

APPLICATIONS TO THE COURT FOR DIRECTIONS BY TRUSTEES IN RELATION TO THE ADMINISTRATION OF THE TRUST

This Practice Direction supplements Section I of Part 64

- 1 This Practice Direction is about applications to the court for directions by trustees in relation to the administration of the trust.

Contents of the claim form

- 2 If confidentiality of the directions sought is important (for example, where the directions relate to actual or proposed litigation with a third party who could find out what directions the trustees are seeking through access to the claim form under CPR rule 5.4) the statement of the remedy sought, for the purposes of CPR rule 8.2(b), may be expressed in general terms. The trustees must, in that case, state specifically in the evidence what it is that they seek to be allowed to do.

Proceedings in private

- 3 The proceedings will in the first instance be listed in private (see paragraph 1.5 of Practice Direction 39A and rule 39.2(3)(f)). Accordingly the order made, as well as the other documents among the court records (apart from a claim form which has been served), will not be open to inspection by third parties without the court's permission (rule 5.4(2)). If the matter is disposed of without a hearing, the order made will be expressed to have been made in private.

Joining defendants or giving notice to those interested

- 4.1 Rule 64.4(1)(c) deals with the joining of beneficiaries as defendants. Often, especially in the case of a private trust, it will be clear that some, and which, beneficiaries need to be joined as defendants. Sometimes, if there are only two views of the appropriate course, and one is advocated by one beneficiary who will be joined, it may not be necessary for other beneficiaries to be joined since the trustees may be able to present the other arguments. Equally, in the case of pension trust, it may not be necessary for a member of every possible different class of beneficiaries to be joined.
- 4.2 In some cases the court may be able to assess whether or not to give the directions sought, or what directions to give, without hearing from any party other than the trustees. If the trustees consider that their case is in that category they may apply to the court to issue the claim form without naming any defendants under rule 8.2A. They must apply to the court before the claim form is issued (rule 8.2A(2)) and include a copy of the claim form that they propose to issue (rule 8.2A(3)(b)).
- 4.3 In other cases the trustees may know that beneficiaries need to be joined as defendants, or to be given notice, but may be in doubt as to which. Examples could include a case concerning a pension scheme with many beneficiaries and a number of different categories of interest, especially if they may be differently affected by the action for which directions are sought, or a

private trust with a large class of discretionary beneficiaries. In those cases the trustees may apply to issue the claim form without naming any defendants under rule 8.2A. The application may be combined with an application to the court for directions as to which persons to join as parties or to give notice to under rule 19.8A.

- 4.4** In the case of a charitable trust the Attorney-General is always the appropriate defendant, and almost always the only one.

Case management directions

- 5.1** The claim will be referred to the master or district judge once a defendant has acknowledged service, or otherwise on expiry of the period for acknowledgment of service, (or, if no defendant is named, as soon as the claimants' evidence has been filed) to consider directions for the management of the case. Such directions may be given without a hearing in some cases; these might include directions as to parties or as to notice of proceedings, as mentioned in paragraph 4 above.

Proceeding without a hearing

6.1

- (1) The court will dispose of the application without a hearing if it considers that to do so will save time or expense, and that a hearing is not necessary. The trustees must therefore consider whether a hearing is necessary and, if so, explain why in their evidence.
- (2) When considering whether to hold a hearing, the court will take into account any dispute between the parties as to directions, but will not necessarily direct a hearing for that reason alone.
- (3) If a defendant considers that a hearing is needed, and that the need is not sufficiently explained in the trustees' evidence, that defendant should so state in evidence, giving reasons why.

- 6.2** Where the court deals with an application without a hearing, it will in any order give the parties an opportunity, within a stated time, to apply to vary or discharge the order at an oral hearing.

- 6.3** In charity cases, the master or district judge may deal with the case without a hearing on the basis of a letter by or on behalf of the Attorney-General that sets out his attitude to the application.

Evidence

- 7.1** The trustees' evidence should be given by witness statement. In order to ensure that, if directions are given, the trustees are properly protected by the order, they must ensure full disclosure of relevant matters, even if the case is to proceed with the participation of beneficiaries as defendants.
- 7.2** Applications for directions whether or not to take or defend or pursue litigation should be supported by evidence of the following matters –
- (1) the advice of an appropriately qualified lawyer as to the prospects of success;
- (2) an estimate in summary form of –
- (a) the value or other significance to the trust estate of the issues in the proceedings;
- (b) the costs likely to be incurred by the trustees in the proceedings, by reference to the principal stages in the proceedings; and

- (c) the costs of other parties to the proceedings for which, if unsuccessful, the trustees may be exposed to liability;
 - (3) any known facts concerning the means of other parties to the proceedings; and
 - (4) any other factors relevant to the court's decision whether to give the directions sought.
- 7.3** References in this practice direction to an appropriately qualified lawyer mean one whose qualifications and experience are appropriate to the circumstances of the case. The qualifications should be stated. If the advice is given on formal instructions, the instructions should always be put in evidence as well, so that the court can see the basis on which the advice was given. If it is not, the advice must state fully the basis on which it is given.
- 7.4** In the case of a pension trust the evidence should include the latest actuarial valuation, and should describe the membership profile and, if a deficit on winding up is likely, the priority provisions and their likely effect.
- 7.5** On an application for directions about actual or possible litigation the evidence should also state whether (i) the Practice Direction (Pre-Action Conduct) or any relevant Pre-Action Protocol has been complied with; and (ii) the trustees have proposed or undertaken, or intend to propose, mediation by ADR, and (in each case) if not why not.
- 7.6** If a beneficiary of the trust is a party to the litigation about which directions are sought, with an interest opposed to that of the trustees, that beneficiary should be a defendant to the trustees' application, but any material which would be privileged as regards that beneficiary in the litigation should be put in evidence as exhibits to the trustees' witness statement, and should not be served on the beneficiary. However if the trustees' representatives consider that no harm would be done by the disclosure of all or some part of the material, then that material should be served on that defendant. That defendant may also be excluded from part of the hearing, including that which is devoted to discussion of the material withheld.

Consultation with beneficiaries

- 7.7** The evidence must explain what, if any, consultation there has been with beneficiaries, and with what result. In preparation for an application for directions in respect of litigation, the following guidance is to be followed:
- (1) If the trust is a private trust where the beneficiaries principally concerned are not numerous and are all or mainly adult, identified and traceable, the trustees will be expected to have canvassed with all the adult beneficiaries the proposed or possible courses of action before applying for directions.
 - (2) If it is a private trust with a larger number of beneficiaries, including those not yet born or identified, or children, it is likely that there will nevertheless be some adult beneficiaries principally concerned, with whom the trustees must consult.
 - (3) In relation to a charitable trust the trustees must have consulted the Attorney-General, through the Treasury Solicitor, as well as the Charity Commissioners whose consent to the application will have been needed under section 33 of the Charities Act 1993.
 - (4) In relation to a pension trust, unless the members are very few in number, no particular steps by way of consultation with beneficiaries (including, where relevant, employers) or their representatives are required in preparation for the application, though the trustees' evidence should describe any consultation that has in fact taken place. If no consultation has taken place, the court could in some cases direct that meetings of one or more classes of beneficiaries be held to consider the subject matter of the application, possibly as a preliminary to deciding whether a member of a particular class ought to be joined as a defendant, though in a case

concerning actual or proposed litigation, steps would need to be considered to protect privileged material from too wide disclosure.

7.8

- (1)** If the court gives directions allowing the trustees to take, defend or pursue litigation it may do so up to a particular stage in the litigation, requiring the trustees, before they carry on beyond that point, to renew their application to the court. What stage that should be will depend on the likely management of the litigation under the CPR. If the application is to be renewed after disclosure of documents, and disclosed documents need to be shown to the court, it may be necessary to obtain permission to do this from the court in which the other litigation is proceeding.
- (2)** In such a case the court will if possible deal with the matter without a hearing, and in deciding whether to do so will take into account the advice of an appropriately qualified lawyer supporting the continuation by the trustees of the pursuit or defence (as the case may be) of the proceedings.

7.9 In a case of urgency, such as where a limitation period or period for service of proceedings is about to expire, the court may be able to give directions on a summary consideration of the evidence to cover the steps which need to be taken urgently, but limiting those directions so that the application needs to be renewed on fuller consideration at an early stage.

7.10 In any application for directions where a child is a defendant, the court will expect to have put before it the instructions to and advice of an appropriately qualified lawyer as to the benefits and disadvantages of the proposed, and any other relevant, course of action from the point of view of the child beneficiary.

7.11 The master or district judge may give the directions sought though, if the directions relate to actual or proposed litigation, only if it is a plain case, and therefore the master or district judge may think it appropriate to give the directions without a hearing: see Practice Direction 2B, para 4.1 and para. 5.1(e), and see also paragraph 6 above. Otherwise the case will be referred to the judge.

7.12 Where a hearing takes place, if the advice of a lawyer has been put in evidence in accordance with paragraph 7.2 or 7.10, that lawyer should if possible appear on the hearing.