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INSOLVENCY LAW REVIEW COMMITTEE

ELVENTH MEETING

Meeting to be held in Meeting Room No 4 (Aldermanbury Entrance) Guildhall, London, EC2 on Monday, 12 December 1977 at 10.00 a.m.

AGENDA

1. Minutes of the meeting on 17 November.
2. Matters arising
3. Secretary's report
4. Oral evidence - Progress report
5. Report of sub-committee on 'Acts of Insolvency'
6. Majority rule by creditors in insolvency (ILRC 41)
7. * Deeds of Arrangement (ILRC 51)
8. Agenda for the next meeting
9. Confirm dates of next meetings

*Time permitting

T H TRAYLOR
Secretary

29 November 1977

11th Mtg
12.12.77

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INSOLVENCY LAW REVIEW

Minutes of the Eleventh Meeting of the Review Committee on 12 December 1977

Present:

K R Cork (Chairman)
P G H Avis
G Drain
A I F Goldman
J M Hunter
M V S Hunter
D McNab
P J Millett
T R Penny
C A Taylor
E I Walker-Arnott
T H Traylor (Secretary)
E L Reeves (Assistant Secretary)

In Attendance:

J R Endersby
D Graham
R B Jack
G A Weiss

1. The Committee met at 10.00 a.m. at the Guildhall. The minutes of the tenth meeting held on 17 November 1977 were discussed. The reference in para 2 to the "Institute of Chartered Accountants" should read "Institute of Chartered Accountants in England and Wales". The minutes as amended were agreed and signed.

MATTERS ARISING

2. The Secretary said that GKN had now replied (para 6 of the minutes of the tenth meeting) and copies of the reply would be sent to members. Also in para 6 there had been a request for a copy of a 'first report' to creditors from a voluntary liquidator; W H Cork, Gully & Co had now provided an example.

SECRETARY'S REPORT

3. The Secretary reported as follows:-

(a) Mr Copp had sent apologies for absence,

(b) papers circulated since the last meeting had been ILRC 54, ILRC 56 and a personal note from Mr Copp,

(c) papers put before the Committee at its present meeting were

(i) the 'first report' mentioned in para 2

(ii) the White Paper on the Conduct of Company Directors (press releases relating to this would be sent to members) and

(iii) a progress report on oral evidence.

4. With regard to Mr Copp's note the Chairman thought that this contained matters which should be looked at. He suggested that the Secretary should draft a reply.

5. Mr McNab asked whether there was anything in the White Paper with which the committee need concern itself. The Chairman thought there was. There were many things which could not be dealt with by the liquidator and there was nobody there to put things right commercially. A false balance sheet could be used to get money from a bank to the benefit of the company; a false report or balance sheet could induce shareholders to buy or sell, but the company itself did not suffer; insider dealing could have an effect on shareholders and might not be picked up by any other organisation. The Committee might have to consider whether or not the liquidator could act as an ombudsman for the company taking action on behalf of parties who had been injured prior to the liquidation.

ORAL EVIDENCE

6. The Committee had before it the Progress Report on Oral Evidence. After discussion the following conclusions were reached:-

(a) the first meeting to take oral evidence would be held on Thursday 12 January 1978; there could then be a general discussion at the meeting on 13 January,

(b) proceedings should start with a half hour's discussion (10.15 to 10.45) to decide upon matters for discussion, initial questions, etc.

(c) consultees would be seen between 10.45 and 12.45, and from 2.30 p.m.,

(d) consultees would normally be given a maximum of two hours and would not usually be seen again,

(e) people should not be seen before they had submitted written evidence,

(f) on 12 January representatives of the Consumer Protection Department of the South Yorkshire County Council would be seen during the forenoon, and a delegation from the City of London Solicitors' Company during the afternoon,

(g) normally, not more than two delegations would be seen in one day, but Mr Farrar was understood to be leaving for New Zealand shortly and it might be possible to see him also on 12 January /this has in fact not proved to be possible/.

(h) the British Bankers Association and British Insurance Association should preferably be seen on the same day; this should not, however, be before the March hearing,

(i) while Committee meetings would continue to be held in Bunhill Row, oral evidence would be taken, if possible, at the Guildhall,

(j) oral evidence taken (together with its preceding written evidence) should if possible (like the Wilson Committee) be published as the Committee went along, and

(k) there should be a press release saying that the Committee were starting to hear oral evidence and the press should be kept informed when consultees were to be seen.

7. It was felt that it would be necessary to hear oral evidence from Inland Revenue, Customs and Excise, and probably Department of Employment. It was agreed, however, that this should be discussed further at the next meeting.

8. It was suggested that it might be desirable to see some individual firms of solicitors who regularly petition. Members were asked to let the Secretary know if they felt that any other body should be added to the list of people who should be seen.

ACTS OF INSOLVENCY

9. Mr Muir Hunter introduced the report of the sub-committee on Acts of Insolvency (ILRC 54), outlining in more detail the sub-committee's thinking in formulating the propositions put in para 10.

10. Mr John Hunter suggested that we should adopt the Canadian view and abandon acts of bankruptcy. He would hope to arrive at a situation where the petitioning creditor should be entitled to a receiving order if he could show with or without the aid of presumptions that the debtor had ceased to pay his debts generally. Certainty was important but this could be achieved by presumptions.

11. Mr Goldman agreed broadly with this. The US Bankruptcy Commission also wished to do away with acts of bankruptcy. In fact he thought that only one was generally used here - non-compliance with a bankruptcy notice.

12. Mr Graham thought that the terminology should be reconsidered - 'acts' were in fact often not 'acts' but 'omissions'. Acts of bankruptcy were nothing more than indications of insolvency; insolvency should be defined and he thought that there should be a new concept which would deal with the situation of insolvency on a more comprehensive basis.

Defaults

13. Mr Taylor said that although he had taken a different approach, if the committee agreed that certain preconditions had to be established before one was entitled to a Court order then he was quite content. Traders and creditors must have a measure of certainty. He pointed out, while the majority of companies in liquidation were traders, only just over half the bankrupts were traders and a fair proportion of bankrupts had only one or two creditors. Insolvency in a bankruptcy was not quite as apt as some believed. He would prefer to hear evidence first from parties who use the law as it is to find out what they think about it.

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14. Mr Millett said that it seemed to him that the Court could declare a person bankrupt if it was proved to the satisfaction of the Court that the defendant was unable to pay his debts as they fall due. This was a diffuse test and there ought to be certain presumptions, but he doubted whether more than one was really needed, namely, that the petitioner had served a notice on the defendant (perhaps by substituted service) calling upon him to pay the debt within a certain time and the defendant had failed to pay.

B/R only.

15. Mr Walker-Arnott supported simple definitions of a state or condition with presumptions, some of which could introduce complete certainty by being irrebuttable. He did not think a simple notice about paying debts as they fall due was enough; in the commercial area one had to allow for the long-term insolvency, the business which had enough cash to pay now but could be proven irrefutably to have an insolvency problem because it could not collect over a period enough assets to meet all its liabilities.

16. The Chairman referred to the position which would arise when the EEC bankruptcy law came into effect; if petitions were allowed to be founded on something slightly vague, there could be a relation-back problem. There were circumstances where it ought to be possible to go to the Courts to get something stopped quickly - companies might transfer assets to subsidiaries overseas, and in the case of companies having the same directors but not the same shareholdings the whole of the profits of one company might be used to support another company.

Ais' note

17. Mr Muir Hunter suggested that para 340 of the Cork MK I Report (reprinted in Schedule A of ILRC 54) seemed to crystallize what had been put forward and referred to the illustrative acts or events in the paragraph in brackets.

18. Mr Millett questioned why these were needed, since insolvency was a condition of being unable to pay one's debts as they fall due. Mr Graham however felt that the Act should specify circumstances. It would aid practitioners in giving

advice to know the circumstances in which the Court might make an order.

19. Mr McNab said that if para 340 was adopted it would be necessary to provide for the debtor filing his own petition.

20. There was further discussion on whether or not presumptions should be irrebuttable. Mr Muir Hunter said that there is a formula that a certain thing is prima facie evidence until the contrary is proved; he felt that this might meet the problem.

21. The Committee accepted in principle that para 340 be used but the presumptions or preconditions (in the brackets) needed to be detailed more fully, and agreed that the matter should be referred back to the sub-committee.

22. The question of whether the assets of a company or individual could be used to get rid of a petitioning creditor was raised. Mr Muir Hunter said that the sub-committee envisaged a discretion for the Court to allow the debtor's assets to be used to pay off the process. He would produce a formula for the next sub-committee meeting.

ILRC 5?

ADVERTISEMENT OF A BANKRUPTCY PETITION

23. It was agreed that the question as to whether or not a bankruptcy petition should be advertised would be discussed at the next meeting. The question of cost of advertising was raised; Mr Goldman indicated that in the case of a winding-up it was £90-£100. bankruptcy the same

MAJORITY RULE BY CREDITORS

24. Mr Muir Hunter introduced ILRC 41. Para 4 raised a question already essentially decided - that nobody is going to have a receiving order or winding-up order "ex debito justitiae" in future except perhaps in a case which permits of no argument. Para 4 also refers to advertisement. The meeting was adjourned at this point for members to meet the Inspector General.

FUTURE MEETINGS

25. The next meeting will be held on Friday, 13 January 1978. Oral evidence will be heard on the preceding day, Thursday, 12 January.