

BRIEFING NOTE

The procedure in relation to *Beddoe* applications

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. As held by Lindley LJ in the case of *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547: "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 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 [beneficiaries] unless under very exceptional circumstances."

The principal purpose behind a *Beddoe* application is to obtain an indemnity out of trust assets in relation to the costs of the litigation, including as to any adverse costs orders should the trustee's case fail. *Beddoes'* relief will protect the trustee against any future claim by any of the beneficiaries that, in paying any or all of these costs from the trust fund, he was acting improperly.

Types of Claim

The types of claims in relation to which a *Beddoe* application is appropriate include:

- Claims by trustees against third parties which do not amount to proprietary claims against the trust;
- Proprietary claims against the trust assets where there is compelling evidence in support of one analysis rather than another;
- Claims for recovery of trusts assets;
- Claims by a trustee against his co-trustee, or against beneficiaries.

A *Beddoe* application would not be appropriate in relation to actions in respect of a breach of trust, applications to remove trustees or protectors, or proprietary claims against the trust assets where there is no compelling evidence either way (in which case the trustee's obligation is to remain neutral).

Procedure

In Jersey, a *Beddoe* application will be commenced by means of a Representation seeking directions from the Court pursuant to Art 51 of the Trusts (Jersey) Law 1984, as amended. The Representation will need to be supported by a detailed affidavit sworn on behalf of the trustee. The exhibits / evidence should include:-

- the pleadings in the main action;
- any draft pleadings proposed to be served by the trustee in the main action;
- A lawyer's opinion setting out the merits of the claim or claims proposed to be brought or defended by the trustee;
- a cost estimate for the main action; and
- evidence in respect of the trust fund, its estimated value, nature and liquidity.

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All of the beneficiaries, and if necessary, a guardian appointed on behalf of the minor and unborn beneficiaries, should be convened as parties to the application. Frequently the *Beddoe* relief will authorise the conduct of the litigation up to a certain stage, following which the trustee must apply for further directions. Full disclosure is essential. The Court must be made aware of the weaknesses as well as the strengths of the trustee's case in respect of the main action. Where there has been a significant new development affecting the claim or defence, such as a change in the law or new evidence not previously available at the first *Beddoe* application, the trustee should go back to the *Beddoe* court for further directions. Failure to do so may mean that the trustee loses the protection of the original *Beddoe* order.

Although it is prudent to obtain a *Beddoe* order before the trustee takes any steps in the main action, a *Beddoe* application can be made during the course of, or after, the main action and in such a case the trustee will be allowed to retain his costs out of the trust estate if, had he applied at the outset, he would have been directed to take the steps that he did, but not otherwise (see Lewin, 18th Edition, 21-129).

A special procedure will apply where the claim is against a co-trustee or a beneficiary. Per *In Re Moritz, deceased* [1960] Ch 251, while it may be proper and necessary to join to the application the parties against whom the proposed action is to be taken, those parties should not be present in court (either in person or through legal representatives) when the matter is debated and they should not be provided with the evidence which the court is asked to consider.

Moritz has been applied, in modified form, in Jersey in the case of *Barclays Bank v Bhandar* (Jersey Unreported, 15 July 1998). The Royal Court noted that the procedure in relation to *Beddoe* applications should be as follows:

1. In matters of this sort, although the Court sits *in camera* it is acting as if the application were to a Master in Chambers in the English jurisdiction.
2. Neither the Judge who presides over the application nor the Jurats who sit with him should sit to hear the substantive action.
3. Because the Court will be addressed *ex parte* and, in the main, without the opposing party being present, it will expect that the weakness as well as the strength of the applicant's case be disclosed.
4. Before the opposing party withdraws, the applicant should give a résumé of the facts, excluding the confidential matters that will be mentioned to the Court *in camera*, and the opponent should be allowed to comment on them.
5. It is desirable that the judgment following the hearing *in camera* should, as far as possible, be given in public. The confidential information disclosed *in camera* should not be mentioned except in a general way. It is not the Court's duty to anticipate discovery.

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James Dickinson represented five members of the Alhamrani family in relation to *Beddoe* proceedings by which Trustcorp sought Court approval to issue proceedings against its predecessor trustee, JP Morgan, for in excess of USD120 million. The application, which was supported by the firm's clients, was granted.

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