

Trustees in Bankruptcy should beware the pitfalls of ignoring legal professional privilege

Published 14 July 2016

Shlosberg v Avonwick Holdings Ltd & Ors [2016] EWHC 1001

Law firm Dechert LLP has been ordered to cease acting for the principal creditor of bankrupt Russian businessman, Mr Shlosberg, because it also acted for the trustees in bankruptcy, and accordingly had had access to documents subject to Mr Shlosberg's legal professional privilege.

Facts

Dechert acted for the bankrupt's principal creditor, Avonwick, in a winding-up petition and subsequently (and not unusually) for the bankrupt's trustees in bankruptcy. The bankrupt's documents were requested by the trustees, including any which would be privileged from disclosure in proceedings, in accordance with s.311(1) Insolvency Act 1986.

The bankrupt's former solicitors provided the requested documents to Dechert which included confidential and privileged advice given to the bankrupt on resisting Avonwick's claims. The bankrupt raised concerns about Dechert acting for both Avonwick and the trustees. Dechert rejected the concern, arguing that Avonwick had already advanced its claim against the bankrupt, obtained a judgment, and Mr Shlosberg now benefited from the protection of a bankruptcy order.

However, Avonwick subsequently brought a new claim against the bankrupt alleging unlawful means conspiracy and wished to rely on the privileged information. The bankrupt sought an order that Dechert cease acting for both Avonwick and the trustees on the basis that they had misused privileged information. Dechert did not dispute that the documents were privileged but argued that the benefit of that privilege had passed to the trustees in bankruptcy and there was no real risk of misuse of information.

Decision

Arnold J pointed to the fact that although s.311(1) of the Insolvency Act provides that privilege will not be a bar to the trustee's power to obtain documents, it does not expressly provide that the bankrupt's privilege should pass to his trustee.

The judge went on to hold that privilege is not an interest within the meaning of s.436(1) of the Insolvency Act nor an exercisable power under s.283(4) capable of vesting in trustees; it has no commercial value, and cannot be realised or distributed to creditors. The nature of the right of privilege is such that it is peculiarly personal to the bankrupt and arises out of the confidential relationship between the client and his/her lawyer.

Whilst there was *"nothing inherently objectionable"* about a solicitor acting for both a trustee in bankruptcy and a major creditor of the bankrupt, Dechert had not put any information barriers in place to safeguard the bankrupt's privileged information. Accordingly, the court ordered Dechert to cease acting for Avonwick in the conspiracy proceedings.

Comment

The application raised an important point of principle with respect to the devolution of legal professional privilege and whether it automatically vests in trustees in bankruptcy simply because the trustees have acquired possession of the paper recording the privileged information.

It is established law that *"any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged."* [Campbell v United Kingdom (1992) 15 EHRR 137]. Legal professional privilege is a fundamental human right, akin to the right to privacy and protected by the European Convention of Human Rights. It follows as a matter of public policy that the right to assert or waive privilege should not automatically devolve to trustees in bankruptcy.

Trustees in Bankruptcy should be mindful that a bankrupt retains the right to assert or waive privilege in physical and electronic files and documents delivered up for the purposes of administering the bankrupt's estate (save where the documents relate to property which has vested in the trustees). Accordingly, they should ensure that sufficient internal safeguards are in place to prevent privileged information being inadvertently shared with creditors with all the complications that his case illustrates may ensue.

Authors



Ross Risby

London - Walbrook

rrisby@dacbeachcroft.com


DAC BEACHCROFT