

5 Stone Buildings

In for a penny, in for a pound: can trustees take their costs from the fund in removal proceedings?

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The scenario

- Some disgruntled beneficiaries bring a removal claim against a trustee
- The trustee wants to know whether it can use trust funds to defend the claim relying on its right of indemnity
- What is the correct advice?



What is the trustee's right of indemnity?

- Right of indemnity in respect of all costs, liabilities and expenses properly incurred in exercise of their duties
- Express, under the general law and by statute (see s 31 (1) of the Trustee Act 2000, s 35 (2) of the Trusts (Guernsey) Law 2007, and s 26 (2) of the Trusts (Jersey) Law 1984)
- See also CPR PD 46 para 1.1

How does this interact with litigation?

- Three types of dispute (see *Alsop Wilkinson v Neary* [1996] 1 WLR 1220, N.B. not *Re Buckton* [1907] 2 Ch. 406):
 - “Trust dispute”
 - “Beneficiaries dispute”
 - “Third-party dispute”
- Removal applications are “category two” disputes

What are the costs rules in category two disputes?

- Costs follow the event, including determination of the trustee's right of indemnity
- Questions for the court are: (i) were the expenses properly incurred? And (ii) were they incurred by the trustee on behalf of the trust (see *Price v Saundry* [2019] EWCA Civ 2261)?

What does this mean for the trustee in a removal claim?

- The trustee may well be awarded its costs out of the fund at the end of the claim, particularly if it has been successful or acted neutrally
- However, it cannot take its costs out of the fund as it goes along: see *Skaftouros v Dimos* [2002] VSC 198 and *Sherborne Corporate Services Limited v The Public Trustee* [2021] GRC 013.
- The trustee must “*reach [its] own decisions as to whether to take advice or be represented in the knowledge that those expenses might not be recouped by [it]*”: *Sherborne* paras 36 and 37.

But... there's no breach of trust allegation... does that make a difference?

- No – the core issue is whether the trustee acted reasonably in defending the claim.
- See *Griffin v Higgs* [2018] EWHC 2498 (Ch) and *Perry v Neupert* [2019] EWHC 2275 (Ch) in which costs orders were made against the PRs without any finding of breach of duty or misconduct.

There is a broad express indemnity: can the trustee rely on it?

- Does not usually entitle the trustee to pre-payment of costs and, if it did, potentially contrary to public policy (*Sherborne* at paras 36 to 37 and 41)
- In any event will not give trustees carte blanche to incur costs improperly or unreasonably (see *In re Tchenguiz Discretionary Trust* [Judgment 54/2015])
- Express clauses providing for indemnities for legal costs are subject to overriding requirement that costs are reasonably/properly incurred: Lewin at 48-010 and *Re the FA and FB Trusts* [2019] BDA LR 87

What about prospective costs orders or Beddoe relief? (1)

- Beddoe relief concerned with trustee's indemnity whereas a prospective costs order determines the costs order in the main proceedings
- Not suitable in category two proceedings as would prejudice the trustee's right of indemnity in circumstances where the court has not determined whether it was appropriate to defend the claim (see *Stander v Schwulst* [2008] (1) SA 81)

What about prospective costs orders or Beddoe relief? (2)

- Possibility of a prospective costs order in “exceptional circumstances” but difficult to see how this would apply in the context of a removal claim
- There are examples of PCOs/Beddoe relief being granted but these are in very different circumstances (e.g. *STG Valmet Trustees Ltd v Brennan* (1998) 4 ITELR 337).

What about prospective costs orders or Beddoe relief? (3)

- *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42

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What about trustees with no assets?



So, what can trustees do?

- Seek an indemnity from friendly beneficiaries
- Offer to step down without making any acknowledgement of the allegations made (see Lewin on Trusts at 48-086)



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Any questions?





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