1(5-3)

ILRC - 46TH MEETING

Brief for Item 6

Insolvency Courts (ILRC 132)

The only comments received have been from John Hunter. He says:-

"I have nothing to add to Ritchie's admirable paper (ILRC 132), the proposals in which appear to me to be sound.

As regards paragraphs 25 and 45 it may be noted that in Northern Ireland appeals from the Bankruptcy Registrar (now Master) have always been to the assigned Bankruptcy Judge and not to the Court of Appeal."

E L REEVES
Assistant Secretary
19 September 1980

ILRC - 46TH MEETING

Brief for Item 7

Disqualification of directors of insolvent companies (ILRC 135-136)

The only comments received have been from John Hunter. He says:-

"The evidence we have received indicates clearly that section 9 of the Insolvency Act 1976 does not go far enough. I would favour the Chairman's suggestion that disqualification should be automatic, subject to the director's right of appeal to the Court to be relieved, but, far from increasing the qualifying number of insolven liquidations, I would like to see the disqualification applied from the first liquidation. If this is not acceptable, then, in addition to automatic disqualification after 2 or 3 insolvent liquidations, I would like to see section 9 retained but with the repeal of sub-section 1(a) (ii) so as to enable the Court, on application, to disqualify a director after one insolvent liquidation where satisfied that his conduct as director made him unfit to be concerned in the management of a company."

E L Reeves

E L REEVES
Assistant Secretary
19 September 1980

INSOLVENCY LAW REVIEW COMMITTEE

FORTYSIXTH MEETING

Meeting will be held in the offices of W H Cork, Gully & Co, Guildhall House, 81/87 Gresham Street, on Thursday 25 September 1980 at 10.00 am.

A G E N D A

1 Minutes of the meeting on 20 August.

2 Matters arising

3 Secretary's report

4 Receiverships (ILRC 73 paras 94-108 and brief issued for last meeting)

5 Compulsory insolvent procedures for individual debtors (ILRC 133 - report by WG1, and ILRC 134)

6 Insolvency Courts (ILRC 132)

7 Disqualification of directors of insolvent companies (ILRC 135 and 136)

8 Any other business

9 Agenda for next meeting (15 October).

T H TRAYLOR
Secretary

August 1980

ILRC - 46TH MEETING

Brief for Item 5

Compulsory insolvent procedures for individual debtors (ILRC 133-134)

1 Comments on ILRC 133 have been received from Alfred, John Copp, John Hunter and Peter Avis; these are attached.

2 Alfred says that he is in substantial agreement with the "excellent report" but, in connection with paras 76-93, is in favour of automatic discharge after specific periods which would differ for "full bankruptcy" and "liquidation of assets".

3 John Copp suggests that a better title should be found for "liquidation of assets". He has some doubt too about the use of the term "protection order". He is a little disappointed that a simpler system has not been put forward, particularly as regards discharge (see paras 3 to 6 of his comments), and stresses the need for differences between the two procedures to be readily apparent. He also makes comments on paras 9, 10, 30-39, 45, 52, 63 and 72.

4 John Hunter regards it as an excellent report but also considers that the term "liquidation of assets" should be reconsidered; he make alterative proposals in respect of discharge (paras 76-93); and he suggests a re-draft on the grounds of accuracy of para 20 dealing with Northern Ireland. He also comments on paras 3(c), 7, 9, 12, 13, 16, 18, 32, 33, 35, 41, 45, 46 and 96.

5 Peter Avis comments on paras 6 and 9 and feels that clarification is needed in para 21 et seq as regards the use of the terms Official Receiver and Provisional Trustee.

E L REEVES
Assistant Secretary
19 September 1980

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Eric Reeves, Esq.,
The Department of Trade,
Insolvency Law Review Committee,
2-14, Bunhill Row,
LONDON, EC1Y 8LL.

AIFG/SG

5th September, 1980.

Dear Eric,

Re: I L R C 133

I would be grateful if you would circulate for the Meeting on the 25th September the Paper I wrote on "Discharge from Bankruptcy", with the following addendum.

" I have now had an opportunity of reading the excellent Report of WG1, "Compulsory Insolvency Procedures for Individual Debtors", with which I am in substantial agreement.

" On the question of Discharge, I adhere to what I wrote on the 29th July but, on reflection, I feel that the period which I suggested in Paragraph 15, automatic discharge in the liquidation of assets procedure, is too long, and that it is essential that the discharge from that procedure should be the shortest possible time, not more than 12 months."

Yours sincerely,

1053

DISCHARGE FROM BANKRUPTCY

(by Alfred Goldman)

1. Before the bringing into effect of the Insolvency Act, 1976, it had been part of Bankruptcy Law and procedures that a Bankrupt was not able to obtain his Discharge unless he made an application to the Court for this purpose, and procedures were covered by S.26 of the Bankruptcy Act, 1914.

2. Under the Insolvency Act, 1976, a totally new concept was brought into effect, namely automatic Discharge, although a Bankrupt may still apply for his Discharge under S.26 above.

3. Under the Insolvency Act, those who, at the appointed day had been adjudicated more than ten years were automatically discharged, no matter how bad the case; those adjudicated for five years or more at the appointed day were automatically discharged on the tenth anniversary, and for all new Bankrupts, and for those adjudicated less than five years at the appointed day, a system of review under S.8 was brought into force.

4. We now intend to bring into force two systems:-

(1) Full Bankruptcy, and

(2) The Liquidation of Assets procedure.

5. I have been favoured with the Minutes of WG1, from which I see that in neither of these two procedures is there to be automatic Discharge. For reasons which I set out below, I disagree with these proposals, which, I think, do not accord with the rest of the proposals relating to Bankruptcy.

6. It has been recognised that it is not socially desirable for individuals to remain in society for long periods of time suffering from the disabilities of Bankruptcy, and although applications/

made in Chambers, and not in open Court, I believe that this will make no difference to the reluctance of a Debtor to make such applications.

7. If I may first deal with the less rigorous of the two systems, that is to say, Liquidation of Assets.

8. As I understand the position, this procedure should apply for a period of not less than one year, and the whole force of the thinking behind this is that it should be quickly dealt with by a Trustee.

9. It is said that either the Trustee or a Debtor could apply for the Discharge and that, if it were the former, there would have to be the assent from the committee of Creditors, and there would have to be various other procedures.

10. I do not think that there will be any incentive for a Trustee to involve himself in such a procedure and that, in practice, it would be the Debtor who would make the application, and he will be under the same constraints as a Debtor always was before the Insolvency Act, of simply not bothering nor wishing to go to the expense of going near a Court.

11. In the full Bankruptcy procedure reserved for the bad cases, the minimum time for the Bankruptcy is recommended to be two years from the making of the Order, and with this I am in agreement but, in these circumstances, it is said that it would "normally be for the Debtor to apply and to prove that the Discharge was warranted and there is to be no automatic Discharge".

12. I have always regarded Bankruptcy as quasi-criminal but, even one convicted of a crime knows for sure what his sentence is and, what is more, that if he behaves himself, he will get a certain remission.

13./

13. He does not, however, have to make an application, and I simply do not accept that in Bankruptcy the man under that sort of disability should not know that there is a time for certain that he will be able to start again, without having himself to go before the Court which has pronounced his sentence.

14. Even in the Green Paper, I notice that it is contemplated that a Receiving Order, at worst, should automatically terminate after a five year period and, although I dislike praying in aid anything from that document, let us not take a backward step from the whole concept of automatic Discharge which was extracted from Government with much pain and difficulty under the Insolvency Act, 1976.

15. My recommendation is that in full Bankruptcy there should be automatic Discharge after five years from the making of the Order and that, in Liquidation of Assets, there should be automatic Discharge after three years.*

29 July 1980

* Note

Mr Goldman feels on reflection that the automatic discharge from the liquidation of assets procedure should be the shortest possible time, not more than 12 months

5/9/80

COMPULSORY INSOLVENCY PROCEDURES FOR INDIVIDUAL DEBTORS

Comments on 1LRC 133 by John M. Hunter

1. This is an excellent report and I agree in substance with most of the proposals.

2. Paragraph 3(b). I think we should reconsider the term "Liquidation of Assets Order". I have indicated some time ago that I prefer "Insolvency Order", adopted in the Ghana Insolvency Act.

3. Paragraph 3(c). I do not think that a second or subsequent insolvency should necessarily result in a bankruptcy order, although the fact of the earlier insolvency, how long ago it was, the reasons for it and whether the debtor fully co-operated in its administration would be matters to be considered by the creditors in making their recommendations in the new insolvency and to which the Court would have regard in making a decision as to the appropriate order to be made. However, I do not want the hands of the Court to be tied so that, whatever the circumstances of the earlier insolvency, what will be in effect a penal order must be made.

4. Paragraph 7. In support of the proposal to get away from the use of petitions we might consider referring to the following note which appears in the Supreme Court Practice ("the White Book") 1979, Volume 1, p.71:- "Under O.5, r.1, the petition remains a mode of beginning civil proceedings. Its survival involves a complication in the rules of procedure which practitioners might well be spared. It is to be hoped that when the Companies Act 1948, is revised the opportunity will be taken to abolish the petition. The supporters of rationality in rules of procedure will then look forward to the day when a single document is prescribed for the commencement of every kind of civil proceeding in the High Court, such document being completed according to the relief prayed".

In view of the fact that the words "petition" and "petitioning creditor" are used in subsequent paragraphs of the present report, I suggest that if the chapter in the Final Report adopts the same language it would be desirable to say at this point something like - "However, the existing and familiar terms "petition" and

/"petitioning

"petitioning creditor" continue to be used in this Report."

5. Paragraph 9. In the last sentence, I suggest the insertion of the word "any" before "proposals". The debtor may not be in a position to make any specific proposal for payment of his debts in full or in part but simply wish to apply for such mode of administration of his affairs under the new Act as is appropriate.

6. Paragraph 12. Is it essential for the creditor applicant to attend the hearing if he is represented by solicitor or counsel?

The Senate of the Inns of Court and the Bar and the Law Society in C 185 (para.10) recommend that when the act of bankruptcy relied on by the petitioning creditor is non-compliance with the requirements of a bankruptcy notice, the affidavit verifying the petition should suffice as proof of the petitioning creditor's debt for the purpose of section 5(2) of the Bankruptcy Act 1914. Under section 52(1) of the Australian Bankruptcy Act 1966 the court may accept the affidavit verifying the petition as sufficient evidence of the matters stated in the petition. I would be in favour of a similar provision in our new Insolvency Act. See also Freshfields evidence referred to in Annex 3 to ILRC 134 at p.3 (C 202).

7. Paragraph 13. Perhaps it might be useful to add after "explored" at the end of (a) a reference to a footnote which would refer to the paragraph in the chapter on DAO which will state that following such an application a DAO may be made in an appropriate case notwithstanding that the liabilities exceed £10,000 (ILRC 100, para.20).

8. Paragraph 16. I suggest that the words "the petitioning creditor's debt" be inserted after "paid" in line 3.

9. Paragraph 18. I assume that if the debtor does not attend the hearing or does not supply the court with the necessary details of his assets and liabilities to enable consideration of any other order, a Protection Order will be made or, if the debtor is the applicant, the application will be dismissed.

10. Paragraph 19. Last sentence. Section 74(2) of the Bankruptcy Act 1914 refers only to the disposal by the O.R. of perishable goods. I am not clear as to the authority for the proposition that he can at present sell other property before an adjudication order is made.

11. Paragraph 20. If this reference to Northern Ireland is to be included in our Final Report, in the interests of accuracy I would ask that it be re-drafted somewhat on the following lines:- "We understand that when proposals were made in Northern Ireland for the replacement of the system of arrangements by insolvent debtors under the control of the bankruptcy Court under the Irish Bankrupt and Insolvent Act 1857 (which normally do not involve a receiving order) by provisions similar to the Bankruptcy Act 1914 under which the initial order would be a receiving order, although this could be followed by an arrangement before adjudication as under section 16 of the 1914 Act, objection was raised by the Incorporated Law Society of Northern Ireland on the ground that the making of a receiving order would almost invariably mean the closing down of a debtor's business which might be capable of being rescued by an arrangement with creditors. They preferred to retain the present provisions which enable an insolvent debtor to obtain a protection order which has the effect of restraining enforcement of judgments by individual creditors and inhibits the debtor from parting with his assets except in the ordinary course of business or for the necessary expenses of himself and his family, without leave of the Court, pending a consideration of his proposals to his creditors, but (unless, exceptionally, a receiving order is made for special reasons) leaves him in possession of his property unless and until the property is vested in the Official Assignee as trustee under the terms of the arrangement. We acknowledge this objection to an immediate receiving order and recognise the need for what we propose should be called a Protection Order to give interim relief to the debtor and to safeguard his assets."

12. Paragraph 32. The application will be for an administration under the Insolvency Act and not for a Protection Order (para.8). If our proposals are accepted, one of the modes of administration under this Act will be a DAO.

/Accordingly

Accordingly, I do not see why, if a DAO is made, the application should be dismissed. The DAO should incorporate a rescission of the Protection Order. No further application for this should be required.

13. Paragraph 33. For the reason given in the preceding paragraph, I suggest that when the Voluntary Arrangement has been approved the matter would be referred back to the Court to rescind the Protection Order but not to dismiss the application.

14. Paragraph 35. The latter part of the last sentence seems to imply that a bankruptcy order would never be made where the creditors do not nominate a trustee, whereas paragraph 41(c) envisages the Court making a bankruptcy order notwithstanding the absence of such nomination. I suggest that in the last sentence the words "and the most that they could expect would be a DAO" should be deleted.

15. Paragraph 41. If, as I have suggested in my paragraph 12 above, the DAO could itself incorporate a rescission of the Protection Order, sub-paragraph (a) will require alteration.

16. Paragraph 45. Whilst I am in favour of a system of monitoring the administration with a view to discouraging delay, I question whether the Court is the proper forum. Presumably the trustee will be required to send periodical statements to the Department of Trade as under section 87 of the 1914 Act in relation to bankruptcies and the Department will exercise control of trustees as under section 81 of the 1914 Act. Under our proposals for Voluntary Arrangements the trustee will have to send periodical accounts to the creditors and to file them with the Department. These accounts could be required to be accompanied by a statement showing the progress of the administration and reasons for any delay and the same procedure applied to Liquidation of Assets Orders. If this were done, then I suggest that it is up to any dissatisfied creditor to complain to the Department and that the Department rather than the Court should be concerned with ensuring speedy disposal of the administration.

17. Paragraph 46. I suggest that the expression "lesser procedures" is not an entirely happy one and that "other insolvency procedures" would be prefereable.

/18.

18. Paragraph 76-93. Discharge.

Whilst I agree that a bankrupt should be required to apply for his discharge, ~~but~~ I am not convinced that this is necessary or desirable in the case of a debtor subject to a Liquidation of Assets Order. I think it is important to establish the maximum possible significant distinctions between bankruptcy and L of A, that in relation to discharge such a distinction can readily be made and that length of time before discharge is not by itself a sufficiently significant difference. I have several times referred WG2 to the passage in the Ghana Insolvency Report (where the context is the confining of public examination to bankrupts) stating "....if all debtors are treated alike, the harmless debtors have little incentive to avoid the excesses that characterise the worst type of debtor, and it becomes much more difficult to reform the bad debtor by pointing out what could happen to him if he does not co-operate. In our view, honest dealing will be promoted better by treating debtors differently according to their conduct, than by making them all go through the mill together." (Ghana Insolvency Report p.127)

I do not think that there is any necessary connection between the discharge of the debtor and the completion of the administration of his estate.

I suggest two alternative proposals. (1) The discharge of the debtor to take effect immediately the Liquidation of Assets Order is made but to be conditional not only on payments under any SIO (as proposed in paragraph 55), but upon his taking all necessary steps to ensure that all his assets subject to the Order are effectively and promptly made available to the trustee and upon his co-operation with the trustee in the administration. If he fails to comply with any of the conditions the trustee could apply to the Court to revoke the discharge and, if appropriate, to adjudicate the debtor bankrupt. (2) The discharge of the debtor to take effect one year (or perhaps 6 months) after the making of the Liquidation of Assets Order (conditional as in (1)) unless the trustee applied to the Court before that date for an order postponing the operation of the discharge.

/As

As regards paragraph 85, see my paragraph 16 above.

19. Paragraph 96. Some such words as "from the requirement" after "resulted" appear to have been omitted.

20. I have noticed typographical errors at paragraphs 6, 38, 42 and 80.

9 September 1980. JOHN M. HUNTER

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P G H Avis
Assistant General Manager

E.L. Reeves Esq.,
Assistant Secretary,
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11 September 1980

Dear Eric,

ILRC 133 -
Compulsory Insolvency Procedures for Individual Debtors

As I mentioned to you at the telephone I feel that this report by WG1 is first class and I would wish to offer my congratulations to them all for all the work and research they have carried out on behalf of the main committee.

I know we shall be discussing the report at the next meeting on 25 September, but you may like some preliminary observations of a relatively minor nature. These are:-

1. Page 2, para 6, last sentence This may possibly need to be rephased depending upon the outcome of the Green Paper.

2. Page 3, para 9, line 3 In referring to the debtors' liabilities should we ensure that both current and contingent/future are included.

3. Page 5, para 21 and subsequent paragraphs deal with the proposals that we have a Provisional Trustee, but in a number of the paragraphs we revert to referring to the Official Receiver and I find difficulty in being able to see easily where the Official Receiver is designated ~~by~~ the Provisional Trustee.

I shall no doubt have an opportunity to explain more clearly the areas which I find difficult, and of course when the final report is written we shall have clarified the position completely.

Yours sincerely,

1065

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COMMENTS ON ILRC 133

by John Copp

1 Despite some disappointment, doubts and dislikes, I think this is an admirable report with just the right amount of detail. There are a number of points which I think merit a debate in full committee - leading, I hope, to some modification!

2 I think we should try once again to find a better title to replace "Liquidation of Assets" and, even more importantly, a satisfactory description of a debtor subject to such a procedure. Unless we can do so the public will almost certainly not distinguish between the two procedures and will refer to all insolvent debtors as "bankrupts". This will be of particular importance when we come to discuss the necessity or otherwise of disclosure and other disabilities and the nature of those disabilities.

2A While on the subject of nomenclature - "Protection Order" is I think used in the Court of Protection under the Mental Health jurisdiction. May be that does not matter and may be it is used elsewhere as well - but we should be aware of it.

3 The great majority of debtors subject to the Liquidation of Assets procedure will be those:-

(a) with realisable assets in excess of those exempt from seizure,

(b) with debts which they cannot pay but which are not outrageous, and

(c) have not been culpably dishonest.

Ideally it should be possible for such a debtor to hand over to a trustee all his non-exempt assets and, subject to:

(i) an order for payment of a proportion of his income for a period,

(ii) a duty to assist the trustee in realisation, and

(iii) a duty to provide the trustee with such information as to past dealings, present assets and future acquisitions and earnings as the trustee can properly require should immediately on such handing over be enabled to make a fresh and untrammelled start.

4 Of course an ideal can rarely be achieved but I am disappointed that we cannot come closer to it. My main disappointment is the necessity for a period from which a discharge has to be sought. Why is this a necessity? Why should the debtor not be freed (subject to (i) (ii) and (iii) above) as soon as he has executed an assignment of his property? Of course this cannot be done immediately on the making of the Order but if a period has to be set to enable it to be done and the trustee to investigate and satisfy himself that there is no more, why need the termination of this period be formalised as a discharge?

5 If the period has been made a part of the procedure in order to enable disabilities to be imposed, I question its need for this purpose - see the last sentence of paragraph 20 of our Interim Report.

6 I do not know what disabilities are to be proposed for the non-bankrupt insolvent but the one which outstandingly conveys a stigma is the inability to incur credit above a low limit without disclosure - and as to what the disclosure is to be see my comments in paragraph 2 above - followed perhaps by an inability to become a director of a limited company. This brings me to my second main point.

7 I think we need a detailed analysis of the differences between our proposed new procedures. We have all been thinking of considerable differences between a Liquidation of Assets procedure and full bankruptcy. I have no doubt that to the insolvency practitioner the differences are great. I am by no means sure that they would appear so to others. If the lesser debtor is to be subject to the important disabilities mentioned above - albeit for a shorter period - the only substantial and practical difference may turn out to be the absence of a public examination. I am thinking not so much of the differences in the relationship of the debtor to the Court or his trustee as of his status in the view of the community. And note that if little difference is seen, the full bankrupt will be no more outstanding than at present - and I think that one of the "rigours of bankruptcy" is that he should be.

8 A few comments on the detail of the report:-

Para 9 — Presumably there will automatically be a restriction on enforcement if a DAO or Protection Order is made.

Para 10 — If we have had a paper or a discussion on Insolvency Courts, I have forgotten it. Would it not be possible, if all County Courts cannot be given insolvency jurisdiction (and quaere why not?) for any County Court to make either a DAO or Protection Order transferring the jurisdiction in the latter case to an appropriate Court. Presumably all that needs to be done, apart from application to the Court, will be done locally with a local trustee.

Paras 30-39 — I'm sure that these paragraphs are satisfactory but I have two niggling doubts. (1) What is the position if, on a debtor's application for a Protection Order (as opposed to a DAO), the creditors fail to nominate a trustee, and (2) the paragraphs read rather too much as if the real decision was that of the creditors rather than that of the Court - however I suppose that any such implication is counterbalanced by the need for a report by the OR - if there is one.

Para 45 — Why is it an "administration"? Is it from this that the discharge concept derives? Surely the debtor need not be kept "undischarged" while the trustee is selling the assets which have been transferred to him?

Para 52 — Should not a SIO be equated with a DAO. Same supervision by local court - same penalties and so on!

Para 63 — I have no experience in the criminal law but I should have thought that this proposed created difficulties. To insist on self-incrimination is surely not justified because only a few people hear it, and what of those few people who listen to a confession and subsequently hear of an acquittal.

Para 72

I doubt the wisdom of this recommendation. Privilege, whether of the client or of his legal adviser, is a purely personal right which I think cannot, and should not, be transferred to a trustee. Maybe solicitors should be prevented by the rules of professional conduct from acting for both husband and wife in such circumstances.