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Beddoe applications in trust disputes

Paul Grant explains the purpose, principal uses of and procedure for Beddoe applications in respect of contentious trust disputes.

Introduction

It has long been recognised that a trustee intending to bring or defend proceedings in his capacity as trustee should first seek directions authorising him to do so. This is known as a Beddoe application. Since the trust has no separate legal personality, the proceedings in question are generally proceedings by or against the trustee in their capacity as such, although they may be against a trust asset.

Beddoe applications derive from the case of Re Beddoe [1893] 1 Ch 547 in which the Court held that a trustee's costs of unsuccessfully defending a claim could not be recovered out of the estate because the trustee had not sought directions from the Court before defending the litigation:

> *"…a trustee who, without the sanction of the Court, commences an action or defends an action unsuccessfully, does so at his own risk as regards the costs, even if he acts on counsel's opinion; and when the trustee seeks to obtain such costs out of his trust estate, he ought not to be allowed to charge them against his cestui que trust unless under very exceptional circumstances.*
>
> *I entirely agree that a trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges, and expenses properly incurred: such an indemnity is the price paid by cestuis que trust for the gratuitous and onerous services of trustees; and in all cases of doubt, costs incurred by a trustee ought to be borne by the trust estate and not by him personally.*
>
> *But, considering the case and comparatively small expense with which trustees can obtain the opinion of a Judge of the Chancery Division on the question whether an action should be brought or defended at the expense of the trust estate, I am of opinion that if a trustee brings or defends an action unsuccessfully and without leave, it is for him to shew that the costs so incurred were properly incurred. The fact that the trustee acted on counsel's opinion is in all cases a circumstance which ought to weigh with the Court in favour of the trustee; but counsel's opinion is no indemnity to him even on a question of costs."*

The types of claims in relation to which a Beddoe application is appropriate include: (1) claims by trustees against third parties which do not amount to proprietary claims against the trust; (2) proprietary claims against the trust assets where there is compelling evidence in support of one analysis rather than another; (3) claims for recovery of trusts assets; and (4) claims by a trustee against his co-trustee, or against beneficiaries.

A Beddoe application may not be appropriate in relation to actions in respect of a breach of trust or applications to remove trustees or protectors.

Procedure and Timing

A *Beddoe* application must be brought under Part 64 of the Civil Procedure Rules. Beddoe applications must be made in separate proceedings and should (if possible) be made prior to the trustee taking any binding step to bring or defend the claim in question. Because beneficiaries of a trust have a direct interest in the question of how trust funds are used, they too must be parties to the Beddoe application.

The reasons for the separate application are that:

- a Beddoe application is a matter between the trustee and the beneficiaries, who generally have a clear right to make representations on whether Beddoe protection should be granted. The beneficiaries are often not parties to the underlying proceedings; and

- matters to be considered in a Beddoe application are often sensitive and confidential matters, of which the parties to the underlying proceedings are not and should not become aware. Those matters include, crucially, a view as to the likely merits of the underlying proceedings. For this reason, the judge hearing the Beddoe application should not be the same judge that hears the underlying proceedings.

Where the main litigation is an external dispute and the beneficiaries are aligned with the trustee, Beddoe applications will



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be fairly straightforward. If the main litigation is contentious and involves a hostile beneficiary, the Beddoe application can involve a substantial and contested hearing. In some circumstances, this may be as costly and time-consuming as the main litigation.

Trustees should seek to obtain Beddoe relief as soon as possible and before defending, or becoming involved in litigation, although this may not always be possible. See Gibraltar Court of Appeal in *STM Valmet Trustees Limited*-v-Brennan and Ors [1999 Gib LR 211] applying *Re Beddoe* [1893] 1 Ch 547.

Full and frank disclosure

Once afoot, trustees have an obligation of full and frank disclosure in Beddoe applications. They must put all relevant evidence before the Court; including advice on the merits of the claim, likely costs of the litigation and details of the trust assets.

Privilege

In hostile trust disputes, beneficiaries may be interested in the trustee's legal advice and will seek to obtain copies of that advice. In England and Wales (and by extension, in Gibraltar), case law suggests that a trustee should be prepared to provide redacted legal material to the hostile beneficiary who will be an adverse party to the trustee in the prospective litigation, provided that this does not prejudice the way in which the trustee could conduct the main litigation.

Advice taken by trustees for the benefit of the trust, such as advice paid for by the trust and advising on the proper discharge of their functions as trustees is not advice upon which trustees can assert privilege against beneficiaries. Such advice will be the subject of joint privilege and cannot be waived by either party unilaterally. By contrast, advice obtained and paid for by trustees for their own benefit will not be the subject of joint privilege, and legal advice privilege could in such circumstances be asserted.

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