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INSOLVENCY LAW REVIEW COMMITTEE

THIRTYSECOND MEETING

Meeting to be held in the Conference Room, 2-14 Bunhill Row, on Tuesday 10 July 1979 at 10.00 am.

A G E N D A

1. Minutes of the meeting on 13 June.
2. Matters arising.
3. Secretary's report.
4. Bankruptcy offences (ILRC 94, paras 61-63 and Annex).
5. Immediate winding up order (ILRC 97 - attached).
6. Voluntary settlements (ILRC 87, para 28). Gifts? (Re Canada)
* 7. Fraudulent preferences (ILRC 88, and brief attached).
8. Any other business.
9. Agenda for the next meeting (19 September).

* Time permitting.

4. need for offences to apply to all types of insolvency status.
Statistics of ~~Offen~~ prosecutions (criminal bankruptcies)
HP Offences.

? Disqualifications. (Annex para 8)
CAB para 12

T H Traylor
Secretary

MH
DM
CT
TT
PA & JE
RP
PM.

31st Mtg
13.6.79.

INSOLVENCY LAW REVIEW

Minutes of the Thirtyfirst Meeting of the Review Committee on 13 June 1979.

Present:	Sir Kenneth Cork	(Chairman)
	PGH Avis	
	J S Copp	
	AIF Goldman	
	J M Hunter	
	MVS 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 thirtieth meeting held on 16 May 1979 were agreed and signed.

MATTERS ARISING

2 With regard to para 2 of the minutes, a meeting of the sub-committee was fixed for Tuesday, 3 July at 10.30 am. Mr Muir Hunter remarked that the observations of the County Court Registrars in the latest batch of written submissions were highly relevant to the grounds for the presentation of a petition and would need to be borne in mind.

3 Referring to paras 5 and 6 of the minutes, the Secretary said that the Committee of London Clearing Bankers had now submitted written evidence, and the CCAB, the American Banks Association of London and the Law Society of Scotland had indicated that they would be submitting evidence by the 30 September. A memorandum and questionnaire had gone to the Registrars.

4 With regard to para 10 of the minutes, the Secretary said that he had written to the Institute of Chartered Accountants in England and Wales as instructed and they had replied to the effect that they had taken note of the Committee's views.

5 Mr Avis, referring to para 32 of the minutes, asked what could be done about speeding up progress. It was noted that the Committee had a very wide remit and the nearest parallel was the Payne Committee which, taking four years, had 67 full-day meetings, 11 full-day hearings of oral evidence plus numerous other smaller meetings. Other committees with narrower remits had taken three years; the length of time taken and the likely number of meetings

would not therefore be extraordinary. Mr McNab remarked that it was important that all points should be discussed and he was not worried about the time being taken; it was necessary to ensure that the right decisions were taken and matters should not be rushed. Mr Taylor stressed that there was a need for an argued case to be presented. Mr Goldman thought that the committee should aim at reporting by a particular date; he did not think that every little detail should be gone into it. Mr Penny suggested that members might have to give more time to the committee. Mr Copp thought that much increased progress would be made when the committee could consider draft chapters of the Report. The Secretary said that it was hoped that some draft chapters and a layout of the Report would be sent to members in July. Mr Muir Hunter thought that satisfactory progress had been made so far but it was in members' own hands to control the length of proceedings by the length and diffuseness of their speeches. He asked members to resolve to be brief and to read their papers. He thought that it would be possible to set the committee's views down concisely without going into enormous detail, and members agreed with this in principle. It was suggested that dates of meetings beyond October should be fixed and the Secretary indicated that he would speak to the Chairman about this.

SECRETARY'S REPORT

6 The Secretary said that Mr Drain and Mr Millett had sent apologies for absence.

7 Further written submissions (C153-165) had been circulated since the last meeting.

8 Regarding meetings in June, the Legal Panel met on 8 June and the Weiss sub-committee on 11 June. The Penny sub-committee were meeting on 18 June, the Drafting sub-committee were meeting on 19 June, there would be a combined Penny/Weiss sub-committee meeting at Guildhall House on 25 June and the Accountants' Panel were meeting on 28 June.

9 The Panels had reached conclusions on a number of matters which had been referred to them and these would be put to the committee as soon as practicable.

HOUSING AND BANKRUPTCY

10 The Secretary referred to paras 43 to 45 of ILRC 94 and to paras 23 to 27 of the minutes of the thirtieth meeting. It had been agreed that the matter would be discussed further when the page proofs of Williams had been made available and these had in fact been circulated with the minutes.

11 Mr Muir Hunter observed that a policy decision had to be taken which might involve interference with the general law. The committee had to decide between the harder line taken by the bankruptcy judges, who were inclined to say that creditors came first with only modest relief to the wife, and the line taken by the Family Division. It was necessary to face up to the fact that in insolvency something must be done for the family, who otherwise might become a charge on public funds. He was in favour of some protection for the family home.

12 Mr Graham suggested a cooling-off period after the declaration of insolvency allowing time for the debtor to arrange his affairs, with the asset becoming available to creditors later. Mr Taylor supported this but did not think that the debtor should get away with free living during the period.

13 The Secretary drew attention to a statement by Lord Denning in a recent case, that most wives are joint owners of the matrimonial home either in law or in equity and that the wife is in occupation just as much as the husband.

14 Mr Goldman pointed out in practice the home is often the only asset available for creditors. He was in favour of a cooling-off period and suggested that no trustee should have the right to start proceedings for eviction until one year from the date of adjudication.

15 Mr Walker-Arnott said that the problem involved any property owned by the bankrupt where anyone is residing as his ordinary home. The Court should have the widest discretion to make orders restraining the trustee from dealing with the asset, taking into account the interest in the property of the other persons, the relationship with the bankrupt, their involvement in the affairs of the bankrupt and their responsibility in the insolvency, the value of the property, the existence of a mortgage, etc.

16 Mr Penny said that he would go further. The problem involved also husbands and the "modern" wife (eg. a co-habitee). The law had done much to protect the latter. The common law had developed from four Acts, the Married Womens Property Act, the Law of Property Act, the Matrimonial Homes Act and the Matrimonial Causes Act. The latter, which only applies to truly marital situations, gives the Court a wide discretion on the disposal of the assets in the family unit and s.25 provides guidelines as to how the discretion should be exercised. He suggested that in all insolvency cases where people claimed a right in the home the Court should have a wide discretion to declare the rights and interests of the parties, and should be required to bear in mind the original and present legal interests of the claimants and the circumstances in which such interests were acquired; the contribution of the claimants to the acquisition and maintenance of the dwelling and to repayment of any loans charged thereon; the period and extent of use by the claimants since acquisition; the relationship of the claimants and the interests of any children (as defined in the Matrimonial Causes Act); the minimum future needs of the claimants and children; and the involvement of the claimant in the affairs of the bankrupt. He added that it was unusual for any real injustice to be done in matrimonial courts. Mr Muir Hunter expressed his support for the suggestion.

17 Mr Graham pointed out that a fair balance had to be struck between the people in the home and the interests of creditors, and suggested that the situation needed to be resolved within 12 months.

18 The Chairman thought that such proposals might lead to a log jam in the Courts but it was pointed out that after a few cases in the Court of Appeal precedents would be set.

19 Mr McNab was concerned about payment of interest on the mortgage during the cooling-off period and thought that the value of the house had to be taken into consideration.

20 Mr Avis said that in a year the property would often deteriorate and the value would go down. There could also be situations where unpaid creditors were in a worse plight than the bankrupt.

21 Mr Weiss said that if there was to be a year, the trustee was entitled to some evidence that efforts were being made by the bankrupt and his family.

22 Mr Penny said that there was no proposal to stop the rights of a mortgagee. He was proposing that the trustee should have the right at any time to apply to the Court for a declaration as to his interest in the property.

23 The Chairman agreed that the considerations enumerated by Mr Penny should be taken into account but thought that it should not be the trustee who applied to the Court. The people living there should apply for relief. This would obviate the year's delay. Mr Goldman and Mr Graham were against the onus being placed on the wife and family, and other members had doubts about this.

24 When it was put to members all were agreed that the family should be accorded some relief.

25 Mr Walker-Arnott said that while he was in favour of giving the Court discretion to restrain the trustee from evicting the family he would not go as far as letting the Court apportion property.

26 Mr Muir Hunter reminded members that under the present law the trustee had to make application to the Court to get possession, and Mr Taylor added that often the family and the trustee come to an amicable arrangement which did not involve application to the Court.

27 It was agreed that the present arrangement that the trustee should apply should continue and that the Court should be given guidelines as to how its discretion should be exercised. The matter was referred to one of the Bankruptcy Working Groups to work out the guidelines.

DISABILITIES OF THE BANKRUPT

28 The Secretary referred to ILRC 94, paras 50 to 51 and reminded members that full bankruptcy was to be reserved for serious cases.

29 With regard to para 50(2)(credit), Mr Goldman supported the Farrar approach (Annex to ILRC 94, para 2) amending the offence to failure to pay within a specified time, with the bankrupt having a defence if he could establish that he had reasonable prospects of paying when he obtained credit. Mr Walker-Arnott however thought that this could lead to much argument. It was finally agreed that the bankrupt should not obtain credit of £ x for goods and services, or a loan of any amount, without disclosure. In defining loans, hire purchase and guarantees would be brought in. As to the amount for goods and services, it would be pointed out this was subject to indexation and the amount should be increased.

30 It was agreed that para 50(3) (engaging in trade or business under another name) should remain.

31 On para 50(4) (acting as director or taking part in management of a company, except by leave of the Court) it was agreed that concern should be expressed at the extent to which this continues to occur and that the offence should include management of a business.

32 In para 50(5) acting as a liquidator or trustee in bankruptcy were added.

33 With regard to para 50(6), it was agreed that there should continue to be an inhibition against the bankrupt taking part in public life but only until he was discharged. The concept of a "certificate of misfortune" should be dropped.

34 It was felt that the complexities arising from a bankrupt escaping abroad were sufficient to justify a restriction on his movements. There was general agreement that he should not be able to keep a passport without leave of the Court.

DISCHARGE OF THE BANKRUPT

35 The Secretary referred to ILRC 94, paras 52 to 53.

36 It was agreed that automatic review should be kept and it was suggested that it should be after three years. Mr Taylor pointed out that a bankruptcy case usually takes three years and the Court must know the outcome of the bankruptcy. There was general agreement that the period should be five years. It was further agreed that the review should commence as a private application but should become a public affair if it was in the public interest or the bankrupt's interest. On the assumption that there was no discharge after the automatic review, there should be automatic discharge after ten years. There might be a lacuna in that the bankrupt might not be advised of his discharge.

37 It was thought that the s.7 (IA 1976) procedure was too new to be able to form any views as to its social desirability and its technical efficiency.

38 It was agreed that bankrupts should be able to apply for discharge upon conclusion of the public examination, and the Court should be able to grant an immediate discharge; the hearing should be in open court. Provision might have to be made for conversion from bankruptcy to "liquidation of assets".

39 It was agreed that all the possible orders should be retained except that of suspending the discharge until a dividend of 50p in the £ had been paid; this was governed by uncertainty and could be covered by para 50(e) anyway.

40 In para 50(e) the reference to "balance" did not mean the whole balance but a proportion and this should be clarified.

ANY OTHER BUSINESS

41 Mr Muir Hunter said that with the Chairman's consent he was asking the Committee if representatives of the Commission of European Communities (concerned with directives on reservation of title and on securities without dispossession) could be present at the relevant deliberations of the Committee. The Committee agreed provided that it was limited to presence when these subjects were discussed.

NEXT MEETING

42 It was agreed that the Committee would meet at 10.00 am on Tuesday, 10 July 1979.

INSOLVENCY LAW REVIEW

IMMEDIATE WINDING UP ORDER

1 This report by the Legal Panel has been seen by the Accountants' Panel who offered the following comments:-

(i) On para 4, notice should be given to the Official Receiver.

(ii) It might be preferable to speed up the voluntary winding up process, but on the other hand, there will be cases where a company cannot bear the cost of calling a s.293 meeting.

(iii) Some doubt is expressed about directors resolving to adopt this procedure; members of the company would have no say and it could be open to abuse. If the shareholders are brought in, immediacy is lost, but only they should be able to pass such a resolution.

2 Regarding para 1(iii) above, note should, perhaps, be taken of the remarks by Mr Justice Brightman in a recent case: that the practice of directors presenting petitions to wind up insolvent companies in the name of the company but without reference to the shareholders or any specific power in the articles should be discontinued.

Case name?

Trevor Traylor

T H TRAYLOR
Secretary
21.6.79.

INSOLVENCY LAW REVIEW

IMMEDIATE WINDING UP ORDER - REPORT BY LEGAL PANEL

1 At the third meeting on 28 April 1977, the Main Committee were considering whether it was necessary for all winding up petitions to go before a judge, or whether uncontested petitions should be dealt with by the registrar, thus saving time and expense (see ILRC 10, para 32(e)).

2 The Committee decided that uncontested petitions should go before the registrar provided it could be ensured that the interests of third parties were not disregarded. In addition, the Legal Panel was invited to consider the practicability of a company itself getting an immediate winding up order (para 22 of the minutes of the third meeting refers).

3 Under the Bankruptcy Acts it is possible for a debtor to get a receiving order and an order for the administration of his estate in bankruptcy at the same time. We think there is a great deal of merit in some comparable procedure being available to a debtor company. If a company has reached the stage at which liquidation is the only answer then it should be able to wind itself up at the earliest opportunity, thus saving costs and delays.

4 We see no reason why the Court should be directly involved. We propose that a company should be able to resolve upon a compulsory winding up and that this should be deemed to be in all respects as if it was by order of the Court, the order being made the moment the resolution was passed.

5 The Official Receiver would become provisional liquidator and convene first meetings of creditors and contributories in the usual way. We believe that the deeming provision should enable the Official Receiver, as an Officer of the Court, to become involved. We do not think that any additional significant burden would fall upon the Insolvency Service because the companies involved would almost certainly get into compulsory liquidation eventually. We note that at present in a creditors' voluntary winding up, if no outside liquidator will accept appointment, there is no provision for the Official Receiver to become liquidator and the only alternative is compulsory winding up.

6 We have considered whether it was right for a company to be able to put itself into liquidation without the creditors having a say. We feel that our proposals do not deprive the creditors of a choice any more than do the existing arrangements.

INSOLVENCY LAW REVIEW COMMITTEE

BRIEF ON FRAUDULENT PREFERENCES

(References are to ILRC 88)

1 Should the word "fraudulent" be dropped? (paras 27-32)

"Williams on Bankruptcy" suggests "voidable" and the Scottish Law Commission favoured "illegal". The Budd Committee and the Department's solicitors were in favour of retaining "fraudulent" as its meaning was well understood in this context.

2 Requirement to prove "intent". (paras 33-36)

There are various proposals for overcoming this problem:-

(i) Adoption of Scots Law whereby intention to prefer is assumed if the statutory conditions are met (eg. six months qualifying period).

(ii) Blagden's proposal for a short period of absolute preference (with a proviso to protect bona fide transactions).

(iii) Presuming an intention to prefer in the case of non-arm's length payments, as in Canada, where the period is one year.

(iv) Relying, not upon an intention to prefer, but upon the insolvency of the debtor, as in the EEC and the USA.

(v) Adopting the Australian test - ie. whether the payment had the effect of giving a preference.

(vi) Putting the onus on the person benefiting to prove that there was no intention to prefer.

3 Concept of pressure (paras 37-39)

There have been suggestions that the test should be insolvency alone without any question of pressure. This appears to be the position in the USA and the Canadian Bill specifically precludes payment under pressure being offered as a defence. In the EEC it would not be a defence if payment was of a debt not yet due.

4 The "suspect period" (paras 40-42)

There have been suggestions that the present six months period should be extended, but six months as a general rule seems to be favoured by most countries. There are ways in which the general rule might be strengthened:-

(a) A shorter period of "absolute preference" with presumption of intent, insolvency, etc.

(b) Tougher rules for transactions which are not at arm's length.

(c) Tougher rules for payment of debts not yet due.

5 Should receivers be able to attack fraudulent preferences? (para 43)

6 If 5 is agreed, who should benefit? (paras 44/45)

7 Should fraudulent preference with knowledge of insolvency be an offence? (para 71)

The Scottish Law Commission think so, such offence being punishable by fine or imprisonment.

8 If 7 is accepted, should it apply also to directors of insolvent companies?

9 Time limits (paras 48/49)

Should there be a time limit within which actions to avoid preferences should be brought? One year has been suggested. The Canadian Bill sets a 3 year limit.

Trevor Traylor

T H TRAYLOR
Secretary
21.6.79.