

ILA Technical Committee wishes to draw members' attention to the decision in *The Estate of the Late Rene Rivkin; Warner v Verfides and Hafner* [2008] EWHC (Ch) 2609 in which a lawyer: (i) intervened in an application by an office-holder against a respondent for production of documents; and (ii) successfully asserted that he had Convention rights in certain correspondence in the files which the office-holder wished the respondent to deliver up.

Members will be aware that the question whether Convention rights reside in correspondence has been the subject of decisions such as:

- (a) *Haig v Aitken* (whether personal correspondence vested in a trustee in bankruptcy); and
- (b) *Foxley* (whether Convention rights of a bankrupt were infringed by a postal redirection order).

However, the Convention rights asserted in *Rivkin* were of a different nature.

The issue

The office-holder, an Australian trustee in bankruptcy (“TiB”) of Rene Rivkin, obtained an order recognising the Australian bankruptcy as “foreign main proceedings” for the purposes of the UNCITRAL Model Law on Cross-Border Insolvency (in Schedule 1 to the Cross-Border Insolvency Regulations 2006).

He then applied (pursuant to Article 21 of the Model Law), on a non-opposed basis, for an order against V - a trust management and corporate services provider - for production of certain specified categories of documents within V’s files relating to the affairs of the insolvent estate. A Swiss attorney and his firm (“H”) who had acted for Rivkin, intervened and resisted production to the TiB on the grounds that H had or might have Convention rights in correspondence on the same files sent to V relating to other of H’s clients.

The procedure adopted

Without prejudice to the TiB’s position that no such rights existed, the parties agreed a procedure similar to that used on *Beddoe* applications which involved: (i) production of the documents by V to the court; (ii) inspection of the documents by H, but not the TiB; (iii) confidential submissions by H to the judge explaining the grounds for resisting production; (iv) hearing before the judge when submissions were also made on behalf of the TiB (but without sight of the disputed documents).

In the event, H objected to the production of only 1 document in its entirety, and to 6 others unless redactions were made. Independently of any Convention rights, the judge decided that the disputed material did not meet the description of documents in the TiB’s application and the files were delivered up after removal of the 1 document and suitable redactions made on the remaining 6.

In order to decide who should pay the costs incurred by the intervention, the court then had to proceed to assess, on a summary basis, whether the intervention had been justified. This, in turn, gave rise to the need for the judge to decide the legal issue - whether H had the claimed Convention rights in the correspondence.

Article 8

H relied on Article 8(1) of the European Convention on Human Rights:

"8. Right to respect for private and family life

(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, the protection of health or morals, or for the protection of the rights and freedoms of others."

The decision on Article 8

The TiB referred to 2 decisions of the Commission which appeared to establish that documents ceased to constitute "correspondence" within the meaning of Art. 8(2) once they had been received by their intended recipient (*G, S and M v Austria* App No 9614/81; 34 DR 119 and *AD v Netherlands* App No 21962/93; 76A(E)/B DR 157).

The judge found that :

- (1) those decisions were inconsistent with the decision of the ECHR in *Niemietz v Germany* (1992) 16 EHRR 97 - there was no principled reason why documents created by H and sent to V should have ceased to be 'correspondence' on receipt by V; and
- (2) in addition, having regard to the fact that (following *Niemietz*) "private life" in Article 8(1) included "business life", H's Convention rights to respect for his private life were also engaged by the TiB's application.

The judge therefore concluded that H's Article 8 rights had been engaged by the TiB's application for disclosure of such documents.

For reasons which were fact specific (including that the TiB had already obtained costs orders against H at earlier hearings relating to the intervention), the judge directed no order as to the costs of the intervention.

Comment

The relevance of this decision may be demonstrated by the following typical example.

A liquidator seeks an order for delivery up by a firm of professionals (solicitors, accountants, patent agents etc.) of their files relating to the affairs of the insolvent company. The firm does not oppose but, for the usual reasons, invites the liquidator to obtain an order. A third party intervenes and alleges that, during the course of his business, he wrote letters to the firm relating to his clients' affairs and that he objects to production of all such correspondence.

At that point, on the authority of *Rivkin*, Article 8(1) is likely to have been engaged. The relevance of this is perhaps more concerned with the ability of an intervener to slow down production of documents and increase the cost of the exercise to the insolvent estate, than it is to the ultimate result for the liquidator.

The Judge made the following observations in this respect :

“It was objected on behalf of the [TiB] that, if that were so, applications for the production of documents in any bankruptcy, whether foreign or domestic, would be complicated almost to the point of impossibility by the necessity to have regard to the interests of any person who had generated any of the documents. I do not agree. A court considering any such application need in ordinary circumstances do no more than have regard to the collective rights of those persons who have produced the documents of which disclosure is sought. Again in ordinary circumstances, it is likely to take the view that the interests of a trustee in bankruptcy justify interference with those rights under paragraph (2) of Article 8 - a view encouraged by the European Court of Human Rights in Niemietz at paragraph 31:

“More generally, to interpret the words ‘private life’ and ‘home’ as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by the public authorities ... Such an interpretation would not unduly hamper the Contracting States, for they would retain their entitlement to ‘interfere’ to the extent permitted by paragraph 2 of Article 8; that entitlement might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case”.

Only time will tell whether, in practice, applications for production under s.236 (companies) or 366 (individuals) will be affected by interventions of this nature. In cases concerning smaller estates, the time and cost involved in “seeing them off” might prove to be prohibitive.