St John's CHAMBERS

Clarification on *Beddoe* orders and protective costs - Pettigrew and others v Edwards [2017] EWHC 8 (Ch)

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Natasha Dzameh, a member of our commercial and chancery team, provides a quick note on the recent case of *Pettigrew and others v Edwards* [2017] EWHC 8 (Ch) in which judgment was handed down by Master Matthews on 12 January 2017. Natasha was present at the first hearing in this matter. The trustees were represented by **Guy Adams** who is also a member of Chambers' commercial and chancery team.

Facts

The deceased died leaving her residuary estate on trust to the first and second trustees beneficially in equal shares however this was subject to an income to be paid to the life tenant (the deceased's fourth husband). The first and second trustees were the deceased's sons whilst the third trustee was her solicitor. The value of the residuary estate exceeded £500,000 and included a promissory note for the sum of £100,000 signed by the life tenant to the deceased in respect of a loan. The hope had been that the loan would only be repaid upon the death of the life tenant.

When the deceased died, she had not paid the entire £100,000 and this was treated as a liability of her estate. The trustees sought repayment of the loan. There was much correspondence between them and the life tenant regarding security but no security was provided.

Ultimately the trustees took the decision to withhold the income from the life tenant on the basis that these funds could be used to repay the loan. The life tenant disputed that there was any such debt and issued a claim against the trustees in the Chancery Division of the High Court ("the Main Claim"). The life tenant sought an order requiring payment of the outstanding income plus interest along with a

direction that the trustees must pay the income to him during his lifetime. The trustees filed a set-off defence on the basis that they could retain the income to pay off the life tenant's debt. They also counterclaimed for the entirety of the loan and/or a declaration that they were entitled to retain the income until the debt was discharged.

The trustees subsequently applied for a *Beddoe* order and a protective costs order.

Main Submissions
Counsel for the trustees made the following arguments:

- Trustees are entitled to an indemnity out of trust funds for all administration expenses properly incurred;
- The promissory note was an asset of the trust;
- Whether the debt was due and owing was a third party dispute;
- It is the trustees' duty to protect and preserve the fund;
- Provided the court considered it was reasonable to claim the sums as due to the estate the trustees were, on the face of it, entitled to an indemnity in respect of the costs of the third party dispute;
- The trustees should have recourse to the fund to do so as the trust stood in the shoes of the deceased and the capital beneficiaries should not be required to fund the proceedings;
- *Re Evans* [1986] 1 WLR 101 and *Re Dallaway* [1982] 1 WLR 756 both concerned cases where the whole fund was in dispute and could be reconciled. Whether or not it was proper to disburse funds in the dispute or to effectively intervene was a decision for the trustees, having regard to all the circumstances including the merits of the claim, but generally required exceptional circumstances;
- The trustees' ability to withhold the income in discharge of the debt was a question of trust administration and the trustees would abide by any given court directions. The income was not lost to the fund, the only question was its application.

Counsel for the life tenant submitted:

- The first and second trustees were adult beneficiaries and, as such, could decide whether the claim should be resisted without the assistance of the court. This was indistinguishable from *Re Evans*;
- There was no prejudice to the trustees. If they were unsuccessful in their application but successful in the main proceedings they could apply for costs in the normal way;
- The life tenant would be prejudiced if the application is granted and the trustees fail in the main proceedings. He would indirectly pay for the trustees unsuccessful defence;
- The trustees do not require permission to make a counterclaim as they have already made such a claim;
- The application was unnecessary in respect of the trustees who were also beneficiaries. They were requesting permission to pay for the proceedings out of money which would eventually be theirs; and
- The life tenant has an ongoing right to the income and it is incidental to that right that the trust fund not be prematurely depleted by a prospective costs order.

Judgment
Master Matthews stated there were three elements to the Main Claim:

1. The claim by the life tenant concerning the failure to pay him the income due under the will trust fund.
2. The defence of set-off of the alleged debt due to the trustees by the life tenant.

3. The counterclaim by the trustees for the whole of the loan and/or a declaration that they are entitled to retain the income due to the life tenant until the debt was discharged.

Although there were three elements, the litigation involved two separate cases:

- Case 1 concerned the validity and enforceability of the promissory note.
- Case 2 concerned how the result bore an obligation on the trustees to pay the income to the life tenant which he was otherwise entitled to.

Case 1 was a third party claim and was a candidate for a *Beddoe* order. The mere fact that it was a candidate did not necessarily mean it was appropriate to make such an order. Master Matthews applied *Re Evans,* doubting whether *Re Dallaway* was consistent with the later Court of Appeal decision. The beneficiaries were adults and *sui juris.* If the court were to make a *Beddoe* order it would result in injustice to the life tenant. Should the trustees' claim against the life tenant fail, a *Beddoe* order having been made, the life tenant status as a beneficiary means he would have paid in part for the unsuccessful claim despite his own success. Although the injustice was not as great as in *Re Evans*, where the disputed property comprised the entire estate, it was significant and justified refusing to make a *Beddoe* order.

Case 2 was internal to the trust and was not a candidate for a *Beddoe* order.

It was not considered appropriate to direct the trustees as to whether they should make or continue their counterclaim in light of the refusal of the *Beddoe* order.

In relation to the trustees' request for a protective costs order, Master Matthews noted that the court could not determine at this stage who would win Case 1 thus the costs must come out of the trust estate. Case 2 was to be characterised as a breach of trust claim and costs for such claims do not come out of the trust fund. Although the court could make a protective costs order subject to any order made by the trial judge, this would not assist the trustees in determining their next steps. Furthermore, as the court could not currently determine whether any of the trustees' costs must inevitably be taken from the trust fund, it could not authorise the incurring of costs up to a certain point either.

Conclusion for Practitioners

- A claim may be comprised of more than one type of case, each of which must be considered when determining eligibility for a *Beddoe* order.
- Where a claim involving a trust fund can be categorised as a third party claim, the beneficiaries are adults and are *sui iuris,* the court will refuse to make a *Beddoe* order unless the injustice caused would not be so significant as to justify the refusal.
- The injustice caused may warrant refusal of a *Beddoe* order even where the dispute does not concern the entire trust fund.
- The court may make a protective costs order in circumstances where it has refused to make a *Beddoe* order if it is satisfied that the applicant's costs will inevitably come out of the trust fund.

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