Does Lord make a difference?

The judgement in R (Lord) v SFO [2015] EWHC 865 (Admin) was handed down in February of this year and initially received little, if any, publicity. Recently this has changed with a series of articles considering the impact of the decision. But, what, if anything, had *Lord* actually changed? Ideally it will lead to the earlier separate representation, by specialist criminal law firms, of individual employees when their employers are under investigation.

In *Lord* the Administrative Court considered the legality of the Serious Fraud Office's (SFO) decision denying the attendance of a specific firm of solicitors to a compulsory s. 2 *Criminal Justice Act* 1987 interview.

The SFO's objection was born from the fact that proposed interviewees chose to be represented by the same firm of solicitors who acted for their corporate employer. The SFO's view was that this state of affairs might realistically prejudice their investigation. The SFO relied on their policy, found in the Operational Handbook. The Administrative Court agreed that the SFO had acted lawfully.

<u>The Solicitors attending</u>
That an interviewee did not have an absolute right to have a solicitor of their own choosing present during a s. 2 interview was well known to those who deal in these cases. *Lord* does not change that position at all.

While *Lord* revealed that the Operation Handbook is being re-written, nothing in the judgement changes the current SFO policy for defence lawyers attending s. 2 interviews.

What the subsequent discussion of *Lord* may change is the decision of firms to act for multiple subjects in a single investigation.

Those acting for companies under investigation remain best placed to know whether they are able to discharge their professional responsibilities when considering whether they are able to act for a s. 2 interviewee.

But *Lord* is a timely reminder of the difficulties of these investigations. It is not difficult to foresee an occasion where the interests of a s. 2 interviewee and the company under investigation may diverge.

The decision is likely to lead to an earlier split in the provision of advice from those firms who represent the companies under investigation and those firms who represent the individuals caught up in an investigation.

Perverting the course

As significant, and surely inconsistent with the main aspect of the decision, the court could see no objection to an employee interviewed under s. 2 disclosing the content to their employer and the corporate lawyers. Yet this is precisely what the SFO seeks to guard against by requiring undertakings not to disclose from those at the s. 2 interview.

By ensuring there is separate representation the problem is removed. It becomes a matter of professional judgment for the solicitors present, whether any part of the interview may be disclosed, without running the risk of interfering with the SFO enquiry. A conflict of interest is never able to develop.

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