under it (known as international business companies, or "IBCs") soon dwarfed companies registered under the old Companies Act. That was followed by the BVI Business Companies Act 2004, which came into force on 1 January 2005. The BVI Business Companies Act was intended to repeal and replace both of the earlier statutes, but because of the sheer number of companies registered under earlier legislation, and the fundamental shifts which the new Act sought to implement, a three-step transitional process was introduced:

(a) From 1 January 2005 to 31 December 2005 all three statutes operated together, and it was still possible to register a company under any of those statutes.

(b) From 1 January 2006 to 31 December 2006 new companies could only be registered under the BVI Business Companies Act, but companies registered under older statutes continued to be regulated by older statutes.

(c) On 1 January 2007 the International Business Companies Act 1984 was repealed, and all companies registered under it were from that time regulated under the BVI Business Companies Act.

(d) On 1 January 2008 the Companies Act 1884 was repealed, and all companies registered under it were from that time regulated under the BVI Business Companies Act.

Companies which were registered under the older statutes could elect to adopt new memoranda and articles of association and re-register under the BVI Business Companies Act at any time during the process. In practice, a number of them did so, although perhaps not as many as the moving minds behind the legislation had hoped.

2.004 But the legislation still needed to accommodate the fact that companies registered under the old Companies Act 1884 and International Business Companies Act 1984 had radically different memoranda and articles of association from that required under the BVI Business Companies Act 2004. Accordingly, the BVI Business Companies Act included extensive transitional provisions to allow those companies originally registered under older legislation to function normally – essentially preserving core aspects of those older statutes within the schedules of the new Act. To this day there remain a substantial number of British Virgin Islands companies which were originally incorporated under the International Business Companies Act 1984 and as such are still subject to the transitional provisions set out in Schedule 2 of the BVI Business Companies Act. A common error amongst company lawyers is to overlook the application and effect of Schedule 2 provisions on older British Virgin Islands companies.

(b) Transitional arrangements

2.005 Schedule 2 of the BVI Business Companies Act 2004 contains a number of transitional provisions to accommodate the fact that the memorandum and articles of association of companies which were originally incorporated under either the International Business Companies Act 1984 or the Companies Act 1884 would not be consistent

with the provisions of the BVI Business Companies Act in certain respects. During the twilight period prior to the repeal of the International Business Companies Act and the Companies Act, companies registered under those statutes were permitted to re-register themselves voluntarily under the BVI Business Companies Act and adopt new memorandum and articles of association which complied with the newer statute,[5] although in practice relatively few companies did so. Where companies did voluntarily re-register under that provision, they were assigned a new company number (as to which, see further below) and were treated for all purposes as being regulated by the substantive provisions of the BVI Business Companies Act from the time of re-registration.

2.006 Where companies incorporated under the older statutes did not voluntarily re-register, they were automatically deemed to re-register at midnight on 31 December 2006 (for companies registered under the International Business Companies Act 1984) or midnight on 31 December 2008 (for companies registered under the Companies Act 1884).[6] Where any company was automatically re-registered in this fashion, the main part of the transitional provisions in Schedule 2 applied to certain aspects of corporate governance which were incongruous with the new legislation. The main areas in which Schedule 2 sought to preserve parts of the former statutes were mandatory requirements for the memorandum and articles of association, such as payment for shares, forfeiture of shares, acquisition of own shares, maintenance of share capital (including increasing or reducing authorised or issued share capital), dividends and distributions of surplus, dealing with security interests which had been registered under the former system of registration in the International Business Companies Act (broadly to allow filings which indicated when security which had been registered under the repealed statute was varied or discharged),[7] and to deal with dissolution and restoration of companies which were struck-off under prior legislation. As with the substantive provisions of the BVI Business Companies Act, a huge amount of energy is also devoted to complicated transitional provisions relating to bearer shares.[8]

2.007 Even after a company has been automatically re-registered under the BVI Business Companies Act 2004, it is still possible to adopt new memorandum and articles of association which are fully compliant with the newer statute and file a notice of disapplication to disapply the transitional provisions in Schedule 2. This is normally only done when the company is proposing to make other changes to its memorandum and articles of association anyhow, and complying with both the substantive provisions and the transitional provisions becomes unworkably complex.

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5 BVI Business Companies Act 2004, Schedule 2, para. 2.

6 Ibid., Schedule 2, para. 6(1).

7 The changes which permitted filing variations or discharges with respect to security registered under the International Business Companies Act 1984 only came into effect on 1 July 2007 pursuant to the BVI Business Companies (Amendment of Schedules) Order 2007. Accordingly, there was a period of six months when such registrations could not be varied or released.

8 See further at Chapter 2, section 11(h) and following.

(c) Company numbers

2.008 Every company in the British Virgin Islands which is incorporated under statute is required to have a unique registration number.[9] Only statutory corporations and companies formed by Royal Charter are exempt from this requirement.

2.009 One can normally get a good idea of the original statute under which a company was incorporated under (and hence whether the transitional provisions are relevant) simply by examining its incorporation number. As a rough rule of thumb, any company which has an incorporation number below 10,000 will normally have been incorporated under the Companies Act 1884. Any company which has a company number greater than 10,000 but less than 1,000,000 (strictly speaking, below 690,583) will normally have been incorporated under the International Business Companies Act 1984. Any company which has a company number above 1,000,000 will normally have been incorporated under the BVI Business Companies Act 2004.

2.010 Although the rule of thumb is accurate for more than 99% of British Virgin Islands companies, it is not perfect. When the International Business Companies Act was first passed into law, companies were initially assigned company numbers below 10,000 until a decision was taken to segregate the numbers. Accordingly, some IBCs which were incorporated in the mid 1980s still have sub-10,000 numbers. Similarly, around 2003 the Companies Registry ran out of numbers below 10,000 and had to start incorporating companies under the Companies Act 1884 *above* 10,000. Finally, during the transitional periods referred to above, it was possible to voluntarily re-register a company originally incorporated as an IBC under the BVI Business Companies Act 2004, and if this was done, then the company was given a new number above 1,000,000 (so, confusingly, the company would have two different numbers during its lifetime).

2.011 The main purpose of trying to determine the pedigree of a British Virgin Islands company is usually to determine whether the transitional provisions set out in Schedule 2 of the BVI Business Companies Act apply to that company, and for that the rule of thumb is very effective - any company which still operates under a company number which is less than 1,000,000 will still normally be subject to the transitional provisions in Schedule 2 (unless it has amended its memorandum and articles of association to comply with the BVI Business Companies Act and filed a notice to disapply Schedule 2 with the Registrar). Any company which has a number greater than 1,000,000 (either by virtue of its original incorporation date or its voluntary re-registration during the transitional period) will not be subject to the Schedule 2 transitional provisions.

2. Incorporation

2.012 Incorporation of a company in the British Virgin Islands appears somewhat unusual compared to most other common law based jurisdictions in that there is no requirement for the initial incorporators to take "subscriber shares". Instead, incorporation is

[9] BVI Business Companies Act 2004, section 7(1)(b).

effected by a registered agent licensed by the Financial Services Commission filing an application with the Registrar of Companies together with the memorandum and articles of association of the proposed company.[10] No person other than a licensed registered agent may incorporate a company.[11] Certain specific types of company have additional requirements. If the company is a segregated portfolio company, then a copy of the written approval of the Financial Services Commission must also be filed.[12] If the company is a restricted purpose company, then this needs to be recorded in the memorandum of association which is filed.[13] Once the Registrar is satisfied that the incorporation satisfies the relevant statutory requirements, she will register the documents, issue a unique company number to the company and issue a certificate of incorporation.[14] The issuing of a certificate of incorporation is conclusive evidence that provisions of the BVI Business Companies Act 2004 have been complied with, and that the company is incorporated from the date specified in the certificate.[15] In theory the power of the Registrar to incorporate (or not incorporate) a company is judicially reviewable, but in practice the prospects of a challenge by way of judicial review are remote.[16] Once incorporated, a company is a distinct legal person in its own right separate from its members and continues in existence until it is dissolved.[17] Subject to the provisions of the BVI Business Companies Act and the Insolvency Act 2003, the debts and liabilities of the company are its own and not those of its individual members.

2.013 The absence of subscriber shares means that upon incorporation a new British Virgin Islands company will have neither members nor directors. Instead, the registered agent which has incorporated the company has the power to appoint the first directors of the company.[18] Once appointed, the board of directors can then issue shares (for companies which have the power to issue shares) or admit guarantor members. Normally directors will be appointed and shares issued on the date of incorporation, however, in some cases where companies are formed as "shelf" companies to be held for sale by the registered agent at a later date, there can be a delay between incorporation and appointment of directors.[19]

2.014 If the Registrar notices an error or omission in the application to incorporate a company, she will issue a defective notice. Although such notices are now issued solely in electronic format, they are still sometimes referred to locally as "green forms", a nickname which arose during the time when the Registrar used to issue defective notices on green paper forms. Where a defective notice is issued, the registered agent may rectify the error within 30 days and thereby preserve the original filing date as the

[10] Ibid., section 6(1).
[11] Ibid., section 6(2).
[12] Ibid., section 6(1)(d).
[13] Ibid., section 8(1).
[14] Ibid., section 7(1).
[15] Ibid., section 7(2); following the common law rule in *Cotman v Brougham* [1918] AC 514.
[16] *R v Registrar of Joint Stock Companies* [1931] 2 KB 197; *R v Registrar of Companies ex p AG* [1991] BCLC 476.
[17] BVI Business Companies Act 2004, section 27.
[18] Ibid., section 11.
[19] See para. 2.274 with respect to the position where directors are not appointed within the statutory time limits.

date of incorporation. If the defect is not cured within 30 days, then the registration lapses and the incorporation fee is returned.

(a) Piercing the corporate veil

2.015 The general rule for limited companies (whether limited by shares or limited by guarantee) is that a member has no liability as a member for the debts and obligations of the company.[20] This statutory provision means that third parties cannot ordinarily sue a member for the company's debts. Under the BVI Business Companies Act 2004, as between the company and a shareholder, the shareholder's liability to the company is limited to the amount unpaid on the shares, any liability expressly provided for in the memorandum or articles, and any liability to repay a distribution made in breach of the solvency requirements.[21] A guarantee member's liability to the company is limited to: (i) the amount that is specified in the memorandum[22] as the members' liability to contribute to the company's assets in liquidation;[23] (ii) any other liability expressly provided for in the memorandum or articles; and (iii) any liability to repay a distribution made in breach of the solvency requirements.[24] There may however be specific situations where a member may be separately liable for the company's debts, such as where the member has personally guaranteed those debts, or where the courts are prepared to "pierce the corporate veil".

2.016 The existing common law relating to piercing the corporate veil was substantially rewritten by the UK Supreme Court in 2013 in a pair of unrelated judgments: *VTB Capital plc v Nutritek International Corp*[25] and *Prest v Petrodel Resources Ltd.*[26] The two cases considered different aspects of piercing the corporate veil – *VTB Capital* concerned an attempt to impose liability on a shareholder for the debts of the company, and *Prest v Petrodel* concerned a case where a judgment creditor sought to attach assets belonging to several companies in relation to a judgment debt against a third party. *Prest v Petrodel* (the later decision) the Supreme Court appeared to affirm that the same basic principles will apply in either case. All earlier case law must now be reconsidered in the light of the guidance provided in those two decisions.

2.017 In *Prest v Petrodel* Lord Sumption provided a masterly analysis of the existing law, and clarified that a number of matters which had been sometimes regarded by both courts and commentators as piercing the corporate veil are in fact no such thing. So, for example, a person who controls a company may be liable in addition to the company itself for something done as its agent or as joint actor. Similarly, property which is legally held by the company may in fact be held on trusts for the controller, either expressly or on constructive or resulting trusts. Alternatively the courts may use equitable remedies such as injunction or specific performance to compel a person who controls a company to

[20] BVI Business Companies Act 2004, section 80(1).
[21] Ibid., section 80(2). The liability to repay distributions arises under section 58(1).
[22] Ibid., section 9(1)(f).
[23] Ibid., sections 9(1)(f) and 80(3)(a).
[24] Ibid., section 80(3). The liability to repay distributions arises under section 58(1).
[25] [2013] UKSC 5.
[26] [2013] UKSC 34.

exercise their control in a certain way. But none of those situations are true exceptions to the fundamental rule in *Salomon v Salomon & Co.*[27] Lord Sumption cited with approval the famous passage from *Adams v Cape Industries plc*:[28]

> '... the court is not free to disregard the principle of *Salomon v A Salomon & Co Ltd* [1897] AC 22 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.'

2.018 The Supreme Court in *Prest v Petrodel* affirmed the basic principle that 'the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities'[29] and reaffirmed the statement in similar terms made in the judgment in *VTB Capital plc v Nutritek.*[30] The difficulty which courts must confront is what precisely constitutes relevant wrongdoing. The Supreme Court felt that traditional terms used in earlier judgments such as "façade" and "sham" were too vague, as they raised more questions than they answered. The better approach was to recognise and properly distinguish between two different principles of wrongdoing: the "concealment principle" and the "evasion principle".[31]

2.019 The concealment principle Lord Sumption described as "legally banal" in that it does not involve piercing the corporate veil at all. In these cases the courts are simply looking behind the corporate structure to see what is being concealed. On the other hand the evasion principle was regarded as different and fundamental. In such cases 'the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement.'[32] Many cases may involve both concealment and evasion, but the court nonetheless regarded the distinction between them as potentially crucial. Lord Neuberger clarified 'if piercing the corporate veil has any role to play, it is in connection with evasion.'[33]

2.020 Re-examining the previously decided cases on this basis Lord Sumption and Lord Neuberger felt that in most cases where the court has indicated that the true analysis was that in most cases the claimant had parallel claims against both the wrongdoer and the company, and the courts were simply looking at the "true relationship" between the wrongdoer and the company, rather than piercing the corporate veil.

[27] [1897] AC 22
[28] [1990] Ch 433 at 536.
[29] *Prest v Petrodel Resources Ltd* [2013] UKSC 34, at para. 27.
[30] *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5, at para. 79.
[31] This concept was not entirely novel - in *Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)* [1991] 4 All ER 769 at 779G the court referred to distinguishing between "lifting" and "piercing" the corporate veil.
[32] *Prest v Petrodel Resources Ltd* [2013] UKSC 34, at para. 28.
[33] Ibid., at para. 61.

2.021 The Supreme Court held in *Prest v Petrodel* that piercing the corporate veil will be considered only where the separate legal personality of a company is abused to evade the law or frustrate its enforcement. The court affirmed in strong terms:[34]

> 'It is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely upon the fact (if it is a fact) that a liability is not the controller's because it is the company's. On the contrary, that is what incorporation is all about.'

2.022 Critically for an offshore jurisdiction, Lord Sumption added in relation to the findings of fact at first instance for the case under consideration:[35]

> 'The judge found that his purpose was "wealth protection and the avoidance of tax". It follows that the piercing of the corporate veil cannot be justified in this case by reference to any general principle of law.'

2.023 The Supreme Court stated in summary that there is a limited principle of law:[36]

> '…which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.'

2.024 The court then went on to note that the reason that the principle is properly described as a limited one is because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil. The court in *Prest v Petrodel* also stressed that the obligation or liability being avoided must be an existing one, stressing that the reason the claim in *VTB Capital plc v Nutritek* had failed was because the claimants sought to invoke the principle so as to create a new liability that would not otherwise exist.

2.025 It is of course important not to confuse piercing the corporate veil with the exercise of judicial remedies which may be available against the company even though no direct cause of action exists. For example, it may be possible to obtain a freezing order against a company even though the claimant has no cause of action against the company, but simply in order to make the freezing order effective.[37]

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34 Ibid., at para. 34.
35 Ibid., at para. 36.
36 Ibid., at para. 35, partially repeated at para. 81.
37 *TSB International v Chabra* [1992] 1 WLR 231. In relation to freezing orders generally, see Chapter 8, section 6.

3. Company Names

2.026 A British Virgin Islands company can be formed with almost any name, but it cannot be exactly the same as a name already used by another company, or be so similar as to cause confusion.[38] All companies with limited liability are required to end their name with an approved corporate suffix (either "Limited", "Corporation", "Incorporated", "Societe Anonyme" or "Sociedad Anonima", or their abbreviated forms)[39] unless the Registrar grants special dispensation to the company as a charitable or non-commercial company carrying out its activities principally within the British Virgin Islands.[40] Companies without limited liability for their members are required to end with the corporate suffix "Unlimited" or "Unltd".[41] Companies which are incorporated as restricted purpose companies are required to end their names with "(SPV) Limited" (or the abbreviated form) and segregated portfolio companies are required to end their names with "Segregated Portfolio Company" or "SPC" prior to any of the other approved corporate suffixes.[42] Companies which wish to operate as private trust companies[43] in accordance with the Financial Services (Exemptions) Regulations 2007[44] are also required to include the designation "(PTC)" immediately before one of the above endings.

2.027 Companies are subject to an administrative limit of one hundred total characters in their name, including spaces.[45] Broadly speaking any alpha-numeric character and all principle forms of punctuation found on a traditional QWERTY keyboard are permissible, with the exception of currency symbols.[46] With the permission of the Registrar (on a case by case basis) currency symbols and characters with accents may be permitted.[47]

2.028 The Registrar has power to restrict the use of certain words in company names without prior approval.[48] An extremely comprehensive list was set out in the BVI Business Companies (Restricted Companies Names) Notice 2013.[49] Broadly speaking, the restricted names fell into five broad categories: (i) words which imply that the company conducts some form of regulated business, such as banking, insurance or investment funds;[50] (ii) words which imply the patronage of the Royal family or the government of the British Virgin Islands; (iii) words which imply that the company is a philanthropic

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38 BVI Business Companies Act 2004, section 18(1). However section 18(3) does confer power on the Registrar to allow similar names to be used by companies which are affiliates.
39 Ibid., section 17(1).
40 Ibid., section 17A.
41 Ibid., section 17(2).
42 Ibid., section 17(3) and 17(4).
43 For a further discussion of private trust companies, see Chapter 9, section 5.
44 SI No 50 of 2007.
45 BVI Business Companies Regulations 2012, regulation 3(1)(b).
46 Ibid., regulation 2(1) and Schedule 1, paras. 4 and 5.
47 Ibid., para. 6 of Schedule 1.
48 BVI Business Companies Act 2004, section 18(2).
49 SI 48 of 2013. This superseded (and expanded) the earlier BVI Business Companies (Restricted Names) Notice 2011 (SI 57 of 2011).
50 Normally the name will be approved as part of the licensing approval process where a company is engaging in such regulated business. In certain cases the Registrar has permitted the use of the word "fund" if she is satisfied that the relevant company is operating as a closed-ended investment fund which does not require a licence under the Securities and Investment Business Act 2010 although current policy does not permit this any longer.

institution; (iv) words which imply the company is engaged in gambling business; or (v) the company is some type of entity other than a company registered under the BVI Business Companies Act 2004. Although the list is not exhaustive (it is not, for example, possible to incorporate a company with a name which is considered obscene), it is nonetheless extensive. In some respects the list is almost comically duplicative: although both the words "mutual" and "fund" are restricted words, "mutual fund" is also separately restricted even though it is entirely composed of restricted words. It also prohibits the use of a number of largely innocuous words, including "British", "change" and "school" for no obvious or apparent reason.

2.029 Currently there are 177 restricted words and phrases. The full list of proscribed words and phrases is as follows: Adjuster; Ahorra; Annuity; Anonima; Anonyme; Arbitrage; Asset Management; Association; Assurance; Assurer; Authorised Representative; Banc; Banco; Bancorp; Bank; Banker; Bankrupt; Bankruptcy; Banque; Belegginsfonds (Belegginsfonds); Betting; Bingo; British; Broker; Brokerage; Building Society; Bureau; Caja; Capital Markets; Captive; Casualty; Chamber of Commerce; Change; Chartered; Church; College; Companies Registry; Company Registry; Cooperative; Cooperative Society; Credit; Critical Illness; Crown; Currency; Deposit; e-bank; E-change; e-commerce; e-Financing; e-Fund; e-gaming; e-Insurance; e-Investment; e-money; e-Money Services; e-savings; e-Trust; Exchange; Extended Coverage; Extended Warranty; Fidelity; Fiduciaire; Fiduciare; Fiduciary; Financing; Financing Business; Fondo; Fondos Mutude; Fondos Mutuds; Fondos Mutuos; Foreign Exchange; Foreign Insurer; Forex; Foundation; Fund; Funding; FX; Gambling; Gaming; Geldmittl;[51] Government; Governor; Guarantee; Guaranteed; Hedge; Hedge Fund; HMS; IBC; Financing; Forex; Fund; Gaming; Insurance; Investment; Money; Money Services; Imperial; Indemnity; Insolvency; Insolvent; Insurance; Insurance Agent; Insurance Broker; Insurance Brokerage; Insurance Consultant; Insurance Manager; Insured; Insurer; Intermediary; Law; Lease; Leasing; Liability; Life; Life and Health; Limited Partnership; Liquidation; Liquidator; Litigation Insurance; LLC; Lloyds; LLP; Loan; Loss Adjuster; Lottery; LP; Majesty; Malpractice; Money; Money Services; Mutual; Mutual Fund; Official Liquidator; Official Receiver; Official Trustee; Partnership; Permanent Health; Pharmacy; Portfolio; Property and Casualty; Protected Cells; Provident; Prudential; Reassured; Re-assured; Reassurer; Re-Assurer; Receiver; Receivership; Registry; Reinsurance; Re-Insurance; Reinsured; Reinsurer; Risk; Royal; Saving; Savings and Loans; School; Securities; Sovereign; Surety; Suretyship; Third Party Administrator; Transmission; Trust; Trust Company; Trust Corporation; Trustee; Trustee Company; Underwrite; Underwriter; Underwriting; and University

2.030 Proscribed words may be permitted to be used on suitable occasions, although the practice of the Registry has varied somewhat over the years. In particular, using the words "BVI" or "British Virgin Islands" in a company name has varied between being virtually forbidden to freely allowed and back again; the most recent change being in

[51] The word "Geldmittl" is a curious word to have included for two reasons. Firstly, it appears to be an incorrect spelling of the German word, Geldmittel (with an "e"). Secondly, the word is extremely antiquated, and in Germany the French word "Fonds" is usually used in modern times to designate investment funds. Even more strangely, "Fonds" is not itself a restricted word.

2015 to permit the use of those words again.[52] The Registrar has also intimated on prior occasions that she would refuse to allow names which imply breach of United Nations sanctions (by including the names of countries or individuals which are subject to wide ranging sanctions), although no formal regulations have been promulgated in relation to this to date.

2.031 A company may also be incorporated using "BVI Company Number" followed by its incorporation number,[53] although to date this has not proved popular with registered agents and their clients.

2.032 Companies can also be registered with a foreign character name with the Registrar's approval,[54] but the foreign character name must be adopted in addition to a name in the Roman alphabet which otherwise complies with the Act. The foreign character name does not form part of the company's legal name.[55] Regulations were intended to be promulgated to deal with specific procedures and types of character, but these were not in fact issued until 2012, although during the intervening period the Registry developed a system for registration of foreign character names and a large number of such names were registered prior to regulations making express provision for a procedure. A great number of British Virgin Islands companies have been incorporated with a foreign character name designated in Chinese characters, but very few other foreign characters are believed to have been used successfully to date. Companies which wish to adopt a foreign character name must file a notarised translation of the foreign character name, confirming and attesting to its accuracy as a foreign translation of the Latin character name.[56]

2.033 Once incorporated, a company may change its name by making an application to the Registrar of Companies.[57] Unlike the old International Business Companies Act 1984, a change of name does not constitute an amendment to the memorandum and articles of association under the BVI Business Companies Act 2004. The Registrar also has the power to direct a company to change its name if she believes on reasonable grounds that the name of the company does not comply with the Act (the most common reason being that the scope for confusion with the name of a previously incorporated company which only becomes apparent at a later stage).[58] The change of a company's name does not affect any of the company's rights or obligations - it remains the same legal entity, but with a new name to designate it.[59]

2.034 Because of the large number of companies formed in the British Virgin Islands, provision is made for the re-use of old company names. Broadly speaking, when a name is no longer used because the original company has either changed its name, been struck off or otherwise dissolved, then that name may be available for re-use.[60]

[52] BVI Business Companies (Restricted Company Names) (Amendment) Notice 2015.
[53] BVI Business Companies Act 2004, section 19.
[54] Ibid., section 20 and BVI Business Companies Regulations 2012, regulation 6.
[55] Ibid., section 2, definition of "name".
[56] The current practice assumes that the Roman character name is in English; presumably if the Roman character name was itself a foreign language, a longer form of translation certification would be required.
[57] BVI Business Companies Act 2004, section 21.
[58] Ibid., section 22.
[59] Ibid., section 23.
[60] Ibid., section 24. The BVI Business Companies Regulations 2012, regulation 13(1)(b) also indicate that this power may be available when a company is continued out of the jurisdiction, although this power does not appear in the primary legislation.

Generally speaking the names are available for re-use immediately after a company has been dissolved, and seven years after the name ceased to be used in all other cases, although this period can be shorted in certain circumstances with the first company's written consent.[61] Where a company has been subject to insolvent liquidation or administrative receivership its name may not generally be re-used except with the leave of the court or as part of a sale of the business and undertaking by the liquidator or administrative receiver.[62]

2.035 The Companies Registry is not bound to take account of any registered trade mark or other intellectual property right when determining whether a company may hold a certain name, nor is the Registrar required to make any determination of the rights or interest of a person in a particular name.[63] The Registrar is permitted to take into consideration such naming rights when exercising her discretion as to whether a particular name is objectionable or contrary to public policy or public interest.[64] Accordingly, the Registrar has pretty much unlimited discretion under British Virgin Islands law as to how she treats intellectual property rights relating to names when dealing with company registrations.

2.036 Where a company is misdescribed in a document, provided it is clear from the document which company was intended to be referred to, then a mis-spelling or other misdescription of the company name will not normally be fatal. So where the directors of a company named "F Goldsmith (Sicklesmere) Ltd" signed a document which wrongly described the company as "Goldsmith Coaches (Sicklesmere) Ltd" the courts will nonetheless hold the contract binding on the intended company if it is clear from the surrounding circumstances that was the intent.[65]

4. Types of Company

2.037 Under the old International Business Companies Act 1984, it was only ever possible to incorporate a company limited by shares. Under the BVI Business Companies Act 2004, there are a wider range of options for corporate formations. It is possible to incorporate:

(a) a company limited by shares;

(b) a company limited by guarantee which is not authorised to issue shares;

(c) a company limited by guarantee which is authorised to issue shares;

(d) an unlimited company that is not authorised to issue shares; and

(e) an unlimited company that is authorised to issue shares.

61 BVI Business Companies Regulations 2012, regulation 14(1).
62 Ibid., regulation 18.
63 BVI Business Companies Act 2004, section 26A(1).
64 Ibid, section 26A(2).
65 *F Goldsmith (Sicklesmere) Ltd v Baxter* [1970] 1 Ch 85, cited with approval in *Dumford Trading AG v OAO Atlantrubflot* [2005] EWCA Civ 24. In that case key factors considered by the court were that (i) there was in fact no company registered with the name "Goldsmith Coaches (Sicklesmere) Ltd" and (ii) the person who signed on behalf of the company was in fact a director of a company called F Goldsmith (Sicklesmere) Ltd.

Furthermore, a company can also be formed as: 2.038

(i) a restricted purpose company; or

(ii) a segregated portfolio company.

Despite the greater number of choices, companies limited by shares continue to be by far the most common type of company incorporated in the British Virgin Islands. Restricted purposes companies[66] and segregated portfolio companies[67] must be companies limited by shares. 2.039

(a) Companies limited by shares

A company limited by shares is one that can issue shares, and the members of which are the holders of such shares. The liability of the members for the debts of the company is limited. The memorandum of association of a company limited by shares must specifically state:[68] 2.040

(a) that it is such a company;

(b) the maximum number of shares that the company is authorised to issue or that the company is authorised to issue an unlimited number of shares; and

(c) the classes of shares and (if there is to be more than one class) the rights, privileges, restrictions and conditions attaching to each such class.

The legislation requires that there must be at least one shareholder at all times,[69] however this requirement does not apply during the period from incorporation of the company to the appointment of the first directors.[70] Accordingly, once the first directors are appointed, they must issue shares. 2.041

A member of a limited company has no liability as a member for the debts and obligations of the company[71] and this is a statutory affirmation of the principle that the company has separate legal personality from its members.[72] A creditor cannot generally sue a member of a limited company for the company's debts. Where there are no members, any person doing business on behalf of or in the name of the company is personally liable for its debts.[73] 2.042

Outside of specific scenarios where the courts will permit piercing of the corporate veil,[74] a shareholder's liability to contribute to the company's assets is limited to (i) the 2.043

66 BVI Business Companies Act 2004, section 10(1).
67 Ibid., section 135(1).
68 Ibid., section 9(1).
69 Ibid., section 79(1).
70 Ibid., section 79(1A).
71 Ibid., section 80(1).
72 Ibid., section 27.
73 Ibid., section 108.
74 See Chapter 2, section 2(a).

amount unpaid on shares held by him, (ii) any liability expressly provided for in the memorandum or articles of association and (iii) a liability to repay any dividend or other distribution made in contravention of the solvency requirements.[75]

2.044 The memorandum or articles may expressly provide for additional liability on the part of a shareholder to the company (for example, a liability to contribute further equity) and specify when such liability should accrue. Where a share imposes a liability to the company and such a share is transferred, the instrument of transfer must also be signed by the transferee.[76]

(b) Companies limited by guarantee not authorised to issue shares

2.045 Companies limited by guarantee and not authorised to issue shares have traditionally been used for charitable and social purposes, although there is no legal reason why they cannot also be utilised for commercial purposes. These companies do not have shares and their members are not shareholders but are referred to as guarantee members.

2.046 In order to be incorporated as such a company, the memorandum must state that it is a company limited by guarantee that is not authorised to issue shares.[77] The essence of such a company is that its guarantee members are liable to contribute to the company's assets only if the company goes into voluntary liquidation under the BVI Business Companies Act 2004 or insolvent liquidation under the Insolvency Act 2003 and are limited to an amount that must be stated in the memorandum.[78] The memorandum or articles can also expressly provide for any additional liability to the company[79] and, as mentioned above in relation to companies limited by shares, there is no reason why that liability cannot arise while the company is a going concern.

2.047 The general rule of limited liability applies to guarantee companies - guarantee members are not liable as members for the debts or obligations of the company except to the extent of their guarantee upon the company going into insolvent liquidation.[80] A company limited by guarantee must have at least one guarantee member at all times,[81] but this requirement does not apply during the period from incorporation of the company to the appointment of first directors.[82] One contrast with companies limited by shares is in the voting rights of members. For companies limited by shares, a shareholder normally has the total number of votes attached to the shares that he holds, whereas a guarantee member is entitled to one vote unless the memorandum or articles provide otherwise.[83]

[75] BVI Business Companies Act 2004, section 80(2).
[76] Ibid., section 54(2).
[77] Ibid., section 9(1)(b)(ii).
[78] Ibid., sections 9(1)(f) and 80(3)(a).
[79] Ibid., section 80(3)(b).
[80] Ibid., section 80(1).
[81] Ibid., section 79(2).
[82] Ibid., section 79(1A).
[83] Ibid., section 81(3).

(c) Companies limited by guarantee and authorised to issue shares

2.048 Companies limited by guarantee can also be incorporated which are able to issue shares as well. As with other forms of corporate vehicle, the memorandum must designate it as such.[84] As it is a hybrid vehicle, the memorandum must contain the matters required for companies limited by guarantee as well as for companies limited by shares. Accordingly, it must state:[85]

(a) the amount which each guarantee member is liable to contribute to the company's assets upon a liquidation;

(b) the maximum number of shares the company is authorised to issue or that the company is authorised to issue an unlimited number of shares; and

(c) the classes of shares and the rights, privileges, restrictions and conditions attaching to each class if there is to be more than one class of shares.

2.049 At least one of its members must be a guarantee member,[86] but it can also have shareholders. The guarantee member's liability to the company will be the same as set out above in relation to a company limited by guarantee not authorised to issue shares,[87] and a shareholder's liability is as discussed above in relation to a company limited by shares.[88] Shareholder members will have the votes attached to their shares, while a guarantee member will have one vote unless the memorandum or articles provide otherwise.[89]

(d) Unlimited company not authorised to issue shares

2.050 As the name suggests, members of an unlimited company have unlimited liability for the debts and other liabilities of the company[90] and are therefore referred to as unlimited members.[91] The company's memorandum must state that it is such a company,[92] and it must have at least one unlimited member at all times.[93] Each member will have one vote unless the memorandum or articles provide otherwise.[94]

2.051 The definition of unlimited liability in section 80(4) appears to be very wide for it is not expressly stated to be a liability to the company (as is the case with the definition of shareholder's liability and guarantee member's liability).[95] The definition has to be read together with provisions of the Insolvency Act, in particular section 195,

[84] Ibid., section 9(1)(b)(iii).
[85] Ibid., section 9(1).
[86] Ibid., section 79(2).
[87] Ibid., sections 9(1)(f) and 80(3).
[88] Ibid., section 80(2).
[89] Ibid., section 81(3).
[90] Ibid., section 80(4).
[91] Sections 78 and 79(3).
[92] Ibid., section 9(1)(b)(iv).
[93] Ibid., section 79(3).
[94] Ibid., section 81(3)(b).
[95] Ibid., section 80.

from which the intention is clear that the liability of unlimited members is indeed a liability to the company to contribute to its assets in liquidation. This accords with the general principle enshrined in the BVI Business Companies Act 2004 that an incorporated company (even an unlimited company) has separate legal personality from its members,[96] with the consequence that its debts and liabilities are not in general those of its members.[97] However, the BVI Business Companies Act does not expressly restrict the liability to when the company goes into liquidation[98] so that the memorandum could provide for the member to contribute to the assets of the company while it is a going concern.

(e) Unlimited company authorised to issue shares

2.052 It is also possible to incorporate an unlimited company that can issue shares. Its memorandum must state: (i) that it is such a company; (ii) the maximum number of shares that it is authorised to issue or that the company is authorised to issue an unlimited number of shares; (iii) the classes of shares; and (iv) if more than one, the rights, restrictions, privileges and conditions attaching to each class.[99] It must have at least one member who is an unlimited member,[100] i.e. who has unlimited liability for the liabilities of the company[101] as explained above, but this requirement does not apply during the period from incorporation of the company to the appointment of first directors.[102]

(f) Restricted purpose companies

2.053 Restricted purposes companies were introduced by the BVI Business Companies Act 2004 to provide special purpose vehicles especially for securitisation and off-balance sheet financing transactions. A number of limitations apply to the incorporation of restricted purpose companies:

(a) the company must be a company limited by shares;[103]

(b) the memorandum as filed on incorporation must state that it is a restricted purposes company;[104] and

(c) the memorandum must state the actual purposes of the company.[105]

[96] Ibid., section 27.
[97] *Salomon v A Salomon & Co Ltd* [1897] AC 22; *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418.
[98] Unlike the definition of liability for guarantee members: see section 9(1)(f). See also the Insolvency Act 2003, section 195(1)(b).
[99] BVI Business Companies Act 2004, section 9(1).
[100] Ibid., section 79(3).
[101] Ibid., section 80(4).
[102] Ibid., section 79(1A).
[103] Ibid., section 2 for definition of "restrictive purposes company"; and section 8(1).
[104] Ibid., section 8(1)(a): "…the memorandum…as filed under section 6…"
[105] Ibid., section 10(2).

2.054 It is also possible for a restricted purposes company to also be a segregated portfolio company.

2.055 In order to be a restricted purposes company, the company must be originally incorporated as such - a company cannot subsequently convert into one.[106] Therefore, a company that is not a restricted purposes company cannot amend its memorandum to state that it is such a company, and any resolution passed by its members or directors to that effect is void.[107] A foreign company may continue into the British Virgin Islands as a restricted purpose company, although this is a relatively modern innovation, and it remains to be seen how this will work in practice.[108]

2.056 Once registered as a restricted purposes company, a company cannot amend its memorandum to delete or modify the statement that it is a restricted purposes company, and any resolution to that effect by its members or directors is void.[109] The purposes in the memorandum may be modified unless the memorandum specifically states that they cannot be amended.[110] Theoretically it would be possible to amend the stated purposes of a restricted purpose company to be so wide that it effectively became a conventional company if the reason for the restriction came to an end and it was not practical to transfer the business and affairs of the company to a more conventional vehicle.

2.057 The key feature of a restricted purpose company is that it has limited corporate capacity, and any acts which are outside of its stated objects will be *ultra vires* and void. Consideration of the effect of the *ultra vires* doctrine and restricted purpose companies is set out in more detail below.[111]

(g) Segregated portfolio companies

2.058 Insurance companies and investment funds are permitted to incorporate or register as segregated portfolio companies (commonly referred to as "SPCs"),[112] and there is a provision to enact Regulations to allow other types of companies to incorporate or register as SPCs.[113] In fact regulations relating to SPCs were not issued until 2018,[114] and, at the time of publication, have not yet been brought into force. SPCs are a highly regulated specialised type of company which allows the compartmentalisation of different classes of assets and liabilities within a single corporate entity. SPCs are considered in more detail below.[115]

[106] Ibid., section 8(2).
[107] Ibid., section 14(3).
[108] BVI Business Companies Amendment Act 2012, section 5.
[109] BVI Business Companies Act 2004, section 14(1).
[110] Ibid., sections 12(2) and 14(2).
[111] See Chapter 2, section 6(b) below.
[112] BVI Business Companies Act 2004, sections 135(2)(a) and (b).
[113] Ibid., section 135(2)(c).
[114] Segregated Portfolio Companies (Mutual Funds) Regulation 2018 (SI No 4 of 2018); Segregated Portfolio Companies (Insurance) Regulations 2018 (SI No 5 of 2018); and Segregated Portfolio Companies (BVI Business Company) Regulations 2018 (SI No 6 of 2018).
[115] See Chapter 6, section 4.

5. Memorandum and Articles of Association

2.059 The constitutional documents of a British Virgin Islands company are its memorandum and articles of association, and these regulate the relationship between the company and its members and directors. Although technically two separate documents, they are invariably annexed to each other and are often treated as a single composite document. In historical legal theory, the memorandum is intended to regulate the relationship between the company and outside world, whereas the articles are intended to regulate the internal management of the company (dating from the times when charter corporations had their powers and objects set out in the charter, but were left to frame their own by-laws). This historical distinction has largely evaporated over the years to the extent that it has little modern significance. The memorandum remains the more important of the two documents, and in the event of any inconsistency the memorandum would prevail.[116]

2.060 The BVI Business Companies Act 2004 prescribes certain compulsory matters that must be stated in the memorandum and allows the company to deal with other matters in the memorandum or articles as it so wishes. Notwithstanding the provisions of the legislation it is not uncommon for companies to adopt memoranda and articles of association whereby matters which the legislation prescribes for inclusion in the memorandum are instead referred to in the articles. This problem occurs most commonly in relation to class rights attached to shares. In *Guinness v Land Corporation of Ireland*[117] it was expressly held that the articles of association cannot be used to fill in any matter which the law requires to be stated in the memorandum. A certain degree of caution is required in relation to that authority – at the relevant time under the Companies Act 1862 in the United Kingdom it was not possible to amend the memorandum of association except in certain limited respects. Moreover, at the time under English law a company's articles of association were not available to the public which in itself would be sufficient justification for the decision. Much of the discussion in the case related to whether the relevant provisions were *ultra vires* and/or would result in an unlawful reduction in capital. None of those considerations would apply to a modern British Virgin Islands company. But the rule in *Guinness v Land Corporation of Ireland* has been affirmed and applied in later English cases,[118] and so the prudent approach is to assume that the rule applies in the British Virgin Islands and to ensure that all matters which are required by section 9 of the BVI Business Companies Act 2004 to be stated in the memorandum are correctly placed in the memorandum rather than the articles.

2.061 By law, the memorandum of association must include:[119]

(a) the name of the company;

(b) its type, for example, company limited by shares, company limited by guarantee, or unlimited company;

[116] *Ashbury v Watson* (1885) 30 Ch D 376.
[117] (1882) 22 Ch D 349.
[118] *Re Duncan Gilmour & Co Ltd* [1952] 2 All ER 871.
[119] BVI Business Companies Act 2004, section 9.

(c) the address of its first registered office;

(d) the name of its first registered agent;

(e) in the case of a company which issues shares:

(i) the maximum number of shares that the company may issue, or that it is able to issue an unlimited number of shares; and

(ii) the classes of shares that the company is authorised to issue, and if these comprise two or more classes, the rights and restrictions applicable to each class;

(f) in the case of a company limited by guarantee, whether or not it is authorised to issue shares, and the amount which guarantor members are liable to contribute upon liquidation;

(g) if the company is a segregated portfolio company, the fact that it is a segregated portfolio company; and

(h) if the company is a restricted purpose company, the fact that it is a restricted purpose company, and the activities which the company is permitted to undertake.[120]

2.062 Except for the special case of restricted purpose companies, there is no need for an objects or purposes clause in the memorandum and subject to its memorandum and articles, a company has full capacity to carry on any business or activity, do any act or enter any transaction.[121] A company may limit its purposes, capacity or powers if it so wishes in its memorandum or its articles,[122] but except for the specific case of restricted purpose companies, this will not normally invalidate a transaction outside of the stated purposes.[123] Section 184B of the BVI Business Companies Act 2004 gives the court power to restrain putative breaches of the provisions of a company's memorandum of association (including, presumably, any strictures on the types of activity the company is permitted to engage in). Although such provisions have been considered, at this time there is no provision to set aside actions solely on the basis that they breach limitations on corporate activities stated in the memorandum (except for in relation to restricted purpose companies).

2.063 For companies formed under the BVI Business Companies Act 2004 there is no requirement for a company to state an authorised capital (or indeed of share capital in general). It is not quite true to say that these concepts have been abolished from British Virgin Islands company law, as they continue to subsist in the transitional provisions in Schedule 2 relating to companies which were formerly incorporated under prior legislation.[124] But there is no need to state the authorised capital or the currency in which shares are to be issued in the memorandum when incorporating a British Virgin Islands company today.

[120] Ibid., section 10.
[121] Ibid., section 28(1)(a).
[122] Ibid., section 10(3).
[123] Ibid., section 29(1).
[124] They also continue to appear on corporate balance sheets as a matter of accounting treatment.

Partnership Act 2017, but not any other partnerships. In relation to all other partnerships (regulated under the Partnership Act 1996) the position remains highly unsatisfactory. The Insolvency Act 2003 made provision for subsidiary legislation dealing with insolvency partnerships generally, but to date no such subsidiary legislation has been prepared.[5]

2. Insolvency

(a) Overview

.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.

'.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]

5 Section 499.
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 Chapter 7, section 6(a)(iii) below.
8 Section 244(3).
9 BVI Business Companies Act 2004, sections 56 and 58(1).

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 company with reference to the interests of the shareholders - it owes its duty to act with respect to 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 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]

7.010 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.

(b) Cash-flow insolvency

7.011 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.

7.012 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.

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).
11 *Gwyer v London Wharf (Limehouse) Ltd* [2003] BCLC 153; *Brady v Brady* (1988) 3 BCC 535 at 632.
12 See Chapter 7, section 7(c) below.
13 Section 10.
14 *Tottenham Hotspur plc v Edennote plc* [1995] 1 BCLC 65.
15 [1986] 1 WLR 114.

7.013 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]

7.014 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 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]

7.015 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]

7.016 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

16 *Re DKG Contractors Ltd* [1990] BCC 903.
17 *Re Douglas Griggs Engineering Limited* [1963] Ch 19.
18 *Re Attiwill* (1932) 5 ABC 54.
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.

interim step, and simply making an application on the basis of the unpaid debt. In appropriate cases, this is entirely sensible.[23]

(c) Balance sheet insolvency

7.017 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]

7.018 The United Kingdom Supreme Court had an opportunity to closely consider 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]

7.019 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 SA*[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.

23 *Re Taylor's Industrial Flooring* [1990] BCC 44 at 49.
24 Section 10(1).
25 Section 10(2).
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 paras. 40, 41.
29 (BVICA 2009/0012).

020 Applications to appoint a liquidator on the basis of balance sheet insolvency are 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]

(d) Statutory demands

.021 A statutory demand is a formal written request for payment of a debt. The statutory 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] 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.

.022 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.

.023 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]

.024 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

30 *Re National Livestock Insurance Co* (1858) 26 Beav 153.
31 At present this is US$2,000. Insolvency Rules 2005, rule 149.
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).

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]

7.025 However, despite the clear legislative intention that demands should not be set aside after the 14-day window has expired, the Court of Appeal decision in *Trade and Commerce Bank v Island Point Properties SA*[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 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.

7.026 The Court of Appeal unceremoniously dismissed the appeal. Their most important 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

36 *China Alarm Holdings Limited v China Alarm Holdings Acquisitions LLC* (BVIHCV 2008/0385).
37 (BVICA 2009/0012).
38 (BVIHCV 2006/0083).
39 *Trade and Commerce Bank v Island Point Properties SA* (BVICA 2009/0012) at para. 21.

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]

7.027 Clearly a great deal of care is needed with respect to this line of authorities. There is 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 Appeal's 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 general principle it must be plainly right to say that if a purported creditor served a bus timetable on a company, and then applied to appoint a liquidator on the basis that it should be regarded as a statutory demand, it would be absolutely correct to dismiss the application on the ground that no proper statutory demand had been served. The decision in *Island Point* is likely to create a strong temptation on the part of the courts to use its power to review the "validity" of a statutory demand as a back-door to setting it aside on the basis of an application made outside of the statutory time limit. The Court of Appeal was undoubtedly correct that the court is not bound to appoint a liquidator upon insolvency having been made out, but the usual basis for declining is that it is not in the best interests of creditors rather than because they believe it is improper for the statutory presumptions to apply. Whilst it is desirable to always seek do justice in individual cases, the approach is somewhat strident in terms of the intended balance of powers between judiciary and legislature.

7.028 In practice, the most common reason for applying to set a statutory demand aside is on the basis that the debt is disputed. In practice, the test of whether a debt is due and payable in relation to an application to set aside a statutory demand, or to appoint a liquidator without such a demand having been made is effectively the same test, and these are considered further below.[42]

3. Liquidation

(a) Overview

7.029 A company may be put into liquidation in one of two ways: either the members may resolve to appoint a liquidator, or a liquidator may be appointed by an order of the court. The relevant company will either be solvent or insolvent when a liquidator is appointed. Solvent liquidations which are commenced by a resolution of the members have already been considered.[43] It is also possible to have a liquidator appointed by the

[40] Ibid., at para. 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 attack merely because, due to no fault of its own, it missed the deadline for setting aside an utterly bad demand.' at para. 22.
[42] See para. 7.044 and following below.
[43] See Chapter 2, section 16. Note that in some circumstances a voluntary solvent liquidation can also be commenced by the directors, see section 199(2) of the BVI Business Companies Act 2004.

court whilst a company is solvent, either on just and equitable grounds or on public interest grounds. However, the liquidations with which this Chapter is primarily concerned are insolvent liquidations. Once a liquidator has been appointed with respect to an insolvent company, with one key exception, the liquidation will largely proceed in the same way, whether the original appointment was made by the members or by the court.

7.030 The Insolvency Act 2003 refers only to the "appointment of a liquidator" rather than the more traditional language of the making of a "winding up order". This is partly for historical reasons. Prior to the passing of the Insolvency Act, there was no Official Receiver under British Virgin Islands law to act as a liquidator of last resort. Accordingly, it was possible for an anomalous situation to arise whereby companies could be placed into liquidation without any liquidator being appointed. To make a decisive break with the former position, the Insolvency Act now solely refers to the appointment of a liquidator.

(b) Appointment by the members

7.031 Members of a company which is insolvent have the right to appoint an eligible insolvency practitioner (but not the Official Receiver) as the liquidator of a company by passing a "qualifying resolution". A qualifying resolution is one passed by a majority of 75 per cent of the votes of the members, or such higher majority as may be required under the company's memorandum and articles of association.[44] Curiously the legislation sets a 75 per cent threshold for a meeting of the members, but specifies no test for a resolution passed in writing; however the better view must be that a written resolution must also be passed by a 75 per cent majority, and in the context of a written resolution that means 75 per cent of the total votes of the members rather than just those members who vote. The insolvency practitioner must consent in writing to act as the company's liquidator prior to the passing of the resolution.[45] However, such an appointment will be invalid if at the time the resolution was passed there was an application pending before the court for the appointment of a liquidator, or a liquidator had already been appointed by the court.[46]

7.032 For the purposes of a liquidation under the Insolvency Act 2003 a foreign company cannot appoint a liquidator by a resolution of the members;[47] a foreign company may only be put into a British Virgin Islands liquidation pursuant to an order of the court.[48]

7.033 A liquidation initiated by shareholders in this manner is deemed to commence at the time when the qualifying resolution is passed.[49]

7.034 Where the members (or, in certain cases, the directors) of a company resolve to appoint a liquidator pursuant to the BVI Business Companies Act 2004 on the basis that the

[44] Sections 159(2), 159(3) and 161(3).
[45] Section 161(1)(c).
[46] Section 161(1) (a) and 161(1)(b).
[47] Section 2(1) definition of "foreign company".
[48] Section 159(4).
[49] Section 160.

company is solvent, and it becomes apparent to the liquidator that the company is in fact insolvent, then the liquidator is required to notify the Official Receiver and call a meeting of the creditors.[50] That meeting is treated as the first meeting of the creditors of an insolvent company and is regulated as for a meeting under section 179 of the Insolvency Act 2003.[51] Thereafter the liquidation proceeds as a voluntary insolvent liquidation.

(c) Appointment by the court

.035 A liquidator may be appointed by the court on three grounds:[52]

(a) insolvency of the company;

(b) just and equitable grounds; and

(c) public interest.

.036 If any if those grounds are established, the court retains a discretion to appoint a liquidator and that discretion is subject to various statutory provisions. Where the company is insolvent there is a presumption that the court will appoint a liquidator,[53] but the court will consider the wishes of all creditors.[54] The court may elect to accord less weight to the views of certain creditors, either because they are secured,[55] or because they are "associated" creditors rather than third-party creditors.[56] The court cannot refuse to make an appointment merely because all the assets of the company are subject to a security interest, or indeed that the company has no assets.[57] Further, the court must dismiss an application if the company is already in liquidation, the liquidator having been appointed by members.[58] Some of the restrictions that are specific to the particular grounds are discussed below.

.037 An application for the appointment of a liquidator must be determined within six months after it is filed,[59] although the court is empowered to extend this period for one or more periods not exceeding three months each if it is satisfied that special circumstances justify the extension, and that an order extending the period is made before the expiry of the period. If an application for the appointment of a liquidator is not determined within the six month period or any extension thereof the application is deemed to have been dismissed. The courts have tended to apply these time limits strictly. If an extension is sought it must be supported by evidence of circumstances which are genuinely special to justify an extension of the period. No application may

[50] BVI Business Companies Act 2004, sections 209–211.
[51] Section 210(2).
[52] Section 162(1).
[53] *Bowes v Hope Life Insurance* (1865) 11 HLC 389 at 402; *Re P&J MacRae Ltd* [1961] 1 WLR 229.
[54] *Re ABC Coupler Engineering* [1961] 1 WLR 243; *Re Lowerstoft Traffic Services Ltd* [1986] BCLC 81.
[55] *Re Flooks of Bristol (Builders) Ltd* [1982] Com LR 53; *Re Crigglestone Coal Co* [1906] 2 Ch 327.
[56] *Re Lowerstoft Traffic Services Ltd* [1986] BCLC 81.
[57] Section 167(2). See also *Re Crigglestone Coal Co* [1906] 2 Ch 327.
[58] Section 167(4).
[59] Section 168.

be made retrospectively for an extension, even in circumstances in which all the parties continue to take steps in the proceedings beyond the end of the six month period in the mistaken belief that they are still extant.

7.038 There are a number of advantages to the liquidator being appointed by the court rather than by the members. A members' appointed liquidator is obliged to call a creditors' meeting within 14 days of his appointment, at which the creditors are entitled to replace him with their own appointee. This is a statutory safeguard against the practice that became known as *Centrebinding*.[60] Prior to the holding of such meeting the members' liquidator's powers are limited to the collecting in and preserving of assets, including the disposal of perishable goods or such other assets whose value is likely to diminish if not immediately sold.[61] To exercise any further powers the liquidator must seek the sanction of the court.[62] In contrast, a liquidator who is appointed by the court immediately enjoys the comprehensive array of powers set out in Schedule 2,[63] as well as such other powers as the court may provide in the order appointing him. A court appointed liquidator is not required to call a creditors' meeting if he considers a meeting unnecessary unless 10 per cent in value of creditors give written notice insisting on such meeting.[64] Further, creditors can only replace a liquidator appointed by the court by making an application to the court pursuant to section 187. In contrast, a liquidator appointed by the members may be ejected from office at the creditors' meeting.[65]

7.039 An application for the appointment of a liquidator by the court can be made by one or more of the following:[66]

(1) *The company*: The company may apply for the appointment of a liquidator over itself. There is case law suggesting difficulties with the board of directors authorising the application as unless the company's articles of association specifically confer on the board of directors the power to apply for the appointment of the liquidator, the board may have no power to do so without a resolution of the company's members.[67] It is questionable whether those authorities would be followed in the British Virgin Islands where a more flexible approach is taken towards the exercise of corporate powers.[68] In addition, it would seem futile to require that the company would require a resolution of all the members when any one member is permitted to make an application alone (see below). The better view must be that the board of directors has ostensible power to exercise the statutory right of the company to make the application.

[60] *Re Centrebind Ltd* [1966] 3 All ER 889.
[61] Sections 179 and 182.
[62] Section 182 (d).
[63] Sections 186(2) and 186(3).
[64] Section 183.
[65] Section 179(4)(b).
[66] Section 162(2).
[67] *Re Emmadart Ltd* [1979] 1 All ER 599, followed by the Grand Court of the Cayman Islands in the case of *Banco Economico v Allied Leasing* 1998 CILR 102.
[68] See Chapter 2, section 6.

(2) *A creditor*. A creditor is defined in the Insolvency Act 2003 as a person with a 'claim against the debtor, whether by assignment or otherwise, that is or would be an admissible claim…in the liquidation of the debtor…'[69] It is obvious from this that the applicant creditor's claim must exist against the company at the date the application for liquidation is made, but need not be immediately enforceable; for example, if it is a claim which will be enforceable at some point in the future or upon the fulfilment of some contingency.[70]

Similarly, a claim where the liability had already been incurred before the date of the application for liquidation, but where the quantum of such liability had not yet been determined, would also suffice. For example, a judgment creditor of a company may apply for the appointment of a liquidator in reliance on a court order for the payment by it of costs awarded to the creditor in proceedings, even though the costs have not yet been taxed.[71] This is in accordance with the definition in section 10 of "liability" (which includes a "debt"), and in particular section 10(2), which provides that a liability may be '…present or future, certain or contingent, fixed or liquidated, sounding only in damages or capable of being ascertained by fixed rules or as a matter of opinion.'

A liquidator will not be appointed unless the creditor is owed more than US$2,000, the prescribed minimum[72] required for a statutory demand which remains outstanding for a period of three weeks (and which has not been disputed by the company or set aside by the court pursuant to section 156), or is a judgment creditor whose debt is unsatisfied. Alternatively, a liquidator can be appointed if the creditor establishes to the satisfaction of the court that the value of the company's liabilities exceeds it assets, or the company is unable to pay its debts as they fall due.

In *Westford Special Situations Fund Limited v Barfield Nominees*[73] the Court of Appeal gave important guidance on the definition of creditor. Investors had invested substantial sums in Westford and over a period of time submitted redemption requests. When these were not paid in full the investors petitioned to wind up Westford and succeeded at first instance. However, the Court of Appeal overturned that order as the redemption proceeds were due to investors "in their character as a member" and section 197 precluded such claim from forming the basis of an application to appoint liquidators.

(3) *A member*. Ordinarily, a member would mean a person who is a member within the meaning of the BVI Business Companies Act 2004, and would not normally include a person who, although beneficially interested in the shares of a company, is not on the register of members or not the holder of shares. However, there is judicial authority confirming that a person who

[69] Section 9.
[70] See *Re British Equitable Bond and Mortgage Corporation Ltd* [1991] 1 Ch 574; *Re a Company (No 003028 of 1987)* [1988] BCLC 282.
[71] *Tottenham Hotspur plc v Edennote plc* [1995] 1 BCLC 65.
[72] Section 155(2)(a) and Rule 149 of the Insolvency Rules 2005.
[73] (unrep., HCVAP 2010/014).

is beneficially interested in the shares of a company but who is not on the register of members is a "member" within the meaning of the term in the Insolvency Act 2003.[74] The Insolvency Act also widens the class of person who are "members" to include a person to whom shares have been transferred or transmitted by law, even though that person is not strictly a member of the company within the meaning of the BVI Business Companies Act.[75] Personal representatives and trustees in bankruptcy would be considered "members" and could therefore apply for liquidation.

At common law, a member faces a restriction on his ability to apply for the appointment of a liquidator in that unless he can show that he has a financial interest in the outcome of the liquidation, the court will dismiss his application. So a fully paid up shareholder of a company that was wholly insolvent could not seek the appointment of a liquidator because there could be no distribution to him.[76] However, the Insolvency Act 2003 appears to reverse that position in section 167(2)(c) which provides that the court shall not refuse to appoint a liquidator merely because no assets would be available for distribution among members.

If a member applies for liquidation on the grounds of insolvency he must first obtain the leave of the court, which will not be granted unless the court is satisfied that *prima facie* the company is insolvent.[77]

(4) *The supervisor of a creditors' voluntary arrangement*. This provision is intended to mean the supervisor can make an application for the appointment of a liquidator in his own name rather than in the name of the company.

(5) *The Financial Services Commission*. The Financial Services Commission, together with the Attorney General, are the only persons authorised to apply for liquidation on the grounds of public interest, but in the case of the Financial Services Commission only if the company or foreign company[78] is a "regulated person", i.e. the holder of a prescribed financial services licence.[79] These provisions close a gap in the legislation that had been identified by case law,[80] namely that although the Financial Services Commission Act 2001 empowered the court to make an order for the appointment of a liquidator against a regulated company in certain circumstances, the Financial Services Commission was not in fact given standing by either that Act or any other statute to make an application to the court.

(6) *The Attorney General*. The Attorney General can apply for the appointment of a liquidator of any company (including a foreign company)[81] on the

[74] *Peter Maxymych v Global Convertible Megatrend Ltd* (BVIHCV 2006/0246).
[75] Section 2(1).
[76] *Re Rica Gold Washing Company* (1879) 11 Ch D 36.
[77] Section 162(3).
[78] Section 163(3B).
[79] Section 162(5).
[80] *British Virgin Islands Financial Services Commission v Meridian Income Bond Ltd* (BVIHCV 2003/0203).
[81] Section 163(3A).

ground that it is in the public interest to do so, as well as on the grounds of insolvency and that it is just and equitable. The test of public interest is discussed further below.

(7) *An administrator of the company*.[82] Strictly speaking, an administrator is not a person who can apply for the appointment of a liquidator under section 162(2). However, where the court discharges an administration order on the application of an administrator, the court can appoint a liquidator if it is satisfied that the company is insolvent. Indeed, the court could even dissolve the company if it concluded that no useful purpose would be served by appointing a liquidator. It should be noted however that provisions relating to administration orders have not yet been brought into force.

.040 So long as the person making the application fits within one of the relevant categories above, they are not restricted from applying for the appointment of a liquidator on a ground which does not appear to relate to that category. For example, a person may have status to make the application as a creditor, but seek an order on the basis of a just and equitable winding up.[83] This is subject to two exceptions that: (a) only the Financial Services Commission and the Attorney General may seek the appointment of a liquidator on public interest grounds; and (b) an administrator can only be involved in an appointment based upon the insolvency of the company.

'.041 The appointment of a liquidator is a class right. Accordingly, to ensure that as many members of the class are aware of the proceedings as possible, an application to appoint a liquidator is required to be advertised. The application must be advertised not less than seven days before the date set for the application to be heard and not less than seven days after the date of service upon the company. The purpose of giving the company seven days after service of notice before advertising is to enable the company to apply for an order restraining advertisement if it is appropriate to do so. The legislation is sensitive to the fact that advertising a petition to appoint a liquidator can have a deleterious effect on the company's business. If, however, the company is itself the applicant, then it must simply be advertised not less than seven days before the hearing.[84]

7.042 At the hearing, if the court is satisfied that one of the three grounds upon which the company will be treated as insolvent is made out (as discussed further below), then it will usually make an order appointing the liquidator.[85]

(i) *Insolvency*

7.043 By far the most common ground for applying to the court for the appointment of a liquidator is in relation to the insolvency of the subject company. What constitutes insolvency on the part of a company has already been considered above.[86] As noted

[82] Sections 110 and 111.
[83] *Re a Company (3028 of 1987)* [1988] BCLC 282 at 293.
[84] Section 165(1).
[85] *Re Lowerstoft Traffic Services Ltd* [1986] BCLC 81.
[86] See Chapter 7, section 2 above.

above, particularly in relation to statutory demands, the principal areas of dispute usually relate to whether the relevant debt is in fact genuine and owing or is disputed.

The test as to whether a dispute relating to a debt is genuine is well settled in the British Virgin Islands, and was set out by Byron CJ in *Sparkasse Bregenz Bank v Associated Capital Corporation*:[87] 7.044

> 'The reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the court should ignore. There must be so much doubt and question about the liability to pay the debt that the court sees that there is a genuine question to be decided.'

This test has also been applied in relation to applications to appoint a liquidator where the question is whether any liability exists at all.[88] 7.045

Where it is alleged that the debt is disputed, the essential question is whether the evidence put forward to dispute the debt is of sufficient cogency that it would lead the court to the reasonable inference to be drawn that this dispute is of such substance that it could only be resolved by cross examination.[89] It is the court's function to inquire whether there is a substantial dispute, not to resolve the issue.[90] In *Professional Offshore Opportunity Fund Limited v Daiwa Securities Trust and Banking (Europe) plc*[91] it was indicated that the court 'must be in no doubt' that the dispute is one in which the company has an honest belief. It is important to note that this comment relates to the honesty of the company's belief in its defence, rather than an attempt to rewrite the burden of proof. However, it is probably reflective of the lack of sympathy with which the courts treat applicants who are simply trying to wriggle out of being put into liquidation on the basis of unpaid debts. 7.046

Where the evidence demonstrates that there are triable issues, then the application to appoint liquidators is not the appropriate forum for the hearing of such disputes. In particular, the procedure is not directed at a just resolution of such issues, as live witnesses may need to be called and cross examined. 7.047

If the evidence shows that the matter should be tried by the court itself, or in an action by some other proceeding, generally this will suffice to show a substantial dispute. In *Akai Holdings Limited v Brinlow Investments Limited*[92] the court looked carefully at the dispute which was raised to resist the appointment. It noted that there were no documents supporting the claims regarding the dispute, only "bald assertions". As a result, the court was not persuaded that the dispute was substantial.[93] 7.048

[87] Civil Appeal No. 10 of 2002, at [3].
[88] *Pioneer Freight Futures Limited v Worldlink Shipping Ltd* (unrep., BVIHCV 2009/0135) at [11].
[89] *China Alarm Holdings Limited v China Alarm Holdings Acquisitions LLC* (BVIHCV 2008/0385) at [29].
[90] Ibid. at [44].
[91] (BVIHCV 2009/0006) at [16].
[92] (BVIHCV 2006/0134) at [31] onwards.
[93] *Re FSA Business Software Ltd* [1990] BCLC 825.

7.049 If it is accepted that the dispute is genuine, the other question which frequently arises is whether in fact the debt is "owing or due". In *Professional Offshore Opportunity Fund Limited v Daiwa Securities Trust and Banking (Europe) plc*[94] the court expressed the view that the legislature had probably intended the distinction between "owing" and "due" to be between a debt which was outstanding but not yet payable, and one that was both owing and payable. It would be sufficient that the court is satisfied that there is a substantial dispute as to either fact.

7.050 A dispute as to the quantum of a claim is not material, so long as there is no dispute as to whether or not the claim is above the statutory minimum.[95]

(ii) *Just and equitable winding up*

7.051 The court has the power to order the appointment of a liquidator on the basis that it is just and equitable that one should be appointed.[96] Although not strictly speaking relating to insolvency, it is convenient to consider at this point the jurisdiction of the court to appoint a liquidator on just and equitable grounds. Although the term "winding up" is no longer used in relation to the appointment of a liquidator in the British Virgin Islands, it is still quite common to refer to such applications as "applications for a just and equitable winding up".

7.052 This phrase has been given wide and flexible judicial interpretation in other common law jurisdictions. In *Wang v Union Zone*[97] the Court of Appeal noted that there are a "plethora of circumstances" where the courts may be prepared to order a just and equitable winding up. Whilst it is not confined to particular instances, it has been held to include such situations as the failure of a company's objects;[98] disappearance of the justification for the company's continued existence;[99] fraud or mala fides in the formation or running of the company;[100] refusal by the majority shareholder to pay dividends or produce accounts;[101] deadlock in the management of the company;[102] justifiable loss of confidence in the company's management,[103] breakdown in trust and confidence between the members in a "quasi-partnership" company;[104] and where the legitimate expectations of members in a small quasi-partnership company have been defeated even if there are no legal wrongs.[105] Where a member of a company relies on this latter ground, he can only do so in respect of his interest in the company as a member and not his interest in some other capacity, such as (for example) as a

[94] (BVIHCV 2009/0006).
[95] *Re Tweed's Garage* [1962] Ch 406; *Re a Company (6273 of 1992)* [1993] BCLC 131.
[96] Section 162(1)(b).
[97] (BVIHCMAP 2013/0024).
[98] *Re German Date Coffee Company* (1882) 20 Ch D 169.
[99] *Re Eastern Telegraph Co* [1947] 2 All ER 104.
[100] *Re T E Brinsmead & Sons* [1897] 1 Ch 406.
[101] *Loch v John Blackwood Ltd* [1924] AC 783.
[102] *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426. In *Re Sat Star Ltd* (BVIHC 2005/0111) where the board continued to pass resolutions it was held that there was no deadlock, although the court did accept that the personal relationship between the two principals had broken down irretrievably.
[103] *Loch v John Blackwood Ltd* [1924] AC 783.
[104] *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, expressly endorsed in *Re Sat Star Limited* (BVIHC 2005/0111).
[105] Ibid.

freeholder of land occupied by the company.[106] There is no requirement to prove fraud, but as the order is an equitable remedy, the applicant must come before the court with clean hands.[107]

7.053 The courts have been mindful about the risk of applying equitable considerations of fairness to what are arm's length commercial transactions.[108] The fact that a company may be a small privately held company, or a family concern, should not derogate from that basic principle.

7.054 Just and equitable winding up on the basis of loss of substratum is a particularly difficult area. In *Aris Multi-Strategy Lending v Quantek Opportunity Fund*[109] the applicant was a minority investor in a feeder fund who sought to have liquidators appointed on the just and equitable ground. The fund had suspended redemptions in the wake of the financial crisis in October 2008 and had presented a realisation plan (which had been accepted by a majority of investors) which provided for an orderly winding down of the master fund. By the time of the hearing some 35 per cent of the assets held by the master fund had been distributed to the investors of the feeder fund. The investor argued that as the suspended feeder fund was no longer taking on new investments or making formal redemptions it had lost its substratum, investors were oppressively trapped in the fund and it should be wound up. This sought to follow a developing line of cases in the Cayman Islands where, broadly, the Caymanian court had found that solvent hedge funds that had suspended and were in wind down mode were no longer "viable" open ended funds and could be wound up on that basis. The British Virgin Islands court rejected the Cayman analysis of "viability", preferring the established test of "impossibility" when considering whether a company was able to continue or had lost its substratum. The fact that a fund had suspended redemptions did not mean that it was no longer possible for it to carry on its business which, in this instance of a feeder fund, was the holding of investments in the master fund for the benefit of its members.

7.055 The Insolvency Act 2003 provides that if a member has another remedy available to him and he is acting unreasonably in pursuing a liquidation instead of that other remedy, the court may refuse to appoint a liquidator.[110] In many cases where a just and equitable winding-up is sought a member will likely have an alternative remedy under section 184I of the BVI Business Companies Act 2004 for "unfair prejudice".[111] In the *Redelinghuys v Palm Bay Capital Limited and Hougaard*[112] the British Virgin Islands court exercised its jurisdiction on an application for the appointment of a liquidator to order the purchase of the applicant's shares instead of a winding up. There is a wide range of orders which the court may make under section 184I of the BVI Business Companies Act to grant relief to the member of a company, the affairs of which have been or are likely to be conducted in a manner that is oppressive,

[106] *Re J E Cade & Sons Ltd* [1991] BCC 360.
[107] *Mehta v Mehta* (BVIHCV 2006/0176) at [30].
[108] *Wang v Union Zone* (unrep., BVIHCMAP 2013/0024).
[109] (BVIHC (Com) 2010/0129).
[110] Section 167(3).
[111] See Chapter 2, section 11(f).
[112] (BVIHC 2006/0314).

unfairly discriminatory or unfairly prejudicial to him in his capacity as a member. Accordingly, minority shareholders are now more likely to apply for relief under the unfair prejudice provisions than applying for the appointment of a liquidator under the Insolvency Act, as the latter would run the risk that the court may conclude that on the particular facts the member had an alternative remedy. Just and equitable winding up has been judicially recognised as a remedy "of last resort".[113]

(iii) *Public interest*

7.056 The ability to put a company into liquidation on the ground of public interest is provided for in section 162(1)(c) of the Insolvency Act 2003. Only the Attorney General and the Financial Services Commission can apply on this ground, based on the need to protect the "public interest". Examples of such cases are rare but not unheard of.

7.057 "Public interest" is not defined in the statute, but there is case law which has given the phrase a broad interpretation to cover a myriad of situations. Thus, for example, orders have been made to protect the public at large[114] or to protect members,[115] investors or creditors against companies that operated pyramid schemes[116] (even where the companies have not technically acted unlawfully), or carried on unauthorised investment businesses or illegal lotteries. Orders have also been made to express the court's disapproval of misconduct by a company (even if the company has stopped trading and the public is no longer at risk from its activities).[117]

7.058 The "public interest" must be the public interest of the British Virgin Islands rather than that of another jurisdiction, however, it could reasonably be expected that the court will include the Territory's wider interests, including maintaining its integrity as a reputable financial centre by not allowing illicit businesses to operate. Thus, for example, the court could appoint a liquidator over a company on the public interest ground if it was conducting authorised investment business but in a fraudulent way targeted solely at investors wholly outside the British Virgin Islands: although the public in the British Virgin Islands may not be at risk from such a business, it prejudices the integrity and reputation of the British Virgin Islands which would be contrary to the jurisdiction's wider public interest.

(d) Liquidation as a class right

7.059 Liquidation is a class right of a company's creditors. Accordingly, even though an application will usually be brought initially by a single applicant, the advertising process is to try to ensure that all of the members of the class are aware of the application and can attend to support or oppose the appointment of a liquidator.

7.060 Where a creditor has established that a company is insolvent and that the debt is due, then in the ordinary course the court will order that the company be put into

[113] *Re Sat Star Distribution Ltd* (BVIHCV 2005/0111) at [26].
[114] *Re Walter L Jacob & Co Ltd* (1989) 5 BCC 244.
[115] *Re Xyllyx plc (No. 2)* [1992] BCLC 378 at 385.
[116] *Re Titan International Inc* [1998] 1 BCLC 102.
[117] *Re Walter L Jacob & Co Ltd* (1989) 5 BCC 244.

liquidation.[118] Whilst the court will consider the views of opposing creditors, generally they will be of little weight when compared against the unpaid creditor's right to an order.[119] Where the creditors opposed to an order are "associated creditors" such as directors or shareholders, their views may be reduced in weight.[120] However, if the overwhelming majority of creditors are opposed to the making of the order, and the basis of their objection is reasonable, the court does have discretion to decline to appoint a liquidator.[121]

7.061 Although liquidation is a class right, it is nonetheless common for individual creditors to use the threat of liquidation as a means to pressure a company into paying a debt. To a certain degree the courts accept that this may be a legitimate use of commercial pressure - a company which does not pay its debts must face certain consequences.[122] The fact that a creditor might be pursuing a personal claim and seeking to put a defendant company into liquidation at the same time is not a bar to the application for the appointment of a liquidator.[123] However, where the application to appoint a liquidator is purely to secure a collateral advantage unrelated to realisation of the debt, the proceedings may be struck out as an abuse of process.[124] Similarly, an application based upon a disputed debt is an abuse of process.[125]

(e) Effect of appointing a liquidator

7.062 Liquidation under the Insolvency Act 2003 commences from the time of the appointment of the liquidator.[126] This is a small but crucial distinction between the British Virgin Islands insolvency regime and that of other common law jurisdictions, where the commencement of liquidation by order of the court is deemed to relate back to the date of the filing of the petition or application. Accordingly, the problems which arise in relation to avoidance of transactions entered into between the time of filing the petition and the making of the appointment, as typified by cases such as *Re Gray's Inn Construction*,[127] cannot arise in the British Virgin Islands.

7.063 The purpose of liquidation is for the liquidator to realise the assets of the company and declare a dividend for creditors (and, in the unlikely event that there is a surplus, to return that to the members).[128]

[118] *Bowes v Hope Life Insurance* (1865) 11 HLC 389 at 402; 11 ER 1383 at 1389.
[119] *Re Camburn Petroleum* [1979] 3 All ER 297. See also *Re P&J MacRae Ltd* [1961] 1 WLR 229.
[120] *Re Lowerstoft Traffic Services Ltd* [1986] BCLC 81.
[121] *Re ABC Coupler Engineering* [1961] 1 WLR 229.
[122] *Re a Company (6273 of 1992)* [1993] BCLC 131.
[123] *Re Dollar Land Holding plc* [1994] 1 BCLC 404.
[124] *Re Leigh Estates* [1994] BCC 292; *Re a Company* [1983] BCLC 492.
[125] *Re a Company (12,209 of 1991)* [1992] BCLC 865; *Mann v Goldstein* [1968] 1 WLR 1091; *Re Selectmove Ltd* [1995] 1 WLR 474.
[126] Section 160. Contrast the position in relation to solvent liquidation under the BVI Business Companies Act 2004 which commences when the resolution appointing the liquidator is filed with the Companies Registry – BVI Business Companies Act 2004, section 202. Where a liquidation is commenced under the provisions of the BVI Business Companies Act but it becomes apparent that the company is insolvent and so continues under the Insolvency Act 2003 it is unclear when the liquidation is deemed to have commenced.
[127] [1980] 1 WLR 711. That case has in any event now been superseded on the narrower point relating to payment into and out of bank accounts in credit; see *Bank of Ireland v Hollicourt (Contracts) Ltd* [2000] EWCA Civ 263.
[128] Section 185(1), rule 139 of the Insolvency Rules 2005.

7.064 Once the liquidation of a company commences:[129]

(a) the liquidator has custody and control of the assets of the company;

(b) the directors and other officers of the company remain in office, but they cease to have any powers, functions or duties other than those required or permitted under the Insolvency Act 2003 or otherwise authorised by the liquidator;

(c) unless the court otherwise orders, no person may

(i) commence or proceed with any action or proceeding against the company or in relation to its assets, or[130]

(ii) exercise or enforce, or continue to exercise or enforce, any right or remedy over or against assets of the company;

(d) unless the court otherwise orders, no share in the company may be transferred;

(e) no alteration may be made in the status of or to the rights or liabilities of a member, whether by an amendment of the memorandum or articles or otherwise;

(f) no member may exercise any power under the memorandum or articles, or otherwise, except for the purposes of the Insolvency Act; and

(g) no amendment may be made to the memorandum or articles of the company.

7.065 There remains a degree of uncertainty under British Virgin Islands insolvency law in relation to the proper approach to be taken to transactions entered into by the board of directors after the commencement of insolvency. Although the legislation does not follow the usual position in common law jurisdictions and provide that post-petition transactions are void unless the court otherwise orders,[131] it does provide that upon the commencement of liquidation the directors 'cease to have any powers, functions or duties'. But if a director were to purport to enter into a transaction on behalf of the company with a third-party after the commencement of liquidation the counterparty would have a strong argument that the transaction should nonetheless be enforceable under the relevant statutory provisions for the protection of third parties in the BVI Business Companies Act 2004.[132] However there is a counter argument in that the Insolvency Act 2003 provides that anything which is purported to be done in contravention of various provisions, including the provision that the directors cease to have any powers, is void and of no effect.[133] How the tension between those two statutory provisions would be resolved has not yet been resolved by the British Virgin

[129] Section 175(1).
[130] Any proceedings started without leave are a nullity, see *Re National Employers Mutual* [1995] 1 BCLC 232.
[131] See for example Insolvency Act 1986, section 127 (United Kingdom) and Companies Law (2016 Revision), section 97 (Cayman Islands).
[132] BVI Business Companies Act 2004, section 31(1)(c)(ii). That section provides: 'A company … may not assert against a person dealing with the company … that … a person held out by the company as a director … does not have authority to exercise a power which a director … customarily has authority to exercise.'
[133] Section 175(3).

Islands courts, although it does seem clear that the director would potentially be personally liable for false warranty of authority.

7.066 The restrictions on commencing or restraining actions against the company or its assets, and on enforcing rights or remedies against assets of the company, do not affect the right of a secured creditor to take possession of or otherwise enforce his security right(s),[134] except to the extent that any security interest may constitute a voidable transaction.[135]

7.067 Once a liquidator has been appointed, the company ceases to be the beneficial owner of its property, and holds it on a statutory trust for the benefit of its creditors to be distributed in accordance with the provisions of the insolvency legislation.[136] However, this trust does not confer any specific beneficial co-ownership of that property, or any kind of proprietary right in it.[137] The creditor's only right in respect of such property is to compel the liquidator to perform his duties. Liquidation (unlike personal bankruptcy) does not result in the automatic vesting of property in the liquidator's name. However, the liquidator can apply to the court for an order vesting any of the company's property in him in his official capacity.[138]

(f) Liquidators' duties

7.068 The principal duties of a liquidator are:[139]

(a) to take possession of, protect and realise the assets of the company;

(b) to distribute the assets or the proceeds of realisation of the assets in accordance with the provisions of the Insolvency Act 2003; and

(c) if there are surplus assets remaining, to distribute them, or the proceeds of realisation of the surplus assets, in accordance with the Insolvency Act.

7.069 Often the most contentious of these duties is the duty to adjudicate upon the unsecured creditor's claims against the company. The nature of that duty was summarised eloquently by Lord Denning: 'It is the duty of the liquidator to inquire into all claims, to see whether they are well founded or not, to pay the good claims, to reject the bad, to settle the doubtful, or, if need be, to contest them. It is only in this way that a liquidator can fulfil his duty … of seeing that the property of the company is applied in satisfaction of its liabilities *pari passu*.'[140] Where a liquidator is aware that a party may have a claim against the company, he is under a positive duty to ask that person whether they have a claim.[141] Failure to do so may result in personal liability. When

[134] Section 175(2). See also *Re Aro Co Ltd* [1980] Ch 196.
[135] See Chapter 7, section 6 below.
[136] *Re Oriental Land Steam Co* (1874) 9 Ch App 557; *Ayerst v C&K (Constructions) Ltd* [1976] AC 107.
[137] *Buchler v Talbot* [2004] 2 AC 298.
[138] Section 192(1); see also *Graham v Edge* (1888) 23 QBD 683.
[139] Section 185(1).
[140] *Austin Securities Ltd v Northgate & English Stores Ltd* [1969] 1 WLR 529.
[141] *Re Armstrong Whitworth Securities Co* [1947] Ch 673.

confidential.[8] However it is undoubtedly the case that the physical media upon which information is stored is property, which may be the subject of a claim for conversion, trespass or detinue.[9]

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.[10] 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

[8] *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.

[9] See Chapter 4, section 7.

[10] 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.

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;

(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.

13.008 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,[11] but that appears to be somewhat oversimplified.[12]

(a) Confidential information

13.009 The courts have recognised four main categories of confidential information: personal confidences, trade secrets, artistic and literary confidences, and state secrets.[13] However these categorisations only provide limited assistance, as the case law will often draw from authorities relating to one type of confidential information and apply it to another. Differentiating between them does not affect the applicable rules, although this may change as this area of the law matures. In all cases however a duty of confidentiality will only operate to protect information which has the 'necessary quality of confidence' about it.[14] But the information will also be protected where there

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

[12] 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.

[13] *R v Department of Health, ex parte Source Informatics* [2001] QB 424.

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

is an express contractual obligation to maintain confidentiality, even if the information is not ostensibly confidential in character.[15] 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.[16]

13.010 In order for the law to protect confidential information, it is necessary that that information be clearly identifiable as confidential information.[17] 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.

13.011 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 that 'something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality.'[18] 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.[19] 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.[20] However this is not an absolute rule.[21] As the court indicated in *Franchi v Franchi*:[22] '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"[23] and

[15] The main exception to this principle relates to agreements to keep information confidential. See generally Chapter 13, section 2(c) below.

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

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

[18] *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 47.

[19] *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 217.

[20] *AG v Guardian Newspapers (No 2)* [1990] 1 AC 109.

[21] '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].

[22] [1967] RPC 149 at 152–153.

[23] *Mustad & Son v Dosen* [1964] 1 WLR 109.

"information generally available to the public".[24] This problem can be particularly acute in the British Virgin Islands with respect to documents which have been used as part of court proceedings.[25] 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.[26] 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.[27]

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:

(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;[28]

(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;[29]

(d) there must be some value to the party claiming confidentiality in the information remaining confidential (although that value need not necessarily be commercial);[30] and

(e) the information must be such that a reasonable person in the position of the parties would regard it as confidential.[31]

13.015 The law will not protect from disclosure information which is regarded as trivial or useless.[32] 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"'.[33] However, the

[24] *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97.

[25] See Chapter 13, section 4(b) below.

[26] *R v Chief Constable of North Wales Police ex p AB* [1999] QB 396.

[27] 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.

[28] *Thomas Marshall Ltd v Guinle* [1979] 1 Ch 227.

[29] *Lancashire Fires Ltd v SA Lyons Co Ltd* [1996] FSR 629.

[30] Toulson & Phipps, *Confidentiality* (Sweet & Maxwell, 2nd edn.) at 3-080.

[31] Ibid.

[32] *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".

[33] *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 48.

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.[34]

13.016 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.[35] 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.'[36]

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.[37] 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.[38] 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.'[39] 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

[34] *Stephens v Avery* [1988] Ch 449.
[35] See for example *Khashoggi v Smith* (1980) 124 SJ 149.
[36] *McKennitt v Ash* [2005] EWHC 3003 at [78].
[37] *Khashoggi v Smith* (1980) 124 SJ 149; *Shelley Films v Rex Features Ltd* [1994] EMLR 134.
[38] *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 at 235.
[39] *Seager v Copydex Ltd* [1967] 1 WLR 923.

misuse has occurred. The broadest attempt to provide a definition of misuse was in *R v Department of Health ex p Source Informatics Ltd*[40] 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.[41] The preponderance of opinion seems 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.[42] 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.[43] The better view, it is submitted, is that if detriment is suffered by others, then those others are the proper claimants in the action.

13.021 Examples of misuse of information which do not involve disclosure typically involve exploiting information for that person's own gain.[44] 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,[45] which broadly provides that a person who has been subject to a duty of confidentiality cannot use the information

[40] [2001] QB 424 at [24].
[41] *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.
[42] Although see para. 13.069 below about preventing unjust enrichment.
[43] *Broadmoor Special Hospital Authority v Robinson* [2000] QB 775.
[44] *Terrapin Ltd v Builders' Supply Company (Hayes) Ltd* [1960] RPC 128; *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 WLR 1293.
[45] *Terrapin Ltd v Builders' Supply Company (Hayes) Ltd* [1967] RPC 375.

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.[46] 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.

13.022 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 at common law to ensure that the information is properly secured.[47] 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.[48] 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.[49] Similarly, although breach of the clause will

[46] *AG v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 259.
[47] *Swinney v Chief Constable of Northumbria* [1997] QB 464.
[48] *AG v Barker* [1990] 3 All ER 257 at 259.
[49] *AG v Blake* [1988] Ch 439 at 453.

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.

13.026 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;[50] where the restriction amounts to a restraint of trade;[51] where publication is justified as being in the public interest;[52] and where publication is protected as freedom of expression.[53]

13.027 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.[54] 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.[55] 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

[50] *Herbert Morris Ltd v Saxelby* [1916] AC 688.
[51] *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181.
[52] *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491.
[53] Ibid. See also The Virgin Islands Constitution Order, article 23.
[54] *Faccenda Chicken Ltd v Fowler* [1987] 1 Ch 117.
[55] *Lamb v Evans* [1893] 1 Ch 218; *Hilton v Barker Booth & Eastwood* [2005] 1 WLR 567.

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,[56] and the entitlement to relief may be barred by the principle of laches.[57]

13.028 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.[58]

(d) Confidential relationships

13.029 There are a variety of relationships which the law regards as giving rise to a duty of confidentiality. They include accountants, agents, arbitrators, bankers, clergy, directors, employees, lawyers, mediators, certain types of professionals, various holders of public offices, spouses, and a variety of others. Even textbooks dedicated to the subject of legal confidentiality balk at the prospect of compiling a comprehensive list.[59] Here it is proposed to focus on the key legal relationships which most often give rise to consideration under British Virgin Islands law.

13.030 Not all information will be subject to a duty of confidentiality simply because it was imparted during the course of a confidential relationship. Information which is, for example, already in the public domain will not be treated as confidential. There have been periodic suggestions that the limits of what will be treated as confidential will be determined by reasonableness, but those suggestions do not seem to have been taken up in later cases.[60] Furthermore the relevant information must be clear and identifiable as confidential.[61]

(i) *Bankers*

13.031 The duty of a banker to maintain the confidentiality of their customer's affairs is one of the oldest and best documented relationships giving rise to a duty of confidence. What constitutes a person as a banker or a customer in a particular relationship has already been considered above,[62] as have various aspects of the banker's duty of

[56] *Hubbard v Vosper* [1972] 2 QB 84 at 101.
[57] 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.
[58] See Chapter 13, section 2(e).
[59] Toulson & Phipps, *Confidentiality* (Sweet & Maxwell, 2nd edn.) at 3-007.
[60] *Dunford & Elliott v Johnson & Firth Brown* [1978] FSR 143 at 148.
[61] *Fraser v Thames Television Ltd* [1984] QB 44 at 63.
[62] See Chapter 11, section 2.

confidentiality.[63] A banker owes its customer a general duty to keep the customer's affairs confidential.[64] The duty arises when the relationship commences, but it continues to subsist after the relationship ends. Although the basis of confidentiality is sometimes expressed to be an implied term in the contract,[65] it may be better regarded as part of the wider category of equitable duties of confidence. The duty attaches to all information obtained by the bank during the course of the relationship and is not limited to the customer's account.[66] The duty restrains the bank from disclosing relevant information to third parties, but will not normally operate to prevent the bank from communicating with other companies within the same group.[67]

13.032 The duty is qualified within itself in four particular respects. A bank is not restricted from disclosing information under its duty of confidentiality:[68]

(a) where disclosure is required under compulsion of law;

(b) where there is a duty to the public to disclose;

(c) where the interests of the bank itself require disclosure; and

(d) where the customer expressly or impliedly consents.

13.033 The position in relation to circumstances where bankers and other parties may be compelled by law to disclose information is considered separately below insofar as it applies to British Virgin Islands law.[69] However, it is important to distinguish between the position where a foreign court or governmental authority seeks to utilise a statutory procedure under British Virgin Islands law to obtain access to information, and the position where a foreign court simply orders a person in the British Virgin Islands to provide confidential information solely pursuant to its own inherent jurisdiction.

13.034 Outside of the statutory procedures, the position of the courts has largely been that the exception in a banker's duty of confidentiality allowing the banker to disclose under compulsion of law does not apply to compulsion by foreign law.[70] Early cases in this area demonstrate a hostility to jurisdictional overreach by foreign courts. However more recent cases appear to demonstrate a more open minded approach, and have permitted disclosure where the courts are satisfied that there is a public interest (for example, preventing or detecting fraud).[71] In relation to the converse position, the courts have been markedly reluctant to issue orders which require banks outside of the court's jurisdiction to provide confidential information,[72] so the courts are at least consistent in their approach.

[63] See Chapter 11, section 6(c).
[64] *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461.
[65] Ibid., at 471: 'the duty is a legal one arising out of contract'.
[66] *Barclays Bank v Taylor* [1989] 1 WLR 1066.
[67] *Bank of Tokyo v Karoon* [1987] AC 45.
[68] *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 at 472.
[69] See Chapter 13, section 6.
[70] *X AG v A Bank* [1983] 2 All ER 464.
[71] *Pharaon v BCCI SA* [1998] 4 All ER 455; *Libyan Foreign Bank v Bankers Trust Co* [1989] QB 728.
[72] *R v Grossman* (1981) 73 Cr App R 302 at 307.

13.035 In relation to the exceptions relating to public duty, most of the examples which are cited tend to focus upon either the prevention and detection of fraud or other crimes, or protecting the public from fraud or other crime.[73] Historically the courts drew a distinction between a person who was either engaging or intending to engage in a crime, and a person who confesses to having committed a crime in the past. Accordingly, outside of specific statutory provisions, it does not seem that a bank is exculpated from its duty of confidentiality in relation to knowledge of a past crime.[74] But in modern times the common law rules have been almost entirely superseded by statutory provisions requiring banks and others to disclosure of past crimes, and in any event holding funds in a bank account which relate to past crimes will often constitute the ongoing offence of money laundering.

13.036 Banks are also permitted to disclose information which would otherwise be confidential when it is in the interests of the bank. This can arise in a variety of circumstances, but the most obvious one is where a customer has an overdrawn account and the bank wishes to claim repayment of the overdrawn sums. Similarly, the bank will ordinarily be permitted to disclose otherwise confidential information when it is joined as a party to proceedings against the customer, or is otherwise called upon to explain or justify its conduct. A more interesting example of disclosure on this ground was in *Sunderland v Barclays Bank Ltd*[75] where the bank dishonoured a cheque, and the customer's husband then remonstrated with the bank manager. The bank manager explained to the husband that the customer had drawn a large number of cheques in favour of bookmakers, and the customer sued for breach of confidence alleging it was improper for the bank to disclose this information to her husband. The Court of Appeal dismissed the action and indicated that as the bank had been put in a position where it was required to explain its conduct, then it was entitled to explain why it had done so in its own interest.

13.037 A bank will also be permitted to disclose a customer's information with the express or implied consent of the customer. Express consent rarely gives rise to any legal difficulty. It is common practice for banks to include a provision in their account opening documentation whereby the customer permits them to disclose information to affiliates within the same group and (in some cases) to third parties who may wish to market other services to the customer. In relation to whether consent has been implied, this is something which is to be determined according to the circumstances of a particular case.[76] There is no generally implied consent to banks to answer enquiries as to the creditworthiness or other status of customers.[77]

[73] *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 at 481, 486.
[74] *Weld-Blundell v Stephens* [1919] 1 KB 520 at 527.
[75] *The Times*, 24 November 1938.
[76] *Lee Gleeson Pty Ltd v Sterling Estates Pty Ltd* (1991) 23 NSWLR 571. In that case A had authorised his bank to tell B that A had authorised certain period payments to be made to B. A later cancelled the periodic payments. The bank never informed B. In determining the various rights, the court held that by authorising the bank to tell B that periodic payments had been authorised, it had also impliedly consented to the bank telling B when those payments were later countermanded.
[77] *Turner v Royal Bank of Scotland* [1999] Lloyds Rep Bank 231.

(ii) *Lawyers*

13.038 The lawyer's duty of confidentiality to his clients has been recognised since the early Victorian era.[78] The protection afforded to the duty of confidentiality owed by lawyers is different from all other examples of the duty in that it is bolstered by legal professional privilege.[79] The particular effect of privilege on confidentiality is expressly recognised in a number of statutes.[80] However, it is important to remember that whilst legal professional privilege will often be a bar to other statutory procedures which enable confidential information to be compulsorily disclosed, if the legal professional privilege is lost, so is the statutory bar. Privilege may be lost in a variety of ways, but the most important way, in this context, is the crime/fraud exception.

13.039 The crime/fraud exception to legal professional privilege broadly asserts that there is no privilege in documents or communications which are themselves part of a crime or fraud, or which seek or give legal advice in relation to the committing or concealing of a crime or fraud.[81] The exception is a common law exception, but has been mirrored in British Virgin Islands statutes,[82] and has been replicated in the Evidence Act 2006 (although the common law rule is arguably wider).[83] The exception applies to both actual crimes, and also to civil fraud.[84] Recent cases have actually gone further, and suggest that other conduct which is subject to legal opprobrium, but falls short of constituting an actual crime or fraud, may also be sufficient to strip away the protection of privilege.[85] The exception does not require the lawyer to have been involved in the crime or fraud, or indeed even be aware of it.[86] The privilege is the privilege of the client, and it will be stripped away even if the lawyer was unaware of the client's true purpose in seeking legal advice. The courts will not lightly hold that legal professional privilege has been lost, and thereby deprive a party of the protection of privilege.[87] But where the privilege is lost under the fraud/crime exception, then any relevant documents or information are subject to statutory powers to compel disclosure in the way that any other information might be.[88]

13.040 However, apart from the incidence of privilege, the content and tenor of a lawyer's duty of confidentiality is broadly the same as for other professionals. It seems that duty for lawyers arises as both an implied term in any contract of retainer, and as a general equitable duty. The duty arising from the implied term will terminate at the end of the retainer, but the equitable duty will continue to subsist indefinitely.[89]

[78] *Taylor v Blacklow* (1836) 3 Bing NC 235.
[79] *AG v Mulholland and Foster* [1963] 2 QB 477 at 489.
[80] Proliferation Financing (Prohibition) Act 2009, section 18(2); Financial Investigation Agency Act 2003, section 4(2)(d); Mutual Legal Assistance (Tax Matters) Act 2003, section 5(2); Financial Services Commission Act 2001, section 48A(1).
[81] *R v Cox and Railton* (1884) 14 QBD 153.
[82] Proceeds of Criminal Conduct 1997, section 30A(9).
[83] Evidence Act 2006, section 115(12).
[84] *Bullivant v AG for Victoria* [1901] AC 196; *O'Rourke v Derbyshire* [1920] AC 581.
[85] *BBGP Managing General Partner Limited v Babcock & Brown Global Partners* [2011] Ch 296.
[86] *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1986] 1 Lloyd's Rep 336.
[87] *R v Snaresbrook Crown Court ex p DPP* [1988] QB 532 at 538.
[88] *R v Central Criminal Court ex p Francis & Francis* [1989] AC 346.
[89] *Wilson v Rastall* (1792) 4 Term Rep 753 at 759; *R v Derbyshire Magistrates Court ex p B* [1996] AC 487 at 504.

13.041 In relation to the duty of confidentiality owed by lawyers, the duty (as in the general case) is not to misuse such information. In the legal context, misuse rarely involves disclosure to a third party. However, the potential for misuse is often considered where a firm of lawyers is engaged to act against a former client. Although such a situation might be uncommon in a larger country, it can be acute in a smaller jurisdiction like the British Virgin Islands. There is no general bar against law firms acting in litigation against former clients,[90] or acting for subsequent clients whose interests are opposed to former clients, but the courts have been prepared to restrain law firms from acting if there is a significant risk that confidential information provided by the former client may be misused. In many cases law firms seek to address these risks by the use of "Chinese walls", and the courts have been prepared to accept the use of internal safeguards in this manner.[91] The operative presumption is that unless it is restrained, information will circulate freely within a firm. Accordingly, if a law firm in possession of relevant confidential information wishes to act against a former client against the wishes of that former client they must satisfy the court on the basis of clear and convincing evidence that effective measures have been taken to ensure that no disclosure of that information would occur.[92] The courts have also been cautious about being over-zealous, warning that a subsequent client's choice of counsel should not be restrained where 'the risk is no more than fanciful or theoretical.'[93]

13.042 Trying to distinguish between the limits of a lawyer's duty of confidentiality on the one hand, and the limits of legal professional privilege on the other, can be difficult. In modern legal practice a lawyer often advises his client on a much wider range of issues than simple matters of law. But it is also clear that for the purposes of determining what is privileged the courts accept that 'legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.'[94] Privilege is in itself a complex subject, but it is clear that in order for information to be privileged it must be confidential.[95] However, information imparted to a lawyer can be the subject of a duty of confidentiality without actually being legally privileged. A lawyer may be compelled by law to disclose information which is "merely" confidential in a way which is not possible when the information is protected by legal professional privilege.

13.043 Unlike bankers and other professionals, lawyers are restricted in their ability to use confidential information imparted to them to protect their own interests. So where an application is made against a law firm for a wasted costs order, the law firm will not normally be permitted to use confidential information to oppose that order.[96] Necessarily this means that on occasion 'lawyers may find themselves at a grave disadvantage in defending their conduct'.[97] As with other areas unique to lawyer's

[90] *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 at 234.
[91] Ibid., at 237-238.
[92] Ibid., at 237-238.
[93] *Koch Shipping Inc v Richard Butler* [2002] EWCA Civ 1280.
[94] *Balabel v Air India* [1988] 1 Ch 317 at 330.
[95] *Kennedy v Lycall* (1883) 23 Ch D 387.
[96] *Medcalf v Mardell* [2003] 1 AC 120.
[97] *Ridenhalgh v Horsefield* [1994] Ch 205 at 237.

confidentiality, the basis for this is founded in legal professional privilege, which is the privilege of the client's to waive. Where proceedings are brought by the client, then the lawyers will normally be entitled to disclose information provided by that client in order to defend themselves,[98] but not where the claim is brought by a third party (unless the client consents).[99]

13.044 Under English law it has been held that a regulatory body exercising its statutory powers to regulate the profession may obtain access to client documents which are confidential and subject to legal professional privilege.[100] Under British Virgin Islands law there is at present no regulatory body which has statutory powers to regulate or investigate the legal profession,[101] and so it is not clear to what extent that authority affects the duty of confidence as it applies to lawyers in the British Virgin Islands.

13.045 It is clear that where a lawyer is compelled by law to disclose confidential information, it does not amount to a breach of his duty to the client to comply.[102]

(iii) *Registered agents*

13.046 It is generally supposed that under British Virgin Islands law a registered agent owes a duty of confidentiality in relation to the documents and records which are within their possession. But it is difficult to find an positive statement of law which explicitly confirms that this is the case. Registered agents are entirely a creature of statute, and there is very little in the way of decided authority relating to their rights and obligations generally.[103] What little case law there is relating to this issue assumes that registered agents are under a general duty of confidentiality without hearing argument on the point or ever formally deciding that this is so.[104] The majority of registered agents in the British Virgin Islands belong to an organisation called the Association of Registered Agents, and the Association has adopted a Code of Conduct to which its members subscribe. That Code of Conduct provides:

> 'A Member should be guided by the highest standards of client confidentiality at all time and in particular:
>
> (a) should not give or disclose to the authorities or other third parties information pertinent to the affairs of any of its clients without the prior written approval of the client or if finally and conclusively required to under British Virgin Islands law; and

[98] *Paragon Finance plc v Freshfields* [1999] 1 WLR 1183; *Lillicrap v Nalder* [1993] 1 WLR 94.
[99] *R v Derby Magistrate's Court ex p B* [1996] AC 487 at 508.
[100] *Parry-Jones v Law Society* [1969] 1 Ch 1.
[101] The Financial Investigation Agency does have jurisdiction to regulate the legal profession with respect to anti-money laundering and terrorist financing, see also the Anti-money Laundering and Terrorist Financing Code of Practice 2008, section 9(2). In terms of more general regulation, and Bill for the introduction of a Legal Professions Act has been introduced into the House of Assembly and had its first reading on more than one occasion, but to date has never progressed.
[102] *Parry-Jones v Law Society* [1969] 1 Ch 1. See also *R (Morgan Grenfell Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563.
[103] One notable exception is *Commonwealth Trust Limited v Financial Services Commission* (BVIHCV 2008/051), but that matter largely related to the proper exercise of the regulator's powers.
[104] *JSC BTA Bank v Fidelity Corporate Services Limited* (unrep., HCVAP 2010/035) at para. [27].

(b) subject as aforesaid communications between a Member and its client should not be made public at any time.'

13.047 However the effect of the Code of Conduct is somewhat unclear in legal terms. The Association is a purely voluntary organisation with no power to regulate its members. And in any event, not all registered agents are members of the Association. But for those registered agents who are members of the association, that provision may have the effect of establishing that information which is imparted to them in their course of their business is to be treated by them as confidential information.

13.048 The Regulatory Code 2009, when setting out the responsibilities of licensees (which would necessarily include registered agents) stresses the requirement of maintaining adequate systems for the protection of a customer's confidentiality.[105] But that provision supposes the existence of an obligation of confidentiality to protect rather than introducing a new one.

13.049 The basis for inferring that a registered agent owes a duty of confidentiality can be expressed on one of five possible bases.

(a) *Agency*. The registered agent is the agent of the company, and thus can be said to owe the normal obligations of confidentiality which an agent owes to their principal.[106] There is some difficulty with this analysis because, as noted above,[107] a registered agent is not a true agent in the legal sense.

(b) *Bankers*. There is case law in other jurisdiction which suggests that the general duty of confidence owed by bankers may extend to other financial services professionals.[108] But although that basic proposition seems sound, it seems unlikely that a pure registered agent could properly be regarded as a financial services professional in the same sense as a banker, financier or broker.

(c) *Trusts*. A registered agent will almost invariably be the holder the holder of a trust licence under the Banks and Trust Companies Act 1990, and thereby might be said to owe the normal duty of confidentiality which a trustee would owe to another person for whom it administers property.[109] However this approach also has difficulties. Although registered agents almost invariably hold a full trust licence, a small number operate solely on the basis of a Class III licence (meaning they cannot act as trustees) or a company management licence under the Company Management Act 1990. Moreover, the fact that a person is licenced to engage in trust business does not mean that everything that they do should be viewed through the prism of trustee's obligations.

[105] Regulatory Code 2009, section 29(2)(k)(ii).
[106] *Parker v McKenna* (1874–75) 10 Ch App 96 at 119; *Phipps v Boardman* [1965] Ch 992 at 1030.
[107] See Chapter 2, section 7.
[108] *Brian Lines v Lines Overseas Management Ltd* [2006] Bda LR 43, 236.
[109] *Heerema v Heerema* 1985-86 JLR 293 (Jersey); *Duchess of Argyll v Duke of Argyll* [1967] Ch 302.

(d) *Contract*. Many registered agents include in their terms of engagement a contractual obligation to maintain confidentiality. Whilst this would clearly be effective to create an obligation of confidentiality on the contractual level, it does not answer the question as to whether, in the absence of an express agreement, an obligation of confidentiality would be imposed by equity on a registered agent.

(e) *Circumstances*. There seems to be a general principle of common law that where information is imparted to a person which in the circumstances holds the "quality of confidence" the law will impose a duty to maintain that confidence.[110] As a matter of practice (and as the Code of Conduct of the Association of Registered Agents and the provisions in the Regulatory Code 2009 demonstrate), there is a general acceptance that information which is given by a client to a registered agent is given in the expectation that it will be maintained in confidence. Where the courts have had to consider disclosure orders against registered agents they have tended to work upon the general assumption that the registered agent is under an obligation of confidentiality,[111] although the point does not ever appear to have been expressly argued.

13.050 It might be said that the point is academic. Whether or not the law imposes a duty of confidentiality on a registered agent, registered agents on the whole elect to protect the confidentiality of their client's affairs. Accordingly, does it really matter whether the law also imposes a duty of confidentiality, and if so what the basis of that duty is? The answer is that it probably does for two reasons.

13.051 Firstly, registered agents can normally be expected to treat the information which they hold as confidential with respect to enquiries which are received from outside parties. However, where there is an internal dispute, such as a shareholder dispute, the registered agent may be prepared to supply information to one of the sides in the dispute and the other side may seek to restrain such disclosure. In such a case it would be necessary in order to restrain disclosure, amongst other things, to show that the information is held under a duty of confidentiality.

13.052 Secondly, even if it is accepted that a registered agent owes a duty of confidentiality, the next logical question is to whom that duty is owed. If the duty arises on the basis of principal and agent (contrary to what is suggested above), then the duty is to the company itself and not (for example) the shareholders or ultimate beneficial owners of the company. Conversely, if the duty is predicated upon the trustee analogy (again, contrary to what is suggested above), then the obligation is owed to the ultimate beneficial owner of the company or other structure. If the duty is owed because of the nature and circumstances in which the information is imparted (which is suggested as the most probable basis), then the obligation is primarily owed to the person who

[110] See Chapter 13, section 2(e).
[111] See for example *PQ v RS* (HCVAP 2011/063); *Morgan & Morgan Trust Corporation v Fiona Trust & Holdings Corporation* (unrep., HCVAP 2005/024); *TSJ Engineering Consulting Limited v Al-Rushaid Petroleum Investment Company* (unrep., HCVAP 2010/0013).

imparted that information to the registered agent.[112] That may be the ultimate beneficial owner, but equally it may in fact be a qualified introducer or other corporate reseller. That may have serious ramifications for any person who is remote from the registered agent who seeks to claim damages against the registered for loss caused by any breach of the duty of confidence.

13.053 Ultimately whilst there is general agreement with the view that registered agents are under a duty of confidentiality, beyond that broad statement there appear to be a number of unresolved issues. It may of course be that there is no single answer. For example, it could be accepted that in relation to the share register (or copy share register) maintained by the registered agent, the duty of confidentiality is owed to the company as an extension of the general duty of confidence owed by directors and officers of a company. However, this would not necessarily prevent a court from holding than any copies of identification documents held by a registered agent to comply with the requirements of the anti-money laundering laws in the British Virgin Islands should be subject to a separate duty of confidentiality in favour of either the person who supplied those documents, or possibly the person identified by them. For the moment these issues await judicial consideration.

(iv) *Others*

13.054 As noted above, it is not practical to summarise the law relating to all of the relationships which automatically give rise to a legal duty of confidentiality under British Virgin Islands law. But before leaving the subject of confidentiality imposed by virtue of particular relationships, it is worth briefly considering noting various other relationships which are generally held to be subject to a duty of confidentiality.

(a) *Accountants*. An accountant will owe a duty to his client not to misuse any confidential information provided to him.[113]

(b) *Agents*. An agent owes a duty to his principal not to misuse any confidential information, either by way of disclosing it where not authorised to do so, or in order to profit personally.[114]

(c) *Arbitrators*. It is generally accepted the process of arbitration implies a degree of confidentiality not only in relation to the arbitrator but also in relation to the different parties to the proceedings.[115] However the ambit of that duty has been called into question.[116]

(d) *Directors*. A director or other officer of a company owes a duty of confidentiality to the company in relation corporate information.[117]

[112] It has been suggested that when obligations are received by a person (the qualified introducer or corporate reseller) who properly discloses them to a third party (the registered agent) then the third party would in principle be subject to the same confidentiality, see Toulson & Phipps, *Confidentiality* (Sweet & Maxwell, 2nd edn.) at 3-050.

[113] *Chantry Martin & Co v Martin* [1953] 2 QB 286; *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222.

[114] *Parker v McKenna* (1874-75) 10 Ch App 96 at 119; *Phipps v Boardman* [1965] Ch 992 at 1030.

[115] *Dolling-Baker v Merrett* [1990] 1 WLR 1205.

[116] *Esso Petroleum Resources Ltd v Plowman* (1994-1995) 183 CLR 10.

[117] *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.

(e) *Employees*. An employee owes a duty of confidence to their employer. It appears that this is treated as an implied term of the employment contract,[118] but subject to an concurrent equitable duty which will subsist after the contract is terminated.[119] The British Virgin Islands does not have general statutory protection for "whistle-blowers" under the Labour Code 2010,[120] but in certain circumstances an employee may claim disclosure is the public interest.[121]

(f) *Partners*. Each partner in a partnership owes various duties to the other partners, including a duty of confidentiality relating to partnership affairs.[122]

(g) *Patent agents and trade mark agents*. A general duty of confidentiality is owned by registration agents in relation to applications for trade marks or patents.[123]

(h) *Trustees*. A trustee owes a general duty to keep the affairs of the trust confidential, and also a separate duty to keep confidential any personal information relating to the beneficiaries.[124]

13.055 One area where there has been remarkably little consideration as to whether the relationship may give rise to a duty of confidentiality is in relation to the offices filled by insolvency practitioners: that of liquidator, supervisor of an arrangement and receiver or administrative receiver. Where a person is appointed as a liquidator of a company or a receiver over company property, there will be a positive obligation on the part of various other people to comply with any requests for information.[125] There seems to have been little judicial exploration of the extent to which the liquidator or receiver is entitled to share that information with other parties. Pressure may be exerted by third parties upon a liquidator or other office holder to share information – particularly where the circumstances of an insolvency suggest that there may be grounds for pursuing claims against other parties for fraud in foreign jurisdictions. The better view seems to be that appointment as an insolvency practitioner in one of those capacities does not automatically give rise to any duty of confidence, but a duty of confidentiality may be imposed in relation to certain types of information under the more general provisions relating to confidentiality imposed by circumstances. A general duty of confidence seems implausible in many cases the insolvency practitioner is required to make and file a public report of their conduct.[126]

[118] *Robb v Green* [1895] 2 QB 315.

[119] *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227.

[120] In other jurisdictions, see for example the Public Interest Disclosure Act 1998 (United Kingdom) and the Whistleblower Protection Act of 1989 (USA).

[121] *Re a Company's Application* [1989] Ch 477.

[122] *Floydd v Cheney* [1970] Ch 602.

[123] *Hunter v Mann* [1974] QB 767 at 772.

[124] *Heerema v Heerema* 1985-86 JLR 293 (Jersey); *Duchess of Argyll v Duke of Argyll* [1967] Ch 302; *A v B* [2002] EWCA Civ 337.

[125] See for example: Insolvency Act 2003, section 124(1).

[126] See for example: Insolvency Act 2003, sections 147 and 226.

(e) Confidentiality imposed by circumstances

13.056 Apart from situations involving contractual agreements to maintain confidentiality and confidential relationships, there appear to be a number of innominate situations where the court will impose a duty of confidentiality on a person not to use confidential information which has come into their possession. Unfortunately it is difficult to distil any common jurisprudential principle from the relevant cases, save to note that in each case they invoke the jurisdiction of equity and have held that for differing reasons it would be unconscionable not to protect the confidentiality of the relevant information. 'No single concept satisfactorily explains or encompasses all species of action for what has traditionally been called breach of confidence.'[127] Accordingly what follows is an attempt to cover the main grounds upon which the courts have been prepared to protect confidential information outside of the bases set out above. All of them follow the basic proposition set out by Lord Goff in the *Spycatcher* case that:[128]

> '...a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances when he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.'

13.057 This category where information is obtained in ostensibly confidential circumstances which the law will protect is easier to describe than to define. In *Lac Minerals Ltd v International Corona Resources Ltd*[129] the claimants had entered into negotiations with the defendants with a view to potentially establishing a joint venture arrangement for the development and financing of a mining property. As part of the discussions the claimants, who had already conducted testing on the property, provided representatives of the defendants with confidential geological findings and analysis relating to the property. After receiving the information, the defendants proceeded to acquire the desired property without informing the claimants. The court unanimously held that the defendants were liable for breach of confidence. The judgments of the Canadian Supreme Court are not completely consistent, but broadly reflect the position stated by Sopinka J that: 'the foundation of action for breach of confidence does not rest solely on one of the traditional jurisdictional bases for an action of contract, equity or property. The action is *sui generis* relying on all three to enforce the policy of the law that confidences are to be respected.'[130] That analysis has been subsequently reaffirmed by the Canadian Supreme Court.[131]

13.058 There are various academic books and articles questioning how far the decision in *Lac Minerals* would be followed in other common law jurisdictions, and in particular under English common law.[132] However, much of that debate centres on the concept of

[127] Toulson & Phipps, *Confidentiality* (Sweet & Maxwell, 2nd edn.) at 2-001.
[128] *AG v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 281.
[129] [1989] 2 SCR 574.
[130] Ibid., at 615.
[131] *Cadbury Schweppes Inc v FBI Foods Ltd* (1999) 167 DLR (4th) 577.
[132] Because of the provisions of the Common Law (Declaration of Application) Act 1705 the views of the English courts are usually treated with greater regard. In relation to the willingness of the British Virgin Islands court to diverge from the English courts, see para. 1.038.

the remedial constructive trust (a remedy which the English courts appeared to diverge away from[133]), and it is respectfully submitted that the decision insofar as it relates to the duty not to misuse information imparted in confidence is sound.

13.059 In relation to this further innominate category, the parameters of which appear to be somewhat uncertain, it has been commented that a key consideration involves 'looking to the source whence the stream has sprung.'[134] That must be right. If it is accepted that the publishing the fact that a public figure has a conviction for drunken driving 20 years ago is a breach of confidentiality if it is imparted by a person who was told in confidential circumstances, but not where an enterprising journalist finds it by trawling through court archives, the only plausible distinction must relate to the source of the information.

13.060 Separately from situations where information is deliberately imparted in confidential circumstances, the law may impose a duty of confidentiality where a person acquires confidential information 'improperly or surreptitiously'.[135] The duty of confidentiality is a duty which equity imposes upon the conscience of a person in possession of the information. The conscience of a person who has acquired the information in bad faith is no less affected, in the eyes of law, than that of a person with whom the information was entrusted.

13.061 The precise boundaries of what constitutes "improper" conduct for these purposes has not been definitively explored, and development has been largely on a case by case basis. It seems clear that if a person commits a crime to obtain the information, that will undoubtedly be improper.[136] For these purposes committing a crime would extend to counselling or procuring that another person commits the primary crime. But conduct which will be considered improper is certainly wider than just crimes. It seems that civil wrongs may also be sufficient, and a duty of confidence has been imposed where the information was obtain by trespass,[137] and has been suggested in relation to simple cases of breach of contract.[138]

13.062 Similarly, there appears to be no authoritative statement as to when a person is regarded as having acted "surreptitiously" for these purposes. It is not even clear if it is intended to be a disjunctive test (i.e. whether it is possible to be surreptitious without being improper or vice versa), or whether the relevant test is simply a broad one of misbehaviour. There are cases where the courts have been prepared to impose a duty of confidentiality even though the person has done nothing legally wrong, and where they do they usually apply the description surreptitious rather than improper.[139]

13.063 Provided that the information was obtained "improperly or surreptitiously" it will also affect any other person who comes to know the relevant information who is aware of

[133] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669.
[134] Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (4th edn., 2002) at 41-035.
[135] *Lord Ashburton v Pape* [1913] 2 Ch 469 at 475; *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 50.
[136] *Francome v Mirror Group Newspapers* [1984] 1 WLR 892 (illegal wire-tapping).
[137] *Franklin v Giddins* [1978] Qd R 72. The case could also seemingly have been treated as one of theft.
[138] *Lord Ashburton v Pape* [1913] 2 Ch 469; *Prince Albert v Strange* (1849) 1 Mac & G 25 at 38.
[139] *Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134; *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444; *Douglas v Hello! Ltd* [2006] QB 125 at para. 118.