Bills Committee on Bankruptcy (Amendment) Bill 2004

Follow-up Actions Arising from the Discussion at the Meeting on 3 November 2004

Introduction

At the Bills Committee meeting held on 3 November 2004, Members requested the Administration to provide additional information on a number of matters relating to the Bankruptcy (Amendment) Bill 2004 (the Bill).

General Comments

2. Before we proceed to respond to the specific questions raised by Members, it may be useful to provide some general background information on the Bill. The Bill aims to facilitate the Official Receiver's Office (ORO) to outsource summary (i.e. asset of bankrupt not likely to exceed $200,000) bankruptcy cases to private-sector insolvency practitioners (PIPs) and make other minor miscellaneous amendments.

(a) Profile of the Bankrupts

3. Under the current proposal, outsourcing will be an option available to, but not mandatory on, the ORO and it will be used only in debtor-petition cases. The reason is because the balance of the deposit in creditor-petition cases, after deduction of the OR's fees and expenses, must be re-paid to the creditor petitioners out of the proceeds of the estate in accordance with the order of priority provided by section 37(1) of the Bankruptcy Ordinance (BO) and will not be available as remuneration for the PIPs. Moreover, the number of creditor-petition cases is much smaller than that of debtor-petition cases.

4. Based on past experience, in the great majority of bankruptcy cases, the bankrupts have very limited assets and income, or no asset and no income at all. For example, in 2003, there were 23,674 bankruptcy cases where the order for summary administration (i.e. assets not likely to exceed $200,000) was granted out of a total of 24,922 bankruptcy cases (or 94%). It is also relevant to note that out of 17,390 bankruptcy cases in the period from April 2003 to March 2004, over 80% of the bankrupts had reported a monthly income of not exceeding $10,000, including some 43% or 7,457 cases of having no income. Given the profile of the bankrupts, experience shows that a number of the arrangements under the BO had not been resorted to in

practice for bankruptcy cases with limited or no assets. These include investigation procedures that require substantial funds or the distribution of dividend. The outsourcing proposal should be considered in the proper context.

(b) Participation of PIP in Bankruptcy Cases

5. It should be pointed out that the appointment of PIPs as trustee-in-bankruptcy has been a common practice for over 3 years. In such cases, the PIPs are appointed at the creditors' meetings. PIPs have rich and proven track record in handling bankruptcy cases. In 2003, there were 1,244 private sector trustees appointed after creditors' meeting. In designing the outsourcing proposal, the ORO has also taken into account the practices of the PIP market.

6. In addition, where appropriate, the ORO has modeled the mechanism of the outsourcing proposal on arrangements that are already adopted in company liquidation. Such arrangements have been in operation for many years and are running smoothly.

7. In any case, the ORO will review the outsourcing arrangements from time to time after their implementation. In this regard, the ORO Services Advisory Committee, which is a customer liaison group comprising representatives from relevant bodies such as the Consumer Council, will be involved as necessary. For instance, the ORO would invite the Committee to provide feedback on matters such as the service standards of PIPs.

Specific Comments

8. Our comments on the specific questions/requests raised by Members are set out in the attached note.

Financial Services and the Treasury Bureau
The Official Receiver's Office
December 2004

Response to Specific Questions Raised by the Bills Committee

A. Tendering scheme for outsourcing summary bankruptcy cases to private-sector insolvency practitioners (PIPs)

(a) Policy, design and operation of the tendering scheme
(b) Pre-qualification criteria for PIPs to participate in tendering
(c) Copies of the tender document and contract used in the existing tendering scheme for outsourcing liquidation cases

1. The Official Receiver's Office (ORO) intends to outsource the debtor(self)-petition summary bankruptcy cases to PIPs by way of open tender, and initially offer a one-year contract to the successful tenderers.

2. The cases will be allocated in batches so that PIPs can achieve economies of scale. The preliminary thinking is that the size of a batch will be in the range of around 1,000 cases per year for successful tenderers. There will be a variation clause to stipulate that the number of cases may be varied by the ORO by say up to 30%, in order to cater for any fluctuation in the number of bankruptcy cases. For planning purpose, in the first 10 months of 2004, there were 9,238 debtor-petition cases[1]. It is estimated that about 90% of them are summary cases and it may mean that this would result in the award of say 10 contracts. Either firms or individuals may submit tenders. Hence, the tender arrangements would help to ensure not only sufficient competition in the market, but also transparency and the adoption of best business practices in determining who should be awarded the tender.

3. PIPs must meet a number of pre-qualification criteria before they are able to qualify as a tenderer. The criteria will be similar to those adopted for the current scheme for contracting out of summary liquidation cases[2]. The PIPs would need to be a member of the specified professional body – Hong

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[1] During the same period, there were 1,152 creditor-petition cases.

[2] For summary liquidation (of company) cases, the current minimum requirements are: (i) 3 years of post-qualification experience; (ii) 300 chargeable hours of relevant insolvency work over last 3 years, with at least 150 hours related to insolvent liquidation/receiverships, and remaining hours may be on solvent liquidation of which the hours would be reduced by 50%; and (iii) having performed a minimum of 4 winding-up cases.

Kong Institute of Certified Public Accountants, Law Society of Hong Kong or Hong Kong Institute of Company Secretaries. They should also have a certain number of years of post qualification experience and a minimum number of professional or chargeable hours in respect of insolvency work[3].

4. Having met the pre-qualification requirements, tenders would be assessed primarily on the basis of tender prices, subject to other considerations such as the track record of the tenderers in providing the services.

5. A copy of the Tender For Taking Up of Appointment as Provisional Liquidator under section 194(1A) of the Companies Ordinance for the Tender issued and awarded in 2004 is attached at Annex 1.

B. The financial arrangements involved in the handling of bankruptcy cases by PIPs

(a) Mechanism for the allocation of the bankruptcy petition deposit for different purposes (such as remuneration for PIPs) and for handling the balance of the deposit, if any

6. The deposit in a debtor-petition case is $8,650, as provided under rule 52 of the Bankruptcy Rules. Under the same provision, the ORO will deduct from the deposit the fees and expenses to be incurred by the ORO, for example, expenses for the gazettal of bankruptcy order.

7. The balance of the deposit will then be used to pay for the remuneration, the disbursements of the trustee and other payments according to the order of priority in section 37(1) of the Bankruptcy Ordinance (BO) (which is proposed to be amended by Clause 11 of the Bill). However, we would like to point out that some of the payments covered by section 37(1) would not or would rarely be applicable in summary debtor-petition bankruptcy cases, such as the expenses incurred by a special manager (as there will not be a special manager) or the taxation cost of the petition (as the costs of a debtor-petition is paid by the

[3] The preliminary thinking is that the required experience must be in insolvency work (either company liquidation or personal bankruptcy) similar to that set out in footnote 2.

bankrupt himself).

8. Any balance remaining after the payments under section 37(1), plus any additional assets realized from the bankrupt will be distributed in accordance with the priorities set out under section 38(1) of the BO. In short, outstanding wages of the employees (or ex-employees)[4] or benefits such as severance payment payable by the bankrupt have the highest priority, followed by statutory debts owed by the bankrupt to the Government.

(b) Means available for creditors to review the remuneration of PIPs

9. Provisional trustees and trustees both owe a fiduciary duty to the creditors. For outsourced cases, their remuneration is fixed by the ORO based on an open tender process. This, coupled with the point that most of the bankrupts would unlikely have much asset left for distribution of dividend, will make the request by creditors for a review of the PIPs' remuneration a rare scenario.

10. If the creditors do see a need to review the remuneration of PIPs, there is an avenue for them to do so. Under the proposed section 85A of BO (which is as proposed to be amended by Clause 27 of the Bill), if one-fourth in number or value of the creditors apply to the OR for the review of the remuneration of the PIPs (as provisional trustee or trustee), the OR may apply to the court and the court may confirm, increase or reduce such remuneration.

(c) How PIPs could recover the investigation costs involved

11. PIPs' duties are set out under the BO and their contract with the ORO. The expenses incurred by PIPs in undertaking their duties such as to apply to the court for a summary procedure order, as well as their remuneration, would be paid out of the assets of the bankrupt's estate in accordance with the order of priority under the proposed section 37(1) of BO (see paragraph 7 above.) As PIPs will be awarded summary cases in batches, there will be economies of scale. Furthermore, given the profile

[4] Or payments made by the Protection of Wages on Insolvency Fund to the relevant employees or ex-employees.

of the bankrupts, particularly in summary cases, a number of the arrangements under the BO had not been resorted to in practice. We therefore believe that there will be interest from PIPs in the outsourcing work under the proposed arrangements.

12. Moreover, in the unlikely event that a PIP wishes to initiate actions aiming to realize additional assets of the bankrupt, he can seek funds from creditors.

C. Monitoring of the performance of PIPs in handling bankruptcy cases

(a) Duties and obligations of PIPs in handling bankruptcy cases, and the performance pledge applicable to them

13. In general, the PIPs as fiduciaries and officers of the court should deal with all matters relating to administration of the estate of the bankrupt and undertake any duties and obligations in accordance with the provisions of the BO and the contract with the ORO.

14. After appointment, the PIPs should first take steps to take into his custody all the property of the bankrupt (sections 53 and 54 of the BO), interview the bankrupt and ascertain the earnings and property of the bankrupt. Thereafter, he should consider the financial contributions, if any, to be made by the bankrupt. He should also ascertain the value of the assets and, in cases where the assets do not exceed $200,000, apply to court for a summary procedure order (section 112A) and the appointment of himself as the trustee[5].

15. In administering the bankrupt's estate, the PIPs should realize all the assets of the bankrupt and review periodically the financial contributions to be made by the bankrupt. The PIPs would receive the proof of debts in respect of the bankrupt's estate (Rules 109 and 113 of the Bankruptcy Rules) and if there were

[5] If the appointed PT comes to an opinion that the value of the assets of the bankrupt is likely to exceed $200,000.00, he would call a meeting of creditors for appointment of trustee under section 17(1) of the BO.

sufficient assets, the PIPs would take steps to arrange for distribution of dividend (section 67 of the BO).

16. At the time for consideration of discharge, the PIPs should review the case to determine whether there are grounds for objection to discharge (e.g. failure to provide an annual statement of earnings and acquisition) (section 30A). It shall also be the duty of the PIPs to investigate the conduct of the bankrupt and to report to the ORO where there is reason to believe that the bankrupt has committed any offence under the BO (section 86A).

17. PIPs are required to comply with the relevant provisions of the BO inducing the time limits stipulated in the Ordinance and the codes of conduct of their profession in undertaking their duties. Furthermore, the ORO will closely monitor the performance of the PIPs under the terms of the tender contract.

(b) Powers conferred upon PIPs for handling bankruptcy cases

18. The powers of the provisional trustee are provided in proposed section 60(2) of the BO (as proposed to be amended under Clause 17 of the Bill). The provisional trustee has the power to take into his custody or control all the property of the bankrupt, sell or dispose of perishable goods and do such things as are necessary to protect or preserve the bankrupt's property.

19. The powers of the trustee are provided in section 60(1) of the BO. The trustee has the power to sell the property of the bankrupt, prove, rank, claim and draw a dividend in respect of any debts due to the bankrupt and exercise all powers vested in the trustee under the BO and do all things as may be necessary for administering the bankrupt's estate and distributing the assets (if any).

(c) Statutory and non-statutory means to ensure that PIPs would exercise their powers in a reasonable and consistent manner

20. There are many "checks and balances" to ensure that PIPs will exercise their powers in a reasonable and consistent manner.

They can be classified into the following categories:

(i) Statutory measures

21. The PIPs will be subject to the statutory control in the BO. Under section 82(2) of the BO, one-fourth in value of the creditors may request the trustee to call a meeting of creditors. Section 83 provides that a bankrupt, creditor or any other aggrieved person may appeal to court against the act or decision of the trustee. Section 84 provides for the control of the court over the trustee in the event of complaint made by any creditor, the Official Receiver (OR), the bankrupt or any other persons.

22. Under section 89 of the BO, the PIPs are required to provide annual statement of proceedings to the OR through which the OR will be able to monitor the progress of the proceedings.

23. Under the proposed section 93(1A) of the BO, the OR may at any time require the PIPs to provide the accounts of the bankrupt's estate. Under the existing section 93(3A), the OR may cause the accounts to be audited.

(ii) Non-Statutory measures

24. As in the outsourcing of liquidation cases, the work specifications of the PIPs will be specified in the contract of appointment[6]. The PIPs will be briefed at the time of the appointment as to their duties and obligations as the provisional trustee and trustee of the bankrupt's estate.

25. The ORO will also monitor the performance of the PIPs through the terms of contract under which the ORO will have with PIPs.

26. The PIPs are professionals. They may be subject to disciplinary action for breaching professional rules or codes of conduct of the professional bodies they are of members of, including the committal of professional misconduct in the course of acting as trustee-in-bankruptcy.

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[6] For examples, the appointed PIPs are required to comply in all respect with the relevant professional standards and ethical guidelines of the relevant professions, and may be required to submit a report to the ORO if they do not complete certain work within the specified timeframe.

(iii) Other Supporting Measures

27. To facilitate relevant parties to understand their rights and duties, the ORO has put in place a number of measures. For example, the ORO has published a Guide on Bankruptcy setting out matters such as the rights of creditors and the duties of bankrupts. Moreover, enquiries or complaints (including any against the PIPs) can be directed to the ORO through a hot line or other means such as the internet.

(d) Existing guidelines provided to PIPs for handling liquidation cases and future guideline(s) to be provided to PIPs for handling bankruptcy cases, including the guidelines on the interpretation of "reasonable domestic needs" of the bankrupt and his family

(i) Present Arrangements

28. PIPs are professionals and are expected to have reasonable knowledge of the relevant duties before they are appointed as trustees in bankruptcy. One of the duties is to realize the assets of the bankrupt, and an integral part of it is to consider the financial contribution to be made by the bankrupt.

29. At present, no guidelines are issued by the ORO, nor by the relevant professional bodies, to the PIPs who are appointed by the creditors, in respect of the financial contribution to be made by the bankrupt. PIPs are expected to exercise their professional judgement in this regard, taking into account relevant legal principles and the circumstances of a particular case. The existing arrangements are working smoothly and the ORO is not aware of any major difficulties encountered by the PIPs in discharging the duty.

30. As for bankruptcy cases currently handled by the ORO in-house, the ORO staff will consider the financial contribution to be made by the bankrupt taking into account the income and expenditures of the bankrupt, as well as the "reasonable domestic needs" of the bankrupt and his family. Information on the former (i.e. income and expenditures of the bankrupt) can be obtained from sources

such as the Forms 1 and 2, copy at Annex 2, that a bankrupt is required to complete. As for the latter (i.e. "reasonable domestic needs") the ORO has internal guidelines (copy with the dollar figures and sensitive instructions taken out is attached at Annex 3). The Guidelines are reviewed periodically.

31. While it is the duty of PIPs to consider the financial contributions, if any, to be made by the bankrupt, they do not have the power to order the bankrupts to make contributions. Under s.43E of the BO, only the court, at the request of the PIPs, may make an income payment order taking into account the "reasonable domestic needs" of the bankrupt and his family. Moreover, PIPs act in a fiduciary capacity and are subject to the control of the court under section 84 of the BO. The system ensures that the interests of both the bankrupts and the creditors are protected.

(ii) Future Arrangements for Cases Outsourced by ORO

32. Under the outsourcing proposal, as mentioned in paragraph 3 above, only PIPs meeting the pre-qualification criteria will be accepted as qualified tenderers and be allowed to submit tenders. Successful tenderers will be briefed by the ORO and their duties and obligations will be specified in the contract of appointment. It is planned that the ORO would provide the appointed PIPs with the Forms and Guidelines to facilitate the latter's consideration of the financial contribution to be made by the bankrupt. However, the outsourcing will not affect the protection afforded to the bankrupts as set out in paragraph 31 above, namely only the court may issue an income payment order. Furthermore, after the implementation of the outsourcing proposal, the ORO would handle any enquiries or complaints.

(e) The interpretation of "reasonable domestic needs" by the court in bankruptcy cases.

33. Two more recent court cases that set out the relevant principles are the Re Rayatt (a bankrupt) [1998] BPIR 495 (see p.500-503) and Kilvert and Flackett [1998] BPIR 721 (see p.723-724). Copies of the judgment of the two case are at Annex 4.

D. Staffing implications of the outsourcing proposal

(a) Impact of the outsourcing proposal on the manpower requirement of the ORO

34. The ORO is now already stretching its staff beyond the limits to deal with the existing workload, which has increased substantially in recent years. As an illustration, the number of bankruptcy orders made by the court had jumped from 3,071 in 1999 to 24,922 in 2003, an increase of 712%.

35. After the implementation of the outsourcing proposal, the ORO staff will continue to deal with the on-going cases and also retain a number of cases, including the creditor-petition cases, for in-house administration. Moreover, the ORO will further enhance its regulatory roles, including the investigation of complaints about non-compliance with the BO.

(b) Re-deployment plans for the existing staff involved in administering summary bankruptcy cases after implementation of the outsourcing exercise

36. At present, there are some 70 posts for the administration of bankruptcy cases. After the implementation of the outsourcing proposal, there would be up to 45 posts for possible re-deployment or deletion[7].

37. Other than some re-deployed staff taking up the role of monitoring the PIPs in the outsourced cases, some staff will be re-deployed to deal with other duties, such as enhancing the role of the ORO as a regulator in the insolvency regime. As the ORO will need to continue to follow up on existing bankruptcy cases before the discharge of the bankrupts, it is expected that the re-deployed staff will continue to deal with the administration of existing bankruptcy cases for some time. To facilitate the

[7] Out of the 45 posts, 17 are planned for deletion.

re-deployment plan, the ORO will provide necessary training, such as organization of seminars for the relevant staff.

(c) Outcome of staff consultation on the outsourcing proposal.

38. Staff in ORO has been informed about the outsourcing proposal. The OR has met with the Association of Insolvency Officers (Insolvency Officers are the departmental grade of ORO) to brief the Association on the outsourcing proposed for bankruptcy cases. The Association welcomed the proposals.

Annex 1

THE GOVERNMENT OF
THE HONG KONG SPECIAL ADMINISTRATIVE REGION
* OFFICIAL RECEIVER'S OFFICE

TENDER FOR SERVICES

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

TENDER FORM

Contract No : .....

LODGING OF TENDER

To be acceptable as a tender, this form, properly completed in ~~triplicate~~ 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 Tender Box situated at Ground Floor, North Point Government Offices, 333 Java Road, North Point, Hong Kong 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)

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

(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
Mong Kok Government Offices, G/F, 30 Luen Wan Street, Kowloon~~

PART 3 — SPECIAL CONDITIONS OF CONTRACT

Attached to this tender (if any).

Dated this 19th day of December ~~XX~~ 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 thereto 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 3(a) 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 & 3 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 **OR/T/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 7-8Annex 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 18Annex 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 that 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:

	Name	Position in the Company	Number of shares held
1.	_____	_____	_____
2	_____	_____	_____
3.	_____	_____	_____

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

	Name	Position in the Company
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.

	Name	Recognised professional bodies & membership No.	Position in firm/ company	Length of service with the firm/ company	Year of post-qualification experience	As AT and/or RP
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)	2001	2002	2003
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: _____

Whether employed or unemployed, you must complete the following Forms 1 and 2 and bring along with you the completed forms and relevant certification documents to the Official Receiver's Office or its Appointed Firm's Office on the day of interview.

To : The Official Receiver

Bankruptcy Ref. No. of the bankrupt : B10/ /

Bankruptcy Ref. No. of your spouse, if also a bankrupt : B10/ /

Form 1 Monthly Income and Expenditure of me and my family are as follows:

Monthly Income ($)		**Monthly Expenditure ($)**	
Items of Income	Income of the Bankrupt	Items of Expenditure	Expenditure of the Bankrupt
Basic Salary and Wages		Rent	
		Rates	
Commission		Management fee	
		Water charges	
Allowances		Electricity charges	
		Town Gas / LPG charges	
Income for self-employment		Domestic telephone charges	
		Mobile phone charges	
Pension / Payment from Retirement Scheme		Family meals	
		Traveling expenses	
Comprehensive Social Security Assistance		Family miscellaneous expenditure	
		School fee	
Maintenance for Separation / Divorce		School miscellaneous items (text books, school uniforms, etc.)	
		Mandatory Provident Fund / Provident Fund	
Amount of family expenditure borne by Spouse [Spouse's income ($ monthly)]		Reserved sum for tax payment	
		Other expenses, please specify :	
Other income / Amounts paid by other parties, please specify :			
Total		**Total**	

Starting from _____ , my monthly contribution shall be $ _____ .

Signature of the Bankrupt : _____

Name : _____ Date : _____

Notes

1. The actual amounts of income and expenditure converted into average monthly figures shall be reported.
2. Expenditure is limited to only the bankrupt and his/her family's basic needs. **If the bankrupt's spouse has any income, he/she shall share the family's expenditure.**
3. **If the bankrupt fails to produce the above information, or conceals information, or provides false information, or transfers his/her assets fraudulently, his/her discharge from bankruptcy will be affected and he/she is liable to criminal prosecution.**

Next Page

Form 2 Certification of Income and Expenditure

Copies of certification of the monthly income and expenditure of my family and myself are attached herewith:

- ☐ Certification of income (Post title : _____)
- ☐ Certification of other income
- ☐ Demand Note / Receipt for rent
- ☐ Demand Note / Receipt for rates
- ☐ Demand Note / Receipt for management fee
- ☐ Demand Note / Receipt for water charges
- ☐ Demand Note / Receipt for electricity charges
- ☐ Demand Note / Receipt for Town Gas/LPG charges
- ☐ Demand Note / Receipt for domestic telephone charges
- ☐ Demand Note / Receipt for mobile phone charges
- ☐ Demand Note / Receipt for school fee
- ☐ Demand Note / Receipt for school miscellaneous items
- ☐ Certification for Mandatory Provident Fund / Provident Fund
- ☐ Tax returns
- ☐ Certification for medical treatment / doctor's certification
- ☐ Separation / Divorce Agreement / Court Order
- ☐ Demand Note/ Receipt of other payment, please specify : _____

_____

_____

_____

_____

_____

☐ Dependents :

Name	Relationship	Age	Present Situation
			☐ employed ☐ unemployed ☐ student
			☐ employed ☐ unemployed ☐ student
			☐ employed ☐ unemployed ☐ student
			☐ employed ☐ unemployed ☐ student
			☐ employed ☐ unemployed ☐ student
			☐ employed ☐ unemployed ☐ student

END

Annex 3

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

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.

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.

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.

(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.

(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

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.

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.

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'.

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:

> '... 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.'

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:

> '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
E 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
F does seem to me to be a little speculative on her part.
>
> 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 B 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 C 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 D 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 E 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 F 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 G 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 H 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.

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:

> '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.'

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.

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).

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.

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
B 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
C finding a school which would be able to offer her the necessary degree of continuity. She continued:

> '[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
D 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.
>
> 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
E 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.'

Mr Registrar James' approach to this evidence appears from the passage
F 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
G 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
H 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.

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.

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

C 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

D 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

E 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.

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,
>
> the trustee may by notice in writing claim that property or, as the case
> H 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.

(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.'

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.

(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.'

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.

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.

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 B 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 C 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.

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 D 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 E 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 F 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 G 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 H 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.

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

KILVERT v FLACKETT

Chancery Division

Peter Scott QC
(sitting as a deputy judge of the High Court)

2 July 1998

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

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.

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.

(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.

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
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

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:

> '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.
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> 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.
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> 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.'

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 (Cmnd 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

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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