

***James v James No 2* [2020] NSWDC 796 (13 November 2020) – New South Wales District Court**

‘Application to tender recordings’ – ‘Assessment of damages’ – ‘Evidence’ – ‘Tort’

Proceedings: Application to tender recordings.

Facts: The recordings were made of the interactions between the plaintiff and the defendant on 20 February 2018 at their former home. The recordings were of a private conversation between the plaintiff and the defendant made without the defendant’s consent, thereby in contravention of s 7(1)(b) of the *Surveillance Devices Act 2007*.

Issues:

1. Whether it was reasonably necessary for the plaintiff to make the recording for the protection of her lawful interests, per the exception in s 7(3)(b)(i) of the *Surveillance Devices Act 2007*.
2. Whether the recording nonetheless admissible as the desirability of admitting the evidence outweighed the undesirability of admitting evidence obtained in an unlawful manner, per the exception in s 138(3) of the *Evidence Act 1995*.

Decision and reasoning: The recording did not fall within the exception under s s 7(3)(b)(i) of the *Surveillance Devices Act 2007*. The meaning of “lawful interest”, referring to the decisions in *DW v R* [2014] NSWCCA 28 and *Corby v Corby* [2015] FCCA 1099, did not extend to the plaintiff’s purpose which was to record the abuse to replay to the defendant later and change his behaviour: (at [3]-[4]). The recording was instead admitted into evidence in the exercise of the court’s discretion under s 138(3) of the *Evidence Act 1995*: at [7]-[9]. It had probative value of the extent of the plaintiff’s damages for her claim in tort. The impropriety of the contravention was not great. The recordings were referred to in the assessment of damages judgment: see *James v James No 3* NSWDC 797 (16 November 2020).