

# General Form of Judgment or Order

In the County Court at  
Salisbury

Claim Number D4QZ88P0

Date 30 April 2019



MR RUSSELL MAYNARD	<b>1<sup>st</sup> Claimant</b> Ref ITVNOSUBTITLES
ITV PLC REGISTERED OFFICE	<b>1<sup>st</sup> Defendant</b> Ref D4QZ88P0
**DISCONTINUED**	<b>2<sup>nd</sup> Defendant</b> Ref

Before His Honour Judge Berkley sitting at the County Court at Salisbury, Salisbury Law Courts, Wilton Road, Salisbury, Wiltshire, SP2 7EP.

Upon the hearing of the Defendants' application of 22 January 2018 on 30 April 2019.

And upon hearing Ms Claire Darwin of Counsel for the Defendants and the Claimant not appearing and not being represented (but having made written submissions and having had his absence excused in advance).

## IT IS ORDERED THAT

- 1 The Claimant's statement of case is struck out pursuant to CPR 3.4(2)(a).
- 2 The Claimant to pay the Defendants' costs of defending the claim, summarily assessed in the sum of £11,000 (excluding VAT), payable by 4pm on 28 May 2019.

Dated 30 April 2019

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B E T W E E N : -

MR RUSSELL MAYNARD

Claimant

- and -

ITV PLC

Defendant

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**JUDGMENT**

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1. This is my ruling on an application made by the remaining Defendant in this matter to strike out the Claimant's claim as disclosing no cause of action, alternatively for summary judgment.
2. I had provided to me a hearing bundle which included witness statements from the Claimant and A Mr Poole, "Head of Architecture, Direct to Consumer", of the Defendant. Mr Maynard also provided written submissions which were at divider 6 of the hearing bundle.
3. Mr Maynard had made a request that the Court make reasonable provision for his disabilities (which include the fact that he is, he says, profoundly deaf in both ears and has other (unspecified) disabilities which rendered it difficult for him to attend Court), namely that he be excused from attending the hearing and that the hearing be dealt with on paper. I indicated to him via the Court office that I was prepared to excuse his attendance from the hearing and proceed to deal with his response to the application

based on his written submissions, though I would not prevent the Applicant from being represented.

4. Mr Maynard did not attend Court for the application. The Defendant instructed Ms Darwin of Counsel to attend to make submissions on the application. Ms Darwin had submitted a written skeleton argument in advance of the hearing, together with authorities and relevant statutory material.
5. Having read Mr Maynard's written submissions and Ms Darwin's written submissions and considered the hearing bundle in advance of the hearing, I did not need to trouble Ms Darwin for oral submissions on the substantive application, though I did hear from her on the question of costs. It follows that I accept the submissions set out in Ms Darwin's skeleton argument (in relation to cause of action, though not summary judgment), and so in the interests of proportionality, draw on significant parts of it for the purposes of this judgment. The arguments are technical and based on legal submissions, and so a lot of the material drawn upon is merely statutory.

### **The Claim**

6. Mr Maynard's claim, as set out in his Claim Form, is that the Defendant is obliged to provide subtitles when simultaneously transmitting ITV channels live over the internet via the ITV Hub (available at [itv.com](http://itv.com)). This is known as "Simulcast".
7. As described by Mr Poole in his evidence, Simulcast is essentially 'live TV' available on a website or mobile phone/tablet app, and can be distinguished from both 'live TV' available on a television set ("linear programming"), or 'catch up' TV also available on a website or app.

8. The Defendant accepted that the live content available on Simulcast is not subtitled, in contrast to content it makes available via both linear programming and catch up services if it is accessed via an internet browser from a desktop, or via an iOS device or Windows phone.
9. Mr Maynard, by ¶2 of his written submissions, claims that he is disabled for the purposes of the Equality Act. The Defendant was prepared to proceed, for the purposes of this application, on the basis that Mr Maynard is a disabled person within s.6 Equality Act, and I have so proceeded.
10. The principle basis for the Defendant's application is that provision of its Simulcast is exempt from the "reasonable adjustments" requirement of the Equality Act by virtue of it being a "content service" as defined by the Communications Act 2010, and thus the question of the provision of subtitles (or not) by Defendant is exempt for consideration under the Equality Act.

## **LEGAL FRAMEWORK**

### **Strike Out/Summary Judgment**

11. The Court may strike out a statement of case if it appears to the Court that it discloses no reasonable grounds for bringing the claim (CPR 3.4(2)(a)). The question for the Court is whether the claim is bound to fail, or raises an unwinnable case where continuance of the proceedings is without any possible benefit to either party and would waste resources on both sides (*White Book* ¶3.4.2).
12. The Court may give summary judgment against a Claimant on the whole of a claim if it considers that the Claimant has no real prospect of succeeding on the claim, and

there is no other compelling reason why the case should be disposed of at a trial (CPR 24.2). The Court must consider whether the Claimant has some 'prospect' or chance of success, and that prospect must be real i.e. not false, fanciful or imaginary (*White Book* ¶24.2.3).

### **The Equality Act 2010**

13. It is common ground that the Defendant is a service provider for the purposes of Part 3 of the Equality Act. Accordingly, the Defendant is subject to the prohibition on discrimination as contained at s.29 of the Equality Act. This means that *inter alia* the duty to make reasonable adjustments applies to the Defendant, unless an exception to s.29 Equality Act applies.
14. The duty to make reasonable adjustments is contained at ss.20 and 21 Equality Act. Essentially, if a provision, criterion or practice of the Defendant's puts disabled persons generally at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, then the Defendant is subject to a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.
15. This application was not concerned with the question of whether the Defendant had taken, or should be required to make, reasonable adjustments to avoid the relevant disadvantage: that was for the trial of the matter should it have proceeded to trial. However, the Court was invited by the Defendant to find that the adjustments sought by Mr Maynard (the provision of subtitles on Simulcast) was so unlikely to be regarded as unreasonable that the Defendant should be granted summary judgment on that basis.

## Exception to s.29 Equality Act

16. Schedule 3 to the Equality Act contains a number of exceptions to s29. Paragraph 31 of Schedule 3 (which I shall refer to as “¶31”) provides that:

31 (1) Section 29 does not apply to the provision of a content service within the meaning given by section 32(7) of the Communications Act 2003.

(2) Sub-paragraph (1) does not apply to the provision of an electronic communications network, electronic communications service or associated facility (each of which has the same meaning as in that Act).

So there is a potential exception from the sub-paragraph 31(1) exception if Simulcast falls within sub-paragraph 31(2).

17. Paragraphs 746-7 of the Explanatory Notes to the Equality Act 2010 explain that:

'Paragraph 31 makes it clear that **claims for discrimination, harassment and victimisation cannot be brought in relation to broadcasting and distribution of content, as defined in the Communications Act 2003**. This would include, for example, editorial decisions on the content of a television programme or the distribution of on-line content.

This paragraph does not, however, extend to the provision of an electronic communications network, service or associated facility, which are also defined in the Communications Act 2003. This will ensure that **the act of sending signals is not excluded by the exception in sub-paragraph (1), only the content of what is broadcast.**' (emphasis added).

18. Further, the EHRC's CoP provides at 13.106 that:

‘The above exception does not apply to the provision of an electronic communications network, electronic communications service or associated facility as defined in s.32 of the Communications Act 2003. **This means that the prohibition of discrimination, harassment and victimisation under the Act applies to the sending of signals, and it is only the content of what is broadcast that is excluded.**’ (emphasis added)

### The Communications Act 2003

19. The Communications Act 2003 (“the 2003 Act”) deals with, among other matters, the regulation of independent television services.
20. The 2003 Act makes specific provision for Ofcom to draw up and maintain a code relating to television services for the deaf and visually impaired (see s.303 of the 2003 Act), and a code on accessibility for people with disabilities (see s.368BC). There is no complaint that any relevant code has been breached, but even if there was, that would be a matter for Ofcom, not the courts.
21. The exception contained at paragraph 31 of Schedule 3 Equality Act cross refers to section 32 of the 2003 Act, and in particular the following definitions:
  - A content service as defined by s.32(7) of the 2003 Act, “*means so much of any service as consists in one or both of the following—*
    - (a) *the provision of material with a view to its being comprised in signals conveyed by means of an electronic communications network;*
    - (b) *the exercise of editorial control over the contents of signals conveyed by means of a such a network.*”
  - An electronic communications network as defined by s.32(1) of the 2003 “means—



(a) *a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; and*

(b) *such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals—*

(i) *apparatus comprised in the system;*

(ii) *apparatus used for the switching or routing of the signals; . . .*

(iii) *software and stored data[; and*

(iv) *(except for the purposes of sections 125 to 127) other resources, including network elements which are not active].”*

- An electronic communications service as defined by s.32(2) of the 2003 Act “*means a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except in so far as it is a content service*”
- An associated facility as defined by s.32(3) of the 2003 Act “*means a facility, element or service which is available for use, or has the potential to be used, in association with the use of an electronic communications network or electronic communications service (whether or not one provided by the person making the facility, element or service available) for the purpose of—*
  - (a) *making the provision of that network or service possible;*
  - (b) *making possible the provision of other services provided by means of that network or service; or*
  - (c) *supporting the provision of such other services.”*

### **The Evidence**

22. I accept the contents of both witness statements before the Court. Neither contradicts the other. Mr Maynard’s deals with his lack of hearing; his experience with the Simulcast, and the effect that that experience had on him. Mr Poole’s statement dealt with the ‘mechanics’ of the Simulcast system.

### **Submissions: The Applicant/Defendant**

23. The Defendant applicant submits that the Simulcast falls into the exception to s29 contained in s31(1) by virtue of it being a “content service”. Ms Darwin submitted, in relation to each of the foregoing definitions, as follows.

- (1) **Content service:** Simulcast is a content service within s.32(7) of the 2003 Act. Relying on the witness evidence of Mr Poole, Ms Darwin submitted that the relevant material is comprised in signals and conveyed by means of an electronic communications network (¶4) which is explained in further detail ¶¶7 - 11. She submitted that further examples of content services would be a broadcast service or an online news service.
  
- (2) **Electronic Communications Network:** Ms Darwin submitted that Simulcast is not itself an electronic communications network, and thus does not fall within ¶31(2), Part 8, Schedule 3 on the basis that an electronic communications network is a transmission system for the conveyance of signals of any description. She relied on ¶87 of the Explanatory Notes to the 2003 Act which give the following examples of electronic communications networks: '*satellite networks, fixed networks (whether circuit- or packet-switched, and including the Internet) and mobile terrestrial networks and networks used for radio and television broadcasting, including cable TV networks.*' She also made further reference to ¶4 of Mr Poole's witness evidence that Simulcast is not *itself* an electronic communications network, but is the material which is transmitted by such a system.
  
- (3) **An Electronic Communications Service:** Ms Darwin again relied on ¶4 of Mr Poole's witness statement in relation to this exclusion to the exclusion. She referred to the Explanatory Notes to the 2003 Act which she pointed out state that examples of such services include telecommunications services and transmission services in networks used for broadcasting: Simulcast is not the means by which signals are conveyed to members of the public. Ms Darwin also

submitted that, even if Simulcast is an electronic communications service, it is also a content service, and therefore is specifically excluded from the definition of 'electronic communications service' (see s.32(2) of the 2003 Act).

- (4) **An Associated Facility:** Again, in reliance on ¶4 of Mr Poole's statement, Ms Darwin submitted that Simulcast is not an associated facility, and therefore does not fall within para. 31(2), Part 8, Schedule 3: Simulcast is not a facility used to make the provision of an electronic communications network or service possible. Examples of such facilities given in the Explanatory Notes include conditional access systems and electronic programme guides, she submitted.

#### **Submissions: the Claimant/Respondent**

24. Mr Maynard submitted that the Defendant was not exempt from duties imposed by the Equality Act.
25. Mr Maynard's first submission was that the ITV website is not "*a service content as it [is] not just showing videos or programmes at its website. Content service is defined as one only showing programmes or videos*". He does not set out the source for that asserted definition.
26. Mr Maynard went on to submit that if the website was "*an additional service to the broadcaster*", then it "*would fall within the Equality Act*". He goes on to submit that the definition of a broadcaster is "*to transmit a programme or some information by radio or television*", and accordingly, he says, the Defendant needs to ensure that its website is accessible by people disabled by virtue of being deaf. No source for that definition is given by him. Mr Maynard also submits that the failure to provide subtitles in the Simulcast part of the website prevents such people from understanding

what is being said on that part of the site, and thus renders the Defendant in breach of its duties under the Equality Act. In particular, Mr Maynard cites the inability to take part in live audience-votes during the course of a Simulcast programme.

27. The rest of Mr Maynard's written submissions deal with arguments to the effect that the provision of subtitles would be a reasonable adjustment the Defendant is obliged to take, and how it would benefit a significant number of people. He also alleges that the BBC provides "*live subtitles when using its services via computer*". He also alleges that ITV have demonstrated an ability to provide sounds and graphics which assist hearing viewers but exclude deaf viewers.
28. Mr Maynard attached three documents in support of his submissions: (1) Equality Act Notes; (2) a document entitled "Action on Hearing Loss Facts" and (3) Article on BBC Subtitles from July 2016.

### **Decision**

29. As I have already indicated, I find in favour of the Defendant/Applicant that the Claimant's statement of case discloses no reasonable grounds for bringing his claim, because his complaint about the lack of subtitles on Simulcast is within the specific exception to s.29 Equality Act contained at paragraph 31 of Schedule 3 to the Equality Act. I do so for the reasons set out in Ms Darwin's skeleton argument in relation to the exception. I do not find in the Defendant's favour in relation to the summary judgment for reasons I shall set out below, after having dealt with my reasons for rejecting Mr Maynard's submissions.
30. Mr Maynard provides two definitions to support the propositions that (i) Simulcast falls outside being a "content service" for the purposes of ¶31(1) of Schedule 3 to the

Equality Act and (ii) that Simulcast falls within one of the exceptions to the exceptions in ¶31(2) of Schedule 3 to that Act. The second of these propositions I infer from the fourth substantive paragraph of Mr Maynard's submissions, where he makes reference to Simulcast being an "*additional service to the broadcaster*" which I take to be a reference to "*an associated facility*" in ¶31(2).

31. The difficulty for Mr Maynard is that his definition of what he considers to be "service content" is not supported by the statutory definitions, and he does not provide a source for his definition purporting to limit "service content" to the provision of videos and programmes. There is no legal basis for that restrictive interpretation. The statutory definitions as set out above, whilst somewhat technical and a little opaque, are clear when read carefully, and particularly when read in conjunction with the Notes of Guidance to the 2003 Act, it is plain that there is a distinction between the "machinery" and hardware used to send and receive signals on the one hand, and the content of those signals on the other.
32. The presence or absence of subtitles within the signals (so to speak) can only be part of its content, and can in no way be said to form part of the physical paraphernalia required for sending (or receiving) the signals themselves.
33. Similarly, Mr Maynard's assertion in the fourth substantive paragraph of his submissions is just that: an assertion. Even assuming that "additional service" is intended to refer to an "associated facility" (which if it is not, renders it completely irrelevant), the definition asserted by Mr Maynard bears no resemblance to the statutory definition and has no other legal basis. The assertion cannot bring Simulcast within the definition if the statutory definition does not do so, which it does not.

34. Whilst I am sure that Mr Maynard, and many others who are deaf or hard of hearing, might benefit from having subtitles to the Simulcast material, that Simulcast is excluded from the operation of the “reasonable adjustments” duty imposed by ss20 and 21 of the Equality Act by virtue of the exception provided by ¶31(1) of Schedule 3 to the same Act.
35. As I have indicated above, I do not grant the Defendant’s application on the basis of summary judgment in relation to the averment that the adjustments sought by the Claimant are so unreasonable as to have had no reasonable prospects of success, i.e. that is claim was a fanciful one. That is not an indication that I would have found that the Defendant would have been required to make those adjustments, but simply that it is one that requires evidence of a far more extensive and detailed nature, from both Claimant and Defendant, than that which I have before me. It would have been a matter for trial as it is a qualitative judgment.
36. However, the application to strike out the Claim Form succeeds for the reasons I have given.

### Costs

37. Costs must follow the event, unless there is good reason to do so. No such reason was advanced by Mr Maynard in his written submissions. The Court may have sympathy with Mr Maynard given the imbalance in the resources available to each party, but that is not a good reason for departing from the normal principles applicable to applications for costs.
38. The Defendant sought costs in the sum of £13,325.10 (excluding VAT, but since the Defendant is VAT registered, VAT on its costs is recoverable in any event). That

£13,325.10 had already included a reduction from the time-costs on the basis of a cap agreed between the Defendant and its solicitors of £8,000 in relation to this application. The time-costs were recorded as having been £10,680.90. I was asked to summarily assess the costs of the entire claim, which was appropriate as it now stands struck out.

39. Taking a broad-brush approach and in the absence of Mr Maynard to take up specific points on the Defendant's costs schedules, I take the view that the costs are a little excessive given the stage the claim has reached. However, a balancing factor is that this was potentially a hugely expensive claim had it succeeded (and in potentially irrecoverable costs even if it had failed after trial), and so the Defendant was justified in taking the claim seriously and using solicitors and Counsel who are suitably experienced in this area of the law and senior in terms of call.

40. On balance, I reduce the recoverable costs to £11,000.



HHJ Berkley

30 April 2019

