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# INSOLVENCY LAW REVIEW COMMITTEE

SEVENTH MEETING

Meeting to be held in the Conference Room, 2-14 Bunhill Row on Thursday, 25 August 1977 at 10.00 a.m.

AGENDA

1 Minutes of the meeting on 28 July 1977

2 Matters arising

3 Secretary's report

4 Programme forecast (ILRC 29) ← General principles

5 Compulsory winding up (ILRC 12)*

6 Voluntary winding up (ILRC 13)*

7 Bankruptcy - General review*

8 Any other business

9 Agenda for the next meeting

10 Confirm date of next meeting (Friday 23 September)

* Further working papers will be sent out shortly.

T H Traylor
Secretary

3 August 1977

7th Mtg
25.8.77

# INSOLVENCY LAW REVIEW

## Minutes of the Seventh Meeting of the Review Committee on 25 August 1977

Present:

K R Cork (Chairman)
P G H Avis
J S Copp
G Drain
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 a.m. The minutes of the sixth meeting held on 28 July 1977 were agreed and signed by the Chairman.

MATTERS ARISING

2. The Secretary said that at the last meeting the Secretariat had been given various tasks (paras 5,8, and 9 refer). He had to report that it had not been possible to progress any of this work to date due to lack of staff. The work of supporting the committee, its panels and consultants had been steadily increasing and additional staff had been applied for. The Chairman asked to be kept informed of the position so that he could take action if it became apparent that the work of the Committee was being held up.

3. The Secretary reported that notes by Mr Muir Hunter and Mr Penny on matters arising had been circulated to members.

4. The Committee discussed Mr Muir Hunter's note (a copy of which is annexed hereto). The Chairman remarked that consideration of Romalpa had been referred to the Legal Panel and they would need to take these additional observations into account. In connection with the

correspondence with the Vice-Chancellor Mr Muir Hunter explained that the Vice-Chancellor proposed to have a meeting with the Chancery Judges within whose field bankruptcy and winding-up falls and who would normally administer Romalpa-type cases, to consider whether they should have a view on Romalpa. During the discussion it was generally agreed that the Committee should only say, on any particular subject, what should happen in insolvency although it would be necessary in coming to a view to consider the effect before insolvency. The Secretary pointed out that enforcement procedures were part of the Committee's remit and it was agreed that to some extent it would be necessary to consider these; it might however be necessary to write to the Minister explaining to what extent the review was being limited. It was further agreed that working papers could be sent to the Vice-Chancellor (or any other body attempting to do similar work to the Committee), that it would be left to the discretion of the Secretary to be as helpful as possible in explaining the general attitude of the Committee and that if he had any doubts he should consult the Chairman; any views expressed however should not be attributed to any particular member of the Committee or to any particular consultee.

5. With regard to para 19 Mr John Hunter pointed out that the 6th Edition of Robson on Bankruptcy published in 1887, referred to the abuse of proxies and Mr Graham added that creditors friendly to the debtor used to put in inflated claims which were not challenged and that trustees then generally were of low calibre. It might be worthwhile looking again at the pre-1883 ideas bearing in mind the changes in professional standards.

6. There followed a general discussion resulting from Mr Penny's note /members are requested to treat this note as an annex to ILRC 27/. It was generally felt that it would be easier to come to conclusions on general principles after the Committee had familiarised itself and discussed each subject and reached tentative conclusions on that subject. The Chairman said that he expected that a consultative document with provisional views would be produced and issued to consultees, and this would obviate the need to hear a great deal of oral evidence.

SECRETARY'S REPORT

7. The Secretary reported as follows:-

(a) Mr Goldman and Mr Millett had sent apologies for absence,

(b) Papers circulated since the last meeting were:

(i) ILRC 29-34 (see para 9),

(ii) a discussion paper on "VAT. Bad Debt Relief" from HM Customs and Excise,

(iii) the second folder of 25 submissions of evidence from consultees together with summaries,

(iv) the two "matters arising" papers already referred to above.

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

(i) an updated list of ILRC's

(ii) a paper published in the Guardian Gazette entitled "The Judgment of Salomon Reappraised",

(iii) a paper on Romalpa from the Head of the Legal Department, German Chamber of Industry and Commerce, and

(iv) a paper on VAT Bad Debt Relief from Mr Logan, the Official Assignee, Northern Ireland,

(d) The Accountants Panel had asked if they could have a study paper summarising the views and comments from consultees on receiverships (the Committee agreed to this request).

(e) He had a meeting with Mr Vidler, the secretary of the Consultative Committee of Accountancy Bodies. The CCAB had set up a working party under the chairmanship of Mr W Mackie to prepare evidence and the other members were:

G T Parsons (Peat Marwick, Mitchell)

I Bond (Deloitte & Co)

S M Fraser (William Murray, Scotland)

G A Whale (a Certified Accountant)

A M D Bird (Thornton Baker & Co, Bristol)

It had been suggested to them that as the working party had been set up late, their evidence should be submitted piecemeal, and

(f) the Croydon visit had been fixed for 6 October.

8. The question of evidence from consultees was discussed. The Secretary said that it was proposed to prepare subject papers summarising the views of consultees on each subject. The Chairman did not feel that there would be time to discuss at length the individual submissions by consultees and

suggested that members should make a note of anything that they felt should be discussed. The Committee might have a one day's discussion on particular points noted by members of the Committee. The question of taking oral evidence would be decided after a consultative document had been prepared. It was hoped that some sort of index of consultees' papers would be available in due course.

9. It was decided that ILRC 34 (the first memorandum from the Department of Trade) was in fact evidence to the Committee and not really proper to the ILRC series of papers. Members are requested to renumber the paper "DT 1 (ILRC)".

10. There was a short discussion as to how the Customs and Excise paper on VAT bad debt relief should be handled. Whether Customs and Excise grant an ordinary trader relief or insist on waiting for insolvency to occur before granting it, was nothing to do with the Committee; the Committee's interest was whether in insolvency the Committee accept that Customs and Excise could prove for a debt either preferentially or otherwise in respect of something that was collected or not collected. It was suggested that the proposal in para 10(f) as presented was wholly untenable - it proposed to quadruple the Customs and Excise preferential claims. It was agreed that Customs and Excise should be informed that the Committee could not consider the matter at this stage.

PROGRAMME FORECAST

11. The Secretary introduced ILRC 29. This updated the earlier programme and took into consideration matters which altered the views as to the sequence of subjects. The proposed programme was accepted but it was agreed that it should be preceded by a short discussion of the general principles of informal alternative procedures to bankruptcy.

INFORMAL ALTERNATIVE PROCEDURES TO BANKRUPTCY

12. The Chairman outlined the present Deeds of Arrangement procedures which he said were both simple and useful and worked well for traders. There were however snags; the calling of the creditors together constitutes an act of bankruptcy, the trustee is in peril for three months until the act of bankruptcy runs out, a creditor who does not join in sometimes uses this as a blackmailing device in order to get paid off, the powers of a trustee are less than those of a trustee in bankruptcy (he cannot for instance go back and examine prior transactions and recover assets as he could in bankruptcy) and there were not the same provisions with regard to wives. It would be possible to eliminate these snags; Deeds could then prove a useful alternative to bankruptcy and would be more widely used.

13. During the discussion which followed, points made were:-

(a) there was no provision for examination of the debtor but public or private examination could be written into the proposals,

(b) substantially the same results are achieved in Northern Ireland under the system of arrangement under the control of the Court (ILRC 35 by Mr John Hunter refers); the system had defects but the debtor was protected from his creditors immediately,

(c) it would be necessary to have a statutory form of Deed,

(d) if the debtor could not persuade at least a simple majority of the creditors that there should be a Deed it was almost certain that he deserved to be made bankrupt,

(e) it would be unthinkable to impose the views of a bare majority of creditors and provision would have to be made for a dissentient creditor to apply to the Court with a view to persuading the Court that the debtor should not have a Deed,

(f) the meeting of creditors should elect the trustee, who should be a member of a recognised body,

(g) the new type Deed should not be available to a fraudulent or reckless debtor, or one with really substantial liabilities in relation to assets,

(h) the trustee of a Deed and his Committee should have a statutory duty to report to the Court with a view to having the debtor made bankrupt if in the course of the administration or private examination he finds a lack of honesty or frankness,

(i) S.3 of the Deeds of Arrangement Act 1914 had been forgotten in the indexation of values and still deals with creditors of £10 or less in value,

(j) at present Deed trustees appear to treat prosecution with contempt as fines are treated as an expense of administration,

(k) it would be necessary to consider how to re-open Deeds, perhaps in the way a creditors' voluntary liquidation can be re-opened, and

(l) the new procedure would only be useful where there were assets; where there were little or no assets other informal procedures would need to be devised.

14. The question of the form of the majority at the meeting of creditors was considered and it was generally accepted that it should be a simple majority, subject to a dissatisfied creditor having the right to apply to the Court.

15. Where there were insufficient assets to warrant a Deed and the debtor was not a person who should be subject to the full rigours of bankruptcy it was suggested that there should be some sort of Court administration. The present Administration Order procedure lacked teeth but this could be modified to provide similar powers for the administrator to those of the trustee in bankruptcy, for example to look at antecedent transactions.

16. It was suggested that the full rigours of bankruptcy should be maintained for debtors who really deserved them, such as those who had been fraudulent or reckless. It was felt that there should be a strengthening of the present arrangements and that there should be a public examination in every case.

17. Mr Copp also suggested that all forms of insolvency should start with an application to the Court.

18. The Committee agreed in principle that there should be three categories of administration, a developed form of Administration Order procedure (perhaps under some other name), a modified form of Deed of Arrangement and a more rigorous bankruptcy.

19. The Chairman suggested that it would be useful to set out on paper for further consideration what the procedures might be and it would then be possible to see what loopholes had to be covered. He asked Mr John Hunter and Mr Penny to prepare a paper on the new form of Administration Order. With regard to a similar paper on a modified Deed, setting out the extra powers trustee should have in getting assets back and holding private examinations and the duties of the trustee to go to Court, Mr Graham pointed out that in collaboration with Mr Weiss he had already been asked to produce something of this nature at the last meeting (para 26); it was agreed that what was now wanted on Deeds was something in more detail. It was thought that it would also be useful to have a paper on the present administration of Deeds, preferably by a Deed trustee who would be able to set out what the problems were; Mr Weiss thought that probably he and Mr Goldman could do this. The Chairman asked Mr Muir Hunter if he would prepare something on the remedies for the protection of the minority of creditors who were unhappy with a Deed and on the grounds on which they could apply to the Court.

20. It was agreed that if possible the modified form of Deed procedures should be discussed at the next meeting.

VOLUNTARY WINDING UP

21. The Chairman said the the Committee were concerned here with the creditors' voluntary winding up; members' winding up applied to solvent companies and he was not sure that these came within the remit. He then outlined the creditors' winding up procedures. Again these were simple and the business could carry on trading. Again, however, there were snags, principally with regard to the chairman and the proxies. By law the chairman had to be one of the directors and he could be an evil director. Many creditors appointed the chairman as proxy and he could use proxies for inter-company debts, true or false, and claims for arrears fo directors' remuneration, true or false; this often enabled him to block the wishesof the creditors present. He also arbitrated as to who would be accepted for voting or not. Where a voluntary liquidation had a reputable liquidator it was almost impossible to get this changed into a compulsory liquidation.

22. There was some argument as to whether or not shareholders should be allowed to meet first to appoint a liquidator or indeed whether they had any interest at all in the liquidation. It was pointed out that they would have to resolve that the company should be wound up, and that the resolution should say that by reason of its liabilities the company could not carry on business. This did not necessarily mean that there was a net asset deficiency and it was not strictly correct to say that the shareholders had no interest.

23. It was suggested that the power of the members to appoint a liquidator should be taken away, but it was pointed out that the Committee would be proposing restrictions on who should be able to act as liquidator and this would meet the objections.

24. There was discussion on the question of who should be chairman. It was pointed out that the meeting fell into two stages. In the first the company's affairs were reported on and a director as chairman was questioned. The second stage was the election of a liquidator and if a creditor or his representative acted as chairman there was the same problem with proxies; that creditor would be gaining a greater say then he was entitled to as an interested person.

25. The Committee accepted in principle that procedures should stay as they are, but a disgruntled creditor should have the right to apply to the Court for a new meeting to be called - the Court could then direct who should act as chairman.

PROVISIONAL ADMINISTRATOR

26. The Chairman drew attention to one of the snags of liquidation in that it was often necessary for there to be someone to keep the company going until a liquidator is appointed. The provisions under compulsory winding up did not work well and there were no provisions under voluntary liquidation. The Committee had been talking about someone being able to apply to the Court to have a receiver or administrator of a company appointed when it was not necessarily insolvent. He suggested that it should be possible in the case of liquidations to apply to the Court to have a provisional administrator appointed on a temporary basis to deal with the hiatus.

27. It was pointed out that Jenkins had recommended that provisional liquidators could be appointed (see para 4 of ILRC 13). The Chairman did not feel that the word "liquidator" should be used. In a contractor's business as soon as a provisional liquidator was appointed the sub-contractors would leave the site and there would be no business to sell. What was needed was someone who would not take credit or get caught for fraudulent trading. This could also be the name for the receiver for a debenture holder; the bank could have the right to appoint a provisional administrator without going to Court.

28. The Chairman invited the Committee to think about this proposal.

OTHER BUSINESS

29. Concern was expressed about including consideration of enforcement procedures in the Committee's remit. Mr Penny remarked that the main complaints in legal journals and the submissions by consultees had been about the County Courts and these complaints might be met by expanding the Administration Order procedure; it would probably not be necessary to go into enforcement generally. It was agreed that the Secretary would circulate an extract of the Minister's statement in the Committee Stage of the Insolvency Bill and that the matter would be discussed at the next meeting.

NEXT MEETING

30. It was agreed that the next meeting would be held on Friday 23 September and dates of meetings after 12 December would be settled at that meeting.

2 September 1977

Annex:

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 (1948)Ch 407. However, the doctrine has received recent statutory recognition in the Hire Purchase Acts and the Consumer Credit Act 1974.

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.

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

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,

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.

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INSOLVENCY LAW REVIEW COMMITTEE

NOTE TO MEMBERS

1. The following papers are enclosed:-

   (a) the minutes of the Seventh Meeting held on 25 August,

   (b) the agenda for the Eighth Meeting to be held on 23 September,

   (c) ILRC 35, Northern Irish Arrangement Procedures - note by Mr John Hunter,

   (d) ILRC 36, Insolvency of Individuals - Outline of Possible New System - by Mr John Hunter,

   (e) a note on Enforcement Procedures together with an extract from the proceedings of Standing Committee C on 27 April 1976, and

   (f) an article on Administration Orders published in the New Law Journal of 28 July 1977.

2. With regard to ILRC 35 and 36, Mr John Hunter has asked me to point out that these were prepared before the discussion at the meeting on 25 August.

3. Item (e) is included in the agenda for the meeting on 23 September. It is hoped to issue before then an ILRC paper setting out consultees' comments to date on Enforcement Procedures.

Eric Reeves

E L REEVES
2 September 1977