

## ASSIGNMENT OF CLAIMS

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1. This is our 8<sup>th</sup> annual seminar at the Watershed, our 1<sup>st</sup> having taken place here on 17 May 2005. The majority of you have attended every year and you will therefore recall Jeremy Bamford's presentation given as part of our 3<sup>rd</sup> annual seminar in May 2007 entitled: Causes of Action – Realising Value and Balancing the Public Interest. A copy of his excellent paper can be found on our website.
2. The purpose of our talk is not to attempt to improve upon Jeremy's paper or even to update it. Having regard to the frequency with which questions of assignment come up, we decided to concentrate on a number of discrete areas within the broad topic. On the flyer and in the programme these have been given the following sub-headings, to which we will adhere below:
  - Assignability and prohibitions against assignment;
  - *Hunt v Harb* and IP liability for costs;
  - The auction process – dos and don'ts; and
  - The court – administrative directions or bomb shelter?
3. Insolvency office-holders are able to assign bare causes of action without attracting any public policy which prohibits trafficking in litigation. They can even assign a cause of action back to the bankrupt on the basis that he might have legal aid and/or on terms that he account for a percentage of any recoveries in the litigation<sup>1</sup>. But there is a logically anterior question – is the cause of action in question assignable at all?

### Assignability and prohibitions against assignment

4. To use Professor Guest's sub-division<sup>2</sup>, there are 4 contexts in which to consider restrictions on assignment:
  - Contractual Terms prohibiting Assignment;
  - Assignments prohibited by Statute or Public Policy;
  - Assignment of Personal Contracts and Covenants; and
  - Assignments which adversely affect the Obligor.
5. We wish to address briefly only the first of these. As Professor Bridge has said recently<sup>3</sup>:

*“The topic of unassignable rights has in recent years been the subject of intense judicial and academic consideration. It pitches against each other two fundamental principles, namely, freedom of contract and freedom to dispose of one's property. The collision of these two principles is compounded by long-standing difficulties of characterising assignment: is it an exception to privity of contract or part of the law of personal property, or both at the same time? In addition, so far as we are concerned with the assignment of debts, the topic raises important considerations about the use of present and future book debts to provide cash flow for businesses charging or discounting those debts. The topic of unassignable rights, moreover, may be seen as one where English law has taken a more restrictive line on assignment than American law, civil law systems and uniform law instruments (See UCC Article 9-408; H Kötz and A Flessner, European Contract Law (1997), Vol 1, pp. 273-75; Unidroit Principles of International and Commercial Contracts (2004)). Given the general openness of English law to proprietary security and to discounting arrangements, its*

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<sup>1</sup> *Groveswood Holdings Plc v James Capel & Co Ltd* [1995] Ch 80; *Norglen Ltd v Reeds Rains Prudential Ltd* [1999] 2 AC 1

<sup>2</sup> Guest on the Law of Assignment (2012) (Sweet & Maxwell).

<sup>3</sup> In his paper; Unassignable Rights (which can be found at: <http://www.lse.ac.uk/collections/law/projects/lfm/London%20Law%20Club%20Unassignable%20Rights.doc>)

*recognition of some broad categories of unassignable rights appears to go against the grain.”*

6. In addition to Professor Bridge’s paper, there is an extensive bibliography on this topic which includes:
  - a. McMeel: *The Modern Law of Assignment: Public Policy and Contractual Restrictions on Transferability* [2004] LMCLQ 483.
  - b. Tolhurst: *The Assignment of Contractual rights* (2006) (pp.246-286).
  - c. Smith: *The Law of Assignment: The Creation and Transfer of Choses in Action* (2007) (pp.).
  - d. P.G. Turner: *Legal assignment of rights of restricted assignability L.M.C.L.Q.* [2008] 306.
  - e. Goode: *Contractual Prohibitions Against Assignment* [2009] LMCLQ 300.
7. There is also a long list of relevant decisions, chief of which are:
  - a. *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All ER 262, QBD
  - b. *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85
  - c. *Flood v Shand Construction Ltd* (1996) 54 Con LR 1254
  - d. *Hendry v Chartsearch Ltd* [1998] CLC 1382
  - e. *Bawejem Ltd v M C Fabrications Ltd* [1999] 1 BCLC 174
  - f. *Don King (Productions) Inc v Warren* [2000] Ch 291
  - g. *Quadmost Ltd v Reprotech (Pebsham) Ltd* [2001] BPIR 349
  - h. *ANC Limited v Clark Goldring & Page Ltd* [2001] BPIR 568
  - i. *Foamcrete (UK) Ltd v Thrust Engineering Ltd* [2002] BCC 221
  - j. *Barbados Trust Co Ltd v Bank of Zambia & Anor* [2007] EWCA Civ 148; [2007] 1 Lloyd’s Rep 495
  - k. *Ruttle Plant Hire Ltd v Secretary of State for the Environment* [2008] 2 BCLC 345; [2007] BPIR 1652
8. Guidance for the Official Receiver is set out in the relevant part of the Technical Manual of the Insolvency Service (Part 6: The Assignment of a Right of Action) as at November 2010, a copy of which is attached as an Annexe to these notes.
9. Recognising that the first and last of them is unlikely to occur often in practice, Professor Goode has consistently over the last 20 years<sup>5</sup> suggested that there are 4 possible interpretations of a no prohibition clause:
  - a. A mere personal undertaking having no effect on the validity of the assignment, with a breach sounding in damages.
  - b. A stipulation that the assignment is to be ineffective against the debtor without affecting relations between assignor and assignee inter se.
  - c. A purported bar even on the transfer of ownership of the right or its fruits as between assignor and assignee.
  - d. A stipulation the breach of which is to entitle the debtor not merely to recover damages but to terminate the contract.

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<sup>4</sup> See also the decision in *R v Chester and North Wales Legal Aid Area Office (No 12)* [1998] 1 WLR 1496 which is a later round of the same litigation and another decision of the CA where the judgments (of Millett and Hobhouse LJ) address the effect of a no assignment clause.

<sup>5</sup> See Goode: “Inalienable Rights” (1979) 42 MLR 553 at 554; the discussion of the 4 categories in the speech of Lord Browne-Wilkinson in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (at 104) and Goode: *Contractual Prohibitions Against Assignment* [2009] LMCLQ 300 at 307.

He suggests that the debtor will usually intend to achieve the result envisaged in b above, but that the contract will often be framed in such a way that it purports to render an assignment completely void – i.e. as in c above.

10. So, in *Helstan*, a contractor had agreed in its construction contract with the council employer:

“[not to assign the contract or any part thereof or any benefit or interest therein or thereunder” without the written consent of the council]”.

The contractor purported to assign the amount due from the council to the Claimant, *Helstan*, which brought an action to recover the amount due. The clause was held to be effective to prevent the assignment, leading to the dismissal of the claim.

11. *Linden Gardens* is the principal authority. It concerned 2 conjoined appeals to the House of Lords. In the first appeal, a lessee of part of a building in Mayfair (Jermyn Street - where Richard Ascroft shops) entered into an agreement with a contractor for the removal of asbestos. The HL interpreted the following standard form no-assignment clause:

“The employer shall not without the written consent of the contractor assign this contract”

as dealing, not only with an assignment of the right to require future performance, but also with an assignment of the benefits arising under the contract (namely, payments that had accrued due and accrued causes of action). In the second appeal, a company entered into a contract with *McAlpine* for the development of a commercial site in Hammersmith. It contained the same clause. The company purported to assign both its interest in the development site and the contract to a sister company, in the latter instance without seeking *McAlpine*’s consent. Again, the HL held that the clause was effective to prevent any benefits under the contract passing to the sister company.

12. Importantly for insolvency office-holders, the HL held that the clause operated to prevent both an assignment of the benefit of the building contracts and also of any accrued causes of action. The HL rejected as “perverse” the distinction drawn by the CA between a non-assignable right to require future performance and assignable benefits in the form of accrued rights of action. In other words, the simple clause was interpreted as a complete prohibition.

13. *Flood v Shand* concerned another clause in a construction sub-contract – in the form of a partial prohibition:

“The sub-contractor shall not assign the whole or any part of the benefit of this sub-contract nor shall he sub-let the whole or any part of the sub-contract Works without the previous written consent of the Contractor. Provided always that the sub-Contractor may without such consent assign either absolutely or by way of charge any sum which is or may become due and payable to him under this sub-contract”

14. The Court of Appeal held that the clause operated to prohibit an assignment of claims for damages or other money claims before they had been fixed/liquidated by a court finding or a concession:

“The contractor as the opposing party may be “indifferent” to the prospect of having to pay a particular sum to a third party assignee when it becomes due and payable under the sub-contract, but it can be important to him that he should operate the contractual machinery, or arbitrate or litigate only with the party with whom he has chosen to contract.”

15. *Hendry v Chartsearch* concerned the purported assignment by a company to its director in breach of a clause which prohibited assignment: “without the prior written consent of the client which shall not be unreasonably refused”. Consent had never been sought prior to issue of proceedings by the assignee against the Client. This was fatal to the action. Importantly, the court also held that, as a matter of construction, the contractual prohibition continued to operate despite the breakdown in commercial relations and the discharge of the contract.

16. *Bawejem* concerned a claim by a director of a company in liquidation that he had taken an assignment of the benefit of a shipbuilding contract made by the company with the employer. The relevant clause provided that the contract:

“is not transferable or assignable by either party without the written consent of the other party”.

The two-judge CA (which included Robert Walker LJ) described the contention that the director had rights directly enforceable under the contract as “simply not arguable”.

17. In *Don King*, the famous boxing promoter had purported to assign to a partnership the benefit of certain promotion and management contracts with boxers. The latter contained express prohibitions against assignment (they were also contracts for personal services). The court had to decide whether the ineffective assignment nevertheless took effect as a declaration of trust of the contractual rights themselves. It was held that a trust of the benefit of a contract differed in character from an assignment of the benefit of a contract and might therefore not be affected by a no-assignment clause. Obviously, it is a matter of drafting but the starting point is that a prohibition on assignment was to be read as limited to assignment.

18. A similar conclusion was reached in *Barbados Trust*, where an oil import facility agreement permitted the assignment of a bank’s rights and benefits to another bank or financial institution on condition that the assignor obtained the “prior written consent” of the Bank of Zambia as borrower “such consent not to be unreasonably withheld”. M purported to assign without consent to BoA. BoA assigned on to a non-bank, GMO. Then M sought the consent of BoZ, which did not respond to the request. BoZ did not repay the loan and the Claimant, Barbados, as ultimate assignee brought proceedings to recover the money, relying initially on the title derived from GMO before turning to a declaration of trust of the asset in its favour executed by BoA some years after the assignments, but without the consent of BoZ. The declaration of trust could only be operative if BoA had obtained by assignment the whole of M’s interest in the asset. It was held that there had not been an effective, “prior” consent by BoZ to the assignment by M to BoA (i.e. the court interpreted the word “assign” in the no-assignment clause as meaning the attempt by M to assign without having previously obtained the permission of BoZ). Although it was not therefore necessary to decide the point as to the declaration of trust made by BoA, the court expressed the view that the no-assignment clause did not on its proper construction preclude a declaration of trust.

19. The assignment in *Quadmost* was by a liquidator to directors of the contracting company (C). This was a classic case where the liquidator inherited a situation in which C was litigating against Reprotect (the Defendant) for sums due under a management contract. C went into CVL, allegedly caused by the failure to make the claimed payments. The Defendant applied for security for costs against C. The liquidator had no funds and assigned the cause of action to the directors in return for a percentage of any realisations. The management services contract contained a clause to the effect that if C should fail for any reason, then another company in which the directors were the principal shareholder could take its place. There was also the following no assignment clause:

“7.1 Subject as is herein mentioned this agreement shall be personal to [C] and [C] shall not be entitled to assign or sub-contract any of its rights or obligations thereunder without the prior written consent of Reprotect.

7.2 The benefit of this agreement shall be capable of being assigned by Reprotect”.

It was argued that the first clause showed that the parties contemplated that the contract could be assigned to the directors. The court held that if the parties to the contract had intended to provide for its assignment to the directors, then it readily could have said so and that the assignment was of no effect.

20. *ANC Limited v Clark* is a case which is somewhat special on its facts. ANC’s liquidator assigned to its directors its rights to sue under a franchise agreement which had been terminated prior to liquidation. The consideration included a percentage of any proceeds of the litigation. The CA

upheld the assignment notwithstanding a contractual prohibition on assignment on the basis that the parties to the franchise agreement had not intended that the restriction should survive termination of the franchise agreement. The particular assignment clause, cl 16.2, provided:

“16.2 The Franchisee agrees that the Agreement is personal to the Franchisee and that neither the agreement, nor the beneficial rights of the Franchisee may be voluntarily, involuntarily, directly or indirectly assigned or otherwise transferred by the Franchisee, without the prior written consent of the ANC as hereinafter provided and any such attempted or purported assignment or transfer shall constitute a breach hereof and be void. ANC agrees not unreasonably to withhold its consent to any proposed assignment or transfer provided that the Franchisee is then in compliance with all provisions of the Agreement and the proposed assignee or transferee shall execute a written acceptance of and undertaking to be bound by the Agreement, the then current edition of the Operators’ Manual and all supplemental agreements to the Agreement signed by the Franchisee and to comply with all requirements imposed thereunder and shall:

16.2.1 Have procured that such persons as ANC shall reasonably require signed Specified Persons’ Undertakings; and

16.2.2 Reimburse such administrative and professional costs and expenses incurred by ANC in processing the application for transfer as have previously been agreed by the Franchisee.

16.3 It shall not be unreasonable for ANC to withhold its consent to an assignment or transfer by the Franchisee where the proposed assignee or transferee or any person required to sign a Specified Persons’ Undertaking pursuant to this clause is in competition with ANC or where in the reasonable opinion of ANC such assignment will prejudice the interests of ANC, any Group Company or the Network”.

21. This had to be read with cl 15.4 which provided that:

‘The expiration or termination of the agreement ... shall not affect or prejudice any provision of the Agreement which is expressly or by implication provided to come into effect on, or to continue in effect after, such expiration or termination ...’

22. In giving the judgment with which the other members of the court agreed, Robert Walker LJ said (at 575):

*“Clause 16 comes immediately after cl 15.4, which states that terms shall continue after termination only if that is provided expressly or by implication. There is no express provision for continuation in cl 16.2, and the submissions made by Mr Hantusch and Mr Boardman persuade me that the implication of such a provision would be contrary to the commercial purpose of the clause. There is nothing in the Linden Gardens case laying down any inflexible rule. On the contrary Lord Browne-Wilkinson (with whom all their Lordships agreed on this point) emphasised, in the passage already cited, that in each case the issue must turn on the terms of the contract in question”.*

23. In other words, this is a rare case (and possibly the only reported case) in which the contract itself was interpreted to mean that the prohibition against assignment would operate only prior to termination. Once terminated, the parties were free to assign accrued rights to sue under the contract.

24. In *Foamcrete (UK) Ltd v Thrust Engineering Ltd*, a JV agreement between P and T provided that rights and obligations under the agreement could not be assigned without the other party’s written consent:

“This agreement shall be binding upon the parties to this agreement and their respective successors and permitted assigns provided that neither of the parties to this agreement shall be entitled to assign this agreement or any of its rights and obligations under this agreement

except by a transfer of that party's shares in the Company which is permitted under the express terms of this agreement and/or which is made in accordance with the articles of association or which is otherwise approved in writing by the other party to this agreement and (in either case) on terms that the transferee shall covenant with that other party to perform all the obligations of the Transferor under this Agreement".

25. P and T also made a stock agreement. The issue arose because P had previously given a debenture to its bank (including a floating charge over its undertaking present and future). An assignee of the bank's rights made a claim against T for non-payment of instalments due under the stock agreement. T refused to pay by reference to the clause prohibiting assignment. The CA upheld the assignee's claim, however, on two grounds, one of which was that the bank's rights derived not from the prohibited assignment but from the earlier floating charge which had given the bank an immediate beneficial interest in all the property of the chargor, present and future (i.e. the bank acquired a beneficial interest in the future debt). The CA also consider the question whether P had committed a prohibited act after entering into the JV agreement. Since the CA concluded that the rights of the bank's assignees to demand payment from T stemmed from the crystallization of the floating charge and not from any prohibited act, the decision of the court should have rested on a restrictive reading of the no-assignment clause. The principal ground of the decision, however, was the quite separate reason that as a matter of construction the no-assignment clause in the joint venture agreement did not apply to moneys falling due under the separate stock agreement.
26. Ruttle is the foot and mouth case. The SoS needed to carry out emergency work to eradicate the disease and engaged F under a contract by which F was to provide labour, plant, materials and consumables. Clause 21.1 of the contract provided that F:

"shall not assign or sub-contract any portion of the contract without prior written consent" [of the Defendant].

F invoiced the Defendant for £16m and was paid £8m. The parties entered into a mediated settlement agreement, under which the Defendant paid F a further sum of £3m. Subsequently, F experienced financial difficulties and went into CVL. The liquidator entered into a deed of assignment with the Claimant. The recitals to the deed stated that the settlement agreement had failed to compensate F adequately, and that F wanted to re-open the matter and to issue proceedings against various parties including the Defendant in contract and tort. By the assignment, the liquidator purported to sell to the Claimant his right to commence and continue to prosecute the proceedings on terms that the Claimant would pay 33 per cent of any moneys recovered in the action. The Claimant accordingly commenced proceedings against the SoS who sought to strike out the claim on the basis, inter alia, that the causes of action arising out of the contract could not be assigned by the liquidator to the Claimant given the prohibition on assignment in cl 21. The Claimant submitted, inter alia, that: (i) cl 21.1 was not intended to prohibit an assignment of F's right to payment or other causes of action under the contract once it had finished providing the services required by the Defendant; (ii) cl 21.1 should not be construed as prohibiting the liquidator from exercising his statutory power under the Insolvency Act 1986 to sell rights to payment and any accrued causes of action under contracts after liquidation; and (iii) cl 21.1 should be held to be inoperable as a matter of policy insofar as the defendant sought to rely on it in relation to the liquidator's assignment. The court held:

- a. The court prohibition on assignment in cl 21 survived the liquidation of F. Although it was evident that the 1986 Act gave wide powers to liquidators to sell property, including disposing of a cause of action on terms that the assignees would pay over a share of the recovery, that did not mean that a liquidator had such a right in relation to causes of action where the parties had agreed that the cause of action should not be assigned.
- b. There was nothing in the contract to show that, objectively construed, the parties intended cl 21.1 to terminate on liquidation. It followed that the Claimant could not pursue the claims in relation to the 2001 contract, even if the settlement agreement were rescinded.
- c. The decision in ANC was special on its facts and of no assistance generally.

27. Ultimately, the court could see no textual support or commercial purpose for construing the prohibition as being limited in duration.

“55..... At any time the right that may be assigned will vary and will depend on performance. Once performance has ended, accrued rights will remain. Over a period of time the remedies available will be subject to limitation. To construe the contract as imposing a time limit on assignment in the absence of any express provision would, I consider, need a clear indication that objectively such was the intention of the parties....

....[58] While there may be a commercial purpose in allowing for parties in financial difficulties to assign benefits after completion of the services, that is not what the parties provided for in the contract. Rather they provided for a prohibition on assignment of the contract, which is a common provision where one party does not wish to deal with a third party it has not chosen to deal with as the other contracting party. That represents the commercial purpose for non-assignment clauses as expressed in the clause.

[59] In any event, I consider that there would also be difficulties in applying with certainty a prohibition on assignment which came to an end on completion of the services. The contract provided for FAL to supply services as directed by ‘MAFF and/or MOD’ during the foot-and-mouth crisis. Whilst the issue of certificates FM7 at particular farms may show that certain work has been completed on a certain site, that does not preclude FAL from being required to provide further services. It would at any time be uncertain whether FAL had finished providing services under the contract.

[60] Equally, whilst the services might end at some stage, there would still be continuing obligations under the contract, including record keeping under cl 12 and indemnities under cl 15”.

28. From this brief review of the authorities, the following guidance might be gleaned for the benefit of an insolvency office-holder who wishes to assign a cause of action in circumstances where there is a no assignment clause:

- a. There is no inflexible rule as to its scope or effect – in each case it will be a question of careful interpretation of the contract as a whole.
- b. A good working rule of thumb or starting point will be that a prohibition in a contract between A and B will be effective to protect B from the effect of a purported assignment to X by the insolvency office-holder appointed over A – therefore the IP ought not to enter into such an assignment.
- c. If the no assignment clause required the consent of B to any assignment and none has been obtained, it will be equally ineffective.
- d. On analysis the clause might be only partial or might be limited in duration – but these will be the exceptions rather than the rule.

29. The greatest danger of an assignment by an insolvency officer-holder in contravention of a clause prohibiting assignment will be his exposure to litigation costs. First, he might himself be a party to court proceedings relating to an assignment in which he has overlooked or given insufficient weight to the no assignment clause – in which case he will be exposed to indemnity costs without recourse to the estate (compare: *Re Capitol Films*; *Rubin v Cobalt Pictures Ltd* [2011] 2 BCLC 359). Secondly, he might be exposed to a non-party costs order in the ensuing litigation between the assignee and the Defendant - and this is our next sub-heading.

### ***Hunt v Harb* and IP exposure to a non-party costs order (NPCO)**

30. This sub-heading relates to the jurisdiction of the Court to make a NPCO pursuant to section 51 of the Senior Courts Act 1981 and CPR 48.2. The guidelines in relation to NPCOs provided by the Court of Appeal in *Symphony Group Plc v Hodgson* [1993] 4 All ER 143 include a duty to

warn a non-party to litigation at the earliest opportunity of the possibility that a NPCO might be sought against that non-party. In the context of assignments of causes of action by IPs, reference should be made to *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613, where it was said that a NPCO:

“may also be made where the third party has been responsible for bringing the proceedings and they have been brought in bad faith or for an ulterior purpose or there is **some other conduct on his part** which makes it just and reasonable to make the order against him.”  
(emphasis supplied)

31. The most recent case on this topic is instructive, *Hunt* (as the trustee in bankruptcy of *Janan George Harb*) v (1) *Harb* (2) *HRH Prince Aziz* [2011] EWCA Civ 1239; [2012] BPIR 117. It is authority for the proposition that, where a TiB was considering assigning a claim on terms that the bankrupt’s estate would receive a share of any recovery on the claim, the court should not make an order, pre-empting the discretion of a trial judge as to costs, that the TiB would not be liable for the costs of a successful Defendant if the assigned claim failed. The court also held that it was wrong to direct, before the TiB invited offers for a claim, that he could reject any offer to assign in return for a share of the proceeds on the ground that he would continue to be at risk of liability for costs.
32. The outline facts were as follows:
- a. The first Defendant, Mrs Harb, claimed to have secretly married the late King of Saudi Arabia (“the King”) in 1968. In May 2003, several years after they had separated, her solicitors sent a draft statement to the King, setting out the basis of a claim which she intended to bring against him under section 27 of the Matrimonial Causes Act 1973.
  - b. She claimed to have subsequently met the King’s son, the second Defendant (“the Prince”), and that he orally agreed to pay her £12m and transfer to her two properties in Chelsea in exchange for her withdrawing certain allegations made in the draft statement, withdrawing the section 27 application, and in discharge of the King’s promises to provide for her during her life. Mrs Harb contended that she duly complied with her obligations under the agreement but that the Prince did not.
  - c. In April 2008, Mrs Harb became bankrupt on her own petition. Her estate consisted of assets valued at around £200,000 and liabilities of over £3.5m. Upon her bankruptcy, the claim vested in Mrs Harb’s TiB. The TiB took the view that the claim had a reasonable prospect of success; although he had not been able to make detailed investigations. Accordingly, in June 2009, shortly before the limitation period was about to expire, the TiB issued the claim against the Prince, which was served on him outside the jurisdiction. The Prince applied to set aside service, relying on the State Immunity Act 1978.
  - d. The TiB was unable to obtain after the event insurance and was unable to find third party funding. Consequently, he discontinued the claim. Mrs Harb applied to the court to set aside the notice of discontinuance, joining the TiB and the Prince. The application was allowed and the court made an order: (i) setting aside the notice of discontinuance; and (ii) giving directions that the proceedings relating to the claim should be adjourned for a reasonable period while the TiB invited offers for the claim but that if no such offers were received then he could serve a fresh notice of discontinuance.
33. Crucially for present purposes, paragraph 9(i) of the court’s order went further, authorising the TiB to reject offers for the claim which provided for some or all of the consideration to come out of any realisations:

“The [trustee] may reject any offer ... on terms that all or any part of the net proceeds of a successful claim will be paid to him or applied for the benefit of the creditors on the grounds that the purchaser would in pursuing the claim after sale be acting as the mere nominee or delegate of the [trustee] who would accordingly continue to be at risk of liability for costs.”



34. Mrs Harb appealed against that part of the order. The question raised by the appeal was this: if a TiB assigns a claim on terms that the bankrupt's estate will receive a share of any recovery on the claim, can he safely assume that no order for costs will be made against him if the claim fails?
35. Pursuant to ss 306 and 311(4) IA 1986 a bankrupt's estate vests in his TiB personally. This is unlike the position where an insolvency practitioner is appointed as a liquidator or administrator of a company. In such a case, nothing vests in the liquidator or administrator. If a liquidator or administrator wants to pursue a claim (which does not arise under the office holder's statutory powers under the IA 1986), he will do so in the name of the company. He personally will not be a party to the action. In the case of a claim brought by a liquidator or administrator although there is jurisdiction to make a third party costs order against him that jurisdiction will only be exercised in exceptional circumstances, such as where there has been some form of impropriety.
36. By contrast, if a TiB wishes to pursue a claim which the bankrupt had before the bankruptcy, he will do so in his own name because the claim will have vested in him. He will therefore be a party to the proceedings. Like any other trustee pursuing litigation on behalf of a trust the TiB will, in principle, be liable for the costs of the proceedings: both his own and, if the claim fails, any costs awarded to the successful party. No third party costs order is necessary. If he acted reasonably he will be entitled to an indemnity from the trust fund; but if the trust fund is a bankrupt estate that may be of limited value. This is unlike other forms of insolvency in which an insolvency practitioner might be appointed as an office holder.
37. The case for Mrs Harb as summarised by the CA was that, almost as a matter of general principle, and almost irrespective of what the facts may be, a TiB who assigns to the bankrupt the right to pursue a claim against a Defendant cannot be liable for the Defendant's costs if the claim fails. The CA was unable to accept that submission. For instance, where a TiB transfers his right to pursue a claim to an impecunious assignee on terms which would involve the TiB receiving a substantial proportion of the proceeds if that assignee is successful, it would seem unjust if the Defendant, were he successful in those proceedings, should never be able to contend that the claim was primarily that of the TiB and was pursued for the benefit of the TiB, who should not then be able to hide behind the assignee to avoid liability for costs. The CA made clear that it was not saying that such an argument should succeed; the point was that it would be wrong in principle and unfair on the defendant if he was precluded in advance from being even able to run such an argument at the end of the case, in circumstances where the court does not know what offers the TiB has received and what the terms of those offers were.
38. Mrs Harb also argued that it was illogical for a TiB to be at risk on costs if he assigns a claim for a share of the proceeds, but not if he assigns the entire claim for a lump sum. The CA disagreed. In the former case, the TiB can fairly be said to be someone who is to benefit from the proceedings and, at least arguably, one of the real parties to the litigation, whereas in the latter case, he cannot.
39. However, although the CA considered that it was inappropriate to grant the sort of pre-emptive costs relief which Mrs Harb sought, for the same sort of reasons the CA considered that paragraph 9(i) of the first instance Judge's order should be deleted. Just as it was not right to impose a restriction on the prospective trial judge's discretion as to costs, so it would be wrong to make a direction before the TiB invited offers for a claim, that he could reject any offer to assign in return for a share of the proceeds on the ground that he would continue to be at risk of liability for costs. Accordingly, the appeal was dismissed but that part of the order was deleted.
40. The CA expressly left open the question as to whether, in an appropriate case, a court would, having seen all the offers which the TiB had received, make an order permitting the TiB to reject any offer which exposed the TiB to liability for adverse costs.
41. This judgment serves as a reminder of the width of the court's discretion to make a non-party costs order pursuant to s.51(1) of the Supreme Court Act 1981 and CPR 48.2 and that an insolvency office holder can be vulnerable to that jurisdiction after and notwithstanding an assignment of a claim.

42. It is the first occasion when the CA has considered whether a TiB remains at risk in relation to costs where he assigns a cause of action on terms that the bankrupt's estate will receive a share of any recovery on the claim. It re-inforces the view that care must be taken by TiBs when considering assigning such claims.
43. It is perhaps unfortunate that this issue was considered on these facts. The TiB was seeking from the court formal prospective confirmation (i.e. before any rival offers had been received) that he was at liberty, as a matter of general principle, to reject offers for the claim which involved an element of the consideration becoming payable out of any proceeds of the litigation. Given that the court was not asked to consider and compare the benefit to the bankruptcy estate of rival offers (see e.g. *Whitehouse v Wilson* [2006] EWCA Civ 1688; [2007] BCC 595), it would have been surprising had such confirmation been given in the abstract. In a different context, it was Neuberger J in *Re T&D Industries* [2000] 1 WLR 646 who had observed that commercial and administrative decisions are for the insolvency office holder and that "the court is not there to act as a sort of bomb-shelter for him". On one view, the offending paragraph 9(i) of the order under appeal was designed to provide just such a shelter for the TiB. We consider further below the effect of such a direction, if given.
44. Insolvency office holders are understandably risk-averse when it comes to the creation of potential future liability for costs and the judgment of the CA makes unwelcome reading for a TiB seeking to assign a claim. Nevertheless, it also offers some guidance as to how a TiB might approach such a situation. In particular, if the assets in the estate are insufficient to provide a worthwhile indemnity, the TiB may try to obtain an indemnity from the creditors (who will be the ultimate beneficiaries of any successful action) or from the party taking the assignment. Otherwise, the TiB could seek to assign the claim in return for a fixed sum (as opposed to for a share in the proceeds of the claim). This will provide the TiB with protection from adverse costs orders in the ordinary course of events. Otherwise the TiB can seek offers for the assignment of the claim on whatever terms are available.
45. Once the offers had been received, if the only, or best, offer available was for assignment in return for a share in the proceeds of the litigation, the TiB may, in appropriate circumstances, apply to the court for an order that he be entitled to reject the offer on the basis that it did not provide adequate protection in relation to the TiB's own exposure as to costs. Many practitioners will recognise this as the favoured approach and it is difficult to see a court criticising a TiB if he rejects an offer which, if accepted, would leave him exposed to a third party costs order – especially where there are no or insufficient assets in the estate upon which his indemnity could bite.
46. However, the auction process can throw up many questions, to which we will now turn.

## The auction process – dos and don'ts

### (i) Identify precisely the cause of action and/or the rights to be assigned

47. This is not necessarily as easy as it may at first appear. In relation to causes of action, the position is usually relatively simple: identify the nature of the claim and the Defendant, if necessary using compulsory powers of examination. However, there may be a difference between property rights and causes of action in relation to those property rights, which may or may not depend precisely upon when the cause of action accrued.
48. Ordinarily, in bankruptcy, a cause of action accruing after the making of the bankruptcy order will be after-acquired property, to be claimed under s 307 IA 1986. But, if that cause of action relates to property that has vested in the trustee in bankruptcy as part of the bankruptcy estate, then, even though the cause of action may have arisen after the commencement of the bankruptcy, it will be vested in the trustee in bankruptcy as a result of him being the legal owner of the property in respect of which the cause of action is derived. Accordingly, it will be necessary to determine precisely the basis upon which the claim arises (in which respect the issues as regards personal and/or hybrid claims will arise).
49. But in relation to pre-bankruptcy (or pre-liquidation) cause of action in relation to property, there may be a differentiation (accidental or deliberate) between the cause of action and the rights to the property itself. In *Young v Official Receiver* [2010] EWHC 1591 (Ch); [2010] BPIR 1477 the bankrupt and his wife purchased some land in Northern Ireland in about 1999, which had the benefit of a right of way. The bankrupt developed a house on the land. Planning problems led to an enforcement notice requiring demolition. The bankrupt and his wife complained, among other things that there had been misrepresentations in the sale by or on behalf the vendors in that they had failed to disclose a dispute with their neighbours. On 9 June 2006, the bankrupt and his wife commenced proceedings in Northern Ireland claiming, among other things, misrepresentation against the vendors, negligence against his conveyancing solicitors and obstruction of the right of way and harassment against the neighbours and their family. However, on 10 May 2006, the bankrupt had presented his own bankruptcy petition in England & Wales. A bankruptcy order was made against him on the petition on 3 July 2006. The Official Receiver became the trustee in bankruptcy. On 28 September 2006, the Official Receiver executed a disclaimer, on its face, of the bankrupt's interest in the land. In May 2009, the Official Receiver informed the bankrupt that he was unwilling to assign the damages claim to him, as he, the Official Receiver, first required independent legal advice, which was unavailable unless the bankrupt provided the funds therefor. On the bankrupt's application under s 303 IA 1986, the court had to decide whether, having regard to the terms of the disclaimer, the damages action was vested in the bankrupt or the Official Receiver, the bankrupt not having raised any issue as to the failure to assign. On 28 August 2009, Chief Registrar Baister concluded that, having regard to s 306 IA 1986 and the decision in *Ord v Upton*, the damages action, as a chose in action, remained vested in the Official Receiver.
50. The bankrupt's appeal was dismissed by Mann J on 23 March 2010. The cause of action vested in the Official Receiver as trustee in bankruptcy. The claims were essentially proprietary in nature and the personal element was insignificant. The disclaimer of the land did not on its terms effect a disclaimer of the claim, therefore the issue as to whether the bankrupt could claim the right to proceed with the claim did not arise. The fact that at one stage the Official Receiver had interpreted the disclaimer as affecting the cause of action, and then later changed his mind, did not in the absence of any estoppel, change its meaning. Upon the disclaimer of the land, and the Crown apparently having not sought to pursue it, the land did not automatically revert in the bankrupt. A vesting order would have been required and that had not been sought. Further, even if, subsequent to the disclaimer, the bankrupt had reacquired his interest in the matrimonial home under the 'use it or lose it' provisions of s 283A IA 1986, such reversion would not have applied to the damages claim.
51. Mann J commented, obiter, that it was curious that these matters should be before the English courts and not before the courts in Northern Ireland, as they related to property located in that jurisdiction. Bizarrely, the same point was the subject of litigation entirely

separately in Northern Ireland, culminating in the decision in *Young and Others v Hamilton and Others* [2010] NICH 11; [2010] BPIR 1468 given on 11 June 2010. After the bankruptcy order and the Official Receiver's disclaimer, on 31 October 2006, the bankrupt and his wife had served the original Statement of Claim against the Defendants. On the ninth day of the trial in Northern Ireland, it became apparent that the bankruptcy order had been made against the bankrupt. The Defendants sought an order dismissing the bankrupt's claim and for judgment against him on the ground that any cause of action which the bankrupt may have had against the Defendants have become vested in the Official Receiver and that at all times thereafter the bankrupt had no interest in any cause of action and no standing to bring the proceedings. The bankrupt argued that the cause of action was of a hybrid nature, including actions both of a financial aspect and of a personal aspect. He submitted that he was entitled to take action to prevent interference with his rights and entitlements and to seek injunctive relief to prevent such interference, and that such right always vested in him. He submitted that he was entitled to take action to protect himself and his family from harassment.

52. Treacy J held that the bankrupt had no standing to have commenced or continued the damages claim. The combined effect of ss 306, 283 and 436 IA 1986 was that all things in action belonging to the bankrupt at the time of the bankruptcy vested in his trustee in bankruptcy. Claims of a proprietary nature vested in the trustee, and all rights of action which related directly to property comprised in the bankrupt's estate passed to the trustee in bankruptcy, as did hybrid claims. The bankrupt's causes of action were proprietary in nature. Even if the causes of action gave rise to heads of damages under both the 'personal' and 'proprietary' categories the action was hybrid, so that the bankrupt's cause of action vested in the trustee. In agreement with Mann J (although without any apparent reference having been made to that earlier decision) it was held that where a trustee in bankruptcy disclaimed an asset, including a cause of action, there was no provision whereby that asset automatically re-vested in the bankrupt. As the bankrupt did not make an application for a vesting order, the disclaimed asset became bona vacantia and was liable to be dealt with accordingly. The bankrupt's claim against the Defendants, and his right to bring and continue the litigation passed to his trustee in bankruptcy, as did his entire interest in the land.

**(ii) Identify whether action viable or whether assignment would leave defendant exposed to vexatious litigant**

53. The office-holder, as an officer of the Court, has to satisfy himself as to the viability of the cause of action, especially if it is being assigned back to the bankrupt, or to the directors of the company.

54. In *Re Papaloizou* [1999] BPIR 106 (a decision of Browne-Wilkinson J given on 4 December 1980) it was stated at p.112:

"Although it is not necessary for me to decide the point, I should sound a note of warning to trustees. At best the transaction here was very close to the line of what is permissible. Although I loyally accept the decision of the Court of Appeal in *Ramsay v Hartley* that the sale of a bare cause of action by the trustee in bankruptcy back to the bankrupt is not per se contrary to public policy, I think trustees should exercise their power to take such a step with great circumspection. It must not be forgotten that by so doing they are enabling the bankrupt to conduct possibly vexatious litigation against third parties who will have no effective remedy in costs against him, since all his assets have been vested in the trustee. There may be cases in which this is an appropriate course to adopt, for example if immediate substantial assets are made available for the creditors. But in general the policy of the bankruptcy legislation is for the trustee – and not any one else – to get in the assets of the bankrupt and for that purpose to decide whether causes of action should be pursued, if necessary with funds provided for that purpose by the creditors in the bankruptcy. Before abdicating this responsibility by putting the bankrupt back in the saddle, the trustee should bear in mind the consequences to the other parties in litigation of so doing. My present view is that it should not be done unless clear and certain benefits are obtained for the creditors".

55. These comments were echoed in *Re Shettar* [2003] EWHC 220 (Ch); [2003] BPIR 1055, a decision of Park J, on a bankrupt's appeal against the refusal of the registrar to direct the Official Receiver (as successor to the first and second trustees in bankruptcy) to assign a cause of action to him, as follows:

"[21] The registrar considered one other matter and I will quote in full the paragraph in the note of the judgment:

'Finally, there is an obligation on the court and the trustee to consider very carefully assignment of actions and as to the effect it has on the defendant. It should be shown in granting an assignment that it would not be used for the purpose of vexatious litigation where [the prospects are low and the costs are unlikely to be recovered from the debtor]. I think this is very likely here'.

[22] I have to say I sympathise with the view which the registrar took on that point. As [the Official Receiver] has very appositely pointed out to me, it is only to be expected that, if [the first trustee in bankruptcy] and [the second trustee in bankruptcy] had thought that there was a good prospect of successfully pursuing the claims against the debtors, they would surely have sued the debtors themselves. Trustees like [the first trustee in bankruptcy] and [the second trustee in bankruptcy], who become trustees in the course of a profession, will naturally be looking to maximise returns for the creditors, but also, equally naturally and entirely properly, to maximise returns because the greater the returns, the higher the likely earnings to the trustees from their positions.

[23] It is clear from the documents that the claims against debtors, which [the bankrupt] is profoundly convinced are sound, would be strenuously disputed by the debtors. It seems a reasonable inference that [the first trustee in bankruptcy] and [the second trustee in bankruptcy] looked at them, decided in the end that: 'the game was not worth the candle', and decided not to bring proceedings themselves.

[24] I must also be influenced to some extent, as I think the registrar was, by the thought that to take a step now which could lead to legal actions being commenced against the various debtors could be regarded as oppressive to them. [The bankrupt] would not accept that for a moment, as I fully understand. He says the position is very clear, that the debtors owe him the money and that it would be a total windfall for them not to be required to pay. I understand that way of thinking about it, but I have to look at it in a more dispassionate way myself. In that connection, I have to say that [the bankrupt] is not an organised litigator. It would be extremely burdensome and time consuming for the alleged debtors to be brought into legal proceedings initiated by [the bankrupt]. Quite apart from the limitation of actions point, which is in itself a justification for the registrar's decision, it is many years since the events which are said to have given rise to the debts, and I believe that any court should hesitate long before exposing alleged debtors to the burden of having to deal with claims against them by [the bankrupt], who I assume would act in person as he has done before me".

56. Similar views were expressed by Laddie J in *Cummings v Official Receiver* [2004] All ER (D) 328 (Apr). The bankrupt sought to bring two actions in negligence. The first action concerned the alleged negligence of the firm of solicitors (CR) instructed on behalf of G Ltd, a company with which the bankrupt had been associated prior to its liquidation, in proceedings for possession of certain premises which took place in 1994. The second action arose in connection with the bankrupt's licensing application, which had been dismissed by the county court in 1995. The bankrupt alleged that his solicitors in that matter (DN), counsel instructed on his behalf, and the Lord Chancellor's Department, had acted negligently in allowing the date of his application for judicial review of the dismissal of his licensing application to be re-listed for hearing, one day later than originally listed, due to the non-availability of opposing counsel on the original date. Those causes of action vested in the Official Receiver as his trustee in bankruptcy. The bankrupt applied for an order requiring the Official Receiver to assign to him the causes of action. That application was dismissed by the registrar and the appellant appealed.

57. Laddie J dismissed the appeal. The Official Receiver had been justified in refusing to transfer the alleged causes of action to the bankrupt. It followed that there had been no error on the part of the registrar. Before a trustee in bankruptcy could be required to transfer a cause of action to the bankrupt, he had to look beyond the interests of the bankrupt and the creditors and consider the interests of the potential defendants to the action. In respect of the first proposed action for negligence in the instant case, CR had been instructed on behalf of G Ltd, not the bankrupt and, if there had been negligence, it had arisen out of the breach of CR's duty to G Ltd. Moreover, the basis of the allegations of negligence was unclear and, in any event, any such claim would have been statute-barred. The second action would have been similarly statute-barred and, even if negligence were to be established on the part of the bankrupt's legal representatives, no damage had flowed from it and such negligence would therefore not have been actionable. There was no basis on which the bankrupt might bring proceedings against the Lord Chancellor's Department.

58. The position was also eloquently encapsulated by the Court of Appeal of New Zealand in *Edmonds Judd v Official Assignee* [2001] BPIR 468. Post-discharge, the bankrupt, Mr Hobbs, sought an assignment of a potential claim his former solicitors, who were also creditors in the bankruptcy. The claim against the solicitors related to proceedings involving a long-term agreement for sale and purchase between the bankrupt and a Mr Ratcliffe in which the bankrupt was embroiled at the date of his adjudication. The Official Assignee responded the same day, confirming that he had no plans for pursuing legal action against the solicitors and that any potential action might be deemed as abandoned and therefore vested in the bankrupt, the main reason for this decision was that there were no funds in the estate. The Official Assignee had not examined the merits of the case. The bankrupt issued proceedings against the solicitors and the solicitors applied to the High Court to quash the decision of the Official Assignee to abandon the cause of action. The High Court (Hammond J) dismissed the application and the solicitors appealed.

59. The Court of Appeal allowed the appeal, holding as follows:

**[31]** In [*Re Callis; Callis v Pardington (1996) 7 NZCLC 261*] and following a brief reference to authorities, this court stated the question as applying to that case as being 'whether the Official Assignee's action was in all the circumstances, including the absence of consultation, unreasonable'. The judgment of the Court delivered by McKay J continued at 261, 216:

'We accept that there will be cases where the Official Assignee may properly decide that he should not pursue a disputed claim because the likely cost is disproportionate to the possibility of benefit to creditors. In such a case, it may be proper for the Official Assignee to assign the cause of action to a party willing to take the risk at that party's own expense while undertaking to account for part of the proceeds if successful. We do not see how the Official Assignee can properly make such decisions without first evaluating both the strength of the claim and its likely result. That evaluation must be undertaken with such advice as the Official Assignee requires, and incurring such expense as the Official Assignee feels justified. The court is not going to reverse the decision merely because it disagrees with it. A decision made without any attempt at evaluation and without advice, however, is likely to be unreasonable. We think counsel was right to exclude the assignment of frivolous and vexatious causes of action, even where there is no cost to the Assignee or the estate, and where there is a theoretical possibility of ultimate gain. Frivolous and vexatious proceedings are an abuse of the process of the court, and it is no part of the proper carrying out of an Assignee's or liquidator's functions, as officers of the court, to traffic proceedings.'

**[32]** *Callis* concerned the entry by the Official Assignee into deeds of assignment to the former bankrupt of rights of action vested in the Official Assignee under the bankruptcy in return for a share of the proceeds of any such action in circumstances where the Official Assignee had not consulted with the creditors or the receivers and there was no evidence that the Official Assignee had attempted to evaluate the merits of the cause of

action. This court upheld Barker J's conclusion that the Official Assignee's decision was unreasonable.

Hammond J's decision reviewed:

**[33]** We are satisfied that Hammond J erred in law in his approach to s 86 and in the application of the jurisdiction under the section. He focused on whether the Official Assignee had acted unreasonably, in an administrative law analogy sense, assessing the conduct of a public law official exercising a discretion. The judge accepted that the Official Assignee had not assessed the merits of the possible claim. He put the matter on the basis that the Official Assignee was not in a position to sue and in the result by abandoning the chose the Official Assignee considered he preserved [the bankrupt's] rights. In doing so Hammond J approached the originating jurisdiction under s 86 too narrowly. Once he had accepted that the Official Assignee had not assessed the merits of the possible claim including the consequences of any decision for the potential defendants and accordingly had failed to consider a relevant matter, he should have gone on himself to exercise the broad jurisdiction conferred by that section.

The decision to abandon the cause of action: analysis

**[34]** We turn to consider the material before the court relevant to the impugned decision of the Official Assignee. That decision was made in response to a perceived sense of urgency. The faxed reply to [the bankrupt's solicitor's] request was made only 2 hours after [the bankrupt's solicitor] faxed. [The bankrupt's solicitor] did not offer advice to the Official Assignee as to the merits of a claim against [the solicitors]. Rather, his advice was that he had been instructed by solicitors for [the bankrupt] to investigate the possibility of bringing an action and there were immediate time-limitation pressures. The Official Assignee's faxed advice to [the bankrupt's solicitor] was that he had no plans for pursuing any legal action against [the solicitors]. The other sentence in the fax, 'Any potential action may be deemed as abandoned, and therefore vests in [the bankrupt], expresses the assumed consequences of that decision and does so drawing essentially on the language of [the bankrupt's solicitor's] fax that 'such claim is deemed to be abandoned and is available to be brought by the [the bankrupt].

**[35]** The affidavit of the Deputy Official Assignee is wholly consistent with that analysis. The only reasonable inference from the affidavit is that the Official Assignee replied immediately because of the urgency of the request and that the decision that the Official Assignee did not intend pursuing any legal action against [the bankrupt's] former solicitors was based on the absence of funds in the bankrupt estate. There was no attempt to evaluate the merits of the cause of action and so to consider whether the institution of proceedings would be frivolous and vexatious and, if not, whether the Official Assignee should offer to assign the cause of action in return for a stipulated sum or a share of the proceeds.

**[36]** Clearly the decision which encouraged and was designed to encourage [the bankrupt's] advisers to institute proceedings the next day was fatally flawed. In the terms in which it was given it cannot stand.

**[37]** As well, and looked at more broadly, it was unreasonable on the material before the court, and in the Official Assignee's possession, for the Assignee to give the go ahead to the issue by the former bankrupt, [the bankrupt], against a creditor in the bankruptcy, [the solicitors], of a claim to damages of some \$240,000. First, any analysis of the Hobbs-Ratcliffe litigation against the contemplated claim against [the solicitors] must have brought home the difficulties in establishing that any breach proved against [the solicitors] was causative of loss to [the bankrupt].

**[38]** Secondly, as emphasised in Callis, it is no part of the Assignee's function to traffic in frivolous and vexatious proceedings. In that regard trafficking must include any act of the Official Assignee which allows the former bankrupt to bring particular proceedings of that kind.

[39] Thirdly, in the exercise of his or her functions, the Official Assignee must recognise a basic principle of bankruptcy law that, following the orderly administration of the bankrupt's estate and distribution of available funds to the creditors, neither bankrupt nor creditor has any claim on the other. In the course of administration of the estate Official Assignees may, in exercise of the statutory powers, assign a right of action without infringing champerty. But that is because, as Lord Hoffmann said in *Norglen Ltd (In liquidation) v Reeds Rains Prudential Ltd* at p 11:

'The courts have recognised that they (Official Assignees) often have no assets with which to fund litigation and that in such case the only practical way in which they can turn a cause of action into money is to sell it, either for a fixed sum or a share of the proceeds, to someone who is willing to take proceedings in his own name'.

But this is not an assignment case. Indeed, abandonment is not provided for by the statute. In adopting a stance which encouraged or allowed [the bankrupt] to sue [the solicitors], the Official Assignee was not serving the due administration of the estate. Further, because of the operation of the bankruptcy law, the stance taken by the Official Assignee effectively denied [the solicitors] any right of set-off in respect of the balance of [the bankrupt's] indebtedness to the firm".

60. It is probable that similar principles would apply to liquidators, as officers of the Court. There appears to be little direct authority applying them to corporate scenarios. However in the early stages of the Ultraframe litigation, the points were considered in passing. In *Ultraframe (UK) Ltd v Rigby* [2005] EWCA Civ 276; [2005] All ER (D) 139 (Jan), Arden LJ took them into account in granting an appeal against an order striking out an application for an order to set aside deeds of assignment of intellectual property rights, and causes of action in relation to them, entered into by the liquidator of Quickfit Conservatories.
61. Having raised the issue as to whether it was desirable for a trustee in bankruptcy to assign a cause of action to the bankrupt, as had been considered in *Re Papaloizou*, by Lord Hoffmann in *Stein v Blake* [1996] AC 243 in *Re Oasis Merchandising Services Ltd; Ward v Aitken and others* [1995] 2 BCLC 493 Robert Walker J felt no need to go further into that aspect. Lord Hoffmann had said this, in his concluding remarks as regards the wider principles involved in bankruptcy set-off and the ability of a trustee in bankruptcy to assign the net balance, which in that case that trustee had done in favour of Mr Stein, the Claimant:

"It is a matter of common occurrence for an individual to become insolvent while attempting to pursue a claim against someone else. In some cases, the bankruptcy will itself have been caused by the failure of the other party to meet his obligations. In many more cases this will be the view of the bankrupt. It is not unusual in such circumstances for there to be a difference of opinion between the trustee and the bankrupt over whether a claim should be pursued. The trustee may have nothing in his hands with which to fund litigation. Even if he has, he must act in the interests of creditors generally and the creditors will often prefer to receive an immediate distribution rather than see the bankrupt's assets ventured on the costs of litigation which may or may not yield a larger distribution at some future date. The bankrupt, with nothing more to lose, tends to take a more sanguine view of the prospects of success. In such a case the trustee may decide, as in this case, that the practical course in the interests of all concerned (apart from the defendant) is to assign the claim to the bankrupt and let him pursue it for himself, on terms that he accounts to the trustee for some proportion of the proceeds.

It is understandable that a defendant who does not share the bankrupt's view of the merits of the claim may be disappointed to find that notwithstanding the bankruptcy, which he thought would result in a practical commercial decision by an independent trustee to discontinue the proceedings, the action is still being pursued by the bankrupt. His disappointment is increased if he finds that the bankrupt as plaintiff in his own name has the benefit of legal aid which would not



have been available to the trustee. Similar considerations apply to an assignment of a right of action by the liquidator of an insolvent company to a shareholder or former director. In such a case there is the further point that the company as plaintiff can be required to give security for costs. The shareholder assignee as an individual cannot be required to give security even if (either because he does not qualify or the legal aid board considers that the claim has no merits) he is not in receipt of legal aid.

I mention these questions because they were alluded to by [Counsel for the defendant] as a policy reason for why the courts should be restrictive of the right of bankruptcy trustees or liquidators to assign claims. But the problems can be said to arise not so much from the law of insolvency as from the insoluble difficulties of operating a system of legal aid and costs which is fair to both plaintiffs and defendants. [The Defendant] is in no worse position now than he was before the bankruptcy when [the Claimant] was suing him with legal aid (although this would not have been the case if the plaintiff had been a company). [The Defendant's] complaint is that the bankruptcy has brought him no relief. But whether it should seem to me a matter for Parliament to decide".

**(iii) Identify any limitation issues**

62. As part of any determination as to the viability of any potential claim, the office-holder will clearly have to determine to what extent, if any, the potential cause of action may be limitation-barred. It is now absolutely clear from *Pickthall v Hill Dickinson LLP* [2009] EWCA Civ 543; [2009] BPIR 1467 that, in order to avoid limitation difficulties, a bankrupt cannot issue protective proceedings pre-limitation in order to preserve the benefit of a cause of action that might (or even will) be assigned to him post-expiry of the limitation period and post-issue of the claim. At first instance, [2008] EWHC 3409 (Ch), [2009] BPIR 114, the Judge had allowed the claim to proceed, the post-issue assignment having perfected the cause of action. The Court of Appeal allowed the appeal and struck out the proceedings. (see also *Haq v Singh* [2001] 1 WLR 1594, where it was held that an amendment of the name of the party from the trustee to the bankrupt post-assignment was not a change in the capacity of the party, merely that and so was not one that could be effected post-expiry of the limitation period; in effect, the assignment has to be effected before the expiry of the limitation period).

63. Whilst the Court of Appeal decision is undoubtedly correct, the first instance decision did, for a limited period, appear to be a flexible remedy to be used. It is nearly always that case that office-holders are pressed for an assignment when the expiry of the limitation period is looming large. See, for example, *Hamilton v The Official Receiver* [1998] BPIR 602, where the hearing of the application for the Official Receiver, as liquidator, to assign the cause of action to the former controller of the company was heard shortly before the expiry of the limitation period. It would have been rather easier on the life of the office-holder were the putative assignee to have been able to commence proceedings, and stay them pending the assignment, without there having to be a headlong rush to perfect the assignment and issue the proceedings before the expiry of the limitation period.

**(iv) Identify whether the claim is vested in the office-holder**

64. In the corporate scenario, this is not so much of an issue: the identified cause of action will be vested in the company (under the control of the liquidator) and so be capable of assignment under the control, of the liquidator (the office-holder claims obviously being un-assignable).

65. But, as we are all aware, the position is not so simple when it comes to bankruptcy. The full extent of these issues is outside the scope of this talk, but regards should be had to the nature of the claim, differentiating between:

- a. Property/money claims and claims of a purely personal nature generally;
- b. General damages, pain, suffering and loss of amenity etc and special damages in personal injury claims;

- c. The various heads of relief in employment claims for unfair dismissal and wrongful dismissal, and particular issues arising in respect of racial discrimination claims.

**(v) Identify whether the cause of action assignable**

66. Either because of the nature of the claim (e.g. an office-holder action, rather than a company claim) or because of the particular contractual provisions (as set out above) it may well be that the subject matter of the assignment is not assignable at all.

**(vi) Don't contract by correspondence**

67. The office-holder should as far as possible seek to reserve his rights as much as possible, in order to avoid any argument that a contract for the sale of the cause of action has arisen upon receipt of a bid or by dealings with the (apparently successful) bidder post-auction. If at all possible, all communications should be headed subject to contract and, especially in a bidding process that includes the prospective defendant, without prejudice. Commonly, some office-holders also reserve the right that any agreement reached through the auction process is also subject to Court or creditor approval.

68. Such reservations of rights avoid the possibility of arguments such as those that arose in *Miller (Trustee in Bankruptcy of Bayliss) v Bayliss* [2009] EWHC 2063 (Ch); [2009] BPIR 1438. M was appointed as B's trustee in bankruptcy and 300 shares in a company vested in him. M also treated a transfer of 187 shares to Mrs B as a transaction at an undervalue and therefore also part of the bankrupt's estate. Although at various times Mrs B acknowledged that the 187 shares ought to be transferred back, she never did so. In exercise of his functions as trustee M entered into negotiations with Mrs P, another shareholder, and Mrs B to sell the 487 shares in the company, referring to a Shareholders' Agreement providing that upon a shareholder seeking to sell their shares, first refusal had to be offered to the other shareholders. Mrs B asserted that M had subsequently concluded a contract with her to sell all the shares to her for £30,500. M asserted that his acceptance of her offer was subject to conditions, which she had not met, so that he was free to sell the shares to Mrs P. On 27 March 2007, M sold the 300 shares vested in him to Mrs P for £20,000. M issued proceedings against Mrs B seeking recovery of the 187 shares on the basis that the transfer to her was a transaction at an undervalue. Mrs B initially argued that the shares had no value. She also issued a cross-application under s 303 IA 1986, criticising the conduct of M in a number of respects, arguing he acted in an improper and unfair way so as to justify the intervention of the court and inviting the court either to give effect to the contract which she said was entered into, or alternatively, to give directions for the setting aside of the transfer to Mrs P. At trial, it was agreed that if M were correct in arguing he was entitled to sell the shares in question to Mrs P, and Mrs B had no grounds for complaint under s 303 IA 1986, she had to return the 187 shares to M.

69. Alison Foster QC (sitting as a Deputy High Court Judge) granted M's transaction at an undervalue application and refused Mrs B's application. (1) The trustee was, at all times, inviting offers from potential purchasers of the shares in the company which he might, but was not obliged to, accept and which he could accept subject to whatever conditions he chose to impose. The presence and terms of the Shareholders' Agreement did not alter that view. There was no auction with an implied term that M was bound to accept the highest offer. No binding agreement had ever been reached between M with Mrs B, and M was entitled to sell the shares to Mrs P.

70. The Deputy Judge also, usefully, went on to emphasise that the function of M was to get in, realise and distribute the bankrupt's estate in accordance with ss 303–335 IA 1986. Overarching all his activity in his capacity as trustee was an obligation that he should conduct the administration and fulfil his function in the interests of the general body of unsecured creditors in whose interests he was appointed. The court would be slow to intervene to upset a decision taken by a trustee, and nothing in the evidence and submissions supported any proposition that M acted other than in an honourable and high-minded way or did not behave as honestly as other people. There was nothing in the authorities that suggested any different

or more onerous duty fell upon a trustee who sought to contract with a third party, and to impose special duties upon him with regard to third parties who sought to enter contracts with him would impair his obligations to act in the interests of the creditors. Thus, judging M's actions against his duties to the creditors, he was seeking to maximise as best he might such value as he held on behalf of the creditors in the shares of a small family company. Whilst he may, erroneously or otherwise, have believed he was bound by the terms of some shareholders' agreement, that belief and the presence of the agreement did nothing either to condition the terms on which he eventually dealt or his understanding and execution of his duties in maximising a return for the creditors. Accordingly, no proper criticism could be made of the conduct of M in the sale of the shares in the company. The conduct was neither dishonest nor dishonourable nor otherwise in breach of any duties owed under s 303 IA 1986. Consequently, once the contract issue was determined against Mrs B, her rights to invoke the court's supervisory jurisdiction against M evaporated. There was nothing in the cases that supported a duty owed to Mrs B as a 'would-be' contracting party with M.

**(vii) Don't commit to highest bid**

71. As part of the rights reserved in entering into the auction process, the office-holder should always reserve the right not to accept the highest bid. This is for a few reasons.
72. First, the office-holder has to have regard to the overriding principles referred to above, in that he should not expose the potential Defendant to a potentially vexatious Claimant. If the only, or the highest, bid is put by such a potential Claimant, then the office-holder will not wish to put himself in a position where he has contracted to override those general principles and expose himself to a challenge to the decision not to accept the bid.
73. Secondly, the office-holder is not obliged to assign a cause of action where the only offer is derisory and seeking other offers would be an unjustifiable expense. In *Khan v Official Receiver [1997] BPIR 109 [1997] BPIR 109*, the bankrupt sought an order requiring the Official Receiver to assign to him a potential cause of action against his former solicitors. The bankrupt offered £100 for the cause of action but was willing to increase the offer up to a figure of £1000. The district judge dismissed the application. The bankrupt appealed but this was dismissed. Leave to appeal was refused by Morritt LJ but the bankrupt renewed his application for leave to appeal. Nourse LJ and Cazalet J refused permission to appeal. The judge was entitled to take the view that £100 or indeed £1000 was a derisory figure and the assignment of the cause of action should therefore not be approved at either of those figures. Further, even if the bankrupt had made an application under s 305(2) of the Insolvency Act 1986 on the basis that the Official Receiver was obliged to dispose of the cause of action at its market value and that the market value was what the bankrupt was prepared to pay, it was doubted whether it would have been successful, as a trustee in bankruptcy was not obliged to dispose of an asset at a figure which the court considered derisory.
74. It is difficult to see how well, if at all, this sits with the decision in *Hamilton*. Negotiations between the liquidator and H about realising the cause of action had proved fruitless, especially as the liquidator was worried about his possible liability for costs if the action was pursued by H (who was legally aided) under an arrangement by which the liquidator took a share of the proceeds, if it then turned out to be unsuccessful. The limited indemnity offered by H was not attractive. Equally, the liquidator was concerned about the position if the cause of action was sold by him at too low a price. The price offered by H was £1,000 but if the claim was successful it might produce a return of up to £500,000. No other persons apart from H were interested in purchasing this claim. Laddie J granted H's application for an order that the cause of action was to be assigned. The costs exposure was ignored, on the basis that if there were an outright sale of the cause of action the liquidator could not be exposed to a third party costs order in the event of the claim failing. By selling the cause of action to H, the liquidator could not be said to be supporting his claim. There was an offer of £1,000 on the table from H to purchase the claim and, in the absence of any other bids, the liquidator should accept that offer because it would be unreasonable of him not to do so. Laddie J said:

"It seems to me that if Mr Hamilton wins his proceedings and it is found that damages of a substantial sum are due, creditors could just as well complain that the official receiver,

by refusing to assign the company's cause of action, has simply thrown away an asset which might be worth a substantial sum. Indeed, it seems to me to go further than that. A creditor who was minded to sue the official receiver could say that not only did he throw away the asset, he spurned an opportunity to at least sell it for £1,000.

In my view, the refusal to accept a reasonable and indeed the only offer on the table for an asset which the receiver has no interest now in realising is, within the meaning of the words as used in the *Re Hans Place* decision, perverse and in my view it is right that I should make an order under the provisions of s 168(5) requiring him to assign the cause of action for £1,000".

On its face, that appears very close to being authority for the proposition that the office-holder should accept the highest bid, regardless of the consequences.

75. But, the fact that the best offer should not be accepted, regardless of the consequences, was recently brought home in *Wilson v The Specter Partnership and Others* [2007] EWHC 133 (Ch); [2007] BPIR 649. A company had engaged a firm of solicitors, to act for it in litigation. Ultimately, the company was wound up on the solicitors' bill for fees. Among other things, Mr Wilson, a director and creditor of the company, issued an application for the removal of the liquidators from office and/or for an order that they assign to him what was said to be the company's cause of action against the solicitors, based on alleging inflation of the bill, invoicing for non-existent work and breach of duty.
76. Mann J dismissed the removal application and the application for an order that the liquidators assign to Mr Wilson the cause of action. The liquidators' solicitors had invited Mr Wilson to identify the cause of action, identify the evidence relied on, to provide any counsel's opinion on the merits that he might have, to identify the lump sum payment that was apparently proposed as part of the consideration (together with the means of payment) and the percentage recovery amount which it was proposed that the liquidators should receive. Those matters were never dealt with or provided by Mr Wilson. The liquidators had declined to assign the chose in action (if any) because they did not know enough about it to form any view as to its assignability, merits or value, or indeed whether it even existed. His Lordship concluded:
77. Finally, of course, keeping options open after closure of the bidding will mean that the office-holder will be able to go back to the parties in an attempt to seek a higher price if the bidders are particularly eager.

**(viii) Be equal with communication (as regards content and quality) and don't prefer one bidder over another**

78. The merest hint that one bidder may have been in receipt of privileged or better information which may have caused another bidder to have adopted a different view as regards the bidding process will nullify the auction, and the process have to be restarted.
79. This was made clear in *Re Michael (A Bankrupt); Hellard v Michael and Fairview New Homes Farnborough Ltd* [2009] EWHC 2414 (Ch); [2010] BPIR 418. Michael agreed to acquire some properties from Fairview, but did not complete the transaction. In 2006 Fairview brought proceedings to recover the balance of deposits. Michael counterclaimed for breach of contract, in the sum of £121,250 plus interest. A bankruptcy order was made against Michael in March 2007, on a third party's petition, and consequently the claim and the counterclaim were each stayed. The only asset potentially of significant value was the counterclaim. The progress of the bankruptcy was hampered in the early stages by a number of meritless applications to court by Michael, culminating in a civil restraint order, and by Michael's attempts to frustrate investigations. It was clear that any realisations would be used to meet the petitioning creditor's costs and legal costs. The trustee in bankruptcy was not going to receive any settlement of his costs and there was no prospect of any recovery for creditors. After taking legal advice, the trustee decided not to pursue the counterclaim due to problems with its merits and funding, and decided that it would be in the best interests of the bankruptcy to offer the counterclaim for assignment, considering that each of Michael and Fairview might

be interested in bidding for it. the trustee's solicitors wrote to each of them in substantially the same terms, inviting bids, on terms that the trustee would have to be indemnified as to any sums payable in the Fairview proceedings and that the trustee's costs of the assignment and application to court were to be borne by the assignee. In correspondence with each of them, the trustee's solicitors indicated that the indemnity would be capped at £3,000. In correspondence with Fairview, the trustee's solicitors indicated that the costs of the assignment and the application would be capped at £5,000 but did not communicate that to Michael. Michael submitted a bid based on a percentage of the recovery on the counterclaim or a fixed sum, whichever was less, whereas Fairview's bid was for an outright cash figure. The trustee decided to accept Fairview's bid, communicated this to the parties and submitted an application for directions for the disposal of the counterclaim. Michael argued that the bidding process was unfair, as he had been unaware of the costs cap of £5,000, and that had he been aware of it he would have submitted a better cash offer with the benefit of third-party finance, which he proceeded to put forward. Michael also argued that it was conceptually impossible for the counterclaim to be assigned to Fairview. Fairview argued that the outcome of the original bid process was determinative, alternatively that if the original bid process was not binding it would wish to make a further bid. The trustee's position was that a further round of final bids from each of Michael and Fairview should now take place. If there were to be a further bidding process, the trustee and Fairview disagreed as to the terms upon which it should take place.

80. Sales J directed that a fresh bidding process take place on the terms submitted by the trustee. Michael's evidence was that if he had known about the cap on the costs of the assignment and application he would have reformulated his bid. Whilst there was some doubt about whether in fact Michael would have been able or would have chosen to do so, he was not afforded the same opportunity as Fairview to decide how to formulate his bid at the time. The possibility that knowledge of that cap may have made a difference to the formulation of Michael's bid could not be excluded. It could not be concluded that he would inevitably have lost the auction even if he had been properly informed about the terms on which it was being conducted. In those circumstances, it would not be fair or appropriate to require or allow the trustee to dispose of the counterclaim in accordance with the outcome of the first bid process. It could also be said to be utterly unreasonable (in *Edenote* terms) for the trustee to proceed to give effect to that bid process. Requiring the trustee to dispose of the counterclaim to Michael would be very unfair to Fairview, as it was entitled to expect that there should be another fair and orderly bidding process.
81. Adopting the usual principles as to the extent to which the Court would interfere with a trustee in bankruptcy's commercial discretion, Sales J held that the trustee's judgment, that it would represent the best further conduct of the bankruptcy for a further orderly bidding process to take place, was the right course. That was a judgment of the trustee on the commercial merits with which, on *Edenote* principles, the court should not interfere.

**(ix) Protect against potential challenges in advance**

82. In order to justify the views reached and decisions made, the office-holder should always record and document the decisions contemporaneously. Upon any challenge to the office-holder's decision-making, the Court will give more credence to contemporaneous reasons, fully documented, than by justifications established after the event. Such evidence should provide greater protection whether the challenge is by the potential assignee (against a decision not to assign) or a potential defendant (against a decision to assign).

**(x) Be careful about disclosing too much information to the potential bidders**

83. The common scenario is that the auction process is between the potential Claimant and the Defendant. The claim may even have commenced prior to the formal insolvency. The claimant is put in a difficult position, especially in relation to personal injury actions in which the bankrupt retains an interest under *Ord v Upton* principles. On the one hand, the Claimant /bankrupt is anxious to take the assignment in order to secure sole control of the proceedings. But, he will want to ensure that the assignment to him is at the cheapest price possible. Therefore, even though the claim may have been issued with the appropriate schedule of

damages attached, the bankrupt's solicitors will usually seek to emphasise some of the difficulties in the claim, whether in respect of liability or quantum, in order to depress the price. Yet, because of the continuing interest in the personal aspects of the claim, the bankrupt's solicitors will also usually be in continued contact with the Defendant/insurers, seeking to justify the claim at its highest. There is a clear tension between the two.

84. In those circumstances, the bankrupt's solicitors should seek to ensure that any information communicated about difficulties in relation to the claim are not communicated to the Defendants, and the trustee in bankrupt should take care to ensure that this is not done. Similarly, the bankrupt's solicitors should also be careful to ensure that its negotiations with the Defendants are kept confidential, for fear that they may impact on the price to be paid to the trustee.
85. Less commonly, these occur in commercial scenarios, because the cause of action will have vested in the office-holder and the putative assignee will not be in a position to be continuing negotiations or discussions with the putative Defendant. But that does not mean that it might not arise, or that the office-holder should not be equally careful when it does.

**(xi) Check whether you need sanction**

86. Pursuant to s 165(3) (voluntary) or 167(1)(b) (compulsory), and para. 6 of Sch. 4 IA 1986, a liquidator has a statutory power, without requiring sanction, to realise the assets of a company, including a bare cause of action, by way of assignment.
87. Pursuant to s 314(1) and para. 9 of Sch. 5 IA 1986, a trustee in bankruptcy has the same statutory power, without requiring sanction, to realise the assets of a company, including a bare cause of action, by way of assignment.
88. Note that where the bankruptcy order was made before 6 April 2010, any power of the trustee in bankruptcy to refer to arbitration, or compromise on such terms as might be agreed on, any debts, claims or liabilities subsisting or supposed to subsist between the bankrupt and any person who might have incurred any liability to the bankrupt, was exercisable only with sanction under para. 6 of Sch. 5 IA 1986. With effect from then, effectively these powers were moved to paras. 9A and 9B, as general powers exercisable without sanction.
89. However, in all cases, the trustee's powers to accept as the consideration for the sale of any property comprised in the bankrupt's estate a sum of money payable at a future time is still exercisable only with sanction under para. 3 of Sch. 5 IA 1986. In *Power v Brown* [2009] EWHC 9 (Ch); [2009] BPIR 340, Gabriel Moss QC sitting as a Deputy High Court Judge held, obiter, that this was a special safeguard that applied only where whole of the consideration is to be paid at a future time, not in a case of "mixed" consideration of present cash and a future sum.

## The court – administrative directions or bomb shelter?

90. Finally, to what extent will a court give a direction to an insolvency office-holder in relation to a matter which involves a business or commercial decision made, or to be made, by the insolvency office-holder? In some instances where directions have been given, it might be thought that the distinction between a business decision and a non-business decision has become blurred. Nevertheless, usually a court should not give an office-holder directions approving of business or commercial decisions in circumstances where no issue has arisen in relation to a legal matter or the propriety or reasonableness of the decision. This is because those decisions are particularly committed by the statutory scheme for insolvency to the office-holder and also a court is not qualified and, in any event, is ill-equipped to make or approve of such business decisions. The Court will not have been privy to the negotiations and circumstances involved in the making of the business decision in respect of which the administrators seek approval. The point was made succinctly by Street CJ in *Re Mineral Securities Australia Ltd (in liq)* [1973] 2 NSWLR 207 at 232:

“When the court is required to pronounce upon the commercial prudence of a transaction, it enters upon a slippery and uncertain field. Apart from the lawyer’s disclaimer of expert qualifications in matters of business prudence, the very process of litigation and the necessary limitations upon the scope of admissible evidence restrict the available material to far less than is necessary for the making of a commercial decision”.

91. However, there is no rule of law and no fixed principle that the consideration by the Court of commercial issues is precluded, although the need to pass judgment on the commercial prudence of a transaction is clearly a ground upon which the Court might decline to give directions, particularly if the office-holder is seeking to pass the actual decision-making onto the Court. In any event, any need to consider commercial issues would not warrant a refusal to give directions where application was made within the context of one of the well recognised areas in which directions are sought, such as whether to act on a liquidator’s commercial judgment to postpone a sale, and where there was a legitimate apprehension of subsequent accusations that the liquidator acted unreasonably.

92. There is an analogy with the refusal of a court to make a business decision committed to an administrator in the refusal of a court to direct a trustee as to how to exercise the trustee’s discretion. There is a jurisdiction in the Court under which trustees can seek directions in relation to matters arising in respect of the trust they are administering. The jurisdiction is one where trustees, in doubt about their powers or in relation to a particular issue arising in relation to the administration of a trust, are entitled to seek directions from the Court. However, the courts have refused to give directions to trustees as to how they should exercise their powers and discretions where no issue of power or propriety arises.

93. In paragraphs 29 to 42 of Jeremy Bamford’s paper (see paragraph 1 above), he distinguished between the different circumstances in which the court might become involved in determining the auction process or any other decision whether to assign a cause of action and, if so, to whom. Whether it is exercising its jurisdiction to sanction a compromise, providing self-standing directions to the office-holder or determining a challenge by a creditor or a putative defendant to the cause of action, it would seem that a direction to the office-holder will indeed operate as a bomb shelter by providing the protection to the office-holder against subsequent challenges. Unless it can be said subsequently that the court was not apprised of all the material facts when making its particular order, the office-holder can stand behind the order and will be protected by it.

94. However, the metaphor “bomb-shelter” in this context does not extend to a prospective assurance that the court will not exercise its discretion in the post-assignment litigation to make a NPCO against the assigning office-holder. Although the Court of Appeal in *Hunt v Harb* left open the possibility that the court might make an order in a particular case insulating an office-holder prospectively from an NCPO, it is not easy to imagine the sort of a case where such an order might be made (other than perhaps on stringent conditions/provisos concerning litigation management and so forth).

# **ANNEXE**

## INSOLVENCY SERVICE

### Technical Manual

## **THE ASSIGNMENT OF A RIGHT OF ACTION**

### **PART 6**

**November 2010**

## **THE ASSIGNMENT OF A RIGHT OF ACTION**

### **31.9.97 Assignment – general**

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

As outlined in [paragraph 31.9.22](#), assignment is one of the 'positive' ways that the official receiver can deal with a vesting right of action. Normally, it is the most effective way for the official receiver, as liquidator or trustee, to deal with a right of action, but such action should not be undertaken 'automatically' or without legal advice.

### **31.9.98 Content of this Part**

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 (see [paragraph 31.9.118](#)), the price that should be paid for the action (see [paragraph 31.9.101](#)) and the form and legality of the assignment (see [paragraph 31.9.99](#)).

It is extremely unlikely that it would be appropriate for the official receiver to offer an assignment without first receiving legal advice (see [paragraph 31.9.102](#)).

### **31.9.99 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 (see [paragraph 31.9.112](#)).
- Assignment may be barred by terms in the original contract (see [paragraph 31.9.119](#)).
- Assignment should not open the defendant up to vexatious litigation (see [paragraphs 31.9.116](#) and [31.9.118](#)).
- Frivolous claims (ones unlikely to succeed) should not be assigned (see [paragraph 31.9.118](#)).
- Assignment should be absolute if the liquidator/trustee is to avoid being made a party to any/a/the judgment (see [paragraph 31.9.108](#)).
- Liquidator/trustee is not required to assign right of action where the only offer received is derisory (see [paragraph 31.9.101](#)).

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 – see [paragraph 31.9.102](#).



### **31.9.100 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 he/she does so in the best interests of the creditors, which means seeking good consideration for the assignment (see [paragraph 31.9.101](#)). 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 (see [paragraphs 31.9.117](#) and [31.9.118](#)).

These competing considerations will require legal advice (see [paragraph 31.9.102](#)), particularly for complex claims [\[note 1\]](#) and, possibly, exceptionally, an application to court for directions (see [paragraph 31.9.122](#)).

#### **31.9.101 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 he/she should seek fair payment [\[note 2\]](#). The official receiver should accept an offer for assignment if it is reasonable and does not prejudice him/her but not before seeking, or attempting again to seek, a settlement from the proposed Defendant (see [paragraph 31.9.112](#)) [\[note 3\]](#) [\[note 4\]](#).

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 [\[note 5\]](#) [\[note 6\]](#).

#### **31.9.102 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 [\[note 7\]](#) (see [Chapter 32, Part 2](#) regarding the employment of solicitors).

In addition to the principles outlined at [paragraph 31.9.98](#), the official receiver, as trustee, will need advice to distinguish carefully between the value of the property and personal elements of the claim (see [paragraph 31.9.38](#)) to properly account to the bankrupt if they are not the assignee. In short, the official receiver should seek the following advice from his/her 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.

#### **31.9.103 Legal advice obtained by the company or bankrupt**

It may be the case that the company or bankrupt has obtained its/his/her own legal advice regarding the merits of assigning the right of action (see [paragraph 31.9.102](#)). 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 at [paragraph 31.9.102](#).

#### **31.9.104 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 £500 - £750 plus VAT. If the official receiver does not have access to a local and competent source of legal advice on this matter, he/she should contact Technical Section for further advice on how to proceed.

### **31.9.105 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 – see [paragraph 31.9.143](#)).

In exceptional circumstances (where, for example, the assignee wishes to take on a 'winnable' right of action, is without funds, and there is the prospect of funds being paid into the estate from the 'winnings'), the official receiver may, with the agreement of Technical Section, incur a debit balance on the estate to seek the necessary legal advice. The costs of the legal advice being recovered from the future 'winnings'. This is most likely to be appropriate in 'hybrid' cases (see [paragraph 31.9.43](#)) where there is a large 'personal' element to the claim.

### **31.9.106 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 champerty or maintenance (champerty and maintenance describe the illegal trafficking and funding of rights of action) [\[note 8\]](#) [\[note 9\]](#) [\[note 10\]](#) [\[note 11\]](#).

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 [\[note 12\]](#).

The exemption to the rules on champerty and maintenance is only available for rights of action that are property of the company or bankruptcy estate and not rights arising due to the insolvency (for example, the right to bring an action to recover a preference [\[note 13\]](#) [\[note 14\]](#) [\[note 15\]](#) with the consequence that the official receiver, as liquidator, or trustee will be unable to assign such an action.

### **31.9.107 Liquidator or trustee permitted to assign a cause of action for a future share of the fruits of the action**

The official receiver, as liquidator or trustee, is permitted to assign a cause of action for a share of the winnings [\[note 16\]](#). The right of action may be assigned (back) to the bankrupt on this basis also [\[note 17\]](#) (though see [paragraph 31.9.116](#)).

The official receiver may consider this course of action where the interested potential purchasers are without funds and an otherwise 'winnable' right of action would have to cease.

Such action (the sale of a right of action 'on credit') does, though, require sanction of Technical Section (carrying on the function of the Secretary of State) [\[note 18\]](#) [\[note 19\]](#) [\[note 20\]](#) (see [paragraph 31.9.133](#)).

The official receiver's legal advisors (see [paragraph 31.9.102](#)) should be able to provide advice on the form of such an arrangement (including a 'premium' to be added to the amount sought from the assignee to reflect the additional risk being incurred by the official receiver).

### **31.9.108 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.

[[note 21](#)] [[note 22](#)] [[note 23](#)].

### **31.9.109 Equitable assignments**

An equitable assignment can take place when one party makes an outward expression of its intention to assign or transfer an item [[note 24](#)] or where the requirements of the law are not met (see [paragraph 31.9.108](#)) [[note 25](#)]. 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.

An equitable assignment should be avoided (see [paragraph 31.9.110](#)).

See [paragraph 31.9.111](#) for advice on avoiding the possibility of an equitable assignment taking place.

### **31.9.110 Adverse consequences of an equitable assignment**

The effect of an equitable assignment is that only the benefit of the right of action passes to the equitable assignee and he/she 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 he/she may find him/herself 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 [[note 26](#)].

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 [[note 27](#)] [[note 28](#)] and a payment as compensation or in respect of a loss.

### **31.9.111 Letters discussing assignment to be marked 'subject to contract'**

To avoid any assertion that an equitable assignment has taken place (see [paragraphs 31.9.109](#)), 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.

### **31.9.112 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 (see [paragraph 31.9.114](#)) and establishing which other parties may be interested in purchasing the right of action (including the Defendant in the form of a settlement - see [Part 5](#)) [[note 29](#)] [[note 30](#)].

The official receiver should not offer or accept an offer of assignment (including an 'accidental' offer or acceptance – see [paragraph 31.9.109](#)) when the settlement of the claim is still possible.

### **31.9.113 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 [\[note 31\]](#).

### **31.9.114 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 (see [paragraph 31.9.17](#)). 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 [\[note 32\]](#).

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 [\[note 33\]](#).

The agreed consideration should be in addition to the provision for the official receiver's legal costs (see [paragraph 31.9.102](#)).

### **31.9.115 Assignment to the Defendant**

The official receiver, as trustee, may assign the action to the Defendant (effectively bring the action to an end) [\[note 34\]](#), but the assignment should not be used as a tool to stifle the claim [\[note 35\]](#).

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.

### **31.9.116 Assignment (back) to the bankrupt**

The bankrupt may request the assignment of a cause of action (back) to him/her where the official receiver, as trustee, decides not to (or is unable) to take it on (by settlement or litigation) [\[note 36\]](#).

The official receiver has the power to assign a right of action back to the bankrupt [\[note 37\]](#), but this should not be an 'automatic' action. For one thing, the official receiver should consider if a better offer may be possible (see [paragraph 31.9.112](#)) and, for another, the official receiver should consider the rights of the defendant (even if the offer from the bankrupt is a good one) (see [paragraph 31.9.118](#)).

### **31.9.117 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 him/her [\[note 38\]](#) [\[note 39\]](#) [\[note 40\]](#). The court will look to see that the official receiver's decision not to assign was reasonable when deciding such an application [\[note 41\]](#).

The court will only overturn the official receiver's decision not to assign if that decision was made in bad faith or was perverse [\[note 42\]](#).

By following the guidance in this Part (and, in complex cases, obtaining legal advice - see [paragraph 31.9.102](#)), the official receiver can reduce the likelihood of being subject to such an application.

### **31.9.118 Considering the rights of the Defendant**

The official receiver should not assign a frivolous claim (one that is unlikely to succeed) [note 43] [note 44] and should exercise his/her 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) [note 45] [note 46].

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.

### **31.9.119 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 [note 47] [note 48].

Such a provision would not affect the vesting of an action in the trustee in bankruptcy as the action passes without assignment [note 49], but is deemed to have been assigned [note 50] [note 51].

The official receiver, as liquidator or trustee, should peruse the contract on which the action is (to be) based to satisfy him/herself that there is no such clause. The legal advisors appointed by the official receiver (see [paragraph 31.9.102](#)) can be asked to assess the situation if there is any doubt.

### **31.9.120 Assigning where there is a counter-claim**

The fact that a claim being brought by the insolvent is subject to a counter-claim (see [paragraph 31.9.48](#)) 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 [note 52] [note 53] [note 54].

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 [note 55].

### **31.9.121 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/him her right to bring an action where that right did not exist prior to the assignment [note 56].

Examples of this may be where the bankrupt is seeking to overturn a judgment on which the bankruptcy order was made [note 57] or where the action was statute barred (see [paragraph 31.9.143](#)).

### **31.9.122 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 [note 58] [note 59] [note 60]. This should be considered to be an exceptional course of action.

### **31.9.123 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 (see [paragraph 31.9.143](#)) [\[note 61\]](#).

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 (see [paragraph 31.9.21](#)) that the official receiver, as liquidator or trustee, should seek to deal with the right of action, either by assignment or settlement (see [Part 5](#)), before the expiration of the limitation period.

### **31.9.124 Indemnifying the official receiver against adverse costs following assignment**

It is possible, particularly in cases where the right of action was sold 'on credit' (see [paragraph 31.9.107](#)), 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 to 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 him/herself 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 [\[note 62\]](#) [\[note 63\]](#).
- By following the procedure that settlement should be offered prior to assignment (see [paragraph 31.9.112](#)), 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.

### **31.9.125 Potential problem where assignment follows issue of proceedings**

Where a protective claim is issued by the liquidator or trustee (see [paragraph 31.9.146](#)) 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 his/her name [\[note 64\]](#) [\[note 65\]](#). If the court refuses that request, the claim will be lost unless the official receiver were minded to take it forward in his/her name (which, he/she should not do).

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 [\[note 66\]](#).

### **31.9.126 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 [\[note 67\]](#) [\[note 68\]](#) (assistant official receiver is not a term recognised in the legislation - see also Chapter 1, [paragraph 1.6](#)).

## CHAPTER 31.9 – NOTES TO PART 6 – THE ASSIGNMENT OF A RIGHT OF ACTION

1. Faryab v Smith [2001] BPIR 246
2. Cummings v Official Receiver [2002] EWHC 2894 (Ch)
3. Hamilton v Official Receiver [2002] BPIR 602
4. Edenote Ltd [1996] BCC 718
5. Khan v Official Receiver [1997] BPIR 109
6. Wilson v Specter Partnership [2007] BPIR 649
7. Faryab v Smith [2001] BPIR 246
8. Re Park Gate Waggon Works Co (1881) 17 Ch D 234
9. Kitson v Hardwick (1871-72) LR 7 CP 473
10. Seear v Lawson (1880) LR 15 Ch D 426
11. Law of Property Act 1925 section 136
12. Glegg v Bromley [1912] 3 KB 474
13. Insolvency Act 1986 section 239
14. Insolvency Act 1986 section 340
15. Oasis Merchandising Services [1998] Ch 170
16. Guy v Churchill (1889) 40 ChD 481
17. Ramsey v Hartley [1977] 1 WLR 686
18. Weddell v JA Pearce & Major (A Firm) [1988] Ch 26
19. Insolvency Act 1986 schedule 4, part 1, paragraph 3
20. Insolvency Act 1986 schedule 5, part 1, paragraph 3
21. Law of Property Act 1925 section 136
22. Glegg v Bromley [1912] 3 KB 474
23. Hamilton v Official Receiver [2002] BPIR 602
24. Finlan v Eyton Morris Winfield (A Firm) [2007] EWHC 914 (Ch)
25. Law of Property Act 1925 section 136

26. Three Rivers District Council v Bank of England (No. 1) [1996] QB 292
27. Insolvency Act 1986 section 168(5)
28. Insolvency Act 1986 section 304
29. Edenote Ltd [1996] BCC 718
30. Ultraframe (UK) Ltd v Rigby and others [2005] EWCA Civ 276
31. Hellard v Michael [2009] EWHC 2414 (Ch)
32. Khan v Official Receiver [1997] BPIR 109
33. Stein v Blake [1996] 1 AC 243
34. Official Receiver v Davis [1998] BPIR 771
35. Shepherd v Legal Services Commission [2003] BCC 728
36. Hamilton v Official Receiver [2002] BPIR 602
37. Kitson v Hardwick (1871-72) LR 7 CP 473
38. Insolvency Act 1986 section 168(5)
39. Insolvency Act 1986 section 303
40. Osborn v Cole [1999] BPIR 251
41. Shepherd v Official Receiver [2006] EWHC 2902 (Ch)
42. Hans Place Ltd [1992] BCC 737
43. Judd v Official Assignee [2001] BPIR 468
44. Citicorp and others v Official Trustee in Bankruptcy and Another [1996] FCA 1115
45. Re Papaloizu [1999] BPIR 106
46. Re Shettar [2003] BPIR 1055
47. Linden Gardens Trust v Lenesta Sludge Disposals Ltd [1994] 1 AC 85
48. Quadmost Ltd (in liquidation) v Reprotect (Pebsham) Ltd [2001] BPIR
49. Insolvency Act 1986 section 306(2)
50. Insolvency Act 1986 section 311(4)
51. Re Landau [1998] Ch 223
52. Stein v Blake [1996] AC 243



53. Insolvency Act 1986 section 323
54. Insolvency Rules 1986 rule 4.90
55. Craig v Humberclyde Industrial Finance Group Ltd [1999] BCC 378
56. Seven Eight Six Properties Ltd v Ghafour [1997] BPIR 519
57. Royal Bank of Scotland plc v Farley [1996] BPIR 638
58. Insolvency Rules 1986 rule 10.3
59. Insolvency Act 1986 section 168(3)
60. Craig v Humberclyde Industrial Finance Group Ltd [1999] BCC 378
61. Haq v Singh [2001] WLR 1594
62. Osborn v Cole [1999] BPIR 251
63. Re Shettar [2003] BPIR 1055
64. Civil Procedure Rules part 19.2
65. Civil Procedure Rules part 17.1
66. Pickthall v Hill Dickinson LLP [2009] PNLR 31
67. Insolvency Act 1986 section 399
68. Insolvency Act 1986 section 400

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