Beddoe applications in hostile litigation: principles and process

By Jeremy Johnson and Guy Carter[1]

Introduction

1. Litigation against trustees is on the rise. That raises the question of when are trustees entitled to have their legal costs in defending their own actions paid for out of the trust fund before a final costs award?

2. This paper considers the application of the *Beddoe* principles in this context. It looks at:

   a. the nature of the application;

   b. what information should be disclosed;

   c. the test for when applications might be granted; and

   d. and whether the approach adopted by authorities to date is correct in principle.

3. In summary *Beddoe* applications can, and should, require exceptional circumstances before they are granted in the context of hostile litigation. In other words the claim must be so clearly without merit that it should be tested on a summary or strike-out basis.

4. The reason for this is clear; it can hardly ever be said to be in the trust's interests to incur the costs to defend a particular trustee's actions until the court has fully assessed those actions. There is no particular strategic advantage given to the beneficiaries through this principle that cannot be mitigated by the trustees taking out appropriate insurance.

Hostile disputes

5. The starting point of this analysis is what category of trust dispute is the trustee facing?

6. The decision of *Re Buckton*[2] was the first occasion where trust litigation was divided into three categories:

   a. proceedings for directions (brought by trustees);

   b. similar proceedings as above, but brought by someone other than a trustee (eg a beneficiary); and

   c. hostile claims, such as against the trustees or between beneficiaries.

7. The *Buckton* categories were developed into what are now recognised as the modern categories of trust litigation in *Alsop Wilkinson*[3] and those have been well traversed. However, for ease, these are set out briefly here:

   a. Trust dispute: this is a dispute as to the trusts on which the trustees hold the subject matter of the settlement. This can be either 'friendly' or 'hostile'

---

[1] Jeremy Johnson is a Partner and Guy Carter an Associate in the Wynn Williams Dispute Resolution Group.

[2] *Re Buckton* [1907] 2 Ch 406

[3] *Alsop Wilkinson (a firm) v Neary* [1995] 1 All ER 431

litigation. So-called friendly disputes might involve consideration of the construction of the trust instrument or some other question arising in the course of the administration of the trust. Hostile litigation, under this category, involves a challenge to the validity of the settlement by the settlor.

b. Third-party dispute: this is a dispute with persons otherwise than in the capacity of beneficiaries. Third party disputes are generally not hostile given they arise in the context.

c. Beneficiary dispute: this is a dispute with one or more of the beneficiaries as to the propriety of any action which the trustees have/have not taken. A beneficiary dispute will be hostile and generally involves allegations of breach of trust (including breach of equitable and fiduciary duties) and seeks removal of the trustees and/or damages.

8. This paper focuses on obtaining a *Beddoe* order in hostile litigation. Such litigation can be either a trust dispute or a beneficiary dispute.

Beddoe application

9. A *Beddoe* application takes its name from the case *Re Beddoe*.[4] In *Re Beddoe*, a trustee had unsuccessfully defended an action against the trust in detinue for the return of deeds of real estate. He sought to be indemnified out of the trust fund against a costs order which had been awarded against him in that proceeding.

10. Bowen LJ uttered the line:

> *The vanquished trustee now seeks to impose the costs of this idle and fruitless litigation on the estate…a trustee can only be indemnified…against costs, charges and expenses properly incurred for the benefit of the trust – a proposition in which the word "properly" means reasonably as well as honestly incurred.*

11. Bowen LJ noted that that all litigation should be avoided, unless there is a chance of success as to render it desirable in the interests of the estate. Accordingly, if the trustee is doubtful as to the wisdom of prosecuting or defending a lawsuit then the trustee can take an originating summons and ask the Court whether the point is one which should be fought or abandoned:

> *To embark in a lawsuit at the risk of the fund without this salutary precaution might often be to speculate in law with money that belongs to other people.*

12. And so the *Beddoe* order was born. Despite its origin in the 19th century, a *Beddoe* application remains a separate proceeding for directions from the Court as to whether to bring or defend proceedings at the expense of the trust.

13. The effect of a *Beddoe* order is to indemnify a trustee from the trust fund in respect of costs incurred in the proceeding, including adverse costs awards.

14. This is different from a prospective costs order (**PCO**) which deals with costs in the proceeding by pre-determining them by awarding either that no costs will be payable by either party or that one party must meet the costs of the other.

15. The key distinction between a *Beddoe* application and a PCO is as follows:[5]

> *The essential distinction between an order made in a Beddoe application and an order made on a prospective costs application is that the former does not*

---

[4] *Re Beddoe* [1893] 1 Ch 547

[5] *Lewin on Trusts (19th Edition)* at 27-241

> *predetermine the order for costs in the main action, while the latter does. The former is concerned with an issue between the trustee and the beneficiaries, while the latter is concerned with an issue between the parties to the main action. The former does not fetter the discretion of the judge dealing with the main action, but the latter does.*

16. The principles behind PCOs are different from *Beddoe* applications focussing much more on the prospects of success in the proceeding.

17. The principles behind *Beddoe* applications come from the principles relating to a trustees' indemnity. In general, a trustee is entitled to an indemnity against all costs, expenses and liabilities properly incurred in administering the trust. This usually extends to defending third party claims for the benefit of the trust.

18. However, if trustees act unreasonably in bringing or defending legal proceedings they may be held personally liable in costs.

19. A *Beddoe* application asks the Court to authorise a trustee to defend or bring court proceedings. Accordingly, the Court must consider whether the proceedings are justifiable (ie that the proceedings will not be fruitless)[6] and must canvas the prospects of success as well as whether the likely costs to be incurred are proportionate to the issues and the significance of the case[7].

20. Circumstances where it may be appropriate to bring a *Beddoe* application include:[8]

    a. Where a trustee is involved in a dispute with a third party where there is no risk of the trust fund being exhausted by the claim.

    b. When a trustee becomes involved in a dispute with a third party where the trustee is faced with a personal claim which is liable to exhaust the trust fund.

    c. When a trustee faces a claim by a person that they are a beneficiary as to their rights (if any) under the trust.

    d. When a question arises as to whether a trustee should sue a former trustee / another trustee for breach of trust.

    e. When a trustee becomes involved in proceedings against the trust or trust property.

21. However, it is generally accepted that a *Beddoe* order cannot be granted in hostile litigation except in exceptional circumstances; this is considered further below. There is considerable authority for this proposition.[9]

22. Hostile litigation in this context includes litigation asserting the trust is a sham or otherwise invalid and litigation claiming breaches of trust and seeking trustee removal.

23. The basic reason for depends, in part, on the nature of the case. Where the claim is one that the trust is invalid then, if successful, the trustee will have unsuccessfully

---

[6] *Re Perrot Mill Pty Ltd* [2013] VSC 428

[7] *Re Macedonian Orthodox Community Church St Petka Incorporated (No 4)* [2007] NSWSC 254 at [6]

[8] *Lewin on Trusts* at 27-237

[9] *Fundacion Pimjo AC v Aguilar and Aguilar Limited* [2015] NZHC 1402 and *Easton v New Zealand Guardian Trust Company Limited* [2016] NZHC 3011 are two recent New Zealand examples.

prevented the rightful beneficiary from accessing their property. That same property should not be used to pay for the trustee's costs.[10]

24. Where the claim is one for removal the trustee then such an order would be inappropriate as:

> *The interests of the trust as a whole are not significantly affected by the identity of the trustee…The trustee has, or should have, no particular interest in being a trustee.*[11]

25. Finally, if a *Beddoe* order was made, but the trial judge held there to be a breach of trust, the trustees would be insulated from the normal cost consequences. The beneficiaries would then in effect have been made to pay for the trustees' unsuccessful defence.[12]

26. The *Pettigrew* decision is a helpful recent decision on *Beddoe* applications (it also involved a PCO application). The trustees sought the orders against the life tenant under a will (Mr Edwards). Mr Edwards was the fourth husband of the deceased, and two of the three trustees were her sons from her first marriage. Mr Edwards owed a loan to the estate but it was intended he would repay this on his death.

27. Mr Edwards evidently remarried and moved (or was intending to move) to France. The trustees became concerned to obtain security and/or repayment of the loan – this was not forthcoming. Accordingly, they withheld income under the trust and Mr Edwards sued for breach of trust.

28. The Court found that, because the life tenant had filed the claim, it could hardly be considered that the trustees could argue that this was effectively a directions proceeding regarding what they should do with the income of the trust.

29. It was properly characterised as a breach of trust claim, "in respect of which it is not normally possible or sensible to make a *Beddoe* order".[13]

30. Interestingly, the Court considered the reasons for not awarding the *Beddoe* order were essentially why a PCO could not be awarded in this case but did note that it was not an automatic consequence.[14]

31. How then do *Beddoe* applications and PCOs tie in together? The answer is in an unusual way. It is possible, through the differing emphasis of the two, for the following scenarios to occur:

    a. for the trustee to be ordered to pay the costs of the other party but be indemnified from the trust fund for that and their own costs – although in hostile litigation such an outcome is highly unlikely; or

    b. for the trustee to receive a costs order in its favour but then not be indemnified from the trust fund.

---

[10] At first instance this might seem difficult to reconcile with *Butterfield v Public Trust* [2017] NZCA 367 however that case involved issues relating to the validity of appointment of the trustees rather than whether the property in question was actually trust property so is distinguishable.

[11] *Uncle's Joint Pty Ltd* [2014] NSWSC 321

[12] *Pettigrew v Edwards* [2017] EWHC 8

[13] Ibid at 27

[14] Ibid at 59-62

32. The final point to remember is that a *Beddoe* order is not the be all and end all on whether a trustee can rely on its general right to indemnity for costs and expenses properly incurred.

33. *Blades v Isaac*[15] considered whether a failure to obtain a *Beddoe* order will prevent a trustee being indemnified at the conclusion of the litigation – while the failure to obtain a *Beddoe* order may prevent a trustee from funding the ongoing litigation, it is not a bar on a trustee indemnifying themselves upon the conclusion of the litigation.

34. At paragraphs 112-116, the Court considers the decision of *Wingate v Butterfield Trust (Bermuda) Ltd*[16] which analyses the decision in *Alsop*.

35. Ultimately the view of the Court is that at the end of the litigation, as when a *Beddoe* application is made, the Court needs to consider whether the trustee is acting reasonably and in the interests of the trust.

36. The Court concluded that a failure to obtain a *Beddoe* application does not mean that the trustee has acted unreasonably in the litigation absent exceptional circumstances.[17] Instead the focus should still be on the trustee's underlying conduct.

37. Obviously, the point of a *Beddoe* order is to get some sign-off from the court before hand. However, due to principles involved in *Beddoe* orders in hostile litigation, that is close to impossible for trustees facing removal / breach of trust proceedings.

Process

38. Technically, the application should be made under Part 18 of the High Court Rules. However, the Court is generally willing to grant leave under HCR 19.5 for the application to be brought as an originating application under Part 19 although directions as to service should also be sought. The beneficiaries of the trust must be served with the application as they are entitled to be heard.

39. The reasons for these procedural rules make sense when considering what a *Beddoe* application is – it is concerned with reviewing the merits of the main proceeding from the viewpoint of the trust.

40. This explains why the proceedings are separate, why the beneficiaries must be heard, and also why the judges in each proceeding must be different.

41. The Court must then decide the extent to which disclosure must be made to other parties to the application (ie the beneficiaries). There are inherent tensions with this:

    a. On the one hand, the trustees should be entitled to maintain privilege in material; particularly documents that disclose the strengths and weaknesses of their case.

    b. On the other hand, the other parties to a proceeding should be entitled to see all material that is before the Court. This is particularly the case where

---

[15] *Blades v Isaac* [2016] EWHC 601 (Ch)

[16] *Wingate v Butterfield Trust (Bermuda) Ltd* [2008] WTLR 543

[17] Indeed at [112] the court seemed to indicate the *Beddoe* process was not appropriate in hostile situations when it referenced a discussion in *McDonald v Horn* [1995] ICR 685 (CA) around *Beddoe* applications in that context and said "the reference was incidental, for the *Beddoe* procedure is appropriate where the litigation is with a third party, whereas the litigation in *McDonald v Horn* was a hostile breach of trust claim by beneficiaries against trustees and others."

beneficiaries are the parties and would generally be entitled to view such material, there being limited privilege between a beneficiary and a trustee.[18]

42. The accepted approach is that trustees are entitled to keep confidential material that discloses the strengths and weaknesses of their case. In similar applications, other parties to the application are required to leave the Court when the trustees are making their case.

43. However, otherwise the general rules of disclosure that apply as between trustees and beneficiaries apply to *Beddoe* applications as well. The decision of *Blades v Isaac* clarified that no legal professional privilege exists between trustees and beneficiaries – the legal advice is for the benefit of the trust.

44. In a recent decision[19] in hostile litigation, the approach of the Court to suppression of documents was as follows:

    a. It was accepted by the parties that litigation privilege applied – accordingly, legal opinions about the merits of the case were able to be suppressed by the trustees.

    b. The issue of whether legal professional privilege applied in a *Beddoe* application did not have to be dealt with on the facts of the case, as the trustees had not asked to suppress any documents attracting legal professional privilege.

    c. All other documents had to be assessed using the approach to disclosure of trust documents set out in *Erceg v Erceg*.[20]

45. Ultimately, the Court undertook a document by document analysis of the documents the trustees sought to suppress. Some of the redactions were maintained on the basis they were personal and of no substantive benefit, others were ordered to be provided to the beneficiaries, while others were determined to be subject to litigation privilege.

46. When considering the process of a *Beddoe* application it is important to remember, at the hearing of the *Beddoe* application proper, that this is no the occasion for a mini-trial on complex issues of law or fact.[21]

47. Indeed, the cost/benefit analysis of making a *Beddoe* application can hardly be justified if it becomes a lengthy hearing involving considering evidence.

48. The Australian decision of *Uncle's Joint*[22] shows that the Court will place weight on the opinion of counsel. This is followed through in other decisions, but the discussion in *Uncle's Joint* demonstrates the Court's thinking. There it carefully analysed the opinion (without disclosing its content) and noted that there was a clear defence available to the trustees.

---

[18] *Blades v Isaac* [2016] EWHC 601

[19] *Glasgow Harley Trustee Limited v McLaughlin* [2018] NZHC 290. The authors acted for the Respondents in that proceeding. As far as the authors are aware, this is the only New Zealand case of its type on suppression of documents in a *Beddoe* application in hostile litigation.

[20] *Erceg v Erceg* [2017] NZSC 28

[21] *Woodward v Smith* [2014] NZHC 407 at [20] citing *Re Westdock Realisations Ltd & Anor* [1988] BCLC 354 Ch at 362

[22] *Uncle's Joint Pty Ltd* [2014] NSWSC 321

49. Part of that analysis involved an analysis of the facts to confirm that the advice of counsel was based in reality. However, the Court was clear (and this analysis exists in other decisions) that an opinion from counsel should form the basis of the *Beddoe* application.

50. Unfortunately for the trustees in that case, the Court considered that even if they were more likely than not to be successful it was not in the interests of the trust that they defend themselves as equity has no interest in the identity of a trustee.[23]

51. It is interesting to highlight the additional analytical step that has been taken here that would not be taken if this was a PCO application. In a PCO application, the Court is concerned with what the likely cost order would be – similarly in a *Beddoe* application the Court will want to be satisfied about the likely outcome.

52. However, the analysis effectively stops at the merits of the proceeding with a PCO whereas the Court must be satisfied that the litigation is in the interest of the trust more generally even if success is considered likely when contemplating awarding a *Beddoe* order.

53. In finishing this section, it is interesting to consider the role of the beneficiary at a *Beddoe* hearing. The most appropriate role for beneficiaries appears to vary between jurisdictions.

54. For example in Hong Kong it appears that the beneficiary is to be limited to more of a 'fact-checking' role – that is, providing the Court with the alternative narrative as to the likely evidence at trial which the Court can then consider against the legal advice it is privy to but not necessarily making submission on the merits of the underlying proceeding.[24]

55. In contrast in New Zealand the Court appears to allow those involved in the underlying dispute – where they are beneficiaries – a more free-ranging role. For example in *Woodward v Smith*[25] it was clear that the other party was entitled to see counsel's opinion and comment on it.

56. Such an approach appears to be perfectly justified in hostile litigation. In a case where the trustees are not remaining neutral in response to a claim by a beneficiary then, given that the beneficiary's interest in the trust fund will be directly affected by a *Beddoe* order, it would appear to breach natural justice to exclude them from the hearing and prevent them from making submissions on the merits of the underlying case.

Exceptional circumstances

57. As the Court noted in *Glasgow Harley*, trustees face a steep incline in establishing they should receive a *Beddoe* order in hostile litigation.[26] The reason for that is clear: a trustee who loses a breach of trust action is not entitled to indemnity. A trustee cannot expect the Court to indemnify him or her in circumstances where it is not known whether the allegations are well founded.

---

[23] See also *Charlesworth Nominees Pty Ltd v Charlesworth* [2017] VSC 445

[24] *Mong Man Wai William* [2012] (unrep, CACV 34/2012, [2012] HKEC 1785). This approach should be looked at in the context of the case where the court directed the trustees to take a more neutral approach.

[25] Above, n20

[26] *Glasgow Harley Trustee Limited v McLaughlin* [2018] NZHC 290 at [15]

58. This leads to a consideration of when a Court will find exceptional circumstances. This analysis necessarily has to include applications for PCO's, given the dearth of examples of a *Beddoe* order being granted in hostile litigation. However, when considering PCO cases it is important to remember the distinction described above – one is concerned with costs as between parties to litigation; the other is concerned with the relationship between trustees and beneficiaries.

59. In *Woodward v Smith*,[27] a PCO application made in hostile litigation, Kos J considered that:

> Only in very exceptional cases, after having regard to the strength of the party's case, the likely costs order at trial, the justice of the application and any special circumstances will a PCO be made.[28]

60. Part of the special circumstances considered included whether Mr Woodward would be able to continue the litigation absent a PCO and the defendants' conduct. Ultimately, Justice Kos ruled against granting a PCO. It is suggested that the analysis is necessarily different in *Beddoe* application as there is another layer that would need to be met before the analysis applied by Justice Kos – is it in the interests of the trust?

61. An example of a PCO being granted in hostile litigation is *Re Westdock Realisations*[29] where liquidators of two companies sought prospective cost orders in relation to two proceedings. In that case, the tipping point for the Court was that the case operated as a useful test case for similar issues that arose in a number of other cases.[30] It appears that the liquidators would not have defended the proceedings absent a PCO being made.

62. To some extent, it is arguable that *Re Westdock Realisations* is not truly hostile litigation. The liquidators were, in effect, acting on behalf of unsecured creditors against the receivers of the companies determining what should be done with any surplus funds.

63. The liquidators argued (quite reasonably) that they were, in effect, asking the Court to determine a question of construction. While the Court found that this was litigation between rival claimants to a fund and it was, therefore, hostile arguably the case would be better characterised as a liquidator seeking directions about what to do with funds and so was, perhaps, closer to a friendly trust dispute than a hostile one given that someone had to argue for the interests of the unsecured creditor.

64. While the liquidator clearly had a view on what should happen with those funds, that is often the case in direction hearings. If anything, the case highlights the need to ensure that cases are properly characterised per *Buckton* and *Alsop*.

65. *STG Valmet Trustees Limited*[31] was a limited *Beddoe* order for the purpose of allowing the trustees to file a strike out application. There, the Court considered the trustees so likely to succeed that they were entitled to test that theory through strike out – the *Beddoe* order was only granted for that limited purpose.

---

[27] Above, n20

[28] Ibid at 39

[29] *Re Westdock Realisations Ltd & Anor* [1988] BCLC 354 Ch

[30] Ibid at 199

[31] *STG Valmet Trustees Ltd v Brennan & Ors* [2002] WTLR 273

66. The above cases highlight just how exceptional a case must be to obtain a *Beddoe* order in hostile litigation: unless your case has the strength of a strike out application, or is a useful test case on a point of law that could otherwise not be brought, it seems unlikely that a *Beddoe* order would be granted.

Is the position right?

67. We accept two basis principles:

    a. The general rule in hostile litigation is that costs follow the event.

    b. Further, it is inappropriate to allow trust funds to be used to litigate against the very people they are for the benefit of. Indeed, Millett J said exactly that in the following passage:

    > A trustee has no right to have recourse to trust money to defend him- or her-self against a claim for breach of trust unless he has an arguable case for saying that he has a beneficial interest in the funds in question. No man has a right to use somebody else's money, for the purpose of defending himself against legal proceedings.[32]

68. Accordingly, it follows that it is appropriate that *Beddoe* orders are not granted easily or, indeed, at all in hostile litigation.

69. It should be remember that this does not limit the trustees' entitlement to an indemnity more generally – it merely affects its timing. Whether a *Beddoe* order is granted or not the court has the discretion to reverse that decision after the outcome of the substantive proceeding is known.

70. There is some suggestion that the trustees being otherwise unable to defend themselves would be a factor that the Court should consider relevant when considering whether exceptional circumstances exist.[33] However, absent evidence of that then there appears no reason why trustees should not fund their own litigation in such circumstances.

71. It also needs to be remembered that:

    a. if the trustees cannot fund their own litigation then a *Beddoe* order should become harder to get because it is less likely that the beneficiaries will recover the costs spent if ultimately successful; and

    b. insurance is available for trustees – if thy failed to obtain it and the beneficiaries gain an advantage in the litigation because of that then it is the trustees' own fault.

72. As the Court notes in *Blades v Isaacs*, a failure to obtain a *Beddoe* order in trustee/beneficiary litigation cannot be considered unreasonable.[34] The same judge in *Pettigrew* notes that "a trustee might not seek a *Beddoe* order, and yet might manage to establish that the liability he incurred to pay costs to another party was properly incurred".[35]

---

[32] *Ostrich Farming Corporation Ltd v Ketchell & Anor* [1997] EWCA 2953

[33] See, for example, the discussion in *Woodward*. See also, *Chau Cham Wong Patrick v Highmax Overseas Ltd* [2013] HKEC1211

[34] *Blades v Issac* [2016] EWHC at [115]

[35] *Pettigrew* at 62

73. Accordingly, it follows that not obtaining a *Beddoe* order does not mean that the trustees cannot indemnify themselves from the trust fund later – it just means that they are effectively facing the same litigation risk as the other party to the litigation. If they are ultimately found to be in breach of trust, then it follows that they should not have been entitled to use the trust fund.[36]

74. It should also be remembered that there are choices that can be made that improve the likelihood of obtaining a *Beddoe* order. For example, in circumstances where it seems likely that beneficiaries are going to commence litigation against trustees, then those same trustees could pre-empt that and seek directions from the Court about the particular matter that is causing conflict.

75. While that is still, technically, hostile litigation it gives the trustees a greater chance of placing themselves into the 'trust dispute' category under *Alsop* and the first category in *Buckton* – thereby allowing them a greater opportunity at obtaining access to trust funds during litigation.

76. Overall, however, the 'exceptional circumstances' principle seems appropriate if regard is had to what *Re Beddoe* itself actually said. The principle is that the costs must be properly incurred for the benefit of the trust.

77. The first implication of this principle is that in cases involving trustee removal it can almost never be said that any costs defending the application are properly incurred provided that the proposed replacement trustee is suitable. That is because, as noted above, the principle is that the interests of the trust are not, on the whole, affected by the identity of the trustee.

78. Accordingly it is correct to say that something exceptional would appear to be required to justify a trustee using trust funds to defend a removal application.

79. However that is not to say that it is always incorrect for a trustee to defend themselves from claims and claims for breach of trust or duty should be viewed as a separate category.

80. In those situations the second implication of the principle espoused in *Re Beddoe* is that in cases where breach of trust or duty is alleged then the court must be sure the conduct in question was proper before it can be said it is in the interests of the trust to defend the claim.

81. In the litigation context, then, a court cannot be sure until the matter is concluded. If it appears more likely than not that the claim could be defeated on a summary basis then it seems appropriate that a *Beddoe* application be granted. That is because the lack of contested evidence means a judge in a *Beddoe* application will have almost as good a view of the matter as a judge hearing a summary judgment or a strike-out application.

82. However where it appears more likely than not that the matter would proceed to a trial then it is appropriate that the trustee wait until the trail is concluded as until the court will not know whether the trustee is speculating "in law with money that belongs to other people."

83. The final question to consider, as to whether the principle is right, is what the role of the trustees' indemnity is. Where there is a wide indemnity – which extends only to

---

[36] The discussion surrounding the overturning of the 80/20 split on recouping of costs by trustees in *Armitage v Nurse* [1998] Ch 241 by Millet LJ is instructive in this regard.

dishonest or fraudulent conduct or wilful breach – should the trustee be able to continue to rely on it when defending apparently hostile proceedings?

84. That might have some attraction at first glance. However the issue was considered in *Armitage v Nurse*[37] and Lord Millett was reluctant to endorse such a principle saying instead:

> *But on what principle can one justify their right to recoup themselves out of the trust fund for the costs of unsuccessfully defending themselves against such an action? It offends all sense of justice.*

85. The answer, perhaps, lies in the inherent limit on the trustees' right to an indemnity. It is for steps taken in the due administration of the trust.

86. At this point there is a need to distinguish between the steps taken in defending the proceeding and the steps taken that give rise to the proceeding. Unsuccessfully defending a breach of trust claim might not be dishonest but it cannot be said to be in the proper administration of the trust.

87. This is particularly relevant when it comes to removal claims. It needs to be remembered that the grounds for removal and the scope of an indemnity (or limitation of lability) clause are different. A trustee cannot defend a removal application on the basis of the scope of such a clause.

88. In such a case you then need to analyse whether defending the removal application can be considered to be a step in the due administration of the trust. As has already been established the answer to that is no unless there are exceptional circumstances.

89. The second implication is that if there is a broad indemnity (or limitation of liability) clause then that might be a case where a court would fund a summary judgment or strike-out application given that the underlying claim – unless dishonesty or wilful breach is properly pleaded – might not succeed in the face of such a broad clause.

Conclusion

90. The intersection between *Beddoe* applications, PCOs and trustees" rights to indemnity and the usual court cost recovery rules in the context of hostile litigation is complex.

91. However the critical points appear to be:

    a. the process appears to vary slightly by jurisdiction but in New Zealand suppression of material appears to be kept to a limited array of documents;

    b. *Beddoe* orders (or PCO orders) in hostile litigation are only granted in exceptional circumstances;

    c. in cases of trustee removal applications the threshold would appear to be even higher;

    d. not obtaining a *Beddoe* order does not mean that the trustee loses their right to indemnity – the outcome of the case will typically determine that; and

    e. the critical questions are whether the trustees are acting in the best interests of the trust and whether the claims against them appear to have some merit (at an interim stage) or are proven (at the final stage).

---

[37] Above, n35

92. This approach is consistent with the key principle identified in *Beddoe* itself. Fundamentally trustees should not be able to speculate with others money. Nor should they be able to use it to defend claims relating to their own wrongdoing.