1961(19)

INSOLVENCY LAW REVIEW

DRAFTING SUB-COMMITTEE - Note to Muir Hunter and David Graham

PRINCIPLES AND PHILOSOPHY OF INSOLVENCY LAW

1 The Committee's early discussions centred around a Discussion Note from Kenneth (ILRC 2) a note on "Objectives and Purposes" from Peter Millett (ILRC 3) and working papers from myself and David (ILRC 5 and 6). Copies of all are attached.

2 At the second meeting both Kenneth and Muir pointed to the need to keep the EEC in mind, to line up with "cessation of payments" and periods of relation back (suspect periods) both in bankruptcy and in winding up.

3 The following decisions were made on the guiding principles set out in ILRC 6, paras 22 et seq:

(a) Paras 22 (i) and (ii) were accepted and on 22 (iii) it was suggested that some of the existing "Rules" ought to form part of the Act; also, that while it would be proper for a Minister to have power to alter things like monetary limits, he should not have power to amend the structure of the Act.

(b) Para 23 (i) was accepted.

(c) Para 23 (ii) should read "there should be an inquisitorial aspect of insolvency law with penalties", this being taken to mean an investigation to see what has gone wrong.

(d) Paras 23 (iii) and (iv) agreed, and it was felt that the word "discouraging" should be used in line 6 of para 23 (v) instead of "frightening".

(e) In connection with para 26 it was agreed that a general principle should be that insolvency law should enable and facilitate the provision of credit where necessary both for individuals and for commercial enterprises. It would be necessary also to be satisfied as to the competence and integrity of Trustees and liquidators.

4 The Committee agreed that as general principles:

(a) it was desirable to seek equality of treatment between people;

(b) relief should be provided for the debtor from harassment by his creditors after proceedings had commenced;

(c) there should be one Insolvency Act with one part applying generally, a second part applying to individuals and a third part applying to companies, with the minimum difference possible between parts 2 and 3; and

(d) it is essential that both for individuals and companies there should be a more severe form of bankruptcy or liquidation, with a more disciplined enquiry - especially some more discouraging form of bankruptcy for those who deserve it.

5 At the 5th meeting it was agreed that we wanted some form of "voluntary liquidation" for the individual who was not a wrong-doer, so as to avoid the stigma of bankruptcy.

6 At the 6th meeting we considered Muir's ILRC 20 on "Assimilation", the need to prevent the possible destruction of a company or an individual by advertisement of a petition and the possibility of a preliminary hearing on notice.

7 At the 7th meeting the Committee discussed Ritchie Penny's annex to ILRC 27 and felt that it would be easier to decide general principles after tentative conclusions had been reached on each subject.

8 At the 8th meeting it was agreed as a general principle that no individual should be made bankrupt unless he had done some evil to the community and that in other cases, insolvency should do the least harm possible to the community. This meant getting back as much as possible for the creditors as quickly as possible, not destroying any business which was of value to the community and not creating unemployment unless it was absolutely necessary.

T H TRAYLOR
2.1.79.

# INSOLVENCY LAW REVIEW COMMITTEE

THIRTYSECOND MEETING

Meeting to be held in the Conference Room, 2-14 Bunhill Row, on Tuesday 10 July 1979 at 10.00 am.

A G E N D A

1. Minutes of the meeting on 13 June.
2. Matters arising.
3. Secretary's report.
4. Bankruptcy offences (ILRC 94, paras 61-63 and Annex).
5. Immediate winding up order (ILRC 97 - attached).
6. Voluntary settlements (ILRC 87, para 28).
* 7. Fraudulent preferences (ILRC 88, and brief attached).
8. Any other business.
9. Agenda for the next meeting (19 September).

* Time permitting.

T H Traylor
Secretary

INSOLVENCY LAW REVIEW

FRAUDULENT PREFERENCES ILRC 88 - Observations by Peter Avis

Before presenting my brief comments on ILRC 88, there is one preliminary point I think I should make. It is my understanding that the Committee, having tentatively agreed in principle to recommend the abolition of the doctrine of "relation back", envisages a general "claw back" provision to enable a trustee or liquidator to investigate antecedent transactions which occurred within, say, one year prior to the insolvency, and to set aside any such transactions which were not bona fide and for full value, or otherwise specifically exempted. If I am right about this, would not this general provision remove the need for any such provisions covering the three present concepts of "relation back", "fraudulent conveyance" and "fraudulent preference"?

1. Yes - possibly Voidable Preferences would be the more acceptable title and more so if at some stage we are to isolate some categories of fraudulent preferences as criminal (para: 50 ILRC refers)

2. Proposal (ii) has merit in my view as has the Blagden Committee recommendation of a period of absolute preference for, say, 21 days with the proviso for some protection for bona fide transactions.

3. It is difficult to visualise a situation where "pressure" or something similar will not naturally arise as in a majority of cases there will be evidence of demand for repayment of the underlying debt which would naturally be produced as evidence to support the payment.

4. Yes, let it be strengthened by consideration of (2), see (2) above.

5. Yes.

6. Especially for Alfred's benefit as it is Christmas - the proprietor of the floating charge !! But more seriously, bearing in mind the changed position and responsibilities which are envisaged for a receiver under a floating charge, it would seem right that the recovered assets should fall into that charge.

7. I suggest that we consider this in detail when we discuss ILRC 101.

8. Please see (7) above.

9. We strongly support the idea of a time limit which we suggest ought not to exceed 12 months. (Please see C.25, 4.9).

# CHAPTER V

## A Philosophy for Insolvency Law

### General

5.1. What should be the aim of a modern Insolvency Law? We attached great significance to this question. If an architect is commissioned to design a building, he will require fairly precise instructions regarding its function and size, and not least, an estimate of the amount available to be spent on the construction of the project and subsequent maintenance costs. His approach to the design of a house will by no means be the same as that for a factory or civic centre. Likewise the framers of new insolvency procedures must be given some guidelines as to what it is intended to achieve and what public resources are to be earmarked for these purposes. In this chapter we accordingly discuss the principal criteria which could be adopted for this purpose.

5.2. The survey of existing procedures and their origins has left us with a clear impression that the objective which the present insolvency laws were intended by their authors to attain have by and large been forgotten. The system has become rigid in its structure and inflexible in its operation so that if any attention is ever paid to the purposes which the system was originally designed to serve, such an exercise leads to the application of principles designed to grapple with problems of insolvency arising in a different generation from our own and not necessarily suited to the conditions prevailing today or, even more so, likely to prevail in the future.

5.3.1. Insolvency is not an exact science and does not possess a set of rules valid for all times and circumstances.

We are, however, satisfied that it is possible to extract from our own accumulated experience in this country as well as elsewhere certain general principles, as opposed to hard and fast rules, to which an insolvency law should strive to give effect. We are conscious that much of the discussion below is directed to the ideal or perfect situation and that, indeed, the full implementation of some of the principles might frustrate or impede the implementation of others. In a subject which is concerned, as insolvency undoubtedly is, with the interplay of a multitude of commercial and social relationships, we believe that it is our duty to seek to resolve these conflicts by the application of practical yardsticks and that we shall accordingly be concerned in the final analysis much more with the art of what is possible.

5.5.7

5.6. The aims of a good modern insolvency law should be as follows :

Credit casualties (a) >

(a) To diagnose and treat ~~the~~ "an" insolvency situation at an early rather than a late stage in its existence;

(b) To relieve and protect the insolvent debtor, on the one hand, from the demands of his creditors and, on the other, to prevent ~~a~~ conflicts between individual creditors over the fate of the debtor, his estate and affairs; balancing the rights of the debtor and his family against that which should properly be considered as the rights of the creditors

(c) To realise the estate of the insolvent with the minimum of delay and expense;

(d) To distribute the proceeds of such realisations amongst the creditors in a fair and equitable manner;

(e) To ensure that the processes of realisation and distribution are administered in an honest and competent manner;

(f) To ascertain the causes of the insolvent's failure and, if and insofar as his conduct merits criticism, to decide what measures, if any, require to be taken against him or ~~him~~ his associates;

(g) To recognise that the effects of insolvency are not limited to the private interests of the debtor on the one hand and ~~of~~ his creditors on the other, but that society in general is ~~vitally~~ affected not only by the fact of the insolvency itself but at every stage in the outcome of the subsequent processes, and to ensure accordingly that these public interests are at all times adequately safeguarded;

(h) To devise a framework of law for the governing of insolvency matters which commands universal respect and observance, is seen to produce practical solutions to financial and commercial problems, is simple and easily understood, is free from anomalies and inconsistencies, is capable of being administered efficiently and economically and yet, is sufficiently flexible to adapt to and deal with the rapidly changing conditions of our modern world;

(i) To ensure due recognition and respect for English insolvency proceedings abroad.

Credit system.
Corporate debtor
debtor's family or dependants
threshold.