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INSOLVENCY LAW REVIEW COMMITTEE

1(2.4)

THIRTEENTH MEETING

Meeting to be held in the Conference Room 2-14 Bunhill Row on Wednesday 8 February 1978 at 10.00 a.m.

AGENDA

1. Minutes of the meeting on 13 January 12th
2. Matters arising
3. Secretary's report
4. Presumptions in support of "Acts of Insolvency" - report of the sub-committee ILRCs 54, 57
5. Deeds of Arrangement (ILRC 51 and 56)
6. The liquidator - powers and duties (ILRC 52 and 55)
7. Any other business
8. Agenda for the next meeting
9. Confirm date of next meeting (8 March)

Trevor Traylor

T H TRAYLOR
Secretary.

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13th Mtg
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INSOLVENCY LAW REVIEW

Minutes of the Thirteenth Meeting of the Review Committee on 8 February 1978.

Present:
K R Cork (Chairman)
PGH Avis
J S Copp
AIF Goldman
J M Hunter
MVS Hunter
D McNab
T R Penny
C A Taylor
T H Traylor (Secretary)
E L Reeves (Assistant Secretary)

corrigenda
12
16
20
21
24

In Attendance:
S J Barton
J R Endersby
D Graham
R B Jack
G A Weiss

1. The Committee met at 10.00 a.m. The minutes of the twelfth meeting held on 13 January 1978 were agreed and signed.

MATTERS ARISING

2. The Secretary said that he had written to the Law Society (para 7 of the note of the twelfth meeting) asking for addresses of local law societies, and to the Consumer Association. With regard to para 8, the TUC would be giving oral evidence in May, the delegation being led by Lord Allen. The Chairman had written to the Lord Chancellor (para 9); Mr Goldman said that he was aware that Mr Justice Templeman would like to give evidence and it was agreed that the Secretary would pursue the matter with the Lord Chancellor's Department. Mr Goldman thought that the Committee should hear evidence from bankrupts and he hoped to be able to give the Secretary the name of somebody who could help.

ORAL EVIDENCE

3. It was agreed that the points which came up at the oral sessions should be put on the Committee's agenda for discussion. In future the Committee would have 15 minutes discussion before the morning session and the examination of witnesses would, where possible, be segregated into subjects.

4. There was a short discussion on the previous days evidence. The Chairman said that what had struck him was that there was no desire to upset the floating charge; the Chambers of Commerce did not want to interfere with limited liability; and on Romalpa the point had been made in the morning that if the creditor wanted the goods back he ought not to be able to prove for the debt. Registration was mentioned and Mr Muir Hunter suggested that, before consideration was given to this, someone from Companies Registration Office should be invited to come before the Committee on this problem. The Secretary said that the Legal Panel, who were dealing with "Reservation of Title", had a letter from the Registrar of Companies on the subject.

5. Mr Muir Hunter pointed out that a matter which might be remembered for another occasion was that the parent/subsidiary arrangement was not universal; there were amorphous groups of associated companies assisting one another and resistance to group liability might turn on such amorphous groups. Mr Taylor drew the Secretary's attention to two articles on companies and groups in the New Law Journal. /Copies are attached herewith/.

SECRETARY'S REPORT

6. The Secretary reported as follows:-

(a) ILRC 57 had been issued since the last meeting;

(b) a copy of an article in the New Law Journal on "Provisional Liquidators" was before the meeting; and

(c) the March hearing of oral evidence would take evidence from the British Bankers Association and the British Insurance Association's Investment Protection Committee.

FUTURE PROCEDURE

7. The Chairman said that he had some proposals which he felt would speed up the work of the Committee. He proposed that an "Interim Report" should be prepared by June setting out the major decisions in principle; if they could not all be agreed by June it might be necessary to extend this to September. Sub-committees should then be set up to work out the details of putting these decisions into effect. The Committee could then work to a planned timetable. He envisaged that the Committee would then meet once a month to hear oral evidence and he recognised that the oral evidence might cause the Committee to amend some of its views; the Committee would also meet every two or three months to clear what the sub-committees had been doing. Members agreed generally that it would be useful to get down in writing a broad outline of provisional decisions. The Chairman said that whether the document should be kept for the Committee's own internal use, or whether it should be published, could be decided after it had been prepared.

8. On the timetable envisaged, the Chairman suggested that the sub-committees would need about a year and this would be followed by 6 months for the Committee to finalise all the matters involved. He hoped that a report could then be produced in the spring of 1980. He asked members to give thought to these proposals, and said that he would discuss the question of the production of the document with the Secretary and report back to the Committee at its next meeting. Also, he would bring to the next meeting the kind of format he had in mind for the document to be produced by June/September.

9. The Chairman said that he had asked Mr Muir Hunter to be Chairman of the drafting sub-committee preparing the final report.

ACTS OF INSOLVENCY

10. Mr Muir Hunter introduced ILRC 57. He said that the four objectives of the sub-committee were to unify the bankruptcy and winding-up codes for the initiation of proceedings; to define 'cessation of payments' as the basis for such initiation; to convert "acts of bankruptcy" into events to be treated as symptoms of cessation; and to provide a basis whereby this could be integrated with the European system. The structure of what followed in the paper was firstly, setting up the concept of cessation and then, if cessation was proved, the debtor was deemed to be insolvent and a creditor could present a petition.

11. Cessation of payments was divided into two cases;

(a) covered a trader ceasing to pay in the ordinary course of business, eg. the standard form of invoice (20th of the month following the month in which the goods were delivered); the bank overdraft, either on demand or on a term loan; and in certain industries, the cyclical payment of debts according to the making and selling of goods.

(b) was intended to cover anyone who was not a trader, such as a professional man. The note in square brackets at the end of Section 1 was a problem to be decided by the Committee as to whether non-payment of debts generally should be more than one debt. If the creditor could use one of the Section 2 provisions, the proviso would not apply. It would, however, cover the long-term insolvency (previously referred to by Mr Walker-Arnott), where none of the s.2 events had happened. (The word "arrogation" should read "allegation").

12. Section 2 endeavoured to set up "defaults", starting off with the basic and most convenient; ie what used to be called default of a bankruptcy notice. The judgment of a court was extended to include a judicial tribunal (eg. a redundancy tribunal)

Two questions were left for the Committee in square brackets - whether the judgments or orders should be final or interlocutary and how long the time prescribed should be (under IA 1976 it is 10 days but under CA 1948 it is 21 days).

13. Subsection 2 sets out defaults to replace acts of bankruptcy and acts of insolvency. These attempted to formulate the kind of events which a businessman or a jury would recognise as indicating that the debtor had stopped paying his debts. Mr Muir Hunter outlined the thinking behind some of the defaults which were included in the Section: item (b) (execution) had been extended, on the lines of the Scots Act, to include distress for rent (a minimum amount needed to be decided by the Committee). He added that the words from "This default..." to the end of the subsection should be in brackets. Item (c) was included on the basis that having your mortgage called in foreclosed was evidence that you were unable to pay your debts. The effect of item (d) was to remove your property out of your own disposition. The reason for the high figure in item (e) was to confine the event to matters of substance and industrial equipment. Item (g) would catch the friendly creditor calling a meeting of creditors. Item (h) was the old BA assignment; assigning all property to creditors, or a class of property to a class of creditors, such as the stockbroker assigning securities to stockbroker or Stock Exchange creditors; here there was no moral blame. Item (i) was the existing provision, assigning with intent to defraud. Item (k) was a big problem and as drafted was crude; the subsection wording should end "thereby delayed In the square brackets it was left to the Committee to consider the nature of intent and what words should be used to deal with a company. Finally, although item (l) did not concern the payment of a debt, it was felt that failure to deposit money in Court should be regarded as an indication of cessation of payment.

14. Section 3 was intended to make the other sections refer also to a debtor company.

15. The first part of Section 4 was a direction to the Court to have regard to all the circumstances of the case; the second part (which perhaps ought to be a separate section) required the Court to declare the date of cessation (which is at present in a receiving order but not in a winding-up order). It might be that the trustee/liquidator would find an earlier cessation in which case he could seek to satisfy the Court that the earlier cessation should apply. In the square brackets was a reference to the banking community wishing to ensure that relation back would be without prejudice to bona fide transactions.

16. There were not many things which were absolutely irrebuttable and Section 5 provided that certain events should be prima facie evidence, the burden of proof falling on the petitioning creditor. For instance (referring back to Section 2) item (a) could be a mistake by the bank; under item (b) the sheriff might not have been operating lawfully; the mortgage might have been foreclosed under item (c) because of failure to comply with a covenant or for letting without the consent of the building society;

under item (d) the Court of Protection may have appointed a receiver; and under item (e) the giro may have forgotten to pay the instalment or the equipment might keep breaking down.
Mr Muir Hunter added that the Committee might wish to discuss whether item (h) should be left in, having regard to a liability to jeopardise a composition with creditors; however, if s.4 was applied, the Court could be satisfied that the debtor was making payments in another form.

17. There was a lengthy discussion on the paper. Some members thought the list of events was too long but Mr Muir Hunter replied that the sub-committee had decided that there was a need to have recognisable events and had thought these items should be included.

18. Mr John Hunter suggested that a "return of no goods" should be included under item (b); this had been an act of bankruptcy in Northern Ireland before the abolition of the sheriff system. Mr Muir Hunter agreed.

19. Referring to item (e) Mr Muir Hunter agreed that "repossession" had a technical meaning and that the sub-section might be made clearer.

20. Mr Muir Hunter said he visualised that the legislation would include a previous section which said that a petition could be presented against an insolvent debtor by a creditor having a debt of £x by the presentation of a petition in the appropraite Court. He also envisaged that there would be a first section which would say that a petition could be presented against any debtor who was alleged to be insolvent; the Court would fix a date for hearing in chambers and at that hearing would determine what should be done with the debtor and whether there should be advertisement. In the case of a "Deed of Arrangement" the Court could be persuaded to go along with the deed if it considered it fair. He thought that there would have to be a default notice which would inform the debtor that if he did not pay the debt he would be brought before the Court, or alternatively that he could invite the Court to convene a meeting of his creditors.

21. Some members were concerned about a dishonoured cheque (item (a)) and it was agreed that a form of notice was required; there should be a minimum amount and it should involve more than the cheque being presented and not met.

22. The point was also made that the Court would not in every case have to make an order.

23. The Committee agreed in principle with the sub-committee's paper, subject to reservations by some members, and it was left to the sub-committee to deal with the points which had been raised.

24. The Committee did not discuss the matters put to it in square brackets in the paper and no decisions on these points were made.

DEEDS OF ARRANGEMENT AND PROPOSED NEW VOLUNTARY ARRANGEMENT FOR INDIVIDUAL DEBTORS.

25. The Committee had before it ILRC 51 (dealing with the present form of Deed of Arrangement).

26. The Chairman summarised the present position and said that the deed was an act of bankruptcy; it needed a majority in number and value; there was no relation back; the trustee had no power to examine anybody; there were no disabilities on the debtor; no after-acquired assets were available unless this was written into the deed; there was no release of the trustee; there was no release of the debtor; and the powers of the trustee were very limited compared with the trustee in bankruptcy.

27. Mr Taylor pointed out that the deed was purely a private contract between the individual and his creditors, with no resort to the Court; this was the main difference compared with a voluntary liquidation where there was provision for resort to the Court if necessary.

28. The Chairman said that what was now being proposed was a form of voluntary bankruptcy akin to voluntary liquidation. Mr Muir Hunter suggested that time might be saved by adopting ss.125 and 126 of the 1869 Act, which had been abandoned because of abuses, but which could be overcome. Mr John Hunter pointed out that those proceedings had to be instituted by a petition to the Court, so that they were judicially controlled.

29. The Committee then turned to ILRC 56. The Chairman referred the Committee to para 8, which provided that the debtor could convene a meeting of creditors; notice of the meeting would be gazetted and advertised; the convening of the meeting would freeze the debtor's assets; notice of convening the meeting would be given to the sheriff, freezing executions; the creditors would either accept a voluntary insolvency with the trustee having the powers and duties of a trustee in bankruptcy or would require the debtor to take other steps; any dissatisfied creditor could apply to the Court for full bankruptcy, but the Court would have discretion to dismiss the petition; the rules relating to distribution of assets would be the same as in bankruptcy, but there would be a divergence from voluntary winding up in that existing exemptions (for clothing, etc) would apply; also, consideration would have to be given to provisions for vesting after-acquired property in the trustee and for the discharge of the debtor. In the latter connection several questions were raised; eg. would there be any distinction with regard to debts which were provable? From which debts would the debtor not be discharged? How would discharge from debts be obtained? There were also problems to be resolved regarding after-acquired property.

30. Mr John Hunter was concerned that the scheme proposed did not provide adequate machinery for identifying the cases which should be subject to the full rigours of bankruptcy and Mr Muir Hunter wondered whether the Court, if brought in to the matter, would have enough material on which to adjudicate.

31. Some members felt that the new scheme should not involve the Court; Mr Copp however felt that all insolvency should go through the Court or be registered with the Court. Mr Muir Hunter could not agree that a trustee under a purely voluntary scheme should be given statutory powers; he would agree however, so long as the statutory powers did not become exercisable by the trustee until he had satisfied the Court that he should be so vested. S.23 of the Deeds of Arrangement Act provides in fact for enforcement by the Court at the moment. Special provision would also have to be made for cases where a petition had already been presented or was presented before the meeting of creditors.

32. It was pointed out that the voluntary liquidator was not entirely free but could be directed or removed by the Court. It was suggested that the same should apply in this proposed scheme.

33. The Chairman envisaged that the scheme would work as follows. A debtor would be advised by his accountant to convene a meeting of creditors and ask for a voluntary insolvency. If the meeting agreed, a trustee and committee of inspection would be appointed. The trustee would advertise his appointment and register with the Court and carry on as in a voluntary liquidation. If he needed to break a trust or gift he would apply to the Court. A dissatisfied creditor could petition the Court but the Court could reject the petition. If the trustee became dissatisfied (eg. because assets had been concealed) he could petition the Court for full bankruptcy. It had not been decided whether the debtor should be released on signing the deed or whether he should be required to wait for a period. Mr Graham agreed that this set out what the authors of the paper had in mind.

34. Mr Muir Hunter pointed out that existing deeds contained a crucial paragraph to the effect that if a debtor was found to have concealed any part of his property the deed was void.

35. It was felt that the option should remain of having a Deed of Arrangement in its present form. The value of this was that it allowed the debtor to maintain the matrimonial home. It was pointed out that there was nothing to prevent a debtor having a contract with all creditors, which would be just a contract such as any other.

36. The Committee agreed in principle to the proposals; Mr Muir Hunter agreeing subject to his qualifications (supported by Mr Penny); Mr Copp suggesting that the Court should be brought in earlier, and Mr Taylor expressing doubts and referring to the views expressed by Blagden. Mr John Hunter supported Mr Taylor and reserved his position to ensure that there was adequate judicial control.

37. The Chairman summed up that there was general agreement for this sort of procedure and said that more detailed preparation of the scheme should be undertaken by Mr Graham and Mr Weiss, co-opting other members as necessary.

Meeting yesterday (7th Nov) preparing detailed blueprint.

FUTURE MEETINGS

38. Oral evidence would be heard next on Tuesday, 7 March. No oral evidence would be heard in August but there would be a hearing on Thursday, 28 September. The Chairman expressed the view that it was neither essential nor desirable that all members attended.

39. The next full Committee meeting would be on Wednesday, 8 March at 10.00 a.m.; the agenda would be reservation of title; the liquidator; and preferential creditors. Meetings subsequent to 11 July were fixed for Thursday 31 August and Thursday 5 October.