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INSOLVENCY LAW REVIEW COMMITTEE

THIRTYNINTH MEETING

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

A G E N D A

1 Minutes of the meeting on 21 February.

2 Matters arising.

3 Secretary's report.

4 Sureties and guarantors (ILRC 89 - see paras 16 and 17 of the 38th Mtg minutes).

5 The Administrator (ILRC 99) - to consider any further proposals put forward by members. (See para 37 of the 38th Mtg minutes).

6 Voluntary arrangements for individual debtors (ILRC 104).

7 Preferential rights (DT4, ILRC 107).

8 General assignment of book debts (ILRC 91).

9 Conclusion of a receivership. (ILRC 103).

10 Any other items.

11 Agenda for next meeting (16 April).

Trevor Traylor

T H TRAYLOR
28 February 1980

39th Mtg
18.3.80

INSOLVENCY LAW REVIEW

Minutes of the Thirtyninth Meeting of the Review Committee on 18 March 1980.

Present:	Sir Kenneth Cork	(Chairman)
	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	
	R B Jack	
	G A Weiss	

1 The Committee met at 10.00 am. The minutes of the thirtyeighth meeting held on 21 February were agreed and signed.

MATTERS ARISING

2 Referring to the last sentence of para 29 of the minutes of the thirtyeighth meeting, Mr Taylor said, in amplification, that the directors had a duty to consult the members before asking for the appointment of an administrator.

SECRETARY'S REPORT

3 The Secretary said that he had had apologies for absence from Mr Avis, Mr Drain and Mr Graham.

4 Papers circulated since the last meeting had been briefs for the items of the agenda, extracts from Hansard of 29 January and 13 February and a note on the Charging Orders Act, 1979.

5 The paper put before the Committee at the meeting referred to the Panel which had been set up by the Department to advise on any revisions of company law.

6 The Weiss sub-committee would be meeting on 21 March, Working Group 2 on 24 March and the Accountants' Panel on 27 March.

GOVERNMENT POLICY ON THE OR'S ROLE IN BANKRUPTCY

7 The Secretary said that he understood that the policy decision of the Cabinet committee (Committee H) regarding the future work of the Insolvency Service was imminent. In the Department's "in-house" journal, the Permanent Secretary had said "the Government has not yet taken a decision on whether bankruptcy should be removed from the ambit of the Insolvency Service which would involve a further substantial cut in numbers." If the Cabinet committee approved the proposal to withdraw the Official Receiver altogether from bankruptcy procedures, the intention will be to issue a consultative document (Green Paper) as soon as possible, probably shortly after Easter. The Secretary under-

stood that this will set out proposals for implementing the transfer of all bankruptcy procedures to the private sector and will invite views and suggestions. The Committee's Interim Report would almost certainly be published at the same time.

8 Because of the time limits which have been set for the manpower reductions in the Civil Service, the Secretary believed the time given for consultation would be short and the deadline for the receipt of views and comments is likely to be September. If, after consultation, the Government decides to go ahead, work will then start on a fairly substantial Bankruptcy Bill. The plan would probably be to deal first with non-controversial sections of the Bankruptcy Act, while awaiting the Committee's Report and recommendations. He thought that work on the Bill, including work by the Rules Committee, would take up most of 1981 with the Bill being enacted and brought into force during the course of 1982.

9 The Secretary went on to say that Mr Armstrong (DIG) has expressed his willingness, as the principal author of the proposals, to attend before the Committee to answer questions on the proposals after the Green Paper has been issued.

10 The Committee viewed with alarm the thought that the Government would produce a Green Paper or Bill which conflicted with what the Committee were considering and felt unhappy that other bodies had been drafting reports about which the Committee had not been made aware.

SURETIES AND GUARANTORS

11 The Committee continued its discussion (see paras 8 to 17 of the minutes of the thirtyeighth meeting).

12 The Secretary said that at the last meeting the Committee had considered ILRC 89 and noted that although Blagden and Budd had recommended direct recovery from the guarantor, from a practical point of view it was easier to recover from the banks - but they are not always involved. The Committee were split on whether the guarantor should be attacked first or the recipient (eg. bank). Mr Millett had pointed out that if "an intention to prefer" was retained, then it should be against the guarantor. It had been decided to reconsider the matter at the next meeting.

13 Since then Mr John Hunter had suggested that the Committee should defer the matter further until the draft report on Voidable Preferences has been received. (This had been prepared by Mr Muir Hunter but had not yet been circulated as it was awaiting Mr Millett's views). Mr Weiss had amplified the minutes to the extent that a secured creditor can so word his charge that he does not necessarily have to release it immediately upon discharge of the principal debt. Thus, if recovery proceedings are taken against him he will suffer no real harm. No other comments had been received.

14 Mr Muir Hunter said that if the liquidator had to go against the guarantor alone, he might not be a very good target - he was suggesting that both the creditor and the guarantor should be made the targets, and the Court should eventually decide who was the true preferee. Mr Millett accepted that the liquidator should be able to go against either or both, and the Committee agreed. Mr Muir Hunter said that he would now ensure that his paper on "Invalid disposals of the Insolvent's Property" was completed and agreed with Mr Millett.

THE ADMINISTRATOR

15 The Secretary said that ILRC 99 had been agreed in principle at the last meeting and proposals for improving the procedure had been invited. Decisions already made were:-

(a) Members should be included in those entitled to apply for an administrator to be appointed.

(b) There was no difficulty over it being a directors' remedy.

(c) A creditor who was entitled to petition for winding-up should be able to apply, giving the grounds for his choice.

(d) Other creditors and shareholders should be able to apply to the Court in the first instance for leave to present an application.

(e) The Department should be able to apply in cases where it could apply for a provisional liquidator now.

(f) The Court should have power to redress any injustices resulting from a frivolous or malicious application.

16 The Secretary said that other matters which had been considered were:-

(a) should the grounds for an application include the likelihood of greater realisations, and the directors being unfit to run the business?

(b) should the administrator have the same personal liability as a receiver?

(c) should the Court have power to include in the Order a ban on hearing a winding-up petition for X months?

17 Since then Mr McNab had questioned whether the admistrator should be empowered to do the work of the receiver for a debenture holder, and also, whether he should be entitled to become a liquidator. No further comments had been received.

18 With regard to para 17 above, it was pointed out that in many cases the debenture-holder does not appoint a receiver, but the liquidator recognises that there is a floating charge and in fact is doing the work of a receiver without being appointed as such; this is what the administrator would do.

19 As to the points in para 16 above, the answers were felt to be in the affirmative except in the case of directors being unfit to run the business - this would not be a right available to shareholders but should be available to creditors.

20 It was agreed that the appointment of an administrator should be available also in the case of trading individuals and partnerships.

VOLUNTARY ARRANGEMENTS FOR INDIVIDUAL DEBTORS

21 The Committee had before it ILRC 104.

22 The Secretary said that:-

(a) Mr Weiss had prepared some short notes to indicate the class of debtor which we have in mind as benefiting from this procedure.

(b) Mr Avis had asked how the problem of the dissenting creditor would be overcome. Perhaps what was needed was amplification of para 13. The Committee's view was that he could still petition but the Court should take into account the wishes of the creditors who supported the VA.

(c) "administrators" should be added at the end of para 5 of ILRC 104.

(d) Mr Avis had also brought up the question of protection of a new creditor during the negotiations for an Arrangement.

(e) Mr Penny had asked if the trustee should have power to apply to the Court for the VA to be superseded by a Liquidation of Assets Order.

(f) Mr John Hunter had suggested that the Committee should refer to the relationship of the VA with the EEC draft Bankruptcy Convention. As there will be no direct Court control, he had suggested that presumably, it will not be within the Convention. The present Deed of Arrangement is not included in the draft Convention but compositions and schemes of arrangements which fall within the provisions of the Bankruptcy Act are included.

(g) No other comments had been received.

23 Mr McNab thought that "serious consequences" in the warning in para 10 of the paper was insufficient and Mr Muir Hunter suggested that the phrase should read "may render yourself liable to proceedings, civil or criminal". This was agreed.

24 It was thought that Mr Avis' points were covered in para 13 of the paper, but the last line of this was amended to read "the court should be required to have regard to the wishes of the creditors".

25 It was agreed that the paper should go forward to the drafting sub-committee.

PREFERENTIAL RIGHTS

26 The Secretary said that at the last meeting he had circulated a paper from the Department (DT4) and a further paper of written evidence (ILRC 107), beyond that circulated in ILRC 60. Since then detailed comments had been circulated from:-

(a) Mr John Hunter who continues to favour restrictions and lists his proposals;

(b) Mr Goldman, who would consider the abolition of all prefs but if this is considered too radical, would favour restrictions;

(c) Mr Avis who raises two points arising from DT4; and

(d) Mr Millett, who has put forward a schedule of recommendations with alternatives.

27 The Secretary added that the Scottish Law Commission had since commented that their current thinking was to abolish all Crown preferences and preferences for rates or alternatively to allow a preference for PAYE, VAT and NI contributions limited to about 3 months.

28 Mr Goldman said that he was in favour of the abolition of all preferences except employees and that he thought that this was the general public view. Mr Taylor suggested that there would have to be a reasoned and argued case in the Report and he felt that the figures in DT4 were misleading; he wanted statistics from the Department. Mr Walker-Arnott thought that the right way to deal with quasi-trust moneys was through individual legislation and not through the insolvency system; he would then be in favour of total abolition.

29 The Committee in general were against total abolition but accepted abolition with some exceptions. The various categories were then considered.

30 Income Tax, Capital Gains Tax and Corporation Tax. It was agreed that, with the exception of PAYE and other "deductable" taxes (as distinct from "assessed" tax), these should not be preferential.

31 The majority of the committee agreed that, in respect of moneys in the following categories which should have been paid over but which had not in fact been paid over, there should be preference for the following periods before the date of winding-up:-

(a) PAYE (returned monthly) - three months

(b) VAT (returned quarterly) - six months

(c) NI contributions - as for PAYE

(d) Deduction of tax from interest - three months

(e) Car tax on sales - as for VAT

(f) Bingo, betting and gaming duties - three months, if returns were submitted monthly, but six months if returned quarterly. The Secretary was asked to find out what periods applied in respect of such returns.

32 The Committee agreed unanimously that rates, including water rates, should not be preferential.

33 So far as wages were concerned, it was pointed out that the individual was protected anyway. It was agreed that the Government and the banks should not be preferential.

34 The question was raised of expenses paid by employees on the company's business. The Committee could not agree that these should be preferential.

35 There was also the problem of the failure of the company to pay over to the Court deductions made under an Attachment of Earnings Order resulting in the employee having to pay the money twice. The general principle was accepted that moneys deducted from employees' wages of a quasi trust nature should be preferential.

GENERAL ASSIGNMENT OF BOOK DEBTS

36 The Committee had before it ILRC 91. The Secretary said that no comments had been received except that Mr Avis had said that the provisions had caused him a great deal of work. No problems were seen by the Committee.

CONCLUSION OF A RECEIVERSHIP

37 The Committee had before it ILRC 103.

38 The Secretary said that this was a report from the Legal Panel who had been asked to consider problems which might arise at the end of a receivership including safeguards for the receiver. They had suggested that in certain circumstances the receiver should convene meetings of shareholders and creditors to report to them and to obtain their wishes and that the company could then resolve to wind up compulsorily as earlier proposed by the Panel. The Accountants' Panel however preferred the solution put forward in their report on receiverships - to give the receiver power to present a winding-up petition.

39 The Chairman suggested that the receiver should report to his committee of creditors and they should decide whether or not to petition. This was accepted.

40 The Secretary said that Mr John Hunter had drawn attention to Clause 39 of the NZ Companies Amendment Bill. Under that clause, where there is both a liquidator and a receiver the court may, on the application of the liquidator, order that the receiver cease to act or that he act in respect of certain assets only. The Committee considered this and thought that the idea could be accepted.

NEXT MEETING

41 The Committee would meet next at 10.00 am on Wednesday, 16 April, the agenda to include Reservation of Title, Distribution of Assets in Liquidations (ILRC 102), Avoidance of Floating Charges and the Propriety of Floating Charges.