

**This guidance is tailored specifically for official receivers. It is discretionary and not designed for use by third parties. This version was the most up to date guidance available to official receivers as at 11 March 2020.**

## 37. Rights of action

### Annexes

[Annex A](#) – Letter requesting information about claim

[Annex B](#) – Letter ending arrangement with solicitor

[Annex C](#) – Letter asking solicitor to agree position

[Annex D](#) – Letter explaining effect of action vesting

[Annex E](#) – Letter retaining solicitors

[Annex F](#) – Letter asking for funds to pay legal advice

[Annex G](#) – Letter circularising creditors

[Annex H](#) – Letter asking solicitor to agree position in unfair dismissal claim

[Annex I](#) - Letter asking solicitor to agree position in wrongful dismissal claim

[Annex J](#) – Letter asking solicitor to agree position in discrimination claim

[Annex K](#) – Flowchart too assist in decision whether action vests or not

### Chapter content

[Table of key right of action cases](#)

[Frequently asked questions](#)

[Introduction](#)

[General points regarding rights of action](#)

[Identifying a right of action and gathering information](#)

[Dealing with a right of action – The basics](#)

[Deciding whether a right of action vests - Bankruptcy only](#)

<a href="#">Vesting of ‘hybrid’ claims</a>
<a href="#">Examples of types of claims to assist in vesting decision</a>
<a href="#">Effect of a right of action vesting</a>
<a href="#">Settlement of a right of action</a>
<a href="#">Assignment of a right of action – General overview</a>
<a href="#">Assignment to be absolute</a>
<a href="#">Equitable assignments</a>
<a href="#">Matters to consider prior to assignment</a>
<a href="#">Litigation of a right of action</a>
<a href="#">Limitation periods</a>
<a href="#">Employment claims - General</a>
<a href="#">Unfair dismissal and wrongful dismissal</a>
<a href="#">Discrimination claims relating to employment</a>
<a href="#">Other employment claims – Redundancy and equal pay</a>
<a href="#">Dealing with the fruits of a right of action</a>
<a href="#">Third-party interest in the fruits of a right of action</a>
<a href="#">Loss of earnings awards</a>
<a href="#">“Negative” options for dealing with a right of action</a>

## Table of key right of action cases

Rights of action is an area which has been largely driven by case law. To assist official receivers in understanding how the law has developed this table lists the key cases that have had some impact on rights of action. The table is in rough chronological order and has links to the paragraph within the chapter where the point made in the case is discussed more fully. The (very) brief summary of the decision in each case should not be relied on its own but should, instead, be considered alongside the more detailed information in the chapter.

Case	Held
Howard v Crowther (1841) 8 M&W 601	“Personal” actions do not vest
Rogers v Spence (1846) 8 ER 1586	Example of personal action staying with bankrupt (personal annoyance).
Beckham v Drake (1849) 2 HL Cas 579	“Personal” actions do not vest
Kitson v Hardwick (1872) LR 7 CP 473	Trustee can assign right of action to bankrupt
Ex parte James (1874) LR 9 Ch App 609	Obligation on officers of the court to act honourably and fairly.
Jackson v North Eastern Rly Co (1877) 5 Ch D 844	Trustee must, at least, become co-claimant on a vesting action. Bankrupt cannot continue it alone.
Re Wilson ex parte Vine (1878) 8 Ch 364	Cannot intercept personal monies, but can claim fruits of investment, etc.
Leeming v Lady Murray (1879) 13 ChD 123	Trustee is not precluded from bringing or defending an action simply because they have not obtained sanction of committee.
Seear v Lawson (1880) 15 ChD 426, CA	Trustee can sell a right of action by assignment – does not constitute champerty or maintenance
Re Park Gate Waggon Works Co (1881) 17 Ch D 234	Liquidator can sell a right of action
Metropolitan Bank v Pooley (1885) 10 App Cas 210 HL	Action can be dismissed as frivolous or vexatious if bankrupt carries it on after vesting.
Guy v Churchill (1889) 40 ChD 481	Action may be sold by the trustee on the basis that some part of the fruits may come back to the estate.

Case	Held
Whitwood Chemical Co v Hardman [1891] 2 Ch 416, CA	Court will normally award damages (rather than reinstatement) for a wrongful dismissal.
Rose v Buckett [1901] 2 KB 449	Claim that gives rise for aggravated damages would remain with bankrupt
Re White ex parte Nichols (1902) 46 Sol Jo 569	Trustee will lose right to be paid out of estate if they do not get sanction.
General Billposting Co Ltd v Atkinson [1909] AC 118	Employee is released from contract in a wrongful dismissal.
Glegg v Bromley [1912] 3 KB 474	Right of action should be assigned without any conditions attached (e.g., a right to interfere in the action).
Bannister v Bannister [1948] 2 All ER 133	Explanation of a constructive trust
Wilson v United Counties Bank [1920] AC 102	There can be two rights of action from the same breach of contract. Over-ruled by Ord v Upton.
Re Kavanagh [1950] 1 All ER 39	If claim settled before court and there has been no evidence to show the shares in which the settlement should be apportioned (between the causes of action – personal v property) it will be split equally.
Ramsey v Hartley [1977] 2 All ER 673	Trustee is entitled to assign claim back to bankrupt for a share of the net proceeds.
Re Papaloizu [1999] BPIR 106 14 December 1980	Trustee should exercise the power to assign causes of action to bankrupts with circumspection – where, for example, to do so would leave the defendant open to vexatious litigation.

Case	Held
R v East Berkshire Health Authority ex parte Walsh [1985] QB 152	Correct forum for a wrongful dismissal claim is Employment Tribunal.
Weddell v Pearce [1988] Ch 26	Since vesting is by operation of law, trustee does not have to give notice to potential defendants. Assignment on terms that trustee is to receive part of the proceeds requires sanction of creditors' committee
Re Hans Place [1992] BCC 737	Court will only overturn official receiver's decision (e.g., not to assign) if decision mala fides or perverse.
Heath v Tang; Stevens v Peacock [1993] 4 All ER 694	Bankrupt has no locus standi to bring a cause of action that vests in trustee without consent of trustee or by order of court. The appeal of any judgement on which bankruptcy order founded is a vesting action.
Linden Gardens Trust v Lenesta Sludge Disposals Ltd [1994] 1AC 85	Action may be non-assignable where there is an express contractual prohibition on assignment.
Re Oasis Merchandising Services Ltd [1995] 2 BCLC 493	Cannot assign rights of action that arise as a result of the insolvency order (preferences, transactions at an undervalue, etc.).
Re Rae [1995] BCC 102	Fishing licence (or similar) is a 'personal' asset.
Royal Bank of Scotland v Farley [1996] BPIR 638	Action seeking to overturn judgment on which bankruptcy founded is vesting asset.
Re Campbell [1996] 1 All ER 537	Can't claim right to criminal injuries compensation.

Case	Held
Stein v Blake [1996] 1 AC 243	Value of claim is the difference between the claimed amount and any counter-claim. Net difference between claim and counter-claim can be assigned.
Three Rivers DC v Bank of England [1996] QB 292	Court will usually require that equitable assignor is joined as a party to the proceedings before judgment is given.
Re Edenote Ltd [1996] BCC 718	Trustee should not accept first offer (if there are multiple potential offers) without first testing the market. Should offer settlement to defendant.
Citicorp and others v Official Trustee in Bankruptcy and Another [1996] FCA 1115	Frivolous claim (one that is unlikely to succeed) should not be assigned.
RBS v Farley [1996] BPIR 638	Bankrupt has no locus standi to challenge judgment on which order is based.
Wordsworth v Dixon [1997] BPIR 337	Right of appeal in a vesting action would also vest.
Griffiths v Civil Aviation Authority [1997] BPIR 50	Pilot's licence is 'personal' property.
Re Ng (a bankrupt) [1997] BCC 507	Trustee should not be used as a 'hired gun' – as a name in which to bring an action.
Seven Eight Six Properties v Ghafour [1997] BPIR 519	Assignment does not give retrospective right to bring an action if bankrupt had no previous right to bring action (e.g. where statute barred, seeking to overturn judgement on which order based).
Khan v Official Receiver [1997] BPIR 109	Trustee not obliged to assign action where only offer is derisory and seeking

Case	Held
	other offers would be an unjustifiable expense.
Vickery v Modern Security Systems Ltd 1997 WL 1104285	Consequences of trustee continuing claim.
Griffiths v Civil Aviation Authority [1997] BPIR 50	Aviation licence is non-transferable and is personal. Right to appeal against decision to withdraw licence is personal.
OR v Davis [1998] BPIR 771	Trustee can assign action to defendant.
Cummings c Claremont Petroleum [1998] BPIR 187	Right of appeal in a vesting action would also vest.
Re Bell [1998] BPIR 26	Lump sum awarded as periodic payment would simply be considered as lump sum (not, for example, income).
Vickery v Modern Security Systems Limited [1998] BPIR 164	Official receiver, as trustee, may be exposed to costs if they allow bankrupt to continue claim.
Morris v Morgan [1998] BPIR 754 CA	A right of appeal may constitute a right of action if it has an economic value in its own right.
Hamilton v OR [1998] BPIR 602	Bankrupt may request re-assignment of cause of action where trustee does not take it on. Assignment should be absolute. Trustee may remain vulnerable to an adverse costs order, if they retain an interest in the outcome – but not if sold outright.
Re Landau [1998] Ch 223	A provision prohibiting assignment of a right of action is not infringed by the vesting in the estate as the action passes into the estate without assignment

Case	Held
	[s306(2)], but is deemed to have been assigned [311(4)].
Artbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd [1998] 1 WLR 1426	Court may not allow claim 'out of time' where, to do so would allow a 'second bite of the cherry'.
Oasis Merchandising Services [1998] Ch 170	Official receiver, as trustee, may not assign right of action that arises as a consequence of insolvency order (e.g. a preference).
Osborn v Cole [1999] BPIR 251	Bankrupt may appeal, under s303 of the IA1986, decision not to re-assign. Official receiver, as trustee, can seek indemnity (e.g., against costs) from assignee.
Craig v Humberclyde Industrial Finance [1999] BPIR 53	Trustee can seek direction from court as to terms in which they can enter into assignment. If the value of the counter-claim is higher than the value of the claim this will, effectively, be a bar on assignment.
Stock v London Underground Ltd 30 July 1999 CA Times, August 13 1999	One claim can have two heads of damage – a "hybrid" claim.
Ord v Upton [2000] 1 All ER 193	Hybrid action vests in trustee.
Mulkerrins v Price Waterhouse Coopers [2001] PNLR 5	It is open to bankrupt to apply for order that action does not vest.
Edmonds Judd v Official Assignee CA(NZ) [2001] BPIR 468	Trustee should not 'traffic' frivolous or vexatious claims.
Patel v Jones [2001] EWCA Civ 779	Limit claim for future lost earnings to three years.

Case	Held
Haq v Singh [2001] 1 WLR 1594	Assignment should be made before the expiration of the relevant limitation period.
Cork v Rawlins [2001] BPIR 222	Permanent disability benefit paid under insurance policies in respect of an accident suffered by the debtor before bankruptcy is bankruptcy asset.
Faryab v Smith [2001] BPIR 246	Bankruptcy should not be used as a means to stifle a claim. Trustee should be careful to seek advice re merits of assignment in complex claims.
Quadmost Ltd v Reporotech (Pebsham) Ltd [2001] BPIR	Action may be non-assignable where express contractual prohibition.
Hamilton v Official Receiver [2002] BPIR 582	Trustee should accept offer for assignment if it is reasonable and does not prejudice them.
Cummings v OR [2002] BPIR 246	Trustee should see that case has merit before assigning and if it does have merit they should seek payment.
Official Receiver v Mulkerrins [2002] BPIR 582	Loss of future earnings a property claim. (though see Patel v Jones).
Grady v Prison Service [2003] 3 All ER 745 Particularly, paragraphs 25-27	Unfair dismissal is a claim for reinstatement, so cannot vest in trustee. Wrongful dismissal is a claim for breach of contract for which a compensatory payment can be made. That action would vest (i.e. not seeking reinstatement)
Mulkerrins v PricewaterhouseCoopers [2003] UKHL 41	Bankrupt can apply for an order declaring that a right of action does not vest, but only those party to the application would be bound by its effect.

Case	Held
Shepherd v Legal Services Commission [2003] BCC 728	Trustee has a duty to consider how best to deal with a claim, so it would not be stifled by bankruptcy.
Re Shettar [2003] BPIR 1055	Official receiver, as trustee, should not carry out an assignment that would leave defendant open to vexatious litigation. Official receiver, as trustee, can seek indemnity (e.g., against costs) from assignee.
Khan v Trident Safeguards Ltd [2004] EWCA Civ 624	Claim for racial discrimination will not vest. Claimant can limit claim to avoid it vesting – probably only in discrimination cases.
Ultraframe (UK) Ltd v Rigby and others (CA) BILD 2001050178 2005	Liquidators should not assign without proper consideration of the value of the claim.
Ajahot v Waller [2005] BPIR 82	Tax appeal is a vesting asset.
James v Rutherford-Hodge [2005] EWCA Civ 1580	Bankrupt's standing to (not) bring claim is unaffected by them having been awarded legal aid.
Skinner v Hood [2005] EWCA Civ 1634	Bankrupt cannot have a vesting order in disclaimed property.
Allan v Newcastle-upon-Tyne City Council; Degnan v Redcar and Cleveland Borough Council [2005] ICR 1170	Compensation for non-economic losses cannot be awarded in a claim for equal pay
Shepherd v Official Receiver [2006] All ER (D) 72 (Nov)	Court will apply "reasonableness" test when considering a s303 application against trustee's decision not to assign.

Case	Held
James v Rutherford-Hodge [2006] BPIR 973	Inability of bankrupt to bring legal action unaffected by them having being granted legal aid.
Horton v Sadler [2007] 1 AC 307	Court can allow claim after expiration of limitation where there has been, for example, a technical failure on the part of the claimant.
Wilson v Specter Partnership [2007] BPIR 649	Official receiver, as trustee, not obliged to assign right of action where no worthwhile offer.
Dadourian Group v Simms [2008] EWCA Civ 474	Bankrupt has no locus standi even where trustee has yet to be appointed.
Nomura International plc v Granada Group Ltd [2008] Bus LR 1	Protective claim may be challenged if it does not meet procedural requirements.
Calvert v William Hill Credit Limit Limited [2008] EWCA Civ 1427	Action against bookmaker for allowing debtor to gamble is likely to be without merit.
Hellard v Michael [2009] EWHC 2414 (Ch)	Official receiver, as trustee, should be fair to all parties when negotiating assignment of right of action.
Gold Shipping Navigation Co SA v Lulu Maritime Ltd [2009] EWHC 1365 (Admlty)	A poorly worded 'standstill agreement' may leave claimant unable to bring claim.
Pickthall v Hill Dickinson LLP [2009] PNLR 31	Person with no interest in a claim cannot bring it (which, of course, would include bankrupt in a vesting claim).
Young v OR (unreported) 23 March 2010	Denial of a bankrupt's right to bring an action not contrary to ECHR or HRA.
Stephen Hunt (as trustee in bankruptcy of Janan George Harb) v Janan George Harb, HRH Prince Abdul Aziz	Assignment for share of future 'winnings' can leave trustee open to adverse costs.

Case	Held
Bin Fahd Abdful Aziz [2011] EWCA Civ 1239	
Ward v Official Receiver [2012] BPIR 1073	PPI claim (and similar) would vest in trustee
Thames Chambers Solicitors v Miah [2013] EWHC 1245 (QB)	Costs can be awarded against solicitors who knowingly act in bringing proceedings on behalf of bankrupt where the claim vests in trustee
Clark v In Focus Asset Management & Tax Solutions Ltd [2014] EWCA Civ 118	Claim cannot be litigated once ombudsman has given an award
Eaton v Mitchells & Butler plc [2015] All ER	Abuse of process for bankrupt to bring a claim that has vested in trustee unless rectified by, for example, assignment.
Sands v Layne [2016] EWCA Civ 1159	Right to appeal the bankruptcy order is not an action that vests in trustee.
Robert v Woodall [2016] EWHC 538 (Ch)	Right to bring a claim under the Matrimonial Causes Act can only belong to spouses.

## Frequently asked questions

These FAQs are intended to be a useful introduction to the subject of rights of action, or to be used as a training tool, but should not be seen as a replacement for the more detailed advice given in the chapter.

### What is a right of action?

A right of action is a claim that, for example, another person has been negligent and caused bodily, financial or mental harm – for which reparation (usually, in the form of financial compensation) is sought. The claim may be brought through a formal process such as a court, but many are settled before reaching that stage.

## What about causes of action and things in action?

These are just alternative names for rights of action. In fact, the Insolvency Act calls them 'things in action' in section 436.

## Why does the Insolvency Act mention them?

It lists them as examples of property that would, for example, constitute part of a bankrupt's estate.

I've heard lots of discussion regarding whether or not a right of action vests in the trustee or not. But, if the Act says that they are property then, surely, they do vest?

Unfortunately, it's not quite as simple as that. Case law has developed since the 19th century to establish a position that some rights of action cannot be considered to be property. If they are not property they can not vest in the trustee.

## What sorts of actions would not constitute property?

In short, it would be actions where the damages sought relate solely to pain felt by the bankrupt in respect of their mind, body or character. These are often referred to as 'personal' actions.

## Can you give some examples of 'personal' actions?

Examples of personal examples include defamation, physical injury and battery. These types of claims would continue to 'belong' to the bankrupt.

But, surely, some claims arise as a result of the bankrupt suffering personal injury and damage to his property. For example, they

might be in a car crash and suffer a broken arm and, also, damage to their vehicle. Who would 'own' the claim in these circumstances?

It used to be the case that the court would allow the claim to be split between 'property' and 'personal' elements and pursued separately. This position was arrived at in 1919 in a case brought by a soldier returning from the First World War who sued his bank for mismanagement of his financial affairs whilst they were away fighting, which mismanagement had caused them both financial losses and reputational damage.

More recently, in 1999, it was held that this was not the correct way to decide matters and, in 2001, the court established the principle of a 'hybrid' claim and how such a claim should be dealt with.

## What is a hybrid claim?

A hybrid claim is a claim that has both 'personal' and 'property' elements. The court held that such a claim would vest in the trustee in bankruptcy with the 'personal' element being held on a constructive trust by the trustee for the bankrupt.

## What is a constructive trust?

A constructive trust is a trust that is created unintentionally, by accident almost, where a party comes into possession of property belonging to another by operation of law.

## What does the creation of the constructive trust mean in practical terms for the official receiver acting as trustee?

Nothing really. It simply means that monies awarded that relate to 'personal' damages would have to be paid to the bankrupt. In reality, the official receiver is unlikely to come into actual possession of the monies – rather they are likely to remain with the bankrupt's (ex) solicitor.

## Can't we claim the monies as after-acquired property?

This was tried as long ago as 1878 and, in that case, it was held that the monies may only be claimed if they were to 'change character'.

## What constitutes a 'change of character'?

The 1878 case ruled out the spending of the monies by the bankrupt on the general living needs of themselves and their dependants and ruled in the spending of the monies on a capital asset.

## There must be grey areas?

There are. For example, the transferring of the monies from a current account to a savings account is likely to be considered a change of character (the 1878 case refers to the 'investing' of the monies), but there is no decided case law on the point.

## What about 'personal' monies awarded before bankruptcy?

The official receiver, as trustee, should consider the monies to be simply 'cash at bank' and claim them accordingly. There would be no need for the monies to 'change character'.

## Most rights of action are ongoing, in some way or another, at the date of bankruptcy. What should be done about those?

In essence, there are five ways that a vesting right of action may be dealt with. These are to settle, assign, litigate, disclaim or do nothing.

## Which is the best option?

'Best' would depend on the circumstances of the case. As a general 'rule of thumb' it is true to say that the best option is unlikely to be to litigate the right of action.

## If we 'own' the claim, why not litigate?

There are two main reasons that it is not normally appropriate to litigate. The first is that the case may be lost and costs may be awarded against the official receiver, as trustee, (personally) and the second is that there are usually no funds in the estate with which to fund the litigation.

There is also the practical consideration that the involvement of the bankrupt may be required and will not necessarily be forthcoming.

## So, if we don't want to litigate, how should we deal with the right of action?

The creditors' best interests are likely to be served by a settlement or assignment of a right of action.

## What are settlement and assignment?

Settlement describes the process whereby the claimant and the defendant (the person against whom the claim is being brought) decide on compensation without (or separate from) any formal proceedings.

Assignment is simply the sale of the right of action.

## So, which should I use to deal with the right of action?

That depends on the circumstances of the claim, but an assignment cannot be undertaken without the defendant first having the opportunity to settle the claim. The possibility of a settlement will very much depend on the attitude of the defendant. If this is not a realistic possibility, then the assignment of the claim should be explored.

## Can the claim be assigned back to the bankrupt?

The claim may be assigned (back) to the bankrupt, or to the defendants (as this will, in effect, bring the claim to an end). In reality, these are the people who are most likely to be interested in the assignment, though other parties (such as a relative of the bankrupt) may seek assignment.

## What does the official receiver have to consider before assigning?

There are a number of considerations for the official receiver before deciding that assignment is the correct way to proceed. They must, for example, establish that the claim has merit and decide on the value of the claim. They must also consider the effect of the assignment (for example, the chances of the assignment opening the

defendant up to vexatious litigation). Legal advice should be sought on these matters.

## Who will pay for this legal advice?

The person who wishes to take the assignment should, in advance of the seeking of the legal advice, remit the necessary funds to the official receiver.

## What if they are without funds?

If the potential assignee cannot pay for the legal advice then the official receiver may incur a debit balance to obtain the advice.

## But if the potential assignee is without funds to pay for the legal advice, how are they going to pay for the assignment?

The official receiver is allowed to negotiate a deal whereby they receive payment for the assignment from the 'winnings' of the legal action (a sale 'on credit', if you like). They should only follow this course where the action has a good chance of success, and following legal advice.

## I've seen letters discussing assignment marked 'subject to contract'. What is the significance of that?

Any letter sent offering the possibility of an assignment should be marked 'subject to contract', to avoid any assertion that the letter constitutes an equitable assignment.

## What is equitable assignment?

Equitable assignment occurs where the actions of one party could lead the other party to believe that they have accrued beneficial ownership of the property. As regards a right of action, it would lead to the messy situation that the claim may only be brought by the official receiver (as owner) but to the benefit of the equitable assignee.

## When would the official receiver, as trustee, disclaim a right of action?

The most likely circumstance under which a right of action may be considered to be 'onerous' by the official receiver (the condition under which property may be disclaimed) is where they are under pressure to deal with a claim that appears to have no merit.

In reality it is usually more appropriate to seek an assignment or settlement.

But the bankrupt wants the official receiver to disclaim so that they can apply for a vesting order – won't this be a good way to 'get rid' of the right of action that lawyers have told the official receiver has no merit.

Unfortunately, the bankrupt has been badly advised. The only persons who can apply to court for a vesting order in disclaimed property are those with an interest in the property. As the effect of a disclaimer is to bring the bankrupt's interest to an end, they cannot apply for a vesting order.

Of course, the defendants could apply for a vesting order, which would have the effect of bringing the claim to an end.

## What if the official receiver doesn't litigate, settle, assign or disclaim. If they do nothing, in other words?

If the official receiver does nothing then the claim will expire for want of prosecution. Without going into too much detail, claims must be brought within a certain period after the date of the event which led to the claim. The periods are three years for personal injury, six years for contract claims and 12 years for claims under deed or statute.

Of course, the official receiver, as trustee, should attempt to deal with any claim that has merit, in the best of interests of creditors.

## What about employment claims – do these vest in the official receiver as trustee?

Employment claims generally result from the employee being dismissed from their employment. To decide whether the claim vests or not you have to establish whether the claim is one for wrongful dismissal or one for unfair dismissal.

# What is the difference between wrongful dismissal and unfair dismissal?

Wrongful dismissal is a claim that there has been a dismissal in breach of the contract of employment (where, for example, the correct disciplinary procedures were not followed). The remedy for a breach of contract is usually financial compensation.

Unfair dismissal is a claim that it was unfair to dismiss the employee – the measure of fairness being decided by the tribunal. The prime remedy for a claim for unfair dismissal is reinstatement – though, unsurprisingly perhaps, the employee usually refuses this remedy and, instead, a financial award is made.

## A claim for wrongful dismissal is a vesting claim as it relates to a breach of contract, but what about unfair dismissal?

It has been held that, as the remedy in unfair dismissal is reinstatement, then the claim must remain personal to the bankrupt. The reason being that the official receiver, as trustee, cannot be reinstated to the job, so the remedy must be personal to the bankrupt.

## Introduction

### 37.1 Basic overview

A right of action is essentially a claim, a right that someone believes that they have against another to enforce a right, to recover money or property etc., often involving court proceedings. Generally speaking it will be property that the official receiver, acting as liquidator or trustee, can deal with, giving the opportunity to realise monies for the estate, but so far as bankruptcy cases are concerned there are exceptions, on which information and advice is given in this chapter.

The chapter also gives advice on how to deal with a right of action to maximise the benefit to creditors and includes a Part that deals with employment claims, as some of the principles are different to those applying to other types of actions.

### 37.2 Scope of this chapter

This chapter does not deal with claims against the insolvent, except for counterclaims and appeals. Advice on claims against the insolvent can be found in chapter 12.

Neither does this chapter deal with claims arising as a result of the liquidation or bankruptcy (claims for preferences and transactions at an undervalue, for example). Advice on those types of claims can be found in chapters 31 and 32.

This is an area which has been largely driven by case law. To assist official receivers in understanding how the law has developed, the 'Table of key right of action cases' lists the key cases that have had some impact on rights of action. The table is in rough chronological order. The (very) brief summary of the decision in each case should not be relied on its own but should, instead, be considered alongside the more detailed information in the chapter.

## **General points regarding rights of action**

### **37.3 A right of action**

In simple terms, a right of action (also called a 'cause of action' or a 'thing in action') is a right to claim something from somebody where, for example, that other party has been negligent or has breached a contract. It is a claim.

### **37.4 Property status of a right of action – company**

The Act provides that the official receiver, as liquidator, shall take into their custody all the property and things in action (which would include rights of action<sup>1</sup>) to which the company is entitled<sup>2</sup>).

Unlike in bankruptcy there can be no doubt whether a right of action belonging to a company in liquidation is one that the official receiver, as liquidator, can deal with. The official receiver should, in these circumstances, satisfy themselves that the right is one that belongs to the company and not, for example, to the directors of the company.

1. Section 436

2. Section 144(1)

## 37.5 Property status of a right of action and the vesting of the action in the official receiver as trustee - bankruptcy

The Act provides that all property belonging to or vested in the bankrupt at the commencement of the bankruptcy forms the bankrupt's estate<sup>1</sup>. Property is defined in the Act as including 'things in action' (which would include rights of action)<sup>2</sup> and the bankrupt's estate vests in the official receiver on their appointment as trustee<sup>3</sup>.

Not all rights of action constitute property and of those that do, not all would form part of a bankrupt's estate.

1. Section 283(1)

2. Section 436

3. Section 306

## 37.6 Not all rights of action form part of the estate - bankruptcy

Case law has developed principles that certain rights of action do not constitute property that would form part of the bankrupt's estate. This concept is explored fully later in this chapter but, in short, rights of action where damages are solely to be estimated by immediate reference to pain felt by the bankrupt in respect of their body, mind or character, and without immediate reference to their rights of property, would not form part of the bankruptcy estate<sup>1, 2</sup>.

1. *Beckham v Drake* (1849) 2 HL Cas 579

2. *Ord v Upton* [2000] Ch 352

## 3.7 Difference between claim and counter-claim is asset

Where there is a counter-claim, the value of a claim is considered to be the difference between the value of the claim and the value of the counter-claim<sup>1, 2, 3</sup>.

1. *Stein v Blake* [1996] 1 AC 243

2. Rule 14.25

3. Section 323

## 37.8 Action where right of set-off applies

A prime example of a right of action that is unlikely to be worth pursuing is where the action is against a creditor of the company or bankrupt and the value of that creditor's right of set-off<sup>1, 2</sup> exceeds the value of the claim.

Set-off only applies where there are mutual credit and debits as at the date of the company going into insolvency or the date of bankruptcy so, in cases where a claim is against a (former) creditor and that debt has been sold on by the creditor prior to the date of insolvency of the company or bankruptcy of the individual, set-off would not apply.

The official receiver should note that where right of set-off applies, they may still pursue claim if the case was likely to pay a dividend and the removal or reduction of that creditor's claim through set-off would materially increase the pro-rata payment to the other creditors.

1. Rule 14.25

2. Section 323

## 37.9 Forum for deciding a right of action

The vast majority of rights of actions encountered by official receivers will be matters that will ultimately be decided in court or at an employment tribunal, if they are not settled outside of legal proceedings.

There are other forums for deciding rights of actions, such as arbitration and a formal complaints procedure.

## 37.10 Arbitration

Arbitration is a process similar to that found in a court trial in that both sides present their case, the matter is considered and a binding judgment is handed down. The difference is that the person deciding the case is not a judge, rather they are an adjudicator appointed by the sides in dispute. They may be a specialist in the area of industry (or similar) in which the dispute arose. The arbitral process may be held anywhere and at a time to suit the parties and is not a public process.

In bankruptcy, the official receiver, as trustee, may be committed to follow an arbitration process if this is provided for in the contract in relation to which the right of action has arisen<sup>1</sup>.

The terms of an arbitration agreement may make provision for costs to be awarded against the 'loser' of the arbitration and, for this reason, it is unlikely that it will be

appropriate for the official receiver to continue with an arbitration. Instead settlement or assignment of the action should be considered.

More information about arbitration can be found on the website of the Chartered Institute of Arbitrators <http://www.ciarb.org/>.

1. Section 349A

## 37.11 Formal complaints to ombudsmen

Many public and private sector organisations have an appointed ombudsman to decide complaints against themselves (within that sector).

A list of the different ombudsmen is available at the website of the British and Irish Ombudsman Association [www.bioa.org.uk/](http://www.bioa.org.uk/).

Where a bankrupt is carrying on a complaint in this way, the official receiver may choose to continue the complaint if they believe that it has merit. In ombudsman's cases, adverse costs are not awarded for an unsuccessful complaint and the procedure ought to be relatively straightforward to follow.

The official receiver would not continue a complaint which is personal to the bankrupt as such complaints remain vested in the bankrupt personally and do not become part of the bankruptcy estate. Most complaints to ombudsmen will be based on a contract for services and will, therefore, vest in the official receiver, as trustee.

## 37.12 No right of action where matter has already been litigated

Where a matter has been litigated to judgment there can be no right of action. When the final judgment is given by the court, the right of action merges with the judgment and ceases to exist.

This principle does not include appeals (see paragraph 37.43).

## 37.13 Joint claims

There can be no such thing as a joint claim. Where more than one party is involved in an incident leading to a claim (a road traffic accident, for example), each party will have a separate claim for their own loss(es) as a result of the incident. In practice such actions will be brought together, as in jointly, but strictly speaking there will be two (or more) separate claims. This point is of importance if one of the two claimants becomes bankrupt and the other wishes to continue with the/their claim.

## 37.14 Class actions

A class action is one where a large (usually) number of people have claims that are substantially the same and against the same person. The claim is usually brought by a representative group for the ease of deciding the matter – rather than having separate hearings (or settlement) for each claim.

An example of a class action might be where a multi national oil company has caused damage to the livelihood of a large number of individuals (perhaps, following an oil leak). Each claim, on its own, might be too small to be worth litigating but, taken together, the sum total of claims is worth pursuing.

Other examples might be damage caused by food contamination on a large scale or health problems caused by a faulty prescription drug.

Where an insolvent has a claim that is being brought as part of a class action, the official receiver, as liquidator or trustee, should consider assigning the action back to the bankrupt, or to the representative group.

Where the company or bankrupt is not part of the representative group, the official receiver should ensure that their interest in the claim is noted by the solicitors dealing with the matter in order that they can receive a share of any settlement or award.

## Identifying a right of action and gathering information

### 37.15 Identifying a right of action – sources of information

There is no easy way of identifying a right of action, where the director or bankrupt has not included details in the preliminary information questionnaire or statement of affairs. Often it will be a case of putting two and two together from information provided during the interview – where, for example, the bankrupt provides information that they have been sacked from a job or involved in an accident.

The insolvent will often have engaged solicitors or other agents who should be written to using the standard letter<sup>1</sup> even if there is no indication of a right of action.

Sometimes, the existence of the right of action may not come to the attention of the official receiver until the other side (the defendant) writes asking for a view on the official receiver, as trustee or liquidator, carrying on the action.

1. NORD2

## 37.16 Information required from the insolvent claimant

In order that the official receiver, as liquidator or trustee, can assess which is the best course of action to take in relation to the right of action, they should attempt to seek the following information from the claimant:

- The event which led to the claim.
- The date of the event that led to the claim
- For contract claims – the date of the contract and a copy of the contract
- The identity of the defendant.
- The monetary value of the claim, including a breakdown of the damages and losses being claimed.
- A comment on the merits of the claim.
- Copies of any legal/counsel's opinion received in respect of the claim.
- For employment claims – whether the action is for wrongful or unfair dismissal.
- Any insurance policy backing the pursuit of the claim.
- The grounds on which any solicitors are acting (for example, is there a conditional fee arrangement, or similar?).
- Any limitation on the claim or advice received regarding the limitation date.
- Copies of any Claim Forms.
- Copies of any documents (for example, orders) issued by or to the court, tribunal or similar.
- Copies of any responses received from the defendant.
- Details of costs so far expended, and an estimate of costs required to bring the matter to a successful conclusion.
- An estimate of the adverse costs in the event of the claim being 'lost'.
- Details of any counter-claim being brought by the (proposed) defendant.

The official receiver may use the letter attached at [Annex A](#) for this purpose.

## 37.17 Getting realistic information regarding right of action

The official receiver, as liquidator or trustee, should not deal with a right of action (including selling that right of action), or otherwise dealing with it positively, which is without merit.

It is important to get a realistic view of the merits of the claim, including whether it is statute-barred. The official receiver should not rely solely on the views of the insolvent, which are liable to be over-optimistic, and should, instead, seek to obtain independent information from third party sources.

## 37.18 Assessing the merits of a right of action

In order to assist in the assessment of the merits of a right of action, the official receiver should consider any (existing) legal advice received by the company or bankrupt in respect of the action.

Where no such legal advice exists, the official receiver may consider appointing their own legal advisors to advise them on the merits of the action. If the advice is required in connection with an assignment, ideally the costs of the advice should be paid by the potential assignee; otherwise the official receiver may fund the costs from the estate.

If the payment required is over £2,500, the guidance in chapter 1 regarding the requirement to obtain permission should be followed before committing to any expenditure.

## Dealing with a right of action – the basics

### 37.19 Basic principle for official receiver when dealing with a right of action

The official receiver has a duty, when acting as liquidator or trustee, to realise assets (of which a right of action is one type) to the maximum benefit of the creditors<sup>1</sup>. The maximum benefit of creditors might be served by an early realisation of an asset even if that means achieving a lower amount in realisation. They should, however, consider the rights and interests of other parties – for example, the bankrupt or the defendant (the person against whom the bankrupt has a right of action).

See, particularly, paragraph 37.99 for information on circumstances where the official receiver may need to take account of the rights and interests of other parties.

1. *Shepherd v Legal Services Commission* [2003] BCC 728

### 37.20 Ways of dealing with a vesting right of action

There are, essentially, six ways that a right of action may be dealt with by the official receiver, as trustee or liquidator. Four of these options might be termed 'positive':

- Litigation (take the case to court or tribunal)
- Assignment (sell the right of action)
- Settlement (do a deal with the defendant to bring the claim to an end)
- Complaints

The remaining two options might be termed 'negative':

- Disclaimer
- Do nothing

Detailed guidance on these options is given later in this chapter.

## 37.21 Effect on solicitors engaged by insolvent of winding-up or bankruptcy order

A contract entered into by a company would form part of the liquidation.

Similarly, any contract or arrangement that the bankrupt has entered into for representation in respect of their claim would form part of the bankruptcy estate – though not if the underlying right of action were not capable of vesting in the official receiver as trustee. In either case, it is possible that the contract or arrangement might be ended by a clause in the document on which it is based.

Where the action vests the official receiver should make it clear to the solicitors that they do not wish to continue the arrangement (except where solicitors are to be retained to negotiate a settlement on behalf of the official receiver). The official receiver may use the letter attached at [Annex B](#) for a bankruptcy (or liquidation, with suitable amendment) for this purpose.

Any debt in respect of fees for work carried out up to the date of the winding up order or bankruptcy order would be a debt in the proceedings, though any liability for fees under a new post-bankruptcy arrangement entered into by the bankrupt (for example, where the bankrupt continued to employ the solicitor to advise them during or following an assignment or settlement) would, of course, be a post-bankruptcy debt for which the bankrupt would be liable.

## 37.22 Dealing with a claim for the recovery of bank charges

A claim for the recovery of bank charges is restricted to those charges levied as 'service' charges against the account(s) of the bankrupt. This is based on the premise that charges such as 'default fees' and/or 'late payment fees', which often

resulted in a levy of in excess of £25, did not reflect the value of the 'service' received (that is, it did not cost the sum charged to administer the fee and/or issue notification of it by post).

The period for which charges can be recovered is limited to six years prior to the date of the claim.

To successfully pursue a claim, it is usually necessary for the claim to include copy statements highlighting the 'excessive' charges. For this reason, there is generally no benefit in pursuing such a claim, unless the bankrupt is in possession of statements which already are, or may easily be, annotated in the required manner.

## 37.23 Dealing with a complaint for mis-selling of Payment Protection Insurance

Payment Protection Insurance is an insurance policy typically sold when a personal loan or some other form of personal credit is granted.

A complaint for mis-selling of PPI, or compensation paid as the consequence of a PPI mis-selling complain, would vest in the official receiver as trustee of the bankruptcy estate<sup>1</sup>. See chapter 38 for guidance on dealing with PPI complaints.

1. Ward v Official Receiver [2012] BPIR 1073

# Deciding whether a right of action vests - bankruptcy only

## 37.24 Scope of this part

This Part of the chapter provides information and guidance to assist an official receiver in making a decision as to whether or not a right of action vests in them as the trustee of a bankrupt's estate. As explained elsewhere, actions that are purely 'personal' do not vest.

This Part of the chapter does not deal with employment claims. Information and guidance relating to such claims can be found later in this chapter.

## 37.25 Property status of a right of action and the vesting of the action in the trustee

The Act provides that all property belonging to or vested in the bankrupt at the commencement of the bankruptcy forms the bankrupt's estate<sup>1</sup>. Property is defined in the Act as including 'things in action'<sup>2</sup> and the bankrupt's estate vests in the official receiver on their appointment as trustee<sup>3</sup>. Case law has, however, developed to set some limits as to the extent that certain types of rights of action constitute property for this purpose and, therefore, vest in a bankrupt's trustee.

1. Section 283(1)

2. Section 436

3. Section 306

## 37.26 Vesting not affected by any restriction on assignment

A provision prohibiting assignment of a right of action does not affect the vesting of a right of action in the trustee. The Act provides that property vests in the trustee without assignment<sup>1, 2</sup>.

Since the right of action vests by operation of law, the official receiver, as trustee, is not required to give notice of the vesting to potential defendants<sup>3</sup>.

1. Section 306(2)

2. *Re Landau (a bankrupt)* [1998] Ch 223

3. *Weddell v JA Pearce & Major (A Firm)* [1988] Ch 226

## 37.27 Actions that are solely 'personal' do not vest

It has long been a principle of bankruptcy law that actions that are solely 'personal' do not vest in the trustee and therefore they remain the property of the bankrupt<sup>1, 2, 3</sup>.

It was held, in 1841, that, 'Nothing is more clear than that a right of action for an injury to the property of the bankrupt will pass to his [trustee]; but it is otherwise as to an injury to his personal comfort. [Trustees] of a bankrupt are not to make a profit of a man's wounded feelings.' This principle still stands today.

1. *Howard v Crowther* 151 ER 1179

2. *Rogers v Spence* (1846) 8 ER 1586

3. *Beckham v Drake* (1849) 2 HL Cas 579

## 37.28 Definition of a personal action

A personal right of action has been defined as an action ‘where the damages are to be estimated by immediate reference to the pain felt by the bankrupt in respect of their body, mind or character, and without immediate reference to their rights of property’<sup>1</sup>.

1. Beckham v Drake (1849) 2 HL Cas 579

## 37.29 Examples of personal actions

Examples of personal (and therefore non vesting) rights of action are:

- Defamation
- Slander (unless the slander was reflected on property – where, for example, slanderous comments were made against the quality of a person’s goods)
- Libel (unless the libel was reflected on property – where, for example, libellous comments were made against the quality of a person’s goods)
- Battery
- Physical injury
- Mental injury (post traumatic stress disorder, for example)
- Reputational damage
- Wrongful arrest

## 37.30 Examples of non-personal (property) actions

Examples of non-personal (property) actions are:

- Breach of contract
- Loss of earnings
- Incurring additional expenses
- Trespass or damage to property
- Forfeiture
- Fraud

## 37.31 Special damages and general damages

Often, in correspondence or papers relating to a claim, the official receiver will see reference to ‘special damages’ and ‘general damages’.

Generally speaking, for the purposes of deciding who owns which part of any claim, special damages are ‘property’ which vest as part of a bankruptcy estate and general damages are ‘personal’ and thus remain in the ownership of the bankrupt.

## 37.32 Date that right arises relevant when deciding whether it vests in the trustee

Generally speaking, a right of action arises at the point of the event which leads to the claim (a vehicle accident, for example), though any action that relates to the property of the bankrupt (including a contract) would vest by virtue of the underlying property vesting, regardless of when the event took place (i.e., even after bankruptcy or after discharge).

Where there is no underlying property, a right of action arising from an event before the date of the bankruptcy would be an asset vesting in the official receiver, as trustee (assuming that the claim was not entirely 'personal').

Any right arising from an event after the date of bankruptcy, but before discharge, would be open to be claimed by the official receiver in their capacity as trustee as after acquired property (again, assuming the claim was not entirely 'personal'). The decision to claim should be based on the value of the 'property' element of the claim and the proximity of discharge, though official receivers should be careful not to claim a right of action that they cannot then deal with. In these circumstances it might be better that the action is left with the bankrupt and any 'property' monies awarded during bankruptcy claimed as after-acquired.

Unless the right arises in relation to property vested in the official receiver, any right of action arising after discharge would not vest in the official receiver as trustee and would not be open to be claimed as after-acquired property.

## 37.33 Date that right of action arises in personal injury type claim

Generally speaking, a personal injury type claim (which would normally only concern the official receiver were it to be a hybrid claim) arises at the date of the event leading to the injury, unless there is a delayed action to the injury – in which case the right arises at the date that the injury became apparent.

The solicitors acting for the bankrupt should be able to clarify when the right of action arose, as they will have had to use this date to calculate the limitation date.

## 37.34 Bankrupt making application for an order/declaration that action does not vest

It is open to a bankrupt to make an application to court for declaration that a right of action does not vest in the trustee of the bankruptcy estate. It has been held that

such an order would have no effect on any person who was not made a party to the application<sup>1</sup>.

It would be vitally important, if the official receiver, as trustee, is served with such an application, that they oppose the application (assuming they were of the view that the action did vest), seeking legal advice if necessary.

1. *Ord v Upton* [2000] Ch 352

## Flowchart to assist in decision whether a right of action vests

The flowchart attached at [Annex K](#) to this chapter may assist official receivers in deciding if, and, if so, to what extent, a right of action vests in a trustee. The flowchart is intended to be a useful overview of the subject, but is not to be used in isolation, without reference to the more detailed information given in the chapter.

## Vesting of ‘hybrid’ claims

### 37.35 Actions which involve damage to both the bankrupt’s person and property

Many events lead to damage to the bankrupt’s property and their person. For example, a typical road accident may lead to an injury to the bankrupt’s body (for example, whiplash) and, also, damage to the bankrupt’s property (damage to the car) and/or the need to incur additional (and otherwise unnecessary) expenses (damage to the financial position – which is a property damage). Following the relevant case law, this may cause a problem in deciding whether the action vests in the official receiver, as trustee, or not.

It used to be the case that such an action would be, effectively, ‘split’ between the personal damage and the property damage, and each claim pursued separately (one by the bankrupt and the other by their trustee)<sup>1</sup>. This way of deciding matters is not, however, now considered good law.

1. *Wilson v United Counties Bank* [1920] AC 102

## 37.36 Approach to actions which involve damage to both the bankrupt's person and property – a 'hybrid' claim

It has been held that where a right of action involves damage to both the person and property of the bankrupt, there is only one cause of action, with different 'heads' of damage<sup>1</sup>.

This position was confirmed, and somewhat advanced upon, in a later case<sup>2</sup>, where such an action (referred to in the judgment as a 'hybrid' claim) was held to be an action that would vest in a bankrupt's estate, with any damages awarded for the personal element of the claim being held on a constructive trust for the benefit of the bankrupt by their trustee.

1. *Stock v London Underground* 30 July 1999 CA, Times August 13 1999

2. *Ord v Upton* [2000] Ch 352

## 37.37 The possibility of 'splitting' a hybrid claim

A claim for race discrimination normally causes more than one type of damage (in technical terms, this is referred to as having more than one 'head of damage').

In the normal way of deciding such matters, such a claim would vest in the trustee in bankruptcy (as a 'hybrid' claim). It has been held, however, that in a claim for race discrimination the claimant can limit their claim to one for injured feelings making the claim entirely personal and taking it out of the bankruptcy estate. In the case in point, the bankrupt was allowed to 'drop' the loss of earnings part of the claim and continue with the claim for 'injured feelings'<sup>1</sup>.

It is thought that this approach was taken due to the seriousness of race discrimination, though it is possible that the principles would be applicable to other discrimination cases. It is not thought that the principle would be applicable to other types of 'hybrid' claims.

1. *Khan v Trident Safeguards Limited* [2004] ICR 1591

## 37.38 Summary of the position regarding hybrid claims

As explained above, all rights of action arising before the date of a bankruptcy order which seek to recover property vest in the trustee whether or not they contain claims

for damage that relate to 'personal' damages to which the bankrupt is entitled. Only a right of action that is solely personal would not vest.

In this context, it is irrelevant if the 'property' element of the claim is the lesser part.

## 37.39 Examples of hybrid actions

Examples of hybrid actions are as follows:

- An assault causing a bodily injury (personal) and damage to spectacles or clothing (property).
- A car crash causing a broken ankle (personal) and the resultant need to pay a third party to carry out household tasks such as shopping/cleaning/gardening (property)
- A car crash causing whiplash (personal), damage to a vehicle (property) and the need to use public transport at additional cost whilst the car was being repaired (property).
- A fall causing a strained back (personal), the need to spend money travelling to the hospital (property) and to pay for a private physiotherapist (property).
- Medical negligence leading to an arm injury (personal) and loss of earnings (property).
- An assault on a taxi driver causing a bodily injury (personal), post traumatic stress (personal), damage to the taxi (property) and an inability to work (loss of earnings – property).
- A fall in the street leading to a broken arm (personal) and damage to a laptop computer (property).
- A wrongful arrest (personal) where the bankrupt's front door was destroyed in the arrest (property).

An action would be a hybrid action even if the property damages were directly connected to the personal damages – as in the second and fourth examples above.

## 37.40 Getting the bankrupt's advisors to agree to the position in a hybrid claim

Where the official receiver is dealing with a 'hybrid' claim they should, as a first step, write to the bankrupt or their legal advisors asking them to form a view on whether the claim vests in the trustee of the bankruptcy estate, or not. Ideally, the position should be agreed.

The official receiver may use the letter attached at [Annex C](#) to this chapter for this purpose.

It is likely that, having read the cases referred to in the letter, the bankrupt or their legal advisors will form the view that the actions vests in them as trustee.

# Examples of types of claims to assist in vesting decision

## 37.41 Certain entitlements do not pass to trustee

Certain statutory entitlements (such as the entitlement to receive tax credits<sup>1</sup> or the entitlement to receive benefits<sup>2</sup>) do not pass to a trustee in bankruptcy. A right arising under such an entitlement cannot, therefore, be property which vests in the official receiver, as trustee.

1. Tax Credits Act 2002 section 45

2. Social Security Administration Act 1992 section 187

## 37.42 Insurance claims

A claim under an insurance contract entered into by the bankrupt would vest in the official receiver as trustee as a contract claim. This would be so even if the property subject to the claim would have been exempt had it been in the possession of the bankrupt as at the date of the making of the order (for example, where the bankrupt's vehicle was destroyed in a fire, or their tools of the trade stolen).

This is subject to any equitable charge on the monies recovered.

## 37.43 Right to bring an appeal

Generally the right to appeal is not ordinarily a 'thing in action' or, as such, an item of property falling within the definition of property given in the Act<sup>1</sup>. If it is not an item of property it will not form part of the bankrupt's estate and will not vest in the official receiver as trustee.<sup>2</sup>

A right of appeal, however, may constitute a thing in action if the right has an economic value in its own right in the sense that damages may still be available<sup>3</sup>. Certainly a right of appeal relating to a vesting action would vest in the official receiver as trustee, even if that right arose after discharge<sup>4, 5</sup>.

A right of appeal against a bankruptcy debt, including the judgement on which the order is founded, vests in the official receiver, as trustee<sup>6</sup>. The right to appeal the making of the bankruptcy order does not vest<sup>7</sup>.

An appeal against a tax assessment has been held to be a vesting claim and so would vest in the official receiver, as trustee<sup>8</sup>.

1. Section 436

2. Re GP Aviation Group International Ltd [2013] EWHC 1447 (Ch)

3. Morris v Morgan [1998] BPIR 754 CA

4. Wordsworth v Dixon [1997] BPIR 337

5. Cummings v Claremont Petroleum NL [1998] BPIR 187

6. Heath v Tang and Another; Stevens v Peacock [1993] 1 WLR 1421

7. Sands v Layne [2016] EWCA Civ 1159

8. Ahajot v Waller [2005] BPIR 82

## 37.44 Claims held on trust by the bankrupt

It may be the case that the bankrupt is holding a right of action on trust for another. This may be the case where the contract from which the right of action arose specified which party had the right to bring an action under the contract, in certain circumstances.

An example may be where the bankrupt was a party to a mortgage loan to purchase a property and it later turns out that the property was not as advertised. The right to sue in relation to any property purchased with the mortgage loan may remain with the mortgagee (under the terms of the mortgage contract), being held on trust by the bankrupt for the mortgagee.

Property held on trust by a bankrupt does not form part of their bankruptcy estate<sup>1</sup>, and so will not vest in the official receiver, as trustee.

The official receiver should, of course, satisfy themselves of the veracity of the trust.

1. Section 283(3)(a)

## 37.45 Claim for permanent disability under a life policy

A claim for permanent disability benefit under a life policy (or similar) would vest in the official receiver, as trustee, as the claim arises from a contract. It has been held that it is of no consequence that the claim is conditional on the claimant having suffered pain and injury. The payment is dependant upon a contractual right to a sum of money and the policy proceeds do not represent recompense to the bankrupt

for personal loss or damage, but rather payment on satisfaction of a contractual prospect<sup>1</sup>.

1. *Cork v Rawlins* [2001] Ch 792

## 37.46 Claim for criminal injury compensation

A claim for compensation from the Criminal Injuries Compensation Authority (<http://www.cica.gov.uk/>) has been held not to constitute property and cannot, therefore, vest in the trustee<sup>1</sup>. In short, it was held that there was no right to claim an award – the award was at the discretion of the board authority and could not, therefore, exist as property.

1. *Re Campbell* [1997] Ch 14

## 37.47 Actions relating to a right to hold a licence

A licence or similar, such as a pilot's licence or a solicitor's certificate to practice, is personal to the person to whom the licence was granted. Rights of action arising in relation to such a licence cannot, therefore, form part of a bankrupt's estate and consequently do not vest in the official receiver, as trustee<sup>1, 2</sup>.

1. *Re Rae (a bankrupt)* [1995] BCC 102

2. *Griffiths v Civil Aviation Authority* [1997] BPIR 50

## 37.48 Actions under the Matrimonial Causes Act

The Matrimonial Causes Act 1973 (MCA 1973)<sup>1</sup> allows a spouse to seek financial relief following divorce. Such a right does not constitute property (and even if it did, it would be property personal to the bankrupt) and cannot, therefore, form part of a bankrupt's estate or vest in the official receiver, as trustee.

Generally speaking, any right arising from a marriage would not vest in a trustee in bankruptcy. In short, the trustee is not party to a marriage and cannot, therefore, be party to any rights arising in relation to the marriage<sup>2</sup>.

The official receiver, as trustee, might consider claiming any property awarded in a financial settlement following divorce as after acquired property if such property is awarded during bankruptcy.

Property awarded under the MCA 1973 prior to the making of the bankruptcy order would vest in the official receiver as trustee.

## 37.49 Claims against veterinary surgeons (vets)

A right to claim against a vet (due, for example, to death or injury caused to a pet negligently during treatment) would vest in the official receiver, as trustee, because the right to bring a claim arises from the contract between the bankrupt and the vet.

If the bankrupt is also claiming personal distress (or similar) due to the negligent death or injury (etc.) of the pet, then the claim would be hybrid and would vest in the official receiver, as trustee.

## 37.50 Claims against professionals such as solicitors or accountants

Generally speaking, solicitors, accountants and other professionals are engaged under a contract for services and thus a claim against that professional would be based on that contract, and would vest in the official receiver, as trustee, notwithstanding the substance of the instruction.

## 37.51 Bankrupt bringing a claim on behalf of a deceased estate

Where a bankrupt is bringing a claim on behalf of a deceased estate, they would be doing so in a representative capacity and the claim would not form part of the bankruptcy estate and consequently would not vest in the official receiver, as trustee.

Any monies awarded as a result of the action may end up vesting if the bankrupt was also a beneficiary under the will but this point has to be considered separately.

## 37.52 Claims under the Fatal Accidents Act 1976

Where a death is caused by a wrongful act or neglect such as would (if death had not ensued) have entitled the deceased to bring an action for damages, the person liable shall still be liable to an action for damages despite the death of the person<sup>1</sup>. Such an action is for the benefit of the dependants of the person whose death was caused<sup>2</sup>.

An action may include (or consist entirely) of a claim for damages for bereavement<sup>3</sup>. A claim which is entirely for bereavement is personal to the bankrupt and would not form part of the bankruptcy estate. Where a claim is partly in respect of bereavement and partly in respect of a claim for financial losses resulting from the death, it would be a hybrid claim and would vest in the official receiver, as trustee.

1. Fatal Accidents Act 1976 section 1(1)

2. Fatal Accidents Act 1976 section 1(2)

3. Fatal Accidents Act 1976 section 1A

## 37.53 Claims under the Inheritance (Provision for Family and Dependents) Act 1975

A claim under the Inheritance (Provision for Family and Dependents) Act 1975 is a claim to an interest in a deceased estate on the grounds that the disposition of that estate does not make reasonable financial provision for the applicant<sup>1</sup>. Such a claim is personal and thus does not form part of the bankrupt's estate.

1. Inheritance (Provision for Family and Dependents) Act 1975 section 1

## 37.54 Claims arising from a bankrupt's pension

Under the relevant legislation<sup>1</sup>, any rights of the bankrupt under an approved pension arrangement are excluded from the bankruptcy estate.

A right of action arising under a bankrupt's pension a scheme would not, therefore, vest in the official receiver as trustee.

Matters would be different were the pension not approved.

1. Welfare Reform and Pensions Act 1999 section 11

## Effect of a right of action vesting

### 37.55 Bankrupt has no standing to bring or continue vesting claim

Where a right of action vests, the bankrupt has no standing (*locus standi*) to bring or continue the action without the official receiver (as trustee) becoming, at least, the co-claimant<sup>1, 2, 3, 4, 5</sup>.

This point should be made clear to the bankrupt and their advisors as soon as the official receiver becomes aware of a right of action that has vested in them as trustee.

The official receiver should use the letter attached at [Annex D](#), for this purpose.

1. *Jackson v North Eastern Railway Company* (1877) LR 5 Ch D 844

2. *Metropolitan Bank v Pooley* (1884-1885) 10 App Cas 210 HL

3. *Heath v Tang and Another*; *Stevens v Peacock* [1993] 1 WLR 1421

4. *Pickthall v Hill Dickinson LLP* [2009] PNLR 31

5. *Eaton v Mitchells & Butler plc* [2015] All ER

## 37.56 Important that official receiver takes initiative in dealing with a right of action

Despite the general inability of a bankrupt to continue an action once it has vested, it has been held that a bankrupt may continue to pursue the claim where they are in ignorance of the appointment of a trustee or of the vesting of their estate (including the right of action) in the trustee, whether or not they ought to have known of the appointment and vesting<sup>1</sup>.

Assuming that the official receiver follows the guidance elsewhere in this chapter and takes proactive steps in respect of the claim (in particular issuing the letter attached at [Annex D](#)), this situation is unlikely to arise.

1. NNM

## 37.57 Official receiver should not give indication that bankrupt or director may continue with claim

The official receiver should not, under any circumstances, give effective or explicit consent to a director of a company in liquidation or the bankrupt continuing with the litigation (including the issuing of proceedings) of any right of action belonging to the company in liquidation or vesting in them as trustee.

If such action were taken the director or bankrupt, as the case may be, may be considered to have been appointed as the official receiver's agent in this matter<sup>1</sup>.

To do so would leave the official receiver, as trustee, in the position of being, at least, co-claimant (in a bankruptcy) and possibly exposing the company or themselves to an adverse costs order.

1. *Vickery v Modern Security Systems Limited* [1998] BPIR 164

## 37.58 Court may award costs against solicitor who conducts proceedings on behalf of a known bankrupt

It has been held that a wasted costs order can be made against solicitors who conduct proceedings on behalf of a known bankrupt without the consent of the trustee in bankruptcy (which consent should generally not be given)<sup>1</sup>.

1. *Thames Chambers Solicitors v Miah* [2013] EWHC 1245 (QB)

## 37.59 Bankrupt's inability to bring a claim unaffected by having been awarded legal aid

The inability of a bankrupt to bring or continue a vesting right of action that vests in the official receiver, as trustee is unaffected by them having been granted legal aid<sup>1</sup>.

1. *James v Rutherford-Hodge* [2006] BPIR 973

## 37.60 Bankrupt's inability to bring a claim not contrary to human rights legislation

It has been held that the fact that a bankrupt is unable to bring a vesting action is not contrary to a bankrupt's right to access the courts under the human rights legislation<sup>1</sup>. Essentially, it was held that the right has not been denied; rather it has vested in the bankruptcy estate<sup>2</sup>.

1. Human Rights Act 1998

2. *Young v Official Receiver*, unreported

## 37.61 Claim issued when official receiver has not agreed

Where the bankrupt issues a claim in a vesting right of action without the permission of the official receiver as trustee, it is likely that the claim will be struck out as an abuse of process<sup>1</sup> or as being frivolous or vexatious<sup>2</sup>.

The issuing of a claim by a bankrupt's solicitors in circumstances where the solicitor is acting contrary to the advice of the official receiver is likely to be a breach of the standards of professional conduct, for which the official receiver should consider making a complaint to the Solicitors' Regulation Authority (<http://www.sra.org.uk/solicitors/solicitors.page>).

1. Pickthall v Hill Dickinson LLP [2009] PNLR 31

2. Metropolitan Bank v Pooley (1884-1885) 10 App Cas 210 HL

## Settlement of a right of action

### 37.62 Settlement – general

Settlement of a claim is the process by which the parties to a legal claim (the right of action) can agree to bring the claim to an end on terms – usually by the payment of a sum of money. Typically, a settlement is attempted before court proceedings are issued, though settlement is allowed after issue, subject to certain rules<sup>1</sup>.

Settlement is likely to be the most cost-effective way to deal with a vesting claim.

1. Civil Procedure Rules part 36

### 37.63 Settlement to be offered before assignment

Settlement is one of the 'positive' ways that the official receiver can deal with a vesting right of action, and should generally always be considered before assignment.

The reason being that the official receiver, as trustee, cannot demonstrate that they have acted in the best interests of creditors (and achieved the best realisation of the right of action) if they have not attempted settlement – for which a better price may be obtained than in an assignment<sup>1</sup>.

Assignment should not be promised before the defendant has had an opportunity to settle. Where the offer of settlement is likely to realise less than an assignment then, of course, the official receiver, as trustee, should explore the assignment in the best interests of creditors. But on this there is likely to be a timing issue, detrimental to the creditors. A settlement will, most likely, produce funds quickly whereas under an assignment, funds may only become available after the conclusion of litigation.

1. Re Edenote Ltd [1996] BCC 718

## 37.64 Settlement – official receiver may deal with negotiations

Where the right of action relates to a simple claim, it should be possible for the official receiver, as trustee, to conduct the settlement negotiations required. The official receiver should attempt to negotiate a payment close to the stated value of the claim (which might be apparent from the background papers provided by the company officers or bankrupt, but it may be appropriate to give a discount to reflect risk of failure in the case or risk of success in any counterclaim.

Where this is not possible or desirable, the official receiver may appoint their own legal advisors or retain those engaged by the company or bankrupt to pursue negotiations for a settlement.

## 37.65 ‘Ogden Tables’ may assist the official receiver in negotiating a settlement in personal injury cases

In personal injury type cases the official receiver, as trustee, may be assisted by the ‘[Ogden Tables](#)’ which give guidance on the amounts that should be awarded in cases of injury and death, including ‘property’ losses such as future medical/care expenses. But official receivers should be very wary of using such specialist information in such circumstances. The handling of personal injury claims is a specialism in its own right and is also likely to involve potentially competing interests – the trustee in bankruptcy, for the creditors on the one hand, and the bankrupt, for themselves, on the other.

## 37.66 Offers of settlement to be marked ‘without prejudice’

Any letter to the defendant offering (or enquiring into the possibility of) a settlement should be marked ‘without prejudice’.

This will give the official receiver a defence to any assertion that the letter was a formal offer to settle to which they are bound.

## 37.67 Settlement – retention of company’s or bankrupt’s solicitors

Where the official receiver, as liquidator or trustee, is dealing with a claim which is in the process of being negotiated towards settlement, they may wish to retain the solicitors engaged by the insolvent to continue to negotiate the settlement on their behalf. This would be a sensible option in that the solicitors would be aware of the value and strength of the claim and would be able to easily form a view whether any offered settlement was fair, although there may be difficulties later with this approach in 'hybrid' claims.

## 37.68 Conditions where bankrupt's solicitors retained

In the circumstances where the insolvent's solicitors are retained, assuming, of course, they were minded to be retained, the official receiver, as liquidator or trustee, should make it clear to the solicitors that they are being retained to negotiate (or continue to negotiate) an out of court settlement and under no circumstances should proceedings (including protective claims) be issued (whether in the name of the official receiver or the bankrupt) without express authority from the official receiver.

The official receiver may use the letter attached at [Annex E](#) for this purpose (modification will be necessary in a company case).

## 37.69 Payment of solicitor's costs where bankrupt's solicitors retained

Where the official receiver, as liquidator or trustee, chooses to attempt to retain the insolvent's solicitors in order to negotiate a settlement, the solicitor's reasonable costs may only be paid from the settlement (no funds will be made available from the estate and nor will the official receiver, as liquidator or trustee, pay the costs). In 'hybrid' claims, the costs should be deducted pro-rata from the gross claim - in effect, from each element of the settlement (and not, for example, just from the portion of the award due to the bankruptcy estate).

These points should be outlined to the retained solicitor from the outset of the instruction if they are minded to act in this way (which may benefit both parties).

## 37.70 Potential difficulties where bankrupt's solicitors retained

Where the bankrupt's solicitors are retained by the official receiver, as trustee, to negotiate a settlement, there may be difficulties where a settlement is reached in a

'hybrid' action and there is no apportionment of the settlement between 'personal' and 'property' damages (often called a 'global' settlement).

The difficulties may arise where, in such a global settlement, there is a dispute as to how the settlement monies should be apportioned between personal and property elements of the claim. In effect, the retained solicitor would be acting for both parties (the official receiver and the bankrupt) in this dispute. This is something to be borne in mind if, as seems sensible, the solicitors are instructed to act in seeking a settlement.

## 37.71 Appointment of the official receiver's own solicitors to negotiate a settlement

In claims where it is not possible or proper to retain the bankrupt's solicitors to negotiate a settlement, or to continue such a negotiation, the official receiver, as liquidator or trustee, may appoint their own legal advisors to assist in the negotiation of a settlement.

When considering this course of action, the official receiver should consider the costs of such an instruction against the amount of any potential settlement. Where necessary, the official receiver may incur a debit balance to pay the costs of such legal representation, seeking permission if necessary (see chapter 1).

## 37.72 Negotiating a settlement where limitation date approaching

In circumstances where the limitation date is approaching, it may be necessary for the official receiver, as liquidator or trustee, to take some action to protect the claim. This may be by way of a protective claim or a standstill agreement. Neither process should be undertaken without first seeking legal advice.

## 37.73 Settlement after issue of proceedings (a Part 36 settlement)

Whilst most settlement negotiations and settlements occur before the issue of proceedings, the relevant rules [note 3] do allow the claim to be settled after that event.

This may occur where the official receiver, as liquidator or trustee, has had to take action to suspend the running of the limitation period by issuing a Claim Form, or where proceedings had already been opened by the date of the making of the bankruptcy order.

It is not envisaged that the official receiver would enter into such a procedure without legal representation.

## 37.74 Advance payments during settlement

Sometimes, the defendants to a claim will offer interim payments to assist the claimant with ongoing expenses, general living costs, etc. Unless there is evidence to the contrary, these payments should be apportioned pro-rata between 'personal' and 'property' elements of the claim (and claimed accordingly).

# Assignment of a right of action – general overview

## 37.75 Assignment – general

In basic terms, the assignment of a right of action simply means the sale of a right of action.

Assignment is one of the 'positive' ways that the official receiver can deal with a vesting right of action, but such action should not be undertaken 'automatically' or without legal advice.

## 37.76 Content of this section

In very brief summary, this Part says that the official receiver, as liquidator or trustee, may assign a right of action but, before doing so, should consider, amongst other things, the rights of those affected, the price that should be paid for the action and the form and legality of the assignment.

It is extremely unlikely that it would be appropriate for the official receiver to offer an assignment without first receiving legal advice.

## 37.77 Basic principles to be considered before the assignment of a right of action

There are some basic principles that the official receiver, as liquidator or trustee, should consider before assigning a cause of action:

- Assignment should not be made without testing the market – including offering settlement to the defendant

- Assignment may be barred by terms in the original contract
- Assignment should not open the defendant up to vexatious litigation
- Frivolous claims (ones unlikely to succeed) should not be assigned
- Assignment should be absolute if the liquidator/trustee is to avoid being made a party to any/a/the judgment
- Liquidator/trustee is not required to assign right of action where the only offer received is derisory

It can be seen that some of these principles require a careful balancing of competing interests, for which legal advice will be required, to avoid the risk of action being brought against the official receiver.

## 37.78 Acting in the best interests of creditors – dealing with competing interests

The basic principle for the official receiver, as liquidator or trustee, when considering whether to assign a right of action, is that they do so in the best interests of the creditors, which means seeking good consideration for the assignment. Most of the law that has developed supports this principle, but there are some controls to protect the interests of the bankrupt and the defendant.

These competing considerations will require legal advice, particularly for complex claims<sup>1</sup> and, possibly, exceptionally, an application to court for directions.

1. *Faryab v Smith* [2001] BPIR 246

## 37.79 Seeking good consideration for the assignment if claim has merit

The official receiver, as liquidator or trustee, should see that the claim has merit before assigning it and if it does have merit they should seek fair payment<sup>1</sup>. The official receiver should accept an offer for assignment if it is reasonable and does not prejudice them but not generally before seeking, or attempting again to seek, a settlement from the proposed defendant<sup>2, 3</sup>.

On the other hand, the official receiver is not obliged to assign an action where the only offer is derisory and seeking other offers would be an unjustifiable expense<sup>4, 5</sup>.

1. *Cummings v Official Receiver* [2002] EWHC 2894 (Ch)

2. *Hamilton v Official Receiver* [2002] BPIR 602

3. *Edenote Ltd* [1996] BCC 718

4. *Khan v Official Receiver* [1997] BPIR 109

## 37.80 Legal advice required before and during assignment

The decision to offer an assignment of a right of action should only be taken following legal advice, particularly in complex claims<sup>1</sup>.

The official receiver, as trustee, will need advice to distinguish carefully between the value of the property and personal elements of the claim to properly account to the bankrupt if they are not the assignee. In short, the official receiver should seek the following advice from their legal advisors:

- Whether there is a cause of action.
- If there is, whether (and, if so, to what extent) it vests in the trustee (bankruptcy only).
- What merit there is to the cause of action.
- What value there is in the cause of action.
- What action may be taken to recover that value.
- Whether the proposed defendant might be prepared to settle and, ultimately,
- What it is in the best interests of creditors to do.

1. Faryab v Smith [2001] BPIR 246

## 37.81 Legal advice obtained by the company or bankrupt

It may be the case that the company or bankrupt has obtained its/their own legal advice regarding the merits of assigning the right of action. It is for the official receiver, as liquidator or trustee, to consider the source and currency of this advice before acting upon it. The official receiver should ensure that the advice provided covers, at least, the first five issues outlined in the paragraph above.

## 37.82 Legal advice – cost and source

It is likely that the costs of the official receiver obtaining initial legal advice on a claim, and its possible assignment, will be in the order of [text redacted]. The legal costs of the actual assignment are likely to be in the region of [text redacted].

## 37.83 Costs of obtaining legal advice to be met by potential assignee

The costs of obtaining legal advice should be met by the potential assignee and remitted to the estate prior to instructing solicitors unless arrangements are made between any solicitors acting for the potential assignee and the official receiver's solicitors. Where there is a solicitor acting for the potential assignee, it is acceptable to accept a written undertaking to pay the costs (where, for example, time is pressing due to an imminent expiration of a limitation period).

The official receiver should make it clear that they will expect the assignee to also pay the legal costs of the assignment if matters were to reach that point.

The official receiver may use the letter attached at [Annex F](#) (with suitable modifications for a company case) for this purpose.

## 37.84 Costs of obtaining legal advice where potential assignee is without funds

In exceptional circumstances (where, for example, the assignee wishes to take on a right of action that the official receiver considers has a good prospect of success, is without funds, and there is the prospect of funds being paid into the estate from assignment), the official receiver may incur a debit balance on the estate to seek the necessary legal advice; the costs of the legal advice being recovered from the consideration payable in respect of the assignment.

## 37.85 Challenging the official receiver's decision not to assign action

A potential assignee (including the bankrupt) may challenge the official receiver's decision, as liquidator or trustee, not to assign a right of action (back) to them<sup>1, 2, 3</sup>. The court will look to see that the official receiver's decision not to assign was reasonable when deciding such an application<sup>4</sup>.

The court will only overturn the official receiver's decision not to assign if that decision was made in bad faith or was perverse<sup>5</sup>.

By following the guidance in this section, the official receiver can reduce the likelihood of being subject to such an application.

1. Section 168(5)

2. Section 303

3. *Osborn v Cole* [1999] BPIR 251

4. *Shepherd v Official Receiver* [2006] EWHC 2902 (Ch)

5. *Hans Place Ltd* [1992] BCC 737

## 37.86 Seeking directions of court where there are matters of dispute or doubt

Where the official receiver, as liquidator or trustee, is unable to resolve matters of dispute or doubt connected with the assignment of a right of action (if, for example, there are competing offers, dispute as to the value of the claim or the risk of a legal challenge to the decision to/not to offer assignment), the official receiver may apply to the court for directions<sup>1, 2, 3</sup>. This should be considered to be an exceptional course of action.

1. Rule 13.4

2. Section 168(3)

3. *Craig v Humberclyde Industrial Finance Group Ltd* [1999] BCC 378

## Assignment to be absolute

### 37.87 Liquidator or trustee permitted to assign a cause of action

A liquidator is permitted to sell a right of action, as is a trustee in bankruptcy. It has been held that this does not constitute the illegal trafficking of claims (known as champerty or maintenance)<sup>1, 2, 3, 4</sup>.

To avoid any claim of champerty or maintenance, the assignment should be absolute and the assignor should retain no control over the right of action once assigned<sup>5, 6</sup>.

1. *Re Park Gate Waggon Works Co* (1881) 17 Ch D 234

2. *Kitson v Hardwick* (1871-72) LR 7 CP 473

3. *Seear v Lawson* (1880) LR 15 Ch D 426

4. Law of Property Act 1925 section 136

5. *Glegg v Bromley* [1912] 3 KB 474

6. Section 246ZD

### 37.88 Liquidator or trustee permitted to assign a right of action for future consideration

The official receiver, as liquidator or trustee, is permitted to assign a cause of action for future consideration<sup>1</sup>. The right of action may be assigned (back) to the bankrupt on this basis also<sup>2</sup>.

Assignment for a future share of the winnings should not be considered and, instead, any assignment for future consideration should be on the terms that the assignee pays the agreed consideration whether or not the action is successful.

1. *Guy v Churchill* (1889) 40 ChD 481

2. *Ramsey v Hartley* [1977] 1 WLR 686

## 37.89 All assignments of rights of action should be absolute

In order that the assignment of a right of action is considered proper, it should be an absolute assignment of every part of the right of action, and no control should be retained over the action. The assignment should include the transfer of:

- The legal right to the action;
- All legal remedies to the action; and
- The power to bring the action to an end (for example, by settlement) without the interference of the assignor.

An absolute assignment must be in writing, must be made under the hand of the assignor and must provide for written notice of the assignment to be given the person against whom the assignor had the original claim.<sup>1, 2, 3</sup>

1. Law of Property Act 1925 section 136

2. *Glegg v Bromley* [1912] 3 KB 474

3. *Hamilton v Official Receiver* [2002] BPIR 602

## 37.90 Consequences where assignment is not absolute – adverse costs

Where the official receiver as liquidator or trustee assigns a right of action on terms less than absolute (where, for example the action is assigned for a share of the 'winnings'), they leave the company/themselves open to a claim for adverse costs from the defendants in the event that the claim is unsuccessful<sup>1</sup>. The court has had, for a long period of time, a wide discretion as to whom should pay the costs of an unsuccessful action.

This should be taken into account when the terms of an assignment for future consideration are agreed and the official receiver should consider staying on the side of caution even if it means a lower return to creditors.

1. Stephen Hunt (as trustee in bankruptcy of Janan George Harb) v Janan George Harb, HRH Prince Abdul Aziz Bin Fahd Abdul Aziz [2011] EWCA Civ 1239

## Equitable assignments

### 37.91 Equitable assignments

An equitable assignment can take place when one party makes an outward expression of its intention to assign or transfer an item<sup>1</sup> or where the requirements of the law are not met<sup>2</sup>. So far as the official receiver is concerned, this is most likely to happen in correspondence discussing the possibility of assigning the right of action, or in correspondence responding to an offer to take an assignment of the action.

1. Finlan v Eyton Morris Winfield (A Firm) [2007] EWHC 914 (Ch)

2. Law of Property Act 1925 section 136

### 37.92 Adverse consequences of an equitable assignment

The effect of an equitable assignment is that the benefit of the right of action passes to the equitable assignee but they cannot commence proceedings on the claim without joining in the legal owner (the official receiver in this context), as a claimant or as a defendant if they do not consent to being a claimant.

In this, the risk for the official receiver is that they may find themselves liable for an adverse costs order as the court will normally require that the official receiver (as legal 'owner' of the claim) is joined as a party to the proceedings before judgment is given<sup>1</sup>.

Another risk is that if the document (the letter) on which the other sides seeks to rely as evidence of an equitable assignment offers the right of action for sale at consideration that is less than its true value, the official receiver, as liquidator or trustee, may be held to that offer, leading to a claim for restitution from creditors<sup>2, 3</sup> and a payment as compensation or in respect of a loss.

1. Three Rivers District Council v Bank of England (No. 1) [1996] QB 292

2. Section 168(5)

## 37.93 Letters discussing assignment to be marked 'subject to contract'

To avoid any assertion that an equitable assignment has taken place, the official receiver, as liquidator or trustee, should mark all letters offering assignment or discussing the possibility of offering an assignment 'subject to contract'. This is an important point not to overlook.

## Matters to consider prior to assignment

### 37.94 Official receiver to test the market prior to agreeing an assignment

The official receiver, as liquidator or trustee, should not accept an offer of assignment without first testing the market - that is assessing the value of the claim and establishing which other parties may be interested in purchasing the right of action (including the defendant in the form of a settlement)<sup>1,2</sup>.

The official receiver should not offer or accept an offer of assignment when the settlement of the claim is still possible.

1. Edennote Ltd [1996] BCC 718

2. Ultraframe (UK) Ltd v Rigby and others [2005] EWCA Civ 276

### 37.95 Official receiver to be fair to all parties

The official receiver, as liquidator or trustee, should be fair to all potential assignees and should not, for example, put conditions on an offer of assignment to one party which are not put on an offer to another party<sup>1</sup>.

1. Hellard v Michael [2009] EWHC 2414 (Ch)

### 37.96 Assessing the value of a claim

The official receiver, as liquidator or trustee, should, as with any other asset, seek consideration for the assignment that is as close to (or more than) the true value of the claim as circumstances allow. The value of the right may be ascertainable from

the paperwork provided by the insolvent. In addition the official receiver's legal advisors may be requested to advise on the value of the claim.

It has been held that the consideration required to be paid for an assignment might not be less than £1,000<sup>1</sup>

Where there is a counter-claim, the value of the claim would be the difference between the value of the claim and the value of the counter-claim<sup>2</sup>.

The agreed consideration should be in addition to the provision for the official receiver's legal costs.

1. Khan v Official Receiver [1997] BPIR 109

2. Stein v Blake [1996] 1 AC 243

## 37.97 Assignment to the defendant

The official receiver, as trustee, may assign the action to the defendant (effectively bring the action to an end)<sup>1</sup>, but the assignment should not be used as a tool to stifle the claim<sup>2</sup>.

If the offer from the defendant is the best offer, then that may be accepted, but not before the value of any offer from other potential assignees (particularly, the bankrupt) have been considered.

1. Official Receiver v Davis [1998] BPIR 771

2. Shepherd v Legal Services Commission [2003] BCC 728

## 37.98 Assignment (back) to the bankrupt

The bankrupt may request the assignment of a cause of action (back) to them where the official receiver, as trustee, decides not to (or is unable) to take it on (by settlement or litigation)<sup>1</sup>.

The official receiver has the power to assign a right of action back to the bankrupt<sup>2</sup>, but this should not be an 'automatic' action. For one thing, the official receiver should consider if a better offer may be possible and, for another, the official receiver should consider the rights of the defendant (even if the offer from the bankrupt is a good one).

1. Hamilton v Official Receiver [2002] BPIR 602

2. Kitson v Hardwick (1871-72) LR 7 CP 473

## 37.99 Considering the rights of the defendant

The official receiver should not assign a frivolous claim (one that is unlikely to succeed)<sup>1, 2</sup> and should exercise their power to assign with circumspection where to do so would, for example, leave the defendant open to vexatious litigation (in short, this is litigation brought for the sake of bringing litigation or litigation with no realistically achievable aim) at the whim of a bankrupt, a person against whom a successful litigant may have no opportunity to recover their costs)<sup>3, 4</sup>.

Before putting a bankrupt 'back in the saddle', the official receiver, as trustee, should bear in mind the consequences on the other parties in litigation of doing so.

1. Judd v Official Assignee [2001] BPIR 468

2. Citicorp and others v Official Trustee in Bankruptcy and Another [1996] FCA 1115

3. Re Papaloizu [1999] BPIR 106

4. Re Shettar [2003] BPIR 1055

## 37.100 Action may be non-assignable due to contractual prohibition

In actions which are based on a contract (an action for breach of contract), the right of action may be non-assignable where there is an express contractual prohibition on assignment<sup>1, 2</sup>.

Such a provision would not affect the vesting of an action in the trustee in bankruptcy as the action passes without assignment<sup>3</sup>, but is deemed to have been assigned<sup>4, 5</sup>.

The official receiver, as liquidator or trustee, should peruse the contract on which the action is (to be) based to satisfy themselves that there is no such clause. The legal advisors appointed by the official receiver can be asked to assess the situation if there is any doubt.

1. Linden Gardens Trust v Lenesta Sludge Disposals Ltd [1994] 1 AC 85

2. Quadmost Ltd (in liquidation) v Reorotech (Pebsham) Ltd [2001] BPIR

3. Section 306(2)

4. Section 311(4)

5. Re Landau [1998] Ch 223

## 37.101 Assigning where there is a counter-claim

The fact that a claim being brought by the insolvent is subject to a counter-claim will not of itself stop it from being assigned. The counter claim will, though, affect the value of the claim and, therefore, the value of the consideration that the official receiver may receive for the assignment.

Where there is a counter-claim, the value of a claim is considered to be the difference between the value of the claim and the value of the counter-claim<sup>1, 2, 3</sup>.

Where the counter-claim is higher than the value of the claim this will, in effect, be a bar to the assignment of the claim<sup>4</sup>.

1. Stein v Blake [1996] AC 243

2. Section 323

3. Rule 4.90

4. Craig v Humberclyde Industrial Finance Group Ltd [1999] BCC 378

## 37.102 Assignment does not confer right to bring an action where none existed previously

The assignment of a cause of action to the bankrupt does not give them right to bring an action where that right did not exist prior to the assignment<sup>1</sup>.

Examples of this may be where the bankrupt is seeking to overturn a judgment on which the bankruptcy order was made<sup>2</sup> or where the action was statute barred.

1. Seven Eight Six Properties Ltd v Ghafour [1997] BPIR 519

2. Royal Bank of Scotland plc v Farley [1996] BPIR 638

## 37.103 Right of action should be assigned before expiration of limitation period

A right of action should be assigned before the relevant limitation period has expired<sup>1</sup>.

In reality, it is unlikely that any parties would be interested in acquiring a right of action which had become statute barred.

It follows that it is in the best interests of the creditors that the official receiver, as liquidator or trustee, should seek to deal with the right of action, either by assignment or settlement, before the expiration of the limitation period.

1. Haq v Singh [2001] WLR 1594

## 37.104 Indemnifying the official receiver against adverse costs following assignment

It is possible, particularly in cases where the right of action was sold 'on credit', that the defendant may seek to join the official receiver, as liquidator or trustee, in any judgment in the action and seek costs. They may seek do this on the basis that the official receiver stands to gain from the prosecution of the claim, or that the right of action ought not to have been assigned in the first place.

The official receiver will protect themselves against this eventuality in two ways:

- The assignee will provide an indemnity as part of the assignment (the official receiver's legal advisors should be instructed to deal with this point). It has been held that the seeking of such an indemnity by the official receiver is not an unreasonable one<sup>1, 2</sup>.
- By following the procedure that settlement should be offered prior to assignment, the official receiver will have the defence that this was the defendant's opportunity to settle the claim, and avoid assignment and the bringing/continuation of legal proceedings.

1. *Osborn v Cole* [1999] BPIR 251

2. *Re Shettar* [2003] BPIR 1055

## 37.105 Potential problem where assignment follows issue of proceedings

Where a protective claim is issued by the liquidator or trustee followed by an assignment of the right of action, the assignee will have to apply for court to amend the proceedings to take (transfer) them into their name<sup>1, 2</sup>. If the court refuses that request, the claim will be lost unless the official receiver was minded to take it forward in their own name (which, they should not do, as explained elsewhere).

Issuing the claim in the potential assignee's name in advance of the assignment would be likely to be viewed as an abuse of the process of the court and lead to the claim being struck out<sup>3</sup>.

1. Civil Procedure Rules part 19.2

2. Civil Procedure Rules part 17.1

3. *Pickthall v Hill Dickinson LLP* [2009] PNLR 31

## 37.106 Deed of assignment signed by deputy official receiver

It is acceptable for the deed of assignment to be signed by a deputy official receiver in place of the official receiver, as liquidator or trustee, if required.

Where the official receiver is liquidator or trustee, any assistant official receiver appointed as a deputy official receiver to that official receiver has the same powers as the official receiver<sup>1,2</sup> (assistant official receiver is not a term recognised in the legislation - see also chapter 1).

1. Section 399

2. Section 400

## Litigation of a right of action

### 37.107 Litigation – General

Litigation is one of the ‘positive’ ways that the official receiver can deal with a vesting right of action.

Litigation, in this context, can be taken to mean the issuing and pursuit of court action by the official receiver, as liquidator or trustee, as the original owner (the insolvent) would have done. For the purposes of this section of the chapter, litigation does not include the negotiation of a settlement (which is covered elsewhere in the chapter).

### 37.108 Bankrupt has no standing to bring or continue vesting claim

Where a right of action vests in the trustee, the bankrupt has no standing to bring or continue the action without the official receiver (as trustee) becoming, at least, the co-claimant<sup>1, 2, 3, 4</sup>.

A similar principle would apply where the right of action forms part of the assets of a company in liquidation.

The official receiver should put the bankrupt and/or their advisors on notice of this. The official receiver may use the letter attached at [Annex D](#) for this purpose.

1. Jackson v North Eastern Railway Company (1877) LR 5 Ch D 844

2. *The Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210 HL

3. *Heath v Tang and another*; *Stevens v Peacock* 01993] 1 WLR 1421

4. *Pickthall v Hill Dickinson LLP* [2009] PNLR 31

## 37.109 Litigation by official receiver not normally the appropriate way to deal with a right of action

It is extremely unlikely that it would be appropriate for the official receiver, as liquidator or trustee, to litigate a right of action.

It is not possible to completely rule out the possibility of litigation, but this course of action is unlikely to be the correct, or most appropriate, course of action for an official receiver to take. Settlement or assignment should be considered first.

## 37.110 Reasons not to litigate a right of action

There are four main reasons that it is not normally appropriate for the official receiver, as liquidator or trustee, to litigate a right of action:

- The risk of an adverse costs order against the official receiver personally if they are trustee<sup>1</sup>. The official receiver acting as liquidator will normally have no personal liability for costs unless there has been some impropriety on their part<sup>2</sup>. Any adverse costs order may result in the need for a fruitless payment to be paid by The Insolvency Service to cover the loss to creditors.
- From a practical point of view, it is difficult to bring an action where the involvement (to attend hearings, etc.) of a (possibly unwilling) director or bankrupt is required. This is particularly the case in a personal injury type claim where it might be required to have the bankrupt (who might have been the claimant) attend medical examinations, etc.
- The official receiver, as liquidator or trustee, is, generally, without funds to pursue an action and, whilst it is possible to incur a debit balance or request creditors to provide a 'fighting fund', the claim would have to have a high potential value to make this course of action worthwhile.
- While the litigation may have the possibility of a higher monetary return to creditors, their interests might be better served by an early realisation (by settlement or assignment) even if that is likely to realise a lower amount.

1. *Vickery v Modern Security Systems Limited* [1998] 1 BCLC 428

2. *Metalloy Supplies Ltd (in liquidation) v MA (UK) Ltd* [1997] 1 WLR 1613

## 37.111 Pressure to litigate applied by solicitors

The official receiver should not allow the insolvent's solicitors to pressure them into continuing (or bringing) the claim, unless they have received their own legal advice that that is the best way to proceed. Often, the solicitor will have been engaged on a conditional fee ('no-win no-fee') arrangement where they will only be paid following a successful outcome and will, therefore, have a vested interest in pursuing the matter through to a successful conclusion by way of litigation.

## 37.112 Insurance backed claims

An insurance policy taken out in the name of the bankrupt to, for example, cover themselves against an adverse costs order would vest in the official receiver as trustee. The official receiver would then have the benefit of that policy. This would apply even if the claim were to be personal to the bankrupt.

This is subject to any clause in the policy terminating it in the event of bankruptcy. Notwithstanding this, it is unlikely to materially affect the basic principle that the official receiver, as trustee, should avoid litigating a right of action, for the reasons given above.

## 37.113 Official receiver should not allow claim to be brought in their name on behalf of original claimant

It has been held that the official receiver should not allow himself/herself to accept engagement as a 'hired gun'<sup>1</sup>. What this means is that the liquidator or trustee should not accept payment in return for bringing a claim.

1. Re Ng (a bankrupt) [1997] BCC 507

## 37.114 Legal advice to be obtained before litigation

No litigation should be considered by the official receiver, as liquidator or trustee, without first seeking legal advice. Where there are no funds in the estate to pay for this advice, the official receiver could send a circular to the principal (preferential) creditors asking them to contribute towards a fighting fund.

Alternatively, the official receiver could make a payment from the estate to obtain that advice provided that it can be shown that litigation is considered to be the best course of action – supported by relevant facts and copy documents, with the decision making process recorded on the relevant ISCIS Note.

If the payment required is over £2,500, the guidance in chapter 1 regarding the requirement to obtain prior permission should be followed before committing to any expenditure.

## 37.115 Information to be obtained and assessed before taking the decision to litigate a claim

Where an official receiver is considering bringing or continuing legal proceedings, they should obtain sufficient information to enable a decision to be made as to whether or not this is an appropriate course of action. The information should cover, at least, the following areas and should complement the general information obtained regarding the claim:

- Details of the events leading up to the decision to take legal action.
- Information regarding the potential success of the case (including any legal opinion obtained in this regard). On what information is this decision based?
- The estimated costs of bringing the action.
- The estimated potential costs of losing the action.
- The balance on the estate and value of potential future realisations.
- The estimated potential value to the estate of bringing the action.
- What provisions have been made to pay any adverse costs order (for example, a creditors' fighting fund).

A note should be made on the electronic file of the above matters considered and the conclusion reached.

## 37.116 Seeking an adjournment

Often, a case will already be going through litigation when it comes to the attention of the official receiver, and it is not unusual for there to be an imminent (sometimes a very imminent) hearing. The insolvent's solicitors will frequently try to encourage the official receiver to seek an adjournment.

The seeking of an adjournment of an ongoing claim - including written application – may be considered by the court to be a formal application which, particularly if opposed, could result in the court refusing to make the adjournment order and making an adverse costs order against the official receiver.

Seeking an adjournment would constitute the bringing of legal proceedings – for which permission of the Senior Official Receiver is required unless suitable indemnities are in place.

In the event that the official receiver is unable to positively deal with the right of action (for example, by way of settlement or assignment) prior to the next scheduled hearing, they may, in advance of seeking an adjournment, request that the other side (the defendants) agree to the adjournment with each side bearing its own costs in the application.

Alternatively, if the official receiver believes that there is no merit in seeking an adjournment, they may, instead, write to the court stating that they do not intend to be present or represented at the hearing as there are no funds in the estate. The court will then make such order as it sees fit (which may well be an adjournment).

## 37.117 Consulting creditors

Where there are no funds with which to pursue an action, or to obtain legal advice regarding the merits of pursuing an action, the official receiver, as liquidator or trustee, may circulate creditors and ask them to provide the required funding (often known as a 'fighting fund'). It is not necessary to circulate all creditors, just the main creditors with the main financial interest in the outcome, including any creditors holding security over the relevant right of action.

It is rare for creditors to respond to such a circular in a positive manner, but such a circular does have the benefit of protecting the official receiver from criticism from creditors in the event that they subsequently decides not to litigate.

The official receiver may use the letter at [Annex G](#) or this purpose (with suitable modification in a company case).

## 37.118 Limit on creditors' involvement in litigation

The trustee or liquidator does not lose their right to pursue a claim/litigation in the manner they consider appropriate where creditors have provided a fighting fund. In other words, the official receiver, as liquidator or trustee, would retain control of the litigation and the creditors may not interfere<sup>1</sup>.

1. Re Exchange Travel (Holdings) Ltd (No.3) [1997] BCC 784

## 37.119 Creditor may apply to carry on action (companies only)

Where the official receiver, as liquidator, is not prepared to litigate (whether they are without funds or because they have been legally advised not to), a creditor or contributory may make an application to the court for leave to carry on the action<sup>1</sup>. In these circumstances, the official receiver should attend the hearing and object to the application unless it is granted on the basis that no costs fall on the company or the official receiver (which is a condition likely to be imposed by the court).

1. Section 167(3)

## 37.120 Official receiver to become claimant in bankruptcy case

In the rare event that the official receiver, as trustee, decides to continue litigation already begun by a bankrupt they would have to apply to court to be substituted as claimant<sup>1</sup>.

In a liquidation, the action would continue in the name of the company.

1. Civil Procedure Rules part 19.2(4)

## 37.121 Official receiver not to pursue speculative claim

It would not normally be appropriate for the official receiver, as liquidator or trustee, to pursue a speculative claim unless the creditors were in favour of that course of action and had provided appropriate indemnities, etc.<sup>1</sup>

1. James v Rutherford-Hodge [2006] BPIR 973

## 37.122 Insurance backed claims

Any insurance policy in the name of the company to cover it against an adverse costs order would continue to be property of the company in liquidation and the company would continue to have the benefit of that policy.

An insurance policy taken out in the name of the bankrupt to cover themselves against an adverse costs order, for example, would vest in the official receiver as trustee of the bankrupt's estate. The official receiver, as trustee, would then have the benefit of that policy.

This is subject to any clause in the policy terminating it in the event of formal insolvency or any assignment of the insurance to a third party – for example, the company or legal advisor assisting in the bringing of the claim.

Notwithstanding this, it is unlikely to materially affect the basic principle that the official receiver, as liquidator or trustee, should avoid litigating a right of action.

## 37.123 Cannot bring claim again

It is not possible to litigate a matter that has already been litigated to a judgment. The defendant would have an automatic defence as what is known as cause of action estoppel.

A similar principle applies where an award has been issued following a complaint to an Ombudsman<sup>1</sup>

1. Clark v In Focus Asset Management & Tax Solutions Ltd [2014] EWCA Civ 118]

## 37.124 Prosecution of a frivolous claim vexatious

A vexatious action is an action that is being brought merely for annoyance or oppression where no practical remedy is likely. A vexatious claim is likely to be stopped by the court, using a restraint order<sup>1, 2</sup>.

It has been held that the prosecution of a frivolous claim (one with no chance of succeeding) would be vexatious<sup>3</sup>.

1. Civil Procedure Rules part 3.11

2. Senior Courts Act 1981 section 42

3. Citicorp and others v Official Trustee in Bankruptcy and Another [1996] FCA 1115

## 37.125 Dealing with/enforcing a judgment following successful litigation

It is likely that any solicitors engaged by the official receiver, as liquidator or trustee, to litigate a right of action will be able to provide advice on enforcing a judgment debt where payment is not made.

Information and guidance on enforcing a judgment debt can be found on GOV.UK.

# Limitation periods

## 37.126 Time limits for bringing claims

The law sets time limits in which a claim must be brought<sup>1</sup>. It would not be possible to fully explore all relevant provisions here and, generally speaking, the official receiver should obtain legal advice on a case-by-case basis. That said, the basic principles are as follows:

- Personal injury claims – three years from the date the cause of action accrued; or the date of knowledge (if later) of the person injured<sup>2</sup>.
- Contract claims – six years from the date on which the cause of action accrued<sup>3</sup>.
- Claims under deed or statute – twelve years from the date on which the cause of action accrued<sup>4</sup>.

1. Limitation Act 1980

2. Limitation Act 1980 section 11

3. Limitation Act 1980 section 5

4. Limitation Act 1980 section 8

## 37.127 Relevant date for a personal injury claim

So far as a personal injury claim is concerned, the limitation period begins with the date of the event leading to the injury<sup>1</sup>, unless there is a delayed appearance of the adverse condition (as in some cases of asbestosis, for example), in which case the right accrues when the condition becomes apparent<sup>2</sup>.

1. Limitation Act 1980 section 11(4)(a)

2. Limitation Act 1980 section 11(4)(b)

## 37.128 Relevant date for a professional negligence claim against a solicitor

Generally speaking, in professional negligence claims, where the claimant became aware that they had been negligently advised at a date later than the date that the advice was given, then there is an additional three years to bring a claim from the date that the claimant first had the knowledge of negligence required for bringing an action for damages in respect of the relevant damage<sup>1</sup>.

The defendants may seek to challenge the claimant's assertion as to the date that they first had knowledge<sup>2</sup>.

1. Limitation Act 1980 section 14A(5)

2. *Haward v Fawcetts* [2006] 1 WLR 682

## 37.129 Protective claims where expiration of limitation date imminent

A protective claim (sometimes known as a protective writ) involves issuing proceedings but refraining from serving the proceedings on the defendant for a maximum period of four months<sup>1</sup> – during which period a settlement can be negotiated. No adverse costs order can be made until the claim is served.

There are potential difficulties in bringing a protective claim. The rules for bringing claims, for example, provide that the claim form shall contain details of the nature of the claim and the remedy sought<sup>2</sup>. This information may not be known to the official receiver, as liquidator or trustee, at the relevant time. A protective claim may be challenged if it does not meet the requirements of the relevant procedural rules<sup>3</sup>. Legal advice should therefore be sought before such a claim is issued.

1. Civil Procedure Rules part 7.5

2. Civil Procedure Rules part 16.2

3. *Nomura International plc v Granada Group Ltd* [2008] Bus LR 1

## 37.130 Substitution of a party after the expiration of the limitation date

The legislation places restrictions on amendments to an issued claim after the limitation period has expired<sup>1</sup>. One of these restrictions concerns the substitution of one party for another (as would be necessary if the official receiver, as trustee, were to continue an action already started by the bankrupt). The relevant rules<sup>2</sup> provide that, where it is not possible to properly continue the action without substituting or adding a party, then such substitution or addition may be allowed.

1. Limitation Act 1980 section 35

2. Civil Procedure Rules part 19.5(2)

## 37.131 Issuing a claim after expiration of limitation period

It is possible for a claim to be issued after the expiration of the relevant limitation period where there was a technical defect in an earlier claim (for example, a failure of service)<sup>1</sup> but this possibility should not be taken for granted.

1. *Horton v Sadler* [2007] 1 AC 307

## 37.132 Standstill agreements

A standstill agreement is an agreement between the defendant and the claimant that the running of the limitation period can be suspended. This course of action may be followed where the limitation date is approaching and the official receiver, as liquidator or trustee, needs more time to consider the merits of the claim, or attempt to reach a settlement.

Such agreements should be avoided without first seeking legal advice, as a poorly worded agreement might leave the claimant unable to bring the claim when, for example, settlement negotiations break down<sup>1</sup>.

The official receiver could make a payment from the estate to obtain that advice provided that it can be shown that entering into such an agreement is considered to be the best course of action – supported by relevant facts and copy documents, with the decision making process recorded on the relevant ISCIS Note.

If the payment required is over £2,500, the guidance in chapter 1 regarding the requirement to obtain prior permission should be followed before committing to any expenditure.

1. Gold Shipping Navigation Co SA v Lulu Maritime Ltd EWHC 1365 (Admlty)

## Employment claims - general

### 37.133 Employment claims generally

Employment claims are generally brought before an Employment Tribunal, unlike other types of claims where the usual forum is the court (though such claim may end up in the court, ultimately). An employment claim will almost certainly concern the bankrupt's leaving of a job, in connection with which they are claiming unfair dismissal or wrongful dismissal.

Another type of employment claim often encountered is one for discrimination, which may or may not be connected with a claim for loss of a job.

### 37.134 Information required from the claimant

In order that the official receiver, as trustee, can assess which is the best option to take in respect of a right of action relating to an employment claim, they should, as a minimum, seek the following information from the claimant bankrupt:

- The event which led to the claim and the date of that event.
- The identity of the defendant.
- The monetary value of the claim, including a breakdown of the damages and losses being claimed.
- Whether the action is for wrongful dismissal, unfair dismissal and/or something else.
- Any insurance policy that is backing the claim.
- The grounds on which any solicitors are acting (for example, is it a conditional fee arrangement, or similar?).
- Any limitation on the claim.
- Copies of any claim forms (this will, most likely, be an ET1 form).
- Copies of any documents (for example, orders) issued by or to the tribunal.

The letter attached at [Annex A](#) may be used for this purpose

## 37.135 Employment Tribunals

Employment Tribunals hear claims to do with employment. They operate in a way similar to courts in that they receive submissions from both sides before considering the evidence and making a binding judgment.

More information on Employment Tribunals can be found on GOV.UK.

## 37.136 Time limit for bringing an employment claim

A claim relating to dismissal (wrongful or unfair) made to an Employment Tribunal must normally be made within three months of the dismissal (normally the dismissal will be the last day worked – regardless of any pay in-lieu of notice, etc.) or last discriminatory act complained of<sup>1</sup>. The Employment Tribunal has discretion to extend this time period<sup>2</sup> where the employee was unable to bring the claim or where it would not have been appropriate to do so (where, for example, the employee was completing, or believed that they were completing, the (former) employer's internal procedures<sup>3</sup> or where the employee was seriously ill)<sup>4</sup>.

Where a claim for wrongful dismissal is brought in a court, the time limit is six years from the date of dismissal<sup>5</sup>.

1. Employment Rights Act 1996 section 111(2)(a)

2. Employment Rights Act 1996 section 111(2)(b)

3. Marks and Spencer plc v Williams-Ryan [2005] ICR 1293

4. Employment Rights Act 1996 section 111(2)

## 37.137 General principle regarding employment claims in bankruptcy

It is a general principle of insolvency legislation that an employment contract (one that requires the bankrupt to provide their skill and/or labour) cannot vest in the trustee in bankruptcy. The trustee cannot carry out the role of the bankrupt, nor can they force the bankrupt to remain in the job and any right of action arising from that contract must remain personal to the bankrupt<sup>1</sup>.

Where the contract has ended (whether by termination or conclusion), any right to claim under that contract would vest in the official receiver, as trustee.

Most employment claims tend to be as a consequence of the bankrupt's dismissal from a job and the ending of the contract of employment. Not all claims for dismissal vest in the official receiver, as trustee and to decide whether a claim for dismissal vests, it is necessary to decide whether the claim is one for unfair dismissal or wrongful dismissal. In short, unfair dismissal claims do not vest; wrongful dismissal claims do.

1. *Beckham v Drake* (1849) 9 ER 1213

## 37.138 Settling an employment claim

As with any other sort of claim, an employment claim may be settled before or during the time it is submitted to the employment tribunal.

It is the normal procedure for the employment tribunal to send a copy of any claim received to the Advisory, Conciliation and Arbitration Service (ACAS) who will attempt to assist the parties in reaching a settlement, if that is what they both wish to do. The official receiver should consider such a facility if the claim is one that vests.

# Unfair dismissal and wrongful dismissal

## 37.139 Unfair dismissal versus wrongful dismissal

In simple terms, a claim for unfair dismissal is a claim that that the bankrupt ought not to have been dismissed from their job (it was 'unfair' to have done so). The primary remedy for an unfair dismissal claim is to reinstate the bankrupt to the job

from which they were unfairly dismissed, or re-engage themselves in an alternative job. Unfair dismissal is a creation of statute<sup>1</sup>.

A claim for wrongful dismissal, on the other hand, is a claim that the person was dismissed in breach of their contract of employment (where, for example, a contractual notice period was not given or where an inefficiency procedure was not followed correctly). Fairness (or otherwise) is not at issue – maybe, for example, the employee was inefficient and it was ‘fair’ to dismiss them, but the correct procedure (as provided for in the contract) was not followed. The remedy for wrongful dismissal is normally financial compensation. Wrongful dismissal is a concept of common law.

1. Employment Rights Act 1996

## 37.140 Constructive dismissal

Constructive dismissal does not, of itself, give rise to a right of action, though it may lead to a claim for unfair dismissal and/or wrongful dismissal.

In simple terms, constructive dismissal describes a situation where an employee terminates their own contract of employment by reason of their employer’s conduct.

In the case of a claim for dismissal based on constructive dismissal, the tribunal or court would first need to establish that the claimed constructive dismissal was, in fact, a dismissal and not, simply, a resignation.

## 37.141 Unfair dismissal

Where a person believes that they have been unfairly dismissed, they may make a claim for unfair dismissal to the employment tribunal<sup>1</sup>. It is then for the employer to show that the dismissal was not unfair with regards to such reasons as the capability, conduct or redundancy of the employee<sup>2</sup>.

Where the tribunal finds in favour of the employee, it will explain to them what order it can make as regards reinstatement to the job from which they were unfairly dismissed, or re-engagement to an alternative job<sup>3</sup> and ask if they wish the tribunal to make such an order<sup>4</sup>. Perhaps unsurprisingly, it is often the case that the employee does not wish to be reinstated or re-engaged, in which case the tribunal may make an award of compensation for the unfair dismissal<sup>5, 6</sup>.

1. Employment Rights Act 1996 section 111

2. Employment Rights Act 1996 section 98

3. Employment Rights Act 1996 section 113

4. Employment Rights Act 1996 section 112

5. Employment Rights Act 1996 section 112

## 37.142 A claim for unfair dismissal does not vest in the trustee

It has been held that a claim for unfair dismissal is personal and cannot vest in the trustee of a bankruptcy estate. This is regardless of whether the bankrupt is seeking reinstatement/re-engagement or simply compensation<sup>1</sup>.

In simple terms, the reason for this is that the primary remedy for a claim for unfair dismissal is reinstatement, and this is not something that the official receiver, as trustee, can be awarded. The trustee cannot carry on the employment.

Any compensation (including for unpaid wages) awarded in connection with a claim for unfair dismissal will be 'personal' to the bankrupt and will not form part of their estate in bankruptcy.

1. Grady v HM Prison Service [2003] ICR 753

## 37.143 Dealing with a claim for unfair dismissal

Where the official receiver, as trustee, has notice of a claim for unfair dismissal, they should write to the solicitors or advisors acting for the bankrupt (or the bankrupt themselves if there are no solicitors or advisors), copying in the relevant employment tribunal and ask them to consider whether they believe that the claim vests.

In the likely situation that they conclude that it does not vest, the claim can then proceed unhindered by the official receiver, as trustee.

The letter attached at [Annex H](#) may be used for this purpose (and includes reference to the leading case on the subject<sup>1</sup>).

1. Grady v HM Prison Service [2003] ICR 753

## 37.144 Wrongful dismissal

A claim for wrongful dismissal is a claim that the dismissal was a dismissal in breach of a provision of the employment contract. In order to be able to bring an action for wrongful dismissal, the employee must show that they were engaged for a fixed period, or a period terminable by notice, and that there were insufficient grounds for their dismissal.

Apart from in exceptional cases, the correct forum for a claim for wrongful dismissal is the employment tribunal<sup>1</sup>.

Unlike in an unfair dismissal claim, it is not the normal practice of the tribunal to enforce the employment contract (to seek to reinstate the employee)<sup>2</sup>. The normal remedy where the tribunal finds in favour of the employee is to award damages.

1. R v East Berkshire Health Authority ex parte Walsh [1985] QB 152

2. Whitwood Chemical Co v Hardman [1891] 2 Ch 416 CA

## 37.145 A claim for wrongful dismissal is a claim that there was a breach of contract and would normally vest

Where there is a claim for wrongful dismissal, it is clear that the person has been dismissed and there is, therefore, no ongoing employment contract. The employee is released from the employment contract by the employer's actions<sup>1</sup>. The right to claim for the breach of contract would, therefore, vest in the official receiver as trustee of the bankrupt's estate.

1. General Billposting Co Ltd [1909] AC 118

## 37.146 Dealing with a claim for wrongful dismissal – getting agreement that claim vests

Where the official receiver, as trustee, is aware that a bankrupt is bringing a claim for wrongful dismissal they should write to the solicitors or advisors acting for the bankrupt (or the bankrupt themselves if there are no solicitors or advisors), copying in the relevant employment tribunal, and inform them that they believe that the right of action vests in them as trustee of the bankruptcy estate. They should seek their agreement to this.

The matter can then proceed on an 'agreed' basis and the official receiver can seek to deal with the right of action in line with the guidance elsewhere in this chapter.

The letter attached at [Annex I](#) may be used for this purpose.

## 37.147 A claim for wrongful dismissal and a claim for unfair dismissal can arise from the same dismissal

It is possible that a bankrupt may have a claim for wrongful dismissal and unfair dismissal based on the same dismissal. Contrary to what might be thought, this would not be a 'hybrid' claim.

In essence, what the official receiver is dealing with is two, separate, rights of action, one that arises from statute and one that arises from a breach of contract (the wrongful dismissal claim). They can be dealt with as two, separate, claims.

Most likely, the appropriate course of action would be to seek to assign the wrongful dismissal claim back to the bankrupt.

## **Discrimination claims relating to employment**

### **37.148 Claims for discrimination**

Where an employee feels that they have suffered some disadvantage in connection with their employment due to their sex, race, disability, religion or belief, sexual orientation or age, they may make a claim for discrimination against the employer<sup>1</sup>.

This may be connected to, or separate from, a claim for dismissal and normally discrimination claims are heard by an Employment Tribunal.

1. Equality Act 2010

### **37.149 Remedies for a claim for discrimination**

The remedies in a claim for discrimination include a declaration of the rights of the parties and an order for compensation (not limited to an order for compensation to injury to feelings)<sup>1</sup>.

The declaration of rights and any compensation for injured feelings would be 'personal' to the bankrupt and any compensation for losses (such as wages losses) would be a 'property' claim, vesting in the official receiver, as trustee.

1. Equality Act 2010 section 124

### **37.150 The possibility of limiting a discrimination claim to avoid it vesting**

In the normal way of deciding such matters, a claim for discrimination (that is, one with more than one head of damage – a 'hybrid' claim) would vest in the official receiver as trustee of the bankrupt's estate. It has been held that in a claim for race discrimination, the claimant can limit their claim to one for a declaration and compensation for injured feelings, making the claim entirely personal and taking it

out of the bankruptcy estate. The claimant can limit their claim at any point (even once it is before the employment tribunal)<sup>1</sup>.

It is thought that the court took this approach due to the seriousness of race discrimination, though it is possible that the principles would be applicable to other discrimination claims. That point has yet to be tested in court. It is not thought that the principle would be applicable to other 'hybrid' claims.

1. Khan v Trident Safeguards Limited [2004] EWCA Civ 624

## 37.151 Dealing with a claim for discrimination – getting agreement that claim vests

Where the official receiver, as trustee, is aware that a bankrupt is bringing a claim for discrimination they should write to the solicitors or advisors acting for the bankrupt (or the bankrupt themselves if there are no solicitors or advisors), copying in the relevant employment tribunal and inform them that they believe that the right of action vests in them as trustee of the bankruptcy estate. They should seek their agreement to this.

The matter can then proceed on an 'agreed' basis and the official receiver can seek to deal with the right of action in line with guidance elsewhere in this chapter.

The official receiver may use the letter attached at [Annex J](#) for this purpose.

## 37.152 Where claimant bringing a claim for discrimination and unfair dismissal

Where a claimant is bringing a claim for unfair dismissal (which does not vest) and a claim for discrimination (which, generally, does vest, it has been held that the employment tribunal can distinguish between the two claims as separate claims and not treat the claim as a 'hybrid' action<sup>1</sup>.

The unfair dismissal claim can then proceed unhindered by the official receiver, as trustee, leaving the discrimination claim to be dealt with as appropriate. That said, it is likely that the best outcome in this circumstance is to seek an assignment of the discrimination claim back to the bankrupt. The claims will be inextricably linked and the bankrupt (and trustee) may find it difficult to litigate each claim separately.

1. Grady v HM Prison Service [2003] ICR 753

# Other employment claims – redundancy and equal pay

## 37.153 A claim for redundancy

Assuming that the contract (employment) has ended as at the date of bankruptcy, the right to claim and receive the redundancy payment vests in the official receiver, as trustee. This would apply equally to a claim for enhanced redundancy (where a redundancy payment has been made but the ex-employee is seeking to increase the amount awarded).

Where the contract (employment) has not ended as at the date of bankruptcy (where, for example, the offer of redundancy has been made and, perhaps, accepted but the employment has yet to cease) any redundancy payment made during the term of bankruptcy should be claimed as after-acquired property<sup>1</sup>, except for arrears of pay (including pay in lieu of notice and holiday pay) which should be claimed under an IPA/IPO<sup>2</sup>.

1. Section 307

2. Section 310

## 37.154 Equal pay claims

A claim for equal pay<sup>1</sup> is claim that an employee (generally, a woman) has been paid less than another person of the other sex doing the same job.

Generally speaking a claim for equal pay will be brought whilst the person is still in the employment to which the claim arises and, that being the case, it would remain personal to a bankrupt and would not form part of their bankruptcy estate. However, any compensatory payment made during the term of bankruptcy would be considered income and should be claimed under a 'lump sum' IPO/IPA<sup>2, 3</sup>.

Similarly, any increase in future pay secured as a result of the action could be considered for an (increased) monthly IPO/IPA if it is awarded during the period of bankruptcy. Such a claim brought after the contract (employment) has ended would vest in the official receiver, as trustee of the bankruptcy estate and the whole amount of compensation would be due to the estate whenever paid. The bankrupt may not limit their claim to one for injured feelings (as is allowed in a claim for unfair dismissal) as compensation for non-economic losses may not be awarded in an equal pay claim<sup>4</sup>.

1. Equality Act 2010 section 19

2. Section 310

3. Section 310A

4. *Allan v Newcastle-upon-Tyne City Council*; *Degnan v Redcar and Cleveland Borough Council* [2005] ICR 1170

## 37.155 Loss of earnings for a period after the making of the bankruptcy order

Where a court makes an award for the loss of future earnings in a vesting claim (most likely a wrongful dismissal claim but not an unfair dismissal claim), the money represents property damages and will therefore vest in the official receiver as trustee<sup>1, 2</sup>. This is the case despite the fact that the award was intended to compensate the bankrupt for lost earnings beyond the date of discharge<sup>3</sup>. The logic behind this position is that the creditors rely upon the ability of a borrower to be able to work and earn money when they decide to give credit.

This view should, however, be balanced against the principle that bankruptcy is intended to provide a 'fresh-start' to the bankrupt. In this regard, it has become normal practice that the official receiver limit their claim over the future loss of earnings to those monies representing the lost earnings in the period ending three years after the commencement of bankruptcy. This brings the official receiver's claim to the monies in line with the period that they would have been able to claim the monies under an IPO/IPA.

1. *Beckham v Drake* (1849) 2 HL Cas 579

2. *Ord v Upton* [2000] BPIR 582

3. *Official Receiver v Mulkerrins* [2002] BPIR 582

## Dealing with the fruits of a right of action

### 37.156 Dealing with the fruits of a right of action – general

The section of the chapter gives guidance and advice on dealing with the 'fruits' of a right of action. Usually, this will be monies received following the settlement of a claim, but the monies may have come from the successful litigation of a claim.

Generally speaking, any dispute as to the distribution of the fruits of a legal action will arise in a bankruptcy case where the bankrupt has a personal interest in a hybrid claim and this section concentrates largely on those areas.

The advice in this section of the chapter is given on the basis that the judgment following a successful litigation has been converted into monies (whether following enforcement, or not).

Advice on enforcing a judgment is given in paragraph 37.125.

## 37.157 Dealing with the fruits of a right of action – ‘non-hybrid’ claims

Where the fruits of the right of action result from a right of action that is not a ‘hybrid’ right of action/claim there will be no need to apportion the funds and the official receiver should have the funds remitted to the estate, dealing with any agent’s (solicitor’s) fees and monies due to other third parties such as the DWP in the normal way.

## 37.158 Dealing with the fruits of a right of action – ‘hybrid’ claims

In circumstances where an award is made or settlement reached in respect of a ‘hybrid’ claim, there is the issue of apportioning the monies between ‘personal’ (where the monies are held by the official receiver, as trustee, on trust for the bankrupt) and ‘property’ elements.

## 37.159 Apportioning an award in a hybrid claim following litigation

Where an award is made following litigation, it ought to be possible to establish the apportionment between ‘personal’ and ‘property’ elements of the claim. Details of the award can often be found in the judgment or order given by the court or, where there is a ‘global’ award (with no breakdown), the apportionment may be calculable from the papers filed in court in respect of the claim.

## 37.160 Apportioning a settlement in a hybrid claim where settlement follows the issuing of proceedings

Apportioning monies in settlement of a claim may be more difficult than monies awarded following litigation. Where the settlement follows the bringing of legal proceedings, the portions into which the monies should be divided should be calculable from the papers filed in court in respect of the claim.

## 37.161 Apportioning a settlement in a hybrid claim where settlement precedes the issuing of proceedings

In the case that the settlement precedes the issuing of proceedings, the apportionment of the settlement monies may prove to be more problematic as the claim may not have been fully made out at the point of settlement.

Where there is evidence to show the division of the claim between ‘personal’ and ‘property’ elements, the official receiver, as trustee, should maintain a position that the settlement monies should be apportioned pro-rata in the same ratio unless this obviously looks perverse.

Where there is no such evidence, there is a principle that the monies should be divided equally between ‘personal’ and ‘property’ elements<sup>1</sup>. If this point is put to the solicitors acting for the bankrupt it may encourage them to assist in the formulation of figures to assist with a more accurate apportionment – particularly given that the personal element of a hybrid claim is typically greater than the property element.

1. Re Kavanagh [1950] All ER 39

## 37.162 Special damages and general damages

Often, in correspondence or papers relating to a claim the official receiver will see reference to ‘special damages’ and ‘general damages’.

Generally speaking, special damages are ‘property’ and general damages are ‘personal’.

## 37.163 Securing monies where a hybrid claim is apportioned

The official receiver, as trustee, should request that the monies awarded following litigation or following a settlement of a hybrid claim should be remitted to them whilst the apportionment is decided. The monies can be held on a suspense account pending the agreement of their division. This way, the bankrupt has an incentive to attend to matters and not to let it them drift.

## 37.164 Seeking directions of court where there are matters of dispute or doubt

Where the official receiver, as trustee, is unable to resolve matters of dispute or doubt connected with the ascertainment or distribution of 'personal' funds held on constructive trust or the apportionment of a 'global' settlement, they may apply to the court for directions<sup>1, 2</sup>.

1. Rule 13.4

2. Section 168(3)

## 37.165 Monies awarded for 'personal' elements of a claim may not be claimed

Monies awarded for 'personal' elements of a claim following litigation or secured in a settlement after the making of the bankruptcy order may not be claimed by the official receiver, as trustee, unless those monies change character during the period of bankruptcy<sup>1</sup>.

There is no statutory or precedent definition of a change of character but, typically, it would be characterised by the purchase of an asset such as a motor vehicle. In that example, the vehicle may then be claimed as after acquired property. The spending of the monies on the general living costs of the bankrupt and their family would not be a change of character<sup>2</sup>.

There is doubt as to whether the negotiation of the funds (for example, the movement of funds from a current account to a savings account, or similar) might constitute a change of character.

Where the action has proceeded to judgment prior to the making of the bankruptcy order, any monies awarded and paid to the bankrupt (including 'personal' monies) would form part of the bankruptcy estate.

1. *Re Wilson ex parte Vine* (1878) LR 8 CH D

2. Section 307

## 37.166 Claiming a 'personal' award

It has been held that a part of any award of compensation in respect of a 'personal' right might be claimed for the bankruptcy estate. The relevant case<sup>1</sup> did not give any indication when it would be appropriate, or correct, to claim such an award.

Whilst it is possible that the official receiver may seek to claim such an award, the position that should be taken is that 'personal' awards might only be claimed if they change character.

1. Grady v HM Prison Service [2003] ICR 753

## 37.167 Advance payments during settlement

Sometimes, the defendants to a claim will offer interim payments to assist the claimant with ongoing expenses, general living costs, etc. Unless, there is evidence to the contrary, these payments should be apportioned pro-rata between 'personal' and 'property' elements of the claim (and claimed accordingly).

## 37.168 Constructive trusts

Monies awarded to a bankrupt for 'personal' damages in a hybrid action do not form part of the bankrupt's estate and are, instead, held on constructive trust for the bankrupt by the official receiver, as trustee of the bankrupt's estate.

In simple terms, a constructive trust is a trust that is not expressly created and instead comes into existence to deal with property held by a person where it would be inequitable for that person to assume full beneficial ownership of that property<sup>1</sup>.

To relate it to the situation of a hybrid claim, the official receiver, as trustee, comes into possession of the personal monies as an inadvertent effect of them being the 'owner' of the right of action.

1. Bannister v Bannister [1948] 2 All ER 133

## 37.169 The practical effect of monies being held by the official receiver in a constructive trust

The bankruptcy estate cannot benefit from the monies held under a constructive trust in these circumstances and, therefore, the official receiver, as trustee, should pay over those monies to the bankrupt at the earliest opportunity.

In many cases, the official receiver will never come into actual possession of the monies and, in such cases, they should agree to the monies being paid to the bankrupt by those holding the funds (for example, the bankrupt's solicitors).

## 37.170 A claim settled or concluded and monies paid prior to the making of the bankruptcy order

Where a claim is settled or concluded by litigation prior to the making of the bankruptcy order, the monies, received or awarded, would form part of the estate simply as 'cash at bank', whether or not the damages were 'personal'<sup>1</sup>.

1. Ord v Upton [2000] Ch 352 at 360

## 37.171 A claim settled or concluded prior to the making of the bankruptcy order but monies not paid

Where a 'property' claim is settled or concluded by litigation prior to the making of the bankruptcy order, any monies awarded but not paid will form part of the bankruptcy estate.

The position is less certain where a 'personal claim is settled or concluded by litigation prior to the making of the bankruptcy order. Where the official receiver encounters this situation the advice of the Senior Official Receiver's Office should be sought.

## 37.172 A claim settled or concluded post-discharge

Assuming that the claim was a vesting claim, or was, unusually, claimed as after-acquired property, any monies awarded would form part of the bankrupt's estate even if they were awarded or paid after discharge (with appropriate division for 'hybrid' claims) and consequently should be claimed by the official receiver, as trustee.

## 37.173 Monies awarded as periodic payments

A successful claim may result in a judgment or order requiring the defendant to make payments to the claimant on a periodic basis. Whether, and how, these monies may form part of the estate (or be claimed for the estate) will largely turn on the facts of the case.

Where the judgment is simply a lump sum payable by instalments then the lump sum and the right to receive the instalment payments would form part of the estate and

should be claimed accordingly (split between ‘personal’ and ‘property’ elements as appropriate)<sup>1</sup>.

Where the judgment is an award that provides for the damages to replace lost income on a periodic basis, it is likely that the payments would constitute income within the meaning of The Act<sup>2</sup> and would, therefore, be available for inclusion of a calculation for an IPO/IPA<sup>3, 4</sup>.

In both cases, this would be subject to any monies being ‘personal’ to the bankrupt (for example, periodic payments being made to enable the bankrupt to have care relating to a personal injury). Whilst, technically, the income-type claim would not be affected by the restriction on claiming, it is unlikely that a court would make an IPO on those terms.

1. Re Bell [1998] BPIR 26

2. Section 310(7)

3. Section 310

4. Section 310A

## 37.174 A ‘personal’ award intended to provide medical care

Where the bankrupt receives an award that is intended to allow the purchase of items to assist with their medical care, it would not be appropriate to claim these items as after-acquired property, under the ‘change of character’ situation.

## 37.175 An award for permanent disability under a life policy

A claim for permanent disability benefit under a life policy (or similar) would vest in the official receiver, as trustee, as the claim arises from a contract. It has been held that it is of no consequence that the claim is conditional on the claimant having suffered pain and injury. The payment is dependant upon a contractual right to a sum of money and the policy proceeds do not represent recompense to the bankrupt for personal loss or damage, but rather payment on satisfaction of a contractual prospect<sup>1</sup>.

1. Cork v Rawlins [2001] Ch 792

## 37.176 Award made where defendant in formal insolvency

Where an award is made in a vesting right of action and the person against whom the award is made has entered into formal insolvency, the official receiver should ensure that the claim is lodged with the relevant office-holder.

## **Third-party interest in the fruits of a right of action**

### **37.177 Right of set-off**

In cases where the insolvent has a claim against a creditor, any award will be subject to automatic set-off and the official receiver's claim, as liquidator or trustee, over the monies will extend only to any surplus after set-off. Set-off only applies where there are mutual credit and debits as at the date of the insolvency of the company or date of bankruptcy so, in cases where a claim is against a creditor and that debt has been sold on by the creditor prior to that date, set-off would not apply<sup>1, 2</sup>.

Set-off is mandatory and will normally be automatically applied by the creditor. In some cases, the creditor may choose to forgo the right of set-off and, in such a case, the official receiver should claim the monies awarded.

1. Rule 14.25

2. Section 323

### **37.178 Claims handling fees**

It may be the case that the insolvent has engaged a claims-handling company, particularly in 'complaint' type cases such as those for PPI mis-selling.

It is open to the official receiver, as liquidator or trustee, to continue to retain the services of those agents, but this must be on the clear understanding that any fees must come from monies the agents secure by their actions. The fees will not be paid by the official receiver or from the estate without there being an underlying realisation. The official receiver should also confirm that the fees the agent charges/intends to charge are reasonable in the circumstances. The decision to retain the agents should be considered against the value of the service provided (including the ease with which the official receiver could successfully conduct the work himself) against the likely return to the estate.

Where the claim has come to fruition before the making of the order (or before the official receiver had knowledge of the claim), the official receiver may allow the fees to be paid on the same terms but they are not bound by the terms of the contract

with the bankrupt. Where the fees are considered to be high in relation to the amount of work carried out consideration should be made to offering a lower fee based on the work carried out.

## 37.179 Legal fees in successful settlements

Where the official receiver, as liquidator or trustee, chooses to retain the insolvent's solicitors in order to negotiate a settlement, the solicitors' reasonable costs may only be paid from the settlement (no funds will be made available from the estate and nor will the official receiver, as liquidator or trustee, pay the costs). In 'hybrid' claims, the costs should be deducted pro-rata from each element of the settlement (and not, for example, just from the portion of the award due to the estate).

In the very unlikely event that solicitors for the insolvent have been retained to act in litigation, the same principles would apply.

## 37.180 Solicitor claiming lien over funds

Whilst the official receiver, as liquidator or trustee, can agree to the payment of fees incurred in bringing the right of action to a successful settlement, they should not allow the monies awarded to be used to pay a debt for fees incurred on an unrelated matter.

If it comes to it, the official receiver should point out to the solicitor claiming the funds that they are under an obligation to surrender the funds, the penalty for non-compliance being contempt of court<sup>1, 2, 3, 4</sup>.

1. Section 235(2)

2. Section 235(5)

3. Section 312(2)

4. Section 312(2)

## 37.181 Creditor with an equitable charge over the award

The official receiver should take care that any monies due to third parties under an equitable charge are paid over. An example of this may be where the bankrupt has been granted free use of a replacement vehicle while the loss to a vehicle is subject to an insurance claim. In such as case, the person who provided the hire vehicle may have an equitable charge over that portion of the claim.

In such cases, the official receiver should seek proof that the vehicle (or similar) was provided before agreeing that the claimed amount be deducted from the award.

It is possible that such a claim will have been assigned to the hire company prior to bankruptcy – possibly by a clause in the hire agreement.

## 37.182 Recovery of benefits and NHS costs

A person who is unable to work due to illness, injury or similar may receive support from the Department for Work and Pensions (DWP) in the form of benefits. Where the person is subsequently awarded monies for loss of income for the period that they were receiving benefit support, the DWP may recover those benefit monies (<https://www.gov.uk/government/publications/recovery-of-benefits-and-or-lump-sum-payments-and-nhs-charges-technical-guidance>). This scheme operates on the principle that the person should not be compensated twice for the same loss. The official receiver, as trustee, should not object to such a recovery.

## Loss of earnings awards

### 37.183 Loss of earnings where the employer has continued to pay wages

In some circumstances, the bankrupt's employer may continue to pay the bankrupt's wages whilst they are absent from work due to the injury suffered to which the claim results.

In this context, if matters were to be looked at in the round, the bankrupt has not incurred a loss in this matter, it is the employer who has incurred the loss. It can only be fair, therefore, that the official receiver, as trustee, accepts the employer's claim over the loss of earnings element of the claim as appropriate. The view to take is that the bankrupt is an agent for the employer's claim. The official receiver should check, though, that the employer is not receiving any monies in excess of those they paid to the bankrupt. Any surplus would represent an asset in the bankruptcy.

### 37.184 Loss of earnings for a period after the making of the bankruptcy order

Where a court makes an award for the loss of future earnings, the money represents property damages and will therefore vest in the official receiver as trustee<sup>1,2</sup>. This is

the case despite the fact that the award was intended to compensate the bankrupt for lost earnings beyond the date of discharge<sup>3</sup>. The logic behind this position is that the creditors rely upon the ability of a borrower to be able to work and earn money when they decide to give credit.

This view should, however, be balanced against the principle that bankruptcy is intended to provide a ‘fresh-start’ to the bankrupt. In this regard, it has become normal practice that the official receiver limit their claim over the future loss of earnings to those monies representing the lost earnings in the period ending three years after the commencement of bankruptcy. This brings the official receiver’s claim to the monies in line with the period that they would have been able to claim the monies under an IPO/IPA.

1. *Beckham v Drake* (1849) 2 HL Cas 579

2. *Ord v Upton* [2000] BPIR 582

3. *Official Receiver v Mulkerrins* [2002] BPIR 582

## 37.185 ‘Smith v Manchester’ awards

A ‘Smith v Manchester’ award refers to a type of award made where the claimant’s injury is not severe enough to prevent them from working, but compromises their ability to undertake a full range of tasks<sup>1</sup>. The award is intended to recognise that, whilst the claimant is still able to carry out their current job (and there is, therefore, no immediate loss of earnings), they will experience difficulty in obtaining a new job were the current one to be lost, or a better job, due to their injury-related restricted ability<sup>2</sup>.

A ‘Smith v Manchester’ type claim is a ‘property’ claim, vesting in the official receiver as trustee. As the award is speculative in nature, any such award should be claimed in full by the official receiver.

1. *Smith v Manchester Corp* (1974) 17 KIR 1

2. *Morgan v UPS Ltd* [2008] EWCA Civ 375

## “Negative” options for dealing with a right of action

### 37.186 ‘Negative’ options – general

As outlined elsewhere in this chapter there are, essentially, six ways of dealing with a right of action:

- Settlement
- Assignment
- Complaint
- Litigation
- Disclaimer
- Do nothing

Generally speaking, it is best to take one of the first three options as these will maximise the return to creditors whilst minimising the risk to the official receiver. In some exceptional cases, the fourth option (litigation) will be appropriate – but only very rarely.

This section of the chapter concentrates on the two remaining options – to be used where it is impossible or inappropriate to take one of the four ‘positive’ options.

## 37.187 Circumstances where it is impossible or inappropriate to use a ‘positive’ option

The most likely scenarios where it will be impossible to use one of the ‘positive’ options for dealing with a right of action are:

- Where the official receiver, as liquidator or trustee, is of the view (perhaps, after having taken legal advice) that the claim is without merit (and cannot, therefore, be settled, sold or litigated), or
- Where the claim has merit but the official receiver, as liquidator or trustee, is without funds and/or indemnity to litigate, there is no offer of settlement, and any potential purchaser is without funds to provide legal advice or actually pay for the action.

## 37.188 Disclaimer of a right of action

A disclaimer is a process that allows the official receiver, as liquidator or trustee, to disclaim their interest in onerous property (in short, property which comes with an obligation to pay money or perform an act) which forms part of the estate. The effect of the disclaimer is to end the interest of the liquidator/trustee and the insolvent in the property and, also, discharges the liquidator/trustee of any liability in respect of the property (see chapter 42 for full information on the disclaimer process).

## 37.189 When to use a disclaimer in a right of action

Generally speaking, a right of action cannot be described as onerous property unless it has entered the stage of being litigated when the insolvency order is made. In those circumstances, it is often the case that the parties to the claim (particularly, the defendants) will put pressure on the official receiver, as liquidator or trustee, to decide what their intentions are with regards to the claim (usually, with a hearing date imminent).

With the assistance of solicitors, it should be possible to negotiate a settlement or assignment in pretty short order. Where none of the 'positive' options are possible/appropriate, the official receiver may disclaim their interest in the claim (rather than seeking to discontinue or adjourn the proceedings as that may lead to an adverse costs order).

## 37.190 Serving notice of the disclaimer

The notice of the disclaimer should be served on the bankrupt (and their advisors), the defendants (and their advisors) and the court/tribunal at which the hearing was taking place.

## 37.191 Vesting orders

The legislation allows any person with an interest in disclaimed property to apply for a vesting order (effectively, an order that they become 'owner' of the property). The person most likely to do this is the defendant as this will have the effect of bringing the claim to an end.

The bankrupt cannot apply for a vesting order as they have no interest in the property once it has been disclaimed<sup>1</sup>. This should be made clear to the bankrupt when discussing the possibility of disclaiming so that they do not get the impression that they will be able to take ownership of the claim following the disclaimer (effectively, getting a 'cheap' assignment).

1. Skinner v Hood [2005] EWCA Civ 1580

## 37.192 When to do nothing

If the claim is not in the process of litigation, and none of the 'positive' options for dealing with the right of action are possible or appropriate, then the best course of action is for the official receiver, as liquidator or trustee, to, effectively, abandon the claim. The bankrupt cannot bring the claim and it will, eventually, become statute-barred.

## 37.193 Creditor may apply to carry on action (companies only)

Where the official receiver, as liquidator, is not prepared to litigate (whether they are without funds or because they have been legally advised not to), a creditor or contributory may make an application to court for leave to carry on the action<sup>1</sup>. In these circumstances, the official receiver should attend the hearing and object to the application unless it is granted on the basis that no costs fall to the company or official receiver.

1. Section 167(3)