



Authored by: Gerrard Tin (Associate) and Jeremy Child (Partner) – Harneys

Introduction

Offshore jurisdictions remain important centres for the establishment and administration of trusts. What should an offshore trustee do when facing the prospect of litigation with a hostile foreign party? This article will examine how a trustee can seek the court's approval of its participation in any such litigation by ordering that the trustee be indemnified in respect of costs from the trust funds.

Cross-border trusts disputes add a layer of complexity: despite the overlap between trusts law in England and Wales and British Overseas Territories, it is wrong to assume that the position offshore will be the same. This article will examine some local considerations when applying for Beddoe relief in certain offshore jurisdictions.



Applications For Beddoe Relief

An application for Beddoe relief is made in (A) response to or (B) anticipation of a claim brought by or against a third party, referred to as the 'main action'. The purpose of the Beddoe application is to obtain the court's (typically) pre-emptive permission to litigate the main action, thereby gaining the protection of the trust funds from which the trustee may be indemnified if they become subject to an adverse costs order.

The main relief sought in the Beddoe application is of course the indemnity for costs. The test is that the court must be satisfied that the trustee is justified in either (A) defending or (B) (i) bringing or (ii) continuing the litigation: if so satisfied, then the court will order that the trustee may be indemnified out of the trust funds. This indemnity will extend to both (i) the trustee's own costs and (ii) any costs which are awarded against the trustee if they lose the main action.

The eponymous Victorian authority from which this powerful relief derives is of course the judgment of Lindley LJ in the case of *Re Beddoe, Downes v Cottam*¹. In that case, the court enunciated the trustee's right to participate in litigation,

in its capacity as trustee (as opposed to the trustee's personal capacity), holding that a trustee may be indemnified in respect of the costs of the litigation from the trust funds in situations where the trustee's actions were justifiable. The relief was and remains discretionary and so will always depend heavily on the specific facts of the case.

At p.558 of *Re Beddoe*, Lindley LJ held that:

"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."

¹ [1893] 1 Ch 547 (CA).

(emphasis added).

Lindley LJ continued as follows, emphasising the risk of participating in litigation without seeking this anticipatory relief:

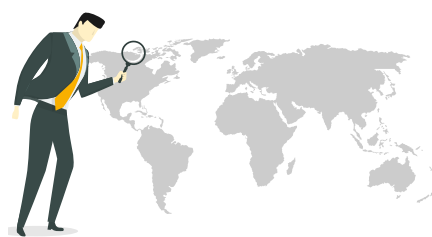
“But, considering the ease and comparatively small expense with which trustees can obtain the opinion of a Judge of the Chancery Division on the question whether an action should be brought or defended at the expense of the trust estate, I am of opinion that if a trustee brings or defends an action unsuccessfully, and without leave, it is for him to show 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.” (emphasis added).

Therefore, the risk which arises should a trustee fail to apply for Beddoe relief is the very serious consequence of having to pay the costs of the main action personally should they lose.²

Beddoe applications should be made in separate proceedings to prevent the court hearing the ‘main action’ from being privy to the strengths and weaknesses of the trustee’s case. See Lightman J at p.436 of *Alsop Wilkinson v Neary*³.

The next part of this article looks at local practice when applying for Beddoe relief in two offshore jurisdictions, namely the (1) Cayman Islands and (2) British Virgin Islands. Both jurisdictions’ trusts laws have their foundations in English common law and equity, which continue to be of guidance in both the

(i) interpretation and (ii) application of trusts law in the local courts, however it is important to apply local case law and variations in practice when making applications for Beddoe relief.



The Cayman Islands

Cayman Islands’ court procedure is governed by the Grand Court Rules (the GCR) (which are based on the pre-1999 ‘Rules of the Supreme Court’ from England and Wales): Order 85 rule 2(2)(a) GCR permits an applicant to seek a court determination of any question arising in the execution of a trust. Section 48 of the Cayman Islands Trusts Act (2021 Revision) (the Cayman Islands Trusts Act) also contains the power for a trustee to apply to court for advice and directions. Section 48 states that:

“Any trustee or personal representative shall be at liberty, without the institution of suit, to apply to the Court for an opinion, advice or direction on any question respecting the management or administration of the trust money or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the Court shall think expedient”. (emphasis added).

Therefore within the ambit of both (i) the court’s inherent jurisdiction and (ii) s.48 of the Cayman Islands Trust Act the jurisdiction for granting Beddoe relief is well-established in the Grand Court of the Cayman Islands (the Grand Court). Section 48 may not be invoked in cases of fraud.



² For a comprehensive practitioners guide to Beddoe relief, see also: Lewin on Trusts (20th Edn), 48-106.

³ [1995] 1 All E R 431.

An important judgment is In the Matter of a Trust Known as Stingray Trust, an unreported judgment of Justice Parker from 2018 (Stingray Trust). In Stingray Trust, the Grand Court granted retrospective Beddoe relief in circumstances where a trustee participated in proceedings for urgent injunctive relief in order to challenge a foreign court's jurisdiction. The urgency of the case and the trustee's demonstrable desire to protect the trust's assets persuaded the court to grant the relief retrospectively: this should not be seen as the optimal way to proceed.

The British Virgin Islands

The court's jurisdiction to make Beddoe orders is well-established in BVI law. See, for example, paragraph [16] of *Ieremeieva an Anor -v- Eстера Corporate Services (BVI) Limited et al*⁴.

Offshore trustees in the BVI should note that there is a statutory provision for a trustee to apply to court for advice and directions: section 6 of the Trustees' Relief Act 1877 (Revised 1991) (Cap 304):

"Any trustee, executor, or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court, or by summons upon a written statement at any Judge at Chambers, for the opinion, advice, or direction of such Judge on any question respecting the management or administration of the



trust property, or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the said Judge shall think expedient". (emphasis added).

Beddoe relief is frequently applied for in the BVI Commercial Court. The question of whether retrospective relief may be granted has not yet been tested.

Concluding Remarks

The obtaining of a Beddoe order to gain an indemnity against the prospect of adverse costs orders remains available to trustees based in the Cayman Islands and the British Virgin Islands. For the optimal deployment of any Beddoe order-related litigation strategy, it is imperative that trustees facing the prospect of litigation (particularly urgent proceedings and / or foreign litigation) seek legal advice as soon as possible if they wish to limit their exposure to personal liability for potential adverse costs.



4 [BVIHC (COM) 118 of 2017] (4 April 2019, unreported).

