



File No. DOIA 2021-1775

7 April 2021

Nick Coyle

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Dear Nick

We refer to your Official Information Act request received on 11 March 2021 and to the telephone conversation on 29 March 2021 between yourself and Ravin Sena, an in house solicitor at the Insolvency and Trustee Service (ITS) wherein your questions (reproduced below in italics) were discussed.

As mentioned in the conversation, whilst we will endeavour to answer your questions as best we can, we are not able to provide you with answers to some of your questions (indicated below where applicable) as ITS does not hold the information or keep records in regard to the same and therefore the information requested cannot be made available without substantial collation or research.

Our response to your questions are as follows:

*Would you please provide me with information (for the past 7 years where relevant) regarding:*

*(1) How the Official Assignee exercises his discretion to begin, discontinue or defend legal proceedings in relation to property of bankrupts.*

By assessing the merits of the proceeding and doing a cost to benefit analysis to determine if the matter is viable. The Official Assignee (OA) also needs to consider how the proceedings would be funded.

*Is there a standing policy document or template which must be referred to in every instance? If so, could you please provide a copy?*

There is no standing policy document or template. Discretion is exercised on a case by case basis based on the factual and financial circumstances unique to that case.

*(2) How many legal proceedings the Assignee has: (a) begun, (b) discontinued, and (c) defended in relation property of bankrupts.*

Not possible to answer as the OA does not keep records of these numbers and it would be too difficult to extract these numbers.

*Could you, if possible without too much difficulty, also provide me with the following information:*

*(a) what type of proceedings fall into each of the above categories, i.e. standard proceeding, appeal, liquidation proceeding; and*

Most are standard proceedings and some appeals.

*(b) what causes of action fall into each of the above categories, i.e. breach of contract/debt, Family Protection Act, negligence, etc.*

The list below are the most common causes of action but is not exhaustive.

#### Begun

- Debt recovery
- Irregular Transactions as defined in s192
- S47 Property (Relationships) Act 1976 to void agreements to defeat creditors
- Applications for contributions under s147
- Applications for possession orders under s152
- Claims for damage to property
- Insurance claims
- Superannuation claims
- Freezing orders
- Search & Seizure
- Breach of contract
- Applications for orders for Partition & Sale of Real Property
- Claims for a distribution from Deceased Estates
- Family Protection Act claims
- Testamentary Promises claims

#### Discontinued

- Contractual Disputes
- Negligence
- Debt Recovery
- Property (Relationships) Act
- Employment matters that do not constitute personal claims
- Insurance claims
- Family Protection Act claims
- Deceased Estates claims

#### Defended

- Claims in relation to the property of the bankrupt which the OA intends to realise for the benefit of the estate creditors
- Many rights of action against a bankrupt/company in liquidation are halted upon the OA's appointment (pursuant to s76(1) of the Insolvency Act 2006/s248 of the Companies Act 1993) if they relate to a liability provable in bankruptcy or liquidation.

*(3) A breakdown of the funding in respect of proceedings which the Assignee has begun, continued or defended in relation to property of bankrupts: i.e. how much litigation has been funded by assets of bankrupts available to the Assignee at the time of their adjudication vs how much has been funded by guarantees/advances to the Assignee by creditors of bankrupts in order to pursue litigation.*

Not possible to answer as the OA does not keep records of these numbers and it would be too difficult to extract these numbers. However, it is likely that more cases were funded by creditor advances.

In cases where the OA considers there may be a need for more clarity in the law or if the case has unusual issues where a decision could set a legal precedent, if there are no available assets and no creditor funding, the OA would apply for funding from the Bankruptcy Surplus Account.

For some more straightforward matters where funding was not available, the OA's in house solicitors have taken the proceedings or the OA has paid the legal fees directly out of the OA's budget.

In some exceptional cases where the prospect of success is very good and where no funding is provided, the OA may enter into a conditional fee arrangement with the OA's solicitors.

*Could you, if possible without too much difficulty, also provide me with a high level summary of how much funds each of the following types of creditors have guaranteed/advanced to the Assignee in order to pursue litigation in relation to property of bankrupts: (a) Inland Revenue, (b) banks and (c) insolvency practitioners.*

Not possible to answer as the OA does not keep records of these figures and it would be too difficult to extract these figures. In response to this, you asked Mr Sena as follows:

*Can you provide information on the top five legal proceedings dealt with by the Auckland ITS office where the OA has received creditor funding and made significant recoveries?*

The following are the figures that we have been able to obtain from recent recoveries:

<b>Advance to fund legal costs</b>	<b>Legal Fees</b>	<b>Creditor Preference Payments re Funding</b>	<b>Other Payments to Creditors</b>
99,247.51	-148,517.42		-922,163.13
5,750.00	-6,490.81	-5,750.00	-276,406.47
5,445.48	-27,366.89		-248,523.45
10,000.00	-9,734.27		-198,168.44
11,000.00	-13,032.89	-10,000.00	-196,387.15

*(4) Any standing arrangement and/or policy understanding between the Assignee and the Commissioner of Inland Revenue in respect of funding provided by the Commissioner to the Assignee in order to pursue litigation in relation to property of bankrupts.*

There is no standing arrangement or policy understanding but the Commissioner has provided the OA with a template to complete when seeking funding. Decisions on funding are however on a case by case basis. A copy of the template is attached.

*(5) How the Assignee exercises his discretion to assign causes of action/proceedings to other persons. Again: is there a standing policy document or template which the Assignee or his agents must refer to? If so, could you please provide a copy.*

Assignments may be considered where the OA has made a decision not to pursue a right of action because it is uneconomic or there are no funds available to finance it and a request has been made for assignment.

In such circumstances, the OA will want to know

- the reason for the assignment and be satisfied that there are merits in pursuing the matter (supported by a comprehensive legal opinion)
- whether the assignment will not result in frivolous or vexatious litigation
- whether the OA will receive consideration for the assignment
- whether the assignee is willing to meet all the costs of the assignment and provide sufficient indemnity for any costs, losses or damages, etc. that the OA may sustain howsoever relating to the conferring of the assignment
- the views of the creditors where relevant (for instance if one of the creditors requests an assignment)

There is no standing policy document or template but we have an internal best practice module for staff's guidance on rights of action and assignments (copy of the module is attached).

*How frequently the Assignee has assigned causes of action belonging to bankrupts to*

*(a) the bankrupt following their discharge from bankruptcy,*

*(b) persons associated with the bankrupt,*

*(c) creditors of the bankrupt, or*

*(d) any other persons.*

Infrequently/very rarely for all of the above

*(6) The level of returns derived by the Assignee from his assignment of causes of action:*

*(a) how much has been "paid up front" in exchange for assignments,*

*(b) how much has the Official Assignee recovered from successful litigation pursued by the assignee in which the Official Assignee was promised a percentage of the proceeds,*

*(c) in how many instances has an assignment of a cause of action/proceeding resulted in no recovery to the Assignee?*

Not possible to answer as the Assignee does not keep records of these figures and it would be too difficult to extract these figures. As an alternative, you asked Mr Sena if we have any examples of payment received or successful recovery. We have two examples that we can provide:

1. An assignment of an interest in a deceased estate to a discharged bankrupt in 2018. The bankrupt was adjudicated under the Insolvency Act 1967 and was discharged in 2003. The exact value of the bankrupt's share that had vested in the OA was uncertain and subject to family

squabbles. As it was a very old bankruptcy, there were issues concerning obtaining and dealing with creditor claims. In the circumstances, the OA decided that it would not be worth dealing with the vested interest and assigned it to the bankrupt for the sum of \$10,000 which was paid at the time when the Deed of Assignment was executed.

2. The OA assigned a vested right of action that the discharged bankrupt had against a previous barrister in 2015. The consideration for the assignment was the sum of \$1 on execution of the deed and 50 percent of any sum recovered by the bankrupt. The proceedings got a little complicated and protracted but ultimately the parties settled the matter in 2019 with the OA agreeing to accept slightly more than 20 percent.

*(7) How assignments to other persons by the Assignee are funded:*

- *does the Official Assignee's in house counsel draft such agreements,*

*Sometimes, but usually by the OA's external solicitors.*

- *is the assignee liable for the cost of drafting and executing any such deed,*

*Yes, that would normally be a condition for the assignment.*

- *does the Official Assignee incur third party legal expenses to draft and advise on such transactions?*

Any legal expenses incurred by the OA will have to be met by the assignee as a condition of the assignment.

I trust this information to be helpful to you. As mentioned above, some information is being refused in accordance with the following sections of the Official Information Act:

18(e) that the document alleged to contain the information requested does not exist or, despite reasonable efforts to locate it, cannot be found:

18(f) that the information requested cannot be made available without substantial collation or research:

Please contact Ravin Sena if you have any further questions. You can contact Ravin by email [ravin.sena@insolvency.govt.nz](mailto:ravin.sena@insolvency.govt.nz) or phone (09) 916 4583. You have the right to seek an investigation and review by the Ombudsman of my decision relating to this request, in accordance with section 28(3) of the Act. The relevant details can be found at: [www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz).

Yours sincerely



**Russell Fildes**  
National Manager  
Insolvency and Trustee Service (ITS)