hence the need for the qualification.
79. Mr Barnes raised a number of points which, I am bound to say, did not seem to me as serving to cast much doubt on the Judge’s reasoning and conclusion on this issue. The fact that the price payable under clause 4(a)(iii) for repeats was the same as for new episodes does not appear to me to be of much, if any, relevance to the issue. Nor does the inclusion of the words “will be deemed to be” have any great significance in the present context. As to the conduct of the parties subsequent to the 1998 Agreement, it appears to me that, as in relation to this aspect on the interpretation of clause 4(a), as discussed above, the Judge was, to put it at its lowest, entitled to treat the evidence as unhelpful.

Conclusion

80. In these circumstances, I would uphold the Judge’s decision without reservations on the two issues that I have just been considering in relation to Rider 8. That renders it unnecessary to revisit the conclusions I have reached in relation to the issues arising in relation to clause 4(a). So far as those issues are concerned, I would substantially

uphold the Judge's decision, subject to the possible qualification discussed in paragraphs 49 to 59 above.

81. I would invite counsel to agree an appropriate form of order. In the light of the form of order agreed following the judgment of Cooke J, as described in paragraph 19 above, it may well be that the correct order would be along the lines that the 1998 Agreement is to be construed in accordance with the judgment of Cooke J, subject to any variations which result from the judgment of this court. I must confess to some unhappiness, as a matter of general principle, with an order in such unspecific terms, but it is understandable why the parties agreed such an order in the present case. Further, given that an order in those terms was made by the Judge after agreement between the parties here, there must be a powerful case for that form of order being reflected in the order that we make, especially as Cooke J decided a number of issues which have not been raised before us.

Lord Justice Jacob

82. I agree.

Sir Anthony Clarke, MR

83. I also agree.