

Complaint by Mr H about *Can't Pay? We'll Take It Away!*

Type of case	Fairness and Privacy
Outcome	Upheld
Service	5STAR
Date & time	7 July 2020, 14:00
Category	Privacy
Summary	Ofcom has upheld this complaint about unwarranted infringement of privacy in the programme as broadcast.

Case summary

Mr H's complaint concerned a repeat broadcast in 2020 of a programme that was first shown on Channel 5 in 2015. The programme included footage of Mr H speaking to High Court Enforcement Agents ("HCEAs") as they enforced a High Court judgment debt against the company of which he was a director. The footage included material captured both inside and outside his home. Mr H was named in the programme and his face was shown unobscured.

Ofcom found that Mr H had a legitimate expectation of privacy in relation to the footage of him included in the programme broadcast on 7 July 2020, and that his legitimate expectation of privacy was not outweighed by the broadcaster's right to freedom of expression and the public interest in the particular circumstances of this case. Therefore, we considered that Mr H's privacy was unwarrantably infringed in the 7 July 2020 broadcast.

Programme summary

On 7 July 2020, Channel 5 broadcast on its 5STAR channel an episode of *Can't Pay? We'll Take It Away!*, a series which follows HCEAs as they attempt to resolve debt disputes through negotiated settlements and asset seizures.

In this programme, which was first broadcast on Channel 5 in 2015, two HCEAs were shown tracking down Mr H for a debt of just over £2,000 owed by a company which sold novelty globes. The programme explained that the HCEAs were in Kent and that they were having trouble finding Mr H's address as he was linked to several addresses. One of the HCEAs had discovered that Mr H was trading

under a different company name to the one against which the debt was owed, and the HCEA was shown posing to be a potential customer and called Mr H on the phone in order to discover his address. Mr H's voice could be heard in the phone conversation.

The programme then explained that the HCEAs' office had discovered Mr H's address and the two HCEAs were shown arriving at a residential house. No house number or road sign was shown in the programme.

The HCEAs were then shown entering the house through an open front door before being met by Mr H. As the HCEAs were walking through Mr H's house, some personal and family possessions could be seen, for example framed photographs which had been blurred. Mr H was also shown talking to the HCEAs, explaining that the company had ceased to trade and that he disputed the debt. Mr H also revealed information about his personal circumstances, including that his wife had set up the company after they had *"temporarily separated"* in 2012, and that *"I lost my father, I lost my house. We [Mr H's family] then lived in temp rented accommodation"*. The HCEAs continued to move around Mr H's property to see if there was *"anything belonging to the company"*. The programme explained that the HCEAs had found some *"unused stock"* but that this would not be enough to cover the debt.

Further footage of Mr H discussing the debt with the HCEAs was shown in which Mr H explained that the reason he had not paid the debtor was because his company had ceased to trade and he had lost his house and had *"personal problems"*. When he was then asked about his own personal financial situation, Mr H told the HCEAs *"I haven't got a pot...I haven't got a pot and I can go and get the figures"*. The programme then explained that with Mr H's company close to being dissolved and not enough company assets to pay off the debt, the HCEAs had decided not to pursue the collection of the debt further.

The programme went on to explain that *"the failure of the business has had a major effect on Mr [H]"*, before including footage of Mr H inside his home as he spoke directly to the camera:

"Six, seven years ago I probably had an A1 credit rating, had a lovely house, swimming pool, five bedrooms, an acre of land. Very pleasant, very comfortable. I probably worked about three and a half days a week, then this idea took over and obviously the whole thing's imploded. My wife and I are basically working twenty-five hours a day, eight days a week, to resurrect things".

The programme showed one of the HCEAs outside the front of Mr H's house, who explained that it was going to be *"difficult for them [the claimant] to get their money because the company's not trading anymore. You can't get blood out of a stone sometimes so, it's just unfortunate. But you know, he's [Mr H] a nice chap, he's tried, he's paid the majority of the debt and he just can't pay the last amount because, you know, the company wasn't trading"*.

The interview with Mr H inside his home continued:

"I was an accountant; I know people who try and close companies down and then set another one up with stock and all this sort of thing."

I know that goes on, but it wasn't us. You know, I've lost virtually, well, I have lost everything. The only thing I haven't lost is my family".

The part of the programme featuring Mr H concluded with the HCEAs leaving the property without any payment from Mr H. Mr H was shown again at the very end with a caption which said that his novelty globe business was still in the process of being dissolved. Mr H's wife and their young children were also shown briefly in the programme; however, their faces were obscured and they were not named, nor were their voices heard.

Summary of the complaint and broadcaster's response

Complaint

Mr H complained that his privacy was unwarrantably infringed in the programme as broadcast on 7 July 2020 because unobscured footage of him interacting with the HCEAs over an outstanding debt was shown in the programme.

Mr H said that when the programme first aired on Channel 5 in November 2015 he had "called the [HCEAs] who said that the airing of the programme was nothing to do with them". Following repeated broadcasts of the programme, Mr H said that he subsequently contacted both the programme makers and Channel 5 in June 2017 to request that the programme not be shown again, or that the footage of him be obscured and for him not to be identified in the programme. He said that his request had been ignored and that the continued broadcast of the programme was causing him "*incredible distress and worry*". Mr H added that had he "*been made aware by the camera crew [i.e. that he would be identified], he would never have consented*". He also said that the programme "*tarnishes people*" and does not allow people to "*get on with our lives*". Mr H said that "*If an individual gets a CCJ [County Court Judgment], this is wiped from the system after six years, but with this programme, there appears to be no time limit or end to it*".

Broadcaster's response

Channel 5 said that, in its view, Article 8 of the European Convention on Human Rights ("ECHR") does not give people a right not to be on television, nor does it prevent footage or photographs of persons being obtained and then broadcast without their consent. What matters in every case is whether or not rights are being infringed and, if they are, whether there are good reasons. This requires the balancing of the rights of privacy (Article 8 of the ECHR) against the right to freely broadcast matters of public interest (Article 10 of the ECHR).

Channel 5 said that Article 8 conferred a right to "respect" for privacy rather than an absolute right¹ and it was neither possible, nor desirable, to seek to give individuals complete autonomous control over information that relates to them². Further, and in accordance with Article 10(2), the right to freedom of expression should not be interfered with by a public authority unless such interference is lawful and necessary in a democratic society in the interests of, inter alia, the economic well-being of the country, the prevention of disorder, and for the protection of the rights and freedoms of others.

¹ M v Secretary of State for Work and Pensions [2006] 2 AC 91 at para 83.

² O'Halloran v UK [2008] 46 EHRR 21.

Channel 5 said that if the claimant had no reasonable expectation of privacy, Article 8 is not engaged, and the claim fails at the outset³.

In support of its position, Channel 5 referred to various judgments from the European Court of Human Rights⁴. It said these established the factors that must be considered when conducting the balancing exercise between the competing Article 8 and Article 10 rights under the European Convention on Human Rights (i.e. the right to respect private and family life and the right to freedom of expression). Channel 5 said that the decisive question is whether the broadcast is capable of contributing to a debate of public interest.

It said that the broadcast of the section of the programme concerning Mr H was clearly capable of contributing to a debate of public interest, namely the manner in which judgment debts can or, as this case clearly demonstrated, cannot be enforced, the powers granted to HCEAs, and how a court judgment is worthless if the company against which judgment is obtained has no significant assets and is due to be dissolved. Where, as in this case, the subject matter of a broadcast contains information which is of public interest, and the broadcast of the material is capable of contributing to a debate of general interest, then this should be accorded significant weight when conducting the balancing exercise.

Channel 5 said that the form of the expression, i.e. broadcasting the footage of the interactions with the HCEAs, was also protected under Article 10 and that it is not for the national authorities to substitute their own views for those of the publisher/broadcaster⁵. It said that, properly considered, the balancing equation must be between the heavily weighted public interest in broadcasting the programme, including the margin of appreciation to include the footage of Mr H, and such Article 8 rights, if any, as might arise in relation to the footage.

Channel 5 said that it accepted that, in principle, Article 8 may extend to certain facets of an individual's business or professional life. However, it added that it was equally clear that Article 8 cannot be extended in a blanket fashion to cover all activities within the business or professional sphere. In support of its position, Channel 5 referred to various judgements from the High Court which it said supported the proposition that there is a line to be drawn between the public aspects of a private life (business and politics in these cases) and the personal aspects of a private life, when it comes to a consideration of whether there is a reasonable expectation of privacy and consequently whether Article 8 is engaged⁶. Accordingly, it said that there was an important distinction to be made between, on the one hand, those aspects of an individual's professional or work life which properly fall

³ Murray v Express Newspapers plc [2009] Ch 481 (at para 27); Associated Newspapers Ltd v HRH the Prince of Wales [2008] Ch 57; McKennitt v Ash [2008] QB 73 at para 11.

⁴ Grand Chamber cases of Von Hannover v Germany (No 2) [2012] ECHR 228; Axel Springer v Germany [2012] EMLR 15; and Couderc v France [2015] ECHR 992.

⁵ Jersild v Denmark [1994] 19 EHRR 1.

⁶ Browne v Associated Newspapers Ltd [2007] EWHC 2020 (QB); Yeo v Times Newspapers Ltd [2015] EWHC 3375 (QB); R (on the application of Prescott) v General Council of the Bar [2015] EWHC (Admin).

within the ambit of Article 8, for example an individual's personal and private messages sent whilst in the workplace⁷ and, on the other hand, those aspects which are purely work-related and public-facing.

In addressing Mr H's complaint, Channel 5 said that at all times while interacting with the HCEAs, Mr H was acting in his business or professional capacity and was not performing these activities for personal fulfilment, but rather in fulfilment of his duties as company director. Accordingly, it said that Article 8 was not engaged.

Channel 5 said that when Mr H provided an interview to the programme makers in his home, during the course of which he disclosed information about the "failure" of the company and the business, personal and financial impact that had upon him, he did so having provided informed consent which was relied upon by both Channel 5 and the programme makers. Channel 5 said that, while the unedited footage filmed by the programme makers and the body cameras worn by the HCEAs no longer exists, the programme makers had made notes of the relevant parts of the unedited footage relating to Mr H's consent which were supplied to Channel 5 in 2015. Channel 5 explained that the information supplied included a transcript of Mr H's interactions with the programme makers, a copy of which was also provided to Ofcom by Channel 5 in its response to Mr H's complaint.

Channel 5 said that it was clear from the programme maker's transcript that Mr H had consented to the use of the footage of the enforcement and to an interview with the programme maker, and that there was never any suggestion that Mr H would be anonymised. It said that both the programmer makers and the HCEAs were under strict instructions never to make any such agreement and to make a note if any such request was made, and added that no such request from Mr H had been noted in the information supplied to Channel 5 by the programme makers. It said that Mr H did not subsequently communicate to Channel 5 or the programme makers anything to indicate that his circumstances had significantly changed since he provided his consent, and certainly not to such an extent that the consent he had provided for the broadcast of the footage could not be relied upon by Channel 5 as it could no longer be considered valid.

Channel 5 said that, in determining whether an individual has a reasonable expectation of privacy, all the circumstances of the case must be considered⁸. It said that there was a clear public interest in seeing the activities of the HCEAs in the course of executing their official duties, and that that public interest extends to including footage demonstrating the increase in "middle class debt" and an unsuccessful enforcement illustrating some of the difficulties faced by the HCEAs. Channel 5 said that the broadcast was entirely in the public interest and, by including the relevant parts of the footage in the programme as broadcast, the programme did not exceed what was necessary and appropriate to make viewers understand the situation and the ramifications of what the HCEAs were attempting to do. Channel 5 said that, even if Ofcom determines that Mr H did have a reasonable expectation of privacy in the matter filmed, this was outweighed by the Article 10 rights of viewers in gaining an important insight into the increase in "middle class debt" and the difficulties encountered by HCEAs in

⁷ *Bărbulescu v Romania* 61496/08.

⁸ *Murray v Express Newspapers plc* [2009] Ch 481 at para 36; *Ambrosiadou v Coward* [2011] EWCA Civ 409; *Various 3rd Wave Claimants v MGN Ltd* [2019] EWHC 2122 (Ch).

identifying addresses where assets may be and their ability, or inability in this case, to enforce judgement debts against limited companies apparently without significant assets.

Channel 5 said that, on the basis of the above considerations, it did not accept that the footage of Mr H included in the programme as broadcast unwarrantably infringed his privacy. It said that, in his complaint, Mr H accepted that he had consented to the filming and broadcast.

Channel 5 said that footage of Mr H interacting with the HCEAs was recorded while he was undertaking his duties as director of a company that owed £2,323.20 pursuant to a judgment debt. In these interactions, it said, he was not operating within the sphere of his private life and as a result it was difficult to see Article 8 could be said to be engaged.

The broadcaster said that footage of Mr H explaining to the programme makers the difficulties encountered by the company and the impact that had on him professionally and financially was recorded with his informed consent and that, as a result, there could be no unwarranted infringement of his privacy in the programme as broadcast.

Channel 5 said that it understood that in his initial complaint to Ofcom Mr H claimed that the day after the attempted enforcement by the HCEAs, he had phoned DCBL, the HCEA company, and was informed by them that he would not feature in the programme. The broadcaster said that while it had no knowledge as to whether such an event took place, strict instructions were given to the programme makers and the HCEAs (from DCBL) that they should never give any assurances about whether people would or would not feature in a programme, or whether they would be identified or featured anonymously, and that if asked they should explain that all decisions would be made by Channel 5.

Channel 5 said that on 13 June 2017 Mr H emailed the programme makers asking that the programme not be repeated, and that the programme makers advised him to contact Channel 5. It said that on 17 June 2017, Mr H emailed Channel 5 and received a response from its Viewer Enquiries team on or around 11 July 2017 which made clear to Mr H that he had consented to be interviewed for the purposes of conveying his side of the story about the circumstances surrounding the debt. Channel 5 said that it had no record of hearing further from Mr H, either disputing this statement or otherwise, until it was provided with a copy of Mr H's complaint to Ofcom in September 2020.

Channel 5 said that, for the reasons set out above, even if Ofcom found that Mr H had some expectation of privacy which attained the required level of seriousness to engage Article 8, it believed that it was clear from all the circumstances that: Mr H was made aware of the nature and purpose of the programme; he was willing to be filmed by the programme makers giving his side of the story; and his contribution was broadcast with his informed consent. It said that, as a result, it did not believe that there was any unwarranted infringement of Mr H's privacy in connection with the broadcast of this repeat of the programme. Channel 5 also said that it wished to reiterate that, given the subject matter of the programme, the Article 10 rights of viewers and of Channel 5 would outweigh any reasonable expectation of privacy that may be found to exist in the matters broadcast.

Channel 5 said that, although it had not been made aware of any significant change in circumstances that would invalidate Mr H's informed consent, it was sorry for any distress or worry the programme and repeats may have caused him. Channel 5 said that, in these specific circumstances, it had decided

that the programme will not be further repeated until the anonymisation process for the programme had taken place. It said that this will include obscuring Mr H's identity, i.e. by removing his name and blurring his face, but that the nature of the business would still be clear.

Ofcom's Preliminary View

Ofcom prepared a Preliminary View that Mr H's complaint about the broadcast of the programme on 7 July 2020 should be upheld. Both parties were given the opportunity to make representations on the Preliminary View, and both parties chose to do so which, insofar as they are relevant to the complaint entertained and considered by Ofcom, are summarised below.

Complainant's representations

Mr H disagreed with the broadcaster's assertion that he was not operating within the sphere of his private life. Mr H said that: the HCEAs were in his home; his personal possessions were shown; and he was surrounded by his family who, despite their faces being blurred, were identifiable given that his home was shown and his face was not blurred in the programme. Mr H said that Channel 5 were seeking to hide behind the fact that he was acting in his capacity as a director of a company which had ceased to trade. Mr H said that the programme makers felt it appropriate to invade his privacy by broadcasting very personal and sensitive details about his private life which were unrelated to his status as a director of the company and the company debt. Mr H said that he and his family are "very private individuals who have never sought publicity..." and that the programme had caused permanent damage to him.

Mr H reiterated his complaint that the episode in which he featured was still being broadcast by Channel 5 six years after the incident had occurred, despite the justice system in the UK deeming that it is in the public interest for a court judgment to be on public file for no longer than six years.

Mr H said that he had been visited by the HCEAs on two occasions. During the first visit, which was not shown nor referred to in the programme, Mr H said the HCEAs had threatened to remove goods from the property. Mr H said that as a result of this first visit, during the second visit, which was shown in the programme, he was concerned that the HCEAs were going to remove goods from the property in front of his family and that he was focussed on this. Mr H said that this had "greatly affected [his] behaviour" and that he was not "rational" in his actions. He added that, contrary to Channel 5's account, it was not possible for him to have given his consent. Mr H said that consent cannot be given while in fear or under duress, nor in circumstances where a person is in a situation of "incredible stress". Mr H said that "there should always be a cooling off period" as it is "impossible to think rationally with bailiffs walking through your home and uninvited cameras following you" and that no one would be able to "make a coherent decision in such a moment". Mr H also said that he had requested for the programme makers to come inside with the TV camera so as not to "make a scene" as they would have been visible to his neighbours and people passing by. Mr H reiterated that "no informed consent was ever or freely given". Furthermore, he said that it was irrelevant for Channel 5 and the programme makers to rely on this because he had not been advised that the HCEAs were wearing body cameras, and, as such, the filming was taking place without his knowledge from the outset.

Mr H said that he had contacted the HCEAs' company the day after the second visit and requested for the episode not to be shown. Mr H said that Channel 5 worked in collaboration with this company and therefore should have been made aware of this call and his concerns.

Broadcaster's representations

General

Channel 5 said that it disagreed with Ofcom's Preliminary View to uphold Mr H's complaint because:

- the evidence it had provided demonstrated that Mr H did give his informed consent to the broadcast, prior to 2017, of the information about him (including the information he provided in an interview to camera). Ofcom's conclusion that it was "unable to ascertain to what extent Mr H had given informed consent over the use of the footage in the programme as broadcast" was therefore unreasonable; and
- Ofcom failed to take into account that, by the time Mr H complained to the programme maker in 2017, the programme had already been broadcast numerous times to the general public with Mr H's consent. The information it contained was therefore already firmly in the public domain.

Consent

Channel 5 said that in reaching its Preliminary View on whether the programme makers had obtained Mr H's informed consent, Ofcom did not give consideration to the following factors:

- It was accurate for the programme makers to confirm to Mr H that the programme could have used the footage obtained irrespective of whether or not Mr H consented. Channel 5 said that this reflected the well-established principle that it is not for a contributor to a programme to exercise editorial control over whether or not footage is used. It said that the decision properly rests with the programme maker and broadcaster, weighing up the competing rights and interests.
- It said Mr H was clearly informed of: the nature and purpose of the programme; the type of contribution the footage and his interview could make; and the fact that the programme makers and Channel 5 retained editorial control over the footage.
- Mr H proceeded to give a full interview to camera, in which he disclosed much of the information on which Ofcom's Preliminary View has focused. Channel 5 said that he was not prompted as to the contents of that interview and, accordingly, had complete discretion as to what information to provide.
- Immediately after the passages of the transcript cited at page 9 of Ofcom's Preliminary View (page 13 of Ofcom's Adjudication), the following further exchange took place which Channel 5 said evidenced Mr H's consent to use of the footage:

Camerman: "No but I think at least getting your footage, getting the interview down on tape, so it's there as an option for the edit is I would suggest is particularly a good start, so they have it there and its eligibly usable if they say which. I don't think the series *Can't Pay?*

We'll Take It Away!, I don't think it looks to demonise anyone, that's my personal view but as I said ultimately all editorial control lies with both Touch⁹ and Channel 5 and their lawyers, so I can't give you a guarantee that it will be balanced but that's as open and upfront I can be about it.

Mr H: Okay.

Cameraman: So, can you just tell me your name one last time.

Mr H: My name's [Mr H gave his first name and surname].

Cameraman: Thank you very much [Mr H's first name], I really appreciate it, I hope things continue to turn around".

- Mr H did not complain to either the programme maker, Channel 5 or Ofcom in respect of the original un-anonymised broadcast, nor any repeat broadcasts, until his communication with the programme maker in June 2017. Channel 5 said that this was consistent with his having originally consented to the use of the footage and suggested that his complaint concerned the continued repeat broadcasts, not the fact that he was initially shown un-anonymised. It said that when Mr H did make contact in 2017, it was explained to him that he did consent to be interviewed for broadcast, and that Mr H did not respond to, or dispute, this point.
- Channel 5 said that Mr H's complaint to Ofcom was consistent with him having originally consented to the use of the footage and suggested that his complaint concerned the repeat broadcasts. Channel 5 said that it did not accept Ofcom's summary of Mr H's complaint, and that Ofcom had misinterpreted the complaint. Channel 5 said its interpretation of Mr H's complaint was that, had Mr H been aware that the programme would continue to be broadcast in an un-anonymised form five years later, he never would have consented. Channel 5 said that it follows from this that Mr H did consent to the use of the footage, un-anonymised, in the original broadcast, and that it was not that Mr H complains of not being made aware that he would be identified. It added that most people who give an interview to camera would assume that they were going to be identified. It said that the fact that Mr H said in his complaint that the programme does not allow people to "get on with our lives", and that there appeared to be "no time limit or end" to the programme's repeats also suggested that his concern was with the repeat broadcasts some years later, not the fact that he was not anonymised in the original broadcast.

Mr H's 2017 communications and subsequent broadcasts

Channel 5 said that, by the date of Mr H's communications with the programme maker in June 2017, the programme had been broadcast on Channel 5 and its associate channels 53 times and had been available on-demand for 3 months and 20 days. It said that this was on the basis that Mr H, for the reasons explained above, had consented to the use of the footage of him. The broadcaster said that after Mr H failed to respond to Channel 5's communication, and prior to the date of Mr H's complaint

⁹ The independent production company who made the programme.

to Ofcom in July 2020, the programme was broadcast a further 76 times, and was available on-demand until 3 November 2017 and then from 11 May 2018 until 20 October 2020. The broadcaster said that it was well accepted that the protection of Article 8 of the ECHR can be lost where information is manifestly public in nature and/or firmly in the public domain¹⁰. It said that cases of national publication or broadcast lie at the extreme end of the spectrum, where it can be said with confidence that any reasonable expectation of privacy has been lost¹¹. Channel 5 referred to case law which it said upheld the striking out of an “unreasonable and unreal” claim for misuse of private information, relying on the fact that the information at issue was “firmly embedded in the public domain” as a result of its disclosure in legal proceedings in Thailand and the USA¹², adding that this was, as a matter of reality, a far lower level of exposure than that involved in repeated national broadcasts.

Channel 5 submitted that, under Practice 8.6 of the Ofcom Broadcasting Code (“the Code”)¹³, Ofcom must first consider whether the broadcast of 7 July 2020 infringed Mr H’s privacy before turning to consider whether he had consented or, alternatively, whether any infringement of privacy was warranted. Channel 5 said that, in its Preliminary View, Ofcom had not addressed that first question. It said, however, that it was clear that, given the repeated national broadcasts, the 7 July 2020 broadcast was not one that was capable of infringing Mr H’s privacy, and that it would be unreal to suggest that the information it contained was not already in the public domain.

The broadcaster said that, if a contributor wishes to restrain the broadcast of private information, he or she must raise concerns promptly, at a stage where it is realistic to argue that the information has not already entered the public domain. It said that, otherwise, a formerly consenting contributor would be able to retrospectively and unilaterally reimpose a reasonable expectation of privacy in respect of information already broadcast nationally on numerous occasions for any or no reason. Channel 5 said that this was both illogical and unprincipled and would have significant repercussions for a huge range of Channel 5’s, and other broadcaster’s, output and their freedom to schedule programming. It further added that Ofcom was aware of the financial pressures on broadcasters and the important role that repeat programming plays in ensuring their sustainability, and that broadcasters must have confidence that contributors will not attempt to veto (without good reason) programming at an indeterminate point after it has already been broadcast numerous times.

¹⁰ *ZXC v Bloomberg LP* [2021] QB at [47]-[49]: “If the information, or similar information, about the individual is in the public domain, it is a matter of fact and degree as to whether that individual can have a reasonable expectation of privacy which the courts should protect. However, the protection may be lost if the information is in the public domain... What may start as information which is private may become information known to the public at large. Whether this is so is a matter of fact and degree for determination in each case depending on the specific circumstances”.

¹¹ *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103

¹² *Higginbotham (formerly BWK) v Teekhungam* [2018] EWHC 1880 (QB), Nicklin J at [64]

¹³ See the [version of the Code](#) in force at the time of the broadcast.
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20 December 2021

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unwarranted infringement of privacy in programmes in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included: a recording and transcript of the programme; both parties' written submissions, including copies of correspondence between the complainant and Channel 5; a copy of a transcript of Mr H's interactions with the programme makers, provided by Channel 5¹⁴; and supporting evidence, including representations made in response to Ofcom's Preliminary View. After careful consideration of the representations, we considered that the points raised did not materially affect the outcome of Ofcom's Preliminary View to uphold the complaint.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing right of the broadcaster to freedom of expression and the audience's right to receive ideas and information without undue interference. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate. This is reflected in how Ofcom applies Rule 8.1 of the Code, which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

In addition to this rule, Section Eight (Privacy) of the Code contains "practices to be followed" by broadcasters when dealing with individuals or organisations participating in, or otherwise directly affected by, programmes, or in the making of programmes. Following these practices will not necessarily avoid a breach of Rule 8.1 and failure to follow these practices will only constitute a breach where it results in an unwarranted infringement of privacy.

In considering Mr H's complaint that his privacy was unwarrantably infringed in the programme as broadcast Ofcom had regard to the following Code practices which state:

Practice 8.5: "Any infringement of privacy in the making of a programme should be with the person's and/or organisation's consent or be otherwise warranted".

¹⁴ Ofcom was not provided with any of the unedited footage for this programme, as Channel 5 explained that neither they nor the programme makers had retained the unedited footage recorded by the programme maker and the HCEAs' body cameras.

Practice 8.6: “If the broadcast of the programme would infringe the privacy of a person, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted”.

In considering Mr H’s complaint about the programme broadcast on 7 July 2020, Ofcom has had careful regard to the fact that the complaint concerned the repeat of a programme that was shown first on Channel 5 in 2015 and has been broadcast extensively since then (both on Channel 5 and its associate channels).

Within this context, we first assessed the extent to which Mr H had a legitimate expectation of privacy regarding the broadcast of footage of him included in the broadcast of the programme on 7 July 2020, having appropriate regard to the circumstances of his inclusion in the original broadcast. The test applied by Ofcom as to whether a legitimate expectation of privacy arises is objective: it is fact sensitive and must always be judged in light of the circumstances in which the individual concerned finds him or herself.

We took into account the material shown in the programme as set out in the “Programme summary” above. We considered that Mr H was identifiable in the broadcast programme; his first and last name and age were included, his face was shown unobscured and his voice was heard undisguised during a phone conversation discussing a potential business order with one of the HCEAs, who was posing as a customer. Mr H was also shown inside his home interacting with the HCEAs after they had gained entry through an open door. He talked to them, as they moved about searching for company assets, about his financial situation, his personal circumstances and why his business had struggled. Mr H was also shown giving an interview to camera in which he discussed further what had happened to his company and the reason for the debt (i.e. ceasing to trade), and the consequences of the failure of his business and the effect this had on his financial situation and personal life.

We acknowledged that the programme revealed some personal or sensitive information about Mr H’s private life: over the course of the HCEAs’ visit, footage of the inside of Mr H’s home was shown, including footage of Mr H’s personal and family possessions and some of the events Mr H described as leading to the problems he now faced. Ofcom considered these were likely to be events that were of some sensitivity to him. In particular, the programme included footage of Mr H explaining that he and his wife had temporarily separated in 2012 and describing the detrimental effect the breakdown of his company had had on his personal financial situation and his family life, including losing his house and having to move to temporary rented accommodation. The programme also revealed that: he had lost his father around the same time; he had been an accountant prior to setting up the debtor company; and the family had previously lived in a five-bedroom property with a swimming pool and an acre of land.

We took into account that the broadcast that was the subject of Mr H’s complaint was the latest airing of a programme that had been repeated extensively since 2015. We also had regard to Channel 5’s submission that, against this background, it would be unreal to suggest that the information it contained was not already in the public domain and, therefore, that the programme was not capable of infringing Mr H’s privacy. In Ofcom’s view, individuals are not necessarily deprived of their right to privacy if information or images, in respect of which they claim that right, have been put into the public domain in the past. Each case must be considered on its own facts and in this case we did not

consider the fact that Channel 5 had filmed and broadcast the footage, thereby placing it in the public domain, meant that Mr H necessarily lost his Article 8 right to privacy. Both the circumstances in which Mr H was shown and the nature of the information that was revealed meant that the situation had the potential to remain sensitive, irrespective of the number of times the footage had been broadcast.

We also took into account Channel 5's arguments that throughout the footage of Mr H in the programme, he was acting in his business and/or professional capacity as the director of the company which owed the debt. We considered that this did not necessarily deprive Mr H of a legitimate expectation of privacy given the footage depicted a sensitive situation taking place inside Mr H's private home, namely HCEAs entering his house to enforce a judgment debt against his company and as set out above, personal or sensitive information about Mr H was disclosed.

Taking all these factors into account, Ofcom concluded that Mr H did have a legitimate expectation of privacy with regards to the material included in the programme as broadcast.

Ofcom next considered whether Mr H's consent had been obtained in relation to the broadcast of the footage of him included in the 7 July 2020 programme. In doing so, we first considered the circumstances surrounding his inclusion in the original broadcast, which had taken place in November 2015.

Channel 5 submitted that Mr H had consented to the footage of him being included in the original 2015 broadcast of the programme. In response to Ofcom's Preliminary View, Channel 5 added that much of the personal or sensitive information about Mr H's private life was volunteered by Mr H himself during an interview given to camera. In contrast, Mr H explained to Ofcom that he did not feel he was provided with a genuine choice over the use of this footage by Channel 5. In his response to the Preliminary View, he stated that it was not possible for him to have given his fully informed consent while "being put in a situation of incredible stress" and for this reason said that he had not "ever or freely given" his informed consent. Mr H also indicated that neither he nor his wife were advised that the HCEAs were wearing body cameras and he said that this filming had taken place without his knowledge.

As explained above, Channel 5 was unable to provide Ofcom with the unedited footage of the programme. We were unable, therefore, to assess the contemporaneous record to assess the issue of consent, but we did have regard to the copy of the transcript provided by Channel 5 of Mr H's interactions with the programme makers.

According to the transcript, when asked by the programme makers to "do a[n] on camera consent" to confirm that he was "happy for [the programme makers] if [they] choose to use the footage that [the programme makers] filmed here today", Mr H said to the programme makers: "Yeah as long as you show both sides". The transcript also indicated that the programme makers had explained to Mr H that they "can't guarantee that [the programme would show a 'balance']", and that this had led Mr H to ask the programme makers "...But I can't say no I don't want you to use it [i.e. the footage of him] can I? You're going to use it anyway". In response, the programme makers replied: "That is true, that is absolutely true". Mr H then continued: "I'd rather you didn't because we are trying to get a business going and obviously I don't think this will have a positive effect". According to the transcript, the conversation continued and the programme makers explained to him that "ultimately all editorial

control lies with both [the programme makers] and Channel 5 and their lawyers, so I can't give you a guarantee that it will be balanced but that's as open and upfront I can be about it".

We acknowledged Channel 5's representations on the issue of consent in that the transcript appeared to show that Mr H had been informed about the nature and purpose of the programme and that he appeared initially to have consented to the programme makers capturing footage of him. We also acknowledged that Mr H expressed concern about the filming, questioning whether he had any choice over the use of the footage. While the transcript indicated that Mr H responded "okay" to the latter part of the conversation, it also suggested that he may not have been entirely comfortable with the situation. Nevertheless, it was notable from Channel 5's submission that Mr H did not complain to either the programme maker, Channel 5 or Ofcom in respect of the original un-anonymised broadcast, nor any repeat broadcasts, until his communication with the programme maker in June 2017.

Taking all of the above into account, Ofcom was unable to reach a definitive view on the issue of consent as far as it related to the inclusion of footage of Mr H in the programme as originally broadcast in 2015. We were also unable to reach a view on the use of any bodycam footage and the extent to which Mr H had been filmed surreptitiously or otherwise.

Ofcom went on to consider Mr H's subsequent contact with Channel 5 in 2017. We noted from the correspondence provided by Channel 5 that in June 2017 Mr H stated that the programme was "first shown in November 2015 and repeatedly since which I would never have agreed to". Mr H also requested that no further repeats of the programme be broadcast. We acknowledged Channel 5's submission that it was explained in response to Mr H that he had consented to be interviewed for broadcast. We also noted Channel 5's submission that Mr H did not respond to, or dispute, this point. Nevertheless, we considered that the June 2017 correspondence was significant in that it showed that Mr H had clearly conveyed to Channel 5 prior to the 7 July 2020 broadcast that he did not consent to featuring in continued repeats of the programme. In Ofcom's view, this had a bearing on the issue of consent in relation to the footage of Mr H included in the programme as broadcast on 7 July 2020. This is because Channel 5 ought to have understood that any consent they might have thought Mr H had given to being featured in the broadcast had been withdrawn. We noted that Channel 5 also submitted that although it had not been made aware of any significant change in circumstances that would invalidate Mr H's informed consent, in these specific circumstances it had decided not to further repeat the programme until it had obscured Mr H's identity by removing his name and blurring his face.

Ofcom therefore went on to consider whether the broadcast of this material on 7 July 2020 without Mr H's consent was warranted under the Code.

The Code states that "warranted" has a particular meaning. Where broadcasters wish to justify an infringement of privacy, they should be able to demonstrate why, in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest could include: revealing or detecting crime; protecting public health and safety; exposing misleading claims by individuals or organisations; or disclosing incompetence that affects the public.

Ofcom carefully balanced Mr H's right to privacy regarding the inclusion of the relevant footage in the programme as broadcast on 7 July 2020 with the broadcaster's right to freedom of expression and the

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audience's right to receive information broadcast without unnecessary interference. We took into account that the footage depicted Mr H as he interacted with the HCEAs in his private home as they attempted to execute a judgment debt against his company, and that this was a sensitive situation. We also considered that Mr H was identifiable in the programme, albeit the footage of him was brief. In our view, for the reasons set out above, Mr H's privacy was not diminished by the fact that the information had previously been placed in the public domain by Channel 5. The information broadcast was not of a nature that it was otherwise known or reported on and, as such, would not have been a matter of common or public knowledge, and only existed in the public domain as a result of the original broadcast of the programme and subsequent repeats.

We then considered whether the intrusion was warranted. We took into account Channel 5's argument that there was a public interest in broadcasting the footage in that it showed the activities of the HCEAs while executing their official duties. Ofcom acknowledged that making programmes which highlight the serious issue of debt and the potential consequences of the failure of a business are capable of engaging the public interest. In addition, we recognised that, as per the case of *Ali v Channel 5 Broadcasting*¹⁵, the format of the programme was capable of contributing to a "debate of general interest" – but that in that case, *Can't Pay? We'll Take It Away!* had gone "beyond what was justified for that purpose" where it was concerned with the position of private individuals. We considered that the footage in Mr H's case showed: the activities of the HCEAs while executing their official duties; the interactions they routinely engage in; and the difficulties they face on a daily basis, including how a particular individual's circumstances can affect the way in which the HCEAs seek the most apt resolution to their responsibilities.

In weighing up the competing rights of the parties, Ofcom carefully considered the footage of Mr H that was broadcast in the programme. The programme included footage shot inside the family home, including the family's possessions, although these were general household items and living room furniture and any framed photographs were blurred out. Brief footage of boxes and other items stored in the garage was also included but the editing focused on leftover stock from Mr H's company. We also took into account that the programme included some information about Mr H's personal life. As outlined above, this included the fact that: he had four children; he and his wife had temporarily separated in 2012; one of the impacts of the company ceasing to trade was that he and his family had to leave their home and move into temporary rented accommodation; he had lost his father around the same time; that he had been an accountant prior to setting up the debtor company; and the family had previously lived in a five-bedroom property with a swimming pool and an acre of land. We considered that much of this information went beyond the immediate circumstances of the debt and the fact that Mr H was a director of the company against which it was owed.

We took into account that the programme was first broadcast in 2015, following which repeats of the programme were shown on numerous occasions (most recently on the 5STAR channel in July 2020). In this Adjudication, Ofcom is considering the programme complained about, that is, the programme as repeated and broadcast on 7 July 2020. Ofcom recognises that repeating programmes for a lengthy period after their original broadcasts may result in a person's privacy being unwarrantedly infringed, where, at the time of original broadcast, it may not have done so. In this case, five years had passed since the programme had first aired and, in that time, it had been shown a total of 129 times on

¹⁵ [2018] EWHC 298.

Channel 5 and its associate channels. It is worth noting that of this total, 76 of these repeats occurred between the date on which Channel 5 corresponded with Mr H in July 2017 – in response to his request that the programme not be shown again – and the date of Mr H’s present complaint about the programme broadcast in July 2020. The programme was also available to viewers via Channel 5’s on-demand platform until 3 November 2017 and again between 11 May 2018 and 20 October 2020.

While we acknowledged the continued public interest in showing the work of HCEAs seeking to enforce court orders against individuals or companies to highlight the serious issue of debt, we took into account that the programme had been repeated extensively over a five year period leading up to its broadcast on 7 July 2020. We considered that any public interest in continuing to identify Mr H in these circumstances had diminished to such an extent by the time of the broadcast of the programme on 7 July 2020 that the intrusion into Mr H’s privacy was no longer justified.

Taking all of the above factors into account, Ofcom considered that, on balance, the interference with the complainant’s Article 8 right to privacy in this case was significant and of such a nature and gravity as to outweigh the public interest in programming of this nature and the wider Article 10 rights of the broadcaster and programme makers. Ofcom considers that it is important that broadcasters should periodically review the justification for infringing a person’s privacy when repeating a programme and ensure any such infringement is warranted in the circumstances.

We acknowledge and welcome Channel 5’s confirmation that it has decided to obscure Mr H’s identity in any further repeats by removing his name and blurring his face.

Ofcom has upheld Mr H’s complaint of unwarranted infringement of privacy in the programme as broadcast.