Careful conduct

James Mather and Joel Seager examine the position of insolvency officeholders and privilege

James Mather (pictured top) is a member of Serle Court Chambers and Joel Seager is of counsel at Enyo Law LLP

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In *Shlosberg v Avonwick Holdings Ltd* [2016], Arnold J rejected the widely held assumption that a trustee in bankruptcy simply 'stood in the shoes' of the bankrupt as regards their rights of privilege and was free to waive the privilege for the purposes of the bankruptcy. As the Court of Appeal determined in upholding that decision (*Avonwick Holdings Ltd v Shlosberg* [2016]), the trustee has a duty to gather in the bankrupt's documents, including those which are privileged (and whether the privilege is theirs or a third party's), but cannot use them 'in a way which amounts to a waiver of the privilege'.

In a further decision recently made in the same proceedings, *Willmont v Shlosberg* [2017], Arnold J has also considered the obligations of confidentiality to which an officeholder is subject. The three judgments in combination provide an important restatement of the law as regards the bankrupt's rights concerning information obtained by officeholders in exercise of their powers under the Insolvency Act and the corresponding limitations imposed on them.

As regards privileged materials, it is clear that the trustee remains entitled to make at least some use of their contents, such as to further an investigation by following a line of enquiry. What the trustee must never do, however, is to divulge the material or its contents to a third party. Consequently (and by way of example), the trustee is constrained from divulging privileged materials to creditors, to potential third-party funders, to third parties whom they are interviewing, or in explaining reasons for their adjudication on a creditor claim.

There remains room for argument as to whether the bankrupt's privileged materials can be deployed in proceedings solely between the trustee and the bankrupt. In the first instance decision in *Shlosberg*, Arnold J drew a distinction between the (impermissible) use of privileged documents for court proceedings and their (permissible) use for other purposes. However, the Court of Appeal adopted a different test, as set out above. The potentially unresolved question is whether use in court as between the trustee and the bankrupt (where no third party is involved) amounts to a waiver of privilege. It is arguable that, if measures are taken to preserve the confidentiality of the material beyond the court, its use in court does not constitute a further waiver. Regardless of the ultimate answer on this point, arguments that material is not privileged at all by reference to the crime-fraud exception will inevitably assume greater importance in the bankruptcy context.

Three further significant practical points emerge for officeholders and their advisers from the trilogy of decisions in the *Shlosberg* litigation.

First, it may not in the past have been unusual for trustees to instruct the petitioning creditor's solicitors. Indeed, this practice had found some judicial support, recognising the practical advantages it may offer in cases where the petitioner's former claims are relevant to the purposes of the bankruptcy (such as where a complex

Avonwick Holdings Ltd & anor v Shlosberg
[2016] EWCA Civ 1138
Shlosberg v Avonwick Holdings Ltd & ors
[2016] EWHC 1001 (Ch)
Willmont & anor v Shlosberg
[2017] EWHC 2446 (Ch)

asset-tracing exercise arises). However, greater caution will now be required, since it is unlikely that solicitors who have previously acted for the creditor may continue to do so while also acting for the trustee. This is because if they review the bankrupt's privileged documents, it will either amount to a de facto sharing of their contents with the creditor or place them in a position of conflict of interest or duty insofar as the contents are of assistance to their other client. Instructing the petitioning creditor's solicitors will thus require an election by the petitioner that it is content to be disabled from itself pursuing further action (including against a related third party) with the assistance of those solicitors.

Second, it was confirmed in *Willmont* that an officeholder can in principle take appointments across several related insolvency estates: while there is an inherent risk of conflicts of interest at the level of the creditors to the various estates, these can be dealt with as and when they arise. However, conflicts at the level of creditors are only one aspect of the difficulties that can arise. Where officeholders utilise their powers of compulsion under the Insolvency Act to obtain materials, they may only use those materials for the purposes for which the powers were conferred (being, in short, the purposes of the bankruptcy estate in which the powers arise). The court cautioned that material can only be shared across the estates where the officeholders have considered the particular material and concluded that there is a proper purpose to that sharing. One such purpose could be to support litigation being pursued by another estate in which there was a real prospect of a surplus that would be distributable to the sharing estate. Although another purpose could in principle be the uncovering of misdemeanours, the sharing of material on that basis requires the permission of the court (although in this instance that permission appears to have been granted retrospectively).

The court nonetheless said that no difficulty arose from the position of an officeholder who, in that case, was common to both the bankruptcy estate and a related liquidation. This appears to have been on the basis that, even if there was de facto sharing of material across the estates (whether or not its purpose could be justified), any inappropriate sharing could be catered for through restricting *use* of the relevant material. However, this latter aspect of the decision should probably not be taken to extend beyond its particular facts. As a matter of principle, it seems clear that the de facto blanket sharing of compulsorily obtained material through the existence of a common officeholder (and undifferentiated teams) is unlawful and could lead to the court's intervention.

Third, the potential receipt of privileged (as opposed to merely confidential) material calls for more stringent controls where a trustee is also the officeholder of another insolvency estate. No de facto sharing of the bankrupt's privileged material will be permitted. Nonetheless, *Willmont* indicates that, where robust arrangements are implemented, joint office-holding arrangements remain possible. The court approved a protocol whereby potentially privileged material would be independently reviewed for privilege and held by a non-overlapping trustee if held to have such. This suggests that, in all instances of overlapping officeholders involving a personal insolvency estate, there will need to be a non-overlapping trustee to receive privileged material in such circumstances. ■

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