

Judgment 23/2005

(1) **Rothschild Trust Guernsey Limited**
(2) **Rothschild Trust Canada Inc.**
(3) **Old Court Limited**
**(In re The Z Trust) - Royal Court (Civil Action
File 888) – 25 April 2005**

Discretionary trust – Beddoes application by trustees to defend proceedings in the Royal Court of Jersey – review of Beddoes jurisdiction and procedure – order granted

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

IN RE THE Z TRUST

25 April 2005

(Advocate P T R Ferbrache appeared for the Trustees)

Sir de Vic Carey, Bailiff, set out the law as follows in paragraphs 19 – 25 and 31 – 32 of his judgment: -

The Beddoes jurisdiction

19. The Applicants are asking for a Beddoes order. This is a procedure, which is used regularly in the case of litigation involving Trustees in England, and the Chancery Division is well versed in its operation. It has also recently been refined in the English Civil Procedure Rules, although it is not at this stage being suggested that we should necessarily follow the form of those rules when considering applications in this Court.
20. The first and most comprehensive review of the Beddoes procedure to be handed down in this Court was the decision of Day D.B. in Brown v. Orion Trust Ltd 14th April, 2000. That case depended on its own facts but it is fair to say that Day, D.B. did not feel it appropriate to distance the Guernsey courts from the practice of English courts in the way that they dealt with Beddoes applications. In particular he accepted the concept of the Court in effect becoming advisor to the Trustee and indicating what the Trustee should be doing when faced with hostile litigation.
21. I interpose here to say that quite properly Mr. Ferbrache drew my attention to clause 18(7) of the Trust Instrument. That permits the Trustee

"to take the opinion of legal counsel locally or where necessary or appropriate elsewhere concerning any difference arising under the Trust or any matter in any way relating to the Trustees or to their duties in connection with the trusts hereof and in all matters to act in accordance with the opinion of such counsel (page 319)"

I agree that this does not provide sufficient authority to enable the Trustees to enter upon litigation without the comfort of a Beddoes order.

22. Mr. Ferbrache drew assistance for the need of obtaining a Beddoes order in a case such as this from a relatively recent decision of Alan Boyle, Q.C. sitting as a Deputy Judge of the Chancery Division in 1998 of Amrik Singh v. Rajinder Singh Bhasin and Another. That case is a cautionary tale for Trustees who have not sought Beddoes relief, but even more important it shows that where a Trustee has acted unreasonably he cannot be expected to be indemnified ex post facto.

23. The learned Judge summed up the position in the following terms

"One factor of importance will be whether the court considers that it would have been prepared to grant the protection of an order under *Re Beddoe* [1893] 1 Ch 547. The nature and effect of such an order is well known. It is directed to ensuring that trustees who become involved in litigation with third parties are entitled to recover their costs out of the trust fund. If the protection of such an order is obtained by a trustee against whom proceedings are brought in his capacity as such, he will be entitled to recover his costs out of the trust fund in his hands win or lose, together with any costs which he may be ordered to pay to the plaintiff. In such a case, the trustee will have no need to have recourse to RSC Order 62 rule 2(2). It is only if no such order has been obtained that questions may arise under RSC Order 62 rule 2(2).

If the trustee omits to apply for a *Re Beddoe* order, he defends the action at his own risk as to costs, and may find at the conclusion of the proceedings that the court adjudges that his conduct was unreasonable. If the court considers that it would have authorised the defence of the proceedings at the expense of the trust fund had such an application been made, it may in the exercise of its discretion permit the costs to be taken out of the trust fund. But if the court considers that it would not have given authority to defend the proceedings, it will not generally allow the costs out of the estate. In the latter case, the fact that the trustee was advised by counsel that he had a good defence may not be sufficient to persuade the court not to visit the costs on the trustee personally."

24. The learned Judge then went on to quote from the judgment in Re Beddoe 1893 1 Ch.547 itself. The judgment of Lindley, L.J. at page 558 said very much the same thing as the passage that I have just quoted

"But, considering the ease and comparatively small expense with which trustees can obtain the opinion of a Judge of the Chancery Division on the question whether an action should be brought or defended at the expense of the trust estate, I am of opinion that if a trustee brings or defends an action unsuccessfully and without leave,

it is for him to shew that the costs so incurred were properly incurred. The fact that the trustee acted on counsel's opinion is in all cases a circumstance which ought to weight with the Court in favour of the trustee; but counsel's opinion is no indemnity to him even on a question of costs."

Bowen, L.J. continued in a similar vein on page 562.

"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 salutary precaution might often be to speculate in law with money that belongs to other people."

25. I note in passing that the days when these applications could be conducted inexpensively may well have passed. This particular application has been pursued by Mr. Ferbrache vigorously and with a degree of contention. Lengthy statements have been produced and I believe Mr. Ferbrache even had a lawyer from England especially attending for the hearing. However I do not see how in this jurisdiction I can distance myself from something that is sensible and has worked well in the mother jurisdiction, if I may put it as such, of the Law of Trusts. I continue therefore to adopt all the learning of the English cases as to how a Court should deal with Beddoes applications.

The broader issues

31. In the case of a Beddoes application to the Court it is trite law to state that Trustees are in a special position, but it is inevitably the case that Trustees are looking after funds, which are not theirs, and therefore they have special responsibilities to their beneficiaries. The Courts of Chancery over the ages supported the development of Trusts and were prepared to offer guidance to Trustees in the discharge of their duties. In the case of in Re Beddoes which appears to have been doing little more than consolidating for the first time the then current Chancery jurisprudence on the vexed issue of when Trustees should engage in expensive litigation and when they should not, it was recognised that the Court would give guidance to Trustees who have asked for it and that more importantly that if the Trustees acted within that guidance then even if at the end of the day the litigation in which they were involved

was unsuccessful they were protected from having to pay the costs out of their own pocket by being authorised to take the costs from the Trust Fund.

32. It is important to emphasise the somewhat narrow nature of this jurisdiction. All the Court can do is to look at the particular issue, which faces the Trustees, and form a view as to whether it is right for the Trustees to take a particular course of action in connection with a then current dispute.