

**Hong Kong Bar Association's Submissions**  
**on the Proposed Practice Direction 20.3**  
**on *Beddoe* Applications**

**INTRODUCTION**

1. The Hong Kong Bar Association (“**HKBA**”) welcomes the proposed practice direction (“**the Proposed PD**”) prepared by the Judiciary for the purpose of regulating the practice of *Beddoe* applications. At the moment, practitioners generally refer to the commentary to RHC Order 85 in the Hong Kong Civil Procedure 2013 for guidance on the practice of *Beddoe* applications and it would be very helpful for a set of practice direction to be issued by the Judiciary to standardise the practice in Hong Kong.
2. The HKBA wishes to comment on the following aspects in the Proposed PD:<sup>1</sup>
  - (1) The nature of advice to support the application (§§5(a), 5(g) and 7 of the Proposed PD).
  - (2) The requirement of making full and frank disclosure on the part of the trustees (§8 of the Proposed PD).
  - (3) The trustees’ obligation to consult in a charitable trust (§9 of the Proposed PD).

**(1) NATURE OF ADVICE TO SUPPORT THE APPLICATION**

Legal Advice on the Merits of Main Action

3. The essential feature of a *Beddoe* application is that the court is required to make an advance assessment of the merits in the main action. In order to make such an assessment, the court will need to be provided with legal advice addressing the strengths and weaknesses of the merits of the trustees’ claim or defence in the main action.
4. In *Alsop Wilkinson v Neary* [1996] 1 WLR 1220, Lightman J at p 1224F

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<sup>1</sup>Apart from the three substantive comments, there seems to be a typographical error on the fourth line of §14 of the Proposed PD. The words in the first set of the brackets should read “*unless the Beddoe application is heard after the Main Action which has been totally disposed of by the judge*”.

said that “[so] long as the trustees make full disclosure of the strengths and weaknesses of their case, if the trustees act as authorised by the court, their entitlement to an indemnity and lien is secure”.

5. §7 of the Proposed PD refers to such advice and recognises that advice from counsel, solicitors or the trustees (if they are legally unrepresented) would be sufficient for this purpose.
6. The HKBA recognises that not all trustees are legally represented. However, the existing §7 of the Proposed PD essentially permits legally unrepresented trustees (who may be professionals but may also be lay persons) to provide their own “advice” to the court (which will, by definition, not amount to legal advice) and this is not entirely satisfactory for the following three reasons.
  - (1) It is difficult for non-lawyers, especially lay persons, to analyse the issues in the main action and come to an objective view as to their strengths and weaknesses. This will be particularly so if the main action involves issues of law or complex issues of fact.
  - (2) It may not be easy for legally unrepresented trustees to satisfy the “full disclosure” requirement (see §4 above) when disclosing the strengths and weaknesses of their case.
  - (3) To allow trustees to make a *Beddoe* application without any legal advice in support is a fundamental departure of the well-established principles.
7. For these reasons, the HKBA suggests that the trustees’ own assessment on the merits of their case should not be accepted by the court as a substitute for legal advice. This does not mean that all trustees need to instruct lawyers to represent them to prepare the affidavit for the *Beddoe* application, or to attend the *Beddoe* hearing on their behalf. What this means is that trustees will have obtain a written legal advice from an appropriately qualified lawyer so that the same can be included in their *Beddoe* application. This would strike a balance between the trustees’ freedom to represent themselves in the preparation of the affidavit and at the substantive *Beddoe* hearing on the one hand, and the provision of assistance to the court from a suitably qualified lawyer in terms of the merits of the main action on the other. If this suggestion is adopted, the last sentence of §14 of the Proposed PD will need to be revised to provide

for the exception in the case of the unrepresented trustees.

8. As far as the advice from counsel or solicitors is concerned, it would be desirable to specify that the relevant counsel or solicitor should be “appropriately qualified”. These are the words used in the equivalent Practice Direction in England,<sup>2</sup> and an appropriately qualified lawyer means “one whose qualifications and experience are appropriate to the circumstances of the case”.<sup>3</sup> It would not be appropriate for trustees to engage a barrister or solicitor who has, for instance, only just finished his or her vocational training, or a solicitor who has no practical experience in litigation, to provide the written legal advice. If this suggestion is adopted, (1) the Proposed PD should require the qualifications of the lawyer to be stated,<sup>4</sup> and (2) the last sentence of §10 of the Proposed PD should be revised to refer to the “advice from an appropriately qualified lawyer” (as opposed to “Counsel’s advice”).

#### Legal Advice Concerning a Child Beneficiary

9. In §5(g) of the Proposed PD, in the event that a child is a defendant, there is a requirement that the evidence of a *Beddoe* application should include legal advice as to the benefits and disadvantages of the proposed action, and any other relevant course of action from the point of view of the child beneficiary. However, no such legal advice is necessary if the trustees are legally unrepresented.
10. Consistent with the practice that a proposed settlement involving a minor needs to be approved by the court having regard to the appropriate legal advice and an explanation as to why the court should approve it (RHC Order 80, rule 11), it is right to recognise that legal advice as to the benefits and disadvantages of the proposed action vis-à-vis a child beneficiary should be submitted to the court in a *Beddoe* application. This important requirement should not be dispensed with in a case when the trustees are acting in person. The child beneficiary’s interest should not be compromised just because the trustees, for whatever reason, decide not to engage lawyers for their *Beddoe* application.

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<sup>2</sup>See §7.2(1) of Practice Direction 64B “Application to the Court for Directions by Trustees in relation to the Administration of the Trust”: [http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part64/pd\\_part64b](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part64/pd_part64b) (“PD 64B”).

<sup>3</sup>The definition is at §7.3 of PD 64B.

<sup>4</sup>See also §7.3 of PD 64B.

11. For these reasons, the HKBA believes that the exception in §5(g) in relation to legally unrepresented trustees should be removed. It is noted the current practice in England is that all applications for directions by trustees (whether or not they are legally represented) in relation to the administration of a trust should include in their application “*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*”.<sup>5</sup>

## (2) REQUIREMENT OF FULL AND FRANK DISCLOSURE

12. In §8 of the Proposed PD, there is a requirement of making full and frank disclosure on the part of the trustees in presenting all the relevant circumstances before the court. It further states that any non-disclosure of material facts or matters would not afford the trustees full and effective protection.
13. A reading of this paragraph may suggest to a dissatisfied beneficiary that he or she is entitled to apply to set aside the *Beddoe* order on the ground of material non-disclosure. Such applications will become satellite litigation and this cannot be the rationale of this paragraph. It appears that the purpose of the paragraph is to ensure that trustees present in the *Beddoe* application a full picture of the strengths and weaknesses of their position and place all the relevant information fully and fairly before the court. This would be consistent with the general principles: see *HSBC Institutional Trust Services (Asia) Ltd v Tin Lik et al* [2002] 1 HKLRD 702 at §§34-35 (Tang VP).
14. In order to avoid discontent beneficiaries bringing unnecessary satellite litigation against the trustees, the Judiciary may wish to revise the wording of §8 to avoid using terminology such as “material non-disclosure”. The following wording taken from the English Practice Direction (with some slight revisions) should be sufficient to ensure that full and complete information is placed before the court in a *Beddoe* application but without implying that a *Beddoe* order may be set aside on the ground of material non-disclosure:

*“In order to ensure that, if directions are given, the Trustees are properly protected by the order, they must ensure full*

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<sup>5</sup>See §7.10 of PD 64B.

*disclosure of relevant and material matters including the weaknesses of the Trustees' case in the Main Action, even if the case is to proceed with the participation of beneficiaries as defendants.*"<sup>6</sup>

**(3) TRUSTEES' OBLIGATION TO CONSULT IN CHARITABLE TRUST**

15. In §9 of the Proposed PD, guidance is given to the trustees in relation to their consultation with the beneficiaries in a private trust. Given the increasing number of charitable trusts in Hong Kong, the HKBA suggests that similar guidance be given to charitable trustees, namely:

*"In relation to a charitable trust, the Trustees must have consulted the Secretary for Justice, through the Department of Justice."*<sup>7</sup>

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HONG KONG BAR ASSOCIATION

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<sup>6</sup>See §7.1 of PD 64B.

<sup>7</sup>This is a modified version of §7.7(3) of PD 64B.

