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INSOLVENCY LAW REVIEW

Minutes of the Twentyeighth Meeting of the Review Committee on 12 March 1979.

Present:	Sir Kenneth Cork	(Chairman)
	J S Copp	
	AIF Goldman	
	J M Hunter	
	D McNab	
	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	
	G A Weiss	

1 The Committee met at 10.00 am. The minutes of the twentyseventh meeting held on 12 February 1979 were agreed and signed.

MATTERS ARISING

2 Referring to para 2 of the minutes of the twentyseventh meeting where it had been said that the Insolvency Practitioners' Association had agreed to assist by providing certain statistics on receiverships, the Secretary said that the Registrar of Companies had now also agreed to keep statistics on receiverships over the period March to May.

SECRETARY'S REPORT

3 The Secretary said that Mr Avis, Mr Drain, Mr Muir Hunter and Mr Jack had sent apologies for absence.

4 Papers circulated since the last meeting had been ILRC 87 to 92 on antecedent transactions. It was pointed out that ILRC 92 dealt with the avoidance of floating charges and not with the propriety of floating charges.

5 Papers now before the Committee were:-

(a) an extract from "Trade and Industry" on "Insolvencies in England and Wales: fourth quarter 1978",

(b) an extract from "Trade and Industry" on the structure of company financing",

(c) a Parliamentary Question regarding the number of winding up orders in 1978,

(d) an article in the Financial Times on the Bond Worth/Monsanto case,

(e) a letter by a Mr Hartley to the Financial Times on the floating charge as a security, and

(f) three replies to that letter.

6 With regard to meetings during March, the Penny sub-committee had met on 2 March, the Accountants' Panel were meeting on 15 March, the Weiss sub-committee were meeting on 19 March, and the drafting sub-committee were meeting on 27 March.

SET OFF

7 The Committee had before it ILRC 76.

8 The Committee agreed that in principle the setting-off of mutual claims where there were no complications was acceptable. Mr Taylor pointed out that the Committee should bear in mind that basically set-off was only applicable to debts which could be proved in an insolvency.

9 On the question of whether or not set-off should be mandatory it was noted that "Halesowen" had upheld the view that parties cannot contract out but there was a strong body of evidence that this decision should be reversed and contracting out was possible under Scots law. It was felt that contracting out would only harm the creditor who had done so and that it would be to the advantage of the other creditors. The Committee agreed therefore that it ought to be possible to contract out.

10 The possibility of contracting in for setting-off claims which were not mutual was touched upon and it was suggested that contracts could already provide for this. It was felt that the Committee should not interfere with normal contract law.

11 The Committee considered whether "knowledge of insolvency" should be a bar to set-off. It was noted that the question of "commencement of insolvency" was a matter still to be settled. It was suggested that taking goods instead of cash after the commencement of insolvency should be barred. There was also the problem of the creditor who bought debts at a discount so that he need not pay his own debt in full; this amounted to a fraudulent preference in that the creditor was taking artificial steps to get himself preferred. It was suggested that this should be void during the suspect period, but the question of the effective date was a matter which should be discussed later. The problem was related to antecedent transactions and it was agreed that it should be discussed when that subject was under consideration.

12 Set-off involving two Government departments was then considered. The Committee agreed that there should be no set-off between taxation, including VAT, and contractional obligations; Mr Taylor and Mr McNab however expressed reservations about some forms of duty or taxation. The Secretary said that the vast majority of the consultees who had commented on set-off had referred adversely to the practice of departments setting-off one form of tax or duty against another. Mr Millett said that although the Crown was regarded as indivisible, Government departments could sue each other and should therefore be regarded as separate entities. Mr Taylor pointed out that there was a lack of mutuality between taxes which were not of the same nature. The Chairman added that departments would not allow an individual to set-off a sum owed to him by one revenue department against a debt owed to another revenue department. The Committee agreed that in respect of taxes there should be no set-off involving two departments. The Committee then considered set-off in respect of trading transactions by different government departments, and Mr Taylor took the view that mutuality should be the test. The Secretary thought that if set-off could not be allowed on taxes it might be difficult to allow it on trading. Mr Penny and Mr McNab felt that the Government should have the same rights as large companies. By a narrow majority the Committee agreed that set-off of trading transactions should not be permitted. The Chairman said that Government departments should be asked whether they accepted that a company trading with different departments would be allowed to set-off a debt, and Mr Graham undertook to try to find out what the practice was in other common law countries.

13 The Committee then turned to the question of a set-off being made first against an unsecured claim where a creditor had both preferential and unsecured claims. The Secretary said that the Inland Revenue applied set-off rateably in a winding-up but against the unsecured claim in a receivership; in "Morel", Mr Justice Buckley had decided that set-off should be applied first against the preferential claim. The Chairman felt that if a preferential creditor obtained his money by some other means (eg. by set-off) then he should be satisfied. To apply the set-off otherwise was unfair to other creditors. Mr Taylor agreed, pointing out that the assets were held in trust, first for the preferential creditors. Mr Walker-Arnott referred to the question of an employee with a preferential claim but who also owed money to the company; the employee had a preferential right and a set-off right and he did not see why that employee should not be able to order his rights to his best advantage. By a majority the Committee agreed that set-off should be applied first against preferential claims. It was noted that if it was decided that companies were to be liable for the debts of wholly-owned subsidiaries, set-off in those cases might have to be considered further.

14 The Committee considered next the miscellaneous points on set-off made in paras 23 to 31 of ILRC 76.

15 ILRC 76, para 23. A number of consultees had suggested that "mutual debts" and "mutuality" should be more clearly defined. It was noted that there was a great deal of case law. It was decided that definition of this was not a matter for the Committee. It was noted that the "British Eagle" case needed to be discussed at some time; Mr Graham suggested that transactions designed to defeat the bankruptcy laws should be void. "Quistclose" was thought to be a trust matter.

16 ILRC 76, para 24. It was noted that the "Access" credit card arrangement was the individual banks operating through a joint company for administrative convenience. The Committee could not accept that there should be restriction on the right of set-off of banks, one branch to another, and with credit card companies.

17 ILRC 76, para 25. The Chairman instanced the case of someone who had a loan of say £1000 from a company and had guaranteed an overdraft; under the present law he had to repay the £1000 and meet the shortfall on the guarantee, and he thought that in fairness set-off might be permitted. Mr Taylor thought that there was an absence of mutuality, and Mr Millett said that it was a question of double proof - it was all one debt and covered by the bank's claim. The Committee agreed that there should be no set-off.

18 ILRC 76, para 27. It was decided that group trading needed to be looked at again.

19 ILRC 76, para 28. (Set-off between contracts in the building trade). It was not felt that the statement made was right. It was thought that the difficulty arose through the contractual arrangement, but the Secretary should seek clarification.

20 ILRC 76, para 29. It was thought that this had been covered.

21 ILRC 76, para 30. It was agreed that there should be no set-off.

22 ILRC 76, para 31. It was agreed that rates should be treated in the same way as taxes.

UPPER CLYDE SHIPBUILDER'S DECISION

23 The Committee had before it C146 to 148 (submissions by the Law Society of Scotland, the Consultative Committee of Accountancy Bodies and the Committee of Scottish Clearing Bankers) and a copy of a letter from the Department of Employment to the Law Society of Scotland. Mr Taylor said that the question of re-engaging employees was the point at issue; he thought that the liquidator might have avoided his problems if he had allowed the winding-up order to terminate the employment, and had then re-engaged the employees on completely different and distinct terms, so that it could not be argued that there was continuous employment. The Chairman thought that people ought to be entitled to their redundancy as and when a receivership or liquidation

came up. The Secretary pointed out that the key finding of the Court was that in the context of the Redundancy Payments Act the liquidator was the same persona as the company, and when he re-engaged employees he did so on behalf of the company and the employee was not taken as dismissed. In consequence the liquidator was saddled with the liability of the employer's share of the redundancy payments. The consultees thought that this was putting the department in a position of preference for the employer's part of the redundancy payment. However the department's letter indicated that irrespective of what might have been implied by the Court's decisions, they intended to continue their previous practice of claiming as an unsecured creditor and not as a preferential creditor. All that he thought was necessary therefore was to bring this intention into legislation. The Chairman agreed and suggested that all that needed to be decided was (i) that if the receiver or liquidator continued trading he did not pick up personally the liability as a first charge on the assets and (ii) although the redundancy will not be known at the time, it would be treated as though it were known for the purpose of subsequent proof and the receiver or liquidator would reserve for it. The Committee did not dissent.

ANY OTHER BUSINESS

24 The Committee congratulated Mr Goldman on his appointment as a Deputy Circuit Judge.

25 It was decided that antecedent transactions (including the further paper on set-off (para 11 above)) should not be discussed until commencement of insolvency had been dealt with. It was hoped that the sub-committee on that subject, together with Mr Millett and Mr Penny, could be re-convened soon.

NEXT MEETING

26 It was agreed that the Committee would meet at 10.00 am on Tuesday, 24 April. It was hoped that the main item on the agenda would be bankruptcy.