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**IN THE SUPREME COURT OF EREWHON**

BEN (First Appellant)  
EREWHON NEWS (Second Appellant)  
EMILY (Third Appellant)  
v  
ADAM (Respondent)

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**SUBMISSIONS FOR THE APPELLANTS**

*Team Dahlia*

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The Court of Appeal erred in affirming the decision of the learned trial judge that:

- (1) Adam did have a reasonable expectation of privacy in relation to the information on the *Erewhon News Blog* (*'EN Blog'*) and within his married life;
- (2) The appellants' acts of publishing the information on the *EN Blog* did not pursue a legitimate aim and was not proportionate to the harm caused to Adam; and
- (3) Emily's act of accessing the respondent's email did not pursue a legitimate aim and was not proportionate to the harm caused to Adam.

The Court of Appeal was correct in affirming the decision of the learned trial judge that:

- (4) Emily's act of disclosing the respondent's personal documents did pursue a legitimate aim and was proportionate to the harm caused to Adam.

1. **Adam did not have a reasonable expectation of privacy in relation to the information on the EN Blog and within his married life**

The right to privacy is engaged if an individual has a reasonable expectation of privacy.<sup>1</sup> This expectation arises when the receiver of the information knew, or ought to have known, that it should be regarded as private.<sup>2</sup>

The interference with the private life must be of some seriousness before the right to privacy is engaged.<sup>3</sup> The question of whether a reasonable expectation of privacy arises is a broad one which takes account of all the circumstances of the case, including:

- the attributes of the claimant;
- the nature of the activity in which the claimant was engaged;
- the place at which it was happening;
- the nature of the intrusion; and
- the absence of consent.<sup>4</sup>

1.1 ***Adam did not have a reasonable expectation of privacy in relation to the information on the EN Blog***

**a. Information published by Frances**

The right to a private life does not insulate an individual from criticisms of an academic or professional nature.<sup>5</sup> The photograph and comment posted by Frances showed Adam in his workplace, viewing copyright infringed material. Adam is a copyright lawyer, a generally outspoken advocate of strong copyright protection and a published academic in the field.

Conduct which occurs in a public place with open access involves a lower expectation of privacy compared with activities within one's home.<sup>6</sup> The conduct occurred in a place to which all

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<sup>1</sup> *Campbell v MGN Ltd* [2004] 2 AC 457, [21]; *Katz v US* 389 U.S. 347, 361 (1967); *Hunter v Southam Inc.* [1984] 2 S.C.R. 145, 159 (Can.); *Halford v United Kingdom* [1997] ECHR 32, [45].

<sup>2</sup> *Browne v Associated Newspapers Ltd* [2007] EWCA Civ 295, [31].

<sup>3</sup> *M v Secretary of State for Work and Pensions* [2006] 2 AC 91, [83].

<sup>4</sup> *Murray v Express Newspapers* [2008] EWCA Civ 446, [36]; applied in *LNS v Persons Unknown* [2010] EMLR 16 (QB), [55].

<sup>5</sup> *Browne v Associated Newspapers Ltd* [2007] EWCA Civ 295, [49]-[50].

<sup>6</sup> *Turner v General Motors Corp*, 750 S.W.2d 76, 79 (Mo. App. 1988).

members of the firm have open access. It is acknowledged that the photograph was taken without Adam's consent.

#### **b. Information published by Emily**

The reasonable expectation of privacy is not automatically enlivened by a personal relationship between the parties.<sup>7</sup> The state of the relationship between the parties is relevant to the expectation of privacy,<sup>8</sup> with unstable relationships attracting less expectation.<sup>9</sup> Adam's statement about his assets was made after Emily indicated the termination of the marriage, when he had a reduced expectation of privacy.

### **1.2 Adam did not have a reasonable expectation of privacy within his married life**

The fact that two parties are married and live together will often be a relevant factor in deciding whether they have a reasonable expectation of privacy *within* their marriage.<sup>10</sup> This question will ultimately depend on the facts of the case<sup>11</sup> and factors such as the manner in which documents are stored,<sup>12</sup> and the extent to which each spouse exhibits their expectation of privacy.<sup>13</sup>

If the parties do not have this expectation of privacy within marriage, then neither spouse is able to maintain a right to privacy against the other.

#### **a. Adam did not have a reasonable expectation of privacy with respect to his emails**

Opening a spouse's personal mail may constitute an intrusion of their privacy,<sup>14</sup> but the key consideration is whether the aggrieved spouse exhibited an expectation of privacy.<sup>15</sup> Emily

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<sup>7</sup> For an authority on the view that not everything communicated within a relationship is of a confidential nature, see: *Browne v Associated Newspapers Ltd* [2007] EWCA Civ 295, [29].

<sup>8</sup> *CC v AB* [2006] EWHC 3083 (QB), [31]; *A v B plc* [2003] QB 195, [45]; *Theakston v MGN Ltd* [2002] EMLR 398, [61].

<sup>9</sup> For an example of judicial reluctance to recognise the rights of one party to a sexual relationship where the other party wishes to expose the other, see: *A v B plc* [2003] QB 195; *CC v AB* [2006] EWHC 3083 (QB), [32].

<sup>10</sup> *Imerman v Tchenguiz* [2011] 1 All ER 555, [87].

<sup>11</sup> *Ibid*, [88].

<sup>12</sup> *Ibid*, [88].

<sup>13</sup> *White v. White* 781 A.2d 85 (N.J. Super Ct. Ch. Div. 2001).

<sup>14</sup> *Ibid*, 91.

accessed Adam's emails without difficulty. There has to have been either a sharing of access information (such as passwords) or shared access to the computer, which refutes Adam's reasonable expectation of privacy in relation to his emails.<sup>16</sup>

**b. Adam did not have a reasonable expectation of privacy with respect to his private documents**

The manner in which documents are stored in a shared marital home can influence whether a person has an expectation of privacy within their marriage, with respect to those documents.<sup>17</sup> Adam stored his personal documents on a computer that Emily had equal access to.<sup>18</sup> Further, a copy of these personal documents was readily available for Emily to take without any difficulty or burden. These facts indicate that Adam stored his personal documents in a manner which exhibited no expectation of privacy within his marriage.

**2. The appellants' acts of publishing the information on the EN Blog did pursue a legitimate aim and was proportionate to any harm caused to Adam**

**2.1 Freedom of expression**

**a. Legitimate aim**

The appellants exercised their right to freedom of expression by publishing the information (photograph and comments) on the *EN Blog* and (with respect to Ben) imparting information to Frances. If the appellants have been pursuing a legitimate aim, Adam's right to privacy can be limited.<sup>19</sup>

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<sup>15</sup> *White v. White* 781 A.2d 85 (N.J. Super Ct. Ch. Div. 2001); Laura W. Morgan and Lewis B. Reich, 'The Individual's Right of Privacy in a Marriage' (2010) 23 *Journal of American Academy of Matrimonial Lawyers* 111, 120-21.

<sup>16</sup> See: *States v Morgan* 435 F.3d 660, 663 (6<sup>th</sup> Cir. 2006); *United States v Aaron* 33 Fed. Appx. 180 (6<sup>th</sup> Cir. 2002); *White v White* 781 A.2d 85, 90-91 (N.J. Super. Ct. Ch. Div. 2001).

<sup>17</sup> *Imerman v Tchenguiz* [2011] 1 All ER 555, [88].

<sup>18</sup> See: *United States v Buckner* 473 F.3d 551, 555-56 (4<sup>th</sup> Cir. 2007); *United States v Morgan* 435 F.3d 660, 663-64 (6<sup>th</sup> Cir. 2006); *United States v Smith* 27 F. Supp. 2d 1111, 1116 (C.D. Ill.1998).

<sup>19</sup> *Browne v Associated Newspapers Ltd* [2007] EWCA Civ 295, [55].

The legitimate aim pursued was publishing the information *in the public interest*.<sup>20</sup> Publication is in the public interest where a person publicly presents an image of themselves which the publication exposes as false.<sup>21</sup> Adam was a prominent copyright protection advocate whose publicly expressed opinions were contradicted through publication of the information.

## **b. Proportionality**

### **(i) Publication of the photograph and Frances' comment**

In a conflict between the right to privacy and the right to freedom of expression no right takes precedence over another.<sup>22</sup> Freedom of expression is of central importance to any democratic society,<sup>23</sup> and any restraint on this right requires careful scrutiny.<sup>24</sup> The substance of the information disclosed by the photograph and Frances' comment revealed a matter in the public interest;<sup>25</sup> disclosure of the private act was merely incidental. The manner in which the photograph was presented (in combination with the comment and link) was sufficient to overbear any privacy inherent in the photograph. This is evidenced by the anonymous comment which focused solely on the matter of public interest disclosed by the photograph.

### **(ii) Emily's comment**

Emily's comment represents her opinion of the public interest matter ("hypocrisy"). Unlike disclosing an extra-marital affair, she merely revealed details of their marital strife.<sup>26</sup> This minor breach of privacy is overborne by the benefits of allowing Emily to express her opinions and disclose Adam's hypocrisy.

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<sup>20</sup> *Von Hannover v Germany* [2004] 40 EHRR 1, [64].

<sup>21</sup> *Campbell v MGN Ltd* [2004] 2 AC 457, [24].

<sup>22</sup> *re S (A Child) (Identifications: Restrictions on Publication)* [2003] 3 WLR 1425, [17]; *Keegan v Ireland* [1994] 18 EHRR 342, [49].

<sup>23</sup> *Observer Ltd and Guardian Newspapers Ltd v United Kingdom* (1991) 14 EHRR 153, [60].

<sup>24</sup> *Campbell v MGN Ltd* [2004] 2 AC 457, [113].

<sup>25</sup> See: 2.1 (a).

<sup>26</sup> Cf: *A v B plc* [2003] QB 195; *K v News Group Newspapers Ltd* [2011] 1 WLR 1827.

## 2.2 Right to possessions under section 32 of The Erewhonian Human Rights Code (“EHRC”)

### a. Ben pursued the legitimate aim of exercising his right to possessions

#### (i) Copyright subsisted in Ben’s photograph

For copyright to subsist in a photograph, the author must have exercised such labour, skill and judgment as confers originality.<sup>27</sup> The level required to establish originality is a low one.<sup>28</sup> As such, while photographs do not normally involve a large degree of originality,<sup>29</sup> even minor decisions such as the exact moment to take the photograph will be sufficient for copyright to subsist in the photograph.<sup>30</sup>

Ben merely took a photograph of an event over which he had no control and it may be arguable that there is no originality because he has simply made a reproduction of that event. However, it was essential for Ben to take the photo in a manner that captured Adam watching the movie *Walter Mitty*, while also capturing the DVD cover which indicated he was watching a pirated version.

The taking of the photograph involved a degree of skill; Ben had to choose the appropriate content to capture in the photograph and these were captured as the correct moment. Otherwise, it would not have been apparent that he was watching the same film as the DVD cover suggested.

#### (ii) Ben is the author of the photograph

The author of the photograph is the person who creates it, usually the photographer. Here Ben is the author of the photograph and the copyright is vested in him.

<sup>27</sup> *GA Cramp & Sons Ltd v Frank Smythson Ltd* [1944] AC 329, 335.

<sup>28</sup> *IceTV Pty Ltd and anor v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, 479; *Ladbroke (Football) Limited v William Hill (Football) Limited* [1964] 1 WLR 273; *Interlego AG v Tyco Industries* [1989] 1 AC 217, 259–263.

<sup>29</sup> *Antiquesportfolio.com v Rodney Fitch* [2001] FSR 23.

<sup>30</sup> *Ibid*, 34.

(iii) Ben's copyright in the photograph constitutes possessions

Ben's act of taking the photo vested him with copyright in it. For his right to possessions<sup>31</sup> his copyright must constitute possessions. The European Court of Human Rights has consistently recognised that intellectual property, including copyright, constitutes possessions.<sup>32</sup>

Furthermore, intellectual property shall be protected.<sup>33</sup> Intellectual property, including copyright, *will* be protected if they fall within the ambit of the right to.<sup>34</sup> This provides intellectual property with the same protection of all other possessions<sup>35</sup> and will bring it on equal footing to other rights.<sup>36</sup>

(iv) Ben pursued the legitimate aim of exercising his property rights

A property owner may pursue a legitimate aim by exercising his rights for the benefit of the public interest. Ben is using his authorial work to highlight the inconsistency between his colleague's actions and his public statements. He has exercised his right for the *EN Blog* to reproduce his work<sup>37</sup> in pursuit of the public interest disclosed by the photograph.

**b. Ben's act was proportionate to the achievement of his aim**

The exercise of Ben's right to property in distributing the photo will inevitably impact upon Adam's privacy rights. He could not exercise his right to distribute without the photo becoming public to some extent. However, while the photograph depicted a private act, it was not of an

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<sup>31</sup> EHRC s 31.

<sup>32</sup> Possessions have an autonomous meaning which is not limited to ownership of physical goods: *Anheuser-Busch Inc v Portugal* (2007) 45 EHRR 36; *Balan v Moldova* [2009] ECDR 6; *Ashdown v Telegraph Group Ltd* [2001] Ch. 685.

<sup>33</sup> *The Erehwonian Intellectual Property Code*, s 15. This wording is identical to the *Charter of Fundamental Freedoms of the European Union*, art 17 (2).

<sup>34</sup> EHRC s 31.

<sup>35</sup> Which reflects the intention of the *Charter of Fundamental Freedoms of the European Union*, art 17 (2) in bringing intellectual property to "the core of protection offered by the European property guarantee". See: Jonathon Griffiths and Luke McDonagh, 'Fundamental Rights and European IP Law – the case of Art 17 (2) of the EU Charter' (August 3, 2011). *Constructing European IP: Achievements & New Perspectives*, C. Geiger, ed., Edward Elgar, 2012, 11.

<sup>36</sup> Including the freedom of expression (EHRC s 32) and the right to privacy (EHRC s 30).

<sup>37</sup> A copyright owner has the exclusive right to authorise reproduction of their work recognised under the *International Berne Convention for the Protection of Literary and Artistic Works*, article 9 (1).

overtly private nature and could be something readily observed. It is not of a nature which should justify the absolute prohibition of Ben's right to property.

3. **Emily's act of accessing the respondent's email did pursue a legitimate aim and was proportionate to the harm caused to Adam**

3.1 *Emily pursued a legitimate aim in accessing Adam's email*

The aim of Emily's act was to determine whether her husband was having an extramarital affair.

Upholding the right to family life includes preventing those acts which are *harmful* to, and *preventative* of, a person's enjoyment of their family life.<sup>38</sup> Thus, a law which threatens the right of a person to their family life, such as through denying them the right to marry, engages the right to family life.<sup>39</sup> Adam's extramarital affair was *harmful* to Emily's family life. Withholding knowledge of the affair from Emily *prevented* her from exercising her right to family life. She was prevented from decide if she wanted to continue her family life with Adam, knowing that he had been secretly maintaining a similar relationship with someone else.

3.2 *Emily's act was proportionate to the achievement of her aim*

Emily's act provided substantial benefits, allowing her to take control of her family life in a manner which was being denied to her by Adam's damaging and deceptive behaviour. It is unlikely other acts would deliver the same benefits. Adam had hid his affair for several months and there was every possibility he would continue to hide it regardless of how Emily confronted him.

Furthermore, the detriment to Adam's privacy was minimal. Within marriage each spouse maintains a life separate and distinct to their *shared marital life*.<sup>40</sup> If Adam had an expectation of privacy regarding his emails generally, the specific emails Emily accessed concerned his *shared marital life* with her.

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<sup>38</sup> *Schak v Austria* [2011] 53 EHRR 20, [56]-[58].

<sup>39</sup> *Ibid.*

<sup>40</sup> *Imerman v Tchenguiz* [2011] 1 All ER 555. [84].



Furthermore, the detriment to Adam's privacy was minimal. Emily simply accessed the email and extracted the information required to achieve her aim. She did nothing more with the email or the information obtained by reading it.

4. **Emily's act of disclosing the respondent's personal documents did pursue a legitimate aim and was proportionate to the harm caused to Adam**

4.1 *Emily's act pursued a legitimate aim*

a. **Emily's share of Adam's assets upon dissolution of the marriage constitutes possessions**

For a possession to fall within s 31 of the EHRC there must be a legitimate expectation of future acquisition by the person claiming the right.<sup>41</sup> Emily's share of Adam's assets upon dissolution of the marriage is the possession. To acquire this share, the couple would have to divorce, and the result of those divorce proceedings would have to be an order awarding a share of Adam's assets to Emily.

Emily and Adam's statements are indicative of forthcoming divorce proceedings. Further, Emily has a *right* to a share of Adam's possessions upon divorce, as indicated in the judgment of Endicott J where he refers to Emily's share of Adam's property upon dissolution of the marriage as a 'right'.

b. **Emily's legitimate aim was to preserve her possessions**

Adam's threat presented Emily with a real risk to the peaceful enjoyment of her possessions. She acted for the purpose of protecting her property rights by preventing Adam from carrying through with his threat. This pursued a legitimate aim.

4.2 *Emily's actions were proportionate*

The presence of Adam's threat to Emily's property rights presented a need to act quickly. Taking the CD presented Emily with a quick act that was also very effective in preserving the necessary

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<sup>41</sup> *Balan v Moldova* [2009] ECDR 6, [31]-[33].

documents to protect her rights. Her objective would not be achieved, with the same benefits, through court action. Seeking the order of a court would take time, would have detrimental effects in terms of cost and difficulty of obtaining the order,<sup>42</sup> and there was a possibility the evidence would be destroyed before the order could be obtained or enforced.

Furthermore, the detriment caused by Emily's act were minimised because she sent the CD without looking at it. The CD kept with her solicitors so that it could be kept until the Family Proceedings were on foot. Solicitors are bound by obligations of confidentiality,<sup>43</sup> mitigating the risk of disclosure to third parties.

*Respectfully submitted,*

Counsel for the Appellants

Word Count: 2,985

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<sup>42</sup> *Araghchinchi v Araghchinchi* [1997] 2 FLR 142.

<sup>43</sup> *Hospital Products Ltd v United States Surgical Corpn* (1984) 156 CLR 41, [97] per Mason J, cited in *Kelly v Cooper* [1993] AC 205, 215.