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INSOLVENCY LAW REVIEW COMMITTEE

FOURTH MEETING

Meeting to be held in the Conference Room, 2-14 Bunhill Row on Wednesday 18 May 1977 at 10.00 am.

AGENDA

1 Minutes of the meeting on 28 April 1977. ✓

2 Matters arising. Jones on Romalpa May 11

3 Secretary's report.

4 Receiverships - continued (ILRC17).

5 Directions to the Accountants' Panel regarding the Committee's proposals on Receiverships.

*6 Winding up by the court (ILRC12).

*7 Voluntary winding up (ILRC13).

8 Any other business.

9 Confirm date of next meeting (Monday 27 June).

*Time permitting.

T. H. Traylor

T H Traylor
Secretary
6 May 1977

§16. reports by Chy-Bkrs. ✓

§2 Mellett paper ✓

KC seem to be becoming quite
a "populist".

16(2.4) MM

4th Mtg
18.5.77

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INSOLVENCY LAW REVIEW

Minutes of the Fourth Meeting of the Review Committee on 18 May 1977

Present:

K R Cork (Chairman)
P G H Avis
A I F Goldman
J M Hunter
M V S Hunter
D McNab
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 am. The minutes of the third meeting held on 28 April 1977 were discussed. It was suggested that the words "if this was acceptable to the other proposed members" at the end of para 6(b) were inappropriate and it was agreed that these should be deleted. The minutes as amended were agreed and signed by the Chairman.

MATTERS ARISING

2 The Secretary referred to a number of matters arising from the previous meeting, referring to these by indicating the relevant paragraphs of the minutes (3rd Meeting).

3 Para 4 of the minutes. The Secretary stated that the Law Commission had replied on 28 April 1977 and copies of their letter had been circulated to members. He suggested that members might think that it would be premature to have a meeting with the Law Commission until the Committee had given some preliminary thought to the subject matter and possibly had received views from some other interested consultees. Mr Muir Hunter felt that

the letter was inaccurate and misleading and that the Commission's views should be clarified before the Committee met them. It was agreed that, before the Committee met the Law Commission, a delegation comprising Mr Muir Hunter, Mr Taylor, Mr Walker-Arnott and the Secretary should seek a meeting with representatives of the Law Commission with this end in view. Mr Muir Hunter undertook to circulate to the members of the delegation a one page note of his observations on the letter so that these could be discussed before the meeting.

4 Para 6(a) of the minutes. It was agreed that Mr Martin Hancock (Clifford-Turner) should be invited to serve on the Legal Panel and that invitations would accordingly be sent to Professor Goode and Mr Hancock. Mr Graham reported that he had started to review Commonwealth law to see whether that would produce any ideas for amendments in detail or in principle. Mr Muir Hunter reported that he had been in correspondence with Professor Goode on 'Romalpa'.

5 Para 6(b) of the minutes. The Chairman reported that Mr Hellyer had indicated his acceptance by telephone.

6 Para 6(c) of the minutes. The Secretary said that he had written to Mr Harris but had not as yet received a reply.

7 Para 7 of the minutes. The Secretary reported that he was not yet ready to put anything before the Committee on the NEB. On workers' co-operatives (which come within the scope of the Industrial and Provident Societies Acts) Mr McNab suggested and it was agreed that the Secretary should get in touch with Mr Wilkinson of the Co-operative Union.

8 Para 8 of the minutes. Mr Muir Hunter indicated that production of a paper on "Cessation of Payments" would be his next task.

9 Para 15(c) of the minutes. The Secretary reported that the views received, together with summaries, would soon start to be circulated. It was agreed that oral evidence should be taken, in particular, of any undischarged bankrupts who wished to give such evidence (but it was pointed out that the problem of undischarged bankrupts would be reduced when the relevant section of the Insolvency Act, 1976 had taken effect).

10 The Chairman at this point stated that he felt that the existing principle that there could not be a scheme of arrangement unless 25p in the £ could be paid was a nonsense - a lower figure would reduce the number of bankruptcies. Mr John Hunter pointed out that there was no

such restriction in Northern Ireland.

11 Para 15(g) of the minutes. The Secretary stated that a list of ILRC's issued to date had been circulated. This would be kept up to date and supported by an index when this became necessary.

12 Para 16 of the minutes. The Chairman reported that the submission to the Wilson Committee could not be made available. However, both he and Mr Avis knew of its contents and there was understood to be no objection to the Chairman or Mr Avis bringing up the points in discussion, the principle one being that the basic bank lending is based on floating charges.

13 Para 27 of the minutes. Mr Walker-Arnott reported that a draft had been prepared and was being discussed with Mr Millett.

SECRETARY'S REPORT

14 The Secretary reported that:-

(a) three documents had been placed before the Committee - the Annex to ILRC 20; a copy of an article in "Trade and Industry" on Insolvencies in England and Wales - first quarter 1977; and a list of ILRC's 1-20;

(b) during the month of August, Armoury House would only be able to provide self-service cold meals (or plat du jour) /The Committee found this acceptable/;

(c) a Parliamentary Question on Romalpa by Mr Douglas Crawford had been replied to by Mr Clinton Davis on 5 May in which he said that the "implications of the use of retention of title clauses for the law on insolvency were being considered by the Insolvency Law Review Committee appointed by the Secretary of State under the chairmanship of Mr Kenneth Cork".

15 Following discussion it was agreed that:-

(a) there might be a number of things (including Romalpa) where the Committee would want to inform the Secretary of State that something should be done in advance of the final report,

(b) the Secretary should circulate copies of:-

(i) Professor Goode's article on Romalpa in the Times of 11 May,

(ii) an extract of Hansard relating to Mr Crawford's PQ, and

(iii) the policy statement by all the accountancy bodies on "Accounting for goods sold subject to reservation of title"; and

(c) the Committee would probably need to hear oral evidence before it came to any final conclusions on Romalpa.

DIRECTIONS TO THE ACCOUNTANTS' PANEL REGARDING RECEIVERSHIPS

16 The Chairman suggested that the panel should be presented with whatever the Committee had tentatively agreed on receiverships and should then (i) consider what the overall effect would be and (ii) put forward details of any other anomalies which required consideration with their views; the Committee would then look at the matter again. He asked whether or not the Committee accepted this approach and they did not dissent.

RECEIVERSHIPS

17 Further discussion took place on the last part of para 31 of the minutes of the Third Meeting where it was said 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. The following points were made:-

(a) no solution had yet been proposed regarding the conflict between the necessity of protecting the interests of the company generally and the unsecured creditor on the one hand without endangering the security of the debenture-holder,

(b) if the right was given to unsecured creditors to apply to the court to give directions to the receiver, the court would need to be given guidelines within which it should operate,

(c) it should be possible to state as a provision of law who the parties (in a legal sense) to a receivership are,

(d) there is a necessary balance between what the bankers and other lenders will accept and what society will demand from floating-charge lenders if they want to lend; it will be necessary to find out by consultation what the various parties want and then to see how this can be balanced between them,

(e) it will be necessary for a panel to work out how this can be done, and

(f) it would appear to be impractical to make a bank indemnify a receiver and then give the receiver duties to a general body and not to the bank alone; it is not possible to have the two together.

18 The Chairman then offered a further observation on who could or could not be a receiver. In the case of a director, the person's livelihood was at stake; a narrower definition could however be given as to who could or could not be a receiver since the person's livelihood was not at stake.

19 The Committee then turned its attention to the items in the Annex to ILRC 17.

20 On Item 1, it was agreed that undischarged bankrupts should be disqualified unconditionally.

21 Discussion on item 2 included the following points:-

(a) it would not be advisable to widen this to include people who had acted as accountants for a company; banks often asked accountants to monitor a company (although this would be paid for by the company) before deciding whether or not a receiver should be appointed, and such accountants would be well qualified to act as receivers as they would know all the facts,

(b) auditors sometimes in practice take instructions from the directors and may have been involved with what has gone wrong with the company, and

(c) a provision that the company or a creditor

could object to the appointment of a particular person on the grounds that he would be in a conflict situation was not practicable, as it would be too late once a person had been appointed.

It was provisionally agreed that auditors, including those of subsidiary and associated companies, should be disqualified and that this along with the Committee's other tentative conclusions would be referred to the panel.

22 It was further agreed that the present statutory provision that bodies corporate should be disqualified should continue to apply.

23 On item 3 it was agreed that persons disqualified from acting as directors should be disqualified, the words "without leave of the court" being deleted.

24 During the discussion on item 4, it was suggested there was no reason why a mortgagee under a fixed charge should not be appointed receiver. Item 4 was agreed in principle, leaving the definition of "family" to be drafted later.

25 The Committee then considered the possibility of including a sweeping-up clause and during the discussion the following points were made:-

(a) there was a proposition in certain foreign legislation that nobody should be eligible if he is likely to find himself in a position where his interest will conflict with his duties,

(b) disqualification should extend to lawyers who have been connected with or acted for the company or its directors,

(c) it is impossible to put into an Act a reference to the disqualification of persons who cannot be defined; it is only possible to have a back-up clause to remove persons who have breached one of the disqualification clauses,

(d) there must be a sweeping-up clause to cover the speedy right to apply to the court to have a person removed before any damage is done,

(e) it might be possible to specify that certain people are absolutely disbarred

but other people may be appointed but can be removed, in which case it would be necessary to devise machinery to have a person removed,

(f) all persons who, owing to their relationship with the company and its officers would find it difficult to behave impartially, could be disqualified,

(g) the court could be given power to remove persons on application of any shareholder, creditor, debenture-holder or mortgagee, and

(h) it should be crystal clear what classes of person are qualified to act as receivers.

The Committee agreed in principle that interested parties or the legal or accountancy representatives of the company or its directors should not be appointed, but it was left that the legal panel should try to define how this could be worked out.

26 The Committee next considered the Meeting of Creditors and agreed that at this, the receiver should give a report which would need to be filed. If there was no money, the receiver should apply to the court to dispense with a meeting. It was also agreed that a copy of the report should be sent to all known creditors unless the court dispensed with this obligation, and that the question of what should appear in the report would be referred to the accountants' panel.

27 On item 5, it was agreed that there should be penalties if the receiver did not call a meeting of creditors within the prescribed time and that there should be discretion in that event to have the receiver removed by the court.

28 Discussion on item 6 included the following points:-

(a) a statement of affairs within a reasonable time is a rarity,

(b) the absence of a prompt statement of affairs does not affect the quality of a receivership,

(c) the books of a receivership start with the assets as shown in the statement of affairs,

(d) the present provision regarding preparation within 14 days is too harsh,

(e) the Registrar of Companies does nothing about the absence of a filed statement of affairs unless he has a complaint from a creditor, and

(f) the first meeting if held within 3 months would have a report before it but no statement of affairs - this would come later.

It was provisionally agreed:-

(i) that the proposed meeting within 3 months together with a report would be of more benefit to the creditors,

(ii) that a statement of affairs should be produced within a reasonable time and filed, but it would be left for the accountants' panel to consider whether or not it should be sent to creditors, and

(iii) it should be possible to apply substantially the whole of the provisions and sanctions relating to statements of affairs in winding-ups (s.235 and the Rules) to receiverships.

29 On item 7, it was agreed that a deficiency account (which should at least go back from the appointment of the receiver to the last balance sheet) should be included with the statement of affairs, but it would be left to the accountants' panel to consider how far back the deficiency account should go.

30 Item 8 was felt to have been covered if the Committee's provisional conclusions on the meeting of creditors and statement of affairs were adopted.

31 On item 9, it was provisionally agreed that the first Abstract of Receipts and Payments should be filed after 6 months with comments and a forecast as to how long the receivership would last.

32 Suggestions on item 10 were that the summary should be made available on payment of a fee, that the notice of the first meeting might be accompanied by a proforma for

the creditor to indicate whether he wished to be informed, and that it might be stated at the first meeting that material would be available at the offices on and after a certain date. It was left that the mechanics should be considered by the accountants' panel with a view to providing the maximum information to the public at the minimum cost.

33 On item 11, it was suggested that the return should indicate what had happened to assets which had been hived off and that accounts of the trading subsidiary, when these were available, should accompany the return. This question would be referred to the accountants' panel.

34 During the discussion on item 12 the following points were made:-

(a) there was no problem about the summary, subject to there being leave of the court to dispense with it,

(b) there would be a committee of creditors to watch over matters, and

(c) there were good grounds for eliminating the number of things required to be done on affidavit; a simple certificate might suffice; there could be a sweeping-up clause to provide that all statements made should be treated as if sworn to and subject to the same penalties as apply to s.1 of the Criminal Justice Act 1967.

It was provisionally agreed that "cross-referenced" would be too onerous and that a summary accompanied by an appropriate commentary would be adequate.

35 Item 13 had already been dealt with in the discussion on item 9 (para 31 above).

36 Discussion took place on item 14, the following points being made:-

(a) there was a model for auditing the receiver's account in s.190 of the Singapore Act,

(b) previous tentative conclusions by the Committee possibly rendered audit unnecessary,

(c) the need for audit was mention by a receiver in the TV presentation

(Minutes of 3rd Meeting, para 2),

(d) s.2 of the Insolvency Act 1976 had made audit of trustees' and liquidators' accounts entirely discretionary (although in fact every account will be audited at least at the beginning and end of the trusteeship or liquidation),

(e) in practice a company in receivership does not receive a Companies Act audit although there is nothing to say it should not, but accounts after the commencement of a receivership bear no relation to the normal company accounts,

(f) receivers' accounts are receipts and payments accounts which should be vouched and the results obtained should somehow be checked with the statement of affairs to see whether or not the receiver had done his job properly, and

(g) the company at the request of the receiver should be able to apply for the requirement of having audited accounts to be waived.

It was provisionally agreed that there should be discretionary powers to audit receiver's accounts and that these should be deemed to have satisfied the company's liability to file accounts unless the court should otherwise order.

37 On item 15 the following points were made:-

(a) if the receiver put into liquidation a company which had paid all its debts he would be guilty of misfeasance at the suit of the shareholders; he has no power to destroy a company, the equity of which belongs to the shareholders,

(b) the receiver might have leave to apply to the court for directions (but the court would probably need guidelines),

(c) under s.29 of the Bankruptcy Act 1914, on the annulment of a bankruptcy, the court is not obliged to hand over the assets to the ex-bankrupt but can do with them as it thinks fit, and

(d) the community has an interest in a

business as much as the owners and the Committee would need to keep this in mind.

It was agreed that the legal panel should look at the problem of handing back a company to its directors and shareholders and see what protection might be given.

38 It was agreed that the answer to item 16 was "yes".

39 The Committee then considered whether or not a receiver should become the liquidator. It was felt that his experience would be of benefit, but that he should rarely be other than a joint liquidator; he should not be sole liquidator without the sanction of the court.

40 The Chairman said that the whole question of applying to the court aboutdirections would need to be considered by the Committee at a later date.

41 On item 17, Mr Muir Hunter pointed out that there were two vital stipulations in the Scots Act; it included the first statutory definition of a floating charge, and it provided that the receiver may only be removed by the court. This latter provision would overcome some problems eg, the problem of undue pressure, the question of removal in the face of his lien and the question of his being removed to the detriment of the preferential creditors. It was agreed that the legal panel should consider the Scots Act section by section.

42 The Committee then discussed further the referral of points to panels. It was agreed that, for the time being, only specific points mentioned as being required to be looked at by a panel, during the present meeting, should be referred to them, the other tentative conclusions being referred to them later.

43 On item 18 it was pointed out that fixed charges over buildings which contain a business (eg the hotel industry, public houses and, to a lesser extent, farms) are almost unmanageable unless they contain a charge over the business. It was suggested that it should not be possible to sever a charge over realty from a charge over the business carried on in it. It was agreed that fixed charges and their inappropriate applications are a matter which the Committee would wish to study, and that Mr Peter Millett should be invited to prepare a paper.

44 It was agreed that item 19 would be considered at the next meeting and that item 20 should also be left over. Mr Graham undertook to prepare a paper on judicial management. Mr Muir Hunter said he would circulate the

text of a paper which he had delivered to Credit Management on rehabilitation.

45 Items 21 and 22 were agreed.

45 It was felt that item 23 was not a matter for legislation.

47 Item 24 was agreed, but restricted to negligence and bonds.

48 On item 25, it was suggested that if the proposition was accepted that the receiver could not be removed except by the court, some part of the argument which the item recorded would fall away. It was also pointed out that the debenture-holder would be responsible if he appointed some one negligently who did not comply with what the Committee would lay down.

49 On item 26, the Secretary stated that a paper had been produced and would be circulated.

NEXT MEETING

50 It was agreed that the next meeting would be held on Monday, 27 June 1977.

INSOLVENCY LAW REVIEW COMMITTEE

NOTE TO MEMBERS

1 The following papers are enclosed:-

(a) Minutes of meeting held on 18 May.

(b) Agenda for meeting on 27 June.

(c) Annex II to ILRC 17 (see Agenda, item 5(c)).

(d) Memorandum from the Consultative Committee of Accountancy Bodies in response to the Department's letter dated 22 January 1976 (ILRC 4 refers).

(e) Policy statement by Accountancy Bodies "Accounting for goods sold subject to reservation of title".

(f) Published papers on Romalpa:

(i) Reverberations of Romalpa by Roy Goode

(ii) Considerations on Romalpa by E Raymond Burton

(iii) The Romalpa Case by Derek Wheatley

(iv) The Romalpa Case by H C Rumbelow

(v) The Romalpa Case by Alan MacKenzie

(vi) Letter by P G Churchill

(vii) Technical Bulletin dated 1 September 1976 by Robson Rhodes, Chartered Accountants.

(viii) Technical Information Release dated 14 October 1976 by Robson Rhodes, Chartered Accountants.

2 I am sure you will be pleased to learn that I have invited Gil Harper, Dai Gwyther and Bill Armstrong, of the Department, to lunch with us on 27 June.

Trevor Traylor

T H Traylor
Secretary
25 May 1977