
STATUTORY INSTRUMENTS

2016 No. 1024

The Insolvency (England and Wales) Rules 2016

PART 7

WINDING UP BY THE COURT

CHAPTER 13

Public examination of company officers and others (section 133)

[Note: a document required by the Act or these Rules must also contain the standard contents set out in Part 1.]

Applications relating to promoters, past managers etc. (section 133(1)(c))

7.98.—(1) An application under section 133(1) for the public examination of a person falling within paragraph (c) of subsection (1) (promoters, past managers, etc.) must be accompanied by a report by the official receiver indicating—

- (a) the grounds on which the official receiver thinks the person is within that paragraph; and
- (b) whether the official receiver thinks it is likely that the order can be served on the person at a known address and, if so, by what means.

(2) If the official receiver thinks that there is no reasonable certainty that service at a known address will be effective, the court may direct that the order be served by some means other than, or in addition to, service in such manner.

Request by a creditor for a public examination (section 133(2))

7.99.—(1) A request made under section 133(2) by a creditor to the official receiver for the public examination of a person must contain—

- (a) identification details for the company;
- (b) the name and postal address of the creditor;
- (c) the name and postal address of the proposed examinee;
- (d) a description of the relationship which the proposed examinee has, or has had, with the company;
- (e) a request by the creditor to the official receiver to apply to the court for a public examination of the proposed examinee under section 133(2);
- (f) the amount of the creditor's claim in the winding up;
- (g) a statement that the total amount of the creditor's and any concurring creditors' claims is believed to represent not less than one-half in value of the debts of the company;
- (h) a statement that the creditor understands the requirement to deposit with the official receiver such sum as the official receiver may determine to be appropriate by way of security for the expenses of holding a public examination; and

- (i) a statement that the creditor believes that a public examination is required for the reason stated in the request.
- (2) The request must be authenticated and dated by the creditor.
- (3) The request must be accompanied by—
 - (a) a list of the creditors concurring with the request and the amounts of their respective claims in the winding up, with their respective values; and
 - (b) from each concurring creditor, confirmation of the creditor's concurrence.

Request by a contributory for a public examination

7.100.—(1) A request made under section 133(2) by a contributory to the official receiver for the public examination of a person must contain—

- (a) identification details for the company;
 - (b) the name and postal address of the contributory;
 - (c) the name and postal address of the proposed examinee;
 - (d) a description of the relationship which the proposed examinee has, or has had, with the company;
 - (e) a request by the contributory to the official receiver to apply to the court for a public examination of the proposed examinee under section 133(2);
 - (f) the number of shares held in the company by the contributory;
 - (g) the number of votes to which the contributory is entitled;
 - (h) a statement that the total amount of the contributory's and any concurring contributories' shares and votes is believed to represent not less than three-quarters in value of the company's contributories;
 - (i) a statement that the contributory understands the requirement to deposit with the official receiver such sum as the official receiver may determine to be appropriate by way of security for the expenses of holding a public examination; and
 - (j) a statement that the contributory believes that a public examination is required for the reason specified in the request.
- (2) The request must be authenticated and dated by the contributory.
 - (3) The request must be accompanied by—
 - (a) a list of the contributories concurring with the request and the number of shares and votes each holds in the company; and
 - (b) from each concurring contributory, confirmation of the concurrence and of the number of shares and votes held in the company.

Further provisions about requests by a creditor or contributory for a public examination

7.101.—(1) A request by a creditor or contributory for a public examination does not require the support of concurring creditors or contributories if the requisitioning creditor's debt or, as the case may be, requisitioning contributory's shares, is sufficient alone under section 133(2).

(2) Before the official receiver makes the requested application, the creditor or contributory requesting the examination must deposit with the official receiver such sum (if any) as the official receiver determines is appropriate as security for the expenses of the public examination (if ordered).

- (3) The official receiver must make the application for the examination—

- (a) within 28 days of receiving the creditor's or contributory's request (if no security is required under paragraph (2)); or
- (b) within 28 days of the creditor or contributory (as the case may be) depositing the required security.

(4) However if the official receiver thinks the request is unreasonable, the official receiver may apply to the court for an order to be relieved from making the application.

(5) If the application for an order under paragraph (4) is made without notice to any other party and the court makes such an order then the official receiver must deliver a notice of the order as soon as reasonably practicable to the creditors or contributories who requested the examination.

(6) If the court dismisses the official receiver's application under paragraph (4), the official receiver must make the application under section 133(2) as soon as reasonably practicable.

Order for public examination

7.102.—(1) An order for a public examination must have the title “Order for Public Examination” and must contain the following—

- (a) identification details for the proceedings;
- (b) the name and title of the judge making the order;
- (c) the name and postal address of the person to be examined;
- (d) the venue for the public examination;
- (e) the order that the person named in the order must attend the specified venue for the purpose of being publicly examined;
- (f) the date of the order; and
- (g) a warning to the person to be examined that failure without reasonable excuse to attend the public examination at the time and place specified in the order will make the person liable to be arrested without further notice under section 134(2); and that the person will also be guilty of contempt of court under section 134(1) and be liable to be committed to prison or fined.

(2) The official receiver must serve a copy of the order on the person to be examined as soon as reasonably practicable after the order is made.

(3) The court must rescind an order for the public examination of a person who was said to fall within section 133(1)(c) if that person satisfies the court that it is not so.

[Note: rule 81.9 (as amended) of the CPR requires a warning as mentioned in paragraph (1)(g) to be displayed prominently on the front of the order.]

Notice of the public examination

7.103.—(1) The official receiver must give at least 14 days' notice of the public examination to—

- (a) the liquidator (if a liquidator has been nominated or appointed);
- (b) the special manager (if a special manager has been appointed); and
- (c) the creditors and all the contributories of the company who are known to the official receiver (subject to any contrary direction of the court).

(2) Where the official receiver thinks fit additional notice of the order may be given by gazetting the notice.

(3) The official receiver may in addition to gazetting the notice advertise it in such other manner as the official receiver thinks fit;

- (4) The notice must state—
- (a) the purpose of the public examination; and
 - (b) the venue.

(5) Unless the court directs otherwise, the official receiver must not give notice under paragraph (2) of an order relating to a person falling within section 133(1)(c) until at least five business days have elapsed since the examinee was served with the order.

Examinee unfit for examination

7.104.—(1) Where the examinee is a person who lacks capacity within the meaning of the Mental Capacity Act 2005(1) or is unfit to undergo or attend for public examination, the court may—

- (a) stay the order for the examinee’s public examination; or
 - (b) order that it is to be conducted in such manner and at such place as it thinks just.
- (2) The applicant for an order under paragraph (1) must be—
- (a) a person who has been appointed by a court in the United Kingdom or elsewhere to manage the affairs of, or to represent, the examinee;
 - (b) a person who appears to the court to be a suitable person to make the application; or
 - (c) the official receiver.
- (3) Where the application is made by a person other than the official receiver, then—
- (a) the application must, unless the examinee is a person who lacks capacity within the meaning of the Mental Capacity Act 2005, be supported by the witness statement of a registered medical practitioner as to the examinee’s mental and physical condition;
 - (b) at least five business days’ notice of the application must be given to the official receiver and the liquidator (if other than the official receiver); and
 - (c) before any order is made on the application, the applicant must deposit with the official receiver such sum as the latter certifies to be necessary for the additional expenses of an examination.
- (4) An order must contain—
- (a) identification details for the proceedings;
 - (b) the name and postal address of the applicant;
 - (c) the name and title of the judge making the order;
 - (d) the capacity in which the applicant (other than the official receiver) made the application;
 - (e) the name and postal address of the examinee;
 - (f) the date of the order for the examinee’s public examination (“the original order”);
 - (g) a statement that the court is satisfied that the examinee specified in the order lacks capacity within the meaning of the Mental Capacity Act 2005 to manage and administer the examinee’s property and affairs or is unfit to undergo a public examination;
 - (h) an order that—
 - (i) the original order is to be stayed on the grounds that the examinee is unfit to undergo a public examination, or
 - (ii) the original order is varied (as specified in this order) on the grounds that the examinee is unfit to attend the public examination fixed by the original order; and
 - (i) the date of the order.

(5) Where a person other than the official receiver makes the application, the court may order that some or all of the expenses of the examination are to be payable out of the deposit under paragraph (3) (c), instead of as an expense of the winding up.

(6) Where the application is made by the official receiver it may be made without notice to any other party, and may be supported by evidence set out in a report by the official receiver to the court.

Procedure at public examination

7.105.—(1) At the public examination the examinee must—

- (a) be examined on oath; and
- (b) answer all the questions which the court puts, or allows to be put.

(2) A person allowed by section 133(4) to question the examinee may—

- (a) with the approval of the court appear by an appropriately qualified legal representative; or
- (b) in writing authorise another person to question the examinee on that person's behalf.

(3) The examinee may at the examinee's own expense employ an appropriately qualified legal representative, who may put to the examinee such questions as the court may allow for the purpose of enabling the examinee to explain or qualify any answers given by the examinee, and may make representations on behalf of the examinee.

(4) The court must have such record made of the examination as the court thinks proper.

(5) The record may, in any proceedings (whether under the Act or otherwise) be used as evidence of any statement made by the examinee in the course of the public examination.

(6) If criminal proceedings have been instituted against the examinee, and the court is of the opinion that continuing the hearing might prejudice a fair trial of those proceedings, the hearing may be adjourned.

Adjournment

[Note: rule 81.9 (as amended) of the CPR requires a warning as mentioned in paragraph (3) to be displayed prominently on the front of the order.]

7.106.—(1) The court may adjourn the public examination from time to time, either to a fixed date or generally.

(2) Where the examination has been adjourned generally, the court may at any time on the application of the official receiver or of the examinee—

- (a) fix a venue for the resumption of the examination; and
- (b) give directions as to the manner in which, and the time within which, notice of the resumed public examination is to be given to persons entitled to take part in it.

(3) An order adjourning the public examination to a fixed date must contain a warning to the examinee that failure without reasonable excuse to attend the public examination at the time and place specified in the order will make the examinee liable to be arrested without further notice under section 134(2); and that the examinee will also be guilty of contempt of court under section 134(1) and be liable to be committed to prison or fined.

(4) Where an application to resume an examination is made by the examinee, the court may grant it on terms that the examinee must pay the expenses of giving the notices required by paragraph (2) and that, before a venue for the resumed public examination is fixed, the examinee must deposit with the official receiver such sum as the official receiver considers necessary to cover those expenses.

Expenses of examination

7.107.—(1) Where a public examination of the examinee has been ordered by the court on a request by a creditor under rule 7.99 or by a contributory under rule 7.100, the court may order that some or all of the expenses of the examination are to be paid out of the deposit required under those rules, instead of as an expense of the winding up.

(2) The costs and expenses of a public examination do not fall on the official receiver personally.