Case No: F00MA124

IN THE COUNTY COURT AT MANCHESTER

Date: 1st April 2021

Before :

HER HONOUR JUDGE CLAIRE EVANS

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Between :

LANCASHIRE FESTIVAL OF HOPE WITH FRANKLIN GRAHAM	**Claimant**
- and -	
(1) BLACKPOOL BOROUGH COUNCIL	**Defendants**
(2) BLACKPOOL TRANSPORT SERVICES LIMITED	

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Mr Aidan O'Neill QC and Mr Darryl Hutcheon (instructed by **Ai Law**) for the **Claimant**
Ms Karon Monaghan QC (instructed by **the First Defendant's Legal Department**) for the **Defendants**

Hearing dates: 17th to 19th March 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Her Honour Judge Claire Evans:

1. The Claimant, Lancashire Festival of Hope with Franklin Graham Limited, is a private company limited by guarantee incorporated on 23rd August 2017, and a registered charity with its charitable purpose defined as "the advancement of the Christian Religion in the Lancashire area by sharing the good news of Jesus Christ". It was set up to organise a festival – the Lancashire Festival of Hope – which took place at the Winter Gardens in Blackpool from 21st to 23rd September 2018. The Festival was a Christian evangelistic event open to all. Some 200 different churches across Lancashire were involved in it, and some 9000 people attended it over the three days.

2. Franklin Graham spoke at the Festival on each day. He is a well-known Christian evangelist. He is the son of Billy Graham, also an internationally well-known Christian

evangelist. He is the President of the Billy Graham Evangelistic Association which is a religious charity based in the United States. He spoke at the Festival on each of its three days.

3. Franklin Graham's religious beliefs include that

- God's plan for human sexuality is to be expressed only within the context of marriage
- Marriage is exclusively the union of one genetic male and one genetic female.

These are religious beliefs shared by the organisers of the Festival and the trustees of the Claimant and, indeed, by many Christians of different denominations.

4. Franklin Graham is a controversial figure to many. By way of example, within the trial bundle is a Guardian newspaper article from September 2018 in which he is described as having a "*track record of homophobic and Islamophobic comments*", and quoted as having said that Islam is "*evil*" and "*wicked*", that Barack Obama's "*problem is that he was born a Muslim*" and that Satan was the architect of same-sex marriage and LGBT rights. The same article refers to the Muslim Council of Britain and some MPs calling on the Home Office to refuse Franklin Graham entry to the UK on the basis that his presence is not conducive to the public good as a result of his "*derogatory and inflammatory views*".

5. In the spring of 2018 the Claimant contracted with the Second Defendant (through its agent Exterion Media Ltd) to advertise the Festival by way of banner advertisements on the Second Defendant's buses from 2nd to 29th July 2018. The advertisements read "*Lancashire Festival of Hope with Franklin Graham – Time for Hope*" and gave the date and venue of the Festival and the URL for the Festival's website. They contained no overtly religious wording nor imagery.

6. Upon the Defendants receiving complaints from members of the public about the advertisements, the advertisements were removed from the buses. The complaints related to Franklin Graham and his association with the Festival, and predominantly referred to his views on homosexuality and same-sex marriage as being offensive.

7. The First Defendant is a unitary authority. The Second Defendant has responsibility for fulfilling the First Defendant's statutory duty pursuant to the Transport Act 1985 to make provision for public passenger transport services. The Second Defendant is a company created solely for that purpose. It is wholly owned by the First Defendant. Its Board of Directors are all appointed by the First Defendant and it is under the control of the First Defendant.

8. The Claimant's case is that it has been discriminated against on the grounds of religion and belief by the removal of the advertisements. It alleges the decision to remove the advertisements was made by both Defendants and founds a claim under the Equality

Act 2010. It also claims that the removal of the advertisements was a breach of its rights under article 9 (freedom of religion) and article 10 (freedom of expression) of the Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as the European Convention on Human Rights) and that in discriminating against it the Defendants further breached article 14 of the Convention.

9. The trial has proceeded on liability only. I have heard evidence on behalf of the Claimant from Reverend Steven Haskett, a director and trustee of the Claimant, and Mr Stewart Whitley, the Chair of Trustees. For the Defendants I heard from Ms Jane Cole, the Managing Director of the Second Defendant.

The facts

10. It is necessary to go through some of the history relating to the arrangements made for the Festival and in particular the involvement of the First Defendant in relation to those arrangements, in order to put in context the later events with which I am directly concerned.

11. In 2016 the organisers of the Festival invited Franklin Graham to speak at it. They hoped that his involvement would lead to a large attendance.

12. In 2017 they entered into discussions with a view to holding the Festival at the Winter Gardens. The Winter Gardens is effectively owned by the First Defendant, through an arm's length company Blackpool Entertainment Company Limited (BECL). The Festival organisers discussed with BECL the nature of the Festival and that Franklin Graham would be speaking. They agreed a provisional booking which subsequently was confirmed by contract between the Billy Graham Evangelical Association and BECL.

13. The First Defendant was well aware of the discussions preceding the booking and of the controversy surrounding Franklin Graham. It was the subject of some discussion and concern amongst the First Defendant's councillors and officers. The following gives a flavour but not an exhaustive history of the relevant communications.

14. In May 2017 the First Defendant's Strategic Equality and Diversity Manager Andy Divall emailed various councillors writing of "*the highly controversial figure Franklin Graham*", indicating that "*a number of good people from within the churches are privately still trying to persuade the organisers not to give Franklin Graham a platform for this kind of hatred*", and expressing his concern that to allow Franklin Graham to speak on the First Defendant's property would result in the First Defendant being found to be in breach of its Equality Act obligations. He subsequently circulated a document containing links to various online news stories and comment on Franklin Graham. From the headlines in the links it can be seen that the vast majority, if not all of them, are negative.

15. Shortly thereafter the First Defendant began to receive complaints from the public objecting to Franklin Graham speaking at the Winter Gardens, on the grounds of their objections to various of his views and/or the manner in which he has expressed them publicly.

16. In June 2017 an email was sent by Steve Thompson (it is unclear whether he is an officer of the First Defendant or of BECL) saying of Franklin Graham "*Clearly this chap cannot be allowed a stage to promote this venom in our premises".*

17. In July 2017, before the booking was finalised but after complaints had been received, Councillor Simon Blackburn who was then the Leader of the First Defendant attempted unsuccessfully to persuade someone connected with the organisation of the Festival not to use Franklin Graham.

18. Councillor Blackburn emailed Alan Cavill, the First Defendant's Director of Transport and Environment, on 12th July 2017 that he had been told that Franklin Graham is "*not here to talk about either of those things* [Islam and homosexual marriage] *anyway (he's coming to talk about building congregations and growing the church)*". He wanted to leave the decision on the booking to BECL. He noted that if BECL refused the festival would take place in Blackpool at the Football Club in any event, saying "*I'm not sure there's a pain-free choice here…".*

19. Later in July 2017 Alan Cavill received legal advice indicating that the First Defendant would not be in breach of any law in permitting the event to go ahead, and the decision was taken by him, Councillor Blackburn and others to leave the decision as to whether to take the booking to BECL.

20. Alan Cavill was asked by BECL whether if BECL accepted the booking, it would have the full support of the First Defendant, to which the answer was yes. Alan Cavill went on to say in that email dated 11th July 2017

    "*We may we'll* [sic] *say that we do not endorse the views expressed in that conference nor do we support the views of their keynote speaker but it is not our place to vet the content of conferences unless we believe they are going to break some law. As Gillian* [Campbell, the Deputy Leader of the First Defendant] *has said if we were to vet conferences that we disagree with then we could not host the Tory's* [sic] *and we would certainly not turn them down.*

    The reason for the wording is to keep our distance from the content so that we can be critical of their views but not of the decision to allow the booking to go ahead".

21. The booking was duly made. The First Defendant continued to receive large numbers of complaints over the booking and the planned attendance of Franklin Graham, including from Christians who did not share the religious beliefs as to sexuality and same-sex marriage and were concerned about the effect on relations between their churches and

the LGBT community, and a group of young LGBT+ people concerned about the effect his visit might have on them and society.

22. On 19th September 2017 Councillor Jim Hobson emailed a large number of other Councillors stating that he had signed an online petition seeking to prevent Franklin Graham entering the country. He said *"I would be at the front of any protest if this bile spewing preacher turns up in Blackpool".*

23. On 19th September 2017 Councillor Lynn Williams sent an email to various Councillors saying that she would be "*dismayed*" if Franklin Graham spoke at the Winter Gardens. Councillor Blackburn replied saying "*Clearly we're all unhappy about the situation, and none of us agree with what the guy is spouting, but we need to be considered and confident that our public position on this is legal and defensible".*

24. In a press statement issued by the First Defendant in December 2017, Councillor Maria Kirkland affirmed the First Defendant's commitment to what are essentially the principles in s149 of the Equality Act 2010 commonly referred to as the public sector equality duty – eliminating discrimination, promoting equality and increasing respect and understanding between people regardless of any protected characteristic. It is unnecessary to set out the statement in full. She went on within the statement to say "*we accept the crucial democratic principles of free speech and associated rights of religious expression under the Human Rights Act".*

25. As appears is usual if there is a large or potentially controversial event taking place in the town, a Safety Advisory Group was convened to consider the possibility of public disorder and how to ameliorate any risk.

26. On 27th February 2018 Councillor Blackburn sent an email replying to someone within the First Defendant who had expressed concern about the event, copying in Alan Cavill, Andy Divall and others, which read "*We're all very concerned about this, and we all find Franklin Graham, and his views, repulsive".*

27. On 1st March 2018 Andy Divall emailed Councillor Kirkland saying "*it is clear from a number of sources that tensions in the LGBT community are building on this issue and there is a feeling that the Council is "sitting on the fence" in terms of our perceived lack of public pronouncements on the views of Franklin Graham. Clearly we need to be very careful not to inflame tensions or to make libellous or defamatory comments, however it may be worth considering following up the existing position with something else that seeks to reassure the LGBT and other affected local communities that the Council stands with them."*

28. On 14th May 2018 Councillor Blackburn replied to a complaint from a representative of Unite the Union saying *"I am also appalled and amazed that the organisers of this festival have invited this individual to attend their event. …Graham has said some truly appalling things, and has caused deep offence to many different groups of people – all of whom Blackpool and the Labour movement hold dear."*

29. On 14th June 2018 the First Defendant councillors were contacted by the Community Cohesion and Hate Crime Officer for the relevant division of the Lancashire Constabulary. He was preparing a Community Impact Assessment to identify any potential policing needs relating to the Festival. He invited them to raise any concerns with him.

30. Amidst all of this controversy the plans for the Festival were continuing, and on 17th April 2018 the contract was made between the Claimant's agent and Exterion for the advertisements to be displayed on the Second Defendant's buses in July.

31. Exterion has a contract with the Second Defendant giving it the rights to manage the advertising on the buses. That contract provides at clause 5.4

"Exterion Media will not without the Company [the Second Defendant]*'s prior consent display Advertisements or accept Distributions of the type listed in Schedule 3."*

Schedule 3 provides

"*Restrictions*

…Political and religious advertisements shall not be permitted"

32. The Claimant's advertisement was accepted without any reference to the Second Defendant.

33. The advertisements began to run on 2nd July 2018.

34. On the evening of 9th July 2018, whilst on the train, Jane Cole received a telephone call from Councillor Campbell expressing her opinion that it was inappropriate for the Second Defendant to advertise that Franklin Graham, whom she described as "*anti-gay*", was attending a conference in Blackpool.

35. Jane Cole's evidence in cross-examination, which was here unchallenged, was that she knew little about Franklin Graham at that point. She was unaware that there was any controversy surrounding his visit, and had no knowledge of the discussions that had taken place within the First Defendant around the Winter Gardens booking until she read the various emails within the trial bundle.

36. When she got home that evening she researched Franklin Graham on the internet. She read an article from the Guardian newspaper which referred to him having described Islam as evil and extremely wicked, having said that Barack Obama was born a Muslim and had allowed the Muslim brotherhood to infiltrate the US government, and had spoken out against LGBT rights and said that Satan was behind same sex marriage. She was "*a bit shocked*" when she read that.

37. At some point that evening Jane Cole spoke to Alan Cavill about the issue. She recorded in an email, again that evening, to Councillor Christine Wright (the Chair of the Second Defendant's Board) that Cavill wanted "*to hold off until tomorrow to make a decision on whether to take the adverts off*". The email referred to Jane Cole's concern that the buses would attract vandalism from anti Franklin Graham groups.

38. Surprisingly, Alan Cavill has not provided any evidence in relation to this claim. The only witness for the Defendants was Jane Cole. No explanation was given for his silence.

39. Again on the evening of 9th July, Jane Cole received an email from a member of the public complaining about the advertisements. The writer described the Festival as a "*homophobic event*"; referred to the huge Blackpool LGBT community; said that Franklin Graham was "*well known for his extreme views*"; and said she was sure that the Second Defendant would experience a "*backlash*" over the next few days.

40. Meanwhile, apparently unknown to Jane Cole whose evidence was that she saw no other complaints until after she took the decision to remove the advertisements, more complaints were being made by email, via the Defendants' websites, and on social media.

41. The social media screenshots within the bundle show that nearly all of the complaints referenced Franklin Graham's views on LGBTQI+ matters including same sex marriage. Many referred to him as preaching hate. A handful also referred to him as being Islamophobic or racist. They demonstrate very clearly the offence, outrage and hurt of those complaining.

42. There is no evidence as to which, if any, of those complaints were seen by Alan Cavill or any other person within the First Defendant before the decision was taken to remove the advertisements.

43. At 0755 on 10th July 2018 Jane Cole emailed Alan Cavill (again at a point where, according to her evidence, she had seen no complaints other than the single email to which I have already referred) as follows:

> "*as you can imagine this is picking up momentum and BTS seem to be the catalyst for encouraging very strong views to be aired on both political and religious issues.*
>
> *If we stick to the truth, the posters are not offensive and they advertise what is reality in that the conference is taking place at the Winter Gardens in September.*
>
> …
>
> *BTS is a transport service provider and we have to take an unbiased view. If we remove these posters then do we do the same thing next time there is a political conference at the Winter Gardens that people take offence to?*
>
> *I am in the mind to remove the posters because from what I see our buses could become the target of people taking revenge. If I do that then how does the council justify the*

conference going ahead at the Winter Gardens and getting revenue but BTS are barred from advertising?

..

I will be guided by the decision made by yourself and the council…"

44. It is notable that not only is there no reference in that email to the contractual provisions relating to religious and political advertising, but there is in fact an indication that religious and political advertising would in the usual course of things be entirely acceptable.

45. Alan Cavill's reply at 0837 was

"I *am sorry we are in this situation and I do need to think about how we can all stay better informed about the Council's policy on arising issues.*

I am very conscious of your concerns about the dichotomy of our approach between Winter Gardens and [the Second Defendant]. *There have been several meetings including with the Police and faith leaders. As you are probably aware the town is split in two in terms of the churches. When we approached the organisers and asked them to cancel they were adamant that they were going ahead and already had the Football Ground lined up as an alternative venue. This town gets this conference whichever way we turn.*

I would like the advertising to be removed please. I think your approach of removing the adverts to ensure that we do not have the buses becoming a target for the argument is a strong one and does not seek to take sides but is a practical response to a potential problem….

I do think we have to look at the event in the WG again as we do run the risk of losing other potential customers…. I do believe that we can control the opposing factions at the event and the Police do not want to cancel on the grounds of any high risk…"

46. Jane Cole accepted in cross-examination that the decision was thus made to remove the advertisements and that it was a joint decision between her and Alan Cavill.

47. She accepted that she did not consult the Second Defendant's Board before making the decision. She accepted that she did not contact the Claimant either before or after the decision for comment, or to see whether a less offensive message could be negotiated. She accepted that she did not pay due or any regard to any equality impacts when making the decision. She accepted that she did not consider free speech or the right to freedom of expression when making the decision.

48. I will return to her oral evidence as to the reason for the decision later.

49. Going back to the chronology, at 0858 Jane Cole replied to the email of complaint she had received the previous day saying "*I am as disturbed as you….I understand the concern that this advertising is causing and please be assured that steps are being taken to remove the posters today*".

50. At 0931 Alan Cavill emailed Councillor Campbell copying in various others saying "*We have this morning agreed that we should remove the advertising from the buses and that the primary reason is to make sure that they do not become a target for the argument with graffiti or worse".*

51. Later that day a press statement was released by the Second Defendant which read

"In light of customer feedback and reactions on social media which has resulted in heightened tension, we have taken the decision to remove all adverts relating to the 'Time for Hope' Festival with immediate effect. We will reimburse any income back to the advertising company.
We work with multiple advertisers and third-parties and in no way do we endorse or support any advertisement which is placed on our vehicles.
Jane Cole, Managing Director at Blackpool Transport said "The removal of these adverts is as a result of us listening and acting on customer and public feedback which we aim to do at all times. Blackpool Transport is a proud ongoing supporter of the Pride and LGBT+ communities and in no way did we intend to cause any distress or upset."

52. Once the decision was publicised complaints started to be made about the removal of the advertisements, some from members of the public who saw it as bias against Christians and others who saw it as censorship and a fetter on freedom of speech.

53. As the complaints from the other side continued, further discussion ensued between Jane Cole and Alan Cavill and within the Defendants.

54. In an email dated 16th July 2018 from Jane Cole to Alan Cavill she referred to the advertisements as having been deemed by the First Defendant as "*not appropriate for the constituents of Blackpool".*

55. Jane Cole agreed in cross-examination that the First Defendant thus far had deliberately distanced itself from the decision and the controversy. As the pressure mounted on Jane Cole and she became the target of unpleasant and personally offensive emails the First Defendant considered whether it should make a public statement.

56. In an email on 17th July 2018 from Alan Cavill to various councillors he said

"*As you are aware it was on our instruction that Jane removed the advertising (though she was more than happy to do so). This was done within 24 hours of the appearance of said adverts. The BTS Board are concerned that they weren't consulted and that we did not try and negotiate a lesser message with Festival of Hope (removing the Franklin Graham name). I would be concerned that this would have meant the adverts being out*

there far longer and I do not think simply removing the name would have appeased the various groups who are against this Festival.

In support of Jane I have agreed to draft a statement from the Council (please see below) that puts the responsibility with us…the line I propose to take is simply that we do not want to be seen to overtly support either side hence our removal of the posters.

..are you content with this approach…"

57. Councillor Campbell replied to Alan Cavill and Simon Blackburn saying "*the decision to remove the adverts as soon as possible to avoid the negative Facebook/Twitter comments and possibility of vandalism was one I wholeheartedly agreed with".*

58. Councillor Blackburn replied to them to say

"*I don't think we can afford to appear ambivalent about the issue and I think we need to be clear…that we find some of what Franklin Graham has to say abhorrent and contrary to the values of the town and the council.*

…[and suggests as a statement] *What we can, and have done, is to ask Blackpool Transport to remove adverts relating to the event – as it has become a highly charged issue in the town, is threatening community cohesion, and causing division rather than unity. There was a real risk of vandalism to the buses, and we did not want Blackpool Transport to be seen to endorse a controversial speaker, whom many people living and working in Blackpool consider to preach hatred"*

59. Alan Cavill forwarded that to Neil Jack, the Chief Executive of the First Defendant, with the comment "*Simon's approach is a little less fence sitting than mine…Bit worried about this approach as it quite clearly puts us on a side but I think that is the line we wish to take."*

60. A statement in more neutral terms indicating that the First Defendant was neither promoting nor seeking to cancel the event was eventually issued.

61. On 2nd August 2018, letters from Stewart Whitley the Chair of Trustees of the Claimant having not been responded to by the Second Defendant, solicitors for the Claimant wrote a letter before action to the Second Defendant indicating an intention to pursue a judicial review of the decision to remove the advertisements. They sought amongst other things a public statement acknowledging that it was wrong to remove them and affirming support and appreciation for Lancashire's Christian Community, and reinstatement of the advertisements.

62. The First Defendant's legal department (to whom the Second Defendant outsources its legal services) replied on 16th August 2018 on behalf of the Second Defendant. It framed the decision in the context of the contractual provision relating to religious and political advertisements. It asserted "*The reason that BTSL does not wish to have*

political or religious advertisements displayed on its vehicles is that BTSL wishes to remain neutral in political or religious controversies."

63. It went on in relation to the alleged Equality Act breach

"a number of the complaints alleged that Franklin Graham held homophobic views and /or had made homophobic comments. The complaints however brought to BTSL's attention that Exterion had accepted an advertisement contrary to the terms of the agreement…

On 10th July 2018 BTSL responded to these complaints by requesting that the Advertisement be removed in line with the terms of the agreement…

The reasons for her [Jane Cole's] *decision were that she wished BTSL to preserve its unbiased or neutral stance and wished to ensure that BTSL's vehicles were not damaged by people who disagreed with the Advertisement. …*

The decision was not taken because of your client's religion…The decision was taken because the advertisements religious content was contrary to BTSL's decision not to accept any political or religious advertisements. The Decision was not because of the religion of the person seeking to place the advertisement, but because of the content of the advertisement...

[and on the Human Rights Act claims] *…BTSL's Agreement with Exterion prohibited the acceptance of political or religious advertisements because BTSL wished to remain neutral. It did not wish to promote or be seen to endorse one viewpoint in favour of others. BTSL wished to secure that users of its services were not presented with views that they might find offensive or as amounting to an infringement of their own rights. BTSL's neutrality means that it does not find itself acting as a censor or arbiter of the content of advertisements on a case-by-case basis. Much as the Irish prohibition was found to be proportionate in Murphy* [*Murphy v Ireland* 38 EHRR 212, a prohibition on religious advertising on radio and terrestrial television]*, a Court would view BTSL's approach of neutrality as a proportionate means of achieving the legitimate aim of protecting the rights of others."*

64. I pause there to note that that is the first mention in any of the emails or press statements, draft or otherwise, of there being any contractual provision relating to religious advertising.

65. The Claimant's solicitors, having read the emails between Jane Cole and Alan Cavill which were disclosed with the response to their letter, then wrote again indicating that they proposed to bring claims under the Equality Act and Human Rights Act against both Defendants.

66. In response the First Defendant's legal department denied that the First Defendant had made the decision. As to the potential claims, the letter restated the bar on religious advertising, and read

"*The Advertisement was removed because of its content and because BTSL wished to maintain its unbiased stance. Commercial concerns, namely the risk of vandalism to BTSL's buses, also played a role in the Decision.*

…The reason …was that BTSL does not accept any political or religious advertisements. The Decision was not taken because of your client's religion, it was taken because of the content of the Advertisement. The objection was to the message and not to your client.
…The same decision would have been taken whether the Advertisement had been placed by a Christian, a person with a different religion, or not religion.
…The relevant comparator would be a person with no or a different religion seeking to display the Advertisement or another religious advertisement on BTSL's buses. Because BTSL does not permit religious advertising, the same decision would have been made."

67. On 6th September 2018 Councillor Blackburn emailed various councillors and officers saying

"I think our statement…should be as follows:
Franklin Graham's presence has, unsurprisingly, become a highly charged issue in the town, and is threatening community cohesion. He is a controversial speaker, whom many people living and working in Blackpool consider to preach hatred. Blackpool Council will be flying the Rainbow Flag over the Town Hall throughout the event, in a statement of solidarity and support for both the LGBT community, and all the other groups who may feel uncomfortable at Franklin Graham's presence."

68. Subsequently it was also agreed that the Tower would be lit in rainbow colours for periods during the Festival.

69. Because of the threat of legal action, Alan Cavill showed Councillor Blackburn's proposed statement to the legal department. He came back to Councillor Blackburn and others saying *"Counsel…has asked that we do not add anything new to the debate. They would rather we went with our statement that has been used previously. They had also asked that we do not fly flags or rainbow the tower…"*

70. The response from Councillor Blackburn was

"*…I've already told people that I've asked for the rainbow flag to be flown from the Town Hall, which (aside from the fact that it's obviously just the right thing to do) makes it impossible, in my view, to change our minds.*
If we need to move a bit on the statement (or reissue the old, bland one), I can live with that, but I might say at Full Council something that'll make legal's knees tremble…"

71. Ultimately the flag did fly over the Town Hall and the tower was indeed lit up with rainbow lights. Reverend Haskett said in evidence that it felt as though it amounted to prejudice against and dismissal of the faith community. He felt as though the LGBT

sector of the community, whom he accepted had a legitimate right to have their voice heard and live without being treated prejudicially or with homophobic treatment, were being treated favourably over and above the faith community.

Jane Cole's evidence as to the reasons behind the decision

72. Jane Cole's evidence as to why the advertisements were removed was varied and inconsistent.

73. In her witness statement she made reference to the contractual provisions around advertising and said that
- She wanted to avoid offence being caused to the Second Defendant's customers and demonstrate that the Second Defendant took a neutral stance
- She wanted to safeguard buses against the risk of vandalism
- She was mindful that a high proportion of the Second Defendant's workforce is LGBT or pro LGBT and took into account the likelihood of the advertisements causing offence to those employees.

74. In cross-examination she asserted repeatedly that the adverts had been primarily removed because of the policy that religious advertisements should not be there in the first place.

75. She accepted that there was no reference anywhere in the contemporaneous emails to the contractual provisions. Nonetheless she said that when considering the feedback coming in from customers she had at the back of her mind that there was a contract prohibiting religious advertising. She said in cross-examination that she had been having conversations before making the decision with her own team including the Commercial and Finance Director of the Second Defendant about the contract. That does not appear in her witness statement nor is it evidenced by any of the documentary evidence. She said her decision was *"what to do about the contract which was always at the back of my mind".*

76. She claimed to have discussed the contractual prohibition with Alan Cavill on the telephone although again that is undocumented and not referred to in their contemporaneous emails.

77. She was unable to explain why it was, if she was considering and discussing the blanket prohibition on religious and political advertising, that her email to Alan Cavill referred to whether if they removed these advertisements they might in due course have to remove advertisements for political conferences with which people disagreed. The best she could say was that she had been "*challenging my thinking … if we take them off do we have to do this every time there is another event?"* She said that that "thinking" was around the contract and the customer feedback.

78. She was asked why she could not adopt the approach taken by the First Defendant in relation to the Winter Gardens booking, and say that the Second Defendant was merely

taking an advertising booking but did not endorse the event or the views of any speakers at the event. She said she could not do that contractually, nor because of the feedback she was getting from customers. It would open the floodgates for any advertisements on the buses in future. It was plainly not something she had considered at the time. She went on to say it was feedback from customers which led to the decision, then (when challenged as to that being a different reason from the contractual one), said that the feedback had prompted her to check the contract whereupon she found it did not allow religious advertisement, and then she decided to remove it because of the amount of feedback. It was a blended approach. She denied that she was constantly moving between reasons to try to find one that stands up to scrutiny.

79. On the issue of vandalism, she said there had been a recent spate of vandalism towards the buses and she did not want the controversy to be a catalyst for people attacking the buses or her drivers. She accepted that the only documentary evidence in the trial bundle relating to vandalism was general vandalism primarily involving schoolchildren and school buses. Although she said that the buses became a target for people to vent their anger when there were issues in the town, and that she was concerned for the safety of the drivers and staff as similar things had happened before, there was no documentary evidence to support that nor did she identify any specific occurrences. She accepted that there were no threats of vandalism made within any of the complaints (nor indeed any threats at all, other than the reference to a "*backlash"* in the very first email). Alan Cavill coordinated the Safety Advisory Group for this Festival but he had never said to her that there was a vandalism threat.

80. When it was put to her that really there was no evidence to support concerns around vandalism, she said that the advertisements had been primarily removed because of the policy that they should not be there in the first place, and because they were getting all the feedback because Franklin Graham was involved with "*religious connotation".*

81. As to the policy or stance of neutrality identified in the solicitor's correspondence, and prohibition on religious advertising, she accepted that at the relevant time there was no written policy of neutrality in matters of political or religious controversy for the Second Defendant, nor was there an oral or understood policy. She relied upon the provisions of Schedule 3 of the advertising contract as amounting to such a policy, but she believed it provided an absolute ban on religious advertising (rather than simply a type of advertising for which prior consent of the Second Defendant should be sought before acceptance), and was unable to say whether the contents of Schedule 3 were drafted to reflect any policy of the Second Defendant, or at the Second Defendant's request, whether they were the standard provisions provided by Exterion or indeed whether they had been considered individually at all.

82. She was asked about the press release accompanying the removal which referred to the Second Defendant being a supporter of LGBT and Pride. She said she had anticipated that removing the advertisements might cause upset or distress to Christians (although that of course is not identified as a factor to weigh in the balance in any of the contemporaneous emails), but that she had only mentioned Pride and LGBT because

that is where the feedback had been coming from. She accepted that with hindsight the statement should have been more balanced.

83. At one point in cross-examination she agreed that she had removed the advertisements because one group of people came first and were offended.

84. She was asked about Pride, and support for the LGBTQI+ community. She said the Second Defendant does support Pride and the community. It supplies a private hire bus free of hire charges to its staff to use at the Pride parade (the staff have to provide a driver and pay for the fuel). There is no prohibition or policy on what they can display on the bus.

85. She said that the same approach of no religious or political advertising would be applied to humanist or atheist adverts. She said that the Second Defendant did not advertise Pride on the buses, although in fact subsequently a photograph has been produced showing an advert for a Pride event on a bus.

The Claimant's pleaded case

86. The Claimant brings claims pursuant to the Equality Act 2010 (the EA) and the Human Rights Act 1998 (the HRA).

87. Its case in relation to the Equality Act is that

(i) The Claimant itself, and its directors and trustees, have a religion namely Christianity ("the religion") and the Claimant is a religious organisation
(ii) The Claimant itself, and its directors and trustees, and Franklin Graham, hold Christian religious beliefs as regards the availability of the institution of marriage to same-sex couples and/or as regards sexual relations between same-sex partners ("the religious beliefs")
(iii) The Defendants jointly decided to remove the advertisements from the buses
(iv) In so doing they directly discriminated against the Claimant in relation to the religion and religious beliefs in that they treated the Claimant less favourably than others in materially the same or similar circumstances would have been treated, on account of the religion and religious beliefs
(v) The others who would have been treated more favourably are identified as
    (a) The persons who requested an open top Heritage bus to be available to appear at the Blackpool Pride Festival parade, for whom it is asserted the Second Defendant arranged for the bus to be appropriately decorated and to appear at the parade
    (b) A charitable organisation run in accordance with a different ethos (e.g. a non-Christian religious organisation) which wished to advertise a religious outreach festival on the buses
    (c) A charitable organisation run in accordance with a religious ethos but which the Defendants perceived to hold or be associated with different religious beliefs on the matters of same-sex marriage or sexual relations between

same-sex partners which wished to advertise a forthcoming religious outreach festival on the buses

(d) A non-religious charitable organisation, e.g. a humanist organisation, wishing to advertise a forthcoming outreach festival on the buses

(vi) Alternatively the Defendants indirectly discriminated against the Claimant in applying a policy of no political or religious advertising on the buses.

88. Its case in relation to the Human Rights Act is that

(i) Both Defendants are public authorities
(ii) Alternatively the Second Defendant, if not a public authority, was engaged in functions of a public nature when providing public transport services and/or advertising on public transport services
(iii) The Claimant as a religious body has rights under article 9
(iv) The removal of the advertisements interfered with the Claimant's article 9 and article 10 rights
(v) The removal of the advertisements cannot be justified
(vi) The Defendants discriminated against the Claimant in relation to its article 9 and 10 rights.

The Defendants' pleaded case

89. In relation to the Equality Act

(i) The Claimant is not a religious organisation for the purposes of the Equality Act nor article 9 and the Claimant itself cannot be said to have a religion
(ii) The pleaded case is unclear as to the extent to which the religious beliefs asserted by the Claimant are accepted to be protected beliefs, but Ms Monaghan accepted in her closing submissions that they are
(iii) The pleaded case is that only the Second Defendant took the decision (although that was not pursued in the closing submissions)
(iv) The advertisements were removed because
  (a) The Second Defendant has a policy prohibiting religious advertising
  (b) The Second Defendant has a policy of neutrality with which the advertisements were inconsistent
  (c) The advertisements caused offence to members of the public because of the reference to Franklin Graham, given his expressed views on homosexuality, same-sex marriage and Islam, and
  (d) buses displaying the advertisements might become a target for vandalism
(v) The advertisements were removed because of their content and their actual and anticipated effect
(vi) They would have been removed whatever the characteristics of the person seeking to display them
(vii) The comparators identified by the Claimant are not suitable comparators

(viii) On indirect discrimination, the advertising policy would not have a differential effect but if it did, it is a proportionate means of achieving a legitimate aim.

90. In relation to the Human Rights Act

(i) The Second Defendant is not a public authority and was not exercising any public function when accepting or removing the advertisements
(ii) The Claimant cannot bring a claim pursuant to article 9 because it is a limited company
(iii) Any interference with article 9 or article 10 rights was justified
  (a) Having regard to the legitimate aims of needing to ensure compliance with the contract with Exterion and the policy of neutrality, to ensure that offence was not caused to members of the public and to avoid the risk of vandalism to the buses, and
  (b) Was proportionate having regard to those legitimate aims, the prominence of the advertisements, the impact of the advertisements on the public (in particular members of the LGBT and Muslim communities), and the fact that the Claimant was still able to advertise and promote the Festival in other means and other places.
(iv) There has been no discrimination under article 14 for the same reasons that there is no direct EA discrimination and/or that any interference with any Convention rights is justified.

The Equality Act 2010

91. s13 EA defines direct discrimination:
(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

92. s19 defines indirect discrimination:
(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purpose of subsection (a), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
  (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
  (b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
  (c) It puts, or would put B at that disadvantage, and
  (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

93. Protected characteristics by s4 include "religion or belief".

94. s10 defines religion or belief:

(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
(3) In related to the protected characteristic of religion or belief –
  (a) A reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;
  (b) A reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.

95. s23 provides that
(1) On a comparison of cases for the purposes of section 13,14 or 19 there must be no material difference between the circumstances relating to each case.

96. s136 deals with the burden of proof in direct discrimination claims:
s136 (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
s136 (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

97. The effect of s136 (per *Efobi v Royal Mail Group* [2019] EWCA Civ 18) is that the burden is first on the claimant to establish facts from which a court could conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred, leaving out of account the defendant's explanation for the treatment; if the claimant discharges that burden then the onus shifts to the defendant to give an explanation for the alleged discriminatory treatment and to satisfy the court that it was not tainted by a relevant proscribed characteristic.

The factual issues

Was the decision to remove the advertisement a joint decision?

98. This was denied by the First Defendant in the Amended Defence although no submissions were made in relation to it in closing. I shall deal with it briefly.

99. Jane Cole in evidence accepted that it was a joint decision made between her and Alan Cavill.

100. If there was a need for anything else, it is clear from the emails leading up to the decision (such as where Alan Cavill said "*I would like the advertising to be removed please*") and the emails following the decision (such as where Alan Cavill wrote "*as you are aware it was on our instructions that Jane removed the advertising*") that this was a joint decision taken by both Defendants, with the First Defendant plainly taking the lead.

The Defendants' position on neutrality and religious advertising

101. I shall come on to the basis on which the Defendants made the decision to remove the advertisements in due course, but the issue of whether there was a policy of not accepting religious advertisements or a ban on religious advertisements, or a policy of neutrality, and, if there was, whether those were policies that played any part in this decision, is one which usefully can be addressed now.

102. No formal written policy on advertising or on neutrality has been produced by either Defendant. Jane Cole accepted that even an informal policy did not exist so far as the Second Defendant is concerned.

103. On advertising, there is no evidence that any consideration had ever been given before these events to the types of advertisements which would or should be allowed on the buses, save for the contract with Exterion which Jane Cole accepted might simply contain its standard terms.

104. More importantly, no reference is made anywhere within the contemporaneous emails or the press statements to a ban (whether contractual or otherwise) on religious advertising. I reject Jane Cole's evidence that she was aware of and had in mind the contractual provisions: that is incredible given the lack of reference to the contract. If there was a ban on religious advertising which applied to this advertisement it would have been at the forefront of the discussion. Indeed, there would be no need for discussion. The Defendants would have had a cast-iron reason for the removal which would have exonerated them from any criticism. Similarly, if she believed there to be a ban on political advertising she would not have posed the question about whether controversial political advertisements might have to be removed if a precedent was set here.

105. Equally I reject the assertion that there existed and was applied a policy of neutrality. Jane Cole accepted such a policy did not exist within the Second Defendant. None of the contemporaneous documents refer to the First Defendant having such a policy. If anything, the evidence suggests the contrary. The press statement issued by the Second Defendant referred only to Pride and LGBT rather than to any effect the removal might have on Christians or others, and did not refer to a policy of neutrality nor give the impression of neutrality. The First Defendant demonstrated an aversion and opposition to the particular religious beliefs of Franklin Graham, and a partiality for the opposing view. Trying to distance itself from controversy and public opprobrium, as it did in relation to the Winter Gardens decision (where Alan Cavill wrote that the First Defendant was trying to" *keep our distance from the content so that we can be critical of their views but not of the decision to allow the booking*") and this decision, is not the same as operating a policy of neutrality.

The Equality Act claims

106. My finding that there was no operative provision, criterion or practice in relation to advertising whether of a religious nature or otherwise, nor any policy of neutrality, means that this cannot be a case of indirect discrimination.

107. Notwithstanding that the principle is not accepted by the Defendants, there is binding authority in *EAD Solicitors v Abrams* [2016] ICR380 that a limited company is capable of bringing an EA claim based upon associative discrimination, that is to say founded upon a protected characteristic of someone other than the claimant.

108. It was properly accepted by the Defendants in submissions that Franklin Graham holds the beliefs set out in paragraph 87(ii) of this judgment and that they are protected religious beliefs. There is no need for me to determine, then, whether the Claimant itself, as a limited company set up for purely religious purposes, can hold and bring a claim based upon its own religion and belief. In any event, the real issue here is whether the Claimant was discriminated against because of Franklin Graham's religious beliefs.

S136(2)

The appropriate comparator

109. s23 requires the Claimant to identify a suitable comparator in comparison with whom the court could conclude that the alleged discrimination had occurred. Ms Monaghan on behalf of the Defendants argued that the correct comparator here was an organisation associated with a speaker holding different, but equally offensive (to some), religious views, because of the s23 requirement that there be no material difference between the circumstances of the Claimant and the comparator. She suggested that an appropriate comparator might be, for example, an "*extremist Muslim cleric*" and gave the example of Anjem Choudary.

110. I disagree. On the particular example of Anjem Choudary, no evidence has been adduced as to his religious views or as to whether he is (as I doubt) a cleric, but it is a matter of public record that he has a conviction for inviting support for a proscribed terrorist organisation for which he served a term of imprisonment. There is no evidence before me of Franklin Graham having been convicted of any offences, whether relating to his religious views or otherwise. Indeed although representations were made to the Home Office that he should be denied a visa on the basis that such denial would be conducive to the public good, he was permitted to enter the UK.

111. There is no evidence before me of Anjem Choudary's "*extremist"* views. There is evidence, and it is a matter of public knowledge, that the religious beliefs set out at paragraph 87(ii) are beliefs held by many religions, Christian and otherwise. They may be offensive to some people, but they cannot properly be characterised as *"extremist".*

112. One difficulty with Ms Monaghan's general submission is that it is the very unacceptability to some sectors of society of Franklin Graham's particular religious beliefs which is the alleged basis for the discrimination. To take into account in considering the s23 requirement something which goes to the heart of the protected characteristic cannot be right. It would be approaching the issue in a way which would defeat the purpose of the legislation to eliminate discrimination on the ground of a

particular religion or belief (see Lord Hope in *Shamoon v The Chief Constable of the RUC* [2003] UKHL 11 at paragraph 39).

113. The other difficulty with approaching the comparator in the manner suggested by Ms Monaghan is that it would require the court to involve itself in the relative acceptability to society of one religious view over another, in order to determine which religious views are so offensive as liable to lead to widespread offence or complaint and which are not. The role of the court is not to enquire into the validity of differing religious views, or to give preference to some over others. All religions and beliefs are characteristics protected by law. The domestic courts and the European Court of Human Rights have consistently affirmed that a pluralistic tolerant society allows for the expression of many different and sometimes diametrically opposed beliefs.

114. Ms Monaghan submitted in closing that the issue in this case was not the religious beliefs themselves but the offensive or inflammatory ways in which they have reportedly been expressed by Franklin Graham, for example the reference to Satan being behind same-sex marriage. She accepted that that in itself may be a religious belief, but objected to its expression in that way in a public context as opposed to within, for example, a church event. That point, it seems to me, falls for consideration more appropriately when considering s136(3) and in due course the Human Rights Act claims, than in selecting the appropriate comparator.

115. In my view one must compare the treatment received by the Claimant to the treatment that would have been afforded to an organisation not associated with these particular religious beliefs, or associated with a different religion or belief, or with no religion or belief. Would another organisation advertising a religious festival in exactly the same way (that is to say, with advertisements which carry no overt religious message) which organisation was not explicitly identified in its advertisements with a person who is known to hold the religious beliefs, have had its advertisements removed? Or if that organisation was associated with a person who held the religious belief that, say, all unions including same-sex unions were blessed in the eyes of God?

116. This is a hypothetical comparison, because no religious advertisements were known to have been displayed before. There was no evidence to suggest that that was because they had been refused, rather that the issue had never needed to be considered.

117. This is an unusual case. It is unusual because unlike in most (if not all) discrimination claims, there is explicit reference made by the Defendants in the course of reaching the decision, and when speaking privately and publicly after the decision, to the religious beliefs of Franklin Graham. Usually an alleged discriminator makes no reference to the claimant's protected characteristics – so, for example, in *Efobi* there was no evidence of anyone referring to the claimant's race when turning him down for jobs. Here there is positive evidence going to the reasoning behind the decision which clearly links it with the religious beliefs, such as

(i) Jane Cole being told by Councillor Campbell that she thought it inappropriate for the Second Defendant to advertise that Franklin Graham whom she described as "*anti-gay*" was attending a conference in Blackpool
(ii) Jane Cole's evidence that she had in mind the offence and distress being caused or potentially caused to customers and staff who identify as LGBT, and that the customer feedback arose because Franklin Graham was involved with "*religious connotation"*
(iii) Jane Cole replying immediately after the decision was taken to the person who had emailed her to complain the Festival was a homophobic event in terms "*I am as disturbed as you…I understand the concern that this advertising is causing and please be assured that steps are being taken to remove the posters today*"
(iv) The press statement issued by the Second Defendant referring to it being a "*proud ongoing supported of the Pride and LGBT+ communities and in no way did we intend to cause any distress or upset"*
(v) The various press statements drafted although not issued by the First Defendant referring to Franklin Graham as someone whom many in the community thought *"preaches hatred"* and referring to flying the rainbow flag in solidarity and support with the LGBT community.

118. Given all of that, a court plainly could conclude on the balance of probabilities that advertisements placed by the comparators would not be removed. The catalyst for the removal was the expressed objection of various people to the particular religious beliefs. A prima facie case clearly is made out. Similarly, I find that a court could conclude that an organisation which has no religious belief – an atheistic organisation, say - advertising a festival again in exactly the same way (so with no overtly atheistic or anti-religious message) would not have had its advertisements removed.

s136(3)

119. The burden of proof is on the Defendants under s136(3). They must give an explanation for the alleged discriminatory treatment and satisfy me on the balance of probabilities that it was not tainted by a relevant proscribed characteristic.

120. Mr O'Neill submits that at this stage he must succeed against the First Defendant because it has called no evidence. I reject that submission, not least because Jane Cole gave evidence on behalf of both Defendants.

121. So far as her evidence is concerned, I expressly rejected earlier the primary reasons the Defendants put forward for the decision, those of the prohibition or policy in relation to religious advertising and/or the policy of neutrality. Not only that, I expressly rejected Jane Cole's evidence that she was aware of and had in mind the contractual provisions relating to religious advertising at the time she made the decision.

122. That renders her evidence as to the reasoning behind the decision immediately unreliable. It may be that she did not, in giving that evidence, deliberately intend to mislead; it may well be that over time she has genuinely convinced herself that she took

those matters into account when she was making the decision. It does not really matter for the purpose of assessing her credibility as a witness. Her credibility on this issue is fatally undermined by her insistence on her reliance on the contractual provisions in relation to religious advertising as the reason or part of the reasoning for the decision.

123. As to the missing evidence of Alan Cavill, Mr O'Neill invites me to draw an adverse inference from his silence.

124. Lord Justice Brooke set out these principles in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324:
    (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
    (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
    (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference; in other words, there must be a case to answer on that issue.
    (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

125. Here the Claimant has already satisfied the third principle.

126. Plainly Alan Cavill might be expected to have material evidence to give on the issue of the reason for the decision and whether it was tainted by the religious beliefs. He took the decision on behalf of the First Defendant jointly with Jane Cole. He had documented email exchanges and undocumented telephone conversations with Jane Cole in the course of coming to that decision.

127. As to the fourth principle: Alan Cavill has been silent within these proceedings. He has given neither written nor oral evidence. No reason whatsoever has been put forward as to why that is. Not only that, but rather than being absent he in fact attended at least the first two days of the trial (this being a remote trial being conducted by Microsoft Teams, he joined the hearing remotely on both days). His silence is deafening.

128. I draw from his silence the inference that he would have given evidence that showed that the religious beliefs were material to the decision.

129. Ms Monaghan submitted that if the advertisements were withdrawn because of the offence taken by members of the public or indeed the perceived risk of vandalism of the buses arising out of that offence, or because of the pressure that the Defendants came under because of the expressions of offence being made on social media, that is not

"because of" the religious beliefs. Rather it is "because of" the concerns about vandalism or the pressure being brought to bear on the Defendants. She relies on the judgment of Baroness Hale in *Lee v Ashers Baking Co Ltd and others* [2018] UKSC 49 at paragraph 33 which reads

"That is very far from saying that, because the reason for the less favourable treatment has something to do with the sexual orientation of some people, the less favourable treatment is "on grounds of" sexual orientation. There must, in my view, be a closer connection than that. "

and argues that the reason for the decision may have been "to do with" the religious beliefs but was not "because of" the religious beliefs.

130. *Ashers* is a very different case to this one. There the point was that the refusal to supply a cake iced with the message "*Support gay marriage*" was not because of the sexual orientation of the customer (as to which the bakers had no knowledge) nor because of an association with a particular sexual orientation inferred as a result of the message. The defendants would have treated any customer, including a heterosexual customer, who asked for a cake iced with that message in the same way - by refusing. No difference in treatment could in fact be made out by reference to a comparator. The reason behind the refusal was the objection to the message rather than an objection to the customer and his protected characteristic (or that of those associated with him).

131. This case is not a case where the Defendants refused to allow any religious advertisements regardless of who wished to place them. It is a case where they refused to allow the advertisement of this particular Claimant because of the Claimant's association with the religious beliefs of Franklin Graham. That is apparent from the Defendants' various emails and from the evidence of Jane Cole. The concern of both Defendants was the offence that had been taken by some sectors of the community (those who objected or took offence to the religious beliefs). Furthermore the First Defendant and many of its officers had an aversion to the religious beliefs and had expressed views in trenchant terms about Franklin Graham and his religious beliefs. As I have said, I draw an adverse inference from Alan Cavill's silence as to the reason for the decision.

132. On that basis I find as a fact that the comparators I identified when dealing with s136(2) would not have had their advertisements removed by the Defendants.

133. The suggestion that removal on the grounds of the offence caused to the public by the association of the Claimant with Franklin Graham and his religious beliefs would not be "because of" the religious beliefs but rather because of a response to public opinion or concern seems to me to be a distinction that cannot properly be drawn having regard to the intention behind the Equality Act of eliminating discrimination. If mainstream societal opinion were to change consequent on, say, a white supremacist rising, should we allow a situation where the Defendants may, without fear of an EA claim, cancel advertisements for companies which are known to promote an anti-racist message because of pressure and complaint made by white supremacist groups? Should a hotelier be able to refuse a double room to a same-sex couple not because he objects to

their sexual orientation but because all of the other guests in his hotel object to it and find it offensive? Rather than eliminate discrimination, to allow that reading of "because of" would be to give free rein to discrimination. "Because of" refers to the factual basis for the decision rather than motive or intention (see Lord Goff in *R v Birmingham City Council ex parte EOC* [1989] AC1155 at p 1194: if motive or intention was a necessary condition of liability, "*it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy.*").

134. There is no defence of justification to direct discrimination. The issues arising from the desire to avoid offence to certain sectors of the community are or may be relevant to the HRA claims, where there is a balancing exercise to be undertaken, but they seem to me not to be relevant to the EA claim in this particular case.

135. The complaints arose from the objections of members of the public to the religious beliefs. The removal came about because of those complaints. I find it also came about because the Defendants allied themselves on the issue of the religious beliefs with the complainants, and against the Claimant and others holding them. If there were any doubt about that it is made explicit by the content of the press statement issued on behalf of the Second Defendant when the advertisements were removed.

136. Insofar as vandalism was expressed as a concern in the contemporaneous emails, my finding is that it was not a material consideration in the reaching of the decision. On reading all of the documents as a whole, it was seen at least by the First Defendant as a convenient peg upon which to hang the decision rather than the reason for the decision. If I were in any doubt about that, the adverse inferences which I have drawn in relation to Alan Cavill would more than deal with it. In any event, even if vandalism were to be one of the reasons for making the decision, it would play no more than a minor role in comparison with the objection to the religious beliefs.

137. Taking all of that into account I am satisfied that the Defendants have failed to discharge the burden under s136(3), and that the Claimant was discriminated against because of the religious beliefs. I would find that even if it were not for the adverse inferences I draw in relation to Alan Cavill, but those adverse inferences make the Claimant's case overwhelming.

138. Insofar as it has been suggested that Franklin Graham's views on Islam were a relevant factor in the decision, my finding is that the Defendants' focus was squarely on the religious beliefs relating to homosexuality and same-sex marriage, as is wholly apparent from the contemporaneous documentation. Islamophobia was not mentioned when the advertisements were first brought to Jane Cole's attention, nor in the only email of complaint she considered at the time of the decision. It is not referred to as a consideration in the contemporaneous emails between her and Alan Cavill. In my judgment any reference in the pleadings to Islamophobia is a red herring calculated to

deflect attention from the true reasons for the making of the decision which were, as I have found, Franklin Graham's religious beliefs as to homosexuality.

The Human Rights Act 1998

139. By s6(1) it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

140. By s6(3)(b) a public authority includes any person certain whose functions are functions of a public nature, but by s 6(5), in relation to a particular act a person is not a public authority by virtue only of subsection 3(b) if the nature of the act is private.

141. s13: If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

142. The Convention rights are set out in Schedule 1.

Article 9

1. Everyone has the right to freedom of thought, conscience and religion; this right include freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 14

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origins, association with a national minority, property, birth or other status.

Is the Second Defendant a public authority?

143. The First Defendant is agreed to be a core public authority.

144. The parties agree that by s63(1)(a) of the Transport Act 1985 it is the duty of the First Defendant to secure the provision of such public passenger transport services as it considers appropriate to secure to meet any public transport requirements within the county which would not in their view be met apart from any action taken by them for that purpose.

145. It is agreed that the First Defendant formed the Second Defendant pursuant to its duties under s63 and s67 to provide public passenger transport services.

146. The Second Defendant is a limited company (as it is required to be under s67). It is wholly owned by the First Defendant. Its Articles of Association provide that the First Defendant has the right to appoint and remove Directors, including the Chair of the Board of Directors. They also provide that the shareholders may by special resolution direct the directors to take or refrain from taking specified action. The First Defendant is the "controlling authority" of the Second Defendant. By s73(3)(a) TA the First Defendant has a duty to exercise control over the Second Defendant so as to ensure that it does not engage in activities in which the First Defendant has no power to engage.

147. The Claimant argues that the Second Defendant is either a core or hybrid public authority. Core public authorities are those essentially of a governmental nature. Everything done by a core public authority is a public function. Core public authorities do not have any Convention rights themselves: as governmental organisations they do not have a right of individual application to the ECHR pursuant to Article 34.

148. A hybrid public authority is a body which performs some functions of a public nature and others which are private. When it is performing functions of a public nature it is a (hybrid) public authority in respect of those functions.

149. Lord Nicholls in *Aston Cantlow PCC v Wallbank* [2003] UKHL 37 identified at paragraph 7 that "*the most obvious examples* [of core public authorities] *are government departments, local authorities, the police and the armed forces. Behind the instinctive classification of these organisations as bodies whose nature is governmental lie factors such as the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution…".* At paragraph 8 he said "*it must always be relevant to consider whether Parliament can have intended that the body in question should have no Convention rights*" when considering whether something is a core public authority.

150. In relation to hybrid public authorities, he said at paragraph 11 that a "*generously wide scope*" is to be given to the expression "public function". At paragraph 12 he noted that there can be "*no single test of universal application*" as to deciding whether a function is public, but factors to be taken into account include "*the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service*".

151. The Defendants rely on the case of *Cameron and others v Network Rail Infrastructure Ltd (formerly Railtrack plc)* [2007] 1 WLR 163 in support of their contention that the Second Defendant is neither a core nor a hybrid public authority when dealing with advertising on its buses. In *Cameron* the defendant was held not to be a core public authority nor a hybrid authority in relation to maintenance of points on the railway network. When originally created it had functions of a public nature such as the power to regulate safety on the national railway network and responsibility for setting standards including safety standards, but those powers had been removed from it before the relevant time.

152. That defendant in being found not to be a public authority, whether core or hybrid, was in a very different position to the Second Defendant. Many of the factors which led to the conclusion that the defendant was not a public authority do not apply to the Second Defendant.

153. In *Cameron,* whilst Sir Michael Turner found that the business of running a railway was not intrinsically an activity of government, he said at paragraph 29(1) that it would be "*hard to dispute the proposition that under the Transport Act 1947 with the powers vested in the Minister of Transport, the former British Railways Board was an emanation of government*". It was privatisation which severed the railways from direct government control. Unlike the defendant in *Cameron,* the need to make provision for passenger transport services is imposed upon the First Defendant by statute.

154. There are other differences: the Second Defendant does not have a clear commercial objective to make profit for private shareholders, because its shares are wholly owned by a core public authority; its very creation requires it to conduct its operations in a manner subservient to the public interest; it is democratically accountable to local government, as its entire shareholding is held by the First Defendant, and the appointment of the board of directors is wholly under the control of the First Defendant. None of that applied to the defendant in *Cameron*.

155. I find that the Second Defendant is a core public authority, It was created by the First Defendant to meet the First Defendant's statutory responsibilities under the Transport Act. It is wholly owned and controlled by the First Defendant. The First Defendant has complete control over the appointment of its directors and may direct it to take any action or refrain from any action. The Second Defendant is not permitted to engage in any activities which the First Defendant (as a core public authority) could not engage

in. In terms of accepting advertising on the buses, that is plainly ancillary to its duties to provide passenger transport services. And it is hard to see why the Second Defendant, as a creature created by and under the complete control of the First Defendant, should itself have any Convention rights.

156. This accords with the treatment of Transport for London in *R (Core Issues Trust) v Transport for London* [2014] EWCA Civ 34, where it was accepted, I think without argument, that TfL was a public authority. It differs from the Second Defendant in the manner in which it was created, being a statutory body established by Parliament under the Greater London Authority Act 1999, but otherwise it is hard to see any difference between its position as against the Greater London Authority or the mayor of London, and the Second Defendant's position as against the First Defendant. The mayor/Greater London Authority has statutory duties to secure the provision of passenger transport facilities. TfL has to exercise its functions of providing passenger transport facilities in accordance with guidance or directions given to it by the mayor for the purpose of facilitating the discharge of those facilities. The members are appointed by the mayor and if the mayor is a member (as he may choose to be), he acts as chair. If TfL is a core public authority, surely so must be the Second Defendant.

157. If I am wrong about that, then I find that the Second Defendant in entering into contracts for advertising on its buses was engaging in a function of a public nature. The Second Defendant provided a public service, namely the passenger transport service, in place of the core public authority so as to discharge the core public authority's statutory duty to provide or facilitate the provision of the service. If it were not providing such a service it would not be able to advertise. The advertising is incidental to the discharge of its functions in providing a passenger transport service. Any profit made from advertising would ultimately belong to the shareholders, that is to say to the core public authority. Advertising cannot be dissociated from its exercise of the public function of providing a public passenger transport service.

Is this an article 9 case or an article 10 case?

158. Mr O'Neill submits forcefully that the court should consider whether there has been interference with both article 9 and article 10 rights. That is inconsistent, however, with the approach of the domestic courts and the European court, where prohibitions on religious advertising have been considered in relation to article 10 rather than article 9 on the basis that they are issues primarily concerning the regulation of the means of expression rather than the profession or manifestation of religion – see, for example, para 92 of *Core Issues* per Lord Dyson, and para 61 of *Murphy v Ireland* 38 EHRR 212. In this case, as was held in *Core Issues,* article 9 seems to me to add nothing to article 10 and I shall consider the decision with reference to article 10.

Does the Claimant have an article 9 right?

159. If I were to be wrong about that it would be necessary to consider whether the Claimant itself possesses rights under article 9.

160. The Defendants submit that limited companies do not enjoy rights under article 9, relying on paragraph 57 of *Ashers* where Baroness Hale said

> *"As the courts below reached a different conclusion on this issue* [whether the company could be compelled to provide a cake iced with the message with which its owners profoundly disagreed on religious grounds], *they did not have to consider the position of the company separately from that of Mr and Mrs McArthur. It is the case that in X v Switzerland (1979) 16 DR 86, and in Justannus Oy Vapaa Ajattelija Ab v Finland (1996) 22 EHRR CD 69, the European Commission of Human Rights held that limited companies could not rely upon article 9,1 to resist paying church taxes. In this case, however, to hold the company liable when the McArthurs are not would effectively negate their convention rights. In holding that the company is not liable, this court is not holding that the company has rights under article 9; rather, it is upholding the rights of the McArthurs under that article."*

161. Insofar as that supports the proposition that a company does not have rights under article 9, rather than simply reciting the decisions in those particular cases, it is obiter.

162. Decisions of the European Commission recognise that a Church is capable of possessing and exercising the rights in article 9 rather than any interference only being capable of being pursued via its individual members (*X & Church of Scientology v Sweden* [1979] App No. 7805/77); similarly an association with religious and philosophical objects is so capable (*OmKaranda and Divine Light Zentrum v Switzerland* [1981] App No. 8118/77 and referred to in *Arm Chappell and the Secular Order of Druids UK* [1987] App No. 12587/86).

163. The Claimant is a limited company which by Article 3.1 of its Articles of Association "*has power to do anything lawful in pursuit of its charitable purposes.*.". No other powers are provided for.

164. Its charitable purposes are set out in Article 2.1 as "*the advancement of the Christian Religion in the Lancashire area by sharing the good news of Jesus Christ*".

165. I can see no good reason for distinguishing between the Claimant and a Church, or an association with religious and philosophical objects, simply on the basis that the legal vehicle for its actions is a limited company rather than an unincorporated association pursuing its charitable objectives via, for example, a charitable trust. It has no purpose or powers according to its Articles of Association other than religious ones.

166. Accordingly insofar as it matters I find that the Claimant does itself possess article 9 rights.

The Claimant's article 10 rights

167. It was admitted by Ms Monaghan in her closing submissions that the removal of the advertisements was an interference with the Claimant's rights under article 10.1. The issue then is whether the interference was justified under article 10.2. The burden of proof is on the Defendants.

168. All Convention rights, and in particular those under article 10, must be considered in the context of the concepts of pluralism, tolerance and broadmindedness on which any democratic society is based. Article 10 protects even expression which could be considered offensive, shocking or disturbing to the religious sensitives of others (*Murphy).*

169. Freedom of expression is not an unqualified right. It carries with it duties and responsibilities which include (*Otto-Preminger-Institut v Austria* (1995) EHRR 34, para 49)

"an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs".

Legitimate aim

170. The Defendants' pleaded legitimate aims were

(a) To ensure compliance with the Second Defendant's policy on advertising reflected in the Exterion contract
(b) To ensure compliance with the Second Defendant's police of neutrality
(c) To ensure that offence was not caused to members of the public by controversial advertisements and by this advertisement in particular
(d) To avoid the risk of vandalism to the Second Defendant's buses.

171. Given my findings on the lack of advertising or neutrality policies, and that vandalism was not a material consideration in the decision, all but the third must fall away.

172. Notwithstanding that there is no bar on offensive views, protecting the right of others (including the rights of individuals of a particular sexual orientation to respect for dignity and private life under Article 8) is a legitimate aim recognised by the courts as, for example, in *Core Issues*.

173. It is superficially attractive to say that the difficulties the Defendants had in relation to the EA claims – Jane Cole's unreliability, Alan Cavill's silence, the First Defendant's objections to the religious beliefs - make it impossible for them to prove as a matter of fact that they took the decision pursuing that legitimate aim. Nonetheless, it is clear from the contemporaneous documents that the Defendants were responding to the offence being expressed by, in particular, members of the LGBTQI+ community. Even

though the Defendants were partial, I find that they were pursuing the legitimate aim of avoiding offence being caused to others.

Proportionality

174. I then must consider whether the admitted interference was necessary in a democratic society to meet that legitimate aim – in other words, the proportionality of the action taken.

175. This is not a case where a clearly articulated and reasoned policy was in place which was then applied to this advertisement. Neither Defendant had given any consideration to article 10 considerations in relation to general advertising before the controversy arose. Jane Cole admitted that she paid no regard to the principles of article 10 before making the decision. Alan Cavill's email of 17th July 2018 in which he said "*The BTS Board are concerned …that we did not try and negotiate a lesser message with Festival of Hope (removing the Franklin Graham name). I would be concerned that this would have meant the adverts being out there far longer and I do not think simply removing the name would have appeased the various groups who are against this Festival.*" is no more than an ex post facto justification. He is, of course, silent on this issue also at trial.

176. I reject Jane Cole's evidence that she had in mind when making the decision that it might itself be offensive or upset some of the Christians in Blackpool to remove the advertisements or that she balanced in any way the offence and distress caused to, for example, the LGBT community with that potentially caused to some of the Christian community. That is neither documented contemporaneously nor is it referred to even obliquely in the press statement released by the Second Defendant. I find that she gave no consideration to the proportionality of the measure.

177. I remind myself of my finding that the Defendants in removing the advertisements allied themselves with the views on the religious beliefs which were expressed by the complainants, and against the Claimant and those holding the religious beliefs with whom the Claimant is associated. This is the antithesis of the manner in which a public authority should behave in a democratic society.

178. Whilst all of those matters clearly set the scene and provide the background against which the assessment of proportionality is to be made, whether a measure is proportionate is a question to be assessed objectively having regard to all of the circumstances. A measure may be proportionate as a matter of fact even if the decision maker had no regard to proportionality or any of the factors which should have been considered in that regard.

179. In itself, everyone agrees, this advertisement was inoffensive. It was not obviously religious, it contained nothing but factual information as to the Festival, it did not even identify that it was a Christian Festival. Only the appending of the name of Franklin Graham, and the fact that some people find him and his views offensive, made it anything other than innocuous.

180. It is clearly significantly different in that regard from the advertisement in respect of which a ban was upheld in *Core Issues*, which was a riposte to an earlier Stonewall advertisement and read "*NOT GAY, EX-GAY, POST-GAY AND PROUD, GET OVER IT"*. Lord Dyson found that the advertisement was "*liable to encourage homophobic views and homophobia places gays at risk*" (para 85) and that it was "*implying offensively and controversially that homosexuality can be cured*" (para 88).

181. It is also different to the advertisement in *Murphy*, where there was a statutory ban on broadcasting on terrestrial television or radio any advertisement "*directed towards any religious or political end*". The advertisement in question was said to be innocuous or offensive it itself, but it did (unlike the Claimant's advertisement) contain overtly religious content including reference to Christ and the resurrection.

182. Ms Monaghan says the Claimant's advertisement is one which whilst "*not on its face, offensive, could have an offensive impact in certain circumstances*" (para 72, *Murphy*), because of the religious beliefs of Franklin Graham and in particular the manner in which he has expressed them. When I pressed her on this issue in relation to the religious beliefs she asserted that it was the reference to "*Satan*" as the architect of same-sex marriage, when expressed in the public domain rather than in a church or similar environment, that made this advertisement offensive and rendered the expression of the religious beliefs so offensive as to be capable of being interfered with. She accepted, however, that the existence of Satan is part of the religious beliefs held by Franklin Graham. Plainly it is, as is the concept that Satan tempts man away from God and God's plans for the world and towards sin. Considered in that manner, the reference to Satan being the architect of same-sex marriage is itself no more than an expression of those religious beliefs, however offensive other people who do not share them may find it.

183. In *Murphy* the Court took into account various factors when considering proportionality, including the concerns as to particular religious sensitivities in Ireland and the history of religious division which led the state to take the view that Irish citizens would resent having such advertisements broadcast into their homes and that they could lead to unrest; the impact of the advertisement (finding that audio-visual had a more immediate, invasive and powerful impact than print media); and that the applicant remained able to advertise in print media and at public assemblies.

184. At paragraph 77 the Court noted "a *provision allowing one religion, and not another, to advertise would be difficult to justify and that a provision which allowed the filtering by the state or any organ designated by it, on a case by case basis, of unacceptable or excessive religious advertising would be difficult to apply fairly, objectively and coherently".*

185. Bearing in mind the principles identified in the numerous cases to which I have been referred, including in particular *Murphy* and *Core Issues,* the following factors are in my view particularly relevant in this case.

(i) This is not a case of a blanket prohibition on all religious advertising, as in *Murphy*. It involves but one decision relating to only one particular religious belief

(ii) There is no general protection from views that are offensive

(iii) Having said that, the advertisement plainly did cause offence to some people within the community including those who may have had a protected characteristic as to sexual orientation

(iv) The advertisement itself was inoffensive and contained no reference to religion nor to homosexuality

(v) From the advertisement itself no one would know that this was a Christian Festival nor would they know anything about the religious beliefs of Franklin Graham (or indeed that he had any religion or belief)

(vi) The appearance of the advertisement would suggest that the Claimant did not set out to be offensive (contrast for example *Otto-Preminger-Institut* where the advertisement was held to be an "*abusive attack"* on the Church and "*primarily intended to be provocative*" and *Core Issues*)

(vii) The removal of the advertisement (the interference with the right to freedom of expression) in itself caused offence to other people within the community including some with a protected characteristic of religion or belief

(viii) The advertising was prominent. This cuts both ways: it appeared prominently on buses circulating around the Blackpool area and so people offended by it might well find themselves confronted by it as they went about their business; on the other hand, the removal deprived the Claimant of the opportunity to advertise it prominently in particular to people not associated with the churches organising it who might otherwise not see any advertisement for the Festival

(ix) The Claimant had other avenues for advertising its event. Advertisements remained on some other buses in the county (or were put back up again after an initial removal) such as Stagecoach buses, and the Festival was advertised on the radio and by social media.

(x) The removal of the advertisement coupled with the press releases issued by the Defendants gave or were capable of giving the public impression that the religious beliefs were unacceptable to society, or at least to the Defendants

(xi) The Defendants, or at least the First Defendant, as a matter of fact did find the religious beliefs unacceptable

(xii) The Defendants made the decision without any regard to the existence of the right to freedom of expression let alone having carried out a balancing exercise in that regard

(xiii) The Defendants took no account of the fact that the removal of the advertisement might (and in fact did) cause offence to other members of the public, including those who shared the religious beliefs and those in favour of free speech

(xiv) The decision was taken without any consultation with the Claimant

(xv) There was no consideration given as to whether a lesser option would achieve the legitimate aim, such as the issuing of a statement by the Defendants making it clear that they were not endorsing any religious beliefs (contrast the First Defendant's approach when the Winter Gardens booking attracted opposition), or some alteration in the advertisements to remove Franklin Graham's name, or the

issue of a statement by the Claimant and/or Defendants jointly or separately assuring the public that no reference would be made at the Festival to homosexuality or same-sex marriage and that all would be welcome regardless of sexual orientation or faith.

(xvi) No discussion was had with the Safety Advisory Group before the removal of the advertisements, to assist in informing the Defendants of the potential impacts and consequences of the advertisement or its removal or to consider what steps might be taken to minimise any adverse impact

(xvii) Similarly no advice was taken, or discussion had, with the police officer who was preparing the Community Impact Assessment with a view to policing any community tensions arising out of the Festival.

186. The Defendants have the burden of proving that the interference with the Claimant's Article 10 rights was justified. Taking all of those factors into account, it is my judgment that the balance comes down overwhelmingly in favour of the Claimant. Yes, the Claimant was still able to advertise its event and yes, it was still a success. But "it turned out all right in the end" cannot be an answer to the question of whether the interference with a fundamental right to freedom of expression can be justified. The Defendants had a wholesale disregard for the right to freedom of expression possessed by the Claimant. It gave a preference to the rights and opinions of one part of the community without having any regard for the rights of the Claimant or those who shared its religious beliefs. It made no effort to consider whether any less intrusive interference than removing the advertisements altogether would meet its legitimate aim. Whilst of course the Defendants are to be afforded a margin of appreciation in considering any interference under Article 10, all of those factors taken together mean in my judgment that its actions fell well outside it.

Article 14

187. It must follow as a matter of course from the findings I have made thus far that the Defendants breached article 14 and discriminated on the ground of religion against the Claimant in relation to its article 10 rights.