

Covert surveillance: Insolvency's forgotten tool

Roger Bescoby explains the possibilities for covert surveillance whilst keeping on the right side of the law



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The implementation of the UK Government's Covid support scheme may be remembered in history as one of the greatest examples of legislative oversight in recent years.

Whilst laudable in its aims to keep businesses afloat during the trials of lockdown, the scheme became a tool for self-enrichment by the unscrupulous. As the Government prioritised ensuring businesses received the financial support needed to remain solvent quickly and easily, some directors took advantage of the urgency of the situation and the lack of thorough checks to benefit at the expense of the public purse. As pressure grows to remedy the situation and recoup funds, we may see surveillance emerge as the key to tracking and catching these criminals.

Thankfully, the Insolvency Service and the Government have taken action to empower insolvency professionals to join the hunt. With the passing of the Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Act 2021, the Government granted the Insolvency Service the power to investigate directors of dissolved companies. This provides an opportunity to open a new front in the war against fraud by empowering insolvency professionals to discover and investigate incidences of fraud themselves – allowing more scammers to be brought to justice despite resource constraints in policing. Since then, the Insolvency Service has disqualified more than 800 company directors between 2023-2024 (an increase of more than 80% on the

previous year) and has even created a team solely dedicated to investigating Bounce Back Loan misconduct.¹

At the same time, fraud has also significantly increased since the pandemic, doubling in value in 2023 compared to the previous year according to analysis by financial services firm, BDO.² Meanwhile, the ability of the authorities to investigate and pursue cases against fraudsters has fallen with prosecutions falling to a record low in 2023 – with only 1 in 1,000 cases making it to court.³

With insolvency-specialists encountering large increases in the volume of cases involving fraud, they are assuming an increasingly crucial role in tackling these crimes. Professionals working in insolvency now have the power to investigate and pursue fraud under insolvency legislation, giving them a uniquely important role in identifying and pursuing fraud. However, the powers given under legislation are still relatively new and many insolvency practitioners today are still not familiar with all the tools that are at their disposal in instances where they suspect foul play.

A powerful legislative toolkit

Insolvency practitioners have wide-ranging powers to investigate company directors so that they can fulfil their duty to properly scrutinise their conduct. Examples of the powers they have include interviewing directors under compulsion, searching and seizing property associated with fraud, having assets frozen, and even

arranging for directors considered a flight risk to surrender their passport.

Another tool available to insolvency professionals, but often overlooked, is covert surveillance. This is likely because the rules around covertly surveillance are not generally well understood. There is a prevailing myth that any and all covert surveillance is illegal when not undertaken by public authorities. However, so long as all relevant laws are complied with, covert surveillance is a legitimate and powerful tool for insolvency professionals looking to gather evidence in an investigation into fraud.

Covert yet compliant

Common legislative considerations to ensure an investigation is legally compliant include the General Data Protection Regulation 2016 (GDPR)⁴ and the Human Rights Act 1998. Any investigation will need to ensure that there is a legitimate interest for collecting and processing any personal data whenever consent has not been obtained – which is unlikely to be the case in a covert investigation. Collecting data for litigation or to detect fraud would be considered a legitimate interest so any properly carried out investigation will generally pass this test.

Other considerations include ensuring that any collected data is adequately protected from being stolen, whether they need to notify the data subject that their data has been collected, whether proper governance frameworks are in place in handling personal data, that the investigator has a data protection officer and whether the



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investigator has the appropriate processes in place to respond to any subject access requests. Meanwhile, it is not permissible to trespass on private property, to access someone's phone or computer without their consent or to record phone calls without notifying all of the participants on the call.

International investigations

When conducting covert surveillance as part of an investigation with an international element, as is commonly the case, then it is essential to ensure that investigators are compliant with all requirements in all relevant jurisdictions.

The laws regarding investigations can vary wildly from country to country. While the UK and many other jurisdictions do not have any specific requirements for investigators to operate so long as the relevant laws are followed, this is not the case universally, and it is important to be cognisant of this. For example, in China, all private investigation is illegal after it was banned in 1993. This is also the case in many countries in the Middle East, such as in Saudi Arabia. When there are suspicions of fraud taking place that necessitates investigation within these territories, it is strictly necessary to work with the public authorities alone.

Meanwhile, many other jurisdictions require investigators to hold a licence to practice such as in Spain, the United States or Ireland. In such territories it would likely be necessary to work with professional investigators locally in the region, if the investigation cannot be carried out remotely. Further, all investigations will need to comply with the relevant local laws in the jurisdiction in which it is being conducted. As an example, at present, each individual state in the United States has its own rules on privacy and compliance for investigators. There are presently 15 states that have passed comprehensive data privacy laws; California, Virginia, Connecticut,



Colorado, Utah, Iowa, Indiana, Tennessee, Oregon, Montana, Texas, Delaware, Florida, New Jersey, and New Hampshire.⁵

It is likely that more states will implement their own laws, in line with international trends to increase the regulation of data. However, this may soon change as the US may soon implement a unified legislative framework with the passing of the American Privacy Rights Act (APRA). This would create a national standard for privacy protections in the US and would supersede any of the state laws.

The key point to understand is that it will always be necessary for investigators to make sure that they have an up-to-date understanding of any relevant legislative and regulatory requirements for any investigation being carried out. If there is uncertainty about what these are, it may be preferable to work with a locally based team to ensure compliance.

After all, if an investigation is undertaken that is not compliant, the investigator may find themselves facing legal repercussions and any their

findings unusable. Nevertheless, so long as these rules are followed, insolvency practitioners should not shy away from making use of their powers to investigate. They now form a critically important dimension in the ongoing campaign to prevent and prosecute fraud. As such, it is key that insolvency professionals familiarise themselves with all the powers that they hold and their concomitant responsibilities in exercising them so that they can do their part to help reduce the amount of fraud taking place. ■

Footnotes:

- 1 See: www.gov.uk/government/news/more-than-800-company-directors-banned-for-abusing-covid-support-scheme
- 2 www.bdo.co.uk/en-gb/news/2024/reported-fraud-doubles-in-2023-bdo-report-finds#:~:text=The%20latest%20Crime%20Survey%20for,to%20a%20three%20year%20high.
- 3 See: www.telegraph.co.uk/news/2023/02/01/fraud-surges-prosecutions-slump-record-low/
- 4 Implemented in the UK by the Data Protection Act 2018.
- 5 See: <https://pro.bloomberglaw.com/insights/privacy/state-privacy-legislation-tracker/#:~:text=Currently%2C%20there%20are%2015%20states,data%20privacy%20laws%20in%20place>



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