

Module 62 – Rights of action

Released under the Official Information Act



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Introduction

This module requires you to exercise a statutory discretion or decision. In doing so you must make your decision in an objective manner, only taking the relevant factors into consideration.

You must also provide clear written reasons for your decision.

Finally, remember that your decision is subject to review.

About rights of action

A right of action is a “thing in action”, and constitutes property for the purposes of insolvency law. Most rights of action are the right to sue for damages or compensation. They may also comprise a right to recover property.

For our purposes there are two categories of right of actions:

- (i) rights of action personal to a bankrupt, and
- (ii) rights of action vesting in the Official Assignee.

Other modules deal with specific rights of action that are conferred on the Official Assignee under the Insolvency Act and Companies Act (eg, the right to set aside an insolvent transaction).

In New Zealand, actions falling into category (i) are fairly limited, because of [s317\(1\)](#) of the Accident Compensation Act 2001, which prohibits any person from bringing civil proceedings for damages arising directly or indirectly out of a personal injury that is covered by the Accident Compensation regime administered by ACC. In other countries, claims for compensation for personal injury caused by the fault of a third party (often involving motor vehicles) are frequently pursued through the Court, and any damages recovered as a result of those proceedings, or pursuant to an out of Court settlement, can't be claimed by the claimant's trustee in bankruptcy.

However, personal injury claims are not the only type of claim that are personal to a bankrupt. Other examples are:

- claims for defamation
- damage to reputation
- harassment, and
- some (but not all) claims against an employer following dismissal from employment.

Such rights of action don't pass to the Official Assignee on bankruptcy. The bankrupt has the right to pursue these actions in their own name without interference from the Official Assignee, and to retain the proceeds. Arguably, the Official Assignee won't be entitled to claim any investment that is the product of any damages received as a result of a personal claim brought by the bankrupt, whether those damages were received before or after the bankruptcy. However, from a practical point of view it may be difficult to identify the investment as referable to the damages received.

Note: While this module provides some guidelines for dealing with rights of action, each case must be decided on its own merits and invariably a legal referral will be required. It's imperative that, once a right of action is identified, information is gathered to determine whether the claim is valid. It's important that the Official Assignee is not put in the position of making a hasty and ill-informed decision.

About this module

This module is concerned with those rights of action that pass to the Official Assignee at the date of either bankruptcy or liquidation. Rights of action can be very complex and involved. A thorough knowledge and understanding of the issues and parties involved is needed in order to make a determination of what action the Official Assignee will take.

Rights of action can be a high-risk area for the Official Assignee, especially in cases where there are time limits for filing Court proceedings (limitation), along with the risk of an award of costs where the Official Assignee is unsuccessful in bringing Court proceedings. In addition there's always the possibility of a person seeking to challenge the Official Assignee's decision to pursue, discontinue or assign a right of action.

Property passing to the Official Assignee

Rights of action passing to the Official Assignee relate directly to the bankrupt's property. All property passes to the Official Assignee in the same condition as it was in the hands of the bankrupt, and is still subject to liabilities. Examples of rights of action that the Official Assignee may have to deal with include:

- breach of contract
- damage to property
- a right to recover a debt, or
- a right to claim a distribution from a deceased estate.

Although [s101](#) states "all property passes", the courts have always held that rights of action purely personal to the bankrupt don't pass.

It should be noted, however, that the line between personal and "property" may not be obvious. Employment disputes, for example, will frequently involve economic/financial damage as well as injury to feelings. It will be necessary to obtain legal advice as to whether an action is personal to the bankrupt.

Employment Relations Act 2000 - [s123 Remedies in relation to personal grievances](#)

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee...

In *Cooley v Prestige* (Unreported CIV-2011-443-436), the Court set out the elements of the test for a personal claim not vesting in the Official Assignee. Namely, the damages being sought need to be estimated:

- by immediate reference to pain felt by the bankrupt
- in respect of the bankrupt's body, mind or character, and
- without reference to the bankrupt's rights of property.

In that case, the point was made that many claims for economic loss have the potential to cause consequential distress to the bankrupt. However, this will not be sufficient to enable the claim to be classified as personal, and thus to enable the bankrupt to bring proceedings in their own name.

Remember that many rights of action **against** the bankrupt/company in liquidation are stayed upon the Official Assignee's appointment (pursuant to [s76\(1\)](#) of the Insolvency Act/[s248](#) of the Companies Act), if they relate to a liability that will only be able to be proved in the bankruptcy. However, this module is concerned with rights of action belonging to the bankrupt or company, which the Official Assignee is able to pursue against third parties.

Assignment

From time to time the Official Assignee may be asked to assign a vested right of action. This is an immediate transfer of an existing proprietary right from the assignor to the assignee.

At the outset, it's important to distinguish between different kinds of rights of action. How the right of action arose will determine the ways the Assignee can deal with it.

If the right of action is vested in the Assignee as an incident of the bankrupt's property vesting under section 101 (e.g. if the bankrupt had a right to sue as at the date of adjudication), then:

- While the bankrupt is undischarged, the Assignee may assign the right of action to any person (**other than the bankrupt**) without permission from the court. The reason that it can't be assigned to the bankrupt is because it would automatically revert back to the Assignee under section 102 of the Act (see *Official Assignee v Henshaw* [2015] NZHC 1856)
- After the bankrupt's discharge, the Assignee may assign the right of action to any person (including the now discharged bankrupt) without permission from the court.

If the right of action is one that is conferred on the Assignee by the Insolvency Act 2006 (e.g. the right to cancel an insolvent gift), then the Assignee will require the court's permission to assign it (see section 221). These are rights to sue that the bankrupt did not have themselves, but which the Assignee may exercise because the Act specifically allows the Assignee to. An application can be made by either the Assignee or the person to whom the right of action is to be assigned.

If a request is made to have a right of action assigned, the Official Assignee should first consider whether assignment is possible (see above). If the right of action is assignable, then the Assignee should be aware of the reasons why the party wants to pursue the right of action. The reasons should be put in writing and supported by documentation. If the requesting party is unable to provide this information, the Official Assignee may have little choice but to decline the request. Possible outcomes are:

If the Official Assignee ...	then...
isn't prepared to take an action	it's unreasonable to assign that claim, just because a request is made for it to be assigned.
refuses the request	the reasons for the decision should be clearly given to the person making the request.
after reviewing all the evidence, is in doubt as to whether to assign a right of action to a requesting party	it may be prudent to seek the directions of the court, and let the court make the decision as to whether the action should be assigned. Alternatively, the Official Assignee might prefer to refuse the request and leave the requesting party to appeal that decision.

If any party is detrimentally affected by a decision to disclaim or refuse to assign a right of action, they have the right to appeal the Official Assignee's decision under section 226.

Best practice is:

- to make a legal referral to ITS solicitors to determine the best way forward (i.e. disclaimer vs assignment)
- to enter into a Deed of Assignment that meets the requirements of [section 9](#) of the Property Law Act 2007, and
- for the person receiving the assignment to fully indemnify the Official Assignee; and
- for there to be some consideration for the assignment.

Consideration is not a precondition for a valid legal assignment, however a Deed of Assignment that records consideration passing between the Official Assignee provides a level of protection in the event that the Official Assignee needs to enforce the terms of the assignment.

Note: A bare right of appeal is generally not assignable. In bankruptcy, it's possible that the bankrupt may approach the Official Assignee seeking an assignment of the right to appeal the judgment debt upon which the bankruptcy order is based, or they may wish to challenge tax assessments made by Inland Revenue before their bankruptcy, and request an assignment for that purpose.

In *Cummings v Claremont Petroleum* (1996) 137 ALR 1, the point was made that a right to appeal which only aims to set aside a liability is unlikely to meet the definition of "property" for the purposes of insolvency law. On that basis, it appears an assignment of such a right of appeal wouldn't be possible.

Disclaimer

Where there's a right of action on file that the Official Assignee is not going to deal with because there's no merit to the claim, or where it would be uneconomic to proceed, it's best practice to disclaim the action.

If the Official Assignee has formed the view that a potential claim is unmeritorious, a disclaimer can be an efficient way of bringing to an end discussions about whether or not the Official Assignee should assign the proceedings to the bankrupt.

Once the disclaimer has been issued, the bankrupt would be able to file proceedings asking for the disclaimed property to be vested in them.

Module cross-reference:
[Disclaimer of property 48](#)

Legislation

Insolvency Act 2006

- [76 Effect of adjudication on court proceedings](#)
- [101 Status of bankrupt's property on adjudication](#)
- [102 Status of property acquired during bankruptcy](#)
- [217 Assignee's general powers](#)
- [190 Bankrupt's co-contractor may sue and be sued](#)
- [221 Assignee may assign the right to sue under this Act](#)
- [225 Assignee may apply for directions by court](#)

- [Schedule 1 Assignee's general powers](#)

Schedule 1(b) the Assignee has the power to “begin, continue, discontinue, and defend legal proceedings relating to the property of the bankrupt”.

Companies Act 1993

- [248 Effect of commencement of liquidation](#)
- [254 Liquidator not required to act in certain cases](#)
- [260 Powers of liquidator](#)
- [260A Liquidator may assign right to sue under this Act](#)
- [Schedule 6 Powers of liquidators](#)

Schedule 6(a) the liquidator of a company has power to “commence, continue, discontinue, and defend legal proceedings”.

Property Law Act 2007

[Part 2, Subpart 5 - Assignment of things in action](#)

High Court Rules

- [HCR 24.52 Applications to court by Official Assignee](#)
- [HCR 24.53 Official Assignee's liability for costs](#)

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Issues of concern/potential problem areas

Any decision regarding rights of action is potentially fraught with risk to the Official Assignee, whether in bankruptcy or as the Liquidator of a company. All decisions must be based on sound reasoning backed up with full legal advice. Like any decision of the Official Assignee, the process must be transparent.

Assignment or transfer

The Official Assignee must look at the merits of any situation before assigning or transferring a right of action to another party. If need be, the Official Assignee should communicate with all affected parties and ask for their views.

It's best practice for creditors' views to be sought first before a right of action is transferred to a creditor or third party. This is particularly true where the request has come from a bankrupt. In most instances it's best practice to ask creditors whether they are willing to fund legal proceedings first before even considering whether or not to assign the proceedings. If creditors are unwilling to fund legal proceedings, that would be relevant to the decision whether to assign.

Creditor in a bankrupt estate

Where the potential defendant is a creditor in a bankrupt estate, care should be taken to ensure that their rights are not infringed. They may have a right to counterclaim or set off their debt. In *Edmonds Judd v Official Assignee* [2000] 2 NZLR 135, the Court's view was that this was a factor that ought to be considered before making a decision in relation to rights of action.

There have been cases where the bankrupt has wished to file proceedings in their own name for breach of fiduciary duty (breach of trust). However, it is well settled that claims of this nature relate to the bankrupt's property, and can only be brought in the Official Assignee's name. Claims under the Family Protection Act 1955, which are based on the moral duty of the deceased at the date of his or her death to make provision for a person's family, are entirely economic claims, and would need to be pursued by the Official Assignee following a person's bankruptcy. Claims under the Law Reform (Testamentary Promises) Act 1949 are also economic claims.

Memoranda for external referral

All memoranda intended to brief in-house counsel or an Insolvency Manager for external referral should be in full, and should - in effect - review the file as to the issues and correspondence held relating to the matter.

In *Re Callis (a bankrupt); Callis v Pardington* (1996) 7 NZCLC 261,211 the Official Assignee was criticised for not disclosing to the solicitor that there was a letter on file previously advising the potential defendant that no action would be taken against them. It's therefore important that as much information as possible is provided to the solicitors.

Right of action

It appears to be fairly well settled that a bankrupt or other party is not able to pursue a right of action purely due to the fact that the Official Assignee has manifested an intention not to pursue the action, or for any other reason it's regarded as having been abandoned. Accordingly, for the bankrupt or a third party to pursue a right of action, there will need to be a valid assignment of the right of action or disclaimer, followed by an application to Court to have the right vested in that party.

Award of costs against the Official Assignee

In the past the courts have been reluctant to award costs against the Official Assignee, because of the public duty imposed on the office. Recently, however, this view has changed, and the Official Assignee has had costs awarded against them in certain instances. It's therefore very important that the merits of a case are carefully assessed before a decision is made.

Arguable claim

Whilst the Official Assignee can enter into a deed of assignment, he/she should only do so if there's an arguable claim to assign. In making a decision as to whether an arguable claim exists, the Official Assignee must give consideration to the likely outcome of the claim. The main reason for assigning a claim would be that the claim has merit, however the cost of pursuing is likely to be greater than the recovery.

Note: Unless a comprehensive indemnity is obtained, the Official Assignee may still be liable for costs should the proceedings be unsuccessful. Any assignment of claims should only be undertaken after careful consideration and legal advice.

Insolvency procedure

Initiating or continuing proceedings

In the majority of cases, the existence of a right of action predates adjudication or liquidation, with legal action having been either contemplated or commenced by the bankrupt or company. It's of critical importance that, if the Insolvency Officer discovers matters of this nature, they be followed up promptly – this includes making an entry into the Asset Register for the estate.

Note: Where a potential right of action is identified, it's best practice to obtain input from counsel sooner rather than later, as there may be a deadline for filing proceedings. In the case of proceedings already on foot, there may be Court timetabling in place.

If it's discovered that a right of action exists:

1. Find out who the solicitors are for both parties.
2. Contact them and advise of the Official Assignee's involvement.
3. Find out what the essential elements of the action are.
4. Obtain:
 - legal files
 - financial records, and
 - copies of all associated correspondence.

5. Speak with the parties potentially involved and complete appropriate file notes. This may include:
 - the bankrupt/director
 - creditors
 - receivers
 - liquidators
 - potential defendants
 - accountants, and
 - previously instructed solicitors.
6. Prepare a referral to Insolvency Manager or legal counsel setting out the following:
 - the facts of the case
 - the evidence available
 - potential legal problems
 - strength of the claim (if known)
 - available funding and/or indemnity from creditors
 - likely recovery for creditors, and the class of creditors who will benefit from any recovery action
 - the potential for an adverse award of costs against the Official Assignee/Liquidator
 - likelihood of successfully negotiating or mediating a settlement with the other party.
7. Legal counsel will then advise whether the right of action should be initiated or continued.

Notes:

- i. If you're approached by solicitors acting for the defendant, proceed with care. Frequently defendants will point to the bankruptcy as a reason why the proceedings should be stayed or discontinued. It's only natural for the defendant's lawyers to overstate the strength of their client's case when they first make contact to enquire whether or not the Official Assignee will be continuing proceedings against their client. In most cases, all that can be said is that the Official Assignee is yet to form a view, and will be unable to do so until all documentation relevant to the proceedings has been obtained and reviewed.
- ii. Take care also when approaching potential defendants. Make sure, for example, that you deal with their solicitors where they have been instructed. Approaches of this kind should be discussed with the Official Assignee's solicitors before being initiated.

8. In some circumstances it may be appropriate to file a discontinuance with the Court, in which case you will need to get a solicitor involved. Whether it is appropriate will depend on the circumstances, but the approach is probably preferable if there is a looming Court date, or if the Court has set a timetable for the filing of certain documents.

Creditor funding

If there are not sufficient funds in the estate to pursue legal action likely to result in a recovery, creditors should be approached and asked whether they are willing and able to fund the action. It's important that *all* known creditors are written to.