APPENDIX (3)

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INSOLVENCY LAW REVIEW

Minutes of the Third Meeting of the Review Committee on 28 April 1977

Present:

K R Cork (Chairman)
P G H Avis
J S Copp
A I F Goldman
J M Hunter
M V S Hunter
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
A J Sim
G A Weiss

1 The Committee met at 10.00 am. The minutes of the second meeting held on 24 March were discussed. It was agreed that para 4, lines 3 and 4 should read "had in part formed a different view". In para 10, line 12, the word "conceived" should read "perceived". In para 17(a), line 2, the word "does" should read "should do". In para 20, line 7, the words "where necessary" should be inserted after "credit". The last line of para 25 was clarified as meaning "harassment by his creditors after the bankruptcy". The minutes as amended were agreed and signed by the Chairman.

MAN ALIVE REPORT - "THE LIQUIDATORS"

2 The Committee had the opportunity of viewing a video-tape recording of the Man Alive Report "The Liquidators" which had been screened by BBC 2 on Tuesday 19 April. They agreed that some of the criticism of receivers and the conduct of receiver-ships might well be justified and should be kept in mind.

MATTERS ARISING

3 The Secretary reported on a number of matters arising from the previous meeting, referring to these by indicating the

relevant paragraphs of the minutes (2nd Meeting).

4 Para 3 of the minutes. A letter had been sent to the Law Commission and a reply was awaited.

5 Para 8 of the minutes (matters to be referred to Panels). The Secretary suggested that "Receiverships" might be the first matter referred to the Accountants Panel, and when it had been considered again by the Committee, then referred to the Legal Panel. "Romalpa", after it had been considered by the Committee, might be another matter which could be referred to the Legal Panel. It was difficult at this stage to say what other things could be referred to Panels. The Chairman felt, however, that the two Panels should have a continuing background duty to pick out anomalies in the individual sections of the existing Acts and to make recommendations on these; The Secretary pointed out that he had largely done this work already, but it was decided that it would be appropriate for the Panels to undertake this task. The Chairman stressed that nothing the Panels did would commit the Committee and it was agreed that, apart from specific matters which the Committee might decide to refer to Panels, it would be left to the Chairman and Secretary to decide what should be remitted to the Panels. It was also agreed that the Secretary should produce papers on anomalies for the Committee.

6 Para 8 of the minutes (constitution of Panels). The Committee then discussed further the possible composition of the Panels:-

(a) Legal Panel. It had already been agreed that Professor R M Goode should be invited and that two other members should be Mr Goldman and Mr Graham. The Committee agreed that another solicitor should be invited, preferably a keen junior partner in a firm of city solicitor's doing a substantial amount of insolvency litigation; some further research would be done to establish which solicitor might be invited and the proposed additional member agreed with Mr Goldman and Mr Graham.

(b) Accountant's Panel. It was agreed that Mr Weiss would be a member and that Mr Paul Shewell (Coopers), Mr Mark Homan (Price Waterhouse) and Mr Ian Watt (Thomson McLintock) should be invited to serve. Discussion took place as to who else might also be invited; it was finally agreed that Mr R W Hellyer (a Certified Accountant and Secretary of the Insolvency Practitioners Association) should be invited to serve if this was acceptable to the other proposed members.

(c) Insurance Panel. Following discussion, it was agreed that the British Insurance Association should be informed that at this stage it was not clear whether or not a Panel would be required but they should be asked meanwhile to nominate an insurance consultant to advise the Committee on matters relevant to insurance companies.

(d) There might have to be joint working parties derived from the Panels to deal with particularly tricky subjects, such as Romalpa.

7 Para 17 of the minutes. The Secretary reported that he had copies of the Acts under which the NEB and the Welsh and Scottish Development Agency's operate, and the NEB guidelines; he asked Mr John Hunter if he could provide some information about the Northern Ireland Agency. It was agreed that the Committee should consider what recommendations might be made in the case of companies which were technically insolvent but which had been kept in operation by Government subventions, including a list of rules for the operation of these organisations and, if they are wound up, how they deal with their creditors. It might be necessary to have a case study on this subject, for instance on Beagle Aircraft. The Chairman pointed out that there was no provision for the Treasury to reimburse creditors even when an Agency had continued to run a company under direction. It was suggested that workers' co-operatives should also be considered.

8 Para 21 of the minutes. In response to the Secretary, Mr Muir Hunter agreed to attend to the production of a paper on "Cessation of Payments".

9 Para 35 of the minutes. The Secretary pointed out that Mr Avis had produced a paper which had been circulated as ILRC16.

10 Para 39 of the minutes. The Secretary reported that ILRC11 and 16 had been circulated and work on a consolidated paper on receiverships was in process.

11 Mr Graham suggested that the legal panel might be instructed to look at an early date into the inquisitorial aspects of the examination (para 15 of the minutes).

12 Mr Muir Hunter and Mr Goldman raised questions about the cost effectiveness of the Official Receiver service in relation to public examinations and the fees charged by Official Receivers in respect of rescissions, and suggested that Mr C A Taylor might like to prepare a short paper on the matter. The Chairman added that the paper could go to a panel first for consideration.

13 Mr Graham referred to para 23 of ILRC10 where Canada appeared to have a desire to homogenise the legislation and suggested that this should be referred to a panel. It was pointed out that the proposal was that relevant overseas legislation, or proposed legislation, would be examined and it might be necessary for the panels to summarise this.

14 Mr Muir Hunter reported briefly on the "Romalpa" symposium held on 19 April. His Dutch colleagues had said that Romalpa was almost certainly wrong in Dutch law. He proposed, when the transcript had been prepared, to summarise it and make the summary, the set papers and any reported cases available to the Committee through the Secretariat. It was agreed that the effect of Romalpa and reservation of title clauses should be discussed as a matter of urgency at the June meeting.

SECRETARY'S REPORT

15 The Secretary reported:-

(a) the City of London Solicitors' Company do not expect to report before the autumn,

(b) other consultees had expressed doubts about being able to report within 3 months; they had been given an indication of the programme and invited to report piecemeal,

(c) some views had already been submitted, on particular points; it was agreed that all members would receive copies of the full submission (unless they indicated otherwise) and that summaries of the submissions would also be provided,

(d) the Secretariat would be exchanging information and views with the Law Reform Commission of Australia who were looking into the problems of the consumer debtor,

(e) press coverage of the 11 March consultative letter had resulted in numerous requests for copies, and

(f) ILRC12 and 13 had not yet been circulated.

(g) The Secretary agreed to issue an index of ILRC's.

WILSON COMMITTEE

16 The Chairman stated that the Clearers and the Scottish Clearers had produced a report for the Wilson Committee including a lot of discussion about receivers and floating

charges. Mr Avis undertook to try to obtain a copy from the Committee of London Clearing Banks.

COMPANIES WINDING UP - GENERAL REVIEW OF EXISTING PROCEDURES

17 The Committee had before them a paper reviewing generally the winding up of companies (ILRC10) and considered the points summarised in paragraph 32 thereof.

18 On paragraph 32(a) it was pointed out that the abolition of the present specific statutory provisions was Departmental policy and had in fact been provided for in the 1973 Companies Bill. The present provisions were now obsolete and the Committee agreed that they should be abolished.

19 The Committee considered whether or not a common bankruptcy code for individuals and companies would be practicable (paragraph 32(b)) and during the discussion the following points were made:-

(a) The Ghana Report [para 293] saw no practical advantage in putting companies winding-up legislation in the same Bill as legislation dealing with insolvency of individuals as the two procedures were of necessity very different.

(b) There were different structures; for example in a company case the property could be left vested in the company throughout the winding up procedure wereas in the case of an individual there have to be divesting provisions.

(c) The Committee would have to consider whether the reputed ownership clause in bankruptcy should be abolished or should be applied to companies.

(d) There is a fundamental problem in that the initiation procedures have always been different for historical and social reasons. In bankruptcy an individual creditor presents a petition which is heard behind closed doors without the name of the debtor appearing and even if it gets to the Court of Appeal his anonymity is still preserved; also, there is no consultation with other creditors except in the very rare cases of simultaneous petitions or substitutions. In the case of a company the petition is in open court, all the creditors are invited to turn up by advertisement and vote according to their debts. To homogenise the two systems, unless

a halfway house could be found, all bankruptcy petitions should be collective (which must involve some kind of advertisement) or alternatively all company petitions should be private. It may be that with the reduction of the stigma of bankruptcy it would no longer matter having collective bankruptcies, and many Registrars would welcome the opportunity of taking a view of all the debts. There is a case for devising a system whereby the court is enabled to take an overall view of the debtor's position but this is a very difficult problem.

(e) Once the system is initiated it may well be possible to run it in exactly the same way.

(f) It appeared to be possible to have some sort of common code in Canada and Australia and the Committee should explore this.

(g) There were too many differences between bankruptcy and liquidation and it might be better to pick out the best in each and import it into the other rather than merge the two.

(h) Most bankrupts are only made bankrupt after they have been given many opportunities to put the matter right and the idea of publishing a private bankruptcy or having group bankruptcies need not dismay the Committee unduly; the debtor could be given a last chance by notice to sort his affairs out and there are many ways of avoiding having the matter made known generally for all except the debtor who deserves to have it published.

(j) It should be possible to introduce a conditional collectivisation of a bankruptcy; on the hearing of a bankruptcy petition by a Registrar, the debtor should be entitled to collectivise it by asking the Court to order a meeting of creditors, the Court itself should have a residual power to order a meeting of creditors if it had good cause to do so, and the Act should abolish an inconvenient decision (ex p. Oram p69; Williams on Bankruptcy) where it was held that an adjournment of a petition could not be granted solely to see whether a deed of arrangement executed by the debtor (to which the petitioning creditor had not assented) works well. The Registrar could then run a collectivised bankruptcy if he saw just cause

to do so or the debtor asked for it.

(k) A winding up order could not be discharged; it could be stayed but it was not at all clear what the effect of that was.

(l) The basic problem was that the philosophy of the two systems was different.

It was agreed, provisionally, that it should be possible to incorporate the provisions in one Act with one part applying generally, a second part applying to individuals and a third part applying to companies, with the minimum of differences possible between the second and third parts.

20 The Secretary explained that paragraph 32(c) presupposed that the Committee had recommended a single system which had bankruptcy as the last (almost penal) resort against either the individual or the company. In that event could we then do away with compulsory winding ups on the basis that voluntary winding ups would have been amalgamated in some way with deeds of arrangement or receiverships. In the discussion which followed the points made were:-

(a) it is essential that both for individuals and companies there should be a more severe form of bankruptcy or liquidation with a more disciplined enquiry, and

(b) the cases which most need investigating are those where the assets have been most successfully concealed.

The Committee took the provisional view that there should be some more discouraging form of bankruptcy maintained for those who deserve it.

21 On paragraph 32(d) the Secretary said that almost invariably dissolution of a company entails winding up first, whereas this is not the case in some other countries. If a company had been promoted for the sole purpose of carrying out a certain aim and the memorandum of the company stated that on completion of that aim the company was to finish, at present it has to go through one of the procedures for winding up, and there are quite a lot of companies with no liabilities to creditors which have to go through compulsory winding up; it seems that there should be some way of dissolution without going through these procedures. It was pointed out that the problems of reviving a company to life are considerable and expensive. The Committee agreed that this question should be considered, possibly by a panel.

22 The Committee discussed paragraph 32(e) and made the following points:-

(a) the Company Law Committee in Northern Ireland had recommended that winding up on the grounds of insolvency only should be dealt with by a Registrar;

(b) contracts between two parties could be cancelled mutually; it should be possible if the creditor wanted to wind up, and the company did not disagree, for this to be allowed without even going before a Registrar;

(c) all winding ups in London have to be dealt with by a barrister whereas in the county courts they could be handled by a solicitor;

(d) sometimes on a creditor's winding up petition, not contested by the company, there were other interested parties not before the court;

(e) the Judges and those practising in the companies court would welcome a change; one which would find favour is to find a means by which the really unopposed petitions should be dealt with without coming before a Judge;

(f) there is no reason why the petition should not be formally dealt with by a Registrar but with a period of grace;

(g) until recently important alterations of status have always been made by Judges but there has been some move towards allowing Registrars to do certain things on the footing that they are safe and uncontested; a safety net could be devised to ensure that a Chambers winding up did not do irreparable harm to anybody as long as the interests of the creditors generally were preserved in some form; and

(h) a company should be able to get an instant winding up order like an individual.

It was agreed that uncontested petitions could go before a Registrar, provided that it could be ensured that the interests of third parties were not disregarded, and that the Panels should be asked to consider whether a company should be able to get an immediate winding up order on itself.

23 On paragraph 32(f) it was pointed out that a member's voluntary winding up is done on the hypothesis that the company will be able to pay its debts within one year, for which it

must prior to the meeting file a declaration of solvency. Sometimes it could not file such a declaration, or found that it could not pay its debts after all; it then became a creditor's voluntary winding up. It was always a potential insolvency situation. It was agreed that the answer to the questions posed was "Yes".

24 On paragraph 32(g) it was agreed that the panel should look at this first but that all the papers should be supplied to the members of the Committee. It was also agreed that it would be necessary to limit the research to those areas most likely to be fruitful, concentrating on Canada, Australia, New Zealand, the Scandinavian group with something from Europe.

RECEIVERSHIPS

25 The Chairman suggested that the Committee might consider the question of the personal liability of receivers. In his view the law is that a receiver is liable for anything he does on a contract unless he specifically excludes his responsibility and he has basically the right to recoup himself for this liability out of the assets of the company. The accepted principle has always been that a receiver is personally liable for all the trading debts that he originates. There is a growing practice among receivers of writing to all creditors and saying that they are excluding personal liability from all their commitments. His firm had had letters pointing out that this was unfair. There are receivers who even with personal liability do not in fact meet their commitments; if they are acting for a clearer, the clearer normally bails them out and does not employ them again.

26 The Committee discussed the question of personal liability and the following points were made:-

(a) if the receiver was not made personally liable, he would be trading fraudulently because he would be incurring fresh liabilities with no means to pay for them, and

(b) if there was not this discipline, receivers would pay less heed to the consequences of continuing to trade.

It was agreed that the receiver should continue to be personally liable.

27 There followed a general discussion as to whether or not the receiver should be permitted to contract out of this personal liability and the following points were made:-

(a) there was no need for the Courts to exclude the right to contract out as it was up to

suppliers to decide whether or not they should supply under these terms;

(b) in cases where special goods are involved the supplier can prevent the receiver from contracting out because he can refuse to supply the goods required and it would not then be possible to complete the receivership;

(c) the building trade are particularly concerned about contracting out and a large part of that trade would like to see it made impossible;

(d) if the receiver on a building contract does not want to adopt it because he feels that it might not be possible to complete it or that it is a bad contract and he wants to continue building, it is important that he should be able to opt out and not be committed to a contract which he would never have entered into himself;

(e) if the receiver contracts out generally with the suppliers, their only hope of getting a dividend on their unsecured claim is to go on supplying;

(f) there is already legislation in other fields on the extent to which you can incorporate absolute exclusion clauses on liability; and

(g) although some receivers trade for cash, many big firms operate under an omnibus contracting out and ensure that personal liability is kept to an absolute minimum.

It was agreed that receivers should be able to contract out on an individual basis but not on an omnibus basis, and further that Mr Millett and Mr Walker-Arnott should attempt to draft a clause giving effect to this. | Drafr

28 The Chairman suggested that the Committee ought sometime to consider the people who ought not to be receivers, such as auditors, directors of the debenture-holder and the secretary of the company.

29 The Committee then continued its discussion of item 12 of the annex to ILRC7 (see paragraphs 37-38 of the minutes of the second meeting held on 24 March), particularly with regard to the points as to whether the debenture-holder should have responsibility for the actions of the receiver and whether he should publicly indemnify the receiver and stand behind him.

16

30 The Chairman referred to Mr Avis' paper (ILRC16) which indicated that the bank was prepared to accept that the receiver is the agent of the company and that if this is not the law the bank would not object to it being the law; and also to Mr Weiss' paper (ILRC14) which suggested that, if you make the debenture-holder stand behind the receiver, it will be the debenture-holder who will run the business and not the receiver. During the discussion the Chairman read a letter from a Mr Goodman who had been appointed as a receiver and manager by a debenture holder who was also director of the company and owned 50% of its share capital; after 12 month's reorganisation and a return to successful trading a large sum had accumulated well in excess of the debenture but in view of the taxation liability both during the receivership and the preferential period before appointment, he could not repay the debenture; the debenture-holder gave notice that the receiver's appointment was discharged and it appeared that he could not stay in office; a substantial sum had to be returned to a company which had not paid unsecured creditors or satisfied the Inland Revenue on taxable profits.

14

31 The following points were made during the discussion:-

(a) at present the indemnity given by the bank (if given at all in formal form) bails out th receiver in respect of liabilities he gets stuck with (eg if he is sued or incurs a liability he cannot meet) but no indemnity is given which protects a creditor of a receivership,

(b) there are three basic liabilities where it would be right for the debenture-holder to indemnify the receiver:-

(i) if the receiver is not properly appointed,

(ii) if the receiver is negligent because he sells the business for less than he reasonably could have done or does not take proper precautions to get the best price, and

(iii) for personal liability to new suppliers where he cannot indemnify himself out of the assets,

(c) the first duty of the receiver is to the preferential creditors who may eat up every single penny,

(d) anyone giving a compulsory indemnity would become entitled to call the tune (to which the

statutory prohibition

Committee is opposed),

(e) receivers should be compulsorily insured to some extent just as solicitors now are,

(f) the bank ought to put up a bond for its receiver, or alternatively the receiver should do so (possibly paid for by the bank),

(g) there was something to be said for a claim against a receiver, when established, being a charge on the debenture moneys; in practice this probably already happens so far as the banks are concerned,

(h) indemnity of a receiver which is really the extension of the bank operating the receivership is a dangerous thing because, of necessity, the receiver has to gamble,

(j) the device of putting in a receiver and making the receiver the agent of the company had effectively robbed the company and anyone interested in the company of the liability of the lender to account; the clock should not be put back all the way,

(k) some receivers are dilatory and probably the clearing banks' receivers carry out their duties in a very different manner from others; it would be useful to know what proportion of receiverships are initiated by clearing banks, and

(l) the receiver in Scotland may only be removed by the Court and this should be introduced in England.

It was generally agreed that provided the receiver's duties are extended to look after all parties he should not be compulsorily indemnified by the bank, but that the matter would be reconsidered when the Committee saw how practical this was.

NEXT MEETING

32 It was agreed that the discussion at the next meeting would commence with "Receiverships" and that the meeting would be held on Wednesday, 18 May 1977.

INSOLVENCY LAW REVIEW COMMITTEE

THIRD MEETING

Meeting to be held in the Conference Room, 2-14 Bunhill Row on Thursday 28 April 1977 at 10.00 am.

AGENDA

1 Minutes of the meeting on 24 March 1977.

2 Matters arising.

3 Secretary's report. Panel on anomalies Mem 43

4 Companies Winding Up - general review of existing procedures (ILRC 10).

5 Receiverships - continued (ILRC 7, Annex item 12 etc).

6 Any other business.

7 Confirm date of next meeting (Wednesday 18 May)

Trevor Traylor

T H Traylor
Secretary
14 April 1977