



LEMOS: PRESERVING A BANKRUPT'S PRIVILEGE

The High Court has considered a recent Court of Appeal ruling on whether trustees in bankruptcy should be able to deploy privileged documents in the discharge of their duties.

The existing position under *Avonwick*

The facts of *Shlosberg v Avonwick Holdings Limited* [2016] EWCA Civ 1138 involved a company called Webinvest. Webinvest was beneficially owned by Mr Shlosberg. Avonwick lent US\$100 million to Webinvest, with Mr Shlosberg personally guaranteeing the loan.

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When Webinvest failed to meet repayments, Avonwick began proceedings to place Webinvest into liquidation and Mr Shlosberg into bankruptcy. Once this had been achieved, Avonwick and the liquidator of Webinvest brought proceedings against Mr Shlosberg for conspiracy. The same law firm acted for both Avonwick and the trustees in bankruptcy of Mr Shlosberg.

The trustees in bankruptcy had acquired Mr Shlosberg's property under provisions of the Insolvency Act 1986, including certain privileged documents. Mr Shlosberg sought an order that the law firm should cease to act for Avonwick, on the basis that it had in its possession documents that were privileged to Mr Shlosberg. The trustees in bankruptcy argued that Mr Shlosberg's privilege vested in them and could thus be waived so as to permit Avonwick to use the documents.

The court held at both first instance and appeal that privilege was personal to Mr Shlosberg. Privilege was not the bankrupt's property, so could not vest in a trustee in bankruptcy. It was therefore not open to the trustees to deploy any documents that were subject to the bankrupt's privilege, without his consent.

Lemos and developments to the law

In *Re Christos Pandelis Lemos*, the trustees in the bankruptcy of Mr Lemos sought clarity on the decision of the Court of Appeal in *Avonwick*, in order to determine how certain potentially privileged documents could be used.

The documents in question were obtained from the former solicitors of Mr Lemos. The trustees in bankruptcy believed that the documents could be of use as evidence in proceedings they intended to bring, pursuant to section 423 Insolvency Act 1986.

The court held that:

- *Avonwick* made it clear that privilege was not the property of a bankrupt that vested in a trustee in bankruptcy.
- The scope of *Avonwick* was neither confined to liability documents¹; nor would trustees in bankruptcy step into the shoes of the bankrupt in respect of privileged documents affecting the assets of the bankrupt.
- The principle of the right to privilege is so fundamental that only an express statutory power could enable the court to direct a bankrupt to waive privilege in any document.

HFW comments

The potential impact of *Lemos* and *Avonwick* on the insolvency industry is serious. There are likely to be major repercussions regarding the ability of trustees in bankruptcy to discharge duties in relation to the recovery of assets. Trustees could find themselves in a position where they have sight and possession of documents containing information relevant to the recovery of assets (such as legal advice received by the bankrupt before the bankruptcy order was made), yet are unable to take any action due to privilege preventing disclosure. Trustees would thus potentially be stymied in the discharge of their duties.

Following the judgment in *Lemos*, trustees in bankruptcy should consider carefully whether certain actions could amount to a waiver of privilege, particularly in the following situations:

- When using privileged documents to further investigations into potential assets to be recovered into the bankruptcy estate.
- When disclosing details of any investigations to third party funders or creditors funding the bankruptcy process.

1. Documents which evidence the liabilities of the bankrupt.



- When considering evidence for the purposes of adjudicating upon a creditor claim.

It should be noted that *Lemos* and *Avonwick* apply only to personal insolvencies and not to corporate insolvencies, where the position is different. It is accepted by the courts that a liquidator or administrator can waive a company's legal professional privilege because the liquidator or administrator is an agent of the company.

The *Lemos* judgment is available [here](#).

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