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INSOLVENCY LAW REVIEW COMMITTEE

TWELFTH MEETING

Meeting to be held in the Conference Room 2-14 Bunhill Row on Friday, 13 January 1978 at 10.00 a.m.

AGENDA

1. Minutes of the meeting on 12 December 1977
2. Matters arising
3. Secretary's report
4. Oral evidence -progress report
5. Advertisement of bankruptcy petitions ?
6. Majority rule by creditors in insolvency (ILRC 41)
7. Administration Orders (ILRC 45 - Third edition) ✓
8. * Deeds of Arrangement (ILRC 51 and 56)
9. * Liquidator - powers and duties (ILRC 55) ✓
10. Agenda for the next meeting
11. Confirm dates of next meetings.

* Time permitting

T H TRAYLOR
Secretary
21 December 1977

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INSOLVENCY LAW REVIEW

Minutes of the Twelfth Meeting of the
Review Committee on 13 January 1978

Present:

K R Cork (Chairman)
PGH Avis
J S Copp
G Drain
AIF Goldman
J M Hunter
MVS Hunter
D McNab
P J Millett
T R Penny
C A Taylor
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. The minutes of the eleventh meeting held on 12 December 1977 were agreed and signed.

SECRETARY'S REPORT

2. The Secretary reported as follows:-

(a) Mr Walker-Arnott is on 4 months' sabbatical leave and out of the country,

(b) papers circulated since the last meeting had been ILRC 45 (third edition) and 55; press notices dealing with the conduct of company directors, company law reform and insider dealing; a reply from GKN amplifying points made in their submission; and copies of further submissions received to date (C71-87),

(c) a press notice about oral evidence had been circulated at the meeting which had heard oral evidence on the 12th January.

ORAL EVIDENCE

3. The Committee discussed briefly the evidence which they had heard the previous day.

4. Members felt that the evidence given in the morning by the representatives of South Yorkshire County Council had been stimulating and that many interesting points had been raised. Some doubt was expressed as to whether or not many of them came within the Committee's terms of reference. It was agreed that where such matters came up and the Committee felt them to be important, they should be referred to in the report. Mr Graham drew attention to a PEP pamphlet published in September 1968 "The Control of Company Fraud" (by Tom Hadden) which had dealt with all the points mentioned by Mr Smith and suggested that the statistics in the pamphlet might be up-dated.

5. The City of London Solicitors' Company in the afternoon had presented some interesting views but it was suggested that they had not added much to their written evidence and had not supported their views with reasons. It was agreed that in future witnesses would be asked not to repeat their written evidence but would be asked if there was anything which they would like to add, before the Committee started with their questions. The Secretary added that consultees often asked which areas of the written evidence the Committee were particularly interested in. It was agreed that when possihle they would be provided in advance with the preliminary questions which the Committee would wish to put.

6. The Secretary was instructed to produce lists of the points which had come up in the morning and afternoon sessions, to ensure that these were discussed at the appropriate time.

7. It was suggested that the morning session had indicated the need for more evidence about consumer debtors, possibly from Citizens Advice Bureaux, in which case the appropriate body to approach would probably be the National Council of Social Service. It was also felt that evidence about small bankruptcies from solicitors in poorer industrial and agricultral areas should be sought. The Secretary was instructed to ask the Law Society for the addresses of local law societies in the North with this end in view. Appropriate consultees would then be sent the Committee's views on small bankruptcies when available abd asked for the comments.

8. The Committee then considered "Oral Evidence - Progress Report No 2". The Secretary said that on 7 February the Committee would be seeing the City of London Solicitors' Company again in the morning and the Association of British Chambers of Commerce in the afternoon. On 7 March the Committee would see the British Bankers Association and the British Insurance Association (Investment Protection Committee) - the British Insurance Association would probably be seen in April. The Chairman felt that the IPC should be asked for their ideas about insolvency as shareholders; the BIA's views would be concerned with insolvency of insurance companies. The Secretary went on to say that in April there would also be a combined delegation from the Federation of Associations of Specialists and Sub-contractors, the Committee of Associations of Specialist Engineering Contractors and the National Federation of Building Trade Employers; Mr Graham referred to his opinion in the British Eagle case and the Secretary asked to be provided with a copy for circulation. In May the Committee would probably see the Institution of Professional Civil Servants (representing the staff of the Insolvency Service)

and the TUC. The position regarding other individual consultees was explained.

9. Mr Taylor felt that it would be necessary to hear separately the views of the Inland Revenue, Customs & Excise and possible the Treasury. It was suggested that the Chancery Judges and the High Court Registrars should be invited to give oral evidence and it was agreed that the Chairman should write to the Lord Chancellor.

10. Mr Muir Hunter felt that the Treasury should be invited to discuss the administration's views as to the appropriate funding of any insolvency service; some indication of what HMG would view as the social aspect of the cost would be useful. It would be pointless to make recommendations for which HMG would not provide the money.

11. Mr Goldman suggested that the Committee needed to hear evidence as to how the OR service works. The Secretary pointed out that Mr Taylor had produced a paper, ILRC 9 (Part A), and had undertaken to produce the remainder of the paper in due course. The Chairman thought that this would be sufficient and that it would not be necessary to hear oral evidence.

12. It was agreed that in hearing oral evidence in future the morning session would end at 12.45 and the afternoon session would run from 2 p.m. to 4 p.m.

ADVERTISEMENT OF A BANKRUPTCY PETITION

13. It had been decided at para 23 of the minutes of the eleventh meeting to discuss this question. During discussion the following points were made:-

(a) advertisements of a petition under the present arrangements would hurt some people as there were many more petitions than receiving orders made,

(b) an alleged act of bankruptcy might not in fact be one, and

(c) the advertisement of a company petition could be just as destructive,

14. Mr Muir Hunter did not feel that the question could be considered in vacuo. There were two kinds of publicity - advertisement of the petition or direct communication with the creditors disclosed by the debtor; but you could not always trust the debtor to disclose all his creditors. He felt that a change in the present system could only be contemplated on the footing of a preliminary hearing which would decide whether it was necessary to communicate with all the creditors, which must then be by advertisement.

15. Mr Millett felt that a creditor ought not to advertise insolvency proceedings (whether individual or corporate) until the debtor had had a reasonable opportunity to pay. Although

advertisement could be delayed until initiating proceedings had come before a Court, he would prefer an arrangement that no insolvency proceedings could be started until after a formal notice had been served on the debtor calling upon him to pay.

16. The Chairman considered that both bankruptcy and winding-up should proceed on the same lines, either with or without advertisement, but Mr Taylor did not feel that that he could agree. The matter was left for further discussion at a later date, after Mr Penny's "Mini-bankruptcy " plan had been resolved.

MAJORITY RULE BY CREDITORS

17. Mr Muir Hunter reintroduced ILRC 41 (para 24 of the minutes of the eleventh meeting) said that in para 7 of the paper five factors had been suggested which would be relevant to determining the size and effect of the majority, while para 8 suggested that the onus of proof should be on the minority to show grounds why the views of the majority should not prevail.

18. The Committee then discussed the question as to how the majority should be decided. Most members seemed to feel it desirable that there should be a simple formula of universal application. There was some discussion as to whether it should be a simple majority, a two-third majority or a three-quarter majority and whether the majority should be in number, in value or in number and value; some members favoured number but more favoured value. It was pointed out that the aim was to devise a simple way of getting the creditors' views to prevail and obtain a definite result as frequently as possible in a vote; where there was deadlock there could be application to the Court. The Chairman said that if the majority was simply "in number", it could be unfair to a single large creditor; but if it was on value alone, it could be unfair to a large number of small creditors. He felt that the general feeling of the Committee was that in every case there should be a proposal from a responsible person which would stand unless there was a majority in number and value against it. Some members, however, felt that this might in some cases leave a loophole. The Secretary was asked to prepare a list of matters on which a vote could be taken by creditors, to establish that in each case the vote was on a proposal by a responsible person.

19. The Committee then considered other matters dealt with in ILRC 41.

20. Mr John Hunter, in connection with para 11, of the paper, referred to the answer by the Secretary of State to a Parliamentary Question on 14 November 1977 regarding the criteria used to institute proceedings to wind-up by the Secretary of State (s.35 of CA 1967). Mr Muir Hunter pointed out that there was an anomaly here which might have to be considered in due course; it was an aspect of "commercial morality" referred to in para 10 of the paper and it might be that in the public interest the views of the majority of the creditors should not prevail.

21. Paras 15-16 of the paper were referred to. With regard to different classes of creditors it was felt that in a voluntary winding-up each vote should count at its face value. The suggestion that creditors' meetings should be chaired by a judge or registrar did

did not find favour.

22. Mr Muir Hunter suggested that s.206 (CA 1948) needed simplification; it would need to be kept however because of its use in a members' winding-up.

23. Mr Muir Hunter said also that the Court could do with more guidance as to how it should consider views of creditors under s.346; the Court's power must be more plainly spelt out.

24. It was generally agreed that where the Court came into the picture, the Court must pay regard to the creditors' views.

DEBTS ARRANGEMENT ORDERS (MINI-BANKRUPTCY)

25. The Committee had before it ILRC 45 (Third Edition) by Mr Penny and considered it in principle.

26. After discussion, it was agreed that the "debt arrangement order" should apply only to cases with liabilities up to a specified monetary limit (unless there was fraud or recklessness in which case bankruptcy would apply). Beyond that limit the "debt arrangement order" could only be applied on an unopposed application. It was further agreed that a sub-committee under the chairmanship of Mr Penny should be set up to prepare a detailed scheme for consideration by the Committee. This would then be sent to the joint working party of the Bar Council and Law Society for comment. The other members of the sub-committee would be Mr John Hunter, Mr Taylor and Mr Graham, with assistance from Mr Weiss as required.

27. Mr Penny asked that before the sub-committee met, certain principles set out in "Heads of Discussion" should be settled (paras 28-40 below).

28. Preferential creditors - it was agreed that there should be no preferential creditors. If there were large preferential claims and injustice would be done this might be one of the circumstances where bankruptcy would be applied.

29. Active involvement by the Court - the Court officer (Administrator) would apply to the Court to enforce the Order where necessary. The scheme could only work if bankruptcy is made more severe. It would probably be necessary to amend s.51 (BA 1914).

30. Initiation - it should not be assumed at this stage that the Committee would accept any kind of bankruptcy procedure without a judgment to support it.

31. Powers of registrar - although the wide powers proposed for the registrars might cause concern, for the moment they should stand. There is a ready means of appeal to a county court judge. not in bankruptcy

32. Reduction order - the scheme should not be worse than bankruptcy and there should be power to make a reduction order.

33. Terms of order - the registrars should have discretion, but this should apply to substantive registrars only, not deputies.

34. Advertisement and publication - there would be no advertisement save by order of the Registrar and then only if he thinks that this might disclose further creditors. It would be useful to have power to publish, and registration would be a good thing.

35. Interim protection order - it was agreed that provision for this would be necessary.

36. Secured creditors - for the moment it must be assumed that secured creditors would remain.

37. Right of enforcement - this should be left for discussion later.

38. Post-insolvency assets - this would be left to the sub-committee.

39. Control by creditors - a dissatisfied creditor should have power to apply to the Court.

40. Contempt or criminal offence - this would be left for discussion later.

41. Liberty of the subject - it was agreed that the scheme should be less harsh than bankruptcy and that there should be a limit to the amount of time in which a debtor would go on paying; a limit of 3 years was suggested but some members felt it should be limited to one year.

FUTURE MEETINGS

42. The next meeting will be held on Wednesday, 8 February, with oral evidence being heard on the preceding day, Tuesday, 7 February. It was agreed that oral evidence would be heard on

Thursday 13 April
Thursday 11 May
Tuesday 13 June
Monday 10 July.

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INSOLVENCY LAW REVIEW COMMITTEE

Note to Members

The following papers are attached:-

(a) Minutes of the Eleventh Meeting,

(b) Programme for the first day of oral evidence on 12 January 1978,

(c) Agenda for the Twelfth Meeting on 13 January 1978

(d) ILRC 45 (Third edition) - "Mini-Bankruptcy" ✓

(e) Mini-Bankruptcy - Heads of Discussion for 13 January

(f) ILRC 55 - Powers of Liquidators ✓

(g) Press Notice - The conduct of company directors

(h) Press Notice - Company Law Reform

(i) Press Notice - Insider dealing

(j) Letter from GKN dated 21 November 1977.

[signature]

T H TRAYLOR
Secretary
20 December 1977