Neutral Citation Number: [2019] EWCA Civ 677

Case No: A3/2018/1028

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
The Hon Mr Justice Arnold
[2018] EWHC 298 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 April 2019

Before:

LORD JUSTICE IRWIN
LORD JUSTICE NEWEY
and
LORD JUSTICE BAKER

- -

Between:

(1) SHAKIR ALI **(2) SHAHIDA ASLAM**	**Claimants**
- and -	
CHANNEL 5 BROADCASTING LIMITED	**Defendant**

- -

- -

Hugh Tomlinson QC, William Bennett QC and Felicity McMahon (instructed by **Hamlins LLP**) for the **Claimants**

Antony White QC and Tom Blackburn (instructed by **Lee & Thompson LLP**) for the **Defendant**

Hearing date: 4 December 2018

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Approved Judgment

Lord Justice Irwin (delivering the judgment of the Court):

Introduction

1. This case concerns a television documentary programme broadcast by the Defendant, one of a series concerned with the work of High Court Enforcement Agents ("HCEAs"), entitled "*Can't Pay? We'll Take It Away*". The Claimants are husband and wife. Following successful proceedings against them in the County Court, the Claimants were evicted from the house they had rented in Barking, Essex. Part of the programme portrayed that eviction. It included footage which the Claimants alleged (and the judge found) represented an intrusion into their private life, not justified by the public interest, and by legitimate exercise by the broadcasters of their rights of free expression. The Claimants were each awarded damages of £10,000.

2. The Claimants appeal their damages awards. The Defendant cross-appeals the finding of liability. For clarity, we will refer to them as Claimants and Defendant throughout.

The Facts

3. The history behind this case and the events of the day are closely analysed in the long and meticulous judgment of Arnold J. We have been able to watch the programme as it was broadcast by the Defendant, as well as watching some of the "rushes" filmed during preparation of the programme, and in addition short pieces of film made and posted on *You Tube* by the Claimants' former landlord. The primary facts are not in dispute between the parties. We shall attempt to summarize matters, although the detail of the events, of what was recorded and broadcast, and of the presentation of the material, is important.

4. The Claimants entered into an assured shorthold tenancy of the premises on 1 December 2012. The landlord was a Mr Rashid Ahmed. His son Omar Ahmed clearly managed his father's affairs to some degree. Both were present at the eviction and Omar played a prominent part in the broadcast events. The Claimants fell behind with their rent, and there came a time when they stopped paying altogether. The agreed rent was £1,325 payable monthly in advance, with interest due on late payment. There was a covenant against sub-letting the property. The First Claimant had been in work but lost his employment, and in March 2015 he injured his left foot, which was in a surgical boot at the time of the filming. He has other significant health problems.

5. After the initial period of six months, the Claimants' tenancy became a periodic tenancy, continuing on a monthly basis, but on the terms set out in the original tenancy agreement. At some point the Claimants were eligible for and received housing benefit. At least from November 2014, this was paid directly to the landlord, Rashid Ahmed. However, as at June 2015 the housing benefit was said to be only £744.20 per month, leaving a monthly shortfall of £580.80. Other evidence suggested slightly different, but not materially different, figures.

6. The evidence was that the First Claimant stopped paying the full amount of rent in January 2014, although he did not tell his wife about that until the end of that year.

7. On 13 June 2014, Rashid Ahmed served notices for possession under section 21(4)(a) of the Housing Act 1988, and commenced proceedings for possession in September. In their defence, the Claimants admitted service of the notices, but claimed they had paid a deposit of £1,325 in cash without getting a receipt. In addition to claiming breach, and arrears of rent, Mr Rashid Ahmed claimed that the Claimants had unlawfully sublet part of the premises. The Claimants have two young children, aged 11 and 10 at the time possession proceedings were issued.

8. Preliminary hearings took place in September to November 2014, and the possession hearing took place on 16 March 2015. The District Judge found for Mr Ahmed, including finding against the claim that a deposit had been paid: that was a false claim. The Order was that the Claimants should give possession on or before 30 March 2015, plus an order for costs. The Order gave the Claimants notice that Mr Ahmed might "ask the Court, without a further hearing, to authorise a bailiff or High Court Enforcement Officer to evict you".

9. There was no order for the payment of rent arrears: such an order had not been sought. Different figures for arrears were in evidence, ranging from £936.10 to £8,347.71, plus court and legal fees.

10. The Claimants approached the local authority on 24 March 2015 for help with their impending homelessness. However, they were, in short, informed that if they left before they were evicted, they would be treated as being voluntarily homeless. As a consequence, the council would avoid any legal responsibility to re-house them, under the Housing Act 1996. The Claimants accepted this, and did not vacate by 30 March. They informed Omar Ahmed of this by phone on 30 March. Mr Ahmed informed the First Claimant he would apply for an order for bailiffs to evict the Claimants.

11. Mr Ahmed had two routes open to him to enforce the Order for possession. In this instance he applied to have the case transferred to the High Court. Once the matter was transferred, it was governed by CPR 83.13(4), meaning that a Writ of Possession might be granted without notice. A Writ of Possession was issued on 1 April 2015. The Claimants were given no notice of the intention to evict on the following day, 2 April 2015.

12. The Order directed a named High Court Enforcement Officer ("HCEO") to enter the property and obtain possession for the landlord. The HCEO, a Ms Sandbrook, was employed by Direct Collection Bailiffs Ltd ("DCBL"). They also employed an HCEA, Paul Bohill, and the eviction was delegated to him. He is an experienced former police officer, who has been engaged in court enforcement for very many years. On the day, he was assisted by an HCEA in training, Phil Short. Mr Bohill had for some time been filmed in the course of his work as part of the "*Can't Pay? We'll Take It Away*" television series.

13. Malcolm Brinkworth is a very experienced television producer, the founder and director of Brinkworth Films Limited ("BFL"). In 2013 Mr Brinkworth decided to make a television series about debt, the courts' enforcement systems and the work of HCEOs/HCEAs. He felt the public were ignorant of the processes, and in particular ignorant of the possibilities open to landlords to achieve speedy and effective evictions, through transfer of cases to the High Court. Mr Brinkworth discussed the idea with Simon Raikes of Channel 5, and it was agreed they should proceed. The

plan was to work with a company employing HCEAs. The co-operation with DCBL (Mr Bohill's employers) took place during the filming of the second series of the programme.

14. The judge described the *modus operandi* of the programme as follows:

> "59. Mr Brinkworth also wanted to show the situations faced by HCEAs in their daily work, interacting with creditors and debtors, and thereby illustrate the consequences of growing levels of indebtedness.
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> 60. Mr Brinkworth pitched the idea to Mr Raikes, who agreed to commission the series. Mr Raikes intended that the series would reveal as never before the process of enforcement, and the consequences of debt for all concerned. He was particularly keen that BFL should try and get interviews with both creditors and debtors. He agreed with Mr Brinkworth's intention to give context to each segment by including relevant statistics. Thus each story would serve as a real life example of a much wider problem, giving it immediacy in the minds of viewers. Mr Raikes hoped that the programme would attract a large audience and trigger a nationwide discussion of the issue. He therefore believed that broadcasting the series would be of significant public interest.
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> 61. In order to make the series, BFL needed to follow the activities of a company employing HCEAs. Originally BFL worked with High Court Solutions, but from the second series BFL worked with DCBL. BFL operated two or three film crews for four-day blocks of filming in various locations. Each crew followed a pair of DCBL HCEAs attempting to enforce around three to five writs a day. The crews were embedded with the HCEAs, and would usually only be notified by DCBL the day before each enforcement of the relevant locations. BFL usually received a copy of the writ, but no other information, in advance.
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> 62. Mr Brinkworth did not attend any of the filming. Ms Crook only attended occasionally, but had overall control on a day-to-day basis.
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> 63. Each programme consisted of four stories i.e. four enforcement actions. When making series 4, BFL attended the execution of 720 writs of possession or control, of which only 120 were broadcast. Series 3 consisted of fewer programmes, but the ratio was about the same.
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> 64. Once filming ended each day, the cameraman (Mr Rea in the case of the Programme) would provide the rushes to Ms Crook and prepare a story synopsis for each enforcement. After that, each story would be reviewed, including by Ms Crook, to

> see if it should be included in the series. A rough-cut of the programme would be assembled by the editing team, and sent to BFL's in-house lawyer Jan Tomalin for review. Mr Brinkworth would view the rough-cut and consider Ms Tomalin's advice. After any changes requested by Mr Brinkworth had been made, a second rough-cut would be sent to Mr Raikes and Channel 5's Director of Content Legal Advice, Stephen Collins, for their comments. After any changes requested by them had been made, a fine-cut would be prepared and then reviewed by Mr Brinkworth, Ms Tomalin and Mr Raikes.
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> 65. Mr Brinkworth's and Mr Raikes' aim was to produce programmes that were balanced and fair, and complied with legal and regulatory requirements, and both believed that they had done so in the case of the Programme."

15. Series 1 consisted of five programmes first broadcast between February and April 2014. Series 2 consisted of 10 programmes first broadcast between September and November 2014, meaning that by then Mr Bohill had acquired a degree of experience of being filmed and broadcast, and a degree of public recognition.

16. The programme which included this eviction was first broadcast on 4 August 2015, as part of Channel 5's "*Britain on Benefits*" season, and was then re-broadcast as episode 12 of Series 3. In all, this programme has been broadcast on Channel 5's main channel, and on subsidiary channels (My5, 5STAR and 5 Spike) a total of 36 times, with total viewers numbered 9.42m, in addition to 230,000 viewers on-line.

17. On the day in question filming took place over about one and a half hours. The film crew greeted Omar Ahmed outside the property. Mr Bohill had earlier commented to his assistant Mr Short on the tension between the landlord and the tenants, anticipating "some sparks". The film contained that conversation, and then discussion with the landlord, wherein he voiced his complaints about the tenants. Following Bohill to the door the camera recorded him opening the door and entering. He then opened an internal downstairs door to reveal:

> "74. … Mr Ali came to the door of the room dressed in his bedclothes (the upper half of which consisted of a T-shirt or vest). It can be seen that he appears to be drowsy and confused. Mr Bohill told Mr Ali "We're High Court Enforcement Officers. We have an order to repossess this property". Mr Bohill said nothing about the presence of the film crew just behind him. Mr Ali asked Mr Bohill a couple of times to give him a second and then said "Let me put my shirt on". Mr Bohill agreed and told him to take his time. Mr Ali then shut the door."

18. As Mr Ali got dressed, the filming recorded Mr Bohill's further discussion with Mr Ahmed, followed by Mr Short ascending the stairs as Mr Bohill advised him "Don't start World War III".

19. When Mr Ali emerged after dressing, he asked why the film crew were recording. Bohill replied "Because we are". He then explained they were executing a warrant for possession, and indicated that Mr Ali and his family had an hour to gather their possessions and leave. There was never an attempt to gain the Claimants' consent to filming. There was further conversation between Bohill and Omar Ahmed, in which Ahmed rehearsed his complaints about the Claimants.

20. At 8:43/4, in further conversation, Mr Ali said his wife was coming home, and that his wife had said not to record (meaning film) the events. Footage then showed further recital of his grievance by Mr Ahmed and further comment sympathetic to the landlord from Mr Bohill. At around 8:49 an altercation occurred between Ali and the Ahmeds. Mr Omar Ahmed filmed Mr Ali on his mobile phone at the same time as saying:

> "Liars! This is Shakir Qureshi, main spokesman in the UK for Muslim League (N) getting evicted today by the High Court. All the lies on the Quran. He lies on the holy Quran that he paid a deposit and the next day he falls down and breaks his leg. No shame on this man, no shame. I had to pay so much money to get him out via High Court and now he can't even face the camera, he's that much ashamed."

21. After he stopped filming Mr Ali, Omar Ahmed rehearsed his complaints again to the film crew.

22. At 08:50 Mrs Aslam returned. Omar Ahmed asked for the flat key back. There then ensued an argument between Mrs Aslam and Omar Ahmed, in the course of which each accused the other of lying. Part of these exchanges was in Urdu. Bohill spoke to Omar Ahmed and said:

> "Just say whatever you like. You're okay. You're okay. I won't be stopping you.
>
> …
>
> No, no, say whatever you like, just give it some wellie, you know it makes good television."

This dialogue was not included in the broadcast.

23. Bohill then asked Omar Ahmed about Mr Ali's political connections, and discussed the number of beds in the property, a significant point because of the accusation of sub-letting. The film crew re-entered the house and the reporter Mr Rea asked the Claimants how things had got to this point. The Claimants explained that they had not expected such swift action, that they had not responded to the landlord's verbal abuse in the conversation just ended, that the debt arose because of the Claimants' circumstances, in particular Mr Ali's ill health and loss of income. They were trying to do "whatever the law is asking". They would have to try and "figure out" what to do next. Mr Ali asked the crew to leave the room. At that point, Omar Ahmed remarked:

> "He's already got another house to go to, so he doesn't need it, he's already renting another house … they keep shutting the door because they're up to something in there, that they want to put their possessions away or their thousands of money that they've probably collected from all the sub-tenants … And he's supposed to be a main UK spokesman on Muslim League N. Isn't that right Mr Shakir Qureshi?"

24. In response to that, Bohill remarked:

> "So he's the UK representative of that political party. So he should actually be setting an example which in these circumstances doesn't appear to be the case".

Omar Ahmed agreed.

25. Soon after, two police officers, PCs Stowers and Smith, arrived. They were asked for their consent to be filmed. Smith initially said he did not want to be filmed and Mr Rea offered to "blur" him. Bohill explained to the police officers what they were doing. Stowers asked if the tenants could be given more time but Short said they could not, because the HCEAs had other jobs waiting. Mr Short explained that the programme would be shown in July and would be "interesting" because there was "a bit of conflict between these two".

26. There were further exchanges with the police officers, Bohill and passers-by. Bohill again made remarks sympathetic to the landlord.

27. At 9:10, police officers were filmed telling the Claimants they had five minutes to leave. The Claimants were then filmed through the open doorway, packing, including packing a "large box of medication". Just after, Mrs Aslam asked the crew to stop filming, but they carried on. It was explained that the Claimants' children had gone to school. There was a further request from Mrs Aslam to stop filming, or to "blur over face okay". Mr Rea declined. Mrs Aslam shut the bedroom door.

28. The police officers then both agreed to be filmed, at 9:18. Rashid Ahmed was asked about his feelings and explained he was happy to get his "house back".

29. The judgment sets out further exchanges as matters proceeded. Bohill expressed to the Ahmeds that their participation "can make good television … telling the other side of the story". At 9:28 a member of the crew emerged and said the Claimants were coming out, and Mr Ali "does want to speak to camera". The officers helped the Claimants with baggage. There was further conversation to the effect that there were "two sides to every story" and "you [the Claimants] can put your side of the story to them".

30. There was then an interview with Mr Ali, which the judge summarised as follows:

> "106. … Mr Ali: denied subletting the Property; accused Omar Ahmed of lying; said that he got into rent arrears of £4-5000 because he was on a low income and his circumstances had got worse due to him being a heart patient; that, after the court

> order, he had been told he would be given two to four weeks for the bailiffs and it was shocking to be given only one hour to leave; that he had no other properties; and that he had sworn on the Quran that he had paid a deposit, but the landlord and the agents had not sworn on the Quran. Towards the end of this, Omar Ahmed can be heard interjecting."

31. Soon after that, Mr Ali again asked the crew to stop filming. The crew did not do so. Ali was followed into the downstairs bedroom. In response to questioning, Mr Ali said they would now be going to the housing department for help. A friend of the Claimants arrived to help them. At 9:40 the programme showed another argument between the parties. At 9:42 Mr Ali came out of the property. The ensuing exchange was in the television broadcast and was filmed by Mr Ahmed. Mr Ali complained again that he had not been given "any time" and that the Ahmeds had abused him, abused his wife and "abused my political life as well". There was a continuing wrangle, set out by the judge, and exchanges between Ali and Bohill about the amount of outstanding rent. There was no issue that there was significant rent unpaid.

32. Mrs Aslam emerged and there was a short further confrontation with Omar Ahmed. There was insufficient room in the friend's car for the Claimants and their baggage. PC Stowers offered to drive Mrs Aslam to the housing office. There was then broadcast an exchange between Bohill and PC Smith, in which Bohill described the episode as "terrific television" and said "but it's a genuine case though", meaning the money was owed. It would never be paid. Mr Bohill added "what we need is a bit of fisticuffs really". In the background was a further argument between Mr Ali and Rashid Ahmed, with Omar Ahmed filming. Mr Bohill intervened to stop that. The parties then left. Afterwards, the HCEAs were filmed in their van, commenting that the episode was "quite a classic" and making comments favourable to the landlord.

The Judge's Findings

33. It was common ground before the court below that the foundation for any such claim as this must be a reasonable expectation of privacy in respect of the information in question, so that the Claimant's rights under Article 8 of the European Convention on Human Rights were engaged: see *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457. This is an objective test and the formulation of Lord Hope in *Campbell* was quoted by the judge as follows:

> "The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the Claimant and faced with the same publicity."

34. As the judge noted, the claim was of course confined to the particulars pleaded by the Claimants in paragraphs 11.4 to 11.14 of the Particulars of Claim, summarised by the judge (paragraph 143) as consisting of the images of the Claimants, of the property and of the details of what took place during the eviction. The judge noted that no complaint was made of broadcasting the fact of the eviction. Some complaints which were made of matters outside the pleaded case could not be received.

35. Although the complaints of the Appellants and Cross-Appellants are specific, in such a case as this the issues and findings interlock. The judge's conclusions rest to a considerable degree on his overall assessment of the case.

36. The judge assessed the material under various heads, beginning with "the sanctity of the home". He concluded firstly that the property concerned remained the Claimant's home until the writ was executed at 9:39 and for the few minutes thereafter (until 9:45), given that their presence in the property for that short period "was tolerated": see paragraphs 144/145. The judge noted the point of law established in *McDonald v McDonald* [2016] UKSC 28, [2017] AC 273, that where a landlord is seeking an order for possession against a private sector tenant, Article 8 does not require the court to consider the proportionality of such an order. But he rejected the Defendant's submission that this was in any way relevant to the present case.

37. In paragraphs 51/54 of his judgment, Arnold J set out the relevant professional standards for HCEOs and HCEAs and noted Mr Bohill's acceptance in the light of those standards that it would be wrong and in breach of confidence for him to describe the contents or events inside a home. Those matters went to underpin the reasonable expectation of privacy. The judge considered that:

> "Channel 5's main answer to this point is to rely upon the open justice principle."

He considered that principle later in his judgment (paragraph 147).

38. The Claimants contended that the programme "showed them at their lowest ebb, being evicted without prior notice, in a state of shock and very distressed", causing a loss of dignity, a point the judge noted to be relevant to Lord Hoffmann's statement in *Campbell* at paragraph 51, that a claim for misuse of private information bears on "human autonomy and dignity". The judge noted that "Channel 5 did not dispute that, absent other factors considered below, the programme would have caused the Claimants to suffer some loss of dignity": paragraph 148. The judge went on to reject the Claimants' submission that the fact Mr Ali was wearing bedclothes during some of the filming was relevant, since all that could be seen was that he was wearing a "t-shirt or vest" (paragraph 149).

39. Applying the dicta of Lord Phillips of Worth Matravers MR in *Douglas v Hello Ltd (No. 3)* [2005] EWCA Civ 595 [2006] QB 125, to the effect that photographic images could be "particularly intrusive", the judge accepted that this was relevant to the present case (paragraphs 150/151).

40. The judge considered the fact that a proportion of the events complained of took place not in the home but in the street outside the home. The Defendant contended the Claimants had no reasonable expectation of privacy in respect of events taking place in a public street. Relying upon the dictum of Lord Dyson in *Weller v Associated Newspapers Ltd* [2015] EWCA Civ 1176, [2016] 1 WLR 1541, to the effect that "a person's privacy …. may be infringed even in relation to things done in a public street", the judge rejected the Defendant's broad submission, indicating that "a more fact-sensitive assessment is called for": paragraph 158.

41. The judge focussed particularly on the principle of open justice and its effect on the Claimants' reasonable expectation of privacy, indicating that the principle was "a key plank of Channel 5's case" (paragraphs 159-162). It was common ground that the Order for possession was made at a hearing in open court with the consequence that the "principle of open justice is inextricably linked to the freedom of the media to report on court proceedings", per Lord Reed in *A v British Broadcasting Corporation* [2014] UKSC 588, [2015] AC 588 at paragraph 26. The judge noted that the Writ of Possession here was not made after any hearing, or in public, but Channel 5 relied on the rule stated by Warby J in *PJS v News Group Newspapers Ltd* [2016] EWHC 2770 (QB), namely that the fact a court deals with an application without a hearing does not preclude the giving of a public judgment, a proposition the judge accepted (paragraph 160). The judge noted that the Claimants did not complain of the broadcasting of the fact of eviction. Their contention was rather that that factor did not justify "the broadcasting of the information in issue in these proceedings, which went well beyond those bare facts and included" filming in the home, filming whilst distressed, and being taunted by the landlords. The judge agreed with that proposition, and further agreed with the Claimants that "the impact of the programme on the children cannot be justified by reference to the open justice principle" (paragraph 163). The judge further rejected the contention of the Defendant that the filming represented "a foreseeable consequence of [the Claimants'] failure to comply with the Order for possession": paragraph 163.

42. As to Mr Ali's political engagement, Channel 5's contention at law was that his political position meant that he was "a public figure with weakened Article 8 rights and no right under Article 8 to be protected against disclosure of information of this kind" and in support of that submission, Channel 5 relied on various dicta from *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB) and *Yeo v Times Newspapers Ltd* [2015] EWHC 3375 (QB). The judge rejected these submissions. He found on the facts that:

> "Mr Ali's political activity was essentially, as he put it, "a hobby". He had no official position. Furthermore there was no reference at all to Mr Ali's political activities in the programme. The Claimants were portrayed as ordinary private people, and the focus of the Programme was the drama of the conflict between landlord and tenants. It might perhaps have been different if the programme had been about Mr Ali's fitness for a public position as a consequence of DJ Mullis having preferred the evidence of Rashid Ahmed's witnesses to Mr Ali's evidence about the deposit, but it was not." (paragraph 164)

43. The judge went on to note that although Mrs Aslam featured prominently in the programme, there was no suggestion that she had engaged in political activity or was a public figure: paragraph 165. The judge did accept that "if and insofar as the damage of which the Claimant's complain is damage to Mr Ali's political reputation, then Article 8 does not protect Mr Ali's political, as opposed to private, life": paragraph 166.

44. The judge expressed his overall assessment of the Claimants' expectation of privacy and the effect of the broadcast in the following terms:

> "169. In my judgment the principal factors relied upon by the Claimants do lead to the conclusion that they had a reasonable expectation of privacy in respect of the information in question. The Programme was largely filmed in their home; it showed them being evicted without prior warning; it showed them in a state of shock and distress; it showed them being taunted by Omar Ahmed; and it was foreseeable that the broadcasting of the Programme would have an adverse effect on their children. I do not accept that the open justice principle means that the Claimants' Article 8 rights were not engaged. Open justice means that Channel 5 was entitled to report the facts that the courts had made the Order for Possession and issued the Writ of Possession and in consequence the Claimants had been lawfully evicted; but what happened in their home on 2 April 2015 was not part of the proceedings. Nor do I consider that the broadcasting of the information was an inevitable consequence of the Claimants' failure to comply with the Order for Possession. Nor do I accept that Mr Ali's Article 8 rights were significantly weakened by his political activity. Mrs Aslam had not engaged in political activity at all. I accept that the Claimants, and their children, had already suffered damage to their privacy as a result of the Ahmeds' postings on social media, but I do not accept that this meant that the broadcasting of Programme either could not or did not inflict further damage given the substantial scale and duration of the broadcasting."

45. The judge also concluded that the filming taking place in the street could not be meaningfully divorced from that which was filmed inside the property as they formed a "single sequence of events". Hence the judge concluded that the Claimants did indeed have a "reasonable expectation of privacy" in respect of those events.

46. The judge went on to consider whether the Claimants consented to the broadcast. The Defendant contended that Mr Ali had indeed consented to the broadcasting of the programme, or at least to much of the key information in the programme, by agreeing to be interviewed at 9:31am. It was said that Mrs Aslam "did not dissociate herself" from this. The Defendant had contended that this constituted a waiver by the Claimants of their right to privacy, treating it as an aspect of issue of reasonable expectation of privacy, but the judge addressed the issue separately. He began by considering what had not happened. When Mr Bohill entered the property and he explained to Mr Ali who he and his colleague Mr Shore were, he did not explain who the film crew were or why they were present. At no point did anyone explain to the Claimants this was a programme for Channel 5, although that had been explained to the Ahmeds and to the police officers. The film crew did not follow the instructions given in BFL's "production bible", which was in evidence in the case. Mr Rae had made an attempt to do so at 8:29, but that was cut across by Mr Bohill. Nor were the Claimants informed that the two HCEAs "were effectively filming for the programme with their body cameras": paragraph 172.

47. The judge emphasised that when Mr Bohill and the film crew arrived they woke Mr Ali. As the judge put it:

> "173. … When he came to the door of his bedroom, he was clearly drowsy and confused. In my view he was not in a fit state to give informed consent then. He was in a fit state to do so by 9:31, but I do not consider that, by giving an interview then, he can be taken retrospectively to have given his consent to the broadcasting of material filmed when he was not in a position to consent."

48. The judge noted that Mr Ali had first asked for an explanation as to the presence of the film crew at 8:29, objected to filming at 8:43 and 9:16 and between those times had requested the crew to leave the bedroom at 9:00am. Mr Ali had shut the bedroom door several times trying to exclude the film crew. The judge further observed:

> "174. … Reliance was placed by counsel for Channel 5 upon the fact that at 9:36 Mr Ali objected to Omar Ahmed filming and said "you are filming this is enough" ([107]). Given that Mr Ali had already objected to being filmed twice without avail, however, I consider that the sense he was conveying was that the filming by the crew was bad enough without Omar Ahmed filming as well."

49. In relation to the consent to be interviewed at 9:31, the judge noted from his witness statement that by then Mr Ali "was aware … that there was a chance that whether I liked it or not, the eviction was going to be on television". He attempted to resile from that evidence in the witness box but it was confirmed by the film rushes, and the judge accepted it: paragraph 176. The judge concluded that by then Mr Ali understood he was choosing the lesser of two evils: not to agree to be interviewed and take the risk that whatever programme was being filmed would be broadcast without his side of the story being included, or to agree to be interviewed, and hope that his side of the story would be included:

> "177. … Moreover, he was faced with that choice knowing Omar Ahmed had made serious allegations against him. Rationally, he chose the second option. In my judgment that did not amount to true consent. In effect, it amounted to an agreement to participate under protest. Moreover it was not fully informed agreement, given that he was not told anything about the programme that was being filmed or who would broadcast it or about the body cameras"

50. There was no doubt that Mr Ali withdrew any consent, during his telephone call to the Defendant, prior to the first broadcast.

51. As the judge noted, Mrs Aslam independently objected to being filmed at 9:14. She never consented to being interviewed.

52. Having concluded that the Claimant's privacy rights were engaged, the judge proceeded to consider the balance between those rights and the Defendant's right to freedom of expression under Article 10 of the Convention. He adopted the approach:

> "180. … stated by Lord Steyn in *Re S (A Child)* [2004] UKHL 47; [2005] 1 AC 539 at [17]:
>
> "First, neither article (8 or 10) has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."'

53. In paragraphs 181 to 183, the judge reminded himself of the authority establishing the importance of freedom of expression within the Convention by reference to *Axel Springer v Germany* (2012) 32 BHRC 493, [2012] EMLR 15 where the court emphasised that it is not "for the court … to substitute its own views for those of the press as to what techniques should be adopted". The judge further reminded himself of the remark of Lord Hoffmann in *Campbell* at paragraph 59: "judges are not newspaper editors". He quoted Lord Hope's remark in paragraph 25 of *In Re British Broadcasting Corporation* [2009] UKHL 34, [2010] 1 AC 145 to the effect that judges: "are not broadcasting editors either". The judge quoted the remark in the judgment of Baroness Hale and Lord Toulson in *O v Rhodes* [2015] UKSC 32, [2016] AC 219 at paragraph 78:

> "A right to convey information to the public carries with it a right to choose the language in which it is expressed in order to convey the information most effectively … "

54. As to the question of the identification of the Claimants, the judge reminded himself of the well-known passage from the judgment of Lord Rodger of Earlsferry in *In Re Guardian News and Media* [2010] UKSC 1, [2010] 2 AC 697 at paragraph 63 emphasising the importance to the press and other media of naming individuals to focus the attention of the reader or watcher.

55. Having reminded himself of the relevant authorities and principles, the judge proceeded to make his assessment as to the public interest.

56. The judge began by observing that, although the question of public interest must be objectively assessed by the court, he would accord some weight to the genuinely held views of the programme-maker and broadcaster, that the programme was in the public interest (paragraph 184). He recorded the submission on behalf of the Defendant to the effect that the programme addressed a number of matters of real public interest: levels of personal debt; rent arrears of tenants; dependence of tenants on benefits; the effect of the enforcement of Writs of Possession by HCEAs; and the consequences for landlords and tenants. It was contended that the Defendant was justified in illustrating those issues by reference to real people and real situations (paragraph 185). The Claimants accepted there was a public interest in broadcasting information concerning

the work of HCEAs and the process of eviction, but asserted that the public interest survived only where the Article 8 rights of those being evicted were respected, and it was further submitted that there was "no nexus" between the public interest arising and the information in the programme of which the Claimants complained. The principal focus of the programme, said the Claimants, was the drama of the conflict between Omar Ahmed and the Claimants (paragraph 186).

57. Before addressing the more general questions, the judge recorded his conclusions as to the behaviour of Mr Bohill. For reasons he set out in paragraphs 187-194, the judge concluded, principally on the basis of footage contained in the rushes, that Mr Bohill had not been behaving so as to "try and avoid any conflict and confrontation at all costs", which is how he had put the matter in evidence. On the contrary, Mr Bohill had been encouraging Omar Ahmed "to taunt the Claimants because it would make 'good television'" (paragraph 190). That should have been apparent to the film crew and to the editorial team at BFL.

58. Overall, the judge reached the following conclusion on the public interest:

> "195. … I accept that the Programme did contribute to a debate of general interest, but I consider that the inclusion of the Claimants' private information in the Programme went beyond what was justified for that purpose. As discussed above, the programme made no reference to Mr Ali's political activities. It was concerned with the Claimants' position as private individuals. The focus of the Programme was not upon the matters of public interest, but upon the drama of the conflict between Omar Ahmed and the Claimants. Moreover, that conflict had been encouraged by Mr Bohill to make "good television" …

59. He continued:

> 196. … [A] particular feature of Mr Brinkworth's public interest justification was the desire to show how landlords could expedite enforcement by moving the process from the County Court to the High Court, and the effect of this. I agree that this is a matter of public interest. However, the Programme contained no information about the legal processes involved beyond the statements that the landlord had gone to the County Court eight months before and have now escalated the case to the High Court to get the tenants evicted …. The circumstances of the Claimants' eviction reveal what in my view is a matter of considerable public interest and concern, namely the fact that the Claimants were given no notice of the eviction and were taken wholly by surprise …. Yet this important aspect of the story is not mentioned in the Programme, although a very attentive viewer might deduce it."

60. In considering the fairness and accuracy of the programme, the judge began by addressing the complaint of the Defendant that certain matters had not been put to Mr Brinkworth in cross-examination. The complaint focussed initially on the separate episodes of Mr Bohill's behaviour. The judge ruled they had been properly put to Mr

Bohill and there was no need for the detail of such points to be put to Mr Brinkworth, since the latter was not present and could not answer as to the detail. Nor was it needful that Mr Brinkworth should be asked about BFL's knowledge of how Mr Bohill had behaved. He could not give evidence about what the film crew had seen, nor about what Ms Ferguson and Ms Crook had learned from watching the rushes, since Mr Brinkworth had not seen them. However, the judge did conclude that the omission from the programme of much of the footage showing the way Mr Bohill had behaved, and the contention that the omission demonstrated the programme was unfair or inaccurate, should have been put to Mr Brinkworth. He had overall editorial responsibility. Since the matter was not raised with him, that aspect of the claim could not be relied on to demonstrate that the programme was unfair and inaccurate (paragraph 202).

61. Three other matters were advanced by the Claimants as demonstrating a lack of fairness and accuracy. Firstly, it was said that the programme misrepresented Mrs Aslam as being angry with Omar Ahmed from the beginning, whereas in fact she was reacting to his taunt about "beds here, beds in the back". The judge rejected this, since it is not clear that she would have heard that speech. In any event the programme did show that Mrs Aslam was reacting to a "peremptory demand from Omar Ahmed in Urdu". Secondly, the Claimants submitted that the programme misrepresented the number of beds in the property and falsely gave credence thereby to the allegations the Claimants had been subletting. The judge rejected the contention that the programme was inaccurate or unfair in this way. Rather, the programme presented both sides' allegations and did not take sides as to "who was right" (paragraph 204). In any event, that should have been put to Mr Brinkworth.

62. The same applied to the allegation that the programme had given prominence to Omar Ahmed's allegation that Mr Ali had lied in court. The judge concluded that the programme made it reasonably clear that this was "an allegation by Omar Ahmed, not a fact" (paragraph 205). This, too, should have been put to Mr Brinkworth.

63. The judge accepted that the Defendant had editorial discretion and that, in so far as the Claimants' complaint concerned the tone of the programme, that lay within the editorial discretion. But he went on to say:

> "I do not accept that Channel 5's editorial discretion extends to its decision to include the private information of which the Claimants complain unless the inclusion of that information was justified as contributing to a debate of general interest."

64. The judge went on to consider the privacy code formulated by OFCOM, a matter to which the court was required to have regard pursuant to Section 12(4)(b) of the Human Rights Act 1988. For reasons he gave (paragraphs 207-209) he concluded that little assistance could be gained from the Code or the relevant adjudications cited.

65. The judge then gave his overall conclusions on liability as follows:

> "210. *The ultimate balancing test.* For the reasons given in paragraphs 169-170 above, I consider that the Claimants did have a reasonable expectation of privacy in respect of the information included in the Programme about which they

> complain. The justification relied upon by Channel 5 for interfering with the Claimants' Article 8 rights is that the Programme contributed to a debate of general interest. As I have explained, I accept that the Programme did contribute to a debate of general interest, but I consider the inclusion of the Claimants' private information went beyond what was justified for that purpose. The focus of the Programme was not upon the matters of public interest, but upon the drama of the conflict between Omar Ahmed and the Claimants, a conflict which had been encouraged by Mr Bohill to make "good television". Although I have not concluded that the Programme was materially unfair or inaccurate in its presentation of what happened, that does not assist Channel 5. The justification relied upon by the Claimants for restricting Channel 5's Article 10 rights is their right to respect for their private and family life and their home. Notwithstanding the importance of freedom of expression, I consider that the restriction is justified and proportionate in the circumstances of this case. Accordingly, in my judgment the balance comes down in favour of protecting the Claimants' Article 8 rights."

66. We address the question of damages later in this judgment.

The Cross-Appeal

67. In opening the cross-appeal for the Defendant, Mr White began with concessions. He does not challenge the finding that the Claimants had a reasonable expectation of privacy in the information complained of. Further, Mr White accepts the principle that the trial judge's conclusion in relation to the balancing exercise between the Claimants' privacy rights under Article 8 and the Defendant's Article 10 rights is to be treated as analogous to the exercise of the judicial discretion. As the matter was put in the judgment of the court in *Lord Browne v Associated Newspapers Ltd* [2008] QB 103 at paragraph 45:

> "45. The approach which should be adopted on an appeal of this kind is not, we think, in dispute. Although the exercise upon which the judge was engaged was not the exercise of a discretion it was similar in that it involved carrying out a balancing exercise upon which different judges could properly reach different conclusions. In these circumstances it is now well settled that an appellate court should not interfere unless the judge has erred in principle or reached a conclusion which was plainly wrong or, put another way, was outside the ambit of conclusions which a judge could reasonably reach."

68. However, the Defendant says that in carrying out the balancing exercise, the judge did go beyond what was justified and made an error of law. The Grounds of Appeal are expressed discursively. At the core of Ground 1 is the proposition that in concluding the "focus" of the programme was not on the matters of public interest but on the drama of the conflict between Omar Ahmed and the Claimants, the judge went

beyond "the ambit of conclusions which the judge could reasonably reach" and erroneously substituted "his own views on editorial matters, intruding on the proper area for the exercise of editorial discretion". Mr White submitted that the judge fell into reliance on two fallacies. Firstly, that making a contribution to a debate of general interest might be determinative of how the balance should be struck between Articles 8 and 10. Although he conceded that this remains one of the criteria which the court must consider, the question could no longer be determinative: see *Weller v Associated Newspapers Ltd* paragraph 72. The second fallacy, said Mr White, was to conclude that a proper exercise of editorial discretion cannot permit an invasion of privacy. On the contrary, in striking the balance between privacy and public interest, considerable latitude had to be accorded to editorial discretion and here Mr White relied on the well-known dictum of Lord Hoffmann in *Campbell v MGN Ltd* at paragraphs 61 and 62:

> "61. That brings me to what seems to be the only point of principle which arises in this case. Where the main substance of the story is conceded to have been justified, should the newspaper be held liable whenever the judge considers that it was not necessary to have published some of the personal information? Or should the newspaper be allowed some margin of choice in the way it chooses to present the story?
>
> 62. In my opinion, it would be inconsistent with the approach which has been taken by the courts in a number of recent landmark cases for a newspaper to be held strictly liable for exceeding what a judge considers to have been necessary. The practical exigencies of journalism demand that some latitude must be given. Editorial decisions have to be made quickly and with less information than is available to a court which afterwards reviews the matter at leisure."

69. The Defendant relies on the principles laid down in *Axel Springer AG v Germany*, as conveniently digested in *Richard v The British Broadcasting Corporation* [2018] EWHC 1837 (Ch) at paragraphs 267-278. Although general public interest may not be a trump card, it is still of importance in reaching the correct balance. The judge was wrong, in his conclusion in paragraph 206, to rule out the capacity of editorial discretion in favour of the inclusion of private information unless "that information" was justified as contributing to a debate of general interest. That was too narrow an approach. If the matter is of general public interest overall, then editorial discretion must be accorded sufficient room to include private information in order to make the article or programme of interest to the public. As Mr White put it, it is in the public interest "to see what it all means".

70. The second discursive ground of cross-appeal related to what the Defendant describes as "three further inter-related errors". The Defendant criticises the judge for failing to take into account the unchallenged evidence from Mr Brinkworth, explaining why the conflict between Omar Ahmed and the Claimants was included in the programme. Mr Brinkworth had been accepted by the judge as a "straightforward witness", and Mr Brinkworth was the person with overall editorial responsibility. At paragraphs 13 and 17 of his witness statement, Mr Brinkworth emphasised how the "heated interactions"

here were a good example of how relations between a landlord and tenant can break down, how the landlord had lost faith and trust in the tenant because of his failure to pay the rent and because of the extensive "back and forth in the county courts"; and in any event the film had given both tenant and landlord the opportunity to state their case about the facts. In paragraph 17, Mr Brinkworth went on to emphasise that the programme was "important to show precisely how High Court Writs of Possession are enforced 'on the ground'" and that the programme informed the public, who had an interest in the work of the HCEAs as to "the nature of rent arrears and debt" and "the issues that non-payment bring".

71. The second specific error really shades into the overall complaint, since it consists of the complaint that the judge confined editorial discretion to tone.

72. Likewise, the third complaint is that the judge took "judicial control of the emphasis or prominence of a particular matter of public interest", and here Mr White was particularly critical of paragraph 196 of the judgement, summarised at paragraph 59 above, where the judge observed that the programme contained very little information about the relevant court processes.

73. The third particular Ground also feeds into the overall complaint. Under this Ground the Defendant complains that the judge introduced a "false dichotomy" in holding at paragraphs 195 and 210 of the judgment that the focus of the programme was not upon matters of public interest but on the drama of the conflict.

74. In our judgment, these complaints in truth converge, in a case where it is agreed there was a degree of legitimate public interest in the subject matter of the programme, into the proposition that the judge interfered too far with the legitimate exercise of editorial discretion in balancing the Article 8 and Article 10 rights. He took too narrow a view of what was in the public interest, effectively confining it to the High Court process. And, in particular, wrongly concluded in an itemised, or over-particular sense, that the publication of each specific piece of information in respect of which the Claimants had a legitimate expectation of privacy had to be justified as a matter of general public interest.

75. In reply, on behalf of the Claimants, Mr Tomlinson advanced three principles. Firstly, some public interest does not justify any interference with privacy. Secondly, editorial discretion does not justify invasion of privacy. And, thirdly that at the margin, creating a "better story" cannot justify an invasion of privacy.

76. The Claimants accept that presenting a story in a particular way could have a bearing on questions of public interest. But here Mr Tomlinson emphasised that the judge found all of the interferences with the Claimants' privacy to be unjustified. A fair reading of his conclusion in paragraph 195 was that he was reaching an overall conclusion in respect of the whole approach taken to the programme.

77. The specific complaint that the judge had paid no attention or no sufficient attention to the unchallenged evidence of Mr Brinkworth as to the inclusion of this material was contradicted by the judge's conclusions in paragraph 196, where he noted that the programme contained "no information about the legal processes involved". The supposed "false dichotomy" advanced under the third ground of cross-appeal did not exist. The conflict between the Claimants and the Ahmeds was not, and could not be,

a matter of general public interest. Here, too, there was no basis for the suggested failure to take into account the evidence of Mr Brinkworth. He had given no evidence as to the process of editing, which had lent to the programme the focus that it bore.

Analysis on Liability

78. The judicial dicta in *Campbell v MGN Ltd* are unanimous in their overall thrust. At paragraph 28, when considering "how the tension between privacy and freedom of expression should be resolved", Lord Nicholls recorded his approach as follows:

> "28. …On the one hand, publication of this information in the unusual circumstances of this case represents, at most, an intrusion into Miss Campbell's private life to a comparatively minor degree. On the other hand, non-publication of this information would have robbed a legitimate and sympathetic newspaper story of attendant detail which added colour and conviction. This information was published in order to demonstrate Miss Campbell's commitment to tackling her drug problem. The balance ought not to be held at a point which would preclude, in this case, a degree of journalistic latitude in respect of information published for this purpose."

79. We have already quoted part of the speech of Lord Hoffmann. However, in another passage he, too, emphasised the need for restraint on the part of judges addressing editorial discretion:

> "58. The reason why Mr Caldecott concedes that the *Mirror* was entitled to publish the fact of her drug dependency and the fact that she was seeking treatment is that she had specifically given publicity to the very question of whether she took drugs and had falsely said that she did not. I accept that this creates a sufficient public interest in the correction of the impression she had previously given.
>
> 59. The question is then whether the *Mirror* should have confined itself to these bare facts or whether it was entitled to reveal more of the circumstantial detail and print the photographs. If one applies the test of necessity or proportionality which I have suggested, this is a matter on which different people may have different views. That appears clearly enough from the judgments which have been delivered in this case. But judges are not newspaper editors. It may have been possible for the *Mirror* to satisfy the public interest in publication with a story which contained less detail and omitted the photographs. But the *Mirror* said that they wanted to show themselves sympathetic to Ms Campbell's efforts to overcome her dependency. For this purpose, some details about her frequency of attendance at NA meetings were needed. I agree with the observation of the Court of Appeal, at p 660, para 52, that it is harsh to criticise the editor for "painting a somewhat fuller picture in order to show her in a sympathetic light."'

80. Later in his speech, Lord Hoffmann addressed the question of photographic images and their impact for editorial purposes:

> "77. No doubt it would have been possible for the *Mirror* to have published the article without pictures. But that would in my opinion again be to ignore the realities of this kind of journalism as much as to expect precision of judgment about the amount of circumstantial detail to be included in the text. We value the freedom of the press but the press is a commercial enterprise and can flourish only by selling newspapers. From a journalistic point of view, photographs are an essential part of the story. The picture carried the message, more strongly than anything in the text alone, that the *Mirror's* story was true. So the decision to publish the pictures was in my opinion within the margin of editorial judgment and something for which appropriate latitude should be allowed."

81. Lord Hope emphasised the importance of editorial discretion as follows:

> "108. The freedom of the press to exercise its own judgment in the presentation of journalistic material was emphasised in a further passage in *Jersild's* case where the court said, at p 26, para 31:
>
> > "At the same time, the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In this context the court recalls that article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed."
>
> In *Fressoz v France* (2001) 31 EHRR 28, 60, para 54 the court said that in essence article 10 leaves it for journalists to decide whether or not it is necessary to reproduce material to ensure credibility, adding:
>
> > "It protects journalists' rights to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism."'

82. Baroness Hale made similar observations as to the proper approach in paragraphs 143 and 156, as did Lord Carswell in paragraphs 168-170.

83. The preponderance of authority from *Campbell v MGN* through to the considered and careful approach taken by Mann J in *Richards v BBC* is to the effect that editorial discretion cannot render lawful an interference with privacy which cannot logically or

rationally be justified by reference to the public interest served by publication. But that where there is a rational view by which public interest can justify publication, particularly giving full weight to editorial knowledge and discretion, then the court should be slow to interfere.

84. In our view it is clear that the issues underlying this programme were indeed of real public interest and extended well beyond the specifics of High Court process. Moreover, this part of this programme has to be seen in the context of the whole. Perhaps the strongest point of criticism from the judge on this aspect of the case was that there was no clear exposition of the difference made by the transfer from the County Court to the High Court, so that the writ was executed extremely rapidly and the Claimants had effectively no notice of the arrival of the HCEAs. Logically it would appear to be a necessary corollary of the judgment that such specific points about the legal system should be incorporated in each package of the series of programme concerned.

85. Much of the evidence of Mr Brinkworth was directed to the series overall, and it is clear that the programmes in the series were different: it could hardly be otherwise. As Mr Brinkworth said in paragraph 13 of his statement:

> "…Choosing which stories are considered is a careful process. In some instances there may be, for example, an issue of mental health which may make a story unsuitable. There may be others where there is no process to observe as the writ may have already been settled or set aside. Each story that is considered always tries to bring to light an aspect of debt, with context, and with the different circumstances of the debtor and creditor being taken into account. As stated above, we always try to put relevant statistics before each story to enable the viewer to see how the story that follows fits into a wider national perspective. The episode in question here, for example, with the various and sometimes heated interactions between Mr Ali, his wife and the landlord illustrated to me that this was a good example of how relations between a landlord and a tenant had broken down; how the landlord had lost faith and trust in the tenant because of his failure to pay the rent; how it had gone through extensive back and forth in the county courts' and that both Mr Ali as the tenant as well as the landlord had the opportunity to state their case about the facts of the matter."

86. We accept the factual conclusions of the judge concerning Mr Bohill in their entirety. We also accept his strictures as to how the evidence from and of Mr Bohill, and its impact upon the editorial process, should have been put to Mr Brinkworth. It seems clear that Mr Bohill had an eye to the impact on the "good television" quality of the film and may have encouraged Omar Ahmed accordingly. We also accept the judge's view as to the absence of true consent on the part of the Claimants. It must have been obvious to them that "the other side of the story" was emerging on the filmed footage and that unless something was said to give the Claimants' account, that would simply not be available to be broadcast. Hence the participation by the First Claimant in the

short interview was essentially enforced. And in any event, such "consent" could not be held to be retrospective in time. The Claimants were, of course, not at all well-known and here the judge was obviously right to discount the First Claimant's political role, such as it was, from consideration. The subject of the broadcast really did not bear on his political life, although that may be a relevant matter for quantum of damages.

87. Turning to the *Axel Springer* criteria, there is in our view no issue but that there is proper general public interest, not merely in the court processes surrounding debt, but the whole human story of debt, of benefits which are insufficient to meet rent, of eviction and the consequences on families. Further, it is hard to see how those matters of public interest could be illustrated in any documentary form without interfering with the privacy of those most affected. No doubt in some instances that could be achieved with the consent of those whose privacy is in question, but in this field as in others, can that be a sufficient answer? In any event, it seems to us clear that the public interest is broader than the detailed processes underpinning the work of the HCEAs.

88. In considering the method of obtaining the relevant information and its veracity, there is no question of a lack of good faith in this case. There was, of course, a selective editorial process. Subject to the moderate qualification as to the role of Mr Bohill, there is no real issue as to the veracity and accuracy of the information which was broadcast. The real complaint here is that it was not necessary to broadcast it.

89. As to the content, form and consequences of the publication, popular documentary television is an accepted form. Mr Brinkworth and those who were instrumental in the broadcast disavow any bias or skewed presentation. Clearly the narrative presented by the programme did contain the account of both sides to some degree. It was framed by the series of comments by Mr Bohill which, in their tone and content, favour the "narrative" of the landlord. However, common sense suggests that will normally be the view adopted by those enforcing execution. It was certainly left open to the viewers to reach their own conclusions as to which viewpoint, or combination of viewpoints, they accepted.

Conclusions on Liability

90. The aspect of the judgment on liability about which we have some reservations is the treatment of the public interest issues. It could certainly be argued that the judge's approach to the public interest issues arising in this case was too narrow. By emphasising the specific public interest in the process of eviction when carrying out the balancing exercise, it could be argued that he failed to place on the scales the other matters of public interest raised in the programme and, more broadly, in this series as a whole. It could also be argued that the judge made inadequate allowance for the exercise of editorial discretion, given the latitude afforded by case law to those who make television programmes of this kind.

91. Those are powerful arguments but, in the end, we have concluded that the cross-appeal on liability should fail for the following principal reasons.

92. First, we are satisfied that the judge was fully aware of the legal principles set out in the case law, to which he made detailed reference in the course of his judgment. In

particular, he was manifestly aware of, and paid due regard to, the crucial principle that, where there is a rational view by which the public interest can justify publication, a court must give full weight to editorial knowledge and discretion and be slow to interfere.

93. Secondly, although the judge unquestionably emphasised one particular aspect of the public interest, namely the process of eviction, we are satisfied that he was fully aware of the range of issues of public interest raised in the programme and in the series as a whole, as summarised in his analysis of the submissions advanced on behalf of the Defendant. We find that, when carrying out the balancing exercise, the judge did attach weight to the range of public interest issues which arose in this case. Although there are aspects of the judgment which, taken by themselves, might support the Defendant's contention that the approach taken was somewhat "atomised", we agree with Mr Tomlinson's submission on behalf of the Claimants that a fair reading of the judge's conclusion in paragraph 195 was that he was reaching an overall conclusion in respect of the whole approach taken to the programme.

94. Thirdly, we bear well in mind the importance of the principle that an appeal court should not intervene in such cases as this, unless the judge at first instance has gone beyond what the appellate court considers is a reasonable view of the evidence presented. We accept that the exercise of judgment in such circumstances is akin to the exercise of discretion. Here, the judgment contains a strikingly thorough and comprehensive analysis of the issues arising in the case. Where this Court is satisfied that a judge at first instance has taken into account all relevant matters, it is always slow to interfere with his or her assessment and conduct of the balancing exercise. Ultimately, whilst we recognise that other judges might have reached a different conclusion, we do not think it can be said that Arnold J was wrong to find in favour of the Claimants on the issue of liability.

The Appeal on Damages

95. We now turn to the appeal on damages.

96. Three grounds are advanced by the Claimants suggesting that the damages awards were too low. In Ground 1, the Claimants submit that the awards are:

> "clearly wrong because they are not capable of bearing a reasonable relationship with: (a) the scale and nature of publication; and (b) the distress caused to each of the Claimants by those publications."

As Mr Tomlinson makes clear in his written submissions, the "fundamental point" in the appeal is that the awards do not reflect the scale and nature of publication.

97. The second ground is that the judge was wrong to take into account the publication of the postings by the Ahmeds when setting the awards of damages for the publications by the Defendant. The third ground is that the judge wrongly failed to take into account the impact of the programme on the Claimants' children.

98. It is helpful to begin by summarising the evidence bearing on the quantum of damage. We have earlier set out in some detail the content of the programme. The judge

concluded that the two postings made by the Ahmeds were relevant. Each is a short clip of film. The first shot is inside the flat, with the First Claimant facing away from the camera as he is fully dressed. The second is a further short clip as the First Claimant emerges from the premises onto the pavement, showing the process of filming by the Defendant's film crew. The visual content of each of these clips is not remarkable, save perhaps that the first shows the interior of the flat to be somewhat disorderly. However, the main thrust of these clips is the running commentary by Omar Ahmed, identifying the First Claimant as the UK spokesman of his political party, but then repeatedly accusing him of being a liar, a conman, and having no shame. In each clip the First Claimant is described as swearing falsely on the Quran. In paragraph 20 above we have set out the dialogue from the 8:49 video.

99. There was evidence before the judge as to the circulation and the impact of these postings. It seems not to be in issue that the viewings of these postings were very much more restricted than the broadcast programme. The clips were posted on social media on 4 April 2015, and in cross-examination the First Claimant estimated that the viewings might be a few dozens or a few hundred. It does not appear this estimate was challenged.

100. However, there was direct evidence of the impact of these postings on the Claimants. This came in the form of a letter from Mrs Aslam to the Local Authority, but which had been composed with input from Mr Ali. It is helpful to quote the relevant text from that letter, as follows:

> "5. On top of that they made video clips and at the time of sudden high court order eviction, it was shocking for our family they recorded videos with abusive, DIRTY, disrespectful shouting commentary to defame my husband, my family his social and political status calling him different horrible names And displayed it on social media, circulated massively on Face book, whatsup and newspapers. THIS CAUSED HUGE DEPRESSION FOR MY HUSBAND AND ALL OF US we found it very difficult to come out of this situation AND WE WILL NOT BE ABLE TO GET OUT OF THIS. My husband is a hard working honest man and we believe that with his hard work very soon we will be able to return to normal Graceful life.
>
> Due to their unethical act my Husband's Social and political status disturbed internationally, His future Business plans stuck and stopped at the moment. We are very upset with this act of their WHEREAS you are thinking that we have been playing deliberately. NO we are not, we/my Husband has no money But earned Respect in society which due to this Situation created by some his old friends and same background people have destroyed only for a small amount of money and due to the Part of different political parties. KINDLY DON'T CONSIDER IT DELIBERATE HOMELESSNESS. They become our enemy."

101. The impact of the postings as compared with the impact of the broadcast of the programme was put to Mr Ali in evidence. It is fair to say that his statement is based in language suggesting drafting by a lawyer, rather than by the Claimant himself. He contrasted the 9.65 million viewings of the programme and added:

> "At the time the Facebook posting was printed out to be included in our disclosure it had been liked by 17 people and shared by 3 people. I think that this showed that the Facebook posting was not in fact looked at by many people. I admit that I was very upset by it but the upset caused to me by the broadcast of the programme was very much worse."

The statement went on to emphasise the volume of viewings of the programme, to make the point that the "Facebook posting was made by someone who clearly disliked us", that the programme was broadcast after he had requested that it should not be broadcast and that Channel 5 went on broadcasting the programme after the Clainants had complained of the harm to them and the children. Later in the witness statement, the First Claimant emphasised the number of people in "my community" who had seen the programme and the degree of embarrassment and stress it had caused.

102. When Mr Ali was cross-examined about the letter of complaint in relation to the video posting, he sought to qualify the suggestion that the videos had circulated "massively" within his community and explained that the newspaper reference was to a news story in a Pakistani newspaper, based on the Facebook postings and that the newspaper had circulated in London as well as in Pakistan. He explained that the postings were also viewed in Canada and Saudi Arabia, and in the course of one answer Mr Ali said:

> "Due to this eviction and these videos we did suffer, and this was our feeling, that we had been very much humiliated and we have let – let down. People started not believe me anymore, and that was – that was stressful, and this is what we wanted to elaborate here."

103. The judge noted that section 12(4)(a)(i) of the Human Rights Act 1998 required the court to have regard to the extent of information already available in public, and in that regard Channel 5 relied on the videos posted by the Ahmeds before the relevant broadcasts. Channel 5 relied upon Mrs Aslam's description of the effect of those videos in the letter of May 2015. The judge accepted Mr Ali's response in cross-examination, which was in substance that there was no comparison between the impact of a few hundred people watching postings on social media and 9.65m people watching a television programme: see paragraph 168.

The Judge's Approach

104. The judge reminded himself that the leading authority on the assessment of damages in privacy claims is the decision of Mann J in *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch), upheld by this Court at [2015] EWCA Civ 12391, [2017] QB 149. There was no submission that the Claimants could attribute any particular loss and damage to the breach of privacy claimed, other than distress. The judge rejected the submissions made by the Claimants that there should be aggravated damages. He rejected that argument based on the supposed unfairness and inaccuracy of the programme, since

he had not reached such a conclusion (paragraph 217). Neither was he persuaded that any of the alleged aggravating factors arising from the conduct of litigation were established (paragraph 218). In respect of the submission that aspects of the presentation of the case at trial, particularly in the cross-examination of Mr Ali, should aggravate the award, he concluded that "these are mildly aggravating factors" but declined to award a separate sum of damages under that head (paragraph 219). There is no appeal against the decision not to award aggravated damages. The matter thus turns on the measure of damages for distress.

105. It seems to us helpful to consider Grounds 2 and 3 before returning to the main ground bearing on the overall quantum.

106. We would reject Ground 2. It seems to us that the proposition advanced is misconceived. In the final paragraph of his judgment, the judge said:

> "220. Looking at the matter in the round, I consider that an appropriate sum of damages is £10,000 for each Claimant. I would have awarded a higher figure if it had not been for the postings by the Ahmeds."

107. In expressing himself in this way, the judge did not mean that he was reducing the appropriate amount of damages awarded for the breach of privacy which he found to arise from the programme. However, in our judgment he was bound to make an assessment of the distress caused by the programme by understanding the impact of the publicity and the distress caused by the publicity generated by the postings. Apart from anything else, he was surely required to do so by Section 12(4)(a)(i) of the Human Rights Act 1998. It must be obvious that the distress attributable to the programme was reduced because a number of people within the Claimants' community or network were already aware of the broad events from the postings. The relevant shame and distress was simply not attributable to the programme: people knew already. In our judgment, had the judge not taken that into account, the Defendant would have had legitimate complaint.

108. We would also reject the contention in Ground 3.

109. The judge did consider the potential impact on the Claimants' children, a point particularly relied on by the Claimants. The contention was that it was foreseeable: there would be an adverse effect on the children of the family, in particular through ridicule at school. This had transpired with the Claimants' daughter. It was exacerbated by the continued broadcasting of the programme after the first complaint to the Defendants. Channel 5's answer was twofold: firstly, that there would have been an adverse impact on the children in any event because of the postings of their videos by the Ahmeds, and secondly that the impact on the children was inevitable as a consequence of the "wrongful conduct that had caused the Claimants to be caught up in court proceedings". The judge rejected the second contention. The observations as to the risk that children may suffer prejudice and damage in cases such as *In re Trinity Mirror PLC* [2008] QB 770, or *Khuja v Times Newspapers Ltd* [2017] UKSC 49, [2017] 3 WLR 351, did not depend on any wrongful conduct by the claimants in those cases, but rather on the open justice principle (paragraphs 152-155).

110. We see no basis on which it can properly be said that the judge failed properly to consider the impact on the Claimants' children.

111. We turn to Ground 1. Here the stark point advanced is that the awards of £10,000 each simply do not represent an adequate response to the scale and nature of the publication. The figures have been set out more than once above: nearly 10 million views over a 20 month period. Mr Tomlinson does not submit that a simple "scale" can be applied to such damages awards, but does submit that the award "represents an award of £277 per Claimant in respect of each broadcast to a quarter of a million viewers". The judge had accepted that the Claimants sustained real distress from the broadcast and in particular that the Second Claimant had been particularly troubled. The judge should have made a higher award to the Second Claimant to reflect her greater level of upset, but did not do so.

112. The Claimants rely on two or three salient points drawn from the decision in *Gulati*. *Gulati* was concerned with phone hacking, and therefore the facts are very different from this case. As Mann J held in that case:

> "damages in a privacy case should compensate not merely for distress (or some similar emotion) but should also compensate (if appropriate) for the loss of privacy or autonomy as such arising out of the infringement by hacking (or other mechanisms) as such, which could include as some to compensate for damage to dignity or standing so far as that was meaningful in this context and was not already within the distress element". (Headnote 17)

113. Mann J also observed that:

> "the relevant caselaw did not bind the court to take either a wrapped-up approach, or a divided-up approach to the award of damages. It demonstrated that the court could, and should, take in appropriate to achieve the objective of compensating the Claimant properly and fairly for the wrong sustained. In some cases a global award would be appropriate to that end; in others a more divided-up approach would be appropriate." (Headnote 22)

114. Although "as a starting point each article should be treated separately in terms of an award of damages" the risk of double counting had to be avoided and:

> "the effect of the articles was likely to have been cumulative, so some later distress built on that already caused… the way of dealing with this was to make sure that any particular sums were adjusted appropriately and to make sure that the overall sum appeared to be proportionate and a proper reflection of the overall pattern of wrongdoing." (Headnote 24, paragraphs 156/7)

115. The Defendant emphasises that the judge correctly directed himself to the principles set down in *Gulati* and took them into account. No "wrong principle of law" has been

identified by the Claimants. The range of awards in *Gulati* in respect of individual publications, even those involving front page articles in the national press and on newspapers' websites, ranged from about £750 to £40,000. These awards, by comparison, cannot be categorised as "inordinately low".

116. Moreover, there is a real distinction between the awards for hacking and for any breach of privacy of this kind. Those responsible for hacking knew all along that what they were perpetrating was unlawful. In the instant case, the Defendant had taken careful steps to obtain expert legal advice on the propriety and legality of what they were doing, and there is no question of bad faith. It is submitted that should operate to reduce the award for distress, since the impact of deliberate illegality should be regarded as greater and more distressing.

117. Although, of course, the scale of publication is relevant, the Defendant submits that "there can be no linear or arithmetical relationship between the number of viewers and quantum". Such a principle is recognised in the analogous area of defamation: see *Cairns v Modi; KC v MGN Ltd* [2013] 1 WLR 1015 at paragraph 48, and see *Collins on Defamation*, paragraph 21.19.

118. We would reject the appeal on the quantum of damage based on Ground 1. It seems to us the judge was best placed to make the relevant assessment of impact. He had to allow for the distress already caused by the Facebook postings, and in particular caused and expressed by Mrs Aslam in her letter of May 2015. It was appropriate to make an award of damages in the round. Although clearly the subjective distress suffered by Mrs Aslam was greater than her husband, the impact of the content of the programme was much more on her husband than on Mrs Aslam: the content of the programme bore on him more directly. We accept that other judges might well have reached a higher figure in an overall assessment of damages. But in this area, too, it is important that an appeal court should be slow to interfere with an assessment of damage in such a case as this, where the measure of damage is necessarily general and cannot be calculated mathematically. The Defendant relies on the principle recently restated by the Privy Council in relation to an award of general damages in a personal injury claim in *Scott v The Attorney General and Another* [2017] 3 LRC 704. The Judicial Committee of the Privy Council there emphasised that an appeal court should be reticent before interfering with such an award.

119. A similar statement of the proper approach appears in the judgment in the Court of Appeal in *Gulati v MGN*, where Arden LJ said:

> "60. I turn to my conclusions. There is a threshold question, which I can take shortly, as to the conditions for interference by this Court in any award for general damages. If the judge makes a material error of law, this Court must intervene. If, however, the challenge is to the size of the award, and the judge has as here heard the evidence of witnesses in assessing the effect on the respondents of the misuse of their private information, this Court should not intervene unless the award is so high as to be perverse. The judge will have performed, and been better placed to perform, an assessment of all the relevant

> factors and it is not enough for this Court to conclude that it would have made some different award."

The same approach must be followed to interference where the complaint is that damages are too low.

120. For these reasons, we would reject the appeal in relation to the quantum of damages awarded.