

**《2004 年破產(修訂)條例草案》委員會
二零零四年十一月三日會議所討論事項的跟進事項**

引言

在法案委員會二零零四年十一月三日舉行的會議上，委員要求政府當局就若干項與《2004 年破產(修訂)條例草案》(條例草案)有關的事宜提供補充資料。

一般意見

2. 在回答委員提出的具體問題之前，我們認為應先提供有關條例草案的背景資料。條例草案旨在利便破產管理署將簡易程序破產個案(即破產人的資產不大可能超逾 20 萬元)外判予私營清盤從業員，以及作出其他輕微的雜項修訂。

(a) 破產人的概況

3. 根據目前的建議，破產管理署可選擇把破產案件外判，但這並非強制性的，而且僅適用於債務人呈請個案。這因為在債權人提出破產呈請時，債權人所繳付的按金（扣除破產管理處的費用及支出後），必須按《破產條例》第 37 條所訂明的優先次序，從債務人產業的收益中撥款償還給有關的債權人，而不能用作私營清盤從業員的酬金。此外，由債權人呈請的破產個案數目，遠較債務人呈請個案為少。

4. 根據過往經驗，在絕大多數破產個案中，破產人的資產及收入都很少，或根本沒有任何資產及收入。舉例來說，在二零零三年總共 24 922 宗破產個案中，有 23 674 宗個案(即 94%)獲法庭發出命令以簡易程序處理(即有關資產不大可能超逾 20 萬元)。在二零零三年四月至二零零四年三月期間的 17 390 宗破產個案中，有超過 80%的破產人報稱每月收入不超逾一萬元，其中約 43%（即 7 457 宗）個案報稱沒有任何收入。鑑於有關破產人的這些狀況，經驗顯示，在很少或沒有任何資產的破產案件中，《破產條例》下的部份安排實際上不曾被採用，這些安排包括需用大量款項的調查程序及攤還債款的派發。委員應在適當情況下考慮外判建議。

(b) 私營清盤從業員參予破產個案

5. 我們想指出，就破產個案而言，委任私營清盤從業員為破產案受託人在過去三年多以來已是很常見的做法。在該等案件中，委任私營清盤從業員的程序會在債權人會議中進行。私人清盤從業員有豐富及已証實的往績去處理破產案件。二零零三年，共有 1 244 名外界受託人於召開債權人會議後獲得委任。破產管理署在制訂外判建議時，已有考慮到私營清盤從業員市場的慣常做法。

6. 此外，破產管理署已在適當情況下，以公司清盤個案經已採用的外判安排作為外判建議的藍本。該等安排已行之多年，而且一直運作暢順。

7. 無論如何，破產管理署會在實施有關的外判安排後不時予以檢討。在這方面，破產管理署服務諮詢委員會(由消費者委員會等有關組織的代表組成的客戶聯絡小組)會在必要時參與這方面的工作。舉例來說，破產管理署會邀請該委員會就私營清盤從業員的服務水平等問題提供意見。

具體意見

8. 我們就委員所提出具體問題／要求的意見，載列於附件。

財經事務及庫務局
破產管理署
二零零四年十二月

就法案委員會提出的具體問題的回應

A. 有關將簡易程序破產個案外判予私營清盤從業員的招標計劃

(a) 招標計劃的政策、設計及運作

(b) 私營清盤從業員參與投標所須符合的預審資格準則

(c) 現時外判清盤案件招標計劃所用的招標文件及合約

1. 破產管理署打算以公開招標方式，把簡易程序破產個案外判予私營清盤從業員，並在初期與中標者訂立為期一年的合約。

2. 該署會把案件分批外判，使私營清盤從業員獲得規模經濟效益。初步構思是每年分批外判案件，每批大約 1 000 宗，並且訂立一項更改條款，容許破產管理署更改外判案件的數目，例如把增減幅度訂為 30%，以配合破產個案數目的波動。就外判計劃而言，在二零零四年首十個月，債務人呈請個案有 9 238 宗¹，預計當中約有九成可以簡易程序處理，換言之，獲批的合約可達 10 份。無論是公司或個人皆可投標，有關招標安排不但有助確保市場競爭，更可確保制度的透明度，以及以最佳的營運做法去決定中標者。

3. 私營清盤從業員必須符合多項預審資格準則，才合資格參與投標。該等準則與現時外判簡易程序清盤個案計劃所採用的準則相若²。私營清盤從業員必須是指明專業團體(即香港會計師公會、香港律師會或香港公司秘書公會)的成員，並於取得專業資格後有若干年數的執業經驗，以及曾就無力償債個案提供不少於某個時數的專業或收費服務³。

¹ 在同一期間，債權人呈請案件則有 1 152 宗。

² 現時，私營清盤從業員必須至少符合以下規定，才能參與競投承辦(公司)簡易程序清盤案件：(i)必須在取得專業資格後有三年執業經驗；(ii)在過去三年曾就與無力償債有關的工作提供 300 小時的收費服務，其中至少 150 個小時與無力償債的清盤／接管工作有關，其餘時數則與有償債能力的清盤工作有關(這方面的工作時數會減少 50%)；以及(iii)曾處理至少四宗清盤案件。

³ 初步構思是要求私營清盤從業員具備與公司清盤或個人破產有關，並與註腳 2 相若的工作經驗。

4. 在投標者符合預審資格的前提下，破產管理署會主要根據投標價格，以及投標者提供服務的往績等其他因素，對標書進行評審。

5. 二零零四年所發出並批准訂立關於根據《公司條例》第 194(1A)條接受委任為臨時清盤人的招標文件，其副本載於附件 1(只有英文版)。

B. 私營清盤從業員處理破產案件時所涉及的財務安排

(a) 關於把破產呈請的按金分配作不同用途(例如作為私營清盤從業員的酬金)及處理按金餘款(如有的話)的機制

6. 根據《破產規則》第 52 條，債務人呈請個案時所須繳交的按金為 8,650 元。根據同一條文，破產管理署會先從按金中扣除該署的費用和開支，例如在憲報刊登破產令所涉及的開支。

7. 按金餘款其後會根據《破產條例》第 37(1)條(按條例草案第 11 條所建議者修訂)所定的優先次序，用作受託人的酬金以及支付受託人所代墊費用和其他款項。不過，我們想指出一點，第 37(1)條所涵蓋的款項，部分並不適用或在甚少情況下適用於以簡易程序處理並由債務人提出呈請的破產個案，例如特別經理人所招致的開支（該等個案無需委任特別經理人）或有關呈請的經評定訟費（債務人呈請的有關費用由破產人自行繳付）。

8. 在支付第 37(1)條所述款項後，餘款連同破產人所變現的任何額外資產，都會根據《破產條例》第 38(1)條所定的優先次序予以派發。簡而言之，破產人須優先償付僱員(或前僱員)的欠薪⁴或其他應付的福利(如遣散費)，其次是欠政府的法定債項。

(b) 債權人覆核私營清盤從業員酬金的途徑

9. 暫行受託人及受託人對債權人負有受信責任。就外判個案而言，他們的酬金是由破產管理署透過公開招標程序釐定，再加上

⁴ 或從破產欠薪保障基金撥付予有關僱員或前僱員的款項。

大多數破產人不大可能有很多資產留供派發攤還債款，因此債權人要求覆核私營清盤從業員酬金的情況會甚為少見。

10. 不過，如債權人確實認為有需要覆核私營清盤從業員的酬金，現時亦有途徑。根據擬議的《破產條例》第 85A 條(按條例草案第 27 條所建議者修訂)，如佔債權人人數或債權價值四分之一的債權人向破產管理署署長提出申請覆核私營清盤從業員(作為暫行受託人或受託人)的酬金，破產管理署署長可向法院申請，而法院可應申請而確認、增加或削減酬金。

(c) 私營清盤從業員如何收回所涉及的調查費用

11. 《破產條例》以及私營清盤從業員與破產管理署所簽立的合約都會訂明私營清盤從業員的職責。私營清盤從業員在履行其職責時所招致的開支(例如向法院申請簡易程序令以及他們的酬金)，會根據《破產條例》第 37(1)條(請參閱上文第 7 段)所定的優先次序，從破產人產業的資產中撥付。當局會分批將簡易程序破產個案外判予私營清盤從業員辦理，以達致規模經濟效益。此外，基於破產人士的概況，令部份在《破產條例》下的安排在實際情況下不會使用（特別就以簡易程序處理的個案而言）。我們因此相信，私營清盤從業員會對擬議安排下的外判工作感興趣。

12. 此外，假設私營清盤從業員想採取法律行動把破產人更多資產變現（機會不大的情況），他可向債權人籌集款項。

C. 監察私營清盤從業員處理破產個案的表現

(a) 私營清盤從業員處理破產個案的職務和責任，以及適用於他們的服務承諾

13. 一般而言，私營清盤從業員作為受信人以及法院代表，須處理一切與管理破產人產業有關的事宜，並按照《破產條例》以及與破產管理署所簽立合約的條文，承擔有關的職務和責任。

14. 私營清盤從業員獲委任後，應先行着手把破產人的所有財產收歸他保管（《破產條例》第 53 及 54 條）、與破產人會面，並確定破產人的入息和財產，然後考慮破產人所須作出的供款(如有的話)，並確定其資產的價值。如破產人的資產不超過 20 萬

元，私營清盤從業員須向法院申請發出簡易程序令（第 112A 條）及委任自己為受託人⁵。

15. 私營清盤從業員管理破產人的產業時，必須把破產人的所有資產變現，並定期檢討破產人所須作出的供款。私營清盤從業員會接獲破產人產業的債權證明《破產規則》第 109 及 113 條），如破產人有足夠資產，私營清盤從業員會着手安排派發攤還債款（《破產條例》第 67 條）。

16. 當考慮解除破產時，私營清盤從業員須檢討個案，以決定是否有理由提出反對解除破產（例如破產人沒有提供一份其入息及財產的取得的周年報告）（第 30A 條）。私營清盤從業員亦有責任調查破產人的行為操守，如有理由相信破產人觸犯了《破產條例》所訂的罪行，便須向破產管理署作出報告（第 86A 條）。

17. 私營清盤從業員執行職務時，須遵守《破產條例》的有關條文（包括有關程序的時限）及他們所屬專業的行為守則。此外，破產管理署會按有關的招標合約的條款，密切地監察私營清盤從業員的表現。

(b) 賦權私營清盤從業員處理破產個案

18. 擬議的《破產條例》第 60(2)條(按條例草案第 17 條所建議者修訂)訂明暫行受託人的權力。暫行受託人有權把破產人的所有財產收歸他保管或控制、把易毀消貨品出售或處置，以及作出為保護或保存破產人財產而需要作出的所有其他事情。

19. 《破產條例》第 60(1)條訂明受託人的權力。受託人有權出售破產人的財產；就任何欠破產人的債項作出債權證明、要求順序攤還和提出申索，並支取攤還債款；行使根據《破產條例》歸於受託人的任何權力；以及作出為管理破產人產業和分發其資產（如有的話）而需要作出的所有其他事情。

⁵ 獲委任的暫行受託人如認為破產人的資產價值可能超逾 20 萬元，便可根據《破產條例》第 17(1)條召開債權人會議以委任受託人。

(c) 為確保私營清盤從業員以合理和一致的方式行使其權力而訂立的法定及非法定措施

20. 有關方面訂定不少“制衡措施”，以確保私營清盤從業員以合理和一致的方式行使其權力。有關措施可分為以下類別：

(i) 法定措施

21. 私營清盤從業員受《破產條例》的法定控制措施所管限。根據《破產條例》第 82(2)條，佔債權價值四分之一的債權人可請求受託人召開債權人會議。第 83 條訂明破產人、債權人或任何其他受屈人士可就受託人的作為或決定，向法院提出上訴。第 84 條訂明法院在任何債權人、破產管理署署長、有關破產人或任何其他人士作出投訴時對受託人作出的控制。

22. 《破產條例》第 89 條規定私營清盤從業員向破產管理署署長提交法律程序周年報表，以便署長藉此監察有關法律程序的進展情況。

23. 根據擬議的《破產條例》第 93(1A)條，破產管理署署長可隨時要求私營清盤從業員提供破產人產業的帳目。現行第 93(3A)條訂明署長可安排審計有關帳目。

(ii) 非法定措施

24. 一如外判清盤案件的情況，委任合約會載明私營清盤從業員的工作詳述⁶。私營清盤從業員會在接受委任時獲告知其作為破產人產業的暫行受託人及受託人的職務和責任。

25. 破產管理署亦會根據該署與私營清盤從業員所訂合約的條款，監察私營清盤從業員的表現。

26. 私營清盤從業員是專業人士。他們可能因違反專業規則或所屬專業團體的行為守則（包括在出任破產受託人時所犯下的專業過失），而受到紀律處分。

⁶ 舉例說，獲委任的私營清盤從業員在各方面均須遵守有關專業的準則及道德標準指引，以及當未有在指明期間內完成某項工作時，可被要求向破產管理署提交報告。

(iii) 其他支援措施

27. 為協助各方面明白本身的權利和職責，破產管理署已訂有多項措施，例如印發破產簡介，載述債權人的權利及破產人的責任等事宜。此外，任何人如有查詢或投訴(包括針對私營清盤從業員的投訴)，可致電破產管理署熱綫或透過其他途徑(例如互聯網)向該署提出。

(d) 現時向私營清盤從業員提供關於處理清盤案件的指引，日後會向私營清盤從業員提供關於處理破產案件的指引，包括詮釋破產人及其家庭的“合理家庭需要”的指引

(i) 現行措施

28. 私營清盤從業員是專業人士，故預期他們在獲委任為破產案的受託人之前，應已對有關職責有一定的認識。其中一項責任是將破產人的資產變現，當中包括考慮破產人所應作出的財務供款。

29. 目前，破產管理署及相關的專業團體都並沒有向由債權人委任的私營清盤從業員發出任何有關破產人財務供款的指引。私營清盤從業員被預期會在這方面考慮有關的法律原則及個別個案的情況後作出專業判斷。現有安排一直運作良好，破產管理署並未有聽聞私營清盤從業員在履行有關責任時遇到重大困難。

30. 至於現時由破產管理署處理的破產個案，在考慮破產人所須作出的供款時，該署人員會考慮破產人的收入和開支，以及破產人及其家人的“合理家庭需要”。在考慮前者（即破產人收入及支出）時，破產管理署職員可以從破產人所需填寫的表格 1 和表格 2(載於附件 2)或其他途徑中獲得有關的資料。至於後者，該署同時訂有一套內部指引，列明破產人及其家人的“合理家庭需要”的準則，該指引（有關銀碼及敏感指示被刪除）的副本載於附件 3(只有英文版)。破產管理署定期對該套指引作出檢討。。

31. 雖然私營清盤從業員的職責之一，是考慮破產人所須作出的供款(如有的話)，但如果破產人反對，他們並無權命令破產人作出供款。根據《破產條例》第 43E 條，只有法院可以在私營清盤從業員提出請求的情況下，於考慮破產人及其家人的“合理家庭

需要”後，作出收入付款令。除此之外，私營清盤從業員負有受信責任，及根據《破產條例》第 84 條受法院控制。該制度確保破產人及債權人雙方的權益均受到保障。

(ii) 破產管理署日後外判個案的安排

32. 根據有關的外判建議，如上文第 3 段所提及，只有符合預審資格準則的私營清盤從業員，才會獲接納為合格投標者，可以提交標書。破產管理署會向中標者作出介紹，並在委任合約內註明他們的職務和責任。該署計劃向獲委任的私營清盤從業員提供有關的表格和指引，協助後者考慮破產人所須作出的供款。外判安排不會影響破產人的權益，正如上文第 31 段所述，只有法院才可作出收入付款令。再者，在實施外判建議後，破產管理署會處理任何有關的查詢或投訴。

(e) 法院在破產個案中對“合理家庭需要”的詮釋

33. 較近期並有闡釋有關原則的法院案件有兩宗，分別是 Re Rayatt (破產人) [1998] BPIR 495 (見第 500-503 頁) 及 Kilvert and Flackett [1998] BPIR 721 (見第 723-724 頁)。該兩宗案件的判詞副本載於附件 4(只有英文版)。

D. 外判建議對人手的影響

(a) 外判建議對破產管理署人手需求的影響

34. 破產管理署人員已經竭盡全力應付因破產及清盤案件近年飆升而大為增加的工作量。舉例說，法院發出的破產令由一九九九年的 3 071 項，跳升百分之 712 至二零零三年的 24 922 項。

35. 在實施外判建議後，破產管理署人員會繼續處理正在進行中的案件，亦會保留若干案件(包括債權人呈請個案)自行處理。此外，該署會進一步加強其規管角色，包括調查關於不遵守《破產條例》的投訴。

(b) 計劃在實施外判措施後重新調配現時處理簡易程序破產個案的人員

36. 目前，約有 70 個職位是為管理破產案件而設。在實施外判建議後，破產管理署可以重新調配或刪減⁷至多 45 個職位。餘下職位會負責債權人呈請案件及管理新投標制度等工作。

37. 部份重新調配的職位會負責監察處理外判個案的私營清盤從業員，部份的職位會被調往處理其他職務，例如加強破產管理署在清盤制度下的監管角色。因為該署須繼續跟進現時正在進行中的破產個案，直至破產人獲解除破產；預期有關人員初期亦會繼續處理現有個案。為利便推行重新調配計劃，破產管理署會為有關人員提供必要的培訓，例如安排講座。

(c) 就外判建議諮詢員工意見的結果

38. 破產管理署人員已獲告知上述外判建議。破產管理署署長已經與破產管理主任協會(破產管理主任屬於破產管理署的部門職系)的代表會面，向他們介紹破產個案的外判建議。該協會對有關建議表示歡迎。

⁷ 在該 45 個職位中，計劃刪除其中 17 個。

THE GOVERNMENT OF
THE HONG KONG SPECIAL ADMINISTRATIVE REGION
OFFICIAL RECEIVER'S OFFICE
TENDER FOR SERVICES

Tender Ref.: OR/T/2004
File Ref.: ES/7/18/3

TENDER FORM

Contract No. _____

LODGING OF TENDER

To be acceptable as a tender, this form, properly completed in ~~English~~ ^{duplicate} and enclosed in a sealed plain envelope marked Tender for ~~Taking up of appointment as provisional liquidators under s.194(1A) of the Companies Ordinance~~ and addressed to the Chairman, Government Logistics Department Tender Opening Committee, in duplicate must be deposited in the Government Logistics Department Offices, 333 Java Road, North Point, Hong Kong. Tender Box situated at Ground Floor, North Point Government before 12:00 noon (time) on 28 January 2004 (date). Late tenders will not be accepted.

INTERPRETATION

PART 1 — TERMS OF TENDER

PART 2 — GENERAL CONDITIONS OF CONTRACT

Details on Interpretation, Terms of Tender and General Conditions of Contract used for tendering for provision of services to the Government of the Hong Kong Special Administrative Region are contained in the Standard Tender Terms and General Conditions of Contract issued by the tender issuing department and any subsequent addendum issued.

The above documents are deposited with tenderers upon successful registration with the tender issuing departments for receiving tender invitations. Copies can also be obtained from the following:

- (a) ~~The Procurement Division, Government Logistics Department
North Point Government Offices, 9/F
333 Java Road, North Point, Hong Kong
(Internet Homepage-<http://www.gld.gov.hk>)~~
- (b) The tender issuing government departments
(name of department and address as shown in tender documents)
- (c) The Central & Western District Office Public Enquiry Service Centre
Harbour Building, G/F, 38 Pier Road, Central, Hong Kong
- (d) ~~The Yau Tsim Mong District Office Public Enquiry Service Centre
Ming Kok Government Offices, G/F, 28 Leun Wan Street, Kowloon~~

Official Receiver's Office
10th Floor
Queensway Government Offices
66 Queensway
Hong Kong

PART 3 — SPECIAL CONDITIONS OF CONTRACT

Attached to this tender (if any).

Dated this 19th day of December 2003.

*Insert appropriate department.

(Steve TSOI)

Government Representative

PART 4 — OFFER TO BE BOUND

1. Having read the Terms of Tender, the General Conditions of Contract and (if any) the Special Conditions of Contract set out in Parts 1-3 hereof, I/we agree to be bound by the terms and conditions as stipulated therein.
2. I/We do hereby agree to carry out the whole (or any part) of the Services mentioned in the attached Schedule which may, during the Contract period or any extension thereof be required, by or on behalf of the Government Representative to be carried out, at the charges quoted by me/us in the said Schedule free of all other charges, subject to and in accordance with the Terms of Tender, the General Conditions of Contract and (if any) the Special Conditions of Contract.
3. ~~I/We understand and agree that in the event that I/we withdraw or revoke the tender hereby submitted within the period stipulated in clause 2.4 of the Terms of Tender or refuse or fail to carry out all or any of the Services provided for in the Contract upon acceptance of the tender hereby submitted, the sum deposited will be absolutely forfeited to the Government in accordance with the Terms of Tender and the Special Conditions set out in Parts 1 & 2 hereof.~~

4. I/We also certify that the particulars given by me/us below, are correct :

(a) The number of my/our/the Company's Business Registration Certificate is

(b) The date of expiry of my/our/the Company's Business Registration Certificate is

(c) I am/We are/The Company is covered by an Employees' Compensation Insurance Policy, the particulars of which are as follows :-

Policy No.

Name of Insurance Company

Period covered by the Policy is from

to

Brief particulars of the cover provided and any special conditions are as follows :
.....
.....

5. I am/We are duly authorised to bind the said Company hereafter mentioned by my/our signature(s).
..... or

I am a partner/We are partners in the firm hereinafter mentioned and duly authorised to bind the said firm and the partners therein for the time being.

6. The name of the Company/Firm is

7. The registered office of the Company is situated at (English and Chinese address)
.....

..... Hong Kong.

..... or
The names and residential addresses of the partners of the firm are as follows :-

Telephone Number :

Fax Number :

8. Name(s) and address(es) of person(s) signing :
.....
.....

Signature(s) :
.....
.....

Dated this day of 20

Note (i) All the particulars required above must be provided.
(ii) Strike out clearly alternatives which are not applicable.

PART 5 MEMORANDUM OF ACCEPTANCE

On behalf of the Government of the Hong Kong Special Administrative Region,

I
(Name and position of officer)

accept your offer upon the terms of this Contract so far as such offer relates to the following item(s) in the Schedule :
.....
.....

Dated this day of 20

Signed by the said

in the presence of :

Official Receiver's Office
The Government of the Hong Kong Special Administrative Region

**Tender for Taking up of Appointment as Provisional Liquidators under
Section 194(1A) of the Companies Ordinance**

Terms of Tender (supplement)

(1) Tender Documents

These Tender documents identified as ORT/2004 consist of **TWO (2) complete sets of documents**, comprising:

- a. Tender Form (G.F. 231 *with Part 4 completed*)
- b. Interpretation (page 1-3 Annex 1)
- c. Terms of Tender (page 4-6 Annex 1)
- d. Schedule [Part I- Work Specification] (page 7-8 Annex 1)
- e. Schedule [Part II- Qualification Criteria] (page 9 Annex 1)
- f. Schedule [Part III- Special Conditions] (page 10-15 Annex 1)
- g. Schedule [Part IV- General Conditions] (page 16-17 Annex 1)
- h. Quotation Sheet (page 18 Annex 1)
- i. Declaration on Details of the Tenderer (Forms A & B)

- (2) The tender and all accompanying documents** must be submitted in the manner stipulated under 'Lodging of Tender' on the front page of the Tender Form GF.231.

Official Receiver's Office
The Government of the Hong Kong Special Administrative Region

**TENDER FOR TAKING UP OF APPOINTMENT
AS PROVISIONAL LIQUIDATOR UNDER
SECTION 194(1A) OF THE COMPANIES ORDINANCE**

INTERPRETATION

In these Tender documents,

- | | |
|---------------------|--|
| "Allocation Period" | means the period commencing from the date of acceptance of the offer referred to in Clause 5(a) of this Tender and ending on 31 March 2006. |
| "Appointment Taker" | means the person, who may be a partner, director or employee of the Tenderer, who will take up the appointment as joint and several provisional liquidators and/or liquidators in a Qualified Case, in accordance with Part I of the Schedule. |
| "Contract" | means the contract referred to in Clause 5(a) of the Terms of Tender and includes the Terms of Tender, the Schedule, the Quotation Sheet and the Declaration on Details of the Tenderer. |
| "Firm" | means the Tenderer whose Tender is accepted. |
| "Government" | means the Government of the Hong Kong SAR. |
| "Official Receiver" | means the Official Receiver appointed under the Bankruptcy Ordinance (Cap. 6). |

"Panel A Scheme"	means the administrative panel of insolvency practitioners operated by the Official Receiver for the appointment of firms of accountants as liquidators and special managers in compulsory winding-up cases estimated to have assets exceeding \$200,000 in value.
"Professional Person"	means a person who meets the requirements under Clause 1(ii) of Part II of the Schedule.
"Qualified Case"	means the liquidation case of a company compulsorily winding up by the court and where Section 194(1A) of the Companies Ordinance (Cap. 32) applies.
"Recognised Professional"	means a person who is a registered member of one or more of the Recognised Professions.
"Recognised Professions"	mean the accounting profession, the legal profession, the company secretarial profession and any other profession which the Official Receiver may recognise in writing as Recognised Profession for the purpose of this Tender.
"Required Subsidy"	means the amount of Subsidy stated by a Tenderer in its Tender as the maximum amount of Subsidy it will demand from the Government for the performance and discharge of the Services when Appointment Takers of the Tenderer are appointed as joint and several provisional liquidators in a Qualified Case by the Official Receiver, and as liquidators thereafter under Section 227F of the Companies Ordinance.
"Schedule"	means the schedule attached to this Tender and includes the

Quotation Sheet.

- "Services" means the work referred to in Part I of the Schedule.
- "Subsidy" means the subsidy payable by the Government in respect a Qualified Case to meet the Appointment Takers' remuneration and fees for the performance and discharge by them of the Services when the net realised assets of the wound up company is insufficient for that purpose.
- "Tender" means the tender hereunder.
- "Tenderer" means the firm or the company who meets the criteria referred to in Part II of the Schedule, and who submits a tender in accordance with the terms and conditions of this Tender.

If the context permits or requests, the singular number shall include the plural, the masculine and neuter gender shall include the others of them.

TERMS OF TENDER

1. Invitation to tender

Tenders are invited for the taking up of appointments as joint and several provisional liquidators in Qualified Cases in two separate groups, namely, "Group A" and "Group B", subject to and in accordance with the terms and conditions in these Terms of Tender, the Schedule and Quotation Sheet attached to this Tender.

2. Tender

- (a) This Tender relates to the appointment of the Firm's Appointment Takers as the joint and several provisional liquidators in place of the Official Receiver in accordance with Section 194(1A) of the Companies Ordinance in Qualified Cases allocated to the Firm by the Official Receiver during the Allocation Period.
- (b) The maximum number of Qualified Cases allocated to the Firm by the Official Receiver during the Allocation Period under Group A and Group B will be as stated in Special Condition 3 in Part III of the Schedule.
- (c) A Tenderer may only tender for Qualified Cases either under Group A or Group B. A tenderer who is not a registered member of the "Panel A Scheme" or who has not, prior to this Tender, undertaken any insolvency cases contracted out by the Official Receiver's Office under any tender, may only bid under Group B. Each Tenderer must state in the Quotation Sheet under which group his Tender was submitted.
- (d) The Tenders will be considered for acceptance on a group-by-group basis.
- (e) The Schedule issued with the Tender must not be altered by the Tenderer, and the Tenderer must not put in additional terms and conditions of his own or make his tender subject to any term or condition not being a term or condition in these Terms of Tender and the Schedule attached to this Tender. Figures should not be altered or erased; any alternation should be effected by striking through the

incorrect figures and inserting the correct figures in ink above the original figures.

All such amendments should be initialled by the Tenderer in ink.

- (f) Tenders are to be submitted in duplicate and are to be completed in ink or typescript; tenders not so completed may not be considered.
- (g) Every Tenderer must complete and submit with his Tender the Declaration on Details of the Tenderer.
- (h) Tenders may not be considered if complete information is not given with the Tender or if any particulars and data asked for in the Schedule are not furnished in full.
- (i) Each Tenderer shall not submit more than one tender in this Tender.

3. Tenders to Remain Open

- (a) Tenders shall remain open for 60 days after the closing date of the Tender.
- (b) Tender closing time in case of Typhoon/Rainstorm:

In case a rainstorm black warning or typhoon signal No. 8 or above is hoisted between 7:00 a.m. and 9:00 a.m., the tender closing time will be extended to 9:00 a.m. on the next weekday (i.e. except Saturday and Sunday) other than public holiday.

4. Required Subsidy

The Required Subsidy should be shown in Hong Kong Dollars.

Tenderers should make certain that the Required Subsidy is correct and final before submitting their tenders. Under no circumstances will the Government accept any request for subsidy adjustment on grounds that a mistake has been made in assessing the Required Subsidy.

5. Acceptance

- (a) The Tender, if accepted, will be concluded as a contract with the Official Receiver. The Firm will receive a letter from the Official Receiver for acceptance of the offer. Tenderers who do not receive any notification within the validity period of their offer shall assume that their offers have not been accepted.
- (b) The Official Receiver is not bound to accept the lowest or any tender. The Official Receiver expressly reserves the right to accept more than one offer in this Tender.

SCHEDULE

Part I - Work Specifications

1. The Firm's Appointment Takers shall take up the appointment as joint and several provisional liquidators in place of the Official Receiver in Qualified Cases allocated to the Firm by the Official Receiver during the Allocation Period. The Firm shall have no right to reject or to refuse to accept any such allocation. At least one of the Appointment Takers must be a partner or director of the Firm, or a person who is acceptable to the Official Receiver as a partner or director equivalent of the Firm.
2. The Firm shall keep under its direct full time employment sufficient staff resources to ensure that all Qualified Cases allocated to the Firm are handled in a professional and expeditious manner. In this regard, the Firm shall not utilize staff from other firms or companies, or to delegate the performance of any part of the Services to any person not being a person under its employment.
3. The Firm's Appointment Takers shall in respect of a Qualified Case allocated to the Firm by the Official Receiver, perform with professionally acceptable standards, all such tasks and duties as are necessary or may be required of a provisional liquidator under Section 194(1A) of the Companies Ordinance; and all such tasks and duties as are necessary or may be required under the Companies Ordinances of a liquidator appointed under Section 227F thereof (when the Appointment Takers are so appointed) and such other tasks or duties as may be imposed on them by the Official Receiver pursuant to this Contract, including but not limited to the duty to convene the meetings of creditors and contributories under Section 194(1)(b) of the Companies Ordinance if the assets of the company turn out to be more than \$200,000 in value.
4. The Firm's Appointment Takers when appointed as joint and several provisional liquidators in a Qualified Case, shall apply to the court within 3 months of the date of the winding-up order of that company for a summary procedure order pursuant to Section

227F of the Companies Ordinance unless there is evidence that the value of the asset of the company will exceed \$200,000, in which case, they shall forthwith but in any event not later than 8 weeks after the date of the winding-up order notify the Official Receiver of the same, and shall arrange to convene the meetings of creditors and contributories under Section 194(1)(b) of the Companies Ordinance.

5. The Firm's Appointment Takers appointed as joint and several provisional liquidators in a Qualified Case shall (unless the Court orders otherwise) continue to act as the company's liquidators when the summary procedure order is granted by the court under Section 227F of the Companies Ordinance, and shall perform with professionally acceptable standards, all such tasks and duties as are necessary or may be required of a liquidator under and pursuant to the provisions of the Companies Ordinance, until the completion of the case and his obtaining a release order from the court under Section 205 of the Companies Ordinance and an order for the dissolution of the company under Section 227 of the Companies Ordinance. The Firm's Appointment Takers shall still be required to deal with and complete all outstanding matters and issues arising in the Qualified Case for whatever reasons after their obtaining the release order under Section 205 of the Companies Ordinance and the order for the dissolution of the company under Section 227 of the Companies Ordinance.
6. The Recognized Professionals of the Firm shall ensure that the performance of the Firm complies in all respect with the accepted professional standards and ethical guidelines of the relevant Recognized Profession.

Part II - Qualification Criteria

A firm or a company must meet the following criteria in order to qualify as a Tenderer:

1.
 - (i) There must be in the firm or the company at least two persons who are Recognized Professionals.
 - (ii) At least one of the Recognized Professionals must be a Professional Person who must
 - (a) have at least 3 years of post-qualification experience;
 - (b) have a minimum of 300 chargeable hours ("the Qualifying Chargeable Hours") over the last 3 years:
 - i) of which, at least 150 hours must be related to insolvency work (creditors or compulsory liquidations) or receiverships [Note: a pass in the HKSA Diploma in Insolvency Programme is equivalent to 50 hours of insolvency work];
 - ii) the remaining hours may be on solvent liquidations [in which case, the chargeable hours counting towards the Qualifying Chargeable Hours would be reduced by 50%, so that two chargeable hours on solvent liquidation will be counted as one Qualifying Chargeable Hour]; and
 - iii) which must have been performed on a minimum of 4 separate winding-up cases of unconnected companies,
 - (c) be a current member of either one or more of the following professional bodies:
 - i) Hong Kong Society of Accountants,
 - ii) Law Society of Hong Kong,
 - iii) Hong Kong Institute of Company Secretaries.
2. The firm or the company must have a minimum of two Appointment Takers. At least one of the Appointment Takers must be a Professional Person.

Part III - Special Conditions

1. Total Services

The services to be performed by the Firm under this Contract shall be as specified in the Work Specification in Part I of the Schedule and shall be carried out in respect of all Qualified Cases allocated to the Firm during the Allocation Period by the Official Receiver.

2. Assignment

The Firm is strictly prohibited from assigning or otherwise transferring this Contract or any part, share or interest therein and the performance of this Contract by the Firm shall be deemed to be personal to the Firm.

3. Estimate of number of Qualified Cases to be allocated to the Firm

(a) Group A

Up to 300 in number of Qualified Cases (which may be varied by the Official Receiver solely at his discretion up by 30 percent) may be allocated to the Firm during the Allocation Period but the number of Qualified Cases allocated to the Firm per month will not be more than 25.

(b) Group B

Up to 60 in number of Qualified Cases (which may be varied by the Official Receiver solely at his discretion up by 30 percent) may be allocated to the Firm during the Allocation Period but the number of Qualified Cases allocated to the Firm per month will not be more than 4.

(c) The numbers referred to in this Special Condition are just estimates and must be regarded as being given for the Firm's information only and not as figures which the Official Receiver binds himself to adhere.

(d) If the Official Receiver accepts more than one offer in Group A and/or Group B in this Tender, he is not bound to allocate an equal number of Qualified Cases to

each Firm. A larger number of Qualified Cases may be allocated to the Firm who has tendered the lower Required Subsidy per case.

4. Security

- (a) The Firm must be covered by professional indemnity insurance to the satisfaction of the Official Receiver.
- (b) The Firm may, in respect of the Qualified Cases allocated to it, be required to give separate security to the satisfaction of the Official Receiver.

5. Quotation Sheet

Tenderers are required to complete the Quotation Sheet. Failure to do so will render their tenders invalid and disqualified.

6. Fees and Remuneration

- (a) Subject to the Official Receiver's right to scrutinize the bill (and if necessary, taxation by the Court), the Firm's Appointment Takers when acting as joint and several provisional liquidators in a Qualified Case, shall be entitled to charge their fees and remuneration for the work they performed when acting as such provisional liquidators on a time-cost basis. The actual charge out rate per grade of staff shall in no circumstances be in excess of the rates set out by the Firm in the Quotation Sheet.
- (b) The Firm's Appointment Takers when acting as liquidators under Section 227F of the Companies Ordinance following from their appointment as joint and several provisional liquidators in a Qualified Case shall be entitled to charge such fees and remuneration as may be approved by the Court, out of the assets of the winding-up company.
- (c) If the assets of the winding-up company are insufficient to meet the Firm's Appointment Takers' fees and remuneration as provided in Special Condition 6(a) and (b) above, the shortfall will be met from the Subsidy but only to the

extent of the Required Subsidy set out by the Firm in the Quotation Sheet and only at or below the charge out rates set out by the Firm in the Quotation Sheet.

- (d) The Subsidy and the Required Subsidy shall be calculated and payable strictly on a case by case basis. Under no circumstances will such Subsidy or Required Subsidy or any balance thereof be transferred between cases.
- (e) No Subsidy will be payable in respect of any Qualified Case allocated to the Firm unless a summary procedure order under Section 227F of the Companies Ordinance is made in respect of the Qualified Case. The Firm's Appointment Takers' fees and remuneration as joint and several provisional liquidators or liquidators in a case where no summary procedure order is made under Section 227F shall be paid out of the assets of the company in accordance with the provisions of the Companies Ordinance.
- (f) Subsequent rescission of the summary procedure order made under Section 227F of the Companies Ordinance in respect of a Qualified case shall not affect any payment of Subsidy already effected unless the summary procedure order was obtained by material non-disclosure or misrepresentation to the Court.

7. Performance of the Firm

- (a) The performance of the Firm will be closely monitored by the Official Receiver in terms of the time taken to complete the case, the quality of work, and also in accordance with Sections 203 and 204 of the Companies Ordinance and other relevant provisions therein.
- (b) The Firm's Appointment Takers, in respect of a Qualified Case allocated to the Firm by the Official Receiver, are expected to complete the case by obtaining a release order from the Court under Section 205 of the Companies Ordinance in an expeditious and professional manner. If a case cannot be completed within one year of the appointment, a report is required to be submitted by them to the Official Receiver before the expiration of the first year of their appointment giving explanations as to why the case cannot be so completed.

- (c) As joint and several provisional liquidators or as liquidators in a Qualified Case, the Firm's Appointment Takers are required to submit accounts to the Official Receiver pursuant to Section 203 of the Companies Ordinance and to submit together with the first accounts under Section 203, a progress report giving details on what has been done; what needs to be done and also an indication with reasons on whether or not the case can be completed within one year of the appointment.
- (d) If the Firm or its Appointment Takers when acting as joint and several provisional liquidators in a Qualified Case or as liquidators following from its appointment as joint and several provisional liquidators in a Qualified Case:
- (i) shall fail to carry out all or any of the Services; or
 - (ii) if the quality of the service provided in respect of the Services is considered by the Official Receiver as unsatisfactory; or
 - (iii) if there is any breach of any terms or conditions of the Contract by the Firm or its Appointment Takers, (which shall be determined solely by the Official Receiver and whose decision shall be final),

the Official Receiver may:

- (1) terminate the Contract at any time by giving 7 days notice in writing, and if the Official Receiver so terminates the Contract, he may:
 - (i) assign to another firm or firms ("the new firm") the balance of any uncompleted service in respect of any Qualified Cases allocated to the Firm of which the Firm's Appointment Takers were still the joint and several provisional liquidators at the time of the termination of the Contract, (in which case, the outgoing Firm's Appointment Takers shall forthwith at their own costs and expenses put the new firm into possession of all property of those uncompleted Qualified Cases) and/or;
 - (ii) arrange for another firm or firms to take up the appointment as provisional liquidators in Qualified Cases which, if not because of the

termination of the Contract, would be allocated to the Firm during the Allocation Period; and/or

- (2) disallow any payment from the Required Subsidy in respect of any Qualified Cases allocated to the Firm prior to the termination of the Contract.

Any deficiency in fees and remuneration and/or in the Required Subsidy and all costs and expenses arising from the termination of the Contract and/or the assignment of the balance of any uncompleted service in respect of any Qualified Cases to the new firm under this special condition shall be borne by the original Firm and its Appointment Takers and recoverable by the Official Receiver as liquidated damages.

- (e) Without prejudice to the provisions in Special Condition No. 7(d) hereof, the Official Receiver may, in those circumstances mentioned in Special Condition 7(d)(i), (ii) and (iii),
 - (1) suspend the Firm's or its Appointment Takers' right to participate in the Panel A Scheme if the Firm is a registered member of the Panel A Scheme; and/or
 - (2) disqualify the Firm or its Appointment Takers from participating in any future tender exercises called by the Official Receiver's Office for such period of time as may be determined by the Official Receiver.

8. Payment of Services

- (a) Payment of fees and remuneration shall be in accordance with Special Condition 6 and shall be paid out in the first instance from the net realised assets of the wound up company after all priority disbursements and charges have been paid as stipulated in Rule 179 of the Companies (Winding-up) Rules.
- (b) Subject to Special Condition 6, the Appointment Takers of the Firm shall as soon as possible and in any event not later than 12 weeks after their

appointment, advise the Official Receiver whether the net realised assets available are unlikely to be sufficient to fully pay his fees and remuneration. In which case, an interim payment of the Firm's time-cost charges may be paid out of the Required Subsidy to the Appointment Takers of the Firm up to a ceiling of 60 percent thereof. The application for the interim payment out of the Required Subsidy must be supported by a narrative history of the work undertaken so far together with details of the billable hours and the names and grade of staff employed on the liquidation. The balance of the Required Subsidy, if any, will be paid upon the completion of the case and the Appointment Takers obtaining a release order from the court under Section 205 of the Companies Ordinance. All claims for payment under this Special Condition shall be made in such form as the Official Receiver may prescribe. Any overpayment of the Required Subsidy shall be reimbursed to the Official Receiver.

9. Change in Qualification Status

The Firm shall inform the Official Receiver in writing immediately of any change in or any factor which may affect its qualification status. The Official Receiver reserves the right to review the Firm's qualification status in the light of any new information relevant to its qualification.

Part IV - General Conditions

1. Additional Information

- (a) At any time after receiving the tender and before acceptance, the Official Receiver may require the Tenderer to furnish additional information.
- (b) Requirements imposed under (a) above may differ as between different Tenderers.

2. Personal and other Data Provided

- (a) Tenderer's personal data provided in the Tender will be used for tender evaluation and contract award purposes. If insufficient and inaccurate information is provided, the Tender may not be considered.
- (b) Tenderer's personal data provided in the Tender may be disclosed to the parties responsible for tender evaluation in other government departments and non-government organisations.
- (c) Tenderers have the right of access and correction with respect to personal data as provided for in Sections 18 and 22 and Principle 6 of Schedule 1 of the Personal Data (Privacy) Ordinance. The right of access includes the right to obtain a copy of the Tenderer's personal data provided in the Tender.
- (d) Enquiries concerning the personal data collected by means of the Tender, including the making of access and corrections, should be addressed to Personal Data Privacy Officer of the Official Receiver's Office.

3. Consent to Disclosure

The Government shall have the right to disclose whenever it considers appropriate or upon request by any third party (written or otherwise), without any further reference to the Tenderer, the name and address of the Tenderer and the Required Subsidy per case it stated in its Tender.

4. Completion of Tender

All Tender documents must be completed in English, signed and lodged to the Government Logistics Department Tender Box situated at G/F, North Point Government Offices, 333 Java Road, North Point, Hong Kong, no later than the closing date of the Tender. Every Tender is a formal offer by the Tenderer for the appointment of the Tenderer's Appointment Taker as provisional liquidator by the Official Receiver in Qualified cases on the terms and conditions set out in the Terms of Tender and the Schedule.

5. Notices

Any notice given under the Contract shall be in written English and deemed to be received as follows:-

- (i) Fax, on the date when sent.
- (ii) Letter, 7 days after being sent in the post postage prepaid.

6. Law and Jurisdiction

The Tender and the Contract shall be governed by and construed in accordance with the Laws of the Hong Kong SAR and the parties thereto shall submit to the jurisdiction of the courts of the Hong Kong SAR.

QUOTATION SHEET

Name of firm/company

*Tender under Group A or
Group B*

Required Subsidy per case **HKD**

*Hourly Charge out rate
per grade of staff*

*Number and grade of staff
available to perform
insolvency work*

*Signature of partner/director
authorised to sign the offer*

Date

Declaration on Details of the Tenderer

Form A

To: Official Receiver

Part 1

I. Full Name of Tenderer firm/company _____

II. Address _____

III. Shareholding details in the case of a limited company:

Number of issued shares: _____

Shareholders' information:

	<u>Name</u>	<u>Position in the Company</u>	<u>Number of shares held</u>
1.	_____	_____	_____
2.	_____	_____	_____
3.	_____	_____	_____

IV. Details of Partners/Directors in the case of a partnership/sole proprietor

	<u>Name</u>	<u>Position in the Company</u>
1.	_____	_____
2.	_____	_____
3.	_____	_____

V. Number of Recognised Professional _____

VI. Number of support staff _____

VII. Details of Appointment Takers ("AT") and Recognised Professional ("RP") [*at least two*] of the firm/company who perform insolvency work.

	<u>Name</u>	<u>Recognised professional bodies & membership No.</u>	<u>Position in firm/ company</u>	<u>Length of service with the firm/ company</u>	<u>Year of post- qualification experience</u>	<u>As AT and/or RP</u>
1.	_____	_____	_____	_____	_____	_____
2.	_____	_____	_____	_____	_____	_____
3.	_____	_____	_____	_____	_____	_____
4.	_____	_____	_____	_____	_____	_____
5.	_____	_____	_____	_____	_____	_____
6.	_____	_____	_____	_____	_____	_____
7.	_____	_____	_____	_____	_____	_____
8.	_____	_____	_____	_____	_____	_____

VIII. Each of the persons named under VII above has also completed an "Individual Experience Return" (i.e. Form B). These returns are returned together with this Form.

I declare and confirm that the information provided above is true and correct.

Signed By: _____

Partners/Director authorized to sign
on behalf of the Tenderer firm/company

Full Name of Tenderer firm/company in
Block Letters

Date: _____

Declaration on Details of the Tenderer

Form B

Individual Experience Return
for Appointment Takers (AT) and Recognized Professionals (RP)

Name of AT/RP: _____

Recognised Professional Bodies: _____

Membership Number: _____

Position in the Firm: _____

I. Details of work and hours involved

	Hours involved		
(Period to 31 December)	<u>2001</u>	<u>2002</u>	<u>2003</u>
Members' Voluntary Liquidations	_____	_____	_____
Creditors Voluntary Liquidations	_____	_____	_____
Compulsory Liquidations	_____	_____	_____
Appointment of Special Managers	_____	_____	_____
Court Appointed Receivers	_____	_____	_____
Section 228(A) Provisional Liquidators	_____	_____	_____
Receivers and Managers under Debentures	_____	_____	_____
Trustees in Bankruptcy	_____	_____	_____
Voluntary Arrangements under the Supervision of the Court	_____	_____	_____
Others (please specify)	_____	_____	_____

II. (a) Number and names of winding up
cases of unconnected Companies
conducted over the last 3 years

(b) Details of the nature of the work
performed on the above cases

I declare and confirm that the above information provided is true and correct.

Signed By: _____

Name of AT/RP

Name in Block Letters

Date: _____

無論是否在職，均須填寫下列表格一及表格二，並於會晤當日帶同已填妥的表格及證明文件到破產管理署或本署委任的行號辦事處。

致：破產管理署署長

破產人的破產案檔號： B10/ /

如果配偶已破產，請填報破產案檔號： B10/ /

表格一 本人及家庭每月之收入與支出如下：

每月收入(元)		每月支出(元)	
收入項目	破產人收入	支出項目	破產人支出
基本薪金及工資		租金	
		差餉	
佣金		管理費	
		水費	
津貼		電費	
		煤氣費/石油氣費	
自僱收入		住宅電話費	
		流動電話費	
退休金/退休計劃支款		家庭膳食	
		交通費	
政府綜援金		家庭雜項開支	
		學費	
分居/離婚贍養費		學校雜費(書簿費、校服等)	
		強積金/公積金	
配偶分擔開支的款項[配偶收入 (每月 元)]		預留稅款	
		其他支出，請註明：	
其他收入/其他人士代支款項， 請註明：			
總數		總數	

由(日期) 開始，本人願意每月還款 元。

破產人簽署： _____

姓名： _____

日期： _____

注意

- 破產人應申報實際數額，化作每月平均數填報。
- 支出只限於破產人及其家庭的合理需要。如果破產人的配偶有收入，亦需分擔家庭開支。
- 如果破產人不提交以上資料，或故意隱瞞或提交虛假資料，或欺詐地移走他的財產，將影響將來破產令的解除，亦可能受到刑事檢控。

表格二 收入與支出證明

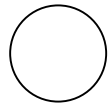
現附上有關本人及家庭每月收入與支出之證明文件副本：

- ☐ 工作入息證明 (職位： _____)
- ☐ 其他收入證明
- ☐ 租單
- ☐ 差餉單
- ☐ 管理費單
- ☐ 水費單
- ☐ 電費單
- ☐ 煤氣費單/石油氣費單
- ☐ 住宅電話費單
- ☐ 流動電話費單
- ☐ 學費單
- ☐ 學校雜費單
- ☐ 強積金證明書/公積金證明書
- ☐ 稅單
- ☐ 醫療費用單/醫生證明書
- ☐ 分居/離婚協議書/法庭命令
- ☐ 其他費用單據，請註明： _____

☐ 受供養人士：

姓名	關係	年齡	現況
			☐ 在職 ☐ 無業 ☐ 學生
			☐ 在職 ☐ 無業 ☐ 學生
			☐ 在職 ☐ 無業 ☐ 學生
			☐ 在職 ☐ 無業 ☐ 學生
			☐ 在職 ☐ 無業 ☐ 學生
			☐ 在職 ☐ 無業 ☐ 學生

B. Set of Criteria for “Reasonable Monthly Expenses”



	Items	Range of Expenses (HK\$)	Factors for Consideration
1.	Meal allowance for the Bankrupt:		• job related requirement e.g. • meal allowance for other family members should be covered by family expenses (item 4 below)
2.	Rent : - public housing - private accommodation		• family size • terms of existing tenancy i.e. is the bankrupt bound to complete the existing term of tenancy • removal cost & agency fees • distance to office, social and other needs of the family • family composition
3.	Transportation fees for bankrupt :		• distance to workplace
4.	Dependent/Family Expenses : - Spouse/Children		• Generally no claim for working spouse
5.	Savings for Tax Payment		• year-end double pay, bonus • Monthly provision -pl. refer to IRD Form I.R.1238 (6/1999)
6.	Utilities :		• depends on past consumption (low or high side)
7.	Miscellaneous : (including)		• necessity

8.	Special Items : e.g.		• special needs • the interest of third party
9.	Others , if any:		• Special needs

Notes

1. It should be emphasized again that this Set of Criteria serves as a REFERENCE only. It is recognized that facts or circumstances do vary from case to case and, hence, if a bankrupt's expenses are above the suggested range, it is his/her duty to provide justification for OR's consideration.

2. Bankrupts should be asked to draw up their own Items of Expenses in the List G (attached) and the amount they want to claim.

A

RE RAYATT (A BANKRUPT)

Chancery Division

Michael Hart QC (sitting as a deputy judge of the High Court)

8 April 1998

B

Bankruptcy – Income payments order – Private education – Purchase of replacement car

C

Mr Rayatt was a civil engineer employed by the London Borough of Lambeth and on 24 April 1997 he was adjudged bankrupt on his own petition with liabilities of £168,000 owed to various financial institutions. The cause of his bankruptcy was unsuccessful property investment. At a meeting with the official receiver Mr Rayatt agreed to an income payments order being made in the sum of £450 per month on the basis that Mr Rayatt would take his three children out of fee-paying schools. When Mr Rayatt broke the news to his eldest daughter her reaction was such that he wrote immediately to the official receiver explaining that he could not maintain his offer. Notwithstanding this the official receiver applied for an income payments order resulting in an order dated 6 June 1997. Mr Rayatt applied to discharge it which application was dismissed on 25 September 1997 and Mr Rayatt appealed.

D

In the meantime the official receiver had sought possession of Mr Rayatt's car which Mr Rayatt needed for his employment. This issue remained unresolved when Mr Rayatt's trustee in bankruptcy was appointed on 3 July 1997. The trustee in bankruptcy proposed to permit £1000 from the proceeds of sale of the car to be used for purchasing a replacement, which proposal was not acceptable to Mr Rayatt who applied for injunctive relief. This resulted in a compromise with the trustee in bankruptcy on 3 October 1997 under which the trustee in bankruptcy agreed that £2000 from the proceeds of sale of the motor vehicle could be used for the purchase of a replacement car. The car was then sold and the net proceeds of sale amounted to £4000. The trustee in bankruptcy refused to permit the sum of £2000 to be used for the purchase of a replacement car until Mr Rayatt complied with the terms of the income payments order. Mr Rayatt applied for a declaration that the trustee in bankruptcy was in breach of his duty in not permitting the sum of £2000 to be used for the purchase of a replacement vehicle, which application was dismissed on 30 December 1997. Mr Rayatt appealed.

E

F

Held – allowing the appeals –

(1) It was incorrect that private education could never fall within the compass of the words 'reasonable domestic needs of the bankrupt and his family'; all the circumstances of each case needed to be considered and, in the instant case, it was inappropriate, at least for the present, for the income payments order to remain in force.

G

(2) Even if the income payments order had remained in force the trustee in bankruptcy had a statutory duty to apply funds in the purchase of a replacement car which duty could not be the subject of the claimed 'set-off'; in any event the terms of the agreement of 3 October 1997 excluded any right to qualify the obligation to apply the sum of £2000 by reference to arrears under the income payments order which had arisen or might arise in the future.

H

(3) The trustee in bankruptcy was obliged as a matter of contract to apply the sum of £2000 within a reasonable time.

(4) The duty to apply the sum of £2000 in the purchase of a replacement car took priority over the bankruptcy expenses.

Statutory provisions considered

Insolvency Act 1986, ss 283, 308, 309, 310

Insolvency Rules (SI 1986/1925), rr 6.187, 6.193, 6.224

Cases referred to in judgment

Gilmartin (A Bankrupt), Re [1989] 1 WLR 513, [1989] 2 All ER 835, ChD

Roberts, Re [1900] 1 QB 122

Walter, Re, Slocock v Official Receiver [1929] 1 Ch 647, [1928] All ER Rep 640

The bankrupt appeared in person, assisted by his *Mackenzie* friend.
Edmund Walters for the trustee in bankruptcy

MICHAEL HART QC: These are appeals against orders made in the bankruptcy of Devinder Singh Rayatt ('the bankrupt'). The first appeal is against an order of Mr Deputy Registrar James dated 25 September 1997 dismissing the bankrupt's application for the discharge of an income payments order under s 310 of the Insolvency Act 1986 which had been made on 6 June 1997 by Mr Registrar Scott. The second is an appeal against an order of Mr Registrar Simmonds dated 30 December 1997 dismissing the bankrupt's application for a declaration that the trustee in bankruptcy was in breach of duty in not permitting a sum of £2000 to be applied in the purchase of a car for the bankrupt and certain ancillary relief. I allowed the appellant to be assisted in representing himself before me (as he had been below) by his *Mackenzie* friend Mr Amyaha, a non-practising barrister.

The background to the bankrupt's applications is as follows. He has for many years been, and still is, employed as a senior civil engineer by the London Borough of Lambeth. On 24 April 1997 he was made bankrupt on his own petition. His statement of affairs showed nil assets and liabilities of some £168,000. It appears that the liabilities are all to lending institutions, and that the cause of the bankrupt's financial misfortune is unsuccessful property investment. On 8 May 1997 he discussed with a representative of the official receiver what sum he could afford to pay under an income payments order. He was persuaded to sign a form of consent to the making of an income payments order in the monthly sum of £450. It was agreed at the meeting that he would be able to afford that sum if he were forthwith to take all three of his children out of their current fee-paying schools and to educate them through the state system. However, when he broke the news that evening to his eldest daughter her reaction was such that he wrote immediately, by letter dated 8 May 1997, to the official receiver explaining that he did not feel able as a father to maintain an offer which would harm a child's educational welfare and speaking of his fears for the psychological health of all his children if he were to remove them from their private schools. He therefore asked the official receiver to reconsider the position and to assist him if necessary in arguing his case in court. The bankrupt wrote to him again on 22 May 1997 enclosing a copy of the earlier letter. These pleas were, however, wholly rejected by the official receiver who advised him by letter dated 27 May 1997 (replying to the letter of 8 May 1997) that '[u]nfortunately, fees for children in a private education do not form part of the allowable expenses' and suggesting that the bankrupt seek legal advice about making an application to court to plead his case. The official receiver then proceeded without more ado to apply to the court for an income payments order in the sum originally agreed by the bankrupt on the basis that he was consenting thereto, resulting in the order of Mr Deputy Registrar Scott dated 6 June 1997 to which I have referred. That order required the first payment to be made on 1 July 1997. The bankrupt

A thereafter protested the making of the order and, without having made any payments pursuant thereto, applied on 28 August 1997 for an order discharging it. That application was heard and determined by Mr Registrar James on 25 September 1997, and it is his decision on that date which is the subject of the first of the appeals before me.

B I should add that it appears that the bankrupt's letter of 8 May 1997 was not before the court on 6 June 1997. Indeed it appears not to have found its way on to the official receiver's file which was later passed to the trustee.

C In the meantime the official receiver had taken steps with a view to obtaining possession of the bankrupt's car. The bankrupt was required by his employer to have a car for the purposes of his employment, and for that purpose had in 1995 been lent £8200 at 5.5% interest pa repayable over 5 years for the purposes of buying a Peugeot 405 car. Repayments of the loan were made by deductions of £174.24 per month out of his salary. By the date of the bankruptcy some £4500 was still owing. The bankrupt appears to have been under the impression that the car remained his employer's property until the whole of the loan had been repaid, and on that ground, and on the ground that it was necessary for his employment, disputed the official receiver's proposal that it be sold. By 17 June 1997 it had become clear that the bankrupt's impression as to ownership was wrong, and the official receiver wrote (to Mr Amyaha) formally claiming the car as an asset of the estate, notifying the bankrupt that agents had been instructed to collect and sell it, and inviting the bankrupt 'to discuss whether the official receiver will make an allowance from the sale proceeds for a vehicle of a lesser value if he can show that the use of a vehicle is essential for his employment'.

E This seems to me an odd letter to have written in two respects. First, the official receiver had already been informed by the employer in a letter dated 9 June 1997 that:

F '... the use of a car is a job requirement and consequently, an essential car allowance is attached to the post the bankrupt currently occupies. The repossession of this vehicle therefore, may result in the council taking further appropriate action, which could result in the termination of his particular employment and subsequent loss of earnings.'

G Secondly, for reasons which I mention below, if the car was indeed necessary for the bankrupt's employment, the ascertainment of the cost of a reasonable replacement should have preceded the official receiver's claim to treat the car as part of the estate. This clearly was not done. The trustee in bankruptcy was appointed on 3 July 1997. At some point, it is not clear when, the trustee offered to make £1000 available from the sale proceeds to purchase a replacement vehicle. That was not acceptable to the bankrupt who took the view that a car purchased for £1000 would not suffice to transport him safely and reliably to and from all job sites. He also continued to maintain a case that the council had an interest in the car. The dispute being unresolved, the bankrupt applied by motion for injunctive relief in early September 1997. In the affidavit in answer the trustee's solicitor did not in terms dispute the reasons given by the bankrupt why £1000 was insufficient for a replacement vehicle but simply asserted that the trustee's offer was a reasonable one and asked for the motion to be dismissed with

indemnity costs. On 3 October 1997 the parties reached agreement on the terms for the disposal of the motion, contained in a fax dated 3 October 1997 from the trustee's solicitors which read:

'We refer to our without prejudice fax of this morning and your subsequent telephone acceptance thereof, and therefore confirm on an open basis that the sum of £2000 will be allowed to your client for a replacement car on the sale of the Peugeot, and accordingly we would ask you to sign the attached form of consent order and return the same to us for filing with the court to avoid attendance on Monday.'

The consent order referred to asked for the motion to be dismissed with the trustee's costs being treated as an expense of administration and an order was duly made in that form by Ferris J on 6 October 1997. On the following day the car was sold at auction for some £5000, and I was told that after auctioneers' commission and storage expenses some £4000 was actually received by the trustee. The trustee then decided not to make any sum available for the purchase of a replacement car, his argument being that he was entitled to retain the £2000 unless and until the bankrupt complied with the terms of the income payments order (which by that stage had been confirmed by Mr Registrar James and which had not been stayed pending the hearing of the appeal against it). The trustee has subsequently developed further arguments for retaining the £2000. In the meantime, the bankrupt has been obliged to hire a car at a cost of £15 per day to enable him to carry on in his job.

The two appeals are thus interrelated to the extent that if the income payments order ought to be discharged ab initio part at least of the trustee's alleged justification for not applying the £2000 as promised in the purchase of a replacement vehicle disappears. At the same time the trustee's realisation of the bankrupt's car without any replacement being purchased has affected the bankrupt's available income (by relieving him of the costs of maintaining the Peugeot but imposing on him the cost of hiring an alternative). Both appeals are true appeals in the sense that I cannot interfere unless satisfied that the registrar's decision was wrong in principle or that he erred in law in the way in which he exercised his discretion: see *Re Gilmartin (A Bankrupt)* [1989] 1 WLR 513.

I will deal first with the appeal against the order of Mr Registrar James. The application before him was made under r 6.193 of the Insolvency Rules. The order which he was being invited to discharge was made under s 310(1) of the Insolvency Act 1986. Section 310(2) of the Act provides as follows:

'The court shall not make an income payments order the effect of which would be to reduce the income of the bankrupt below what appears to the court to be necessary for meeting the reasonable domestic needs of the bankrupt and his family.'

In his written judgment Mr Registrar James summarised the evidence of income and expenditure which had been available when the original order was made. It indicated a total monthly income to the bankrupt's household of some £2003 (after including his wife's income – she also is a bankrupt but has a small pension) and total expenditure of £2165.06 per month. Of

A the latter figure £844 represented school fees payable in respect of the three children, £444 of which were the fees of the eldest daughter and the remainder the contribution of the bankrupt and his wife to the fees of the other two children which are partly paid for by grandparents. He recorded that there had been no change in that information since the date of the original order. In relation to the school fees he said this:

B 'Now that is really where the crux of this matter lies: on the question whether or not expenditure on private education is a proper expenditure that should be taken into account when assessing a bankrupt's liability to pay contributions from his income ...'

And later:

C '... the position remains that a very substantial sum of money, £844 per month, is being expended by the bankrupt on private education. The matter therefore really rests upon whether or not that is a proper expenditure to be taken into account.'

D After referring to a passage in the judgment of Tomlin J in *Re Walter, Slocock v Official Receiver* [1929] 1 Ch 647 and noting a suggestion that the bankrupt's position in the community entitled him to be able to expect to educate his children privately, he continued:

E 'I was also asked to take into account the report of the headmistress as to the likely effect on the eldest child of her being withdrawn from private education. I have read the letter of Miss Ellis the headmistress who says that, in her view, the child would be seriously disadvantaged by moving schools at this stage. That does not seem to be either surprising or exceptional. She goes on to say elsewhere that it would not be impossible that the child might become disillusioned and demotivated to such a degree that she might develop mental problems, eating disorders etc. That does seem to me to be a little speculative on her part.'

F The real point is whether or not private education is a necessity which the bankrupt can expect to be able to enjoy and the short answer to that is that it is not. Indeed I know of no case where it has ever been considered to be so.'

G He then, after setting out the terms of s 310(2), referred to a passage in the judgment of Tomlin J in *Re Walter* in which he had approved Lindley MR's dictum in *Re Roberts* [1900] 1 QB 122 at p 128 that 'necessity is the limit of the exception', and had then gone on to speak of the bankrupt only being entitled to retain 'those fruits of his personal exertions which are necessary to enable him to live'. He concluded:

H 'In my judgment the expense of private education is not a necessity for that purpose. It is unfortunate that the consequence of bankruptcy may be that a bankrupt and his wife will be deprived of the ability to have their children educated privately but it is a necessary consequence of bankruptcy and an inevitable one.'

In my judgment this was not a correct approach to the construction of s 310(2). What the court must consider under that subsection is not that which 'is necessary to enable the bankrupt to live' but that which is necessary 'for meeting the reasonable domestic needs of the bankrupt and his family'. Although the registrar set out the statutory formula in his judgment, he seems to me to have attached a greater importance to the quoted expressions of judicial opinion in decisions based on the Bankruptcy Act 1914 and its predecessors. That legislation provided, unlike the present, for all post-bankruptcy earnings to form part of the bankrupt's estate. The exception of what was 'necessary to enable the bankrupt to live' was judge-made and obviously required in a system which did not pretend to provide, from state resources, social security in the modern sense of the term. By contrast, the regime of the 1986 Act is to except post-bankruptcy earnings from the available estate except to the extent to which the court, in its discretion, makes an income payments order – which it can only do within the limits prescribed by s 310(2). The registrar was also, in my judgment, in error in asking himself the general question which he posed at the outset namely 'whether or not expenditure on *private education* is a proper expenditure that should be taken into account when assessing a bankrupt's liability to pay contributions from his income' (*italics added*). The question to be asked was whether the particular expenditure by this bankrupt and his wife fell within the compass of the words 'reasonable domestic needs of the bankrupt and his family'. As I read his judgment the registrar was deciding that it could not because 'private education' could never, as a matter of general principle, fall within those words. I do not consider that any such general proposition can be spelled out of the test laid down by statute. The question whether particular expenditure by the bankrupt on the education of a child can be described as necessary to meet the reasonable domestic needs of the bankrupt or his family must depend on an examination of all the circumstances of the individual case.

The existence of parallel systems of 'state' and 'private' schools has for so long been such a matter of political controversy in this country that there is a danger that in a case of this kind the real issue can be obscured. Thus, in his submissions to me, counsel for the trustee asked rhetorically: why should the bankrupt's creditors subsidise the private education of his children, when the majority of the people in this country cannot afford to do so and the State provides education for free? There is more than an echo of that sentiment in the final passage quoted from the registrar's decision. It is the wrong question to ask. The correct questions to ask are the following.

First, can expenditure in relation to the education of a child in any circumstances constitute the meeting of a *domestic need* of the bankrupt and his family? The answer is obviously yes. If one has children, some expenditure on their education is both necessary and may properly be described as domestic. Even in the state system parents (at least those not wholly dependent on state benefits for all their needs) may be expected to defray some such expenses, for example the costs of travel to school, uniforms (where worn), dinner money, school trips, etc.

Secondly, how much expenditure of this kind can be described as meeting a *reasonable* domestic need? This is, as Parliament no doubt intended, a much more subjective matter for the tribunal having to apply it. It is a jury-type question. It raises a spectrum of possible answers, each highly

- A dependent on the particular facts which have given rise to it. Take the case of the woman who has chosen to educate her children in the state system, but who has within the freedom allowed to her by that system, and making the best judgment she can of what is in the best interests of her children, elected for a school which necessitates an expensive journey each day across the capital rather than letting them walk each day to the 'sink' school round the corner from her home. If she is made bankrupt while her daughter is half-way through her GCSE course work in a range of subjects not offered by the 'sink' school, should her creditors be heard to say that the daughter's prospects must be subordinated to their desire to be paid a monthly sum equivalent to the daughter's rail ticket and that the mother's assertion that that expenditure is a domestic necessity is an unreasonable one? One can ask the same question in the case of the state school parent who has elected to pay for private coaching for her child in some particular subject which the child finds difficult. Take the case of the Old Etonian, who has 'done something in the City' and has a son on the point of leaving preparatory school to go to his father's old school at the moment at which whatever it is that the father has done in the City has led to the father's bankruptcy. Is the father to be heard to say that the commissions he continues to receive from what remains of his business should be applied to enable him to clone his son in his own educationally privileged image rather than be paid as a dividend in his bankruptcy to the widows and orphans who have been ruined as the result of the insolvent trust over which he presided? Take a fourth case. It may not be far from the present. A Sikh family, expelled from its homeland in Africa, settles in this country. The son of the family, overcoming the disadvantages of that dislocation, applies himself and acquires professional qualifications which lead in due course to a responsible job in public service. He marries and has children. He retains his Sikh culture and at the same time acquires the classical aspirations of the professional classes of the host community. Both these factors motivate him to choose a private education for his children, and the former motivates him to seek a single-sex education for his daughters. He gets his daughters admitted to a local fee-paying school and there they thrive. Hoping to improve his family's security, he invites banks to lend him money on a property speculation. Notwithstanding the modesty of his income the banks accept his invitation. The venture is a disaster, and he is left with nothing except his job and massive debts. Are the banks entitled to require him to make the children change schools so that part of his post-bankruptcy earnings may be devoted to recouping their losses even though the evidence is that this will have a seriously damaging effect on one at least of the children?

I do not suggest that the answers to any of these cases are obvious without further inquiry into all the relevant circumstances of each case. But the examples suffice to indicate some of the reasons why, in my judgment, it cannot be correct to say that avoidable expenditure on the education of children can never, as a matter of principle, be seen as reasonably necessary. Each case must be examined by reference to its individual circumstances.

For the reasons indicated I consider that the registrar erred in principle in the way at which he arrived at his decision, and I am free to approach the matter afresh. Before turning to examine the facts of the case before me in more detail, I remind myself of the following matters.

First, the 1986 Act, unlike its predecessors, does not automatically treat the post-bankruptcy earnings of the bankrupt as part of the estate. Before any part of those earnings can be so treated the court must exercise its discretion under s 310(1). Section 310(2) then operates by circumscribing that discretion, and itself introduces a further discretionary element ('... what appears to the court to be necessary [etc] ...'). The two discretionary elements are no doubt usually telescoped into one, but it is important not to allow a focus on the second element to obscure the existence of the initial discretion. A B

Secondly, it can be inferred that the purpose of the legislation was to place emphasis on the court being able to consider at an early stage of the bankruptcy the extent to which the bankrupt can realistically pay off, or contribute to paying off, the debts out of his earnings. This exercise will involve, amongst other things, a consideration of the size of those debts. In the *Report of the Review Committee on Insolvency Law and Practice* (1982) (Cmnd 8558), I find this inference confirmed in the following paragraph: C

'591. It has been almost the rule in the past to think in terms of "selling up" the debtor and dividing the proceeds amongst the creditors as the main, if not the only, means of debt recovery. We believe that, in principle, far more emphasis should in future be placed on the prospect of the debtor's ability to pay his debts out of surplus future income. This is not to say that the existing assets are to be ignored or that a debtor's earning capacity is to be made available for payment until the debts are paid in full however long that may take; the debtor must in no circumstances become the slave of his creditors. This shift in emphasis should, none the less, enable a more realistic and a more humane attitude to be taken than previously regarding the position of the debtor and his family.' D E

Thirdly, it is not the object of the legislation that, to use the Review Committee's language, the debtor should become the slave of his creditors. Implicit in this restriction is the notion that, within reasonable limits, the debtor should retain some freedom of choice as to the life-style he adopts for himself and his family on the basis of the earnings which he is able to achieve by the deployment of his professional or other skills. He is not under any legal obligation to work at all. Even under the old law consideration to what was reasonably necessary was tempered by regard being had to the 'occupation and station' of the particular bankrupt: see per Tomlin J in *Re Walters* (above) at p 653. F G

Fourthly, the choice which a parent makes as to the education of his children is one of the most important decisions he or she will make on their behalf. Where it has been made, it deserves to be accorded a degree of respect (cf Art 8 of the European Convention on Human Rights). In this connection it is noteworthy that in s 310(2) Parliament has used the concept of 'reasonable domestic needs' rather than the more limited concept, to be found in s 283(2)(b), of 'basic domestic needs' (*italics added*). H

Fifthly, to the extent that the making of an income payments order will impose real hardship on a debtor or his family, there must, I think, be some reasonable proportionality between the hardship imposed and the benefit which will thereby be reaped by the creditors. This consideration seems to

A me relevant to the exercise of the initial discretion under s 310(1). In this case the effect of the income payments order would be to reimburse the creditors after the best part of 30 years, even if nothing is deducted for the trustee's remuneration on the way.

B In this case there was evidence before Mr Registrar James that if the eldest daughter were to be moved from her current school at the present juncture she would be 'very seriously disadvantaged'. That quotation is from the letter from her very experienced headmistress, who prefaced it with the statement that it expressed her professional opinion. The headmistress pointed out that the child had been a pupil at the school since the age of 5, that she was due to take GCSEs in 10 subjects in the summer of 1998 with a variety of examining boards, that GCSEs involve a substantial amount of coursework spread over the 2-year period of study, and the improbability of finding a school which would be able to offer her the necessary degree of continuity. She continued:

D '[She] is a gentle quiet studious girl. She is always polite and courteous, and anxious to please both her teachers and her family. It would be a serious disadvantage to her to have to leave her existing teachers and friends and it would cause her considerable distress, leading in turn to a reversal of her consistent and steady increase in attainment over the years.

E I would go further and say that it is not impossible that she would become so disillusioned and demotivated that she might develop mental problems, eating disorders etc. As a society we have a duty to provide stability for our young people and, in [her] case, she needs the security of this learning environment along with the support of her teachers and friends.

The family give the highest importance to the education of their children and the emotional upheaval that this would cause to the whole family is not justifiable.'

F Mr Registrar James' approach to this evidence appears from the passage in his decision which I have quoted. He accepted the evidence of serious disadvantage but treated it as immaterial given the existence of the general rule against payment for private education which he invoked. As indicated, I do not think that any such general rule exists. Apart from any such general rule, I for my part think that the letter established beyond doubt that the continuation of the child's education at that school at least until the completion of her GCSE course was a 'reasonable domestic need'. Even without the evidence of the headmistress I think that the nature and content of the modern GCSE course is well enough known for it to be obvious that a change of school in the middle of the course is a grave step for any concerned parent to contemplate. I would have come to that conclusion even had the headmistress not added what she did about her fears for the pupil's mental health, but I would not myself have regarded these fears, expressed from a responsible and experienced source, as being easy to discount as purely speculative. In fact, by the time the matter came before me, there was evidence, in the form of a report by a clinical psychologist, that the child was showing symptoms of depressive illness as a result of the prospective change in her schooling. Mr Walters, for the trustee in bankruptcy invited me to discount this report on the ground that a clinical psychologist does not

have the expertise of a psychiatrist, and that in any case to say that the child was showing symptoms of depression did not amount to saying that she was actually suffering from depression. These distinctions were too fine for me. The report reinforced my conclusion that the views of the headmistress had been both responsible and perceptive.

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Counsel for the trustee submitted that, even if I took the view that the bankrupt should continue to be at liberty to pay for the eldest daughter's education, the order should remain in force because the bankrupt could, by taking his other two children out of private school, afford to keep her at her present school and make the payments under the income payments order. However, I do not think that the arithmetic underlying the original order justifies that conclusion, even supposing there were no objection in the case of those children. The original order was made on the basis that if one subtracted some £840 from the bankrupt's monthly expenditure, it was reasonable to ask him to pay £450 per month by way of income payments. The prima facie inference is that, of the £840 'saved', it was reasonable that the bankrupt should have £390 for other expenditure on himself and his family and that £450 should go to the trustee. On that basis if only £400 is 'saved', there is room only for £10 for the trustee. I do not think that it is right that I should make an order in that sum. Although I had no evidence about the effect a change to the state system would have on these children (a daughter aged 12 at the same school as the eldest child and a son aged 8), it scarcely seems possible that the paltry sum which this approach yields for the trustee could justify the disruption to their lives which it would inevitably cause and the interference with the parental choice of education which it would involve.

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In an endeavour to justify by other arguments the continuation of the income payments order, reference was made to the fact that the bankrupt's net income had increased since the date of the original order. On examination, however, this turned out simply to be the result of the normal disapplication of the PAYE rules during the year of bankruptcy rather than any change in circumstances since the date of the original order. Next, counsel for the trustee robustly challenged certain items of expenditure by the bankrupt, even though these had, presumably, been accepted as reasonably necessary by Mr Deputy Registrar Scott. Amongst these were the expenditure, at the rate of £30 per month, on 'Birthdays/Weddings/Christmas'. I was asked to rule that this was ex facie extravagant. I cannot accept this. It seems to me reasonable that the household budget should allow for each member of the family to give a present on the birthday of a member of the family. Birthdays alone account for 20 presents. If each member of the family gives a present to every other member at Christmas, expenditure on another 20 presents is necessary. That allows for presents each worth less than £10. If the budget has to allow for giving to grandparents, to schoolfellows or work colleagues at their birthday celebrations, and for the occasional wedding or such like, the mean value of each present given or exchanged is a mean value indeed. Mr Walters also criticised the amount spent on hairdressing (£40 per month). If each member of the family has their hair professionally cut every 6 weeks, I calculate the average cost of a cut per head to be about £12. There is, perhaps, room for some further economy but the evidence for it is by no means overwhelming. Again Mr Walters criticised the expenditure of any money at all on private

A orthodontic treatment for the female children. He asserted that orthodontic treatment was available on the National Health. But I think I may take judicial notice of the fact such services are not necessarily available on the National Health either at the time or in the manner in which they are needed in the individual case. On the whole I considered that the criticisms which were made served only to highlight the relative modesty of the claims which the bankrupt had made.

B For the reasons I have indicated I do not consider that the income payments order which was made was justified on the evidence which was before me. Because it was made on the false basis that the bankrupt was consenting to it, no proper opportunity was given to him at the outset to present his case that all his children should continue to be privately educated. Nor has any proper opportunity been given to him to challenge by evidence the assertions now made on behalf of the trustee that his claimed expenditure on the other matters mentioned was excessive, or to consider putting in evidence that expenditure on matters not so far mentioned (eg family holidays, visits to museums or other cultural activities) might be both incurred and reasonable. I have considered whether I should simply suspend the existing order pending the completion by the eldest child of her GCSE course, but concluded that that would not be right. The way in which, and the basis upon which, the original order was obtained seems to me to have been so flawed that a fresh start is required. Nothing I have said precludes the trustee from making a fresh application for an order when the eldest daughter's current GCSE course expires, but I have said enough to indicate that it is by no means obvious to me that an order in the terms of the present order will at that point in time necessarily be an appropriate order for the court to make. In the meantime for the reasons which I have given this appeal should be allowed and the existing income payments order discharged. That of course renders redundant the recent application by the trustee that the existing order be varied so as to enable the sums due to be deducted at source from the bankrupt's salary.

E I turn now to the second appeal. The statutory background is as follows.
F Section 283(2) of the 1986 Act excludes from the bankrupt's estate inter alia: 'such ... vehicles as are necessary to the bankrupt for use personally by him in his employment ...'. Section 308 provides (so far as material) as follows:

'(1) Subject to [section 309], where—

- G (a) property is excluded by virtue of section 283(2) (tools of trade, household effects, etc) from the bankrupt's estate, and
(b) it appears to the trustee that the realisable value of the whole or any part of that property exceeds the cost of a reasonable replacement for that property or that part of it,

H the trustee may by notice in writing claim that property or, as the case may be, that part of it for the bankrupt's estate.

(2) Upon the service on the bankrupt of a notice under this section, the property to which the notice relates vests in the trustee as part of the bankrupt's estate ...

(3) The trustee shall apply funds comprised in the estate to the purchase

by or on behalf of the bankrupt of a reasonable replacement for any property vested in the trustee under this section; and the duty imposed by this subsection has priority over the obligation of the trustee to distribute the estate. A

(4) For the purposes of this section property is a reasonable replacement for other property if it is reasonably adequate for meeting the needs met by the other property.' B

Section 309 provides that a written notice under s 308 must be given within 42 days after the property first came to the knowledge of the trustee. These provisions are supplemented by r 6.187 of the Insolvency Rules 1986 which provides as follows:

'(1) A purchase of replacement property under section 308(3) may be made either before or after the realisation by the trustee of the value of the property vesting in him under the section. C

(2) The trustee is under no obligation, by virtue of the section, to apply funds to the purchase of a replacement for property vested in him, unless and until he has sufficient funds in the estate for that purpose.' D

The legislative purpose is fairly clear. The bankrupt is to keep his car if it is needed for his employment, but if a cheaper one would serve equally well, the trustee can claim the car and allow a cheaper one to be purchased. The excess value falls into the estate, but the bankrupt is not impeded in his employment. The trustee's claim has to be timeously made. In the present case I entertain considerable doubts whether the official receiver's letter dated 17 June 1997 constituted a valid notice under s 308. The twin premises of a notice under s 308 are that the property should be excluded from the estate under s 283(2) and that it appears to the trustee that its realisable value exceeds the cost of a reasonable replacement. The letter by contrast indicates that the official receiver did not necessarily accept that the car fell within s 283(2) and had not yet considered what the cost of a reasonable replacement might be. I need not, however, explore these doubts further. The validity of the notice was not the subject of argument before me, the view no doubt being taken that any doubts had been effectively compromised by the way in which the motion before Ferris J had been disposed of. E

I have already set out the agreement (contained in the letter dated 3 October 1997) which was then reached as to the terms on which that motion was dismissed by consent. At the date of that letter there were no funds in the estate, and the bankrupt was already £1800 in arrears under the income payments order. Nothing was said by the trustee to the bankrupt about refusing to make the £2000 available for the purchase of a replacement car while those arrears continued to remain unpaid. The language of the letter was unconditional. Indeed I was told by counsel for the trustee (and I accept) that the reason nothing was then said was that no decision to apply the so-called 'set-off' had then been taken by the trustee. It was only some time thereafter that the idea crossed the trustee's mind that retention of the £2000 was one way of dealing with the situation of the arrears which had arisen under the income payments order. F

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- A It was submitted on his behalf that the trustee was entitled to set off the sum he had promised to make available for the purchase of a replacement car against the amount due from the bankrupt in respect of the income payments order. Since I have held that the income payments order ought to be discharged, this argument cannot now get on its feet at all. However, it seems to me that the language of set-off is in any event inappropriate. The trustee had a statutory duty to apply funds (agreed as a matter of contract in the sum of £2000) in the purchase of a replacement car. That was not a sum owed by the trustee to the bankrupt but, rather, a sum which he was bound to see was applied for a specific purpose. I do not see how that obligation could, as a matter of the law of set-off, be diminished or extinguished by the fact that the bankrupt owed money to the trustee. Moreover, even if I am wrong about that, it seems to me that, given the circumstances which existed at the date of the letter agreement dated 3 October 1997, that agreement by necessary implication excluded any right to qualify the undertaking thereby given by reference to the arrears which had arisen and which might continue to accrue under the income payments order.
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- The decision of Mr Registrar Simmonds was based on the fact that the income payments order was still effective, that it had been entered into by consent, that no payments had been made under it, and that the present appeal was still to be heard. None of these reasons still holds good, and his order cannot therefore be justified by reference to them. Mr Walters, for the trustee, has suggested that it can be justified on other grounds. He points out, first, that s 308(3) imposes no time-limit within which the statutory duty falls to be discharged. That is true, but in the context of the present case where the execution of the statutory duty has been the subject of an agreement between the bankrupt and the trustee, it was in my judgment a term of the letter agreement dated 3 October 1997, necessary to give it business efficacy, that the £2000 would be made available within a reasonable time of the receipt by the trustee of the proceeds of sale of the Peugeot. There is, in any case, no warrant in the language of the statute for the proposition accepted by Mr Registrar Simmonds, that the duty only arises if and when the trustee is likely to make a distribution to creditors. Secondly, he submitted that the trustee was entitled to retain the £2000 in order to recoup legal costs incurred by the trustee in responding to the bankrupt's applications and appeals in a sum of £6015.32. Once again so far as those costs had already been incurred at the date of the letter agreement, this contention seems to me to be inconsistent with what the parties were seeking to achieve by that agreement. So far as they were incurred after that date, I am unable to see why they should have priority as expenses of the bankruptcy over the expense implicit in assuming the earlier obligation to apply the £2000: money spent on purchasing a replacement vehicle under s 308(3) appears to me to come within the wording of r 6.224(1). I was told by Mr Walters that that was not the view expressed in *Muir Hunter on Personal Insolvency* (Sweet & Maxwell, 1987) but, on referring to that work, I find that the conclusion of the learned author is that '[o]n balance ... the reference to the trustee buying the replacement property out of funds comprised in the estate must imply that he is entitled to do so in priority to all other prior claims, which can only mature and become payable at a later date' (see para 3-216). That expresses my own view of the matter.
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For these reasons I consider that the bankrupt is entitled to a declaration that

the trustee has acted in breach of both a statutory and a contractual duty in failing to apply the sum of £2000 in the purchase by or on behalf of the bankrupt of a replacement car. In my judgment he is also entitled to an order that the trustee do now so apply the sum of £2000. Paragraph 2 of the relief claimed by the bankrupt (seeking an order that the trustee repay the money to the estate of the bankrupt) is, on the basis of what I have been told, misconceived since the trustee continues to hold the sum as part of the estate and has not in fact used it in the payment of other expenses of the bankruptcy.

Solicitors: *Royds Treadwell* for the trustee in bankruptcy

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[1998] BPIR

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KILVERT v FLACKETT

Chancery Division

Peter Scott QC

(sitting as a deputy judge of the High Court)

B

2 July 1998

*Bankruptcy – Income payments order – Lump sum pension payment –
Insolvency Act 1986, s 310*

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On 22 October 1996 a bankruptcy order was made against the bankrupt who was a dentist and a member of the National Health Service Pension Scheme. On 16 April 1997 the bankrupt became entitled to benefits under the scheme comprising a tax-free lump sum payment of £50,504.53 ('the lump sum') and a taxable annual pension of £17,830.05 ('the annuity'). The trustee in bankruptcy sought an order that the annuity and the lump sum be paid to him as 'income' of the bankrupt within the meaning of the Insolvency Act 1986, s 310. The bankrupt admitted: (a) that his reasonable living expenses were met sufficiently out of his income as a dentist such that the annuity should be paid to his trustee for the period until his discharge from bankruptcy; and (b) that the lump sum was 'income' within the meaning of s 310(7). The bankrupt denied that any part of the lump sum should be paid to his trustee. The district judge directed that the annuity and £10,000 of the lump sum be paid to the trustee on various grounds, including that lump sum payments were treated generally as an income-generating asset and it would not be fair to pay the entirety of the lump sum to the trustee. The trustee appealed.

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Held – directing that the whole of the lump sum should be paid to the trustee –

(1) In reaching his decision, the district judge had wrongly directed himself by taking into account the following matters:

- (i) the way in which others might treat lump sum payments;
- (ii) the timing of the receipt of the lump sum by the bankrupt;
- (iii) the admission that the annuity was payable to the trustee; and
- (iv) notions of 'income' in the narrow sense in arriving at the sum of £10,000.

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(2) The court's discretion had to be exercised by reference to the general purpose of the legislation to vest in the trustee in bankruptcy all property belonging to the bankrupt at the commencement of the bankruptcy and to provide that payments in the nature of surplus income received between the bankruptcy and discharge should also benefit the estate unless there were reasons to the contrary.

(3) No good reason had been made out against the making of an income payments order in respect of the entirety of the lump sum.

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Statutory provisions considered

Insolvency Act 1986, ss 279(2)(b), 306, 307, 310(1), (2), (7)

Pensions Act 1995, s 91(1),(2)

Case referred to in judgment

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Gilmartin (A Bankrupt), Re [1989] 1 WLR 513, [1989] 1 All ER 835

Hilary Stonefrost for the respondent

PETER SCOTT QC: This appeal relates to the proper treatment for the purpose of s 310 of the Insolvency Act 1986 of a lump sum received

pursuant to an employees' pension scheme. That section enables the court to make income payments orders in respect of income (as defined) of the bankrupt for the benefit of the bankruptcy estate. The lump sum in question is £50,504.53. District Judge Schroeder made an income payment order in the sum of £10,000 only. The applicant appeals to the court contending that the order should have covered the entire lump sum. To succeed, the applicant must show that the district judge erred in law or in principle in the way in which he applied or exercised his discretion (*Re Gilmartin (A Bankrupt)*) [1989] 1 WLR 513 at p 516). The second respondent has agreed to abide by the result.

The background facts are not in dispute and may be summarised as follows:

- (a) The first respondent was the subject of an order in bankruptcy made by Mr Registrar James on 22 October 1996. The list of creditors totalled £2,079,200 and the sums due to creditors are said to be 'considerable'.
- (b) The applicant was appointed as the trustee in bankruptcy by the Secretary of State on 11 April 1997.
- (c) At the date of the bankruptcy order the first respondent who is a dentist was a member of the National Health Service Pension Scheme.
- (d) The first respondent is now 61 years of age; he attained the age of 60 on 16 April 1997. At that time he became entitled to benefits under the scheme. The relevant benefits at 16 April 1997 amounted to a tax-free lump sum payment of £50,504.53 and a taxable annual pension of £17,830.05.
- (e) In response to a questionnaire the first respondent stated on 7 May 1997 that he was married and had three dependants, ie his children aged 19, 20 and 21 who were all students. He said that he was self-employed and added, 'I am doing temporary dental surgery work without contract, as an in-fill for a sick colleague, no guarantee of continuity. I have been unwell, but hope to continue from now on. For work carried out £4068.10 March 1997 and £2638.82 April 1997'. He put his regular outgoings at £36,000 pa, and offered to make monthly contributions to his bankruptcy estate of £150. There was no evidence that the first respondent's position had materially changed since May 1997.
- (f) In his affidavit of 13 August 1997, the first respondent suggested that the trustee was not entitled to claim the lump sum because of the provisions of s 91(1) and (2) of the Pensions Act 1995. That point is no longer pursued. He also made this important statement:

'However, I admit that my current income from work as a dentist provides me with my reasonable living expenses pursuant to the Insolvency Act 1986, s 310 and that therefore any payments from my pension with the National Health Service that are made and in the nature of income and [sic] can currently be claimed by my trustee.'

There is accordingly no dispute about the annuity which is destined to go to the trustees, but only for the period of the bankruptcy. The bankruptcy

A normally would be the subject of discharge in October 1999: Insolvency Act 1986, s 279(2)(b). The district judge noted that the bankrupt's present income needs were met from sources other than the annuity, and observed, as seems to be the position, that there is no authority on the treatment of lump sum payments such as the one in question. He accepted (and this finding was accepted by counsel for the first respondent who told me that she did not wish to argue to the contrary) that such a payment could in principle be the subject of an income payments order as it is within the statutory definition of income (see s 310(7)). The judge also found that an order should be made in the present case; but, as indicated above, only in his view to the extent of £10,000. He said this:

C 'Having come to that conclusion I have to consider whether the £50,000 ought to be paid to the trustee or whether I should look at it on a different basis. It does seem that it is not right to treat it as a one-off surge of income. The point was made with reference to a birthday falling 2 days before the discharge where the bankrupt would lose out but that if the birthday was 2 days after the discharge then there would be a different result. I must have regard to the justice of the situation and come to a fair conclusion.

D The reality is that after receipt of these lump sums many people use the lump sum to purchase annuities or as a lump sum to enhance their income and it can be seen as an income-generating asset and that is how the court should treat it. Equally, however, it would be wrong to exclude it totally and allow the trustee no entitlement because it does have some benefit.

E Having taken into account that Mr Flackett agreed to the earlier order, as a matter of principle and in exercising my discretion I order that the sum of £10,000 be payable to the trustee. I have taken into account the fact that a concession was made with regard to the income payments order linked to the annual pension.'

F With respect, I consider that the district judge erred in principle in this reasoning. First it does not seem to me to be relevant that many people may use such a lump sum as an income-generating asset. I accept the first respondent's submission that s 310(1) does enable the court to exercise a discretion as to whether or not to make an income payment order or to limit the ambit of any such order, even though the reason for refusing or limiting the order is not the one specified in s 310(2), ie that the effect of such an order would be to reduce the income of the bankrupt below what appears to the court to be necessary for meeting the reasonable domestic needs of the bankrupt and his family. But the court's discretion must be exercised by reference to the general purpose of the legislation which is to vest in the trustee all property belonging to the bankrupt at the commencement of the bankruptcy (Insolvency Act, s 306) and indeed after-acquired property in limited circumstances (s 307), and to provide that payments in the nature of income received between the bankruptcy and the discharge should also benefit the estate unless there are reasons to the contrary. Those reasons must in my view be truly relevant to the facts of the case in hand. Without attempting to identify all such reasons, it seems to me that the court's approach should be to seek to achieve proportionally between the creditors and the bankrupt, whilst not creating a situation in which the bankrupt is the

slave of the creditors (see the Report of the Review Committee on Insolvency Law and Practice 1982 (Cmd 8558)). The court should recognise that in general the purpose of the legislation is to make property owned by the bankrupt at the outset together with other property and surplus income accruing during the period of bankruptcy available to pay off the sums due to the creditors. These considerations involve looking at the position of the individual bankrupt, and not at what others, not in the unfortunate position of bankruptcy, might do with sums available to them under pension schemes or indeed from other sources. Whilst some may do as the district judge suggests, others may wish to pay off debts or simply expend the money in a variety of ways. There was no evidence of what Mr Flackett would do with the money, and it is far from clear that any particular investment intention would have been relevant. Secondly, the district judge pointed out that the timing of the receipt would determine, perhaps by chance, whether it came within s 310. I agree, but that too does not seem to be relevant. Parliament, must have appreciated that that would be so. The timing line must be drawn somewhere, and Parliament has drawn it. Thirdly, it does not seem to me to be relevant that Mr Flackett agreed to the order in respect of the annuity. It was not suggested to me, nor so far as I can see to the district judge, that in doing so, Mr Flackett put himself in a position where he could not meet the reasonable domestic needs of himself and his family, or otherwise went further than was appropriate. Lastly, I can see no basis for the sum of £10,000. Counsel for the first respondent suggested that it reflected the fact that only income accruing during the period of bankruptcy (normally 3 years) would go to estate and is an estimate of what would be earned by investing the lump sum from the date of receipt to the date of discharge. But if this was the basis, it confused income in the narrow sense (which is usually periodically received and is subject to tax) such as salary, wages or dividends, with the broader sense in which the word is used in s 310 to encompass (as is specifically admitted) payments such as the one in issue.

Accordingly, I consider that I must exercise myself the discretion given by s 310(1). In doing so I bear in mind all the facts and matters set out above. As I have stated I accept the logic of the submission of counsel for the first respondent that s 310(2) does not inevitably mean that the income of the first respondent must be reduced to that required for his reasonable domestic needs and that of his family, but observe that if the district judge were right most of the lump sum would be available to enhance the first respondent's income above that level even during the bankruptcy, and some reasonably plain justification ought to exist if that were to be the result. I am unable to see such a justification.

It is also true that if invested the sum could after discharge produce an income for the remainder of Mr Flackett's life. But as against that there is practically no evidence as to what will be the first respondent's financial position or that of his family after discharge from bankruptcy, except such very limited inferences as can be drawn from his age and the annuity of £17,830.55 pa which he will undoubtedly receive. The relevance of the point is in any event obscure. In all the circumstances I can see no good reason why an income payment order should not be made in the sum of £50,504.53 and I think it is right to do so. I so order.

As to costs, I provisionally consider that these should follow the event and

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A be paid by the first respondent to the applicant, but give liberty to apply on this point, or any other point if within 7 days the first respondent gives notice that he wishes to make submissions. If no such notice is given, the order of the court will reflect my provisional conclusion.

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