

Trustees' indemnity: litigation costs

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warns trustees not to take indemnity for granted

A trustee is not always entitled to recoup his or her litigation expenses from the trust fund. Often a trustee will have to await the outcome of litigation before he or she can exercise any right of indemnity. There are now over 300,000 trusts in New Zealand and an increasing number of trust disputes are being brought before the courts (Wear "QC says NZ needs specialist trust bar" *Lawtalk*, 18 February 2008). However, it is still common for trustees to be advised that they are entitled to have their litigation expenses met out of the trust fund. This is not always the case.

Where trustees receive advice to take their litigation expenses out of the trust fund and act on that advice both the trustee and the adviser may be at risk. The trustee may be personally liable to the trust to reimburse it (with an account or damages), and the adviser may be liable for dishonest assistance.

The general rule is that a trustee is entitled to be reimbursed for expenses incurred in carrying out the trust. Section 38(2) of the Trustee Act 1956 is the express statutory provision included in New Zealand legislation to reflect the principle developed by the Chancery Courts. This right of indemnity is a lien on trust income and capital (*Stott v Milne* (1884) 25 Ch D 710 (CA)). To claim such an indemnity a trustee need not apply to the court nor seek the permission of beneficiaries or any other person. It is a right conferred on the trustee by virtue of that position. However, this right will not necessarily extend to all litigation commenced or defended by a trustee.

A trustee is only entitled to claim litigation expenses where the expenses incurred are "properly incurred" in the capacity of trustee. Whether the costs have been properly incurred is determined by reference to three factors:

- the cost arose from an act falling within the scope of the trusteeship;
- it was a cost incurred because the trustees obligations required it; and
- in all the circumstances the expense incurred was reasonable (*Re O'Donoghue* [1998] 1 NZLR 116).

To assist in analysing litigation expenses and the question whether or not a trustee has properly incurred the expenses, the courts have divided trust cases into well-established categories or classes. By reference to these classes the court can determine:

- whether or not a case is appropriate for a protective costs order (a *Beddoe's* order);
- whether a trustee has a duty to take or defend a proceeding; and
- whether the litigation is of a type in respect of which the trustee should receive indemnity.

CLASSES OF TRUST LITIGATION

In the late nineteenth and early twentieth centuries it became common in England for trustees to make application to the court, by way of originating summons, to have trustee questions determined. However, the ease of the procedure led beneficiaries to make claims by way of originating summons which were adverse to other beneficiaries. These types of claims were distinguishable from the other two types of trust claims that were often brought before the courts which were:

- when trustees would ask the court to construe an instrument for their guidance and in order to ascertain the interests of beneficiaries; and
- claims made by beneficiaries which, although the claims had not been made by the trustees, were claims relating to difficulties of construction or administration and which would have justified an application by the trustees.

These two classes were held to be entirely appropriate for an award of costs out of the trust fund.

However, in a further class, where beneficiaries were making claims that were adverse to the interests of other beneficiaries, it was recognised that, although the beneficiaries had taken advantage of a convenient procedure to get a question determined, the action was one that traditionally would have been commenced by writ and would fall within the description of adverse litigation.

In *Re Buckton* [1907] 2 Ch 406 Kekewich J stated:

once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs. Whether he ought to be ordered to pay the costs of the trustees, who are, of course, respondents, or not, is sometimes open to question, but with this possible exception the unsuccessful party bears the costs of all whom he has brought before the Court.

Such litigation was termed "hostile" litigation. Accordingly, in "hostile" trust litigation the general rule was borne that costs, as with other litigation, follow the event.

The rule was extended and applied to trustees involved in litigation where the trustees were in dispute with a beneficiary or beneficiaries. Such litigation is hostile and until such time as the trustee is proved justified in his or her actions, the trustee is not entitled to an indemnity out of the trust fund. Similarly, if the trustee is unsuccessful in the litigation, then the trustee may be ordered to pay costs to the beneficiary personally.

A modern and authoritative classification of trust litigation was given in *Alsop Wilkinson (a firm) v Neary* [1995] 1 All ER 431. In *Alsop Wilkinson* the English High Court revisited the classes of trust litigation and provided for three convenient distinctions:

- a trust dispute;
- a beneficiary dispute; and
- a third-party dispute.

All modern trust litigation can be categorised within one of the classes referred to above.

Lightman J expanded at 434:

- (1) ... "a trust dispute" is a dispute as to the trusts on which they hold the subject matter of the settlement. This may be "friendly" litigation involving, for example, the true construction of a trust instrument or some other question arising in the course of the administration of the trust; or "hostile" litigation, for example, a challenge in whole or in part to the validity of the settlement by the settlor on grounds of undue influence or by a trustee in bankruptcy or a defrauded creditor of the settlor, in which case the claim is that the trustees hold the trust funds as trustees for the settlor, the trustee in bankruptcy or creditor in place of or in addition to the beneficiaries specified in the settlement. The line between friendly and hostile litigation, which is relevant as to the incidence of costs, is not always easy to draw ...
- (2) ... "a beneficiaries dispute" is 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. This may take the form of proceedings by a beneficiary alleging breach of trust by the trustees and seeking removal of the trustees and/or damages for breach of trust.
- (3) ... "a third party dispute" is a dispute with persons, otherwise than in the capacity of beneficiaries, in respect of rights and liabilities, for example in contract or tort, assumed by the trustees as such in the course of administration of the trust.

There is no automatic right to an indemnity in hostile litigation. A third party dispute is generally not hostile and provided the trustees have acted reasonably they will be entitled to be indemnified for their litigation expenses.

A trust dispute may or may not be hostile. A beneficiaries' dispute will be hostile. Where the litigation is hostile and the trustees wish to take their legal fees while the litigation progresses they should make what is known as a *Beddoe's* application. Where the litigation is not hostile trustees are generally entitled to take their expenses as litigation progresses provided the trustee is acting reasonably.

THE *BEDDOE'S* APPLICATION

The application takes its name from the case *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547. In that case the English Court of Appeal sanctioned a procedure by which trustees could apply to the Court at an early stage for directions as to whether to bring or defend proceedings. The application requires a trustee to make full disclosure of the strengths and weaknesses of the case. Provided that such disclosure is made, trustees will not have to personally bear any costs or pay those of anyone else.

In New Zealand the application should be made under Part IV of the High Court Rules and in a separate proceeding to the proceeding which the trustees take or defend. This is so that the trustees can openly inform the court of the strengths and weaknesses of their case. The court can take account of

the views of the trustees and beneficiaries regarding the prospects of success of the proposed litigation. Such information could not appropriately be revealed to the court which will try the case or to the other parties to the litigation. In *Kain v Hutton* (HC, Christchurch M 198/00, 3 October 2001, Panckhurst J), the application was made as an interlocutory application. The Judge noted the usual requirement that a separate proceeding be brought but in any event refused the application on its merits and because of the hostile nature of the litigation. The *Beddoe's* application must name all beneficiaries of the trust as respondents. Usually each of the parties to the action will be entitled to know everything that is communicated to the court. However, because a *Beddoe's* application involves the supply of privileged information to the court when some of the beneficiaries may be involved in the litigation to be tried, orders should be sought to put privileged information in an affidavit which will only be read by the court and the trustees. Such an order should usually be granted because it enables the court to have a full and proper view of the prospects for success (*Re Moritz* [1959] 3 All ER 767; *Re Eaton* [1964] 3 All ER 229).

There is some academic authority suggesting that the original trust instrument can provide a clause that ousts the need for a *Beddoe's* application. Such clauses will usually provide for the recovery of legal expenses without a court order where trustees conduct legal proceedings in accordance with the advice of experienced counsel (Underhill and Hayton, *Law of Trusts and Trustees*, 17th ed, 2006 at 83.18). It is suggested that such a clause will often be sufficient to enable trustees to take their funds without making a *Beddoe's* application, provided the advice to the trustees from experienced counsel is that the trustees should take or defend proceedings to fulfil their duty to act in the best interests of the beneficiaries as a whole. Trustees should carefully consider any advice received.

DUTY TO TAKE OR DEFEND PROCEEDINGS

One of a trustee's fundamental duties is to get in and preserve trust assets. A trustee should take proceedings to protect trust assets and defend any matter which might adversely affect trust assets. If a trustee becomes aware that a breach of trust has been committed, the trustee has a duty to take proceedings to have that breach of trust redressed. This can extend to a duty to seek the removal of a co-trustee where the co-trustee can no longer act in the best interests of the beneficiaries (*Ferne v Young* (1804) 10 Ves 184 and *Carson v Sloane* (1884) 13 LR 139). Failure to take proceedings in such circumstances may itself be a breach of trust (*Scott on Trusts* §124, 173 and *Re Brogden* (1883) 38 Ch D 546).

HOSTILE LITIGATION

Having determined that in hostile litigation the right to an indemnity is not automatic, it is necessary to consider the principles that will guide the court in determining the right to costs in hostile trust litigation.

The overriding principle which guides the court in ordinary litigation is set out in r 47(a) of the High Court Rules:

The party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds.

In *Shirley v Wairarapa District Health Board* [2006] 3 NZLR 523, the Supreme Court said at para [19]:

Rule 47(a) reflects the longstanding principle that, unless there are exceptional reasons, costs should follow the result. That is, the loser, and only the loser, pays.

Rule 48D(c) provides that the award of costs may be reduced if the party claiming relief was successful overall, but unsuccessful on a cause of action that significantly increased the costs of the party opposing costs.

This general rule that costs follow the event is subject to an overriding judicial discretion, exercised in accordance with other established principles. In hostile trust litigation these principles play an important role in determining whether or not the trustee can claim indemnity for his or her costs.

The general discretion set out in r 46 must be exercised in accordance with proper principles. It is at this point that the classifications and principles set out in *Alsop Wilkinson* and *Re O'Donoghue* become highly relevant.

A trustee is entitled to indemnification from the trust fund for any costs "properly incurred" in the capacity of trustee. Whether the costs have been "properly incurred" is determined by reference to three factors:

- the cost arose from an act falling within the scope of the trusteeship;
- it was a cost incurred because the trustee's obligations required it; and
- in all the circumstances, the expense incurred was reasonable.

A trustee who has been successful will then usually be entitled to receive costs on a party and party basis. Any shortfall will then be met from the indemnity out of the trust fund.

An unsuccessful trustee is not necessarily disentitled from claiming indemnity from the trust fund if it is found to have acted reasonably. An unsuccessful trustee who has acted unreasonably will not be entitled to indemnification from the trust fund.

In *Re O'Donoghue* [1998] 1 NZLR 116 at 121, Hammond J stated:

There is a respectable volume of case law authority around in the British Commonwealth as to what may be regarded as "not improperly incurred expenses". Necessarily, given the principle, these cases all appear to be determinations on the factual position arising in a particular case. But the principle that expenses must be properly incurred necessarily requires a trustee, if called upon, to demonstrate that the expenses arose out of an act falling within the scope of his trusteeship; whether it was something that his or her obligations required the trustee to undertake; and whether the expense incurred was, in all the circumstances, "reasonable".

Support for this latter proposition is found in *McDonald v Horn* [1995] 1 All ER 961 at 970 per Hoffmann LJ:

In the case of a fund held on trust, therefore, the trustee is entitled to his cost out of the fund on an indemnity basis, provided only that he has not acted unreasonably or in substance for his own benefit rather than that of the fund.

Although this statement was made after considering the relevant English Supreme Court Rules, Hoffmann LJ stated that it reflected the old established principles applied by the Court of Chancery (see also *Kain v Hutton* (HC, Christchurch M 198/00, 18 November 2005, Panckhurst J)).

Whether the actions of a trustee are unreasonable in the circumstances is determined from the conduct of the trustee

and the specific facts of the case. A trustee will be precluded from claiming indemnification from the trust fund if its conduct is such that it has disentitled itself by virtue of adopting an unreasonable position in litigation or acting in substance for its own benefit.

It needs to be highlighted that an honest trustee may still act unreasonably. In *Re Chapman* [1895] 72 LT 66 (CA) Lindley LJ stated at 68:

A trustee may be honest, and yet, from over-caution or some other cause, he may act unreasonably; and if, as in this case, his conduct is so unreasonable as to be vexatious, oppressive, or otherwise wholly unjustifiable, and he therefore causes his cestuis que trust expense which would not otherwise have been incurred, the trustee must bear such expense, and it ought not to be thrown on the trust estate or on his cestuis que trust.

Where proceedings are not properly taken or defended on behalf of the trust, there is no right to indemnity. Such actions are unreasonable.

The principle that an unreasonable position in litigation can disentitle a trustee to indemnity from a trust fund was supported by the Privy Council in the leading case on trustee removal: *Letterstedt v Broers* (1884) 9 App Cas 371 at 386.

The [trustees] having good grounds for thinking that to submit to the appeal would be derogatory to their character, and so injurious to their business, ought not to be made to pay costs, but as they are wrong in resisting the inquiry concerning the profits, and as their removal is held to be necessary, ought to bear their own costs of the appeal.

As a rule, a trustee who resists removal but whose removal is subsequently required by the court will not be entitled to indemnity from the trust (*Letterstedt v Broers*, and *Borell v Tangitu* (HC, Hamilton M 89/89, 22 June 1990, Fisher J)). If a trustee has resisted removal but been found unjustified in doing so, then its costs were not reasonably incurred in the interests of the beneficiaries and it has no claim to indemnification from the trust.

This principle extends to all aspects of litigation where a trustee's actions are called into question. For example, if a trustee has refused to provide information and is found to be unjustified in making that refusal and defends proceedings to provide the information, then the trustee will have to pay for the costs of that litigation.

In *Re O'Donoghue* Hammond J stated at 121–122:

The classical Chancery principle was, from the outset, that it is only expenses which are "properly incurred" which are the subject of a trustee's indemnity. The authority most often cited for this is *Re Beddoe*; but the principle still obtains today (see *Holdings and Management Ltd v Property Holding and Investment Trust plc* [1990] 1 All ER 938 (CA)). The direct consequence of this principle is that improperly incurred expenses fall upon a trustee personally. In that sense, a trustee is always at risk when he or she incurs expenses.

...

A Court will naturally hesitate before leaving a trustee, who, after all, shoulders an onerous burden, to carry costs personally. But I am afraid that this is such a case: I can see no proper reason for the trustee having adopted the obdurate position he did. He acted unreasonably in the

sense that I can discern no proper justification, or even a reasonably arguable one, for his having persisted in forcing Health Waikato up to a full defended hearing, and a delayed distribution of some years of the estate. It cannot be right that he should then seek to offload his costs of the proceeding onto the residuary beneficiary.

Finally, it needs to be pointed out that even though a trustee may be unsuccessful in litigation, this does not mean that it is not entitled to an indemnity from the trust where there is no misconduct on his or her part in the trustee capacity.

In *Re Ogilvie* (1910) 11 SR (NSW) 11 the trustees were allowed the costs of an unsuccessful defence to an ejectment action. Where a trustee is unsuccessful but there is no misconduct, then usually a trustee will remain indemnified (see also Jacobs *Law of Trusts in Australia*, 6th ed, para 2110 and *Halsbury's Laws of England* (4th ed, reissue) para 788).

EXERCISING THE RIGHT OF INDEMNITY

A trustee entitled to exercise his or her indemnity must debit each item of expenditure against either the income or the capital of the trust fund.

The general principle is that income expenses must be borne out of the income and capital expenses out of capital but the courts have struggled to deal with determining the nature of an expense, and how to deal with expenses that benefit both income and capital beneficiaries.

The following principles are relevant to how a trustee treats an expense:

- the trustee's duty to act fairly and impartially between different classes of beneficiaries;
- the trustee's duty to act in accordance with the terms of the trust instrument;
- whoever obtains a benefit should bear the burden.

The cases have laid down some general rules but are notable for the significant number of exceptions. The general rule is that income bears all ordinary outgoings of a recurrent nature, and capital bears those expenses and costs incurred for the benefit of the whole estate. In *Carver v Duncan* [1985] 2 All ER 645 at 652 Lord Templeman stated:

Trustees are entitled to be indemnified out of the capital and income of their trust fund against all obligations incurred by the trustees in the due performance of their duties and the due exercise of their powers. The trustees must then debit each item of expenditure either against income or against capital. The general rule is that income must bear all ordinary outgoings of a recurrent nature, such as rates and taxes, and interest on charges and incumbrances. Capital must bear all costs, charges and expenses incurred for the benefit of the whole estate.

The question that arises from *Carver v Duncan* is whether it is sometimes appropriate to depart from the general rule.

The English High Court recently had the opportunity to consider application of the principle in *Revenue and Customs Commissioners v Trustees of the Peter Clay Discretionary Trust* (2007) 10 ITEL 654 on appeal from the Special Commissioners in *Trustees of the Peter Clay Discretionary Trust v Revenue and Customs Commissioners* (2007) 9 ITEL 738. The issue in the case was essentially whether various expenses of administering the trust could be properly attributed in part to income so that under the applicable tax

legislation the trust did not suffer high rates of tax on the trustees' income. The decision was given in the context of the Income and Corporation Taxes Act 1988 (UK) but some of the underlying trust law principles remain relevant to the law in New Zealand.

The Special Commissioners had regard to the general rule set down in *Carver v Duncan*, stating at para [12]:

The distinction made by Lord Templeman in *Carver v Duncan* is between expenses incurred for the benefit of the whole estate, such as the audit in *Re Bennett* [1896] 1 Ch 778 and the investment managers' fee and the premiums on the term and endowment policies in *Carver v Duncan*, and ordinary outgoings of a recurrent nature which are charged to income. The issue in this appeal is whether one can attribute a single charge between the income and capital elements when it covers different work in relation to each element.

The Special Commissioners decided that it was permissible to apportion some of the trustees' expenses between capital and income based on the trustees' duty to keep a fair balance between classes of beneficiaries. They emphasised the general principle was designed to achieve fairness between beneficiaries entitled to income and capital (paras [17] and [18]).

On appeal Lindsay J felt that the rule in *Carver v Duncan* was to be applied as a rule of inescapable application unless there were very clear exceptional circumstances on which the Court had particular evidence. The Court did not illuminate what would constitute clear exceptional circumstances.

Lindsay J stated at para [33]:

Very attractive as the "fairness" argument is and powerful as it might otherwise seem to be in supporting some apportionment of some of the trustees' expenses between capital and income, I fail to see, to the extent that any particular expense is to be regarded as incurred for the benefit of the whole trust estate, that I am at liberty, with respect to that expense, to ignore a principle which the House of Lords has held to be derivable from *Re Bennett*, to have been accepted for nearly 90 years and which the House of Lords itself, by Lord Templeman, twice restates. Whatever doubts I might otherwise have had as to *Re Bennett* as intending to ground a rule of inescapable application, bound, as I am, by *Carver's* case, I am not free to read *Re Bennett* other than as establishing or restating the principle or rule, within the general law of trusts, as to trustees' expenditure incurred for the benefit of the whole estate which Lord Templeman states, namely that it has to be regarded as a capital expense.

To treat the rule in *Carver v Duncan* as one of inescapable application is unlikely, in the author's view, to be correct. The object of the general rule is to ensure that expenses are shared fairly between income beneficiaries and capital beneficiaries. Income beneficiaries must bear the recurrent outgoings. Capital beneficiaries must bear expenses for the benefit of the whole estate. The High Court in England is further saying that if there is a single expense incurred and that expense can in some way be said to benefit the whole of the trust then the expense in total must be borne out of the capital. This is in contrast to the approach taken by the Special Commissioners who essentially said that one can attribute a single charge between the income and capital elements when it covers different work in relation to each element.

The approach of the English High Court is correct in that the general rule should apply to a single expense that has been incurred as a result of some elements of work attributable to income and other elements of work attributable to capital because such an expense has been incurred for the benefit of the whole estate and therefore in being taken from capital the expense is in fact being borne by all beneficiaries. The capital has been reduced thereby affecting the capital beneficiaries while at the same time affecting the income beneficiaries by reducing the capital from which income can be generated. However, to apply this as a rule that cannot be departed from by the trustees is, in the author's view, wrong.

There is real merit to the Special Commissioners' decision in that the Special Commissioners recognised that the primary duty of trustees in dealing with expenses is to deal with them fairly between beneficiaries. The general rule was developed to provide a method to deal with expenses in a fair manner between beneficiaries. There is no reason why trustee discretion should be excluded and the rule be applied when it would create a windfall for some beneficiaries at the expense of others. For instance, counsel might render a fee for litigation that involved ten issues, nine of which were for the benefit of the income beneficiaries and one of which was for the benefit of the capital beneficiaries. It would be disproportionate and unfair for the expense in its entirety to be borne out of capital (but this is the law in England: see Underhill and Hayton, *Law of Trusts and Trustees*, 17th ed, LexisNexis Butterworths, London, at para 51.3). In such circumstances it is suggested the English authorities should not be followed and the expense could appropriately be apportioned by the trustees between income and capital.

This approach is more in line with traditional principles developed by the Chancery Courts in support of the trustees' right of indemnity. In *Hardoon v Belilios* [1901] AC 118 (PC) Lord Lindley stated:

The plainest principles of justice require that the cestui que trust who gets all the benefit of the property should bear its burden unless he can show some good reason why his trustee should bear them himself.

While this case dealt with the right to an indemnity it is clear that the principle underlying that right is that he who obtains the benefit should bear the burden. There seems no reason in principle why trustees cannot make decisions about particular expenses and the extent to which an expense might be apportioned between income and capital given the underlying elements of the work involved.

However, there is also longstanding authority that even though a settlor might provide in the trust instrument a power for trustees to decide the question of whether or not an item of expenditure is one of income or capital, such a power is void because the matter is one of law and the clause is an attempt to oust the court's jurisdiction (see *Re Wynn* [1952] Ch 271). If this authority was applied in New Zealand then it would be unhelpful but probably of little consequence because it is clear that a settlor can achieve the same object by inserting a clause that allows trustees to treat income as capital or to treat capital as income.

Where trustees embark on litigation for a number of trusts, and they are trustees for all of those trusts, there may be an apportionment of counsel's fee between the trusts depending on the scope of the work involved for each trust. This is implicit in the decision of Panckhurst J on costs and

other outstanding issues in *Kain v Hutton* (HC, Christchurch M 198/00, 18 November 2005).

The determination of this issue is relevant to how litigation expenses are dealt with. It will often be obvious for whose benefit litigation is conducted, but in certain circumstances litigation that is being taken or defended by a trustee may involve a range of issues, some for the benefit of particular beneficiaries and others for the benefit of the estate as a whole. In such cases it is suggested that an apportionment of litigation expenses is appropriate. However, until this issue is finally resolved in the New Zealand courts, trustees should exercise particular care in the debiting of expenses. Where an expense is incurred for particular beneficiaries trustees should take care to ensure there is evidence of that fact. The safest course of action is for trustees to request that separate fees be rendered for:

- work performed for the income beneficiaries;
- work performed for capital beneficiaries; and
- work performed for the benefit of the trust as a whole.

Similarly, in litigation conducted for multiple trusts a trustee is wise to seek separate fees for each trust.

CONCLUSION

From all of this some simple principles can be distilled:

- In hostile litigation or non-hostile litigation, a trustee will only be entitled to an indemnity for litigation expenses properly incurred.
- The trustee must obtain an order from the court or the entitlement to take litigation expenses may be subject to challenge by the beneficiaries.
- A trustee is not automatically entitled to have its expenses paid in hostile litigation.
- If a trustee wishes its expenses to be met during the course of hostile litigation then the trustee should obtain a *Beddoe's* order allowing it to take costs from the trust fund.
- In circumstances where hostile litigation fails a trustee may still be entitled to an indemnity if the trustee's actions were reasonable. In a beneficiary dispute or hostile trust dispute, it will rarely be the case that an unsuccessful trustee will be found to have acted reasonably if he or she loses the litigation.
- In a third party dispute, despite a trustee being unsuccessful, the court may well find its actions to have been a reasonable measure in attempting to get in, preserve, or protect the trust assets.
- A trustee may take its indemnity out of capital and income but must then debit each item of expenditure either against capital or income. To avoid some of the problems of apportionment a trustee should, where possible, obtain separate invoices for work performed for the benefit of income beneficiaries, capital beneficiaries, and for the trust as a whole.

One thing is certain; a trustee intending to have recourse to the trust fund to fund litigation expenses should beware. If the trustee has been taking its indemnity in hostile litigation before the entitlement to the indemnity has been recognised by the court, then it may well be required to repay the funds to the trust with an account or damages. A trustee is only entitled to its costs if a *Beddoe's* order has been granted or otherwise following the order of the court. □