INSOLVENCY LAW REVIEW COMMITTEE

Note to Members

CHAPTER 16 - INSOLVENCY PRACTITIONERS - POWERS AND DUTIES

Enclosed are two copies of the above-mentioned draft. I think the Report will be more digestible if this forms a separate chapter from "Qualifying Requirements" (Chapter 15).

I am not too happy with the draft, it has been rather difficult to prepare because we (and our consultees) dealt with the powers and duties of trustees, voluntary liquidators, compulsory liquidators and receivers separately along the lines of existing law, whereas there is a need to think of them all in the context of one Insolvency Code covering our proposed procedures. At the same time, we would want amendments to 'powers and duties' even if our new procedures are not acceptable and even if there is no harmonisation of insolvency codes.

The chapter is incomplete in that I have yet to prepare a few paras on the duties of receivers and administrators respectively. But it would be helpful if I could get views on the draft thus far and, in particular, if the various 'Notes' could be resolved.

Eric is adding this to the rapidly increasing list for consideration on 13 July.

Trevor Traylor

T H TRAYLOR
Secretary
25 June 1981

CHAPTER 16

INSOLVENCY PRACTITIONERS - POWERS AND DUTIES

Introduction

1 The powers and duties of a liquidator in a compulsory winding up, a liquidator in a voluntary winding up and of a trustee in bankruptcy are fairly well defined in the Companies Acts and the Bankruptcy Act respectively. On the whole, many of these provisions are satisfactory and we shall refer only to specific matters where we consider the existing rules should be extended, curtailed or modified. We have already made some observations about receivers and managers in Chapter 8 and we shall refer to their powers and duties in greater detail. We shall also draw attention to the responsibilities of the proposed administrator (see Chapter 9) where they differ from those of a receiver and manager.

2. In a number of matters the powers of a liquidator or trustee are subject to the prior sanction of his committee of creditors (at present called "the Committee of Inspection") or, where there is no committee, the Department of Trade or of the Court. We deal with such "Committees of Creditors" (as we propose to rename the Committee of Inspection) in the next chapter; suffice it to say at this stage that, in relation to the exercise of their powers, we consider that the general requirement for such sanctions can be dispensed with. In reaching this decision, with its necessary diminution on the element of "creditor control", we have borne in mind our proposals for comprehensive qualifying requirements for all insolvency practitioners, and our proposals for imposing upon them the statutory duties of care which are

of criteria, this has not happened in the field of insolvency administration. The Bankruptcy Courts, in particular, have not always chosen ~~not necessarily~~ to go along with the ~~flow~~ current of legal development.

4 We consider it highly desirable that the duties of all types of insolvency practitioner (including receivers or managers) to the debtor, creditors and other interested parties should be expressly defined in accordance with the way that the law has been developing generally.

5 People ought to know where they stand, and it should be possible to find in the statute what responsibilities Parliament has ~~said~~ prescribed that the person ~~administrator of~~ administering an insolvent estate should have to the interested parties and to which of them. That would certainly be in accord with the policy of modern legislation generally.

6 At ~~present it is virtually impossible~~ under present law it is extremely difficult for a bankrupt to take any action against his trustee. Section 80 of the Act of 1914 ~~makes provision that~~ allows the bankrupt, or any of his creditors, or any other person who is aggrieved by any act or decision of the trustee, ~~to~~ may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such Order as it thinks fit.

7 This provision ~~dates back to~~ from the introduction of 1883, ~~Prior to that date~~, even if there was a surplus for the bankrupt or, but for the trustee's action or inaction, there might have been a surplus, the bankrupt was not effectively debarred ~~entitled to~~ from instituting proceedings complaining about the trustee's misconduct. But the introduction of what is now section 80 would appear to have done little to improve the situation; we were informed that there is ~~in fact~~ no reported case where the bankrupt has successfully invoked the jurisdiction under that section. The Courts have to the best of our knowledge been heard (Bankruptcy)

Defend Court

consistently adopted a narrow construction of the provision so as, in practice, the to deny the bankrupt any effective right of complaint in all but the most exceptional cases. It would seem that the law will be existence or real probability of a surplus is a prerequisite of the bankrupt's right to move the Court on questions of administration (Williams and Muir Hunter on Bankruptcy, page 426). A single individual creditor seeking to impeach the trustee's administration must, it seems, undertake seeks apparently show that the trustee is acting entirely unreasonably, to Judge by the case of Shaw v. York-O-Matic cited below " "

8 The question of a duty of care was discussed in the Justice Report on Bankruptcy, where the suggestion was made that the duty owed by a trustee in bankruptcy to the debtor, as well as to the general body of his creditors, should be a duty of the utmost good faith, giving rise to a cause of action on the part of the bankrupt and the creditors for breach of statutory duty, if default has been made

Refer B

9. While we support, generally, the proposals put forward by "Justice", we would not go so far as to suggest that the duty of a trustee - or of any other insolvency practitioner - should be one of the utmost good faith. In our view, such an obligation would go beyond ordinary fiduciary duties, and would imply in particular a duty to report and disclose akin to that owed by one partner to another, or by an assured to an insurer. We do, however, consider that the liquidator or trustee should owe a certain fiduciary duty to the debtor, to the creditors and to other interested parties; the extent and characteristics of that duty will, we think, vary according to the person to whom it is owed.

man towards a client, there might be a danger of numerous actions particularly by individual debtors against their trustees. It is a well-known fact that not only individual debtors, but also the directors of insolvent companies, invariably take a very optimistic view of the value of the available assets, and tend to take a critical view of their trustees or liquidators. If the trustee or liquidator did not realise the assets at the estimated value put in the statement of affairs, this constitutes a prima facie case the insolvent might well feel that ~~there was cause~~ for complaint.

11 We do not regard this as sufficient reason for precluding the introduction of such legislation; but there must be a sifting process to prevent the liquidator or trustee from being constantly prone to attack. This can be achieved by providing that a debtor (or debtor company) should not be allowed to bring such an action without the leave of the Court.

[NOTE: What about similar actions by creditors or other interested parties? Should they also first obtain leave of the Court?]

12 In the preceding paragraphs our discussion has centred upon the liquidator or the trustee. The position of the receiver and manager has already been considered (see paragraphs 442 to 454). We see no reason why the same duty of care towards the debtor company, the creditors and other interested parties should not be required from a receiver.

Recommendations

13 We recommend that:

(a) the respective duties owed by a liquidator or trustee owed to the debtor, the creditors and other interested parties should be laid down by statute;

(b) his principal (a primary?) duty should be to act in a fiduciary capacity and to deal with the property under his control honestly, and in good faith, and in a commercially reasonable manner; his consequential duties should be to comply promptly and efficiently with all the statutory duties and requirements which his office imposes on him.

(c) ~~the provision~~ should give rise to causes of action on the part of the debtor (or debtor company) and the creditors and other interested parties for breach of statutory duty, ~~if default has been made and~~ to the extent of any damage sustained by the claimant in consequence thereof ~~by~~ (other than nominal damages);

default in the performance of the principal duty and, where appropriate, the consequential duties

(d) the provision should apply to all liquidators and trustees administering insolvent estates; and

(e) the ~~provision~~ should also apply to receivers and administrators, but to a limited extent, having regard to the differences between their offices and those of liquidators and trustees.

Refer to (b) or (c)

General responsibilities

14 Many powers and duties apply both to liquidators and trustees; some apply ~~or should apply~~ - also to receivers. Some apply to liquidators in compulsory winding up, but do not apply ~~(and should)~~ (although they should) to voluntary liquidators. Some provisions which have the same intention differ in their wording as between the Companies Acts and the Bankruptcy Act. Some provisions lay down different time limits within which identical duties shall be carried out, depending upon whether it is by a liquidator or by a trustee.

15 We consider that there is much to be gained by harmonising the various provisions so far as ~~is possible~~ practicable. The introduction of comprehensive qualifying requirements for all insolvency practitioners should enable much of the existing duties of detailed supervision by the Department of

Trade to be dispensed with, [~~thus enabling greater harmonisation of the provisions relating to the powers and duties of insolvency~~ practitioners.]

16 We ~~consider [recommend?]~~ recommend that there should be a single group of provisions setting out the powers and duties of all persons who are administering insolvent estates, followed by separate provisions to cover responsibilities which do not apply universally.

Control by the Department of Trade

17 Section 81 of the Act of 1914 and section 250 of the Act of 1948 enable the Department to exercise control over trustees in bankruptcy and liquidators in compulsory winding up proceedings and to investigate complaints against them. We recommend that the provisions contained in section 250 should apply to all liquidators, whether acting in a compulsory or a voluntary winding up. [note re Ch. 13 §§ 64/5 V.W.up. means members W.V.]

18 In the context of the more stringent qualifications required of all trustees and liquidators, this should not prove to be a heavy burden, and we think that there should be access to the Department to ~~register~~ ventilate a bona fide complaint even in voluntary proceedings.

[NOTE: Do we intend this to apply to our Voluntary Winding Up, ie. the present Members' Voluntary Winding Up?] See above § 17. Question — the two broad categories

Control by the Court

19 Sections 245(3) and 246(5) of the Act of 1948 both deal with control by the Court in a compulsory winding up, enabling application to be made to the Court concerning the liquidator's administration. Section 245(3) is wider than subsection 246(5), in so far as the former applies to a proposed exercise of powers, but it is narrower in that

only a creditor or contributory may apply, whereas under subsection 246(5) any person aggrieved may do so.

20 Section 307 of the Act of 1948 is intended to provide the company, its shareholders, and creditors the means of access to the Court in a voluntary winding up, just as in a compulsory winding up. The wording of this provision, however, is quite different from that of the other provisions referred to above, and it would seem that it is not designed specifically to deal with grievances against the liquidator.

21 Section 55 and 56 of the Bankruptcy Act 1914 (which broadly correspond to section 245 of the Act of 1948) do not contain any provision similar to subsection 245(3). Section 80 of the Act of 1914 is, however, similar to subsection 246(5).

22 It would seem that, at the very least, some rationalisation is necessary. ~~We have received many representations about the lack of clarity and harmonisation in the insolvency codes.~~ We consider that this is an example where one simple provision covering all classes of insolvency practitioner, including receivers and administrators, should be introduced.

Personal liability

23 It has been suggested to us that the liability of the liquidator [or trustee] in a particular case should be limited to the extent of the assets in his hands. We do not agree. This would be unfair, in particular, to third parties dealing with him. He is presently entitled to an indemnity out of the estate if he has acted ~~properly~~; if he incurs liabilities beyond the extent of the assets he does so at his own risk.

Rule E

Registered land

24 We have received submissions [from insolvency practitioners] that a trustee in bankruptcy or a liquidator should have power to require the Land Registry to disclose the names of the registered owners of land and property.

25 The position in England, as we understand it, is that a folio in the Land Registry cannot be inspected without the written consent of the registered owner. In Ireland the Land Register has always been open to general public inspection.

[NOTE: The submission which came from Mr R B Knight (C17) was changed by the Accountants' Panel to giving the liquidator power to search the register (as in Ireland). We rejected this (by a majority) because we were against giving the liquidator any "fishing" powers. John Hunter, in support of the proposal, pointed out that there would be no breach of confidentiality of the register involved as the liquidator or trustee stands in place of the registered owner. In the Report should we:

(a) omit all reference to this submission, or

(b) say why we reject it, "fishing" doesn't really tie in with asking the LR to disclose, or

(c) support the original proposal?]

Employment of solicitors

26 Section 245(1)(c) of the Act of 1948 requires the sanction of the Court or the committee of inspection for the appointment of a solicitor to assist the liquidator. Section 245(2)(g) requires no such authority for the appointment of an agent to do any business which the liquidator is unable to do himself. It is difficult to see the reason for this distinction.

27 By contrast, Section 56(3) of the Act of 1914 requires the trustee in bankruptcy to obtain the permission of the committee of inspection before employing a solicitor or other agents to take any proceedings or do any business which may be sanctioned by the committee.

Committees of creditors

28 In the next Chapter we put forward proposals whereby a committee of creditors (and shareholders, where applicable) should be kept informed of the progress of the administration, and ~~also giving them power to apply~~ to the Court if they are not satisfied. In view of this, and the tighter control ~~on~~ who may act as a liquidator or trustee, we consider that sanction to employ a solicitor is no longer necessary. The liquidator (or trustee) however should be required to inform the committee of his intentions, ~~and~~ if the majority are opposed to the action he proposes, he should only be able to proceed ~~with~~ the leave of the Court.

Taxation of costs

29 This is another matter where the rules relating to different insolvency proceedings vary and where, in our view, they should be harmonised. In a compulsory winding up, ~~and~~ in bankruptcy, all bills and charges of "solicitors, managers, accountants, auctioneers, brokers ~~and~~ other persons" are required to be taxed before payment. In a voluntary winding up, however, there is no taxation unless required by the liquidator, and we have been informed that this works quite satisfactorily.

30 It has been suggested to us that all costs, together with appropriate information, should be submitted to the committee, and if approved by them, should be paid without taxation. We agree that it is unnecessary to require taxation in every case, but we see no reason to impose the task of approving costs on the committee.

31 We recommend that there should be no requirement for the taxation of costs in any insolvency proceedings unless required by the liquidator, the trustee, or the committee (or a representative thereof).

Borrowing powers

32 Liquidators should have express powers to borrow.

[NOTE: Put forward by the Society of Conservative Lawyers, supported by the Accountants' Panel, this went through "on the nod" when we took ILRC 140. Has anyone anything to say on it please? Why should he want to borrow? Is it to include the OR when acting as liquidator? What about a trustee, say, dealing with a business in a Liquidation of Assets?]

Power to grant leases of the company's property

33 We recommend that it should be made clear that a liquidator has power to grant leases of the company's property, if that will assist in its beneficial realisation. It may be that the words in subsection (1)(b) of section 245 and in section 281, "necessary for the beneficial winding up" are too restrictive, and that "conducive to the beneficial winding up"should be substituted.

The position of the liquidator in relation to individual creditors or shareholders

34 We have been informed that problems have at times arisen by reason of the fact that the liquidator is only concerned with the property of the company and the rights and obligations of the company as a legal entity, and is not regarded as a trustee for creditors or shareholders to the extent that might be thought desirable. This means in practice that a liquidator is frequently unable to take proceedings in the name of the company because only the individual

rights of the creditors or shareholders are affected and they themselves are either unwilling or unable to take individual action. It has been suggested to us that the liquidator should have the power to bring proceedings not only in the name of the company but also in the names of creditors or shareholders. We cannot support this proposal. The fact that in certain circumstances statute has permitted the taking of action in the name of a company where the company's usual executive authority - the board of directors - has failed to activate the company, is no precedent for enabling a liquidator to take action in the name of creditors or shareholders.

35 In the first place, the company is an artifical entity and has to be moved into action by someone. If the directors will not act, justice may well require the Department of Trade or the Court to cause the company to take proceedings. Shareholders and creditors, on the other hand, will be able to look after themselves. In the second place, action in the name of a company involves only one person as plaintiff. Action for a whole body of creditors or of shareholders involves proceedings for many plaintiffs who may be in entirely different positions - on any comparison inter se - as regards their claims against directors or others. One shareholder may have been a shareholder for a long time; another for a short. One creditor may have had one representation made to him; another creditor another representation.

36 At the same time we appreciate that the general body of shareholders and of creditors often have no information, whereas the liquidator has. If a liquidator has a statutory duty to consider whether, apart from the company having claims against directors or others, the general body of shareholders or of creditors had such claims themselves, then it would follow that in appropriate circumstances a liquidator could properly expend sums

in drawing shareholders' or creditors' attention to wrong-doing and in providing them with necessary information. The initiative as to taking action or not, however, should remain entirely with the shareholders or creditors themselves. After all, they will have to foot the bill. We consider that this is the right approach and we accordingly recommend that such a statutory duty should be imposed upon the liquidator.

Dividends to creditors

37 Liquidators and trustees appointed by the Court have authority to exclude from any distribution those parties who have failed to establish their claim to the satisfaction of the liquidator, or trustee or the Court within a certain limit of time. At present a liquidator in a creditors' voluntary winding up cannot make a distribution with complete safety other than by an Order of the Court following an application to the Court under section 307 of the Act of 1948. Even then the distribution may be thwarted by reason of claims notified just before the distribution is made.

38 We recommend that the authority in this matter presently enjoyed by liquidators and trustees appointed by the Court should be extended to voluntary liquidators in creditors' voluntary winding up proceedings (replacing ~~that is~~ proceedings), liquidation of assets and also to receivers and administrators.

Petition to wind up compulsorily a company in voluntary liquidation

39 There are restrictions on what part the voluntary liquidator may play in connection with a petition for compulsory winding up presented after his appointment (see, for example, re Lubin Rosen & Associates Ltd [1975] 1 WLR 122). This suggests that the voluntary liquidator should not oppose the petition, even if instructed to do so by the committee of

inspection.

40 Apparently, the voluntary liquidator should leave it to individual creditors to oppose a petition unless he goes to the trouble of circulating all the creditors impartially and reporting on the views he obtains. However, it is thought that in practice many courts do take account of the views of the voluntary liquidator and, because of the strictures on what he may do, we think that it would be desirable to spell out what steps he is entitled to take in the circumstances.

41 We therefore recommend that it should be provided that the liquidator in a voluntary liquidation (or in a liquidation of assets) should be entitled to be heard by the Court in relation to a subsequently presented petition for a compulsory winding up; and also to oppose the petition at the request of the committee of creditors.

Destruction of books and papers

42 The committee of creditors should not be involved in matters relating to the disposal of books and papers. We recommend that the liquidator should have power to destroy books and papers two years from the date of dissolution of the company, having given twentyeight days' notice to the Department of Trade, unless earlier destruction has been authorised by the Department.

Liquidators' and trustees' miscellaneous duties

43 We think that the duties of liquidators and trustees, in general, are adequately defined and do not require radical amendment. This view seems to be supported by the submissions from the general public. Nevertheless, we propose changes in certain areas, particularly under the heading of accounts, meetings and information to the creditors.

44 At present, In a creditors' voluntary winding up, at the end of the first and every subsequent year, the liquidator must hold meetings of the company and of his creditors, at which he must present an account of his acts and dealings and of the conduct of the winding up. The liquidator must also submit an abstract of receipts and payments to the Department of Trade at the end of the first year and half-yearly thereafter. Final meetings must be held at the end of the liquidation. In a compulsory liquidation winding up, after the first meeting of creditors, there is no requirement for any further meetings, although the Court, or one-tenth in value of the creditors, may require the holding of a meeting (but rarely do). Accounts are submitted to the Department of Trade half-yearly and, although there is provision for their submission to creditors, the Department normally waives the requirement on the grounds of expense.

45 We recommend that in a compulsory winding up and in a creditors' voluntary winding up (now liquidation of assets) there should be a requirement for a meeting of creditors at the end of each year, and that a report should be circulated by the liquidator to creditors beforehand, incorporating a statement of account. The statement of account should give a summary of receipts and payments in the liquidation to date, measured against the figures in the directors' statement of affairs, together with the liquidator's estimate of further realisations. The style of the accounts should be on similar lines to that which we have proposed for receivers (paragraph 487). A copy of the accounts should be submitted annually to the Department (in substitution for the present half-yearly requirement).

46 We further recommend that the liquidator should have authority to apply to the Court for permission not to hold further meetings and not to submit further reports, if there is no reasonable prospect of

any funds becoming available for distribution to creditors, or if the cost would be disproportionate to the benefit. Alternatively, he should be able to apply for permission to send reports to, and have meetings of, only those classes of creditors who are to receive a dividend in the liquidation.

47 The provisions recommended in paragraphs 45 and 46 above should also apply to a trustee in bankruptcy (or in liquidation of assets).

48 We have received a number of criticisms about the requirement that some statutory returns by liquidators and trustees are required to be sworn and others are not. It seems anomalous, for example, that the liquidator's periodic statement of account must be accompanied by an affidavit sworn before a Commissioner for Oaths whereas no pre-liquidation return of the company requires to be ~~sworn~~ required in this manner.

49 We strongly recommend that the requirement to submit formal affidavits in support of the statutory reporting requirements of all insolvency practitioners should be abolished. Our proposals regarding the qualifications of insolvency practitioners lend weight [better wording wanted] to this recommendation. degree of trust, oath little extra. Stat. returns – authors liable to penalties.

50 We further recommend that on any unopposed application to the Court by a liquidator, trustee, receiver or administrator, he may give evidence by a report instead of by affidavit, unless the Court otherwise orders. This is in line with the provision already extended to Official Receivers by the Bankruptcy Rules, in relation to certain applications.

No.

In ex parte & semi-formal & ex parte
Re Allied Produce (1972)

CHAPTER 16 (Continued)

Powers of a receiver

51. The powers of a receiver and manager in England depend upon the terms of the instrument pursuant to which he has been appointed and of the appointment itself. The powers contained in the normal form of a debenture creating a fixed and a floating charge over the whole of a company's assets have to some extent become standardised, and, with a few exceptions to which we refer below, are in the main ~~adequate~~ satisfactory.

52. However, it would be advantageous to give certain powers by Statute and we have made a recommendation to this effect in paragraph 494. The provisions should be reasonably comprehensive and as widely stated as possible, on the view that it is desirable that the receiver should not require to resort to the Court for authority save in special cases. We believe that section 15 of the Scots Act of 1972, which contains a list of powers, could usefully be adopted in England, subject of course to the obvious modifications. If it is desired in a particular case, that the receiver's powers should be less ample, the instrument ~~enacting~~ creating the floating charge may restrict them.

53. We consider that a receiver appointed under a floating charge should have power to manage the company's business unless such power is expressly excluded.

54. We recommend that the powers of a receiver appointed by the Court should be the same as in the case of a receiver appointed directly by the holder of a floating charge. The suggested powers are wider than those normally conferred by the Court in practice but,

as we have been informed, the need for such a receiver to apply to the Court for special powers is a troublesome and expensive business. We consider that the receiver should only need to resort to the Court for guidance on matters of peculiar difficulty.

55. One matter where we feel it is essential that the receiver should refer to the Court concerns the recovery of assets disposed of by the debtor. This matter is discussed in Chapter - .

56. When a receiver is appointed it is not unusual for the directors to disappear, either literally or by way of resignation. This gives rise to a number of technical problems, one of which is the use of the company's seal. The present position is that a receiver has no power to affix the company's seal, unlike liquidator see s.245(2)(b) seal simply because in practice a company's Articles of Association never provide that he may, and there is no statutory provision which does so. In the absence of a legal charge the receiver has to make use of the power of attorney almost always included in a debenture, or to apply to the Court. Both may involve difficulty, expense and delay: see the recent cases of Sowman v David Samuel Trust Limited (1978) 1 WLR 22 and Barrows v Chief Land Registrar (The Times, 19 October 1977, Whitford J), the latter of which leaves the law in an unsatisfactory state. We recommend that a receiver should be given power by statute to use the company seal, both before and after winding-up. Receivers of Scottish companies already have statutory power to use the company seals. seal book 4p.

57. We recommend that a receiver should in general have the right to move the registered office of a company if the old address has become manifestly unsuitable, or if a quorum of directors is not available. We were informed of one case where nothing could be done for several years although the registered office had long since been demolished. vacated

compulsorily PA

58. A receiver presently has no power to examine the directors or other persons with knowledge of the affairs of the company. We consider that a power to examine the directors and other officers of the company similar to that accorded in a liquidation under section 268 of the Act of 1948 should be available in a receivership. This would be particularly helpful in tracking down possible assets of the company. The existing power to call for a statement of affairs under section 372 of the above Act is in some cases inadequate, both because it is difficult for a receiver to enforce its production if it is not readily forthcoming and also because he has no satisfactory means of compelling the directors to give answers to any supplementary questions which he may wish to ask. inadequate penalty s.372(5) default fine £10. s.235 not up Rule 55. committal

59. We recommend that a receiver should have a power, similar to that contained in Winding Up Rule 106 and section 27 of the Trustee Act 1925, to advertise for claims arising in the receivership and not known to him, whether against him personally or as liabilities payable out of receivership funds. The latter would consist, for example, of contractual liabilities incurred during the receivership but where personal liability was excluded under section 369(2) of the Act of 1948, or liabilities not binding the receiver personally, since he had not himself entered into a contract, to pay receivership expenses such as rent of leasehold premises subsequently abandoned, salaries, etc. At present, because of the possibility of liabilities unknown to him, a receiver often feels obliged to retain receivership funds for a considerable period before handing them over to the debenture holder, the liquidator or the directors, as the case may be, unless he can obtain a satisfactory indemnity.

60. Representations have been made to us concerning the distinction for empty property rate purposes between a liquidator and a receiver.

A liquidator (and indeed a trustee in bankruptcy) can obtain relief against empty rates, whereas a receiver cannot. In Banister v Islington Borough Council (1972) 71 LGR 239, it was held that a receiver and manager appointed under a debenture is personally liable for empty property rates, notwithstanding that he is constituted agent of the company since he is the person "entitled to possession". This is generally regarded as unfair and various devices are being used to seek to avoid this liability, for example, by excluding, in his appointment, a receiver's powers to take possession of a particular property or, when a leasehold property is worthless, by releasing it from the debenture.

61. We recommend that rates on empty properties should be treated merely as unsecured liabilities of the company or at best a subsequent charge on such properties, since no benefit accrues to the receivership, the property being by definition unoccupied. This should naturally not change the treatment of rates on properties occupied during the receivership as receivership expenses.

62. With regard to the supply of services from statutory undertakings such as gas, water and electricity; we consider that the law needs clarification and, possibly, amendment. The British Gas Corporation, for one, maintains that the receiver is not a new customer and therefore not entitled to supply without paying off arrears. We see no reason why this should be so. The receiver should not have to pay off arrears, which should rank as an unsecured claim, but should have the normal right of supply.

63. Section 369(1) of the Act of 1948 provides that a receiver appointed out of Court may apply to the Court for directions in any particular matter arising in connection with the performance of his

functions and empowers the Court to give such directions, or make such orders declaring the rights of persons, as the Court thinks just. [This provision places a receiver appointed out of Court in the same position as a receiver appointed by the Court.] The Jenkins Committee recommended that the sub-section should be extended to empower the Court to give the same directions and make the same orders on the application of a debenture holder as, of course, it can already do if the receiver is appointed by the Court. The recommendation has not been enacted.

64. We [strongly?] endorse the recommendation of the Jenkins Committee. A situation might arise where there is a dispute between the receiver and the debenture holder and we think it reasonable that it should be open to either party to refer the matter to the Court for ~~instructions~~ directions. Further, we can see no good reason for the distinction that is made in this matter between a receiver appointed by the Court and a receiver appointed out of Court. We note that provision has been made for this in section 23(1) of the Scots Act of 1972.

[Note. Jenkins' recommendation was rejected by the Department because no good reason had been put forward in support.]

65. A receiver appointed out of Court under a charge that subsequently proves to be invalid, or in circumstances which do not make the power of appointing a receiver exercisable, is a trespasser and may incur heavy liabilities, especially if he has purported to act as receiver and manager. The Jenkins Committee recommended that the Court should be empowered to relieve a person so appointed, wholly or in part from any liability he may incur, provided the act or omission would have been proper had the appointment been valid.

Further, that the Court should be empowered to hold the person making the appointment liable to the extent that the receiver is relieved from liability. The recommendation has been enacted in Scotland (section 23(2) of the Scots Act 1972) but not in England.

66. It is the practice of receivers to protect themselves against the possibility of the charge being invalid by making enquiries before accepting appointment and by requiring an indemnity against claims and losses from the appointor. The recommendation is not therefore an important one. Moreover, a debenture holder may not be worth pursuing, and if he is not the company would suffer to the extent that he did not meet the liability imposed upon him.

67. We endorse the recommendation of the Jenkins Committee with the qualification that the relief granted to the receiver should be limited ~~to~~ the extent that the company or the liquidator may be able to recover from the debenture holder.

[NOTE. The Accountants' Panel suggested that we should support the Jenkins recommendation, but I feel the above proviso is an improvement on Jenkins. Is it accepted please?]

[FURTHER NOTES.

1 Should this go in - we don't appear to have discussed it anywhere:

"Pension Schemes. We suggest that a receiver should have specific statutory powers with regard to pension schemes, for example, where the trustees are no longer willing to act, since he will obviously wish to look after the interests of the employees while he continues to make use of their services."

2 Have been unable to find any additional powers for the Administrator over and above those of a receiver; are there any?

3 Have not dealt with the 12 month ban on secured creditors because I assume it will be either in the chapter on "Charges" or in the chapter on "Romalpa". JM

Yes, under s 516 of ch. 9.