In depth

The court's role in assisting trustees: *Re Beddoe* orders and other directions

Kate Davenport QC* and Tiaan Nelson†

Abstract

Re Beddoe applications and the court's wider jurisdiction to provide trustees with directions are essential tools that all trustees should be conscious of. This article starts by explaining *Re Beddoe* applications in general, outlining some of the key procedural elements and setting out in which types of cases these applications are likely to be successful. The law relating to *Re Beddoe* applications and applications for directions in the UK, New Zealand, and Australia is then reviewed. The role that judges play in assisting trustee decision-making is considered and commented upon.

Introduction

Trustees enjoy the special position of being able to obtain advice as to the appropriateness of their actions from the courts. This jurisdiction of the courts is extremely useful and trustees should be conscious of its potential applicability. *Re Beddoe* applications form an essential part of this jurisdiction, and are necessary tools for trustees that are in doubt as to whether to engage in litigation. This article explains the origin and purpose of *Re Beddoe* applications, and reviews the approaches that the courts have adopted in dealing with them in the UK, New Zealand, and Australia.

Applications for directions are then considered on a wider basis in each of these jurisdictions. The approaches and applicable statutes, if any, are outlined in relation to each jurisdiction. In conclusion, the role that judges play in relation to trustee decision-making is analysed and critiqued.

Re Beddoe applications

A *Re Beddoe* application is a specific type of application that trustees can make for directions from the court as to whether to bring, continue, or defend court proceedings in their capacity as trustee.[1] It essentially involves asking permission from the court to engage in litigation and normally provides the trustee with an indemnity from the trust fund for the costs of the proceedings, including the costs of the application as well as any costs order made against the trustee if unsuccessful.

> *A Re Beddoe application is a specific type of application that trustees can make for directions from the court as to whether to bring, continue, or defend court proceedings in their capacity as trustee*

The application takes its name from the case *Re Beddoe*. Lindley LJ set out the reason as to why *Re Beddoe* applications are needed[2]:

* Kate Davenport QC, Barrister, PO Box 141, Shortland Street, Auckland 1140, New Zealand; Tel: +64 9 307 8787; Fax: +64 9 307 8788
† Tiaan Nelson, BCom/LLB (Hons) (pending Honours dissertation), Law Clerk, Bankside Chambers, Auckland, New Zealand; Tel: +64 9 3790802.

1. *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547 (CA) 557.
2. ibid 557–58.

 doi:10.1093/tandt/ttw230

> But 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 the 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 *cestui que trust* unless under very exceptional circumstances.
>
> But, considering the case 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 shew that the costs so incurred were properly incurred.

However, regrettably, the extent to which trustees can obtain advice from the court at 'small expense' is questionable in modern times. In *Breakspear v Ackland*, Briggs J commented that[3]:

> The assumption in Re Beddoe [1893] 1 Ch. 547 that trustees can always obtain the directions of the court at modest expense is, I am afraid, simply wrong in modern times.

Trustees should, therefore, take care not to have a *Re Beddoe* application turn into a substitution for the main action by letting it become overly complex and expensive as they will face criticism from the court.

Trustees are generally entitled to an indemnity for any expenses that were properly incurred.[4] This indemnity will extend to proceedings properly brought or defended, but the burden will be on the trustee to establish this. There is, therefore, no requirement that trustees must obtain a *Re Beddoe* order before engaging in litigation, but trustees that engage in litigation without one will have the burden of justifying their actions and showing that the costs were properly incurred.

In *McDonald v Horn*, Hoffmann LJ said that provided sufficient disclosure 'has been made, the trustee can have full assurance that he will not personally have to bear his own costs or pay those of anyone else'.[5]

When making *Re Beddoe* applications, trustees should apply for an indemnity for costs as well as directions as to whether to bring, continue, or defend the litigation to ensure that they will not have to bear the costs. This application removes the risk that trustees may need to bear the costs of litigation personally, and it prevents beneficiaries from later claiming that the costs of the litigation should not be paid out of the trust fund. The certainty of the indemnity is discussed in more detail below.

Re Beddoe applications are desirable as even honest trustees may act unreasonably, whether it is from 'over-caution or some other cause',[6] and 'views may vary whether proceedings are properly brought or defended'.[7]

Re Beddoe orders will generally be made if the court is satisfied that it is in the best interests of the trust to do so.[8] The decision is made after calculating the risk of the litigation and its likely consequences. However, each application depends on its own facts and is a matter of discretion for the court.

Key procedural aspects

The key procedural requirements of *Re Beddoe* applications are largely the same in the UK, New Zealand, and Australia. Each jurisdiction will be considered below after some common elements are canvassed.

Re Beddoe applications are usually made at the outset of proceedings. The application should be

3. [2008] EWHC 220 (Ch), [2009] Ch 32 [10].
4. Trustee Act 2000 (UK), s 31(1); Trustee Act 1956 (NZ), s 38(1) and state-specific legislation in Australia eg Trustee Act 1925 (NSW), s 59(4).
5. [1995] ICR 685 (CA) 696.
6. *Re Chapman* (1895) 72 LT 66 (CA) 68.
7. *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 (Ch) 1224.
8. L Tucker and others, *Lewin on Trusts* (19th edn, Sweet & Maxwell 2014) paras 27–243; *Alsop*, ibid.

made in a separate proceeding to the one in relation to which directions are being sought.[9] The application should also be heard by a separate Judge to the main action.[10] This enables trustees to openly disclose the strengths and weaknesses of their case to the court. These should obviously not be disclosed to the other party in the main proceedings.

Beneficiaries should be parties to the *Re Beddoe* application proceedings since they are entitled to be heard on the issue as to whether trust money should be spent or placed at risk in the main action.[11] However, where the beneficiaries are parties to the main litigation it may be inappropriate for all of the information regarding the strengths and weaknesses of the case to be disclosed to them. Beneficiaries may thus be excluded from certain parts of the hearing where appropriate.

Trustees must make full disclosure of the strengths and weaknesses of their case in the application. Lightman J stated in *Alsop Wilkinson v Neary* that 'so long as trustees make full disclosure of the strengths and weaknesses of their case, [and] if the trustees act as authorised by the court, their entitlement to an indemnity and lien is secure'.[12] The corollary to this is that if the trustees do not make full disclosure, their indemnity may not be secure.

Perhaps the high water mark of trustees' disclosure obligations was articulated by Lindsay J in *Professional Trustees v Infant Prospective Beneficiary*.[13] His Honour made the following observations[14]:

> I do wonder also whether ''disclosure'' adequately covers all cases where inroads are, in justice, proper to be made into the total assurance of his costs which *Beddoe* relief will normally give a trustee. What, for example, if the trustee adequately discloses the strengths and, more particularly, the weaknesses of which he has knowledge but not the weaknesses which, had only he made a sufficient inquiry, he would have known of? What if he makes material factual mistakes which do not come to the notice of the Judge who hears the Beddoe application? Such cases, one might hope, will be exceptional.
>
> . . .
>
> But even where the proceedings are launched or are continued, a trustee will not, in my view, as a matter of inescapable necessity, get his costs out of the trust estate. If, for example, it transpires that the picture which the trustee painted before the Judge in order to get the *Beddoe* relief was materially inaccurate and that the inaccuracy was the trustee's fault, the trustee could, in my judgment, and without inconsistency with *McDonald v Horn*, find himself vulnerable in costs. In that sense, the *Beddoe* hearing, strictly speaking, determines nothing relevant.

However, it should be kept in mind that one of the central benefits of a *Re Beddoe* application is to provide certainty to trustees that their indemnity is secure, and that they will not have to bear the costs personally. If the level of disclosure required extends beyond what the trustee subjectively knows, this purpose may be undermined. The lesson that trustees can learn from *Professional Trustees* should be to err on the side of more disclosure rather than less.

The authors' view is that a trustee discharges his/her obligations to the court if all information known to the trustee is disclosed, both good and bad.

Lewin on Trusts suggests that a *Re Beddoe* application should be supported by the following evidence[15]:

- advice from appropriately qualified counsel as to the prospects of success;
- an estimate in summary form of the value or other significance of the issues in the proceedings to the trust;

9. *Alsop*, ibid 1225; *Salmi v Sinivuori* [2008] QSC 321 [14]; *Kain v Hutton* (2001) 1 NZTR 11-011 (HC) [15].
10. ibid.
11. Tucker and others (n 8) paras 27–239; *Alsop* (n 7) 1226; *Salmi* (n 9) [15].
12. *Alsop* (n 7) 1224.
13. [2007] EWHC 1922 (Ch), [2007] WTLR 1631 [21]–[25].
14. ibid [24]–[25].
15. Tucker and others (n 8) paras 27–252. This reflects the requirements of Practice Direction 64B para 7.2.

- costs that will likely be incurred by the trustees in the main action;
- costs of other parties in the main action, which if unsuccessful, the trustees may have to pay; and
- any other factors relevant to the court's decision.

This is the UK's courts' requirements, but both Australian and New Zealand authorities concur that this is the required list.

It is crucial that trustees follow the correct procedure in making *Re Beddoe* applications. The *Re Beddoe* application in *Alsop Wilkinson* was characterized as 'fundamentally flawed' because it was not made in a separate proceeding and all of the necessary parties were not before the court.[16]

Types of cases trustees may be faced with

Lightman J explained in *Alsop Wilkinson* that trustees may be involved in three kinds of dispute, set out below.[17] These categories are ultimately discretionary and can overlap. Every application will depend on its own facts and is essentially a matter of discretion for the Judge. Lightman J, writing extra-judicially on his judgment in *Alsop Wilkinson*, noted that[18]:

> categorisation is a useful tool in the decision-making process, but it is only a tool. At the end of the day the issue before the courts is what justice requires on the facts of the particular case.

First, there are 'trust disputes'. These are disputes as to the trusts on which the trustees hold the assets. This may be friendly litigation (eg a question of construction of the trust instrument) or hostile litigation (eg a challenge to the validity of the settlement).

Secondly, there are 'beneficiary disputes'. These typically consist of hostile disputes between the trustees and beneficiaries. This would include, for example, a claim of breach of trust against a trustee.

Thirdly, there are 'third party disputes'. These are disputes with a party other than beneficiaries, usually concerning some act or omission of the trustee in the course of the administration of the trust.

Re Beddoe orders will normally be appropriate in trust disputes and third party disputes.[19] They may also be appropriate in disputes between beneficiaries where the trustees are required to remain neutral. On the other hand, *Re Beddoe* orders will normally not be made in 'beneficiary disputes' where the trustees are being challenged by the beneficiaries, especially not where the actions are being challenged as a breach of trust.[20] Trustees will generally be expected to bear the cost of their own defence in these cases.

The law as it relates to *Re Beddoe* applications in the UK, New Zealand, and Australia will now be considered.

The UK

The general principles outlined above originated in English cases and accurately portrays the current position in the UK.[21] However, the authors note some other points of interest that have emerged from the cases, while they do not change the substantive principles. Further, it should be kept in mind that most of these cases predate the Civil Procedure Rules 1998 (the UK). *Davies v Watkins* contains a useful modern outline of *Re Beddoe* applications in the context of the Civil Procedure Rules.[22]

Recently, in *Spencer v Fielder* the types of cases in which trustees will be entitled to an indemnity in *Re Beddoe* applications were outlined once again.[23]

16. *Alsop* (n 7) 1225.
17. *Alsop* (n 7) 1223–24. The categories set out in *Re Buckton, Buckton v Buckton* [1907] 2 Ch 406 (Ch) 414–15 are also often cited.
18. Lightman J, 'Costs orders for trustees: some thoughts on *Alsop Wilkinson v Neary*' (2006) 20(3) Tru LI 151, 155.
19. *Alsop* (n 7)1224.
20. ibid 1224.
21. *Alsop* (n 7); *McDonald* (n 5); *Re Beddoe* (n 1); see also *Halsbury's Laws of England* (online ed, 2013) vol 98, para 348 for a concise summary of the law as it relates to *Re Beddoe* applications.
22. [2012] EWCA Civ 1570; see also Practice Direction 64B para 7.2.
23. [2014] EWHC 2768 (Ch), [2015] 1 WLR 2786 [21]–[27].

While the court emphasized the discretionary nature of these categories, the Judge said[24]:

> . . . categorisation is not some kind of statute and there are cases which do not easily within any of those categories . . .
>
> . . . what matters is whether, in substance trustees who are parties to litigation are acting in the best interests of the trust rather than for their own benefit. It is clear, for example, that, depending on the precise facts, trustees may be entitled to an indemnity for costs even though incidentally they will secure a personal benefit from a successful claim or defence or where there are allegations of breach of trust . . .

New Zealand

Re Beddoe applications appear to be relatively uncommon in New Zealand. The principles were recently set out in *Fundación Pimjo AC v Aguilar & Aguilar Ltd*.[25] Katz J outlined the general principles that are canvassed above, and noted that the High Court has the jurisdiction to make *Re Beddoe* orders as part of its equitable jurisdiction to supervise the administration of trusts.[26] The judgment also leaves some scope for *Re Beddoe* applications to be brought with an element of retrospectivity[27]:

> . . . there may be some rare cases where a trustee is forced to act urgently, and should nevertheless be indemnified provided a *Beddoe* order is then sought as soon as is reasonably practicable. In other than exceptional circumstances, however, a delayed *Beddoe* application will likely be inconsistent with the principles underlying such applications.

Her Honour also noted the 'overriding discretion' that the court has in relation to costs in trustee litigation.[28] The Judge also noted the discretionary nature of the categories of dispute set out in *Alsop Wilkinson*.[29] Her Honour ultimately declined to make *Re Beddoe* orders as the application concerned a claim of breach of trust where these orders are generally not available.[30]

It is not clear why these applications feature so rarely in New Zealand cases. Despite the lack of appellate decisions on point, the principles that the court will apply when faced with *Re Beddoe* applications are recognized by the New Zealand courts in the same form as outlined in the UK cases. In *Woodward v Smith*, Kós J observed that *Re Beddoe* orders have been 'part of equitable procedure for 120 years now'.[31]

Trustees in New Zealand should be aware of these applications and should make use of them when they are in doubt as to whether to engage in litigation. *Garrow and Kelly* suggests that it appears appropriate for *Re Beddoe* applications to be made under section 66(1) of the Trustee Act 1956 (New Zealand).[32] That section concerns applications for directions by trustees. Applications for directions are used in this manner in Australia and the expansive approach recently outlined to section 66(1) in *New Zealand Māori Council v Foulkes* covered in detail below, leaves the door open for such use.[33]

Australia

In Australia, *Re Beddoe* applications are made as applications for directions from the court. This approach was confirmed by the High Court of Australia in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the*

24. ibid [26]–[27].
25. [2015] NZHC 1402 [28]–[41]. This is the most in-depth account in New Zealand case law to date.
26. ibid [32].
27. ibid [41].
28. ibid [33]–[36]; *Alsop* (n 7) and *Re Buckton* (n 17) were cited and outlined by Katz J.
29. *Fundación* (n 25) [38].
30. ibid [63].
31. [2014] NZHC 407; [2014] 3 NZLR 525 [27].
32. C Kelly and G Kelly, *Garrow and Kelly Law of Trusts and Trustees* (7th edn, LexisNexis NZ 2013) para 24.36.
33. [2014] NZHC 1777; [2015] NZAR 1441 [42]–[51].

Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand in the context of section 63 of the Trustee Act 1925 (New South Wales).[34] The Australian cases refer to directions as 'judicial advice'; these terms are used interchangeably.

In the context of engaging in litigation, judicial advice will normally be sought as to whether the trustees are justified in engaging in the proceedings and whether they can use the trust's assets to fund the proceedings.[35] These are separate but interrelated questions. The Australian courts generally appear to approach these questions as two distinct issues in contrast to the UK and New Zealand where they are treated as part of the same issue.

If the court advises that the trustees may engage in litigation, the court has discretion to order whether the costs should be paid by the trust.[36] Less emphasis is placed on the categories of litigation set out above but more emphasis is on the court's discretion. This does not appear in fact, to be a material difference as the UK and New Zealand cases also regularly note the discretionary nature of the categories.

Through exercising the discretion in an application for judicial advice, the court 'resolves doubt about whether it is proper for a trustee to incur the costs and expenses of prosecuting or defending litigation'.[37] Their Honours in the *Macedonian Church* case saw no error in the approach of determining whether the legal issues were 'properly arguable', and then whether there were 'sufficient prospects of success to warrant the trustee in proceeding with the litigation'.[38]

Applications of this nature are still commonly referred to as *Re Beddoe* applications in Australia.[39] The Supreme Court of Queensland held in *Glassock* states that[40]:

> Where an executor or trustee is in doubt as to the course of action to be adopted, the executor or trustee is entitled to seek the opinion of the Court as to what it should do. In determining such an application, it is not the function of the Court to investigate the evidence and make a finding whether or not the trustees will be successful in the litigation. The Court has merely to determine whether or not the proceedings should be taken. However, the matter should be sufficiently investigated to determine whether or not the proceedings would be fruitless.
>
> The sole purpose in giving advice is to determine what should be done in the best interests of the trust estate. The Court's ambit includes obtaining advice about whether it is proper for the trustee to incur the cost and expense of prosecuting or defending litigation. The function of the power is not merely to afford personal protection to the trustees. It is also to protect the interests of the trust.

The standard articulated in this judgment appears lower in Australia in light of judicial remarks such as 'properly arguable' and considering whether it will be 'fruitless' but the emphasis on acting in the best interests of the trusts brings the approach in line with the UK and New Zealand.

There has been some confusion arising out of remarks from the High Court as to whether there is an obligation on trustees to obtain judicial advice. The High Court held in the *Macedonian Church* case that[41]:

> A necessary consequence of the provisions of s 63 of the Act is that a trustee who is sued should take no step in defence of the suit without first obtaining judicial advice about whether it is proper to defend the

34. [2008] HCA 42, (2008) 237 CLR 66.
35. *Salmi* (n 9) [10]–[13].
36. *Glassock v The Trust Company (Australia) Pty Ltd* [2012] QSC 15, [17]; *Macedonian Church* (n 34) [80] where the majority cited, without disapproval, the approach of Palmer J in the Supreme Court in relation to exercising the discretion as to costs, see also [82]–[85].
37. *Macedonian Church* (n 34) [71].
38. ibid [162].
39. Queensland Law Reform Commission, *A Review of the Trusts Act 1973 (Qld) Interim Report* (WP No 71, 2013) para 12.128. The report concluded on a preliminary basis that it was not necessary to provide more guidance as to the specific circumstances in which trustees ought to apply for directions. See also Queensland Law Reform Commission, *A Review of the Trusts Act 1973 (Qld) Report* (Report No 71, 2013) paras 8.98–8.102.
40. *Glassock* (n 36) [14]–[15].
41. *Macedonian Church* (n 34) [74].

> proceedings. In deciding that question a judge must determine whether, on the material then available, it would be proper for the trustee to defend the proceedings.

This statement suggests that there is an obligation on trustees to receive judicial advice before defending proceedings against them for breach of trust. However, the court also observed that it will not always be appropriate for a court to give advice and that it will depend on the circumstances of the case.[42] The New South Wales Supreme Court provided some clarification in *Re Perpetual Investment Management Ltd* holding that[43]:

> If it is true that there are cases when advice under s 63 should not be given to a trustee in respect of the trustee's position in litigation, it must follow that there are cases when a trustee is not required to seek judicial advice before it takes a step in defence of a suit against it.

In *Re Bideena Pty Ltd*, Sackar J held that[44]:

> The High Court's remarks in *Macedonian Orthodox* have not been taken to imply that a trustee who embarks upon litigation having not obtained judicial advice loses any right of indemnity.

In summary, the High Court observed that even though the statutory provisions may differ by jurisdiction, they are still largely similar in effect and 'useful guidance' may be obtained from cases such as *Re Beddoe* when applying the fundamental principles.[45]

A brief mention of prospective costs orders

It is not uncommon for prospective costs orders to feature in the same cases as *Re Beddoe* applications. There is undoubtedly some overlap but it is important to understand the distinction between these two applications, as litigants often confuse them, and as a result fail in their *Re Beddoe* applications. Prospective costs orders fall into two broad categories. First, trustees may seek an order that their own costs be paid out of the trust fund. Secondly, trustees may seek an order in advance of the substantive hearing, that they will not be liable to pay the other party's costs, regardless of the outcome of the litigation. Katz J noted in *Fundación* that there is no reason why these orders cannot be made with an element of retrospectivity.[46]

The conventional principle is that costs follow the event. Prospective costs orders run contrary to this principle by predetermining the issue of costs between the parties in the main action. On the other hand, *Re Beddoe* orders predetermine the potential issue between trustees and beneficiaries as to whether the costs of the main proceedings should be recoverable from the trust fund by the trustee, as well as providing directions in relation to litigation.

Prospective costs order will be made if the Judge is satisfied that there should be departure from the usual principle of determining costs after the proceedings in light of the following factors[47]:

- strength of the party's case;
- likely orders as to costs at trial;
- justice of the application; and
- any special circumstances.

Applications for directions

Trustees have the right to apply to the court for directions where they are in doubt as to their actions. This right forms part of the equitable jurisdiction of the court, and is covered by statute in Australia and New Zealand. Where there is a statute, there is usually some form of protection for trustees that act in accordance with the court's directions.

42. ibid [67].
43. [2014] NSWSC 784 [55].
44. [2016] NSWSC 735 [32]–[33].
45. *Macedonian Church* (n 34) [44]–[45].
46. *Fundación* (n 25) [40]. However, a prudent trustee would be advised to make the application in advance.
47. *Re Biddencare Ltd* [1994] 2 BCLC 160 (Ch) 168; *Alsop* (n 7) 1226; *Lewin on Trusts* (n 8) paras 27–243.

The UK

The High Court has jurisdiction to provide trustees with directions.[48] The position was put succinctly by Ardern LJ in *MCP Pension Trustees Ltd v Aon Pension Trustees Ltd*, stating that 'it is always open to a trustee who is in doubt as to his position to apply to the court for directions'.[49]

Hart J set out the situations,[50] in which trustees will apply for directions in *Public Trustee v Cooper*[51]:

> The first category is where the issue is whether some proposed action is within the trustees' power.
>
> . . .
>
> The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. . . . In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries.
>
> . . .
>
> The third category is that of surrender of discretion properly so called. There the court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so that the question cannot be resolved by removing one trustee rather than another) or because the trustees are disabled as a result of a conflict of interest . . . The difference between category (2) and category (3) is simply as to whether the court is (under category (2)) approving the exercise of discretion by trustees or (under category (3)) exercising its own discretion.
>
> . . .
>
> The fourth category is where trustees have actually taken action, and that action is attacked as being either outside their powers or an improper exercise of their powers.

Hart J also noted that there are 'no doubt numerous variations' of the above situations. Blackburne J, after outlining the above categories, noted the following in *Merchant Navy Ratings Pension Fund Trustees Ltd v Chambers*[52]:

> There is one other matter which I should refer to at this stage. That is the threshold test for the provision of the court's blessing under category (2). The test is whether it can be said that, in reaching its decision to implement the proposal, the trustee has taken into account irrelevant, improper or irrational factors, or whether it has reached a decision that no reasonable body (category 3) of trustees properly directing themselves could have reached.

New Zealand

Trustees may apply for directions from the court under section 66 of the Trustee Act 1956 (New Zealand). They may seek directions concerning any property subject to a trust or the management or administration of trust property, as well as directions regarding any power of discretion they have.

48. Civil Procedure Rules 1998 (UK), pt 64.2 and Practice Direction 64B. There is no statutory equivalent to the provisions that can be found in Australia and New Zealand.

49. [2010] EWCA Civ 377, [2012] Ch 1 [23].

50. Contained in the unreported decision of Robert Walker J in *Re Egerton Trust Retirement Benefit Scheme*.

51. [2001] WTLR 901, 922–24. Recently adopted in *The Charity Commission for England and Wales v Mountstar (PTC) Ltd* [2016] EWHC 876 (Ch), [2016] Ch 612 [61].

52. [2002] ICR 359 (Ch) 363; *Lewin on Trusts* (n 8) paras 27-078 to 27-081 for a detailed account of the court's function where there has been no surrender of discretion.

In *New Zealand Māori Council*, Kós J set out a four-part formulation for section 66.[53] This approach is an articulation of judicial activism in this area that is a departure from earlier cases. Kós J's approach is summarized in the paragraphs that follow.

First, His Honour held that the court's role under section 66 is not confined to an advisory one and goes beyond considering how powers may be exercised.[54] It may be used to resolve any live question of interpretation of the trust deed or any uncertainty as to the exercise of a power. It is a 'robust, parallel source of jurisdiction' to resolve any substantial questions of law concerning the meaning or administration of a trust.

Secondly, the existence of a dispute is not fatal to the exercise of discretion. His Honour outlined that 'the existence of a dispute, or at least a doubt, is essential'.[55]

Thirdly, 'the more profound the dispute, the more care must be taken that those with a legitimate interest in the outcome are represented'.[56] This particularly includes beneficiaries. Kós J noted that in some cases applications under the ordinary inherent equitable jurisdiction may be more appropriate otherwise affected persons, not party to the section 66 proceedings may raise the same issues again and seek different outcomes.[57]

Fourthly, relief sought under section 66 must not involve resolution of any disputed issues of fact.[58]

Kós J acknowledged that this approach was 'perhaps more liberal' than previous decisions,[59] but did not think that the 'mere possibility of separate and subsequent beneficiary-led litigation should deter trustees from engaging in this useful jurisdiction'.[60]

This broader approach has been received favourably. It has been followed in two recent High Court decisions.[61] Most recently, in *Re Burnett Mount Cook Station Charitable Trust*, the court, while not required to do so, approved Kós J's broad approach to section 66.[62] Gendall J suggested that the 'modern and perhaps more extensive possibilities' for using section 66 as expressed by Kós J 'may well have some merit'.[63] Comments by the earlier courts in *Neagle* and *Melville* were much more restrictive; the courts held that applications for directions were to be used for minor issues arising in the management of a trust.[64]

Australia

Applications for directions or judicial advice by trustees are covered by statute in most Australian states.[65] The right to apply for directions from the court is also recognized 'under the general principles of equity'.[66] The level of protection afforded to a trustee who obtains judicial advice varies by state.

The High Court of Australia provided guidance as to when trustees can obtain judicial advice in the *Macedonian Church* case.[67] The High Court made it clear that a broad approach is to be adopted and that the only 'jurisdictional bar' is that[68]:

> the applicant must point to the existence of a question respecting the management or administration of the trust property or a question respecting the interpretation of the trust instrument.

53. *New Zealand Maori Council* (n 33) [42]–[51].
54. ibid [46].
55. ibid [47].
56. ibid [48].
57. ibid [48].
58. ibid [49].
59. *Neagle v Rimmington* [2002] 3 NZLR 826 (HC); *Melville v NRMA Insurance NZ Ltd* HC Wellington CP70/01, 17 April 2002.
60. *New Zealand Maori Council* (n 33) [50].
61. *Mair v Pehi* [2015] NZHC 1398 [11]; *Re Vella* [2016] NZHC 1130 [23].
62. [2016] NZHC 2669 [53].
63. ibid [52]–[53].
64. *Neagle* (n 59); *Melville* (n 59).
65. Trustee Act 1925 (ACT) s 63; Trustee Act 1925 (NSW) s 63; Trustee Act 1936 (SA) s 91 (applying s 69 of the Administration and Probate Act 1919 (SA)) and Trustees Act 1962 (WA) ss 92, 95.
66. *Re Permanent Trustee Australia Ltd* (1994) 33 NSWLR 547 (SC) 548; *Re Atkinson* [1971] VR 612 (SC) 615.
67. *Macedonian Church* (n 34).
68. ibid [58].

The majority made eight general points about section 63 of the Trustee Act 1925 (New South Wales) (the judicial advice provision).[69] Most significantly, it was held that the section is not limited to any specific kind of proceeding.[70] Trustees will not be precluded from seeking judicial advice in adversarial proceedings nor in situations where the beneficiaries are in dispute with trustees, such as a breach of trust claim. The court observed that classification of proceedings as adversarial proceedings will generally not be helpful.[71] It was also noted that the role and context of section 63 will vary with the type of trusts involved.[72] The majority noted that[73]:

> . . . the court's sole purpose in giving judicial advice is to determine what ought to be done in the best interests of the trust estate, and that while it was not the court's purpose to determine the rights of adversaries, that could be done as a necessary incident of determining what course ought to be followed in the best interests of the trust estate.

It seems clear from examining recent cases that the guidance from the High Court in the *Macedonian Church* case increased the frequency of judicial advice applications in Australia. Lindsay J observed in *Re Estate Late Chow Cho-Poon*[74]:

> Not unnaturally, the High Court's observations have been taken as an encouragement to trustees to make a s 63 application whenever confronted by an element of doubt about steps to be taken in the due administration of a trust; as an encouragement to courts of first instance to exercise s 63 jurisdiction liberally; and as an encouragement to them not to withhold judicial advice by adoption of a restricted view of the operation of s 63.
>
> The High Court's judgment has served the beneficial purpose of opening to view the breadth and flexibility of the jurisdiction of this Court to aid the due administration of trusts by proceedings for relief falling short of a general administration order.

However, Lindsay J went on to caution that[75]:

> . . . if the jurisdiction of the Court to aid the due administration of trusts is to be exercised fairly, efficiently and beneficially, care needs to be taken to ensure that an application to the Court is not made unnecessarily, prematurely or without due engagement of persons who may have an interest in the outcome of a s 63 application.

Role of judges in trustee decision-making

Re Beddoe applications appear to involve a surrender of trustees' discretion to the court provided, however, that trustees are not bound by the court's decision. The court is tasked with deciding whether it will be in the best interests of the trust to engage in the litigation, and by extension whether the expenditure will be in the best interests of the trust. This can be contrasted with seeking directions in relation to other 'momentous decisions' where the court adopts a role more in the nature of a review.

The discretion of the courts in the context of *Re Beddoe* applications is embodied in the following passage from *Re Evans*[76]:

> First and foremost, every application of this kind depends on its own facts and is essentially a matter for the discretion of the master or judge who hears it.

The other cases referred to in this article also make it clear that the granting of *Re Beddoe* orders is a highly discretionary exercise. The trustees may

69. ibid [55]–[76].
70. ibid [56].
71. ibid [116].
72. ibid [67].
73. ibid [105].
74. [2013] NSWSC 844 [196]–[197].
75. ibid [198].
76. *Re Evans* [1986] 1 WLR [101], [106].

submit their own views on what is the appropriate course of action but the exercise remains one of the court's discretion, where the court substitutes its own judgment for that of the trustees. The court thus takes a very active role in *Re Beddoe* applications.

Re Beddoe applications can potentially have grave consequences for trusts that may end up bearing significant litigation costs. In light of this, it seems appropriate that the court should satisfy itself as to the correct course of action before doing so. There does not appear to be any reason why the court cannot adopt this role. It is consistent with the court's role in supervising the administration of trusts that it only places the trust funds at risk with a *Re Beddoe* indemnity when it is satisfied it is in the best interest of the trusts to do so, as opposed to merely being satisfied that a reasonable trustee could take that action. This approach is solidified in over 100 years of common law.

Even though the discretion is passed to the court in a *Re Beddoe* application, the trustee will not be bound by its decision as to what course of action is appropriate. However, it would be a foolhardy trustee who goes against the court's view and who then carries the risk of being personally liable for the costs of the action to do so. In this aspect, *Re Beddoe* applications are similar to other applications for directions.

In relation to seeking directions from the court generally, the following paragraph from O'Regan J illustrates the position[77]:

> I propose to adopt the approach of considering the application made by the trustees and giving the Court's advice or directions on it, but not going further and assuming the trustees' role of exercising their discretions. If the outcome is a negative answer, it will be up to the trustees then to reconsider the exercise of their discretion in the light of the Court's views and to exercise their discretion again in the manner they believe is appropriate in the circumstances. I consider that approach appropriately reflects the role of the Court in relation to an application under s 66 and the role of the trustees who are responsible for the exercise of the discretions vested in them by the trust deed.

However, from comment made by the Privy Council it appears that trustees can also surrender their discretion in applications for directions when it is their desire to do so,[78] and if the issue is truly one in which the court considers that the decision is momentous enough for the court to accept a surrender of discretion,[79] trustees must then ensure that they put all relevant information and reports before the court.

The situations in which courts will give directions have been covered in detail above. In one of the Australian cases it was noted that 'ordinarily the court will not exercise its jurisdiction in such a way as to usurp the roles and responsibilities of trustees in relation to the making of commercial decisions'.[80] This proposition seems sound in all three jurisdictions; courts are generally wary of usurping the roles and responsibilities of trustees. However, there are some contradictory statements between the courts' stated wish of not usurping trustees' decisions and comments such as those made in the Privy Council's *Marley* decision and in decisions such as *New Zealand Maori Council*.[81]

The authors' view is that there are cases where trustees should be able to seek orders from the court as to the proper exercise of their discretion. There are many examples of warring beneficiaries or warring beneficiaries and trustees where whatever decisions trustees make will be challenged. In these cases, the court should be able to step in, in the best interests of the beneficiaries, and make the orders sought to protect the trust fund.

77. *Gailey v Gordon* [2003] 2 NZLR 192 (HC) [34].
78. *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198 (PC); *Allen-Meyrick's Will Trusts* [1966] 1 WLR 499 (Ch) 504.
79. David Richards J, *Re MF Global UK Ltd (in special administration) (No 5)* [2014] EWHC 2222 (Ch), [2014] Bus LR 1156 [28]–[30].
80. *Australian Executors Trustees Ltd v Attorney General (WA)* [2015] WASC 439 [33].
81. *Marley* (n 78); *New Zealand Maori Council* (n 33) [42]–[51].

Nonetheless, the management of the trust is vested in the trustees and one must not lose sight of the principle that the trustees, acting together, must make trust decisions. So this jurisdiction must be exercised sparingly.

There is a clear trend especially in Australia and New Zealand, of the courts being more willing to take a more active role in trustee decision-making even if just by way of a review. However, trustees should at least have genuine doubt before applying for directions. Otherwise, there is a risk that the courts become involved in an array of uncontroversial decisions that trustees should be making themselves.

Trustees are in a special position in having relatively easy access to the courts for the purpose of receiving advice or directions. They should be able to utilize this function freely when they are in genuine doubt as to how to act, even if it involves a seemingly commercial decision. It is suggested that an appropriate limitation to prevent the courts from assuming the role of trustee is to adopt a review type function in relation to what appear to be commercial exercises of discretion (excluding *Re Beddoe* cases). The court should consider questions such as whether a reasonable trustee could reach that decision, whether all relevant matters have been considered and other similar enquiries, including the honesty and propriety of the decision. In this way, the jurisdiction of the court to supervise and oversee trusts is discharged without usurping the role of the trustees.

Kate Davenport QC *(LLB (Hons); MJur (distinction)) is a member of Outer Temple Chambers and called to the Middle Temple in London, and Bankside Chambers in Auckland. Kate is a civil litigator with more than 23 years' experience at the bar. She specializses in equity and trusts law. E-mail: kate@katedavenportqc.co.nz.*

Tiaan Nelson *worked as a junior for Kate Davenport QC at Bankside Chambers while completing the final year of his BCom/LLB (Hons) degrees at the University of Auckland. E-mail: tiaannelson@yahoo.com.*