DG

INSOLVENCY LAW REVIEW COMMITTEE

See 20.
58(a)

SIXTH MEETING

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

AGENDA

1 Minutes of the meeting on 27 June 1977.

2 Matters arising.

3 Secretary's report.

4 Sale of goods with reservation of title clauses ('Romalpa') (ILRC 18).

5 Assimilation of bankruptcy and company winding-up initiatory procedures (ILRC 20).

6 Winding-up by the Court (ILRC 12).

7 Voluntary winding-up (ILRC 13) (time permitting)

8 Any other business.

9 Agenda for next meeting.

10 Confirm date of next meeting (Thursday 25 August) and fix October and November meetings.

Trevor Traylor

T H Traylor
Secretary

1 July 1977

Decisions

36. Romalpa only where goods unchanged.

40.

41. Book debts for identifiable goods

INSOLVENCY LAW REVIEW COMMITTEE

MATTERS ARISING FROM MINUTES OF THE SIXTH MEETING BY MR MUIR HUNTER

Paragraph 11 (b) - Romalpa

(A) I should have pointed out that if "reputed ownership" were to be introduced into the law of company winding up, so as to "harmonise" it with bankruptcy, and as a means of defeating "Romalpa-type" clauses in insolvency, it would be necessary considerably to tighten up the existing reputed ownership doctrine.

This has become eroded both with the passage of time, and with the growth of hire purchase, leasing, etc., and with the "recognition" by the courts of "notorious customs" relating to specific classes of trader, which excludes any such reputation: see Williams (18th Edn at p330). The last reported case is Re Fox (1949)Ch . However, the doctrine has received recent statutory recognition in the Hire Purchase Acts and the Consumer Credit Act 1974 (see s.).

I do not think that reputed ownership can be sporadically applicable; it should be all or nothing.

(B) I have received from Mr Meier-Ewart Head of Legal Department of the German Chamber of Commerce in London, a memorandum dated 20 July 1977 on Reservation of Title from a German standpoint.

(C) I have received from the Vice-Chancellor, Sir Robert Megarry, a letter dated 27 July in answer to mine of 23 May and the Secretary's of 26 May. A copy of the Vice Chancellor's letter and my reply is attached marked 'A'.

Paragraph 19

Could (the Secretary) enlarge on the "abuses" of ss. 125, 126 of the 1869 Act to which he referred in ILRC 5 para 8, and to which I have referred? The photocopy of these sections in the 1869 Statutes which (the Secretary) annexed to my paper ILRC 20 shows annotation of a large number of cases therein.

see Robson. (1887)

Paragraph 21 (e) and (f)

Consideration must be given to harmonising the s. 227 cheque-honouring situation in company petitions with the more indulgent bankruptcy rules in Re: Dalton (1963) Ch. 336 ; notice of an act of bankruptcy does not invalidate bona fide payments, and the payment by a bank of the debtors cheque drawn in favour of a third party is equivalent to payment to the debtor, or to an assignment of his funds.

Paragraph 23

I feel that there must be some established system (other than the bank's generosity) for financing bona fide post-petition trading. Should not the Official Receiver have access to public funds (quaere, the Redundancy Fund) for trading which will avert the closure of a business and subsequent redundancies, leading to claims on that fund?

Paragraph 26

See ILRC 34 para 7.

I am preparing a paper as promised (herewith Part I in M.S.)

22 August 1977

Muir Hunter

THE VICE-CHANCELLOR

Royal Courts of Justice
Strand
London WC2A 2LL

27th July 1977

VC 4

Dear Muir Hunter,

Romalpa

I am sorry not to have answered your letter of 23rd May before. It arrived just after I had left for Canada, as I think my clerk told your clerk, and it was part of a heavy accumulation that I found on my return. I have made some progress, but I fear that I shall be unable to give you a full answer until after a judges' meeting next term.

I do not know how much we will be able to help you, as we seem to have had little experience of such clauses so far. I imagine that in bankruptcy the order and disposition clause, s.38(c), will take most of the sting out of Romalpa clauses, and that one of the major questions will be whether something like s.38(c) ought to be applied to companies, and what the consequences of doing this would be in other spheres. However, there seem to be many other problems arising from Romalpa clauses which affect the general law, and I wondered whether such clauses were not matters which ought to be looked at by the Law Commission for their effect on the law as a whole, rather than be considered only from the insolvency point of view. Indeed, for a moot that I had to do some while ago I began to consider setting a problem based on X fabricating into one article goods that he had obtained from A, B and C, when A's and B's goods (but not C's) had been obtained under Romalpa clauses. I soon dropped the idea because of the difficulty, inter alia, of keeping the argument

within manageable limits!

I will let you know when I have any progress to report. I should be grateful if you would ask Mr Traylor to treat this letter as also being a reply to his letter of May 26th.

Yours sincerely,

Copy

18th August, 1977.

The Hon. the Vice-Chancellor,
Royal Courts of Justice,
Strand,
London, WC2.

Dear Vice-Chancellor,

"Romalpa"

Thank you very much for writing to me on 27th July on this matter, despite your many other commitments.

The "Romalpa" affair continues to gather momentum in the business world, and our Insolvency Law Review Committee has been discussing it at length.

We shall be greatly obliged if the Chancery Judges feel able to assist us in our study of this subject.

We do not feel able to deal with the application of the Romalpa principles to the law of the sale of goods generally, where among other problems it infringes on the projected internationalisation of that law, e.g. through UNCITRAL (the United Nations Commission for International Trade). Our remit does not seem to extend beyond the effect of those principles in insolvency, and the necessity or possibility of controlling them within that limited field. We have indicated that view to the Law Commission to whom you refer in your letter.

We may very well come around to recommending the introduction into winding-up of the bankruptcy "reputed ownership" clause, but it would need to be in a more robust form than that which now prevails in bankruptcy.

We are meditating the possibility of some form of registration of "Romalpa titles", but this seems to involve great administrative difficulties.

Cont...../

I am sending a copy of our correspondence to our Secretary, Traylor, and will ask my colleagues' consent to send you a copy of our current documentation and deliberations.

Yours sincerely,

Muir Hunter.

✓Copy to T.T.

INSOLVENCY LAW REVIEW

Minutes of the Sixth Meeting of the Review Committee on 28 July 1977

Present:

K R Cork (Chairman)
P G H Avis
J S Copp
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

1 The Committee met at 10.00 a.m. The minutes of the fifth meeting held on 27 June 1977 were discussed. With regard to the second sentence of para 20 it was pointed out that registration was for an all moneys charge and the amount was not necessarily specified; it was agreed that it would be necessary to come back to this point, the general feeling being that on floating charge registrations there must be registration of the limit and alteration of limits if they were to be valid (ie any excess over the stated figures on the register would not be secured in a liquidation). It was suggested that the first and second sentences of para 40 appeared to be contradictory and that no mention had been made in the summing up of the important decision taken in para 36. It was agreed that the words "with a view to continuing the discussion" should be inserted after "session" in line 1. It was pointed out that in discussing book debts (para 41) it had not been decided how one established which book debt referred to which goods. The last sentence of para 46 was felt to need clarification and it was agreed that it meant that the item was accepted by the Committee. Para 58(a) was discussed further and it was agreed that the word "hinge" should read "impinge". The minutes as amended were agreed and signed by the Chairman.

2 The Chairman suggested that in future, to save time, members having comments on the minutes should send them to the Secretary in advance of the following meeting.

CRIMINAL BANKRUPTCY

3 The Chairman reported that a meeting had been held with Mr Blom-Cooper, QC (Advisory Council on the Penal System) regarding criminal bankruptcy. Mr Blom-Cooper had said that the system was not working because those against whom criminal bankruptcy orders were made under the present rules were those persons who were subjected to lengthy prison sentences and therefore, those most likely to be unco-operative in the bankruptcy procedings. The Chairman added that a fuller discussion on this matter would take place later.

SECRETARY'S REPORT

4 The Secretary reported as follows:

(a) Mr Drain, Mr Millett and Mr Weiss had sent apologies for absence.

(b) Mr Howard and Mr Sell had been invited to lunch with the Committee.

(c) Papers circulated since the last meeting were:

(i) ILRC's 25, 26, 27 and 28,

(ii) a folder of comments from the first 25 consultees,

(iii) extracts from Hansard of 5, 9 and 27 May of various Parliamentary Questions, and

(iv) a letter dated 15 July from the Law Commission regarding their proposed draft report regarding interest at a statutory rate.

(d) The following papers had been put before the Committee at the present meeting:

(i) LP3 - a brief to the Legal Panel on their remits from the Committee,

(ii) an extract from Trade and Industry of 8 July concerning the bringing into force of the provisions of s.7 and s.8 of the Insolvency Act 1976 on 1 October, and

(iii) two extracts from Hansard of 5 July of further answers to PQ's, one of which specifically referred to the Committee.

5 With regard to the comments from consultees; it was agreed that when the Committee had a particular subject to discuss, they should also have before them a paper summarising

relevant comments from consultees, on the lines of ILRC 28 (which summarised the Romalpa comments).

6 With regard to the Law Commission's letter of 15 July, it was agreed that this was within the terms of reference but that the Commission should be told that the Committee could not help them at this stage. It was further agreed that copies of the letter should be passed (a) to the Insolvency Rules Committee and (b) to the Insolvency Service, who should be asked for a paper setting out their views.

7 It was agreed that Scotland should be added to the countries referred to in para 2 of LP3 (remit to the Legal Panel).

8 The Chairman suggested that as soon as the Committee had finished with a particular subject a draft of the intended report, as nearly as possible to its final form, should be produced. This would help to clarify the Committee's thinking and could be amended later as necessary. Also, it would form the basis of a consultative document which might be sent out in stages. He did not think, however, that Romalpa could wait for the final report and an interim report might be necessary.

9 The Chairman also suggested that members should be provided with a loose-leaf file setting out under simple headings miscellaneous matters which they were required to consider (such as criminal bankruptcy applying in fraud cases) and which had been referred to in PQ's, Judgments, etc.

ROMALPA

10 The Chairman referred to the approach from the Law Commission and remarked that there was a clearly defined difference in the remits. The Committee were concerned only with what happened in an insolvency situation but the Commission were dealing with Romalpa under ordinary trading conditions and had been told that we had no objection to them considering that aspect of the problem.

11 The Secretary pointed out that in addition to ILRC 18, referred to under item 4 of the agenda, members had also received ILRC 27 "Thoughts on Romalpa" by Mr Penny and ILRC 28 which summarised the comments on Romalpa which had been received to date from consultees. Mr Penny's paper was discussed and the following observations were made:

(a) it went outside the terms of reference; the committee's interest was only in what happened in an insolvency situation to the goods which the debtor (or debtor company) had in his ostensible possession or the debts resulting therefrom; this was really the old question of reputed ownership, which had been invented to overcome precisely the problems with which we were now faced - what the debtor had in his possession was deemed to be his; business would not come to a standstill if reservation of title was prohibited but it could do so

Reputed ownership should be tightened up

if floating charges were destroyed,

(b) the problem could be solved by applying the reputed ownership doctrine to companies with the exception of goods which formed part of a security which was registered,

(c) the Committee could not abolish Romalpa; all it could do was recommend that the effect in an insolvency be limited,

(d) if a Romalpa - creditor was not diligent, then he should lose his rights,

(e) there was a great difference between simple and extended reservation clauses; any claim that the title for goods should not pass until a lot of other things had happened must, in itself, be a floating charge; the Court of Appeal did not consider exhaustively the whole situation, but in the Interview case, the Irish Court had said that although they would allow the following of the goods, they would not allow the following of the book debt because that was in fact a charge on book debts,

(f) most small traders belonged to trade protection organisations and could find out whether Romalpa clauses existed if the use of Romalpa clauses was registered,

(g) the paper brought out basic principles and these could not be isolated from Romalpa; there were a number of ways in which one creditor could get ahead of the general body; property could be taken out of a company by means of a trust (the Kayford case); then there is the situation where property never gets into a company because of Romalpa or because of a lease; there could be a vendor's lien in the sale of property; a limited property interest could be acquired by means of a lien, or there could be a charge; it could be argued that it was fair to expect to get out of an insolvency that for which you had contracted when dealing with the company before insolvency,

(h) reservation of title had existed in this country for many years, but had not been applied to general trade goods, and,

Mrs Swart

(i) we had been interfering with the rights of the general trading public for hundreds of years; there was an absolute rule of insolvency law that you could not have a provision whereby you improved your position in liquidation, and Romalpa offended against that principle.

12 The Chairman remarked that in his view, people should be able to do what deals they liked within reason, as long as everyone dealing with that particular concern knew what the deal

was; credit should be given on an intelligent anticipation of the likely solvency of the company. There followed some discussion about registration of Romalpa type clauses and the following points were made:

(a) a prospective seller would look at the register and if anyone had registered that the prospective purchaser bought Romalpa-type goods, then the seller would have nothing more to do,

(b) it should be possible to design a central registry which would disclose that a company was subject to Romalpa-type clauses; prospective creditors had every means of determining the status of a person with whom they proposed to do business,

(c) a central registry would impose an immense burden on the Registrar of Companies or involve setting up a large and expensive additional registry,

(d) other matters, such as chattel mortgages, would also have to be registered, and

(e) the Department should be asked to carry out a feasibility study of having a central registry.

do they agree?

13 The Chairman then asked individual members of the Committee whether they thought that retention of title clauses should or should not be enforceable in an insolvency. With the exception of Mr Walker-Arnott, all those present agreed in principle that such clauses should not be enforceable in insolvency, although Mr Goldman and Mr Copp expressed reservations. Mr Walker-Arnott thought such clauses should be enforceable in insolvency provided their existence had been disclosed. The Chairman said that there was an overwhelming view that such clauses should be void; if, for some reason, this view was not acceptable then it followed that there ought to be a notification somewhere so that people would know of the existence of the clauses.

14 Mr Muir Hunter thought that there should be provisos. Firstly, in referring to insolvency, it would be necessary to exclude execution and landlords rights. Secondly, the Committee would have to decide as to whether by "insolvency" they should include the enforcement of a floating charge otherwise than in insolvency (under s.94, which was sometimes loosely talked about as an insolvency) and whether the floating charge holder should be entitled to go against Romalpa protected goods in the same way as a liquidator could.

15 It was accepted that the Report would have to set out the reasons for making the recommendations that Romalpa clauses should not be enforceable in insolvency.

16 It was agreed that the decision should be remitted to the Legal Panel to see whether or not legislation could be drafted

which would carry the Committee's recommendation into effect.

17 The Chairman took the view that the decision should apply only to trading goods and that it should not apply to goods sold subject to HP agreements or leasing arrangements, which were generally goods of a capital nature. He thought that the Legal Panel should try to work out how this distinction could be made. In the discussion which followed the following points were made:

(a) a trading asset in the hands of a vendor was often a capital asset in the hands of the purchaser,

(b) there were good precedents for making distinctions; under the HP Act everything over £5,000 was excluded and a distinction was made in capital gains tax,

(c) there would be immense difficulties in drafting any such provisions which would also have to take into consideration such matters as tolling contracts, and

(d) if, for example, one referred to "contracts of sale where the goods which were the subject of the contract were in the possession of the insolvent company, but the title had been retained by the vendor" people would find another way which would not actually constitute a contract of sale.

Mr Goldman observed that what was now being said was that reservation of title clauses would be void in an insolvency, but with reservations, and he asked for a clearer remit for the Legal Panel. The Chairman said he would accept that all reservation of title should be out, but HP agreements should remain valid.

ASSIMILATION OF BANKRUPTCY AND COMPANY WINDING-UP INIATORY PROCEDURES

18 The Committee continued its consideration of ILRC 20.

19 Mr Muir Hunter said that he had discussed with Registrars and Practioners the question of collectivising bankruptcy and there was a feeling that the disclosure of the existence of a bankruptcy petition against an individual in the way that he had postulated would, in many cases, be socially and commercially disastrous. He had now devised some mechanics which might enable the two systems to run side by side in that when you received a bankruptcy notice it would invite you to collectivise the bankruptcy at your own request. You would invite the court to convene a meeting of creditors in the way set out in the annexure from the 1869 Act. Most of the High Court Registrars expressed concern about dealing with a debtor whom they believed to have substantial other debts. More important was the other half of the paper in which he sought to struggle with the dangers of the collectivisation of a company winding-up and to which he

had directed the extract from the Credit Management paper and the quotation from Lord Justice Philimore. Basically, what one needed to do was to ensure that the publication of a winding up petition did not destroy the business. If the onus of proof was reversed and all transactions by a company subject to a winding-up petition were valid unless the court decided that they were improper then some of the destructive effect of the advertisment might be reduced. The revival of s.125 and s.126 of the 1869 Act would require close thought, particularly with regard to the abuses mentioned in para 22 of the paper. He asked for Mr Avis's views on the proposal that banks should be protected in keeping a company's account going.

20 Mr Avis said that the submission by the British Bankers Association, which the Committee would soon be receiving, took up this point. Under the present provisions a bank had the choice either of stopping the company's account or continuing it and monitoring or accepting, often with difficulty, those transactions which were judged by the bank to be bona fide for normal trading purposes in the period between the winding-up petition and the hearing. It was not practical to go to court every time a cheque was presented. The BBA suggest that s.227 be amended to enable a company to continue to operate its bank account until the final hearing of the petition unless the court ordered otherwise on the application of a creditor and notice of such order had been given to the bank. This would enable the company to trade normally until the court decided its future.

21 During discussion the following points were made:

(a) any cheque presented could be disposing of part of the company's net worth,

(b) case law is in an extremely unsatisfactory situation,

(c) the period between the presentation of a petition and the hearing was often very long,

(d) the assassination of a company by advertising a petition (before it was served) by spiteful people was counter-productive,

(e) at present the general rule, with some exceptions, was that no cheque was paid,

(f) cheques to the company were often met but not cheques to third parties, and

(g) the problem could not be disassociated from who should be allowed to control the company in the interim period.

22 The Secretary thought that "disposition of property" would be a major subject to be dealt with on its own by the Committee. He added that the Jenkins Report (para 503(k)) had recommended that the court be empowered, between the

petition and the winding-up, to validate a disposition and that it should be made clear that the court was empowered to sanction the carrying on of the business, including the drawing of cheques on the company's bank account. However, in the immediate post-Jenkins period, the Department had felt that case law indicated there were no real doubts as to the court's powers under s.227, but there was a danger that if these were spelt out, there would be a presumption that without the court's sanction the company could do nothing after the presentation of a winding-up petition. The Chairman remarked that nowadays one had to look into the effect on the community. It was a widely held belief that any company which had a petition against it was beyond saving as a business. Too many companies went into creditor's voluntary winding-up instead of being wound up compulsorily merely because of this provision.

23 In discussion, the following points were made:

(a) the court ought to hear the majority views,

(b) an individual was in a worse position than a company; one determined petitioning creditor would prevail whereas he should not be entitled to more rights than a creditor of a company,

(c) the Companies Acts specifically say that the court shall have regard to the wishes of the creditors and can convene meetings for that purpose - the Bankruptcy Act is silent on the point,

(d) creation of a Deed of Arrangement is an act of bankruptcy and one determined creditor can either get paid in full or prevent the Deed and destroy the business; this was a reason for having notice taken of the collective views of creditors, and

(e) there was no hope of getting a scheme going once a petition had been presented.

24 Mr Penny suggested that the problems would largely be solved in both types of insolvency if there was a preliminary hearing on notice; a notice should be sent to the individual debtor or debtor company saying that a debt was unpaid and that a petition would be presented if the debtor did not apply to court for it to be stayed. The Chairman felt that this might be considered later.

25 The Chairman then suggested that the problem should be divided into two parts, the events leading up to the petition and the procedures thereafter. With regard to the latter, it was agreed that it would be desirable to attempt to divise almost identical systems.

26 The Chairman suggested that a paper should be produced setting out what the present procedures were in voluntary winding up, compulsory winding up, bankruptcy and deeds of arrangement;

indicating the problems and how these procedures might be harmonised, treating "deeds" as a form of voluntary liquidation for individuals; he wanted the paper to be on a practical rather than a historical basis. Mr Graham undertook to do this and the Chairman suggested that Mr Weiss might assist him. Members of the Committee questioned whether there might not be other answers than bankruptcy or "deeds" for individuals and the Chairman invited alternative suggestions to be submitted. Mr Graham pointed out that the Legal Panel was already looking into alternative systems in other countries. Mr Muir Hunter pointed out that compulsory and voluntary winding up procedures were already set out in ILRC's 12 and 13 and he undertook to prepare a parallel paper on bankruptcy.

AGENDA FOR NEXT MEETING

27 It was agreed that there would be a general discussion on compulsory and voluntary winding-up and bankruptcy based upon ILRC's 12 and 13 and the paper to be prepared by Mr Muir Hunter.

OTHER BUSINESS

28 Mr Penny said that he would prepare a paper on administration orders and their extension into small bankruptcies.

FUTURE MEETINGS

30 It was agreed that the next meeting would be held on Thursday 25 August. The dates of subsequent meetings were fixed:

Friday 23 September

Monday 17 October

Thursday 17 November and

Monday 12 December.

3 August 1977