# European privacy laws a stumbling block for ASIC

**Nick Hart looks at how European rights to privacy have recently dealt a blow to ASIC's requests in the UK to obtain information for its investigations in connection with the infamous Offset Alpine affair.**

## The Offset Alpine affair

The Offset Alpine affair has attracted much public attention and intrigue because of its mix of high-profile figures, large sums of money, and suspicions of criminality.

It began with the purchase from Kerry Packer of the Offset Alpine printing firm in 1992 and its subsequent flotation by the late Rene Rivkin, the flamboyant and successful stockbroker.

At the end of 1993 the firm's principal asset, the printing plant, was destroyed by fire. It transpired that the plant was valued at approximately $3million but had been insured for the replacement value of around $42million. A payout of over $50million caused the value of the company's shares to increase dramatically.

## ASIC investigation

ASIC launched an investigation in 2003 into share trading at the company – following an investigation by the *Australian Financial Review* into the alleged secret ownership of a parcel of the shares in the company on behalf of Mr Rivkin, former minister Graham Richardson, and businessman Trevor Kennedy. It was alleged that Mr Rivkin and Mr Kennedy had used Swiss banks to hold the shares so that their beneficial ownership was kept secret and that perjury had been committed in evidence given to the Australian authorities.

## Judicial review

The recent High Court proceedings in London were for judicial review brought personally by the Swiss lawyer, Benno Hafner, and his law firm Hafner And Hochstrasser, who acted for all three men connected with the affair. The defendant in this case was a lower English Court that had ruled previously that the information sought by the Australian Securities and Investments Commission (**ASIC**) did not concern any rights to privacy under European law.

The chain of events leading to these most recent proceedings began in late 2004 when the Attorney General requested on ASIC's behalf that the UK authorities assist it in obtaining evidence from the UK under the *UK Crime (International Co-Operation) Act 2003* (**CICA Act**).

The request for information sought the taking of evidence from two employees in London of Mees Pierson Intertrust Ltd (**MPI**), including questions regarding the connection between this company and the Swiss lawyer, Benno Hafner.

## Claim for breach of privacy

Both Mr Hafner and his law firm had concerns that the information sought by ASIC included private correspondence and professional correspondence subject to Swiss confidentiality laws and legal professional privilege. Their claim was that any disclosure of this information would breach their privacy rights under Article 8 of the European Convention on Human Rights.

Interestingly, the information sought for disclosure did not only concern the men investigated by ASIC, but also information about Mr Hafner himself and particularly a document showing the beneficial shareholding interests of a number of individuals in various companies.

Prior to these recent proceedings, in 2006 the UK courts had already established a set of possible procedures which would give Mr Hafner and his firm opportunities to challenge disclosure sought by ASIC. These orders included the right for Hafner and his firm (the claimants) to appear and be legally represented, for the MPI employees to answer in writing a series of questions, and for counsel to make oral submissions to the court in determining whether the documents were relevant for disclosure under the CICA Act - but also whether they were 'inappropriate' for disclosure in light of the claimants' Article 8 privacy rights.

The procedure was agreed between ASIC and the claimants - but it was a permissive order rather than obligatory. As it happened, in subsequent hearings in London regarding the disclosure information sought by ASIC, the Judge of those hearings decided **not** to follow the agreed procedure. Instead, that Judge considered documents from Mr Hafner and his firm against disclosure, and a questionnaire in relation to the documents. On 27 March 2007 the Judge gave his decision about the disclosure, which included a somewhat surprising statement that the Article 8 privacy rights are not relevant – that 'Article 8 is not engaged in any way, shape or form'.

## Judge 'manifestly in error'

It was on the basis of this statement about privacy that Mr Hafner and his firm made their claim – that the Judge had been 'manifestly in error' in deciding that their privacy rights are not engaged 'in any way, shape or form'. This was claimed not only in relation to the document of various beneficial shareholdings but also in relation to various documents that emanated from Mr Hafner and his firm and contained confidential information in relation to their clients.

## The European rights to privacy

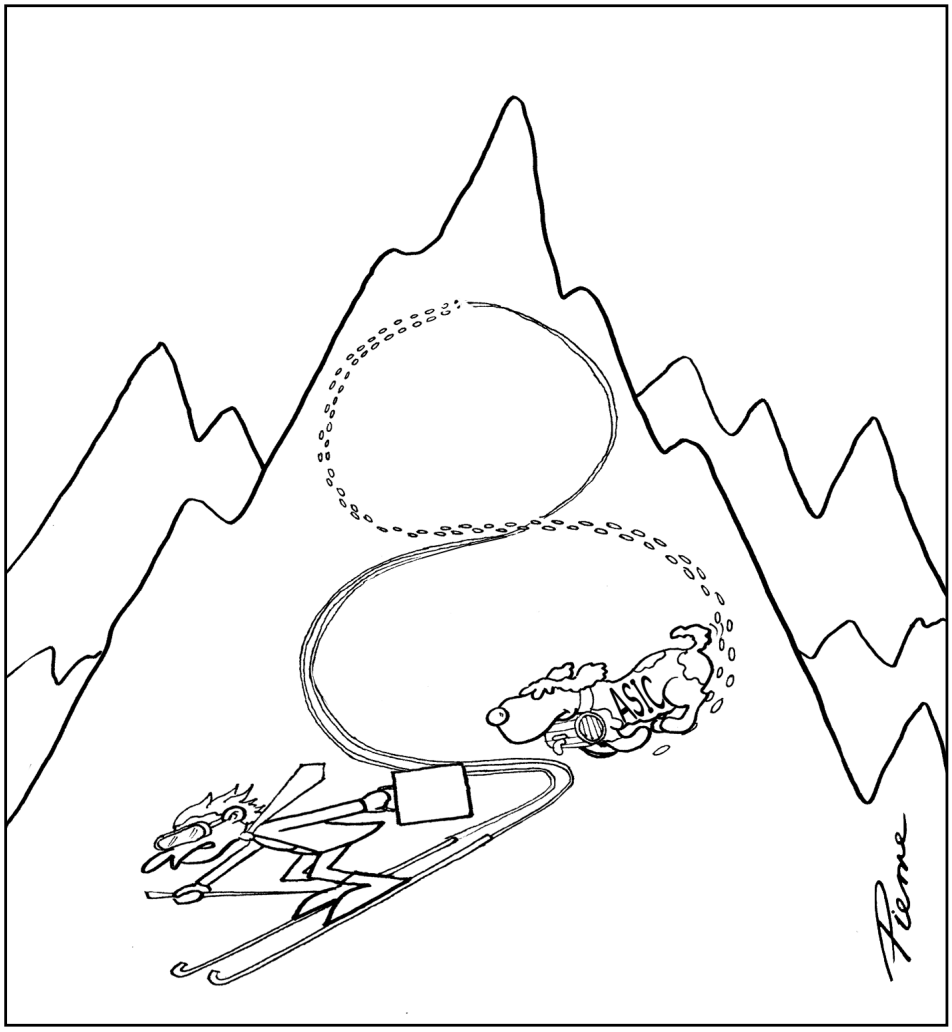
Article 8 of the European Convention on Human Rights, the 'Right to respect for private and family life', states:

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

## The High Court's findings – privacy engaged

The High Court disagreed with the previous Judge that Article 8/privacy rights were 'not engaged'. In fact, the High Court stated that 'there can be no doubt' that compulsorily acquiring documents and information which were given by MPI to Mr Hafner and his firm in confidence – and then communicating that to a third party (ASIC) – engages the Article 8 privacy rights.

The High Court went on to confirm that it agreed with the following, which had been argued for Mr Hafner and his firm:




- That the protection of 'private life' and 'correspondence' can also include business correspondence;
- That even though Mr Hafner and his firm were not initially concerned in the legal proceedings, they were still given the protection of Article 8;
- That public authorities obtaining documents compulsorily must engage the right to respect for private life and correspondence in each step of obtaining, storing and using that information.

## Safeguards against abuse

The lawyers for Mr Hafner and his firm cited various cases from the European Court of Human Rights in Strasbourg. This included the case *Franke v France (1993)* and this interesting extract from that judgment regarding foreign borders and privacy in connection with capital outflows and tax evasion:

> *'States encounter serious difficulties owing to the scale and the complexity of banking systems and financial channels and to the immense scope for international investment, made all the easier by the relative porousness of national borders. The Court therefore recognises that they may consider it necessary to have recourse to measures such as house searches and seizures in order to obtain physical evidence of exchange-control offences and, where appropriate, to prosecute those responsible. Nevertheless, the relevant legislation and practice must afford adequate and effective safeguards against abuse…'*

In this case, the safeguards were contained in the nomination of a court under the CICA Act to receive evidence and for judicial review proceedings. The High Court confirmed that when considering evidence, such a court would have to consider the privacy rights under Article 8 as well as legal professional privilege. This would apply regarding any person whose rights may be infringed if the application for the disclosure of evidence is granted.

The High Court stated that where prevention of crime is at stake then the rights to private and family life are unlikely to prevail – but that 'the court should protect documents or information that go beyond that which is necessary for this purpose'.

## ASIC should have realised the Judge's error

The High Court referred the matter of assessing whether the documents and information should be disclosed back to a lower court – with the effect that the ASIC investigation will be further significantly delayed.

The High Court also accepted the arguments against ASIC that it should have been 'quite plain' that the original Judge had been wrong in his findings, and that even though judicial review would have been a necessary step to rectify that error, if ASIC had not opposed the judicial review it would have been a much shorter and less expensive process. The Court therefore ordered ASIC to pay two thirds of Mr Hafner and his firm's costs since the date of the previous order of 27 March 2007.

This can only add to ASIC's frustrations and illustrates that relying on possibly 'bad judgments' is not without risk.

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