**IN THE HIGH COURT OF NEW ZEALAND**
**DUNEDIN REGISTRY**

**CIV-2013-412-000124**
**[2015] NZHC 2124**

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| BETWEEN | WAYNE ERNEST GOODWIN<br>Plaintiff |
| AND | BRIAN STEWART COPLAND<br>Defendant |

Hearing: 25 August 2015

Appearances: A Beck for Plaintiff
J C D Guest for Defendant
G E Slevin for Official Assignee (written submissions only)

Judgment: 3 September 2015

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**JUDGMENT OF ASSOCIATE JUDGE MATTHEWS**

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[1] Mr Goodwin applies for an order under either s 119 or s 221 of the Insolvency Act 2006 assigning to him the cause of action in the present proceeding, which passed to the Official Assignee on his adjudication in bankruptcy.

## Background

[2] In 2004 Mr Copland filed a proceeding in the High Court against Mr Goodwin arising from a number of investments he had made in a company controlled by Mr Goodwin, which failed resulting in the loss of the investments. The proceeding was due to be tried in May 2006, but shortly before that the parties reached a settlement agreement. Apart from providing that Mr Copland would receive an agreed sum of money and a contribution towards costs, the agreement also reflected concerns Mr Goodwin had about material which had been posted on a website by providing for that material to be removed. The relevant clause of the agreement is in the following terms (with the name of the website deleted for the purposes of this judgment):

> The Plaintiff will cause the present reference to the Defendant on the website [deleted] together with all accompanying documents, to be removed ~~immediately~~ *as soon as reasonably practicable*.

[3] The payments agreed to in settlement were not made, so as permitted by the settlement agreement, judgment was entered for Mr Copland on an admission of claim on 11 October 2006. Mr Copland took enforcement steps which resulted in his recovering part of the judgment debt.

[4] In March 2010, Mr Goodwin applied for an order setting aside the judgment on the ground that he had learned of an entry about him on the same website, which he maintained amounted to a breach of the settlement agreement. Full details of the facts which led to this application are contained in the judgment of this Court by Associate Judge Faire.[1] The Court refused to set aside the judgment either under the High Court Rules or under the Court's inherent jurisdiction. Argument on the latter basis revolved around a submission on behalf of Mr Goodwin that the obligation on Mr Copland in relation to removal of material from the website was a continuing one, not one confined only to removing the material immediately after the settlement agreement was reached. The learned Judge found that the material before the Court did not enable him to undertake a careful consideration of the interpretation of the terms of the settlement or even to rule on what material might be admitted, taking into account the principles in *Boatpark Ltd v Hutchinson*.[2] The Judge also said that if Mr Goodwin could mount a case for breach of the memorandum, the appropriate way to do so was by way of a proceeding alleging breach of contract.[3]

[5] Notwithstanding this, in 2012 Mr Goodwin again applied unsuccessfully to have the judgment set aside, invoking the Court's inherent jurisdiction.[4] As well, in May of that year, Mr Goodwin applied to stay both the 2006 judgment, and enforcement proceedings taken by Mr Copland on a separate proceeding. The Court rejected the stay application, observing in relation to Mr Goodwin's claim that "the position as advanced by (counsel) on behalf of the defendant [Mr Goodwin] as to his

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1 *Copland v Goodwin* HC Dunedin CIV-2004-412-000346, 11 June 2010.
2 At [23], citing *Boatpark Ltd v Hutchinson* [1999] 2 NZLR 74 (CA).
3 At [24].
4 *Copland v Goodwin* [2012] NZHC 3211.

claims is very tenuous, to say the least, and unlikely to succeed".[5] His Honour went on to conclude on the stay application:[6]

> I am satisfied by a wide margin that this attempt is a collateral last-gasp attack on the entry of judgment on the same basis that was asserted and failed before Associate Judge Faire.

[6] Shortly before that application was heard, Mr Copland had applied for an order adjudicating Mr Goodwin bankrupt. After the release of the judgment on the second application to set aside the judgment, this application was allocated a fixture date, as it was opposed by Mr Goodwin. He maintained he had a counterclaim against Mr Copland. As the judgment of 28 March 2013 on the bankruptcy application (the bankruptcy judgment) records, Mr Goodwin issued the present proceeding against Mr Copland on 25 February, three weeks before the fixture was due to be heard.[7]

[7] The bankruptcy judgment speaks for itself. Suffice it to say in the present context that the Court found little merit in Mr Goodwin's pleaded claims in the present proceeding, and found that it was not an abuse of process for Mr Copland to proceed with the bankruptcy application. After balancing all factors, the Court found that there was no sound basis on which to exercise the discretion given by s 37 of the Insolvency Act not to adjudicate Mr Goodwin bankrupt, and made an order of adjudication.

[8] Mr Goodwin appealed unsuccessfully to the Court of Appeal. The Court of Appeal said:[8]

> [35] Mr Beck argued the Associate Judge erred in declining to exercise this discretion in Mr Goodwin's favour. We reject that submission, which rests on three interrelated grounds. The first is Mr Goodwin's claim that Mr Copland breached the settlement agreement which is the basis for the judgment debt. Mr Goodwin has put that argument unsuccessfully to two different Associate Judges in his successive applications to set aside the judgment. A third Judge, Gendall J, was dismissive of the merits of one of those applications to set aside. Associate Judge Matthews again analysed the claim and found it had no substance. The claim forms the third cause of action in the proceeding Mr Goodwin finally filed against Mr Copland on

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5 *Copland v Goodwin* [2012] NZHC 996 at [13].
6 At [15].
7 *Re Copland, ex parte Goodwin* [2013] NZHC 652 at [7].
8 *Goodwin v Copland* [2014] NZCA 568 (citations omitted).

> 25 February 2013. The pleading is that Mr Copland was required to cause the offending material to be deleted permanently from the website. As Associate Judge Matthews pointed out, that pleading is at odds with the wording of the settlement agreement and alleges a position Mr Copland "was powerless to maintain".

[9] After recording the High Court analysis of the causes of action brought by Mr Goodwin, the Court noted that the present proceeding had been filed six years after the entry of judgment, and shortly after Mr Copland filed his application to have Mr Goodwin adjudicated bankrupt. The Court said:[9]

> That delay and timing is difficult to reconcile with a claim that has compelling merit. Rather, it strongly suggests a last ditch attempt to avert bankruptcy.

[10] Finally, the Court of Appeal endorsed the observation of the High Court that as the present cause of action would vest in the Official Assignee, it would be for that officer to assess the claim and determine whether it should proceed.

[11] This has in fact occurred. The Official Assignee has notified Mr Goodwin that she will not proceed with the present claim against Mr Copland. This has resulted in the application now before the Court.

**The present application**

[12] Mr Goodwin relies on ss 119 and 221 of the Insolvency Act as presenting different pathways by which he may obtain an order assigning his cause of action against Mr Copland from the Official Assignee to himself. Although the Official Assignee ostensibly maintains a neutral stance in this matter, and did not appear at the hearing, nonetheless she filed a memorandum, an affidavit from Mr R G McDonald (an insolvency manager and deputy assignee in the Christchurch office of the Insolvency and Trustee Service) and written submissions from counsel, Mr G E Slevin.

[13] As the two statutory provisions relied on by Mr Goodwin are distinctly different it is necessary to consider these separately.

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9 At [37].

*Application under s 119*

[14] Section 119 provides:

> **119 Position of person who suffers loss as a result of disclaimer**
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> (1) A person suffering loss or damage as a result of disclaimer by the Assignee may –
>
> (a) claim as a creditor in the bankruptcy for the amount of the loss or damage, taking account of the effect of an order made by the Court under paragraph (b):
>
> (b) apply to the Court for an order that the disclaimed property be delivered to, or vested in, that person.
>
> (2) The bankrupt may also apply for an order that the disclaimed property be delivered to, or vested in, the bankrupt.
>
> (3) The Court may make an order under subsection (1)(b) or (2) if it is satisfied that it is fair that the property should be delivered to, or vested in, the applicant.

[15] Before an order can be made under s 119, it is necessary to establish that the Official Assignee has disclaimed the property in respect of which assignment is sought. Disclaimer is provided for in ss 117 and 118. Section 117 provides:

> **117 Assignee may disclaim onerous property**
>
> (1) Subject to section 120, the Assignee may disclaim onerous property.
>
> (2) Subsection (1) applies even if the Assignee has taken possession of the property, tried to sell it, or otherwise exercised rights of ownership in relation to it.
>
> (3) The Assignee must, within 10 working days after the disclaimer, send a written notice of the disclaimer to every person whose rights are, to the Assignee's knowledge, affected by it.
>
> (4) For the purposes of this section and section 120, **onerous property** –
>
> (a) means –
>
> (i) an unprofitable contract; or
>
> (ii) property of the bankrupt that is unsaleable, or not readily saleable, or that may give rise to a liability to pay money or perform an onerous act; or
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> (iii) a litigation right that, in the opinion of the Assignee, has no reasonable prospect of success or cannot reasonably be funded from the assets of the bankrupt's estate; but
>
> (b) does not include –
>
> (i) a netting agreement to which sections 255 to 263 apply; or

(ii) any contract of the bankrupt that constitutes a transaction under that netting agreement.

[16] In this case, the property in question is Mr Goodwin's present claim against Mr Copland. Mr Goodwin says that the Official Assignee has disclaimed this property. Mr Copland and the Official Assignee say that no disclaimer has occurred. Evidence in relation to this is contained in the affidavit of Mr McDonald. Before referring to this, I record a procedural step taken by the Official Assignee in this case, on 19 January 2015. The Official Assignee applied by way of memorandum for a direction on whether, in light of s 102 of the Insolvency Act, a claim that has been vested in the Assignee pursuant to s 101 of the Act could effectively be assigned to the bankrupt during his or her term of bankruptcy. The question was dealt with on the papers by Gendall J, and a judgment released on 19 February 2015.[10] I will discuss this judgment in greater detail later, but for present purposes record that his Honour found that the present causes of action could be assigned to Mr Goodwin by the Assignee if first approved, on an appropriate application, by the Court, under s 221.[11] Alternatively, if the Assignee were to disclaim the action, the bankrupt could apply to the Court to have the claim vested in him under s 119.

[17] Counsel for Mr Goodwin then asked whether the Official Assignee would assign the cause of action to Mr Goodwin under s 221, if leave were granted. The response of the Assignee was that she would abide the Court's decision on any leave application made under s 221, but would not herself apply.

[18] However, before an application was made under s 221, the Assignee advised that she would be disclaiming the cause of action as onerous property, pursuant to s 117. On the basis of the judgment of Gendall J, that opened up to Mr Goodwin the prospect of assignment under either section.

[19] The first issue to be decided in relation to the application under s 119 is whether, as a matter of law, there has been a valid disclaimer. Mr Goodwin, in his first affidavit, says it is unclear to him whether or not the Official Assignee has disclaimed the cause of action.

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10 *Goodwin v Copland* [2015] NZHC 213.
11 At [25]-[26].

[20] Mr McDonald says that once the Court had decided that an order could be made under either s 119 or s 221, the Official Assignee's office considered the position. Mr McDonald says:

> ... the insolvency officer handling the estate, Mr Marshall, resolved to disclaim the right to pursue it on the basis it was not readily saleable and was likely to draw the Assignee into incurring costs for no benefit to creditors.
>
> Although he issued a disclaimer notice our computer system, instead of printing it out so that it could be signed, sent it automatically by email to Mr Goodwin. Mr Marshall subsequently thought he had dealt with the matter and took no further steps beyond recording on the file that the property had been disclaimed.

[21] Mr McDonald annexes the disclaimer notice sent automatically by email to Mr Goodwin (though not to Mr Copland). The document is in the following terms:

> **NOTICE OF DISCLAIMER OF PROPERTY**
>
> I HEREBY DISCLAIM, pursuant to section 117 Insolvency Act 2006, the property of the bankrupt, being:
>
> Civil action Christchurch High Court CIV 2013-412-000124
>
> Note: The Insolvency Act 2006 provides as follows:
>
> ***s118 Effect of disclaimer***
>
> ...
>
> ***s119 Position of person who suffers loss as a result of disclaimer***
>
> ...
>
> ***s226 Appeal from Assignee's decision***
>
> ...
>
> If you are unsure as to your legal position it is recommended that you seek professional advice.
>
> Dated at Christchurch this 22nd day of April 2015.
>
> Robert Gordon McDonald
> Deputy Assignee in bankruptcy in the property of Wayne Ernest Goodwin.
>
> To: Wayne Ernest Goodwin, Christchurch
>
> To: High Court, Dunedin.

[22] Mr Marshall did not, apparently, take any further steps. Accordingly, this case remained extant in the Dunedin High Court. The Official Assignee's office then decided to discontinue the proceeding. A notice of discontinuance was filed in the Court. Mr McDonald says this was thought to be the best option because it brought the proceeding to an end, but did not extinguish the underlying claims. The

Assignee's main intention was to avoid incurring further costs while awaiting any steps that Mr Goodwin might take by way of seeking leave from the Court for an assignment.

[23] Against this background Mr Slevin acknowledges Mr Beck's submission that there can be no dispute that Mr Marshall decided to disclaim the claim against Mr Copland. However, Mr Slevin says that the notice issued in the name of Robert McDonald was unsigned and was sent out before Mr McDonald could make any decision to sign it or not. Mr Slevin submits, correctly in my view, that the resultant issue is whether Mr Marshall's decision to disclaim was all that was required for the effective exercise of the power given to the Official Assignee by s 117.

[24] Mr Beck says that the scheme of the Act is that there must be a disclaimer and a notice of disclaimer, as separate steps. The notice must be given after the property has been disclaimed. It is, as he puts it, a separate administrative requirement. Mr Beck draws an analogy with taxation assessments, where the statutory scheme provides a clear distinction between the Commissioner of Inland Revenue making an assessment and giving notice of an assessment after it has been made.[12] Mr Beck says that as a matter of construction the same approach applies to s 117. He says it would be inappropriate for the validity of an important decision to hinge on the giving of notice, so the lack of the giving of notice to Mr Copland and the Court cannot invalidate the decision of the Official Assignee itself. Mr Beck observes that it does not appear that there is any requirement to give notice of a disclaimer to the Court.

[25] It will be seen that Mr Beck's submission is directed more to the consequence of notice of disclaimer not having been given to Mr Copland, than to whether there had in fact been a disclaimer of which notice could be given. His point is that this requirement is satisfied simply by Mr Marshall's decision to disclaim, backed up by his generating a notice of disclaimer on his computer system.

[26] Mr Slevin argues that the Assignee has not made a valid decision to disclaim the cause of action. He notes that s 401(4) of the Insolvency Act provides that:

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12 *Hyslop v Commissioner of Inland Revenue* [2001] 2 NZLR 329 (CA) at [20].

> An Assignee may execute all documents by signing the Assignee's name over the official name, and need not affix a seal to any document, although he or she may do so.

The reference to a seal relates to the requirement of s 401(3) that the Assignee must have a seal of office which must be kept and used when required in the administration of the estates in the Assignee's charge.

[27] Mr Slevin says that the document sent out by Mr Marshall is in the form of a notice of disclaimer, and not a notice that a disclaimer has already occurred. Therefore, it could only have been executed by Mr McDonald or someone authorised to do so on his behalf, which it has not been. He notes that the notice was accompanied by a covering letter to Mr Goodwin signed by Mr Marshall stating incorrectly that the enclosed notice was by him, explaining its effect, and recommending he take legal advice. But Mr Slevin submits that this cannot alter the fact that the notice itself is not executed. Mr Slevin submits that Mr Marshall cannot be deemed to have executed a document in the name of Mr McDonald without having his authority to do so. Mr Slevin submits that exercise of the power to disclaim determines the rights and interests of the Assignee and a bankrupt in the property disclaimed and may cause loss or damage to third parties, as recognised by s 119. For these reasons it is important that affected parties should be able to determine exactly when the power has been exercised. If it were to be held that a decision to exercise the power itself amounted to an exercise of the power, that would lead to an unacceptable level of uncertainty. He says that, for example, it might be impossible at a later date to establish when the disclaimer had occurred if no contemporaneous note of it had been made, and the officer who made the decision was unavailable or unable to recall the date the decision was made.

[28] Mr Guest, for Mr Copland, says that the Official Assignee must take a formal step to disclaim, and this did not occur. He said a disclaimer is a significant event: the Official Assignee ceases to be the owner of the asset, the Crown then becomes the owner, and rights to assignment under s 119 accrue. Other parties are affected including, in the case of a court proceeding, other parties to that proceeding. As well, rights of challenge to the decision of the Official Assignee may arise.

[29] Although I agree with Mr Beck that two separate steps must be taken, I otherwise accept the submissions of Mr Guest and Mr Slevin. Consideration of whether to disclaim requires, first, a decision whether a specific item of property comes within the definition of onerous property in s 117(4). If that is the case, a decision must then be made by the Assignee on whether to disclaim it. Elements of the definition of onerous property indicate that the rights of other persons will almost inevitably be affected by a decision of the Assignee to disclaim. There must inevitably be at least one other party to a contract which is being assessed for its profitability. For example, if an item of property is being assessed for whether it may give rise to a liability to pay money or perform an onerous act, there must necessarily be a payee or parties affected by the act under review. A litigation right will necessarily affect other parties to that litigation. It is therefore, in my opinion, essential that there be a clear act of decision-making readily identifiable without uncertainty as to whether it has occurred and, if so, when. Only a formal resolution will provide this level of certainty.

[30] Equally it is clear from s 117(3) that the act of giving notice of the disclaimer is a separate act to be undertaken after, but within a limited time of, the formal disclaimer.

[31] It is, in the end, for the Official Assignee to settle the way in which a decision to disclaim is to be made, subject to the overriding requirement for that decision which I have set out.[13] The submissions of Mr Slevin and the evidence of Mr McDonald lack clarity on the Official Assignee's usual process. Plainly, the Assignee's computer system contains a document headed "Notice of Disclaimer" in the terms which I have set out. Although described as a notice of disclaimer, suggesting that it is a notice under s 117(3), the opening sentence of the document is a statement of disclaimer. It is clear that the Official Assignee takes the view that this document is itself a disclaimer, because as far as I can tell from the evidence of Mr McDonald, both the notice of disclaimer and an accompanying letter were sent to Mr Goodwin on the same day, with the letter stating:

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[13] I comment further on this, below at [46]-[48].

> Enclosed please find my notice disclaiming the Official Assignee's interest in your High Court action CIV2013-412-000124.

[32] The letter is dated 5 May 2015 but the notice 22 April 2015. No explanation is given for this disparity, which seems strange given that the evidence of Mr Marshall is that the notice was sent "automatically by email" and it is the letter which bears the email address.

[33] On the evidence available to the Court I am not satisfied that a formal decision to disclaim has been made by an officer of appropriate delegated authority to disclaim this proceeding. The notice appears to require the signature of Mr McDonald, s 401 requires the Assignee to execute all documents in the manner prescribed, and Mr Slevin says in his submission that this document could only have been executed by Mr McDonald or someone authorised to do so on his behalf. I accept Mr Slevin's submission that Mr Marshall cannot be deemed to have executed a document in the name of Mr McDonald without having his authority to do so. There is no evidence that Mr McDonald ever authorised the formal execution of a notice of disclaimer.

[34] The subsequent conduct of the staff of the Assignee's office is inconsistent with there having been disclaimer. They decided to file a notice of discontinuance. They could not lawfully have undertaken this step after disclaiming the contract because the Official Assignee would have had no further right or interest in the proceeding, by virtue of s 118(a).

[35] Because this proceeding has not been disclaimed the Court does not have jurisdiction under s 119(2) to vest the cause of action in this proceeding in Mr Goodwin.

*Application under s 221*

[36] Section 221 was considered by Gendall J in his judgment dated 19 February 2015.[14]

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[14] *Goodwin v Copland,* above n 16.

[37] Section 221 provides:

> **221 Assignee may assign right to sue under this Act**
>
> (1) The Assignee may, if the Court has first approved it, assign any right to sue that is conferred on the Assignee by this Act.
>
> (2) The application for approval may be –
>
> (a) made by the Assignee or the person to whom it is proposed to assign the right to sue; and
>
> (b) opposed by a person who is a defendant to the Assignee's action, if already begun, or a proposed defendant.

[38] His Honour concluded that an assignment of a right to sue, by the Assignee to a bankrupt, will be effective if an appropriate application has been made on notice to the Court and approval first given by the Court to the assignment.[15]

[39] This judgment was considered by Associate Judge Smith in *The Official Assignee v Henshaw*.[16] His Honour said:

> [18] The issue raised in this case, which was apparently not drawn to the attention of Gendall J in *Goodwin*, is whether the words "conferred on the Assignee by this Act" in s 221 exclude from the ambit of the section the assignment of a right to sue which was already owned by the bankrupt at the date of his or her adjudication, and thus formed part of the bankrupt's property which vested in the Assignee under s 101.

His Honour then said:

> [23] In my view, the requirement for approval under s 221 applies only to assignments of rights that are *created by the Act for the Assignee*, such as the ability to apply to set aside certain transactions. Those are rights that never inhered in the bankrupt prior to adjudication and could not have vested in the Assignee under ss101 or 102. Instead they are "conferred". Parliament has required the Court's approval if rights to sue of that kind are to be assigned to any third party.
>
> [24] I conclude, therefore, that s 221 does not provide authority for the Court to approve the proposed assignment.

[40] With respect to the decision of Gendall J on 19 February 2015, I prefer and will follow the decision of Associate Judge Smith in *The Official Assignee v Henshaw*. The right to sue referred to in s 221(1) must be a right to sue that is conferred on the Assignee by the Insolvency Act. These are not rights which were

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15 At [27].

16 *The Official Assignee v Henshaw* [2015] NZHC 1856.

formerly the rights of the bankrupt, which vest in the Official Assignee under ss 101 or 102. It is within the power of the Official Assignee to assign rights which vest in the Assignee under these sections for consideration without the leave of the Court. It follows that the rights to sue referred to in s 221 are not rights to sue which have already vested in the Official Assignee, as court approval for the former is required under s 221.

[41] Accordingly the application under s 221 is dismissed.

*Consequence of the decision on the application under s 119*

[42] It follows from my decision in relation to the application under s 119 that the present proceeding remained vested in the Official Assignee at the time the notice of discontinuance of this case was filed on 21 May. Mr Beck says that in this event, the Court has power to set aside the notice of discontinuance as an abuse of process. I preface discussion of this submission with the observation that as the cause of action remained vested in the Official Assignee, it was for the Assignee to make a decision in accordance with her duties as Assignee on whether it was for the benefit of the creditors to maintain and pursue the action. Mr Beck had been asked to provide copies of the court documents and any documents relied on to support the claims made in this proceeding, but none had been provided. Mr Marshall's decision that the claim should be disclaimed was made on the basis that the cause of action was not readily saleable and was likely to draw the Assignee into incurring costs which would not benefit the creditors.

[43] Mr Beck says that there is power to set aside the notice of discontinuance[17] and that the power should be exercised where it would be manifestly unfair to Mr Goodwin not to do so.[18] Mr Beck says that the Assignee has behaved in a way which appears to be designed to prejudice Mr Goodwin. The Assignee was aware of Mr Goodwin's wish to have the proceeding assigned to him and then proceeded with her purported disclaimer despite that. In so doing she acted with undue haste, not only in purporting to disclaim the proceeding, but subsequently in discontinuing it.

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17 *R G Developments Ltd v MacLennan Realty Ltd* HC Auckland CIV-2003-404-3260, 18 March 2005 at [56].

18 *Telstra NZ Holdings Ltd v Commissioner of Inland Revenue* [2010] 21 PRNZ 1 (HC) at [38].

[44] I am unable to accept this submission. There is no evidence that the Assignee acted other than properly in deciding to discontinue the proceeding, having formed the view that it had not been lawfully disclaimed, let alone that she took a step designed to prejudice Mr Goodwin. Notice of the disclaimer was sent on 5 May; the notice of discontinuance was not filed until 21 May. Whilst the steps taken within the Official Assignee's office in relation to disclaimer appear to have fallen short of the standard of competence that ought to have applied, I do not find that any valid criticism can be made of the Assignee for discontinuing the action. Quite apart from any other factor, no source of funding for the litigation has been identified by Mr Goodwin in either of his affidavits. And both this Court and the Court of Appeal have commented numerous times on the evident lack of merit of the claim, as I have summarised earlier.

[45] I find that there is no proper basis to set aside the notice of discontinuance.

*Further comment*

[46] As I have recorded earlier in this judgment, s 117 provides for two distinct steps to be taken once the Official Assignee has decided that it is appropriate to disclaim an item of property as onerous. The first step is to actually disclaim it. The second is to give notice of that decision to every person whose rights are, to the Assignee's knowledge, affected by it. The document used by the Assignee has the potential to cause confusion, as it appears to conflate these two steps. It is headed "Notice of Disclaimer of Property" but in the opening sentence purports to be the disclaimer, not notice of it. In my view this document is unsatisfactory for the statutory purpose for which it is being used. There should be two documents. The first should be the disclaimer itself, headed and drafted accordingly, and signed by the appropriate officer of the Official Assignee's office. The second should be a notice referring to the former, by date, and described as a notice of that disclaimer.

[47] The letter sent by Mr Marshall had potential to exacerbate the confusion. It was sent to one of the persons whose rights would be affected by the disclaimer, Mr Goodwin. It should, therefore, have been a notice complying with s 117(3). In the opening sentence, however, Mr Marshall states that he is enclosing "my notice

disclaiming the Official Assignee's interest in your High Court action". It is trite to point out that this sentence is, in itself, a conflation of terms. Notices do not disclaim interests. A document is one or the other. If the letter was the notice under s 117(3), the document to be enclosed should have been a disclaimer. If the document headed "Notice of Disclaimer of Property" was intended to be the notice, it should not, in its opening sentence, have purported to be a disclaimer.

[48] Adoption of a procedure that follows the requirements of the Act may avoid difficulties in future cases.

**Outcome**

[49] The application dated 22 May 2015 is dismissed.

[50] Mr Goodwin has the benefit of legal aid. Were that not the case I would award costs against him on a 2B basis, plus disbursements. Mr Guest did not pursue an order for costs in the circumstances, so no order is made.

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J G Matthews
Associate Judge

Solicitors:
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