# Getting **a trust to pay** for litigation

The process is expensive, uncertain and so bogged down by a need for procedural fairness and factual evidence that it is usually uneconomic to apply for one

**Anthony Grant**

If you find most articles about Beddoe orders boring, you're not alone. I do too. It's because a Beddoe order is a procedural device which, to use a maritime image, is like a boat whose hull has become so encrusted with barnacles, seaweed and other growths that it is on the verge of sinking.

This article will hopefully shine a more positive light on the procedure.

Beddoe orders are directions given by a court in which it approves a trustee bringing or defending proceedings at the expense of a trust. With a Beddoe order in place, the person can pursue or defend claims with the confidence that he or she will not be personally liable for the reasonable costs they incur.

**Anthony Grant**

When the original *Beddoe* decision was made in the late 19th century, the process for getting a Beddoe order was said to be cheap and efficient.

Not now. The process is expensive, uncertain and so bogged down by a need for procedural fairness and factual evidence that it is usually uneconomic to apply for one.

But times are changing. The Rules Committee recently introduced a new rule in the High Court Rules (it's 19.4A) which clarifies to a degree the nature of the application process.

Amongst other things, applications should be accompanied by "the advice of an appropriately qualified lawyer as to the prospects of success of the proceeding and whether bringing or defending the proceeding is in the best interests of the trust".

If the legal advice obtained by the applicant has to be given to the respondent, the process will get bogged down in conflicts about the quality and accuracy of the advice.

**The new High Court Rule and the Court of Appeal's guidance should make the Beddoe procedure a bit more useful**

Kós P, in giving judgment for the Court of Appeal in *McCallum v McCallum & Others* [2021] NZCA 237 on 8 June 2021, said it may not be necessary to give a copy of the advice to the opposing party and the trustees in that case were not required to disclose to the plaintiffs the expert advice they had been given.

The second development which has helped to clarify and possibly simplify the Beddoe regime to some degree is the *McCallum* case itself.

The trustees, who were also sued in their individual capacities and in their capacities as executors, wanted Beddoe orders for eight different causes of action. The High Court and the Court of Appeal have considered whether Beddoe orders should be made for each of those claims and, in doing so, they have set out some principles that will hopefully simplify some Beddoe applications going forward.

This is a summary of the outcome of the application in relation to each of the eight causes of action.

- No Beddoe order was made for a claim of breach of moral duty under the Family Protection Act.
- No Beddoe order was made in respect of two causes of action, involving two trustees in their personal capacities, for breaching their fiduciary duties as trustees by profiting from the assets of a trust of which neither was a beneficiary and receiving an asset at an undervalue which was said to be the subject of a moral claim owed to another.
- No Beddoe order was made for a claim that sought the removal of executors of the estate and trustees of two trusts on the grounds of their alleged conduct. This order was predictable since, in general, Beddoe orders are not made in respect of 'hostile' litigation and applications to remove trustees are almost invariably characterised by the courts as 'hostile'.
- No Beddoe order was made in respect of a claim that trustees in their personal capacities knowingly received trust and estate assets for no consideration or inadequate consideration. "That claim lies against the respondents purely in their personal capacities. The new trust has no interest in those assets. It is not in the interest of the new trust that it funds the defence of that claim." [68]

Now for the more interesting parts.

A limited Beddoe order was made in respect of a claim that assets of a trust had been invalidly resettled on another trust. The Court of Appeal said, "The scope of the order made is very limited. .... To the extent the trustees incur legal costs for the limited purposes... [of] assist[ing] the court with the provision of factual information and submissions on relevant legal principles (but not actively defending), the trustees are patently entitled to expect indemnity, subject only to any rebate for misconduct." [67]

A Beddoe order was made in relation to a claim that a grant of probate should be recalled on the basis

**Continued on page 07**

**With a Beddoe order in place, the person can pursue or defend claims with the confidence that he or she will not be personally liable for the reasonable costs they incur**

**Continued from page 06**

that it had been procured by undue influence. This is because "if successful [the claim] would diminish the assets of the new trust. It is in the best interests of the new trust that the respondents defend" the cause of action. [70]

What was described as a 'general Beddoe order' was made in respect of 'a novel cause of action' which alleges that a person owes 'legal and fiduciary duties' to others, based on a combination of parentage and wealth, to make sufficient provision for his children out of his estate.

Kós P said that it was "in the best interests of the beneficiaries of the new trust that this claim is defended, because the effect of the claim, if successful, would be to diminish the assets of that trust. But the indemnity can extend only to reasonable and proper costs attributable to the new trust's defence, as opposed to any costs incurred by [the two trustees] personally in defending it. The costs sheeted home to the trust must reflect the marginal costs needed to protect the trust assets." [65]

The new High Court Rule and the Court of Appeal's guidance should make the Beddoe procedure a bit more useful. But it would be helpful if there was a designated judge to hear such applications who is also tasked with trying to make the procedure as efficient as possible.

***Anthony Grant is an Auckland barrister specialising in trusts and estates***