1(67)

INSOLVENCY LAW REVIEW COMMITTEE

THIRTYSEVENTH MEETING

Meeting to be held in the Conference Room, 2-14 Bunhill Row on Friday 18 January 1980 at 10.00 am.

A G E N D A

1 Minutes of the meeting on 14 December 1979.

2 Matters arising.

3 Secretary's report.

4 Fraudulent preferences (continued). (ILRC 88 and brief dated 21.6.79).

5 Sureties and guarantors (ILRC 89).

6 Wrongful trading (ILRC 101).

7 * Fraudulent conveyances (ILRC 90).

8 * General assignment of book debts (ILRC 91).

9 Any other business.

10 Agenda for next meeting (21.2.80).

Note It would be helpful if you would kindly let me have brief notes of points which you wish to raise on any item of the agenda as soon as convenient so that they can be circulated to the other members.

* Time permitting.

Trevor Traylor

T H TRAYLOR
12.79.

3C3.7)

INSOLVENCY LAW REVIEW COMMITTEE

Note to Members

BRIEF FOR MEETING ON 18 JANUARY 1980

Attached are comments which have been received from members of the Committee on items due to be considered at the meeting on Friday 18 January, viz:-

Item 4 - Fraudulent preferences (in particular, see 36th Mtg minutes, para 49):

Comments from Mr Goldman , Mr John Hunter and Mr P J Millett

(Note Detailed comments from Mr Avis and Mr John Hunter were circulated before the last meeting).

Item 5 - Sureties and guarantors:

Comments from Mr John Hunter were circulated before the last meeting.
No further comments received.

Item 6 - Wrongful trading:

(a) Observations by Mr Avis.
(b) Comments by Mr Walker-Arnott.
(c) Comments by Mr John Hunter.
(d) Comments by Mr McNab.

Item 7 - Fraudulent conveyances:

(a) Points to be raised by Mr John Hunter were circulated before the last meeting.

(b) Observations from Mr Avis.

(Note Points for discussion are set out in para 14 of ILRC 90)

New Zealand Bill

Also enclosed is a copy of the Companies Amendment Bill which has been received from New Zealand.

Trevor Traylor

T H TRAYLOR
Secretary
14.1.80

3(42)

INSOLVENCY LAW REVIEW COMMITTEE

BRIEF FOR MEETING ON 18 JANUARY 1980

ITEM 4(d)

Fraudulent Preferences

(Observations by Muir Hunter)

1 Some system for the invalidation of disposal of the insolvent's assets "immediately preceeding" the commencement of insolvency is essential, in the interests of the general body of creditors and of the concept of "commercial morality".

2 All existing insolvency systems possess such a system; vital characteristics of each reflect national policy decisions in the insolvency field. Each commercial society must make such decisions for itself, and the characteristics of other systems can do no more than provide examples of machinery or of useful legal terms of art.

3 The term "fraudulent preference" is not merely misleading; it may confuse both debtor and creditor, and would plainly be inappropriate to any "automatic invalidation" of pre-insolvency transactions. The term "voidable preference" would be more appropriate and more accurate.

4 Any system for invalidating transactions or voidable preferences must be:-

(1) visibly fair and just;

(2) reasonably easy and cheap for the trustee/liquidator to operate;

(3) such as not to encourage litigation; and

(4) such as not to induce pressing creditors to adopt compulsory insolvency proceedings instead of accepting a possibly voidable payment.

5 As to (1), for a system to be visibly fair and just, it must not produce "automatic invalidation", but must discriminate to some extent between "valid" and "voidable" transactions. Its operation must not jeopardise the ordinary course of business including the payment of due debts.

6 As to (2), any system of "automatic invalidation", in respect of any period before the commencement of insolvency, must impose on the trustee/liquidator an obligation to attack all transactions, and to recover all payments falling within that period. This is bound to make the administration complicated and expensive. The trustee/liquidator must be able to pick and choose which transaction (or payment) he affirms (or acquiesces in) and which he thinks it right to attack.

7 As to (3), any such obligation as under (2) above must necessitate litigation by the trustee/liquidator. I do not know on what statistics the Blagden Committee said (ILRC 88, para 1) that no provision had given rise to so much litigation as had fraudulent preferences; this is not consistent with my experience or with the record of reported cases in the last 40 years. Indeed, the heavy burden of proof on the trustee/liquidator has always tended to discourage fraudulent preference claims.

8 As to (4), any system for "automatic invalidation" must face a pressing creditor with the choice of taking payments, which he may have to refund, or going straight for compulsory insolvency. This would seem to be socially and commercially undesirable.

9 My own proposals

(1) The subjective element of preference (ie. the debtor's intent) should be retained, but the burden of proof should be reversed and put upon the recipient of the "preference". This is the present position in bankruptcy, where under section 45, proviso (ii) and section 46 transactions with the debtor are invalid unless carried out without notice of an available act of bankruptcy or the presentation of a petition, the onus of proof of absence of notice being on the other party.

(2) On this basis, any or every recipient could be called upon to "justify" his receipt, on grounds of bona fide dealing and/or lack of notice that the debtor was in severe financial difficulties and/or was intending to prefer him: the trustee/liquidator would be able to pick and choose.

(3) A problem arises as to the kind of circumstances (indicated above as "severe financial difficulties") which would be relevant. There is a danger of falling back into the trap of "cessation of payments", requiring a definition comprising either inability to pay debts as they fall due or balance-sheet insolvency; we have largely discarded this concept in relation to the initiation of proceedings. The concept of genuine "pressure" should be retained, so as to reward the proverbial "diligent creditor", but it should not avail (any more than it does now) if the pressure was not the effective cause of the preferential receipt.

(4) What is to be struck at by the voidable preference system is the payment of money (or passing of other asset-value) unaccompanied by a proper "contra-value" accruing to the debtor's estate. This is the present law, which concerns itself only with the preferential treatment by the debtor of a person who is already an unpaid creditor. In the absence, however, of

"pro-forma invoice trading", (ie. trading for cash) there is almost invariably some period of credit (eg. "payment during month after month of invoice") during which the other party is an unpaid creditor. This problem can be solved by applying (in the case of a trader) whatever are the rules or customs applying to that trader's class of business.

(5) The test of showing "a commensurate advantage for the general body of creditors" (para 49 of the minutes of the 36th Meeting) is very difficult to define and to apply, unless it simply means paying for a current purchase. If the test is "enabling the business to be carried on as a going concern", this would include payment for accrued debts, due, eg. to an essential supplier of goods or services. I would favour the applicability of both tests, together with the more general one of a bona fide dealing without notice of an intent to prefer.

(6) Considerable difficulties arise in extending or applying the foregoing principles - which for the greater part turn on a "trading world" situation - to the case of a non-trader, either a company director, a professional man or a totally "non-trading" person. Different tests would seem to be necessary, to do justice as between such persons and their creditors. Experience tends to show that voidable preferences in this personal field are almost invariably (and indeed logically) in favour of "connected persons". Indeed, in the absence of some kind of "nexus" between the debtor and the recipient, it is almost impossible to provide prima facie grounds for inferring an intention to prefer. A man does not pay off the bank overdraft because he loves the Bank as such, but because either (a) he likes, or is grateful to, the branch manager or wishes to redeem property (usually of others) charged to the Bank, or (b) he just pays his credits into the account, which have the effect of discharging the overdraft. In this connection, it must be borne in mind, in relation to the earlier discussion of absolute avoidance, that all payments off or reductions of bank overdrafts would "automatically" be invalidated. This would be detrimental to the interests of bankers.

(7) A further special problem arises in connection with bankers. A banker is probably in a better position than anyone else to tell whether a customer (be he trader or non-trader) is becoming insolvent. A banker therefore may, under any form of new system, need special protection; there are precedents for this in the Bankruptcy Act.

10 Conclusion

The present system is grossly inadequate by reason of the location of, and the weight of, the burden of proof. It would be undesirable to tilt the scales right over to the other side, either by way of a period of absolute avoidance, or an unreasonable burden of proof being laid on the creditor-recipient.

15.1.80

INSOLVENCY LAW REVIEW COMMITTEE

THIRTYSEVENTH MEETING

Meeting to be held in the Conference Room, 2-14 Bunhill Row on Friday 18 January 1980 at 10.00 am.

A G E N D A

1 Minutes of the meeting on 14 December 1979.

2 Matters arising.

3 Secretary's report.

4 Fraudulent preferences (continued). (ILRC 88 and brief dated 21.6.79).

5 Sureties and guarantors (ILRC 89).

6 Wrongful trading (ILRC 101).

7 * Fraudulent conveyances (ILRC 90).

8 * General assignment of book debts (ILRC 91).

9 Any other business.

10 Agenda for next meeting (21.2.80).

Note It would be helpful if you would kindly let me have brief notes of points which you wish to raise on any item of the agenda as soon as convenient so that they can be circulated to the other members.

* Time permitting.

Trevor Traylor

T H TRAYLOR
12.79.

22(2.4)
37th Mtg
18.1.80

INSOLVENCY LAW REVIEW

Minutes of the Thirtyseventh Meeting of the Review Committee on 18 January 1980.

Present:	Sir Kenneth Cork	(Chairman)
	PGH Avis	
	J S Copp	
	G Drain	
	AIE 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 Secretary explained that in the hurry to get the minutes of the thirtysixth meeting held on 14 December 1979 to members before the Christmas holiday, three errors had crept in - although Mr Goldman was recorded as speaking he had inadvertently been omitted from the list of members present; at the end of para 5 the reference should be to "Mr Muir Hunter"; and in line 4 of para 25 the word "to" should read "in". Mr Penny had suggested that in place of "if the creditors agreed" in line 5 of para 17 there should be substituted "after the creditors had been given the opportunity to be heard", and this was accepted. The minutes as amended were agreed and signed.

SECRETARY'S REPORT

2 The Secretary said that he had had an apology for absence from Mr Millett.

3 Papers circulated since the last meeting had been:-

(a) briefs for the items on the agenda, and

(b) the New Zealand Companies Amendment Bill,

and placed before the meeting was a publication by the Department of Employment giving guidance to liquidators, etc on "Employees' rights on insolvency of the employer" under the Employment Protection (Consolidation) Act, 1978, and a note summarising the position reached on fraudulent preferences.

4 The following meetings had been fixed: Accountants' Panel on 22 January; Working Group 2 on 25 January; Mr Weiss sub-committee on 30 January; Legal Panel on 6 February and Working Group 1 on 7 February.

5 Sir Leo Pliatzky had reported on "Quangos" and the White Paper had been published; this said that the Committee would be dissolved when it had completed its deliberations.

6 Mr John Hunter pointed out that the New Zealand Bill made a number of references to the Macarthur Report and the Secretary said that he hoped that New Zealand would be sending him a copy.

FRAUDULENT PREFERENCES

7 The Secretary referred to members' comments which had been circulated and in particular to the summary put before the Committee. He went on to say that at the last meeting it had been agreed that the word "fraudulent" should go, but the Committee were undecided as to whether "voidable" or "wrongful" should be substituted. Since then the Committee had received Mr Muir Hunter's paper in which he inclined towards "voidable". The Committee also had the NZ Companies Amendment Bill proposing to effect the same change. Mr John Hunter pointed out that "voidable" was used by New Zealand in connection with bankruptcy. Members then made other suggestions, but it was pointed out that the transaction would not have been wrong at the time it happened. By a majority, the Committee agreed that the word "voidable" should be recommended.

8 The Secretary then went through the rest of the summary, saying that at the last meeting the Committee had discussed pressure being put upon the debtor by a creditor, and by a majority had decided that this should no longer be a good defence against the trustee/liquidator. Since then both Mr Millett and Mr Muir Hunter had expressed reasons why the concept of genuine pressure should be retained as a reward for the diligent creditor. At the last meeting, the Committee had discussed possible periods of absolute avoidance or voidability and the Chairman had put forward two suggestions which were set out in paras 46 and 49 of the minutes. Mr Goldman and Mr John Hunter had written to say that they disliked para 49. Mr Goldman preferred para 46 because the period was shorter; Mr John Hunter preferred the Australian law. Mr Millett thought we should first decide as a matter of policy what kind of payments should be clawed back. He cited four kinds:

(1) Payment of debt in ordinary course of business where commercial considerations only make the payment necessary.

(2) Payment under pressure.

(3) Payment without pressure or an intention to prefer.

(4) Payment with the intention to prefer.

Under present law only type (4) is recoverable and the burden of proof is on the liquidator. Mr Millett opted for leaving the law as it is, with minor modifications only, but, in the alternative, he would support the Australian solution. His recommendation was set out in para 9 of his paper. Mr Muir Hunter set out the principles on which the system should be based. He was against "automatic invalidation", preferring to leave the liquidator to decide which transactions should be attacked. He suggested retaining the element of intent but reversing the burden of proof.

9 Mr Taylor supported Mr Millett's proviso to except a payment which the payee could prove was made in good faith and in the ordinary course of business and Mr Graham pointed out that the Australian view on good faith was concerned with the state of mind and the attitude of the creditor rather than the debtor.

10 Mr Goldman expressed concern about the creditor who had acted diligently and been paid, but might have to pay back. Mr Walker-Arnott supported this; there would be little signals that all was not well and the natural reaction to these would be to try to get your money back. It would be extremely unsatisfactory if, under the good faith test, you were required to make a full enquiry. It would complicate the collection of debts. The number of transactions in the period could be very large and it would be difficult for the liquidator to enquire of each creditor who had been paid as to his state of mind, whether he had asked questions, etc.

11 The Chairman said that there could be hundreds of transactions and there had to be a simple rule with the onus on the creditor and not the liquidator. He suggested that a settlement made after legal process (and not just the threat of it) should be acceptable, but Mr Goldman could not agree; one solicitor could issue a writ and if payment was made this would be accepted, but another solicitor might first observe the courtesies and send a letter - if payment then resulted it would not be accepted.

12 Mr Goldman was inclined to the proposal in para 8 of Mr Millett's comments but Mr Copp pointed out that the small creditor had less opportunity to be as diligent as the larger creditors, such as the banks.

13 It was observed that the proposal in para 9 of Mr Millett's comments was very much in line with that in para 49 of the minutes of the previous meeting and it appeared that all members inclined to one or the other, but with the proviso set out by Mr Millett (ie. unless the payee could prove that the receipt was in good faith and in the ordinary course of business). The general concensus was that it was not in good faith on the part of the creditor if the creditor knew that the debtor was unable to pay his debts as they became due from his own money and that the effect of the transaction would be to give him a preference over other creditors - the suggestion that it should include "or ought to have known" was rejected.

14 As to the period before commencement of insolvency proceedings, during which voidance should apply, it was at first suggested that this should be 3 months. Mr Taylor said that this was too short; it had been raised from 3 months to 6 months because of scandals where insolvency had been staved off to get outside the period. It was agreed unanimously that the period should be 6 months.

15 The Committee then returned to the brief dated 21 June 1979 on ILRC 88 to deal with the outstanding points.

16 The first question was whether or not receivers should be able to attack fraudulent preferences. It was noted that the Insolvency Practitioners Association and the Accountants' Panel were in favour and it was agreed that receivers appointed over the whole or substantially the whole of a company's assets should be able to attack such preferences.

17 There was a long discussion as to who should then benefit. The Chairman said that in a large number of cases there would be a surplus for the unsecured creditors and there was no problem. If there was not likely to be such a surplus, the risk of costs of an action would fall on the debenture-holder and it seemed fair that he should get any benefit. Mr Taylor said that other creditors might be prepared to find funds for the action; and in a winding-up the benefit would be for all creditors. The Chairman suggested that the other creditors through their Committee should be given the opportunity and if they declined, the benefit should accrue to the debenture-holder; but this was not thought to be acceptable. It was pointed out that unsecured creditors could still petition for winding-up, and it was agreed by a majority that any benefit should form part of the receivership assets. Mr Taylor, supported by Mr Goldman, dissented on the basis that this would be taking away from unsecured creditors their existing rights.

18 It was agreed that fraudulent preference with knowledge of insolvency should not of itself be an offence.

19 There remained the question as to whether or not there should be a time limit within which actions to avoid preferences should be brought, there being none at present. One year was thought to be too short a period. It was agreed, however, that a creditor should be informed within one year of the commencement of insolvency that a transaction was thought to be suspect, but in complicated cases (such as those with incomplete accounts and records) the liquidator should be able to apply to the court for an extension. Proceedings should then be started within three years of commencement, again with power to apply to the court for an extension.

20 It was agreed that Mr Muir Hunter and Mr Millett should be asked to put the matter in shape for the final report.

WRONGFUL TRADING

21 The Secretary said that ILRC 101 and comments by members on that paper had been circulated. No-one was against the principles set out.

22 Subsection (1). Mr Walker-Arnott had said:-

> "The definition of wrongful trading appears to deal with insolvency on a short-term test only: that is, the inability to pay debts as they fall due. A company can be insolvent notwithstanding an ability to meet, out of its available cash resources, debts as they fall due because its liabilities (perhaps suddenly increased by some award of damages) exceeds its assets. Should not wrongful trading arise if debts are incurred where there is no reasonable prospect of their being paid at a time when there is insolvency on the long-term test?"

Mr Taylor agreed that the long-term test did not necessarily include the short-term test, particularly in the case of insurance companies, building societies and friendly societies and it was agreed to say "insolvent" instead of "unable to pay any one or more of its debts as they shall have fallen due". It would be necessary for the committee to define "insolvent" later.

23 Subsection (1). Both Mr Avis and Mr John Hunter had advocated the use of "liabilities" instead of "debts" and this was agreed, as "liabilities" was a wider word.

24 Subsection (2). Mr Avis had asked whether "the administrator" should be included. This was agreed, and it was accepted that in all cases where liquidator/receiver was mentioned this should be taken to include the administrator.

25 Subsection (3). Mr Walker-Arnott had said:-

> "If the last sentence is designed to enable the person administering the company to appear at the hearing notwithstanding the application is made by a creditor or contributory, should not "the receiver or manager" be added after "the official receiver or the liquidator?"

This was accepted.

26 Subsection (3). Mr Walker-Arnott had raised a further point and had suggested amending (a) and (b) to read:-

> "(a) Knew that the company's trading was wrongful, or
> (b) as an officer of the company was reckless as to whether the company's trading was wrongful or not".

Mr Walker-Arnott explained that he was bothered about "ought in all the circumstances to have known" and what enquiries directors ought to make. Solicitors would tend to advise clients to go to court and the courts could be submerged. It did not help to get advice, if it turned out that there was a massive liability which could have been found out by asking the manager of a branch. The Chairman pointed out that a director who was worried could apply for the appointment of an administrator. Mr Muir Hunter thought that the test should be what a reasonable businessman would have done and the Secretary added that the reasonable test would be different for a non-executive director as compared with an executive director. Mr Walker-Arnott thought a test of reasonableness to be too uncertain; people would go to court. The Secretary said that the Legal Panel had rejected the concept of recklessness and Mr Goldman pointed out that the Panel's thinking was set out in paras 9-13 of the paper, and in particular para 12. It was agreed that this covered the position adequately.

27 Subsection (3). Mr John Hunter had suggested that a parent company ~~should~~ be ~~considered to be~~ a party to carrying on the business of a subsidiary. This was left for discussion under group trading.

28 Subsection (3). Mr McNab had referred to auditors and accountants. The Chairman did not think that an officer who was not a director should be caught, and Mr Muir Hunter supported this; except where there was an allegation of conspiracy. The Secretary suggested that "officer" might have to be defined. Mr Goldman drew attention to paras 9 and 10 of the paper pointing out that no liability attaches to anyone who is not actually party to the carrying on of the business. It was pointed out that an accountant who supplied false figures could be caught and it was agreed that a note should be made for the final report of instances of people who would be caught.

29 Subsection (6). Mr McNab had expressed doubts about a Judge's knowledge of the business world and had said:

> "While there undoubtedly are a few Judges with a considerable commercial experience I doubt if even they would wish to take on such a responsibility. Unless a complete investigation by an independent accountant who is a member of one of the Associations no-one in their right mind would accept and give a decision which could be adding further substantial debts which may never be repaid."

The Secretary said that other members were generally in favour of the subsection and Mr Graham pointed out that the courts were at present making this sort of decision; they were required under s.227 to sanction payments which the company is making after the payment of a petition. Mr Goldman drew attention to paras 19 to 21 of the paper. It was noted that if the court had doubts an administrator could be appointed and this should be put in as a possibility.

30 There was a brief discussion as to whether or not an individual could apply to the court, and it was accepted that anybody who might be caught by the Section should have the right to apply. The court however would not deal with the affairs of a party who was not before it, and it was left to the legal members to work out how the company should be brought in if an individual applied.

31 It was agreed that the subject should be passed to the drafting sub-committee to prepare a draft Chapter for the final report in due course.

NEXT MEETING

32 The Committee would meet next at 10.00 am on Thursday, 18 February.

38th Mtg
21.2.80

INSOLVENCY LAW REVIEW

Minutes of the Thirtyeighth Meeting of the Review Committee on 21 February 1980.

Present:	Sir Kenneth Cork	(Chairman)
	PGH Avis	
	J S Copp	
	AIF Goldman	
	J M Hunter	
	MVS 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. Para 27 was amended to read "Mr John Hunter had suggested that a parent company could be a party..". The date in para 32 should have read "21 February". The minutes as amended were agreed and signed.

MATTERS ARISING

2 The Secretary said that he now had a copy of the Macarthur Report from New Zealand referred to in para 6 of the minutes of the last meeting.

3 With regard to para 28 of the minutes of the last meeting, it was confirmed that the note referred to would be produced by the Drafting sub-committee.

SECRETARY'S REPORT

4 The Secretary said that he had had an apology for absence from Mr Drain.

5 Papers circulated since the last meeting had been:-

(i) briefs for the items on the agenda, and

(ii) further written submissions C191-196.

6 Papers placed before the meeting were:-

(i) an extract from the Accountant on the "Receiver's Duty to Account" and "Setting off Crown Debts",

(ii) a written answer to a Parliamentary Question on 22 January 1980,

(iii) an extract from British Business - "Insolvencies in England and Wales: fourth quarter",

(iv) papers for the March 1980 meeting:-

(a) Voluntary Arrangements for Individual Debtors - ILRC 104,

(b) Reservation of Title - ILRC 105-106, a note by the Secretary, and a letter from the Law Commission dated 4 February 1980,

(c) Preferential Rights - ILRC 107, a further written submission C197 and a memorandum from the Department of Trade (DT4).

7 As to meetings of sub-committees etc, Working Group 2 had met on 14 February; the Weiss sub-committee would meet on 25 February; the Accountants' Panel on 28 February; and Working Group 1 on 6 March.

SURETIES AND GUARANTORS

8 The Committee had before it ILRC 89 and Mr John Hunter's comments. The Secretary pointed out that both Blagden and the Budd Committee (Ireland) had advocated the attempted direct recovery first from the surety or guarantor and this had been supported in written evidence by the banks and the Insolvency Practitioners Association, but the Australian view was to the contrary.

9 Mr Millett said that the Australian idea was essentially that the liquidator should recover any debts which had been paid at a time when the recipient knew or ought to have known that at that date the debtor was insolvent, whether there was any intention to prefer or not. It would be unfair on a principal creditor who is paid off, releases the guarantee as he does not know that he is being preferred, and then has to return the money but has lost the guarantee. If the UK system was kept, however modified, it would still depend on the wrongful intention to prefer a particular creditor. The bank ought not to have to pay back if the director merely wanted to get his guarantee released.

10 Mr Muir Hunter said that what was being proposed was that all transactions done in the relevant period would be capable of being set aside unless the recipient could show just cause why he should not refund; one reason might be that he has released the guarantor. He was in favour that in certain circumstances the guarantor should be the target because in many cases the intention was to prefer the guarantor. If the burden of proof was reversed, most recipients would be able to show that the transactions were acceptable.

11 The Chairman said that from a practical point of view going against the banks was easier as they usually paid back, but if the liquidator had to go against the guarantor he would have to fight a legal action. Mr Avis confirmed that the banks would be content to pay back if it was a windfall.

12 Mr Muir Hunter was concerned about an absolute period which would mean the liquidator having to go against everybody. If there was to be direct process against an innocent bank because the effect of what it received was to prefer the guarantor, this would need a great deal of thought. As long as the intention to prefer is the dominant thing which the liquidator has to prove, banks are reasonably safe. If there was an absolute period the liquidator would have to undo every transaction during the period and this would result in interminable litigation.

13 Mr Taylor said that he differed from Mr Muir Hunter. Blagden made the test of whether there was a preference or not - this was more simple than asking whether there was intention to prefer.

14 The Chairman thought that if you could not get the money from the guarantor it ought to be possible to go against the bank. Mr Walker-Arnott pointed out the difficulties in computing what it might be possible to get back from the guarantor, whereas there was no difficulty with banks. It was pointed out that not all recipients were banks. The Chairman then suggested requiring the liquidator to go first against the guarantor and then if there was any shortfall going against the recipient. However he would not like the liquidator to fight a difficult legal action if there could be a simple one. He then asked members whether in their view the trustee/liquidator should go first against the bank or against the guarantor.

15 The Committee's views were split. Mr Taylor remarked that it should be against the bank as that was where the money had gone and Mr Millett said that if "intent" was retained it should be against the guarantor, but if an "unless" was included it should be against the bank - the Committee had however to choose one or the other.

16 Mr Muir Hunter said that he hoped to get a paper, approved by Mr Millett, before the Committee by the next meeting.

17 The Chairman said that he thought that if the bank had received the money in good faith and did not fall within the avoidance procedures, the right to go against the guarantor should be retained. However it would be necessary to reconsider the matter to see whether the recipient should be made responsible. This should be done at the next meeting.

FRAUDULENT CONVEYANCES

18 The Committee had before it ILRC 90 together with comments from Mr Avis and Mr John Hunter. The Secretary said that where prior to bankruptcy the debtor had disposed of property the conveyance may be avoided by the trustee if it was a voluntary settlement - this had been covered by ILRC 87 and had been dealt with by the Committee. Para 2 of ILRC 90 pointed out that a further ground for avoidance was provided by s.172 of LPA 1925, which provided that any conveyance of property made with intent to defraud creditors shall be voidable at the instance of any person thereby prejudiced. There was no time limit.

19 Para 14(a) posed the question as to whether the insolvency code should stand on its own feet or whether dependence on s.172 was satisfactory. Mr Muir Hunter pointed out that a fraudulent conveyance was different from a voidable preference in that it could be a disposition in favour of someone not a creditor. It was noted that Mr John Hunter's comments had said that one of the crucial points of disagreement on the

interpretation of s.172 was whether the section required an actual intention to defraud creditors or whether it was sufficient if it could be shown that the necessary effect of the conveyance would be to defeat, hinder or delay creditors. It was noted that s.172 applied also outside insolvency. Mr Muir Hunter added that if the voluntary settlement provisions had sufficient teeth, s.172 would not be needed in the ordinary way and "fraudulent conveyance" would not be needed except for cases where something had been done before the voluntary settlement period. It was suggested that the term "wrongful conveyance" or "wrongful transfer" might be used. The Committee agreed that the insolvency code should stand on its own feet.

20 The Committee then considered para 14(b) (should there be a limit on the suspect period?) The Secretary pointed out that in the case of a voluntary settlement the Committee had said 12 months void and 5 years voidable. It was agreed that fraud was a serious matter and that a truly fraudulent transfer should be void for an unlimited period.

21 The Committee then considered the case of a man about to engage on a hazardous venture who had first transferred his property to his wife. It was suggested that this could be a fraud on future creditors and most members agreed that provision should be made to catch this type of case. More doubt was expressed about a transfer to a charitable institution; Mr Millett thought that a Victorian judge would describe fraud as an act done with intent to defeat or delay creditors and would not say in this case that fraud had been proved. The Chairman pointed out that the transaction would be voidable under other provisions for a long time and it was agreed that the clause should refer to intent to defeat or delay past present or future creditors.

22 Mr Hunter pointed out that the Australian provision said that the section did not apply if the transfer was in good faith (on the part of the transferee) and for valuable (as distinct from good) consideration.

23 Mr Muir Hunter said that he thought that the Report should say that s.172 was unsatisfactory (with reasons) and that it would be unsatisfactory with the abolition of acts of bankruptcy, which include fraudulent conveyances, if the insolvency code did not have its own weapon; we should propose that it should cover a transaction with intent to defeat or delay creditors, past, present or future, the proof of intent being on the trustee/liquidator. We could recommend that s.172 should be brought into line and that the insolvency code provision be used only by the creditors' representative and not by an individual creditor. If the recipient had innocently spent the money, this would be a matter which would have to be left to the general law.

24 As to conveyances effected after the petition but before adjudication or the winding-up order (para 14(c)) it was agreed that these should be void.

25 With regard to a time limit within which proceedings should be started (para 14(d)) it was agreed that this should be the same as that proposed for voidable preferences (creditor to be informed within a year of the commencement of insolvency, subject to there being power to obtain an extension, and actual proceedings to be started within 3 years, again with possibility of getting an extension).

THE ADMINISTRATOR

26 The Committee had before it ILRC 99 and comments by Mr Avis, Mr John Hunter and Mr Walker-Arnott.

27 Mr Walker-Arnott said that the proposals were a very significant step; they instantly removed power from the directors and the administrator would not be subject to the restraints of s.227. The Report would have to say in precise terms what the grounds for appointment should be and what evidence would have to be presented. Mr Muir Hunter said that he regarded the proposals with the same degree of concern and thought that they contained the elements of unreality.

28 The Committee read through ILRC 99 and two specific comments were made. "Members" had deliberately not been mentioned in para 6, but the paper had said "the company itself" which had been felt to cover the members too; nevertheless it was agreed that "members" should be included. With regard to para 10, the Chairman said that he did not agree that such a scheme should come into operation only when there was a genuine possibility of rehabilitation.

29 Mr Walker-Arnott saw no difficulty where the directors agreed that the appointment of an administrator was desirable and it was not possible to have a receiver appointed. Frequently where there is a floating charge, directors ask for the appointment of a receiver. The difficulty would be the case where the directors contest it; he could not conceive how it could be done speedily as the court would need evidence before it. All members agreed that it could be a directors' remedy, but Mr Taylor made the proviso that it should not be so if the company was ostensibly solvent.

30 The Committee then considered an application by a creditor. It was agreed that a creditor who was able to petition for winding-up should be able to apply alternatively for the appointment of an administrator, giving the grounds on which he preferred the latter.

31 It was suggested that this might be extended to creditors who could demonstrate that their payments were in jeopardy. Mr Muir Hunter said that judges were unwilling to make business decisions and that a creditor did not have a public interest in the survival of the company. Mr Graham felt that an individual creditor would have difficulty in spelling out a case to support jeopardy. Mr Walker-Arnott did not object to a creditor with a sum due later being able to apply on the grounds of jeopardy but thought that this would be of little significance as there would almost certainly be a creditor with a sum due now. As to shareholders, Mr Taylor suggested that the shareholder should have to show that he could not use his normal rights. It was agreed however that a shareholder, or a creditor who was unable to petition for winding-up, should be able to apply to the court for leave to present an application for the appointment of an administrator.

32 With regard to applications by the Department, Mr Taylor preferred the law as it is, with the Department applying for the appointment of a provisional liquidator, and pointed out that although the paper said that the provisional liquidator was not entitled to appear on the hearing of a petition, his views were usually sought. It was agreed that where the Department had power to apply for a provisional liquidator it could apply for an administrator.

33 Extending the grounds under para 10 to include, as well as the genuine possibility of rehabilitation, the likelihood of greater realisation than in a liquidation and the directors being unfit to run the business, was considered. Mr Muir Hunter pointed out that judges would be unwilling to draw reflections on individuals, and the extension was limited to greater realisation. Mr Muir Hunter said however that he would be prepared to consider an extension to include employees and the public interest.

34 The Chairman thought it essential that the administrator should have the same personal liability as a receiver.

35 On the question of frivolous or malicious applications, it was agreed that the court should be able to make such an Order to redress any injustice resulting therefrom as it thinks fit.

36 Mr Muir Hunter suggested (with regard to para 24 of ILRC 99) that the court should have power to include in the Order an instruction that no insolvency petition would be given a hearing for X months, without the leave of the court.

37 The paper was agreed in principle and members were asked to put forward constructive observations for improving the proposed procedure and amendments which might be made to the paper in readiness for its inclusion in the Final Report. These would need to be circulated in time for the next meeting.

NEXT MEETING

38 The Committee would meet next at 10.00 am on Tuesday, 18 March 1980.