1(4.6)

INSOLVENCY LAW REVIEW COMMITTEE

THIRTYSIXTH MEETING

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

A G E N D A

1 Minutes of the meeting on 21 November.

2 Matters arising.

3 Secretary's report.

4 Debts Arrangement Orders (ILRC 100).

5 Fraudulent preferences (ILRC 88 and brief dated 21.6.79).

6 Sureties and guarantors (ILRC 89).

7 * Fraudulent conveyances (ILRC 90).

8 Any other business.

9 Agenda for next meeting (18 January 1980).

* Time permitting.

Trevor Traylor

T H TRAYLOR
22.11.74

36th Mtg
14.12.79

INSOLVENCY LAW REVIEW

Minutes of Thirtysixth Meeting of the Review Committee on 14 December 1979.

Present:	Sir Kenneth Cork	(Chairman)
	PGH Avis	
	J S Copp	
	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	
	R B Jack	
	G A Weiss	

1 The Committee met at 10.00 am. The minutes of the thirtyfifth meeting held on 21 November 1979 were agreed and signed.

MATTERS ARISING

2 The Secretary said that the date fixed for the meeting in June 1980 was inconvenient for the Chairman and the meeting would now be held on Wednesday, 25 June 1980.

3 Referring to para 2 of the minutes of the thirtyfifth meeting, the Secretary reported that the Chairman had received a letter from the Parliamentary Under Secretary of State regarding the Ethics Committee ruling on the question of receivers acting as joint liquidators. This indicated that the Department appeared to be more favourably disposed to the Committee's views. Copies of the letter had been circulated.

PROGRAMME FORECAST

4 The Secretary said that a paper had been put before the Committee setting out a Programme Forecast. To speed up consideration of matters by the Panels, these had been or were being split in pairs at the Chairman's suggestion to prepare the initial drafts of reports. The work of the drafting sub-committee had been suspended for the time being. The Programme Forecast indicated that the following new subjects needed reports to be prepared:-

Criminal Bankruptcy
Partnership Bankruptcy
Administration of deceased insolvents' estates
Special insolvency courts
Company reconstructions and amalgamations
Investment of surplus moneys by liquidators and trustees.

5 The Chairman suggested that Mr Muir Hunter, Mr Walker-Arnott, Mr Millett and Mr Avis should form an informal sub-committee to deal with these matters and members present agreed. The Chairman went on to say that he wanted the sub-committee to allocate subjects to individual members to prepare an initial report with recommendations; the sub-committee should consider these and report to the Committee. The sub-committee should make their own arrangements for informal meetings and choose their own chairman. The Secretary added that the secretariat could undertake any necessary typing. The Secretary said that Mr Muir Hunter had informed him that he was likely to be increasingly busy in the New Year and would find it difficult to take on additional work. Mr Penny offered to prepare a report on "Special insolvency courts" and it was agreed that this should then go to the sub-committee. Mr Walker-Arnott said that he would prepare a report for the sub-committee on "Company reconstructions and amalgamations". Mr Avis said that he would take on "Partnership Bankruptcy" and "Administration of deceased insolvents' estates" but thought that Mr Muir Hinter would be the best person to handle "Criminal Bankruptcy".

6 Mr Walker-Arnott pointed out that there were special problems relating to the insolvency of insurance companies and other special bodies such as building societies, and industrial and provident societies. The Secretary said that the Department was not expecting the Committee to deal with these. Mr Walker-Arnott suggested that if insurance companies were not to be dealt with, the insolvency of Lloyds underwriters (as syndicates) should also be excluded.

7 The Secretary pointed out that although the Programme Forecast envisaged dealing with the main subjects by the end of September 1980 and that emphasis would then fall on the final Report, it might be necessary to deal with ancillary subjects, including any further oral evidence, during the Autumn.

SECRETARY'S REPORT

8 The Secretary said that he had had apologies for absence from Mr Drain and Mr Muir Hunter.

9 Apart from the papers put before the meeting and referred to above, ILRC 101 to 103 had been circulated, together with comments by members on the subjects on the present agenda.

10 As to meetings early in 1980, the Committee would be meeting on 18 January, the Accountants' Panel on 22 January, Working Group 2 on 25 January, the Weiss sub-committee on 30 January, the Legal Panel on 6 February and Working Group 1 on 7 February.

DEBTS ARRANGEMENT ORDERS

11 The Committee had before it ILRC 100 (the report by the Penny sub-committee) and comments by members on that report. The Committee discussed these.

12 Para 11 of ILRC 100. Mr Avis had suggested that once an order had been made, administration of it could be contracted out to a suitable firm or body. Several members opposed this; Mr Taylor said that experience of unofficial OR's had not been satisfactory and Mr Millett was against farming out on an ad hoc basis although

he thought that the court should have power to appoint a firm to administer all the workload on an annual fee basis. Mr Penny thought that a private trustee who was a member of an approved body and acceptable to the court could be contemplated. It was agreed that the Registrar should have power to appoint a private administrator in cases where he thought this suitable.

13 Para 14 of ILRC 100. Mr Avis thought "arranging debtor" clumsy. It was agreed to use the term "DAO debtor".

14 Para 18 of ILRC 100. Mr Goldman said the designated official in the County Court must be someone of quality, especially trained and specially paid. It was agreed that the report should say that the work should be carried out by a properly qualified person.

15 Para 20 of ILRC 100. Mr Avis' suggestion that line 8 should read "no significant realisable assets" was accepted.

16 Para 26 of ILRC 100. Mr Avis suggested that where the summons and writ explained how a debtor could apply for a DAO, there should be added "emphasising that he should not dispose of any of his assets improperly", but it was pointed out that this would be on the application form. Mr Goldman thought that altering the form of writ would be difficult but Mr Taylor said that this was no more than putting a note on it. It was agreed that the para would "suggest" and not "propose".

17 Para 29 of ILRC 100. Reference was made to "necessary support of the family" and "in the ordinary course of business". It was pointed out the latter was an accepted phrase and, as to the former, the cases would only involve small debtors, property would not be involved and the DAO would only be made if the creditors agreed. The wording was left unchanged.

18 Para 30 of ILRC 100. Mr Avis thought that future assets such as interest under a trust should be included and Mr McNab wanted substantial gifts in the last 12-18 months detailed. It was pointed out that substantial gifts could be taken into account when a DAO is made and that if future assets arose an interested party could apply for review. It was agreed that information about disposal of assets should be given and that the debtor should give an undertaking to notify any change of circumstances, including change of address and change of employment.

19 Paras 34 and 39 of ILRC 100. Minor amendments by Mr Avis were accepted.

20 Para 35 of ILRC 100. It was agreed that the report should refer to a provision similar to the lost Clause 10, and 10(5) and 10(6) should be omitted.

21 Para 39 of ILRC 100. It was noted that a debtor could only gain time to the extent of 14 days, and that as there would not be a list of debts on a creditor's application the stay would not take effect until the DAO was made.

22 Para 41 of ILRC 100. The application would date from the time of filing by the court.

23 Para 47 of ILRC 100. It was agreed that line 10 should read "The order should also prohibit....". As to the Enforcement Restriction Order this should apply in respect of all forms of insolvency; all credit could not be prohibited but only credit above a specified amount. Whether or not breaking the terms of an ERO should be an offence would need to be considered, and the limit and the penalty for contravention should be the same as in bankruptcy. There would be no time limit on an ERO, but it was always subject to review.

24 Para 53 of ILRC 100. It was agreed that extension to 5 years should only be after review, and that "or" in the last line should be deleted.

25 Para 57 of ILRC 100. Contingent claims should be excluded but when making an order the court would take into account future liabilities. Creditors should not get money in advance in respect of a debt owing to say a year's time. When it became due, the debt could be enforced in the usual way or the creditor could apply for review of the DAO.

26 Para 58 of ILRC 100. Mr Avis thought that the idea that creditors who could not know of the application could still participate in the DAO conflicted with the decision taken at the last meeting (para 38 of the minutes), but the other members saw no clash. The latter decision referred to moneys paid in to court not accruing only to creditors at the date of the first petition, but to creditors at the date of the Protection Order. Only debts due and payable at the date of the DAO would be included in the DAO.

27 Para 60 of ILRC 100. It would be made clear that there were no preferential creditors.

28 Para 62 of ILRC 100. Mr McNab's suggestion that a second DAO should be published was accepted.

29 Para 63 of ILRC 100. It was agreed that there should be a central registry, as well as local registration.

30 Para 67 of ILRC 100. It was agreed that "Credit shall include HP or allied transactions which are at present held to be excluded".

31 Paras 69-74 of ILRC 100. Mr Penny pointed out that in para 30 (and in the interim report) it was said that in the event of failure to comply debtors may be held to be in contempt of court. This was discussed. Mr Goldman was against imprisonment for small debtors, but others thought that there could be cases where it could achieve results. By a majority the Committee accepted the idea of contempt, and agreed that the administrator would report any failure to comply with the terms of the DAO to the Registrar who would either revoke the DAO, recommend the debtor be made bankrupt, or refer the case to the Judge for consideration of contempt of court.

32 Para 70 of ILRC 100. The idea that an Attachment of Earnings Order should be noted on the P45 when employment changed was rejected.

33 Para 76 of ILRC 100. The matrimonial home was being discussed by Working Group 2.

34 Para 87 of ILRC 100. It was agreed that the final report should draw attention to the Payne Committee's recommendations on a debt counselling service.

35 Para 88 of ILRC 100. There had to be proper contributions from income in full bankruptcy.

36 Para 89 of ILRC 100. It was agreed that fines should be excluded, because if they were included the creditors would be paying the fine. It was a matter for the courts to decide as to how and when the fine should be paid.

37 Mr Copp's comments. The Secretary said that this covered two points. The first was that there should only be one initiation procedure - this was a matter Working Group 1 could take up. The second was that more emphasis should be placed on contributions from income rather than selling up. Mr Copp said that this was a point of principle. The relationship between surplus income and the realisable value of assets had changed and the value of household assets had fallen. Contributions from income in all insolvency procedures at an early stage should be considered. The Secretary said that the last three lines of para 88 accepted this principle and Mr Goldman said that Working Group 2 had Mr Copp's views in mind.

38 Mr Penny undertook to produce a draft chapter for the final report, to be considered by the Drafting sub-committee.

39 The Committee congratulated the sub-committee on its work.

FRAUDULENT PREFERENCES

40 The Committee had before it ILRC 88, a brief on ILRC 88 and comments by Mr Avis and Mr John Hunter.

41 It was agreed that the word "fraudulent" should be changed. It was suggested that "voidable" or "wrongful" should be used but no decision was taken and further consideration was deferred.

42 Mr Avis said that the Committee envisaged a "claw back" provision which would enable the trustee or liquidator to investigate antecedent transactions within a specified period and set aside any which were not bona fide or full value. Was it necessary therefore to consider "fraudulent preferences" separately? The Chairman said that the Committee would be attempting to define those payments prior to insolvency which can be voided.

43 There was a long discussion on "intent", "pressure" and a period of absolute avoidance. Mr Avis and Mr Taylor supported Blagden's idea of a short period of absolute preference (perhaps 21 days) but with a proviso to protect bona-fide transactions. The Chairman was against this as it would be enormously difficult to go back and look at every transaction during the period. Mr Hunter did not see why last minute creditors should suffer. Mr Millett pointed out that a company collecting a debt would not be safe in the case of an absolute period for 3 weeks and during that time may have used the money to pay its own debts.

44 The Chairman suggested that any creditor paid under genuine pressure should be able to retain the money. Mr Millett supported

this, saying that the diligent creditor should keep the fruits of his diligence. The Secretary pointed out that Canada had said that pressure should not be a defence. It was put to the meeting, but the majority of members thought that pressure should be no defence.

45 It was agreed that there should be an absolute void from the commencement of insolvency.

46 The Chairman suggested that there should be a one month void period which would apply unless the creditor could prove that in exchange for the payment there had been some form of consideration which was commercially sensible and would be to the benefit of the general body of creditors; the onus should be on the liquidator to prove otherwise. Mr Millett suggested that only payment of a pre-existing liability should be clawed back.

47 Several of the members liked the Australian idea of the test being whether the payment had the effect of giving a preference and Mr Hunter pointed out the Australian saving for the rights of a payee who could prove the payment was in good faith, for valuable consideration and in the normal course of business; there was no interference with bona-fide transactions such as would result from a period of absolute voidability. The Chairman added that while he accepted this, the payment should also be for the benefit of creditors generally.

48 It was agreed that where a payment was made which would result in something to the ultimate benefit of creditors it should stand.

49 The Chairman suggested the following formula. A payment within 6 months of the commencement of insolvency should be void unless there was a commensurate advantage for the general body of creditors or it enabled the business to be carried on as a going concern. He asked that members should consider this and if they did not accept it to provide the Secretary with a suggested alternative. The matter would be considered further at the next meeting.

FUTURE MEETINGS

50 The Committee would meet next at 10.00 am on Friday, 18 January 1980. As indicated in para 2 above, the June 1980 meeting would be on Wednesday, 25 June and not as previously agreed.

3(3-4) 36th Mtg
14.12.79

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