

UPDATE

Do not step on the stingray: Cayman Court affirms retrospective *Beddoe* relief for foreign proceedings

Update prepared by Hector Robinson QC (Partner, Cayman Islands)

In the recent decision of *In the matter of the Stingray Trust*, the Grand Court of the Cayman Islands (the **Grand Court**) considered the appropriateness of granting retrospective *Beddoe* relief to a trustee.

The main purpose in bringing a *Beddoe* application is for a trustee to obtain court sanction for its participation in litigation in its capacity as trustee. In doing so, this will confirm a trustee's ability to use trust assets to meet the costs and expenses of the litigation and, subject to very narrow exceptions, remove a beneficiary's ability to challenge it doing so.

For obvious reasons, a trustee will normally bring a *Beddoe* application prior to taking any substantive steps in the litigation. However, in certain circumstances, it may be unable to do so. The Grand Court's decision in *In the matter of the Stingray Trust* confirms that a trustee of a Cayman Islands law governed trust may obtain *Beddoe* relief retrospectively; even where the litigation in question has been determined prior to the application being made.

However, whilst the decision demonstrates the flexibility possessed by the Grand Court in dealing with applications of this nature, it is important to bear in mind that retrospective relief is not granted readily and, as demonstrated by the facts of this case, exceptional circumstances may be required.

Background

The Stingray Trust was settled by a Declaration of Trust dated 5 July 2005. The settlors of the Trust were CDF (now deceased) and her sister IDF; both of whom were Italian citizens residing in Milan. The beneficiaries of the Stingray Trust were CDF, IDF and a charity, MF.

The Swiss Proceedings

After CDF's passing, IDF's health began to deteriorate which led to the appointment of a guardian by the Milanese Courts. Shortly after her appointment, IDF's guardian (the **Guardian**) began to make a number of enquiries of the Trustee. Unsatisfied with the responses received, the Guardian, in IDF's name, issued proceedings against, amongst others, the Trustee in Lugano, Switzerland (the **Swiss Proceedings**).

The Swiss Proceedings sought to attack the validity of the Stingray Trust and, *inter alia*, sought: (i) delivery of assets to the Guardian on the basis that the Trust was invalid and all of the Trust assets were the property of IDF; and (ii) an order preventing the Trustee from making decisions in respect of the management of the Trust. In addition, the Guardian sought urgent injunctive relief against the Trustee which required the Trustee to act quickly.

The Trustee, upon advice, elected to defend the Swiss Proceedings including the injunction proceedings. The Swiss Proceedings were dismissed at first instance and, upon an appeal by the Guardian, by the Appeal Court of the Canton of Ticino.

The Milan Proceedings

Shortly after the dismissal of the Swiss Proceedings, the Trustee issued its application for *Beddoe* relief in relation to the Swiss Proceedings (the **Swiss Beddoe Application**).

However, before the Swiss Beddoe Application could be determined, the Guardian issued proceedings; this time in the Court of Milan (the **Milan Proceedings**). The Milan Proceedings were similar in nature to the Swiss Proceedings and, *inter alia*, sought orders and/or declarations that: (i) the Trust is invalid; (ii) the beneficiary charity, MF, holds no interest in the assets of the Trust or the income it generates; and (iii) the Trustee should transfer any assets under its control to the Guardian.

The Trustee, upon advice, decided to defend the Milan Proceedings. Unlike the position it faced regarding the Swiss Proceedings, the Trustee had sufficient time to seek *Beddoe* relief prior to taking any substantive step in the Milan Proceedings and, accordingly, it filed a *Beddoe* application in relation to the Swiss Proceedings before doing so (the **Milan Beddoe Application**).

The Decision

Upon hearing the Milan and Swiss Beddoe Applications, the Grand Court granted the relief sought.

The Swiss Proceedings

Upon reviewing the evidence, the Grand Court found that the Trustee acted reasonably in deciding to defend the Swiss proceedings and, as a result, it should be indemnified out of the trust fund. The Grand Court considered that, due to the nature of the proceedings which went to the very heart of the Trust's existence, it was necessary for the Trustee to defend the action, particularly since the only other beneficiary, MF, was not named as a party nor was it served with a copy of the proceedings. Absent participation by the Trustee, there was a substantial risk to the Trust that its assets would be transferred to the Guardian. In the circumstances, the Grand Court held that it was appropriate for the Trustee defend the Swiss Proceedings and to use the Trust's assets to meet the reasonable costs and expenses associated with doing so.

The Grand Court accepted that, whilst it is unusual for a trustee to only seek such relief after the conclusion of the litigation in question, the failure to apply for *Beddoe* relief at an earlier stage was understandable given the urgency of the case and in view of the injunctive relief obtained by the Guardian. It further considered that, had an application been made before the Trustee's participation in the Swiss Proceedings, the relief sought would have been granted. On that basis, it was prepared to make a *Beddoe* order in the Trustee's favour.

The Milan Proceedings

With regards to the Milan Proceedings, the Grand Court held that, in light of the advice received by the Trustee, and given the severe consequences to the Trust if the Milan Proceedings were not defended¹, it was appropriate to give the Trustee sanction to participate in the proceedings.

However, that sanction was not open-ended and the Grand Court limited the Trustee's permission to challenging the jurisdiction of the Milan Court. If the Trustee's jurisdictional challenge proved unsuccessful, the Grand Court directed that the Trustee return to court for further directions, including as to whether it was appropriate for it to defend the Milan Proceedings on the merits.

As a result, the Grand Court also directed that the Trustee was entitled to be indemnified out of the Trust assets for the reasonable costs and expenses of those proceedings.

¹ Although served with the proceedings, MF elected not to actively participate in them.

Comment

In some respects, this decision is an entirely orthodox decision. The Trustee acted as any trustee would: it obtained advice upon being served with proceedings and, consistent with that advice, defended proceedings which sought to attack the validity of the trust consistent with its fiduciary duties. It is therefore unsurprising that *Beddoe* relief was granted by the Grand Court.

However, the decision is unusual in that it is not often that a trustee will seek such relief after the conclusion of the proceedings in which it was participating. A trustee should normally seek approval from the Court as soon as possible; otherwise the litigation will be conducted with the risk that the trustee may be unable to meet its costs out of the trust assets.

As set out above, the inability of a trustee to do so will not prove fatal and, in exceptional circumstances, the Court will grant retrospective *Beddoe* relief. This is not an easy burden to meet and, in order for relief to be obtained, it must be shown that (a) the Court would have granted such an application if made before the trustee's participation in the litigation and (b) there is a good reason for not seeking prior approval.

The decision also demonstrates that the Cayman Court will take into account the expertise of trustees and permit the trustee to exercise its judgment in taking urgent action for the benefit of the trust and its beneficiaries, particularly where there are beneficiaries whose interests may be overlooked without the participation of the trustee. However, despite the Court's confirmation that retrospective *Beddoe* relief is available, it is always best practice for a trustee to seek directions from the Court prior to commencing or defending proceedings if at all possible.

Hector Robinson QC and Christopher Levers acted for the successful trustee.

Contacts



Hector Robinson QC
Partner, Mourant Ozannes
Cayman Islands
+1 345 814 9114
hector.robinson@mourant.com
