

Oxford International Intellectual Property Moot 2012

Facts

Adam is an intellectual property lawyer working in the Erewhonian office of the international law firm, Reywal Peets LLP. His practice is in copyright and media law, and his clients consist mainly of record companies and commercial publishing houses. He is a regular commentator on legal matters, and an outspoken advocate of strong copyright protection. Each year he teaches a session on the Erewhonian University Diploma in Intellectual Property Law and Practice, and recently he has finished an article explaining why stronger measures are required to enforce copyright infringement than those provided for in the Erewhonian Intellectual Property Code. His article has just been published in Erewhon's pre-eminent academic legal journal, the *Erewhonian Law Review (ELR)*.

One of the other copyright solicitors at Reywal Peets LLP, Ben, is irritated by Adam's professional success. He doubts the sincerity of the views presented in Adam's article, and believes that Adam's interest is mainly in building a reputation for himself.

One night, while working late at the office, Ben goes to the partners' lounge at Reywal Peets LLP to fix himself a drink. As he enters he sees Adam reclining intimately on a couch with one of the firm's young paralegals, watching a movie on the partners' full-sized movie-screen. Ben sees a DVD cover on the table with "PIRATED WALTER MITTY" on the front, and the Reywal Peets LLP "seized goods" sticker directly underneath. He recognizes the DVD as one that was seized in a copyright raid carried out by the firm in the previous week. While withdrawing quietly from the room, Ben takes a photograph of the pair using his mobile phone. The photo shows clearly the cover of the DVD and Danny Kaye as Walter Mitty on the movie-screen.

Ben believes that the event vindicates his assessment of Adam. When he gets back to his office he downloads the photo from his phone and emails it to Frances, a legal journalist employed by the *Erewhonian News (EN)*. Frances posts the photo on her *EN*-hosted law blog, along with a reference to Adam's *ELR* article, and a comment to the effect that if the Government is not persuaded by Adam's academic arguments to strengthen its measures for enforcing copyright, then perhaps it will be persuaded by the vision of him watching a copyright-infringing film. An anonymous reader of her blog posts the further question whether reputable academic journals such as the *ELR* should publish articles by authors with vested commercial interests in the views they espouse.

Frances's blog entry goes viral, upsetting the editor of the *ELR*, the paralegal, Adam, and his wife, Emily. The following day, at home, Emily searches Adam's personal email account, and discovers that he has been having an affair with the paralegal for months. She tells Adam that she is leaving him and intends to "clean him out" in court. When Adam replies that she will never find more than 5% of his assets, she takes the CD containing the most recent copy of the hard-drive of their home computer, which she knows to contain his personal documents, and sends it to her solicitor for safekeeping. She also posts a comment to Frances's blog thanking Frances for exposing her husband's "hypocrisy", reporting his statement regarding his assets, and asking for tips from other women whose husbands have threatened to hide their assets from the family courts.

Adam brings an action in the Erewhonian High Court against Ben, the *EN* and his wife, seeking relief for infringement of his privacy rights under section 30 of the Erewhonian Code of Human Rights. The particular relief he seeks is as follows: (a) unspecified damages from each of the defendants for the emotional distress and reputational damage which their actions have caused him; (b) injunctions prohibiting any future use (including publication) by

any of the defendants of the photograph or information concerning Adam's relationship with the paralegal or personal (including financial) affairs; (c) an order against EN for deletion of the blog entry and associated comments; and (d) an order against Ben and Emily for delivery up of the photograph and CD respectively. The High Court (Endicott J) grants Adam judgment on all but one of his claims, being that arising from his wife's provision of the CD to her solicitor. With respect to the relief sought he grants only (a) and (c).

Reasons for Judgment

This case involves three distinct rights, each of which is recognized in the Erewhonian Charter of Human Rights and now embodied statutorily in the Erewhonian Code of Human Rights (ECHR). They are the right to privacy, the right to property, and the right to freedom of expression.

(a) The right to respect for one's private and family life, home and correspondence

The right to be let alone, as the right to privacy was famously defined by Warren and Brandeis in the 19th century, is a basic human right recently introduced into Erewhonian law with the enactment of the ECHR; the closest thing this jurisdiction has to a Bill of Rights. What exactly does it mean? Thankfully I do not need to answer that question, beyond confirming that it includes the right to prevent a person from walking into a room in which you are reclining with a friend and purposefully talking a photograph of you, much less publishing that photograph on the world wide web.

More difficult has been determining the implications of the right to privacy in the context of marriage. Can a person rely on his right to be let alone to prevent his wife from accessing his personal email account, and disclosing to another person the contents of his computer's hard-drive? Having regard to section 30 of the ECHR – including its reference to respect for one's "private *and family life*" (emphasis added) – I believe that the answer must be "yes". I also believe that section 30 entitles a person to prevent his wife from publishing the details of their marital strife. Quite aside from the value which I place on personal autonomy, I am persuaded in this view by the public interest in judicial protection of the institution of marriage. While under increasing attack by eroding social values, marriage remains the bedrock of family life, and in my view the courts ought where ever possible to protect it, including by ensuring its sanctity against those who "on the way out" would turn it in to a public spectacle or battle ground.

(b) The right to the peaceful enjoyment of one's possessions

True it is that there is no allegation of copyright infringement in this case, there having been no unauthorized copying. However, that does not mean that the right to copyright is not engaged, which in my view it is. The reason is the principle of Erewhonian law that people shall have the right to the peaceful enjoyment of their possessions (ECHR section 31), which plainly includes the right to use and exploit their authorial works as they see fit; a conclusion supported by the direction in section 15 of the Erewhonian Intellectual Property Code that "intellectual property shall be protected". While the act of taking the photograph of the claimant was an invasive and perhaps illegal act, it was also an authorial act which had the effect of making the defendant photographer a property owner, and I must consider fully his rights as such in my determination of this case.

More difficult is whether the right of the claimant's wife to a share of his assets upon the dissolution of their marriage is within the scope of ECHR section 31. I admit to having found this a difficult question, but have reached the firm conclusion that it is.

(c) The right to freedom of expression

It was to be expected that the defendants would respond to the current action by waving the banner of free speech. And rightly so: freedom of expression is an important value that is recognized by most democratic nations, including Erewhon (see ECHR section 32). Plainly it is engaged by this action; the claimant's action having its basis in three acts of speech, *viz*, those of the claimant's colleague, the claimant's wife, and the journalist/*EN*.

(d) Balancing these interests

Identifying the rights engaged by this case has been easy in comparison with determining the weight which ought to be afforded to each, and how they ought to be "balanced" *inter se*.

First, to the matter of weight. It is accepted in the international arena, from where (having regard to the wording of its text) the ECHR plainly derives, that each of the three human rights with which we are concerned have equal legal weight, and I accept that the same is true in Erewhon. Thus, none prevails over the others, and none is to be given priority in any balancing exercise. Which is what makes that exercise so difficult.

Let me confess at the outset my discomfort with the notion of "balancing" rights, especially those as different as the three at issue in this case. The tool used in other jurisdictions is the principle of "proportionality", though in the abstract at least, "proportionality" strikes me as an empty legal concept; as empty as the concept of "equality" has been argued by some commentators to be.

Notwithstanding these remarks, I have determined the proper way forward in this case. The first thing I must decide is whether the claimant had a reasonable expectation of being let alone, either in the partners' lounge of Reywal Peets LLP or in his married life. It seems to me that he did, in both. The next question is whether the actions – (A) of any of the three defendants in publishing the information which they published about the claimant and the photo of him, (B) of the claimant's wife in accessing his private email, and/or (C) of the claimant's wife in forwarding information previously copied from their shared computer to her solicitor in anticipation of its potential use in future legal proceedings against him – pursued a legitimate aim, and if it did, whether the benefits to be achieved by such actions were proportionate in light of the harm which they threatened to cause to the claimant's section 30 right. I find no legitimate aim in relation to (A) or (B), but a legitimate aim in relation to (C). The aim in question was to prevent the claimant from acting on his threat to hide his assets from the family courts, and thereby to interfere with his wife's peaceful enjoyment of her possessions. In addition, I find that the benefits to be achieved by the act of forwarding the information to her solicitor were sufficient to outweigh the harm thereby threatened to the claimant's right to privacy. (As there is no property in information *per se*, and no suggestion by the claimant to have owned the physical medium of the CD, there is no countervailing right by him to property in the same.) Accordingly, I find for the claimant on all grounds, except in relation to his wife's use of the CD, which I find was justified in pursuit of her right to property.

The Erewhonian Intellectual Property Code

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15. Intellectual property shall be protected.

The Erewhonian Human Rights Code

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30. Everyone has the right to respect for his private and family life, his home and his correspondence.

31. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

32. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

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Mooters' Instructions

The Court of Appeal affirms, and the defendants appeal to the Supreme Court of Erewhon. They seek reversal of the Erewhon Court of Appeal's affirmance of the judgment of the High Court concerning the publication of the information and photograph, and ask that the Supreme Court dismiss the claimant's entire action. The claimant cross-appeals the part of the High Court's judgment that found for his wife.