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The lawyer's smoking gun

Insolvency, fraud and privilege

In almost every company insolvency, someone suggests (often quite loudly) that the directors have been guilty of fraud or misconduct. Sometimes the allegation may be serious, and the authorities investigate. One rich source of evidence may be the legal advice given to the company – it may be the smoking gun, proving that the directors knew exactly what they were doing. But can the prosecutors use it?

Legal advice from a lawyer is absolutely privileged from disclosure in most circumstances. That can be the reason why canny directors route sensitive management and compliance discussions through their solicitor – that's very common in competition law discussions, for instance.

The privilege belongs to the client, not the lawyer, and the client can waive it. That is an important point in connection with insolvency, where the client is often the company. What if the liquidator or administrator waives privilege and provides the advice to the prosecutor or regulator, to be used against the directors who took the advice?

But the legal distinction between advice to the company and advice to the directors is a fine one, especially when dealing with issues of fraud or regulatory compliance. It's the directors who may go to jail, even if the company pays the lawyer's bills. Can the liquidator really pull the rug out from under the directors by turning over the legal advice to the prosecution?

No, the court has said in *R. (Stewart Ford) v The Financial Services Authority* in October 2011. It held that *joint interest legal professional privilege* applied to the legal advice. Even where the lawyer's retainer is in the name of one party – the company – others may be able to rely on the privilege if they had a joint interest in the advice. For joint privilege to arise, the facts must demonstrate that all those sharing the privilege, and the lawyer, knew, or ought to have known, that they enjoyed legal professional privilege with the others. To claim privilege, the director had to show:

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- That he communicated with the lawyer for the purpose of seeking advice in an individual capacity;
- That he made clear to the lawyer that he was seeking legal advice in an individual capacity, rather than only as a representative of the company;
- That those sharing the joint privilege (the other directors and the company) knew or ought to have appreciated the legal position;
- That the lawyer knew or ought to have appreciated that he was communicating in an individual capacity.
- That the communication with the lawyer was confidential.

The directors succeeded, and the FSA were barred from relying on two crucial emails from the lawyer which had been handed over by the administrators.

The lawyers who gave the advice were my old firm Irwin Mitchell. Interestingly, the authors of the two legal textbooks on the subject were leading counsel on opposite sides in the case!

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