# Examinations

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## Introduction

1. One of the most powerful investigative tools in any office holders' armory is the ability to apply to the court to examine a person who has demonstrated a reluctance to co-operate. Whilst it is wide ranging there are limitations placed upon what is otherwise a wide reaching power. The statutory context of the power, particularly as it sits within the framework of human rights law, is important to understanding how the court will strike a balance between competing interests in appropriate cases.

## The Act

2. The relevant statutory provisions are contained in s.236 Insolvency Act 1986 ("IA 86") in the case of companies, s.366 IA 86 in respect of bankrupt individuals and s.251N IA 86 in respect of individuals who have obtained debt relief orders. Whilst the corporate and individual provisions are similar they are not identical and the differences will be dealt with below.

3. Broadly the provisions in relation to individuals, whether under the bankruptcy or debt relief order regime are similar, where differences exist they are highlighted if relevant.

4. The relevant sections and insolvency rules ("IR") are set out in full in the appendix to these notes, incorporating the amendments introduced by Insolvency (Amendment) Rules 2010 which came into force on 6 April 2010.

## Purpose

5. The purpose of the powers of investigation were clearly set out in *Re British & Commonwealth Holdings plc* [1] by Lord Slynn:

> *"In my opinion, although there may be some difference in the wording of these sections, the position under section 236 of the Insolvency Act 1986 is broadly the same as that under section 268 of the Companies Act 1948 as explained by Buckley J. in In re Rolls Razor Ltd [1968] 3 All E.R. 698, 700, in a passage subsequently approved by the Court of Appeal in re Esal (Commodities) Ltd [1989] B.C.L.C. 59, 64:*
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> *"The powers conferred by section 268 are powers directed to enabling the court to help a liquidator to discover the truth of the circumstances in connection with the affairs of the company, information of trading, dealings, and so forth, in order that the liquidator may be able, as effectively as possible, and, I think, with as little expense as possible . . . to complete his function as liquidator, to put the affairs of the company in order and to carry out the liquidation in all its various aspects, including, of course, the getting in of any assets of the company available in the liquidation. It is, therefore, appropriate for the liquidator, when he thinks that he may be under a duty to try to recover something from some officer or employee of a company, or some other person who is, in some way, concerned with the company's affairs, to be able to discover, with as little expense as possible and with as much ease as possible, the facts surrounding any such possible claim."*

6. The same reasoning applies to s.366 IA 86.

7. It should be noted that the Official Receiver can apply for an order regardless of whether he is the trustee or liquidator, meaning that in such a case the purpose must be extended to include

[1] *[1993] AC 426 at 438 (HL)*

the carrying out of his statutory functions. In *Re Pantmaenog Timber Co Ltd* [2] the House of Lords held that a liquidator's functions in relation to a company which was being wound up were not limited to the recovery and distribution of the company's assets but extended to the investigation of the causes of the company's failure and the conduct of those concerned in its management, in the wider public interest of appropriate action being taken against those engaged in commercially culpable conduct and that s.236 IA 86 could be invoked to gather information for the purposes of disqualification proceedings.

**Applicant**

8. The applicant is the office-holder (provisional liquidator, liquidator, administrator, administrative receiver, trustee or, in compulsory liquidation or bankruptcy, the OR (whether or not he is liquidator or trustee). The power is not available to a nominee of a voluntary arrangement, a contributory nor a creditor.

9. The official receiver alone has the ability to apply under s 251N IA 86 where a debt relief order has been made.

**Respondent**

10. The respondent in the case of an application pursuant to s. 236 IA 86 can be any officer of the company, any person known or suspected to have in his possession property of the company or supposed to be indebted to the company, and any person the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company: s 236(2) IA 86.

11. In the case of an application under s.366 IA 86 the respondent can be the bankrupt, any current or former spouse or civil partner, any person known or suspected to have in his possession property of the bankrupt or supposed to be indebted to the bankrupt, and any person the court thinks capable of giving information concerning the bankrupt's dealings, affairs or property.

12. Persons include corporations. An order against a corporation will require compliance by a proper officer.

13. In the case of companies, obvious and frequent targets are directors, debtors, shareholders and auditors; in the case of individuals the bankrupt, spouse or relatives; in both cases solicitors and bankers. The power is also exercisable against administrative receivers and against the Crown.[3] Further discussion of the individual respondent is set out below.

14. There is no doubt a bankrupt, even if out of the jurisdiction, is liable to be summoned to appear before the court. The power probably extends to other respondents out of the jurisdiction, although there is some doubt whether ss 236 and 336 can be used to order someone outside the jurisdiction to be examined in the jurisdiction. There are also the obvious difficulties with the enforcement of such an order.

**The application**

15. The application is usually made by application[4] in existing insolvency proceedings (including where an administrator has been appointed out of court) to a registrar or district judge in the first instance. Where there are no such proceedings (such as in a voluntary winding-up or administrative receivership), it would appear that the amendments to the rules now means that the application should be made on the same form, despite there being no pre-existing proceedings.

16. The application must sufficiently identify the respondent and specify the order sought, and in particular whether it is for an oral examination, clarification/additional information, a witness

[2] *[2004] 1 AC 158*
[3] *Soden v Burns [1996] 2 BCLC 636.*
[4] *Following the rule changes this will now be on Form 7.1A*

statement (with details of the matters the witness statement is to cover) or for production of books, papers or other records (in which case they must be specified). Merely requesting an account of all dealings by the respondent with the insolvent company/bankrupt is not sufficient. The request must be more specific as to the information required.[5] It may adversely affect the court's view as to the office-holder's need for the information if the application is not sufficiently specific or is framed in indiscriminate terms.

17. The application may be accompanied by applications (where proper grounds exist) for ancillary orders in the form of interim injunctions, such as a "No say" injunction (restraining the respondent from disclosing the order to third parties), an order restraining the respondent from leaving the jurisdiction pending examination, or a search and seizure order.

**Evidence**

18. The application must be accompanied by a brief statement of the grounds on which it is made: IR r 9.2(1) and the name of the respondent.

19. It should also state whether the application is for the respondent IR 9.2(3):

    19.1. to be ordered to appear before the court, or

    19.2. to be ordered to clarify any matter which is in dispute in the proceedings or to give additional information in relation to any such matter and if so CPR Part 18 (further information) shall apply to any such order, or

    19.3. to submit witness statements (if so, particulars to be given of the matters to be included), or

    19.4. to produce books, papers or other records (if so, the items in question to be specified).

20. In addition the statement should make full disclosure of the relevant circumstances known to the office-holder. It will usually need to cover in addition to the maters set out in IR 9.2(3):-

    20.1. the respondent's relationship with the insolvent

    20.2. the factual information which the applicant requires from the respondent

    20.3. the reasons why the court's assistance is required.

21. If there is any information which the office-holder wishes to keep confidential from the proposed examinee, he should identify it and put it in a separate confidential annex which is not served on the respondent. The statement should explain why the office-holder wishes to keep the annex confidential, but the court must also be satisfied that the application can be fairly and properly disposed of without the respondent seeing the documents in question.

**With or without notice**

22. Prior to 1996 it was almost routine for applications to be made without notice and for the evidence not to be disclosed to the respondent to the application.

23. However this was held to be inappropriate. The general rule was set out in *Re Murjani [1996] 1 BCLC 272 at 285* where Lightman J said:

> *"The general rule is that applications to the court for orders whether under s 366 or otherwise must be made inter partes and that a good and sufficient reason is required to justify the exceptional course of an application ex parte. This general rule is the*

[5] *Re Aveling Barford Ltd [1989] BCLC 122 at 127.*

*stricter where mandatory orders, for example to attend for examination or to produce documents, are to be made."*

24. There are exceptional circumstances which may justify the application being made without notice: IR 9.2(4). However rules of general applicability to without notice applications will similarly apply to ss 236 and 366.

25. Generally an order should not be made against a person without first hearing what he has to say. The exception is when two conditions are satisfied:

    25.1. First, where giving them such an opportunity appears likely to cause injustice to the applicant by reason either of the delay involved or the action which it appears likely that a respondent or others will take before the order can be made. For example the destruction of relevant documents or the possibility of the respondent absconding;

    25.2. Second, where the court is satisfied that the risk of uncompensatable loss is clearly outweighed by the risk of injustice to the applicant if the order is not made.

26. Urgency must be justified, although this must not be occasioned by or substantially contributed to by reason of a lack of diligence on the office holder's behalf.

27. Where such an order is made it must contain a statement required by CPR r 23.9(3) of the right of a respondent to make an application to set aside or vary the order under r 23.10.[6] As with all without notice applications there is a duty of full and frank disclosure on the applicant. This means setting out the material facts in support of and against the making of the order.

28. Where an order has been wrongly obtained without notice it will not necessarily be discharged unless the respondent can show some substantive prejudice or matter in issue. Thus in *Murjani [1996] 1 BCLC 272* itself it was found that the order should not have been obtained on a without notice basis but it was not discharged because:

> *'In the circumstances the trustee's error in proceeding ex parte was the merest technicality which in no wise justified a challenge to the orders made. To challenge an order made ex parte on a mere technicality where as a matter of substance there is no point to be taken with the order made and no undue prejudice has been occasioned by the application having been made ex parte rather than inter partes is to be deprecated….'*

**When will the court make an order?**

29. For the court to exercise its discretion in favour of the making of an order any applicant must satisfy it that there is a proper case for the order to be made. The balancing exercise recognises the competing interests of an office holder in requiring information and/or documents and the need not to impose an unnecessary and unreasonable burden on any respondent. Factors such as inconvenience, the burden of work upon a respondent or potential exposure to future claims are not a bar to the making of an application, but they are relevant factors to be taken into account when deciding whether an order should be made. A further consideration is the status of the respondent. The more distant the connection between a respondent and the insolvent, the greater the justification required to obtain an order.

30. In carrying out this exercise the Court will, as Browne-Wilkinson V-C said in the Court of Appeal in *Cloverbay Ltd (joint administrators) v Bank of Credit and Commerce International SA [1991] 1 All ER 894 at 900*, need to:

> *'…balance the requirements of the liquidator against any possible oppression to the person to be examined. Such balancing depends upon the relationship between the*

[6] *Hill v. Van der Merwe [2007] BPIR 1562*

*importance to the liquidator of obtaining the information on the one hand and the degree of oppression to the person sought to be examined on the other.*'

31. This was approved in *British & Commonwealth Holdings Plc v Spicer & Oppenheim [1993]* AC 426 where Lord Slynn stated:

> *"...it is plain that this [the power under ss 236 and 366] is an extraordinary power and that the discretion must be exercised after a careful balancing of the factors involved - on the one hand the reasonable requirements of the administrator to carry out his task, on the other the need to avoid making an order which is wholly unreasonable, unnecessary or "oppressive" to the person concerned..."*
>
> *The protection for the person called upon to produce documents lies, thus, not in a limitation by category of documents ("reconstituting the company's state of knowledge") but in the fact that the applicant must satisfy the court that, after balancing all the relevant factors, there is a proper case for such an order to be made. The proper case is one where the administrator reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the administrator's requirements. An application is not necessarily unreasonable because it is inconvenient for the addressee of the application or causes him a lot of work or may make him vulnerable to future claims, or is addressed to a person who is not an officer or employee of or a contractor with the company in administration, but all these will be relevant factors, together no doubt with many others."*

32. In *Green v BDO [2005]* EWHC 2413 (Ch) Kitchin J said:

> *"It is well established that the powers conferred by s 236 are powers directed to enabling the court to help a liquidator discover the truth of the circumstances connected with the affairs of the company in order that the liquidator may be able, as effectively and cheaply as possible, to complete his function and put the affairs of the company in order, including the getting in of any assets of the company available in the liquidation. When the liquidator thinks he may be under a duty to recover something from some person concerned with the affairs of the company then it is appropriate for the liquidator to be able to discover, with as little expense as possible and with as much ease as possible, the facts surrounding any such possible claim. Normally the court should seek to assist the liquidator to carry out his duties in this way."*

33. Legitimate purposes for seeking an order include:-

    33.1. To enable an office holder to trace known assets and it is in this context that urgent applications are the most likely;

    33.2. To reconstitute accounting or other business records;

    33.3. To identify previously assets and;

    33.4. To obtain information from third parties to enable contracts to be completed.

34. The court will <u>not</u> allow an office holder to who intends to litigate obtain an advantage over the proposed target which would not otherwise exist in the usual litigation process, which is discussed in more detail below.

35. The burden of proof of establishing that the information is reasonably required will always rest with the office holder, but the court does recognise the practical difficulties of an office holder arriving after relevant events may have occurred and gives his views a great deal of weight. He is, after all, the independent third party acting on behalf of the general body of creditors, so

there is no requirement to show an absolute need or to go into the level of detail which would be expected of an applicant in course of civil proceedings.

36. The following factors are relevant:-

36.1. The stage of the insolvency process; in the earlier stages the court recognises that it may be of critical importance to office holders to find out as quickly as possible, insofar as they can, what is the true situation and what are the assets of any insolvent.[7]

36.2. The importance of the information required and the purpose for which it is required.

36.3. The proximity of the relationship between any respondent and the insolvent. It is generally more difficult to obtain an order against a third party than someone connected with the insolvent. Thus it is generally easier to obtain an order against a company officer, including auditors who are treated as officers of a company[8], and a bankrupt than a third party.[9] The more distant a respondent from the insolvent the more likely an order will be oppressive.

36.4. As a rule an order for an oral examination will be regarded as more oppressive than an order to produce documents.

36.5. Self incrimination, see below.

36.6. The entitlement of a respondent to documents. See for example *Colishaw v O&D Building Contractors Ltd* [2009] EWHC 2445 (Ch) where HHJ Cooke refused to order the disclosure of documents which would otherwise have been unavailable to the insolvent by reason of non payment. He said:-

> *"The benefit to the administration of obtaining these documents is in my judgement outweighed by the unfairness to the respondent of being required to produce them, in circumstances in which the respondent is a stranger to the companies in administration and (perhaps indirectly) a substantial unsecured creditor which will go unpaid as a result of that administration. But for the insolvency the respondent would have been under no obligation to provide any of the documents to the companies in administration and, particularly, that purpose and effect of the order sought is to obtain the benefit of the work done by the respondent in performance of his contract, without the payment which the companies in administration ought to have made for that work."*

36.7. Confidentiality and third party interests, see below in respect of legal professional privilege.

36.8. If there has been a long delay between the start of the insolvency and the application it will be necessary to explain what investigations have been made, the results of those investigations and the information required to fill any gaps.

**Litigation – threatened or otherwise**

37. The possibility or the fact that a decision has been made to commence proceedings or extant proceedings are all relevant factors to be taken into account when the court decides whether an order ought to be made. They are not necessarily determinative[10]. The question is whether any oppression to a respondent is outweighed by the legitimate requirements of an office holder.

[7] *Hill v Van Der Merwe (above) at para 20*
[8] *Green v BDO (above) at para 30*
[9] *Re Seagull Manufacturing Co Ltd (in liquidation)* [1993] Ch 345 at 358.
[10] *Cloverbay (above)*

38. In *Shierson V Rastogi* - [2003] BPIR 148 Peter Gibson J demonstrated the balancing exercise the court will undertake:

> *"…it is oppressive to require a defendant accused of serious wrongdoing to provide what amount to pre-trial depositions and to prove the case against himself on oath. But that oppression may be outweighed by the legitimate requirements of the liquidator."*

39. It is not proper to apply for an order where the purpose is to obtain evidence for use in intended negligence actions or where an office holder already has sufficient information to decide whether proceedings should be commenced and the purpose is to bolster a pre-existing claim.

**Privilege against self incrimination**

40. In *Hamilton v Naviede* [1995] 2 A.C. 75 it was stressed:

> *"One of the basic freedoms secured by English law is that (subject to any statutory provisions to the contrary) no one can be forced to answer questions or produce documents which may incriminate him in subsequent criminal proceedings."*

41. A bankrupt is under a statutory duty to make full disclosure and cannot assert the privilege against self incrimination, but it can be asserted by a bankrupt's spouse or other persons falling within s.366 IA 86. It is arguable that the privilege against self incrimination has been impliedly abrogated by s.433 IA 86 which prevents any statement provided under compulsion from being used in subsequent criminal proceedings following the decision in *Saunders v United Kingdom* [1997] EHRR 317 where it was held that such use was a breach of Article 6 of the European Convention on Human Rights.

**Confidentiality and legal professional privilege**

42. A bankrupt or officer of a company cannot rely upon legal professional privilege where the privilege to be asserted is theirs or that of the company. It is possible for any other respondent to do so. Where the respondent is an insolvents solicitor he cannot claim privilege on behalf of that insolvent, as the privilege belongs to the client not to the solicitor. However, in rare circumstances where the information requested can be clearly demonstrated to be entirely personal to a bankrupt, it may be appropriate not to disclose without a court order (see below).

**Bank as respondent (by Neil Levy, Guildhall Chambers)**

43. Where the insolvent was the bank's customer, no issue as to confidentiality may arise. But if the information relates to a customer of the bank who was not the insolvent, the confidentiality attaching to dealings between the bank and its customer will be a factor for the court to take into account in deciding whether an order should be made and if so on what terms. An order may be made against a third party's bank if the office-holder can satisfy the court that there may have been payments made by or for the insolvent into the third party's bank account which merit investigation. In such cases it will normally be appropriate for the third party to be given notice of the application and the opportunity to be joined so as to make objections to the order sought. But this will not be required if it is impractical to give such notice or, exceptionally, if giving notice might prejudice the purpose of the application, or the case is one of emergency. If the court is satisfied that disclosure of the order to the bank's customer might frustrate the purpose of the investigation, the court could also make an ancillary order restraining the bank from disclosing the existence of the order to its customer (a No say injunction).

44. Often banks offer to co-operate with the applicant so long as they are compelled to do so by court order (for without a court order they may be accused of acting in breach of their duty of confidentiality). So long as suitable wording for the proposed order can be agreed, a bank will often take a neutral stance – neither objecting nor consenting to the order being made.

45. Banks will frequently have the following key concerns, which an office holder should be prepared to address.

45.1. An application seeking to have an officer orally examined is more likely to be met with resistance than an application for disclosure of documents. One way round this is to limit the scope of the order sought in the first instance to documents, whilst reserving the right to apply back for oral examination once the documents have been considered.

45.2. The documentary material which the applicant seeks to obtain needs to be specified accurately, so as not to leave room for doubt as to precisely what is sought. It does not assist simply to ask for "full copies of the bank's books and records relating to the banking arrangements of" the insolvent. An order in that form would require the bank to decide what books and records are to be included, and would not necessarily enable the bank to implement the order without difficulty. It is unreasonable to place the burden on the respondent to have to interpret an order which is ambiguous or otherwise lacks clarity. Usually account numbers should be specified as well as specific documents or classes of documents.

45.3. The volume of material which the applicant seeks should also be limited so far as possible. For example, an application for "copies of all cheques" relating to a particular account could be onerous, depending on the volume of cheques, and any order should make provision for the possibility that the bank may not be able to locate or obtain copies of each and every cheque. If it is genuinely necessary to obtain what is likely to be a very large quantity of documentation, the court may direct that documents be provided in stages.

45.4. There may be sensitive information which the office-holder does not necessarily need to see and which the bank will be particularly reluctant to provide. A prime example might be reports which are made by banks (internally and externally) to persons and authorities responsible for anti-money laundering procedures. Banks are likely to be concerned at the prospect of disclosing documents whereby authorised disclosure has been made to a constable or "nominated officer" under the provisions of the Proceeds of Crime Act 2002, in view of the "anti-tipping-off" provisions which prohibit any disclosure being made which is likely to prejudice an investigation which might be conducted following an authorised disclosure. Banks also have a legitimate concern that staff should not be deterred from making full and frank internal reports to nominated officers or external reports to relevant authorities, by the possibility that such reports (or the information which they contain) may be disclosed to third parties, or used in later civil proceedings. For these reasons, again at least in the first instance, it may be wise to except such material from the scope of the order.

45.5. Depending on the nature of the underlying issues, the bank is likely to be alert to the possibility of future claims being made against it on behalf of the insolvent. If a claim is a possibility, the office-holder will need to be careful to address in some detail the purpose of the application and the reason why the balance comes down in favour of an order being made. This issue has been considered in more detail above.

45.6. Where the cost of compliance with any order made is likely to be significant, how the bank's reasonable costs of compliance are to be met will need to be addressed.

**Solicitor as respondent**

46. Prior to the introduction of the new code of conduct in April 2007 the Law Society offered substantial guidance in respect of the provision of information to office holders. The new rules simply state:

> *"If a client becomes insolvent you will need to consider to whom you owe a duty of confidentiality. To some extent this will depend on whether your client is a company*

*or an individual and you will need to refer to the relevant statutory authority, such as the Insolvency Act 1986. Where statutory power overrides confidentiality you should consider carefully to what extent it is overridden. It may, for example, require you to disclose only certain categories of information or documents. You should ensure that any disclosure you make is strictly limited to what is required by the law."*

47. Since an office holder's powers to obtain property apply to property belonging to the insolvent, a solicitor is obliged to give the office holder only those papers on the solicitor's file which belong to the bankrupt or insolvent company. However, there are differences of views about which papers belong to the client and which to the solicitor and it might be unwise to place too much reliance on a claim to ownership as a ground for refusing to hand documents over to a trustee. In any case, the solicitor could be compelled, under ss 236 and 366, to produce the documents.

48. Where there is a concern as to the disclosure, for example the documents are incriminatory, the solicitor should in such cases explain he or she regards himself or herself as unable to comply with the request without either the client's authority or an order of the court giving the reasons why the solicitor takes this view.

49. If an application is made against the solicitor, the question of costs arises; the solicitor may expose himself or herself to the risk of an adverse costs order by resisting. The now superseded Law Society guidance did suggests that the solicitor should inform the client of the application or possible application, explaining the powers given to the court (in particular, the power to require disclosure) and that, unless the client instructs the solicitor to the contrary and puts the solicitor in funds, the solicitor will not resist the application. It is not the solicitor's duty to bear the cost of opposing an application, or the risk of a costs order, without the client's instructions and funding. This should be explained to the client, which gives the client the opportunity to take action, either through the solicitor or in person.

50. The Law Society's view is that a solicitor who has acted in this way should not be at risk of an adverse costs order, provided the reasons for so acting are explained to the court, and that the solicitor would be safe from any complaint which the client might make for breach of confidence or privilege.

**Orders**

51. Orders must be served as soon as reasonably practicable and be served personally: IR r 9.3(5). There is a general discretion to dispense with personal service, to which the principles set in CPR Part 6 apply.

52. An order requiring attendance for examination must specify the venue for attendance and the examination must be at least 14 days from the date of the order (though time can be abridged: IR r 12A.55)). An order requiring provision of an witness statement must specify the time within which the witness statement is to be submitted: IR 9.3(3). An order for production of documents must specify the time and manner of compliance: IR 9.3(4). If the respondent is required to clarify any matter or give additional information, the court must direct the questions to be answered and whether answers are to be supported by a statement: IR 9.4(3).

53. Where the respondent is required to attend for oral examination, in an appropriate case the court may require the office-holder to provide in advance a list of the topics to be canvassed with copies of documents to which reference may be made

54. To mitigate against risks that the information might come into the possession of third parties and be used against the respondent, the court may require the office-holder to provide undertakings expressly restricting the use to which the material may be put.

**Oral examinations**

55. An oral examination is usually before a registrar or district judge. The examination is usually conducted on oath: ss 237(4) & 367(4) IA 86. A written record must be made of the hearing.

At the end of the hearing the court directs a time and place for the respondent to attend for the record to be read to or by the respondent and authenticated by him IR r 9.4(6). The record is private and not placed on the court file unless the court otherwise orders IR r 9.5(1). IR 9.5(2) has been amended to expressly provide that copies of any questions put to the respondent or proposed to be put to the respondent and other documents are not open to inspection without an order of the court, other than by the applicant or someone who has locus to make an application.

56. A respondent has a right to be legally represented: IR r 9.4(5). Where the application has been made on information provided by a creditor, that creditor may attend the examination with the permission of the court if the applicant does not object: IR r 9.3(2).

57. The court will control the line of questioning and if it thinks that a line of questioning is unfair, for example if there had been no prior notice of it and the court thought such notice appropriate, it could stop the questions until the examinee is in a proper position to answer.

**Enforcing compliance**

58. If the respondent fails to attend he is liable to committal for contempt. IR r 7.19(1). A bench warrant may be issued to compel attendance of a respondent who fails to appear without reasonable excuse, or if there are reasonable grounds to believe he has absconded or is about to abscond, to avoid appearing. Warrants are issued by the High Court to the tipstaff and his assistants and by the county court to the registrar and the bailiffs. An examinee who is arrested must be brought before the court as soon as reasonably practicable for examination: IR 7.23(1). The arresting officer must apply to the court for a venue to be fixed: IR 7.23(3). The court must appoint the earliest practicable time for the examination: IR r 7.23(4). In the meantime the examinee can be held in custody: IR r 7.23(2).

59. If information obtained during the examination discloses assets belonging to, or indebtedness owing to, the insolvent, the applicant may at the conclusion of the oral examination apply for summary relief under s 237 (order for delivery up or payment) or 367 (the equivalent in bankruptcy). This is an underutilised provision.

**Use to which transcripts of examinations or documents produced may be put**

60. Just as the court will not make an order ss 236 and 366 for a purpose outside the scope of the applicant's statutory function, the use which the applicant may make of evidence obtained under the section is similarly limited. In *Barlow Clowes Gilt Managers Ltd* [1992] Ch. 208 Millett J refused liquidators permission to disclose voluntarily to defendants in criminal proceedings transcripts of interviews conducted by the liquidators after the interviewees had been threatened with compulsory examination under s.237 IA 86: the disclosure would have been for purposes collateral to the liquidation and foreign to those for which the information was obtained. In *First Tokyo Index Trust v Gould* [1996] B.P.I.R. 406, the Court of Session refused to allow liquidators to disclose transcripts of evidence, obtained by them under ss 236 and 237 IA 86, to a third party contemplating its own private litigation.

# Relevant sections of the Insolvency Act 1986

**234 Getting in the company's property**

(1) This section applies in the case of a company where-

(a) the company enters administration, or

(b) an administrative receiver is appointed, or

(c) the company goes into liquidation, or

(d) a provisional liquidator is appointed;

and "the office-holder" means the administrator, the administrative receiver, the liquidator or the provisional liquidator, as the case may be.

**235 Duty to co-operate with office-holder**

(1) This section applies as does section 234; and it also applies, in the case of a company in respect of which a winding-up order has been made by the court in England and Wales, as if references to the office-holder included the official receiver, whether or not he is the liquidator.

(2) Each of the persons mentioned in the next subsection shall:-

(a) give to the office-holder such information concerning the company and its promotion, formation, business, dealings, affairs or property as the office-holder may at any time after the effective date reasonably require, and

(b) attend on the office-holder at such times as the latter may reasonably require.

(3) The persons referred to above are:-

(a) those who are or have at any time been officers of the company,

(b) those who have taken part in the formation of the company at any time within one year before the effective date,

(c) those who are in the employment of the company, or have been in its employment (including employment under a contract for services) within that year, and are in the office-holder's opinion capable of giving information which he requires,

(d) those who are, or have within that year been, officers of, or in the employment (including employment under a contract for services) of, another company which is, or within that year was, an officer of the company in question, and

(e) in the case of a company being wound up by the court, any person who has acted as administrator, administrative receiver or liquidator of the company.

(4) For the purposes of subsections (2) and (3), "the effective date" is whichever is applicable of the following dates:-

(a) the date on which the company entered administration,

(b) the date on which the administrative receiver was appointed or, if he was appointed in succession to another administrative receiver, the date on which the first of his predecessors was appointed,

(c) the date on which the provisional liquidator was appointed, and

(d) the date on which the company went into liquidation.

(5) If a person without reasonable excuse fails to comply with any obligation imposed by this section, he is liable to a fine and, for contravention, to a daily default fine.

**236 Inquiry into company's dealings, etc**

(1) This section applies as does section 234; and it also applies in the case of a company in respect of which a winding-up order has been made by the court in England and Wales as if references to the office-holder included the official receiver, whether or not he is the liquidator.

(2) The court may, on the application of the office-holder, summon to appear before it-

(a) any officer of the company,

(b) any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or

(c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company.

(3) The court may require any such person as is mentioned in subsection (2)(a) to (c) to submit to the court an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in paragraph (c) of the subsection.

(3A) An account submitted to the court under subsection (3) must be contained in:-

(a) a witness statement verified by a statement of truth (in England and Wales), and

(b) an affidavit (in Scotland).

(4) The following applies in a case where:-

(a) a person without reasonable excuse fails to appear before the court when he is summoned to do so under this section, or

(b) there are reasonable grounds for believing that a person has absconded, or is about to abscond, with a view to avoiding his appearance before the court under this section.

(5) The court may, for the purpose of bringing that person and anything in his possession before the court, cause a warrant to be issued to a constable or prescribed officer of the court:-

(a) for the arrest of that person, and

(b) for the seizure of any books, papers, records, money or goods in that person's possession.

(6) The court may authorise a person arrested under such a warrant to be kept in custody, and anything seized under such a warrant to be held, in accordance with the rules, until that person is brought before the court under the warrant or until such other time as the court may order.

**366 Inquiry into bankrupt's dealings and property**

(1) At any time after a bankruptcy order has been made the court may, on the application of the official receiver or the trustee of the bankrupt's estate, summon to appear before it:-

(a) the bankrupt or the bankrupt's spouse or former spouse or civil partner or former civil partner,

(b) any person known or believed to have any property comprised in the bankrupt's estate in his possession or to be indebted to the bankrupt,

(c) any person appearing to the court to be able to give information concerning the bankrupt or the bankrupt's dealings, affairs or property.

The court may require any such person as is mentioned in paragraph (b) or (c) to submit a witness statement verified by a statement of truth to the court containing an account of his dealings with the bankrupt or to produce any documents in his possession or under his control relating to the bankrupt or the bankrupt's dealings, affairs or property.

(2) Without prejudice to section 364, the following applies in a case where:-

(a) a person without reasonable excuse fails to appear before the court when he is summoned to do so under this section, or

(b) there are reasonable grounds for believing that a person has absconded, or is about to abscond, with a view to avoiding his appearance before the court under this section.

(3) The court may, for the purpose of bringing that person and anything in his possession before the court, cause a warrant to be issued to a constable or prescribed officer of the court:-

(a) for the arrest of that person, and

(b) for the seizure of any books, papers, records, money or goods in that person's possession.

(4) The court may authorise a person arrested under such a warrant to be kept in custody, and anything seized under such a warrant to be held, in accordance with the rules, until that person is brought before the court under the warrant or until such other time as the court may order.

# Amended Insolvency Rules

**9.1. - Preliminary**

(1) The Rules in this Part apply to applications to the court for an order under:-

(a) section 236 (inquiry into company's dealings),

(b) section 251N (debt relief orders – inquiry into dealings and property of debtor), or

(c) section 366 (inquiry into bankruptcy, with respect to the bankrupt's dealings – including section 366 as it applies by virtue of section 368).

(2) The following definitions apply:-

(a) the person in respect of whom an order is applied for is "the respondent";

(b) "the applicable section" is section 236, 251N or 366, according to whether the affairs of a company or those of a debtor in relation to a debt relief order or an application for a debt relief order or a bankrupt or (where the application under section 366 is made by virtue of section 368) a debtor in bankruptcy proceedings are in question;

(c) the company or, as the case may be, the debtor in relation to a debt relief order or an application for a debt relief order, the bankrupt or debtor in bankruptcy proceedings concerned is " the insolvent" ;

(d) "the applicant", in any application made under section 251N, means the official receiver.

**9.2. - Form and contents of application**

(1) The application shall be in writing and specify the grounds on which it is made.

(2) The application must specify the name of the respondent.

(3) It shall be stated whether the application is for the respondent—

(a) to be ordered to appear before the court, or

(b) to be ordered to clarify any matter which is in dispute in the proceedings or to give additional information in relation to any such matter and if so CPR Part 18 (further information) shall apply to any such order, or

(c) to submit witness statements (if so, particulars to be given of the matters to be included), or

(d) to produce books, papers or other records (if so, the items in question to be specified),

or for any two or more of those purposes.

(4) The application may be made without notice to any other party.

**9.3 - Order for examination, etc.**

(1) The court may, whatever the purpose of the application, make any order which it has power to make under the applicable section.

(2) The court, if it orders the respondent to appear before it, shall specify a venue for his appearance, which shall be not less than 14 days from the date of the order.

(3) If he is ordered to submit witness statements, the order shall specify:-

(a) the matters which are to be dealt with in his witness statements, and

(b) the time within which they are to be submitted to the court.

(4) If the order is to produce books, papers or other records, the time and manner of compliance shall be specified.

(5) The order must be served as soon as reasonably practicable on the respondent; and it must be served personally, unless the court otherwise orders.

**9.4 - Procedure for examination**

(1) At any examination of the respondent, the applicant may attend in person, or be represented by a solicitor with or without counsel, and may put such questions to the respondent as the court may allow.

(2) Unless the applicant objects, the following persons may attend the examination with the permission of the court and may put questions to the respondent (but only through the applicant):-

(a) any person who could have applied for an order under the applicable section; and

(b) any creditor who has provided information on which the application was made under section 236 or 366.

(3) If the respondent is ordered to clarify any matter or to give additional information, the court shall direct him as to the questions which he is required to answer, and as to whether his answers (if any) are to be made in a witness statement.

*(4) Deleted*

(5) The respondent may at his own expense employ a solicitor with or without counsel, who may put to him such questions as the court may allow for the purpose of enabling him to explain or qualify any answers given by him, and may make representations on his behalf.

(6) There shall be made in writing such record of the examination as the court thinks proper. The record shall be read over either to or by the respondent and authenticated by him at a venue fixed by the court.

(7) The written record may, in any proceedings (whether under the Act or otherwise) be used as evidence against the respondent of any statement made by him in the course of his examination.

**9.5. - Record of examination**

(1) Unless the court otherwise directs, the written record of questions put to the respondent and the respondent's answers, and any witness statements submitted by the respondent in compliance with an order of the court under the applicable section, are not to be filed with the court.

(2) The documents set out in paragraph (3) are not open to inspection without an order of the court, by any person other than:-

(a) the applicant for an order under the applicable section, or

(b) any person who could have applied for such an order in respect of the affairs of the same insolvent.

(3) The documents to which paragraph (2) applies are:-

(a) the written record of the respondent's examination;

(b) copies of questions put to the respondent or proposed to be put to the respondent and answers to questions given by the respondent;

(c) any witness statement by the respondent; and

(d) any document on the court file as shows the grounds for the application for an order.

(4) The court may from time to time give directions as to the custody and inspection of any documents to which this Rule applies, and as to the furnishing of copies of, or extracts from, such documents.

**9.6. - Costs of proceedings under ss.236, 251N and 366**

(1) Where the court has ordered an examination of any person under the applicable section, and it appears to it that the examination was made necessary because information had been unjustifiably refused by the respondent, it may order that the costs of the examination be paid by him.

(2) Where the court makes an order against a person under:-

(a) section 237(1) or 367(1) (to deliver up property in his possession which belongs to the insolvent), or

(b) section 237(2) or 367(2) (to pay any amount in discharge of a debt due to the insolvent),

the costs of the application for the order may be ordered by the court to be paid by the respondent.

(3) Subject to paragraphs (1) and (2) above, the applicant's costs shall, unless the court otherwise orders, be paid-

(a) in relation to a company insolvency, as an expense of the liquidation,

(b) in relation to an individual insolvency, but not in proceedings relating to debt relief orders or applications for debt relief orders, out of the bankrupt's estate or (as the case may be) the debtor's property.

(4) A person summoned to attend for examination under this Chapter shall be tendered a reasonable sum in respect of travelling expenses incurred in connection with his attendance. Other costs falling on him are at the court's discretion.

(5) Where the examination is on the application of the official receiver otherwise than in the capacity of liquidator or trustee, no order shall be made for the payment of costs by him.

**Mike Pavitt, Blake Lapthorn**
**Christopher Brockman, Guildhall Chambers**
**April 2010**