IN THE VIDEO APPEALS COMMITTEE

BETWEEN

PRIME TIME PROMOTIONS (SHIFNAL) LTD

- and -

OTHERS

Appellant

AND

THE BRITISH BOARD OF FILM CLASSIFICATION

Respondents

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(1) Geoffrey Robertson QC for the **Appellants**

(2) Andrew Caldecott QC for the **Respondents**

JUDGMENT

These are consolidated appeals by a number of distributors of Video works in respect of nine titles –

Prime Time Promotions (Shifnal) Ltd	Lubed
Prime Time Promotions (Shifnal) Ltd on behalf of Pabo	The Secrets of the Kama Sutra
Queensway Film Distribution	Queensway Trailers
Tongue in Cheek Ltd	Semi-Detached
Premier Film Productions	Dungeon Diva 2
Hot Rod Productions Ltd	Heart of Darkness
Ben Dover Productions	Cumming of Age 2
Solarnet Media	Catering for all Tastes 1
Millivres Prowler Ltd	L'Elisir d'Amore

Content of the Video Works

All the video works contain graphic depictions of a variety of sexual activities, all between consenting adults, including showing heterosexual and homosexual sex, individual acts of male and female masturbation, group masturbation, oral sex individually and as a group, sex between men and women often as a group and with anal penetration and simultaneous double anal penetration of one woman. Sometimes sexual aids are used. In one video there is exclusively sex between men. In every video there were graphic close-ups.

In Appeal No.15, which also involved Prime Time, Mr Hurlstone, a director of the company, gave a description of the classification of works in the United States. In that appeal the video works could be considered as XX. The most extreme he described as XXX, full blown hardcore pornography. Mr Robertson considered the video works before us could be described as medium core porn, reserving the most extreme category for fetishism by which he meant sado-masochism and sex accompanied by violence. We do not accept this submission, in the view of all of us this is hard core pornography. The Appellants argue that the proper classification is 18 and not R18.

Video Recordings Act 1984

Our attention was drawn to Section 4A of this Act, familiar territory for this Committee. The Section did not appear in the 1984 Act but was inserted by Section 90(1) of the Criminal Justice and Public Order Act 1994. The Section reads as follows:

> 4A Criteria for suitability to which special regard to be had
>
> (1) The designated authority shall, in making any determination as to the suitability of a video work, have special regard (amongst the other relevant factors) to any harm that may be caused to potential viewers or, through their behaviour, to society by the manner in which the work deals with –
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) …
>
> (e) human sexual activity.
>
> (2) For the purpose of this Section –
>
> "potential viewer" means any person (including a child or young person) who is likely to view the video work in question if a classification certificate or a classification certification of a particular description were issued;
>
> …
>
> … and any behaviour or activity referred to in subsection (1)(a) to (e) above shall be taken to include behaviour or activity likely to stimulate or encourage it."

Mr Robertson pointed out that nowhere in this section is there any reference to visual content in the video work and he submitted that explicitness cannot be equated with harm, the degree of explicitness is not very significant, it is the manner in which human relations are shown that is important. It is the seductiveness and attractiveness of the message that produces the impact: "it is the ideological vapidity that strongly argues for classification at 18".

Mr Caldecott points out that Section 4(1)(a) of the Act designates the Board as the appropriate classification authority with responsibility for –

> "determining for the purposes of this Act whether or not video works are suitable for classification certificates to be issued in respect of them, having special regard to the likelihood of video works in respect of which such certificates have been issued being viewed in the home."

It is mandatory for the Board, he says, to consider the manner in which the work deals with human sexual activity, narrative content may be important and the degree of explicitness must be a highly significant element in the manner in which sexual activity is portrayed. Reference was made to the Williams Committee on Obscenity and Film Censorship which reported many years ago and in particular to paragraph 44 of the summary dealing with film censorship –

> "In formulating its policy on the control of film content, the Board shall be required to have regard to the following guidelines:
>
> (a) the issue of certificates indicating a film's suitability or unsuitability for persons under 18 should take account of the protection of children and young persons from influences which may be disturbing or harmful to them, or from material whose unrestricted availability to them would be unacceptable to responsible parents.
>
> (b) a film should be classified for restricted exhibition only if its visual content and the manner with which it deals with violence, cruelty or horror, or sexual, faecal or urinary functions or genital organs is such that in the judgment of the examiners it is appropriate the film should be shown only under restricted conditions."

Classification Certificates

Classification certificates are dealt with in Section 7 of the Video Recordings Act 1984.

> "(1) In this Act "Classification Certificate" means a certificate –
>
> (a) issued in respect of a video work in pursuance of arrangements made by the designated authority; and
>
> (b) satisfying the requirement of subsection 2 below.
>
> (2) Those requirements are that the certificate must contain the title assigned to the video work in accordance with Section 4(1)(a)(b)(ia) of this Act and –
>
> (a) …

(b) a statement that the video work concerned is suitable for viewing only by persons who have attained the age (not more than 18 years) specified in the certificate and that no video recording containing that work is to be supplied to any person who has not attained the age so specified; or

(c) the statement mentioned in paragraph (b) above together with a statement that no video recording containing that work is to be supplied other than in a licensed sex shop."

Sex Shop

The definition of sex shop is in paragraph 4 of schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982.

"4 (1) In this Schedule "sex shop" means any premises …. used for a business which consists to a significant degree of selling, hiring, exchanging, lending, displaying or demonstrating –

(a) sex articles; or

(b) other things intended for use in connection with, or for the purpose of stimulating or encouraging –

(i) sexual activity; or

(ii) acts of force or restraint which are associated with sexual activity;

(2) No premises shall be treated as a sex shop by reason only of their use for the exhibition of moving pictures by whatever means produced.

(3) In this schedule "sex article" means –

(a) anything made for use in connection with, or for the purpose of stimulating or encouraging –

(i) sexual activity; or

(ii) acts of force or restraint which are associated with sexual activity;

(b) anything to which sub-paragraph (4) below applies.

(4) This sub-paragraph applies –

(a) to any article containing or embodying matter to be read or looked at or anything intended to be used, either above or as one of a set, for the reproduction or manufacture of any such article; and

(b) to any recording of vision or sound, which –

(i) is concerned primarily with the portrayal of, or primarily deals with or relates to, or is intended to stimulate, or encourage, sexual activity or acts of force or restraint which are associated with sexual activity; or

(ii) is concerned primarily with the portrayal of, or primarily deals with or relates to, genital organs, or urinary or excretory functions."

Mr Caldecott submitted that the definition in paragraph 4 is not limited to fetishism and that when one reads Section 7(2)(c) of the Video Recordings Act 1984 with the definitions in paragraph 4 of Schedule 3 to the Local Government (Miscellaneous Provisions) act 1982 it is implicit that explicitness of portrayal, content and sexual context means such video works are only suitable for sale in a licensed sex shop. Not so, says Mr Robertson. Sex shops are full of sado-masochistic material, the sale of R18 videos is only a small part of the business, the preponderance of sexual aids on display would put off those who wished to buy or hire R18 videos from entering and the fact that there are only some 300 or so sex shops in this country – mostly in large urban areas, means that persons who live some distance away or are disabled would be arbitrarily discriminated against. Furthermore, despite what Mr Caldecott said, there is no Parliamentary or legal ban on reducing the category of this material to 18.

R18 Category

As a result of the recommendations of the Williams Committee the Home Office issued Circular No. 98/1982 –

> "… the [R18] classification will be applied to films which, while not portraying illegal acts or extremes of sexual perversion or horror or violence, are likely to be more explicit than films at present given an 'X' certificate."

In Appeal 15 this Committee stated –

> "The classification R18 was established in order that people who wanted them could buy pornographic videos for pleasure and stimulation but it set up what are reasonable and commonsense restrictions."

Mr Robertson submitted that the Video Recordings Act does not make it mandatory on the Board to classify sexually explicit material. He said that this is medium core porn, these are not the most explicit works and the R18 category would still be available for the most extreme works such as those showing fetishism. We agree that the R18 category is for extreme works but, as we have said above, we do not consider that we are here dealing with medium core porn. Mr Robertson plainly recognised that it was important that, were material such as this categorised as 18, it would be important to ensure that sales or hiring would not be to children or unsuspecting adults. He suggested that any difficulty could be met by ensuring that stores and newsagents covered the works so that children and unsuspecting adults did not see them and, further, that they be given a special category of 18X to indicate it was more extreme than the usual 18 material.

Mr Caldecott submitted that the R18 category affords certainty; it tells the general public what to expect if they choose to watch material such as we have here and avoiding the uncertainty of choosing a video work classified 18 without knowing whether the content was soft, medium or hard core porn.

Harm to Potential Viewers

In Appeal 15 we made reference to the absence of research into the harm that may be caused to children by viewing R18 video works. We recognise that it would be wrong to question children in depth or, indeed, to show videos to them unless, perhaps, a child is being interviewed following an allegation of abuse or following "grooming" by a paedophile. The Board has endeavoured to meet our concerns by commissioning research including that by Dr Guy Cumberbatch – well known in this field – and Sally Gauntlett and a report on R18 pornography by Cragg, Ross and Dawson. We have also seen a consultation paper issued by the Home Office on R18 video works. The opening paragraph of the latter reads as follows –

> "The Government maintains a firm commitment on the protection of children from unsuitable sexually explicit material. It takes the commonsense view that exposure to pornography of this type is potentially harmful to children generally … There is, however, evidence that this type of material is used by paedophiles to "groom" children for sexual abuse …"

Paragraph 2.1 contains this observation –

> "The effect of this Act (the Video Recordings Act 1984) was to require the BBFC to apply an additional test with regard to the classification of videos – that of the suitability for viewing in the home – to reflect the fact that, unlike cinema films where age restrictions may be "policed" by box office staff, videos in the home were more likely to be viewed by younger age groups and could be replayed many times with individual scenes taken out of context and repeated in slow motion or even frame by frame."

And at paragraph 2.7 –

> "While the sexual content of the video may be less explicit than that available in many other European countries, there remains substantial public concern in the UK that such material may fall into the hands of children and that it is clearly unsuitable for them. There is concern that the mechanistic and impersonal way sexual activity can be portrayed in the videos could cause harm to children if they view it."

We should point out that this paper was written in July 2000, some two months after the conclusion of the Judicial Review of our judgment in Appeal No.15 in respect of video works which were nowhere near as explicit as those we have here.

The Cumberbatch research has caused us some anxiety. Mr Robertson criticised it in that the participants were briefed in such a manner that it was inevitable that they would support the Board's guidelines. Mr Johnson, the Board's chief examiner produced the briefing note and we are satisfied that the research was impartial. In relation to four of the video works we have to consider the survey agreed that they should be classified R18. However, we have exercised a good deal of caution in respect of this research as it is from a very small sample.

The Home Office Circular does not produce any evidence that exposure to pornography is harmful to children but it does express a view which we consider would be endorsed by the general public. In the research "Where do you draw the Line" there is a quotation from James Check on the "Effect of Violent Pornography" where the author concludes that "erotica is benign but that both sexually violent and non-violent de-humanising pornography has anti-social effects".

Mr Robertson argued that there are therapeutic benefits in making this material available as an aid to masturbation since masturbation provided protection against prostate cancer. It will give a man a better chance of avoiding prostate cancer and studies show that masturbation provides protection against this illness and that aids to it should be widely available. If there are potential benefits, we must put into the balance the potential risks.

Mr Caldecott pointed out that there are special reasons for reducing the risk of this material being shown to children and as a matter of common sense children would be harmed by it. The sex portrayed is explicit and mechanistic, it is unremitting, there is no story and no message in any of the video works. We think there is a message in some of these video works. The message seems to be that sex in any context is normal, that casual sex between people who have just met is normal. We were very concerned at the predatory nature of the Ben Dover video work and that all the videos seem to be de-humanising sexual activity.

We would go further. In few of the heterosexual and homosexual acts is the sex protected, it is generally speaking casual, unprotected sex between strangers. Not only is it unremitting, it is cold and unremitting and except in the homosexual video the sexual acts are unemotional. Using our collective wisdom and experience, we believe that this material would be harmful to children and vulnerable adults. It may be that children in a secure and loving home would recover more quickly than those in dysfunctional families where the parents may not take the trouble to explain the video works, especially in relation to the ability to distinguish between consent or lack of it. A child might mistake passion for punishment.

The Board's Guidelines

The Board's latest guidelines were formulated in 2005, the previous Guidelines in 2000. In summary the Board will not allow explicit sex in the 18 category unless it can be exceptionally justified by context, but will allow it in R18 material. Put another way, if the video work shows simulated sex without graphic detail it will be classed as 18, if it shows real sex the category will be R18.

As the Board itself points out, Guidelines are merely that, they do not seek to do more than guide the Board and distributors of the type of material that will be allowed. It is undeniable that the Board has adopted a more liberal attitude in the 21st century but it maintains that unless the circumstances are exceptional explicit sex is R18 and nothing else. We were invited to view two well known films (now in video and DVD) entitled "9 Songs" and "Baise-Moi". There is no doubt that these are both works which show unsimulated sex. "9 Songs" was described by the Guardian newspaper as "the most sexually explicit film in the history of British cinema". Mr Robertson says that if the Board can give these two works an 18 certificate it is inconsistent not to do the same for the nine works under appeal. The Board's response is that they have taken the context in which the material is displayed and it is entirely different to that in the video works. Some may express surprise at the certificates given to "9 Songs" and "Baise-Moi" but we do understand the Board's logic; the video works, as we have already said, contain no story line, except "L'Elisir d'Amore" to a small extent, and are really nothing except a vehicle to show graphic sex.

A Board report written by Dr Robert Towler and entitled Public Opinion and the BBFC Guidelines 2005 was shown to us. The research is extensive and helpful. It shows that the public is in favour of allowing explicit sex to be viewed by adults but with a strong proviso that it should not be seen by children. Over 11,000 people gave their views and a large majority said that young people should be protected from material that causes harm (93%) and a very slightly smaller percentage that they should be protected from unsuitable material (90%). Only 9% agreed that young people should be allowed to view what they wanted.

Mr Robertson urged us to have particular regard to the research under the heading "sex" on page 10. So far as the sex standards outlined in the Guidelines are concerned, in 2004 10% thought they were too strict, 50% thought they were about right and 30% said they were not strict enough. As to the sex standards and the percentages agreeing with the Guidelines, at 18 some 27% thought they allowed too much sex, 32% thought they were about right and 41% that they allowed too little. It is never easy to assess the merits or otherwise of this type of research where a series of questions is asked without detailed consideration of the material: we merely observe that far from helping Mr Robertson's case, we think it supports the Board's current Guidelines. Each work must be considered separately given the context but the Guidelines are helpful and we think they are about right.

Mr Hurlstone produced some magazines he had bought in a newsagents on the morning of the appeal in Central London. We agree they leave little or nothing to the imagination. Apparently some are not suitable for seizure by the police or Customs & Excise but some of this type have been prosecuted under the Obscene Publications Act 1959. Mr Johnson said, if the material had been on video, some would have been classified but some which have sado-masochism, urolagnia, urination, would not be granted any kind of certificate. Much of the content was similar to that shown in the videos save, of course, the latter contain moving images.

We refer to the Divisional Court case of Interfact Limited and Pabo Limited against Liverpool City Council where judgment was given on the 23 May 2004. We deal with this case in more detail under the next heading but we observe here that the Court said that where restrictions can be circumvented it is no answer to say they are unjustified.

Human Rights

The Board must have regard to the Convention on Human Rights and so must we. It is given the force of statute by the Human Rights Act 1998. Mr Robertson made the point that the regime imposed by the Board on distributions in this country is more severe than anywhere in Europe and raises a prima facie breach of Article 10 of the Convention which reads –

> "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."

He relied also on Article 8 which relates to the right to respect for private and family life –

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right expect such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 deals with the prohibition of discrimination and reads –

> "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 origin, association with a national minority, property, birth or other status.

Mr Robertson's submission here is that Article 8 is breached if adults are forced to make a public and degrading entrance to a sex shop in order to obtain lawful material necessary for their private life. And Article 14 is breached in that by giving this material a classification which allows it to be supplied only in a sex shop discriminates against those whose religion, or race or sex or physical handicap may make it difficult or embarrassing or culturally shameful to be in or to be seen in a sex shop.

Mr Caldecott relied strongly on Interfact. He conceded that the case concerned statutory interpretation of the word "supply" as defined in Section 1(4) of the Video Recordings Act 1984 but he submitted that the Divisional Court rejected the appeal in relation to Article 10 on substantially the same grounds as in this case. He also relied upon paragraph 2 of Article 10 which reads –

> "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 10 enables a State Party to the convention to set up a licensing system and Articles 8 and 14 allows exceptions to the freedoms there set out where it is necessary to protect health and morals. It is our belief that the references to the protection of morals in these articles is especially relevant to the protection of children and vulnerable adults.

We do not consider we are bound by Interfact but it is strongly persuasive to our consideration of these appeals. Mr Robertson submits that the case begs the question of what was harmful material. It is true that the Judges were not asked to rule upon the material, as we have to do, and the judgment proceeded on the grounds that the material was properly classified as R18. But there are passages in the judgment that are particularly relevant. Thus on page 8 at paragraph 19 we find these observations –

> "It has not been in dispute that the principal purpose of the classification procedure is to guide parents and others in connection with what is suitable material for children to view and to control and thereby prevent viewing by children of video works, which are available by way of supply to adults but which are not considered suitable to be viewed by children. The dispute, in truth, has been over the ambit of the restriction in Section 7(2)(c). The purpose is to prevent children viewing unsuitable material and the ambit of the restriction on supply in Section 7(2)(c) should be interpreted with a view to that purpose being achieved. It seems plain to us that the restriction, requiring that a video work is not to be supplied other than in a licensed sex shop, is designed to eliminate a range of circumstances carrying the risk that such material might come to be viewed by persons under 18, for which the certificate in Section 7(2)(c) and enforcement under Section 11(1) of the Act provides some but limited protection."

And at page 9 paragraph 21 –

> "The purpose of the classification procedure and Section 12 is to ensure that the supply of restricted material only takes place at licensed establishments because thereby an effective scheme for restricting the viewing to adults will be in place … We have no doubt that one of the main reasons for the restriction is to ensure that the customer comes face to face with the supplier so that there is an opportunity for the supplier to assess the age of the customer. It is a disincentive to a visibly under age customer to seek out the forbidden material."

What these passages clearly show is that the Court regards the protection of children as paramount and it is our task to ensure that material of the nature we have here, which we unhesitatingly consider is hard core pornography, does not find its way into the hands of children and, we would add, vulnerable adults.

The Divisional Court cited the well known human rights cases of Handyside (*Handyside v UK* (1979-80) 1 EHRR 737 and *Wingrove v UK* (1997) 24 EHRR 1. *Handyside* says that there is no uniform European conception of morals and that moral standards vary from time to time and place to place. State authorities are in a better position to judge such standards than an international judge. The Court cited this passage from page 58 of *Wingrove* –

> "Whereas there is little scope under Article 10 paragraph 2 … for restrictions on political speech or on debate of questions of public interest … a wider margin of appreciation is generally available to the contracting states when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals."

The Divisional Court at page 12 paragraph 25 in a very important passage –

> "We have no difficulty in coming to the conclusion that it has been convincingly established that the restrictions in question are lawful, necessary and proportionate by reference to Article 10.2."

Mr Caldecott submits that these passages are conclusive that Article 10.2 does not apply. He goes on to say that Article 8 permits restrictions on the grounds of health and morals and that Article 14 does not allow of the interpretation Mr Robertson puts on it. We agree it may well be that members of the public are reluctant to enter sex shops, that there may not be such a shop within miles and that disabled people may somehow be unable to gain access to a shop but we do not accept that in the context of these appeals there are breaches of Articles 8, 10 and 14. We consider the restrictions, lawful, necessary and proportionate.

Imported and Internet Material

Mr Hurlstone complains that he and fellow distributors are seriously disadvantaged in that requests for hard core pornography can be made on the internet and that Customs & Excise will not seize such material when it is imported. The explicit magazines he showed us are not restricted though Mr Johnson told us that some of them would be prosecuted under the Obscene Publications Act 1959. There are frequent references in the media on the lack of restriction in respect of material ordered on the internet and Mr Hurlstone told us that this material is uncut and even stronger than that we have here. We have a good deal of sympathy for Mr Hurlstone's point and that he and his fellow distributors are financially disadvantaged. However, in the "Red Hot Dutch" case referred to by this Committee in Appeal 15 at page 23 we say –

> "The importance of Leggatt LJ's judgment is the emphasis he gives to the protection of children, hence the somewhat emotive remark of putting children before profits."

At page 12 of the judgment in Interfact it is said –

> "It is no answer to say that the restrictions can be circumvented and so are not justified."

It is, of course, perverse that stronger uncut material can be obtained by using the internet but in our view that does not mean that we should reduce the classification for that reason.

Decision

For the first time this Committee has sat in a panel of seven. We have done this to get a broad view as we recognise that this is a field in which different opinions are held. Nevertheless, we are unanimous in our decision.

Mr Robertson asks us to direct a policy shift comparable to the shift taken in Appeal 15. This we are unable to do. The material in that case was different to that we have viewed here, it was certainly not in the XXX category described by Mr Hurlstone in that case. We agree there are even more extreme versions of pornography. But our view is that the material here is explicit and extreme and would be very damaging to vulnerable members of society, children especially. It is true that research has shown that many adults would like to have unrestricted access to extreme pornography but research has also shown a substantial concern that children and vulnerable adults are likely to suffer harm if exposed to this material. Even though we allowed Appeal 15 we expressed concern that children might see the material, which was XX material not XXX. We said XX material could be given an R18 certificate, the Board now gives an R18 certificate to XXX material.

Mr Robertson said that an 18X certificate and wrapping of those videos would suffice. It would allow the videos to be sold or hired in stores and newsagents, people who were reluctant or unable for one reason or another to visit a sex shop would be able to purchase or hire them. The suggestion of an 18X certificate does not convince us that it would be safe to allow the material to be on general sale. An 18X seems to us to be R18 under another guise and we are seriously concerned that it would be readily available in places visited by children and would be very alluring to them. We make no observation on the suggestion that stores or newsagents would be less careful in selling or hiring this material, we merely say that with the number of outlets dramatically increased there would be an increasing likelihood that video works would fall into the wrong hands.

We are firmly of the opinion that the material which is the subject of this appeal is not suitable for distribution other than in a sex shop. We have considered each video individually but in none of them do we find any grounds to change the classification. The Board has the onerous task of ensuring that material of this kind does not fall in the hands of children or the vulnerable and the fact that a person may not order it by mail in this country and must purchase it in person goes some way to enable the Board to discharge its duty.

By a unanimous decision of 7-0, we dismiss this appeal.……

John Wood

15 July 2005