
IN THE SUPREME COURT OF EREWHON

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

SUBMISSIONS FOR THE RESPONDENT

Team Dahlia

The Court of Appeal was correct 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 *Erewhonian 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 erred 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; and
- (5) Adam should not be granted an injunction preventing future use of the photograph and personal information, or an order requiring delivery of the photograph and CD.

1. Adam had a reasonable expectation to privacy

The right to privacy¹ is engaged if an individual has a “reasonable expectation of privacy”.² The question of whether a reasonable expectation of privacy arises depends upon the circumstances of the case,³ including the:

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

1.1 *Adam did have a reasonable expectation of privacy in relation to the information published on the EN Blog*

a. *Photograph published on the EN Blog*

The courts have held that circumstances involving:

- An intimate act;⁵
- A private location;⁶
- The use of photography;⁷
- Secret intrusion;⁸ and
- An absence of consent,⁹

All suggest a reasonable expectation of privacy exists. The image captured by Ben included all of these circumstances. Consequently, these circumstances gave rise to a reasonable expectation of privacy.

¹ *Erewhonian Human Rights Code* s 30 (“EHRC”).

² *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].

³ *Murray v Express Newspapers* [2009] Ch. 481, [36].

⁴ *Ibid.*

⁵ *Theakston v MGN Ltd* [2002] EMLR 398, [68].

⁶ *Moseley v News Group Newspapers Ltd* [2008] EWHC 687 (QB), [98].

⁷ *Douglas v Hello! Ltd (No. 3)* [2006] QB 125, [84].

⁸ *Campbell v MGN Ltd* [2004] 2 AC 457, [123].

⁹ *Murray v Express Newspapers* [2009] Ch. 481, [51].

b. Information published by Emily

A person has a reasonable expectation of privacy with respect to details of their financial affairs.¹⁰ Emily's comments disclosed details of what Adam intended to do with his assets, which relates to his financial affairs.

A person also has a reasonable expectation of privacy with respect to information about their marital difficulties.¹¹ Emily disclosed these difficulties by making reference to (1) Adam's intention to hide his assets from her, and (2) potential proceedings before the Family Court. Without some degree of marital strife, there would be no reason for Emily to make these statements. Thus, they disclosed Adam's private information.

1.2 Adam did have a reasonable expectation of privacy within his marriage

a. Adam's personal emails and documents constitute private information

A person has a reasonable expectation of privacy in relation to their personal correspondence¹² and information concerning their personal and financial affairs.¹³ Adam's personal emails constitute his correspondence¹⁴ and the CD included information about his personal and financial affairs. Thus, his right to privacy was engaged in relation to these documents.

b. Adam has a reasonable expectation of privacy within his marriage

Section 30 of the EHRC implies that a distinction exists between an individual's private life and their shared family life, which includes one's matrimonial relationship.¹⁵ Therefore, Adam retains his right to privacy within his marriage,¹⁶ which extends to his personal emails¹⁷ and personal documents.¹⁸

¹⁰ For the view that communications, including personal finances and business dealings, are aspects of personal confidentiality under art 8 EUHR Convention, see: *Imerman v Tchenguiz* [2011] 1 All ER 555, [76]. See also: *Fressoz and Roire v France* [1999] ECHR 1; *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253.

¹¹ *X & Y v Persons Unknown* [2007] EMLR 10, [23].

¹² *Imerman v Tchenguiz* [2011] 1 All ER 555, [76].

¹³ *Ibid*, [76]-[77].

¹⁴ *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB), [54]-[55]; *Imerman v Tchenguiz* [2011] 1 All ER 555, [77].

¹⁵ *Imerman v Tchenguiz* [2011] 1 All ER 555, [76], [84].

¹⁶ *Duchess of Argyll v Duke of Argyll* [1967] Ch 302.

Privacy within marriage is not dependent upon the particular acts a person takes to protect their rights; that is, privacy is not dependent upon “locks and keys”.¹⁹ To suggest otherwise places an obligation upon a person to take precautions to protect their privacy.²⁰ This is an undesirable result because it means individuals have to adopt an overly paranoid approach to the conduct of their daily lives, for fear that any private act will otherwise be disclosed.²¹ Underlying this approach is a belief that privacy is of little value to society,²² which is inconsistent with its protection in *Erewhon*.²³

Thus, it is irrelevant that Emily was able to access Adam’s emails, or that the CD was easily accessible.

2. The appellants’ acts of publishing the information on the *EN Blog* was not for a legitimate aim and was not proportionate to the harm caused to Adam

2.1 Freedom of expression

The exercise of freedom of expression under the EHRC involves the unhindered ability to publish information and the right of the public to receive it.²⁴ The publication on the *EN Blog* represents the appellants’ exercise of their individual freedom of expression.

a. Legitimate aim

¹⁷ *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB), [54]-[55]; *Imerman v Tchenguiz* [2011] 1 All ER 555, [77].

¹⁸ *Imerman v Tchenguiz* [2011] 1 All ER 555, [85].

¹⁹ *Ibid*, [88].

²⁰ Elizabeth Paton-Simpson, ‘Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places’ (2000) 50 *University of Toronto Law Journal* 305, 313, 340.

²¹ *Ibid*, 341.

²² *Ibid*.

²³ EHRC, s 30.

²⁴ *R (Animal Defenders) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312, 1317; *Jersild v Denmark* (1994) 19 EHRR 1, [31].

Freedom of expression can only infringe on a countervailing right if it is pursued for a legitimate aim.²⁵ To establish a legitimate aim, it must be shown there is a genuine public interest in the publication²⁶ – it must not merely be information that is of some interest to the public.²⁷ The publication of the photograph ((1) photographed by Ben; and (2) uploaded by Frances onto the *EN Blog*), and (3) comments of Emily, related to the private affairs of Adam and thus were not matters of genuine public interest as:

- (a) Ben published the photograph with the intention of tainting Adam's professional reputation;
- (b) Frances was biased towards Adam, as excerpts from Adam's private life were uploaded solely to discredit Adam's professional reputation when there is no reasonable connection between the two aspects of Adam's life; and
- (c) Emily's comment did not contribute to the substance of the article and was substantially focused on matters regarding Adam's private life.

b. Proportionality

Where a conflict exists between the right to privacy and the right to freedom of expression no right takes precedence over another.²⁸ It is not a question of whether the information was *simply* a matter of public interest, but whether it was in the public interest to breach the individual's privacy by disclosing the information.

(i) Photograph

The public interest must be significant to interfere with Adam's right to privacy.²⁹ The circumstances in which the photograph was taken show that the taking of the photograph, and the acts which followed from that, were not proportionate to a breach of Adam's right to privacy. The photograph was taken:

²⁵ *Jersild v Denmark* (1994) 19 EHRR 1, [45].

²⁶ *CC v AB* [2006] EWHC 3083 (QB), [37].

²⁷ *HRH Prince of Wales v Associated Newspapers* [2008] Ch. 73, [50].

²⁸ *Re S (A Child) (Identifications: Restrictions on Publication)* [2003] 3 WLR 1425, [17]; *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130, 1179.

²⁹ *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 11 (Ch), [50].

- (a) at night;
- (b) in a social atmosphere; and
- (c) in intimate circumstances.

An assessment of proportionality requires a review of the means used to impair a right to determine whether those means were no more than was necessary to achieve the legitimate aim.³⁰ Frances could have expressed her opinion about Adam's hypocritical stance regarding copyright by using mere text. The photograph was not needed to make her point and unnecessarily infringed on Adam's privacy.³¹

(ii) Comment

Even if Emily's comment contributed to a legitimate aim, it still went beyond what was necessary to achieve this aim.³² Reporting on Adam's statement and requesting assistance to locate his assets did nothing to further the debate over Adam's conduct.

Proportionality also takes account of the audience to the disclosure.³³ A limitless number of people could have viewed Emily's comments, as opposed to a select group of friends or family members, which supports the respondent's assertion that they were not proportionate.

2.2 *Right to possessions under section 32 of the EHRC*

a. **Ben's photograph does not engage his right to possessions**

If Ben's rights of copyright do fall within the scope of his right to possessions, they will only provide protection for recognised rights, such as the right to distribute³⁴ and the right to publish.³⁵ However, such rights are only engaged where someone other than the copyright owner exercises those rights.

³⁰ *de Freitas v Permanent Secretary of Ministry of Agricultures, Fisheries, Lands and Housing* [1999] 1 AC 69, 80.

³¹ *Campbell v MGN Limited* [2004] 2 AC 457.

³² *de Freitas v Permanent Secretary of Ministry of Agricultures, Fisheries, Lands and Housing* [1999] 1 AC 69, 80.

³³ *CC v AB* [2006] EWHC 3083 (QB).

³⁴ *Frisby v British Broadcasting Corporation* [1967] Ch. 932.

³⁵ See: *Infabrics Ltd v Jaytex Shirt Co Ltd* [1981] 1 All ER 1057.

If Ben is seeking to justify, or enforce the right to, distribute his photograph to the public then his assertion is more appropriately based on his right to impart information,³⁶ as part of his right to freedom of expression.³⁷

b. Even if Ben's right to property is engaged, the act of publishing the photograph did not pursue a legitimate aim

Ben exercised his right to possessions in respect of the photograph by sending it to Frances. Ben was not interested in exercising his right to use, exploit or distribute his copyrighted work. His aim was to cause detriment to Adam by ensuring the photo was published; sending it to Frances would achieve this aim. If Ben *was* pursuing his property rights then he would have taken steps to obtain a benefit for the EN's use of the photo, or at the very least sought recognition as the author of the photo. The manner in which the photo was published could lead a member of the public to believe Frances or EN were the author of the photo.

c. Alternatively, Ben's act was not proportionate

By sending the photo to Frances, Ben was not attributing any benefit to his property rights because he did not gain any recognition as the property owner, nor did he even acknowledged as the owner. Because there were no benefits in his act, but detriment caused to Adam's privacy rights, Ben could have not distributed the photo and achieved the same benefit.

3. Emily's act of accessing Adam's email did not pursue a legitimate aim and was not proportionate to the harm caused to Adam

³⁶ EHRC, s 32.

³⁷ See: 2.1.

3.1 Emily pursued no legitimate aim in accessing Adam's private emails

The purpose of Emily's action was to determine whether Adam was having an extra-marital affair. Emily's right to access Adam's emails is not a right recognised under the EHRC.

3.2 Alternatively, even if Emily had a legitimate aim, she could have taken alternative actions to pursue that legitimate aim

Emily had other options available to determine whether Adam was having an extra-marital affair. She could have confronted Adam with the photograph and asked him to explain or to have asked him whether he was having an affair. Neither act would have breached Adam's right to privacy.

4. Emily's act of disclosing Adam's personal documents did not pursue a legitimate aim and was not proportionate to the harm caused to Adam

4.1 Emily's right to possessions was not engaged

The right to possession imparted by the EHRC is only engaged in respect of a person's existing assets and rights of property.³⁸ Marriage starts from the proposition that a husband and wife are autonomous people within marriage and as such their property remains separate during marriage.³⁹ Emily's future share of Adam's assets does not constitute current possession. Any right to Adam's property would only crystallise upon the dissolution of their marriage.⁴⁰

In the absence of a competing right, Emily's interests are outweighed by Adam's right to privacy.

³⁸ *Balan v Moldova* [2009] ECDR 6, [31]-[33]; *Marckx v Belgium* [1979] 2 EHRR 330; *Inze v Austria* (1988) 10 EHRR 394.

³⁹ *Imerman v Tchenguiz* [2011] 1 All ER 555.

⁴⁰ *Marckx v Belgium* [1979] 2 EHRR 330, [50]; *Inze v Austria* (1988) 10 EHRR 394, [38].

4.2 *Alternatively, Emily's action was not proportionate to the harm caused to Adam*

Emily's act of 'self-help' disclosing all Adam's personal documents on the CD was disproportionate to the aim of securing her right to property.⁴¹ The same objective was capable of being achieved by lawful and less intrusive means. Emily's aim could be achieved by taking possession of the CD but not disclosing it to a third party.

Alternatively, Emily could have sought a court order for disclosure of Adam's documents.⁴² Reliance on court proceedings would provide judicial supervision and protect Adam's rights.⁴³ This is preferred over relying upon self-help remedies,⁴⁴ to which the law has a long-standing aversion.⁴⁵

5. Adam should be granted an injunction preventing future use of the photograph and personal information and an order requiring delivery of the photograph and CD

5.1 *An injunction preventing use or publication of the photograph and information ('injunction') is necessary to prevent a further violation of Adam's right to privacy*

A person must establish a legal right and violation of that right in order to obtain an injunction.⁴⁶ That person may then pursue an injunction to prevent recurrence of the violation of their right.⁴⁷

Adam seeks the injunction on the basis of a violation of his right to privacy. While the information and photograph remain in the possession of the appellants there remains a danger that it will be maliciously used or published, causing further violation of his rights.

⁴¹ For a judgment considering that a spouse must consider their alternative options when there is a possible breach of their spouses rights, see: *Imerman v Tchenguiz* [2011] 1 All ER 555, [156].

⁴² For judicial consideration of the phrase 'no real harm' see: *Imerman v Tchenguiz* [2011] 1 All ER 555; *Emmanuel v Emmanuel* [1982] 1 WLR 662, 676.

⁴³ *Imerman v Tchenguiz* [2011] 1 All ER 555, [129].

⁴⁴ *L v L* [2007] EWHC 140 (QB), [1]-[2].

⁴⁵ *Imerman v Tchenguiz* [2011] 1 All ER 555, [117].

⁴⁶ *Re V (a Minor) (Injunction: Jurisdiction)* [1996] 2 FCR 382.

⁴⁷ *Wood v Conway Corporation* [1914] 2 Ch 47.

The appellants cannot publish or use the information in pursuit of their own rights without violating Adam's right to privacy. The injunction would therefore impose no burden upon the appellants.

If Emily claims she needs to use this information for the purpose of future court proceedings then the appropriate course of action is to apply to the Family Court to use such information. Where no proceedings have even been commenced it is unreasonable to allow the possibility that information gained through a breach of Adam's privacy might be used in the future to prevail over the continued threat posed to Adam's privacy.⁴⁸

5.2 The court should order Ben and Emily to deliver the photograph and CD respectively

a. Photograph

To allow Ben continued access to his photograph would allow him continued possession of a photograph obtained in circumstances which violated Adam's privacy and possibly amounted to an illegal act. This represents an unacceptable policy position.⁴⁹

To deprive Ben possession of the photograph would not be an unreasonable burden on his rights.⁵⁰ Ben cannot exercise those rights in a manner that does not violate Adam's privacy. As such, taking the photograph does not affect any of Ben's rights and prevents an ongoing risk to Adam's privacy.

b. CD

The delivery of the CD will achieve the best balance between preventing Emily from the advantage gained by having access to his private documents, and the need to do justice between the parties as to any future divorce proceedings by ensuring Adam cannot hide his assets.⁵¹ To allow Emily to retain possession of the CD would give her continued access to Adam's private information where there was no compelling evidence he was avoiding his responsibilities and no

⁴⁸ Cf. *Imerman v Tchenguiz* [2011] 1 All ER 555.

⁴⁹ *Imerman v Tchenguiz* [2011] 1 All ER 555.

⁵⁰ If the court has determined his right to possessions are engaged in respect of the photograph. See: 1.1 (a).

⁵¹ *Imerman v Tchenguiz* [2011] 1 All ER 555, [148].

proceedings for divorce had been commenced.⁵² Furthermore, the existence of the CD has now come into public knowledge and it will be possible for Emily to apply to a court for its production, should she take divorce proceedings.

Respectfully submitted,

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⁵² See *Imerman v Tchenguiz* [2011] 1 All ER 555 where divorce proceedings *had* been commenced and the wife was still ordered to return her husband's documents obtained in breach of his privacy.