Neutral Citation Number: [2019] EWHC 1451 (Ch)

Case No: E30BS276

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BRISTOL DISTRICT REGISTRY

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 10 June 2019

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

Damian Lines **(as administrator of the Estate of Mrs NE Brock, deceased)**	**Claimant**
- and -	
(1) Maureen Wilcox **(2) Gary Wilcox** **(3) Clive Brock** **(4) Caroline Brock** **(5) Michelle Long**	**Defendants**

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- -

Oliver Wooding (instructed by **Rubin Lewis O'Brien**) for the **Claimant**
Gareth Thomas (instructed by **Everett Tomlin Lloyd & Pratt**) for the **First and Second Defendants**
The third to fifth defendants made no submissions

Decision on paper after written submissions

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ Paul Matthews :

Introduction

1. This is my judgment on an issue (which I have called "the threshold issue") which arises in relation to an application for a *Beddoe* order in relation to prospective litigation by the claimant against the first and second defendants. The claimant is the administrator of the estate of the late Mrs Nancy Elizabeth Brock, who died on 28 November 2014, leaving a 'homemade' will, hand-written on a printed form, and dated 22 April 2005. That will appointed the first defendant as executrix. Under the terms of the will, the first, third fourth and fifth defendants, who are the deceased's four adult children, are to share equally in "all the money". The second defendant is married to the first defendant.

2. It appears from the terms of the will that at the time she made it in 2005 the deceased had agreed to sell the house solely owned by her at 6 Mildfield Estate, Pontypool, to the first and second defendants for the sum of £100,000. That house was her home, and represented a considerable part of her then assets. It also appears that some three months later she transferred the house to the first and second defendants, by a form TR1 dated 18 July 2005, for nil consideration. Also at about that time, the deceased moved to live in a care home. As I have said, the deceased died in 2014.

3. A question thereafter arose as to whether the deceased had capacity to make the transfer of the house in 2005, or whether (if she did) it was procured by undue influence. The value of the house appears to be comfortably in excess of the value of the residuary estate. Because of the actual or potential dispute between the first and second defendants on the one hand and the other defendants on the other about the propriety of the 2005 transfer, the first defendant did not in fact prove the will. By agreement the claimant, an independent solicitor, on 11 September 2015 was appointed administrator of the estate with the will annexed.

4. It appears that the claimant has assumed that the phrase "all the money" in the will means 'residuary estate'. For present purposes, I do not need to decide if this is correct. But I note that the phrase "all the money" immediately follows a reference to the price of £100,000 to be paid for the house under the agreement with the first and second defendants, whereas immediately following the gift of "all the money" there is a statement that the first defendant will dispose of "all the rest of my belongings".

Procedure

5. Having taken counsel's advice, and concerned that he might be criticised by one or more of the will beneficiaries whatever action he took or did not take, the claimant now seeks a *Beddoe* order, authorising him, in his capacity as administrator of the estate, to issue a claim against the first and second defendants to set aside the transfer of July 2005 to them. Originally this proposed claim was based both on lack of capacity and on undue influence, but the former head of claim is no longer to be pursued. (I emphasise that no substantive claim has yet been issued.) The claim form under CPR Part 8 seeking *Beddoe* relief was issued in the Bristol District Registry on 21 February 2018, supported by a witness statement made by the claimant together with exhibits. The original of the witness statement is not on the court file, and the

only copy I have seen is not signed or dated. Nevertheless, I proceed on the basis that the copy is accurate.

6. The *Beddoe* claim was served on all five defendants thereafter. Newbold, solicitors then acting for the first and second defendants, acknowledged service on 22 March 2018, stating that their clients did not intend to contest the (*Beddoe*) claim. Slater and Gordon, acting for the third and fourth defendants, acknowledged service on 27 March 2018, also stating that their clients did not intend to contest the claim. The fifth defendant was served on 8 March 2018, but so far as I am aware no acknowledgement of service has been filed by her. (She appears to have made a witness statement dated 19 May 2017, suggesting that there was substance in the allegation of undue influence, but, since these *Beddoe* proceedings were issued only in February 2018, and no substantive claim has yet been issued, I am not sure what significance this has.)

7. On 12 December 2018 the first and second defendants served notice on other parties of change of solicitors to Everett Tomlin Lloyd and Pratt. The change was not the result of any dissatisfaction with the first firm instructed, but was apparently made necessary by the accidental service on those solicitors of privileged documents.

The hearing of 17 December 2018

8. For some reason, the matter was not listed once the first four defendants had acknowledged service. But eventually it was listed for directions. There was a hearing before me on 17 December 2018, when counsel for the claimant (not being the counsel who had advised the claimant on the proposed claim) appeared. None of the defendants appeared or was represented at that hearing. The solicitors for the third and fourth defendants had written to the court on 14 December, expressly consenting to the *Beddoe* order. The solicitors for the first and second defendants had written to the court on 14 and 17 December 2018. The terms of their emails do not indicate any objection to the order sought in the *Beddoe* proceedings.

9. At the hearing, however, I discussed with counsel for the claimant a question which appeared not so far to have been considered by anyone. This was whether this was an appropriate case for a *Beddoe* order at all, since all those interested in the estate (the four children of the deceased) were adult, and the litigation about the lifetime transfer to the first and second defendants could perfectly properly be carried on between them as substantive parties, with the claimant joined as a nominal party so that he was bound. In this connection I mentioned the decision of the Court of Appeal in *Re Evans deceased* [1986] 1 WLR 101. Understandably, however, counsel had not come prepared to deal with this question or this authority, and none of the other parties was present or represented.

10. As a result, I adjourned the hearing and gave directions for the claimant to file and serve written submissions on this question (the "threshold issue"), with written submissions in answer (if so advised) to be filed and served by any of the defendants, and then any written submissions in reply might be filed and served by the claimant. The court would then consider whether the matter should be dealt with at a hearing or on paper. Written submissions were indeed filed and served (in January 2019) on behalf of the claimant, and then subsequently (at the beginning of February 2019) on behalf of the first and second defendants. The submissions of the first and second

defendants, prepared by counsel instructed on their behalf, made clear that they had now changed their position from the indication given in the acknowledgements of service filed on their behalf by their former solicitors in March 2018, and now opposed the grant of *Beddoe* relief. No submissions were filed or served by the claimant in reply, nor any other submissions on behalf of the other defendants.

11. In a letter to the court dated 6 March 2019, the claimant's solicitors referred to the submissions filed and served on behalf of the first and second defendants, and stated that their counsel did not consider that any further submissions needed to be filed, and that he was happy for the matter to be dealt with on paper rather than being listed for hearing. A letter sent by the first and second defendants' solicitors to the court on 13 March 2019 referred to the letter dated 6 March 2019 and to the written submissions filed and served. It went on to say that, if I were minded to grant *Beddoe* relief to the claimant then they would prefer the case to be listed and dealt with at an oral hearing, but that if I were minded to refuse the claimant's application then they had no objection to the matter being dealt with on paper.

12. I am sorry to say that I then overlooked the fact that the submissions were now complete and ready for me to consider. But eventually the parties asked the court staff what had happened, and they drew the matter to my attention. I have now considered the submissions, and this is my decision and the reasons for it. I am sorry for the delay in providing them.

The *Beddoe* jurisdiction

13. It is convenient to begin by considering the *Beddoe* jurisdiction, and then the decision of the Court of Appeal in *Re Evans deceased* [1986] 1 WLR 101, to which I referred at the hearing, before turning to the rival submissions made to me.

14. The *Beddoe* jurisdiction arises out of the special rules for costs affecting trustees and personal representatives. These are largely contained nowadays in CPR rule 46.3 and PD 46.1, and in relevant caselaw. They are well known and set out in a number of recent cases, of which *Blades v Isaac* [2016] EWHC 601 (Ch), [57]ff, is only one example. I will merely summarise them here.

15. In substance, and subject to one important exception, a trustee or personal representative who is party to any legal proceedings in that capacity is entitled to be paid the costs of those proceedings (including any costs of other parties which he or she is ordered to pay) out of the relevant trust or estate, assessed on the indemnity basis, to the extent that they are not recovered from anyone else. The exception is for the case where the costs are not properly incurred, in particular where the trustee or personal representative has acted unreasonably or in substance for his or her own, or indeed a third party's, benefit (in the books and cases this is sometimes called "misconduct"). In that case the trustee or personal representative is deprived of the indemnity.

16. Trustees and personal representatives who are contemplating the bringing or defending of legal proceedings typically seek assurance that their legal costs will be paid out of the trust fund or estate. So they ask the court to make a pre-emptive costs order in their favour to that effect. This is called a *Beddoe* order, after the decision in *Re Beddoe* [1893] 1 Ch 549. But the court will only make such an order if it can be

satisfied that, in the circumstances of the case as known at that time, the indemnity will indeed apply, and the exception will not: see for example *McDonard v Horn* [1995] ICR 685, 697A-B, per Hoffmann LJ (decided under the RSC).

17. For costs purposes, disputes involving trustees or personal representatives are usually divided into three kinds: see *eg Alsop Wilkinson v Neary* [1996] 1 WLR 1220, 1224-1225. The first kind is a *trust* dispute, where there is a dispute about the terms of the trust or the assets which are subject to it. This can be either 'friendly' (such as an argument over the true construction of the trust instrument) or 'hostile' (such as a challenge to the whole trust, or a claim by one beneficiary to the share of another). The second kind of dispute is a *beneficiary* dispute, where a beneficiary sues a trustee or personal representative for a breach of trust, a *devastavit*, or other wrong allegedly committed. The third kind of dispute is a *third party* dispute, one which has nothing to do with the internal workings of the trust or estate, but instead with the relations between the trustee or personal representative and some third party. This might for example be a breach of contract or tort claim brought by or against the third party, or a boundary or other property dispute with a neighbour.

18. In the case of third party disputes, the interests of the trustees or personal representatives on the one hand and the beneficiaries on the other are not normally in conflict. Nor are the interests of the beneficiaries as between themselves usually in conflict. The beneficiaries stand squarely behind the trustees or personal representatives in putting forward the claim or defence against the third party. So, if the trustees or personal representatives provide all relevant information to the court, it can judge whether the trustees or personal representatives are acting reasonably in spending trust or estate money in prosecuting or defending the claim. If the court considers that they are, it may make a *Beddoe* order. (In some cases, the 'third party' may be one of the beneficiaries, and different considerations arise.)

19. In beneficiary disputes, however, the court is usually unable to predict in advance whether the trustee or personal representative will be held to have acted unreasonably or in substance for his or her own benefit until the claim is concluded, since that is usually the point of the claim. In such cases costs should follow the event and not come out of the trust fund or estate: see *Williams v Jones* (1886) 34 ChD 120. In such cases, therefore, a *Beddoe* order will not be made.

20. In the case of 'friendly' trust disputes, it will usually be clear to the court that the proceedings are for the benefit of the whole trust or estate, and that the trustees or personal representatives will obtain their indemnity at the end of the proceedings. The court is therefore likely to make a *Beddoe* order (at least unless it is so obvious that it is a waste of money to apply for one).

21. But 'hostile' trust disputes are or may be different. If it is a case where there are in effect rival claimants to the fund, the trustee's or personal representative's role should normally remain neutral and allow the rival claimants to fight out the matter between them. In *Alsop Wilkinson v Neary* [1996] 1 WLR 1220, 1225, Lightman J put it this way:

> "In a case where the dispute is between rival claimants to a beneficial interest in the subject matter of the trust, rather the duty of the trustee is to remain neutral and (in the absence of any court direction to the contrary and substantially as

> happened in *Merry* [*v Pownall*] [1898] 1 Ch 306) offer to submit to the court's directions leaving it to the rivals to fight their battles. If this stance is adopted, in respect of the costs necessarily and properly incurred *eg* in serving a defence agreeing to submit to the courts direction and in making discovery, the trustees will be entitled to an indemnity and lien."

22. The present case is one which looks like a third party dispute, that is, a claim by the estate against third parties, as transferees of an asset formerly belonging to the deceased. But the substance is that of a dispute as to who are the beneficial owners of that asset, which once belonged to the deceased and which may now still beneficially form part of her estate. So it can also be seen as a hostile trust dispute, where there are rival claimants to a fund. *Alsop Wilkinson v Neary* was such a case. *Re Evans deceased* was another.

Re Evans deceased

23. In *Re Evans deceased* [1986] 1 WLR 101 six adult nephews and nieces claimed as the next of kin of their uncle, who had died intestate. One of the six took out letters of administration. A second, however, issued a claim against the first (alone), claiming the entire estate by virtue of a proprietary estoppel based on promises said to have been made to him by the deceased during his lifetime. The administrator issued a separate claim for a *Beddoe* order, making all the other nieces and nephews defendants to the application.

24. Upon the proprietary estoppel claimant's undertaking to join all the other nephews and nieces to the *main action*, the master dismissed the *Beddoe* application. The administrator appealed to the judge, who allowed the appeal, and, following *Re Dallaway deceased* [1982] 1 WLR 756, made the *Beddoe* order sought. The claimant appealed to the Court of Appeal, which allowed the appeal and discharged the *Beddoe* order.

25. *Re Dallaway deceased* [1982] 1 WLR 756 was a case factually similar to *Re Evans deceased*. By his will, the testator had left his entire estate, apart from one small legacy, to his ten siblings. One of them issued proceedings claiming the entire estate by virtue of an alleged oral agreement with the testator that he would leave his estate to that sibling. The executor of the will (who was a professional executor, and not a beneficiary) sought an order directing the executor to defend the proceedings. The claimant suggested that, instead of making a *Beddoe* order, the court should direct the other beneficiaries to indemnify the executor against the costs incurred. But Sir Robert Megarry V-C declined to take up that suggestion, granted the *Beddoe* order, and also directed that the executor be indemnified out of the estate as to costs "subject to any order of the trial judge".

26. In *Re Evans deceased* Nourse LJ (with whom O'Connor and Robert Goff LJJ agreed) distinguished *Re Dallaway deceased* on the grounds that (i) every *Beddoe* application was fact-specific, (ii) the judge in that case had "serious reservations" about the strength of the claim being made, and (iii) there was no proposal in that case (as there was here) that the other adult beneficiaries be joined as parties to the proceedings. He went on to agree with counsel for the claimant that it would be unjust for the claimant to succeed in his claim, and then for the property which he had successfully fought for

to have to be sold to meet the costs of the unsuccessful defendant administrator, while the other nephews and nieces would have risked nothing and lost nothing.

27. Nourse LJ said this:

> "In my view, in a case where the beneficiaries are all adult and sui juris and can make up their own minds as to whether the claim should be resisted or not, there must be countervailing considerations of some weight before it is right for the action to be pursued or defended at the cost of the estate. I would not wish to curtail the discretion of the court in any future case but, as already indicated, those considerations might include the merits of the action. I emphasise that these remarks are directed only to cases where all the beneficiaries are adult and sui juris."

28. In distinguishing *Re Dallaway deceased*, Nourse LJ seems to have relied heavily on (i) a perception that the judge in *Dallaway* considered the claim weak, and (ii) the fact that there was no direction to join the beneficiaries to the action. But it is not easy to see why these matters should have made all the difference. Plainly, however, if there is any conflict between the cases, I am bound by the decision of the Court of Appeal, and I must follow the principle laid down by Nourse LJ.

The claimant's submissions

29. In his submissions, the claimant argues that *Re Evans deceased* does not lay down a binding rule, but makes clear that the court has a discretion to be exercised in all the circumstances of the case. The claimant accepts that there is a potential injustice in the present case, if a *Beddoe* order is made, and the first and second defendants successfully defend the claim, because their share of the estate will be reduced by the amount of the unsuccessful claimant's costs. But the claimant says that other considerations outweigh that argument.

30. The first point made by the claimant is that there is no unanimity between the three other defendants who are beneficiaries of the estate and would benefit if the claim against the first two defendants were successful. Only the fifth defendant has indicated support for the claim, but she has not offered an indemnity in respect of the costs. None of those three beneficiaries has indicated that he or she would bring the claim personally.

31. The claimant seeks to distinguish *Re Evans deceased*, and also *Pettigrew v Edwards* [2017] EWHC 8 (Ch). In the former case, the claimant undertook to join the other beneficiaries, and on that basis the application for a *Beddoe* order failed. In the latter case, the application for a *Beddoe* order was made in the substantive proceedings, to which the relevant beneficiaries were already parties, rather than beforehand. But here it is not possible to join the other beneficiaries, because the substantive proceedings have not yet been commenced, and the beneficiaries have shown no inclination to fight it out between themselves.

32. Moreover, any cause of action in respect of the 2005 transfer would be vested in the (unadministered) estate rather than in the beneficiaries of the estate. So the beneficiaries could only bring the claim as a derivative claim, under the principles set out in *Hayim v Citibank NA* [1987] AC 730, *Parker-Tweedale v Dunbar Bank* [1991]

Ch 12, and *Roberts v Gill* [2011] 1 AC 240, [53]. But (it is said) the conditions for such a claim are not met. Here there are no 'special circumstances' such as a

> "failure, excusable or inexcusable, by the trustees in the performance of their duty owed by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate" (see per Lord Templeman in *Hayim v Citibank NA* [1987] AC 730, 748, quoted in *Roberts v Gill* [2011] 1 AC 240, [52]).

On the contrary, says the claimant, in this case the personal representative is able and willing to issue the claim, but seeks the protection of a *Beddoe* order first.

33. In addition, the claimant submits that it would be curious if the dismissal of an application for *Beddoe* relief meant that, in effect, it was for the *beneficiaries* to collect in the estate of the deceased, rather than for the personal representative (under the Administration of Estates Act 1925, s 25) to do so.

34. The second main point made by the claimant is that counsel's advice on the merits of the proposed claim is positive. However, the claimant accepts that this may change in due course as more information becomes available. The claimant accordingly does not resist any direction by the court to limit *Beddoe* relief to a certain point in the litigation, such as completion of disclosure and/or exchange of witness statements.

The first and second defendants' submissions

35. On the other side, the first and second defendants say that the proposed claim does not relate to the preservation or calling in of undisputed assets of the estate, but to recovery of an asset which was disposed of by the deceased some nine years before her death. It is (they say) a claim framed in terms which are "combative and partisan", and show that the claimant, albeit a personal representative, is not in any way neutral. They resist the suggestion that any presumption of influence arose between the deceased and the second defendant. They also refer to the lapse of time between the 2005 transfer and the present day, when the substantive proceedings to recover the property have not yet been issued. That is more than 12 years ago, which they say bars any claim in law, and they argue that laches will be a bar to any equitable claim.

36. The first and second defendants also argue that this is a claim essentially between the beneficiaries of the estate. They rely on a statement in Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* (21st edition) in paragraph 57-17, which says (in part) of cases where the parties to the proposed litigation include persons interested in the estate:

> "These cases raise special difficulties. If the claimant in the claim against the estate or trust fund is himself one of the beneficiaries, and the dispute is in the nature of a family dispute, then if all the beneficiaries are ascertained and of full age so that they can make up their own minds as to whether the claim should be resisted or not, it will usually be ordered the beneficiaries be joined as defendants in the substantive proceedings and left to fight the claim, if they so wish, at their own expense, rather than that the claim be fought at the expense of the fund or estate. Similar considerations apply where one of the beneficiaries wants the representative or trustee to make a claim against another beneficiary…"

37. The first and second defendants also rely on the fact that the estate (without the house returned to it) is worth about £81,000, out of which a budget of approximately £33,000 has been prepared for the claimant's costs of the litigation. They say that this is a disproportionate amount of the estate to budget for in costs.

Discussion

38. The first point to notice is that, in this case, it is the personal representative that proposes to make a claim, in the interests of all the beneficiaries, against some of them. In this respect it is different from cases like *Re Evans deceased* and *Re Dalloway deceased*, both of which were cases of proposed claims by one of the beneficiaries against the estate. The question is whether this makes any difference. The last sentence of the quotation from Williams, Mortimer and Sunnucks, above, suggests that it does not. The claimant says however that it does. An individual beneficiary is competent to bring whatever claim, vested in that beneficiary, against the estate he or she wishes to. But claims belonging *to the estate* are vested in *the personal representative*, *ie* the claimant in the present application. If for any reason he or she does not bring such a claim against some of the beneficiaries, the remaining beneficiaries can bring the claim only under the principles of derivative claims already referred to.

39. I accept the conclusion, *ie* that the remaining beneficiaries can make the claim only as a derivative claim on behalf of the estate. But I also consider that, if the claim of the estate lies against one or more of the beneficiaries of the estate, the grant of *Beddoe* relief to the personal representative has the potential to cause substantial injustice It would relieve those beneficiaries for whose benefit it is brought from having to pay all the costs if the claim is unsuccessful, and throw the concomitant burden of having to pay a share of the costs on the (in that case successful) first and second defendant beneficiaries. The claimant, as I understood him, accepts that there is that potential for injustice. If then the court reaches the conclusion that it would be in the interests of justice *not* to grant *Beddoe* relief, so that (whether or not the personal representative is *directed* not to make the claim) the personal representative is very unlikely to do so, and in fact then declines to do so, then those are precisely the kind of "special circumstances" in which a derivative claim may be brought by the remaining beneficiaries (see [32] above).

40. In *Re Field* [1971] 1 WLR 555, for example, a man married twice, divorcing his first wife to marry the second, to whom he had left his entire estate (about £6,000). After his death, the company which employed him received some £18,966 under life assurance policies written in trust. In exercise of powers under these trusts, the company paid the entire sum to the second wife. Thereafter, the first wife of the deceased obtained an order that his estate pay periodical payments to her under the divorce legislation then in force. This made her in effect a beneficiary of the estate. At the same time the court revoked the letters of administration of his estate granted to the second wife (and widow), and appointed two other, independent persons as administrators in her place.

41. The first wife then sought an order, in originating summons proceedings (equivalent to a modern CPR Part 8 claim) against the administrators of his estate and the second wife, for an order that the administrators bring an action against the employer company and the second wife, to recover the sum of £18,966 paid to her under the life

assurance policies, on the basis *either* that the trusts were void for uncertainty, *or* that the powers under the trusts were not properly exercised, so that, in either case, the sum paid fell back into the estate, and the administrators should recover it. The judge (Cross J) declined to make this order (with an indemnity for the administrators), or an alternative order that the first wife might be at liberty to bring the claim in her own name (though without any indemnity). But no judgment or other reasons for the decision appear to have been given. At any rate, none were later available.

42. The first wife now started a third action, by writ of summons (equivalent to a CPR Part 7 claim), against the company to recover the proceeds of the life policies (on the same grounds as before, *ie* that the trusts were void, or alternatively the powers were improperly exercised), but joining the administrators as nominal defendants against whom no relief was sought. The company applied to strike out this claim. Goff J allowed an application by the first wife to amend her pleadings to aver that (as the judge understood to be the case) the administrators had refused to sue the company. After examining the caselaw, he concluded that a derivative claim might be maintained on behalf of the estate against a third party in "special circumstances". He found the special circumstance largely in the fact that the alleged asset of the estate (the sum of £18,966) had been paid to the second wife on the footing that it was not an asset of the estate. He therefore refused to strike out the claim.

43. What that case shows is that a derivative claim can be brought on behalf of an estate to recover an asset (or compensation for an asset) paid to a third party but which is later alleged to be an asset of the estate, and it or its value is sought to be recovered for the benefit of the estate, where the personal representatives decline (for whatever reason) to make the claim. If *Beddoe* relief is not granted in the present case, the claimant will have to decide whether to launch the claim without the indemnity, or to seek an express indemnity from the defendants other than the first and second (and in the latter case those other defendants would have to decide whether to give it). But if, for whatever reason, the claimant declines to bring the claim, the other defendants will in principle still be able to do so as a derivative claim, joining the claimant as a nominal defendant. However, since they are not trustees or personal representatives entitled to an indemnity, they will take the same risk as to costs in prosecuting the claim as the first and second defendants will take in defending it. On the face of it, that seems just to me.

44. The claimant says that it would be curious if the *defendants* collected in the assets of the estate, instead of the claimant as administrator. But in my judgment this is all part of the same point. Wherever a derivative claim is brought on behalf of an estate, *ex hypothesi* the "wrong" person is collecting in the estate. But that does not bar the claim. So the point does not take the matter any further. Next, the claimant says that there is no unanimity between the third to fifth defendants. I am not sure that the evidence on this point is as clear as the claimant says, but in any event I do not see why that matters. And, if any of the third to fifth defendants has expressed a view up to now, she or he may change it in light of this judgment. The fact remains that any one beneficiary may in an appropriate case bring a derivative claim, or indeed they all can.

45. The claimant also urges the merits of the claim. I agree with the claimant that counsel's advice so far has been positive. But in the usual way, as the claimant accepts, that may change in the future, as developments occur and more information

becomes available. In my judgment, it would not be right, in an open judgment, to dwell too much on the question of merits, since in part at least of this must be based on a consideration of material not seen (and which should not be seen) by the proposed defendants, who in the present case are also parties to the application. I accept that, as Nourse LJ said, the matters for consideration *might* include the merits, certainly where the materials available suggest that they are poor. But, once the court is satisfied that there is or may be some merit in the claim, I doubt that the court ought to try to place the claim on a sliding scale in order to weigh the merits in the balance as precisely as one might weigh the ingredients for a cake. In the present case, I do not consider that the fact that the advice is positive should outweigh the factors tending to suggest that *Beddoe* relief should not be given.

Conclusion

46. In my judgment, the first and second defendants are right to say that this is in substance a dispute between beneficiaries of the estate, as to whether the house formerly belonging to the deceased is to be shared between all four beneficiaries of the estate, or is to belong only to one of them and her husband. This is therefore properly to be categorised as a 'hostile' trust dispute. Accordingly, and as Lightman J pointed out in *Alsop Wilkinson v Neary*, at first blush the duty of the claimant as administrator is not to take proceedings at the risk of the estate, but to remain neutral, and allow the various claimants to the house to fight it out between themselves, at their own risk as to costs. That would avoid the potential for unfairness to which I referred above (at [39]).

47. Do the particular circumstances of this case alter that provisional view? Having considered the matter in the light of the submissions, I see nothing in the circumstances of this case to cause me to reach a different conclusion. In particular, the beneficiaries of the estate are all *sui iuris* and entitled to an equal share of the residuary estate absolutely, just as in *Re Evans deceased*. They can make up their own minds what to do. I shall not therefore make a *Beddoe* order in favour of the claimant.

48. In these circumstances, if (as I expect) the claimant does not take proceedings, any of the estate beneficiaries that wishes to do so will in principle be able to sue on behalf of the estate as a derivative claim, just as the first wife was able to do in *Re Field*. The claimant as administrator will of course be joined to the proceedings in order to bind the estate (see *Roberts v Gill* [2011] AC 240, [45], [56], [62]), and will be entitled to an indemnity out of the estate for the small amount of costs which it is proper for him to incur in that neutral capacity.

49. I add only that, if it had been appropriate in my judgment for the claimant to take proceedings on behalf of the estate (because different circumstances made it so), I would not have declined to grant a *Beddoe* order merely on the basis that the costs budget proposed by the claimant was disproportionate to the value of the potential claim or otherwise unreasonable. The proportionality or reasonableness of costs incurred or to be incurred is a quite different matter, and is to be judged by the rules relating to such costs, in particular the costs budgeting rules in CPR Part 3, Section II.