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Property Law Briefing

Beddoe Applications

If trustees or executors intend to take or defend Court proceedings in relation to the exercise of their powers and duties, they are strongly advised to make a *Beddoe* application (*Re Beddoe* [1893] 1Ch 547), which entails asking the Court to approve in advance the costs that the trustees or executors intend to incur on behalf of the trust fund in litigation.

Typically a *Beddoe* application is made when the trustee is unable to obtain an indemnity from the beneficiaries, but there are other times when they should be used. Indeed I have recently represented trustees on a *Beddoe* application who were confronted with a civil recovery claim under the Proceeds of Crime Act 2002.

Failure to make a *Beddoe* application is not a breach of trust but where there is a doubt as to the merits or the trustee is unable to obtain an indemnity from a beneficiary, he is well advised to obtain the approval of the Court or he is at risk of being personally liable for the costs.

The general rule is that a trustee is indemnified for expenses properly incurred by him in the course of carrying out his duty as trustee and he has a lien on the trust assets to secure such indemnity.

Trustees have a duty to protect and preserve the trust estate for the benefit of the

beneficiaries and must represent the trust in any third party dispute. Accordingly their right to an indemnity and lien extends to costs of proceedings properly brought or defended for the benefit of the trust estate. To avoid the risk of being challenged as to their entitlement to be indemnified the *Beddoe* application for Court authorisation is the appropriate course.

The categories of litigation in which trustees are likely to be involved were set out by Lightman J in *Alsop Wilkinson -v- Neary* [1996] 1 W.L.R. 1220 Ch D at 1223, as; firstly, 'trust disputes' which are disputes as to the trusts on which they hold the subject matter of the settlement; secondly, 'beneficiary disputes', which are disputes with one or more of the beneficiaries as to the propriety of any action taken or omitted by the trustees; thirdly, 'third-party disputes', which are disputes with persons other than beneficiaries in respect of rights and liabilities assumed by the trustees in the course of administering the trust.

A *Beddoe* application is appropriately made in relation to a 'trust dispute' or a 'third party dispute'. It is not appropriate for a 'beneficiary dispute'.

The *Beddoe* application must be made by separate CPR Part 8 proceedings to the underlying proceedings, as it is a matter between trustees and beneficiaries not between the parties of the underlying proceedings.

Failure to make the application in separate

proceedings will result in refusal of relief. The procedure for the application is set out in CPR Part 64.

Paragraphs 7.1 to 7.6 of the Practice Direction 64B contain detailed guidance on the evidence to be submitted. Generally the Court wants to see in a witness statement; a description and account of the trust with relevant distributions; the trust documents; a detailed description of the underlying proceedings; any written legal advice as to the merits of the underlying proceedings including a copy of the formal instructions; details of consultations with the beneficiaries; a costs estimate for the underlying proceedings.

Crucially the trustees must disclose all relevant information, otherwise, any *Beddoe* protection obtained is liable to be set aside.

The Court decides the application by reference to the best interests of the beneficiaries as a whole. The Court will take all circumstances into account, in particular the likely outcome of the underlying proceedings including costs and the value of the proceedings to the trust.

It is open to the Court to make an order permitting the trustee to take steps up to a certain stage of proceedings (e.g. disclosure or exchange of witness evidence).

Wherever possible, the lawyer who provided the advice on the underlying proceedings should attend the *Beddoe* hearing.

My experience is that whenever acting for parties who themselves are acting in a representative capacity it is always best to err on the side of caution. The relatively inexpensive step of a *Beddoe* application reaps its rewards in the value of the protection it affords.