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20. Public examinations

Calling and holding a public examination in court of a bankrupt or director under the insolvency legislation

Chapter content

Public examinations generally

20.1 Uses of examination

The two principal uses for a public examination are as a means to enforce co-operation (bankruptcy only) and as an aid to the official receiver's enquiries.

Section 59 and Schedule 3 of the Youth Justice and Criminal Evidence Act 1999 gives statutory effect to the decision of the European Court of Human Rights in the case of Saunders v UK1997 BCC 872 and restricts the use that may be made in criminal prosecutions of evidence obtained under compulsory powers including that obtained in a public examination to;

a) where the defendant themself introduces the answers that they have given; and

b) where the defendant is being prosecuted for a failure to answer a question or disclose a material fact or is being prosecuted for giving an untruthful answer

Guidance concerning when a public examination should be used is given in link to new guidance chapter 19 - Co-operation, non co-operation and enforcement of the duty to co-operate.

A public examination should not be regarded as an automatic alternative to obtaining initial information by way of interview. The official receiver should also make proper use of their powers to requisition accounts and further information where this is likely to provide the details necessary for the purpose of their enquiries. The official receiver should remind potential examinees of their duty to co-operate where such non-compliance is the reason for the public examination.

Specifically in relation to companies, following the decision in Re Wallace Smith Trust Co Ltd 1992 BCC 707 where a winding-up order has been made, the public examination should not be used solely as a means to obtain orders enforcing compliance which ought instead to be considered under Rule 12.52. An application for public examination should only be made where there is a genuine intention to question that person.

When considering whether to apply for the public examination of an officer or for an order under Rule 12.52 official receivers will be aware of the tolerance of their local courts and should use their own judgment to establish the correct method for enforcing co-operation in the circumstances of each case.

Where it is considered that a public examination is appropriate, the fact that its cost may result in a debit balance on the estate account should not prevent its being held.

20.2 Warning letter

Before fixing a public examination at least two attempts must have been made to arrange, and advise the officer or bankrupt of the need to attend for interview.

When an examination is being considered because of non co-operation the official receiver should write to the potential examinee advising them of the possibility of a public examination and that notice of the examination may be given by public advertisement[1].

Where the examination is to be fixed to enforce attendance, if the examinee has previously received written warning of the possibility of public examination, in letters fixing appointments, it is not necessary to send an additional warning letter.

1. Rules 7.103(3) and 10.100(3)

Application for examination

20.3 Persons who may be examined – companies

Where a company is being wound up by the court, the official receiver may apply to the court for the public examination[1] of any person who –

a) is or has been an officer of the company (i.e. a director, secretary, manager or in certain circumstances the auditor except where they have been appointed for a limited purpose); or

b) has acted as liquidator or administrator of the company or as receiver or manager; or

c) not being a person falling within a) or b) above, is or has been concerned, or has taken part, in the promotion, formation or management of the company[2]

The word director is defined in section 250 of the Companies Act 2006 (CA 2006) as including 'any person occupying the position of director, by whatever name called'. It is strongly arguable that this definition includes a de facto director, although the definition is silent as to whether formal appointment as a director is actually necessary. Given this uncertainty an application in the case of a de facto director should be made under section 133(1) (a) and (c) of the Insolvency Act 1986.

An application in respect of a shadow director or other person who has taken part in the promotion, formation or management of the company should be made under s133(1)(c).

The court has the power to order a person outside the jurisdiction to attend for examination[3].

1. Section 133(1)

2. Companies Act 2006 sections 250, 1121 (2), 1173 (1) and Schedule 8

3. Re Seagull Manufacturing Co Ltd [1993] CH 345, [1993] BCC 241 and Dar Al Atkan Real Estate Development Co v Ali-Refrai [2014] EWCA civ 715, [2015] 1 WLR 135

20.4 Persons who may be examined – partnerships

Where a winding-up order has been made against a partnership as an unregistered company, the official receiver may apply to the court for the public examination of:

a) any person who is or has been an officer of the partnership; or

b) has acted as liquidator or administrator of the partnership or as receiver or manager; or

c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part, in the formation of the partnership[1]

Where orders have been made against the members of an insolvent partnership on a joint bankruptcy petition, without a winding up order being made against the partnership, the official receiver may apply to the court for the public examination of those members[2].

1. Insolvent Partnership Order 1994 schedule 3 part II para 8; schedule 4 part II para 11; schedule 5 para 2; schedule 6 para 4

2. Insolvent Partnership Order 1994 schedule 7 para 9

20.5 Partnerships - variation in procedure

The provisions relating to public examination are modified where a partnership is concerned as follows:-

a) where insolvency orders have been made against the members of an insolvent partnership, whether or not a winding-up order has been made against the partnership, application may be made to the court that the public examination of a member of the partnership may be combined with the public examination of any other person. This enables all the public examinations of the partners to be held together

b) where insolvency orders have been made against the members of an insolvent partnership, and no winding-up order was made against the partnership, at their public examination a member may be examined as to the affairs and dealings of the partnership in addition to their own affairs and dealings[1]

1. Insolvent Partnership Order 1994 schedule 4 para 11 schedule 7, para 9; schedule 7, para 9

20.6 Persons who may be examined - bankruptcy

Where a bankruptcy order has been made, the official receiver may apply to the court for the public examination of the bankrupt at any time prior to discharge, although the hearing of the public examination may occur post discharge

20.7 Time of examination

A public examination can be held at any time before:

a) the company's dissolution[1]

b) where a winding up order has been made against a partnership as an unregistered company, before the winding up is complete[2]

An application for the public examination of a bankrupt must be made prior to the bankrupt's discharge although the hearing itself may be held at any time. It should be noted however that the official receiver will not be able to seek the suspension of the bankrupt's automatic discharge if the hearing is held after discharge[3].

1. Section 133 (1)

2. Insolvent Partnership Order 1994 schedule 3 part II para 8, schedule 4 part II para 11; schedule 5 para 2, sch 6 para 4 IPO 1994]

3. Section 279(3)

20.8 Contents of application

An application to fix a date for a public examination hearing need not contain a lengthy justification for the proposed examination, but the application should always contain a statement of the basic ground for the application (e.g. failure to co-operate, need for further information, etc.)[1].

In a winding up the application should state whether the proposed examinee falls within section 133(1)(a), (b) or (c). Where they fall within section 133(1)(a) it will suffice to state that they were recorded on the registrar of companies' file as a director or secretary. In the case of a person falling within section 133 (1)(b), brief details should be stated of the grounds for supporting that they fall within that paragraph. Where application is made under section 133(1)(c) see paragraph 20.9 below.

The court has no discretion but must make an order for public examination on application by the official receiver subject to compliance with the requirements of the rules 7.98 and 7.102 but can generally revisit any order made, in accordance with Rule 12.59 and section 375, so the examinee can have the matter reviewed by the court[2].

1. ISCIS form PEAO

2. Jeeves v Official Receiver [2003] EWCA civ 1246, [2003] BCC 912

20.9 Application under section 133(1)(c) - shadow directors etc

Where an application to fix a date for a public examination hearing relates to a person falling within section 133(1)(c), the official receiver must lodge in court with

their application a report indicating the grounds on which the person is alleged to fall within that paragraph [1]. This may involve a claim that the person concerned was a shadow director[2]. The report should also indicate whether in the official receiver's opinion service of the order could be effected at a known address[3], which should be effected in accordance with the provisions of Part 6 of the Civil Procedure Rules 1998[4].

Form PEAO[5] may be edited to remove the sentence which refers to the examinee being recorded at Companies House as a director, and appropriate text inserted detailing why the official receiver believes the examinee falls within section 133(1)(c). Alternatively, a short report to court may be prepared.

Where service in accordance with Rule 7.98(1)(b) seems uncertain, the court may direct that the order be served by some other means other than, or in addition to, service at a known address[6].

Any order issued by the court in relation to a person alleged to fall within section 133(1)(c) can be rescinded by the court if it is satisfied that they do not in fact fall within that paragraph of the subsection[7].

1. Rule 7.98(1)(a)

2. Companies Act 2006 section 251

3. Rule 7.98 (1)(b)

4. Insolvency (England and Wales) Rules 2016 Schedule 4, para 1

5. ISCIS form PEAO

6. Rule 7.98(2)

7. Rule 7.102(3)

20.10 Address for service

In winding up, partnership or bankruptcy the proposed method of, and address(es) for, service of the court's order for the examination, and the reason for the use of each address, should also be stated in the application.

Where an insolvent has previously attended for interview, the address given at that interview should be used. Where a considerable period of time has elapsed between the interview and the fixing of the public examination, the proposed examinee's continued occupation of that address should be verified by making enquiries or by inspection. Otherwise the address for service used will usually be that given on bankruptcy order or for a company director the Companies House file. Where a winding-up order is made against a partnership as an unregistered company without

bankruptcy orders being made against the members of the partnership, the official receiver will have to rely on their own enquiries to establish the partners' addresses.

To ensure, as far as is possible that the address used is correct, further enquiries as listed below may be necessary, although some of the following enquiries may have been carried out in the initial stages of the cases:-

a) inspection of any known addresses

b) Equifax search

c) petitioning creditor's solicitors

d) insolvent's own solicitors or accountants

e) judgment search or electoral roll search

f) local HMRC offices

Service should be effected at any alternative addresses discovered during the course of the enquiries set out above.

Where a bankrupt, or a bankrupt member of a partnership is to be examined the official receiver should search the court file to ensure that all known addresses are included, as the statutory demand or petition may have been served at additional addresses not shown on the bankruptcy order.

The official receiver should also state that they are not aware of any other address(es) for the examinee. All this information will assist the court in the issue of a warrant for arrest should the examinee fail to attend their examination and therefore care must be exercised that the information provided is accurate[1].

For further information regarding service of the order see paragraph 20.18.

1. Sections 134(2) or 364(1) and Rule 12.54

20.11 Address unknown

Where the examinee's current address is unknown it may be possible to effect service through their solicitor or accountant, although, their willingness to accept service on behalf of the examinee should be ascertained before making an application to the court for a public examination.

If the official receiver has no known address or other known route as to how to contact the potential examinee there is usually no benefit in fixing a public examination as the court is unlikely to issue warrants or orders in such circumstances, but see the following paragraph in respect of the suspension of discharge from bankruptcy. If there is a potential to contact the examinee through

some route other than normal service (i.e. third parties) an application for an order for substituted service should be considered.

In bankruptcy cases, application to the court to suspend the bankrupt's discharge should be used as an alternative to fixing a public examination where the bankrupt's current whereabouts are unknown. There is a difference in approach in the High Court in London, in that a public examination is held even in non trace cases, and application to suspend the bankrupt's discharge made at the public examination rather than a separate application being made under section 279. There is nothing preventing a distinct application under s279(3), in any court, if it is appropriate in the circumstances.

An application under s279(3) will usually be appropriate if there is any risk that the bankrupt will be discharged before the public examination comes before the court . Although there is a precedent case for an interim order1 (Jacobs v Official Receiver – see chapter 22), last minute applications under section 279(3) are rarely well received by the court.

Requests

20.12 Power to request an examination

A public examination may be requested by creditors whose claims comprise at least one-half the total value of known claims, (which includes the claims of secured creditors without regard to the value of their security)[1]. The request must be in the prescribed form. It must also be accompanied by a list of the creditors supporting the request, the amounts of their claims in the insolvency proceedings and written confirmation from the supporting creditors that they do in fact support the request, unless the request is made by a single creditor whose claim is alone sufficient to enable them validly to make it[2].

In a winding up, a public examination may alternatively be requested by three-quarters in value of the company's contributories, and the legislation imposes similar requirements as to the form and content of a contributory's request as apply where a request is made by creditors[3].

Where a winding-up order has been made against a partnership, a public examination may be requested by one half in value of the partnership's creditors. Where bankruptcy orders have been made against the members of an insolvent partnership on a joint bankruptcy petition without a winding-up order being made against the partnership, a public examination may be requested by one half in value of the creditors of the member to be examined[4].

The person(s) requesting a public examination is described as the requisitionist.

Unless the court orders otherwise, the official receiver is obliged to make an application to the court for a public examination if requested to do so in accordance with the Insolvency Rules[5].

1. Section 133(2)(a) or s290(2)

2. Rules 7.99(1) and 7.101 (1) or 10.101(1)

3. Section 133(2)(b) and Rule 7.100(1)

4. Insolvent Partnership order schedule 3 part II para 8, schedule 4 part II para 11, schedule 5 para 2, schedule 6 para 4 and schedule 7 para 9

5. Section 133(2) and section 290(2)

20.13 Reasons for examination

The requisitionist must give reasons as to why the public examination should be held and in a winding up must specify the name of the proposed examinee and their relationship with the company. The official receiver should seek to obtain from the requisitionist details of the areas on which they wish the proposed examinee to be questioned[1].

1. Rules 7.99(2) or 10.101(1)(c)

20.14 Effect of section 133(1)(c) - requisitioned examination

Where the proposed examinee is a person falling within section 133(1)(c) the official receiver is still required to submit a report to justify their reasons for the examination. If the official receiver is of the opinion that there are no grounds on which the person falls within the provisions of section 133(1)(c), the official receiver should seek relief from holding a requested public examination.

20.15 Application for relief

The official receiver may apply to the court for relief from holding a requested public examination if they consider the request to be unreasonable, e.g. where they have sufficient information for the purpose of their enquiries and the requisitionist has not given them adequate grounds for holding an examination. The application may be made without notice to any other party, and if an order for relief is made on an application without notice the official receiver is required to give notice of it to the requisitionist[1].

The test in rules 7.101 (4) and 10.101 (6) is a subjective one based on the opinion of the individual official receiver as to whether the request is an unreasonable one in the circumstances. In addition, the official receiver should seek relief where the application relates to a person within section 133(1)(c) and the official receiver is of the opinion that there are no grounds on which the person falls within that section[2].

If an insolvency practitioner has been appointed as liquidator or trustee, their views as to the usefulness of the requested public examination should be sought although this should not be the overriding factor when deciding whether to apply for relief. The liquidator or trustee can apply for a private examination, without involving the official receiver, if they require further information.

1. ISCIS document PEAR

2. Rules 7.101(4) or 10.101(6)

20.16 Time within which requisitioned examination to be held

If the official receiver does not propose to apply to the court for relief from holding an examination, they must within 28 days of receiving the request apply to the court for a hearing date for the examination to be fixed. If they do apply for relief but their application is refused they must apply as soon as reasonably practicable after the conclusion of the hearing of their application for a date for the public examination to be fixed[1].

1. Rules 7.101 or 10.101

20.17 Deposit and costs

The official receiver must obtain a deposit from the requisitionist to cover the costs of the examination. The deposit should not only cover the cost of sending out notices, and giving notice by publication in the Gazette and advertisement where it is proposed to do so, but also any court fees and the estimated costs of the shorthand writer (including their attendance). It is difficult to estimate how long any examination will last, but, unless there are unusual circumstances, it should be assumed that it will last for no longer than an hour and the potential costs should be calculated on that basis for the purpose of the deposit. The official receiver's estimated time costs for preparing for and taking part in the examination are not to be included[1].

If the official receiver's costs increase, a request for an increase in the funds provided as the deposit may be made.

It will be a matter for the court at the conclusion of the examination to order whether the expenses of the examination are to be paid out of the estate rather than from the

deposit. The official receiver should in this context inform the court as to the financial position of the estate and indicate whether in their opinion the public examination has produced information not already obtained by other means or has otherwise been a useful exercise[2].

If the public examination does not take place, there will be no order of the court requiring the official receiver to deduct funds from the deposit and any monies provided by the requisitionist as deposit should be returned.

1. Rules 7.101 or 10.101

2. Rules 7.107 or 10.105

Service and notice of order

20.18 Service of order

The order appointing a hearing for a public examination should be served on the examinee as soon as is reasonably practicable after the order is made[1]. Ordinary first class post is the usual method of service, although the Civil Procedure Rules provide for various other methods of service including personal service, document exchange, leaving the document at a specified place and fax or other means of electronic communication. Service should be effective at least 14 days before the hearing[2]. The order contains a 'penal clause' warning the subject of the order that a failure to attend the hearing may result in imprisonment and is accompanied by a letter which explains that the individual is liable to be arrested if they fail to attend the examination[3].

Certain courts may require that the examinee be served additionally by recorded delivery post before considering issuing a warrant, but this is not essential unless the court so requires. Personal service may also be used in addition to first class post if the proposed examinee was known to be about to leave an address to attempt to avoid service, or if court practice dictates the use of such a method. If personal service is not to be effected in a case where the official receiver is likely to request a warrant for arrest, the official receiver must be able to satisfy the court that all reasonable steps have been taken to contact the director/bankrupt and that they are aware of the proceedings. Service should be effected at all known addresses[4].

If the official receiver is aware that the examinee no longer lives at an address and does not know any other, they should draw these facts to the court's attention and may seek an order for substituted service on another party. If a solicitor has agreed to accept service on behalf of an examinee where the latter's address is unknown to

the official receiver but is known to the solicitor it is probable that the court will accept such service as adequate. The court may order substituted service on a solicitor even if the solicitor is unwilling to accept service.

1. Rule 7.102

2. Rule 7.103

3. ISCIS documents PEAO & PE

4. Schedule 4 paragraph 1 and Civil Procedure Rules 1986 Rule 6.3

20.19 Effective date of service

Service by first class post will be effected, unless the contrary is shown, on the second business day after the date of posting, which date is presumed to be the post-mark on the envelope containing the order. “Business day” means any day except Saturday, Sunday or a bank holiday; and “bank holiday” includes Christmas Day and Good Friday[1].

1. Schedule 4 paragraph 1 and Civil Procedure Rules 1998 rules 6.2 and 6.26

20.20 Verification of service

A certificate of service [N215] should be prepared by the person who effects service, and be filed in court (this is required to be done within 21 days of service having been effected). Where service has been by post the certificate of service should be completed by the person responsible for the outgoing post. It is important that the certificate is completed in its entirety including the statement of truth. This will assist the court in the issue of a warrant for arrest if the examinee fails to attend.

The certificate of service must state the details set out below[1]: -

Method of service	Details to be certified
Personal service	Date of personal service
First class post, DX or other service which provides for delivery on the next business day	Date of posting, or leaving with, delivering to or collection by the relevant service provider
Delivery of document to or leaving at a permitted place	Date when document delivered or left at the permitted place

Method of service	Details to be certified
Fax	Date of completion of the transmission
Other electronic means	Date of sending the email or electronic transmission
Alternative method or place permitted by the court	As required by the court

1. Civil Procedure Rules 6.17

20.21 Service out of the jurisdiction

The court may order a person living outside its jurisdiction to appear before it at a public examination, irrespective of their nationality[1]. The court may specify the time and manner in which service should be effected and may require such proof of service as it thinks fit[2].

1. Re Seagull Manufacturing Co Ltd [1991] 3 WLR 307

2. Insolvency Rules 2016 Schedule 4 paragraph 1

20.22 Discovery of an additional address

Where an additional address is discovered after service of the order the official receiver should ensure that the examinee is immediately served with the order at the new address and should file a further report to court stating the details of the service. It will not be sufficient for the official receiver to inform the court at the hearing, of the further address that has been served, if it is proposed to seek a warrant for the arrest of the examinee. If the examinee fails to attend and it was not possible to serve the new address at least 7 days prior to the hearing then the official receiver should seek an adjournment, so that service may be put in order.

20.23 Check of proper service

Where it is anticipated that the examinee is unlikely to attend the hearing and a warrant will be sought, at least 7 days before the hearing the official receiver should ensure that all known addresses have been served and that service is in order. If a defect in service is discovered, which cannot be remedied to provide adequate service, and the examinee does not attend the examination, then the hearing should normally be adjourned so that proper service can be effected.

20.24 Proposed examinee in custody

In the case of an examinee who is in prison custody an application for production must be made by the official receiver by letter addressed to the Governor of the prison where the interviewee is being held. The official receiver should also confirm that the costs of production will be met from the insolvent's estate. The order for public examination to be served on the examinee must be sent to the prison governor with a covering letter requesting that they arrange service on the examinee.

Prison inmates are allocated different security ratings and a prisoner who is graded with a security rating "A" will not be produced for a public examination as that person is considered to be a maximum security risk. In such cases the prison governor should be requested to have the inmate's file clearly marked that notification should be given to the official receiver if it is intended to release that person or if their security rating is downgraded to "B".

The expenses of bringing an examinee in custody to the court must be charged to the estate.

20.25 Notice to others

The official receiver must also give at least 14 days' notice of the hearing to:

a) any liquidator or trustee nominated or appointed

b) any special manager; and

c) unless the court orders otherwise, to all the creditors (and, in a winding up, contributories) known to the official receiver[1]

1. Rule 7.103 (2) or 10.100 (3) and ISCIS document PEN

20.26 Relief from giving notice to creditors

The official receiver can seek a direction of the court to relieve them from the obligation to send notice to all creditors (and contributories)[1]. It is usual to seek such a direction where the public examination is being held exclusively to enforce co-operation or where the number of notices to be sent exceeds 50. If the official receiver thinks that notice to certain creditors (e.g. those with the largest claims) would be useful in the context of the examination, the official receiver may, as part of the same application, seek a direction to send notice to those creditors only[2].

1. Rule 7.103 (2) or 10.100

2. Rule 13.3

20.27 Publication of the examination

The official receiver may publish notice of the public examination in the Gazette and if necessary advertise it in any other manner, as they think fit. A notice of a public examination may not be advertised without also being gazetted. The notice must appear at least 14 days before the date fixed for the hearing. In a winding up, where the court's order relates to a person falling within section 133(1)(c), unless the court otherwise directs, the notice may not appear before at least 5 business days have elapsed since the examinee was served with the order[1].

1. Rule 7.103 or 10.100

20.28 Consideration of whether to publish

Whether or not notice of an examination is published in the Gazette is a matter of discretion for the official receiver and they will wish to consider whether in the particular circumstances of any case such a publishing would produce a benefit in relation to their inquiries and the usefulness of the examination. Any advertisement of an examination should be placed in such place as is likely to be seen by the greatest number of interested persons.

The potential publication or advertisement of the public examination, which would include the examinee's name, may be used to persuade a potential examinee to attend and the possibility of such an occurrence should be included in any warning letters sent.

Co-operation before the public examination

20.29 Subsequent surrender to proceedings

Where a public examination has been fixed because of non-surrender to the proceedings and the examinee subsequently surrenders and co-operates with the official receiver to an extent which makes a public examination unnecessary, the official receiver should apply to the court for a rescission of the order fixing the examination. The application should refer to the original order, briefly to the examinee's subsequent conduct and state that in the circumstances a public examination would serve no useful purpose[1].

If the examinee surrenders only a short time before the date of the hearing, consideration should be given to holding the examination as arranged, particularly where notice has been given to creditors or other parties or the examination has been advertised and there is no time to inform these parties that the examination will not now be held.

If a public examination has been held and adjourned but subsequent co-operation by the examinee makes the adjourned examination unnecessary, the court should be asked to declare the examination concluded.

1. Section 375(1) and Rule 12.59

Examinee unfit to be examined

20.30 Unfit person - alternative location

The official receiver should not normally fix a public examination hearing for a person who suffers from any illness, disability, or mental disorder which they know would make it difficult for the examinee to attend or take part in the hearing. Where a public examination has been fixed, and the court takes the view that the examinee is unfit to undergo or attend it, the court may either stay the order fixing the examination or direct how and where the examination should be conducted. If the official receiver is aware that the examinee is likely to be unable to attend court they should in their application for the holding of the public examination ask that the court order the examination to take place at a convenient location, e.g. the examinee's home. The official receiver should speak to the district judge or registrar in advance of making the application to seek their views[1].

As an alternative, the court may, under Rule 12.24 appoint another person to act in place of the incapacitated person

1. Rules 7.104 (1) and 10.102 (1)

20.31 Applicants

An application to the court concerning a stay in, or a different venue for, holding a public examination will normally be made by :-

a) a person appointed by a court in the United Kingdom or elsewhere to manage the affairs of or to represent the examinee, or

b) a relative or friend of the examinee whom the court considers to be a proper person to make the application, or

c) by the official receiver

Only exceptionally should the official receiver himself make such an application.

Where the applicant is other than the official receiver and the proposed examinee is not a patient within the meaning of the Mental Health Act 1983, the application must be accompanied by a witness statement of a registered medical practitioner as to the examinee's mental and physical condition[1].

1. Rules 7.104 and 10.102

20.32 Notice, deposit and expenses

The applicant must give the official receiver and any liquidator or trustee at least 5 business days' notice of the application[1]. Before any order is made, the applicant must provide the official receiver with a deposit to cover any additional expenses caused (e.g. by the need to use a venue other than the court). The official receiver will need to fix this sum, which should be notified by letter to the applicant[2]. The order subsequently made may nevertheless provide for the payment of expenses out of the estate. If the official receiver makes the application it may be without notice to any other party and supported by evidence in the form of a report to the court rather than a witness statement. Any expenses incurred in holding an examination where the application is made by the official receiver are deemed an expense of the official receiver and are paid as part of the expenses under Rule 7.108 (4) or 10.149.

1. Rules 7.104 and 10.102

2. ISCIS document PECOE

Procedure at hearing

20.33 Requirement to answer questions

The examinee will be examined on oath and must answer all the questions that the court may put, or allow to be put, to them. Refusal to answer will be a contempt of court and punishable accordingly[1].

There is no strict requirement, statutory or otherwise for disclosure of material or of the questions to be asked prior to a public examination. It is possible that an application to disclose material could be made under the Civil Procedure Rules (CPR) as the overriding objective of the CPR is to enable the court to deal with a case justly, including so far as is practicable ensuring that the parties are on an equal footing. The provisions of the CPR apply to insolvency proceedings to the

extent that they are consistent with the Insolvency Rules, and as the overriding objective is consistent with the Rules, there may be scope to argue for prior disclosure in the interests of equality and fairness[2].

1. Rules 7.105 and 10.103

2. Rule 12.1

20.34 Criminal Proceedings

If criminal proceedings have been instituted against the examinee, the court may adjourn the examination where it considers that to continue may prejudice a fair trial of the criminal proceedings[1].

1. Rules 7.105 and 10.103

20.35 Self incrimination

The principle has been affirmed in a series of modern cases with reference to both individual and corporate insolvency, that under English law the long-established privilege against self-incrimination is not an absolute right, but is one which is capable of being removed in specific situations if Parliament so intends. In the case of the Insolvency Act 1986, among other legislative enactments, the courts have concluded that Parliament did so intend, and in consequence it is not open to an examinee undergoing public examination to invoke the plea of self-incrimination as a ground for refusing to answer a question properly put in the course of the insolvency proceedings[1].

1. Re Jeffrey S Levitt Ltd [1992] 2 WLR 975; [1992] BCLC 250; [1992] BCC137; Re London United Investments Ltd [1992] All ER 842; [1992] BCLC 285; [1992] BCC 202, CA; Bishopsgate Investment Management Ltd v Maxwell; Cooper v Maxwell [1992] BCC 214; [1992] 2 All ER 856, CA.

20.36 Concurrent examinations

In a winding up or partnership cases where two or more persons are to be examined, they may be examined together. All examinees should in these circumstances take the oath at the beginning of the examination. The official receiver should then question the examinee, after asking the other or others to listen carefully to the answers given by the first. Other examinees may subsequently be questioned. Examinees already questioned may then be re-examined in the light of answers given by others.

20.37 Representation of examinee

The examinee may at their own expense, employ a solicitor, with or without counsel, who may question them, as the court allows, to enable them to explain or qualify any answers they give, and who may make representations on their behalf[1].

1. Rules 7.105 and 10.103

20.38 Persons who may put questions

The following, in addition to the official receiver, may question the examinee and, with the approval of the court, appear by solicitor or counsel, or may in writing authorise another person to question the examinee on their behalf:

a) the liquidator or trustee

b) any special manager

c) any creditor who has tendered a proof

d) in a winding up, a contributory[1]

1. Section 133(4) and 290(4)

20.39 Official receiver to take lead

As an officer of the court the official receiver is answerable to the court; and as a statutory office holder in individual cases they have responsibilities to the creditors, shareholders or the bankrupt for the administration of the estate. It is therefore the duty of the official receiver to see that the examination does not degenerate into a mere formality. For these reasons and because of the knowledge of the examinee's involvement in the insolvency which the official receiver will acquire from their inquiries it will be their duty to take the lead in the public examination, whether or not they are the liquidator or trustee.

20.40 Requisitioned examinations

Where a public examination is held as a result of a requisition, the official receiver should still take the lead, although they should limit their questions to matters they consider relevant, which may nevertheless include points raised by the requisitionists.

20.41 Matters to be dealt with

After a few questions identifying the examinee with the proceedings, reference to their activities which have no direct bearing on the insolvency proceedings should be very brief. Generally, it is advisable to deal with events in chronological order so that

the facts appear in perspective. It will be easier to clarify disputed points and the evidence may clearly refute an examinee's continued denial of early insolvency or knowledge of it. In this connection dates of legal proceedings, long outstanding debts, continued borrowings, staving-off of creditors, etc., may be material.

The official receiver should ensure that if the examination is being held for a particular purpose the relevant points are fully explored and dealt with to their satisfaction.

20.42 Manner of questioning

Few examinees are able, or likely, to answer precisely and succinctly. It is important that the public examination should not be unnecessarily long (one reason is the cost) and questions should mainly be so framed that the examinee can clearly and correctly answer yes or no. Leading questions, i.e. questions framed in such a manner as to suggest to the examinee the answers required or expected of them, should be avoided. Where the examinee has been interviewed in the proceedings it will be proper for the official receiver's questions to be framed to keep the examinee's answers very short. There will be occasions, however, when, subject to the court's direction, the examinee should be allowed or required to give an explanation. Where the examinee has not previously surrendered to or fully co-operated in the proceedings it is more likely that such explanations will be required.

20.43 Questions by others

If a practitioner, acting as liquidator or trustee attends or is represented at the hearing, the official receiver should ensure, so far as possible, that they leave to the practitioner such questions as that person may properly wish to put (e.g. about assets), so as to avoid duplication and perhaps a reduction in the effectiveness of the practitioner's questions. Where there is a special manager the official receiver may wish them to put questions directly to the examinee. The official receiver should normally deal with matters arising from transactions with individual creditors, even if they are present or represented and have intimated that they may wish to ask questions.

The official receiver should grant every facility and assistance to creditors and contributories or their representatives who want to take part in the examination, as their personal knowledge of the examinee and their business and dealings may occasionally enable them to elicit valuable information. Wherever possible, the official receiver should offer to pose questions on their behalf, to avoid creditors using the public examination to verbally attack the examinee. If a questioner insists, that they should be allowed to ask their questions, if they make a statement instead of putting questions (as persons inexperienced in such matters may do), the official

receiver may, with the permission of the court, intervene to give such questions an interrogative form and to ensure that the examinee returns a clear answer. When any third parties have finished their questioning, the official receiver may find it advisable to put some further questions to clarify particular points or to obtain dates or other omitted details.

20.44 Undertakings or court orders regarding compliance

Where an examination is being held to enforce surrender to the proceedings or co-operation generally it may be sufficient to obtain undertakings from an examinee as regards future co-operation, the submission of a statement of affairs, etc. In county court cases where the examinee is present, such undertakings should be recorded on form PEGUTC and the court asked to direct that the examinee sign the form before leaving court. It may be more satisfactory, depending on the circumstances of the case, if the court makes specific orders in relation to those matters.

In company cases, care should be taken to avoid conflict with the judgment in the case of Wallace Smith Trust Co Ltd[1].

1. [1992] BCC 707

20.45 Documents produced

Should it be essential, because of possible civil or criminal proceedings, any important document which is put to the examinee on their public examination may be handed to the registrar or district judge to be marked as an exhibit to the notes of the examination and returned to the official receiver for safe custody. If the document is produced by a third party it should be similarly marked and the official receiver should ask the court to require the producer either to hand over the marked document to the official receiver or to give an undertaking to the court to lend or produce it to the official receiver on request. Where an examinee is asked to agree with figures or other information contained in accounts or other documents, it is preferable to let the examinee have sight of copies of the relevant documents, so as to avoid vague or deliberately evasive answers.

20.46 Press

Press reporters may be present at a public examination. Where a member of the press contacts the official receiver, only such information as is publicly available should be given.

In Friederich v Herald and Weekly Times (1990) 8 ACLC 109, the Full Court of the Supreme Court of Victoria held that only in the most exceptional circumstances should a public examination be made subject to reporting restrictions. The object of the procedure was to give a public airing of the affairs of the company concerned in order to expose suspected frauds or concealment of material facts and it was desirable that a public examination should be given as much publicity as it deserved. This decision is persuasive but not binding in the United Kingdom. Nevertheless, the same principles would appear to apply.

20.47 Interpreters

Where an examinee is unable either to speak or to understand English the official receiver should employ an interpreter to attend at the public examination to translate the questions and answers.

20.48 Costs of examination

There are no provisions that would enable the official receiver to recover the costs of a public examination from the examinee and accordingly these costs should be paid from the estate. An exception is where the public examination was requisitioned by creditors (or, additionally in a winding up, contributories), in which case the court may order that they pay for the examination. There is also no provision for the examinee to be reimbursed any expenses incurred in attending a public examination and any claim for such expenses should be rejected.

20.49 Examination as continuing leverage

Where an examinee has given undertakings to the court the official receiver should normally in such circumstances ask for the examination to be adjourned so that its potential reinstatement remains as leverage against the examinee should they subsequently fail to fulfil their obligations. The official receiver may feel that they have sufficient information from their other inquiries to enable them to carry out a full examination at the first hearing without having to adjourn the public examination.

Adjournments

20.50 Options for adjournment

The court can adjourn the public examination either to a fixed date or generally. The former may apply, for example, where service is incorrect, further enquiries are

needed, or an order is obtained for compliance by the examinee to co-operate in a specific manner e.g. submission of a statement of affairs. Once the examinee has provided such information or complied with an order, the official receiver should briefly report the facts to the court and request that the public examination be concluded. If there are several matters in one order then the official receiver should clearly delay their report until each has been complied with to their satisfaction. The examinee should be informed of the official receiver's request to conclude the public examination. A general adjournment will be appropriate where the examinee does not give adequate answers to questions put or it is intended to hold interviews with the examinee to obtain further information[1].

1. Rule 7.106 and 10.104

20.51 Criminal proceedings

Where criminal proceedings have been instituted against the examinee, the court may adjourn the hearing where it is of the opinion that continuing the hearing may prejudice a fair trial[1].

1. Rule 7.105 and 10.103

20.52 Reinstatement of adjourned examination

Where the examination has been adjourned generally the official receiver or the examinee may apply to the court to fix a venue for the resumption of the examination and for directions about the notice to be given to those entitled to take part[1]. Where the examinee applies for the resumption of the examination, the court may make it a condition that they pay for the notices to be given and that they give a deposit to the official receiver for that purpose[2]. The official receiver should write to the examinee regarding the deposit required in these circumstances[3].

1. ISCIS form PERES

2. Rule 7.106 and 10.104

3. ISCIS form PECOE

20.53 Suspension of automatic discharge on adjournment - bankruptcy only

Where a public examination in bankruptcy is adjourned for any reason the official receiver may make a verbal application to suspend the operation of any automatic discharge period applicable[1].

The default position is that the official receiver should ask for the suspension to apply until such time as the official receiver is of the opinion that the bankrupt has complied with their obligations under section(s) 288 and/or 291 of the Insolvency Act 1986 as evidenced by a report filed by the official receiver. However recent court decisions have determined that such a clause may be considered penal as it leaves too much discretion to the Official Receiver or trustee. The level of seriousness of the non-cooperation should therefore be taken into consideration and a fixed term of suspension or the fulfillment of one specified condition (which can be revisited if the default continues) be considered where appropriate[2].

Form PEN[3] which is sent to the bankrupt with the public examination order makes reference to the possible suspension of the bankrupt's discharge. If the bankrupt later complies with their obligations, the official receiver should make an application to have the suspension lifted, filing a brief report, with draft order, at Court referring to the order suspending the bankrupt's discharge and confirming that the official receiver became satisfied that the bankrupt had complied with their obligations as from a specific date given in the report.

Further guidance concerning the discharge of the suspension order is given in guidance '22 - Discharge from Bankruptcy'

1. Section 279(3) and Rule 10.104

2. Mawer v Bland [2013] EWHC 3122; Wier v Hilsdon [2017] EWHC 983 ; Harris v Official Receiver [2016] EWHC 343

3. ISCIS form PEN

20.54 Failure to attend

If, without having a reasonable excuse, an examinee fails to attend their public examination, a warrant for the examinee's arrest may be issued. This is also a contempt of court for which the court may also issue a warrant for the examinee's arrest[1, 2]. The extended process of committal is explored in a recent case; Official Receiver v Clive Washington Brown, where there were extensive issues raised by the bankrupt over their failure to co-operate[3].

Full details as regards the issue of warrants and the enforcement of warrants (however issued) are given in guidance on Cooperation and non-cooperation.

1. Sections 134(2)(a), 364(2)(e) and Rule12.54

2. ISCIS form PEWA

3. Official Receiver v Clive Washington Brown [2017 EWHC 2762]

Shorthand writers and the record of the examination

20.55 Transcripts

Most courts now record public examinations for later transcription. Paragraphs 20.58 and 20.59 apply whatever the means of producing the written record of the examination.

20.56 Appointment

A shorthand writer can either be appointed directly by the court or on the application of the official receiver. Where the official receiver applies they must name the person they propose for appointment[1].

1. Rule 12.65

20.57 Remuneration

Shorthand writers' remuneration is determined by the court[1]. Where the appointment is made on the application of the official receiver in order that a written record may be taken of an examinee's evidence the cost of the written record is deemed an expense of the official receiver in the proceedings and the shorthand writer's remuneration is paid, and ranks highly, as part of the expenses under the Insolvency Rules[2]. Where a shorthand writer is appointed directly by the court the remuneration is payable as part of the expenses but has a lower priority. The official receiver should ensure that a shorthand writer is always paid promptly, even if this means incurring a debit balance. The rates of remuneration for shorthand writers are agreed between the Shorthand Writers' Association and the Treasury, and increases are often backdated. Such increases should be paid by the official receiver in accordance with instructions issued.

1. Rule 12.65

2. Rules 6.42, 7.108 and 10.149

20.58 Written record

To facilitate reference, the questions in the written record will be numbered consecutively and, if the examination is adjourned, the questions put at the adjournment will be numbered in continuation of the numbers in the notes of the original hearing. The written record made of the examination will be read over either

to or by the examinee, authenticated by them and verified by a statement of truth at a venue fixed by the court. Depending on local practice, the court may expect the official receiver to write to the examinee requiring their attendance to make the verification. The official receiver should make arrangements with the court sufficient to ensure that they receive copies of all relevant documents for their file[1].

1. Rules 7.105 and 10.103

20.59 Attendance at other court for signature

Where an examinee can more conveniently attend a court other than the court dealing with the proceedings, for the purpose of authenticating the record of the examination, the latter court may, on the application of the examinee or the official receiver, make an order in aid. Where such an order is made it will be sent by that court to the registrar or district judge of the other court, who should make arrangements directly with the examinee (whose address should be stated) for their attendance. The official receiver should inform the examinee in writing that arrangements are being made for them to attend another court and that they must await instructions from the registrar/district judge of the court which they are to attend.

20.60 Evidence of shorthand writer

Where the record of the examination has not been read over to or by the examinee and authenticated by them, shorthand writers should retain their original notes until the written record has been authenticated by the examinee. In all cases in which it appears that the examinee's authentication to the written record cannot be obtained (if, for instance, they have absconded or cannot be traced) the original notes must be obtained from the shorthand writer and, with a memorandum of identification authenticated by them, placed on the official receiver's file in an envelope suitably identified and marked that it is not to be destroyed separately from the office file.

The verbal evidence of the shorthand writer will not be admissible in most criminal prosecutions following the decision in Saunders v UK and the passing of the Youth Justice and Criminal Evidence Act 1999.