

**BEDDOE ORDERS:  
ADEQUATE COSTS PROTECTION FOR  
TRUSTEES AND PERSONAL REPRESENTATIVES?**

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## **Introduction**

1. This paper will focus on *Beddoe* Orders and whether they provide suitable costs protection for trustees or personal representatives.
2. *Beddoe* Orders cover both matters of life (trustee of an active trust fund) and death (personal representative of an estate of a deceased person), and there are no obvious differences between a trustee applying for a *Beddoe* Order or a personal representative applying for a *Beddoe* Order.
3. This paper will covering the following topics:
  - (1) What is a *Beddoe* Order?
  - (2) When would you apply for a *Beddoe* Order? (With example situations)
  - (3) How do you make a *Beddoe* Application?
  - (4) Some problems with *Beddoe* Orders
  - (5) Possible alternatives

### **(1) What is a *Beddoe* Order?**

4. A *Beddoe* Order is an order made by the Court giving directions to a trustee or personal representative to bring or defend legal proceedings that affect the estate or trust fund, at the expense of the estate or trust fund.
5. Consequently, a ‘*Beddoe* Application’ is the name of the application made by trustees or personal representatives (or even beneficiaries) to the Court, for the Court’s directions (a *Beddoe* Order) as to whether or not the trustees or personal representatives should bring or defend legal proceedings.
6. A ‘*Beddoe* Order’ has been described as “*the only absolutely certain protection*”<sup>1</sup> that a trustee or personal representative could obtain against the risk of having to pay, *personally*, the costs of commencing or defending legal proceedings. This is subject to the caveat that the position may be otherwise if the trustee had failed to make

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<sup>1</sup> *Dagnell v J.L. Freedman & Co* [1993] WLR 388 at 392 (per Lord Browne-Wilkinson).

sufficient disclosure at the Beddoe stage<sup>2</sup>. As to the proper procedure for making a Beddoe Application see heading (3), below.

7. A *Beddoe* Application takes its name from the case of ***Re Beddoe, Downes v Cottam* [1893] 1 Ch. 547**. ***Re Beddoe*** was a decision of the Court of Appeal, which heard an appeal from Kekewich J who dealt with a trustee's costs of his unsuccessful defence to an action in detinue in relation to the custody of deeds<sup>3</sup>. In ***Re Beddoe*** Lindley LJ commented, at pages 557-558:

*“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 costs, even if he acts on counsel's opinion... 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 of whether an action should be brought or defended at the expense of the trust estate, I am of the 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. 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 the question of costs...”*

8. At page 562, Bowen LJ in ***Re Beddoe*** gave the following warning to trustees (which is equally applicable to personal representatives):-

*“... If there be one consideration again more than another which ought to be present to the mind of a trustee, especially the trustee of a small and easily dissipated fund, it is that all litigation should be avoided, unless there is such a chance of success as to render it desirable in the interests of the estate that the necessary risk should be incurred. If a trustee is doubtful as to the wisdom of prosecuting or defending a lawsuit, he is provided by the law with an inexpensive method of solving his doubts in the interest of the trust. He has*

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<sup>2</sup> ***3 Individual Present Professional Trustees of 2 Trusts v (1) An infant prospective beneficiary of one trust and (2) An adult beneficiary of the other* [2007] EWHC 1922 (Ch)**, as per Lindsay J [21] – [22].

<sup>3</sup> Traditionally, the old Chancery practice was to give a trustee his costs out of the trust estate, but after a provision in the old RSC (Order 65, Rule 1) the award of costs was made a matter of discretion even in trust/trustee cases.

*only to take out an originating summons, state the point under discussion, and ask the Court whether the point is one which should be fought out or abandoned. To embark in a lawsuit at the risk of the fund without this salutary precaution might often be to speculate in law with money that belongs to other people.”*

9. In general, a trustee or personal representative is entitled to an indemnity against all costs, expenses and liabilities properly incurred in administering the trust or estate<sup>4</sup>. This indemnity usually extends to the costs of proceedings properly brought or defended against a third party for the benefit of the trust or estate. However, if trustees or personal representatives put a step wrong or act unreasonably in bringing or defending legal proceedings, fail to pursue a good claim or fail to defend a bad claim on behalf of the trust or estate, they may be held personally liable in costs.
10. Trustees and personal representatives are often put in a difficult position when litigation involving a trust fund or estate is likely. On the one hand, they are under a duty to the beneficiaries to get in trust assets, which may involve bringing a claim. On the other hand, they are also under a duty to preserve the trust or estate, which may involve representing and defending the estate or trust in third party disputes<sup>5</sup>.
11. Even if a trustee or personal representative has been advised by counsel to bring or defend legal proceedings on behalf of the trust or estate, they will not receive their costs out of the trust or estate unless the court is satisfied that it would have authorised the claim or defence had a *Beddoe* Application been made<sup>6</sup>.
12. A *Beddoe* Order predetermines the issue of costs arising from litigation as between the trustee/personal representative and the beneficiaries; a *Beddoe* Order grants the

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<sup>4</sup> See s.31(1) of the Trustee Act 2000

<sup>5</sup> See *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 at 1224

<sup>6</sup> *Singh v Bhasin* [2000] WTLR 275

trustee or personal representative a form of indemnity as to his costs, out of the trust fund or estate.

13. A *Beddoe* Order does not affect the issue of costs as between a trustee/personal representative and a third party. When trustees or personal representatives bring legal proceedings against a third party, the usual Civil Procedure Rules on costs apply<sup>7</sup>.

14. If the trustee or personal representative obtains a *Beddoe* Order to pursue proceedings against a third party, and the trustee or personal representative brings such proceedings and loses and/or is ordered to pay the costs of the third party, by obtaining the *Beddoe* Order the trustee or personal representative may be indemnified out of the trust fund or estate in respect of their own costs and for any costs which they are ordered to pay to the third party.

15. In summary, if a trustee or personal representative is anxious about putting a foot wrong in bringing or defending proceedings on behalf of the trust or estate, and becoming personally liable for the costs of those proceedings if unsuccessful, a trustee or personal representative should consider applying for a *Beddoe* Order.

## **(2) When would you need a *Beddoe* Application?**

16. The usual situation in which it is appropriate to make a *Beddoe* Application is when a trustee or personal representative becomes involved in a ‘third party dispute’<sup>8</sup>. A third party dispute has been defined as a dispute with persons otherwise than in the capacity of beneficiaries, in respect of rights and liabilities, for example in

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<sup>7</sup> CPR r.44.3(2)(a). Note CPR r.44.3(2)(b), that a court has discretion to make a different order, having regard to all the circumstances including the conduct of the parties, whether a party has succeeded on part of his case, and any payment into court or admissible offer to settle made by a party which is drawn to the court’s attention and which is not an offer to which costs consequences under Part 36 apply.

<sup>8</sup> In *Alsop Wilkinson (a firm) v Neary* [1996] 1 WLR 1220, Lightman J summarised the main categories of litigation that a trustee may be involved in: (1) A ‘trust dispute’: a dispute as to the trusts on which the trustees hold the subject matter of the settlement. This includes (a) ‘friendly litigation’, e.g. the true construction of a trust instrument; and (b) ‘hostile litigation’, e.g. a challenge in whole or in part to the validity of the settlement by the settlor on grounds of undue influence. (2) A ‘beneficiaries dispute’: a dispute with one or more of the beneficiaries as to the proprietary of any action which the trustees have taken or omitted to take or may not take in the future, e.g. proceedings by a beneficiary alleging breach of trust from the trustees and seeking removal of the trustees. (3) A ‘third party dispute’ (see above).

contract or tort, assumed by the trustees as such in the course of administration of the trust.

17. It may also be appropriate to make a *Beddoe* Application when a trustee or personal representative becomes involved in a dispute with a third party who claims to be a beneficiary<sup>9</sup>; when a trustee questions whether he should sue another trustee or former trustee for breach of trust<sup>10</sup>; or when a beneficiary becomes involved in proceedings against the trust or trust property.

### Some examples

Is a *Beddoe* Application required in the following 5 examples?

*(1) Damage is committed to property of a testator's estate. The personal representative wishes to bring an action against a third party for damages for the tort. All the beneficiaries of the estate are in agreement that the personal representative should bring this action.*

If all the beneficiaries are ascertained and competent, and are agreed as to the course that they want the personal representatives to take, then the representatives are protected and there is no need or justification for seeking the directions of the court<sup>11</sup>. For the avoidance of doubt, it would be wise for the personal representative to secure the agreement of all the beneficiaries in writing, or ask some of the beneficiaries to give them an indemnity.

If all the beneficiaries are not ascertained and competent (for example they are minors or do not have sufficient mental capacity), it may be appropriate for the personal representative to make a *Beddoe* Application; the personal representative should weigh up whether the size of the estate or the matters at issue justify the making the Application.

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<sup>9</sup> *Singh v Bhasin* [2000] WTLR 275 (In this case, the trustee had failed to apply for *Beddoe* relief. The Judge held that the trustee had acted unreasonably in defending the claim; if the trustee had applied for *Beddoe* relief, it would have been refused on the facts of the case.)

<sup>10</sup> *Lewin on Trusts*, para 21-99.

<sup>11</sup> *Williams, Mortimer and Sunnucks 'Executors, Administrators and Probate'*, paragraph 60-10.

(2) *A trustee wishes to bring a claim, in his capacity as trustee, against a third party for breach of contract. The limitation period on the breach of contract claim is about to expire.*

In a case of urgency, including where a period for service of proceedings is about to expire, the trustee should still make a *Beddoe* Application marking it urgent. The court may be able to give directions on a summary consideration of the evidence to cover the steps which need to be taken urgently, but limiting those directions so that the application needs to be renewed on a fuller consideration at an early stage<sup>12</sup>.

If the matter is extremely urgent, the trustee would normally be allowed to take the necessary action (i.e. issue a claim form) and then apply for a *Beddoe* Application as soon as possible thereafter<sup>13</sup>. The Court may stay the main proceedings, to allow the trustee to make a *Beddoe* Application.

(3) *A third party has been unlawfully enriched with £3,000 of trust monies. It is clear that the trustees ought to commence legal proceedings to recover the monies for the trust fund. The total amount in the trust fund is now around £2,000.*

If the legal issues are clear, the trustees have very strong prospects of success, and the size of the trust fund is not large, a *Beddoe* Application may not be justified in these circumstances.

CPR 64 BPD, para 7.2 states:

*“... There are cases in which it is likely to be so clear that the trustees ought to proceed as they wish that the costs of making the application, even on a simplified procedure without a hearing and perhaps without defendants, are not justified in comparison with the size of the fund or the matters at issue.”*

However, trustees (and representatives) should err on the side of caution in deciding whether or not to make a *Beddoe* Application, to ensure that they are protected.

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<sup>12</sup> CPR 64 BPD, para 7.9

<sup>13</sup> *Dagnel v JL Freeman & Co* [1993] 1 WLR 388

(4) *A trustee has acted with a lack of due diligence and a third party wishes to bring proceedings against the trustee.*

A trustee should be aware that if he has acted in breach of trust, with a lack of due diligence in his capacity as trustee, in a partisan manner and/or fails to disclose the true picture to the court in the *Beddoe* Application, the court is unlikely to be sympathetic. In these circumstances, it would be inappropriate for a trustee to make a *Beddoe* application. If a trustee loses a breach of trust action, he is not entitled to an indemnity out of the trust fund, therefore a *Beddoe* Application will often be pointless for a trustee in this position.

It should be noted that in exceptional circumstances, it may be appropriate for a trustee facing a breach of trust claim to take steps at the expense of the fund to test the prospects of success of such a claim by making a striking out application<sup>14</sup>.

(5) *Personal representatives of a deceased's estate face a claim from a third party, who alleges that the whole of the deceased's estate was held on trust for him, not the current beneficiaries.*

In this instance, in a *Beddoe* Order a court *may* sanction the personal representatives defending the third party's claim at the expense of the estate, even if there could be no estate from which to pay the costs if the third party's claim is successful<sup>15</sup>. (*Beddoe* relief may even be granted when personal representatives face a claim from some of the beneficiaries, alleging that the whole of the deceased's estate is held on trust for them alone<sup>16</sup>).

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<sup>14</sup> See *STG Valmet Trustees Ltd v Brennan* (2001) 15 Tru.L.I 170, at 178 (Gib CA)

<sup>15</sup> See *Alsop Wilkinson v Neary* [1995] 1 All ER 431 - the court held that in this circumstance, the personal representative should remain neutral and offer to submit to the court's discretion, in the absence of any direction to the contrary. There is a risk that if the personal representatives take an active role or act in a partisan manner, and the trust fund is insufficient to meet any costs incurred in the main proceedings, the personal representatives may be personally liable for the costs.

<sup>16</sup> *Re Dallaway* [1982] 1 WLR 756. However, see also, *Re Evans* [1986] 1 WLR 101, Nourse LJ: "In my view, in a case where the beneficiaries are all adult and sui juris and can make up their own minds as to whether the claim should be resisted or not, there must be countervailing considerations of some weight before it is right for the action to be pursued or defended at the cost of the estate. I would not wish to curtail the discretion of the court in any future case but, as already indicated, those considerations might include the merits of the action. I emphasise that these remarks are directed only to cases where all the beneficiaries are adult and sui Juris. The position might be entirely different if, for example, one of the beneficiaries was under age..."

As an alternative scenario, if the personal representatives wish to bring a claim against a third party, and there is a risk that if the claim fails, the costs of the personal representatives and any costs which might be ordered to pay to the third party will equal or exceed the estate, the court is unlikely to give directions in a *Beddoe* hearing permitting the claim to be pursued at the expense of the estate<sup>17</sup>.

### **(3) How do you make a *Beddoe* Application?**

18. It is important to ensure that a trustee or personal representative correctly follows the appropriate procedure when making a *Beddoe* Application, to ensure that the trustee and personal representative will be protected.

#### **(i) The Application Form**

19. A *Beddoe* Application is made under Part 64 of the Civil Procedure Rules<sup>18</sup>.

20. The Application is made by way of Part 8 claim. The Application is made independently of the main litigation, to a different Master or Judge<sup>19</sup>. The Application is usually made by the trustees or personal representatives, but beneficiaries may also make the Application.

21. If it is important for the contents of the claim form to remain private (for example, where the directions sought in the claim form relate to proposed litigation with a third party who could find out what directions the trustees are seeking), the statement of the remedy sought could be expressed in general terms<sup>20</sup>.

22. A draft order should be filed with the Application.

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<sup>17</sup> *Lewin on Trusts*, para 21-60.

<sup>18</sup> Unless the application concerns settled land, in which case the application will be made under section 92 of the Settled Land Act 1925.

<sup>19</sup> Under CPR, Practice Direction 2BPD.5, a Master or District Judge may not deal with *Beddoe* Applications (without the consent of the Chancellor) except in '*plain cases*'.

<sup>20</sup> CPR BDP 64, para 2. If the claim form is in general terms, the trustees or personal representative must state in the evidence specifically what it is they seek from the court.

(ii) Parties to the Application

23. In a *Beddoe* Application, all trustees or personal representatives should be made a party. If some of the trustees or personal representatives do not consent to being made a claimant, they must be made a defendant.

24. Any persons with an interest in the Application or an interest in the trust or estate, could be added as a party by the trustee or personal representative<sup>21</sup>. The Practice Direction to Part 64, paragraph 4, gives further guidance on who should be joined as a party to a *Beddoe* Application:

- (1) If there are only two views of the appropriate course to take in the proposed litigation, and one is advocated by one beneficiary who is opposed to the trustee or personal representative's view, that beneficiary should be joined. It *may* not be necessary for other beneficiaries to be joined, as the trustees *may* be able to present the other arguments.
- (2) In simple cases, the court may be able to assess what directions to give without hearing from any party other than the trustees.
- (3) If the trustees (or personal representatives) are unsure as to who should be joined, the trustee may issue the claim form without naming any defendants<sup>22</sup>. The Application could then seek further directions as to which persons to join as parties.

25. It should be noted that when deciding who to join as a party to the *Beddoe* Application, trustees and personal representatives should remain neutral in the proposed litigation and should not come across as partisan. Beneficiaries are *usually* necessary parties to the *Beddoe* Application because they are entitled to be heard on whether trust money should be spent or placed at risk in the main action.

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<sup>21</sup> See CPR 64.4(1).

<sup>22</sup> See CPR r.8.2A

(iii) Evidence in support

26. The Application needs to be supported by evidence, contained in a witness statement. All the parties to the Application should have an opportunity to file their own witness statement.

27. To ensure that the trustee or personal representative is properly protected in making the Application, they must give full disclosure of relevant matters (including both the strengths and weaknesses of the proposed action)<sup>23</sup>.

28. The evidence should include the following:-

- The advice of a suitably qualified lawyer<sup>24</sup> as to the prospects of success and other relevant matters including cost estimates. If the advice is given on formal instructions, the instructions should be put in evidence as well;
- Any known facts concerning the means of the opposite party;
- A draft of any proposed statement of case;
- The value of the trust assets;
- The significance of the main action to the trust/estate and why the court's directions are needed;
- Whether the Practice Direction on Pre-Action Conduct or any relevant Pre-Action Protocol has been complied with;
- Whether the trustees or personal representative have proposed or undertaken, or intend to propose, mediation/ADR, and if not, why not;
- What, if any, consultation there has been with the beneficiaries<sup>25</sup>.

29. The evidence would not usually be served on a beneficiary who is a defendant to the Application (and a party to the litigation about which directions are sought), unless no harm would be done by the disclosure<sup>26</sup>. Redaction to parts of the

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<sup>23</sup> Lindsay J in **3 Individual Trustees v An Infant Beneficiary** [2007] EWHC 1922 (Ch) said at [33] “*If there is a want of that full disclosure, the whole Beddoe application can become close to pointless and that suggests that the trustees should err, if at all, if only for their own sake, on the side of disclosure...*”

<sup>24</sup> An appropriately qualified lawyer means one whose qualifications and experience are appropriate to the case. In the advice, the lawyer should state his/her qualifications. (BPD 64, para 7.3)

<sup>25</sup> See BPD 64, paras 7.1-7.4

<sup>26</sup> BPD 64, para 7.6

evidence to be served on a defendant beneficiary may offer a workable alternative<sup>27</sup>.

(iv) Hearing of the *Beddoe* Application

30. On the issue of the *Beddoe* Application, the court office should be asked for a hearing date or, in a simple case, for the claim to be put before the Master for consideration as to whether an order can be made without a hearing<sup>28</sup>.

31. A *Beddoe* Application is heard in private or “in chambers”. Therefore, the hearing is confidential and should not be spoken of outside of court and the parties involved. This explains why, unfortunately, there is not a great deal of reported case law on *Beddoe* Applications; where a case report is released it is usually anonymised.

32. Any beneficiary who is opposed to the trustee or personal representative’s view would usually be excluded from the part of the hearing where the trustee or personal representative discusses the merits of the proposed litigation<sup>29</sup>.

33. If the *Beddoe* Application is dismissed, the trustees or personal representatives cannot proceed to litigate at the expense of the trust or estate. If they do proceed, this will be at their own risk and at their own expense (unless they subsequently receive an indemnity from any beneficiary).

**(4) Some problems with *Beddoe* Orders/Applications**

34. A *Beddoe* Order may not give absolute protection. If the circumstances of the case drastically change (i.e. the law changes significantly), or if it transpires that the trustees/personal representatives painted an inaccurate picture before the judge at the *Beddoe* hearing<sup>30</sup>, they may no longer be entitled to an indemnity from the Trust fund or Estate. Therefore, it is important to ensure that full disclosure is

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<sup>27</sup> *3 Individual Trustees v An Infant Beneficiary* [2007] EWHC 1922 (Ch)

<sup>28</sup> BPD 64, para 6.1

<sup>29</sup> *Re Moritz* [1960] Ch. 251

<sup>30</sup> *3 Individual Present Professional Trustees v An infant beneficiary* [2007] EWHC 1922 (Ch).

made during the *Beddoe* hearing, and the trustees and personal representatives constantly assess the merits of the main action (and obtain further directions from the court if necessary), to ensure that they are protected.

35. The trustees and personal representatives should try to avoid appearing partisan in making a *Beddoe* Application, as this may lead to tension and hostility between the beneficiaries and the trustees/personal representatives. As far as is possible, the trustee/personal representatives should act as a neutral party. This point is heightened when a trustee/personal representative needs to consider which parties to add to a *Beddoe* Application, and how to express the relief sought from the court (whether they ask the court to *sanction* a pre-determined position, or whether they ask for general *directions* from the court<sup>31</sup>). The trustee/personal representative should avoid putting himself in a position where he is advocating claims on behalf of a beneficiary, if the other beneficiaries and/or the Judge would consider that this is acting in a partisan manner.

36. If on a *Beddoe* Application the trustees/representatives do not obtain the relief they sought in their Application and/or the Application was not properly presented, there is *a risk* that the trustees/representatives may be liable to pay the costs of the *Beddoe* hearing. In any event, *Beddoe* Applications should usually be of '*comparatively small expense*', so that on a cost/benefit analysis making a *Beddoe* Application is normally justified.

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<sup>31</sup> In practice, there is often little difference between seeking 'sanction' or 'directions' from the Court. Robert Walker J explained in the unnamed case heard in chambers which was cited to the court in *Public Trustee v Cooper* [2001] WTLR 901, for the trustees to surrender their discretion is a last resort.

## **(5) Possible Alternatives**

37. There is no real substitute to a *Beddoe* Application. However, depending on the facts of the case, trustees or personal representatives may wish to explore similar alternatives:

### **(i) Express Indemnities**

38. A trustee or personal representative may be protected in bringing or defending legal proceedings against a third party if the beneficiaries (of the fund or estate) provide them with an express indemnity and/or guarantee that the costs of such litigation are recoverable.

39. In deciding whether the indemnity or guarantee provided by the beneficiaries is sufficient, the trustee or personal representative should assess (depending on the nature of the guarantee/indemnity): (i) whether the value of the trust fund or estate is sufficient to cover the costs spent in litigation, and/or (ii) whether the beneficiaries have sufficient monies to guarantee the costs, and (iii) whether the beneficiaries providing the indemnity/guarantee are all adult and have full capacity (in order for the indemnity/guarantee to be binding).

### **(ii) Prospective Cost Orders**

40. Prospective costs applications are usually only made in non-hostile trust litigation rather than third party litigation. However, they have on occasion been considered as an alternative to a *Beddoe* application<sup>32</sup>.

41. A prospective costs application is made at an early stage of the main proceedings, by way of interim application within the main proceedings. In a prospective costs application, the judge predetermines the order for costs (i.e. decides the matter of costs up-front). A prospective costs order will be made in exceptional circumstances, if the judge is satisfied that there should be a departure from the usual practice of dealing with costs after rather than before trial in light of the

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<sup>32</sup> *Alsop Wilkinson v Neary* [1996] WLR 1220, at 1226.

outcome of the trial, having regard to (i) the strength of the party's case, (ii) the likely order as to costs at the trial<sup>33</sup>, (iii) the justice of the application and (iv) any special circumstances<sup>34</sup>.

42. If the trustees or personal representatives wish to make a prospective cost application, the beneficiaries are not necessarily parties, unless they are parties to the main litigation. Therefore, where the manner in which the claim is litigated is of high importance for the beneficiaries, the trustees should make a *Beddoe* application rather than a prospective costs application.

(iii) Quasi- Benjamin Orders

43. A more controversial alternative could be the use of a quasi *Benjamin* Order. This could be of use if the majority of the beneficiaries are against the trustee or personal representative bringing litigation against a third party, the minority are in favour of litigation, and the trustee/representative wants assurance from the Court that it will not be committing a breach of trust by not bringing the litigation.

44. *Benjamin* Orders are used in probate cases, when representatives cannot be sure who is entitled to the estate. A *Benjamin* order<sup>35</sup> permits representatives to distribute an estate on the footing that certain events have or have not happened; the representatives are relieved of liability if it transpires that the basis on which they are permitted to distribute the estate turns out to be incorrect. In effect, by granting a *Benjamin* Order, the court is prepared to relieve a trustee of the consequences of a potential breach of trust.

45. A 'quasi-*Benjamin*' application could be used by trustees or representatives if they want to obtain an order from the court permitting them to distribute the estate or administer the trust on the basis that they need to take no further legal action

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<sup>33</sup> Generally, it is only where the judge hearing the application is satisfied that the judge at the trial could properly exercise his discretion only by making an order in accordance with the proposed prospective costs order that the order will be made (Lewin on Trusts, para 21-120).

<sup>34</sup> In *re Biddencare Ltd* [1994] 2 BCLC 160

<sup>35</sup> After *Re Benjamin* [1902] 1 Ch. 723.

against third parties; relieving the trustees or representatives from liability in not bringing a claim against such third parties.

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