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Who should pay, and when?

Jeremy Johnson and James Anson-Holland, Wynn Williams, Auckland, on *Beddoe* applications

INTRODUCTION

Litigation against trustees is on the rise. That raises the question of when parties to the litigation are entitled to have their legal costs paid for out of the trust fund.

Beddoe applications are probably underused in New Zealand. The purpose of this article is to set out how trustees should approach litigation and *Beddoe* orders, including what considerations are relevant and what procedure should be followed. As a result, this article covers:

(a) the appropriate categorisation of trust proceedings;
(b) Beddoe applications;
(c) Beddoe applications in hostile litigation; and
(d) the correct procedural path when deal with bringing or defending trust proceedings.

APPROPRIATE CATEGORISATION OF TRUST PROCEEDINGS

The starting point of this discussion is what category of trust dispute is the trustee facing? The decision in *Re Buckton* [1907] 2 Ch 406 was the first occasion where trust litigation was divided into three categories:

(a) proceedings for directions brought by trustees;
(b) proceedings for directions brought by someone other than a trustee (that is, a beneficiary); and
(c) hostile claims against the trustees or between beneficiaries.

The *Re Buckton* categories were developed into what are now recognised as the modern categories of trust litigation in *Alsop Wilkinson (a firm) v Neary* [1995] 1 All ER 431. While these categories have been well traversed, it is useful to provide a brief summary of each 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 either be 'friendly' or 'hostile' litigation. A friendly trust dispute might involve consideration of the construction of the trust instrument or some other question arising in the course of the administration of trust. A hostile dispute involves a challenge to the validity of the settlement by the settlor.
(b) Beneficiary dispute. This is a dispute with one or more of the beneficiaries as to the property of any action which the trustees may or may not have 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.
(c) Third-party dispute. This is a dispute with persons that are not in the capacity of beneficiaries. Third-party disputes are generally not hostile given the context from which they arise.

The primary focus of this article is on obtaining *Beddoe* orders in hostile litigation. Such litigation can either be a trust dispute or a beneficiary dispute.

WHAT IS A *BEDDOE* APPLICATION?

A *Beddoe* application derives its name from the decision *Re Beddoe* [1893] 1 Ch 547 (CA). In that decision 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 that had been awarded against him in that proceeding. In response, Bowen LJ uttered (at 562):

> 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.

The Lord Justice went on to note 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 bringing or defending a lawsuit then that trustee can file an originating summons and ask a court whether the point is one which should be fought or abandoned. It was noted (at 562) that to do other "might be to speculate in law with money that belongs to other people".

And so the *Beddoe* application was born. The effect of which is to seek indemnification from the trust fund in respect of costs a trustee will incur in a proceeding.

The need for such an application was recently considered in the Court of Appeal of New Zealand decision *Pratley v Courteney* [2018] NZCA 436. That decision involved a claim by a son against his father's estate for costs incurred in caring for the father. The claim itself was for $36,000. The trustee spent $29,000 in legal fees and $8,000 on his own time unsuccessfully defending the claim. The question on appeal was whether the High Court was correct in determining the trustee should have applied for a *Beddoe* order.

It was held that the High Court incorrectly classified the litigation as a beneficiary dispute when it was more appropriately classified as a third-party dispute. Gilbert J (giving judgment for the Court) determined that the son pursued his claim, not as a beneficiary, but as a person claiming to be a creditor of the estate (at [22]).

Notwithstanding the fact that most third-party disputes are not considered hostile, the *Pratley* Court made the following observations of more general import in relation to the appropriateness of a *Beddoe* order:

(a) An executor and/or trustee must act reasonably, exercising due skill and care. In cases of doubt, the executor/

trustee may take legal advice or seek directions from the court. In this instance, it was reasonable to rely on legal advice given the short timeframe and expense of a directions application.

(b) An executor and/or trustee is not entitled to immunise themselves against possible claims irrespective of the difficulty of the issue or the amount at stake: *New Zealand Guardian Trust v Hewitt* (1998) 1 NZTR 8-001.

(c) An executor and/or trustee is not entitled to allow a claim against an estate/trust to proceed on an unfettered basis merely because the amount claimed is modest: *Pratley v Courteney* [2018] NZCA 436 at [26]. This would open an executor/trustee up to claims for failing to adequately protect the assets of the estate/trust.

It is important to note the distinction between *Beddoe* orders and prospective costs orders (PCOs), which deal with costs in the proceeding by pre-determining them or determining that no costs will be payable by a party.

The key distinction between a *Beddoe* order and a PCO has been set out by the learned editors of *Lewin on Trusts* (19th ed, Sweet & Maxwell, London, 2015) at [27-241]:

> 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 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.

The principles underpinning PCOs are focused on the prospects of success while the principles behind *Beddoe* orders borrow from principles relating to a trustee's indemnity. In general, a trustee is entitled to an indemnity against all costs, expenses, and liabilities properly incurred in administering the trust: see s 38(2) of the Trustee Act 1956. The Court of Appeal in *Butterfield v Public Trust* [2017] NZCA 367, (2017) 4 NZTR 27-015 discussed a trustee's right to an indemnity at length and held (at [21]):

> The proposition is so fundamental that it need not be justified. It is a right, probably proprietary in nature, recognised by equity as an incident of trusteeship. The right is to an indemnity for reasonable costs and expenses incurred in the administration of the trust.

This indemnity usually extends to defending third party claims for the benefit of the trust. However, if trustees act unreasonably in bringing or defending legal proceedings, they may be held personally liable for the costs associated with bringing or defending that claim.

A *Beddoe* application expressly requests a court to authorise a trust to bring or defend proceedings. Accordingly, a court must consider whether the proceedings are justifiable (that is, that the proceedings will not be fruitless: *Re Perrot Mill Pty Ltd* [2013] VSC 428) 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: *Re Macedonian Orthodox Community Church St Petka Incorporated (No 4)* [2007] NSWSC 254 at [6].

Circumstances where it may be appropriate to bring a *Beddoe* application include (but are in no way limited to):

(a) Where a trustee is involved in a dispute with a third party and 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.

It is generally accepted that a *Beddoe* order should not be readily granted in hostile litigation. However most New Zealand authority, until recently, involved discussion of costs orders in the context of PCOs as well as *Beddoe* applications with some conflation of the principles involved between the two of them.

BEDDOE ORDERS IN HOSTILE LITIGATION

The recent High Court of New Zealand decision *Glasgow Harley Trustee Limited v McLaughlin* [2018] NZHC 3198 has clarified the law in this area. The Court affirmed the basic principle that the key question to ask when assessing a *Beddoe* application is whether it is in the best interests of the trust for the litigation to be defended (or brought). The Court then recorded that it is difficult to imagine defending a hostile claim against trustees as being in the best interests of the trust where the claim has some merit (at [30]).

Before considering that judgment in detail it is worth sketching out the prior authorities. In the High Court of New Zealand decision *Woodward v Smith* [2014] NZHC 407, [2014] 3 NZLR 525, a PCO application was made in hostile litigation. Kós J assessed the *Buckton* categories of litigation and recorded (at [23]):

(a) [t]he first category involves proceedings brought by trustees to obtain the Court's guidance on the construction of the trust deed or some aspect of the trust's administration. In such cases, the costs of all parties necessarily participating are treated as incurred for the benefit of the estate and ordered to be paid out of the trust fund.

(b) The second category involves a similar application, but by someone other than a trustee (such as a beneficiary). However, it is a case which would have justified application by a trustee. The same approach is taken to costs in the second category as to the first.

(c) The third category, however, is where a beneficiary is making a "hostile claim" against the trustees, or another beneficiary. The claim may still involve a point of construction, or administration. It will often involve a claim to a beneficial interest or entitlement to a part of the trust fund. In the third category, involving a hostile claim against trustees or another beneficiary, the usual principles as to costs apply. Ordinarily they will follow the event.

His Honour then went on to consider when a PCO may be made in hostile litigation. He stated (at [39]) 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 be PCO be made.

The issue of the granting of a PCO and the granting of a *Beddoe* in hostile litigation was then considered in *Fundación Pimjo Ac v Aguilar & Aguilar Ltd* [2015] NZHC 1402. There the High Court considered that the Buckton categories applied and, following *Woodward*, stated that exceptional circumstances were needed to grant either a PCO or a *Beddoe* in hostile litigation (at [36] and [39]).

In *Easton v The New Zealand Guardian Trust Company Limited* [2016] NZHC 3011 the High Court again affirmed the principle saying (at [12]):

> …even accepting that a *Beddoe* application should have been made, such an application does not ordinarily deal with costs between the parties in the main proceeding. In hostile trust litigation … costs should follow the event in the usual way. Moreover, it is clear from the case law that *Beddoe* orders will not be granted where the actions of the trustee are being challenged as a breach of trust.

In the English High Court the matter was considered in *Pettigrew v Edwards* [2017] EWHC 8 (Ch), where it was recorded (at [27]):

> On the whole, and after consideration of the material placed before me, I consider that this is not a "friendly" dispute, and that it should properly be characterised as a breach of trust claim, in respect of which it is not normally possible or sensible to make a Beddoe order.

There is also older English authority relating to when a PCO might be granted in hostile litigation. R*e Westdock Realisations Ltd* [1988] BCLC 354 is a case where liquidators of two companies sought prospective cost orders in relation to two proceedings. The liquidators were acting on behalf of unsecured creditors against the receivers of the companies determining what should be done with surplus funds. The liquidators argued (quite reasonably) that they were, in effect, asking the Court to determine a question of construction that should more appropriately be characterised as friendly litigation.

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. The decision also highlights the need to ensure that cases are properly characterised per *Buckton* and *Alsop*.

The cases that engaged with the issue most directly were those of *STG Valmet Trustees Ltd v Brennan* [2002] WTLR 273 and *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42, (2008) 237 CLR 66.

STG Valmet concerned a limited *Beddoe* application for the purpose of allowing the trustees to file a strike out application. The Court considered that the trustees were so likely to succeed that they were entitled to test that theory through strike out. The *Beddoe* order was granted for that limited purpose.

Macedonian Orthodox was a more complex case which went to the High Court of Australia. The Macedonian Orthodox Community Church St Petka Incorporated (the Association) held land on trust for the Macedonian Orthodox Church. Proceedings were instigated against the Association, alleging that it had wrongly dismissed a clergy member, had dealt with church property improperly, and had repudiated the trust. The Association instituted separate proceedings to obtain judicial advice under s 63 of the Trustee Act 1925 (NSW) (the equivalent of s 66 of the Trustee Act 1956, although there are some differences in the wording) as to whether it was justified in defending the proceedings, and whether it was entitled to be indemnified out of trust assets for the costs incurred in doing so. The trial Judge's decision granting the orders sought was reversed by the Court of Appeal. The Association then appealed to the High Court.

The High Court of Australia allowed the appeal. It held that nothing in s 63 precluded the Court from giving the advice sought by the Association. Provided there was a question about the administration of trust property or the interpretation of the trust instrument, nothing in s 63 limited the application to non-adversarial proceedings. It went on to say that the classification of the proceedings as adversarial or non-adversarial was not useful in deciding whether advice should be given under s 63. Instead the critical question was what was in the best interests of the trust (at [71] and [72]).

Having said that, however, the High Court made some further observations. First it noted that the necessary consequence of s 63 was that trustees should not take steps to defend the proceeding until judicial advice has been sought. This is an important point which is relevant to the discussion on procedure below.

Second, the High Court noted that while the general question is what is in the best interests of the trust it will be problematic for a trustee sued for misdeeds to justify indemnification pending the substantive hearing. In particular, the Court said (at [67] and [152]):

> Where there is a non-charitable private trust involving a conflict between beneficiaries, or between beneficiaries alleging a breach of trust out of which a trustee has profited and that trustee, and where the defendants in those proceedings have a personal capacity to fund the defence, it might not be correct to give the trustee an opinion, advice or direction.

On the last matter, it would be bizarre that a trustee responsible for (and other defendants participating with the trustee in) grave breaches of trust of the kind alleged in the statement of claim (version 8) should not be exposed to personal liability for the costs of proceedings to remedy the breaches, including the costs of the plaintiffs.

This approach was then affirmed in the New South Wales Supreme Court decision *Re Uncle's Joint Pty Ltd* [2014] NSWSC 321, (2014) 12 ASTLR 487. In that case the applicants for the *Beddoe* order were the defendants in other proceedings in which it was contended that they had each not been duly appointed as trustees of their respective trusts. They sought advice as to whether they were justified in defending the claims and, if so, whether they were justified in using the resources of the relevant trusts to do so.

The Court considered that the substantive proceedings were analogous to a dispute between the trustee and one or more beneficiaries (albeit not with respect to the trustee's actions, but with their appointment). The key point was, as the Court recorded, "in this class of case, the trustee is not litigating to defend or enhance the trust assets, but only in his or her personal interests" (at [23]).

The general rule in such cases is that trustees will be allowed their costs out of the estate only after the proceedings have been resolved in their favour. The Court acknowledged the holding in *Macedonian Orthodox*, but said that this did not mean that trustees will invariably be given advice to defend hostile proceedings: the question is whether it is practical and fair for the trustee to be an active litigant, with recourse to the trust fund for the costs of the litigation.

Fairness and practicality did not favour enabling the trustees to access the trust fund in this case. However, this did not preclude the trustees from successfully defending the proceeding and claiming an indemnity. It simply meant the defence should be funded in the first instance other than by the trust.

These decisions were before the Court in *McLaughlin*. Having considered them the Court recorded that the previous statements in *Woodward, Fundación*, and *Easton* need to be treated with caution.

Rather than saying that, as for a PCO, exceptional circumstances were needed before a *Beddoe* would be granted in hostile litigation the critical question was what was in the best interests of the trust. As Thomas J said (footnotes omitted):

> [29] The test as educed from case law is simply that *Beddoe* applications are gauged against the fundamental question of what is in the best interests of the trust. The Court must therefore exercise its jurisdiction in the best interests of the trust, and the beneficiaries as a whole, having regard to all the circumstances. This may include the need to balance the interests of different beneficiaries, as well as the interests of beneficiaries and trustees. That basic test conforms to the principle on which such applications are founded, namely that trustees ought to be indemnified for costs properly and reasonably incurred for the benefit of the trust.
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> [30] In any event, my analysis of the law does not suggest that substantive outcomes are likely to be materially different. It is difficult to imagine a truly hostile proceeding, such as an allegation of a breach of trust with at least some prospect of success, where it would be in the best interests of the trust to fund the proceedings out of its own assets prior to determination of those allegations. I doubt whether, in that situation, the different tests for *Beddoe* or prospective costs applications would yield materially different results. It is therefore unnecessary to add a special or exceptional circumstances test in the context of hostile litigation, as the threshold of the best interests of the trust itself adequately addresses that circumstance.

The Court then made some practical observations. Critically it was observed that in deciding on a *Beddoe* application the Court will need to categorise the proceeding as per *Buckton* and assess whether the proceeding touches on or affects the future administration of the trust in a manner in which the trustee is legitimately interested: see [32] to [37].

In summary, then, the effect of *McLaughlin* is:

(a) when assessing a *Beddoe* application the court needs to categorise the proceeding and assess its affect on the future administration of the trust;

(b) having done so it must then ask whether the spending of trust funds on the proceeding is in the best interests of the trust; and

(c) where the litigation is hostile and the trustees' personal interests are at stake it is unlikely that it will be in the interest of the trust to defend the proceeding.

Is the position right?

Arguably the position in *McLaughlin* is correct although it is questionable whether there was any purpose in abandoning the use of the language of 'exceptional circumstances' (as the Judge tacitly admitted).

Why is it right? Two fundamental principles must be accepted:

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

(b) It is inappropriate to allow trust funds to be used to litigate against the very people they are for the benefit of. Millet J said exactly that in the following passage from *Ostrich Farming Corporation Ltd v Ketchell & Anor* [1997] EWCA 2953:

> 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.

It must follow that *Beddoe* orders are not granted easily or, indeed, at all in hostile litigation. 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 a court has the discretion to reverse that decision until the outcome of the substantive proceeding is known.

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: see for example the discussion in *Woodward v Smith* [2014] NZHC 407, [2014] 3 NZLR 525 and *Chau Cham Wong Patrick v Highmax Overseas Ltd* [2013] HKEC 1211.

However, absent evidence of that then there appears to be no reason why trustees should not fund their own litigation in such circumstances.

It is also needs to be remembered that:

(a) if 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 and if they failed to obtain it and the beneficiaries gain an advantage in the litigation because of that then it is the trustees' own fault.

As the Court notes in *Blades v Issacs* [2016] EWHC 601 (Ch) at [115], a failure to obtain a *Beddoe* order in trustee/beneficiary litigation cannot be considered unreasonable. That same Judge in *Pettigrew v Edwards* [2017] EWHC 8 (Ch) notes (at [27]) 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".

It must follow 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 the trustees are ultimately found to be in breach of trust, then it follows that they should not have been entitled to use the trust fund. 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.

NAVIGATING THE CORRECT PROCEDURAL PATH

Technically speaking, a *Beddoe* application must be made under pt 18 of the High Court Rules 2016. In saying that, the

Court is increasingly willing to grant leave under High Court Rule 19.5 (court may permit proceeding to be commenced by originating application). In the event an originating application is permitted, directions as to service should always be sought. The beneficiaries of the trust must be served with the application as they are entitled to be heard.

The reasons for these procedural rules make sense when considering the purpose of a *Beddoe* application. That is, to review the merits of an extant proceeding from the viewpoint of the trust. This explains why the extant proceeding and *Beddoe* proceeding are separate, why the judge in each proceeding must be different, and why the beneficiaries must be heard.

The High Court does have the ability to deal with these applications as a matter of urgency. As was said in *Courteney v Pratley* [2017] NZHC 3285 at [56] and [57]:

> Sections 66 and 69 of the Trustee Act are intended to provide an easy method for trustees to obtain directions from the Court in relation to specific matters of trust administration. Section 66 provides the right for a trustee to apply to the Court for directions concerning any property subject to a trust, or in relation to the management or administration of such property, or the exercise of any power or discretion vested in the trustee. Section 69 provides protection to a trustee acting under any direction of the Court, deeming the trustee to have discharged their duty as a trustee, notwithstanding that the Court's direction is later invalidated, overruled, set aside or rendered of no effect.
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> In that way, the Court can hear parties, at its direction, and give such direction as is required. There should be no impediment to any trustee seeking urgency from this Court, when faced with a pressing dilemma, such as an approaching hearing of a proceeding. This option does protect the trustee, in the event that costs and expenses are incurred in engaging in litigation, if the Court so directs.

Once the *Beddoe* application is filed the Court must decide the extent to which disclosure must be made to other parties to the application (i.e. the beneficiaries). There are inherent tensions with this decision.

On the one hand, the trustees should be entitled to maintain privilege in material; particularly documents that disclose the strengths and weakness of the case. 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 beneficiaries are the parties and would generally be entitled to view such material, there being limited privilege between a beneficiary and a trustee: *Blades v Issac* [2016] EWHC 601 (Ch).

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. In all other respects the general rules of disclosure that apply between trustees and beneficiaries apply equally to *Beddoe* applications.

In *McLaughlin* the approach to suppression of documents in hostile litigation was as follows:

(a) It was accepted by the parties that litigation privilege applied. Accordingly, the legal opinions in relation to 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 that attracting legal professional privilege.

(c) All other documents had to be assessed using the approach to disclosure of trust documents, as set out in the Supreme Court of New Zealand decision *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320.

In the end, the Court undertook a document-by-document analysis of the documents that 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.

When considering the process of a *Beddoe* application it is important to remember that it is not the occasion for a mini-trial on complex issues of law or fact: see *Woodward v Smith* [2014] NZHC 407, [2014] 3 NZLR 525 at [20] citing *Re Westdock Realisations Ltd* [1988] BCLC 354 (Ch) at 362. Indeed, the cost/benefit analysis of making a *Beddoe* application can hardly be justified if it becomes a lengthy hearing involving considered evidence.

It is also important not to under estimate the legal opinion that the trustees should have inevitably sought prior to considering the *Beddoe* order. The decision in *Uncle's Joint Pty Ltd* shows that the court will place significant weight on the opinion of counsel.

In that decision the Court carefully analysed the opinion (without disclosing the content) and noted that there was a clear defence available to the trustees. The Court made it clear that as long as the legal opinion was based in reality, it should form the basis of the *Beddoe* application.

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. 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.

Role of the beneficiary

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. For example, in Hong Kong it appears that the beneficiary is to be limited to more of a 'fact-checking' role — 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: see *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.

In contrast, New Zealand appears to allow those involved in the underlying dispute (where they are beneficiaries) a more free-ranging role. The decision in *Woodward v Smith* is

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referrals, (b) 2,584 conferences held, (c) 162,287 charges faced in the District Court, and (d) 64,387 people charged there ((calculated from Ministry of Justice communication to authors (29 March 2019) obtained under Official Information Act 1982 request to the Ministry). So, whilst neither of the latter is a problem-free proxy for cases that could be referred under s 24A, the referrals made are only 7.8 per cent of (c) or 19.7 per cent of (d). Percentages for conferences actually held are only about one-fifth of those figures : just 1.6 per cent and 4 per cent respectively.

By contrast, our proposal is sweeping and delivers comprehensively on restorative justice's promise as a paradigm shift. Specifically, we propose *making restorative justice the new default setting wherever the offender admits wrongdoing*, by sending all such cases to purpose-designed Community Resolution Centres as explained below instead of to court.

This returns prosecution to being truly a last resort as it was early in common law jurisdictions' procedural history. Because the great majority of defendants plead guilty, under our proposal most cases would bypass our clogged courts altogether. Thus, the adult system would become primarily diversionary, just as New Zealand's youth justice system was meant to be (and was initially). The proposal adapts and mainstreams the successful premise of New Zealand's youth justice system, which switched the default process to Family Group Conferences. (Our system would apply to both adults and youth — but youth offending could stay in the existing structure if desired.)

Crucially of course, under our proposal anyone denying the offending would still enjoy full rights to defend it in court. Courts and corrections structures would thus continue but greatly scaled down, preserving the best of the traditional world. Moreover, if a restorative justice conference decided they needed to, matters would still go to court. And by either good practice or legislated rules, each restorative justice plan (conference outcome) could say that if it was not carried out by x date or in y manner the prosecution may lay charges in court within z days.

Equally importantly, to get the very best of the restorative world, we advocate making restorative justice as the new "first resort" better funded and supported. This would involve creating Community Resolution Centres to handle all alleged criminal wrongdoing, and also civil disputes suitable for mediation. (Existing providers would contract to the Centres. For more, including the civil side, see them described under an earlier name: FWM McElrea "Updated Proposal for Community Justice Centres" (April 2006) Judge McElrea Restorative Justice Collection <https://www.napierlibrary.co.nz>). Note that Community Resolution Centres could be in courthouses, marae or iwi centres, local town halls, or anywhere they were needed. Moreover, we propose centrally funded education programmes and programmes that offenders might have to attend as part of a restorative plan, plus further training of restorative conference facilitators and quality control.

The new system would be publicly funded by ongoing savings in courts and corrections, especially from reduced imprisonment. This would expedite restorative conferencing and provide programmes for offenders. Typically, restorative justice spends more money and time upfront in more tailored procedure, understanding the causes and consequences of offending and deciding how to respond to it, whereas its outcomes are massively cheaper than traditional sentences, and even economically productive.

However, financial savings must not be the main driver. That would lead to running restorative justice on the cheap, probably undermining it, and government might stop ploughing as many of those savings as are needed back into restorative justice. And a financial focus detracts from our main reason for favouring restorative justice: vindication of the victim.

Our proposal is an outline. However, we hope that a suitable embodiment of it for New Zealand may be thrashed out in a thorough and historically informed debate where the default setting of the present legacy is itself on the table, not just its modifications. Then eventually with government, lawyers, the judiciary and police understanding the new default, the punitive-adversarial mindset might loosen its grip, in a wider culture shift towards a more restorative society which politicians might variously lead or follow. A well-established restorative schools movement is in a sense preparing the next generation for this already. Meanwhile of course, programmes such as restorative prisons and restorative policing could easily complement our proposal; the "other worlds" mentioned above will have much to offer; and improvements by way of modification within the traditional system for defended cases should certainly continue.

Lastly, because the traditional system is a shared international legacy bequeathing common contemporary problems, forms of this solution may be of interest in other common law countries, and even beyond.

This proposal is ambitious, but doable. Might some version of it be part of the next chapter in our criminal justice history? ❐

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a good example where the beneficiary was entitled to see the legal opinion and comment on it. Such an approach seems 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 the *Beddoe* order, it would appear to a breach of natural justice to exclude them from the hearing and prevent them from submitting on the merits of the underlying proceeding.

CONCLUSION

When facing litigation trustees should ask themselves the same question they face in all situations — is doing this in the best interests of the trust? The problematic part comes when the trustees' personal interests become involved as well. In that case the trustees are well advised to seek an objective opinion from senior counsel while bearing mind that it will only be rarely that a *Beddoe* order and having the trust pay the costs of defending a claim against trustees will be justified. ❐