ILRC - 48th Mtg

Brief for Item 6

THE ADMINISTRATOR (Draft Chapter)

1 The first draft of this chapter was based on ILRC 99 (Report by AP) and the minutes of the 38th and 39th meetings. Comments now received from members fell into two groups: (a) suggestions for improving the draft, and (b) matters not previously considered which the member concerned feels should be decided and included in the report. I suggest that the Committee deals only with these latter points, leaving suggestions under (a) to be taken into consideration by the draftsman when preparing a final draft.

2 Comments by Peter Avis, Alfred, John Hunter, Ritchie and Edward are attached. Also attached is a redraft of the chapter by Peter Millett - he has side-lined and dotted changes of substance.

3 John Copp has commented that he feels we need to be more specific on the powers (akin perhaps to those of a receiver but the parallel is not exact) and his duties and to whom they are owed, and that we need to specify the extent to which the powers of the directors are over-ridden; if they have any remaining powers or duties, what they are.

E L REEVES
Assistant Secretary
13 November 1980

Midland Bank Limited

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P G H Avis
Assistant General Manager

E.L. Reeves, Esq,
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5 November 1980

Dear Eric.

Insolvency Law Review Committee Meeting : 48th Meeting 20th November 1980

Final Report - First Draft Chapter : "The Administrator"

I attach a copy of the first draft which I have amended in one or two places, such amendments being for your consideration and certainly not ones I would insist upon.

You will know from my letter of 12th February this year that I did have one or two comments on ILRC 99 and I was pleased to see that these were included in the Draft Chapter.

I am still a little concerned about the situation as set out in para: 16 when we refer to the debenture holder being given notice and I still consider that we should make this as water tight as possible to ensure that there is no failure on behalf of the debenture holder to receive notice. You will see I have suggested that the notice be given in the usual form which I think was a decision of Committee when they discussed this particular aspect and also I have again suggested that the debenture holder's consent should accompany the application for the order to the court.

One further aspect of the suggested draft which I feel we should perhaps consider in more detail is that which is set out in para: 23, where we say that when the order is discharged creditors revert to their respective positions at the time when the application for the order was made, but we go on to say "subject to the prior rights of anyone who in the meantime has advanced money ...". I have considerable reservations that a secured creditor reverting to his original position should be disadvantaged by subsequent lenders having priority over his security, particularly if we are recommending a twelve month ban on secured creditors realising their securities once the appointment of an administrator has been approved by the court.

Yours sincerely,

1135

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FIRST DRAFT
(22.10.80)

FINAL REPORT - CHAPTER -

THE ADMINISTRATOR

A matter to which we have given earnest attention is the need for a breathing space in certain cases when a company is approaching, or indeed already in, a possible insolvency situation. We are thinking, in particular, of cases where there is a bona fide chance of the company being returned to profitability or where at least parts of its business can be sold as a going concern.

2 Clearly, the appointment of a provisional liquidator as provided for by s.238 CA 1948 would not be suitable. Not only would such an appointment ~~usually~~ INVARIABLY be too late for what we have in mind, but it would ALSO be for the wrong objectives. What is required is a moratorium, preferably before the stage has been reached when winding-up is inevitable.

3 At present IN THE SITUATION WE ARE POSTULATING there is a choice between an informal moratorium or a scheme of arrangement under the CA 1948. The problem with the latter is time and expense; the problem with the former is that it is informal, it is not binding on creditors and it can lead to great problems in administration. What is required is a middle course which we believe could best be achieved by the appointment of an administrator.

4 The scheme which we put forward in the following paragraphs has been designed with ~~a~~ THE corporate debtor in mind. We think, however, that there may well be occasions when it would be advantageous to appoint an administrator where a sole trader or a partnership was carrying on a substantial business.

5 It has been suggested to us that it should be for the directors alone to decide that an administrator should take over, and that they should actually appoint him. We do not agree. If the company had granted a floating charge then clearly, as a condition precedent, ~~they~~ THE DIRECTORS would have to obtain the consent of the debenture-holder. If he did not agree then the whole idea of an administrator would fall down, unless provision was made for an application to the court.

6 We propose THEREFORE that the system should operate only by an application to the court, the administrator being appointed by order of the court. Not only will this enable interested parties other than the directors to make an application but it will allow for an administrator to be appointed provisionally in the first instance, with instructions to report back to the court.

7 We think that it should be permissible for an application for the appointment of an administrator to be made to the court by a creditor, the company itself, the board of directors or the Secretary of State for Trade. By a "creditor" we mean a creditor who is qualified to apply for an Insolvency Order (see para). A creditor who was not so qualified but who could demonstrate that his payment might be in jeopardy, or an individual shareholder, should be able to apply to the court for leave to present an application for the appointment of an administrator.

8 We have specifically included the directors because they have a more onerous responsibility than the members. Moreover, our recommendations for extending the fraudulent trading provisions to include a new concept of "wrongful trading" (see paras) will increase the danger to directors of incurring a personal liability. This being so,

we feel that they must have the power to do something about it and that they should have an unfettered right to apply for an administrator to be appointed.

9 We recommend that it should be expressly provided that if the directors at any time considered the company to be insolvent, in the context of s.332 CA 1948 (or its successors) ~~then~~ they ~~had~~ HAVE a duty to take immediate steps for the company to be placed in liquidation, receivership or administration. [Note by Secretary - this para might fit better elsewhere, say under "Delinquent directors" or Directors' duties"].

10 One of the occasions when the Secretary of State might consider it appropriate to apply for an administrator to be appointed would be following an inspection carried out under the provisions of s.109 CA 1967.

11 In paragraph 2 ~~above~~ we have said that the appointment of a provisional liquidator in terms of s.238 would not be suitable for the moratorium which we have in mind. This is not to say, however, that an administrator could not or should not be appointed for those occasions when, under the present law, an application would be made for the appointment of a provisional liquidator.

12 We propose that when considering an application for the appointment of a provisional liquidator, the court should have a discretion to appoint an administrator INSTEAD THE SITUATION WARRANTS IT if ~~it seems fit~~. Furthermore, although a provisional liquidator is not entitled to appear on a winding up petition, we think that the court should be able to hear the views of any administrator so appointed.

Really cannot comment + leave it for discussion with Mike having the practical experience.
But your proposal does make sense.

[Note by Secretary - Paras 11 and 12 set out the proposals in ILRC 99 as agreed by the Committee. But I wonder - cannot we perhaps suggest the abolition of a provisional liquidator under s.238? His powers and duties are very limited, are set out in the order of his appointment and are, I think, no more than we expect an administrator to have. The practice has been to appoint the OR, but the court may appoint "any fit person" and I think someone told us that this is increasingly happening. In any case, if the OR is appointed and there is a business to run, a special manager is usually appointed. So who better to combine both jobs than our administrator.]

13 The circumstances in which an application for the appointment of an administrator should be made are analagous to those pertaining when a receiver and manager is appointed. These may include special circumstances relating to the company such as the creditors' interests being in jeopardy or insolvency, or more general considerations, such as the public interest.

14 We suggest that an application should be supported by evidence showing prima facie that there was a genuine possibility of rehabilitating the company either through the injection of fresh capital, the sale of a part of the undertaking or assets, or through the forebearance of creditors. Alternatively it should be demonstrated that there was likely to be greater realisations for the benefit of the creditors or the shareholders than would be possible in a liquidation.

15 An application for the appointment of an administrator should not be advertised, but where an application is by a creditor or the Secretary of State, notice should be served on the company on the day when the application is presented or on the next following day.

16 It is anticipated that the procedure would be used primarily in cases where the company had not granted a debenture secured by a floating charge. However, if a floating charge exists, as a condition precedent, the debenture-holder must be given notice IN THE USUAL FORM of the application to the court, WHICH SHOULD BE ACCOMPANIED BY HIS CONSENT. If he has taken no action by the date of the hearing, he should lose his power to appoint a receiver or manager unless the court grants an extension. If the debenture-holder has appointed a receiver or manager, no order for the appointment of an administrator should be made, and where there is a debenture, the court should not make an order for the appointment of an administrator if the debenture-holder has given an undertaking to appoint a receiver.

17 The PROPOSED procedure is likely to be of benefit only where there is a business of substance, such ~~as~~ THAT an administration, having regard to the costs, would be likely to benefit creditors generally and save the business. The applicant will need to nominate a suitably qualified person to act as administrator which, in itself, may be effective in preventing frivolous applications. We suggest that only persons who are qualified to act as liquidators or receivers should be entitled to act as administrators. Under the Committee's proposals such persons will be members of a bonded practice (see paras).

18 As regards the possibility of frivolous or malicious applications, we think that the court should be enabled to make such an order to redress any injustice resulting there from as it thinks fit.

19 The person appointed administrator should be the applicant's nominee unless the court orders otherwise. In the case of a court appointment, we suggest that the Department of Trade should be asked to nominate as is the case when a special manager is appointed.

20 The hearing of an application should not be delayed by the necessity of first giving notice to the creditors or members of the company in time to permit them to present a contrary case. For this reason the order should, therefore, initially be provisional for the minimum period necessary to enable a statement of affairs and a plan of reconstruction to be prepared and submitted to the creditors and, if so instructed by the court, to the members.

21 When these documents have been circulated, a creditors meeting must be convened to consider the proposals (also, a meeting of members if the court has so ordered). It will be for the creditors (and members) to decide whether the administration should continue or whether the company should go into liquidation. These resolutions should be reported back to the court by the administrator. The court should then either confirm or discharge the order of his appointment. Although the company could be left as it was if the order was discharged, the court should have discretionary power to put the company immediately into some other form of insolvency proceeding.

22 If the creditors resolve that the company should go into liquidation it will be necessary for them to nominate a liquidator. In any event they should nominate a "committee" which would take effect if the court confirmed the order appointing the administrator, or if it put the company into some other form of insolvency proceeding.

23 If the order is discharged, all creditors should revert to their RESPECTIVE positions ~~as it was~~ at the time when the first application was made, subject to the prior rights of anyone who in the meantime has advanced money to enable the company to be carried on as a going concern and to the costs and expenses incurred UP TO THE TIME THE ORDER WAS DISCHARGED. The administrator, whether provisional or confirmed, should have a similar personal liability to that of a receiver.

24 Upon the appointment of an administrator all actions and proceedings and the rights of creditors to enforce security or payment should be stayed to the same extent as if a protection order has been made EXCEPT AS ~~Applied~~ PROVIDED FOR UNDER PARA 16 ABOVE. The 12 month ban ~~on~~ secured creditors realising their securities subject to an application to the court to do so, which we have recommended in paras...., should apply also in the case of an administration. ON CERTAIN (IE FIXED CHARGES)

25 ~~The rights of creditors to petition for liquidation proceedings should not be taken away by~~ The making of an order for administration. SHOULD NOT DISTURB THE RIGHTS OF CREDITORS TO PETITION FOR LIQUIDATION PROCEEDINGS However, we think the court should have power to include in the order an instruction that no insolvency petition would be given a hearing for X months, without the leave of the court.

26 We think that in the specific case of an administration it will be essential that the committee meet as soon as possible in the first instance and frequently thereafter. We suggest that the first meeting of the committee should be held within 14 days of confirmation of the Order and that there should be monthly meetings thereafter unless the committee resolve otherwise. The administrator should be under a duty to report regularly to the committee of creditors on the progress of the Scheme. To obtain his release he would have to show that the administration had been brought to an end and that the company was solvent, or that it could not be carried on because of the company's insolvency. This release should only be given under the authority of the court.

[Insert a cross-reference to our proposals about "committees"].

I would prefer A below

[Note by Secretary. The Accountants' Panel included in ILRC 99 a sentence to the effect that it should not be for the court to formally agree a Scheme. This would seem to be in line with equating an administration to a receivership, which is probably what we want. If so, perhaps we should insert the following:-

A "If the appointment of the administrator is confirmed, the administration should then continue to all intents as if it were a receivership (see our recommendations about receiverships in Chapter -)"

2 However, I should point out that the City of London Solicitors took a different view and if we followed their advice we would need to insert the following paragraph:-

B "The administrator should negotiate with the committee (of creditors) with a view to finalising the scheme. The scheme should then be submitted to the court for confirmation and, if confirmed, will be binding to all creditors, both secured and unsecured, on the company and on any party who has undertaken to provide funds or facilities on the face of which the creditors have accepted the scheme."]

27 In contrast to the position when AT PRESENT a provisional liquidator is appointed, the directors' powers should not cease when an administrator is appointed. They should remain in office, but with their powers curtailed to the same extent as is the case upon the appointment of a receiver and manager of the whole of the property and undertaking of the company.

28 If at any time the administrator feels that there is no prospect of rehabilitation and that the company should go into some form of liquidation he should inform the committee and any debenture-holder, and report to the court, at the same time advising the court on the form of insolvency proceeding which should ensue. This could be either:

(a) the holding of meetings (as under s.293 CA 1948) with a view to resolving upon a liquidation of assets, or

(b) by meetings of creditors and contributories convened by the Official Receiver in the usual way.

/ May need a cross-reference here /.

29 The administration should continue until either:

(a) a resolution has been passed for a liquidation of assets, or

(b) the court has made an alternative order.

28th October, 1980.

Comments on the draft Chapter for
the Final Report - The Administrator.

I have read this Chapter with great interest, as it has reminded me of matters which were discussed long ago, and which tend to go from one's mind.

I do not want to involve myself in any form of competition with the draughtsmen, but I wonder if the Chapter could not have a different opening, which would combine the proposed first paragraph with the first sentence of paragraph 16.

I set out below, at any rate tentatively, what I have in mind:-

"During the course of our deliberations, it has become clear to us that present Insolvency procedures do not provide a remedy for those cases where a Company might be saved from Liquidation, and we have in mind, particularly, situations where the Company has not granted a debenture secured by a floating charge..

"In cases of this nature, even where there may be a bona fide chance of the Company being returned to profitability, there is no alternative but for a winding up, an informal moratorium or a scheme of arrangement under the Companies' Act, 1948, all of which may often be unfair to the Company, its creditors, and, not least, to its employees.

"We therefore recommend the appointment of an Administrator, who will operate in circumstances and under procedures which we now set out....."

In regard to the note by the Secretary, I on page 8 prefer the recommendation of the Accountants' Panel in I.L.R.C. 99 to the suggestion of the City of London Solicitors; and I am in sympathy with the suggestion by the Secretary in his note under paragraph 12, that we might well abolish the provisional Liquidator under Section 238.

On a general point, I wonder if it is necessary in our Report to deal with the procedure in so much detail? I have an open mind about this but, if throughout our Report we do go into so much detail, may we not run the danger of those reading the Report losing the thrust of our proposals, which are, in many cases, radical?

---oOo---

Alfred Goldman

FINAL REPORT - DRAFT CHAPTER -
THE ADMINISTRATOR

Comments by John M. Hunter

Paragraph 1.

Lines 2 and 3. I would prefer to re-phrase to read - "... when a company is approaching a possible insolvency situation or indeed is already in such a situation...".

Paragraph 7.

Would an application by the company itself have to be authorised by a resolution at a general meeting, as distinct from the proposed application by the board of directors? Should not any one director have the right to apply, at personal risk of costs of course if he is not successful?

Paragraph 9.

I agree with the Secretary that this would be better placed elsewhere in the report. Textually, I would prefer "consider" in line 2 and "have had" in line 3.

Paragraph 12.

In line 3 I would prefer "thinks" for "seems".

Paragraph 17.

Suggest that the first sentence should read - "the procedure is likely to be of benefit only where there is a business of substance and where the appointment of an administrator would, having regard to the costs, be likely to benefit creditors generally and save the business."

Paragraph 21.

I suggest substituting "should" for "must" in line 2 and adding, in line 4, after "members" the words "if a meeting of members has been ordered".

Paragraph 24.

In line 3, substitute "had" for "has".

I have raised the question of the proposed embargo on realisations by secured creditors in my comments on ILRC's 141 and 144. In any case, it was

/only

only to apply in an insolvent situation and to assets necessary for the running of the business.

Paragraph 26.

Suggest deletion of "the specific case of" in line 1.

Paragraph 28.

As regards (b), the meetings mentioned can only follow after a winding-up order, so should the reference not be to a winding up by the court?

Paragraph 29.

In (b) I suggest substituting for "an alternative order" the words "an order discharging the administration order or making a winding-up order".

7 November 1980.

ILRC 48TH MEETING

The Administrator

Comments by Ritchie Penny

1 If our proposals are to meet with approval we must give the answers to all the obvious questions that our critics will ask. Our proposal is novel and likely to be received with some scepticism, so we must spell it out making the best use we can of existing law.

2 I think we must first set out what we hope to achieve and thereby define the purpose of the appointment of the Administrator.

3 On reading the draft it does seem as if we are a little uncertain, but putting together the various aspects set out in the chapter we seem to seek to do the following:-

(a) Ascertain whether a company of doubtful solvency can be restored to profitability.

(b) Make proposals for the most profitable realisation of assets for the benefit of creditors and contributories.

(c) Consider the re-organisation of the company and its management to restore profitability.

(d) Make recommendations as to the future of the company.

For this purpose the appointment of an Administrator gives a breathing space for the company and various stays of proceedings are provided.

4 We next need to consider how the Administrator will achieve these ends and in doing so we have to decide what sort of an animal we are creating. It seemed to me originally that the Administrator was a temporary appointment lasting no more than say six months; but para 21 appears to imply that the Administrator may continue in office indefinitely. Is he really a Liquidator or is he merely a temporary Receiver and Manager? Should he be given the powers of both and more particularly, is it contemplated that he will realise assets before he reports to the creditors or will he just "hold the line" by keeping the business going and the assets intact? I had assumed the latter was the case. ILRC 99 (para 2) appears to contemplate a temporary administration for the submission of proposals to creditors for re-contruction or liquidation. If he proposes a re-contruction he presumably will carry it out and when this has been completed he would be discharged and the company handed back to the contributories to elect a new Board of Directors. During re-contruction he would probably require an extention of his powers which the Court must grant.

5 The powers and duties of the Administrator must be more clearly defined as his appointment will have an immediate effect on the company's operations, and the rights of pre-Administration and post Adminstration creditors must be decided and set out. We have provided for cash provided to the Administrator to be given priority and resumably he will deal with all save the bank or person financing him, on a strictly cash basis as does a Receiver. I suggest therefore that he be given the right to continue trading, but not to realise substantial assets without the consent of the creditors committee. Anyone dealing with him in good faith would obtain a good title to any property (including goods) sold.

6 The status of employees would presumably remain unchanged and he would be paying them as employees of the company. In this respect he would be different from a Receiver.

7 Once the nature of the animal we are creating has been settled we can then more readily consider how he should be appointed, controlled and discharged. The position of the Court in all this is vital and I suggest we have to make up our minds who is to be boss - the Court or the creditors.

8 First, dealing with the original appointment; the Court has to be satisfied before depriving the Board of Directors of control that the situation of the company warrants it. I suggest the following as grounds for appointment of an Administrator:-

"(a) the company is insolvent or in danger of becoming so or

(b) the company is not being properly managed and as a result the creditors' and/or the contributories' interests are in jeopardy,

and that there is a genuine possibility of rehabilitating the company.. etc, etc, as in para 14.

9 Before making the appointment the Court would require a written consent and before giving his consent the Administrator would normally require the applicant to underwrite his fees and expenses.

10 Secondly, the control of the Court during the Administration appears to be limited to making decisions on any matters referred to it.

11 Thirdly, the Court is obliged to make a decision on what sort of an order is appropriate at the termination of the Administration. It can then either:

(a) approve a scheme of re-construction recommended by the Administrator and approved by the creditors and for contributories,

(b) make an order for the company to be subject to an Insolvency Order which could be striking-off Liquidation of Assets or Compulsory Winding-up, or

(c) discharge the Administrator and order that the Board of Directors resume control of the company, or that a new Board be elected for that purpose.

12 The binding of the Administration is an important judicial act but the Court could have no responsibility for the Administrator's actions and he would be personally responsible as provided in para 23. The Court would normally accept the recommendations of the creditor's committee that the Administrator be discharged. It is presumed that the Administrator will not be responsible to the Court for making his report as provided in paras 21 and 28.

COMMENTS BY EDWARD WALKER-ARNOTT

THE ADMINISTRATOR

Paragraph 12

I do not think that we can abolish the provisional Liquidator under Section 238. I agree that in many circumstances the appointment of an Administrator would fit the bill. However, whenever a petition is presented and it is plain that a winding up must follow and there are good reasons for not leaving the conduct of the affairs of the company in the hands of the directors, a provisional Liquidator will be needed.

Paragraphs 13 and 14

I think we should be more precise about stating the grounds justifying the appointment of an Administrator.

As I understand it, the Court shall not appoint an Administrator unless:-

Both:-

(i) the Court is satisfied:-

(a) that there is jeopardy to the general body of creditors, or particular creditors owed substantial sums in relation to the overall liabilities of the company;

(b) the company is insolvent (within the meaning of the new test - however formulated); or

(c) the public interest requires an appointment of an Administrator;

and

(ii) the Court is satisfied:-

either:-

(a) that there is a reasonable possibility of a scheme for the reconstruction or reorganisation of the company (whether with or without other companies) becoming effective; or

(b) the interests of creditors or shareholders would be better served by an administration rather than a liquidation.

Paragraph 16

If the debenture holder may be denied the power to appoint a Receiver or Manager once the Court has appointed an Administrator, it will be necessary for there to be implied by statute in all floating charges a power to appoint a Receiver on any application being made for the appointment of an Administrator. Otherwise, a debenture holder's power to appoint may not actually have arisen before it is taken away.

Paragraph 18

I think we should be more specific about the sort of Orders the Court can make where the application was frivolous or malicious. In the first place, there could be a Penal Order as regards costs. In the second place, the person who consented to be nominated as prospective Administrator could be removed from the categories of persons qualified to act as a Receiver or Liquidator or Administrator.

Paragraph 19

There is a reference here to "the case of a Court appointment".

Does this mean that it is envisaged that the Court can appoint an Administrator of its own motion when hearing a case involving a company, even if no one has applied for the appointment of an Administrator?

Paragraph 21

We have not really tackled the basic issue as to whether or not the Court plays any part in supervising the placing of the scheme of reconstruction or reorganisation, or the Administrators proposals before the meeting of creditors or members.

In formal schemes of arrangement under Section 206 the Court has a considerable role in vetting the documents which go out to the shareholders or creditors, checking that the right class meetings of creditors or shareholders are convened, checking the accuracy of the basic facts about the history of the company, checking the conduct of the convening and holding of the meeting, and so on.

I would suggest that we make it plain that we do not envisage the Court playing any role at all, other than receiving a report from the provisional Administrator. The quality and accuracy of the information put to the creditors and shareholders, the selection of correct classes, the convening and holding of the meetings, should be all a matter for the Administrator and his advisers. The Administrator will be putting his professional reputation at risk. In the event of anything being wrong, a creditor or shareholder can apply to the Court at the hearing for the making of the provisional appointment final, and the professional Administrator will be at risk of receiving a public rebuke for failing to discharge his responsibilities. (And in additon, if there is to be a facility for removals from the list of qualified Receivers, Liquidators and Administrator, by order of the Court, there can be the sanction of such a removal in an extreme case.)

Paragraph 24

I take it that the stay operates from the provisional appointment - not simply the final.

But in addition, should there not be some protection between application and provisional appointment: as there is in winding up between petition and order, under Section 226. It is true that the application is not advertised but where an application is made by some creditors (perhaps contrary to the wishes of others), the news will be out and an avalanche of enforcement proceedings will follow.

Paragraph 25

I think there should be some provision for argument in Court about the good sense or no of having an Administration between the provisional appointment and the consideration at the final hearing of the reconstruction proposals, the views of creditors and shareholders expressed at meetings, and so on. After all, a company may obtain an appointment of an Administrator on its application and the creditors may regard this as unsatisfactory. They will not want the company's funds to be spent on the preparation of a large and complicated scheme if they are determined to have a liquidation. Should they have a power to apply to dismiss the provisional appointment of the Administrator, or should they simply be left with their power to petition for winding up between provisional appointment of an Administrator and final confirmation?

There is a danger of a battle between contesting groups of creditors and a counting of heads and quantum of debts before the rehabilitation scheme can even be put to the general body of creditors.

Paragraph 26

I disagree with the Accountants Panel and support the City

of London Solicitors. Whether or not the Court should formally bless the rehabilitation scheme or the Administrator's proposals is a fundamental issue. In my view, as in many cases the confirmation of the appointment will be linked with some variation in the rights of creditors, it is crucial that a Court blessing is given and the Court Order made. However, see my comments on paragraph 21 above. The necessity for a Court Order at the confirmation stage should not require the Court to be involved in the circularising of creditors and shareholders. Here, the protection is that a man anxious to guard his professional reputation is handling the matter.

FINAL REPORT - CHAPTER - SECOND DRAFT

(PETER MILLETT)

THE ADMINISTRATOR

1. Elsewhere in this Report we have made a number of criticisms of the present law relating to floating charges, and we have put forward various proposals for reform. There is, however, one ~~e~~a spect of the floating charge which we believe to have been of outstanding value to the general public; we refer to the power to appoint a receiver and manager of the whole property and undertaking of the company which is enjoyed by the holder of any well-drawn floating charge, but by no other creditor. Such receivers and managers are normally given extensive powers to manage and carry on the business of the company. In many cases, they have been able to restore an ailing enterprise to profitability, and return it to its former owners. In others, they have been able to dispose of the whole or part of the business as a going concern. In either case, the preservation of the profitable parts of the enterprise has been of advantage to the employees, the commercial community, and the general public.

2. None of this is possible in the absence of a floating charge. Where there is no such charge,

the choice lies between an informal moratorium or a formal scheme of arrangement under the CA 1948. Neither is wholly satisfactory. The latter is expensive and time-consuming; the former is informal, is not binding on those creditors who do not assent, and can lead to problems in practice. Where neither course is practical, the directors of a company which is or appears to be insolvent have, in practice, no option but to cease trading. We are satisfied that, paradoxically, but in a significant number of cases, companies have been forced into liquidation, and potentially viable businesses capable of being rescued have been closed down, for want of a floating charge.

3. Accordingly, we propose that in all cases, and whether or not there is a floating charge in existence, provision should be made to enable an Administrator to be appointed whenever the circumstances justify such a course, with all the powers normally conferred upon a receiver appointed under a floating charge, including power to carry on the business of the company and to borrow for that purpose.

4. The proposals which we put forward in the following paragraphs have been designed primarily

with the corporate debtor in mind. We do not, however, intend that they should be so limited. We consider that the appointment of an Administrator may well be advantageous where a substantial business is carried on by a sole trader or in partnership. For simplicity, however, we shall refer to the debtor as "the company".

5. We propose that the power to appoint an Administrator should be vested in the Court, and should be exercisable only by an order of the Court made upon the application of an interested party. We consider that the application should be capable of being made by any creditor, by the company itself, by its board of directors (but not by individual directors), or by the Secretary of State for Trade. By a "creditor" we mean a creditor, whether secured or unsecured, who is qualified to apply for an Insolvency Order (see paragraph). A creditor who is not so qualified or in a suitable case an individual shareholder, who can satisfy the Court that the assets are in jeopardy, should have the right to apply to the Court for leave to make an application for the appointment of an Administrator.

6. The right of the directors to apply for the appointment of an Administrator is of fundamental

importance. Our proposals to replace the present provisions relating to fraudulent trading by the new concept of "wrongful trading" (see paragraphs :) will expose the directors to an increased risk of incurring personal liability if they allow their company to continue to trade while insolvent. Their proper course, if our recommendations are accepted, will be to apply for the appointment of an Administator; and it is important that their right to do so should be unfettered. Indeed, we have recommended elsewhere (see paragraph :) that the legislation should expressly provide that, if the directors at any time consider the company to be insolvent, they should have a duty to take immediate steps for the company to be placed in liquidation, receivership or administration.

7. We propose that an application for the appointment of an Administrator should not be advertised, but where the application is made by a creditor or by the Secretary of State for Trade, notice of the application should be served on the Company.

8. It is expected that the new procedure will be used primarily in cases where the company has not granted a debenture secured by a floating

charge, although it is not intended to be limited to such cases. Where a floating charge exists, however, notice of the application should be served upon the debenture-holder. If the debenture-holder has already appointed a receiver, or if he does so on receipt of notice of the application, no order for the appointment of an Administrator should normally be made; and where there is a debenture, the Court should not normally make an order for the appointment of an Administrator if the debenture-holder gives an undertaking forthwith to appoint a receiver. Once an Administrator is appointed, however, then until he is discharged by a further order of the Court, the power to appoint a receiver should cease to be exercisable by the debenture-holder.

9. In urgent cases, the Court should have power to appoint a provisional Administrator on the ex parte application of a creditor or of the Secretary of State for Trade, but such an appointment would be strictly limited in duration unless confirmed subsequently by the Court. The appointment ex parte of a provisional Administrator would not cause the debenture-holder's powers to lapse. The new right to apply ex parte for the appointment of a provisional Administrator will supersede the present right to apply for the appointment of a

provisional liquidator, which should be repealed.

10. The Court should have power to appoint an Administrator whenever it considers it expedient to do so. The circumstances in which it will be expedient to appoint an Administrator will be almost infinitely various, and we consider that it would be unwise for them to be prescribed in the legislation. In practice, they will often be found to be closely similar to the circumstances which lead debenture-holders to appoint receivers under the present law.

11. The application should be supported by evidence showing the grounds upon which the appointment is sought. This will normally consist of evidence that the company is or appears to be insolvent, togetner with evidence that there is a real prospect of rehabilitating the company or preserving all or part of its business as a going concern, whether by the injection of fresh capital, the sale of all or part of its undertaking, the forbearance of creditors, or otherwise. Alternatively, it would be sufficient to demonstrate that the appointment of an Administrator would be likely to achieve greater realisations for the benefit of the creditors or shareholders than would be expected to be achieved by a liquidation.

12. The new procedure is likely to be beneficial only in cases where there is a business of sufficient substance to justify the expense of an administration, and ~~where~~ in which there is a real prospect of returning to profitability or selling as a going concern. It will be necessary for the applicant to nominate a suitably qualified person to act as Administrator, and this in itself will tend to discourage frivolous or vexatious applications. We propose that only persons who are qualified to act as liquidators or receivers, and who will be members of a bonded practice (see paragraphs :) should be qualified to be appointed to act as Administrators.

13. In order further to discourage frivolous or vexatious applications, we recommend that the Court should have ~~full~~ power, not only to award costs against an unsuccessful applicant, but to make such orders as it thinks fit with a view to redressing any injustice which mayhave resulted.

14. The Court should normally appoint as Administrator the person nominated by the Applicant, unless there is special reason to the contrary. Where the applicant's nominee is rejected, the Court should have power to appoint any other suitably

qualified person, with power if thought fit to invite the Secretary of State to nominate the person to be appointed.

15. The initial appointment should require the Administrator to prepare and submit to the creditors and, if the Court so ordered, the members, a statement of affairs and outline proposals for the company's rehabilitation. When these documents have been circulated, a creditors' meeting (and a members' meeting if the Court has so ordered) should be convened to consider the Administrator's proposals. It will be for the creditors (and where applicable the members) to decide whether the administration should continue or whether the company should go into liquidation. Their resolutions should be reported back to the Court by the Administrator. The Court may then either confirm or discharge his appointment and, if discharging it, either return the company to its former status or order it to be placed immediately into one of the forms of insolvency proceedings.

16. If the creditors resolve that the company should be placed in liquidation, it will be necessary for them to nominate a liquidator. In any event, they should nominate a committee which will take

office if the Court confirms the order appointing the Administrator or directs that the company be placed in some form of insolvency proceedings.

17. If the order is discharged, all creditors should revert to their position as it was when the original application was made, subject to the prior rights of anyone who in the meantime has advanced money to the Administrator to enable the company's business to be carried on as a going concern. The Administator, including a provisional Administrator, should be personally liable for all debts and other obligations incurred by him, but should be entitled to be indemnified out of the assets of the company. The costs of the administration, and the Administrator's indemnity, should result in priority to all other debts, and if the company should be placed in any form of liquidation or receivership within 3 months after the Administator's discharge, should be treated as costs and expenses of the liquidation or receivership.

18. Upon the appointment of an Administrator, all actions and proceedings, and the rights of creditors to enforce security or payment or to levy execution, should be stayed to the same extent as if a protection order had been made. The 12-month

prohibition on secured creditors realising their security except with the leave of the Court, which we have recommended when a receiver is appointed under a floating charge (see paragraphs :), should apply once an Administrator has been appointed.

19. The rights of creditors to petition for liquidation proceedings should not be taken away altogether by the appointment of an Administrator. Save in exceptional circumstances, however, the Court should include in the order appointing an Administrator a direction that no insolvency petition should be presented during the period of administration without the leave of the Court. Where such a direction is included, we propose that the period of administration should not be included in the computation of the period next before the commencement of the insolvency for the purpose of challenging antecedent transactions (see paragraphs :).

20. It will be particularly desirable in the case of an administration that the committee should meet as soon as possible in the first instance and regularly thereafter. We recommend that the first meeting of the committee should be held within 14 days after the order of the Court confirming the appointment of the Administrator, and that there

should be monthly meetings thereafter unless the Committee resolves otherwise. The Administrator should be under a duty to report regularly to the Committee on the progress of the scheme. The Administrator should have full power to implement the scheme or to depart from it, to borrow money, to carry on the company's business, and to deal with and dispose of the company's assets, without any further order of the Court. Once confirmed, the administration would thus continue to all intents and purposes as if it were a receivership, while the functions, powers and duties of the Committee would correspond with those of the Committee's in other insolvency proceedings (see paragraphs :).

21. The powers of the directors will not cease on the appointment of an Administrator. The directors will continue in office, but with their powers curtailed to the same extent as is the case under the present law upon the appointment of a receiver and manager of the whole of the property and undertaking of the company.

22. If at any time the Administrator should reach the conclusion that there is no prospect of rehabilitation and that the company should be placed in some form of liquidation, he should so

inform the committee and any debenture-holder, and report his conclusion to the Court. He should include in his report to the Court a recommendation on the form of insolvency proceeding which should ensue. This will be either:-

[Note by Secretary - I think this is in error]

(a) the holding of the appropriate meetings for the purpose of resolving upon a liquidation of assets (see paragraphs :); or

(b) an Order for the compulsory winding-up of the company (see paragraphs :).

23. If at any time the Administrator should be satisfied that the company is solvent and that the continuation of the administration is no longer required, he should similarly inform the Committee and any debenture-holder, and report to the Court with a recommendation that the administration be brought to an end and that he be discharged.

24. An administration, once confirmed, should continue until either:-

(a) a resolution has been passed for a liquidation of assets; or

(b) the Court has made an alternative order.