The courts have not yet had an opportunity to explore what sort of interest an otherwise unconnected party will need to establish to have standing to apply for a dissolved company to be restored, but the courts have tentatively suggested that a person who purported to acquire shares or take an assignment of debts in a company which was dissolved may have such an interest.[798] The court has a wide jurisdiction to declare the dissolution of the company void and to restore the company subject to such conditions as it considers just.[799] The discretion of the court is however exercised differently where a company is dissolved subsequently to a liquidation (as opposed to being struck-off). In *Dedyson Enterprises Ltd v Registrar of Corporate Affairs*[800] the court indicated that '[o]rdinarily, a company which has been dissolved … after declaring that a liquidation has been completed should be restored only when necessary for the purpose of either dealing with matters which should have been dealt with in the winding up but were inadvertently overlooked or which have unexpectedly arisen subsequently' and that 'other than in the most exception circumstances … there could be no grounds for restoring a company which had been wound up and dissolved under the provisions of Part XII of the [BVI Business Companies Act] for the purpose of enabling it to resume business or commence some new business.'

2.395 Where the company was dissolved following the termination of its voluntary liquidation,[801] the court shall not restore the company to the Register unless a liquidator is appointed and consents to act, and proper provision is made for the costs of the liquidation.[802] Prior to 2012 there clear judicial authority in the British Virgin Islands that where the court ordered a dissolution set aside then, notwithstanding that the company had been dissolved subsequent to liquidation, it was restored to good standing and was no longer regarded as being in liquidation.[803] However, amendments made to the BVI Business Companies Act in 2012 make clear that a company restored in such circumstances will be restored in liquidation.[804] In appropriate cases an application may then subsequently be made for termination of the liquidation.[805]

2.396 The restoration of the company take effect from the time that the sealed order of the court is filed with the Companies Registry.[806] Where a company is restored to the Register by the court, it is deemed never to have been struck-off.[807] A company is restored to the Register with the name that it had immediately before it was dissolved, or if that company name has been re-used, then it is restored with its company number used as its name.[808]

798 *Re Test Holdings (Clifton) Ltd* [1970] Ch 285 at 289F.
799 Section 218A.
800 BVIHCM 2011/0002 at paragraph [12].
801 Whether the voluntary liquidation was solvent or insolvent.
802 Section 218A(2).
803 *Dedyson Enterprises Ltd v Registrar of Corporate Affairs* (BVIHCM 2011/0002) at paragraph [19].
804 Section 218B(3), inserted by BVI Business Companies (Amendment) Act 2012, section 72.
805 For solvent voluntary liquidations, see section 207A(1). For insolvent liquidations, see section 233(1) of the Insolvency Act 2003.
806 Section 218B(2).
807 Section 218B(6).
808 Section 218B(4) and (5).

Chapter 3

CREDIT AND SECURITY

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1. Introduction

British Virgin Islands companies are often used as asset holding vehicles, either on a standalone basis or as part of a wider group structure. When the beneficial owner of the relevant company or the corporate group of which the company forms a part needs to raise capital through debt financing, there are a number of features of British Virgin Islands law which make it particularly attractive to lenders to structure the transaction either through the relevant British Virgin Islands companies, or using those companies as third party security providers. The main features of British Virgin Islands law which appeal most directly to lenders are: 3.001

(a) clear and simple security registration system for companies;[1]

(b) robust insolvency legislation predicated on protection of the rights of creditors (and in particular, secured creditors);[2]

(c) enforcement of security interests do not normally require applications to court;

(d) companies are permitted to provide financial assistance for the acquisition of their own shares;[3] and

(e) outside of very rare instances,[4] no Governmental or regulatory approval is needed for credit transactions.

The particular aspects of British Virgin Islands insolvency law which make the jurisdiction attractive to creditors include the bifurcated definition of solvency which includes both cash-flow and balance sheet tests, statutory support for set-off, a clear mechanism for the appointment of liquidators, and limited preferential creditors. For secured creditors, both receivership and administrative receivership are codified in the Insolvency Act 2003. Further, although the Insolvency Act contains provisions for administration orders, these have not yet been brought into force.[5] As a result there are no statutory provisions under which a liquidator or competing creditor might seek to impose a moratorium on enforcement of a secured creditor's rights, and, other than limited grounds for avoidance on insolvency[6] or transactions entered into to defraud creditors,[7] a secured creditor can expect its interests to be robustly upheld. 3.002

1 See paragraph 3.071.
2 As to which, see Chapter 7.
3 Section 28(2)(a)(iv) of the BVI Business Companies Act 2004. This considerably simplifies documenting acquisition finance. See paragraph 2.230 above.
4 The two main exceptions are lending to Governmental bodies, which needs to be approved under section 32 of Management of Public Finance Act 2004 and for certain types of secured financing involving regulated entities, which needs to be approved by the Financial Services Commission under the relevant statutes (see e.g. section 14(1) of the Banks and Trust Companies Act 1990). The latter are considered in more depth at paragraph 3.035 and following.
5 Public notices issued by the Financial Services Commission in 2004 indicated that the provisions on administration orders would not be brought into effect until adequate safeguards existed to prevent them being used by structured finance vehicles. Although periodic suggestion is made that the introduction of administration orders could be potentially advantageous for dealing with distressed companies, at the time of writing no serious proposals have been made for introducing administration orders.
6 See generally Part VIII of the Insolvency Act 2003, discussed further at paragraph 7.140 and following.
7 Section 81 of the Conveyancing and Law of Property Act 1961. See further at paragraph 4.046.

3.003 Debt financing transactions are principally regulated by the laws of contract in the British Virgin Islands (subject to applicable rules of the conflict of laws). Much like the law of property in the British Virgin Islands,[8] the law of contract has had relatively little interference from the statutory draftsman, and largely represents the body of common law rules. Whilst it is not appropriate to try and render a complete summary of the laws of contract in the British Virgin Islands, it is helpful to be cognisant of which statutes do *not* exist as part of the body of legislation in the British Virgin Islands.

(1) In the British Virgin Islands there is no Unfair Contract Terms Act. If a party wishes to allege that it should not be bound by a term in a contract on the basis that it is unfair, it will normally be necessary to allege that given the nature of the clause, insufficient steps were taken to bring that clause to the attention of the other party.[9]

(2) In the British Virgin Islands there is no Consumer Credit Act. Generally speaking, British Virgin Islands law does not grant special protection to parties to a contract on the basis that they are consumers, or otherwise subject to an inequality of bargaining power.[10]

(3) In the British Virgin Islands there is no Contracts (Rights of Third Parties) Act. The ordinary common law rules of privity of contract apply.[11]

(4) In the British Virgin Islands there is no Misrepresentation Act. The law relating to misrepresentation is to be found solely in the common law rules.

(5) There is no statutory prohibition on gaming and wagering contracts, and under the common law rules, gaming contracts are valid and enforceable.[12]

(6) There are no usury or interest limitation laws in the British Virgin Islands.[13]

3.004 This general principle of "non-interference" with bargains, combined with the simple registration system to preserve the position of security interests with respect to third parties, and a relaxed approach to the requirement of corporate benefit,[14] have combined to make the British Virgin Islands a particularly friendly jurisdiction for lenders to work with.

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8 As to which, see Chapter 4 below.

9 See e.g. *Thompson v LM & S Railway* [1930] 1 KB 41 and *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163. The probability of a clause in a finance document negotiated at arm's length being struck down by the courts on this basis are remote, although the risk may be greater in pre-printed standard form banking documents.

10 *Pao On v Lau Yiu Long* [1980] AC 614 and *National Westminster Bank plc v Morgan* [1985] AC 686. However the rules of equity relating to unconscionable bargains and undue influence are applicable in the British Virgin Islands - see for example *Aylesford v Morris* (1873) LR 8 Ch App 484 (unconscionable bargains) and *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 703 (undue influence).

11 *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 and *Beswick v Beswick* [1968] AC 58.

12 *Micklefield v Hipgin* (1760) 1 Anst 33; *Good v Elliott* (1790) 3 TR 693 and *Hussey v Crickitt* (1811) 3 Camp 168. Curiously however, it is a criminal offence to allow premises to be used for the purposes of gambling in the British Virgin Islands, see section 301(1) of the Criminal Code 1997.

13 Subject to the one qualification that the court may in some circumstances, upon the application of a liquidator, interfere with an extortionate credit transaction under section 248 of the Insolvency Act 2003. However, there is no general principle upon which an interest rate can be interfered with prior to a company going into insolvency.

14 See paragraph 2.099.

2. Documentation

In practical terms, the vast majority of loan agreements and other credit documentation 3.005
concluded with British Virgin Islands entities will be governed by the laws of another jurisdiction: characteristically, English, Hong Kong or New York law, or a system of law associated with the *lex situs* of commercial transactions or assets. However it is not uncommon to find promissory notes, and more commonly security documents, governed by British Virgin Islands law and in this context it is worth noting a number of areas of British Virgin Islands statutory law which differ from the common law position.

Under the conflicts of laws rules in the British Virgin Islands, where a contract (or 3.006
putative contract) is expressed to be governed by the laws of a foreign jurisdiction, then most of the matters relating to the validity and enforceability of the agreement will be determined by the chosen law. In particular, the governing laws will determine:

(1) if the agreement does in fact constitute a contract;[15]

(2) whether the agreement is valid and enforceable;[16]

(3) the proper interpretation of the contract, and the rights and liabilities of the parties to the contract;[17]

(4) the terms (including any implied terms) of the contract;

(5) discharge of the contract (whether by performance, frustration, breach or otherwise);[18] and

(6) whether the contract is voidable on the basis of mistake, misrepresentation, duress or similar grounds.[19]

Key matters which are not to be (or may not be) determined by the chosen governing 3.007
law include:

(1) Matters which are considered to be matters of procedure. These are a matters for the *lex fori*, and these will include:

(a) the quantum of damages;[20]

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15 *Re Bonancina* [1912] 2 Ch 394; *Albeko Schuhmaschinen v Kamborian Shoe Machine Co Ltd* (1961) 11 LJ 519; *Britannia SS Insurance Association Ltd v Ausonia Assicurazioni SpA* [1984] 2 Lloyd's Rep 98.

16 *R v International Trustee for Protection of Bondholders AG* [1937] AC 500 and *Zivnostenka Banka National Corp v Frankman* [1950] AC 57. However, if the agreement would be unlawful in the place where it is to be performed, then it would not be enforced by the British Virgin Islands courts, even if it were valid under the chosen governing law - see *A V Pound & Co Ltd v M W Hardy & Co Inc* [1956] AC 588 and *Ralli Bros v Cia Naviera Sota y Aznar* [1920] 2 KB 287.

17 *Bonython v Commonwealth of Australia* [1951] AC 201 and *Mount Albert Borough Council v General Mutual, etc. Ltd* [1938] AC 224.

18 *Jacobs v Credit Lyonnais* (1884) 12 QBD 589 and *Compannie d'Armement Maritime v Cie Tunisienne de Navigation SA* [1971] AC 572.

19 *Mackender v Feldia AG* [1967] 2 QB 590.

20 *Coupland v Arabian Gulf Petroleum Co* [1983] 2 All ER 434. However, questions of remoteness of damage and duty to mitigate loss are matters for the proper law, see *D'Almeida Araujo (J) Ltd v Sir Frederick Becker & Co Ltd* [1953] 2 QB 329.

(b) what evidence is permitted to be admitted in relation to the claim - this is particularly important in common law jurisdictions, as many forms of estoppel are treated as a rule of evidence (i.e. whether the party is allowed to lead evidence in relation to the matter which is subject to the estoppel); and

(c) applicable limitation periods.[21]

(2) Whether any corporate entity which is party to the agreement had the necessary capacity to enter into the agreement.[22]

(3) The proper method of executing the contract.[23]

(4) Whether enforcement should be declined on the basis of public policy.[24]

3.008 Because the majority of the significant issues relating to the relevant credit documentation fall to be determined according to the chosen governing law, this reduces the risk for lenders that some unanticipated aspect of British Virgin Islands law might adversely affect a credit transaction which is expressed to be governed by (for example) the laws of Singapore.

(a) Lending and borrowing

3.009 Debt transactions in the British Virgin Islands are normally documented in one of three ways: either as a bond or other form of debt instrument, under a loan agreement (either in the conventional long form, or as a shorter facility letter), or under a promissory note. Promissory notes are considered further below. Generally speaking, outside of certain specific limited exceptions, there are no Governmental or regulatory approvals required to enter into a debt transaction in the British Virgin Islands.[25] Foreign financial institutions do not need licences or approvals to lend to British Virgin Islands companies or individuals.[26] Providing debt securities are not being issued to the public within the British Virgin Islands,[27] there are no general restrictions on British Virgin Islands companies or partnerships issuing debt. Debt financing transactions are not

21 Where the *lex fori* is British Virgin Islands law, the relevant limitation periods will be 6 years for most contractual claims, or 12 years where the action is brought on a deed.

22 *Banco de Bilbao v Sancha* [1938] 2 KB 176. In relation to natural persons, it seems that capacity will be governed by the proper law of the contract, see *Cooper v Cooper* (1888) 13 App Cas 88 and *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240.

23 The conflict of laws position on which law determines whether an agreement has been properly executed is not settled. There is authority support for (i) the law of the place where the contract was made (see *Guépratte v Young* (1851) 4 De G & Sm 217) and (ii) the proper law of the contract (see *Van Grutten v Digby* (1862) 31 Beav 561). The better view is probably that the British Virgin Islands courts will regard a contract as having been validly executed provided that it has been properly executed according to either one. This was the view formerly held by the editors of Dicey Morris & Collins prior to the introduction of the Contracts (Applicable Law) Act 1990 in the United Kingdom.

24 The British Virgin Islands courts will always apply their own public policy limitations on enforcement of agreements, see e.g. *Kaufman v Gerson* [1904] 1 KB 591.

25 See footnote 4.

26 In certain cases, foreign financial institutions may need a licence to solicit persons within the British Virgin Islands to enter into certain types of financial transactions, but this does not normally affect non-resident British Virgin Islands companies. This is considered further below in Chapter 5.

27 As to which see section 25(1) of the Securities and Investment Business Act 2010.

subject to any mandatory filings in the British Virgin Islands, and no notice is required to be given to any public authority in relation to entering in lending transactions.

It is possible to enter into lending transactions without any written documentation; a purely oral loan agreement would be legally enforceable if all the other requirements of a lawful contract were met. Where any person advances money to another person in the absence of any agreement, the usual legal implication is that the advance is by way of loan and that the second person should repay that money unless the "presumption of advancement" applies.[28] The presumption of advancement will apply where a man gives money or property to his wife, fiancée or children. In such cases the implication is reversed: it is for the person advancing the money to establish that it was by way of loan and not a gift. The presumption of advancement is an old common law rule, and does not appear to apply to women,[29] or to grandparents[30] or co-habitees.[31] It has been said that the presumption of advancement is a "weak one", and it has been criticised judicially, but it has never been overturned.[32] 3.010

Where the presumption of advancement does not apply and the person who receives the money (or any related third party) alleges that the money is not repayable, then the burden of proof is upon them to establish this. In *Alfa v Cukurova (No 2)*[33] at first instance the respondent alleged that monies paid to the company were by way of "equity" rather than loans, and the court accepted this even though no shares were issued in consideration of the advances. 3.011

Loan documents are usually structured in a broadly similar format: after any recitals and naming of the parties, they will describe the nature and amount of the relevant facility; they will set out the provisions for calculation and payment of interest; they will set out the mechanical process by which the borrower may draw the loan; they will include a list of covenants which the borrower undertakes to abide by, and a series of representations which the borrower will give which will normally be repeated at regular intervals until the loan is repaid; they will list events of default upon which the lender may accelerate the loan, and these will typically include non-payment, breach of covenants, breach of representations and insolvency; they will include a number of standard mechanical provisions relating to contracts generally; and will normally conclude with an express choice of governing law and the selection of the courts of a particular jurisdiction to determine any disputes in relation to the loan documents. Depending upon the complexity of the loan, there may be additional covenants which deal with syndication and transfers of participation, and treatment of increased costs of borrowing or adverse tax changes. All of these matters are largely regarded as direct matters of contract, and outside of highly unusual cases, the British Virgin Islands courts will not normally interfere with the agreed terms of the parties' 3.012

28 *Seldon v Davidson* [1968] 1 WLR 1083.

29 *Mercier v Mercier* [1903] 2 Ch 98 (wives); *Bennet v Bennet* (1879) 10 Ch D 474 at 478 (mothers).

30 *Silverwood v Silverwood* (1997) 74 P&CR 453.

31 *Lowson v Coombes* [1999] Ch 373.

32 *Pettit v Pettit* [1970] AC 777. '[w]hen there are no living witnesses to a transaction and inferences have to be drawn' it was felt the rule may be of use, but 'I do not think it would often happen that when evidence had been given, the presumption would today have any decisive effect' per Lord Hodson at 811.

33 BVIHCV2007/0072 and 0119. See also paragraph 2.178 above.

bargain. The courts willingness to intervene in such transactions is normally limited to external factors which apply to contracts generally, such as fraud, duress, mistake, misrepresentation and undue influence.

3.013 At present there is no separate regulation of public issues of debt instruments in the British Virgin Islands. Part II of the Securities and Investment Business Act 2010 provides for regulation of public issues of securities within the British Virgin Islands, but at time of writing these provisions have not been brought into force.[34] The provisions do not in any event purport to regulate a public issue of securities where the offer is not made to the public in the British Virgin Islands.[35]

3.014 With effect from 1 January 2012, there are no withholding taxes in the British Virgin Islands applicable to debt transactions. Up until 31 December 2011, it was possible for withholding to be imposed in certain limited circumstances pursuant to the EU savings directive,[36] but with effect from 1 January 2012 the option to withhold tax is no longer applicable.[37] Similarly, there are no exchange controls in force in the British Virgin Islands, and no restrictions on removal of currency. If the relevant loan document has a British Virgin Islands company as a party to it, then it will be exempt from British Virgin Islands stamp duty;[38] but if no British Virgin Islands company is a party, then it will be subject to stamp duty at a nominal rate.[39]

3.015 Where a loan is expressed to be repayable upon demand then there must be a valid demand for the debt to become due. For a valid demand:[40]

> 'there must be a clear intimation that payment is required … ; nothing more is necessary, and the word 'demand' need not be used, neither is the validity of the demand lessened by its being clothed in the language of politeness; it must be of a peremptory character and unconditional, but the nature of the language is immaterial provided it has this effect.'

3.016 The demand does not need to specify the amount.[41] The borrower is only allowed such time as is necessary to effect the mechanics of payment; they do not have any time to

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[34] However, certain activities connected with public issuance of securities may potentially be regulated as "investment business" if conducted in or from within the Territory, see paragraph 5.108.

[35] This would include where an offer is received by a person in the British Virgin Islands; Securities and Investment Business Act 2010, section 25(2)(b). However, for these purposes the receipt by a company incorporated in the British Virgin Islands of an offer at its registered office does not constitute receipt of an offer in the British Virgin Islands under section 25(2)(b).

[36] European Council Directive 2003/48/EC, incorporated into British Virgin Islands law by the Mutual Legal Assistance (Tax Matters) Act 2003.

[37] Mutual Legal Assistance (Tax Matters) (Automatic Exchange of Information) Order 2011.

[38] BVI Business Companies Act 2004, section 242(3).

[39] Stamp Act 1887. If the loan agreement is executed as a deed, then stamp duty is assessed at US$5.00, and if the loan agreement is executed as a simple contract, then stamp duty is assessed at 15¢. Stamp duty is payable on documents executed overseas when they are brought into the Territory.

[40] *Re Colonial Finance, Mortgage, Investment and Guarantee Corp* (1905) SRNSW 6 at 9; cited with approved in *Re a Company* [1985] BCLC 37.

[41] *Bank of Baroda v Penessar* [1987] Ch 335.

try and raise further credit elsewhere except by the lender's indulgence.[42] A term loan is repayable at the end of the term. Unless expressly provided for in the agreement, no further demand for repayment is necessary.[43]

Most written loan agreements will provide that repayments must be made with set-off or deduction with respect to any counterclaim, and case law confirms that such provisions are not contrary to public policy.[44] However upon going into insolvency liquidation, the insolvency set-off under section 150 of the Insolvency Act 2003 will operate automatically unless the creditor has previously waived their right to insolvency set-off. 3.017

Similarly, most written loan agreements will provide for acceleration of the repayment where an event of default occurs. Provided such clauses simply accelerate the debt (including accrued interest) then they will seemingly not be a penalty,[45] but if the clause provides that interest which would have been payable after the default (i.e. future interest) is also payable, then that will constitute a penalty and would not be enforced.[46] 3.018

A loan agreement will characteristically provide for various events of default. The lender is generally entitled to enforce these strictly and in accordance with their terms. There is no obligation on the part of the lender to notify a borrower of potential events of default, or to waive breaches or permit time to remedy them.[47] However, where the loan is secured the courts do have jurisdiction to grant relief from forfeiture. Lenders will often serve an acceleration notice where an event of default has occurred. Where a notice is served incorrectly (i.e. where no event of default is held to have occurred) then the notice is ineffective, but there is no wider liability on the lender for having served an inaccurate notice.[48] 3.019

Where money is lent for a specific purpose and that purpose fails, then the sums are held by the borrower on trust for the lender. The lender has a proprietary claim to the money, even if the borrower subsequently goes into liquidation.[49] If the borrower in fact spends the money the lender should be able to trace their equitable claim into any property acquired, although instances of this being tested before the courts are rare. 3.020

Many loans will be reinforced by security granted either by the borrower or a third party. It is important to understand that the security stands independently of the underlying personal debt obligation. The lender may disregard his security and sue the borrower on the loan,[50] or sue the borrower for any shortfall after enforcing the 3.021

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[42] Ibid.

[43] *Chitty on Contract* (30th ed.) at 38-248.

[44] *Coca-Cola Financial Corp v Finstat International Ltd* [1998] QB 43.

[45] *The Angelic Star* [1988] 1 Lloyd's Rep 122.

[46] Ibid.

[47] *Chitty on Contract* (30th ed.) at 38-253.

[48] *Concord Trust v Law Debenture Trust Corp* [2005] UKHL 27.

[49] *Re Nanwa Gold Mines Ltd* [1955] 1 WLR 1080.

[50] *China and Southsea Bank v Tan Soon Gin* [1990] 1 AC 536 at 545.

CHAPTER 7

INSOLVENCY LAW

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1. Introduction

The laws of the British Virgin Islands relating to insolvency and financial distress were 7.001
substantially rewritten and codified in 2003 with the passing into law of the Insolvency Act 2003.[1] The Insolvency Act was brought into force on 1 January 2004, save that Parts III (Administration) and XVIII (Cross-border Insolvency) were not brought into force, and at the time of writing have still not been brought into force. The provisions of Parts VIII (Voidable transactions) and IX (Malpractice) were not given retrospective effect when the statute was brought into force, and so only regulate matters subsequent to that date.

Since then the Insolvency Act 2003 has been amended only twice, both times in 2004, 7.002
which is an unusual degree of stasis for a commercial statute in the British Virgin Islands. Arguably, insolvency law in the jurisdiction has been too static. It took over a year after the Insolvency Act came into force before the Insolvency Rules 2005[2] were promulgated. Given that certain key matters had been deferred to the Insolvency Rules (including the classes of preferred creditors) this left liquidators during the intervening period in some difficulty. Some matters which are stated in the principal Act to be dealt with by way of subsidiary legislation have still not been addressed.[3]

Nonetheless, the lack of legislative intervention in relation to the Insolvency Act 2003 7.003
is largely regarded as an affirmation of strength rather than an indication of weakness. During the financial crisis which engulfed the world following the collapse of Lehman Brothers in late 2008, the British Virgin Islands' insolvency regime was required to deal with a number of complex bankruptcies which had fact patterns which could not have been remotely contemplated by the original draftsmen. Nonetheless, the matters were administered and the regime remained true to its core values of protection of creditors' rights and cross-border cooperation.

British Virgin Islands Insolvency law is predicated heavily towards the protection of 7.004
secured creditors' rights.[4] On the face of it, that is unsurprising - the economy of the British Virgin Islands revolves to a large degree around the use of offshore companies, a great many of which are used in structured financing transactions. Anything which operated as a fetter on the ability of secured creditors to have recourse to their collateral would be highly deleterious to the financial services industry in the British Virgin Islands.

In this chapter we consider only insolvency laws as they apply to companies. The 7.005
bankruptcy of individuals is not addressed as it is beyond the scope of this work, and (as noted above) it is unclear as yet which provisions of the Insolvency Act 2003 will apply to partnerships.[5]

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[1] Unless otherwise indicated, references in this chapter to sections, parts or schedules are to sections and parts of and schedules to the Insolvency Act 2003.
[2] SI No 45 of 2005.
[3] See for example, sections 499 and 500 deferring treatment of insolvent partnership and insolvent estates to the Insolvency Rules. No such rules have yet been promulgated.
[4] See for example, section 15(4), section 175(2) and section 467(4).
[5] The treatment of partnerships in financial distress is considered at paragraph 10.152 and following below.

2. Insolvency

7.006 For the purposes of British Virgin Islands law, a company will be regarded as insolvent in any of four following circumstances:[6]

(1) *Cash-flow insolvency*. If a company cannot pay its debts as they fall due.

(2) *Balance sheet insolvency*. If the value of a company's liabilities exceeds the value of its assets.

(3) *Technical insolvency*. Irrespective of the true financial position, a company will be deemed to be insolvent if either:

(a) it fails to comply with the requirements of a valid statutory demand, or

(b) execution on a judgment or other order of a British Virgin Islands court in favour of a creditor of the company is returned wholly or partly unsatisfied.

7.007 Any of these grounds will serve as the basis for making an application to appoint a liquidator on the grounds of the company's insolvency. However, being deemed to be insolvent has other effects under the legislation other than merely permitting a creditor to apply for the appointment of a liquidator. With respect to certain of these other consequences, only some of the above grounds will be relevant. For example, where it is alleged by a liquidator that a transaction entered into by the company should be voidable under Part VII of the Insolvency Act 2003, it is necessary to demonstrate that at the time of the transaction the company was insolvent or that the transaction caused it to be insolvent,[7] but for these purposes, insolvency excludes balance sheet insolvency.[8] Similarly, a company is not permitted to declare a dividend or make any other distribution to shareholders if it is cash-flow or balance sheet insolvent, but there is no stricture against doing so due to technical insolvency.[9]

7.008 Conversely, the mere fact of insolvency does not itself automatically lead to liquidation. The appointment of a liquidator normally depends upon a creditor making the relevant application to court. Many companies have survived for long periods of time without any application being made; eventually many fail, but some will trade out of their difficulties.

7.009 If a company becomes insolvent, then the board of directors ceases to owe its duties to the shareholders - it owes its duty to act in the best interests of the creditors, being the persons who are beneficially entitled to the company's assets.[10] There are various suggestions that the directors' duties may be owed to creditors even if the company

[6] Section 8(1).

[7] The requirement that the company was insolvent, or the transaction caused it to be insolvent, does not apply to extortionate credit transactions under section 248. See generally further below at paragraph 7.154.

[8] Section 244(3).

[9] BVI Business Companies Act 2004, section 56 and 58(1).

[10] *West Mercia Safetywear Ltd v Dodd* (1988) 4 BCC 30; *Yukong Lines Ltd of Korea Rendsburg Investments Corp* [1998] BCC 870; *Re Cityspan Ltd* [2007] EWHC 751 (Ch).

is only near insolvency or of doubtful solvency.[11] If, in addition to being insolvent, the directors form (or should form) the view that the company cannot trade out of its difficulties and avoid insolvent liquidation, they become subject to stringent duties under the provisions of the Insolvency Act 2003 relating to insolvent trading.[12]

When considering the relevant tests for insolvency, it is important to be clear when the relevant provision requires consideration of a "debt" (cash-flow insolvency) and when it requires consideration of a "liability" (balance sheet insolvency). A liability is defined as 'a liability to pay money or money's worth including a liability under an enactment, a liability in contract, tort or bailment, a liability for a breach of trust and a liability arising out of an obligation to make restitution, *and "liability" includes a debt*' (emphasis added).[13] The statute does not define a debt. 7.010

(a) Cash-flow insolvency

A company is insolvent on the cash-flow basis if it cannot pay its debts as they fall due. The provision is confined to debts rather than liabilities, although a debt that is due but for an unascertained sum, such as an order for costs that has not been taxed, would suffice.[14] As regards future or contingent debts, although these would establish the standing of a creditor to apply for liquidation, the court may be unable to infer insolvency on the basis of such a debt which by definition would not be due at the time of the application, and therefore additional evidence would need to show that the company was insolvent. 7.011

The well known case of *Cornhill Insurance plc v Improvement Services Ltd*[15] demonstrates that failure to pay a debt that is due and which is not disputed is sufficient evidence of insolvency, even if there is other evidence showing that the company has a substantial surplus of assets over liabilities. 7.012

Whether or not a company can pay its debts as they fall due is essentially a question of fact. An applicant for an order can seek to establish this fact in a number of different ways, including (for example) the company's failure to pay invoices[16] or a lack of available assets for execution.[17] The ability of the debtor to pay off its debts, if given sufficient time, is generally not a good reason to regard the company as solvent.[18] 7.013

The statutory wording provides only that the company must be unable to pay its debts "as they fall due". There is no definition of the time at which that issue is to be ascertained. This test may be satisfied at some times and not others for a company which is on the brink of insolvency. Historically the court would look at the position at the time of the application and will try to ascertain whether the company is 7.014

[11] *Gwyer v London Wharf (Limehouse) Ltd* [2003] BCLC 153; *Brady v Brady* (1988) 3 BCC 535 at 632.

[12] See paragraph 7.192 below.

[13] Section 10.

[14] *Tottenham Hotspur plc v Edennote plc* [1995] 1 BCLC 65.

[15] [1986] 1 WLR 114.

[16] *Re DKG Contractors Ltd* [1990] BCC 903.

[17] *Re Douglas Griggs Engineering Limited* [1963] Ch 19.

[18] *Re Attiwill* (1932) 5 ABC 54.

actually paying its debtors. However, in England and Australia some courts have held that they can also look to the future to see what debts will fall due and whether the company will be able to pay them. In *Re Cheyne Finance plc*[19] the court was prepared to hold that if it was established that a company would become unable to pay its creditors in the future, then that would constitute cash-flow insolvency even if at the time of the application it was able to meet its obligations.[20] On the face of it this seems inconsistent with the general tenor of the statutory provisions and the way that they have previously been interpreted. It has been pointed out that the case was not technically an application for the appointment of a liquidator, but rather the construction of a provision in a finance document which used the statutory definition. Further, by definition, a future debt is one which has not become due at the time of the application. Finally, it also seems to go against the grain of established authority which shows that when applying the cash-flow test, the court is not entitled to take account of a hope or expectation of future funds being made available.[21] However, the better view is that *Cheyne Finance* was correctly decided, and should be followed in the British Virgin Islands. In that case, the company was a special purpose financing vehicle, and it was perfectly possible for the court to see that it "would" become cash-flow insolvent once the relevant assets had been exhausted. That is quite different from the situation where the court was being asked to speculate about whether further funds might become available. It is also consistent with earlier authorities which show that when a debtor is able to pay agreed instalments on a debt, the fact that they are unable to discharge the debt in totality is not a sufficient basis for an order.[22]

7.015 Historically in the British Virgin Islands where creditors wished to put a company into liquidation on the basis of cash-flow insolvency it was conventional to serve a statutory demand to benefit from the automatic statutory conclusion of insolvency. Recent practice has tended to move towards omitting the statutory demand as an interim step, and simply making an application on the basis of the unpaid debt. In appropriate cases this is entirely sensible.[23]

(b) Balance sheet insolvency

7.016 To be regarded as balance sheet insolvent, the liabilities of the company must exceed its assets, and liabilities for this purpose is given a wide definition in section 10 going beyond debts: it will include liability under an enactment, in contract, tort or bailment, liability for breach of trust, and liability to make restitution.[24] Further, the liabilities can be present, future or contingent, liquidated or unascertained.[25]

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19 [2007] EWHC 2402 (Ch).
20 Although the decision was regarded as controversial when made, it was following established Australian precedent: *Bank of Australia v Hall* (1907) 4 CLR 1514 at 1528.
21 *Byblos Bank v Al-Khudairy* (1986) 2 BCC 99, 549.
22 *Re a Debtor (17 of 1966)* [1967] 1 All ER 668.
23 *Re Taylor's Industrial Flooring* [1990] BCC 44 at 49.
24 Section 10(1).
25 Section 10(2).

The United Kingdom Supreme Court recently had an opportunity to closely consider 7.017
issues relating to balance sheet insolvency in *BNY Corporate Trustee Services Ltd v Eurosail-UK-2007-3BL plc*.[26] However it seems likely that much of the guidance offered by the Supreme Court would not assist in the application of the balance sheet test for insolvency under British Virgin Islands law for two particular reasons. Firstly, under the relevant English legislation the balance sheet test is used as a basis upon which a court may hold that a company is 'unable to pay its debts as they fall due'. In the British Virgin Islands under the Insolvency Act 2003 the relevant test is to establish "insolvency". Accordingly, much of the commentary in the judgment of Lord Walker about whether a company could properly be said to be unable to pay its debts as they fall due would be inapt in relation to the statutory test in the British Virgin Islands which eschews reference to the core part of the test. Secondly, under the English legislation the courts are required to "take account of" prospective and contingent debts, and that involves a qualitative assessment of the impact of such debts. However, under British Virgin Islands law there is no similar requirement – the shorter test under the Insolvency Act 2003 only requires that the liabilities exceed the assets, and liabilities are defined specifically to include contingent and prospective debts without any qualifying words such as "take account of".[27] Accordingly under British Virgin Islands law there would appear to be a real risk of the situation identified by Lord Walker in the *Eurosail* case as being highly undesirable whereby a company whose assets value dipped briefly below the value of its liabilities in absolute terms could be wound up even if it was generally viable.[28] In the British Virgin Islands that concern is probably met by the decision of the Court of Appeal in *Trade and Commerce Bank v Island Point Properties S.A.*[29] which affirmed that notwithstanding that a company might be insolvent under the statutory test, the courts still had a discretion as to whether or to make the order for the appointment of a liquidator.

Applications to appoint a liquidator on the basis of balance sheet insolvency are 7.018
extremely rare. Normally the financial position of a company's balance sheet is such that a great deal of insider knowledge would be needed to ascertain the true position at any given time, and may require expert analysis. For the purposes of the test, only assets which are owned by the company are taken into account.[30]

(c) Statutory demands

A statutory demand is a formal written request for payment of a debt. The statutory 7.019
demand must be in writing in a form that complies with the Insolvency Act 2003 and the Insolvency Rules 2005, and must be for a debt above the prescribed minimum.[31]

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26 [2013] 1 WLR 1408.
27 Section 10(2).
28 *BNY Corporate Trustee Services Ltd v Eurosail-UK-2007-3BL plc* [2013] 1 WLR 1408 at paragraphs 40, 41.
29 BVICA 2009/0012.
30 *Re National Livestock Insurance Co* (1858) 26 Beav 153.
31 At present this is US$2,000. Insolvency Rules 2005, rule 149.

It must require the company to pay the debt or secure or compound it to the creditor's satisfaction within 21 days of service. The demand must be in respect of a debt that is due and payable at the time of the demand,[32] so a contingent debt would be outside its scope if the contingency has not occurred at the time of the demand.[33] If the company fails to pay or secure the debt within the 21 days, and the demand is not set aside, the company is deemed to be insolvent.

7.020 An application to set aside a statutory demand must be made within 14 days of the service of the demand,[34] and the grounds for setting it aside are set out in section 157. The court is required to set the demand aside if:

(a) there is a substantial dispute as to whether the debt is owing, or whether it exceeds the prescribed minimum;

(b) the company has a cross-claim that equals or exceeds the debt in the demand, or which would bring it below the statutory minimum; or

(c) the creditor holds security equal to or exceeding the debt, or which would bring it below the statutory minimum.

7.021 Furthermore the court may in its discretion set aside a statutory demand if it is satisfied that there would be a substantial injustice because there is a defect in the demand or for some other reason.[35]

7.022 The time limit in the legislation is expressed to be strict. Once the 14 days have passed, the court no longer has jurisdiction to set aside the statutory demand. On the face of it, this is harsh. As noted previously, most British Virgin Islands companies are based offshore, and there is inevitably a time delay between service of the statutory demand, and when it comes to the attention of the directors of the company. The directors are usually reliant upon the registered agent promptly forwarding the demand when it is received at the registered office. However, in practice, days can be lost quickly due to public holidays in different jurisdictions, and different time zones, and the 14 days in which to instruct British Virgin Islands lawyers to make an application to set aside a demand can shrink rapidly. The court has no power to extend this period, and up until 2008 the courts had repeatedly affirmed that this deadline is "strict".[36]

7.023 However despite the clear legislative intention that demands should not be set aside after the 14 day window, the Court of Appeal decision in *Trade and Commerce Bank v Island Point Properties S.A.*[37] largely turned the previous law on its head, and mitigated much of the harshness attendant on a short and inflexible time period. In that case the appellant had served a statutory demand upon the registered office of the company. The company had failed to make an application to set aside the statutory demand within

[32] Section 155(2)(a).
[33] *JSF Finance & Currency Exchange v Akma Solutions Inc* [2001] 2 BCLC 307.
[34] Section 156(1).
[35] Section 156(2).
[36] *China Alarm Holdings Limited v China Alarm Holdings Acquisitions LLC* (BVIHCV 2008/0385).
[37] BVICA 2009/0012.

the prescribed time, and the debt was not paid, resulting in the appellant's application to liquidate the company. At first instance the company did not appear, possibly in reliance on the previous decision of the British Virgin Islands High Court in *Metalloyd Ltd v Burwill Resources*[38] which had once again affirmed that a company which failed to set aside a statutory demand within the time frame permitted by the Insolvency Act 2003 could not then dispute the debt at the application to appoint a liquidator. Instead, the sole beneficial owner of the company filed a Notice of Appearance and was heard *de bene esse* by the court. The High Court dismissed the application to appoint a liquidator on the basis that the statutory demand disclosed no viable cause of action, whether in debt or at all. On appeal the appellant's main argument was that once a statutory demand had not been set aside and the legal conclusion of "insolvency" under section 8(1)(c) arose, then the appointment of a liquidator on the basis of insolvency was inevitable and the court had no residual discretion to examine the statutory demand, even if the statutory demand had been irregular. Otherwise, it was argued, the legal conclusion of "insolvency" mandated by the legislation would be rendered meaningless.

The Court of Appeal unceremoniously dismissed the appeal. Their most important 7.024
finding was that the decision in *Metalloyd* did not mean that a company's failure to challenge a statutory demand deprived the court of its inherent jurisdiction to review a statutory demand. This would render otiose the discretion of the court under section 167. The Court of Appeal chose to distinguish (but not overrule) *Metalloyd.* The Court affirmed that where a company had been unsuccessful in setting aside a statutory demand having made an application to do so, the company could not later have a second bite at the cherry and seek to resist an application to appoint liquidators on the same grounds on which it relied for setting aside the demand, unless there were "good and substantial reasons" to do so. The addition of the "good and substantial reasons" test acts as a safety valve which prevents the company from being shut out without exception.[39] However the Court of Appeal appeared willing to be more flexible where no application had been made to set aside the demand at all. In such cases the Court of Appeal felt that it had the necessary discretion, in particular under section 167 of the Insolvency Act 2003, to assess the validity of the statutory demand.[40]

Clearly a great deal of care is needed with respect to this line of authorities. There is 7.025
no doubt that the previous position, whereby the recipient of a statutory demand had an extremely small window in which to make a challenge combined with the courts' insistence that there was no jurisdiction to extend the time for challenge was harsh, and led to undesirable outcomes. It also seems clear that this harshness was uppermost in the Court of Appeals mind in reaching their conclusions.[41] However, where a statute is unduly harsh but clear, then the proper redress is to amend the statute. Whilst as a

[38] BVIHCV 2006/0083.
[39] *Trade and Commerce Bank v Island Point Properties S.A.* (BVICA 2009/0012) at paragraph 21.
[40] Ibid., at paragraph 22.
[41] Ibid. '…a perfectly healthy and profitable company could find itself being killed off on a wholly fallacious or contrived basis and being wholly deprived of the ability to defend itself from the attach merely because, due to no fault of its own, it missed the deadline for setting aside an utterly bad demand.' at paragraph 22.

Chapter 9

TRUSTS

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1. Overview

(a) Introduction

9.001 The general principles of British Virgin Islands trust law are derived from the principles of English common law and equity. These principles are supplemented by statute, primarily via the Trustee Act 1961 (as amended by the Trustee (Amendment) Act 1993 and Trustee (Amendment) Act 2003)[1] which is principally based upon the English Trustee Act 1925. Other key British Virgin Islands legislation which has affected trusts in the Territory, and which will be reviewed in this chapter is the Virgin Islands Special Trusts Act 2003 and the Financial Services (Exemptions) Regulations 2007. Otherwise the fundamental principles of trust law are largely drawn from the common law and the rules of equity.

9.002 In this chapter we seek to broadly summarise the law of trusts as it relates to commercial structures, which will involve focusing upon express trusts. We do not consider in any depth the law as it relates to constructive or resulting trusts, or the tracing of assets, or other trusts which arise solely by operation of law rather than express grant. Nor do we consider particular aspects of trusts commonly referred to as *Quistclose* trusts[2] or *Kayford* trusts,[3] although these are considered to some degree in Chapter 7.[4]

(b) The meaning of "trust"

9.003 The Trustee Act 1961 states that the term "trust" refers to 'the legal relationship created, either inter vivos or on death, by a settlor when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a special purpose.'[5] However, as has been noted elsewhere,[6] there is no really satisfactory definition of what amounts to a trust. Perhaps the most useful description of the key characteristics of a trust may be that adopted by Lewin: '[an arrangement] in which the legal owner of property is constrained by a court of equity so to deal with it as to give effect to the equitable rights of another.'[7]

9.004 The Trustee Act 1961 further provides that a trust has the following characteristics:[8]

(a) the assets constitute a separate fund and are not part of the trustee's own estate;

(b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee; and

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1 Unless otherwise indicated, references in this chapter to sections are to sections of the Trustee Act 1961.
2 See *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 and *Twinsectra v Yardley* [2002] UKHL 12.
3 See *Re Kayford* [1975] 1 WLR 279.
4 See paragraphs 7.097 and 7.103.
5 Section 2(2).
6 *Lewin on Trusts* (18th ed., 2008) at para 1-01.
7 Ibid., citing *Re Astor's Settlement Trusts* [1952] Ch 534 at 541 and *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 705, 709.
8 Section 2(3).

(c) the trustee has the power and the duty in respect of which he is accountable to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed on him by law.

9.005 Lastly, it is provided in the legislation that 'the reservation by the settlor of certain rights and powers, and the fact the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust'.[9]

9.006 A key element of trust law, and the concept of a trust in general, is the range of duties, primarily fiduciary, which the trustees owe to the beneficiaries and how the beneficiaries are able to bring the trustees to account if they have not discharged their duties to the standard of care required of them. The key concept underlying the trust principle is to separate the legal incidents of ownership between the trustee (who will hold the legal title) and the beneficiary (who will hold the beneficial interest, or equitable title).

(c) Principal parties

(i) *The settlor*

9.007 The transferor of property to a trustee to hold on trust is commonly known as the settlor of the trust. Any individual of sound mind over 18 years of age may be settlor of a trust. A corporation may also be settlor unless prohibited by its constitution. Additionally, persons other than the original settlor may contribute property to a trust unless this is expressly prohibited in the trust instrument.

(ii) *The beneficiaries*

9.008 The beneficiaries are those for whom the trustee holds the trust assets to benefit. In the jurisdiction, beneficiaries may be individuals (including unborn persons, minors and persons of unsound mind), corporate bodies, the trust's settlor, a trustee, charitable organisations and purposes or non-charitable purposes.[10] The principal right of the beneficiaries is to compel the trustee to account for the economic benefits derived from the trust property. A beneficiary is regarded as the equitable owner of the trust property, but only to the extent of his entitlement under the trust instrument and under the general law.

(iii) *The trustees*

9.009 The office of trustee is potentially onerous and, like all fiduciary positions, should not be taken on without due consideration. Any individual of sound mind over 18 years of age may be a trustee of a British Virgin Islands trust.[11] In order to hold the office of corporate trustee, a company will normally need hold a licence to carry on trust business in or from within the Territory under the Banks and Trust Companies Act 1990 unless it qualifies for an exemption, most usually on the grounds that it is a Private Trust Company carrying on either "related trust business"[12] or

[9] Section 2(4).
[10] In relation to non-charitable purpose trusts, see paragraph 9.103 below.
[11] Age of Majority Act 1994.
[12] Paragraph 1, Part I of the Schedule to Financial Services (Exemptions) Regulations 2007.

"unremunerated trust business."[13] Considerations relating to the licensing of trustees have been considered previously in Chapter 5.[14]

(iv) *The protectors*

9.010 Although it has been common practice for some time for certain powers to be conferred on individuals other than the trustees or to require that specific powers are only exercisable by the trustees with the consent of third parties, it is only in more recent times, especially in offshore jurisdictions, that these functions have often become the responsibility of protectors. A trust instrument in the jurisdiction may contain provisions relating to the appointment of a protector of a trust. The office of protector is recognised by statute.[15] Trust instruments may accordingly require that certain trustee powers are only exercisable with protector consent or may confer on the protector powers which are usually vested in the trustee.[16]

(d) Forms of express trusts

(i) *Discretionary trusts and fixed interest trusts*

9.011 Express trusts are those which are intentionally created, most commonly by a settlor transferring assets to a third party trustee to hold on specific trusts or by a settlor declaring himself to be a trustee holding the trust assets on trusts as declared. Where assets are transferred to a trustee, the trust instrument may be in the form of a declaration of trust by the trustee or a settlement deed to which the settlor and trustees will both be parties.

9.012 Non-purpose trusts are known as private trusts where trust property is held for the benefit of either a named individual or a specified class of individuals. British Virgin Islands private trusts may be discretionary or fixed interest in nature. However, in the main the majority of professionally prepared trust instruments tend to be created as discretionary trusts. These are trusts where the distributions of trust capital and income between a class of beneficiaries are at the discretion of the trustee with the result that no beneficiary can oblige the trustee to distribute trust capital or income. Discretionary trusts thus offer a high level of flexibility, especially, as is usual, where there is a power to add to or remove from the class of beneficiaries. Such power may be vested in the trustees, protector or settlor.

(ii) *Protective trusts*

9.013 Protective trusts are something of a hybrid between fixed interests trusts and discretionary trusts. They occur where trust assets are held for the benefit of "the principal beneficiary" such that he has a right to receive the income from the trust assets or otherwise enjoy them (i.e. a fixed interest). However if he takes any action to deprive himself of these rights (for example by attempting to assign his beneficial

[13] Paragraph 2, Part I of the Schedule to Financial Services (Exemptions) Regulations 2007.
[14] See paragraph 5.158.
[15] Section 86.
[16] See paragraph 9.132.

interest), his beneficial interest will determine (technically it is forfeited) and instead the trust assets will held on discretionary trusts for the principal beneficiary, his spouse, children and remoter issue or if none of these persons, other than the principal beneficiary, are in existence, for those who would be entitled if the principal beneficiary were dead.[17] Protective trusts are therefore of particular appeal where a settlor is keen to ensure that a reckless beneficiary is not able to "lose" his interest in a trust by his own financial imprudence or reckless actions.

(iii) *Purpose trusts*

9.014 Historically, trusts have also been established for the advancement or furtherance of charitable purposes, which are sometimes known as public trusts. However, it is now possible in the Territory, as it is in other offshore jurisdictions, to constitute a trust for the benefit of non-charitable purposes. Such vehicles are often used in commercial contexts and are discussed in more detail below.[18]

(e) Requirements of a valid trust

9.015 The creation of a valid trust is largely regulated by the rules of common law. The principal requirements are often abbreviated to the "three certainties".[19] In order to create a trust the settlor must indicate certainty of intention, certainty of subject matter, and certainty of beneficiaries (or objects).

(i) *The three certainties*

9.016 Firstly, the settlor must intend to create a trust, but there is no one prescribed way in which this must be achieved. This limb of the three certainties has also been termed "certainty of words",[20] but a fundamental maxim of equity is that it will look to intent rather than to form and this may enable a trust to be inferred by the conduct of the involved parties and other circumstances relevant to the situation.[21] The position may be complicated in circumstances where a settlor expressed an intention to create a trust, but did not in fact have the intention to create a trust on the terms declared; such trusts may be disregarded as a "sham".[22]

9.017 Secondly, one must be able to ascertain exactly all the property which is subject to a trust. For example, "the bulk of" the property[23] and, in the British Virgin Islands decision of *Re Pagarani*,[24] "all my wealth", have both been held as ineffective to create a trust, primarily because the subject matter in each case was not ascertainable. If there is uncertainty as to subject matter, the trust assets will remain in the legal ownership of the settlor and no trust will be created.

17 Section 34.
18 See paragraph 9.103.
19 *Knight v Knight* (1840) 3 Beav 148.
20 *Lewin on Trusts* (18th ed., 2008) at para 4-04.
21 *Paul v Constance* [1977] 1 WLR 527, CA.
22 See paragraph 9.138 below in the context of reserved powers.
23 *Palmer v Simmonds* [1854] 2 Drew 221.
24 *Pagarani v T Choithram International SA* (unrep., High Court of Justice BVI, Suit No 184 of 192).

Thirdly, a trust will fail if it is unenforceable because there is uncertainty as to the beneficiaries who are able to bring the trustees to account (unless it is a charitable trust or a non-charitable purpose trust). In the context of fixed interest trusts, this requires that the trustees are able to draw up a complete list of those who are intended to benefit under the trust.[25] However, when one is dealing with a discretionary trust, the rule has been relaxed from a "complete list test" to a "class test" since the decision in *McPhail v Doulton*.[26] It is now sufficient to be able to say with certainty whether any individual is or is not a member of a class of beneficiaries. However, even with this in mind, a trust may still fail if a conceptually certain beneficial class is so large as to make it administratively unworkable.[27] 9.018

(ii) *Shams*

Where a settlor purports to declare assets to be held on trust, but in actual fact has no intention of doing so, such a declaration may be disregarded as a "sham". For example, in *Midland Bank v Wyatt*[28] the court was satisfied that although the settlor had executed the relevant trust instrument, it was "not to be acted on but put in the safe for a rainy day". The implication being that the settlor intended to treat the property as his own, but should circumstances arise whereby he wished to demonstrate that he was not the beneficial owner of the relevant assets, the trust instrument could at that time be produced as evidence of this, but would otherwise never be revealed. Interesting applications to have a trust set aside as a sham are not infrequently made by the settlor himself, for example when assets are purportedly held on trust for a spouse, but the marriage subsequently breaks down.[29] 9.019

Although the rules are relatively straightforward to state, ascertaining whether facts amount to a sham can present greater problems in practice. It is important to try and distinguish motive from intent. A settlor might well have the motive of seeking to put his assets beyond the reach of his creditors by declaring that they are held on trust for his family. The fact that this motive may be improper does not mean that the trust itself is invalid for this reason only,[30] any more than if he had transferred absolute legal title to those assets to another member of his family.[31] So long as the party has a genuine *intention* to create the trust, their *motive* for doing so is not relevant to the validity of the trust. 9.020

Where a trust is found to be a sham, the general effect is that the trust is treated as absolutely void, and the property is regarded as beneficially owned by the settlor. However, there have been judicial comments which have indicated that where a trust is found to be a sham, the settlor may be precluded from pleading his own wrong against the revenue authorities.[32] 9.021

25 *Whitshaw v Stephens* [1970] AC 508 HL.
26 [1970] AC 424.
27 *R v District Auditor, ex p West Yorkshire County Council* [1986] 26 RVR 24.
28 [1997] 1 BCLC 242.
29 See for example *Minwalla v Minwalla* [2004] EWHC 2823.
30 *Miles v Bull* [1969] 1 QB 258.
31 The proper recourse in such circumstances would be to make an application under section 81 of the Conveyancing and Law of Property Act 1961 or under Part XIV of the Insolvency Act 2003 to set aside the declarations of trust (or transfers).
32 *Commissioner of Stamp Duties (Queensland) v Jolliffe* [1920] 28 CLR 178.

(f) Trustees

9.022 As with all fiduciary roles, the office of trustee carries with it many responsibilities. Commonly, the process of selection on the part of the settlor will involve a careful analysis of the experience of the potential trustee, whether individual or corporate, and their suitability to the specifics of the trust in question, in terms of the nature of the underlying trust assets, their administration and the ongoing relationship with the beneficiaries (and settlor).

9.023 Most commonly, a trustee's acceptance of the position will take place by signing the trust deed, although such acceptance may also be implied from conduct in relation to the trust assets, such as by receiving trust property. Trustees cannot be obliged to act and so are able to disclaim the office at any point prior to acceptance.

9.024 As soon as a trustee has accepted the position, the full spectrum of trustee duties will become applicable and must be discharged with the appropriate standard of care. As a result, a trustee is well advised to ascertain certain information about the trust, its assets, its beneficiaries and so on prior to accepting the office. It is also imperative that trustees ensure they are aware of how the trust operates, the personal nature of their responsibilities and that they are not going to be in a position of conflict as between their own personal self interests and their fiduciary duties as trustees.

(i) *Appointment and discharge of trustees*

9.025 Except for certain anomalous cases relating to trusts of land in the British Virgin Islands,[33] there are no restrictions on the number of trustees which may be appointed in relation to a trust. This remains subject to the overarching common law rule that the trust must not be administratively unworkable.

9.026 As a general rule the first trustees of a trust are appointed by the trust instrument. After the constitution of a trust, the settlor will no longer have power to appoint new trustees unless this is expressly reserved to him in the trust instrument. Such a reservation is common in the Territory, although the power to appoint new trustees is also frequently conferred on the protector. It is also increasingly commonplace for a power to remove the trustees to be reserved to the settlor or the protector.

9.027 The Trustee Act 1961 provides that, where a trustee dies or remains outside the jurisdiction for more than 12 months or wishes to be discharged, and where the trust instrument makes no provision as to the person nominated for the purpose of appointing new trustees or where such person is unable or unwilling to do so, the continuing trustees or the personal representatives of the last surviving trustee may appoint a new trustee in his, her or their place.[34] It is now common practice in trust instruments in the Territory to exclude expressly the statutory provision that a trustee may be replaced if he has remained outside the British Virgin Islands for 12 months.

[33] Section 35(1). Trusts of land may have no more than four trustees.
[34] Section 36(1).

9.028 Trustees have a statutory power to appoint additional trustees, unless the trust instrument gives that power to another person. The power to appoint additional trustees may not be used to increase the number of trustees in office to above four.[35]

9.029 Where a trustee wishes to retire, he may do so by deed if his co-trustees and any person empowered to appoint trustees (pursuant to the trust instrument) consent by deed.[36] This is not necessary where the retiring trustee is being replaced by a new trustee. Additionally the court has power to appoint new trustees or replace existing trustees in a variety of circumstances, such as when a trustee has become bankrupt or of unsound mind.[37]

9.030 Modern practice dictates that retiring trustees will now seek to be indemnified from the trust fund for any future liabilities in connection with the trust which they will suffer as a result of their former trusteeship. Importantly, however, the retiring trustee cannot be put in a better position than that which he enjoyed during his time as trustee and thus the indemnity provided by the new or continuing trustees cannot be more extensive than that which is provided in the trust instrument and which applies to the new and continuing trustees. It is therefore unusual nowadays for the deeds under which any change of trustees is affected not to contain a form of indemnity to any retiring trustees.

(ii) *Trustees' duties*

9.031 Trustees stand in a unique position in that they are legal owners of assets which they hold, not for themselves, but for the benefit of others or for the advancement of a purpose. The trustees are thereby responsible both to the beneficiaries and to the outside world. Although there is a certain degree of flexibility in relation to modifying trustees' duties in the trust instrument, there are certain duties which are said to form an "irreducible core" under the general law.[38] If a trust instrument seeks to derogate from or exclude those core duties, then the offending provisions would be regarded as void, or the resulting relationship would not be regarded as a trust as it would be regarded as manifestly inconsistent with basic trust principles. These core obligations include (i) not to act fraudulently towards the beneficiaries; (ii) to be legally accountable towards the beneficiaries for management of the trust assets; and (iii) to preserve the trust property as a fund separate from the trustee's personal assets.

9.032 Trustees hold a fiduciary position and it is therefore implicit that they must always act in good faith. The law imposes numerous duties and responsibilities on them, with the key duty being to administer the trust and manage the trust property prudently for the benefit of the beneficiaries or furtherance of the trust's purpose in accordance with the powers given to them by general law and under the trust instrument.

9.033 Before considering the various trustee duties themselves, one must address the standard of care which is expected of a trustee in discharging the duties. Importantly, in exercising any power, a trustee has a general duty to exercise care. There is no equivalent of the English Trustee Act 2000 in the jurisdiction and therefore there is

[35] Section 36(5).
[36] Section 40(1).
[37] See paragraph 9.143 below.
[38] *Armitage v Nurse* [1998] Ch 241.

Chapter 13

CONFIDENTIALITY

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1. Introduction

13.001 Confidentiality has the potential to be a contentious subject in any jurisdiction. But sensitivities relating to confidentiality tend to be particularly acute in a jurisdiction which is heavily focused upon private wealth management. The British Virgin Islands is perceived as a jurisdiction which is extremely protective of confidentiality. For example, the amount of information available to the public in relation to companies incorporated in the jurisdiction is very limited. However, legal protection for confidential information is actually quite limited in the Territory, and the fundamental legal basis of confidentiality in the British Virgin Islands is entirely based upon common law rules. Those basic common law rules are thereafter subject to a wide ranging patchwork of derogations under various statutory provisions negating the obligation of confidentiality in various circumstances.

13.002 Under British Virgin Islands law there is no specific statutory protection for confidentiality or confidential relationships.[1] Nor is there any specific data protection legislation,[2] although the British Virgin Islands legislature has passed legislation relating to computer misuse which may lead to limited data protection provisions.[3] The British Virgin Islands Constitution does provide that '[e]very person has the right to respect for his or her private and family life, his or her home and his or her correspondence, including business and professional communications.'[4] But as has been judicially noted, the concepts of a right to privacy and the duty of confidentiality are not the same thing:[5]

> '[C]onfidence and privacy, while capable of overlapping, are essentially different concepts. Breach of confidence, being an equitable concept, is conscience based. Invasion of privacy is a common law wrong which is founded on the harm done to a plaintiff by conduct which can reasonably be regarded as offensive to human values.'

13.003 Similarly whilst the law recognises the protection of intellectual property, the weight of decided judicial authority is that there is no proprietary right in information simply because it is confidential.[6]

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[1] Contrast for example the Confidential Relationships (Preservation) Law (2009 Revision) of the Cayman Islands.

[2] Contrast for example the Data Protection Act 1998 of the United Kingdom. The British Virgin Islands is outside of the European Union and so is not subject to EU data protection rules. Limited data protection is provided for under the Authorisation of Surveillance Devices Act 2013, but this relates only public surveillance systems.

[3] Computer Misuse and Cybercrime Act 2014. This legislation is not in force yet. See paragraph 13.162.

[4] The Virgin Islands Constitution Order 2007, article 19. That provision is modeled on article 8 of the European Convention on Human Rights.

[5] *Hosking v Runting* [2004] NZCA 34 at paragraph [246].

[6] *Jeffreys v Boosey* (1854) 4 HL Cas 814; *Oxford v Moss* (1979) 68 Cr App R 183. However the position is not settled. In *Boardman v Phipps* [1967] 2 AC 46 the House of Lords was divided on the issue, and *Seager v Copydex (No 2)* [1969] 1 WLR 809 where the court awarded damages on the basis of conversion for the market value of information which was misused. It is however undoubtedly the case that the physical medium which information is stored upon is property.

13.004 As in other countries, the British Virgin Islands has witnessed a steady erosion of the right of confidentiality as a result of successive statutory interventions.[7] In a sense the legal position simply reflects modern life: with vast amounts of data which previously would have been considered to be confidential in nature now freely available on the internet, attempts to preserve individual confidentiality can sometimes feel as futile as the efforts of King Cnut trying to order back the tide. Whilst this trend has, to some degree, been counterbalanced in other jurisdictions by enhanced protection for the collateral right of privacy, no such counterbalancing appears evident in the British Virgin Islands.

13.005 The erosion of the duty of confidence has gone through three distinct evolutionary stages. In the first stage, within a relatively short period of time following the development of a duty to maintain confidentiality, the courts recognised various circumstances where the person in possession of confidential information might be permitted to disclose that information from third parties, and shielded the party from any liability which might otherwise arise from having made such disclosure. In the second phase of the evolution, legislatures began to impose a requirement to mandatorily disclose information in steadily increasing numbers of situations. In the final stage, statutes were enacted which not only required persons to disclose confidential information, but then imposed strict duties on the party required to disclose the information not to allow the person whose information was disclosed to find out about the disclosure. Given that the primary remedy to restrain improper disclosure of confidential information is an injunction, this represents a fairly serious undermining the legal framework for the protection of confidentiality. Much of the legislation in the third stage of development was driven by international organisations such as the OECD and the IMF seeking greater transparency in response to the decline of currency controls across the world and the increasing globalisation of financial markets.

13.006 One does need to be careful when considering the various statutes mandating the disclosure of otherwise confidential information not to become overly cynical about the legal developments simply because the trend is all in one direction. Most of the statutory exceptions relate to helping authorities investigate and prevent white collar crime such as money laundering and terrorist financing. These are clearly matters where the authorities need to have powers to obtain information conveyed upon them in order to discharge their duties, and it falls to the legislature to determine where the line should be drawn between protecting the confidentiality of information and preventing crime.

2. Duty of Confidentiality

13.007 Broadly speaking, a duty of confidentiality will be imposed in three primary circumstances:

(a) where there is an agreement between the parties that information should be kept confidential;

[7] When reviewing the duty of confidence under English law, the Jack Committee Report on Banking Services Law (1989) commented that there had been a "massive erosion" of the duty.

(b) where the relationship between the parties is one which the law imposes a duty of confidentiality with respect to; and

(c) where the nature and circumstances of the person obtaining the information make it such that the law will require that they keep the information confidential.

Although it is common to talk about the duty of confidentiality as a unitary concept, the form of the duty may vary to a certain degree according to the circumstances which give rise to the duty of confidentiality. For example, where the duty arises by virtue of an agreement, under the normal principles of freedom of contract the parties may specify different treatment of confidential information than that which might otherwise arise under ordinary equitable principles. Similarly, certain specific duties of confidentiality which are imposed by law may be subject to specific exceptions which are not applicable in other circumstances. It is sometimes said that there is no distinction between the duty of confidentiality imposed by equity and the duty of confidentiality protected by the law of contract,[8] but that appears to be somewhat oversimplified.[9] 13.008

(a) Confidential information

Generally speaking, a duty of confidentiality will only operate to protect information which has the 'necessary quality of confidence' about it.[10] However the information will also be protected where there is an express contractual obligation to maintain confidentiality, even if the information is not ostensibly confidential in character.[11] Furthermore, the duty will ordinarily only operate where the information is obtained in circumstances under which the duty attaches to it. Not all information in possession of someone who is subject to a duty of confidentiality will be protected as confidential information. It has been judicially noted on several occasions that formulating a precise definition of what constitutes confidential information is problematic.[12] 13.009

In order for the law to protect confidential information, it is necessary that that information be clear and identifiable as confidential information.[13] It will be for the party who is asserting that information is confidential to establish that the information, or in appropriate cases, which part of the relevant information, is confidential. 13.010

Information is generally no longer regarded as being confidential once it is a matter of public knowledge. But it seems that there are exceptions to this. It has been held 13.011

[8] *Lamb v Evans* [1893] 1 Ch 218.

[9] Ibid. That case related to the contractual duty of confidential arising from an implied term, rather than an express agreement to maintain confidentiality. The position becomes considerably more complex with an express agreement.

[10] *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 215.

[11] The main exception to this principle relates to agreements to keep information confidential. See generally paragraph 13.023 below.

[12] *Thomas Marshall Ltd v Guinle* [1979] Ch 227 at 248: 'It is far from easy to state in general terms what is confidential information'.

[13] *Fraser v Thames Television Ltd* [1984] QB 44 at 63.

that 'something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality.'[14] This is particularly true in the modern era where valuable "information" is actually an analysis constructed by applying proprietary algorithms to publicly available data.

13.012 Once information is in the public domain, it is normally no longer regarded as confidential.[15] When considering whether or not to restrain the publication of information in breach of the UK's Official Secrets Acts the House of Lords declined to do so where the information had already been widely published.[16] However this is not an absolute rule.[17] As the court indicated in *Franchi v Franchi*:[18] 'Clearly a claim that disclosure of some information would be a breach of confidence is not defeated simply by proving that there are other people in the world who know the facts in question … It must be a question of degree depending on the particular case, but if relative secrecy remains, the plaintiff can still succeed.' Similarly, embarrassing facts about somebody's past might be uncovered if someone was to assiduously research old newspaper archives relating to the time of their youth, but the fact that something is not generally known will normally be sufficient to give it the necessary quality of confidence for the law to protect if (for example) that person's psychiatrist threatened to reveal the information more generally to the press.

13.013 What exactly constitutes the "public domain" has never been precisely settled. Cases also use other phrases with similar connotations such as "common knowledge"[19] and "information generally available to the public".[20] This problem can be particularly acute in the British Virgin Islands with respect to documents which have been used as part of court proceedings.[21] The mere fact that something is available as part of the public record does not necessarily make it "common knowledge" or insufficiently confidential for protection by the law.[22] This can lead to curious results – an investigative journalist who by careful digging uncovers embarrassing information is unrestrained (because the law imposes no obligation of confidence in relation to information simply because it is embarrassing), but a person to whom the same information is confided may be subject to legal censure if they relay the information to another.[23]

13.014 With respect to information which is not public, although there is no accepted definition of what constitutes confidential information, there do appear to be a number of factors which have been accepted by the courts as being relevant to determine whether information is subject to the duty of confidentiality. These factors include:

14 *Coco v A.N. Clark (Engineers) Ltd* [1969] RPC 41 at 47.
15 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 217.
16 *AG v Guardian Newspapers (No 2)* [1990] 1 AC 109.
17 'In general, once information is in the public domain, it will no longer be confidential or entitled to the protection of the law of confidence, *though this may not always be true*' (emphasis added). *Douglas v Hello! Ltd (No 3)* [2006] QB 125 at [105].
18 [1967] RPC 149 at 152-153.
19 *Mustad & Son v Dosen* [1964] 1 WLR 109.
20 *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97.
21 See paragraph 13.081 below.
22 *R v Chief Constable of North Wales Police ex p AB* [1999] QB 396.
23 Although in appropriate cases an individual person (although probably not a company) may have a claim against the journalist for breach of privacy: The Virgin Islands Constitution Order 2007, article 19. In relation to companies, see *R v Broadcasting Standards Commission ex p BBC* [2001] QB 885.

(a) in the commercial context, the party claiming confidentiality must believe on reasonable grounds that the release of the information would be harmful to them, or would benefit a commercial competitor;[24]

(b) the party claiming confidentiality must believe on reasonable grounds that the information is confidential;

(c) in commercial cases, it must be established that the relevant information must have been known (or ought to have been known) objectively as commercially confidential;[25]

(d) there must be some value to the party claiming confidentiality in the information remaining confidential (although that value need not necessarily be commercial);[26] and

(e) the information must be such that a reasonable person in the position of the parties would regard it as confidential.[27]

The law will not protect from disclosure information which is regarded as trivial or useless.[28] Defining the boundary of when information is regarded as trivial or useless can be more difficult where the information is personal rather than commercial in nature. The law does not protect 'mere gossip or "trivial tittle-tattle"'.[29] However, the courts have held, whilst affirming general principle that equity will not intervene unless the circumstances of sufficient gravity, the revelation of a person's sexual conduct was certainly something which the law would prevent disclosure of in appropriate cases.[30] 13.015

Difficult issues can arise when a person simultaneously seeks to argue that information is (a) confidential, and (b) untrue. This issue tends to arise in the area of confidential personal information where one party seeks to prevent publication of personal information which is embarrassing simultaneously on the alternative grounds that it is (a) defamatory (which requires that it must be untrue) and (b) that it would be a breach of confidentiality.[31] The modern view appears to be that the mere fact that the information which is the subject of enquiry may contain either untrue or exaggerated elements should not excuse a party from complying with their duty of confidentiality. It would also create an undesirable logistical problem if a party asserting a right of confidentiality was required to plead and prove the truth of the material which was potentially subject to disclosure in breach of confidence. '[T]he protection of the law would be illusory if a claimant, in relation to a long and garbled story, was obligated to spell out which of the revelations are accepted as true, and which are said to be false or distorted.'[32] 13.016

24 *Thomas Marshall Ltd v Guinle* [1979] 1 Ch 227.
25 *Lancashire Fires Ltd v SA Lyons Co Ltd* [1996] FSR 629.
26 Toulson & Phipps, *Confidentiality* (Sweet & Maxwell, 2nd ed.) at 3-080.
27 Ibid.
28 *AG v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 292; *McNicol v Sportsman's Books Stores* (1930) McGCC 116. In the latter case the court memorably refused the requested injunction on the basis that the information was "perfectly useless".
29 *Coco v A.N. Clark (Engineers) Ltd* [1969] RPC 41 at 48.
30 *Stephens v Avery* [1988] Ch 449.
31 See for example *Khashoggi v Smith* (1980) 124 SJ 149.
32 *McKennitt v Ash* [2005] EWHC 3003 at [78].

13.017 Similarly, the question of whether information can properly be regarded as confidential when the intention is to publish that information in any event can be problematic. The general view seems to be that where a person intends to publish confidential information themselves, then that information shall nonetheless be regarded as confidential up until the time of publication, but not afterwards.[33] It is a requirement that confidential information has some value, and the recognition of the right necessarily requires that the person who has the benefit of that right should be able to seek to exploit it in the way most advantageous to themselves, even if that includes selling the information to the tabloid newspapers. The logical extension of that principle would be that if another unauthorised party was able to publish the confidential information contemporaneously with the official publication, there would be no breach of confidence.

(b) Misuse of information

13.018 The essence of the duty of confidentiality is to prevent the misuse of confidential information.[34] Most commonly misuse of the information will be either by way of general publication or unauthorised disclosure to another person. But the duty imposed in relation to confidential information is wider than that – the duty is to 'not take unfair advantage of it.'[35] The parameters of what constitutes taking unfair advantage of information is still evolving. Although the courts may still find it hard to define the limits, they seem generally comfortable to determine on a case by case basis whether misuse has occurred. The broadest attempt to provide a definition of misuse was in *R v Department of Health ex p Source Informatics Ltd*[36] where the English Court of Appeal stated the test of misuse would be whether a reasonable person's conscience would be troubled by the use of the relevant information. However, with respect, that is simply restating the formulation rather than illuminating the boundaries of what constitutes misuse.

13.019 In practice what the courts will be prepared to hold constitutes misuse of the relevant information will often depend closely upon the basis upon which the duty of confidentiality has been imposed. Where the duty of confidentiality arises on the basis of a contractual agreement, then any potential breach of that agreement is protected under the ordinary principles of the law of contract. In other contexts it can be more difficult. If a medical practitioner uses the example of a patient (without revealing the patient's name) in a published paper, is that misusing information? Does it make a difference if the publication is for financial gain?

13.020 Part of the answer may lie in the putative requirement whether in order to have a remedy for breach of confidentiality it is necessary for the claimant to have suffered any detriment. This is an issue which the courts have returned to on several occasions, but do not appear to have definitively resolved.[37] The preponderance of opinion seems

33 *Khashoggi v Smith* (1980) 124 SJ 149; *Shelley Films v Rex Features Ltd* [1994] EMLR 134.
34 *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 at 235.
35 *Seager v Copydex Ltd* [1967] 1 WLR 923.
36 [2001] QB 424 at [24].
37 *Coco v A N Clark (Engineering) Ltd* [1969] RPC 41 at 48; *AG v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 255-256 and at 281-282.

to suggest that the person seeking the assistance of the court must show some form of detriment which they seek to avoid. This would accord with a number of general equitable principles, including the broad proposition that equity does not act in vain, and that the basis of the law of confidentiality is to protect confidences rather than to punish wrongdoers.[38] There is no necessity that the detriment needs to be great or material, and it is respectfully suggested that there must be an interest for the law to protect, even if it is ephemeral like a person's reputation or self-esteem. The courts have contemplated that a plaintiff may be seeking to restrain the publication of confidential information which may harm others, but in the only case where that issue was in point, the claim was rejected for exactly that reason.[39] The better view, it is submitted, is that if detriment is suffered by others, then those others are the proper claimants in the action.

Examples of misuse of information which do not involve disclosure typically involve exploiting information for that person's own gain.[40] However, in such circumstances difficult questions can arise where the person who has acted in breach of confidence continues to profit from their breach after the information has become available to the public and is therefore no longer generally protected under the law of confidentiality. This is sometimes referred to as the "spring-board" theory,[41] which broadly provides that a person who has been subject to a duty of confidentiality cannot use the information as a spring-board for conduct detrimental to the person entitled to confidentiality even after the information has become public. To the extent that the spring-board theory has been accepted by the courts, it seems to operate as a partial exception to the rule that confidential information is not protected once it has become public, but only for the limited purpose of preventing the wrongdoer from profiting from their own wrong.[42] Accordingly it may be better to view the principle as part of the law relating to the prevention of unjust enrichment rather than an anomalous principle of the law relating to confidentiality. 13.021

Where misuse of the information does involve disclosure, in most circumstances the disclosure will characteristically be deliberate. The extent to which a person may be liable for breach of a duty of confidentiality for inadvertent disclosure of the information appears to still be evolving. It is reasonably clear that where there is a contractual duty to take reasonable care to keep information confidential, liability may follow if the confidante fails to take reasonable care and as a result the information becomes exposed. Although there is no judicial authority which definitively answers the issue, the better view seems to be that in relation to the equitable duty of confidentiality, because the duty is one of conscience, it would only operate to restrain deliberate disclosure of the information rather than accidental or negligent disclosure. However, in certain circumstances it appears clear that a person who possesses confidential information which has the ability to harm another person may owe a duty of care 13.022

38 Although see paragraph 13.069 below about preventing unjust enrichment.
39 *Broadmoor Special Hospital Authority v Robinson* [2000] QB 775.
40 *Terrapin Ltd v Builders' Supply Company (Hayes) Ltd* [1960] RPC 128; *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 WLR 1293.
41 *Terrapin Ltd v Builders' Supply Company (Hayes) Ltd* [1967] RPC 375.
42 *AG v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 259.

at common law to ensure that the information is properly secured.[43] However this appears to be part of the general law of tort of negligence at common law (dealing with situations where there is a foreseeable risk of harm to others) rather than any particular aspect of the equitable duty of confidentiality.

(c) Contractual confidentiality

13.023 Confidentiality agreements give rise to a number of issues when considered in the broader context of the legal protection of confidential information. Generally speaking, subject to certain statutory exceptions, the law of contract permits two people to agree that certain information shall be kept confidential even in circumstances where the law would not otherwise protect the information. If a wealthy individual makes their household staff sign a contract which includes a covenant to keep the affairs of the household private and confidential, the fact that certain information may leak into the popular press will not prevent any subsequent disclosure by the household staff from constituting a breach of their contract. So long as the agreement not to disclose information is enforceable as a matter of the law of contract, it will be valid.[44] However, once information has become public that may change the effect of a breach or threatened breach of a confidentiality clause. The courts will not normally issue an injunction to prevent breach of a confidentiality clause where the information is ostensibly no longer confidential.[45] Similarly, although breach of the clause will ordinarily sound in damages, if the information is public in any event, it may be difficult for the claimant to establish loss.

13.024 Conversely it is perfectly clear that a person who is otherwise entitled to the benefit of a duty of confidentiality may by agreement limit, modify or waive that duty for the benefit of another person by agreement.

13.025 Accordingly, the consideration of duties of confidentiality which arise by agreement usually need to be considered in three different respects:

(a) where an express contractual obligation is entered into to keep information confidential, which will normally be protected under the ordinary principles of contract;

(b) where an agreement does not make express provision for confidentiality, but the law implies a term into such agreement to impose a duty of confidentiality; and

(c) where, by virtue of an agreement between them, information which is passed by one party to another is designated as confidential, and thereby subject to protection under the equitable duty of confidentiality outside of the law of contract.

[43] *Swinney v Chief Constable of Northumbria* [1997] QB 464.
[44] *AG v Barker* [1990] 3 All ER 257 at 259.
[45] *AG v Blake* [1988] Ch 439 at 453.

In relation to express agreements not to publicise or disclose information, these are unexceptional and are routinely enforced. A covenant not to disclose information can be potential vulnerable on a number of grounds: uncertainty, illegality, restraint of trade, public policy, etc. but none of these areas of law are modified with any particular respect to confidentiality agreements as distinct from the law of contracts generally. Particular areas which have been considered in relation to confidentiality agreements include where the agreement would prevent an employee from utilising his trade skills after leaving his employer;[46] where the restriction amounts to a restraint of trade;[47] where publication is justified as being in the public interest;[48] and where publication is protected as freedom of expression.[49] 13.026

Where a contractual relationship is entered into which is of a confidential nature, the courts are prepared to imply terms into the agreement pursuant to which parties are under a contractual duty to maintain confidential with respect to relevant information.[50] There are various cases which suggest that the duty of confidentiality should be the same, regardless whether it is a duty imposed by equity or one which arises because of an implied term in an agreement.[51] As a statement of general law that seems unexceptional – in the same way that the duty to take reasonable care to prevent injury to another will be the same duty whether it arises in tort as a result of a contract, it is consistent with good sense that the duty of confidentiality protected by the law should be expressed and enforced in the same terms whether it arises from equitable principles or an implied term. However it should be borne in mind that when a claimant seeks relief on the basis of an equitable duty, he will be subject to the usual limitations on equitable relief, including the requirement that he must come to the court with clean hands,[52] and the entitlement to relief may be barred by the principle of laches.[53] 13.027

Sometimes the only function of an agreement in relation to the obligation of confidentiality is to imbue information with the necessary quality of confidentiality. As between the parties an agreement that information is to be treated as confidential is determinative, but even in the wider context such an agreement will be powerful evidence that such information was entrusted in circumstances where it was clear it was intended to be kept confidential. This may add little to the rights against the other party to the contract, but it may be important where a third party comes into possession of the information and is aware that the parties agreed that it should be kept confidential.[54] 13.028

[46] *Herbert Morris Ltd v Saxelby* [1916] AC 688.
[47] *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181.
[48] *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491.
[49] Ibid. See also The Virgin Islands Constitution Order, article 23.
[50] *Faccenda Chicken Ltd v Fowler* [1987] 1 Ch 117.
[51] *Lamb v Evans* [1893] 1 Ch 218; *Hilton v Barker Booth & Eastwood* [2005] 1 WLR 567.
[52] *Hubbard v Vosper* [1972] 2 QB 84 at 101.
[53] Broadly, the refusal of equity to entertain stale claims, see *Nelson v Rye* [1996] 1 WLR 1378. Laches operates distinctly from limitation periods under the Limitation Act 1961.
[54] See paragraph 13.056 and following.