Applications under s 236 Insolvency Act 1986

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Introduction

1. The IA s 236 powers of investigation are intended to enable the court to help an office-holder to discover the truth of the circumstances in connection with the affairs of the company, its trading and dealings, in order that the office-holder may be able, as effectively as possible and with as little expense as possible to complete his function, being (in the case of a liquidator) to put the affairs of the company in order and carry out the liquidation in all its various aspects, including getting in any assets.[1]

2. The powers compel the provision of information to the office-holder, whether by the provision of books, papers or other records, by answering requests for clarification, providing an affidavit, or submitting to oral examination: IR r 9.2(3).

3. Material obtained may be used for other purposes – eg reporting to the appropriate authorities of criminal offences or misconduct relevant to proceedings for the disqualification of a director.

4. The court will need to be satisfied that the powers are being invoked for proper purposes, and that it is just and convenient to make an appropriate order.[2]

Scope

5. The section 236 jurisdiction is "expressed in the widest terms".[3] It extends to company members' voluntary liquidation and winding-up on a contributory's petition or in the public interest.[4] Equivalent powers exist for investigation of the affairs of bankrupts: s 336 IA.

6. Section 236 extends to documents which comprise not only the company's own records but those of third parties which relate to the affairs or property of the company.[5]

Applicant

7. The applicant is the office-holder (provisional liquidator, liquidator, administrator, administrative receiver) or, in compulsory liquidation, the OR (whether or not he is liquidator)[6]: s 236(1). The power is not available to a nominee of a voluntary arrangement, or to a contributory or creditor.[7]

Respondent

8. The respondent 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). For the comparable provisions in bankruptcy, see s 336(1).

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

10. Directors, debtors, shareholders, auditors, solicitors and bankers are often targets. The power is also exercisable against administrative receivers,[8] and against the Crown.[9]

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[1] Re British & Commonwealth Holdings plc [1993] AC 426 at 438 (HL).
[2] Re British & Commonwealth Holdings plc at 439-440.
[3] Re Pantmaenog Timber Co Ltd [2004] 1 AC 158 (HL) at 163.
[4] Re Galileo Group Ltd [1998] 1 BCLC 318 at 332.
[5] Re Trading Partners Ltd [2002] 1 BCLC 655 at para 11.
[6] The OR successfully applied at a time when he was not liquidator in In re Pantmaenog Timber Co Ltd [2004] 1 AC 158.
[7] Re James McHale Automobiles Ltd [1997] BCC 202.
[8] Re Trading Partners Ltd [2002] 1 BCLC 655 at para 14; Re Delberry Ltd [2008] BCC 653.
[9] Soden v Burns [1996] 2 BCLC 636.

11. The power probably extends to respondents out of the jurisdiction,[10] 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.

The application

12. The application is usually made by ordinary application 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), the application is made by originating application.

13. The application must sufficiently identify the respondent. IR r 9.2(2).

14. The application should specify the order sought, and in particular whether it is for an oral examination, clarification/additional information, an affidavit (with details of the matters the affidavit 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.[11] 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.[12]

15. 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.[13]

Evidence

16. The application must be accompanied by a brief statement of the grounds on which it is made: IR r 9.2(1). The statement should make full disclosure of the relevant circumstances known to the office-holder. It will usually need to cover (a) the identity of the respondent and the respondent's relationship with the insolvent (b) the information which the applicant requires from the respondent (c) reasons why the court's assistance is required and (c) an explanation of the relief sought.

17. 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.[14]

18. Good reasons for keeping documents confidential include the fact that disclosure would defeat the reason for seeking an examination instead of seeking answers on affidavit,[15] or if the documents contain highly sensitive information.[16] 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.

Notice

19. There must be good and sufficient reason for an application to be made without notice – such as where documents are urgently required or that the material might be lost or destroyed if the

[10] Re Casterbridge Properties Ltd [2002] BCC 453; McIsaac [1994] BCC 410 (Scots Court of Session; Outer House); and Re Seagull Manufacturing Co Ltd [1992] Ch 128 at 137 (Mummery J); and on appeal ([1993] Ch 345 at 358) where the issue concerned public examination under s 133 IA, but the court held that power could be invoked against persons who were out of the jurisdiction even if they were not British subjects. In Re Mid East Trading Ltd [1998] BCC 726 it was held that an order could be made in relation to documents held abroad relating to a company being wound-up in the jurisdiction.

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

[12] See for example Colishaw v O&D Building Contractors [2009] EWHC 2445 (Ch) at para 42.

[13] See for example Daltel Europe Ltd v Makki [2005] 1 BCLC 594, where freezing orders and orders for delivery up of passports were made.

[14] Re British & Commonwealth Holdings plc (No 2) [1992] Ch 342 at 356.

[15] As in Re Bishopsgate Investment Management Ltd (No 2) [1994] BCC 732.

[16] As in Re Murjani [1996] 1 BCLC 272.

respondent is made aware of the application in advance.[17] Urgency attributable to the office-holder's own delay, a wish to avoid disclosing confidential material, or dealing with an unco-operative respondent are not good reasons.[18]

20. As with any "without notice" application, the evidence in support must be such as to meet the need for full and frank disclosure.[19] This means setting out material facts bearing on the decision whether or not to grant the order.

21. An order wrongly obtained without notice will not necessarily be discharged unless the respondent can show some substantive matter in issue and prejudice.[20] Likewise the court has a discretion whether to discharge an order obtained without notice in circumstances where there was a failure to make full and frank disclosure.[21]

Demonstrating a proper case

22. For the court to exercise its discretion in favour of making an order, the applicant must satisfy the court that, after balancing all relevant factors, there is a proper case for the order to be made. A proper case is one where the office-holder reasonably requires the information/documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the respondent. An application is not necessarily unreasonable because it is inconvenient for the respondent or causes him a lot of work or may make him vulnerable to future claims or he is a person who was not an officer, employee or contractor with the insolvent party, but these are all relevant factors.[22]

23. In principle it is a legitimate purpose that the order is sought to enable the office-holder to ascertain what has become of assets of the insolvent, to reconstitute the company's records, to understand its affairs and, with that understanding, to identify its assets wherever they may be, including any causes of action against anyone whoever they may be.[23] Since making the best possible realisation of a company's assets is part of an office-holder's function, obtaining information from a third party building contractor to enable administrators to decide how best to realise a part-completed building project is also in principle a proper use of s 236.[24]

24. In contrast, an order will only be made in exceptional circumstances if the purpose is to consider a proof of debt, as a proof of debt can be rejected so as to put the burden on the alleged creditor to prove the debt.[25] Nor is the power intended to give an office-holder who is about to become a litigant, an advantage over what ordinary parties to litigation would have under the normal rules of civil procedure (an aspect considered in more detail below).[26]

25. In every case, the onus of proving that the information is reasonably required is on the office-holder. His views will be accorded a good deal of weight.[27] He does not have to show an absolute need for the information or go into the level of detail which would be expected on a disclosure application in the course of civil proceedings.[28]

26. Although each case turns on its particular facts, the following factors will usually be relevant for the court to take into account when balancing the reasonableness of the office-holder's request against any unfairness or oppression to the respondent (the balance of benefit and prejudice).

    26.1 The importance of the information sought and the purpose for which it is required. So far as purpose is concerned, it is unlikely to be sufficient that the liquidator wished to

[17] Re Mawell Communications Corp plc (No 3) [1995] 1 BCLC 521; Re PFTZM [1996] 1 BCLC 272 at 284-5.
[18] Re Murjani [1996] 1 BCLC 272 at 285.
[19] See the commentary in the White Book 2009 at para 25.3.5.
[20] Re Murjani above.
[21] Re Para Partners, Unrep 3 Dec 1992 (Roger Kaye QC sitting as a deputy High Court Judge).
[22] Re British & Commonwealth Holdings plc (No 2) [1993] AC 426; Green v BDO [2005] EWHC 2413 (Ch) at para 30.
[23] Re RGB Resources plc [2002] BCC 1005 at para 62.
[24] Colishaw v O&D Building Contractors [2009] EWHC 2445 (Ch).
[25] Re Bellmex International Ltd [2001] 1 BCLC 91.
[26] Re Bishopsgate Investment Management Ltd (No 2) [1994] BCC 732 at 739.
[27] Sasea Finance Ltd v KPMG [1998] BCC 216 at 220; Green v BDO [2005] EWHC 2413 (Ch) at para 29.
[28] Cloverbay Ltd v BCCI [1991] Ch 90 at 102; Re Trading Partners Ltd [2002] 1 BCLC 655 at para 19; Green v BDO [2005] EWHC 2413 (Ch) at para 29.

establish the true financial position of the company, to investigate its affairs and reconstitute its knowledge, because this is to do no more than state the liquidator's function. The liquidator may need to explain why the documents are required to carry out his function,[29] what information or documentation is already available to him, and why the information is unavailable from any other source.[30]

26.2 The closeness of the connection between the respondent and the company. The case for making an order against an officer/former officer will usually be stronger than against a third party.[31] For this purpose auditors are regarded as officers.[32] Although the s 236 power is wide enough for an order to be made by one office-holder against another, it has been said to be highly undesirable that an office-holder should be subjected to the compulsory process of examination unless the circumstances are exceptional and there is no alternative.[33] Generally speaking the court will regard an order for oral examination as more oppressive to a respondent than an order for the production of documents.[34] So if the respondent has little connection with the insolvent, the court may prefer to require written answers to written questions instead of oral examination.[35]

26.3 The risk that the respondent might incriminate or disadvantage himself in threatened criminal or civil proceedings.[36] This is considered in more detail below.

26.4 The risk that compliance might expose the respondent to some penalty or liability – for example under some foreign law to which the respondent is subject, or by inadvertent contravention of some English law prohibition.[37]

26.5 The fact that the insolvent never had, or was never entitled to have, the documents covered by the application,[38] or was only entitled to have them after paying for them, and any limitation on their utility to the office-holder (such as copyright restrictions).[39]

26.6 Any public or other interest in preserving any confidentiality attaching to the information in question. The court will have regard to the interests of any third party whose material is sought to be obtained from the respondent.[40] The court will take into account the fact that if an order is made confidentiality attaching to the material will be eroded.[41] The court may be inclined to refuse an order where the material which the office-holder seeks was imparted to the respondent by a third party in confidence (such as by client to solicitor)[42] or is the subject of legal professional privilege.[43] But legal professional privilege is no answer if the privilege is that of the insolvent,[44] or joint privilege with the insolvent.[45] In the context of an application for material to be disclosed by administrative receivers, it was held to be neither proper nor desirable for the s 236 procedures to be utilised so as to enable an office-holder to obtain an insight into the "strategic considerations" of the receivership, or to enable

[29] Green v BDO [2005] EWHC 2413 (Ch) at para 35.
[30] Colishaw v O&D Building Contractors [2009] EWHC 2445 (Ch) at para 24-25 and 42.
[31] Re British & Commonwealth Holdings plc (No 2) [1992] Ch 342 at 372; Re RGB Resources plc [2002] BCC 1005 at para 26; Green v BDO [2005] EWHC 2413 (Ch) at para 30; Colishaw v O&D Building Contractors [2009] EWHC 2445 (Ch) at para 23.
[32] Mutual Reinsurance Co Ltd v Peat Marwick Mitchell [1996] BCC 1010; Green v BDO [2005] EWHC 2413 (Ch) at para 30.
[33] Re Trading Partners Ltd [2002] 1 BCLC 655 at para 24.
[34] Re Cloverbay Ltd [1991] Ch 90 at 103; Re Westmead Consultants Ltd [2002] 1 BCLC 384 at 387.
[35] As in Re Norton Warburg Holdings Ltd [1983] BCLC 235.
[36] Re British & Commonwealth Holdings plc (No 2) [1992] Ch 342 at 372.
[37] Re Galileo Group Ltd [1998] 1 BCLC 318 at 330; Re Mid East Trading Ltd [1998] 1 All ER 577 (CA).
[38] Re British & Commonwealth Holdings plc [1993] AC 426 at 438 (HL).
[39] Colishaw v O&D Building Contractors [2009] EWHC 2445 (Ch) at para 42 where the court refused to order provision of certain documents to which the insolvent company would not have been entitled without having paid the respondent (a third party building contractor).
[40] Morris v Director of The Serious Fraud Office [1993] Ch 373; Re Murjani [1996] 1 BCLC 272.
[41] Re Galileo Group Ltd [1998] 1 BCLC 318 at 331.
[42] In Morris v Director of The Serious Fraud Office [1993] Ch 372 Sir Donald Nicholls VC would not express a view as to whether legal professional privilege could be overridden under s 236.
[43] In Re Trading Partners Ltd [2002] 1 BCLC 655 it was agreed that the order should exclude material disclosed in litigation which was subject to the usual implied undertaking as to its use, as well as material covered by legal professional or litigation privilege: see at para 18.
[44] Re Murjani [1996] 1 BCLC 272.
[45] Re Konigsberg (a bankrupt) [1989] 3 All ER 289.

the applicant to obtain sight of confidential material or communications passing between the receiver and the debenture-holder, whether technically privileged or not.[46]

26.7 If there has been a long delay between the start of the insolvency and the application being made, the office-holder may need to explain what investigations have been carried out over that period, what those investigations have revealed and what, if any, gaps remain.[47]

Actual or threatened litigation

27. The likelihood of proceedings against the respondent, the fact that a decision has been taken to bring proceedings, or the existence of proceedings already brought against the respondent, are all relevant factors, but not necessarily determinative.[48] The question is whether any oppression to the respondent is outweighed by the legitimate requirements of the office-holder.[49]

28. So orders have been made under s 236 where a protective writ had been issued to prevent the potential claim from becoming time-barred,[50] and where proceedings involving serious allegations of dishonesty and fraud had been brought against the respondents and pre-emptive remedies obtained.[51]

29. In contrast, it has been held not to be a proper case for an order to be made if the purpose is to obtain evidence or admissions for use in an intended negligence action against the respondent rather than to gather information to enable the applicant to decide on the merits of prosecuting the action.[52] But this was in the context of a case in which the court considered that the liquidators already had ample material at their disposal in order to enable them to decide whether a viable negligence claim existed against the company's auditors, and the main purpose of the application was not to elicit information (most of which was already known to the liquidators) but to obtain admissions or explanations regarding information which had already been obtained.

30. It has been held to be a proper purpose for an order to be made in a subsequent liquidation for disclosure of documents by administrative receivers who had carried through a "pre-pack" sale, to see whether the remuneration the receivers had been paid was open to challenge and whether they might be liable for breach of duty/misfeasance.[53]

31. It has also been held to be a proper case for an order to be made if the purpose of the application is for the OR to obtain documents for use in pending directors' disqualification proceedings.[54] In this context it has been authoritatively stated that the functions of a liquidator are not limited to the administration of the insolvent estate. They include the investigation of the causes of the company's failure and the conduct of those concerned in its management.[55] However, it was said that although the jurisdiction exists to make an order where the purpose is for documents to be used in disqualification proceedings, it will be rare for any application under s 236 to be made for that sole purpose, and in such a case the court must be astute when exercising its discretion to prevent the oppressive use of its powers.[56]

Banks as respondents

32. An order made under s 236 overrides the bank's duty of confidentiality.

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[46] Re Trading Partners Ltd [2002] 1 BCLC 655 at para 19
[47] Green v BDO [2005] EWHC 2413 (Ch) at para 33.
[48] Re Atlantic Computers plc [1998] BCC 200 at 208; Re BCCI (no 7) [1994] 1 BCLC
[49] Re RGB Resources plc [2002] BCC 1005 at para 39.
[50] Sasea Finance Ltd v KPMG [1998] 1 BCC 216.
[51] Re RBG Resources plc [2002] BCC 1005; Daltel Europe Ltd v Makki [2005] 1 BCLC 594.
[52] Re Sasea Finance Ltd [1998] 1 BCLC 559. See to similar effect comments in Re PFTZM Ltd [1995] 2 BCLC 354 and Re Bishopsgate Investment Management Ltd (No 2) [1994] BCC 732 at 739.
[53] Re Delberry Ltd [2008] BCC 653.
[54] Re Pantmaenog Timber Co Ltd [2001] 2 BCLC 555.
[55] Re Pantmaenog Timber Co Ltd at para 64.
[56] Re Pantmaenog Timber Co Ltd at para 88.

33. 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.[57] 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).

34. 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.

35. Banks will frequently have the following key concerns, which the applicant should be prepared to address.

    35.1 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.

    35.2 The documentary material which 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.

    35.3 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.[58]

    35.4 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[59], in view of the "anti-tipping-off" provisions[60] 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

[57] Re Murjani [1996] 1 BCLC 272 at 286.
[58] As in Re BCCI (No 12) [1997] 1 BCLC 526; [1997] BCC 561 at 576.
[59] See s 338 of the 2002 Act.
[60] See s 333 of the 2002 Act.

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.

35.5 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.

35.6 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. The issue of costs generally is considered in more detail below.

Orders

36. 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.

37. 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 12.9(2)). An order requiring provision of an affidavit must specify the time within which the affidavit 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 given on affidavit: IR 9.4(3).

38. 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.[61] But this will not be ordered if there is a danger that the evidence which emerges may bear too much the stamp of the examinee's lawyers.[62]

39. 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.[63]

Oral examinations

40. An oral examination is usually before a registrar or district judge. The examination is usually conducted on oath: IA ss 237(4) & 367(4). 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 signed by him. IR r 9.4(6). The record is private and not placed on the court file. IR r 9.5(1).

41. The 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 9.4(4).

42. 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.[64]

Enforcing compliance

[61] Hamilton v Naviede [1995] 2 AC 75 at 101 (HL).
[62] Re Bishopsgate Investment Management (No 2) [1994] BCC 732 at 737.
[63] As in Sasea Finance Ltd v KPMG [1998] BCC 216.
[64] Re RGB Resources plc [2002] BCC 1005 para 43.

43. If the respondent fails to attend his 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. IA s 236(4)-(6); 366(2)-(4). Warrants are issued by the High Court to the tipstaff and his assistants and by the county court to the registrar and the bailiffs: IA s 236(5) & 366(3); IR r 7.21(2). 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).

44. 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).

Use of material obtained

45. Material obtained by the office-holder under these powers is subject to a qualified obligation of confidentiality.[65] The office-holder may only use the material for the purpose of the insolvency. The written record, answers and affidavits can be inspected by anyone who could have applied for the same order. If any other person wishes to inspect them, that person will need an order of the court. IR 9.5(2).[66]

46. The obligation of confidentiality is also qualified by the fact that the material may be disclosable under other statutory provisions.[67]

47. Most importantly, the material may be used by an office-holder against the respondent or other persons, in subsequent proceedings which have as their purpose the insolvency.[68] Once deployed in court in such proceedings, they probably lose the qualified privilege which attached to them.

48. The material can also be used in criminal proceedings even if in providing the information the respondent was compelled to incriminate himself, although the judge in the criminal proceedings would have a discretion whether to admit it[69] and use in later criminal proceedings might cause the criminal trial to be unfair contrary to the requirements of the European Convention on Human Rights.[70]

49. Production of documents to an office-holder pursuant to an order under s 236 or 336 does not affect any lien to which the documents are subject.[71]

Costs

50. Costs of obtaining or opposing the order at a contested hearing will usually follow the event in the normal way.

51. The applicant's costs of obtaining an order are also, unless otherwise ordered, payable out of the insolvent estate. IR r 9.6(3).

52. Where there has been an examination, the costs of the examination itself may be ordered to be paid by the respondent if the information was unjustifiably refused by the respondent. IR r 9.6(1).

[65] Sasea Finance Ltd v KPMG [1998] BCC 216 at 225.
[66] In Hamilton v Naviede [1995] 2 AC 75, the SFO obtained transcripts of a private examination.
[67] Eg IA s 218; CDDA s 7(3).
[68] Re Esal Commodities Ltd [1989] BCLC 59.
[69] Hamilton v Naviede [1995] 2 AC 75.
[70] By analogy with Saunders v UL [1998] 1 BCLC 362.
[71] Re Aveling Barford Ltd [1989] BCLC 122.

53. The respondent has to bear the costs of employing his own lawyer at an examination. IR 9.4(5).

54. A respondent summoned for examination is entitled to a reasonable sum for travelling expenses. Whether he gets any other costs is at the court's discretion. IR 9.6(4).

55. The cases suggest that the court has power to make an award to cover costs and expenses incurred by a respondent ordered to produce documents under s 236.[72]

56. Where an examination is on the application of the OR but not in his capacity as liquidator or trustee, the OR will not be ordered to pay costs. IR r 9.6(5).

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[72] Re Aveling Barford Ltd [1989] BCLC 122; Re BCCI (No 12) [1997] BCC 561, but in both cases the point was deferred until after the requested documents had been produced.