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ENGLAND AND WALES

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A. Insolvency Law in England and Wales

(1) Different insolvency regimes

(a) CVA

- 1.01** A company voluntary arrangement (CVA) is one of the insolvency procedures available to creditors under the Insolvency Act 1986 (IA 1986). It is an agreement between a company, its shareholders, and its creditors. Generally a CVA is proposed by the company's directors,¹ whereby a plan to reorganize the company or to provide staged payments to creditors is agreed.
- 1.02** The directors of the company make a proposal to their nominee insolvency practitioner.² The nominee reports to the court on whether to call meetings of the shareholders and creditors to consider the proposal. A CVA comes into effect if 75 per cent in value of the company's creditors present and voting vote in favour of the proposal, as long as that majority is also more than 50 per cent of those creditors who are not connected to the company proposing the CVA.
- 1.03** If approved, a CVA will bind all creditors who were entitled to vote (and were given notice), apart from secured and preferential creditors.³ Creditors and shareholders have limited rights to challenge a CVA. Creditors may challenge if they have been unfairly prejudiced or if there has been a material irregularity in the conduct of the meetings. Shareholders may challenge if 50 per cent or more (in value) of the members have voted against the CVA.
- 1.04** The CVA will terminate in accordance with the provisions of the CVA proposal approved by creditors.

¹ Although it can also be proposed by a liquidator or an administrator.

² Generally, in fact, the proposal is drafted by, or in consultation with, the insolvency practitioner in question.

³ Unless those creditors also agree to be bound.

(b) Administration

An administration is a process whereby a company can achieve a reorganization or a managed wind-down of a company.⁴ The process either begins out of court (in the case of appointments by the company or its directors, or by the holder of a qualified floating charge) or in court (by a creditor). **1.05**

The main purpose of an administration is to rescue the company as a going concern. Only if this objective is not reasonably practicable (or if a better result will be achieved than any other method of dissolution) is the administrator permitted to carry out other objectives instead.⁵ Often administration is used to achieve a 'pre-pack' sale of assets,⁶ although there has been a great deal of criticism of this use. **1.06**

While a company is in administration, it is controlled by the administrator, not by its directors. **1.07**

The administration will terminate either by distribution, dissolution, handing back to the directors, CVA, or liquidation. **1.08**

(c) Administrative receivership

An administrative receiver is an insolvency practitioner who acts as a receiver or manager of the whole (or substantially the whole) of a company's property appointed by or on behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge, or by such a charge and one or more other securities.⁷ **1.09**

Administrative receivership is now of limited relevance to charges created after 15 September 2003, save in respect of certain limited cases:⁸ **1.10**

1. Pursuant to agreements forming part of a capital market arrangement as defined involving a debt of at least £50 million.
2. In respect of project companies of public private partnership projects with step-in rights.
3. Where the floating charge is granted over the property of a project company involved in a utilities project with step-in rights.

⁴ Similar to Chapter 11 in the US (although in administration, administrators manage the company, not the debtor in possession) and *sauegarde* in France.

⁵ Namely achieving a better result for the company's creditors as a whole than would be likely if the company were wound up or realizing property in order to make a distribution to one or more secured or preferential creditors.

⁶ Where the sale is arranged prior to administration and completed very shortly after administration commences.

⁷ IA 1986, s 29(2).

⁸ Ibid, ss 72B–G.

4. In respect of arrangements in relation to a project company involved in a finance project with step-in rights. If, on a proper interpretation of the documents, there are no step-in rights, the purported appointment will be invalid.⁹
 5. Relating to financial market charges.
 6. Companies registered as social landlords under the Housing Act 1996.
- 1.11** A receiver is under a duty to cease to act when all his costs, expenses, and liabilities have been paid and he has sufficient funds to discharge the secured debt owed to his debenture holder (and in respect of floating charge realizations, all sums owing to the preferential creditors). Where he vacates office at the end of his receivership, an administrative receiver gives notice to any liquidator who has been appointed and to members of any creditors' committee in the receivership. All receivers give notice to the Registrar of Companies of ceasing to act, and that fact is noted on the register of charges.
- 1.12** Because administrative receivership is very different from many other insolvency processes, it is generally not addressed further in this chapter.¹⁰
- (d) Members' voluntary liquidation*
- 1.13** Although not an insolvency procedure (because it involves solvent companies), mention must be made of members' voluntary liquidation (MVL).
- 1.14** A company may be placed into MVL if:
1. A majority of the directors make a declaration that the company is solvent.¹¹
 2. A 75 per cent majority of the members has resolved to place the company into liquidation and to appoint a specified insolvency practitioner as the liquidator.
- 1.15** The MVL commences from the date upon which the resolution has been passed. As at that date, the powers of the company's directors can no longer be exercised.
- 1.16** If the liquidator subsequently forms the view that the company is in fact insolvent, then the MVL can (and should) be converted into a creditors' voluntary liquidation (CVL).¹²

⁹ *Feetum v Levy* [2005] EWCA Civ 1601.

¹⁰ Reference should be made to the authoritative text on administrative receiverships: G Lightman & G Moss on *The Law of Administrators and Receivers of Companies*, (4th edn, Sweet & Maxwell, 2007).

¹¹ Section 89 IA 1986.

¹² As to which, see the next section.

Once the company's affairs are wound up and final accounts have been presented to a meeting of creditors (and filed with the Registrar of Companies), the company is deemed to be dissolved at the expiration of three months. **1.17**

(e) Creditors' voluntary liquidation

If a company is insolvent (and/or the directors are not in a position to swear a declaration of solvency¹³), a company can be placed into CVL if: **1.18**

1. A 75 per cent majority of the members resolve to place the company into liquidation and to appoint a specific insolvency practitioner as liquidator; and
2. A majority by value of the creditors present and voting at a creditors' meeting (held within 14 days of the shareholders' meeting) pass a similar resolution.

If the creditors are not prepared to agree to the shareholders' liquidator, then the creditors' choice prevails. **1.19**

The CVL commences on the date upon which the members' resolution is passed, but the powers of the liquidator are limited until he is confirmed at the creditors' meeting. **1.20**

As with an MVL, once the company's affairs are wound up and final accounts have been presented to a meeting of creditors (and filed with the Registrar of Companies), the company is deemed to be dissolved at the expiration of three months. **1.21**

(f) Compulsory liquidation

Compulsory liquidation results from the petition of a creditor presented to the court, seeking the winding up of the company. Generally such a petition is based upon the inability of the company to pay its debts as they fall due. A company is deemed unable to pay its debts¹⁴ either on a cash flow or a balance sheet insolvency test: **1.22**

1. if a creditor (by assignment or otherwise) to whom the company is indebted in a sum exceeding £750 then due has served on the company, by leaving it at the company's registered office, a written demand requiring the company to pay the sum due and the company has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor, or
2. if, in England and Wales, execution or other process issued on a judgment, decree, or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part, or

¹³ See above.

¹⁴ IA 1986, s 123.

3. if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due,¹⁵ or
4. if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

1.23 A compulsory liquidation commences at the time of presentation of the winding up petition (and not the date on which the order is made).¹⁶

1.24 The directors' powers cease at the date of the winding up order. The business of the company ceases except to the extent necessary for it to be wound up.

1.25 Once the company's affairs have been completed as far as possible, and a final report has been presented to a meeting of creditors (and filed with the Registrar of Companies), the company is deemed to be dissolved at the expiration of three months.

(g) Schemes of arrangement

1.26 Under section 899 Companies Act 2006,¹⁷ a company can enter into a scheme of arrangement to effect a compromise or arrangement with its creditors. Schemes can be proposed by the company or any creditor.¹⁸ There is some current uncertainty about the extent to which a scheme can affect proprietary interests.¹⁹

1. The first stage in the process is to make an application to the court for a meeting of creditors to be summoned. The scheme will become binding if it is approved by 75 per cent in value and the majority in number of each class of creditors present and voting.

2. The second stage is for the court to sanction the scheme.

1.27 Creditors can mount a challenge either at the convening hearing or the sanction hearing. Generally the basis for such challenges will either be upon the basis of the improper classification of classes of creditors, that the creditors lacked sufficient information, or that the schemes are unfair.

1.28 Like CVAs, schemes of arrangement terminate in accordance with their terms.

¹⁵ Which includes contingent and prospective liabilities. How much these future liabilities will be taken into account is a fact-specific question, but generally will be brought into the balance where the company is in a 'run off' situation (*Cheyne Finance Plc* [2007] EWHC 2402 at 30–6).

¹⁶ Unless the winding up follows an administration.

¹⁷ Formerly Companies Act 1985, s 425.

¹⁸ Or an administrator or liquidator.

¹⁹ *Lehman Brothers International (Europe)* [2009] EWHC 2141 (Ch).

(b) *Individual voluntary arrangements*

An individual voluntary arrangement (IVA) is similar in effect to a CVA. There are two potential routes to obtaining an IVA. **1.29**

1. To apply for an interim order.²⁰ An interim order will be made by the court if appropriate in the circumstances and if no interim order has been made in the past 12 months.²¹ The debtor's nominee then reports to the court, which can (if satisfied) then call a meeting of creditors.²²
2. To ask the court to call a meeting of creditors (having considered the nominee's report).²³

An IVA comes into effect if 75 per cent in value of the debtor's creditors present and voting vote in favour of the proposal, as long as that majority is also more than 50 per cent of those creditors who are not connected to the debtor proposing the IVA. **1.30**

If approved, an IVA will bind all creditors who were entitled to vote (and were given notice), apart from secured and preferential creditors.²⁴ Creditors may challenge an IVA if they have been unfairly prejudiced or if there has been a material irregularity in the conduct of the meetings. **1.31**

The IVA will terminate in accordance with the provisions of the IVA proposal approved by creditors. **1.32**

(i) *Bankruptcy*

In civil proceedings, a bankruptcy petition can be presented against a debtor by the debtor, his creditors, or the supervisor of an IVA.²⁵ **1.33**

A bankruptcy petition shall not be presented to the court unless the debtor:²⁶ **1.34**

1. is domiciled in England and Wales,²⁷
2. is personally present in England and Wales on the day on which the petition is presented, or
3. at any time in the period of three years ending with that day—
 - (a) has been ordinarily resident, or has had a place of residence, in England and Wales, or
 - (b) has carried on business in England and Wales.

²⁰ Which carries with it a moratorium on proceedings by creditors.

²¹ IA 1986, s 255.

²² *Ibid*, s 256.

²³ *Ibid*, s 256A.

²⁴ Unless those creditors also agree to be bound.

²⁵ IA 1986, s 264.

²⁶ *Ibid*, s 265.

²⁷ As to which see *Barlow Clowes International Ltd (In Liquidation) v Henwood* [2008] EWCA Civ 577.

- 1.35** The first stage in presenting a creditor's petition is to serve a written demand in the prescribed form (known as a statutory demand).²⁸ The debtor then has 21 days to apply to set aside the statutory demand.²⁹ If he does not do so (or if the debtor is unsuccessful in such an application) a creditor may present a petition if the debt exceeds £750, is for a liquidated sum, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay, and there is no outstanding application to set aside a statutory demand in respect of the debt or any of the debts.³⁰
- 1.36** A debtor's petition may be presented to the court only on the grounds that the debtor is unable to pay his debts.³¹
- 1.37** The court may make a bankruptcy order if the debt has neither been paid nor secured or compounded for, and is a debt which the debtor has no reasonable prospect of being able to pay when it falls due.³²
- 1.38** A bankrupt is discharged from bankruptcy after one year, unless an application to suspend that discharge is made before that time.³³

(2) Powers and duties of office holders

(a) *General duties*

- 1.39** The general obligation of the office holder in each insolvency process identified above³⁴ is to maximize recoveries of assets and deal with all creditors fairly and equally.

(b) *Moratorium on claims against the assets*

- 1.40** One of the most important preliminary tools in the arsenal of an office holder is the moratorium upon claims that might diminish the assets of the debtor. The extent of these stays is a matter of complexity. For present purposes it suffices to identify the extent of the stay in each of the insolvency processes identified above.
- 1.41** Once a winding up order has been made, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose.³⁵

²⁸ IA 1986, s 268.

²⁹ Although a petition may be presented before the end of the 21-day period if there is a serious possibility that the debtor's property or the value of any of his property will be significantly diminished during that period and the petition contains a statement to that effect—IA 1986, s 270.

³⁰ IA 1986, s 267.

³¹ *Ibid*, s 272.

³² *Ibid*, s 271.

³³ *Ibid*, s 279.

³⁴ Save for administrative receivership, where the duties and obligations are more limited.

³⁵ IA 1986, s 130.

The stay in bankruptcy is also wide, but is not automatic. Once a bankruptcy order has been made, the court may (and usually does) stay any action, execution, or other legal process against the property or person of the bankrupt.³⁶ **1.42**

As for voluntary arrangements: **1.43**

1. Generally a CVA does not carry with it any stay, although 'small company' CVAs³⁷ have a limited 28-day moratorium.
2. Unlike a CVA, an IVA does provide for a moratorium for a debtor once an interim order has been made by the court.³⁸ During that time
 - (a) no bankruptcy petition relating to the debtor may be presented or proceeded with,
 - (b) no landlord or other person to whom rent is payable may exercise any right of forfeiture by peaceable re-entry in relation to premises let to the debtor in respect of a failure by the debtor to comply with any term or condition of his tenancy of such premises, except with the leave of the court, and
 - (c) no other proceedings, and no execution or other legal process, may be commenced or continued and no distress may be levied against the debtor or his property except with the leave of the court.

When a CVL is commenced, there is no automatic stay on proceedings against the company (although any transfer or any alteration in the status of the company's members is void without the liquidator's sanction). However, the liquidator or any creditor or shareholder may apply to the court for a stay on any proceeding. The court will not grant a stay automatically, but it will usually be granted where proceedings have been commenced after the resolution of the members. **1.44**

A scheme of arrangement carries with it no moratorium. However, the court may grant a stay of proceedings to enable a company to implement the scheme. **1.45**

(c) Claims available to the office holder

There are many specific claims that arise on insolvency. Some are limited to liquidators or trustees in bankruptcies. Others extend to administrators. None are available to supervisors of IVAs or CVAs or to scheme administrators. **1.46**

(i) Misfeasance (section 212 IA 1986) Misfeasance actions are available only in a voluntary or compulsory liquidation, and not in an administration (or in relation to individuals). An application may be made by the Official Receiver, a **1.47**

³⁶ Ibid, s 285.

³⁷ With a limited turnover, balance sheet, and number of employees.

³⁸ IA 1986, s 252.

liquidator, or any creditor³⁹ or contributory,⁴⁰ although no application may be made against a former liquidator⁴¹ or administrator⁴² after his release without leave of the court. No application may be made by a contributory except without leave of the court, but there is no need for the contributory to prove that he will benefit from any order made by the court.⁴³

- 1.48** Misfeasance claims are available against those who are or have been officers of the company,⁴⁴ have acted as liquidators or administrative receivers of a company,⁴⁵ or have taken part in the promotion, formation, or management of the company. Misfeasance claims are also available against former administrators.⁴⁶
- 1.49** Misfeasance requires that a person has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company. The most likely claims will be against former officers of the company as opposed to against former office holders.
- 1.50** The court has a wide power to make orders on a misfeasance application, requiring a defendant to:⁴⁷
1. repay, restore, or account for the money or property or any part of it, with interest at such rate as the court thinks just, or
 2. contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.
- 1.51** Misfeasance covers the whole spectrum of a director's duties including a breach of duty of care owed to the company at common law,⁴⁸ including for negligence.⁴⁹ Section 212 does not create any new liability or rights, but simply provides a summary procedure for enforcing rights.⁵⁰
- 1.52** The limitation period for the claim brought under section 212 Insolvency Act is the same as that applicable to the underlying claim.⁵¹

³⁹ Although any order made will only be in favour of the company, and not the creditor himself: *Oldham v Kyrris* [2003] EWCA Civ 1506; [2004] BCC 111.

⁴⁰ IA 1986, s 212(3).

⁴¹ *Ibid*, s 212(4).

⁴² *Ibid*, para 75(6) of Schedule B1.

⁴³ *Ibid*, s 212(5).

⁴⁴ *Ibid*, s 212(1)(a). This term includes directors (whether legally appointed, or shadow, or de facto), managers, and secretaries (Companies Act 2006, s 1173).

⁴⁵ IA 1986, s 212(1)(b).

⁴⁶ *Ibid*, para 75 of Schedule B1.

⁴⁷ *Ibid*, s 212(3).

⁴⁸ *Westlowe Storage & Distribution Ltd* [2000] BCC 851.

⁴⁹ *D'Jan of London Ltd* [1993] BCC 646.

⁵⁰ *Continental Assurance Co of London Plc* [2001] BPIR 733, para 393.

⁵¹ *Eurocruit Europe Ltd (In Liquidation)* [2007] EWHC 1433.

The court will be cautious in judging the actions of directors with the benefit of hindsight.⁵² 1.53

(ii) **Fraudulent trading (section 213 IA 1986)** Fraudulent trading actions are available only in a voluntary or compulsory liquidation, and not in an administration (or in relation to individuals). Applications are made by the liquidator. 1.54

If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose,⁵³ the court may declare that any persons who were knowingly parties to the carrying on of the business are to be liable to make such contributions to the company's assets as the court thinks proper.⁵⁴ It should be noted that there is no scope for the court to order payment to one particular creditor. Any order that is made must be compensatory alone, not punitive.⁵⁵ 1.55

The liquidator must demonstrate that there was been 'actual dishonesty, involving real moral blame'.⁵⁶ Such applications are rarely brought, because of the easier hurdle of wrongful trading applications. 1.56

Fraudulent trading is also a criminal offence.⁵⁷ Criminal proceedings can be brought outside liquidation. 1.57

(iii) **Wrongful trading (section 214 IA 1986)** Wrongful trading actions are available only in a voluntary or compulsory liquidation, and not in an administration (or in relation to individuals). Applications are made by the liquidator. 1.58

If a company has gone into insolvent liquidation, and at some time before the commencement of the winding up of the company, a director⁵⁸ of the company knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, the court may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper.⁵⁹ Awards made by the court should be compensatory and not punitive in nature.⁶⁰ 1.59

⁵² *Facia Footwear Ltd (In Administration) v Hinchcliffe* [1998] 1 BCLC 218.

⁵³ IA 1986, s 213(1).

⁵⁴ *Ibid*, s 213(2).

⁵⁵ *Morphitis v Bernasconi* [2002] EWCA Civ 693; [2003] Ch 552.

⁵⁶ *Re Patrick and Lyon Ltd* [1933] Ch 786.

⁵⁷ Companies Act 2006, s 993.

⁵⁸ Director is defined as including a 'shadow director'—IA 1986, s 214(7).

⁵⁹ IA 1986, s 214(1)(2).

⁶⁰ *Re Produce Marketing Consortium Ltd* (1989) 5 BCC 569.

- 1.60** Insolvent liquidation is defined as the position if a company goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up.⁶¹
- 1.61** In determining the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both:⁶²
1. the general knowledge, skill, and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and
 2. the general knowledge, skill, and experience that that director has.
- 1.62** It is a defence for a director to show that he took every step with a view to minimizing the potential loss to the company's creditors as (assuming him to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation) he ought to have taken.⁶³ It is not a defence for the director to show that he has acted honestly and reasonably and ought fairly to be excused.⁶⁴
- 1.63** The limitation period for a claim under section 214 is six years from the date on which the liquidation commences.⁶⁵
- 1.64** (iv) **Invalid floating charges (section 245 IA 1986)** Proceedings to attack invalid floating charges are available in a voluntary or compulsory liquidation, and in an administration (but not in relation to individuals). Applications are made by the liquidator or administrator.
- 1.65** A charge which, as created, was a floating charge⁶⁶ on the company's undertaking or property created at a 'relevant time' is invalid except to the extent of the aggregate of:
1. the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the company⁶⁷ at the same time as, or after, the creation of the charge;⁶⁸

⁶¹ IA 1986, s 214(6).

⁶² Ibid, s 214(4).

⁶³ Ibid, s 214(3).

⁶⁴ *Re Produce Marketing Consortium Ltd* (1989) 5 BCC 569. As a result, Companies Act 2006, s 1157 does not apply.

⁶⁵ *Re Farmizer (Products) Ltd* [1997] BCC 655.

⁶⁶ And therefore including any charge which has since become a fixed charge—IA 1986, s 251.

⁶⁷ Payments made to a company's bank account to reduce an overdraft are not made 'to the company'—*Re Fairway Magazines* [1992] BCC 924.

⁶⁸ This figure is defined as the value of any goods or services supplied by way of consideration for a floating charge, such value being the amount in money which at the time they were supplied could reasonably have been expected to be obtained for supplying the goods or services in the ordinary

2. the value of so much of that consideration as consists of the discharge or reduction, at the same time as,⁶⁹ or after, the creation of the charge, of any debt of the company; and
3. the amount of such interest (if any) as is payable on the amount falling within the two previous subparagraphs in pursuance of any agreement under which the money was so paid, the goods or services were so supplied, or the debt was so discharged or reduced.

The 'relevant time' is defined as:

1.66

1. in the case of a charge which is created in favour of a person who is connected⁷⁰ with the company, at a time in the period of two years ending with the onset of insolvency;⁷¹
2. in the case of a charge which is created in favour of any other person, at a time in the period of 12 months ending with the onset of insolvency;
3. in either case, at a time between the making of an administration application in respect of the company and the making of an administration order on that application; or
4. in either case, at a time between the filing with the court of a copy of notice of intention to appoint an administrator under paragraph 14 or 22 of Schedule B1 and the making of an appointment under that paragraph.

course of business and on the same terms (apart from the consideration) as those on which they were supplied to the company—IA 1986, s 245(6).

⁶⁹ This is a question of fact and degree, but any time lag must be so short as to be regarded as minimal—*Re Shoe Lace Ltd* [1992] BCC 367.

⁷⁰ A person is connected with a company if he is a director or shadow director of the company or an associate of a director or an associate of the company (IA 1986, s 249). An associate is the subject of a very complex definition in IA 1986, s 435, including spouses, partners, children, siblings, aunts, and uncles (including step relations and illegitimate relatives), employees, trustees, and controlling shareholders.

⁷¹ The onset of insolvency is defined in IA 1986, s 245(5) as follows:

- in a case where this section applies by reason of an administrator of a company being appointed by administration order, the date on which the administration application is made,
- in a case where this section applies by reason of an administrator of a company being appointed under paragraph 14 or 22 of Schedule B1 following filing with the court of a copy of notice of intention to appoint under that paragraph, the date on which the copy of the notice is filed,
- in a case where this section applies by reason of an administrator of a company being appointed otherwise than as mentioned in the previous two subparagraphs, the date on which the appointment takes effect, and
- where a company is going into liquidation, the date of the commencement of the winding up.

- 1.67** Where a company creates a floating charge in favour of a person who is not connected with the company, that time is not a relevant time unless the company:
1. is at that time unable to pay its debts as they fall due;
 2. becomes unable to pay its debts as they fall due in consequence of the transaction under which the charge is created.
- 1.68** (v) **Transactions at an undervalue (sections 238 and 339 IA 1986)** Proceedings to recover transactions at an undervalue are available in a voluntary or compulsory liquidation, in administration, and in bankruptcy. Applications are made by the liquidator, trustee in bankruptcy, or administrator.
- 1.69** Where the company or individual have at the 'relevant time' entered into a transaction with any person at an undervalue, the court shall make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.⁷²
- 1.70** A company or individual enters into a transaction with a person at an undervalue if:⁷³
1. the company or individual makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company or individual to receive no consideration;
 2. the company or individual enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company or individual; or
 3. (in the case of an individual only) the individual enters into a transaction with that person in consideration of marriage or the formation of a civil partnership.⁷⁴
- 1.71** Creation of a security is not a transaction at an undervalue.⁷⁵
- 1.72** In considering the relevant 'transaction', the court may consider a series of linked transactions as one 'transaction'.⁷⁶

⁷² IA 1986, ss 238(3) and 339(2).

⁷³ Ibid, ss 238(4) and 339(3).

⁷⁴ Ibid, s 339(3)(b).

⁷⁵ *Re MC Bacon* [1990] BCC 78, although this has been doubted in *Hill v Spread Trustee Co Ltd* [2006] EWCA Civ 542; [2006] BCC 646.

⁷⁶ *Phillips v Brewin Dolphin Bell* [2001] 1 WLR 143.

The court will not make an order in respect of a transaction at an undervalue in relation to a company if it is satisfied:⁷⁷ **1.73**

1. that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business; and
2. that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company.

In relation to a company, the time at which a company enters into a transaction at an undervalue is a 'relevant time' if the transaction is entered into:⁷⁸ **1.74**

1. between the making of an administration application in respect of the company and the making of an administration order on that application; or
2. between the filing with the court of a copy of notice of intention to appoint an administrator under paragraph 14 or 22 of Schedule B1 and the making of an appointment of an administrator under that paragraph; or
3. at any other time during the period of two years ending with the onset of insolvency.⁷⁹

Where a company enters into a transaction at an undervalue in the time periods specified above is not a relevant time unless the company:⁸⁰ **1.75**

1. is at that time unable to pay its debts;
2. becomes unable to pay its debts in consequence of the transaction.

A company is presumed to be unable to pay its debts at that time where there is a transaction at an undervalue entered into by a company with a person who is connected with the company. **1.76**

In relation to an individual, the 'relevant time' is if the transaction is entered into at a time in the period of five years ending with the day of the presentation of the bankruptcy petition on which the individual is adjudged bankrupt. **1.77**

Where an individual enters into a transaction at an undervalue, that time is not a relevant time⁸¹ unless the individual:⁸² **1.78**

1. is insolvent at that time; or
2. becomes insolvent in consequence of the transaction.

⁷⁷ IA 1986, s 238(5).

⁷⁸ Ibid, s 240(1).

⁷⁹ As to which see n 71 above, with the addition that 'onset of insolvency' where a winding up follows an administration, is the date on which the administration appointment was made—IA 1986, s 240(3)(d).

⁸⁰ Ibid, s 240(2).

⁸¹ Although if the transaction is entered into in the period of two years or less before the bankruptcy order is made, there is no need to prove insolvency.

⁸² IA 1986, s 341(2).

- 1.79** An individual must be insolvent on a cash flow or balance sheet basis. He is presumed to be insolvent in relation to any transaction at an undervalue which is entered into by an individual with a person who is an associate⁸³ of his (otherwise than by reason only of being his employee).
- 1.80** The relevant limitation period for a transaction at an undervalue is either six years (if the claim is essentially one to recover money) or 12 years (if it is not).⁸⁴
- 1.81** A transaction at an undervalue claim can be brought against someone who is outside the jurisdiction.⁸⁵
- 1.82** (vi) **Preferences (sections 239 and 340 IA 1986)** Proceedings to recover preferences are available in a voluntary or compulsory liquidation, in administration, and in bankruptcy. Applications are made by the liquidator, trustee in bankruptcy, or administrator.
- 1.83** Where the company or individual has at the 'relevant time' given a preference to any person, the court shall make such order as it thinks fit for restoring the position to what it would have been if the company or individual had not given that preference.
- 1.84** A company or individual gives a preference to a person if:⁸⁶
1. that person is one of the creditors of the company or individual or a surety or guarantor for any of the debts or other liabilities of the company or individual, and
 2. the company or individual does anything or suffers anything to be done which has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation or the individual becoming bankrupt, will be better than the position he would have been in if that thing had not been done.
- 1.85** The court will not make an order under this section in respect of a preference given to any person unless the company or individual which gave the preference was influenced in deciding to give it by a desire to put that person in a better position.⁸⁷
- 1.86** A company or individual who has given a preference to a person connected with the company or individual (otherwise than by reason only of being its employee)

⁸³ As to which see n 70 above.

⁸⁴ *Re Priory Garages (Walthamstow) Ltd* [2001] BPIR 144.

⁸⁵ *Re Paramount Airways Ltd* [1993] Ch 223.

⁸⁶ IA 1986, ss 239(4) and 340(3).

⁸⁷ *Ibid*, ss 239(5) and 340(4).

at the time the preference was given is presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire.⁸⁸

The fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of that thing from constituting the giving of a preference.⁸⁹ **1.87**

In relation to a company, a time is a relevant time: **1.88**

1. if a preference is given to a person who is connected with the company⁹⁰ (otherwise than by reason only of being its employee), at a time in the period of two years ending with the onset of insolvency;⁹¹
2. in the case of a preference which is not also a transaction at an undervalue and is not given to a connected person, at a time in the period of six months ending with the onset of insolvency;
3. at a time between the making of an administration application in respect of the company and the making of an administration order on that application; and
4. at a time between the filing with the court of a copy of notice of intention to appoint an administrator under paragraph 14 or 22 of Schedule B1 and the making of an appointment under that paragraph.

Where a company gives a preference, that time is not a relevant time for the purposes of section 238 or 239 Insolvency Act unless the company— **1.89**

1. is at that time unable to pay its debts; or
2. becomes unable to pay its debts in consequence of the preference.

The time at which an individual gives a preference is a 'relevant time' if the preference is given: **1.90**

1. in the case of a preference which is not a transaction at an undervalue and is given to a person who is an associate⁹² of the individual (otherwise than by reason only of being his employee), at a time in the period of two years ending with that day; and
2. in any other case of a preference which is not a transaction at an undervalue, at a time in the period of six months ending with that day.

Where an individual gives a preference that time is not a relevant time for the purposes of Insolvency Act, ss 339 and 340 unless the individual— **1.91**

1. is insolvent at that time; or
2. becomes insolvent in consequence of the preference.

⁸⁸ Ibid, ss 239(6) and 340(5).

⁸⁹ Ibid, ss 239(7) and 340(6).

⁹⁰ As to which see n 70 above.

⁹¹ As to which see n 71 above.

⁹² As to which see n 70 above.

- 1.92** An individual is insolvent if he is insolvent on a cash flow or balance sheet basis.
- 1.93** The relevant limitation period for a preference claim is either six years (if the claim is essentially one to recover money) or 12 years (if it is not).⁹³
- 1.94** A preference claim can be brought against someone who is outside the jurisdiction.⁹⁴
- 1.95** (vii) **Orders that can be made by the court on preferences or transactions at an undervalue** The court has a very wide discretion as to the types of orders it can make, including undoing the transaction in whole or in part.
- 1.96** The court can impose any obligation on any person whether or not he is the person with whom the company in question entered into the transaction or (as the case may be) the person to whom the preference was given; but such an order⁹⁵—
1. cannot prejudice any interest in property which was acquired from a person other than the company or individual and was acquired in good faith and for value; and
 2. shall not require a person who received a benefit from the transaction or preference in good faith and for value to pay a sum to the office holder, except where that person was a party to the transaction or the payment is to be in respect of a preference given to that person at a time when he was a creditor of the company or individual.
- 1.97** Where a person has acquired an interest in property from a person other than the company or individual, or has received a benefit from the transaction or preference, and at the time of that acquisition or receipt:
1. he had notice of the transaction or the preference and of the insolvency proceedings; or
 2. he was connected with, or was an associate of, either the company in question or the person with whom that company entered into the transaction or to whom that company gave the preference,
- then, unless the contrary is shown, it is presumed that the interest was acquired or the benefit was received otherwise than in good faith.
- 1.98** (viii) **Transactions to defraud creditors (section 423 IA 1986)** An office holder or a creditor (or a 'victim'⁹⁶) of a transaction at an undervalue may apply to the

⁹³ *Re Priory Garages (Walthamstow) Ltd* [2001] BPIR 144.

⁹⁴ *Re Paramount Airways Ltd* [1993] Ch 223.

⁹⁵ IA 1986, ss 241(2) and 342(2).

⁹⁶ Such concept is to be interpreted very flexibly—*Hill v Spread Trustee Co Ltd* [2006] EWCA Civ 542; [2006] BCC 646.

court for relief if that transaction at an undervalue was entered into by a company or an individual for the purpose:

1. of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or
2. of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

This action is available outside formal insolvency procedures as well as inside them. The court has a very wide discretion as to the orders which it may make⁹⁷ but such an order: **1.99**

1. shall not prejudice any interest in property which was acquired from a person other than the debtor and was acquired in good faith, for value, and without notice of the transaction, or prejudice any interest deriving from such an interest; and
2. shall not require a person who received a benefit from the transaction in good faith, for value, and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.

The limitation period for a section 423 claim is 12 years running from the date of the bankruptcy order or the commencement of the liquidation.⁹⁸ **1.100**

A claim based upon transactions to defraud creditors can be brought against someone who is outside the jurisdiction.⁹⁵ **1.101**

(ix) Disqualification of directors The court has a very wide power to disqualify the officers (director, secretary, and shadow directors), liquidators, receivers, or managers of companies under the Company Directors Disqualification Act. There are a number of specific circumstances in which such an order may be made, but usually the allegation made is that the person is 'unfit' to be a director of a company. **1.102**

If a disqualification order is made, for a specified period beginning with the date of the order, the person against whom the order is made shall not, for a period of between two and 15 years (depending on the seriousness of his errors): **1.103**

1. be a director of a company;
2. act as a receiver; or
3. in any way, whether directly or indirectly, be concerned or take part in the promotion, formation, or management of a company, unless (in each case) he has the leave of the court.

⁹⁷ IA 1986, s 425.

⁹⁸ *Hill v Spread Trustee Co Ltd* [2006] EWCA Civ 542; [2006] BCC 646.

⁹⁹ *Re Paramount Airways Ltd* [1993] Ch 223.

(3) Insolvency tools for domestic and international asset tracing

(a) Definition of property

1.104 An office holder will take over all the 'property' of a company or an individual. Property is very widely defined¹⁰⁰ as including money, goods, things in action, land, and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property.

(b) Public examinations

1.105 The court has wide powers to order public examinations.

1.106 In relation to a company:¹⁰¹

1. Where a company is being wound up by the court, the Official Receiver may at any time before the dissolution of the company apply to the court for the public examination of any person who—
 - (a) is or has been an officer of the company; or
 - (b) has acted as liquidator or administrator of the company or as receiver or manager of its property; or
 - (c) any person who is or has been concerned, or has taken part, in the promotion, formation, or management of the company.
2. The following people may take part in the public examination:
 - (a) the Official Receiver;
 - (b) the liquidator of the company;
 - (c) any person who has been appointed as special manager of the company's property or business;
 - (d) any creditor of the company who has tendered a proof or, in Scotland, submitted a claim in the winding up;
 - (e) any contributory of the company.

1.107 In relation to an individual, the position is very similar,¹⁰² but only the bankrupt may be examined.

(c) Getting in the 'property' of the company or the bankrupt

1.108 An administrator, administrative receiver, liquidator, or provisional liquidator can apply to the court for an order requiring any property, books, papers, or

¹⁰⁰ IA 1986, s 436.

¹⁰¹ *Ibid*, s 133.

¹⁰² *Ibid*, s 290.

records to which the company appears to be entitled¹⁰³ to be returned to the office holder.

Where the office holder:

1.109

1. seizes or disposes of any property¹⁰⁴ which is not property of the company, and
2. at the time of seizure or disposal believes, and has reasonable grounds for believing, that he is entitled (whether in pursuance of an order of the court or otherwise) to seize or dispose of that property,

The office holder is not liable to any person in respect of any loss or damage resulting from the seizure or disposal except in so far as that loss or damage is caused by the office holder's own negligence; and he has a lien on the property, or the proceeds of its sale, for such expenses as were incurred in connection with the seizure or disposal.

(d) *Section 235 and section 366 IA 1986*

In relation to a company, an administrator, administrative receiver, liquidator, or provisional liquidator can apply to the court for an order requiring the following people to assist him:¹⁰⁵

1.110

1. those who are or have at any time been officers of the company;
2. those who have taken part in the formation of the company at any time within one year before the effective date;
3. those who are in the 'employment' of the company, or have been in its employment (including employment under a contract for services) within that year, and are in the officer holder's opinion capable of giving information which he requires;
4. those who are, or have within that year been, officers of, or in the employment (including employment under a contract for services) of, another company which is, or within that year was, an officer of the company in question; and
5. in the case of a company being wound up by the court, any person who has acted as administrator, administrative receiver, or liquidator of the company.

¹⁰³ The court can determine whether or not the company actually is entitled to the property on such an application (*Re London Iron & Steel Co Ltd* [1990] BCC 159).

¹⁰⁴ Although it appears that in fact this only applies to tangible property (*Welsh Development Agency Ltd v Ex Fin Co* [1992] BCC 270).

¹⁰⁵ IA 1986, s 235(3).

- 1.111** The specific assistance that can be required by an office holder comprises:¹⁰⁶
1. giving to the office holder such information concerning the company and its promotion, formation, business, dealings, affairs, or property as the office holder may at any time after the effective date¹⁰⁷ reasonably require; and
 2. attending on the office holder at such times as he may reasonably require.
- 1.112** If a person without reasonable excuse fails to comply with any obligation to assist the office holder, he is liable to a fine and, for continued contravention, to a daily default fine.¹⁰⁸
- 1.113** Information obtained from such persons can be passed to the Secretary of State for the purposes of considering a director's disqualification application¹⁰⁹ without breaching that person's human rights.¹¹⁰
- 1.114** Similarly, a bankrupt is required to assist the trustee in bankruptcy¹¹¹ in the following manner¹¹² (including after he has been discharged from his bankruptcy¹¹³):
1. give to the trustee such information as to his affairs;
 2. attend on the trustee at such times; and
 3. do all such other things,
- as the trustee may for the purposes of carrying out his functions under any of this Group of Parts reasonably requires
- 1.115** Where at any time after the commencement of the bankruptcy any property is acquired by, or devolves upon, the bankrupt or there is an increase of the bankrupt's income, the bankrupt is required to give the trustee notice of the property or, as the case may be, of the increase.¹¹⁴
- 1.116** If the bankrupt fails to comply with any obligation imposed by this section without reasonable excuse, he is guilty of a contempt of court and liable to be punished accordingly (in addition to any other punishment to which he may be subject).¹¹⁵

¹⁰⁶ Ibid, s 235(2).

¹⁰⁷ That is, after the relevant orders or appointments have been made (IA 1986, s 235(4)).

¹⁰⁸ IA 1986, s 235(5).

¹⁰⁹ *Re Polly Peck International Plc* [1994] BCC 15.

¹¹⁰ *Re Westminster Property Management Ltd* [2000] 1 WLR 2230.

¹¹¹ Or, under IA 1986, s 291, the Official Receiver.

¹¹² IA 1986, s 333(1).

¹¹³ Ibid, s 333(3).

¹¹⁴ Ibid, s 333(2).

¹¹⁵ Ibid, s 333(4).

(e) Section 236 and section 366 IA 1986

By far the most commonly used statutory provisions to obtain information are sections 236 and 366 IA 1986. **1.117**

In relation to a company, an administrator, administrative receiver, liquidator, or provisional liquidator can apply to the court for an order requiring the following people to appear before the court:¹¹⁶ **1.118**

1. any officer of the company;
2. any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company; or
3. any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs, or property of the company.

Such an examination must be necessary in the interests of the insolvency process and should not be oppressive or unfair to the examinee.¹¹⁷ The court frowns on attempts to use this section to gain an unfair advantage in litigation.¹¹⁸ As a result, generally these powers should not be used where a firm decision has been made to commence litigation.¹¹⁹ **1.119**

The court may require any such person to submit an affidavit to the court containing an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company.¹²⁰ **1.120**

If a person (without reasonable excuse) fails to appear before the court when he is summoned to do so under this section, or there are reasonable grounds for believing that a person has absconded, or is about to abscond, with a view to avoiding his appearance before the court, the court may cause a warrant to be issued for the arrest of that person, and for the seizure of any books, papers, records, money, or goods in that person's possession.¹²¹ **1.121**

The court can make orders for delivery of property, payment of money due, and examination of persons (whether on oath or otherwise).¹²² There is no privilege against self-incrimination,¹²³ although such statements cannot be used in later criminal proceedings.¹²⁴ Similarly there is no legal privilege available, at least **1.122**

¹¹⁶ Ibid, s 236(2).

¹¹⁷ *British & Commonwealth Holdings Plc (No 2)* [1993] AC 426.

¹¹⁸ *Re Atlantic Computer Plc* [1998] BCC 200.

¹¹⁹ *Re Cloverbay Ltd (No 2)* [1991] Ch 90.

¹²⁰ IA 1986, s 236(3).

¹²¹ Ibid, ss 236(4) and 236(5).

¹²² Ibid, s 237.

¹²³ *Re Bishopsgate Investment Management Ltd* [1993] Ch 1.

¹²⁴ *Saunders v UK* [1997] BCC 872.

where the client was the company.¹²⁵ The information obtained is confidential, but can be passed to others if necessary in the public interest.¹²⁶

- 1.123** The Official Receiver can use a section 236 application even when the sole purpose is to obtain information for proceedings for a director's disqualification.¹²⁷
- 1.124** The position in relation to a bankrupt is very similar.¹²⁸ The court can require cooperation from:
1. the bankrupt;
 2. his spouse or former spouse or civil partner or former civil partner;
 3. any person known or believed to have any property comprised in the bankrupt's estate in his possession or to be indebted to the bankrupt;
 4. any person appearing to the court to be able to give information concerning the bankrupt or the bankrupt's dealings, affairs or property.
- 1.125** Only persons other than the bankrupt or his spouse (or former spouse) or civil partner (or former civil partner) can be required to submit an affidavit to the court.¹²⁹
- 1.126** It is unclear whether these sections have extraterritorial effect.¹³⁰

(f) Obtaining information and cooperation from a bankrupt

- 1.127** There are numerous obligations on a bankrupt (or any third party holding property or information in relation to the bankrupt) to provide information and property to a trustee in bankruptcy.¹³¹ These include the power to seize the bankrupt's property.¹³²
- 1.128** In addition, there are other remedies that can be used against non-cooperating bankrupts:
1. a public examination;¹³³
 2. suspension of automatic discharge;¹³⁴

¹²⁵ *Re Brook Martin & Co (Nominees) Ltd* [1993] BCLC 328.

¹²⁶ *R v Brady* [2004] EWCA Crim 1763.

¹²⁷ *Re Panmaenog Timber Co Ltd* [2003] UKHL 49; [2004] 1 AC 158.

¹²⁸ IA 1986, ss 366 and 367.

¹²⁹ *Ibid*, s 366(1).

¹³⁰ *Re Tucker* [1990] Ch 148 and other cases in the bankruptcy context suggest that they do not. There are, however, numerous cases in the corporate insolvency context where such orders have been made, for example *Miller v Bain* [2003] BPIR 959.

¹³¹ For example IA 1986, ss 311 and 312.

¹³² IA 1986, s 365.

¹³³ *Ibid*, s 290.

¹³⁴ *Ibid*, s 279(3)—see, for example, *Shierson v Rastogi* [2007] EWHC 1266 (Ch); [2007] BPIR 891.

3. application to court to obtain cooperation;¹³⁵
4. obtaining a warrant for arrest;¹³⁶
5. seizure of property and records;¹³⁷
6. private examination;¹³⁸
7. redirection of post.¹³⁹

(4) Cross-border insolvencies

There are numerous routes into England and Wales for a foreign office holder. **1.129**
This book is not able to do more than sketch out the basics of those routes.¹⁴⁰

(a) *The Commonwealth (section 426 IA 1986)*

Section 426 provides that the courts having jurisdiction in relation to insolvency law¹⁴¹ in any part of the UK shall¹⁴² assist the courts having the corresponding jurisdiction in any other part of the UK or Alderney, Anguilla, Australia, the Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Guernsey, Hong Kong, Republic of Ireland, Malaysia, Montserrat, New Zealand, St Helena, Sark, South Africa, Turks and Caicos Islands, Tuvalu, and the Virgin Islands. **1.130**

The English courts can either apply English law,¹⁴³ or that of the originating jurisdiction.¹⁴⁴ The courts will be influenced by principles of judicial comity.¹⁴⁵ Generally assistance will be given.¹⁴⁶ The court can, for example, allow foreign office holders to use powers under section 426 IA 1986 to obtain documents,¹⁴⁷ or can permit a foreign company to enter into a CVA¹⁴⁸ or administration.¹⁴⁹ **1.131**

¹³⁵ IA 1986, s 363(3).

¹³⁶ *Ibid*, s 364.

¹³⁷ *Ibid*, s 365.

¹³⁸ *Ibid*, ss 366 and 367.

¹³⁹ *Ibid*, s 371.

¹⁴⁰ For detailed examination of this area, readers are referred to G Moss, I Fletcher, and S Isaacs, *The EC Regulation on Insolvency Proceedings* (MFI) (2nd edn, Oxford University Press, 2009) and Look Chan Ho, *Cross Border Insolvency* (Globe Business Publishing Ltd, 2009).

¹⁴¹ Widely defined and circumscribed by section 426(10) (*Hughes v Hannover-Re* [1997] BCC 921).

¹⁴² Despite the use of the word 'shall', the court retains a discretion as to whether to provide assistance (*Hughes v Hannover-Re* [1997] BCC 921).

¹⁴³ Including substantive English insolvency law (*Re BCCI SA* [1993] BCC 787).

¹⁴⁴ *Hughes v Hannover-Re* [1997] BCC 921.

¹⁴⁵ *England v Smith* [2001] Ch 419.

¹⁴⁶ *Duke Group Ltd v Carver* [2001] BPIR 459.

¹⁴⁷ *Re Trading Partners Ltd* [2002] BPIR 605.

¹⁴⁸ *Re Television Trade Rentals Ltd* [2002] EWHC 211 (Ch).

¹⁴⁹ *Re Dallhold Estates (UK) Pty Ltd* [1992] BCC 394.

Section 426 can be used even if it would require the application of a foreign law substantially different in effect from English law.¹⁵⁰

- 1.132** In requesting assistance from the English court, the foreign court must specify what assistance it seeks.¹⁵¹

(b) *EC Regulation*

- 1.133** EC Regulation 1346/2000 (the EC Regulation) entered into force on 31 May 2002. It has transformed the manner in which insolvency processes in the European Union¹⁵² interact. Interpretation of the EC Regulation is assisted by reference to the Virgos-Schmit Report.¹⁵³
- 1.134** The EC Regulation gives primacy to the country that opens proceedings in relation to a company or individual in the Member State where a company has its centre of main interests (COMI).¹⁵⁴ The law of that country automatically takes priority,¹⁵⁵ has the same effect in all other Member States¹⁵⁶ as in the originating Member State,¹⁵⁷ and governs all issues,¹⁵⁸ except for those expressly excluded by the EC Regulation, which remain governed by their own national law.¹⁵⁹ The foreign office holder is able to exercise his powers in all other Member States.¹⁶⁰
- 1.135** The concept of COMI remains a troublesome one. There is a presumption in favour of the place of habitual residence of an individual or the registered office of a company.¹⁶¹ However, this presumption is rebuttable. The only guidance provided by the EC Regulation is contained in Article 13, which provides that ‘[t]he “centre of main interests” should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties’ and paragraph 75 of the Virgos-Schmit Report which provides that ‘[w]here companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor’s centre of main interests

¹⁵⁰ Such as, for example, to repatriate assets which would not be distributed in a strict *pari passu* distribution (*Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21).

¹⁵¹ *Fourie v Le Roux* [2007] UKHL 1.

¹⁵² Apart from Denmark.

¹⁵³ See Appendix 2 to MFI.

¹⁵⁴ EC Regulation, Art 3(1)—including what assets form part of the estate, the liquidators’ powers, effect on current contracts, proofs, avoidance claims, and distribution.

¹⁵⁵ EC Regulation, Art 16.

¹⁵⁶ Except Denmark.

¹⁵⁷ EC Regulation, Art 17.

¹⁵⁸ *Ibid*, Art 4(1).

¹⁵⁹ Such as rights *in rem* (Art 5), set-off (Art 6), retention of title (Art 7), immovable property (Art 8), payment systems and financial markets (Art 9), contracts of employment (Art 10), rights of registration (Art 11), patents and trademarks (Art 12), protection of third party purchasers (Art 14), pending lawsuits (Art 15).

¹⁶⁰ Except Denmark (Art 18).

¹⁶¹ EC Regulation, Art 3(1) and para 75 of the Virgos-Schmit Report.

is the place of his registered office. This place normally corresponds to the debtor's head office.'

Relying upon paragraph 75 of the Virgos-Schmit Report, the courts permitted rebuttal of the presumption in favour of registered office by proof of the place from which head office functions were exercised.¹⁶² Head office functions are generally, by their very nature, functions that are ascertainable by third parties. However, it now appears possible that it is *also* necessary to demonstrate that those head office functions are objective factors ascertainable by third parties.¹⁶³ **1.136**

The application of the concept of COMI is of particular difficulty where there has been a fraud perpetrated to hide (or which has the effect of hiding) the true COMI of the company.¹⁶⁴ **1.137**

The EC Regulation also provides for secondary insolvency proceedings to be opened where there is an establishment¹⁶⁵ in that Member State, but not the company or individual's COMI.¹⁶⁶ **1.138**

(c) UNCITRAL

The Cross-Border Insolvency Regulations 2006 give the UNCITRAL Model Law the force of law in Great Britain in the form set out in Schedule 1 to the 2006 Regulations (which contains the UNCITRAL Model Law with certain modifications to adapt it for application in Great Britain). **1.139**

Aids to the interpretation of any provision of the UNCITRAL Model Law include any documents of UNCITRAL and its working group relating to the preparation of the UNCITRAL Model Law; and the Guide to Enactment of the UNCITRAL Model Law prepared by UNCITRAL in May 1997. **1.140**

Under Article 17(1) of Schedule 1 to the 2006 Regulations, unless a 'foreign proceeding' is contrary to the public policy of the English courts (see Article 6 of the 2006 Regulations), it 'shall be recognised' by the English court if: **1.141**

1. the proceedings are 'foreign proceedings';

¹⁶² See, for example, *Daisytek* [2003] BCC 562; *Ci4Net* [2005] BCC 277; *Collins & Aikman* (unreported, 15 July 2005, although *Ci4Net* has been recently doubted by Lewison J in *Stanford International Bank Ltd* [2009] EWHC 1441 (Ch), a decision currently under appeal).

¹⁶³ See the interpretation of *Re Eurofood IFSC Ltd* [2006] Ch 508 in *Stanford International Bank Ltd* [2009] EWHC 1441 (Ch), a decision currently under appeal. This position is contrary to another first instance decision by the same judge, *Re Lennox Holdings* [2009] BCC 155.

¹⁶⁴ But see *Stanford International Bank Ltd* [2009] EWHC 1441 (Ch), a decision currently under appeal, where the judge held that the COMI test in a case of fraud was the same as in the absence of fraud.

¹⁶⁵ Any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

¹⁶⁶ EC Regulation, Art 3(2).

2. the representative is a 'foreign representative';
3. certain formal requirements have been complied with (formal documents provided and statements about other extant foreign proceedings made in supporting documents); and
4. the application has been issued in the Chancery Division of the High Court.

1.142 Under Article 2(i) of Schedule 1 to the 2006 Regulations, a 'foreign proceeding' is a: collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation.

It therefore includes proceedings that are not in a formal liquidation.

1.143 The Guide to Enactment makes it clear that the relevant 'proceeding' is a broad concept.¹⁶⁷ Paragraph 71(1) states as follows:

The definitions of proceedings or persons emanating from foreign jurisdictions avoid the use of expressions that may have different technical meaning in legal systems and instead describe their purpose or function. This technique is used to avoid inadvertently narrowing the range of possible foreign proceedings that might obtain recognition and to avoid unnecessary conflict with terminology used in the laws of the enacting State. As noted in paragraph 52 above, the expression 'insolvency proceedings' may have a technical meaning in some legal systems, but it is intended in subparagraph (a) to refer broadly to proceedings involving companies in severe financial distress.

1.144 Under Article 2(j) of Schedule 1 to the 2006 Regulations, a 'foreign representative' means:

a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceedings.

1.145 Once it has been determined that the proceedings are 'foreign proceedings' and that the representative is a 'foreign representative', the foreign proceedings are recognized as either main or non-main: Article 17(2) of Schedule 1 to the 2006 Regulations.

1.146 A 'foreign main proceeding' is defined by Article 2(g) of Schedule 1 to the 2006 Regulations as a 'foreign proceeding taking place in the State where the debtor has the centre of its main interests'. As a result, the concept of COMI is central to the question of whether proceedings are main or non-main.¹⁶⁸

¹⁶⁷ But see the narrow interpretation of this concept in *Stanford International Bank Ltd* [2009] EWHC 1441 (Ch), a decision currently under appeal, where the judge limited proceedings to those brought under statute, based on the company's insolvency.

¹⁶⁸ And the courts are likely to apply the same test as under the EC Regulation, see *Stanford International Bank Ltd* [2009] EWHC 1441 (Ch).

A 'foreign non-main proceeding' is defined by Article 2(h) of Schedule 1 to the 2006 Regulations as 'a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment . . .'. (By Article 2(e) of Schedule 1 to the 2006 Regulations, an 'establishment' is defined as 'any place of operations where the debtor carries out a non-transitory economic activity with human means and assets or services'.)

1.147

The relief available to a foreign representative in main proceedings includes an automatic stay on proceedings and the freezing of assets (Article 20). In non-main proceedings, the stay is discretionary (Article 21 of Schedule 1 to the 2006 Regulations).

1.148

Otherwise, under Article 21 of Schedule 1 to the 2006 Regulations the court has a wide discretion as to the relief that it can provide either in the context of a foreign main or non-main proceeding, including permitting the foreign representative to have the right to deal with the distribution of all or part of the assets located in the United Kingdom (Article 21(2)). Article 21(3) allows the court more discretion in relation to the administration of assets in a non-main proceeding, provided that:

1.149

In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of Great Britain, should be administered in the foreign non-main proceeding or concerns information required in that proceedings.

In granting relief, the court must be satisfied that the interests of all creditors (including secured creditors) are adequately protected (Article 22 of Schedule 1 to the 2006 Regulations).

1.150

The question of relief (save for the automatic stay) is a matter for the discretion of the court. Generally it is presumed that the court would give priority to a foreign main representative over a foreign non-main representative. However, that would depend on the case.

1.151

(d) *Common law*

Common law recognition is available where recognition under the 2006 Regulations¹⁶⁹ or the EC Regulation is not available.¹⁷⁰

1.152

Common law recognition has recently been reinforced by the Privy Council in *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of*

1.153

¹⁶⁹ *Stanford International Bank Ltd* [2009] EWHC 1441 (Ch), although the court declined to grant assistance under common law where there was a liquidation in the country where the company had its COMI. An appeal is pending on this issue.

¹⁷⁰ *Re Phoenix Kapitaldienst GmbH* [2008] BPIR 1082.

Navigator Holdings Plc [2006] UKPC 26; [2007] 1 AC 508 which demonstrates that:

1. Fairness to creditors and a pragmatic or 'modified' universalism¹⁷¹ are the main principles governing the court's approach at common law to recognizing foreign insolvency proceedings.
2. In deciding whether to recognize the foreign insolvency and what fairness to creditors requires, the court will consider the circumstances of the case, the connections between the foreign jurisdiction and the relevant company, and the position of objecting parties (both in terms of their connection with the foreign jurisdiction and participation in the foreign insolvency proceedings).
3. Once the court decides to recognize foreign insolvency proceedings it follows that the court should exercise its powers so as to provide active assistance.
4. In deciding what kind of assistance to provide, the English court can provide assistance by doing whatever it could have done if the relevant company had been subject to a domestic insolvency. Accordingly, when requested to provide assistance by making orders to give effect to a plan of reorganization approved in a foreign insolvency proceeding, the English Court should consider whether the same result could have been achieved had English insolvency or corporate reorganization proceedings been commenced or utilized.

B. Asset Tracing in England and Wales

(1) Introduction

- 1.154** The purpose of this section is to provide an overview of the English law of asset tracing and the orders the English court may make to assist a claimant in tracing and recovering assets. A detailed examination of these complex and difficult topics is not possible in the scope of this work and only a brief overview can be given. Nor is there room to cover areas which might be of great importance to a claimant, such as claims for conspiracy by unlawful means.¹⁷² The focus of this section is on pure asset tracing and recovery, although piercing the corporate veil and sham as methods of attacking assets purportedly held by third parties are also considered.

¹⁷¹ *Re HIH Casualty & General Insurance Ltd* [2008] UKHL 21 [2008] 3 All ER 869 at 876g–h, per Lord Hoffmann.

¹⁷² For a detailed review of all of these areas we recommend Paul McGrath, *Commercial Fraud in Civil Practice* (Oxford University Press, 2008), which has been of great assistance in writing this section.

(2) Constructive trusts

The constructive trust is a notoriously difficult subject. As Millett LJ put it:¹⁷³ **1.155**

A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of the property (usually though not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another.

A constructive trust may arise in answer to a catalogue of different types of wrongdoing or in response to a breach of fiduciary duty:¹⁷⁴ **1.156**

When appropriate, the court will grant a proprietary remedy to restore to the plaintiff property of which he has been wrongly deprived, or to prevent the defendant from retaining a benefit which he has obtained by his own wrong. It is not possible, and it would not be desirable, to attempt an exhaustive classification of the situations in which it will do so. Equity must retain what has been called its 'inherent flexibility' and capacity to adjust to new situations by reference to mainsprings of the equitable jurisdiction.

It is not clear whether there is a general category of unconscionable conduct which will give rise to a constructive trust,¹⁷⁵ but it is clear that a constructive trust might arise in a wide range of circumstances. What follows is a non-exhaustive summary of some of the common types of circumstances in which one might arise. **1.157**

(a) *Stolen property*

Although under English law a thief gains no title to stolen property and so it should be impossible for a thief to be a trustee (constructive or otherwise) over stolen property it is generally accepted that stolen property is traceable in equity. According to Lord Browne-Wilkinson in *Westdeutsche Bank v Islington LBC*,¹⁷⁶ equity is enforcing the proprietary interest under a constructive trust: **1.158**

I agree that the stolen moneys are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises under a constructive, not a resulting, trust. Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity.

(b) *Fraudulent misrepresentation*

The position here is more difficult. Where a contract is rescinded for fraudulent misrepresentation, ownership of the property transferred under the contract reverts in the representee, such that the property is held on trust for the representee. **1.159**

¹⁷³ In *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400.

¹⁷⁴ Millett J in *Lourho v Fayed (No 2)* [1992] 1 WLR 1, 9.

¹⁷⁵ As espoused by Lord Browne-Wilkinson in *Westdeutsche Bank v Islington LBC* [1996] AC 669.

¹⁷⁶ [1996] AC 669, 716.

However, the property is not held on trust prior to rescission. Although the contract is voidable, property passes under the contract until such time as it is avoided. The question is then whether, if the person no longer has the property itself, such that *restitutio in integrum* is impossible, the claimant is limited to a personal remedy against the representor, or the claimant can retrospectively claim a proprietary interest in the property transferred or its proceeds. The position is unclear but it is arguable that the claimant may be able retrospectively to claim a proprietary interest in the property transferred or its proceeds.

1.160 Millett J held in *Lonrho v Fayed (No 2)* that:¹⁷⁷

A contract obtained by fraudulent misrepresentation is voidable, not void, even in equity. The representee may elect to avoid it, but until he does so the representor is not a constructive trustee of the property transferred pursuant to the contract, and no fiduciary relationship exists between him and the representee: see *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 387-390 per Brennan J. It may well be that if the representee elects to avoid the contract and set aside a transfer of property made pursuant to it the beneficial interest in the property will be treated as having remained vested in him throughout, at least to the extent necessary to support any tracing claim. But the representee's election cannot retrospectively subject the representor to fiduciary obligations of the kind alleged. It is a mistake to suppose that in every situation in which a constructive trust arises the legal owner is necessarily subject to all the fiduciary obligations and disabilities of an express trustee. Even after the representee has elected to avoid the contract and reclaim the property, the obligations of the representor would in my judgment be analogous to those of a vendor of a property contracted to be sold, and would not extend beyond the property actually obtained by the contract and liable to be returned.

1.161 Lord Millett has since suggested extra-judicially¹⁷⁸ that a proprietary remedy should only be available where the underlying agreement relates to the transfer of land or other property of special value to the transferor. However, there are a number of authorities that offer support for the contention that title retrospectively reverts in the transferor upon rescission, or is to be treated as though it had always remained with the transferor, at least for the purposes of tracing the proceeds of the property transferred and asserting a claim to those proceeds. Some are summarized below.

1.162 In *Bank Belge pour L'Etranger v Hambrouck* [1921] 1 KB 321, the Court of Appeal held that where monies had been obtained from a bank through the use of a fraudulent cheque, and then gifted by the wrongdoer to a third party, the bank was entitled to recover the monies from the third party as 'the moneys which were so paid out were the moneys of the plaintiff bank which they were entitled to

¹⁷⁷ [1992] 1 WLR 1, 11–12.

¹⁷⁸ 'Restitution and Constructive Trusts' in Cornish et al (eds), *Restitution: Past Present & Future*, 216.

recover if they could'. Banks LJ said he would assume that the wrongdoer obtained only a voidable title to the proceeds of the cheque.

In *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, Lord Browne-Wilkinson stated¹⁷⁹ that, 'when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity'. **1.163**

Lord Denning MR said in *Banker's Trust v Shapira* [1980] 1 WLR 1274 AC that the court should only grant disclosure orders against a bank, 'when there is good ground for thinking the money in the bank is the plaintiff's money—as, for instance, when the customer has got the money by fraud—or other wrongdoing—and paid it into his account at the bank. The plaintiff who has been defrauded has a right in equity to follow the money.' **1.164**

There is also support in Millett J's judgment in *Lonrho v Fayed*¹⁸⁰ that, '[i]t may well be that if the representee elects to avoid the contract and set aside a transfer of property made pursuant to it the beneficial interest in the property will be treated as having remained vested in him throughout, at least to the extent necessary to support any tracing claim.' **1.165**

Similarly, in *El Ajou v Dollar Land Holdings* [1993] BCC 698, Millett J said,¹⁸¹ **1.166**

if the other victims of the fraud can trace their money in equity it must be because, having been induced to purchase the shares by false and fraudulent misrepresentations, they are entitled to rescind the transaction and revert the equitable title to the purchase money themselves, at least to the extent necessary to support an equitable tracing claim: see *Daly v Sydney Stock Exchange* (1986) 160 CLR 371 per Brennan J at pp 387–90. There is thus no distinction between their case and the plaintiff's. They can rescind the purchases for fraud, and he for the bribery of his agent; and each can then invoke the assistance of equity to follow property of which he is the equitable owner. But, if this is correct, as I think it is, then the trust which is operating in these cases is not some new model remedial constructive trust, but an old-fashioned institutional resulting trust. This may be of relevance in relation to the degree of knowledge required on the part of a subsequent recipient to make him liable.

In *Shalson v Russo* [2005] Ch 381, Rimer J held that monies paid over by way of a fraudulently induced loan became the transferee's property, both legally and beneficially upon transfer, as that was what the transferor intended, albeit induced by fraud. However, following the discovery of the fraud, the contract of loan was rescinded. Rimer J followed the line of reasoning in the authorities cited above and held that upon rescission, the transferor 'had revested in him the property in **1.167**

¹⁷⁹ At 715.

¹⁸⁰ [1992] 1 WLR 1, 11–12.

¹⁸¹ At 734, although referring to a resulting rather than constructive trust.

the money he had advanced entitling him at least to trace it into assets into which it was subsequently applied'.¹⁸²

- 1.168** In *London Allied Holdings Ltd v Lee* [2007] EWHC 2061 (Ch), Etherton J also followed this line of reasoning, holding that:¹⁸³

LAH is on much more firm and conventional ground with this submission. There is no doubt that a transaction induced by fraud is voidable and, subject to equitable considerations, may be rescinded. The effect is to restore retrospectively to the claimant the equitable title to the property, at least to the extent necessary to support an equitable tracing claim: see, eg *El Ajou* at p. 734d; *Shalson* at para [120]–[127].¹⁸⁴

(c) *Mistaken payments*

- 1.169** In *Chase Manhattan Bank v Israel-British Bank* [1981] Ch 105 a bank mistakenly made two transfers of US\$2m on the same date to another New York bank for the account of the defendant British bank. It should only have made one. Two days later, it was found that the defendant knew or should have known about the clerical error. Soon thereafter, the defendant became insolvent. Goulding J granted a declaration that the defendant bank became a constructive trustee of the second (mistaken) payment on receipt of it.

- 1.170** *Chase Manhattan* therefore stands as authority for the proposition that a payment made by way of mistake can give rise to a constructive trust without needing to establish any knowledge on the part of the recipient. The decision has been much criticized and is of limited value. More recent decisions involving payments made under mistake such as *Nestlé Oy v Lloyds Bank plc* [1983] 2 Lloyd's LR 658 and *Re Farepak Food and Gifts Ltd (in admin)* [2007] 2 BCLC 1 have focused on a constructive trust arising where at the moment of receipt the conscience of the recipient is affected such that the recipient 'could not in good conscience keep the money' although as Mann J said in *Re Farepak* at page 16: 'It is not just the pricking of the conscience that gives rise to the constructive trust: there is something more.'

- 1.171** The Court of Appeal in *Triffitt Nurseries (a firm) v Salads Etcetera Ltd (in admin rec)* [2000] 1 BCLC 761 said that a claim would only succeed if it would be 'wholly unconscionable' for the recipient to oppose the claim (although it is not clear whether the Court of Appeal was seeking to raise the threshold of unconscionable conduct).

¹⁸² At para 127.

¹⁸³ At paras 275–6.

¹⁸⁴ The defendants in this case were not represented and Etherton J noted that he had received only limited submissions on behalf of the claimant (see para 254).

(d) Bribery

If a third party (the briber) is shown to have paid a commission to the agent of a principal in circumstances where the principal is unaware of the payment (and it is not necessary to establish that the secret commission was paid with a corrupt motive or intention to persuade or influence the agent) the principal may not only have personal claims against the briber and the bribed agent, a constructive trust may be imposed over the bribe monies. Although the Court of Appeal in *Lister & Co v Stubbs* (1890) 45 Ch D 1 held that the agent was only under a personal liability to account for the bribe monies, the subsequent Privy Council decision in *Attorney General of Hong Kong v Reid* [1994] 1 AC 324 held that the bribe monies were held on constructive trust for the principal, thus providing the principal with the benefit of a proprietary claim. It is more likely than not that the English courts will follow the approach advocated by the Privy Council in future cases concerning the availability of proprietary relief for bribes.

1.172

(e) Breach of fiduciary duty

If a person has a pre-existing status of a fiduciary, a claim based on breach of fiduciary duty will not require proof of fraud or bad faith. It is a matter of strict liability. The English courts have found it a difficult task adequately to define a fiduciary relationship and Lord Millett, writing extra-judicially,¹⁸⁵ dismissed the benefit of looking for an all-embracing definition and instead suggested that the focus should be on defining the characteristics of the fiduciary relationship, and that fiduciary relationships are of many types. There are a number of established categories of fiduciary relationships such as trustee and beneficiary, solicitor and client, company and company director. There are, of course, others and all will give rise to different types of fiduciary duties. Millett LJ set out in *Bristol and West Building Society v Mothew* [1998] Ch 1 a common list as follows:

1.173

The principal is entitled to the single-minded loyalty of his fiduciary. The core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.

A breach of fiduciary duty may lead to both personal claims (for all benefits and profits made by the fiduciary as a result of the breach) and proprietary remedies. If the defendant is solvent, there should be no need to consider the imposition of a proprietary remedy since the equitable duty to account to the principal will ensure that the breaching fiduciary is stripped of all benefits and profits.

1.174

¹⁸⁵ 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214.

So, for example, in the leading case of *Boardman v Phipps* [1967] 2 AC 46, it was unnecessary to impose a constructive trust. However, in an insolvency situation, proprietary claims are much more important and where appropriate there is no doubt that the court will grant a proprietary remedy by way of the imposition of a constructive trust over the profits obtained by a fiduciary in breach of his duties.

(3) Remedial constructive trust

- 1.175** In some jurisdictions a remedial constructive trust is a trust imposed by the court in its discretion whenever it thinks it is just and proper to do so. There are no rights arising under such a trust unless and until the court imposes the trust over the property. However, English law does not recognize the remedial constructive trust. There has been no case in which the concept of a remedial constructive trust has been applied although there have been some supportive comments. Thus, in *Metall & Rohstoff AG v Donaldson Lufkin* [1990] QB 391 the Court of Appeal held that it was arguable that such a remedy was available and in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 Lord Browne-Wilkinson suggested that a remedial constructive trust might be introduced.
- 1.176** However, the concept was firmly rejected in *In re Polly Peck Intl PLC (No 2)* [1998] 3 All ER 812. The applicants sought leave to bring proceedings against Polly Peck, claiming that the proceeds of certain assets sold by Polly Peck were subject to a remedial constructive trust for their benefit on the basis that Polly Peck had been unjustly enriched. The Court of Appeal, having found no scope for an institutional constructive trust on the facts, was unanimous in rejecting the possibility of a remedial constructive trust. Two of the judges restricted their comments to insolvency cases but Nourse LJ went further and said at 831 that the remedial constructive trust would have permitted the courts 'a discretion to vary proprietary rights' and 'you need an Act of Parliament' to do that. This decision has since been supported by the House of Lords in *Foskett v McKeown* [2001] 1 AC 102.

(4) Unjust enrichment

- 1.177** English law has never adopted an unjust enrichment-based approach to constructive trusts and the House of Lords decisions in *Westdeutsche Landesbank* [1996] AC 669 and in *Foskett v McKeown*¹⁸⁶ reject two propositions: in the former case that the resulting trust may be the best vehicle to effect proprietary claims based upon unjust enrichment and in the latter case that the law of unjust enrichment has anything to do with the existence or otherwise of proprietary claims. Thus, whilst, for example, if stolen property, or its identifiable proceeds, is still in the hands of an innocent recipient, applying the relevant tracing rules

¹⁸⁶ [2001] 1 AC 102.

below, the claimant is entitled to recover the property or the proceeds as a proprietary claim, if the recipient does not still have the property, or its identifiable proceeds, then no claim lies against the recipient unless he has been at fault in some way. If he is guilty of fault, equity treats him as a constructive trustee. The nature and degree of fault have been the subject of conflicting decisions and will give rise to a personal claim.

(5) Knowing receipt

A claim for knowing receipt requires the following to be established:¹⁸⁷

1.178

1. Assets must be held under a trust or fiduciary relationship.
2. There must be a transfer of those assets in breach of that trust or fiduciary relationship to a third party who beneficially receives those assets in circumstances where it would be unconscionable to permit that third party to retain those assets.

Liability for knowing receipt is an equitable claim giving rise to personal liability on the part of a defendant who receives assets transferred to him in breach of trust in circumstances where the defendant's knowledge of events is such as to render it unconscionable for him to retain those assets. The claim requires the defendant to have a certain level of knowledge before any personal liability is imposed on him for receipt of trust assets wrongly transferred. Liability for knowing receipt gives rise to an *in personam* liability to account to the beneficiary for the value received by the defendant.

1.179

(6) Dishonest assistance

A claim for dishonest assistance requires the following to be established.

1.180

1. There must be a trust or fiduciary relationship.
2. That trust or fiduciary relationship must have been breached.
3. The trustee or fiduciary need not have been dishonest but the third party must have induced or assisted in the breach and the third party must have acted dishonestly in providing the inducement or assistance.

Liability for dishonest assistance gives rise to a personal liability to account. Liability is not limited to the loss caused by his assistance but extends to the loss which flows from the breach of fiduciary duties.

1.181

¹⁸⁷ *El Ajou v Dollar Land Holdings plc* [1994] 1 All ER 685, 700 [Hoffmann LJ]; *BCCI v Akindele* [2001] Ch 437, 448, CA.

(7) Tracing

1.182 Several key points are helpfully set out in the seminal case of *Foskett v McKeown* [2001] 1 AC 102.

1.183 Tracing is a set of identification rules, not a claim nor a remedy. As Lord Millet said in *Foskett v McKeown*:¹⁸⁸

Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim.

1.184 The difference between tracing and following was expressed by Lord Millet in *Foskett v McKeown*:¹⁸⁹

The process of ascertaining what happened to the plaintiffs' money involves both tracing and following. These are both exercises in locating assets which are or may be taken to represent an asset belonging to the plaintiffs and to which they assert ownership. The processes of following and tracing are, however, distinct. Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old. Where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner.

1.185 Tracing is part of the law of property and not part of the law of unjust enrichment. Thus in *Foskett*¹⁹⁰ Lord Millet held:

The transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment. There is no 'unjust factor' to justify restitution (unless 'want of title' be one, which makes the point). The claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment. Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is 'fair, just and reasonable.' Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.

1.186 In the same case, Lord Browne-Wilkinson made it clear (at 109) that 'it is a fundamental error to think that, because certain property rights are equitable rather than legal, such rights are in some way discretionary'. It is a question of, as he put it (ibid), 'hard-nosed property rights'.

¹⁸⁸ [2001] AC 102 at 128.

¹⁸⁹ Ibid, at 127.

¹⁹⁰ Ibid, at 128.

Tracing can be used in various types of claim. It is most commonly used in a proprietary claim, to point to an asset (which the claimant did not originally own) and to assert a proprietary interest over it by virtue of its being the traceable proceeds of the asset originally owned by the claimant, but it can also be used for some personal claims in equity, for example to show in a knowing receipt claim that the recipient received the claimant's property and also in relation to common law *in personam* claims such as conversion. 1.187

In this chapter only an overview of this complex area of law can be given and so what follows is merely a statement of some well-known principles. 1.188

1. Common law tracing under English law is restricted to the asset which originally belonged to the claimant or to a 'clean substitute' for it and the profits obtained from the asset or its 'clean substitute' and it is not possible at common law to trace through a mixed fund, a bank's clearing payments, or electronic bank payments.
2. To trace in equity, it would appear there is still a need for the presence of a fiduciary to invoke the equitable tracing rules, but, once invoked, equity will permit a claimant to trace into and through a mixed fund and in and through the banking system.
3. Where proprietary funds are mixed with those of a wrongdoer, the rules in *Re Hallett* (1880) 13 Ch D 696 and in *Re Oatway* [1903] 2 Ch 356 ensure that monies paid out and lost are deemed to be the wrongdoer's own funds, thereby treating the remaining funds as those of the victim. The funds deemed to be have been paid out first are the wrongdoer's own funds, unless they have resulted in a lucrative investment which the victim wishes to claim.
4. Where trust monies have been mixed with monies belonging to an innocent third party, English law generally applies the 'first in, first out' basis following *Re Clayton's Case* [1814-23] All ER Rep 1 unless this would cause injustice or is too impractical to apply, in which case the *pari passu* rule will apply instead. *Clayton's Case* has been subject to considerable criticism over the years and the *pari passu* method often employed.
5. A claimant is unable to trace beyond the lowest intermediate balance of the mixed fund after the claimant's contribution has been made: *Roscoe v Winder* [1915] 1 Ch 62.
6. Where a wrongdoer has purchased property using the mixed fund the claimant is not limited to a lien over the purchased property and can assert a rateable share of the purchased property in line with the level of the claimant's funds used to make the purchase: *Foskett v McKeown*.¹⁹¹

¹⁹¹ Ibid, at 127.

(8) Resulting trusts

- 1.189** A resulting trust may arise in circumstances where a transfer of property causes the legal interest to vest in another person but does not intend the beneficial interest to pass to the transferee. Unlike in the case of constructive trusts, the conscience or knowledge of the transferee is not relevant, rather the inquiry is focused on the transferor and whether he intended to benefit the recipient.
- 1.190** Resulting trusts arise in two main situations. First, where there is a gratuitous transfer of property. Lord Browne-Wilkinson in *Westdeutsche Landesbank* [1996] AC 669 said at 708–9:
- [W]here A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of joint purchase by A and B in shares proportionate to their contribution.
- 1.191** The trust arises by operation of law to give effect to the presumption that A did not intend B to take the property beneficially. The presumption may be rebutted by proof that A did in fact intend B to take the property beneficially. This intent can be established by direct evidence or by reliance on the presumption of advancement. The presumption of advancement applies to certain transfers between parties where it may be inferred that a gift was intended from A to B, for example from husband to wife or father to child, although that presumption of advancement can also be rebutted by evidence of the actual intention of the donor.
- 1.192** Secondly, a resulting trust will also arise where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest in the property, or where an original express trust fails at the outset.
- 1.193** A trust may also arise where one person, A, advances money to another, B, on the understanding that B is not to have the free disposition of the money and that it may only be applied for the purpose stated by A, often that B should apply the money for the payment of his creditors. This is known as a ‘*Quistclose* trust’ after the case in which the House of Lords authoritatively articulated the nature of the trust, *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567. The effect of the trust is to retain for A the beneficial interest in the money, providing A with some proprietary security for his advance.
- 1.194** A trust will only be imposed if A intends to restrict B’s freedom to dispose of the funds by requiring that it should not be applied for any purpose other than that stipulated. B will then hold the legal interest in the money on trust for A unless and until it is applied in accordance with his directions. A standard *Quistclose* trust is a resulting trust which arises from the failure of the transfer of the legal title from A to B to exhaust A’s entire beneficial interest in the money.

(9) Piercing the corporate veil

The general position is that a duly formed and registered company is a separate legal entity from those who legally and/or beneficially own and control it (*Salamon v Salamon* [1987] AC 22) and where a company is properly formed and registered without fraud, concealment, or deceit, the court will not pierce the veil, even if there are innocent losers as a result of the formation (*Ord v Bellhaven Pubs Ltd* [1998] 2 BCLC 447, 457). **1.195**

However, in appropriate circumstances, the court will go behind the strict legal position and look at the reality. See for example, Danckwerts LJ in *Merchandise Transport v British Transport Commission* [1962] 2 QB 173 at 206: **1.196**

... where the character of a company, or the nature of the persons who control it, is a relevant feature, the court will go behind the mere status of the company as a legal entity, and will consider who are the persons as shareholders or even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance.

The authorities suggest that the appropriate terminology is to pierce the veil rather than simply to lift it, as it is intended to 'treat the rights or liability or activities of a company as the rights or liability or activities of its shareholders' (whereas to lift the veil is to 'have regard to the shareholding in a company for some legal purpose')—see *Atlas Maritime Co SA v Avalon Maritime Ltd* [1991] 4 All ER 769, per Staughton LJ at 779. **1.197**

The court may pierce the veil in relation to a company which has been properly formed and not only used for fraud, as long as it has been used as a device or façade for fraud. It is necessary for there to be control of the company by a connected third party such that the controller is able to cause the company to act in the manner complained of, linked with illegality or impropriety and the use of the company as a façade to conceal the true facts (*Woolfson v Strathclyde Regional Council* [1978] SLT 159, per Lord Keith at 161; *Adams v Cape* [1990] Ch 443, per Slade LJ at 539–47; *Re H and others* [1996] 2 All ER 391, per Rose LJ at 401). The court should not pierce the veil solely on the basis that to do so would be necessary to achieve justice (*Trustor SA v Smallbone (No 2)* [2001] 1 WLR 1177, per Morritt V-C, paras 22 and 23): **1.198**

... it would make undue inroads into the principle of Salamon's case if an impropriety not linked to the use of the company structure to avoid or conceal liability for that impropriety was enough. In my judgment, the court is entitled to 'pierce the corporate veil' and recognise the receipt of the company as to that of the individual(s) in control of it if the company was used as a device or façade to conceal the true facts thereby avoiding or concealing any liability of those individual(s).

The court should not pierce the veil solely on the basis that a number of companies have been treated as a single economic entity (*Ord v Bellhaven Pubs Ltd* [1998] 2 BCLC 447, per Hobhouse J at 456i–457h). **1.199**

- 1.200** The court should pierce the corporate veil where a group has been structured in a dishonest manner and used for a scheme of concealment (*Kensington International Ltd v Congo* [2006] 2 BCLC 296, per Cooke J at 341–50, paras 177–202, in particular paras 199 and 200).

(10) Sham

- 1.201** The classic definition of a sham is to be found in the judgment of Diplock L.J in *Snook v London & W Riding Invs Ltd* [1967] 2 QB 786 at 802):

As regards the contention of the plaintiff that the transactions between himself, Auto-Finance, Ltd. and the defendants were a 'sham,' it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. One thing I think, however, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v MacLure and Stoneleigh Finance, Ltd. v Phillips*), that for acts or documents to be a 'sham,' with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived.

- 1.202** There has been an authoritative restatement of the principles concerning shams by the English Court of Appeal in the case of *Hitch v Stone (Inspector of Taxes)* [2001] STC 214 where, in a judgment concurred in by the other members of the court, Arden, LJ said at 229:

The particular type of sham transaction with which we are concerned is that described by Diplock, L.J. in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786. It is of the essence of this type of sham transaction that the parties to a transaction intend to create one set of rights and obligations but do acts or enter into documents which they intend should give third parties, in this case the Revenue, or the court, the appearance of creating different rights and obligations. The passage from Diplock LJ's judgment set out above has been applied in many subsequent decisions and treated as encapsulating the legal concept of this type of sham.

- 1.203** An inquiry as to whether an act or document is a sham requires careful analysis of the facts and the following points emerge from the authorities. First, in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties. Second, as the passage from *Snook* makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations

to third parties. Third, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship. Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. The proper conclusion to draw may be that they agreed to vary their agreement and that they have become bound by the agreement as varied (see for example *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1966] 1 QB 650, at 683–4 per Diplock LJ). Fifth, the intention must be a common intention.

The doctrine of sham is capable of applying to trust deeds just as much as to contracts or conveyances of property. For a trust deed to be a sham, both the settlor and the trustee must intend that the true arrangement is otherwise than as set out in the trust deed. The question is then whether the intention of the donor should be ascertained subjectively or objectively. **1.204**

In *Twinsectra Ltd v Yardley* [2002] 2 All ER 377 the issue was whether, when transferring money to a solicitor's client account to be dealt with in a certain manner, the transferor, Twinsectra, had created a trust. This raised the question of whether Twinsectra, acting through its moving spirit Mr Ackerman, intended to create a trust. The House of Lords held that Mr Ackerman's subjective intention was irrelevant. His intention had to be ascertained from the document. Thus Lord Hoffman said ([2002] 2 All ER 377 at 382): **1.205**

As for Mr. Ackerman's understanding of the matter, that seems to me irrelevant. Whether a trust was created and what were its terms must depend upon the construction of the undertaking. Clauses 1 and 2 cannot be ignored just because Mr. Ackerman was not particularly interested in them.

Lord Millett said (*ibid*, at 396):

A settlor must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant. If he enters into arrangements which have the effect of creating a trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter into them.

It is an essential requirement of a trust that a settlor should intend to create a trust. The House of Lords held that this should be ascertained objectively from what the settlor has signed. It does not matter that, subjectively, he did not mean to create a trust. **1.206**

However, in the case of a bilateral sham with a separate trustee and a trust deed, the court is concerned with subjective intention: where there are two parties and they have both agreed that the relationship will in truth be other than as set out in **1.207**

the documents. In those circumstances the court will take into account their common subjective intent. Therefore, in the case of an express trust, in order to find a sham, the court must find that both the settlor and the trustee had the intention that the true position should be otherwise than as set out in the trust deed which they both executed.

1.208 The question is then whether an element of dishonesty on the part of both parties is required in order for a sham to be made out. In *Snook* itself, Diplock LJ defined sham as ([1967] 2 QB at 802)—

[D]ocuments executed by the parties to the ‘sham’ which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual rights and obligations (if any) which the parties intend to create.

1.209 In *Hitch v Stone* (ibid) the Court of Appeal said ([2001] STC at 230):

The parties must have intended to create different rights and obligations from those appearing from (say) the relevant documents, and in addition they must have intended to give a false impression of those rights and obligations to third parties.

1.210 It is not sufficient to defeat an action based on sham if one party, for example the trustee of an express trust, merely ‘went along with’ the intention on part of the settlor. In *Midland Bank plc v Wyatt* and the decision of Mr Young QC ([1995] 1 FLR 696 at 699) the Judge said:

I consider a sham transaction will still remain a sham transaction even if one of the parties to it merely went along with the ‘shammer’ not either knowing or caring about what he or she was signing

1.211 Therefore, *Wyatt* confirmed that a party who goes along with a sham neither knowing nor caring what he is signing (ie who is reckless) is to be taken as having the necessary intention.

1.212 It should be added that even if an original settlement on express trust is valid, but later another asset is purportedly transferred to the trustee to be held upon the trusts of the settlement in circumstances where the true intention is that that asset should not be so held, the transfer of that asset into the settlement will be held to be a sham.¹⁹²

(11) Court orders generally available for asset tracing (civil)

1.213 In addition to the insolvency-specific court orders discussed above, there are a range of court orders which may be available to assist in the tracing of assets.

¹⁹² The Deputy Bailiff in the Jersey case *In the Matter of the Esteem Settlement* [2003] JLR 188, 225.

(a) Freezing and other orders

The English court will, in appropriate circumstances, grant a freezing order against the assets of a defendant. For an order to be granted in aid of proceedings in England,¹⁹³ there must be a course of action justifiable in England and Wales, a good arguable case on the merits, prima facie evidence of assets within the jurisdiction or outside it (if it is a worldwide order), and a real risk that the defendant may dissipate those assets without justification before enforcement of any judgment such that a judgment would remain unsatisfied. The freezing order is a powerful weapon in litigation. However, it does not afford the claimant any priority or security over the assets in the event of the insolvency of the defendant. **1.214**

The standard form freezing order catches all assets of the defendant whether or not in the defendant's own name and whether solely or jointly owned and includes any asset which the defendant has the power, directly or indirectly, to dispose of or deal with as if it were his own and the defendant is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions. **1.215**

If it is alleged that an asset in fact belongs to a third party, the court is empowered to join that third party to the proceedings and directions may be given for the service of evidence and generally to have the issue resolved prior to or at the main trial: *SCF Finance Co Ltd v Masri* [1985] 1 WLR 876. **1.216**

In *TSB Private Bank International v Chabra* [1992] 1 WLR 231, the defendant was a majority shareholder in an English company. An injunction was granted preventing the defendant from disposing of the company's assets and preventing the company from disposing of its assets. Although there was no claim against the company, Mummery J held that there was a good arguable case that some of the assets in the company's name were the beneficial assets of Mr Chabra, either on the basis that the company held on trust or as nominee for him or on the basis that the company was nothing more than a convenient repository for him. **1.217**

A worldwide freezing order must contain what is known as a Babanaft proviso after the case *Babanaft International Co SA v Bassatne* [1990] Ch 13, which protects foreign-based third parties by stating that the order will not bite on them unless and until it has been recognized, registered, or enforced by the relevant local foreign court. **1.218**

Further, a worldwide freezing order will contain what is known as the Baltic proviso after the case *Baltic Shipping v Translink Shipping Ltd* [1995] 1 Lloyd's **1.219**

¹⁹³ As opposed to in aid of foreign proceedings where a separate cause of action is not required (see below).

Rep 673 so that banks having a branch within the jurisdiction may comply with what they reasonably believe to be their lawful obligations in relation to assets of the defendant held at other branches abroad. This is important as breaching or assisting in a breach of a freezing order may be a contempt of court.

- 1.220** Under section 25 CJA 1982 the English court will now grant a freezing injunction in aid of proceedings taking place in any foreign jurisdiction even if there are no proceedings in this jurisdiction. The general two-stage approach to be adopted in any application under section 25 was laid down in *Refco v Eastern Trading Co* [1999] 1 Lloyd's Rep 159. The first stage is that the court should consider whether it would grant the relief if the matter was proceeding in this jurisdiction and then consider whether the fact it does not have substantive jurisdiction renders it inexpedient to grant the relief. There are a number of important authorities on the latter part which need consideration by any practitioner, and which are too wide a topic for this chapter (for example, *Credit Suisse Fides Trust Sa v Cuoghi* [1998] QC 818).
- 1.221** A proprietary injunction may also be granted, which contains the additional feature that the applicant asserts that certain assets held by the respondent are in fact owned by the applicant. The court will then need to consider not only the merits of the claim but also an examination of the tracing exercise pursuant to which the assets have been identified.
- 1.222** On any application for a freezing injunction, almost always made without notice to the opposing party, in addition to the injunctive relief, the applicant will generally obtain disclosure from the respondent of details of the value and location of, and may seek information about what has happened to, certain assets or property.
- 1.223** An applicant has a duty to give full and frank disclosure and it will generally be necessary to give a cross-undertaking in damages, to cover the respondent for any losses he might suffer where it is later proved that an injunction was wrongly obtained.
- 1.224** Other orders which may be granted are:
1. A search order: this is an order which permits the applicant, with a supervising solicitor, to enter premises for the purpose of searching them and removing articles or documents or obtaining information, for example from computers. The application is made without notice and the applicant must have 'an extremely strong prima facie case', the damage (whether 'potential' or 'actual') must be 'very serious' for the applicant, there must be 'clear evidence' that the defendants have in their possession 'incriminating documents or things', and there is a 'real possibility' that the defendants may destroy such material before any application *inter partes* is made.¹⁹⁴

¹⁹⁴ *Anton Pillar KG v Manufacturing Processes* [1976] Ch 55, 62A–B per Ormond LJ.

2. A writ *ne exeat regno* order: this is an order to prevent the defendant from going abroad; or more likely, a *Bayer AG v Winter* order restraining the defendant from leaving the jurisdiction and giving up his passport. Such an order should, however, generally only last so long as it is necessary to enable the claimants to serve the injunctive orders and to try to obtain the necessary information identified in the orders.
3. A gagging order: it is possible to obtain a gagging order, an injunction restraining those served with the order or others from informing third parties of the existence of the proceedings or the fact that an order has been made. It can be used to give the applicant time to use information obtained through execution of the order to secure or freeze assets or to preserve evidence, for example as part of a search or *Norwich Pharmacal* order.

(b) *Norwich Pharmacal* and *Bankers Trust* orders

A *Norwich Pharmacal* order may also be sought at an early stage—typically pre-action—to obtain disclosure and information from respondents such as banks, accountants, and financial advisers. The relevant principle was set out by Lord Reid in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 (HL) at 175: 1.225

... that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

The authorities¹⁹⁵ suggest that the following factors to varying degrees are relevant to the court's determination of an application for this relief. 1.226

The respondent must have become mixed up in some form of wrongdoing or potential wrongdoing and his involvement must go beyond that of a mere witness. 1.227

The applicant must require the information/documentation in order to vindicate some right or to take a step to protect itself arising out of some wrongdoing or potential wrongdoing. It is not a requirement of the *Norwich Pharmacal* jurisdiction that information is needed to start proceedings, although this will usually be the case. 1.228

¹⁹⁵ *Norwich Pharmacal v Customs & Excise* [1974] AC 133; *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033; *Carlton Film Distributors Ltd v VCI Plc* [2003] EWHC 616, [2003] FSR 47; *British Steel Corporation v Granada Television Ltd* [1981] AC 1096; *Bankers Trust v Shapira* [1980] 1 WLR 1274.

- 1.229** The wrongdoing or potential wrongdoing is not limited to tortious claims and includes claims in equity, breach of contract, breach of confidence, equitable proprietary claims, and even crimes.
- 1.230** The information required is not limited to the identity of the individual who committed the wrongdoing but can extend to whether or not any such wrongdoing in fact took place.
- 1.231** The respondent is required to give full information on the matters required. It has been suggested this should be limited to that required to be produced under the old *subpoena duces tecum* procedure but such restriction does not obviously sit with Lord Reid's views in *Norwich Pharmacal*.
- 1.232** Under section 25(1)(5) CJA 1982 (as amended), and the principles established in *Credit Suisse v Cuoghi*,¹⁹⁶ it is possible to obtain a *Norwich Pharmacal* order from the English court in respect of a respondent subject to English jurisdiction to assist proceedings taking place abroad.
- 1.233** *Norwich Pharmacal* orders are not a suitable means of obtaining information and discovery against respondents situated outside of the jurisdiction, even in aid of English proceedings. Letters rogatory are the appropriate means of obtaining such evidence.
- 1.234** It has been suggested that *Norwich Pharmacal* applications should only be made in circumstances where none of the procedures under the CPR are available. While it is accepted that this head of jurisdiction should not be lightly invoked, it is denied that this jurisdiction is subject to any such sort of condition precedent.
- 1.235** Further, an application may be made under the *Bankers Trust* jurisdiction (*Bankers Trust Co v Shapira*,¹⁹⁷ which shares some common characteristics with the *Norwich Pharmacal* jurisdiction. *Bankers Trust* applications are, however, solely concerned with obtaining information relating to the location of assets against which the claimant is asserting a proprietary claim. They are typically sought against third parties who become mixed up in the laundering of the proceeds of fraud and are therefore in a position to provide information and documentation to assist the tracing exercise. The first principle laid down by Hoffmann J in *Arab Monetary Fund v Hashim (No 5)* [1992] 2 All ER 911 is that the claimant must demonstrate a real prospect that the information may lead to the preservation of assets to which he is making a proprietary claim.
- 1.236** Instead of pursuing an application for *Bankers Trust* relief, the claimant can consider making an application under the Bankers' Books Evidence Act 1879.

¹⁹⁶ [1998] QB 818.

¹⁹⁷ [1980] 1 WLR 1274.

However, it is limited in scope as 'bankers' books' has been held not to include cheques, paying in slips, or even correspondence between the alleged fraudsters and the bank.

(c) *Witness summons*

Under CPR r 34.2, a named individual may be required to attend trial to give oral evidence and/or to produce documents. Production of documents will usually take place at a convenient date before the trial so that the parties are able to review the material fully before trial. The witness summons must specifically identify the documents sought and must not be 'of a fishing or speculative nature' (Gross J in *South Tyneside MBC v Wickes Building Supplies Ltd* [2004] EWHC 248). Production of the documents must also be necessary for the fair disposal of the matter or to save costs. If documents are confidential, a claim that their production is necessary for the fair resolution of the proceedings may well be subjected to particularly close scrutiny by the court. It is of particular importance that the documents must be either individually identified or identified by reference to a class of documents or things so that the person to whom the summons is addressed can know what obligation the court imposes on him.

1.237

(d) *Disclosure*

(i) **Pre-action disclosure** The *Norwich Pharmacal* and *Bankers Trust* jurisdictions have been considered above. In addition, under CPR r 31.16 a party may obtain pre-action disclosure if it can be shown that the applicant and respondent are likely to be parties to future proceedings, that any disclosure would fall within the ambit of standard disclosure, and that such disclosure is desirable in order to dispose fairly of the proceedings, or to assist the dispute to be resolved in those proceedings or to save costs.

1.238

(ii) **Standard disclosure** In proceedings in England and Wales, the parties must give disclosure of documents which, unless the court otherwise orders, means 'standard disclosure'. This may be dispensed with or limited by the court and the parties may do likewise by agreement. Standard disclosure is defined in terms of: (a) the documents on which a party relies; (b) documents which (i) adversely affect his own case, (ii) adversely affect another party's case, or (iii) support another party's case; and (c) documents a party is required to disclose by a relevant practice direction.

1.239

A party must make a reasonable search for such documents. A party to whom a document has been disclosed has a right to inspect it except where (a) the document is no longer in the control of the party who disclosed it or (b) the party disclosing the document has a right or a duty to withhold inspection of it (for example, if the document is subject to legal professional or litigation privilege) or (c) where a party considers that it would be disproportionate to the issues in the case to permit inspection within a category or class of documents disclosed.

1.240

- 1.241** The duty of disclosure continues until the proceedings are concluded. The court may make an order for specific disclosure of documents on the application of a party; the rationale for the discretion is that the overriding objective obliges the parties to give access to those documents which will assist the other's case.
- 1.242** A party may inspect a document mentioned in a statement of claim, a witness statement, a witness summary, or an affidavit.
- 1.243** A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed except where (a) the document has been read to or by the court or referred to at a hearing which has been held in public (though the court may by order restrict or prohibit such disclosure) or (b) the court gives permission or (c) the disclosing party and the party to whom the document belongs agree.
- 1.244** (iii) **Third party disclosure** Under CPR r 31.17 a claimant is entitled, after proceedings have commenced, to seek disclosure against a non-party if the third party is likely to have documents which are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings, and disclosure is necessary in order to dispose fairly of the claim or to save costs.

(e) Publicly available information

- 1.245** A good deal of information can be obtained through searches of public registers, including, for example, Companies House which has records of all filings of companies registered in England and Wales and at the Land Registry, which has details of ownership and charges and other information concerning all registered land in England and Wales.

C. Criminal Powers

(1) Introduction

- 1.246** The purpose of this section is to give an overview of the Proceeds of Crime Act 2002 (POCA) and the powers that it gives to the Crown in England and Wales to make applications to the court for orders in respect of assets. A detailed examination of POCA is not possible within the scope of this work and a specialist work should be consulted for further detail upon the areas outlined here.
- 1.247** Any action undertaken by the Crown in respect of assets that are in dispute or that may form part of an insolvency procedure will affect the actions and remedies available to other parties. This section highlights the powers available to the Crown and summarizes the potential rights and actions available to those acting for third parties.

(2) **The Proceeds of Crime Act 2002: an overview**

The Proceeds of Crime Act 2002 received Royal Assent on 24 July 2002. The significant parts of the Act for the purposes of this work are as follows: **1.248**

1. Criminal Confiscation (Part 2)
2. Civil Recovery (Part 5)
3. Taxation (Part 6)
4. Money Laundering (Part 7)
5. Investigations (Part 8).

(a) *Criminal confiscation*

POCA consolidated and extended the confiscation of criminal assets regimes found in the Criminal Justice Act 1988 (CJA) and the Drug Trafficking Act (DTA) 1994 (and their subsequent amendments). In the event of a conviction the court will determine the defendant's benefit from his criminal offences and then determine his available assets before making a confiscation order in respect of the lower sum. A period of time is usually allowed for payment but ordinarily this is not greater than six months and in exceptional circumstances not greater than 12 months. A sentence of imprisonment in default of payment will be imposed to be served if the confiscation sum is not paid. Service of any default sentence does not extinguish the defendant's liability to pay the confiscation sum. It is important to note that the confiscation order is one against the defendant personally. It does not attach to particular assets. **1.249**

Under section 10 POCA, where it can be demonstrated that the defendant had a criminal lifestyle and benefited from his general conduct, it is presumed that all property in his possession or connected to him in the previous six years was derived from the benefit of his general criminal conduct as defined under section 7 POCA, and the burden of proof falls upon the defendant to satisfy the court that it was not. The court need not apply the assumptions if it is satisfied that to do so would create a serious risk of injustice. **1.250**

Under section 75(2) the offences that are deemed to demonstrate a 'criminal lifestyle' are: **1.251**

1. Drug trafficking, money laundering, directing terrorism, people trafficking, arms trafficking, counterfeiting, intellectual property offences, pimping and brothel keeping, and blackmail (all inchoate offences in relation to the above).
2. Any offence which constitutes conduct forming part of a course of criminal activity involving a benefit of not less than £5,000 (s 75(3) and (4)).
3. An offence carried out over a period of six months which benefited not less than £5,000.

1.252 Under section 75(3) the definition of a course of criminal activity is as follows:

Any proceedings in which the defendant was convicted of three or more offences constituting conduct from which he has benefited: in the period of six years ending on the day which proceedings started, and the defendant was convicted on at least two separate occasions on the offence constituting conduct in which he has benefited.

1.253 Proceedings in respect of confiscation begin by way of a prosecutor statement under section 16 POCA. This document sets out the Crown's claim and whether the Crown is asking for the assumptions set out above to be applied. Third parties are not entitled as of right to see this document, as they are not a party to the confiscation proceedings, but the Crown may agree to its disclosure with the permission of the court. Following service of the prosecutor's statement, the defendant will be required to file a statement in response. Again a copy of such a statement may be useful to third parties investigating the defendant's assets. If the defendant is not prepared to provide a copy of his statement voluntarily, an application to the Crown Court dealing with the matter will be required. The service of statements is followed by the hearing of the issues. In complicated matters the confiscation hearing can take place some time after conviction. The Crown and the court will provide information as to the hearing date to third parties. The hearing takes place in open court and therefore third parties are able to attend. As they are not parties to the proceedings they cannot make representations. The hearing will in most cases result in a confiscation order being made.

1.254 The confiscation order is an order for a sum of money to be paid to the state. This is enforced by the magistrates' court that committed the defendant for trial. If the defendant does not pay the sum of money in the time allowed by the Crown Court a sentence of imprisonment in default is imposed by means of a warrant of commitment to prison. No further assessment of the defendant's means is undertaken at that stage. Serving the sentence of imprisonment does not extinguish the confiscation sum owed.

1.255 A confiscation order should be distinguished from a compensation order. A court should consider any compensation order or other financial penalties before imposing a confiscation order. However, it is imperative that any party seeking compensation liaises closely with the prosecuting authority to ensure that its claim for compensation is properly put before the court.

(b) Civil recovery

1.256 Under Part 5 of POCA, the Crown institutes proceedings for civil recovery where the value of recoverable property exceeds £10,000 (POCA, s 303). Recoverable property is property that has been obtained through unlawful conduct or property that represents such property (POCA, ss 304–310). Civil recovery is an action against assets rather than a personal action against the respondent.

It is not necessary that the unlawful conduct took place in the jurisdiction provided that the equivalent conduct would contravene the criminal law in the United Kingdom (POCA, s 241(2)). Again, this is a procedure to recover monies for the state not for private entities. The respondents will be the holders of unlawfully obtained property and not necessarily persons suspected of specific criminal offences (section 243). It is not necessary for the defendant to have been charged in criminal proceedings or that he may be in future be charged with criminal offences. **1.257**

The standard of proof is on the balance of probabilities. **1.258**

Civil recovery was previously led by the Assets Recovery Agency and is now led by the Serious Organised Crime Agency (SOCA). Parties seeking private civil recovery of assets should liaise with SOCA in order to ensure that there is no civil recovery action that would remove these assets from the potentially available pot. **1.259**

(c) Taxation

SOCA can acquire the powers of the HMRC under section 317 POCA. SOCA must have reasonable suspicion that income, gain, or profit has accrued to the tax payer as a result of criminal conduct or that an inheritance is attributable to criminal property before exercising its powers to levy tax. Whereas the HMRC must ordinarily identify a source for income to be taxed, this is not necessary under POCA.¹⁹⁸ **1.260**

To date there appears to be little utilization of the powers by Her Majesty's Revenue & Customs. The merging of the Revenue & Customs Prosecution Office with the Serious Organised Crime Agency may affect this position. **1.261**

(d) Money laundering

Under Part 7 of POCA the money laundering offences set out under the DTA 1994 and CJA 1988 were brought together under a single regime. The following offences are created: **1.262**

1. Section 328—concealing, transferring, disguising, and removing criminal property from the country.
2. Section 328—assisting another to retain the benefit of criminal conduct.
3. Section 329—the acquisition, use, or possession of criminal property.

Criminal property is defined as property which represents a person's benefit from criminal conduct in whole or in part, whether directly or indirectly. Jurisdiction is only an issue to the extent that the criminal conduct would be criminal if it occurred within the United Kingdom. Once the relevant conduct of the defendant **1.263**

¹⁹⁸ Section 319.

is established, it is not relevant when the property was acquired, who carried out the conduct, or who benefited from it.

- 1.264** Offences of failing to disclose in the regulated sector under sections 331 and 332 POCA and offences of tipping off under section 333 may also be relevant where the defendant has operated in a regulated sector, such as in the financial or real property sectors.

(e) Investigations

- 1.265** Under Part 8 POCA the Crown can obtain document production orders (ss 345, 349, and 350), search and seizure warrants (s 352), disclosure orders (s 357), customer information orders (s 363), and bank account monitoring orders (s 363). It is an offence to prejudice an investigation generally (s 342) and an offence to refuse to comply with an investigation order (ss 359 and 366). POCA gives the Crown very wide powers to compel individuals and organizations to provide a wide range of information which may be used in criminal or civil proceedings or taxation proceedings. The Crown generally experiences little difficulty in persuading a court to issue such orders.

- 1.266** (i) **Restraint orders** Under section 41(2) POCA, the Crown Court may make a restraint order in relation to (a) all realizable property held by the specified person at the time of the order whether or not the property is described in the order and (b) to realizable property transferred to the specified person after the order is made. It is common for restraint orders to be made in relation to all realizable property held by the defendant. The restraint order usually makes provision for reasonable living expenses and for the purpose of enabling any person to carry out any trade, business, or professional occupation. An exception to the restraint order cannot be made in relation to legal expenses where these relate to the offences in respect of which the restraint order is made. A restraint order is in certain cases made to restrict dealings with specific property or to property whose likely value is to be that of the compensation order. It is important to note that the purpose of the restraint order is to preserve the assets so that a confiscation order can be made. If a restraint order is made against the defendant's assets before any private asset recovery proceedings are instituted or before any bankruptcy proceedings, the assets in the restraint order may not be utilized in subsequent proceedings or used to pay the fees of the professional advisors involved in such proceedings. In the event of insolvency proceedings the restrained assets will not form part of the defendant's estate if the restraint order predated the bankruptcy order. No undertaking in damages is usually given by the Crown in respect of a restraint order.

- 1.267** Conversely, where a defendant has been made bankrupt, the assets held by the trustee in bankruptcy are not *held* by the defendant for the purpose of section 41 or future confiscation. However it should be noted that under section 84(2) POCA,

property held by a person does include reference to property vested in this trustee in bankruptcy or liquidator. Arguably such a provision would allow the court, in appropriate circumstances, to make the confiscation order notwithstanding the defendant's bankruptcy.

Additionally the following are exempt from restraint and enforcement under POCA: **1.268**

1. Under section 418(3)(b) after acquired property comprised in a bankrupt estate for the purpose of Part 9 Insolvency Act 1986 at the time under consideration is excluded. In addition, the section excludes after acquired property to which the bankrupt's trustee in bankruptcy has made claim to the estate without an application to the court under section 307 IA 1986.
2. Section 418(3)(b): tools of the bankrupt's trade that are as a matter of course excluded from the estate in which the trustee made claim on the basis that their value exceeds the cost of a reasonable replacement.¹⁹⁹
3. Section 418(3)(c): tenancy which a trustee in bankruptcy may claim for the estate.²⁰⁰
4. Section 418(3)(c): property acquired by the bankrupt since the court ordered his/her discharge from bankruptcy on condition that the property is reapplied to paying off the defendant's creditors²⁰¹ under section 280(2)(c) Insolvency Act 1986.
5. Section 418(3)(d): any sums remaining in the hands of the enforcement receiver after a previous confiscation order made under POCA has been paid in full.

(ii) **Variation and discharge of a restraint order** A restraint order prevents the defendant, or any third party on notice, from dealing with property which is the subject of the order. It does not have any proprietary affect.²⁰² **1.269**

Under rule 59.3(2) of the Criminal Procedure Rules (CrPR) an application may be made to vary or discharge a restraint order to the Crown Court either by the person who applied for the order (normally the Crown) or by any person affected by the order. A party may apply for any order on agreed terms and the court can under CrPR r 59.3(3) deal with such application without a hearing. Where the restraint order provides, certain variations can be made by written agreement between the parties. **1.270**

¹⁹⁹ IA 1986, s 308.

²⁰⁰ Ibid, s 308A.

²⁰¹ Under IA 1986, s 280(2)(c).

²⁰² *Re A, A v A* [2002] EWHC 6111 para 100.

- 1.271** An application to vary or discharge an order must be made in writing and must be supported by a witness statement which must be lodged at the Crown Court and served on the person who applied for the restraint order and any other person who is prohibited from dealing with the realizable property at least two days before the date fixed for hearing of the application under CrPR r 39.
- 1.272** There is provision for an application to be made without notice under CrPR r 59.1(2) if the application is urgent or there are reasonable grounds for believing that giving notice would cause a dissipation of realizable property which is the subject of the application under CrPR r 59(4).
- 1.273** If a court does order a variation of the restraint order the applicant must serve copies of the varied order and the witness statement in support of the defendant and any person who is prohibited from dealing with realizable property and any other person whom the applicant knows to be affected by the order as directed by CrPR r 59.2(8).
- 1.274** Under CrPR r 59 an application may be made to discharge an order. The application must be in writing and must state the grounds of the application. Whilst there is no specific requirement for service of a witness statement, good practice would suggest that this would be required if the application is likely to be contested. If the court orders the discharge of the restraint order, the applicant must serve copies of the order upon the defendant and any person who is prohibited from dealing with the realizable property and any other person whom the applicant knows to be affected by the order under CrPR r 59.
- 1.275** (iii) **Position of third party creditors in respect of restraint orders** It should be noted that confiscation proceedings and associated restraint proceedings are orders *in personam* and not orders *in rem*. Restraint orders imposed to preserve a defendant's assets for the purpose of imposing a confiscation order do not have proprietary effect. A restraint order does not prevent secured creditors exercising their security. It does not prevent a bank from exercising its common law rights of set-off or contractual right of set-off.²⁰³ However, under POCA a restraint order will prevent payments of restrained property to unsecured creditors (other than trade creditors). The court has no power under POCA to vary restraint orders to permit such payments.²⁰⁴
- 1.276** Under section 69(3)(a) POCA the court is required to exercise powers with a view to enabling those with an interest in the restrained property to retain or recover the value of their interest. Secured creditors therefore have no difficulty in

²⁰³ See *REK* [1990] 2 QB 298.

²⁰⁴ *Serious Fraud Office v Lexi Holdings plc (in administration)* [2008] EWCA Crim 1443. Note that under the preceding legislation the court had power to vary a restraint order to allow payment of an unsecured creditor: *Re X (Restraint Order Variation)* [2005] QB 133.

enforcing their security. Unsecured creditors are unfortunately not in the same position and may have to await the conclusion of any confiscation proceedings before attempting recovery. It is fair to say that the legislative steer of section 69(3)(a) is difficult to reconcile with the decision in *Lexi Holdings* and that case is ripe for challenge.

If a restraint order is discharged during the course of a bankruptcy and an enforcement receiver or administrator has not been appointed by the court in respect of realizable property, property previously the subject of a restraint order will then vest in the bankrupt's estate and will be dealt with in the bankruptcy in the ordinary way. This is because a restraint order does not have any proprietary effect.²⁰⁵ **1.277**

(3) Insolvency and civil recovery under POCA

Civil recovery proceedings in the High Court or summary proceedings for the recovery of cash may not be taken against property that forms part of the bankrupt's estate or the assets of a company being wound up following a resolution for voluntary winding up or subject to other specified insolvency procedures without leave of an appropriate court.²⁰⁶ The position in relation to restraint orders and bankruptcy has already been set out above. **1.278**

The following specific property is excluded from civil recovery proceedings: **1.279**

1. Section 311(3)(a): an asset of the company being wound up following a resolution for its voluntary winding up.
2. Section 311(3)(b): an asset subject to a voluntary arrangement for the payment of its creditors.
3. Section 311(3)(c): property in respect of which an interim receiver has been appointed in order to protect it in the period between the presentation of the position for the respondent's bankruptcy and the making of the bankruptcy order.
4. Section 311(3)(d): the property forming part of the respondent bankrupt estate.
5. Section 311(3)(e): the assets of a respondent who is subject to a voluntary arrangement for the payment of his or her creditors.

There is no provision under POCA for a claimant in the civil recovery to prove a civil recovery judgment as a debt in the bankruptcy. The trustee in bankruptcy may not admit a civil recovery claim in the bankruptcy proceedings.²⁰⁷ **1.280**

²⁰⁵ *Re A, A v A* [2002] EWHC 611, para 100.

²⁰⁶ POCA, s 311(1) and (2).

²⁰⁷ *Ibid*, s 266(2). A civil recovery order vests the property in question in the Trustee for Civil Recovery. It does not create an *in personam* liability on the respondent to pay a sum of money.

(a) Property freezing and interim receiving orders

- 1.281** A property freezing order or an interim receiving order may only be made by a specified enforcement authority. In England and Wales this is the Serious Organised Crime Agency, the Director of Public Prosecutions, the Director of Revenue & Customs Prosecutions, or the Director of the Serious Fraud Office. The application may only be made where the authority may take proceedings for a recovery order.²⁰⁸ The application may be made before or after the start of the substantive proceedings for a recovery order. Under POCA civil proceedings an interim receiver or a civil management receiver (with wide ranging powers similar to a management receiver appointed over assets in common law restraint proceedings and receivers in ordinary civil proceedings) may be appointed. The jurisdiction to appoint a management receiver is dependent upon the making of a property freezing order.²⁰⁹
- 1.282** An application for a property freezing order and an interim receivership order may be made without notice if the claimant can show that giving notice to the respondent would prejudice its rights to recover the property in question.
- 1.283** To make a property freezing order and an interim receiving order the court must be satisfied that there is a good arguable case that the property in question is either recoverable or associated property.²¹⁰ ‘Associated property’²¹¹ means property of any of the following descriptions (including property held by the respondent) which is not itself recoverable property.
1. any interest in the recoverable property;
 2. any other interest in the recoverable property;
 3. if the recoverable property is a tenancy in common the tenancy of the other tenant;
 4. if (in Scotland) the recoverable property is owned in common, the interest of the other owner;
 5. if the recoverable property is part of a larger property but not a separate part the remainder of the property.
- 1.284** No property is to be treated as associated property consisting of rights under a pension scheme.²¹²
- 1.285** If the court is satisfied that there is a good arguable case then it has discretion whether to make a property freezing order or an interim receiving order.

²⁰⁸ POCA, s 245(a)(1).

²⁰⁹ *Ibid*, s 245(e)(1)(a).

²¹⁰ *Ibid*, ss 245(a)(4), (5) and 246(4) and (5).

²¹¹ *Ibid*, s 245(1).

²¹² *Ibid*, s 245(3).

It should be noted that there is no provision for the authority to be required to give an undertaking in damages to the respondent for any loss which may accrue if a recovery order is not subsequently made. **1.286**

A property freezing order prevents a respondent from dealing with the identified property in any way. It is a personal obligation upon the respondent. In contrast an interim receiving order prevents the respondent from dealing with or disposing of the property itself. **1.287**

(b) The variation and discharge of property freezing orders and interim receiving orders

There is provision for a property freezing order and an interim receiving order to be varied. However, under sections 245 and 252 POCA powers to exclude property from the terms of the property freezing order or interim receiving order must be exercised with a view to ensuring so far as practicable that the right of the enforcement authority to recover property is not unduly prejudiced. **1.288**

Property may be removed from the order where it is shown that it is not recoverable property or associated property.²¹³ A third party may make an application to remove property from an order where it is able to demonstrate that the property is legitimate property rather than recoverable property. It should be noted that the removal of property from a freezing or interim receiving order is not determinative of proprietary rights. **1.289**

An application to vary or discharge the order may be made at any time.²¹⁴ An application for variation or discharge must be on notice under section 245 or 251 POCA. Affected parties and any receiver must be given the opportunity to be heard. Under section 42(6) POCA, the property freezing, management receivership, or interim receiving order may be set aside at any time. There is no automatic discharge from the order at the conclusion of the proceedings. **1.290**

D. International Enforcement and Assistance

(1) Assistance in restraint and confiscation cases

(a) Request from the UK to other authorities

A prosecutor may make a request via the Secretary of State to the appropriate authority in other jurisdictions for assistance in enforcing restraint and confiscation orders under section 74 POCA. If the Secretary of State believes it is appropriate **1.291**

²¹³ Ibid, ss 245(b)(4), 254(1).

²¹⁴ Ibid, ss 245(b)(5), 251(3).

to do so then, under section 74(5), he may forward the request for assistance to the appropriate authority of the receiving country.

- 1.292** The confiscation provisions of POCA 2002 apply to all of the defendant's property wherever situated.²¹⁵ Assistance may be required from other jurisdictions in order to preserve the defendant's property prior to confiscation. The High Court and Crown Court can also order the defendant to repatriate his assets held abroad.²¹⁶ Whether the requested state is able to grant assistance will depend upon its domestic law. The relevant law of the requested state should always be considered for compliance in respect of any request.
- 1.293** In a case where no confiscation order has been made, a request for assistance is a request to the appropriate authority of the requested state to prohibit any relevant person from dealing with realizable property (s 74(2)). In a case where a confiscation order has been made and has not been satisfied, discharged, or quashed, a request for assistance is a request to the requested country to ensure that any relevant person is prohibited from dealing with realizable property and that realizable property is realized and that the proceeds are applied in accordance with the law of the receiving country (s 74(3)).
- 1.294** Mutual assistance in criminal matters in the United Kingdom is primarily governed by the Crime (International Co-operation) Act 2003 (CICA). CICA gives effect to the EU Convention on Mutual Assistance in Criminal Matters. The state receiving a request must in principle comply with the formalities and procedures indicated by the requesting state.
- 1.295** CICA extends to England, Scotland, Wales, and Northern Ireland. It does not extend to the Channel Islands, the Isle of Man, or British overseas territories which have enacted their own domestic legislation governing mutual assistance and remain responsible for making, and providing assistance with, requests for mutual legal assistance.

(b) Requests for assistance by prosecuting authorities

- 1.296** A UK prosecuting authority can seek mutual assistance from a foreign state under section 7 CICA in the following way:
1. by requesting that a judge, justice of the peace, or (in Scotland) a sheriff issues a letter of request; or
 2. if the prosecuting authority has been designated then it can issue a letter of request itself directly to the foreign country.

²¹⁵ *Ibid*, s 84(1).

²¹⁶ *Director of Public Prosecutions v Scarlett* [2000] 1 WLR 515 and POCA, s 41(7). The court may make such order as it believes appropriate for ensuring that the restraint order is effective.

Section 7(1) CICA permits the court to issue a letter of request to the authorities of a foreign state provided that: **1.297**

1. an offence has been committed, or there are reasonable grounds for suspecting that an offence has been committed, and
2. proceedings in respect of the offence have been instituted or the offence is being investigated.

In the United Kingdom, proceedings are ‘instituted’ when a suspect is charged, or an information is laid for the issue of a summons by a magistrates’ court under the section 1 Magistrates Courts Act 1980.²¹⁷ However, a prosecuting authority, unlike a defendant,²¹⁸ can issue or apply to a court to have issued a letter of request at the investigatory stage. **1.298**

A defendant in criminal proceedings²¹⁹ can make an application to court for a letter of request only after proceedings against him have been instituted. A criminal defendant is not able to issue a letter without applying to a court. Section 7(1)(c) CICA makes it clear that a defendant cannot apply before proceedings have been instituted. **1.299**

Helpful guidance on contents of a letter of request is contained in Part II of the Home Office Guidelines.²²⁰ **1.300**

(c) Foreign requests for restraint, confiscation, and forfeiture orders in the United Kingdom

Requests from foreign states in relation to Restraint Confiscation and Forfeiture are governed by the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (the External Request Order) which came into force on 1 January 2006. All incoming requests for mutual assistance are processed by the UK Central Authority on behalf of the Secretary of State. **1.301**

The United Kingdom can assist in restraining assets, enforcing foreign forfeiture, and confiscation orders in respect of assets held in the United Kingdom. It is not able to restrain assets outside the United Kingdom in support of foreign proceedings.²²¹ **1.302**

²¹⁷ *R v Manchester Stipendiary Magistrates, ex p Hill* [1983] 1 AC 328, 345.

²¹⁸ CICA, s 7(3)(c).

²¹⁹ See *Cuoghi v Governor of Brixton Prison* [1997] 1 WLR 1346.

²²⁰ <http://police.homeoffice.gov.uk/publications/operational-policing/MLA_Guidelines_6th_edition.pdf>.

²²¹ *Serious Fraud Office v King* [2008] EWCA 530.

- 1.303** The power to obtain production orders,²²² search and seizure warrants,²²³ disclosure orders,²²⁴ customer information orders,²²⁵ and account monitoring orders²²⁶ may be exercised at the request of foreign states under POCA 2002 and Part 1 of the Crime (International Co-operation) Act 2003 (CICA).
- 1.304** It should be noted that property recovered under a foreign confiscation or forfeiture order in the United Kingdom is not automatically transmitted to the foreign enforcement authority or state. Property (or its equivalent in money) recovered under a foreign confiscation order is placed in the UK Government's Consolidated Fund.²²⁷ Forfeited property in England and Wales is disposed of at the direction of the High Court, which must give persons holding any interest in the property in question a 'reasonable opportunity' to make representations to the court.
- 1.305** However, there are specific agreements with the United States and Canada which have particular arrangements in respect of such sums. Where there is no such agreement diplomatic negotiations are required between states.
- 1.306** (i) **The Crown Court's power to make a restraint order or to enforce an external order at the request of a foreign state** The Crown Court may make a restraint order on the application of a foreign state if either condition in section 7 of the External Requests Order is satisfied.
- 1.307** The first condition is that:
1. relevant property in England and Wales is identified in the external request;
 2. a criminal investigation has been started in the country from which the external request was made with regard to an offence; and
 3. there is reasonable cause to believe that the alleged offender named in the request has benefited from his criminal conduct.
- 1.308** The second condition is that:
1. relevant property in England and Wales is identified in the external request;
 2. proceedings for an offence have been started in the country from which the external request was made and not concluded; and
 3. there is reasonable cause to believe that the defendant named in the request has benefited from his criminal conduct.

²²² POCA, s 345.

²²³ *Ibid*, s 352.

²²⁴ *Ibid*, s 357.

²²⁵ *Ibid*, s 363.

²²⁶ *Ibid*, s 370.

²²⁷ In the same way, where the United Kingdom seeks the assistance of a foreign state in enforcing a domestic confiscation order under POCA 2002, s 74, any property recovered in the foreign state falls to be dealt with under that state's law and is not automatically remitted to the UK: POCA 2002, s 74(3).

The procedure for applying for a restraint order is set out in CrPR rr 57.15 and 59. The application must be in writing and be supported by a witness statement which must: **1.309**

1. give the grounds for the application;
2. to the best of the witness's ability, give full details of the realizable property in respect of which the applicant is seeking the order and specify the person holding that realizable property;
3. give the grounds for, and full details of, any application for an ancillary order under art 8(4) for the purposes of ensuring that the restraint order is effective.

An application to discharge or vary a restraint order may be made under section 9 of the External Requests Order. **1.310**

Under section 12 of the External Requests Order, if a restraint order is in force, a constable or a relevant officer of Revenue & Customs may seize any property which is specified in it to prevent its removal from England and Wales. Any property so seized must be dealt with in accordance with the directions of the court that made the order. **1.311**

Under section 15 of the External Requests Order the court may appoint a management receiver who may then exercise the powers specified in section 16 in relation to property specified in the order. **1.312**

Part 60 of CrPR contains rules relating to the appointment of management receivers. Chapter 3 of Part 2 of the POCA Order 2005 contains procedural provisions concerning receivers. **1.313**

(ii) **Confiscation orders** The Crown Court's power to enforce an external order is contained in Chapter 2 of the External Requests Order. There are three principal stages in the enforcement of such an order. **1.314**

The first step in the enforcement of an external order following its receipt from a foreign state is its referral by the Secretary of State to either the Director of Public Prosecutions or to the Director of SFO.²²⁸ **1.315**

The relevant director may apply to the Crown Court to give effect to the external order under section 20(1). The request may be made *ex parte* to a judge in chambers and must include a request that the relevant director be appointed as the enforcement authority for the order. **1.316**

²²⁸ SI 2005/3181, s 18.

1.317 The Crown Court must decide to give effect to the external order by registering it where all of the following conditions are satisfied:²²⁹

1. the external order was made consequent on the conviction of the person named in the order and no appeal is outstanding in respect of that conviction;
2. the external order is in force and no appeal is outstanding in respect of it;
3. giving effect to the external order would not be incompatible with the Convention rights (within the meaning of the Human Rights Act 1998 (HRA 1998)) of any person affected by it;
4. where an external order authorizes the confiscation of property other than money the specified property must not be subject to a charge under the legislation specified in section 21(6).

1.318 (iii) **Other orders which may be made in addition to and in aid of restraint orders and external orders** The Crown Court may make such orders as it believes are appropriate for the purpose of ensuring the restraint order is effective.²³⁰ This power relates to assets within the jurisdiction.²³¹ Examples of such orders include:

1. An order requiring the defendant to swear an affidavit as to the whereabouts of his assets.²³²
2. An order for cross-examination on the defendant's disclosure affidavit.²³³ This power should only be used in exceptional circumstances where there are justifiable concerns over whether the defendant has given full disclosure of his assets.²³⁴ The only legitimate purpose of the cross-examination is to establish the extent of a defendant's assets and hence would be unnecessary if sufficient assets are known about to meet the claim.²³⁵
3. An order requiring the defendant to repatriate his assets.²³⁶
4. An order for the delivery up of the defendant's passport.²³⁷

²²⁹ SI 2005/3181, s 21, External Requests and Orders.

²³⁰ SI 2005/3181, s 8(4), External Requests and Orders.

²³¹ *Serious Fraud Office v King* [2008] EWCA 530.

²³² *Re O (Disclosure Order)* [1991] 2 QB 520.

²³³ *A J Bekhor & Co Ltd v Bilton* [1981] QB 923.

²³⁴ *Den Norske Bank ASA v Antonatos* [1999] QB 271.

²³⁵ *Great Future International Ltd v Scarlett* [2000] 1 WLR 515. This was a repatriation order made in ordinary domestic criminal proceedings; however the reasoning is equally applicable to restraint proceedings brought at the instance of a foreign state.

²³⁶ *Director of Public Prosecution v Scarlett* [2000] 1 WLR 515.

²³⁷ For examples of this in freezing orders see *Bayer AG v Winter* [1986] 1 WLR 497 and *B v B* [1997] 3 All ER 258.

(iv) **Provision of information and evidence by the United Kingdom at the request of a foreign state in respect of restraint and confiscation** 1.319
The powers available under Part 8 POCA 2002 and Chapter 4 CICA include:

1. Production orders: orders requiring a specified person appearing to be in possession or control of material to produce it to an appropriate officer for him to take away, or requiring a specified person to give an appropriate officer access to the material.
2. Search and seizure warrants: warrants authorizing an appropriate person to enter and search specified premises and to seize and retain any material found there which is likely to be of substantial value to the civil recovery investigation.
3. Disclosure orders: orders requiring a specified person to answer questions, provide information, and produce documents.
4. Customer information orders: orders requiring financial institutions to provide certain information in relation to a specified customer of the institution.
5. Account monitoring orders: orders requiring financial institutions to provide certain account information in relation to an account held by the financial institution.

(v) **Banking transactions** Chapter 4 of CICA enables the United Kingdom 1.320
to seek from and provide assistance to other countries in relation to banking transactions.²³⁸ Sections 32 to 36 concern requests to the United Kingdom by foreign authorities for information. Sections 43 to 45 concern requests by the United Kingdom to foreign authorities

Customer information orders Section 32 CICA applies to requests for banking 1.321
information. Upon receipt of such a request the Secretary of State may direct a senior police officer to apply, or arrange for a constable to apply, for a customer information order, or direct a senior customs officer to apply, or arrange for a customs officer to apply, for such an order.²³⁹

A customer information order is an order made by a judge that a financial institu- 1.322
tion²⁴⁰ specified in the application for the order must provide any such customer information as it has relating to the person specified in the application.²⁴¹ A financial institution that is required to provide information under a customer information order must provide the information to the applicant for the order in such manner, and at or by such time, as the applicant requires. The definition of

²³⁸ SI 2006/2811.

²³⁹ CICA, s 32(3).

²⁴⁰ As defined in CICA, s 46(4).

²⁴¹ Ibid, s 32(4).

customer information in section 364 POCA has effect for the purposes of section 32 CICA, as if that section were included in Chapter 2 of Part 8 of POCA.²⁴²

- 1.323** A judge may make a customer information order, if he is satisfied that the person specified in the application is subject to an investigation in the country in question; the investigation concerns serious criminal conduct, the conduct constitutes an offence in England and Wales or would do if it occurred there, and the order is sought for the purpose of the investigation.²⁴³
- 1.324** *Account monitoring orders* Section 35 CICA applies to account monitoring orders.
- 1.325** An account monitoring order is an order made by a judge that a financial institution specified in the application for the order must, for the period stated in the order, provide account information of the description specified in the order to the applicant in the manner, and at or by the time or times, stated in the order.²⁴⁴ Account information is information relating to an account or accounts held at the financial institution specified in the application by the person so specified.²⁴⁵

²⁴² Ibid, s 32(6).

²⁴³ Ibid, s 33(1).

²⁴⁴ Ibid, s 35(4).

²⁴⁵ Ibid, s 35(5).