

## IN THE SUPREME COURT OF EREWHON

BEN

**Appellants**

EREWHONIAN NEWS

EMILY

and

ADAM

**Respondent**

### ARGUMENTS OF THE RESPONDENT

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**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:
  - (i) Jurisprudence from the United Kingdom is persuasive, particularly given the influence of the *Human Rights Act 1998* (UK) ('**HRA**'). The HRA requires courts to consider certain Convention rights when hearing disputes between private parties.<sup>1</sup> This is often referred to as a form of 'horizontal effect'.<sup>2</sup>
  - (ii) UK courts have recognised Article 8 through expansion of the action for breach of confidence.<sup>3</sup> This has involved some modification of the traditional

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

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

<sup>3</sup> See, eg, *Douglas v Hello! Ltd (No 1)* [2001] QB 967; *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457 ('**Campbell**').

elements of this action,<sup>4</sup> for instance through expanding the first limb to include private information,<sup>5</sup> and, in effect, dispensing with the second limb.<sup>6</sup>

(iii) Breach of confidence has been described as a 'privacy right in all but name.'<sup>7</sup>

## 2. The Supreme 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.<sup>8</sup> Justice Endicott was correct to adopt the same approach.

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

(a) the respondent had a reasonable expectation of privacy;<sup>9</sup> and

(b) the respondent's right outweighed any countervailing rights of the appellants.<sup>10</sup>

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.<sup>11</sup> The respondent submits that these propositions should also apply to interpretation of the Code.

2.4 The respondent submits that the Court should only disturb the outcome of Endicott J's balancing exercise where 'the judge has erred in principle or reached a conclusion which was plainly wrong or, put another way, was outside the ambit of conclusions which a judge could reasonably reach.'<sup>12</sup> The decision of Endicott J was not plainly wrong or outside the ambit of conclusions that a judge could reasonably reach, save for the findings in relation to the CD.

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<sup>4</sup> For these traditional elements, see especially *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47.

<sup>5</sup> See, eg, *Campbell* [46] (Lord Hoffman).

<sup>6</sup> See, eg, *A v B plc* [2003] QB 195, 207.

<sup>7</sup> Gavin Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 *The Modern Law Review* 726, 758.

<sup>8</sup> 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, 2<sup>nd</sup> edition, 2011) 226.

<sup>9</sup> *Murray* [35]-[39].

<sup>10</sup> *Ibid* [40].

<sup>11</sup> See, eg, *Re S (FC) (a child)* [2005] 1 AC 593, [17] (Lord Steyn).

<sup>12</sup> *Lord Browne of Madingley v Associated Newspapers* [2008] QB 103, [45].

**3. The respondent had a reasonable expectation of privacy in relation to all claims made against the appellants.**

*Claims against Ben, EN and Emily in relation to publication of the blog entry, comments and photograph*

- 3.1 Adam's right to respect for his private life is engaged with respect to his activities in the partners' lounge as he had a reasonable expectation of privacy.
- 3.2 The private information disclosed by the photograph, blog post and comments can be divided into four categories:
- (a) Adam's relationship with the paralegal: there is authority for the proposition that the existence and details of extra-marital relationships fall within the scope of Article 8 (and, the respondent submits, section 30).<sup>13</sup>
  - (b) Adam's viewing of an allegedly unauthorised copy of a film:
    - (i) The European Court of Human Rights ('ECHR') has recognised that reputation falls within the scope of the right to respect for private life.<sup>14</sup>
    - (ii) Frances inferred from the photograph that Adam was watching the film for entertainment purposes, directly contradicting his publically espoused views on copyright. This inference was pure speculation. For instance, Adam and the paralegal may have been viewing the film for legal purposes or for research, inferences that are particularly likely since they were watching the film at work. By using the photograph to provide evidence of Adam's hypocrisy (and without any corroborating details), the blog and comments merely serve to damage Adam's reputation.
  - (c) Adam's image: the ECHR has recognised that the right to privacy encompasses an individual's right to control use of his or her image.<sup>15</sup> Even public figures have been able to successfully challenge the publication of photographs taken in public places.<sup>16</sup> Since the photograph contains Adam's image, it falls within the ambit of his section 30 right.

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<sup>13</sup> *CC v AB* [2007] EMLR 312, [24].

<sup>14</sup> See, eg, *Radio France v France* (2005) EHRR 706; *Compana v Romania* (2005) 41 EHRR 41; *Pfeifer v Austria* (2007) 48 EHRR 175.

<sup>15</sup> See, eg, *Reklos v Greece* [2009] EMLR 16 ('*Reklos*').

<sup>16</sup> See, eg, *Von Hannover v Germany* (2005) 40 EHRR 1 ('*Von Hannover*').

- (d) The couple's marital issues: Emily's blog comment related mainly to their marital conflict and reported statements made by Adam. Spouses are entitled to expect that the privacy of marital discussions will be maintained.<sup>17</sup>

*Claims against Emily in relation to accessing Adam's emails*

- 3.3 The respondent's right to respect for his private and family life, home and correspondence is engaged as he had a reasonable expectation of privacy with regards to his email.
- 3.4 The ECHR has held that emails are *prima facie* covered by notions of 'private life' and 'correspondence' for the purposes of Article 8(1).<sup>18</sup> Adam's emails therefore constitute part of his private life for the purposes of s 30 of the Code. This conclusion should not be disturbed on the basis that Adam and Emily are married.
- (a) Although marriage entails a degree of transparency between spouses, there nonetheless remains 'a sphere in which each spouse has, within and as part of the marriage, a life separate and distinct from the shared matrimonial life.'<sup>19</sup> The proposition that the parties' marriage alone justifies an otherwise unlawful intrusion into Adam's privacy is therefore 'simply unsustainable'.<sup>20</sup>
- (b) It has been accepted that a spouse's reasonable expectation of privacy turns on the facts of each case.<sup>21</sup> There is no evidence that in this particular marriage, Adam's email constituted part of the couple's 'shared matrimonial life' rather than Adam's distinct, private life.
- (i) The account was Adam's 'personal email account' and not a joint account.
- (ii) It is improbable that Adam would permit Emily to have access to his emails if they contained information revealing his extra-marital affair. Indeed if this were the case, it is unlikely that the relationship with the paralegal would have remained secret for months.
- (iii) Adam's expectation of privacy was reasonable regardless of whether or not his email was password protected since 'confidentiality is not dependent upon locks and keys or their electronic equivalents'.<sup>22</sup>

*Claims against Emily in relation to the CD of personal documents*

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<sup>17</sup> See, eg, *Argyll v Argyll* [1965] 1 All ER 611.

<sup>18</sup> *Copland v United Kingdom* (2007) 45 EHRR 858, [41].

<sup>19</sup> *Imerman v Tchenguiz* [2011] Fam 116, [84] (*'Imerman'*).

<sup>20</sup> *Ibid* [82].

<sup>21</sup> *Ibid* [88].

<sup>22</sup> *Ibid* [79].

3.5 Adam's right to respect for his private life is engaged as he had a reasonable expectation of privacy with regards to his personal documents.

- (a) In *Imerman*, a husband successfully restrained his wife from utilising documents obtained surreptitiously from his computer. It was stated that communications concerning 'personal finances' and 'personal business dealings' are 'specifically covered by article 8 of the Convention'.<sup>23</sup> The documents here were Adam's 'personal documents' and accordingly were inherently private in nature.
- (b) As noted at para 3.4(a), the respondent's expectation of privacy was reasonable, notwithstanding his marriage to Emily.
- (c) The fact that the respondent and Emily shared a computer, and that Emily could access the CD, do not derogate from the respondent's reasonable expectation of privacy in his personal documents. In *Imerman* it was stated that '[t]he fact that a defendant has a means of access to get into a claimant's room or even into his desk does not by any means necessarily lead to the conclusion that he has the right to look at, let alone to copy, or even disseminate, the contents of the claimant's private or confidential documents contained therein.'<sup>24</sup>

**4. The respondent's right to privacy was not outweighed by any countervailing rights of the appellants.**

*Claims against EN*

4.1 Justice Endicott was correct to find that the interference with EN's free speech was justified. Although it is conceded that EN had a right to freedom of expression under s 32 of the Code, the respondent's right to respect of private life was comparatively stronger with respect to all aspects of the information disclosed by the photograph.

- (a) Adam's relationship with the paralegal: the purpose of the blog post was to expose Adam's purported hypocrisy in relation to his professional conduct. Incidentally, however, it also revealed information pertaining to his relationship with the paralegal through the photograph. This had no relevance to Frances' story, did not make contribute to a 'debate of general interest',<sup>25</sup> and if anything was mere 'vapid tittle-tattle'<sup>26</sup> which attracts little weight in terms of freedom of expression. The invasion of privacy and the harm it caused to Adam in terms of emotional distress were therefore disproportionate to the aim pursued by EN. This is not a case where

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<sup>23</sup> Ibid [76].

<sup>24</sup> Ibid [79].

<sup>25</sup> *Von Hannover* [76].

<sup>26</sup> *Jameel v Wall Street Journal Europe SPRL (No 3)* [2007] 1 AC 359, [147].

Adam's relationship was in any way relevant to the performance of his professional duties.<sup>27</sup>

- (b) Adam's viewing of an allegedly unauthorised copy of a film:
- (i) The claim made in Frances' blog post was supported only by the photograph taken by Ben. There was no other evidence presented to corroborate Frances' allegations of hypocrisy, and her accusations relied on a series of assumptions regarding the moment captured in the photograph.<sup>28</sup> These facts can be contrasted with *Fressoz and Roire v France*, where the hypocritical actions of the Chairman of Peugeot were exposed by the publication of his tax records.<sup>29</sup> Unlike the inferences drawn by EN, the tax records were truly 'correcting a false image'<sup>30</sup> as they were irrefutable proof of the newspaper's allegations.
  - (ii) The Court should not favour EN's speculative publication over Adam's right to privacy given the minimal informative value conveyed by the blog when contrasted with the harm caused to Adam.
- (c) Adam's image: Adam did not consent to either the taking of the photograph or its publication online.

#### *Claims against Ben*

- 4.2 Justice Endicott was correct to find that the interferences with Ben's rights, if any, were justified.
- 4.3 Ben's right to peaceful enjoyment of his possessions was not engaged. The natural and ordinary meaning of the term 'possessions' connotes a *tangible* thing. For instance, the law of personal property distinguishes between *choses in possession* (physical, moveable things) and *choses in action* (such as copyright).<sup>31</sup>
- 4.4 The respondent submits that there are good reasons to *not* expand the term 'possessions' to include all forms of personal property. It has been observed that the inclusion of a 'right to property' in human rights instruments is a 'paradox'<sup>32</sup> as such instruments are intended to protect certain rights from undue interference by the state, however property rights are subject to continued legislative revision. This paradox is even stronger for copyright, as the

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<sup>27</sup> Cf *Goodwin v NGN* [2011] EMLR 27; *Rio Ferdinand v MGN* [2011] EWHC 2454.

<sup>28</sup> See above para 3.2(b)(ii).

<sup>29</sup> *Fressoz and Roire v France* (2001) 31 EHRR 2.

<sup>30</sup> *Rio Ferdinand v MGN* [2011] EWHC 2454, [68].

<sup>31</sup> See, eg, Sarah Worthington, *Personal Property Law: Text, Cases and Materials* (Hart Publishing, 2000) 5.

<sup>32</sup> Peter Drahos, 'Intellectual property and human rights' [1999] *Intellectual Property Quarterly* 349, 360.

very existence and scope of rights depends heavily on government regulation.<sup>33</sup> Copyright has even been described as a statutory monopoly rather than a sub-species of property.<sup>34</sup> This makes it difficult to conceive of a right to 'peaceful enjoyment' of copyright. The respondent respectfully disagrees with the broad interpretation of 'possessions' adopted in some ECHR jurisprudence.<sup>35</sup>

4.5 In the alternative, even if Ben's right to peaceful enjoyment of his possessions was engaged, intrusion on this right was justified. Ben's authorial rights in the photograph were weak compared with Adam's right to privacy:

- (a) A point-and-shoot photograph taken using a mobile phone camera will barely, if at all, satisfy the requirements for originality.<sup>36</sup> The resulting copyright will be enforceable in the narrowest terms.<sup>37</sup>
- (b) Adam's right to control the use of his image is an integral part of s 30.<sup>38</sup> Adam's image constitutes 'one of the chief attributes of his personality'<sup>39</sup> and he should have had the choice to prevent the photograph being taken at all. However here the image was taken surreptitiously and without Adam's consent.

4.6 To the extent that Ben might claim a right to freedom of expression, his position is equivalent to that of EN (to whom he supplied the photograph). The respondent refers to and repeats its submissions at para 4.1 in relation to the interaction between ss 30 and 32.

#### *Adam's claims against Emily*

4.7 The respondent respectfully submits that Endicott J erred in finding that Emily's s 31 right was engaged. Section 31 confers on a person rights to 'his possessions'. The ECHR has interpreted the equivalent Convention article as applying 'only to a person's existing possessions' and has stated that therefore it 'does not guarantee the right to acquire possessions'.<sup>40</sup> Notwithstanding the fact that Emily and Adam are married, the facts do not disclose that Emily had any existing right to any of Adam's assets (for instance under an express trust). This is consistent with the UK position which 'starts from the principle of

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<sup>33</sup> For a description of this regulation, see, eg, Huw Beverley-Smith, *The Commercial Appropriation of Personality* (Cambridge University Press, 2002) 277-278.

<sup>34</sup> See, eg, James Penner, *The Idea of Property in Law* (Clarendon Press, 1997) 118-119.

<sup>35</sup> Such as *Anheuser-Busch v Portugal* (2007) 45 EHRR 36, [72].

<sup>36</sup> For discussion of the originality of photographs, see, eg, Lionel Bently and Brad Sherman, *Intellectual Property Law* (Oxford University Press, 3<sup>rd</sup> edition, 2009) 109-111.

<sup>37</sup> See, eg, *Bauman v Fussell* [1978] RPC 485.

<sup>38</sup> See, eg, *Von Hannover* [57]; *Sciacca v Italy* (2006) 43 EHRR 20, [29].

<sup>39</sup> *Reklos* [40].

<sup>40</sup> *Marckx v Belgium* (1979-80) 2 EHRR 330, [50].

separate property during marriage’ whereby ‘[e]ach spouse is legally in control of his or her property while the marriage lasts.’<sup>41</sup> Upon divorce, a UK court has discretion to redistribute assets irrespective of existing property rights.<sup>42</sup> This suggests the creation of new property rights as a result of the redistribution.

4.8 In the alternative, if Emily’s section 31 right was engaged, Endicott J was plainly wrong to find that the interference with Adam’s right was justified.

(a) If Erehwon law mirrors that of the UK, Adam had no obligation to disclose details of his finances until required to do so during divorce proceedings.<sup>43</sup> Since the facts do not indicate that such proceedings have been initiated, Emily’s actions were premature.

(i) It is usual for the law to provide mechanisms by which assets may be identified, for instance through discovery, search and seizure, and orders that assets be frozen.<sup>44</sup> It would be highly undesirable for the Court to allow a potential litigant to by-pass these established mechanisms on the basis of s 31.

(b) Emily’s intrusion on Adam’s right to privacy was disproportionate as she intended to obtain Adam’s financial documents but instead took all his ‘personal documents’. It is likely that these included private documents not pertaining to Adam’s finances.

4.9 Justice Endicott was right to find that the intrusion upon Emily’s right to free speech was justified. The information contained in Emily’s blog comment – which related to the marital strife between the herself and Adam – did not promote a ‘debate of general interest’.<sup>45</sup> This is not a case where Adam had ‘misled the public by false denials’ or ‘moralised publicly on his family life’, so there is no genuine interest in the disclosure of this information.<sup>46</sup> Disclosure of information pertaining to Adam’s private, marital matters are of no relevance for the public in their assessment of his professional conduct.<sup>47</sup> This conclusion is not altered by Emily being an ‘injured party’. Communications made by spurned spouses in a public domain have been accorded low priority in law if they amount to mere ‘tittle-tattle’.<sup>48</sup> This is clearly the case here.

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<sup>41</sup> *Miller v Miller* [2006] 2 AC 618, [123].

<sup>42</sup> *White v White* [2001] 1 AC 596, 605.

<sup>43</sup> *Imerman* [143].

<sup>44</sup> *Ibid* [128].

<sup>45</sup> *Von Hannover* [76].

<sup>46</sup> *CC v AB* [2007] EMLR 312, [52].

<sup>47</sup> *Cf Rio Ferdinand v MGN* [2011] EWHC 2454.

<sup>48</sup> *CC v AB* [2007] EMLR 312, [35]-[36].



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