

IN THE SUPREME COURT OF EREWHON

BEN

Appellants

EREWHONIAN NEWS

EMILY

and

ADAM

Respondent

ARGUMENTS OF THE APPELLANTS

1. Jurisprudence from a variety of jurisdictions can be used to inform the content of the Erewhonian Human Rights Code ('Code').

1.1 For the purposes of interpreting and applying the Code, the Court may look to a number of different jurisdictions for persuasive authority. These include, inter alia:

- (a) Europe: sections 30, 31 and 32 of the Code replicate substantially Article 8(1), Article 1 of Protocol No 1 and Article 10(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('**Convention**').
- (b) United Kingdom: jurisprudence from the UK is persuasive, particularly given the influence of the *Human Rights Act 1998* (UK) ('**HRA**'). The HRA requires courts to have regard to certain Convention rights when hearing disputes between private parties.¹ This is often referred to as a form of 'horizontal effect'.²
- (c) United States: US law recognises four privacy torts.³ These include intrusion upon seclusion and publicity given to private life.⁴ The First Amendment of the US Constitution recognises a right to freedom of speech.

¹ HRA s 6; see also s 1 (these 'Convention Rights' includes Articles 8 and 10, and Article 1 of the First Protocol).

² Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006) 125.

³ *Restatement of the Law, 2nd, Torts 1977* (US) §§ 652B-652E.

⁴ *Ibid* §§ 652B and 652D.

2. The Court should adopt a two-step test in analysing rights under the Code.

2.1 UK Courts have identified two key elements that must be considered in actions that implicate the right to privacy.⁵ Justice Endicott was correct to adopt the same approach.

2.2 For the reasons set out in the remainder of these submissions, the appellants should prevail on all claims. In each claim:

- (a) the respondent did not have a reasonable expectation of privacy;⁶ and/or
- (b) the appellants' rights outweigh any such privacy right of the respondent.⁷

2.3 The House of Lords has accepted a number of propositions with regards to balancing rights under the Convention. These indicate that no article takes precedence over the others, and that where Convention rights are in conflict, courts should consider matters such as the 'comparative importance of the specific rights being claimed', the 'justifications for interfering with or restricting each right' and the proportionality test.⁸ The respondent submits that these propositions should also apply to interpretation of the Code.

3. The respondent's right to respect for privacy was not engaged as he did not have a reasonable expectation of privacy.

3.1 The appellants do not deny that the respondent had a reasonable expectation of privacy in relation to some aspects of his marriage and professional life. However they submit that no such right to privacy was engaged in this case.

3.2 The respondent did not have a reasonable expectation of privacy with respect to his activities in the partners' lounge.

- (a) The partners' lounge is not a private space in the same sense as a person's bedroom or living room, where there is a greater expectation of seclusion. The facts suggest that it was not uncommon for employees to access the partners' lounge. Adam could not reasonably expect to remain unseen.
- (b) The photograph does not reveal the *details* of the relationship between Adam and the paralegal.⁹ At most it hints at the 'bare fact'¹⁰ that a close relationship *might*

⁵ See, eg, *Murray v Express Newspapers plc and another* [2008] 3 WLR 1360, [35]-[41] ('**Murray**'); *McKennitt v Ash* [2008] QB 73, [11]. See generally Mark Warby QC, Nicole Moreham and Iain Christie, *Tugendhat and Christie The Law of Privacy and the Media* (Oxford University Press, 2nd edition, 2011) 226.

⁶ *Murray* [35]-[39].

⁷ *Ibid* [40].

⁸ See, eg, *Re S (FC) (a child)* [2005] 1 AC 593, [17] (Lord Steyn).

⁹ Cf the information revealed in the photograph in *Campbell v MGN* [2004] 2 AC 457, [165].

¹⁰ *Goodwin v NGN* [2011] EMLR 27, [90] ('**Goodwin**').

exist between them. By ‘reclining intimately’ in the partners’ lounge, neither Adam nor the paralegal can then assert a reasonable expectation that the existence of their relationship is a private matter.

- (c) Adam is a public figure who actively campaigns for stronger copyright protection. The fact that he was watching a pirated movie relates directly to this role and is not something about which he can claim a right to privacy.¹¹
- (d) The Court should not follow European Court of Human Rights (‘ECHR’) case law recognising a broad right to control one’s image.¹² This right goes far beyond the domestic laws of most jurisdictions, where the mere use of a person’s image does not, without more, give rise to an actionable harm. For instance, in the UK, subjects do not have any rights to photographic copyright save for a limited privacy right for *commissioned* portraits.¹³ Even in the US, where publicity rights are recognised,¹⁴ such rights focus on commercial appropriation and are subject to the strong countervailing right to free speech.¹⁵

3.3 The respondent did not have a reasonable expectation of privacy that Emily would not access his email.

- (a) The transparency between spouses means that they have a lower expectation of privacy between themselves than with third parties. Although each spouse retains ‘a sphere’¹⁶ of individual privacy, its boundaries must be manifested objectively so that each spouse knows what is reasonably expected to remain private.¹⁷
- (b) The facts do not reveal any objective intention on the part of Adam for his email to be inaccessible by Emily.
 - (i) The content of an individual’s email is not necessarily private. A distinction can be made between the facts of this case and those concerning covert monitoring of email by employers.¹⁸ Even in the latter scenario, a warning

¹¹ See, eg, *Von Hannover v Germany* (2005) 40 EHRR 1, [61] (‘*Von Hannover*’).

¹² See especially *Reklos v Greece* [2009] EMLR 16.

¹³ See, eg, *Copyright, Designs and Patents Act 1988* (UK) s 85 (‘*CDPA*’).

¹⁴ See, eg, *Haelan Laboratories, Inc v Topps Chewing Gum, Inc* 202 F 2d 866 (2nd circuit, 1953); *Zacchini v Scripps-Howard Broadcasting Co* 433 US 562 (1977).

¹⁵ See, eg, *Vanna White v Samsung Electronics America, Inc* 989 F 2d 1512, 1519 (9th circuit, 1993) (per Kozinski J, dissenting); *ETW Corporation v Jireh Publishing, Inc* 332 F 3d 915, 938 (6th circuit, 2003).

¹⁶ *Imerman v Tchenguiz* [2011] Fam 116, [84] (‘*Imerman*’).

¹⁷ *White v White* 781 A 2d 85 (NJ Super Ct Ch Div, 2001).

¹⁸ See especially *Copland v United Kingdom* (2007) 45 EHRR 858.

that communications will be monitored can lower or dispense with an expectation of privacy.¹⁹

- (ii) The fact that Emily simply 'accessed' Adam's email suggests his account was not password protected.
- (c) Even if Adam had a reasonable expectation of privacy, the fact of a close relationship with the paralegal was not secret. In *Stephens v Avery* it was stated that information 'ceases to be capable of protection as confidential when it is in fact known to a substantial number of people.'²⁰ By 'reclining intimately' with the paralegal in his workplace, Adam voluntarily disclosed the fact of his close relationship with the paralegal.

3.4 The respondent did not have a reasonable expectation of privacy in relation to Emily's retention of the CD.

- (a) As submitted at para 3.3(a), within a marriage a reasonable expectation of privacy must be manifested objectively. Adam manifested no such expectation with regards to the documents:
 - (i) The documents originated from the couple's shared computer.
 - (ii) Emily did not have to take active steps to copy the documents as they were already stored on the CD. Furthermore, the respondent has not claimed ownership of the physical CD. This would be expected if he considered the contents private.
- (b) Documents pertaining to Adam's finances should not, in law, be considered private in his marital relationship.
 - (i) The Court should depart from *Imerman* and hold that in marriage, 'a spouse has a legitimate expectation that information about financial issues should be shared.'²¹ A strict application of the laws of confidence and property would be 'at odds with the idea of marriage as a meaningful partnership.'²²
 - (ii) *Imerman* is also at odds with the 'sharing principle' of divorce which stipulates that in the division of assets, 'equality should be departed from only if, and to the extent that, there is good reason for doing so.'²³ Assuming

¹⁹ Ibid [42].

²⁰ *Stephens v Avery* [1988] Ch 449, 454.

²¹ Rebecca Probert, 'For richer, for poorer - but how does one find out which?' (2011) 127 *Law Quarterly Review* 28, 30.

²² Ibid.

²³ *White v White* [2001] 1 AC 596, 605.

Erewhonian law reflects that of the UK, courts have discretion to redistribute assets upon divorce irrespective of existing property rights.²⁴ However the sharing principle 'can have no meaning if one partner does not know what is to be shared.'²⁵

(c) *Imerman* is distinguishable on several bases:

- (i) In *Imerman* the documents were accessed by the wife's brother. The relationship between husband and brother-in-law clearly entails less transparency and a higher expectation of privacy than that between spouses.
- (ii) The documents were on a computer located at Mr Imerman's workplace, rather than a shared home computer.
- (iii) Mr Imerman's computer account was password protected, which required active steps to bypass. There is no evidence that such steps were required in this case.

3.5 Emily's comments on Frances' blog did not reveal any private information. She revealed only that there may be some dispute in relation to the distribution of assets – a wholly unremarkable state of affairs for couples contemplating divorce. Adam can have no reasonable expectation of privacy in relation to the general fact that the couple are experiencing marital strife.

4. Even if the respondent had a reasonable expectation of privacy, the appellants' rights outweighed this right.

Claims against EN

4.1 Justice Endicott erred in finding that the respondent's right to privacy outweighed EN's right to freedom of expression under s 32 of the Code.

- (a) The information revealed on Frances' blog contributed to a debate of general interest. Adam's status as a 'regular commentator' and 'outspoken advocate' means that he is 'inevitably a figure in whom a section of the public and the media would be interested.'²⁶ The photograph and blog post raised allegations of a 'conflict with professional interests or duties',²⁷ by contrasting Adam's public stance on copyright enforcement with his private conduct. It was in the public interest to question the

²⁴ Ibid 600.

²⁵ Probert, above n 21, 30.

²⁶ *A v B plc* [2003] QB 195, 217.

²⁷ *Goodwin* [103].

'false image'²⁸ portrayed by Adam and his 'hypocrisy'.²⁹ Given the nature of the scene captured – which occurred outside business hours, and involved two people 'reclining intimately' whilst watching a film – it was open to conclude that Adam was watching the movie for entertainment.

- (b) The inclusion of Adam and the paralegal in the photograph was an indispensable aspect of the story. The fact that the parties were 'reclining intimately' supported the inferences described in para 4.1(a) above. Publishing the photograph was essential to sustain the allegations of hypocrisy.³⁰ Accordingly, the photograph serves a purpose greater than merely 'satisfy[ing] the curiosity'³¹ of the readers of Frances' blog.
- (c) As freedom of expression 'constitutes one of the essential foundations of a democratic society'³² the press is given wide scope to present ideas including ones that 'offend, shock or disturb'.³³ The ECHR has recognised that 'it is not for this Court ... to substitute [its] own views for those of the press as to what techniques of reporting should be adopted.'³⁴ The content and form of the story about Adam falls within the autonomy afforded to editorial decisions.

Claims against Ben

4.2 In the High Court, the respondent sought the following orders against Ben:

- (1) damages;
- (2) an injunction 'prohibiting any future use (including publication) of the photograph'; and
- (3) delivery up of the photograph.

Justice Endicott made the first order, but declined to make the second and third.

4.3 Justice Endicott did not give due weight to Ben's rights as author of the photograph. Ben has a property right in the photograph as copyright owner. The ECHR has recognised that 'possessions' in the equivalent Convention provision includes forms of intellectual

²⁸ *Rio Ferdinand v MGN* [2011] EWHC 2454, [85].

²⁹ *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892, 989.

³⁰ See, eg, *Hutcheson v NGN* [2012] EMLR 2, [46].

³¹ *Von Hannover* [65].

³² *Jersild v Denmark* (1995) 19 EHRR 1, [31] ('*Jersild*').

³³ *Handyside v United Kingdom* (1979-80) 1 EHRR 737, [49].

³⁴ *Jersild* [31].

property.³⁵ The Court should follow this approach, which accords with the prevailing view that copyright is a sub-species of personal property.

4.4 Justice Endicott stated that the right to peaceful enjoyment of possessions ‘plainly includes the right [of authors] to use and exploit their authorial works as they see fit’. The appellants submit that such uses include exploiting the rights granted to copyright owners by law, such as online publication.³⁶ They also submit that Ben’s right to freedom of expression in s 32 was not given adequate weight in the High Court decision.

(a) By finding against Ben and awarding the respondent damages, Endicott J effectively found it was unlawful for Ben to exercise some of his authorial rights. This interfered with Ben’s right to peaceful enjoyment of his possessions.

(b) Ben’s right to peaceful enjoyment of his copyright is related closely to his right to freedom of expression. It has been observed that copyright fortifies ‘our democratic institutions by promoting public education, self-reliant authorship, and robust debate.’³⁷ Copyright also helps foster creative expression by guaranteeing protection of authors’ work.³⁸ The Court should not award damages where doing so is likely to have a ‘chilling effect’ on freedom of expression.³⁹ This is likely to be the case for private citizens like Ben, who may be particularly deterred by the prospects of adverse findings against them.

4.5 Justice Endicott was right not to award the orders of delivery up or injunction. In assessing whether a person has been wrongfully deprived of their possessions under s 31, the Court should look to the ‘realities of the situation complained of’⁴⁰ to establish whether there has been a de facto expropriation. For instance, the ECHR has found that where an applicant cannot dispose of or sell property, a de facto expropriation has occurred.⁴¹ In this case, an injunction that prohibits ‘any future use (including publication)’ would in effect deprive Ben of all his authorial rights. Similarly, requiring Ben to deliver up all copies of the photograph would make it difficult for him to enjoy his rights in the photograph. As the ECHR has noted, the right to peaceful enjoyment of possessions protects rights that are ‘practical and effective’.⁴²

³⁵ See, eg, *Anheuser-Busch v Portugal* (2007) 45 EHRR 36, [72].

³⁶ See, eg, *CPDA* ss 18, 20.

³⁷ Neil Weinstock Netanel, ‘Copyright and a Democratic Civil Society’ (1996) 106 *Yale Law Journal* 283, 291.

³⁸ Warby et al, above n 5, 396.

³⁹ See, eg, Helen Fenwick & Gavin Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006) 901.

⁴⁰ *Sporrong and Lonnroth v Sweden* (1983) 5 EHRR 35, [63] (*‘Sporrong’*).

⁴¹ *Kopke v Germany* (2011) 53 EHRR 249 (*‘Kopke’*); *Papamichalopoulos v Greece* (1993) 16 EHRR 440.

⁴² *Sporrong* [63].

Claims against Emily

- 4.6 Justice Endicott was right to find the interference with Adam's right to privacy was justified in relation to Emily's retention of the CD.
- (a) Emily's right to property under s 31 was engaged.
 - (i) It can be inferred from Adam's threat to hide assets that Emily has some proprietary right to them. Such a right may arise in numerous ways, including where: Emily and Adam are co-owners of property; Emily is the beneficiary under a trust; or Emily has rights under a resulting or constructive trust.
 - (ii) In the alternative, the ECHR has recognised that a claim can constitute a possession where a person has a 'legitimate expectation of obtaining effective enjoyment of a property right.'⁴³ Emily's marriage to Adam entitles her to a claim for the assets. Since such a claim would not be 'devoid of any prospect of success',⁴⁴ Emily's expectation of obtaining enjoyment of the property right is legitimate.
 - (b) Emily's right to her possessions under s 31 is comparatively stronger than Adam's right to respect for his private life.
 - (i) Emily was justified in sending the CD to her solicitor given Adam's threat to hide his assets. Similarly, in *Kopke*, the ECHR found in favour of an employer who surreptitiously filmed an employee at work following incidents of theft. The ECHR emphasised that collecting evidence to use in court proceedings was justified as it was the only way the employer could 'effectively safeguard' their property rights.⁴⁵ The potential for Emily to suffer significant financial detriment if Adam follows through with his threat outweighs any harm Adam may experience because of her intrusion into his privacy.
 - (ii) Emily's interference with Adam's right was limited to the extent necessary to protect her right to property. In *Kopke*, the Court noted that the employer's interferences were 'restricted to what was necessary' as the data was processed only by 'a limited number of persons'.⁴⁶ Similarly, Emily sent the CD to her solicitor and there is no evidence that she, or any others, read or processed the contents of the CD.

⁴³ *Kopecky v Slovakia* (2005) 41 EHRR 43, [35].

⁴⁴ *Ibid* [43].

⁴⁵ *Kopke* [49].

⁴⁶ *Ibid* [48].

4.6 Endicott J erred in finding that interference with Adam’s right to privacy was not justified in relation to Emily’s blog comment. Emily’s right to freedom of expression is stronger than Adam’s right to respect for privacy. Emily’s freedom of expression is strong as she is exercising her own rights as a party to the relationship to disclose her experiences.⁴⁷ Her comment served the legitimate aim of seeking advice from others with similar experiences.

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⁴⁷ See, eg, *A v B plc* [2003] QB 195.