

Practice Direction – Applications to the court for directions by trustees in relation to the administration of the trust

THIS PRACTICE DIRECTION SUPPLEMENTS RSC ORDER 85 (SCHEDULE 1 TO THE CPR) AND RULE 8.2A

- 1.1 This Practice Direction is about applications to the court for directions by trustees in relation to the administration of the trust. Such applications are to be brought by Part 8 claim form. RSC Order 85 is relevant. References to trustees in this Practice Direction include, where relevant, personal representatives.
- 1.2 RSC Order 85 applies to the High Court and the county court.

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 the Practice Direction supplementing Part 39 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 RSC Order 85 rule 3(2) 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 RSC Order 15 rule 13A.
- 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.
- 5.2 Case management directions will be given where the court grants an application to issue the claim form without naming a defendant under rule 8.2A (rule 8.2A(4)).

PROCEEDING WITHOUT A HEARING

- 6.1 The court will always consider whether it is possible to deal with the application on paper without a hearing. The trustees must always consider whether a hearing is needed for any reason. If they consider that it is they should say so and explain why in their evidence. If a defendant considers that a hearing is needed, this should be stated, and the reasons explained, in his evidence, if any, or otherwise in a letter to the court.
- 6.2 If the court would be minded to refuse to give the directions asked for on a consideration of the papers alone, the parties will be notified and given the opportunity, within a stated time, to ask for a 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.
- 6.4 Cases in which the directions can be given without a hearing include those where personal representatives apply to be allowed to distribute the estate of a deceased Lloyd's name, following the decision in *Re Yorke deceased* [1997] 4 All ER 907: see Chancery Masters' Practice Direction 12 section G, as well as applications under s.48 of the Administration of Justice Act 1985 (see CDPD 12 section A).

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 (see *Re Beddoe* [1893] 1 Ch 547) should be supported by evidence including the advice of an appropriately qualified lawyer as to the prospects of success and other matters relevant to be taken into account, including a cost estimate for the proceedings and any known facts concerning the means of the opposite party to the proceedings, and a draft of any proposed statement of case. There are cases in which it is likely to be so clear that the trustees ought to proceed as they wish that the costs of making the application, even on a simplified procedure without a hearing and perhaps without defendants, are not justified in comparison with the size of the fund or the matters at issue.
- 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 All applications for directions should be supported by evidence showing the value of the trust assets, the significance of the proposed litigation or other course of action for the trust, and why the court's directions are needed. 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) any relevant Pre-Action Protocol has been followed; 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: see *Re Moritz* [1960] Ch 251; *Re Eaton* [1964] 1 W.L.R. 1269.

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. The implied

undertaking limiting the use of documents disclosed by another party to the litigation does not preclude their use on an application by trustee parties for directions, since that is use for the purposes of the litigation: *White v Biddulph*, Hart J, unreported 22 May 1998.

- (2) In such a case the court may sometimes direct that the case be dealt with at that stage without a hearing if the beneficiaries obtain and lodge the written advice of an appropriately qualified lawyer stating that he or they support the continuation of the directions. Any such advice will be considered by the court and, if thought fit, the trustees will be given a direction allowing them to continue pursuing the proceedings without a hearing.
- 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 usually without a hearing: see the Practice Direction supplementing Part 2: Allocation of Cases to Levels of the Judiciary, para 4.1 and para. 5.1(e), and see also paragraph 6 above. Otherwise the case will be referred to the judge.

REPRESENTATION ORDERS

- 8 It is not the normal practice of the court to make representation orders under rule 19.7 on an application for directions.

COSTS

- 9. Normally, the trustees' costs of a proper application will be allowed out of the trust fund, on an indemnity basis, as will the assessed (or agreed) costs of beneficiaries joined as defendants, subject to their conduct in the proceedings having been proper and reasonable.

CHARITY TRUSTEES' APPLICATIONS FOR PERMISSION TO BRING PROCEEDINGS

- 10. In the case of a charitable trust, if the Charity Commissioners refuse their consent to the trustees applying to the court for directions, under the Charities Act 1993 section 33(2), and also refuse to give the trustees the directions

under their own powers, under sections 26 or 29, the trustees may appeal to the court under section 33(5), in accordance with RSC Order 108 rule 3. On such an application, which may be dealt with on paper, the judge may call for a statement from the Charity Commissioners of their reasons for refusing permission, if not already apparent from the papers. The court may require the trustees to attend before deciding whether to grant permission for the proceedings. It is possible to require notice of the hearing to be given to the Attorney General, but this would not normally be appropriate.

11. This Practice Direction does not extend to applications for pre-emptive costs orders, as in *Macdonald v Horn* [1995] 1 All ER 961, though some similar issues arise in those cases.