

INSOLVENCY LAW REVIEW COMMITTEE

FORTYNINTH AND FIFTIETH MEETINGS

Meetings to be held in the Conference Room, 2-14 Bunhill Row, on Wednesday 17 December and Tuesday 18 December, both starting at 10.00 am.

A G E N D A

- 1 Minutes of the meeting held on 20 November.
- 2 Matters arising.
- 3 Secretary's report.
- ✓4 Initiation of Insolvency Proceedings - draft chapter: points of principle.
- ✓5 Property of an Insolvent Debtor divisible amongst his Creditors (ILRC 146-147) (Note 1).
- ✓6 Administration of Estate of Person Dying Insolvent (ILRC 148-149) (Note 1).
- 7 Compulsory Insolvency Procedures for Corporate Debtors - Harmonisation with ILRC 133 (ILRC 150-151) (Note 2).
- 8 Distress and Executions (ILRC 152-153) (Note 3).
- 9 Scope of Disclaimer in Bankruptcy (ILRC 154) (Note 3).
- ✓10 Miscellaneous matters arising after Adjudication of a Bankrupt (ILRC 155-156) (Note 3).
- 11 Tort Claims in Insolvency (ILRC 157) (Note 4).
- 12 Fines in Insolvency (ILRC 158) (Note 4).
- 13 Enforcement Procedures (ILRC 159-160) (Note 4).
- 14 Functions of the OR's Service (ILRC 9 Parts A & B, and ILRC 161 (Written evidence - circulated on 4 December).
- 15 Schemes of Reconstruction, Arrangement or Compromise (ILRC 162-163) (Note 5).
- ✓16 Trust Property (ILRC 164-165, circulated herewith; see also ILRC 139).
- 17 Any other business.
- 18 Agenda for meeting on 14 January 1981.

E L Reeves
 E L REEVES
 Assistant Secretary
 12 December 1980

<u>Notes</u>	(1)	Circulated on	4	November
	(2)	"	" 11	"
	(3)	"	" 2	December
	(4)	"	" 4	"
	(5)	"	" 9	"

INSOLVENCY LAW REVIEW

Minutes of the Fortyninth Meeting of the Review Committee on 17 December 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: N Cave
D Graham
R B Jack
G A Weiss

1 The Committee met at 10.00 am. The minutes of the fortyeighth meeting held on 20 November were agreed and signed.

MR P J MILLETT

2 The Committee congratulated Mr Millett on his election as a Bencher of Lincoln's Inn.

MATTERS ARISING

3 Para 3 of the minutes of the fortyeighth meeting. The paper on delinquent directors (ILRC 167) had been given to members and would be considered at the January meeting.

4 Para 18 of the minutes of the fortyeighth meeting. Mr Taylor thought that this should include a saving for archivistic papers, which was the current law. This was accepted.

5 Para 26 of the minutes of the fortyeighth meeting. The paper by Mr Goldman and Mr Weiss had been circulated as ILRC 166. The Chairman said that he was assuming that the paper reflected the views of the Committee and could be accepted; there was no dissent.

6 Mr McNab thought that the minutes should have recorded what had been said about employees' expenses. [Note by Secretary - para 5 of the minutes recorded that good cases had been put forward for increase the range of preferential claims, including expenses of employees incurred on behalf of a business. The Committee had not accepted the but mention of them would be made in the Report. The earlier agreement had been at para 34 of the minutes of the thirtyninth meeting.] Mr Muir Hunter pointed out that expenses might be money paid on behalf of the company which might put it in a slightly higher moral category. It was agreed that it would be recommended that current expenses of employees in respect of payments made on behalf of the company should be paid by the state along with wages under the EPA - this already includes items other than wages.

SECRETARY'S REPORT

7 The Secretary reported that an apology for absence had been received from Mr Drain.

8 In a folder placed before members was the first part of the Final Report (the Introductory and Chapters 1-4)-this was in single spacing, comprising chapters which had been redrafted in the light of members' comments, and it was hoped that these could be approved in due course on a page by page basis. Chapter 5 (Initiation) was on the current agenda, and the first drafts of Chapter 6 (Voluntary arrangements), Chapter 7 (DAO) and Chapter 8 (Compulsory procedures for individual debtors) were being despatched shortly to members for comment.

9 The Secretary pointed out material for the chapter on Group Trading was awaited from Mr Millett and Mr Walker-Arnott.

10 Papers circulated since the last meeting had been:-

- (a) ILRC 152-166 (and placed before the Committee were ILRC 167-168);
- (b) Briefs and comments on items on the agenda;
- (c) DT7, a note from Miss Llewellyn Smith on qualifications of receivers;
- (d) Further comments on the Green Paper (GP15-16 and an addendum to GP12);
- (e) An "off-the record" letter from Inland Revenue on a point arising in oral evidence; and
- (f) The remaining transcripts of oral evidence.

11 The agenda for January would include, in addition to items not dealt with by the end of the following day's meeting:-

- (a) delinquent directors (ILRC 167-168);
- (b) a paper from Mr Penny on qualifications of liquidators, etc, (which would be ILRC 169);
- (c) bankruptcy offences and disabilities; and
- (d) residual powers of directors in receiverships and liquidations, on which a paper was expected from Mr Millett and Mr Graham, (as recorded in the minutes of the nineteenth meeting (para 12) and the twentyfourth meeting (para 10)).

INITIATION OF INSOLVENCY PROCEEDINGS

12 The Committee had before it the draft of Chapter 5 and comments by members, and considered the points of principle involved.

13 Mr Millett thought that there should first be a separate chapter dealing with what he would call "harmonisation", covering such matters as whether insolvency should be an individual remedy or collective and whether it should be in private or in the presence of creditors for

whom there had been advertisement. He would try to prepare what he had in mind and let the Committee decide how it should be organised in the Report - Mr Penny and Mr Goldman agreed with Mr Millett.

14 The Committee then considered those paras on which points had been raised.

15 Para 1.2. Mr Goldman pointed out that there is now no local advertisement, but only advertisement in the London Gazette.

16 Para 1.3. Mr Copp had pointed out that great damage can be caused by an ill-founded allegation of insolvency. This would be a comment in the new chapter being drafted.

17 Para 1.6. The reference to "voluntary insolvencies" should read "voluntary arrangements".

18 Para 2.3. "Claw-back" would be better referred to as "voidable antecedent transactions".

19 Para 2.5. There was a brief discussion on the last sentence but this was accepted in principle.

20 Para 2.7 (1)(b). It was suggested that the notice should be sent to the registered office only, as any variation from this gave the opportunity for evasion. After discussion it was agreed however that the text should stand. As to the length of notice being 21 days, Mr Penny had suggested 7 days being adequate as it was only a final warning after a judgment. The Committee compromised on 14 days.

21 Para 2.8. As to whether it should be by registered post, it was felt that this should be recorded delivery as the former was merely used for insurance of contents. It was accepted however that the para should read by recorded delivery or personal service. It was noted that the "serious consequences" had not been described; these would be included.

22 Para 2.9. The last sentence was deleted, to go in 2.10.

23 Para 2.10. It was agreed that a formal notice of the application should be sent. Mr Penny's suggestion was accepted that the last sentence should read "Before acceptance of the application by the Court the Registrar would be required to give leave to file on his being satisfied as to those merits".

24 Para 2.12. It was agreed that it was not necessary for the Registrar to satisfy himself as to the petition being properly founded, and it should be up to the applicant in due course to show that it was in fact properly founded. This was a change from the present law. As the application was not to be advertised, there was no necessity for the Registrar to satisfy himself as to its correctness, formal or otherwise.

25 Para.2.13. It was pointed out that there were matters here which were contradictory to ILRC 150 (still to be discussed), such as the 28 days. Discussion was left over.

26 Para 2.14(5). It was noted that this must be repeated in ILRC

133.

27 Note to para 2.14. Mr Penny said a special section should be included on payments made before the Protection Order; it should cover the Note to 2.14 and a number of other matters, such as decisions recorded in paras 35, 38 and 39 of the minutes of the meeting on 29 November 1979 and in para 8 of ILRC 98.

28 The Committee then went on to discuss payment by instalments and agreed that the insolvency procedure should not include any order for payment by instalments; if there was any question of instalments the Court would adjourn and para 3.2 should include "and on such terms" after "for such reason".

29 It was noted that Working Group 1 had produced recommendations from the time of filing the application and the present paper overlapped. It was agreed that "initiation" should end with the filing of the application and para 3.1 et seq would be covered in subsequent chapters.

30 Mr Avis had expressed concern about the "suspect period". It was agreed that it would be necessary to point out in the Report that dealings in good faith and normal transactions will stand right up to the time of advertisement.

31 It was accepted that there should be a tendency to allow applications to be paid off. At present in bankruptcy third party money was accepted without proof that it was in fact third party money; in winding-up no question was even asked.

COMPULSORY INSOLVENCY PROCEDURES FOR CORPORATE DEBTORS

32 The Committee had before it ILRC 150 and 151 and the comments of Mr Millett, Mr John Hunter and Mr Avis. The Committee considered points raised on ILRC 150.

33 Para 3. It was accepted that application should be made by the company itself.

34 Para 6. This should include provision for the Court to make an order for advertisement.

35 Para 11. The Protection Order should be registered with the Registrar of Companies.

36 Para 12. The Protection Order would be taken as the commencement of insolvency. However, if advertisement had been made earlier, third parties dealing with the debtor before then and the date of the PO may have known about this, or might be deemed to have known about it, and such transactions could be subject to challenge.

37 Para 18. The present rights should be maintained. In addition to application by the OR provision should be made for application by any interested party. If the Protection Order was reinstated it would be readvertised.

38 Para 22. There was a long discussion about majorities. The proposal was that a simple majority in number would be fairer to more people. The Committee were not happy about this and the Secretary proposed a compromise - a £1000 a vote, on the Canadian lines. This met with some measure of approval but £100 a vote was suggested instead.

It was finally agreed that across the board there should be simple majorities, with one vote for each £100 or part thereof, with the proviso that an aggrieved creditor should be entitled to apply to the Court.

39 Para 29. The Committee were against automatic freezing of assets but accepted that where a criminal action was pending the liquidator should be able to apply to the Court for an order freezing the director's assets. The proposal by Mr John Hunter for a savings clause allowing for disposals in the ordinary course of the director's personal business or for the necessary expenses of himself or his family was also accepted.

40 Para 31 was varied. It was agreed that where a claim is made by a liquidator against a former director judgment is obtained against the director and the director becomes bankrupt, the liquidator may invoke the relevant periods, not back from the bankruptcy of the director but back from the date of the claim.

41 Mr Avis had expressed concern about the debenture-holder's position but it was pointed out that the debenture-holder would still be able to appoint a receiver.

DISTRESS AND EXECUTIONS

42 The Committee had before it ILRC 152 and 153 and discussed the comments by Mr Avis, Mr John Hunter and Mr Walker-Arnott on ILRC 152.

43 Para 19. The Committee discussed Blagden (para 100) and the Department's working party comments on that. However, para 19 was accepted with Mr Taylor dissenting.

44 Mr Walker-Arnott pointed out that the paper did not deal with the critical gap between the despatch of a notice by a company declaring its intention to go into winding-up and the holding of the meeting at which the resolution to wind-up was passed. The problem arose where liquidation of assets was obtained by resolution instead of by way of a Protection Order; it was generally thought in this case the date of the resolution should replace "the date of the Protection Order" in para 19. It was pointed out that there could be a rush of creditors seeking executions once the notice had gone out. The Chairman suggested a compromise - from the date of the notice the sheriff could deal with what he had in his hands but should not be able to get any more. This was accepted.

ANY OTHER BUSINESS

45 The Chairman asked that henceforth any member commenting on a paper should put forward a proposal with an alternative form of wording.

NEXT MEETING

46 The remainder of the agenda was left over to be dealt with at the following day's meeting.

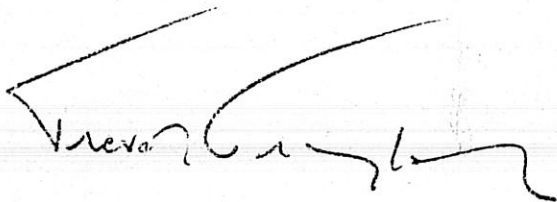
ILRC - 49th - 50th Mtgs

Brief for Item 4

Attached are copies of comments which have been received from Messrs Avis, Copp, Penny and Millett.

2 In addition, Messrs Copp, McNab and Penny have written various comments on copies of the draft chapter to which I will try to refer during the debate.

3 Both Mr Drain and Mr Goldman accept the draft chapter, though Mr Goldman would prefer the final paragraph to be omitted.



T H TRAYLOR
Secretary
12 December 1980

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