

Adjudication

In the case of AUCTIONWORLD LIMITED (in administration)

Summary

On the basis detailed in the Decision:

Under powers delegated from the Ofcom Board to Ofcom's Content Sanctions Committee, Ofcom has decided in accordance with section 238 of the Communications Act 2003 that the licence held by Auctionworld Ltd ("Auctionworld") to provide the service known as Auctionworld should be revoked with immediate effect for the following reasons:

- a) Auctionworld Ltd (in administration) has failed to comply fully with directions previously imposed on it by Ofcom to take action to remedy serious breaches of the Ofcom Code; and*
- b) Ofcom is satisfied that it is necessary in the public interest to do so because:*
 - the seriousness of the Code breaches committed by Auctionworld, combined with Auctionworld's inability to remedy its failures in accordance with directions issued by Ofcom, are such that the continued holding of a licence by Auctionworld is not in the public interest;*
 - Ofcom is concerned to ensure that such breaches are not perpetrated in future by Auctionworld or by any successor to Auctionworld;*
 - Ofcom does not believe that Auctionworld, which is in administration, is capable of complying with all the other directions Ofcom has made including those seeking to remedy Auctionworld's failures in respect of its dissatisfied customers; and no evidence has been produced by the Administrators of Auctionworld to suggest that it is capable of doing so;*
 - In the light of Auctionworld going into administration, Ofcom has reason to believe that it was materially misled as to Auctionworld's financial position (it has not paid any of the fine of £450,000 imposed by Ofcom and payable to HMG);*

- *Auctionworld will not be able satisfactorily to compensate its dissatisfied customers: the Administrators have stated publicly that the vast majority of customers who are awaiting either refunds or goods will not receive anything owed to them from the Company;*
- *There is no persuasive evidence that revoking Auctionworld's licence will have any material adverse effect on the ability of the Administration to provide appropriate compensation for Auctionworld's dissatisfied customers.*

Note: Ofcom's first adjudication against Auctionworld dated 17 November 2004 followed an oral hearing at which Auctionworld was given a full opportunity to make representations and adduce evidence through Leading Counsel on the substantive issues. Following consideration of all the evidence, the Committee concluded that the breaches committed by Auctionworld justified initiating the process for revocation under section 238 of the Communications Act 2003 ("the Act"). However, in accordance with section 238 (2) (c) of the Act, Auctionworld was first directed to comply with certain specified steps to remedy its breaches, (including steps designed to satisfy Ofcom that customers' complaints had been properly resolved). Such directions were given on the basis that if Auctionworld failed to comply with any of those steps within the time specified for that step, Ofcom would proceed to revocation of the licence, if that was considered necessary in the public interest.

Decision

Introduction

1. On 15 December 2004 Ofcom's Content Sanctions Committee ("Ofcom") reconvened to consider the representations made by Auctionworld's Administrators and decide whether or not we should revoke Auctionworld Limited's broadcasting licence under section 238 of the Communications Act 2003 ("the Act").
2. As indicated above, on 17 November 2004 we published our first Adjudication in relation to Auctionworld. We did so following an oral hearing at which Auctionworld had adduced evidence and made submissions to us through leading counsel. For the reasons set out in our first Adjudication, we decided that we ought to reflect the very serious nature of Auctionworld's breaches of Ofcom's Programme Code, not only by a substantial fine, but by instituting the process for revocation of Auctionworld's licence prescribed by section 238. We determined that Ofcom should serve notice on Auctionworld specifying in accordance with section 238(2)(c) that Ofcom would revoke Auctionworld's licence unless Auctionworld took, within the times specified in the notice in relation to each step, steps to remedy its breaches of the Code, in particular by preventing further breaches and helping existing customers who had been wronged to obtain redress. The Administrators have now already stated publicly that the vast majority of the customers who are awaiting either refunds or goods will not receive anything owed to them from the Company.
3. We directed Auctionworld to abide by the following directions set out in paragraph 20 of our first Adjudication:
 - 3.1 a direction (taking effect within 12 hours of being made) preventing Auctionworld from referring in its service to any guide prices for loose diamonds or for diamond jewellery (including watches) unless and until an independent expert approved by Ofcom has verified those guide prices;
 - 3.2 a direction requiring Auctionworld to broadcast, in sound and vision, Ofcom's statement of findings three times a day at 1200, 1600 and 2200 hours respectively for every day for the next 21 days with immediate effect. The statement should read:

"Ofcom, the communications regulator, has found Auctionworld in breach of the Advertising Standards Code for its customer service and misleading viewers about its guide prices for diamond jewellery and loose diamonds.

Ofcom considers these continued and repeated breaches to be extremely serious and has fined Auctionworld. It has also required Auctionworld to remedy these failures.

For a fuller account, log on to www.ofcom.org.uk"

- 3.3 a direction requiring Auctionworld within 21 days to inform Ofcom in writing with respect to every complaint referred to Auctionworld by Ofcom or by the Advertising Standards Authority (Broadcasting) ("ASA(B)") since 21 June 2004 whether that complaint has been resolved; if so, how; and if not, why not;
 - 3.4 a direction requiring Auctionworld in respect of each and every complaint received by the ASA(B) from today's date and forwarded by the ASA(B) to Auctionworld, until further notice to inform Ofcom in writing within 10 working days of the ASA(B) forwarding such a complaint to Auctionworld, whether that complaint has been resolved; if so, how; and if not, why not;
 - 3.5 a direction requiring Auctionworld within 28 days to put into operation and lodge with Ofcom an effective written procedure for customer service and complaints handling, to include key performance indicators for the answering of telephone calls, letters, any other communications used by customers (for example email and fax); substantive responses to enquiries and complaints; and to include a clear statement of policy for refunds and the payment of compensation;
 - 3.6 a direction requiring Auctionworld until further notice to send to Ofcom on or before the 15th day of each month from December 2004 a written report of the working of its customer services in the previous month;
 - 3.7 a direction requiring Auctionworld to ensure, with immediate effect, that when delivery times are referred to in the broadcast service, it is made clear that delivery times are not guaranteed;
 - 3.8 a direction requiring Auctionworld, with immediate effect, to inform every buyer when concluding the sale of his or her rights of cancellation.
4. We also stated in paragraph 21 of our first Adjudication that it was our intention that Ofcom should within the next six months review the taking by Auctionworld of these remedial steps. This was with a view to revoking Auctionworld's licence with immediate effect if satisfied in accordance with section 238(3) of the Act that Auctionworld had not complied with any step

within the time specified for that step, and that it was necessary in the public interest to revoke the licence.

5. Ofcom also imposed a financial penalty on Auctionworld of £450,000 payable to HMG within a specified time.

Auctionworld's failure to comply with directions

6. Almost immediately, Auctionworld was in breach of those directions. In breach of the direction set out in paragraph 3.2 above, it failed three times to broadcast the required statement, namely on 18 November 2004 at 22.00 hours, and on 19 November 2004 at 12.00 hours and at 16.00 hours.
7. Accordingly, on 3 December 2004 Ofcom notified Auctionworld of its intention to revoke its licence under section 238 (3) of the Act. By that time Auctionworld had ceased trading and had gone into administration. The Administrators were two partners of a well-known firm of accountants, who instructed solicitors in London. Ofcom's letter specified the breaches set out above, and stated that Ofcom was satisfied that it was in the public interest for Auctionworld's licence to be revoked for the following reasons:
 - 7.1 the seriousness of the breaches of Auctionworld's licence;
 - 7.2 Ofcom did not now believe that Auctionworld, which was now in administration, was capable of complying with all the other directions Ofcom had made;
 - 7.3 in the light of Auctionworld going into administration, Ofcom had reason to believe that it was materially misled as to Auctionworld's financial position and that Auctionworld would not be able to compensate its dissatisfied customers.
8. Ofcom's view as to the capacity of Auctionworld to comply with all the other directions, has been confirmed by the fact that Auctionworld has since failed in other respects to comply with the directions set by Ofcom. They have failed to comply with the direction set out in paragraph 3.3 above requiring Auctionworld within 21 days to inform Ofcom in writing with respect to every complaint referred to Auctionworld by Ofcom or by the Advertising Standards Authority (Broadcasting) ("ASA(B)") since 21 June 2004 whether that complaint has been resolved; if so, how; and if not, why not. Auctionworld has also failed to pay any of its financial penalty, as directed by Ofcom.

Invitation to make representations

9. By Ofcom's letter of 3 December 2004, we invited representations from the Administrators by 17.00 hours on Tuesday 7 December 2004. The Administrators replied on that day contending that the administration precluded Ofcom from revoking the licence.

10. Ofcom replied that its legal advice was to the contrary, and extended the deadline for representations on this and the other matters put to them in previous correspondence, until noon on Thursday 9 December 2004.
11. No representations or other communications were received before expiry of that deadline, and Ofcom therefore enquired after the deadline had passed whether any were to be made, and following a telephone conversation extended the deadline for a second time to 17.00 hours the same day.
12. The Administrators' Solicitors wrote repeating that they believed that the administration precluded Ofcom from revoking the licence and asking for more time with a view to their transferring the licence to a buyer (unnamed) of Auctionworld's business. Ofcom advised the Administrators that the licence could not be transferred in any event without its consent and that we would have serious concerns and reservations about any proposal to transfer a licence that was subject to and in the middle of a revocation process, with all that that entailed. We specifically invited a response to the substantive allegations made against Auctionworld by a deadline extended for the third time to 17.00 hours on Monday 13 December 2004.
13. The Solicitors replied that the Administrators were in court all day Monday and were unable to give instructions. Ofcom extended the deadline for a fourth and final time to noon on Tuesday 14 December 2004.
14. At no time has anyone on behalf of Auctionworld attempted:
 - 14.1 to dispute that Auctionworld has failed to comply fully with our directions or to explain why not; or
 - 14.2 to address the issue whether it is necessary in the public interest to revoke the licence (in particular in the light of Ofcom's primary concerns that breaches of the Code are not repeated by Auctionworld or any successor and that Auctionworld's customers who have already been wronged, should, if possible, be properly compensated) other than by asserting that the administration precluded revocation of the licence, that the Administrators needed more time (how much more was never stated) to "save" Auctionworld's business; that Ofcom was jeopardising those attempts by seeking to revoke the licence and that Ofcom would not be prejudiced by delay.

Further consideration of revocation

15. We convened again on Wednesday 15 December 2004. We were wholly satisfied that Auctionworld had failed to comply fully with our directions. We therefore had to consider whether it was necessary in the public interest to revoke Auctionworld's licence: Communications Act 2003, section 238(3)(b).

16. We were concerned that breaches of the Code should not be repeated by Auctionworld or any successor. For the reasons set out in our first Adjudication, we had concluded that Auctionworld's business suffered from a very serious and systemic problem, characterised by a management failure to institute proper systems and control, or any proper structure for customer relations. Having been of the view that Auctionworld's business operation was deeply flawed, we are now convinced that the flaws are irremediable.
17. As mentioned, our directions were intended to have the remedial effect of helping disappointed customers to obtain redress. In the absence of any attempt to justify or even explain Auctionworld's failure to comply fully with our directions, and in the absence of any assurances or plan for the future to satisfy the customers, we have no confidence at all that anyone in control of Auctionworld or its business will ever have the will or the ability to give redress to those customers. As we made clear in our first Adjudication, Auctionworld has a compliance record far worse than all of its competitors, either taken individually or together. This has been compounded by their failure to comply fully with Ofcom's directions. We believe that to allow this state of affairs to continue without taking action to revoke Auctionworld's licence risks bringing into disrepute the whole of the teleshopping industry which is an expanding industry with a generally good compliance record.
18. We also note that nobody has attempted to argue that Ofcom was not materially misled as to Auctionworld's financial position despite this being contended in Ofcom's letter to the Administrators notifying them of its intention to revoke Auctionworld's licence, subject to consideration of any representations they wished to make. Before the hearing that led to our first Adjudication, Ofcom had sought from Auctionworld and was given reassurance about its financial position. Those assurances were belied by the Administrators' subsequent confirmation that outstanding liabilities amount to some £14 million. We had fixed the fine we imposed with knowledge of what Auctionworld had said it could afford to pay. It now appears that the position was misrepresented to Ofcom. No explanation or other comment has been forthcoming. (Giving false or withholding material information from Ofcom with the intention of misleading Ofcom is in itself a statutory ground for revocation).
19. We have also considered whether revocation might be a breach of Article 1 of the First Protocol to the European Convention on Human Rights (Human Rights Act 1998) on the basis that revocation of the licence might be an unlawful interference with Auctionworld's property. For the same reasons as those given above, we do not think it could be. In any event, we are satisfied that the process we have undertaken of repeatedly but unsuccessfully inviting representations on substantive issues has been fair, reasonable and in accordance with the due process required by the Act.

20. Furthermore, we believe our decision to revoke is, in all the circumstances, proportionate and necessary in the public interest. As we have already stated in our first Adjudication, we have been mindful of our obligation under section 3 (1) (b) of the Act to further the interests of consumers in relevant markets and under section 3 (3) (a) of the Act to regulate in a manner that is targeted only at cases in which action is needed. We remain in no doubt that this is a case in which action is necessary.
21. We are accordingly satisfied that it is necessary in the public interest to revoke Auctionworld's licence with immediate effect.

The plea for delay

22. We have been urged to delay any such decision in the interests of the administration. However, it has not been convincingly explained to us why revocation of the licence would affect the administration. Although Ofcom has invited representations, Ofcom has not been told the substance of any plan to dispose of or revive Auctionworld's business or why not revoking the licence is so critical (no intrinsic value is attached to the existing licence, given any purchaser of Auctionworld's business is entitled to apply at any time for a new licence subject to limited statutory requirements: see below).
23. Furthermore, neither the Administrators nor the Solicitors seemed to have understood the explanations already given by Ofcom that the Administrators have no absolute right to transfer Auctionworld's licence, and would need Ofcom's consent to do so under the Broadcasting Act 1990 (as amended), section 3(6); that consent is unlikely to be given while revocation is under consideration; that, as indicated above, any assignee of Auctionworld's business, or any other person, is entitled to apply for a new licence; that in practice Ofcom deals with applications for transfer or the issue of a new licence in much the same way; and that the fact of the administration (which in itself constitutes a change in the persons having control over Auctionworld, which change would induce Ofcom to refrain from awarding the licence, were the application for the licence being made at this time), would entitle Ofcom to consider revoking the licence under the 1990 Broadcasting Act (as amended), section 5(5), free from any restriction imposed by section 238 of the 2003 Act. In short, any future application for a new licence would be viewed on its own merits, and in much the same way as an application for consent to a transfer.
24. It is stated that Auctionworld's former employees have lost their jobs and further delay might help to safeguard some of their future employment prospects. However, no specific explanation has been given as to why revocation of the licence would prohibit achieving such an objective. Taking all the circumstances into account, Ofcom, in performing its duties under the Act, considers that the public interest in revoking the licence outweighs the

public interest there may be in the possibility of furthering any future employment prospects.

25. It is not a question of Ofcom suffering prejudice as the Administrators' Solicitors have more than once contended. Ofcom's obligation is not to consider its own interests, but the public interest. Ofcom has a statutory obligation to regulate with a light touch, but it must act firmly when circumstances require, as they do here.
26. For all these reasons, we conclude that delay would serve no useful purpose.

The impact of the administration

27. The fact that Auctionworld is in administration is obviously a relevant factor, which we have taken into account to the extent set out above.
28. The Administrators contend that the fact of the administration is also a legal bar to Ofcom revoking the licence. We accept the legal advice given to us to the following effect. When a company goes into administration, the Insolvency Act 1985 as recently amended, Schedule B1, paragraph 43(6), imposes a moratorium on legal process against the company or its property. In cases decided under the old form of words contained in section 11(3)(d) of that Act, it has been held that the moratorium imposed did not preclude a regulator from regulatory action such as the revocation of a licence. The leading case is *Winsor v. Bloom, Re Railtrack Plc (in railway administration)* [2002] 1(2) WLR 3002 (CA), in which Lord Woolf CJ at paragraphs [31] to [38] recognised that it was a consideration that the legislative preference was for facilitating administrators continuing to run an insolvent business so as to achieve an orderly sale of that business rather than that the business should be forced immediately into liquidation. Nevertheless, he held that there was a legislative interest in enabling a regulator to pursue a different agenda, where the regulator has to take into account considerations affecting as a whole the industry that is regulated, making the regulatory role quite unlike that of a judge or arbitrator. He therefore approved the decision (but not necessarily the reasoning) in *Air Ecosse Ltd v. Civil Aviation Authority* (1987) BCC 492 (Inner House of the Court of Session) in relation to the revocation of a licence to operate a particular air service in Scotland. The newly amended legislation has slightly different wording, but the expression "legal process" was used in section 11(3)(d) itself and other sections of the original Act, the amendments were made after the *Railtrack* case, and the legislature did not extend the moratorium to acts of a regulator, so that the newly amended wording should be interpreted in the same way.
29. The Solicitors instructed by the Administrators, to whose attention Ofcom drew these authorities, were invited to make submissions to the contrary, but have contented themselves by asserting that the proposition that regulatory

action is not precluded by the statutory moratorium on legal process is wrong, but without suggesting why the principles set out in the *Railtrack* case should not apply in this case.

Conclusion

30. We conclude that for all the reasons set out above Ofcom should proceed to revoke Auctionworld's licence with immediate effect.
31. After we had reached our conclusion, the Administrators advised Ofcom that they were negotiating with potential purchasers of Auctionworld's business and hoped to be able to transfer the licence in order to preserve the position on the Electronic Programme Guide, but recognised that nobody is likely to want to acquire the licence subject to paying the fine and the other regulatory requirements. However, even at this very late stage, we were given no detail, apparently because of an obligation of confidentiality. Having considered what we have been further told by the Administrators, we believe that it makes no practical or other difference to the conclusion we have reached for the reasons already set out in this Adjudication.

Members comprising the Committee for the purposes of this decision are:

Richard Hooper
Sara Nathan
Tim Suter
Ian Hargreaves

17 December 2004