In the Supreme Court
Sitting As a Court of Civil Appeals

CA 1697/11

Before: His Honor, Justice S. Joubran
His Honor, Justice U. Vogelman
His Honor, Justice N. Sohlberg

The Appellants: 1. **A. Gottesman Architecture Ltd**
2. **Asaf Gottesman**

v.

The Respondent: **Arie Vardi**

Appeal against the judgment of the District Court of Tel Aviv-Jaffa (Her Honor Judge A. Baron) of January 17, 2011 in CF 1222/09

On behalf of the Appellants: Adv. **Hillel Ish-Shalom**, Adv. **Roy Kubovsky**, Adv. **Guy Lotem**

On behalf of the Respondent: Adv. **Eran Presenti**

JUDGMENT

Justice U. Vogelman

An architect designed a unique house for a client and asked to photograph it in order to show it on his firm's website. The client refused. The architect published computer simulations of the client's house on the website, without giving details identifying the owner of the house. Does this case give rise to an infringement of privacy? That is the question that faces us.

The Main Facts and Proceedings

1. The Second Appellant (hereinafter referred to as "Gottesman") is an architect who heads a firm of architects. At the beginning of the year 2000 the Respondent (hereinafter referred to as "Vardi") commissioned Gottesman's services for the latter to

design his residence for him. The parties do not dispute the fact that the project was one of a kind and a house was ultimately built that was exceptional as regards its size, the type of materials used in its construction and its unique design. Despite the extensive scale of the project, no written agreement was ever made between Vardi and Gottesman, either with regard to the commissioning of the architectural work or concerning the possibility of documenting and photographing the building for Gottesman's purposes.

2. Even before the construction was completed, Gottesman asked Vardi to photograph his house, as was his firm's practice. Vardi, for his part, made the photographs conditional upon Gottesman and the intended photographer signing a letter of commitment in respect of the photographs' use. According to the wording proposed by Vardi, Gottesman and the photographer would be obliged to apply to him in writing whenever they wanted to make use of the pictures and obtain his express consent. The two were also required to undertake to pay Vardi agreed damages without proof of loss for any breach of that undertaking: Gottesman - $500,000 and the photographer - $50,000 (hereinafter referred to as "the letter of commitment"). Gottesman asserted that the letter of commitment that Vardi proposed was a new requirement that was contrary to a previous understanding between the parties in respect of photographing the house. Vardi, on the other hand, expressed anger at the fact that Gottesman categorically denied the importance of protecting his privacy. No agreement was ultimately made between the parties and in the absence of any understanding, professional photographs of Vardi's house were not taken.

To complete the picture, it should be noted that at the relevant time photographs of Vardi's house were published in two places: firstly, pictures of the house exterior were published in a book that was printed in hundreds of copies, published by Apex Ltd (hereinafter referred to as "Apex"), which had installed windows and shutters in Vardi's house; secondly, pictures were published on the website of the carpenter who had done carpentry work in Vardi's house. Both Apex and the carpenter had signed a letter of commitment in favour of Vardi with regard to using pictures of his house in terms similar to those that Gottesman had been asked to sign.

3. Since Gottesman had not been permitted to photograph Vardi's house he commissioned the services of a studio that specialised in the creation of computer simulations in order to create an artificial simulation of the architectural work in Vardi's house. Those simulations, which look very similar to actual photographs, were published on the website of Gottesman's firm (hereinafter referred to as "the website"). There were no details identifying the owner of the house or its address alongside the pictures. After Vardi discovered that the computer simulations had found their way

onto the website, he filed a lawsuit in the Tel Aviv Magistrates Court against Gottesman and his firm, in which he applied for a permanent injunction restraining them from making any use of photographs or simulations showing his house. At the same time as bringing the action, a motion was also filed for the provisional relief of removing the simulations from the website. An order prohibiting publication of the existence of the legal proceedings, including any identifying detail in respect of any of the parties to the action, was also sought. On November 11, 2008, during a Magistrates Court hearing of the motion for provisional relief, the parties reached an understanding with regard to publicising Vardi's house on the website until the motion for provisional relief is heard on its merit. In that understanding it was provided that the simulations would be removed from the website and other pictures of the house, which had already been published in the Apex book with Vardi's consent, would be published instead (hereinafter referred to as "the procedural arrangement"). On September 24, 2008 the Court (Her Honour Judge Z. Agi) allowed the application for the award of an interim gag order. Nevertheless, the Court ordered the trial to be remitted to the Tel Aviv District Court because it was found that the relief sought in the action was within its residual jurisdiction since it was an application for a permanent mandatory order incapable of financial quantification. Both the procedural arrangement and the gag order remained in force during the trial of the action.

The Judgement of the Lower Court

4. The District Court (Her Honour Judge A. Baron), to which the trial was remitted, allowed Vardi's claim and held that his privacy had been infringed as a result of the exposure of his home on the Internet. It was held that although the simulations did not include personal belongings or intimate items, they did make it possible to obtain an impression of the lifestyle in the house, the habits of its occupants and their financial position. On the other hand, the Court dismissed the plea that removing the simulations would infringe the freedom of occupation and intellectual property rights of Gottesman and his firm. Consequently, against the infringement of Vardi's privacy, the Court weighed the harm to the economic interest that Gottesman and his firm would sustain, if they could not use the simulations in order to attract potential clients. In balancing them, the Court held that Vardi's right of privacy outweighed Gottesman's economic interest. Alongside that, the Court held that Vardi had not expressly or impliedly agreed to publication of the pictures or simulations. It was found that even if there had been talk between the parties about publishing pictures of the house in some or other framework, no express agreement had been reached to take and publish photographs. It was also held that there was no implied agreement to publishing the pictures. Amongst other things, the Court declined to treat the working relationship between Gottesman and Vardi or the fact that Gottesman had designed and planned the

house as implied consent to the use of the simulations. It was further held that Vardi's agreeing to allow Apex and the carpenter to make certain use of photographs did not constitute implied agreement to similar use by Gottesman. Finally, the Court stated that even had Vardi's agreement been obtained, the agreement was unenforceable by virtue of section 3 of the Contracts (Remedies for Breach of Contract) Law, 5731-1970. A permanent injunction was therefore awarded restraining Gottesman and his firm from making any use of photographs or simulations showing Vardi's house, and the procedural arrangement that the parties had reached was annulled/rescinded. The sweeping gag order in the case was also removed and replaced by a mere prohibition of publishing the evidence.

The Parties' Arguments on Appeal

5. In the appeal herein Gottesman and his firm reiterated their assertion that they should be permitted to publish the simulations on the website. At the outset, the Appellants dispute the lower court's finding that showing the computer simulations infringes "the privacy of a person's intimate life", within the meaning of the definition in section 2(11) of the Protection of Privacy Law, 5741-1981 (hereinafter referred to as "the Protection of Privacy Law" or "the Law"). Firstly, it was pleaded that showing the computer simulations of a house without specifying details identifying the owner cannot be construed as an infringement of privacy as defined in the Protection of Privacy Law. According to the Appellants, in order to prove an infringement of privacy as a result of the information published, it has to be shown that a link can be made between the information and a specific "person". In the instant case, it was argued, the computer simulations were shown in a "sterile" state, based on the planning position before the occupants entered the house and while making certain modifications. Alongside that, it was asserted that in any event there was no infringement of "the privacy of a person's intimate life" because the section relates to highly intimate information, such as a person's sexual proclivity or state of health. The same goes all the more so, according to the Appellants, in respect of the simulations that show the outside of the house and the spaces designated for hospitality. In the alternative, the Appellants plead that even if an infringement of privacy was caused, it did not give rise to a cause of action since it is a minor infringement "of no real significance", as defined in section 6 of the Protection of Privacy Law, because the simulations were published anonymously, without specifying personal details.

6. Even if there was an infringement of Vardi's privacy, the Appellants plead that the defence of good faith applies in the circumstances prescribed in the Protection of Privacy Law. In particular, it was pleaded that the Appellants did not imagine that the publication would infringe Vardi's privacy and they are therefore entitled to the

defence prescribed in section 18(2)(a) of the Law ("he did not know and need not have known that an infringement of privacy might occur"). It was further pleaded that the publication was intended to serve Gottesman's moral right to obtain fitting credit for his work, which he has by virtue of an architect's copyright in his work (section 4 of the Copyright Law, 5768-2007 (hereinafter referred to as "the Copyright Law")). According to the Appellants, this entitles them to the defence under section 18(2)(c) of the Protection of Privacy Law ("the infringement was committed in defence of a legitimate personal interest of the infringer") because, according to them, the moral right should enable the architect to publish computer simulations of his work.

7. The Appellants further argue that it was inappropriate for the lower court to find that the element of "absence of consent" necessary to establish an infringement of privacy had been fulfilled. The Appellants first protest the finding that Vardi's consent was necessary in this context. Such consent, according to them, would only be necessary if Gottesman had sought to enter Vardi's house and photograph it in the private domain. However, they assert, it is unnecessary to obtain consent when involved is the use of the architectural plans and simulations created on the basis of them. Secondly, they argue, Vardi had originally agreed to the house being photographed and in any event his implied agreement to publishing the simulations could be inferred from the agreement that he had given to publish pictures of the house in the Apex book and on the carpenter's website, and also from the principle agreement to the procedural arrangement. Therefore, the Appellants maintained, Vardi's attempts to procure Gottesman's signature to the letter of commitment should be construed as an attempt contrary to a previous understanding between the parties. Such being the case, it should be held that Gottesman's refusal to sign the said document is irrelevant. Finally, the Appellants argue that it should be presumed that had Vardi wished to limit the use of the work, he would have done so from the outset in an express agreement.

8. Vardi, for his part, endorses the lower court's ruling. According to him, publishing the simulations on the website constitutes an infringement of his and his family's privacy. According to Vardi, the fact that simulations, rather than actual pictures, were published on the website was aimed at circumventing the Protection of Privacy Law because the simulations show the house almost exactly as it really is and it is easy to link them with it. In view of that, Vardi seeks to adopt the District Court's finding that publishing the simulations on the website should be treated as publication of a matter relating to a person's "intimate life", as provided in section 2(11) of the Protection of Privacy Law and it therefore involves an infringement of privacy. According to Vardi, the Appellants cannot benefit from the defences prescribed in the Law: as regards the defence under section 18(2)(a) of the Law, which deals with the absence of knowledge of an infringement of privacy, it is asserted that Vardi

emphasised to Gottesman that he jealously guards his privacy, and his attorney also demanded that the Appellants remove the pictures from the website immediately; as regards the defence under section 18(2)(c) of the Law, it was pleaded that the Appellants were not protecting a "legitimate personal interest" by publishing the simulations but merely sought to produce an economic gain. In any event, Vardi argued, the essential requirement of good faith to establish the said defences was not fulfilled in the present case because the Appellants had failed to remove the pictures at his request.

9. Furthermore, according to Vardi, the case herein does not give rise to a clash between copyright law and protection of privacy law. An architect, according to Vardi, has no copyright in a house that was built but at most in the two-dimensional plans of the house and even those, it is argued, cannot be published by the architect without the client's consent. Consequently photographing the house and circulating the photographs, including by way of simulations, is not an inherent right of the architect. Even were copyright involved, Vardi asserts, it is an economic right which does not supersede the right to privacy. In this context, Vardi emphasizes that the lower court was not moved to award relief that would preclude the Appellants from showing the project to customers and in professional circles; instead an injunction restraining publication at large, on the Internet, or in a book or magazine, was sought. Such being the case, according to Vardi, the Appellants' freedom of occupation or copyright was not infringed. Finally, Vardi maintains that the plea of copyright infringement was merely made by Gottesman incidentally and in an unspecified manner at the trial in the lower court and it is therefore a prohibited "amendment of pleadings" on appeal.

10. The parties also took issue with regard to the formation of consent to publish the simulations. Vardi asserts that his agreement to the publication of the simulations was not obtained. According to him, during the years of the relationship between the parties, his confidence in Gottesman had lessened and he had therefore chosen to ask for any understanding in respect of photographing his house and using the pictures to be put in writing. A written undertaking along those lines did not come about and, such being the case, according to Vardi, no agreement was consummated between the parties in respect of publication. In that connection Vardi rejects the Appellants' argument that agreement to publication could be inferred from the procedural arrangement that the parties reached or from the agreement that was given to the carpenter and Apex for publication. According to him, a person is entitled to control his privacy so that consent to waive privacy should be made knowingly and expressly.

The Procedural Progression

11. On April 2, 2012 we had an appeal hearing in the presence of the parties before a bench headed by the (now retired) Deputy President, Justice E. Rivlin. At the hearing we believed that it would be best for the dispute between the parties to be resolved in mediation. The parties accepted our proposal and agreed to go to mediation. Unfortunately, the mediation did not prove successful and the parties notified us on July 27, 2012 that they had not reached an overall understanding. Prior thereto, in May 2012, the Deputy President retired and he was replaced by my colleague, Justice N. Solberg (as decided by the President, A. Grunis on August 13, 2012). In view of the change to the bench since the hearing, the parties were permitted to supplement summations in writing. The time for a ruling has now been reached.

Discussion and Ruling

The Right to Privacy

12. The right to privacy is one of the most important human rights in Israel. It is one of the freedoms that mould the character of the regime in Israel as a democratic one (HCJ 6650/04 *Jane Doe v. The Netanya Regional Rabbinical Court*, para 8 (May 14, 2006) (hereinafter referred to as "Jane Doe")). Since the Basic Law: Human Dignity and Liberty was passed, it is even vested with constitutional status (section 7 of the Basic Law). Privacy enables a person to develop his selfhood and to determine the degree of society's involvement in his personal behaviour and acts. It is his "proprietary, personal and psychological castle" (Crim. App. 5026/97 *Gilam v. State of Israel*, para 9 (June 13, 1999) (hereinafter referred to as "Gilam")). The right to privacy therefore extends the line between the private and the public, between self and society. It draws a domain in which the individual is left to himself, to develop his "self", without the involvement of others (HCJ 2481/93 *Dayan v. The Jerusalem District Commander*, PD 45(2) 456, 471 (1994) (hereinafter referred to as "Dayan"). It "embodies the individual's interest not to be bothered by others in his intimate life" (CA 8825/03 *Clalit Health Services v. The Ministry of Defence*, para 21 (April 11, 2007)).

Infringement of Privacy – Section 2(11) of the Protection of Privacy Law

13. The prohibition of infringing privacy is currently embodied in the Protection of Privacy Law. Section 1 of the Law provides that "no person shall infringe the privacy of another without his consent". As has already been held, the definition of "privacy" is not simple (HCJ 6824/07 *Manna v. The Tax Authority*, para 34 (December 20, 2010); CA 4963/07 *Yediot Aharonot Ltd v. John Doe*, para 9 (February 27, 2008) (hereinafter referred to as "Yediot Aharonot")). Section 2 of the Protection of Privacy Law

prescribes what an infringement of privacy is. In his claim, Vardi referred to section 2(11) of the Law, which concerns "publishing any matter relating to a person's intimate life, including his sexual history, state of health or conduct in the private domain". Of the three alternatives mentioned in the section, the most relevant herein is "publishing any matter relating to a person's intimate life" and also, to some extent, "publishing any matter relating to [a person's] conduct in the private domain". In order to delineate the expression "any matter relating to a person's intimate life", two matters should be clarified: firstly, what is a matter relating to a person's "intimate life"; and secondly, whether the information published indeed makes it possible to identify a "person".

(a) *A Person's Intimate Life*

14. Firstly, as regards the expression "a person's intimate life": what can fall within that definition? "Intimate life" is also a vague expression, the boundaries of which are unclear (Eli Halm, *Protection of Privacy Law*, 148 (2003) (hereinafter referred to as "Halm")). It is therefore clear that the answer to the question as to what will be regarded as a matter relating to "a person's intimate life" is not plain and simple and that "like many expressions that we encounter in the law books and ordinary life, their interpretation depends on the context and the purpose for which the interpretation is needed (see and compare the opinion of Justice T. Strasburg-Cohen in CA 439/88, *The Registrar of Databases v. Ventura*, PD 48(3) 808, 835 (1994) (hereinafter referred to as "Ventura"); also compare the opinion of Justice G. Bach in the same case, p 821). In this respect I would mention that I do not accept the interpretation that a high threshold of intimacy needs to be crossed – for example matters relating to a person's sexual history – in order to establish infringement of "a person's intimate life". That interpretation, which Gottesman propounded, relies on the fact that section 2(11) provides that infringement of privacy is "publishing any matter relating to a person's intimate life, *including his sexual history*" (emphasis added – UV). However, studying the legislative history of the Protection of Privacy Law indicates that the ending, after the word "including", was added to the section merely to clarify that "a person's sexual history" is also a matter relating to his "intimate life" (see the Explanatory Notes on the Draft Protection of Privacy (Amendment No. 8) (Prohibition of Publishing a Matter of Sexual History) Law, 5766-2005). In that sense the addendum is merely to clarify and elucidate (see ALA 2985/96 *Medalsi v. Goni* PD 50(2) 81, 86 (1996). See also: Aharon Barak, *Legal Interpretation, Volume II, Legislative Interpretation* 137-138 (1993)).

15. Having said all that, the first issue to clarify is whether the phrase "a person's intimate life" also embraces publications concerning a person's home. A person's home is not one of those concrete matters that are mentioned in section 2(11) of the Protection of Privacy Law – "a person's state of health" and "his conduct in the private

domain". Nevertheless, information relating to a person's home might certainly fall within the scope of "a person's intimate life". Indeed, a person's home gains a place of honour in the case law relating to privacy. Thus, for example, in Dayan, His Honour the Deputy President (as he then was) A. Barak held that:

> "The constitutional right to privacy extends, inter alia […] to a person's right to conduct the lifestyle that he wants in his own home, without interference from outside […] The right to privacy is therefore intended to ensure that a person will not be a prisoner in his own home and will not be forced to expose himself in his own home to interference that he does not want" (ibid, p 470; see also Jane Doe, para 10; Gilam, para 9).

Nevertheless, as I see it, these statements are not to be understood literally as relating merely to the physical aspect of the home. As President A. Grunis noted in respect of the statement cited above from Dayan, "it should be understood more broadly, metaphorically, along the lines of the expression coined by Warren & Brandeis, 'the right to be let alone'" (HCJ 8070/98 *The Association for Civil Rights in Israel v. Ministry of the Interior* PD 58(4) 842, 856 (2004); see also Yediot Aharonot, para 9). It should therefore be said that information relating to a person's home will not necessarily always be included in the scope of the matters concerning a "person's intimate life". For the publication of information relating to a person's home to be construed as an infringement of privacy, as defined in the Law, it is necessary to see whether it is such as to cross that threshold of intimacy, beyond which it may be said that "a person's intimate life" was infringed. In the instant case, reviewing all the circumstances leads to the conclusion that publishing the simulations of Vardi's house interior does indeed involve infringement of "a person's intimate life". The interior of a person's home is his castle and he is entitled to be let alone in it. Inside a person's home he exercises his right to privacy in the clearest form. A person therefore has a reasonable expectation that pictures of the interior of his home will not be published at large without his consent. In the instant case, studying the simulations of Vardi's home as published on the website shows that, despite the fact that they are computer simulations, the impression gained from them is very tangible. In this respect I accept the findings of the trial instance that "since the simulations show Vardi's house as it really is, it matters not whether they are the result of computer work or a camera" (p 13 of the lower court's judgement). And note, although the simulations do show the house in a "sterile" condition, namely without Vardi's personal belongings appearing in them, the items of furniture in them are very similar indeed to the existing furniture; they expose "personal" spaces in the house, like the bedroom and bathroom; and they are such as to attest to Vardi's lifestyle and also demonstrate, in the words of the section, "his conduct in the private domain".

16. The simulations of the house exterior should be treated differently. Ordinarily, the front of a house is exposed to passers-by. It is in the "public eye". Consequently, insofar as the front of a house is visible from the street, it is clear that showing its picture or simulation will not give rise to any infringement of privacy (see also CF (J'lem District) 7236/05 *Levin v. Ravid Stones*, para 14 (May 15, 2006)). The right of privacy does not extend to information that is already in the possession of the public. Therefore, when certain information is in any event in the public domain, the view that the right of privacy is not howsoever infringed is appropriate. (For similar statements in American law, see *Jackson v. Playboy Enterprises, Inc*., 547 F. Supp. 10, 13 (S.D. Ohio 1983); *Fry v. Ionia Sentinel-Standard*, 101 Mich. App. 725, 731 300 N.W. 2d 687 (Mich. Ct. App. 1980); *Reece v. Grissom*, 154 Ga. App. 194, 196, 267 S.E.2d 839 (Ga. Ct. App. 1980). See also David A. Elder, *Privacy Torts* 3-45, 3-44 (2002) (hereinafter referred to as "Elder"); James A. Henderson, Richard N. Pearson and John A. Siliciano, *The Torts Process* 930-31 (4th ed. 1994).)

17. According to Vardi, a distinction should be made between the situation described above, in which the front of the house as visible from the street is shown, and the simulations published by Gottesman on the website. Vardi asserts that the simulations of the house exterior that Gottesman posted on the website of his firm show the house from an angle that necessitates access to the grounds of the house, from which passers-by cannot obtain an impression of it. In that sense, Vardi pleads, a photograph from "the public domain" is not involved. Even if Vardi is right in that plea, there is no question that portraying the front of a person's house in public does not give rise to an infringement similar in extent to that caused by displaying the interior of his house. Whilst the interior of a person's house is visible only to his invited guests, the front of his house is less "private". The front of a person's house does not have the same "intimacy" that is characteristic of the intimate rooms of his home. In that sense, the simulations of the house exterior are not "information" that is sufficiently close to the nucleus of the interest protected by section 2(11) of the Law. Hence, whilst the simulations that portray the internal spaces of the house might infringe "a person's intimate life", publishing simulations of the house exterior does not give rise to such an infringement.

(b) *"A Person's" – the Requirement of Identification*

18. The wording of section 2(11) of the Protection of Privacy Law shows us that in order for the publication of a matter to constitute an infringement of privacy, it has to be established that the information published makes it possible to identify **a person.** When can it be said that information published does indeed make it possible to identify

a person so that an infringement of privacy does arise? Essentially, it appears that the answer is that an infringement of privacy will not arise where the requirement of "identification" is not fulfilled, namely **insofar as a reasonable person would be unable to connect the information published with a specific person**. On this point I would immediately clarify, ex abundanti cautela, that we might in future come across cases in which it will be possible to consider making that requirement more flexible. Those will be the exceptions in which particularly sensitive information is published to the point that even if it cannot be connected with someone, the very publication will create in the one to whom the information relates a serious sense of his privacy's violation, so that its protection will be justified. We shall leave discussion of such matters for when they arise since that is not the case herein.

19. In order to comprehend the nature of the identification requirement, recourse may be had, by way of analogy, to defamation law that we can use as an aid to interpretation and source of inspiration (see CA 723/74 *Haaretz Newspaper Ltd v. The Israel Electric Corporation Ltd*, PD 31(2) 281, 293 (1977); Dan Hay, *The Protection of Privacy in Israel*, 91-97 (2006) (hereinafter referred to as "Hay") and the references there). This is because in many senses an infringement of privacy is similar to the damage caused to reputation as a result of publishing defamatory information. Even before the enactment of the Defamation Law, 5725-1965 (hereinafter referred to as "The Defamation Law"), this Court insisted that in a claim on a cause of defamation it has to be established that the focus of the publication is a specific person. It was therefore held that the plaintiff on such a cause will be obstructed by the fact that he cannot be identified in the picture that was published (CA 68/56 *Rabinowitz v. Mirlin* PD 11 1224, 1226 (1957)). This requirement was intensified after the Defamation Law was enacted. Indeed, a question similar to that facing us was considered at length in the context of defamation law in CA 8345/08. *Ben Nathan v Bachri* (July 27, 2011) (hereinafter referred to as "Jenin Jenin "). In that case the Court considered the criteria whereby it could be held that defamation addressed at a group defames its members (ibid, para 18). The Court held in that case that "[…] For cause to arise to take proceedings in respect of the publication of defamation it has to be shown that *it relates to an individual or certain individuals* and when the proceedings are taken by the injured party, he must show that the statement *relates to him*" (ibid, para 32. Emphasis added – UV). What is important with respect to the instant case is that the inference was drawn, inter alia, from the fact that the section of the relevant statute (section 1 the Defamation Law) provides – as in the case herein – that the subject of the statement must be a "person" (ibid).

20. By way of comparison, in American law a similar criterion is also accepted in respect of the infringement of privacy. According to the case law there, the requirement of identification has been recognised as an essential one that confronts anyone seeking to assert the infringement of his privacy. Such being the case, where the plaintiff's image or name was not used, the courts in the USA have held that in practice no infringement of privacy arises (see: *Branson v Fawcett Publications,* 124 F. Supp. 429, 431-32 (E.D. III 1954); *Rawls v. Conde Nast Publications, Inc.* 446 F. 2d 313, 318 (5th Cir. 1971) (hereinafter referred to as "Rawls"). See also: Elder, pp 3-40). Consequently, as regards publications such as a photo of a person's house, car, dog or more, that are made without mention of some or other person's name, it has been held that they do not constitute an infringement of privacy, even if subjectively a person feels that his privacy has been infringed (Rawls, ibid; Samuel H. Hofstadter and George Horowitz, *The Right of Privacy*, 44 (1964)).

21. From the aforegoing it prima facie appears that it suffices for the information published to be shown anonymously in order to avoid the possibility of infringing privacy. However, in this respect it should be taken into account that even information that is shown anonymously might establish a connection with a specific person. In other words, even if the name of the person is not expressly mentioned alongside the information, it has to be ensured that he cannot be identified by other means, for example: if in the publication numerous identifying details are given from which it might be possible to deduce with whom the publication is dealing (see: Hay, p 115). If we treat the prohibition as merely the specification of a person's name, "it would make a mockery of the Law because it is enough to mention numerous identifying details in order to make it clear in many cases who is involved" (Zeev Segal, *The Right of Privacy against the Right to Know*, Iyunei Mishpat IX 175, 190 (1983) (hereinafter referred to as "Segal)). As held in Jenin Jenin, "the requirement of identification is substantive, rather than technical. The question is not whether the name of a person is expressly mentioned in the statement published […] The requirement of identification will be fulfilled in those cases where what is published is attributable to the individual who asserts damage implied from the publication or as a result of extrinsic circumstances or a combination of the publication and the extrinsic circumstances" (ibid, para 34).

22. In order to analyse whether it is possible to connect a person with particular information, a criterion of "de-anonymising" has been proposed in the literature. According to the criterion, if anyone has a key that will make reverse engineering possible, namely to attribute the information published to a particular person, then it can be said from the outset that the information is identifying (Michael Birnhack, *Private Space – Privacy, Law & Technology,* 191-193 (2010)). As aforesaid, it is

therefore not necessary for a person's name or picture to appear alongside the publication; it suffices for it to be possible by some means to connect the information with a specific person by "reverse engineering". Clearly, such "reverse engineering" is mainly likely to occur when the information published includes clear and unique characteristics (cf: *Motschenbacher v RJ Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974)).

23. In the instant case, is the requirement that the publication deal with a "person" fulfilled? To that end it is necessary to substantiate the conclusion that despite the anonymous publication of the simulations on the Gottesman website, they can be linked with Vardi. In the case herein we have reached the conclusion that although Vardi's name is not mentioned in the publication, the simulations' publication is likely to make it possible to identify him by other means in view of those unique characteristics relating to Vardi's house. As the lower court held, Vardi's house is a "project of a unique type". In this connection the lower court described Vardi's house as "spectacular and extraordinary as regards its size, the type of materials used in its construction, its unique design and also as regards the investment in each one of the architectural details that make it up". Gottesman himself attested to the project as a "one-off project" and in his appeal he described the house as "a spectacular, extravagant and extraordinary residence […] one of the largest houses in Israel and the largest designed by the Appellants". On the Gottesman website the unique design of the house is described as including the use of special materials like blue glass, unique metal, illuminated gardens and more. All these constitute distinctive construction characteristics that distinguish Vardi's house from others. These indicate that Vardi's house is unlike any other; it is an extraordinary, unique work of architecture. In view of that, it appears that recourse may be had to the simulations published on the Gottesman website for the purpose of that "reverse engineering" that will make it possible to deduce that the simulations shown on the website in fact simulate Vardi's house.

Section 6 of the Protection of Privacy Law –Infringement of No Real Significance

24. Even if the information published does indeed relate to "a person's intimate life", the Protection of Privacy Law requires it to be established that the infringement was not of "no real significance" (section 6 of the Protection of Privacy Law). In this connection, it has to be shown that the infringement of privacy was not done as a "trivial act" because such an infringement vests no right to relief (The Association for Civil Rights, p 863). The intention of the section is to do away with vexatious lawsuits, in respect of which no reasonable person would take the trouble of going to court (cf section 4 of the Civil Wrongs Ordnance [New Version]; see also CF (TA Magistrates)

199509/02 *Tzadik v. Haaretz Newspaper Publishing Ltd*, para 10 (January 22, 2014); Hay, p 124).

25. In the instant case, the publication of the simulations is not "a trivial act". The simulations that appeared on the Gottesman website tangibly show the interior of Vardi's home and in that way enable the public at large to gain an impression of the home owner's lifestyle and manners. There is no doubt that when any clear image of a person's home is made visible, and especially his intimate rooms – the bedroom, bathroom etc. – the publication is likely to give him an intense feeling of discomfort. The nature of those rooms is that they are concealed from the eye, and usually from the eyes of invited guests as well. That is where a person expects more than anything that he will be secluded from the public eye. Such being the case, bringing the lawsuit herein seems to be in good faith on the face of it and it is certainly not a frivolous or vexatious claim. It is such as to express the deep sense of discomfort caused to Vardi by the publication – which to my mind also has objective foundation in the circumstances. However, that is not the case with regard to the publication of the simulations of the front of the house. As I mentioned above, in that connection I tend to believe that even if publication of the simulations of the house exterior might cause some infringement, it is minor and trivial, in respect of which there is no cause for the grant of relief.

Defences to a Plea of Privacy Infringement (Section 18 of the Law)

26. Another element necessary for the award of relief on a cause of infringement of privacy is negation of the existence of the circumstances of one of the defences prescribed in section 18 of the Law. Those defences demonstrate that the Protection of Privacy Law does not make the right of privacy an "absolute" one (CA 1928/93 *The Securities Authority v. Gibor Sabrina Textile Enterprises Ltd*, PD 49(3) 177, 193 (1995)). The defences prescribed in the Law might therefore bar a civil claim or criminal proceedings in respect of the infringement of privacy. Nevertheless, a party seeking to shelter behind those defences must show that he acted **in good faith.** Good faith is "like a gate and only if it is traversed will the circumstances in which the specific infringement of privacy was committed be examined" (Gilam, para 8). It should be noted that the case law has interpreted this as a requirement of subjective good faith. It is therefore necessary to prove that the person committing the infringement acted in the belief that the infringement was in the scope of the defences prescribed by the Law (Jane Doe, para 24). In order to prove good faith, the defendant or accused can have recourse to the presumption mentioned in section 20(a) of the Protection of Privacy Law, according to which:

"20. (a) Where the accused or defendant proves that he committed the infringement of privacy under any of the circumstances referred to in section 18(2) and that it did not exceed the limits reasonable under those circumstances, he shall be presumed to have committed it in good faith."

In this connection the court will review "the form, substance and extent of the publication in order to see whether the publisher has fulfilled his duty, for which the defence extends to him, or went beyond that and exceeded the 'limits reasonable' in connection with which the legislative norm was framed" (Segal, p 199).

Against that presumption that is available to the defendant or accused, the plaintiff or prosecutor can have recourse to the presumption mentioned in section 20(b) of the Law:

"20. (b) The accused or defendant shall be presumed not to have committed the infringement of privacy in good faith if in committing it he knowingly went further than was reasonably necessary for the purposes of the matters protected by the section."

In this respect, proving that the publisher knew that he had exceeded the reasonable is equivalent to establishing the absence of the publisher's subjective good faith because it will demonstrate "his indifference to the consequence involving infringement more than necessary to protect the value recognised by the Law" (Segal, ibid).

27. In his appeal Gottesman relied on two defences – those prescribed in sections 18(2)(a) and (c), which provide as follows:

"18. In any criminal or civil proceedings for infringement of privacy, it shall be a good defence if one of the following is the case:

[…]

(2) the defendant or accused committed the infringement in good faith in any of the following circumstances:

(a) he did not know and need not have known that an infringement of privacy might occur;

[…]

(c) the infringement was committed in defence of a legitimate personal interest of the infringer;

[…]"

28. We shall therefore review whether the infringing act was committed in one of the circumstances mentioned in section 18(2) – and in our case, the circumstances prescribed in section 18(2)(a) or 18(2)(c) of the Law. As regards the defence prescribed in section 18(2)(a) of the Law, as the lower court held, before publication Vardi repeatedly emphasised to Gottesman that he jealously guarded his privacy and he was resolute in his refusal to publicise the house or parts of it. Consequently, from such time as Vardi made it perfectly clear to Gottesman that he strongly objected to publication without the latter signing the letter of commitment, it is difficult to conceive that the infringement was committed without Gottesman "knowing […] that an infringement of privacy might occur", as the section requires. Clearly, therefore, the plea with regard to the defence under that section cannot be upheld.

29. We should now examine whether Gottesman has available the defence under section 18(2)(b), which concerns an infringement committed in order to protect a "legitimate personal interest" of the infringer. The section necessitates a balance to be made between the right of privacy and other conflicting values, and the expression "legitimate personal interest" should be construed "by making a balance between the desire to protect the interest of the injured party and safeguard his privacy, on the one hand and the contrary interests of the infringer, on the other hand" (Crim App 1132/96 *Hatuha v. State of Israel*, para 8 (January 20, 1998)). In the instant case, Gottesman and his firm have a twofold interest in publishing the simulations: both a creative interest and a business interest. It cannot be disputed that Gottesman has the moral right in his architectural work. Such being the case, he is entitled to the work being credited to him, namely to his work being identified with his name. This expresses recognition of the author's personality and the attempt to respect the personal connection between the author and his work (sections 45 and 46 of the Copyright Law; see also: Tony Greenman, *The Moral Right – From Droit Moral to Moral Rights, Authoring Rights – Readings on the Copyright Law* 439, 439-440 (Michael Birnhack & Guy Pesach, Editors, 2009)). The desire to safeguard the freedom of creative expression means that the transfer of an architect's economic rights in his work will not preclude his expressing himself in the same artistic style and motifs in other works (cf Sara Presenti, *Copyright Law, vol. II* (3rd edition, 2008)), and in the instant case, that the work can be exposed to other circles. Consequently, on the artistic-creative level, one can understand Gottesman's desire to expose to the public Vardi's house, a work

that is unquestionably of unique quality and size. In addition, there is nothing wrong in Gottesman's desire to publicise his work for economic reasons as well because displaying the work might certainly enable its author to establish a reputation and attract clients. Nevertheless, as we have mentioned, in the scope of the defence under section 18(2)(c) a balance needs to be made between the infringement of Vardi's privacy and the legitimate personal interest of Gottesman. As mentioned above, as I see it, showing the interior of Vardi's home gives rise to a considerable infringement of his privacy. On the other hand, the harm to Gottesman's legitimate personal interest is limited. This is because Vardi's request was limited to precluding publication of the simulations on the website and, such being the case, there is nothing to stop Gottesman from making use of simulations for his business purposes, exposing them on a more limited scale, for example by showing them to clients in his office or to professional circles, a matter to which Vardi has himself agreed in writing (paragraph 23 of his summations). In this connection, certain weight should also be given to the fact that Gottesman could have given full expression to his interest in publishing the simulations by making an express agreement in such respect with Vardi in real time. To this should be added the fact – as explained above – that Gottesman can also show the simulations of the house exterior on the website. In the overall balance between the competing rights and interests, the outcome is therefore that it is inappropriate to apply the defence of section 18(2)(c) to publishing simulations of the interior of Vardi's house. Having found that publication of the simulations does not fall within one of the circumstances mentioned in section 18(2) of the Law, we have no need to consider the question of good faith or the application of the presumptions prescribed in section 20 of the Law.

Absence of Consent to Infringement of Privacy

30. Having reached the conclusion that that there is an infringement, of real significance, of Vardi's privacy, in respect of which it cannot be said that it is covered by one of the defences prescribed in the Law, we must rule whether Vardi's consent was given to the publication discussed herein. The Protection of Privacy Law provides that an infringement of privacy will not occur where there is consent to the infringement (section 1). Such consent can be expressed or implied (section 3 of the Protection of Privacy Law; Jane Doe, para 20). The reason for that requirement is that "the right of privacy is to protect the individual, and as a rule society cannot protect an adult against his will" (Crim App 4463/93 *Birav v. State of Israel*, PD 49(5) 447, 458 (1996)). And note, consent is not cause to justify an infringement of the rights of privacy. Consent itself is an inherent part of the right so that if it is given, a right of action does not arise (Halm, p 41). Although consent for the purpose of infringement of privacy can be inferred from a series of cases and modes of behaviour (Hay, p 122), it

is best to exercise extreme care in determining that consent to publication has been obtained. "Care should be taken not to apply the justifying force of consent to cases in which it is clear that there is no real consent and the use of the consent is therefore constructive and fictitious" (Ruth Gavison, *Prohibiting Publication That Infringes Privacy, Human Rights in Israel – Collection of Articles in Honour of Haim H. Cohn*, 177, 199 (1982)). It has been held along these lines that from the fact that an individual agreed to disclose certain particulars to one person or several persons, it cannot be inferred that he is precluded from objecting to the publication of those particulars to the public at large (Ventura, p 822); and that even the existence of a close relationship such as marriage does not per se indicate implied consent to one partner's infringement of the other's privacy (Jane Doe, para 20).

31. From the general to the particular – in the instant case it appears that such consent was not obtained. I would mention at the outset that I do not accept Gottesman's claim that Vardi's consent to the publication was not necessary because all that was published were the simulations based on the architectural plans. Insofar as that publication causes an infringement of privacy, then it is subject to the principle that "no person shall infringe the privacy of another without his consent" (section 1 of the Protection of Privacy Law). In the instant case, it would appear that such consent was not consummated. As the lower court held, the relationship between Vardi and Gottesman was conducted on the basis of oral understandings, without the issue of consent to publication reaching exhaustive discussion between the parties. Vardi's requirement that photographs of his home could only be taken subject to signing the letter of commitment that he proposed therefore did not constitute a departure from a previous understanding between the parties but an unsuccessful attempt to reach an understanding. Since that agreement was not signed, express consent to publication was not obtained. Indeed, as aforesaid, the existence of consent can also be inferred. However, we have not found substance to the plea that Vardi's agreeing to the publication of other pictures of the house infers that implied consent was also given to Gottesman. Actually, the fact that other publications were specifically made subject to signing the said letter of commitment is such as to demonstrate the absence of consent in the instant case. Our conclusion is therefore that consent to the infringement of privacy was not obtained.

Conclusion

32. In conclusion, we have found that publishing the simulations showing the front of Vardi's house does not give rise to an infringement of privacy and in any event not an infringement of real significance, as defined in section 6 of the Law. On the other hand, we have reached the conclusion that the simulations showing the interior of

Vardi's house do infringe "his intimate life" and that despite their anonymous publication, it is possible to connect them with Vardi. It has also been found that it is not an infringement "of no real significance" and that the defences prescribed in section 18(2) of the Protection of Privacy Law are inapplicable. Because the infringement of Vardi's privacy was made without his consent to the publication, there is no alternative but to find that publication of the simulations of the interior of his home on the website cannot be permitted.

I therefore suggest to my colleagues to allow the appeal in part to the effect that the injunction remains in force in respect of publishing the simulations of the house interior on the website. The meaning of this is that there is no bar to simulations of the house exterior being published on the site. In view of that result, I suggest to my colleagues to set aside the liability for costs at first instance and make no order for costs in the current instance.

Justice S. Joubran

I concur.

Justice N. Sohlberg

I concur with the judgement of my colleague Justice U. Vogelman. The distinction that he made between the front of the house and the house interior, has deep roots in Jewish law. The Torah forbids a creditor to enter his fellow's home in order to collect his debt: "When you make a loan of any kind to your neighbor, do not go into his house to get what he is offering as a pledge. Stay outside and let the man to whom you are making the loan bring the pledge out to you" (Deuteronomy 24:10-11). Although a lender and borrower, rather than strangers, are involved, the respect of privacy requires that the house not be entered; the homeowner brings the pledge outside. Despite the fact that the borrower has a debt to the lender and the lender's prima facie moral right to enter the borrower's house in order to take steps to secure repayment of the debt, the Torah prohibits entry to the borrower's house. The Torah did not make do with a moral provision but prescribed a legal right for the protection of privacy (see: N. Rakover, *The Protection of Privacy* (5766-2006) 265).

Jewish law protects a person's privacy not only by precluding admittance to the private domain but also by precluding "damage by sight" [*hezek reiyah*] from outside. As we know, Bilam sought to curse the Children of Israel when he saw them dwelling in the desert according to their tribes but he found himself blessing, instead of cursing, them and he said "How goodly are your tents, O Jacob, your dwelling places, O Israel" (Deuteronomy 24:5). This is interpreted by the Talmud as follows: "What did Bilam see? He saw that the openings of their tents did not exactly face each other, whereupon he exclaimed, worthy are these that the divine presence should rest upon them". That is to say that when Bilam saw that the tents of the Israelites were positioned so that their openings did not face each other and were directed in such a way as to ensure the privacy of everyone, he was filled with admiration and said: "How goodly are your tents, O Jacob, your dwelling places, O Israel!" (N. Rakover, ibid, pp 269-272). The Code of Jewish Law [The *Shulchan Aruch*] *(Choshen Mishpat,* 154:3) lays down the rule: "A person shall not open a window onto his neighbour's courtyard. And even one of the people who share the courtyard and has sought to open a window in his house onto the courtyard shall be restrained by his partner because he can see him from it. And if he has opened one, it shall be blocked. And if the people who share the courtyard with him have given him permission to open a window or door, he may, but he shall not open a door opposite a door or a window opposite a window and shall distance them from each other. And if it is to another courtyard, onto which he has been given permission to open a door or window, he should distance it from his neighbour's door or window until he cannot see in it at all". This is not the place for details of the Jewish law (see at length, Rakover, ibid) but merely for the principle of respecting a person's privacy. That is how God [*HaKadosh Baruch Hu*] acted when he called to Adam from the entrance to the Garden of Eden, from which we shall learn: "A person should never suddenly enter his neighbour's house. And every person shall learn the appropriate mode of behaviour [*derech eretz*] from God, who stood at the entrance to the Garden of Eden and called upon Adam, as it is said: "But the Lord God called to the man and said 'where are you'?" (*Genesis* 3:9; *Derech Eretz Raba,* Chapter 5).

We can therefore see the distinction between the interior and exterior back from ancient times. A few years ago I heard the lawsuit of a man and his wife who had built a rounded wall of unique design, made of basalt manufactured by Ravid Stones Ltd, at the front of their house. In order to promote its sales, the company published a photograph of the front of the house in the press, on the Internet and in a catalogue. The plaintiffs asserted infringement of their privacy, amongst other things. I stated there that the list of acts in section 2 of the Protection of Privacy Law, 5741-1981, that involve an infringement of privacy, does not contain "a prohibition against publishing the front of a person's home; and not without reason. A person's home – on the inside – is his castle. The front of it that faces outward is naturally exposed to the whole world.

Any person passing by may savour the outer beauty of the house. A photograph of the front of the house from the public domain does not involve an infringement of privacy" (CF (J'lem) 7263/05 *Levin v. Ravid Stones*, para 14 (May 15, 2006)).

I therefore concur with my colleague's judgement, on the basis of its reasoning.

Held as stated in the opinion of Justice U. Vogelman.

January 23, 2013