Re Casterbridge Properties Ltd (in liq.). Jeeves v Official Receiver.

Chancery Division (Companies Court).
Burton J.
Judgment delivered 21 November 2001.

Winding up – Examination – Public examination – Private examination – Order made for public examination on without notice application in relation to St Vincent company – Company had interest in timeshare development in England – Examinee a resident of Liechtenstein – Application to set aside or rescind order – Later application to substitute order for private examination – Applicant claimed inability to comply with order due to non-disclosure provisions in St Vincent statute – Further claimed public examination compared with private examination was inappropriate and prejudicial – Whether public examination order should be set aside or substituted by private examination – Insolvency Act 1986, s. 132, 133, 236; Insolvency Rules 1986 (SI 1986/1925), r. 4.47.

This was an application to set aside, or alternatively to review, an order under s. 133 of the Insolvency Act 1986 for the public examination of the applicant in relation to the affairs of a company registered in St Vincent but ordered to be wound up in the UK in the public interest on a petition brought by the Secretary of State for Trade and Industry.

The company, 'Casterbridge', was incorporated in the British Virgin Islands in 1996 but continued and registered in 1998 in St Vincent as an international business company in accordance with the St Vincent International Business Companies Act 1996. Its sole director was a St Vincent company, 'CDL', of which there were nine directors including the applicant. Casterbridge's business involved buying and selling timeshare interests, most particularly such interests in a timeshare development at the Hever Golf and Country Club in England. In August 1999 the Secretary of State petitioned for the winding up of Casterbridge in the public interest. The applicant swore an affidavit in opposition to the winding-up petition on behalf of Casterbridge, but the company was ordered to be wound up on 1 August 2000 by which time the order was not opposed. The applicant failed to respond to a questionnaire sent by Casterbridge's liquidator and the liquidator obtained an order without notice for public examination of the applicant under s. 133 of the Insolvency Act 1986. The applicant informed the liquidator that he was unable to attend for public examination due to the provisions of the St Vincent Confidential Relations Preservation (International Finance) Act 1996 ('the CRPA'), which restrained him under criminal penalty from supplying the information requested or any other information about Casterbridge, at least without an order of the St Vincent court permitting the supply of the information. The applicant applied to the St Vincent court for permission under the CRPA and the public examination was adjourned pending determination of that application. Unfortunately the St Vincent application proceedings were then repeatedly adjourned. The applicant applied in the English court for an order to set aside the order for public examination or alternatively for a review and rescission of the order pursuant to r. 7.47 of the Insolvency Rules 1986. The applicant later sought, in the event that the order for public examination were not set aside or rescinded, an order in the alternative for private examination of the applicant under s. 236 of the Insolvency Act 1986 on the grounds that a public examination, as opposed to a private examination, was inappropriate or prejudicial to him.

Held, **upholding the order for public examination:**

1. There was no doubt as to the propriety and appropriateness of the standard procedure for an order under s. 133 to be sought without notice.

2. The court was bound on the application of the official receiver to make an order for public examination. The wording of s. 133(3) was mandatory on the court: 'On an application ... the court shall direct that a public examination of the person to whom the application relates shall be held ... ' But the court was not bound to continue or uphold the order where there was an application under r. 7.47 of the Insolvency Rules. On the r. 7.47 application, the court would have to place adequate weight upon the mandatory nature of the original order, the special role of the official receiver and in particular the special duties of the official receiver under s. 132. Because the order was mandatory, the onus of discharging it lay on the applicant.

3. The English court was not required nor qualified to arrive at a definitive construction of the CRPA and other St Vincent statutes, which was a matter for the St Vincent court. But on the declared policy of s. 3(1) of the CRPA to protect and preserve confidentiality and prevent unauthorised disclosure of confidential information of a professional nature, and allowing for the due protection by St Vincent of confidential professional advice, it could not be likely that the CRPA would or should be construed so as to prevent the disclosure by the applicant of at least most of the information sought in this case. If it was so construed then it would be likely to be regarded by the English court as exorbitant. The weight of the possibility that the applicant would be at risk under the CRPA to be considered in the court's discretion was little. As the applicant opposed the making and continuation of the order it was neither likely nor reasonable that he should be regarded as in breach of any duty, professional obligation or standard if he was compelled to be examined. In light of the English court's attitude in this case not to *impinge* upon on the public policy of St Vincent and the desire of the official receiver adequately to complete his investigation of the affairs of a company being wound up in England as a result of the carrying on of business by it in England, the St Vincent court might grant permission for the applicant to give information.

4. There was no reason to believe that the s. 133 order would not be enforceable and/or be enforced in Liechtenstein, where the applicant was resident, and no reason to believe that the order would serve no useful purpose.

5. Section 133 was extra-territorial (Re Seagull Manufacturing Co Ltd [1993] BCC 241) whereas an order for private examination under s. 236 might not have full territorial effect. If a s. 133 order was otherwise appropriate an order for private examination in Liechtenstein was obviously a less attractive proposition for the official receiver. A public examination in this case was neither inappropriate nor materially or unjustifiably more onerous and the official receiver was entitled on the facts to conclude that an application for a s. 133 order was so appropriate.

The following cases were referred to in the judgment:

Atherton, Re [1912] 2 KB 251.
Brannigan v Davison [1997] AC 238.
British Nylon Spinners Ltd v Imperial Chemical Industries Ltd [1953] 1 Ch 19.
Cloverbay Ltd, Re (No. 2) [1990] BCC 414; [1991] Ch 90.
Galileo Group Ltd, Re [1998] BCC 228.
Hughes v Hannover Ruckversicherungs-Aktiengesellschaft [1997] BCC 921.
McIsaac & Anor, Petitioners [1994] BCC 410.
Mid East Trading Ltd, Re [1998] BCC 726.
Morris v Banque Arabe Internationale d'Investissement SA The Times, 23 December 1999.
Paramount Airways Ltd, Re (No. 2) [1992] BCC 416.
PFTZM Ltd, Re [1995] BCC 280.
Richbell Strategic Holdings Ltd, Re [2001] BCC 409.
Salcombe Hotel Development Co Ltd, Re (1989) 5 BCC 807.
Seagull Manufacturing Co Ltd (in liq), Re [1991] BCC 550; [1992] Ch 128; [1993] BCC 241 (CA); [1993] Ch 345.

A *Smith, Re* [1990] 2 AC 215.
Surzur Overseas Ltd v Koros (unreported, 20 July 1999, Toulson J).
Tucker (A Bankrupt), Re [1990] Ch 148.
Wallace Smith Trust Co Ltd, Re [1992] BCC 707.

Daniel Lightman (instructed by Druces & Attlee) for the applicant.
Richard Ritchie (instructed by the Treasury Solicitor) for the official receiver.

B JUDGMENT

Burton J: 1. This is an application by Mr Bryan Jeeves ('the applicant'), a former UK national and citizen, but for some years a resident, and since 4 July 2000 a citizen, of Liechtenstein, to set aside, or alternatively pursuant to r. 7.47 of the *Insolvency Rules* 1986 (SI 1986/1925) ('the Rules') to review or rescind, an order made by Mr Registrar Buckley on 27 February 2001. This order under s. 133 of the *Insolvency Act* 1986 ('the 1986 Act') in favour C of the official receiver was for the applicant's public examination in respect of the affairs of Casterbridge Properties ('Casterbridge'), a company registered in St Vincent and the Grenadines ('St Vincent'), but ordered to be wound up in the UK, on a petition brought by the Secretary of State for Trade and Industry (as he then was).

The history

D 2. Casterbridge was originally incorporated in the British Virgin Islands in May 1996, but on 3 April 1998 it was continued and registered in St Vincent as an international business company, in accordance with the *International Business Companies Act* 1996 of St Vincent ('the IBCA'). Casterbridge's sole director was a St Vincent incorporated company called Corporate Directors Ltd ('CDL'), of which there were nine directors, including the applicant, who since 1993 has been President of the St Vincent Trust Service, and who was in 1997 the author of a book entitled 'St Vincent – the New Legislation'; this contains and expounds the E 1996 St Vincent legislation which included the IBCA, the *Confidential Relations Preservation (International Finance) Act* 1996 ('the CRPA') and the *International Trusts Act* 1996 ('the ITA'). The business of Casterbridge involved the buying and selling on of timeshare interests, and most particularly for these purposes such interests in a timeshare development at the Hever Golf and Country Club ('the Hever resort'), in Hever in Kent.

3. On 29 August 1999 the Secretary of State presented a petition to wind up Casterbridge in the public interest. Relevant paragraphs of the petition read as follows:

F '5. Each of [5 named] companies [including Hever Worldwide and Monaman] together with Casterbridge, has been involved in, and is part of a scheme relating to the development and marketing of land and timeshare accommodation at ... the Hever resort.

6. Each of the companies is linked either directly or indirectly to the ultimate ownership or control of both or either of two brothers, Mr Ron Popely and Mr John Popely.

G ...

9. ... Whilst the public has subscribed in the region of £7 million to Hever Worldwide for the shares (and timeshare accommodation) a substantial proportion of which appears to have been received by Casterbridge, Hever Worldwide is left with "occupation rights" of dubious title and value.

...

H 16. Casterbridge maintains an account with Lloyds Bank at Butler Place London.

17. The business of Casterbridge was in fact carried out at the Hever resort ...

(3) ... An invoice [was sent] dated ... in respect of Casterbridge administration fees to Messrs J and R Popely, Hever Golf and Country Club, Hever Road, Kent.

(4) Lloyds Bank statements in the name of Casterbridge have been addressed to the Secretary at Hever, Kent.

...

54. A substantial proportion of monies paid by the public to Hever Worldwide for Ordinary Point Shares has been transferred (by means of invoices for occupation rights) by Hever Worldwide to Casterbridge, a company incorporated outside the jurisdiction, in relation to which it is impossible to obtain information without a Court Order, and which is effectively beneficially owned by interests connected with the Popelys. The money is transferred to Casterbridge by means of unparticularised invoices for "occupation rights" for which no proper valuation has been obtained, and some of which appear not even to belong to Casterbridge. Casterbridge has received a substantial proportion of the proceeds of the wrongdoing in relation to Hever Worldwide summarised ... above.

55. In the premises it is just and equitable that Casterbridge be wound up.'

4. On 5 October 1999 Mr Boyall was appointed provisional liquidator upon the Secretary of State's without notice application. On 15 October 1999 an affidavit was sworn in opposition to the winding-up petition on behalf of Casterbridge by the applicant. Relevant paragraphs are as follows:

'1. I make this affidavit on behalf of Casterbridge ... and in support of its contention that this Court does not have jurisdiction ... to wind up this company and in opposition to the petition ... Where the contents of this affidavit are not made from my own personal knowledge, they are based upon information and advice given to me by those persons instructed by me to conduct this litigation on behalf of the company.

2. I am the President of the St Vincent Trust Service, which is a trust service for St Vincent ... I am also the trustee of certain trusts, the full details of which I set out below, which are the ultimate owners of the shares in Casterbridge.

5. On 27 November 1997 the St Vincent Trust Service received instructions to hold the shares of Casterbridge ... in trust. The shares were duly brought into the Mars Trust and the Blue Ridge Trust, which were then registered after the completion of certain formalities with the Registrar pursuant to enclosed certificates.

6. On 27 November 1997 R A Popely transferred 70% of the shares of Casterbridge into the Mars Trust and on the same day J H Popely transferred 30% of the shares of Casterbridge into Blue Ridge Trust.

7. The Board of Directors manages Casterbridge. Ron and John Popely have not in any way acted on behalf of Casterbridge. The individuals who, in the course of running Casterbridge who have acted on its behalf signed agreements in the name of Casterbridge and made decisions about the purchase and sale of property and property rights are, in addition to me, Mr Alex Jeeves [whom I understand to be the applicant's son] and Miss Petra Fiel. The various agreements made by Casterbridge ... were made and signed by me, acting on behalf of Casterbridge and they were all made outside of England and Wales.

8. The appointed director since continuation in St Vincent ... is Corporate Directors Ltd ... Neither Ronald Popely nor John Popely are directors of Corporate Directors Ltd ...

11. It is not true that Casterbridge is ultimately owned and controlled by the Popelys. The position is as I have set out in this affidavit. Further there has been no attempt to conceal the position from any proper enquiry. It is alleged that Casterbridge is run from the Hever resort. This is not the case.

13. It is true that a bank account was opened for Casterbridge at the Lloyds Bank at Butler Place London. This account was opened on or about the 3 December 1997 and was operated only for a short period and was closed in July 1998. The purpose of this

A bank account was to facilitate the timely sale of 523 occupation weeks to Hever Worldwide and a loan to Interval Holdings Ltd to purchase shares in Hever Worldwide prior to its launch on 8 December 1997.

15. ... Details of various transactions relating to the purchase of occupation rights at various resorts in the world are set out. It is denied that these transactions could provide grounds for stating that Casterbridge has traded in England and Wales. I say this because these agreements were actually made outside the jurisdiction. The agreements were made on behalf of Casterbridge by myself or Alex Jeeves or Petra Fiel who are all resident in Liechtenstein.

20. I note that it is alleged ... that Mr J Popely ... told the deponents that "all accounting records and supporting papers and other company documentation of all the Hever companies had been seized and removed from the premises by officials from HM Customs and Excise ...". I doubt whether it was intended to convey the information that Casterbridge's records had been seized. However I can say that its records were not seized and it was not the subject of a Customs and Excise investigation.

25. In paragraph 40 of the petition it is set out that by an agreement signed by J Popely on behalf of Casterbridge, Casterbridge took over from Country Hotel as "'vendors' of the Hever resort ... This is wrong. The said agreement is signed by J Popely on behalf of Hever Country Hotels Ltd and executed by a director of Casterbridge" [I observe that this statement does not appear consistent with the information supplied that the sole director of Casterbridge was a corporate director, namely CDL].

28. Paragraphs 67 to 70 [of the petition] deal with payments made to Casterbridge ... It is said in the affidavit "I am unable to explain why such a large amount was paid after such a short period following acquisition". The answer is that in the two weeks after the acquisitions, transactions were entered into which entitled Casterbridge to this payment. The payments were for the sale of timeshare weeks.

35. ... It is correct that Casterbridge sold occupation rights at the Hever and other resorts to Hever Wordwide for a sum of £988,000 and that Hever Worldwide acquired other occupation rights ... for a total sum of over £2 million and that Casterbridge received payment for these. The important point is not whether Casterbridge legally owned all the occupation rights it contracted to sell: it is whether Casterbridge was in a position to procure the transfer to Hever Worldwide of those occupation rights. So far as I am aware it is not alleged that Casterbridge is in breach of its contract or that Hever Worldwide failed to receive that which it paid for. Casterbridge was in a position to procure the transfers of occupation rights and ... nothing has occurred which could be the subject of any criticism.

43. In addition I would like to point out that the ultimate beneficiaries of any profits of Casterbridge are members of the Popely family, though not John or Ron Popely ... since 1983 the site has appreciated in value ... There is no obligation on the Popely family to pass that profit on to the shareholders in Hever Worldwide and nowhere are the shareholders told that they can expect to receive this benefit.'

5. On 26 May 2000 Mr Boyall obtained the court's approval of the sale of Hever Worldwide and of Casterbridge's timeshare rights. On 1 August Casterbridge was wound up by Park J in the Companies Court and Mr Boyall was appointed liquidator of Casterbridge. I have seen a transcript of the hearing before Park J. Casterbridge was represented by counsel, who made it clear that the order was not opposed, but the inferences that the Secretary of State was seeking to draw were not accepted by counsel for Casterbridge, and indeed, by virtue of the non-opposition, were thus not adjudicated upon. Park J said as follows:

'It started because the Secretary of State thought that it was just and equitable in the public interest that they be wound up. He still thinks that. Those advising the companies think it is just and equitable that the companies should be wound up. They would not

agree that that is just and equitable in the public interest; they would see it more in perhaps the private interest – the companies and the shareholders – there is no purpose to be served in my getting myself troubled about those two differences ... It being agreed that I have power to wind up these five companies on this hearing, the companies being represented and consenting to the winding up, though not necessarily consenting to the particular policy consideration which initially prompted the Secretary of State to initiate these proceedings, I can wind them up, and I will.'

6. At the beginning of December 2000 Mr Ron Popely, who lives in Turkish North Cyprus, eventually gave an interview to the official receiver: at that interview he stated that the Lloyds Bank account which had been operated in Casterbridge's name of which he was the signatory had been opened by him because he had been asked to do so by the applicant. The first contact by Mr Boyall with the applicant was by a letter dated 7 December 2000, which stated that he understood that the applicant was or had been an officer of Casterbridge, and asked him to get in contact and to complete a questionnaire which was enclosed. By letter dated 20 December the applicant wrote to Mr Boyall pointing out that he was not a director of Casterbridge. On 19 January there was a request from the official receiver to the applicant to attend for interview with the fully completed questionnaire, and when the questionnaire was not received a letter was sent to the applicant dated 8 February 2001 indicating that failure to return the fully completed questionnaire would result in an application to the court for his public examination. An order for public examination under s. 133 was applied for by Mr Boyall to Mr Registrar Buckley on 14 February and such order was made ex parte, i.e. without notice, on 27 February. By letter dated 5 March, written by the applicant on Casterbridge headed notepaper, he informed Mr Boyall that he was unable to attend the public examination, due to the provisions of the CRPA. I shall refer further below to the terms of the CRPA, but the applicant's case was then, and is now before me, that its terms restrained him from supplying the information requested or any information about Casterbridge, at least unless an order permitting the supplying of the information was made by the St Vincent court, conditionally or otherwise, upon an application by the applicant to that court under s. 4(1) of the CRPA. As I understand it, as a result of the indication that the applicant's position with regard to the CRPA was being considered, the Secretary of State agreed an adjournment of the public examination from 6 April until 11 May. Such application pursuant to s. 4(1) of the CRPA was made by the applicant on 4 May, and the applicant's solicitors requested the official receiver to agree to a further adjournment of the public examination from 11 May. Mr Boyall did not agree, and there was a hearing before Evans-Lombe J on 10 May. At this hearing no point was taken by the applicant as to the fact that the s. 133 order had been made without notice, nor any application made to set it aside: the relief sought was that, in view of the fact that there was a hearing in St Vincent of the s. 4 application fixed for 15 May, the public examination fixed for 11 May be adjourned. The application was supported by the witness statement of the applicant's solicitor, recording the belief that the St Vincent court would either determine the application on 15 May or alternatively adjourn it for a short period. Evans-Lombe J ordered that the public examination be adjourned, in the first instance until 17 May, and that Mr Boyall pay the costs. The s. 4 application was adjourned by the St Vincent court on 15 May to enable further evidence to be put in, and again on 24 May to allow consideration of Mr Boyall's affidavit which, although he was not a party to the s. 4 application, nor entitled to be so, had been filed with the St Vincent court, setting out the official receiver's case, and of the other evidence, by the Solicitor General (notice being required to be given of a s. 4 application to the Attorney-General of St Vincent). This application was adjourned again on 8 June until 6 July, because the Solicitor General had retired from office and a replacement had yet to be appointed, and because both High Court judges were occupied in court, and no other judge was available. It was then that, by ordinary application dated 29 June 2001, the applicant applied for an order setting aside Mr Registrar Buckley's order alternatively for a review and rescission of that order pursuant to r. 7.47 of the Rules. What has happened thereafter in St Vincent is manifestly unfortunate. It is in no way the fault of the applicant (nor of course of the official receiver), but

A it is clearly quite different from what Evans-Lombe J expected would be the case when he adjourned the public examination initially for a short period at the instance of the applicant, and notwithstanding the opposition of Mr Boyall, on 10 May. After the three adjournments of the s. 4 application in St Vincent to which I have referred, there was a further adjournment on 6 July until 28 September: the case was not listed on 28 September and was instead listed for 5 October; on 5 October it was further adjourned until 19 October; on 19 October further adjourned until 2 November, and on 2 November yet further adjourned because there was no B judge available until 23 November when it presently stands for hearing.

7. The other events leading up to the hearing of this application, apart from the service of evidence on both sides, can be shortly summarised:

(i) In September there was an application by Casterbridge and four creditors, all of them companies connected with the applicant, for leave out of time to apply for rescission of the winding-up order: this was dismissed by Hart J on 29 October.

C

(ii) In the light of the position taken by the applicant, to which I shall refer below, that there were grounds to argue that a public examination, as opposed to a private examination, was inappropriate or prejudicial to him, under cover of a letter dated 23 October 2001 from the Treasury Solicitors, there was sought in the alternative 'in the event that the Court ... does set aside or rescind the order of Mr Registrar Buckley' an order for private examination of the applicant, pursuant to s. 236 of the Act. Knowing that the matter was D to be fully considered before me, Neuberger J made an order for leave to serve such application out of the jurisdiction under r. 12.12(3) on 14 November.

(iii) A certificate of good standing was issued by the Registrar of International Business Companies in St Vincent on 5 November 2001 certifying Casterbridge's standing in St Vincent, followed by a letter dated 8 November 2001 from the St Vincent Offshore Finance Authority stating that 'our view is that Casterbridge ... falls under our E jurisdiction and any winding up has to take place here in St Vincent'. I have already indicated in para. 5 above that, notwithstanding the affidavit in opposition originally filed by the applicant on behalf of Casterbridge disputing the jurisdiction of the English court, no such point was pursued and indeed there was the positive support for, and non-opposition to, the order on 1 August 2000 by Casterbridge, represented by counsel, to which I have referred above.

F **The UK legislation**

8. Section 133 of the 1986 Act reads as follows in material part:

'(1) Where a company is being wound up by the court, the official receiver or, in Scotland, the liquidator may at any time before the dissolution of the company apply to the court for the public examination of any person who–

G (a) is or has been an officer of the company; or ...

(c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part, in the promotion, formation or management of the company.

(2) Unless the court otherwise orders, the official receiver ... shall make an application under subsection (1) if he is requested in accordance with the rules to do so by–

(a) one-half in value, of the company's creditors; or

H (b) three-quarters, in value, of the company's contributories.

(3) On an application under subsection (1), the court shall direct that a public examination of the person to whom the application relates shall be held on a day appointed by the court; and that person shall attend on that day and be publicly examined as to the promotion, formation or management of the company or as to the conduct of its business and affairs, or his conduct or dealings in relation to the company.

(4) The following may take part in the public examination of a person under this section and may question that person concerning the matters mentioned in subsection (3), namely– A

(a) the official receiver; ...

(d) any creditor of the company who has tendered proof ...

(e) any contributory of the company.' B

9. The relevant Rules are as follows:

'4.211 Order for public examination

(1) If the official receiver applies to the court under section 133 for the public examination of any person, a copy of the court's order shall, forthwith after its making, be served on that person. C

(2) Where the application relates to a person falling within section 133(1)(c) (promoters, past managers etc.), it shall be accompanied by a report by the official receiver indicating:

(a) the grounds on which the person is supposed to fall within that paragraph ...

(4) In a case to which paragraph... (2) ... [applies], the court shall rescind the order if satisfied by the person to whom it is directed that he does not fall within section 133(1)(c). D

4.212 Notice of hearing

(1) The court's order shall appoint a venue for the examination of the person to whom it is directed ("the examinee"), and direct his attendance thereat.

(2) The official receiver shall give at least 14 days' notice of the hearing– E

(c) subject to any contrary direction of the court, to every creditor and contributory of the company who is known to the official receiver or is identified in the company's statement of affairs.

(3) The official receiver may, if he thinks fit, cause notice of the order to be given, by advertisement in one or more newspapers, at least 14 days before the date fixed for the hearing; but, unless the court otherwise directs, there shall be no such advertisement before at least 7 days have elapsed since the examinee was served with the order. F

4.215 Procedure at hearing

(1) The examinee shall at the hearing be examined on oath; and he shall answer all such questions as the court may put, or allow to be put, to him. G

(2) Any of the persons allowed by section 133(4) to question the examinee may, with the approval of the court ... appear by solicitor or counsel; or he may in writing authorise another person to question the examinee on his behalf.

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

(4) There shall be made in writing such record of the examination as the court thinks proper. The record shall be read over either to or by the examinee, signed by him, and verified by affidavit at a venue fixed by the court.'

10. The sections of the Act relating to private examination read in material part as follows:

A '236(1) This section applies ... in the case of a company in respect of which a winding-up order has been made by the court in England and Wales as if references to the office-holder included the official receiver ...

236(2) The court may, on the application of the office-holder, summon to appear before it–

(a) any officer of the company,

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

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

237(3) The court may, if it thinks fit, order that any person who if within the jurisdiction of the court would be liable to be summoned to appear before it under section 236 or this

C section shall be examined in any part of the United Kingdom where he may for the time being be, or in a place outside the United Kingdom.

237(4) Any person who appears or who is brought before the court under section 236 or this section may be examined on oath, either orally or ... by interrogatories, concerning the company or the matters mentioned in section 236(2)(c).'

11. The relevant Rules relating to private examination are as follows:

D '9.2 Form and contents of application

(1) The application shall be in writing, and be accompanied by a brief statement of the grounds upon which it is made.

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

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

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

(c) to submit affidavits (if so, particulars to be given of the matters to which he is required to swear), or

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

F or for any two or more of these purposes.

(4) The application may be made *ex parte*.

9.3 Order for examination, etc.

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

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

9.4 Procedure for examination

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

H (2) Any other person who could have applied for an order under the applicable section in respect of the insolvent's affairs may, with the leave of the court and if the applicant does not object, attend the examination and put questions to the respondent (but only through the applicant).

(5) The respondent may at his own expense employ a solicitor with or without counsel, who may put to him such questions as the court may allow for the purpose of enabling

him to explain or qualify any answers given by him, and may make representations on his behalf. A

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

9.5 Record of examination

(1) Unless the court otherwise directs, the written record of the respondent's examination ... shall not be filed in court. B

(2) The written record ... shall not be open to inspection, without an order of the court, by any person other than–

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

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

9.6 Costs of proceedings under section 236 ...

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

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

The application

12. I turn then to the contentions at the hearing before me, which were ably and conscientiously presented by Mr Daniel Lightman on behalf of the applicant and Mr Richard Ritchie on behalf of the official receiver. E

The procedure

13. I deal first with the preliminary question raised by the applicant, that the order under s. 133 should have been sought and made on notice to him. The rival contentions are:

(i) The applicant asserts that such application should not ordinarily be made without notice. He accepts that the standard procedure has been to apply without notice, and that no authority supports his proposition. However he refers to a speculative passage in the recent book by Boyle and Marshall, *Practice and Procedure of the Companies Court* (1997, Informa Publishing Group), at para. 15.6.6, which suggests that an application should be made on notice unless there is good reason for it to be made without notice, and he then seeks to apply to a s. 133 application the principles well known in the field of emergency injunctions. F G

(ii) The respondent contends that such standard procedure is in accord with the provisions and the principles of the 1986 Act and the Rules (e.g. r. 4.212(3)), that there is no point in making the application on notice since the order is effectively administrative, because the court *shall* make the order (s. 133(3) and see r. 4.211(1)), as is well recognised and accepted for example by Mummery J in *Re Seagull Manufacturing Co Ltd (in liq)* [1991] BCC 550; [1992] Ch 128 ('Seagull Ch D') at p. 557H; pp. 140H–141B, and that in any event any entitlement to take such point was waived when the applicant applied in court on 10 May to Evans-Lombe J, seeking not its discharge on that ground or at all, but the adjournment of the public examination ordered pursuant to it. H

14. I am satisfied that there is no need for me to doubt the propriety or appropriateness of the present standard procedure for an order to be sought without notice, accompanied by the

A appropriate official receiver's report where appropriate, pursuant to r. 4.211(2), as was the case here, nor for me to resolve the issue between the parties on a fully argued basis (and indeed I encouraged the cutting short of oral argument on this point), because as there is before me an application to review or rescind the order under r. 7.47 I have all the power and the material to decide whether I can or should discharge this order, now that it has been argued fully before me.

B *Is there a discretion to set aside/review/rescind the order?*

15. This is the next issue, i.e., whether the provisions of s. 133, or more precisely s. 133(1) and (3) as opposed to s. 133(1) and (2), are *mandatory* (as described by Mummery J in the passage from *Seagull* which I have quoted above) except in the specific circumstances provided for by r. 4.211(4), or whether there is a discretion.

16. The official receiver submits that the court has no discretion in respect of an application C by him of his own motion, as opposed to one made as a result of a request under s. 133(2). As there is express provision for rescission of the order pursuant to r. 4.211(4) in limited circumstances, then pursuant to the construction 'inclusio unius exclusio alterius' the grounds there set out (not applicable here) are the only grounds upon which rescission can be ordered. He relies upon the passage from *Seagull* at p. 557; pp. 140–141, but also on a passage of the judgment of Evans-Lombe J in *Re Richbell Strategic Holdings Ltd* [2001] BCC 409 at p. 413E:

D > 'It follows that it was mandatory upon the court ... to direct an examination, although the court does retain a power to control the form that that examination takes pursuant to the provisions of r. 4.215(1), see the reference "to such questions as the court shall allow" to be put to the examinee.'

17. Mr Ritchie submits, as appears from that passage, that there is a discretion that can be exercised in relation to the public examination, but it arises later, once the examination has been ordered, and that a judge or registrar could at a pre-hearing summons or on the first day of E the examination (if for example it relates to an objection to giving any answers at all or some category of answers) or as the hearing goes along, there is a continuing or residual discretion to exclude answers or even to terminate the examination. That, he submits, is sufficient and is consistent with the otherwise mandatory nature of the s. 133 order.

18. The applicant's submissions are as follows:

(i) There is no justification for a difference between an order for a s. 236 private F examination and one for a s. 133 public examination, and indeed if anything, because of the more rigorous and public nature of the latter, there should be the greater care before ordering it. The court should not act as a rubber stamp or 'executive agency'. The official receiver points out the different nature of a s. 133 examination, namely that it is always sought by the official receiver and pursuant to the official receiver's duty to investigate, by virtue of s. 132(1) of the Act '(a) if the company has failed, the causes of G the failure and (b) generally, the promotion, formation, business, dealings and affairs of the company': and further he points out the distinct difference in the nature of the provisions, s. 133 being apparently, or as he would say clearly, mandatory, whereas the provisions relating to s. 236 plainly, in each subsection and in the Rules, using the word *may*, and thus clearly providing for a power and a discretion, rather than an obligation.

(ii) He points to the case of *Re Wallace Smith Trust Co Ltd* [1992] BCC 707 at p. 712 per Ferris J:

H > 'An oral public examination under sec. 133 would be no less oppressive than an oral private examination under sec. 236 and the balancing exercise described in *Re Cloverbay Ltd (No. 2)* [1990] BCC 414 should be carried out. In substance the same consideration applies to an application under r. 7.20 for an order designed to compel performance with the statutory duties referred to in that rule. It is right to say that Mr Heslop, on behalf of the official receiver, did not disagree with this approach.

Accordingly I must evaluate the factors relied on by Mr Smith as pointing against the making of the order sought and give them due weight in the scales against the strong grounds which I have mentioned . . .' A

Having done so he made the order.

Mr Ritchie, who was in fact junior counsel to Mr Heslop QC on that occasion, points out that this arose by virtue of a concession on behalf of the official receiver in that case, which he does not make in this case. B

(iii) Mr Lightman relies upon r. 4.212(3), which provides a seven-day window after service of the order upon the examinee before there can be an advertisement of the examination which the official receiver has the power to place. Mr Lightman submits that this sub-rule (which itself Mr Ritchie had already submitted to be inconsistent with the suggestion that the original order should be made on notice) is giving the opportunity for the examinee so served to make application to discharge pursuant to r. 7.47, which must suggest a discretion to do so. The official receiver responds that such window is not for that purpose, or certainly not sufficiently clearly for that purpose to found a submission upon it. Mr Ritchie submits that what it is actually aimed at is giving the opportunity to the examinee to seek to persuade the official receiver to exercise his discretion not to advertise, and if necessary to obtain a court order to restrain advertisement. Alternatively it does not in any event argue for the broad discretion to rescind for which Mr Lightman contends, given the existence of the application to rescind under r. 4.211(4). C D

(iv) Mr Lightman further submits that the word 'shall' should not be construed in an untrammelled mandatory sense. In reliance on a passage in the judgment of Scott J in *Re Salcombe Hotel Development Co Ltd* (1989) 5 BCC 807 he submitted that in certain circumstances the use of the word *shall* could be interpreted as 'permissive and directory' rather than mandatory. The words of the subsection being construed by Scott J were in my judgment however completely different and of no assistance in this case. He further referred to *Hughes v Hannover Ruckversicherungs-Aktiengesellschaft* [1997] BCC 921, where there was construction of a provision that the courts 'shall assist': this too seems to me completely different, because 'shall assist' does not necessarily mean (and was not found to mean) 'shall make the order sought'. E

(v) Mr Lightman primarily founds himself upon the terms and availability of r. 7.47. While accepting the principle that general rules give way to the particular, he submits that the special provision in r. 4.211(4) should not oust or limit this general jurisdiction, and thus the court should now reconsider the position inter partes. The official receiver responds that any such consideration is pointless, because of the mandatory terms of s. 133(1) and (3), i.e. that even if there be a reconsideration, the court must still make the order. F

19. There is here almost an example of the irresistible force meeting the immovable object. My tentative answer to the apparent conundrum is as follows. I can see why it is that Mr Heslop QC made the concession he did in *Wallace Smith*, because there is indeed something uncomfortable about the court being a rubber stamp, albeit of course in a situation where what is relied upon is an application by the official receiver. My resolution is that the court is indeed bound on the original application of the official receiver to make an order – 'the court *shall* direct that a public examination of the person to whom the application relates shall be held' – but that it is not bound to continue or uphold that order when there is an application under r. 7.47 : albeit that there would plainly not be the same exercise as on an entirely discretionary decision relating to a s. 236 examination, because adequate weight must be placed upon the mandatory nature of the original order, the special role of the official receiver and in particular the special duties of the official receiver pursuant to s. 132 set out in para. 18(i) above. This is the basis upon which I approach the balancing exercise which, in the circumstances above set out, I am satisfied I am entitled to carry out. In the alternative, in the light of the submissions of G H

A the official receiver to which I have referred in para. 17 above, namely that a judge would always have a discretion, on the calling on of a public examination, to consider the same if not similar matters, once again always against the background of the mandatory nature of the original order, I conclude that it would make no sense if there had simply to be the formality of calling on such hearing; and I would think it both proper and in accordance with the overall objective of the CPR, that the same function as could be carried out at a pre-trial hearing or by formally calling on the first day of the examination, should rather be carried out at the hearing
B of a r. 7.47 application.

The discretion

20. I turn then to the exercise of that discretion. As, apart from *Wallace Smith*, in which the concession was made, there are no reported cases in which the balancing exercise has been carried out, it is obviously helpful to look at the reported cases where such exercise has been
C carried out in relation to a s. 236 order to consider the kind of questions which can arise. This is an exercise which obviously must be carried out with care. First, of course every case depends upon its own facts, and in particular upon the features which either side argue should be included in the weighing scales. Secondly, I must approach, in my judgment, a s. 133 balancing exercise in a somewhat different way, because, as I have already indicated, there is even on the applicant's case, but certainly in the light of my own conclusions, a discretion which must inevitably be influenced by the ordinarily mandatory nature of the order, and the different
D nature of s. 133. Caution is in the cases urged, and rightly and understandably urged, in relation to s. 236 applications, where the ambit of the section is manifestly wider. As made plain above, whereas s. 133 provides for questioning only of officers or those involved in the promotion, formation or management of the company (and with the power to challenge the latter fact pursuant to r. 4.211(4)), a s. 236 application inevitably ranges far wider by virtue of s. 236(2):

> '*any person* known or suspected to have in his possession property of the company or
E supposedly indebted to the company or ... whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company.'

It is plainly in particular because of this that in cases involving s. 236, such as *Re Cloverbay Ltd (No. 2)* [1990] BCC 414; [1991] Ch 90 at p. 420; 103 and *Re PFTZM Ltd* [1995] BCC 280 at p. 282D, emphasis is placed on the need for caution. Similarly in the light of the official
F receiver's duty to investigate under s. 132, the comment of Lightman J in *Re Galileo Group Ltd* [1998] BCC 228 at p. 241B, namely that 'Section 236 is (at least primarily) designed to protect the interests of creditors in an insolvent liquidation' must obviously be of the less, if any, significance in relation to a s. 133 order, on the facts of this case.

21. The official receiver contends as follows:

(i) The first feature is the mandatory nature of the order, and the special role and duties of the official receiver referred to above. He points out that the use of public examinations
G is no longer limited, as it was prior to the 1986 Act, to cases in which fraud is alleged.

(ii) He emphasises that information is necessary about the affairs of Casterbridge: substantial sums of money went into and through the company, which was, he submits, interposed between purchase and sale for no apparent reason.

(iii) The applicant is the only person apparently available who can give the information, and he has not been prepared to co-operate. An opportunity has been offered for private or
H informal meetings before and/or after and notwithstanding the order for public examination.

(iv) The caution referred to above, apparent in the s. 236 cases, relating to third parties is in any event not appropriate here. On the facts of this case, and in the light of his own evidence, the applicant has a great deal of personal knowledge, and was himself involved in signing agreements on behalf of Casterbridge. Irrespective of whether he

could be said to be a shadow director of Casterbridge, Mr Lightman in the course of argument conceded that the applicant could not be said to be a third party in such context, and indeed himself pointed to s. 235 of the Act, which he accepted imposed a duty to co-operate with the official receiver on the applicant:

'235(1) This section applies ... in the case of a company in respect of which a winding-up order has been made by the court in England and Wales, as if references to the office-holder included the official receiver ...

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

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

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

(3) The persons referred to above are–

(d) those who are ... officers of ... another company which is ... an officer of the company in question.' [i.e. CDL].

(v) The applicant has already put himself forward as in a position to give such information. Park J, at the hearing of the winding-up petition on 1 August 2000, after considering the papers before him, including the affidavit from the applicant, found it 'fairly bewildering to work out what company was meant to have done what', and the official receiver remains in the same position. It is certainly right, in my judgment, in the light in particular of the paragraphs of the applicant's affidavit in opposition to the winding-up order which I have recited in para. 4 above, that to date the applicant has (a) shown that he does have much knowledge and information that he could give about the affairs of the company, and (b) by what he has said to date raised more questions than he has given answers.

(vi) He submits that the nature of the information sought is obvious. There is no requirement under s. 133 even to do that which is provided for in relation to a s. 236 application by r. 9.2(3) (and that is not more than to show a prima facie case for the order sought: see *Re Mid East Trading Ltd* [1998] BCC 726 at p. 738G–H per Evans-Lombe J), but what is required is in any event clear, if only from the passages I have recited from the winding-up petition and the applicant's own affidavit. However at my suggestion in the course of the hearing the official receiver produced a document headed ' Areas for questioning of Mr Jeeves', ('the scope document') which reads as follows:

'Without limiting the scope of the examination:

(1) Inter-relationship of Casterbridge with the other companies in the Hever Group of companies.

(2) All assets and liabilities.

(3) The circumstances and explanation of

(a) Casterbridge's purchase of occupation rights to the Hever County Hotel complex for Monoman Ltd

(b) The sale of those and other timeshare rights by Casterbridge to Hever Worldwide Properties Ltd

(4) Details of all timeshare rights bought by Casterbridge from Monaman Ltd

(5) Details of what happened to the £4m approx received by Casterbridge from Hever Worldwide Properties Ltd

(6) List of all bank accounts (both in UK and overseas), including details of signatories of accounts.

A (7) Full explanation of the disbursements of all monies received by Casterbridge and on whose authority those disbursements were made and to whom.

(8) Details of and explanation of all intercompany transactions and loans with other companies in the Hever Group of Companies.

(9) Insofar as not covered above, the answer to the question asked [by notice dated 16 March 2001, namely full details of the whereabouts of six identified sums, totalling
B £1,627,560, which had been paid to Casterbridge: if such monies have been disbursed then full details of to whom, when and for what purpose the payments were made].

(10) All questions in the questionnaire unless answered before the examination.

(11) The identity of the person(s) from whom he took his instructions, what those instructions were, and how they were given.

[and then by handwritten addition]

C (12) Delivery up of accounting records.'

22. The applicant's submissions are as follows:

(i) Mr Lightman first and primarily relies on the St Vincent legislation, and in particular the CRPA. I shall return to this issue below ('the CRPA issue'). He submits that he is at risk of prosecution under the CRPA if he answers questions and/or that by virtue of comity there should be no public examination. The official receiver has known about this since
D March 2001 and has ploughed on regardless.

(ii) He relies upon unenforceability in Liechtenstein of an order for public examination if made. I shall return below to this issue ('the Liechtenstein issue').

(iii) The applicant is not an officer of the company, although it is accepted, as set out in para. 21(iv) above, that he cannot be said to be a third party by virtue of his involvement, which is apparent on the evidence, in the affairs of the company, and he owes the
E statutory duty of co-operation also referred to above. He is, and has been since 1962, a resident in Liechtenstein and would thus have to come here. The company, which was not UK incorporated, had, he submits, little connection with the UK.

(iv) No sufficient steps have been taken to identify the information sought or to show why it is required or that the giving of it by the applicant was necessary. The point is made that the official receiver did not notify the authorities of St Vincent of the making of the winding-up order, although I have not been persuaded that there is any relevance in that
F regard as to the obtaining of information, given the role which on any basis the applicant has claimed. The applicant further submits that Mr Boyall has not advertised the making of the winding-up order, not advertised or held any meetings of Casterbridge's creditors or members or otherwise contacted Casterbridge's shareholders. Again the question relating to Casterbridge's members, or shareholders, hardly adds anything. On the information supplied by the applicant the members are the two trusts, of which he is
G trustee. So far as concerns meetings of creditors, the official receiver belatedly produced at the hearing a copy of a report to creditors, which was filed at court in September 2000: the applicant complains of inaccuracies in the report, particularly that its contents misrepresent the position in relation to the background circumstances by suggesting that misrepresentations were made to the public, when they were not; but in the context of whether it might have been likely to come to the notice of those with information to provide that seems hardly a relevant point. As for the advertising of the winding-up
H order, it does appear that the order was gazetted by reference to the correct name, but the wrong company registration number and registered office (the office of Hever Worldwide being given).

(v) What has been ordered is a public examination, rather than a private examination. Quite apart from the very difference arising out of the public rather than private nature of such examination, with its attendant greater risks of publicity and damage to reputation, the

applicant points to specific aspects of the public examination which are more onerous. I shall set out those differences by reference to the different Rules, which I have recited in para. 9 and 11 above.

(a) More information, it is submitted, falls to be provided in support of a s. 236 examination (r. 9.2(3)) than in support of a s. 133 application (r. 4.211(2)).

(b) Whereas by r. 9.4(1) only the applicant for private examination may examine, asking such questions as the court may allow and by r. 9.4(2) other parties entitled to attend may only ask questions through the applicant for examination, by r. 4.215(1) and (2) questioning by the other parties who are entitled to attend a public examination is also permitted.

(c) By r. 4.215(4) the record of a public examination must be signed by the examinee and verified by affidavit, whereas no affidavit is necessary in the case of private examination by r. 9.4(6).

(d) Whereas by r. 9.6(4) a person summoned to attend a private examination receives his or her travelling expenses and possibly other costs (although subject always to the power under r. 9.6(1) to order costs against him), there is no similar provision in relation to public examination.

The sanctions for non-attendance or non-compliance appear to be somewhat similar: compare s. 134 with s. 236(4) and (5). So too would be the nature of the questioning: complaint is made by Mr Lightman of Mr Boyall's statement (para. 13 of his witness statement) that

> 'there are a number of matters upon which my staff wish to obtain Mr Jeeves' version of events and then test these by asking him further questions. I need this information in order to prepare a report into the affairs of Casterbridge and to administer its affairs',

but it is plain to me, after hearing submissions, and indeed Mr Lightman did not seem to pursue the point, that this was not intended to amount to any suggestion of cross-examination, as opposed to testing and cross-checking of the evidence in the usual way.

Mr Lightman's submission is summarised in para. 19 of his written submissions in reply:

> 'The OR has not offered any justification for imposing on Mr Jeeves the especially onerous aspects of a public examination ... nor has he offered to palliate them, such as by undertaking:
>
> (a) not to advertise the examination
>
> (b) not to examine Mr Jeeves on oath
>
> (c) not to commit Mr Jeeves for contempt were he to fail to attend the examination or
>
> (d) to pay Mr Jeeves a reasonable sum in respect of travelling expenses.'

(vi) There is a further and discrete point arising by way of this contrast between public and private examinations, relating to the question of extra-territoriality. The applicant accepts that there is binding Court of Appeal authority that the effect of s. 133 is extra-territorial (*Re Seagull Manufacturing Co Ltd* [1993] BCC 241 [1993] Ch 345 ('Seagull CA'). Mr Lightman originally submitted that s. 236 had no extra-territorial effect, and that it was not a justification for the making of an application for a s. 133 examination that s. 236 had no extra-territorial effect, or alternatively that there was doubt whether it had. This submission was refined by Mr Lightman on the second day of the hearing, when the legislation was looked at carefully. He now accepts that s. 236 does have an extra-territorial effect, but this was limited, where there was an application for private examination for someone abroad, to ordering such examination to take place in the foreign country in which he or she was situated ('partial extraterritoriality'), such that there could not be jurisdiction under s. 236 to require such a person to attend private examination in England ('full extra-territoriality'). Consequently he submitted that, as private examination was available in Liechtenstein (although for other reasons the

A applicant would not consent to any such course), that was the course which the official receiver should take, rendering unnecessary any application for (the more onerous) public examination in England. I shall deal below with this 'extra-territoriality issue'.

The CRPA issue

23. The applicant is resident in Liechtenstein, but has stated that he visits St Vincent regularly, some two to three times per year (though the duration of the visits is not specified). B He is concerned in three trust companies, and has interests in seven other companies in St Vincent. His regular visits are to meet up with accountants, lawyers and staff, including the staff of CDL, and to hold and attend business meetings.

24. The relevant sections of the CRPA, which is described as 'an Act to provide for the preservation and protection of confidential relationships and information international finance [sic]' are as follows:

C '2(1) In this Act, unless the context otherwise requires –

"confidential information" means and includes any and all information and data, whether contained in a written document, electronic storage medium or otherwise, concerning any property or other thing of value in which the principal has a legal or beneficial interest, that would not be generally known to the recipient thereof outside of his relationship with that principal.

D "principal" means a person who has imparted to a professional person, either directly or indirectly, confidential information in the course of the transaction of business of a professional nature.

"professional person" means and includes a public or government official, a bank or financial institution, a registered or authorised agent, a trust company, an international business company, a barrister, solicitor or other lawyer, an accountant, an estate agent, E an insurer, a broker and every kind of commercial agent and adviser, whether or not answering to the above descriptions and whether or not licensed or authorised to act in that capacity, and every person engaged by, subordinate to, or in the employ or control of such person for the purpose of such person's professional activities.

3(1) The public policy of the State is to protect and preserve the confidentiality, and to prevent the unauthorised disclosure, of all confidential information with respect to F business of a professional nature which arises in or is created or disseminated within or is transported into the jurisdiction of the State.

(2) ... this Act has application to all confidential information with respect to business of a professional nature, which information arises or is held or is created or disseminated within or is transported into the State (through whatever medium) and to all persons coming into possession of such information, under claim of right or otherwise, at any time thereafter whether they be within jurisdiction of the State or outside thereof G Without limiting the foregoing, all confidential information shall remain subject to this Act, no matter where it is located and regardless of the medium of media in which it is contained or transmitted.

...

4(1) Whenever a person intends or is required to give evidence in, or in connection with, any proceedings being tried, enquired into, or determined by any court, tribunal or other H authority (whether within or outside of the State) of any confidential information within the meaning of this Act, he shall before so doing apply for and await directions from the Court.

(2) Application for directions under section 4(1) shall be made to, and be heard and determined by, the Court sitting alone and in camera ... At least seven clear days notice of any such application shall be given to the Attorney General of the State and, if the

Judge hearing the application for directions so orders, to any person in the State who is a party to the proceeding in question, unless such notice would jeopardise the intent of this Act ... [the Official Receiver is of course not a person in the State] ... The Attorney General may appear as an amicus curiae at the hearing of any such application, and any party on whom notice has been served as aforesaid shall be entitled to be heard thereon ...

5(1) ... any professional person who –

(a) being in possession of confidential information however obtained –

(i) divulges it; or

(ii) attempts, offers or threatens to divulge it; or

(c) gives such information in evidence other than as prescribed by the court as provided in section 4 ...

shall be guilty of an offence and liable on summary conviction to a fine of fifty thousand dollars and imprisonment for three years.

5(4) Whoever, being a licensed professional person entrusted as such with confidential information which is the subject of the offence, commits an offence under section 5 subsection ...(1) ... shall be liable to double the penalty therein prescribed.'

[Mr Bignell, the applicant's solicitor, has made a statement in which he asserts that the applicant is 'probably a licensed professional within the meaning of the Act', but no explanation has been offered either as to the source or meaning of such definition or of the basis upon which this suggestion is made.]

25. In addition there is reference by the applicant to s. 64 of the ITA, which reads as follows:

'(1)... subject to the terms of the instrument creating an international trust and to the terms of the [CRPA] no trustee ... or other person shall disclose to any other person not legally entitled to any information or document respecting an international trust, including without limitation:

(a) the name of the settlor or any beneficiary ...

(e) any other matter or thing respecting an international trust.'

26. This section is not directly relied upon as part of the applicant's application, but it became relevant in two respects. The first of these is made clear by the third witness statement of the applicant which was served during the course of the hearing, and the relevant paragraphs are as follows:

'4. At paragraph 7 of my affidavit [on 15 October 1999 in the winding-up proceedings] I stated

"The Board of Directors manages Casterbridge. Ron and John Popely have not in any way acted on behalf of Casterbridge.".

5. At paragraph 47 of my second witness statement I stated:

"Following receipt of Mr Boyall's request for information I asked my principals for authority to comply. That authority has not been forthcoming."

6. There is no discrepancy whatsoever between these two statements. As I stated at paragraph 6 of my affidavit, the shares in Casterbridge are owned (as to 70%) by the Mars Trust and (as to 30%) by Blue Ridge Trust.

7. The principals to whom I referred in paragraph 47 of my second witness statement were the beneficiaries of these two trusts. I am not prepared to identify these principals, since were I to do so I would be in breach of section 64 of the International Trusts Act 1996 ... Both of these trusts are international trusts within the scope of the International Trusts Act 1996. Section 64 of the Act provides that no trustee, protector or other person shall disclose to any other person not legally entitled to any information or document respecting an international trust, including the name of any beneficiary.

A 8. I can, however, confirm that Ron or John Popely, neither of whom are beneficiaries of either of these trusts, were not the principals to whom I was referring in paragraph 47 of my second witness statement.'

27. There are obviously a number of unanswered questions in this regard:

(i) Any prohibition on disclosure is 'subject to the terms of the instrument creating' the trust, which have themselves not been disclosed.

B (ii) The applicant has already disclosed that he is the trustee of Mars Trust and Blue Ridge Trust (para. 2 of the October 1999 affidavit): it is somewhat unusual for the trustee to describe and regard the beneficiaries of the trusts as the principals.

(iii) No explanation is given as to how s. 64 allows or has allowed the provisions of the amount of information that has been given, as to the identity and name of the trusts and the trustee of those trusts, and as to who are not the beneficiaries of them: or indeed the information given in para. 43 of his October 1999 affidavit as to the nature of the C 'ultimate beneficiaries of any profits of Casterbridge '. The other respect in which s. 64 may be relevant is thus by reference to the eleventh of the areas for questioning of the applicant in the scope document.

28. The applicant's case is as follows:

(i) all questions proposed to be asked of him will require the giving of information which will fall within the ambit of the CRPA. By virtue of the provisions of the CRPA he is D prevented from disclosing such information and/or is at risk of prosecution under the CRPA as and when he were to carry on his present regular visits to St Vincent referred to in para. 23 above: and further or in the alternative there would be risk to his reputation and/or business if he were compelled to disclose the information sought and/or he may be sued for breach of fiduciary duty. Hence the official receiver should be prevented from asking any questions and the order should be discharged; or

E (ii) the same result should follow on the alternative basis that some, most or many of the questions will seek such information; or

(iii) the same result should follow on the basis of comity: the English courts should accept and not disregard or invade the ambit and effect of the CRPA; or

(iv) any order for examination should be subject to a condition subsequent dependent upon the outcome of the s. 4 application to the St Vincent court, which, notwithstanding the F previous many adjournments, it is hoped may be finally resolved on 23 November.

29. The basis of the applicant's case by reference to the sections of and definitions in the CRPA which I have set out in para. 24 above is as follows:

(i) the applicant is a *professional person* (the explanation being that he is either an *authorised agent* or a *commercial adviser*), and a director of CDL, which is a professional person;

G (ii) the *principal* is Casterbridge;

(iii) all the information sought by the official receiver to investigate the affairs of Casterbridge and in particular to reveal the true position about the timeshare interests and their proceeds is *confidential information* .

(iv) such *confidential information* is, within s. 3(2), *confidential information with respect to business of a professional nature*.

H (v) such *confidential information* within s. 3(2) is *held in the State*, because:

(a) all knowledge of the applicant is imputed to Casterbridge;

(b) Casterbridge is based in the State;

(c) even though the applicant remains for the substantial majority of the year outside of the State, as what is in his head is imputed to Casterbridge, therefore it is held in the State.

or

(vi) some, much or most of the information sought is confidential information within s. 3(2) and arises or is created in or has been transported into the State;

(vii) no permission has yet been given for disclosure by the St Vincent Court pursuant to s. 4;

(viii) therefore anything which is disclosed by the applicant puts him at risk of prosecution under s. 5(1) or *probably* s. 5(4).

30. The applicant therefore submits that, as he goes to St Vincent some two to three times a year and has business interests there to which I have referred, he should not be rendered in breach of the provisions of the CRPA or put at risk of sanctions under it. The applicant accepts that he has no privilege against self-incrimination even under English law by virtue of questions answered at a public examination and certainly therefore, a fortiori, no such privilege in respect of incrimination at foreign law, but that where he may be put at risk by answering any questions at a public examination, at a relevant foreign law and/or in a relevant foreign jurisdiction (and have his reputation and business efficacy possibly damaged) that should weigh heavily against making or upholding any order for public examination, as a matter of discretion.

31. The applicant also relies upon the principle of comity, that an order of the English court in English winding-up proceedings should not interfere with the ambit of the CRPA. The applicant points to the following:

(i) A letter from a former Prime Minister of St Vincent, which records that:

> 'Mr Jeeves has long been an advocate for higher due diligence standards to be introduced into the jurisdiction of St Vincent and the Grenadines, as well as stating that the jurisdiction must make every effort to be removed from the FATF blacklist by introducing certain measures that would help to combat the laundering of money.'

(ii) At para. 36 of his second witness statement, the applicant repeats a quotation from his book (to which I have referred in para. 2 above) from a Mr Scranton, who has also written a letter which has been exhibited, that ' Confidentiality in financial services, originally developed by the Swiss through their hallmark bank secrecy protocols and later refined and mandated by the Cayman Islands in legislation, has found its most concrete expression in this new Vincential Act, which is arguably the most restrictive confidentiality law in the world today'.

At pp. V and VI of his book under the heading 'The Advantages for the Practitioner' the applicant wrote:

> 'Confidentiality. The new laws really offer protection in a very encompassing fashion as described already. Protection of genuine clients is paramount.
>
> Trusts: This new law is guaranteed to delight all trust specialists ... Strict trustee confidentiality combined with asset protection, ... which virtually gives the settlor statutory protection against creditor claims, and much more, are all reflected. Further the truncated statutes of limitation supported by the fact that a complaining creditor must not only fulfil high levels of proof and support the claim by a minimum security deposit of US$25,000 before pursuing a claim against such a trust in St Vincent, indicate the legislators' desire to create an ideal infrastructure.'

32. The official receiver's case is that there may be some questions which may fall within the provisions of the CRPA, for example, if indeed any documents are located in St Vincent, but that the vast majority of the information sought, as is clarified in the scope document, can have little or no relevance to St Vincent. Mr Ritchie points out that the very purpose of an international business company is not to do business in St Vincent: (see s. 5(1)(a) of the IBCA ('an international business company is a company that does not ... regularly carry on business

A with persons Resident') and e.g. s. 10(1)). As to the CRPA Mr Ritchie's submissions are as follows:

(i) He does not accept that the applicant is necessarily a *professional person* within the definition of s. 2(1). In any event:

(a) the applicant is submitted to be the *principal*, in that he is the trustee of the two trusts which are the shareholders, and was a shadow director of Casterbridge,
B and/or was the man who signed many if not all of the agreements, and/or managed or carried on the business on Casterbridge's behalf about which information is sought; or

(b) in so far as he is not the principal, but it is said that Casterbridge is, then the information has not been *imparted* to him *in the course of the transaction of business in a professional nature*, but learnt by him in the ordinary course of
C business of Casterbridge in performing the above roles; and/or

(c) in that the purpose of the Act is to protect the privacy of the professional relationship, in so far as he may have information which he obtained in performing the above roles, then that information is not information which *would not be generally known to the recipient thereof outside of his relationship with the principal.*

D (ii) The information even if otherwise *confidential information* is not within s. 3(2):

(a) the public policy of St Vincent is set out in s. 3(1) as being to ' protect and preserve the confidentiality ... of all confidential information with respect to business of a professional nature which arises in or is created or disseminated within or is transported into the jurisdiction of the State '. This definition again emphasises that it relates to business of a *professional nature*, and not the
E carrying on of commercial business relating to timeshares in the United Kingdom, managed or controlled by the person who has the relevant knowledge;

(b) the words 'held in' in s. 3(2) do not, as can be seen, feature in the setting out of the public policy in s. 3(1), and for that reason, and in any event, Mr Ritchie submits that in s. 3(2) they cannot possibly be construed as meaning held in the mind of the applicant (who on his own case was not even a shadow director) yet deemed
F to be held *in the corporate mind of Casterbridge, in St Vincent.* It must, he submits, apply and be limited to physical holding in the State.

He also makes other submissions in relation to s. 3(3) and 4 of the Act, which I need not summarise.

33. The official receiver accepts that this court is not required, nor qualified, to arrive at a definitive construction of the St Vincent statutes, which is of course a matter for the St Vincent
G court. He submits however that for the purposes of the exercise of my discretion I must assess the risk of any real impingement resulting from that statute upon the ordinary course of conduct of the official receiver, while he seeks to discover the facts about a company which is being wound up, without opposition, and indeed with some support, by the company itself, by the English courts, and about its English business and the proceeds of it. Mr Ritchie accepts that, notwithstanding that there is no privilege of self-incrimination available, such matters can and indeed should be taken into account as part of the discretion in any balancing exercise, but in no
H way as a conclusive factor. He refers to the decision of the Privy Council on appeal from the Court of Appeal of New Zealand in *Brannigan v Davison* [1997] AC 238, particularly per Lord Nicholls at pp. 247C–E and 249H–250F ('In its simple, absolute, unqualified form the privilege, established in a domestic law setting, cannot be extended to include foreign law without encroaching unacceptably upon the domestic country's legitimate interest in the conduct of its own judicial proceedings') and p. 251B–G; and also *Re Atherton* [1912] 2 KB

251, *Surzur Overseas Ltd v Koros* (unreported, 20 July 1999) per Toulson J and *Morris v Banque Arabe Internationale d'Investissement SA* The Times, 23 December 1999 (Neuberger J). The official receiver relies upon the following passage in the judgment of Chadwick LJ in *Re Mid East Trading Ltd* [1998] BCC 726 at p. 754 (Court of Appeal):

> 'In applying that test – and, in particular, in considering what burden would be imposed on a bank required to disclose details of another customer's affairs – the court will, of course, give weight to any risk that compliance with the order would or might expose the bank to claims for breach of confidence, or to criminal penalties, in the jurisdiction in which the documents are. Where that is a real risk, it seems to us likely that the Companies Court will be slow to order production; at least if there is some other route by which the documents can be obtained which affords protection to the bank. But that is because the risk that the bank will be exposed to liability is a factor – albeit an important factor – to be weighed with others; and not because there is some special hurdle of "exceptional circumstances" to be overcome by the applicant.
>
> Evans-Lombe J was satisfied that there was no real risk that the Lehman companies would be exposed to liability if they were required to comply with an order for the production of documents which were in New York.'

34. As to comity, Mr Ritchie's primary case is that the CRPA does not in reality impinge on the ambit of the public examination or the making or upholding of the order, for the reasons above given. However if it does, then Mr Ritchie points to the very exposition of the legislation, and the other matters, set out in para. 31 above to submit that if it does fall to be construed as widely as alleged, then the jurisdiction is exorbitant. He submits that comity does not require the English courts, where it is satisfied that, for example in this case, information is required for the purposes of a UK winding up, to recognise, or at any rate to be inhibited by, an apparently exorbitant jurisdiction.

35. My conclusions are as follows.

(i) I am not in a position to construe the CRPA, but I am persuaded by the official receiver's case that, on the basis of the declared public policy in s. 3(1), and allowing for the due protection by St Vincent of confidential professional advice, it cannot be likely that it will or should be construed so as to prevent the disclosing by the applicant of at least most of the information sought in this case. Further I consider that if the Act did fall to be construed as Mr Lightman contends, then it would be likely to be regarded by an English court as exorbitant (see e.g. *British Nylon Spinners Ltd v Imperial Chemical Industries Ltd* [1953] 1 Ch 19).

(ii) Consequently, whereas the possibility that, unless relieved, the applicant may be at risk under the CRPA must be taken into account in the exercise of my discretion, I agree with Mr Ritchie that this must be given very much less weight than that for which Mr Lightman contends. I also conclude that as he has opposed the making, or continuing, of the order it is neither likely nor reasonable that he should be regarded as in breach of any duty nor of any professional obligation or standard if he was compelled to be examined.

(iii) The relevance of the CRPA does not of course stop there. There remains the outstanding application under s. 4 to the St Vincent court, which, by virtue of the previous adjournments, remains still unresolved. I hope and believe that there is in fact no need for what might otherwise be regarded as a stand-off between the two jurisdictions, or any kind of even possible double jeopardy for the applicant. Particularly now that, perhaps with the assistance of this judgment, the St Vincent court is in a position to appreciate the respects in which there is no impingement, nor intention to impinge, upon the public policy of the state of St Vincent, but a desire on the part of the official receiver adequately to complete his investigation into the affairs of a company being wound up in England as a result of the carrying on of business by it in England, it may be that relief under s. 4 will be granted by the court.

A *The Liechtenstein issue*

36. The applicant put forward as a matter for consideration in the balancing exercise a case as to unenforceability of any order in Liechtenstein, where he is resident. He referred to *Re Tucker (A Bankrupt)* [1990] Ch 148 at p. 161 per Dillon LJ, where it was found to be an important such factor where the Belgian court would not, and the English court could not, enforce the order. But the evidence adduced by the applicant himself, which the official
B receiver did not have time to answer because of its recent delivery, but which for the purpose of this hearing was accepted, was not to this effect. The limit of the expert Liechtenstein advice adduced by the applicant was that 'a decision given by an English court in civil, commercial or insolvency matters cannot directly and automatically be enforced in Liechtenstein'. However the same advice made clear that an order of the English court could be indirectly enforced by application to the Princely Court in Vaduz, and no indication was given that such an application
C would not be entertained by the Princely Court in relation to this order. Thus if the matter did come to an issue of enforceability (and I have already pointed to the statutory duty to co-operate which Mr Lightman has accepted applies to his client, pursuant to s. 235(3)(d) of the Act), I have no reason to believe that such order will not be enforceable and/or enforced, and in any event no reason to believe, as Dillon LJ did in *Tucker*, that the order would serve no useful purpose.

D

The extra-territoriality issue

37. The issue of extra-territoriality of s. 236 is relevant:

(i) for resolution of the subsidiary and alternative application for an order under s. 236 (which only arises if the s. 133 order be discharged); but also

E (ii) to take into account (or not), as a matter of discretion as to whether to uphold the s. 133 order.

38. As to issue (ii), I have referred, in para. 22(vi) above, to the fact that it is no longer asserted by the applicant that s. 236 has no extra-territorial effect. He accepts that there is power to make an order under s. 236 with extra-territorial effect, but it would be, in this case, limited to an order for the holding of a private examination in Liechtenstein (partial extra-
F territoriality) as opposed to ordering one to take place here (full extra-territoriality). The issues are these:

(i) Mr Lightman submits that the availability of a private examination in Liechtenstein is a relevant matter, particularly in the light of his case that a public examination is oppressive, or more oppressive.

(ii) Mr Ritchie submits that s. 236 does have full extra-territorial effect, so as to justify his
G subsidiary case if he needs it, on issue (i); but in case he is wrong, then he is entitled to rely on the fact that there is at least a question mark as to full extra-territoriality in relation to s. 236, to support his case as to entitlement to an order under s. 133 in any balancing act as to discretion in relation to whether he should be entitled to hold his s. 133 order (as to which there is no doubt about as to extra-territoriality). Mr Lightman submits that this should not be considered as a factor.

H (iii) Mr Ritchie further submits that the asserted availability of a private examination in Liechtenstein is irrelevant, and/or would not be a suitable alternative, and should not be a factor against upholding the order for a public examination here, (or if necessary a private examination here) under English law.

39. I turn then to the question of extra-territoriality of s. 236. I have set out s. 237(3) above, but I repeat it again for convenience:

'237(3) The court may, if it thinks fit, order that any person who if within the jurisdiction of the court would be liable to be summoned to appear before it under section 236 or this section, shall be examined in any part of the United Kingdom where he may for the time being be, or in a place outside the United Kingdom.'

40. There was a similar section in s. 25(1) of the *Bankruptcy Act* 1914, which was construed by Dillon LJ in *Tucker*, and which has itself been re-enacted in similar terms in s. 367(3) of the Act. Dillon LJ concluded that, on its true construction, s. 25(1) did not assert a jurisdiction over British subjects resident abroad.

41. *Tucker* was referred to, obiter, in *Seagull Ch D* and *Seagull CA*, which dealt with the extra-territoriality of s. 133. The conclusion was that s. 133 (in contrast with s. 236, upon acceptance obiter of the effect of *Tucker*) did have extra-territorial effect. Mummery J in *Seagull Ch D*, in considering *Tucker*, while differentiating it, stated as follows:

(i) ([1991] BCC 550) at p. 554E; ([1992] Ch 128) at p. 136:

'It was submitted that this type of provision must be construed against the background summarised by Dillon LJ in his judgment in *Re Tucker* at p. 158. The general practice in international law is that courts of a country only have power to summon before them persons who accept service or are present within the territory of that country when served with the appropriate process. There is no general power in English law either to serve process on British subjects resident abroad or to serve a subpoena on a British subject resident outside the jurisdiction to compel him to come and give evidence in an English court.'

This appears to ignore the impact of permission to serve out of jurisdiction.

(ii) At p. 555D; 137:

'There is little doubt that, on the authority of *Re Tucker*, the court would construe the provisions of sec. 366 and 367 as subject to the same territorial qualification as sec. 25 of the *Bankruptcy Act* 1914. The wide discretionary power of the court to order a private examination of "any person" with regard to the dealings, affairs and property of the bankrupt thus only applies to such a person who is in England at the relevant time and can be served with the appropriate summons in England.

Sections 236 and 237 of the *Insolvency Act* 1986 confer on the court a similar power to order private examination of any officer of the company and also any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company ...'

This does not appear to recognise that on any basis there is partial extra-territorial effect of s. 236, as now accepted and asserted by Mr Lightman, to make an order not only in relation to 'a person who is in England at the relevant time and can be served' but also a person who 'if within the jurisdiction of the court would be liable to be summoned'.

42. In the Court of Appeal, Peter Gibson J, who delivered the lead judgment, decided the matter in a slightly different way. He analysed s. 133, and then dealt separately with any interface between s. 133 and s. 236. At ([1993] BCC 241) p. 248A; ([1993] Ch 345) p. 358B he stated as follows:

'... if it be right (1) that sec. 366 and 367 should be construed as subject to the same territorial limitation as sec. 25 of the 1914 Act, and (2) that sec. 236 and 237 should be similarly construed by reason of the inclusion of the subsection corresponding to sec. 25(6) (and Mr Davis, appearing for the official receiver, whilst recognising the force of an argument to that effect, does not concede that the relevant section should be so construed), sec. 133 is plainly distinguishable ...'

The matter was thus left open.

43. The only other authority referred to by either side is a Scottish case, *McIsaac & Anor (Petitioners)* [1994] BCC 410 , but both sides are agreed that the right result in that case was

A achieved for the wrong reasons, primarily those explained in an article in the *Journal of Law Society of Scotland* 1996, Vol. 41, pp. 142–143 by Philip Smart, and so neither side places any reliance upon it.

44. The applicant's submissions are as follows:

(i) He relies on *Tucker* as discussed, and relied on obiter at least by Mummery J, in *Seagull Ch D* and *Seagull CA*. Although Mr Ritchie points out that there was no consideration in
B Seagull so far as can be seen, of the impact of *Re Smith* [1990] 2 AC 215 at pp. 237–238 per Lord Jauncey, which emphasised that the 1986 legislation was self-contained and new, and should not necessarily be construed in the same way as similar or equivalent provisions in the earlier legislation, nevertheless the decision in Tucker was not, as was the case in Smith, an old authority, but one decided, albeit in respect of the 1914 Act, after the passage of the 1986 legislation, to which reference could thus have been made,
C if thought right.

(ii) In any event the logic remains good, that the ambit of s. 236, in relation to the persons who are subject to its orbit, is wider than s. 133, as recognised by Mummery J at p. 556A; 138F:

'First, the power of the court to summon persons to appear before it for private examination extends to a very much wider class of persons than the court's power in the
D case of a public examination.'

(iii) Section 237(3) in any event means what it says, namely that there is express provision for the court to order any person who if within the jurisdiction of the court would be liable to be summoned to appear before it to be privately examined in a place outside the UK; and by virtue of the maxim *inclusio unius exclusio alterius* this provision does indeed, as Dillon LJ concluded in relation to the provision in *Tucker*, as recorded at
E p. 556E; 139C by Mummery J

'"conclusively" and "inevitably " connote that, if the person in question is not in England, he is not liable to be brought before the English court.'

45. The official receiver's submissions on the other hand are as follows:

(i) Dillon LJ's apparent conclusion (based in any event on a different section of a different Act) on any basis appears to go wider in its conclusion of non-extra-territoriality than
F even the applicant is now contending for: the decision of Mummery J is obiter, and in any event may be flawed in its reliance upon Dillon LJ: the Court of Appeal per Peter Gibson J in *Seagull CA* left open the proper construction of s. 236, as appears above.

(ii) There is no justification for any differentiation between s. 236 and s. 238 of the Act (where extra-territoriality has been found, in *Re Mid East Trading Ltd* and *Re Paramount Airways Ltd (No. 2)* [1992] BCC 416): in each section the reference is to
G 'any person'.

(iii) Equally there is no basis for any distinction between s. 236 and s. 133 . The justification for extra-territoriality set out in *Seagull CA* by Peter Gibson J in respect of s. 133 can as well apply to s. 236. With regard to the passage cited from Mummery J at p. 556A; 138F with regard to the 'very much wider class of persons', that can be perfectly well, and better, coped with by the exercise of discretion under s. 236 not to make an extra-
H territorial order in relation to someone who is a third party, or on the periphery, in appropriate circumstances.

(iv) The proper construction of s. 237(3) is, he submits, clear. The section is facilitative. For the avoidance of doubt, it provides that private examination *can take place abroad*: otherwise it might be argued that examination can only be ordered, and take place, within the jurisdiction.

Conclusions

46. I approach the question of the review under r. 7.47 on the basis that I may discharge the s. 133 order made. I accept however that because the order is ordinarily mandatory the onus of discharging it must lie on the applicant.

47. I deal first with the more general matters involved in the balancing exercise.

(i) I see no problem in ordering the examination when the applicant is resident in Liechtenstein. I take into account that the order cannot be directly enforced, but the Liechtenstein court will no doubt approach an application for the order to be enforced within the ordinary principles of comity, when it is clear the order is made in favour of the official receiver to enable, in relation to a company being wound up by the English court, the proper investigation of its affairs in the circumstances set out in this judgment. As for the need for the applicant to come here, Liechtenstein is no great distance by air: and no case has been put forward that the applicant would be in any personal difficulties or at any hazard if he came to England.

(ii) The connection with the UK is in my judgment fully established both by the winding-up order itself and the facts that I have seen, some of which I have set out in this judgment.

(iii) The applicant is plainly not a 'third party' and his role, on his own evidence, and the knowledge he clearly has about matters relevant to the carrying on of the business of Casterbridge in this country, are sufficiently established. I am further not in any way persuaded that the official receiver has failed to set out or explain what information is required and/or what information it is believed that the applicant can give, or has failed to show that he has taken any material steps which might have discovered any alternative way of eliciting the information. In so far as it is suggested that insufficient steps were taken with regard to the advertisement of the petition, that may well be so, but none of the criticisms of the official receiver in any way detract from the clear case that the applicant has information to give, and indeed, irrespective of any other steps, is the person with the most relevant information to give. I accept that the handwritten addition at the end of the scope document, being item 12 relating to records, may not be recoverable, but that would be a matter for the carrying through of the examination, and does not in my judgment impinge upon the appropriateness of the order otherwise.

48. I turn then to the question of public or private examination:

(i) I can see that there is a potential issue about the full extra-territoriality of a s. 236 order. In the light of the conclusion I have reached, I do not need to resolve that issue. Mr Ritchie's arguments seem to be more logical, but Mr Lightman's may be said to have the greater backing of authority, albeit not binding. It remains therefore the position that a s. 236 order may not have full extra-territorial effect. There is no doubt about (a) the partial extra-territorial effect of s. 236, or (b) the undoubted full extra-territorial effect of s. 133.

(ii) If a s. 133 order is otherwise appropriate, an order for s. 236 private examination in Liechtenstein is obviously a less attractive proposition for the official receiver. Mr Lightman says that as it is available, it should be weighed in the balance. There is no doubt in my mind that, given particularly that there has been full consideration by the English court of the impact of the St Vincent legislation, and that ongoing problems may occur, the prospect of a private examination conducted in Liechtenstein and at Liechtenstein law is not a straightforward one.

(iii) I am not satisfied, having carefully considered the arguments put forward by Mr Lightman, that a public examination in this case is either inappropriate or materially or unjustifiably more onerous. Indeed I am entirely satisfied that the official receiver was entitled to conclude, and did conclude, that an application for a s. 133 order on the facts of this case was so appropriate. In para. 22(vi) I have set out Mr Lightman's suggested *palliations*. I take each of these in turn.

A (a) An offer not to advertise the examination. In the course of the hearing, Mr Ritchie submitted that I could indicate if I considered that it was inappropriate to advertise. I see no need for advertisement in this case, and thus answer the implicit request for guidance from the official receiver.

(b) An offer not to examine the applicant on oath. I cannot see what is materially more onerous about giving evidence on oath, note that he has already done so by swearing an affidavit and have no doubt that he will give truthful evidence in any event. In any event a private examination may be conducted on oath (s. 237(4)).

(c) An offer not to commit the applicant for contempt were he to fail to attend the examination. It would be plainly inappropriate in advance of an examination to indicate that there would be no sanctions for non-attendance. In any event (in so far as there is intended to be some comparison with private examinations) a warrant for arrest can be issued for failure to attend a private examination also (s. 236(5)).

(d) An offer to pay the applicant a reasonable sum in respect of travelling expenses. There is no evidence of the applicant's means, but I cannot conceive that he has any financial embarrassment. No doubt the official receiver would consider any application for an ex gratia payment.

In any event I note that the official receiver has offered a private or informal examination as an alternative to public examination, but such has been refused.

49. I do not conclude that a s. 133 order is inappropriate, whether as compared with a s. 236 order or at all, in any event. Given that, the other two features, which I have summarised, are of the less significance:

(i) I bear in mind the alternative of a private examination in Liechtenstein, but given the inevitable complexities of it, and in any event in the light of my conclusion that a public examination in the UK is both appropriate and not overly oppressive, it does not affect the position.

(ii) If I were otherwise in two minds about the s. 133 order, I would have borne in mind the fact that there are doubts about whether I could make the order sought in the alternative by the official receiver for a private examination in England and considered that an appropriate additional reason for the s. 133 order, but I do not need to do so.

50. I turn finally back to the St Vincent legislation. I have concluded, after taking into account all other matters urged before me, that a s. 133 order was appropriate. Although there is no privilege against self-incrimination, I also take into account in my discretion the CRPA. For the reasons that I have given:

(i) the risk of sanctions being taken against the applicant (the effective author of the St Vincent legislation) is in any event, even if it exists at all, considerably less than has been submitted, whether on a proper construction of the statute and its implementation or at all, and/or he may in any event be granted relief;

(ii) the desirability and appropriateness of the obtaining of the information by the course proposed in any event in my judgment outweighs any such consideration.

I do not believe that this court is in any way in conflict with the St Vincent court. One of our two courts has to resolve this matter first, and, given the unfortunate but it seems inevitable delays in the St Vincent proceedings, but in any event by virtue of the greater knowledge available to this court, where the jurisdiction of the winding up in any event resides, that decision has been made by this court, and I hope will be of assistance to the St Vincent court in considering the question of relief. Whether or not however relief is granted, I conclude, taking all matters into account, and assuming in favour of the applicant that I have the discretion he urges, that I should exercise it in favour of upholding the s. 133 order.

The s. 236 application

51. In the light of the fact that I uphold the s. 133 order, I need not, and do not, make any order on the alternative and subsidiary claim for an order that the applicant attend for private examination in the UK pursuant to s. 236, and consequently, as indicated in para. 48(i) above, need not and do not resolve the interesting issue between the parties as to whether there would be jurisdiction to make such an order.

(*Order accordingly*)