IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA294/2020
[2021] NZCA 237

BETWEEN	WILLIAM FRASER MCCALLUM JNR Appellant
AND	CARRICK ROBERT ZACHARY MCCALLUM, CALLUM FRASER MCCALLUM AND MCCALLUM INDEPENDENT TRUSTEES LIMITED AS TRUSTEES OF THE MCCALLUM FAMILY TRUST First Respondent
	CARRICK ROBERT ZACHARY MCCALLUM AND CALLUM FRASER MCCALLUM AS EXECUTORS OF THE ESTATE OF WILLIAM FRASER MCCALLUM SNR Second Respondent
	FIONA CATHERINE JANE MCCALLUM BY HER LITIGATION GUARDIAN MARTHA SELWYN Third Respondent

Hearing:	4 May 2021
Court:	Kós P, Gilbert and Goddard JJ
Counsel:	D A T Chambers QC and J M McGuigan for Appellant A S Butler and A M Cameron for First and Second Respondents S L Robertson QC for Third Respondent
Judgment:	8 June 2021 at 9 am

JUDGMENT OF THE COURT

A The applications to adduce fresh evidence are granted to the extent identified at [26] of this judgment.

B The appeal is allowed to the extent identified in [68] and [69] of this judgment.

C No order is made for costs.

REASONS OF THE COURT

(Given by Kós P)

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Introduction

[1] "Beddoe orders" are directions given by a court approving trustees bringing or defending proceedings at the cost of the trust.[1] With a Beddoe order in place, trustees

[1] So-called after the decision of the English Court of Appeal in *Re Beddoe* [1893] 1 Ch 547 (CA).

may pursue or defend claims with the confidence that they will not be liable personally for costs reasonably incurred. Without such an order, they proceed at risk.

[2] These orders are supposed to be fast and inexpensive. The orders sought in this case have been fought tooth and nail for two years. So, neither fast nor inexpensive.

[3] Beddoe orders will only be made where necessary and in the best interests of the trust (as opposed to the trustees). And they will seldom be appropriate where the litigation is "hostile", that is, alleging wrongdoing by the trustees.

[4] In this case, partial Beddoe orders were made by Gwyn J.[2] This appeal challenges the making of these partial orders.

Background

[5] The McCallum family moved from Scotland to South Auckland in the 1860s. There they acquired land: the Pakihi and Karamurau Islands off the Clevedon coast, and an estate at Wairoa Bay, Clevedon, known as Lismore. There they built a substantial homestead.

Trusts and transfers

[6] In 1986 Bill Snr (1936–2017) settled the W F McCallum Trust (Old Trust). The beneficiaries of that trust were his wife, Heather; children, William Jnr and Fiona; any grandchildren; any trust or superannuation scheme for the benefit of the aforementioned persons; and any charitable trust. The trustees were Bill Snr; his brother, Robert; and his son, William Jnr.

[7] At that stage Fiona was 25 years of age, and William Jnr was 24. They are now 60 and 59 years of age respectively. Neither has children. Fiona has been intellectually disabled for most of her life, and suffered a stroke three years ago. William Jnr appears to have capacity, but suffers from his own developmental difficulties. He is described as vulnerable. In 2016 he was removed as a trustee of

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2 *McCallum v McCallum* [2020] NZHC 907 [Judgment appealed].

the Old Trust because of his unwillingness to engage with the other trustees.[3] Woodhouse J held that he was "unfit to continue to act as a trustee".[4] He also said that:[5]

> The evidence establishes that William junior is not competent to make sensible decisions relating to management of the trust assets, that he is not able to distinguish between his duties as a trustee and his personal interests, and that he is either unwilling or unable to participate in the necessary decision making of the trustees.

[8] In 2010 Bill Snr was diagnosed with prostate cancer. By 2016 that condition was irreversible and hospice care was needed. Heather (then aged 83 years) also had serious health issues. Jumping ahead, Bill Snr died in January 2017, and Heather in August 2017.

[9] Beginning in August 2016, a series of transactions occurred involving both the Old Trust and the McCallum Family Trust (New Trust), and Bill Snr's separate property. The exact details will concern the Judge who decides the substantive proceedings in due course. The detail need not concern us here, dealing as we are separately with a Beddoe order application. The key participants in those transactions were three: Bill Snr, his brother Robert, and Bill Snr's nephew, Callum (son of his late brother, John).

[10] In sum, however, there was an exchange of assets between Bill Snr and the trustees of the Old Trust, and a transfer of assets from Bill Snr to Robert, Callum's trust,[6] and the New Trust. We need only summarise the four organising transactions.

[11] First, in August 2016 Bill Snr settled the New Trust. The trustees were Bill Snr, Robert and Callum. The discretionary beneficiaries of the New Trust were Bill Snr, Heather, Fiona, William Jnr, any children of William Jnr and Fiona, and any trust for the benefit of the discretionary beneficiaries. The final beneficiaries of the New Trust are any children of William Jnr and Fiona, any charitable trusts, Bill Snr's

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3 *McCallum v McCallum* [2017] NZHC 1218.
4 At [18].
5 At [20].
6 For value as to part, but alleged to be undervalue.

grand-nephews and grand-nieces (some of whom are Callum's children), and any trust for the benefit of the final beneficiaries.[7]

[12] Secondly, Bill Snr made a will in November 2016 in which he gave his personal domestic assets to Heather, forgave his debt to the New Trust, and gifted the residue of his estate to the trustees of the New Trust. One of the assets falling into that residue was a debt owed by the Old Trust.

[13] Thirdly, in the same month Bill Snr also gifted a number of assets to the New Trust, including shares in two family companies, his half share in the family home, and the yacht *Thistle.*

[14] Fourthly, and after Bill Snr's death, there was a resettlement of the remaining assets of the Old Trust on to the New Trust. That occurred in November 2017.

Litigation

[15] Heather's estate comprises a half share in the family home and about $1 million held in bank accounts. Before her death she had brought proceedings against Bill Snr's estate under the Property (Relationships) Act 1976. Her executor has continued those proceedings. We can set them to one side for present purposes.

[16] More relevantly, the substantive proceedings (being CIV-2019-404-00372) underlying the Beddoe application were brought in March 2019. William Jnr is plaintiff, later joined in that capacity by his sister Fiona through her litigation guardian. The defendants are Robert and Callum in three capacities: (1) as executors and trustees of the estate of Bill Snr; (2) as trustees of the New Trust; and (3) personally.

[17] The statement of claim (at least at the time Gwyn J heard the Beddoe application) alleges:[8]

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7 Robert and Callum were identified also as limited interest beneficiaries, enabling their use of the yacht *Thistle.*

8 The pleading has been amended further. We address the Beddoe application, however, on the state of the pleadings at the time of the original hearing. We do however take into account the fact that Fiona has been joined as plaintiff in the substantive proceedings.

(a) First cause of action (against the defendants in their capacities as executors of Bill Snr's estate): that Bill Snr breached his moral duty in terms of the Family Protection Act 1955 by not making adequate provision for William Jnr (and Fiona)'s proper maintenance and support.

(b) Second cause of action (against the defendants in their capacities as trustees of the New Trust, and personally): a novel cause of action alleging that Bill Snr owed "legal and fiduciary duties" to William Jnr (and Fiona), based (it appears) on a combination of parentage and wealth, to make sufficient provision for his children out of his estate. Assets received by Robert and Callum are said to have been transferred in breach of these duties, and to be held on constructive trust for William Jnr (and Fiona).[9]

(c) Third cause of action (against the defendants in all three capacities): that the assets of the Old Trust were invalidly resettled on the New Trust.

(d) Fourth cause of action (against the defendants in their personal capacities): that Robert and Callum knowingly received trust and estate assets for no or inadequate consideration.

(e) Fifth cause of action (against Callum in his personal capacity): that Callum breached his fiduciary duties as a trustee by profiting from the assets of the Old Trust, of which he is not a beneficiary, and receiving an asset from Bill Snr at undervalue which was subject to a moral duty owed by Bill Snr to William Jnr (and Fiona).

(f) Sixth cause of action (against Robert in his personal capacity): that Robert breached his fiduciary duties by receiving an asset from Bill Snr at undervalue which he knew was subject to a moral duty owed by Bill Snr to William Jnr (and Fiona).

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9 If sustained, the claim would seem to enable tracing from the Old Trust.

(g) Seventh cause of action (against the defendants in all three capacities): an application for order for removal of Robert and Callum as trustees of the two Trusts, and as executors of Bill Snr's estate.

(h) Eighth cause of action (against the defendants in their capacities as executors of Bill Snr's estate): seeking orders that the grant of probate of Bill Snr's estate be recalled, and that his November 2016 will be declared invalid on the basis that it was procured by undue influence through "sustained pressure" from Robert and/or Callum.

[18] On 17 May 2019 Robert and Callum applied for Beddoe orders in these terms:

> (a) Whether it is reasonable and proper for the first applicants to defend the proceedings in CIV-2019-404-00372.
>
> (b) Whether the first applicants as trustees of the Trust are entitled to be reimbursed out of the assets of the Trust for their reasonable legal costs.
>
> (c) Whether the second applicants as executors should defend the proceedings in CIV-2019-404-00372 seeking their removal as executors, and whether they are entitled to be reimbursed out of the assets of the estate for their reasonable legal costs of doing so.

[19] It is obscure which the "Trust" referred to is, but we will take it to be the recipient New Trust. We shall have more to say about the form of application later in this judgment.

Judgment appealed

[20] In the judgment appealed, Gwyn J carefully reviewed the jurisdiction to grant Beddoe orders, the nature of the claim, the Trusts, and the merits of the substantive proceedings. She noted in the latter respect that an opinion had been provided by the applicants from independent counsel, Mr Chris Kelly. That opinion was of course privileged and had not been seen by the respondents to the application. While the Court was assisted by it, the Judge had made her own necessarily preliminary assessment of the merits of the substantive proceedings.[10]

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[10] Judgment appealed, above n 2, at [34].

[21] Taking a preliminary and provisional view only, the Judge accepted for present purposes that the trustees' position was a strong one.[11] To the extent that there were allegations of breach of trust or obligations owed by executors, it would in the usual course not be appropriate for the trustees to actively defend such allegations. But at the stage the Judge was considering the matter, Fiona was not a plaintiff. The Judge noted that, to the extent the relief William Jnr was seeking would result in significant assets passing to him alone, the proceedings could not be said to be in the best interests of the trusts as a whole.[12] The Judge took a cause of action by cause of action approach to the claim. She noted that even where it was appropriate that the applicants remain neutral, that did not necessarily mean "passive". As the Judge put it:[13]

> In some cases, the Court may be assisted by the provision of factual information and/or submissions from the trustees as to the principles of law or construction involved, although a claim is not actively defended on its merits.

[22] Reviewing, then, the eight causes of action (set out at [17] above), the Judge held:[14]

(a) First cause of action (Family Protection Act): no order granted.[15]

(b) Second cause of action (fiduciary duty of parent): application granted in respect of the reasonable and proper legal and associated costs of defending the second cause of action in the substantive proceedings. The Judge noted that the claim was novel, and did not allege a breach of trust. The Judge said:[16]

> Bearing in mind the legal complexity but limited prospect of success, the *Beddoe* application is granted in respect of the reasonable and proper legal and associated costs of defending the second cause of action in the substantive proceedings. I expect that this will solely, or largely, entail submissions on the relevant legal principles.

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11 At [38].
12 At [39]. Since the date of judgment, Fiona has been joined as a plaintiff in the substantive proceedings.
13 At [41].
14 At [81].
15 The applicants had indicated they would abide the Court's decision: at [43].
16 At [50].

(c) Third cause of action (invalid resettlement): application granted for the reasonable and proper legal and associated costs of providing the Court with all relevant factual information and submissions on relevant legal principles, but not actively defending the merits of the claim.

(d) Fourth cause of action (knowing receipt): application granted for the reasonable and proper legal and associated costs of providing the Court with all relevant factual information and submissions on relevant legal principles, but not actively defending the merits of the claim.

(e) Fifth and sixth causes of action (breach of fiduciary duties): no order granted.[17]

(f) Seventh cause of action (removal of trustees): application granted in respect of the reasonable and proper legal and associated costs of defending this cause of action in the substantive proceedings solely in respect of the claim seeking the applicants' removal as executors of Bill Snr's estate.

(g) Eighth cause of action (recall of probate): application granted for the reasonable and proper legal and associated costs of providing the Court with all relevant factual information and submissions on relevant legal principles, but not actively defending the merits of the claim.

Appeal

[23] From that judgment William Jnr appeals. Fiona is now joined as plaintiff in the substantive proceeding, and respondent on the Beddoe appeal. In effect she participated as co-appellant, her counsel, Ms Robertson QC, supporting the appeal,

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[17] The applicants, at least in their relevant capacities as trustees and executors, were abiding the Court's decision on these causes of action: at [70]–[71].

although not quite for the same reasons advanced for William Jnr by Ms Chambers QC and Ms McGuigan.

[24] The essence of William Jnr's appeal was that: (1) Beddoe orders should be abolished, being contrary to public policy; (2) the making of the orders here was in breach of natural justice; and (3) (in a context of hostile litigation), even if the foregoing complaints were not upheld, the orders should not have been made in this case. Ms Robertson focused on the latter argument only for Fiona. Later in this judgment we will address the submissions made in more detail.

[25] There was no cross-appeal by Robert and Callum against the limits imposed by the Judge on the orders granted.

[26] William Jnr, and Robert and Callum, each seek to adduce fresh evidence. There was no great contest about this evidence. It is largely documentary, and to the extent it is updating in nature, we will receive it. That said, we find most of it of very little practical assistance in determining the appeal. We advised counsel at the hearing that we had elected not to read the opinion of independent counsel, given the natural justice appeal ground. We have not found it necessary to revisit that decision. Obviously, the fact that Fiona is now plaintiff in the substantive proceedings is a material development, and we take that into account.

Trustee duties, trustee costs, and Beddoe applications

[27] Before turning to the issues arising on appeal, we survey briefly the essential principles governing trustee duties, trustee costs and Beddoe applications.

Trustee duties

[28] As this Court observed in *Pratley v Courteney*, a trustee has a duty to protect trust assets for the benefit of the beneficiaries.[18] The duty extends to bringing, and defending, claims necessary to fulfil that duty. But they must do so where the grounds for action, or defence, are reasonable. The trustees must exercise due skill and care. If there is doubt as to what they may do, trustees should take legal advice, and they

[18] *Pratley v Courteney* [2018] NZCA 436, [2018] NZAR 1787 at [18].

may seek directions from the court.[19] Litigation costs incurred for the benefit of the trust in its defence will generally be paid out of trust funds. But they must be reasonably and properly incurred.[20] A Beddoe order may be sought to confirm pre-emptively the propriety of action or defence, and to confirm the trustees' entitlement to indemnity for costs to be paid out of the trust's funds.

Trustee costs

[29] The legal history of costs in trusts litigation was surveyed briefly by the High Court in *Woodward v Smith*.[21] But the starting point, as noted by this Court in *Butterfield v Public Trust*, is that it is:[22]

> … one of the fundamental rights of an honest express trustee that costs and expenses properly incurred in the administration of the trust are compensable out of the assets of the trust.

In support of that proposition, we cited the judgment of Danckwerts J in *Re Grimthorpe*:[23]

> It is commonplace that persons who take the onerous and sometimes dangerous duty of being trustees are not expected to do any of the work on their own expense; they are entitled to be indemnified against the costs and expenses which they incur in the course of their office; of course, that necessarily means that such costs and expenses are properly incurred and not improperly incurred. The general rule is quite plain; they are entitled to be paid back all that they have had to pay out.

[30] As this Court noted in *Butterfield*, the right is essentially proprietary in nature, recognised as an incident of trusteeship. It is to an indemnity for reasonable costs and expenses incurred in the administration of the trust. The entitlement is against the trust itself, and a current trustee is entitled to deduct reasonable costs and expenses incurred in the administration of the trust from trust assets, in exercise of a right of exoneration.[24]

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19 At [18].
20 See also *McLaughlin v McLaughlin* [2018] NZHC 3198, [2019] NZAR 286 at [18].
21 *Woodward v Smith* [2014] NZHC 407, [2014] 3 NZLR 525 at [21]–[25].
22 *Butterfield v Public Trust* [2017] NZCA 367, [2017] NZAR 1439 at [20].
23 At [20], citing *Re Grimthorpe* [1958] Ch 61 (Ch) at 623.
24 At [21].

[31] This Court, in its supervisory jurisdiction, will review costs and expenses incurred. It will do so to ensure the costs were necessarily incurred in the interests of the trust and that they were reasonable in extent. In *Butterfield* we endorsed this observation made by the High Court in *New Zealand Māori Council v Foulkes*:[25]

> The limitation on a trustee's right of indemnity is, however, that the expenses are "properly incurred". The duty to seek advice does not extend, for instance, to pose questions the answers to which are perfectly obvious. Nor where no real and substantial dispute exists. Unnecessary proceedings, or the taking of unnecessary procedural steps needlessly increasing costs, may mitigate (or eliminate) the right of indemnity. Again, excessive costs lie beyond the scope of indemnity. Every dollar paid in trustees' expenses is a dollar denied to beneficiaries of the Trust.

[32] The editors of *Lewin on Trusts* observe that a trustee's indemnity out of the trust fund extends both to his own costs and any costs he is ordered to pay other parties, unless the court orders otherwise:[26]

> Thus, where a trustee successfully defends proceedings brought by a beneficiary, he should be entitled to an indemnity out of the fund for any costs not recovered from the beneficiary. Even where he is unsuccessful, he is still in principle entitled to recover from the trust fund any costs he has been ordered to pay to the successful beneficiary. In either case, however, the court may limit or remove that entitlement …

Misconduct, broadly construed, may deprive a trustee of a right to indemnity. Given we are dealing here with assets the trustee is charged with protecting, misconduct includes careless and unreasonable conduct in the conduct of litigation or the management of the trust. A trustee partisan in his own interests or the interests of only some beneficiaries likewise may be deprived of indemnity.[27]

[33] It is also patent that there will be some proceedings in which the right to indemnity is, or is likely to be, displaced. And that in turn will affect whether it is proper to make a pre-emptive Beddoe order. There have been various, differing attempts in the authorities to classify proceedings in which indemnity for trustees' costs might or might not be given.

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25 At [21], citing *New Zealand Māori Council v Foulkes* [2015] NZHC 489 at [31] (footnote omitted).

26 Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) vol II [*Lewin on Trusts*] at [48–005] (footnote omitted).

27 At [48–008].

[34] As Hoffmann LJ observed in *McDonald v Horn*, the classic statement is that of Kekewich J in *Re Buckton*.[28] The latter case concerned costs in the event, rather than a pre-emptive Beddoe application. Kekewich J divided trust litigation into three broad functional categories:[29]

(a) Proceedings brought by trustees to obtain the court's guidance on construction of the trust deed or some aspect of the trust administration. The costs of all parties necessarily participating in those proceedings are treated as incurred for the benefit of the estate and will be ordered to be paid out of the trust fund.

(b) An application similar in nature to the first category, but brought by someone other than a trustee (such as a beneficiary). It would equally have justified application by a trustee. The same approach is taken to costs in this category as in the first category.

(c) Claims where a beneficiary or third party is making what might be termed a hostile claim against the trustees, or another beneficiary. That claim may still involve a point of construction or administration, but will often involve a claim to a beneficial interest or entitlement to a part of the fund. Here, the usual principles as to costs apply; they follow the event.

[35] Trust proceedings may of course be characterised in a number of different ways. Elsewhere in their estimable text, the editors of *Lewin* identify seven broad functional categories of proceeding:[30]

> (1) proceedings for the construction of the trust instrument or determination of questions of law as to the validity or scope of the trusts or powers under the trust instrument or imposed or conferred by law;

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28 *McDonald v Horn* [1995] 1 All ER 961 (CA) at 970, citing *Re Buckton* [1907] 2 Ch 406 (Ch) at 413–415.

29 At 414–415. *Lewin on Trusts* has identified two further categories: (d) a proceeding commenced by a *trustee* but otherwise with the characteristics of the third category; and (e) an issue of construction pursued by a third party acting in dual capacity, in part for the benefit to the beneficiaries, and in part for his own benefit by way of defence to a hostile claim: *Lewin on Trusts*, above n 26, at [48–039]–[48–040].

30 At [48–002] (footnotes omitted).

(2) proceedings in which directions are sought for the guidance of the trustee in the administration or execution of the trust;

(3) proceedings in which the assistance of the court is sought under various statutory provisions, for example under the Trustee Act … in relation to the appointment of trustees and vesting of trust property;

(4) proceedings in which the rights of beneficiaries in the administration or execution of the trusts are sought to be enforced, for example in relation to accounts, provision of information to beneficiaries or distribution of the trust fund;

(5) breach of trust proceedings;

(6) proceedings concerning self-dealing and profits from the trust; and

(7) proceedings for or concerning the removal of trustees.

It is reasonably obvious that the prospects of indemnity for trustees' costs being denied are greater in the latter three categories than in the former three (with the fourth category in no man's land, capable of being seized by either outcome). In the latter three categories, a trustee ought not to expect a pre-emptive determination of indemnity in their favour via a Beddoe order. That order will only be made where doing so is nonetheless in the best interests of the trust.[31]

[36] We have not discussed thus far the subtly different tripartite classification system posed by Lightman J in *Alsop Wilkinson v Neary*.[32] That system, not explicitly applying *Buckton*, is more focused on the character of the party opposing the trustees in the litigation:[33]

(a) a dispute as to the trusts on which they hold the subject matter of the settlement ("a trust dispute");

(b) a dispute with one or more of the beneficiaries as to the propriety of any action which the trustees have taken or omitted to take or may or may not take in the future ("a beneficiaries dispute"); and

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31 See the discussion commencing at [43] below.
32 *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 (Ch).
33 At 1223–1224.

(c) a dispute with persons, otherwise than in the capacity of beneficiaries, in respect of rights or liabilities assumed by the trustees as such in the course of administration of the trust ("a third party dispute").

The *Alsop* classification system is also helpful, as far as it goes, but it is less instructive as to the likely availability or denial of indemnity. That is because the first and second *Alsop* categories include both non-hostile and hostile proceedings (the latter being far less likely to earn indemnity). In contrast, the operating assumption underlying the first and second *Buckton* categories is that they are non-hostile (and, therefore, likely to earn indemnity). Despite these divergences, there has been a tendency to run the *Buckton* and *Alsop* classification systems together.[34]

Beddoe applications

[37] As noted before, a Beddoe order may be sought to confirm pre-emptively the propriety of action or defence, and to confirm the trustees' entitlement to indemnity for costs to be paid out of the trust's funds. *Re Beddoe* is a relatively rare instance of a litigant in person succeeding on appeal. True, the appellant, a Mr Cottam, was a solicitor. On the other hand, he succeeded despite the fact his dealings with the trustee were described by Bowen LJ as "overbearing, irritating, and offensive".[35] The trustee had declined to deliver up certain deeds. He was then the subject of a successful claim in detinue brought by beneficiaries, of whom Mr Cottam was one. The trustee nonetheless obtained an order for indemnity for costs out of the trust fund. Mr Cottam appealed. As Bowen LJ put it:[36]

> If the present appeal fails what, we are told, amounts to nearly a quarter of a tiny trust fund will have been wasted with impunity in an unsuccessful litigation of no profit whatever to the trust; and the legal profession will have devoured, without any corresponding advantage to anybody, a considerable portion of a very small oyster.

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34 See, for example, *McLaughlin v McLaughlin*, above n 20, at [24]–[25]; and Jeremy Johnson and James Anson-Holland "Who Should Pay, and When?" [2019] NZLJ 360 at 360 and 362.

35 *Re Beddoe*, above n 1, at 563.

36 At 561.

Warming to this theme, Bowen LJ went on:[37]

> On the true construction of the will the trustee had no answer in law to the demand. But his solicitor entertained at the outset some doubt as to the law of the case — doubts which the result shewed to be unfounded. He did not take out any summons for directions from the Court, as he might have done, and thereby have avoided litigation; but on his own responsibility he defended the action down to the trial at the assizes, and was there defeated in the end. The vanquished trustee now seeks to impose the costs of this idle and fruitless litigation on the estate …

[38] Both Lindley and Bowen LJJ emphasised that the right of indemnity lay only for costs reasonably and honestly incurred.[38] Bowen LJ said:[39]

> 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 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 salutory precaution might often be to speculate in law with money that belongs to other people.

[39] As is apparent from the two preceding passages, Lindley and Bowen LJJ had in mind originating applications being made for directions. That procedure emerged in the court's inherent jurisdiction in equity, but was then enacted in the Law of Property Amendment Act 1859 (UK) (Lord St Leonards' Act), and then in the Rules of the Supreme Court 1883 (UK). Order 55, rule 3 provided a simpler, statutory advisory jurisdiction whereby trustees could obtain directions without going through the cumbersome process of bringing all interested persons before the Court.[40] The innovation of *Re Beddoe* was less the making of the declarations sought than its declaration as to the potential consequences of not seeking them.

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37 At 561–562.

38 At 562. See also 557–558.

39 At 562.

40 Susan Kiefel "Judicial Advice to Trustees: Its Origins, Purposes and Nature" (2019) 42(3) MULR 993 at 997, citing *Re Davies* (1888) 38 Ch 210 (Ch) at 212, and *Re Wenham* [1892] 3 Ch 59 (Ch) at 60–61.

[40] Beddoe applications are made, usually by originating application, separately from the substantive proceeding. They seek directions as to whether to bring or defend those substantive proceedings, at the trust's expense. The applicants are usually, but not invariably, trustees. As the effect of the order is to give pre-emptive direction for the indemnification of the applicant's expenses from the trust's funds, full disclosure of the strengths and weaknesses of the proceedings is required.[41]

[41] A Beddoe order will not however normally deal with party-and-party costs — that is, as between the applicant trustees and the other parties to the substantive proceedings. Because the trustees remain at risk of payment of those costs, applications are sometimes made also for what are known as "prospective costs orders". Those are designed to deal with party-and-party costs. Such an application was made (and declined) in *Woodward v Smith*.[42]

[42] We referred earlier to the concept of "hostile" claims.[43] There are a number of New Zealand authorities suggesting that a Beddoe order will not be granted in hostile litigation, or only in exceptional circumstances.[44] The expression "hostile" is a convenient but crude shorthand for cases where it is inappropriate to pre-empt allocation of costs in advance of the ultimate event. Typically, such a case involves a claim by a beneficiary asserting breach of trust or other fiduciary duty by the trustee. Because the label is crude, it is also inaccurate. For example, it is not inappropriate to pre-empt indemnity where trustees are defending the interests of the trust against third parties. Such litigation is "hostile" in a general sense, but the trustee will be indemnified for the reasonable and necessary costs in defending the trust estate against insurgents. In that sense the label "hostile" is wrong; some "hostile" claims will earn pre-emptive indemnity via a Beddoe order. A better (but still not wholly accurate) label would be "self-interested" litigation. In that sense, the fifth, sixth and seventh modern *Lewin* categories referred to at [35] above are "self-interested litigation" and unlikely to earn pre-emptive indemnity via a Beddoe order. Whether, in the end result,

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41 *McLaughlin v McLaughlin*, above n 20, at [19].
42 *Woodward v Smith*, above n 21, at [56].
43 See above at [3] and [34].
44 *Woodward v Smith*, above n 21, at [39]; *Fundación Pimjo Ac v Aguilar & Aguilar Ltd* [2015] NZHC 1402 at [36] and [57]; and *Easton v New Zealand Guardian Trust Co Ltd* [2016] NZHC 3011 at [12].

indemnity is available to trustees *defending* such actions will depend on the ultimate outcome of, and the trustees' conduct in, the litigation.

[43] Thomas J in *McLaughlin v McLaughlin* was right to criticise earlier authority suggesting a Beddoe application brought in hostile proceedings will succeed in exceptional circumstances only.[45] We endorse these observations made in that decision:[46]

> 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.

[44] As the Judge also observed, the substantive outcomes with or without the "exceptional circumstances" gloss are unlikely to differ materially. It would be difficult to imagine a truly hostile proceeding, involving 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 pre-emptively indemnify the trustees for costs out of the trust assets before determining those allegations.[47]

[45] No absolute rule can, or should, be stated. As Sir Terence Etherton observed in *Spencer v Fielder*:[48]

> I have emphasised that 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 …

What can be said is that the greater the degree of self-interest of the trustee bringing or defending the proceeding, the less likely it will be that a Beddoe order should be made. That is because it is correspondingly less likely predetermination of that matter

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45 *McLaughlin v McLaughlin*, above n 20, at [28].
46 At [29] (footnotes omitted).
47 At [30].
48 *Spencer v Fielder* [2014] EWHC 2768 (Ch), [2015] 1 WLR 2786 at [27].

is in the best interests of the trust. But there will still be circumstances where the trustee defence would be self-interested, but it would nonetheless be right to grant pre-emptive indemnity. For instance, where the substantive proceedings are weak or vexatious, and should be tested by way of strike-out or summary judgment, or where it is in the interests of the trust that the claim be defended but the trustees otherwise lack resources to do so.[49] And, as we go on to consider, it may be in the best interests of the trust that at least a partial Beddoe order is made.

Should Beddoe orders be abolished in New Zealand?

[46] We can deal with this argument briefly.

[47] In William Jnr's written case, the following submission was advanced: "it will be submitted that *Beddoe* applications are contrary to New Zealand's principles of natural justice and open justice and should not be part of New Zealand law".

[48] That submission might be described as heroic. It heralded a titanic clash with embedded equitable authority. But it proved a damp squib.

[49] In the end Ms Chambers neither abandoned, nor exploited, the submission. Rather, the argument segued to the safer alternative ground that Beddoe applications were not appropriate in proceedings where the claim was properly classified as hostile litigation.

[50] We are in any case quite unpersuaded by the heroic argument. We accept the submission made to us by Mr Butler, for Robert and Callum, that the Beddoe order jurisdiction has a long and secure lineage. As *Re Beddoe* itself exemplifies, it represents an important protection for trustees in authorising the bringing or defending of a suit in circumstances where there might be doubt as to the availability of indemnity. Finally, the existence of the jurisdiction has been confirmed in major

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[49] *Re Evans* [1986] 1 WLR 101 (CA) at 107; *STG Valmet Trustees Ltd v Brennan* (1999) 4 ITELR 337 at 351 (CA) at 351; and *Re Uncle's Joint Pty Ltd* [2014] NSWSC 321, (2014) 12 ASTLR 487 at [28].

cognate jurisdictions within the Commonwealth.[50] No good reason is evident why New Zealand should abandon that safe convoy and henceforth refuse to entertain Beddoe applications.

[51] Some clarification of when it is proper to make such orders is, however, needed.

Should Beddoe orders have been made here?

[52] Two challenges were advanced by William Jnr. Ms Chambers argued that the process adopted by the Judge in this case was in breach of natural justice and inappropriate. Ms McGuigan argued that the Judge erred in granting Beddoe orders in the context of hostile litigation, in which a trustee had a personal interest in defending the proceedings.

Breach of natural justice

[53] We can deal with the natural justice challenge briefly. The essential objections were two. First, that the receipt by the Judge of independent counsel's opinion on the strengths and weaknesses of the trustees' defences to the substantive proceedings was not shared with William Jnr (or Fiona), contrary to their right to receive trust information.[51] Secondly, the hearing was bifurcated in that the appellant's counsel were excluded from that part of the hearing in which that opinion was addressed.

[54] We agree, however, with the submission made by Mr Butler that the process here was an orthodox one and did not breach natural justice. Counsel for the appellant were given notice of the Beddoe application and provided copies of all relevant material other than Mr Kelly's opinion of 17 May 2019. The issue of litigation privilege had been addressed by Associate Judge Bell in his judgment of

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50 No English citation is needed; the Beddoe order is well embedded in that jurisdiction. In Australia, see *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42, (2008) 237 CLR 66.

51 Relying on *Addleman v Lambie Trustee Ltd* [2019] NZCA 480; and *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320.

30 July 2019.[52] No appeal was filed. The procedure adopted on the day was one to which counsel had acceded in advance. Neither protest was made, nor a recall sought.

[55] While it is unusual for a Judge to see material that only one party has seen, it is not exceptional; it happens also in contested privilege cases. It is also conventional in Beddoe applications, the purpose of the independent opinion being to alert the Judge to pitfalls that otherwise might be concealed by supporting submissions of a generally exhortatory nature.[53] Rather than prejudice the unseeing respondent to the application, the procedure exists to protect his or her interests. Further protection is given to that party by providing that the Judge determining the Beddoe application will not also determine the substantive proceedings.[54]

"Hostile litigation" — submissions

[56] Ms McGuigan submitted that the Judge erred here in granting Beddoe orders in the context where either the trustees were: (1) self-interested, in as much as a breach of trust is alleged; or (2) disinterested because the challenge was essentially one between rival beneficiaries. In neither case could it be said to be in the interests of the trust that legal costs incurred by the trustees be pre-emptive indemnified. The Judge had made too much of the original state of the proceedings in which William Jnr was sole plaintiff, given relief would now be shared between William Jnr and his sister, Fiona, following her joinder. Ms McGuigan submitted it was not in the best interests of the New Trust or Bill Snr's estate for the respondents to actively defend the plaintiffs' claims in the substantive proceeding, let alone access trust and estate funds to do so. Rather, the respondents should remain neutral to the extent they are acting in trustee or executor capacities.

[57] Ms Robertson supported the submissions made by Ms McGuigan. Her submissions were helpful. She submitted this was not an appropriate case for a Beddoe order. The respondent trustees were "effectively defending claims of misconduct made against them". They ought not to have recourse to the trust fund to

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52 *McCallum v McCallum* [2019] NZHC 1925.
53 See generally *Lewin on Trusts*, above n 26, at [48–147].
54 At [48–133].

defend any claims unless and until the claims are dismissed, and they should moreover not have been meeting their legal costs from the trust fund to date.

[58] Mr Butler (who was not engaged prior to this appeal) sought to uphold the judgment. He submitted that the Judge had properly recognised the claim as hostile in nature, but then appropriately approached the proceeding, which involved a variety of differing claims against the respondents in different capacities, on a cause of action by cause of action basis. He submitted that the Judge's assessment was careful and nuanced. Mr Butler also submitted that the decision of a Judge on a Beddoe order application is in the nature of an exercise of a discretion. He therefore submitted that the present appeal was governed by the *May v May* (review) criteria,[55] not the *Austin Nichols* (general appeal) criteria.[56] The appellant needed to show an error of law.

"Hostile litigation" — discussion

[59] We will start with Mr Butler's last point: the standard of review.

[60] That submission is answered by the decision of the Supreme Court in *Erceg v Erceg* which makes clear that the exercise of the supervisory jurisdiction, whether based on inherent or statutory jurisdiction, is an ordinary decision, requiring evaluation, rather than more limited review of the exercise of discretion.[57] The same goes for any appeal to this Court in such a case. As the Supreme Court put it:[58]

> In the present case, the decision of the High Court was subject to a general right of appeal to the Court of Appeal under s 66 of the Judicature Act 1908. We do not see any reason to distinguish the nature of the appeal in the present case from that in *Kacem v Bashir*. That being the case, we consider the Court of Appeal was free to decide the case according to its view, and not constrained as it would be if the *May v May* standard applied.

[61] Although that case concerned disclosure of trust documentation to beneficiaries, the same principles ought to apply to appeals in Beddoe applications.

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55 *May v May* (1982) 1 NZFLR 165 (CA).
56 *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
57 *Erceg v Erceg* above n 51, at [18]–[19] and [70].
58 At [70] (footnote omitted). See also [18]–[19] and [68]–[69].

There is no sound policy reason to distinguish the two exercises of the supervisory jurisdiction. Although Beddoe applications are in part concerned with costs, that does not make the jurisdiction discretionary. They are also concerned with authority to sue or defend, and with whether indemnity should be determined pre-emptively. This is not the ordinary stuff of party-and-party costs, where discretion dominates, but still does not displace principle.[59] Although appeals in Beddoe applications are not to be encouraged, the appeal lies of right and, when conducted, is by way of rehearing.

[62] We turn now to whether Beddoe orders should have been made here.

[63] First, a significant difficulty lying in the way of the making of Beddoe orders here was the complexity of the pleadings in which they were to be assessed. As [17] above makes clear, those pleadings involved a series of complex, interconnected causes of action interweaving defendant liability in varying capacities: as executors, as trustees of one or other Trust, and personally. Doubtless the claim might have been more clearly pleaded, but it is there for better or worse; no one has sought to strike it out for wanton infelicity. Instead it was incumbent on the respondents, as applicants for the orders, to draft their application in terms that addressed the different causes of action distinctly. In short, which aspects of the intended defence were to be authorised and pre-indemnified amidst all the swirling allegations being addressed? How were they to be distinguished from defence either in hostile (*Buckton* category three or *Lewin* categories five to seven) trustee claims or claims against the defendants in their personal capacities? It can only be steps taken in the capacity of executor or trustee that should be authorised and indemnified. Had an attempt been made to discriminate by capacity sued, the difficulty of making a Beddoe order would have been at once apparent, and a more tailored application might have been advanced, or none at all. The blunt application made here — quoted at [18] above — was never fit for purpose.

[64] Secondly, in some cases it may be possible to discriminate between causes of action, authorising and indemnifying the defence of some but not others. *McLaughlin* is a case in point. Thomas J declined to grant Beddoe orders for four of the five causes

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[59] *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523 at [15]–[17]; and *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [7]–[8].

of action, on the basis they each involved serious allegations against the defendant trustees. But an order was granted for the second cause of action (an application for directions as to the proper investment of trust assets), authorising payment of costs out of trust funds, but subject to the direction of independent senior counsel agreed or appointed.[60] The present appeal however is of an order of magnitude more complex than *McLaughlin*, given the form of the pleadings. Nonetheless, and in agreement with the Judge, we think it is still capable of the discriminatory analysis needed.

[65] The sole cause of action in which a general Beddoe order was made was the second cause of action, being the "novel" claim of breach of (parental) fiduciary duty by Bill Snr, translated into a claim against Robert and Callum as trustees of the New Trust and in their personal capacities, based on knowing receipt. The claim is not made on the basis that Robert and Callum are in breach of trust, with respect to the New Trust. We would accept it is 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 Robert and Callum personally in defending it. The costs sheeted home to the Trust must reflect the marginal costs needed to protect the trust assets, bearing in mind the defence being advanced by other contradictors at their own (rather than the Trust's) cost. No party contended for the appointment of independent supervising counsel — the course adopted by Thomas J in *McLaughlin.* So that Beddoe order may stand, and any argument about reasonableness or apportionment will need to be addressed after the event.

[66] A limited Beddoe order was made in the case of the third, fourth, seventh and eighth causes of action. The third cause of action was brought against the respondents in all three capacities. It involves allegations of invalid resettlement of Old Trust assets on Bill Snr (ultimately then received by Callum) and the remaining assets of the Old Trust being resettled on the New Trust. The fourth cause of action (which is connected to the third) is against the respondents in their personal capacities, and alleges that Robert and Callum knowingly received trust and estate assets for no or

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60 *McLaughlin v McLaughlin*, above n 20, at [119]–[127].

inadequate consideration. The Judge identified weaknesses in relation to the claims in her judgment.[61] The Judge went on to say:[62]

> I conclude that it is appropriate to grant the order to a limited extent. The *Beddoe* application, in so far as it relates to the third and fourth causes of action, is granted to enable the defendants to assist the Court with the provision of all relevant factual information and submissions on relevant legal principles, but not to actively defend the merits of the claims.

[67] We accept that defence of the third cause of action is in the interests of the New Trust, for the same reasons given in relation to the second. The scope of the order made is very limited. There is no cross-appeal. It might be thought that there would be little point seeking an order in such confined terms. The terms of the application — set out at [18] above — were less constrained. To the extent the trustees incur legal costs for the limited purposes identified by the Judge, namely to assist 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. There can be no real argument about the matter, and the risk to the trustees in taking these limited steps would be slight indeed. The making of a Beddoe order serves very little utility beyond declaring the obvious. Prudent marshalling of the assets of the Trust might militate against the costs of application. But we do not find the Judge erred in making the order. The same observation made in [65] above about only necessary marginal cost being indemnifiable applies here.

[68] We part company from the Judge on the fourth cause of action. This claim concerns the transfer of assets of Bill Snr's estate (but said to be held on constructive trust for the Old Trust, namely shares in Excelsior Ltd) to Robert, and assets of the Old Trust (a one-third interest in Lismore Farm) to Callum, allegedly in breach of trust. 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 interests of the New Trust that it funds the defence of that claim. The Judge erred making the Beddoe order in respect of the fourth cause of action.

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61 Judgment appealed, above n 2, at [52]–[57] and [64]–[68].
62 At [69].

[69] We also differ from the Judge on the limited Beddoe order made in respect of the seventh cause of action. That seeks the removal of Robert and Callum as executors of the estate, and trustees of the two Trusts. The basis for removal advanced is alleged misconduct. A trustee challenged on that basis cannot expect a pre-emptive costs indemnity, and a Beddoe order ought not be made in such a case.[63]

[70] Finally, however, we accept the limited Beddoe order made in respect of the eighth cause of action was appropriate. It is based on alleged undue influence exercised by Robert and Callum on Bill Snr. As with the third cause of action, that claim if successful would diminish the assets of the New Trust. It is in the best interests of the New Trust that the respondents defend the eighth cause of action, subject again to the point made at the end of [67] above.

Costs

[71] The appellant has had modest success, setting aside two of the four limited orders made, but not the more extensive order relating to the second cause of action. In the usual way, and in the absence of misconduct, parties to a Beddoe application are entitled to be indemnified as to their fair and reasonable legal costs out of the assets of the trust.[64] There is no misconduct demonstrated in relation to the present appeal. Accordingly, we make no order for party-and-party costs. If there is any challenge to the costs claims made, that may be taken up in the High Court.

Result

[72] The applications to adduce fresh evidence are granted to the extent identified at [26] of this judgment.

[73] The appeal is allowed to the extent identified in [68] and [69] of this judgment.

[74] No order is made for costs.

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63 *Lewin on Trusts*, above n 26, at [48–085]–[48–086].

64 *Pratley v Courteney*, above n 18, at [18]; *Davies v Watkins* [2012] EWCA Civ 1570; and *Lewin on Trusts*, above n 26, at [48–157].

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