Neutral Citation Number: [2021] EWHC 2444 (Ch)

Case No: PT-2021-000327

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 10/9/2021

Before:

MASTER CLARK

- -

Between:

MARIA CLYNE

Claimant

- and -

(1) MR KEVIN CONLON
(2) MR MARTIN CONLON
(3) MR PATRICK O'SHEA

Defendants

- -
- -

Maurice Rifat (instructed by **MHHP Law LLP**) for the **Claimant**
Mukhtiar Otwal (instructed by **The GPT Law Practice**) for the **First Defendant**
The **Second Defendant** in person
The **Third Defendant** in person

Hearing date: 18 August 2021

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Approved Judgment

I direct that this approved judgment, sent to the parties by email on 10 September 2021, shall deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

.....

Master Clark:

1. This is an application seeking Beddoe relief, made by Part 8 claim form dated 13 April 2021.

2. The claimant, Maria Clyne, is the sole executor of the estate of her uncle, Patrick Conlon, who died on 4 June 2018, leaving a will dated 8 March 2016 ("the Will"). Probate of the Will was granted on 19 October 2018 to the claimant and her sister, Jacqueline Clyne. Jacqueline was removed as executor by an order dated 26 October 2020 of Deputy Master Lloyd.

3. The beneficiaries under the Will (each taking a 25% share of the residuary estate) are the claimant, and the deceased's 3 sons, Kevin Conlon, Martin Conlon and Patrick O'Shea, who are the defendants to this claim. I refer to each of the parties by their first name.

4. The estate has a net value of about £516,000. Its two main assets are properties registered in the deceased's sole name:
   (1) 168 Headstone Drive, Harrow, HA1 4UR ("168 Headstone Drive"), valued at about £425,000 – this consists of two flats;
   (2) the freehold reversion of 84 Canning Road, Harrow, HA3 7SN ("84 Canning Road"), valued at about £28,000.

5. Kevin claims to be beneficially entitled to one half of 168 Headstone Drive and all of 84 Canning Road (referred to together as "the Properties"). He has entered Form A and Form B Restrictions against both Properties.

6. On 26 February 2021 he issued a claim ("the main claim") against the claimant in her capacity as executor of the deceased's estate. The particulars of claim set out that, in the early 1980s, the deceased and Kevin agreed to go into business together buying and refurbishing properties with a view to profit, and that it was an express or implied term of that agreement that they should have equal interests, as beneficial tenants in common, in the properties bought pursuant to the agreement.

7. The particulars of claim then sets out a series of purchases and sales, all said to follow a similar pattern, and each resulting in the property in question being held by Kevin and the deceased as tenants in common in equal shares. The purchase of the first property, 38 Frognal Avenue, Harrow HA1 2SF, is said to have been funded by £10,000 each from Kevin and the Deceased, with the remainder of the purchase price funded by a mortgage "that could only be obtained" in the sole name of the deceased, and with the deceased alone being registered as the proprietor. It is then alleged that Kevin carried out refurbishment works to the property at his own expense, following which it was sold at a profit.

8. The purchase of the next property, 7 Blawith Road, Harrow, HA1 is said to have been part-funded from the net proceeds of sale of 38 Frognal Avenue, with the remaining funding provided by a mortgage "that could only be obtained" in the sole name of the deceased, and with the deceased alone being registered as the proprietor. Again, Kevin

is said at his own expense to have carried out refurbishment works, including conversion into 2 flats (and obtaining planning permission for this).

9. The profit on 7 Blawith Road is said to have been realised by granting 2 long leases of the flats. This is said to have been used to part-fund the purchase of 84 Canning Road, the remaining funding being on the same basis as the previous 2 properties; and with the property being refurbished, including conversion into 2 flats at Kevin's expense; and long leases of those flats being granted to realise the profit on it.

10. 168 Headstone Drive is the final property, said to have been bought in about 1985 partly with the profit from 84 Canning Road, with the remainder of the funding on the same basis as the previous properties. It was also developed into 2 flats, and this refurbishment is said to have been at Kevin's expense.

11. There is no explanation in the particulars of claim as to why each of the various mortgages could only be obtained in the deceased's name, or as to how the payments due under those mortgages were met.

12. Paragraphs 23 and 24 state:

> "23. In or about 1995 the Claimant and the Deceased had discussions about dividing up the Properties between them. … The said discussions concluded in an oral agreement made between the Claimant and the Deceased whereby the Claimant would solely retain ownership of Canning Road and the upstairs flat at Headstone Drive and the Deceased would solely retain ownership of Blawith Road and the downstairs flat at Headstone Drive.
>
> 24. In the premises, as at in or about 1995 Headstone Drive continued to be held on trust for the Claimant and the Deceased as beneficial tenants in common in equal shares and Canning Road was held on trust for the Claimant absolutely."

13. The relief sought includes a declaration that the ownership of the Properties is as set out above.

14. As noted, Maria is the only defendant to the claim, and she is sued only in her capacity as executor of the deceased's estate, and not as beneficiary. None of the other beneficiaries are parties.

15. The claim form was served under cover of Kevin's solicitors' letter dated 19 March 2021. This letter referred to Maria's proposed application for a Beddoe order (raised in earlier correspondence) and asked her solicitors to confirm various matters, including her stance as to making the application if the beneficiaries, including Maria personally, were made parties to the claim.

16. Maria's solicitors replied on 29 March 2021 asking whether they Kevin intended to join the beneficiaries and, if so, on what basis. They also sought agreement to the proposed Beddoe application, and if not, an extension of time for service of the Defence until 14 days after its determination.

17. Kevin's solicitors' response on 1 April 2021 was:

> "We confirm that our client will undertake to add all beneficiaries to the claim and by reason of the same invite your client not to make an application for a Beddoe order."

18. Maria's solicitors again sought, in their letter of 6 April 2021, Kevin's agreement to an extension of time for the Defence until after determination of the Beddoe application.

19. Kevin's solicitors' response of 8 April 2021 did not engage with the substance of the request, but instead raised the procedural point that the parties could not agree an extension beyond 28 days, and asked Maria's solicitors to "confirm the basis of your request". In circumstances where the parties could have sought the court's approval for the extension by filing a consent order, this effectively amounted to a refusal to agree to the extension.

20. This application was made by Part 8 claim form filed on 13 April 2021. The Defence and Counterclaim in the main claim is dated 14 April 2021, and was, I assume, filed and served shortly thereafter.

21. On 21 April 2021, Deputy Master Linwood ordered the main claim to be transferred to the County Court at Central London, where it now has claim no. HC00CL284.

22. In this claim, Patrick has acknowledged service stating does not oppose it. In his acknowledgement of service, Kevin states that he opposes the claim on the grounds that:

> "all those beneficiaries interested in the estate are adults and the First Defendant's main claim to ownership of assets of the estate can properly be carried on between those beneficiaries as substantive parties to the main claim, and each can decide if they wish to defend it."

23. Martin has not filed an acknowledgement of service. However, in his letter dated 11 April 2021 to Maria's solicitors, he states:

> "It is my view that Maria Clyne should not be given an indemnification from the Estate in respect of her legal costs. Maria Clyne should pay for all legal costs from her own resources. I agree with Kevin Conlon's claim and will not be challenging it.
>
> Furthermore I believe that Mr. Patrick O Shea and Maria Clyne have already received inheritance from the estate of their parents. Namely Patrick OShea from his adopted Parents and Maria Clyne from her natural Parents. Kevin Conlon and I have a legitimate legal natural right to inheritance from Patrick Martin Conlon. For the aforementioned reasons I believe Patrick OShea and Maria Clyne should decline any claim they have to the estate of Patrick Conlon deceased. I am willing to be witness to any of this dispute."

24. On 13 August 2021, the CCMC in the main claim took place. Kevin did not apply at the CCMC to join the beneficiaries to the claim. The trial is listed to take place before HHJ Gerald in January 2021.

25. The parties' costs of the claim as set out in their budgets are £107,472 (Kevin) and £84,604 (Maria), making the parties' combined costs £192,076 (plus VAT, giving an approximate total of £230,00). The value of Kevin's claim is £212,500 (half of Headstone Drive) and £28,000 (Canning Road) making a total of £240,500. If he succeeds in his claim therefore, £275,500 will remain in the estate to meet his costs and the costs of defending the claim.

26. Kevin by his counsel offered at the hearing an undertaking to join the beneficiaries as parties to the main claim.

Legal principles

27. CPR 19.7A provides that:

> "(1) A claim may be brought by or against trustees, executors or administrators in that capacity without adding as parties any persons who have a beneficial interest in the trust or estate ('the beneficiaries').
>
> (2) Any judgment or order given or made in the claim is binding on the beneficiaries unless the court orders otherwise in the same or other proceedings."

28. However, as explained *Williams, Mortimer & Sunnucks* Executors, Administrators and Probate (21st edn) at para 57-14:

> "If personal representatives, without the sanction of the court, bring legal proceedings against third parties for the benefit of the estate or defend proceedings brought against them as executors they may be held personally liable for the costs if they are unsuccessful and are considered to have acted unreasonably in doing so. They may, conversely, be held personally liable for having failed to pursue a good claim of the estate or for having failed to defend a bad claim against the estate. To protect themselves against this risk the representatives may seek the directions of the court as to whether to take or defend or pursue litigation."

29. A Beddoe application depends on its own facts and is essentially a matter for the discretion of the judge who hears it: *Re Evans* [1986] 1 WLR 101.

30. The modern framework for a Beddoe application is found in CPR 46.3 which provides:

> "(1) This rule applies where –
> (a) a person is or has been a party to any proceedings in the capacity of trustee or personal representative; and
> (b) rule 44.5 does not apply.

(2) The general rule is that that person is entitled to be paid the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the relevant trust fund or estate.

(3) Where that person is entitled to be paid any of those costs out of the fund or estate, those costs will be assessed on the indemnity basis."

31. This is supplemented by CPR PD 46, para 1.1:

> "A trustee or personal representative is entitled to an indemnity out of the relevant trust fund or estate for costs properly incurred. Whether costs were properly incurred depends on all the circumstances of the case including whether the trustee or personal representative ('the trustee') –
> (a) obtained directions from the court before bringing or defending the proceedings;
> (b) acted in the interests of the fund or estate or in substance for a benefit other than that of the estate, including the trustee's own; and
> (c) acted in some way unreasonably in bringing or defending, or in the conduct of, the proceedings."

32. The fact that a trustee or executor may also be a beneficiary does not render her capacity unrepresentative: see *Re Evans*, at 106G-H.

33. As stated in *Williams* at 57-14, if all the beneficiaries are ascertained, competent and capable of deciding whether or not to pursue or defend a claim, and they are agreed as to the course they want the personal representative to take, then the representatives are completely protected, and there is no need or justification for seeking the directions of the court. Where the beneficiaries are not agreed, then the representative is at risk of her claim to be indemnified from the estate being challenged.

34. In *Re Evans* [1986] 1 WLR 101, the main claim was to the entire estate of the deceased intestate, which would otherwise have been distributed among his 6 nieces and nephews. One of the nephews obtained a grant of letters of administration. Another of the deceased's nephews and his wife brought the claim against the administrator. After serving a defence and counterclaim for possession of part of the estate, the administrator applied for permission to continue to defend the claim and pursue the counterclaim, and an order indemnifying him for all the costs of the proceedings. The Master dismissed the application on the claimants' undertaking to join the remaining nieces and nephews as defendants to the claim. The Court of Appeal reversed the Judge who had allowed the appeal from the Master.

35. The Court of Appeal held that in cases where the beneficiaries were all adult, *sui juris* and capable of deciding whether or not to resist or pursue a claim, the potential injustice of the indemnity provided by a Beddoe order to a successful claimant or defendant had to be balanced by countervailing considerations of some weight, such as the merits of the case, before it would be right for a claim to be defended or pursued at the cost of the estate. However, the main claim in *Re Evans* was for the entire estate, so that the order sought would have resulted in the unsuccessful defendant trustees' costs being met from the assets recovered by the claimants. As Nourse LJ put it, "the losers would have started by risking nothing and ended by losing nothing."

36. In *Alsop Wilkinson v Neary* [1996] 1 WLR 1220, the claimant solicitors had obtained judgment of £1 million against the first defendant, a former partner in the firm, for dishonest misappropriation of client monies. During the time when the misappropriations were taking place, the first defendant made two settlements, the beneficiaries of which were himself, his wife and their issue. The claimants brought a claim against the first defendant and the trustees of the settlements for declarations that they were void as transactions for the purpose of putting assets beyond the reach of creditor (within s.423 of the Insolvency Act 1986). Again, therefore the entire trust estate was in issue in the main claim, so that if an indemnity were granted, the costs of unsuccessfully defending the claim would have been paid from the assets recovered by the claimants.

37. The judge (Lightman J) held that in a case where the dispute is between rival claimants to a beneficial interest in the subject matter of the trust, the duty of the trustee is to remain neutral and (in the absence of any court direction to the contrary) offer to submit to the court's directions, leaving it to the parties to fight their battles.

38. However, in *Alsop Wilkinson*, the rival contenders were parties to the claim, and the trustees' role could properly be described as mere stakeholders. The position is, in my judgment different where, as here, the claimant choses to sue only the trustee. The beneficiaries cannot defend because they are not parties. If the trustee does not defend the claim, then the claimant may win by default, irrespective of merit.

39. If the trustee is clearly advised that she has no reasonable prospect of success in defending the claim, then the reasonable course may be not to do so. Otherwise a failure to defend places the trustee at risk of a claim from the beneficiaries. As the editors of *Lewin on Trusts* (20th edn) state, at para 48-104:

> "The rationale for neutrality on the part of the trustee is not present because there is no rival with whom the claimant might fight his battle. For the trustee to allow the claim to go by default when there is a reasonable prospect of defence, but no effective defendant, would be tantamount to passive support to the claimant against the beneficiaries, not mere neutrality. It is one thing for a trustee to take proper measures for his own protection, but a trustee must not by his acts or omissions set up the right of a third party against the beneficiaries …"

Discussion and conclusions

40. The main claim is not brought by Kevin in his capacity as a beneficiary of the estate. He brings it as a third party seeking to establish his beneficial interest in the Properties, which would otherwise be assets of the estate.

41. If he were not a beneficiary, then the application of the principles set out above would be straightforward: as between herself and the beneficiaries, Maria would be entitled to an order indemnifying her from the estate if the court was satisfied that it was reasonable and proper to defend the claim, having regard to the merits and any other relevant factors, for instance, the value of the claim and its relationship to the likely costs.

42. However, this position is altered by the fact that Kevin is a residuary beneficiary of the estate, so that the costs of an unsuccessful defence of his claim will be paid (as to one quarter) from his share of the residuary estate.

43. In deciding whether it would be right to make an order that Maria be indemnified as to the costs of the claim, I consider the following factors:
    (1) the merits of the main claim;
    (2) whether Maria has acted reasonably in defending the claim to date;
    (3) whether by continuing to defend the claim she would be acting reasonably;
    (4) the risk of injustice to Maria if the order is not granted;
    (5) the risk of injustice to Kevin if the order is granted;
    (6) whether there are other ways of managing the risk of injustice to the parties.

Merits of the main claim

44. Maria's counsel submitted that the merits of the main claim were so poor that they justified a summary judgment application, and this, he submitted, was an important factor in the Beddoe application.

45. His submissions focussed on paragraphs 23 and 24 of the particulars of claim (set out at paragraph 12 above). The oral agreement pleaded there did not he submitted meet the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 or section 53(1)(a) and/or (b) of the Law of Property Act 1925.

46. Section 2 of the 1989 Act relevantly provides:

> "**Contracts for sale etc. of land to be made by signed writing.**
> (1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each."

47. Section 2(5) of the 1989 Act provides "nothing in this section affects the creation or operation of resulting, implied or constructive trusts". In the leading case of *Yaxley v Gotts* [2000] Ch. 162, it was held that an oral agreement whereby the purchaser of a house promised to grant another, in exchange for materials and services supplied, an interest in the property, though void and unenforceable under section 2 of the Act of 1989, was still enforceable on the basis of a constructive trust under section 2(5) in circumstances where, previously, the doctrines of part performance or proprietary estoppel might have been relied upon.

48. Section 53 of the 1925 Act provides:

> "(1) Subject to the provisions hereinafter contained with respect to the creation of interests in land by parol—
> (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;

(b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;

(c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.

(2) This section does not affect the creation or operation of resulting, implied or constructive trusts."

49. Maria's counsel submitted that since all that is pleaded in paragraph 23 of the particulars of claim is an oral agreement, the claim based on it was bound to fail. This is, in my judgment, an unrealistically restrictive view of the main claim. On any basis, the main claim contains a sustainably pleaded claim of a constructive trust giving rise to ownership as beneficial tenants in equal shares of the 3 properties: 168 Headstone Drive, 84 Canning Road and 7 Blawith Road. Even if paragraphs 23 and 24 of the particulars of claim were struck out as disclosing no reasonable grounds for bringing the claim, the remainder of the claim would stand. In this context, I note that the prayer includes, as further or alternative relief, an inquiry into the beneficial interests in the 3 properties.

50. In any event, although not well pleaded, the particulars of claim includes, at paragraphs 25 and 26, factual allegations which are capable of constituting relevant changes of position for the purposes of establishing a constructive trust: the deceased retaining for his own use the proceeds of sale of 7 Blawith Road, and Kevin declaring the rent from the upstairs flat at 168 Headstone Drive to HMRC.

51. I therefore reject the submission that the main claim has no real prospect of success because the agreement or agreements relied upon were oral.

52. Maria's counsel also relied upon what he submitted were evidential weaknesses in Kevin's claim. First, he relied upon the repeated use in the particulars of claim of the phrases *"…the Claimant is unable to recall the specific details of where each and every discussion took place or the words used…"* and *"…to the best of the Claimant's recollection…"* in relation to transactions and or events which took place many years ago, some of which took place in the 1980s.

53. He also submitted that there is no proper explanation as to why Kevin's ownership of the Properties was not registered or recorded in writing or by trust deed, when he and his father were experienced property developers, and both were (and Kevin remains) owners of multiple properties. A further weakness, he submitted, is that Kevin has not provided any explanation as to why did not raise this claim while the main witness, the deceased, was still alive. Finally, he relied upon the absence of corroborative detail and documents in relation to the various properties bought and sold, despite these being requested in a Request for Further Information dated 19 May 2021.

54. The matters relied upon by Maria's counsel are not matters which it would be appropriate to review in detail, or reach a conclusion upon for the purposes of this application. I note them as points which can be raised in defence to the claim.

55. Kevin's counsel submitted that that the merits of the defence to the main claim were not sufficiently strong clearly to justify it being defended at the cost of the estate. He relied upon the following evidence. The first was an attendance note of a meeting on 5 January 2016 between the deceased and Gordon Wheeler of Cameron Jones Solicitors, whom the deceased had instructed to prepare the Will. This includes the following:

> "Mr Conlon has one son, owns 61 Kingsway and is the joint owner with his son of property at 168 Headstone Drive, Harrow. This property is the subject of a dispute with his son, but initially I dealt with him regarding his Will.
> …
> In respect of the dispute it appears that Mr Conlon and his son acquired 168 Headstone Drive together. They own the freehold, Mr Conlon is not sure whether it is as joint tenants or tenants in common. There was an agreement between father and son that the father would have control of the ground floor flat and let it out and the son would have the top floor. This agreement has been in place to date.
> …
> I an initially to find out how this property is held, …"

56. The second item of evidence was a passage in a witness statement dated 2 October 2019 by Maria in possession proceedings in respect of the first floor flat, in which she said:

> "13. … It was my understanding that there was an agreement between the Deceased and Kevin whereby the Deceased would have control of the ground floor flat and be entitled to the rental income arising from letting it out and Kevin would have control of the first floor flat and be entitled to income arising from the letting of that flat. However, it is now evident that nothing was ever formally done at the Land Registry to separate the flats into two separate units as the title of the Property remained as freehold in the sole name of the Deceased up to the date of his death …"

57. The third item of evidence was an email and accompanying schedule from Michael Filiou Limited, chartered certified accountants, confirming that Kevin received the rent from the top floor flat.

58. As against this, Maria's counsel relied upon a further attendance note of a meeting on 10 February 2016 between the deceased and Mr Wheeler which states:

> "The property is definitely in Mr Conlon's sole name and there is no evidence of any interest in the property of Kevin. It was pointed out that Kevin has twenty other houses at present and there is some talk that he is about to sell them all off to liquidate all his assets.
>
> There was a gentleman's agreement between father and son that the son could put tenants into the property on the first floor at 168 Headstone Drive, but nothing further. It was agreed that at this stage I should close the file and deal with the invoice when the Will was completed."

59. As to Maria's witness statement in the possession proceedings, he relied upon the following passage:

> "21. Kevin Conlon is a residuary beneficiary of the estate of the deceased. He does not have any legal interest in the property and as such has no legal power or authority to grant a tenancy to the Defendant or otherwise allow him to occupy the property without the specific consent of myself and my sister as the executrices of the Deceased."

60. In my judgment, the merits of the defence are not insufficiently strong to justify the claim being defended by the estate, or at least it is not clear that they are not. Taking into account the factual matters relied upon by both sides, it is simply not possible on the written evidence to form a clear view as to merits of the claim and its likely outcome. This will be for the trial judge, who will have the benefit of disclosure and cross-examination.

Whether Maria has acted reasonably in defending the claim to date

61. In my judgment, having been sued only in her representative capacity, Maria has acted reasonably in defending the claim to date. Neither, she, in her personal capacity, or Patrick could defend the claim, because they were not parties. If Maria had not defended the claim, Kevin would have succeeded irrespective of its merits, and she would have been open to a claim of breach of duty by Patrick.

62. I also reject Kevin's counsel's submission that because Maria is also a beneficiary of the estate, she was acting for her own benefit when she defended the claim brought against her in her representative capacity: see paragraph 32 above. She ought therefore to be indemnified for her costs to date by the estate.

63. Kevin's counsel relied upon *Alsop Wilkinson* as justifying refusal of the application, on the basis that this dispute, properly analysed, is between rival claimants to the estate, in which Maria was obliged to act neutrally. There are two related flaws in this argument. First, not all the "rival claimants" are parties to the main claim, so there is no framework within which the dispute between them can be resolved. Secondly, as concluded above, neutrality on the part of the executor does not require acquiescing in the claim.

64. This conclusion is unaffected by the statement by Kevin's solicitors in their letter of 1 April 2021 that he "will undertake to add all beneficiaries to the claim". Unless and until the beneficiaries were added, the claim needed to be defended by the only defendant to it.

65. Moreover, having stated that this was Kevin's intention, he has not in fact taken any steps to seek to add the beneficiaries to the claim, although the obvious occasion would have been before or at the CCMC.

Whether by continuing to defend the claim Maria would be acting reasonably

66. The position as analysed above remains the case, unless and until the beneficiaries are added as defendants, and in my judgment, Maria is acting reasonably by continuing to defend the claim until then.

67. Kevin's counsel relied upon his undertaking to add the beneficiaries as parties, but this is not as straightforward as he appeared to assume. Joinder of the beneficiaries (and the consequential amendments to the statements of case) would require the court's permission: CPR 19.4, 17.1. Even if Maria consents, the joinder may be opposed by Patrick and/or Martin, and, if so, the application to join would then need to be listed for a hearing. If either of them wishes to fully defend the claim, it seems unlikely the procedural stages required to do so could be completed by the trial date. For that reason the judge in the main claim may refuse the joinder application, as having been made too late.

Risk of injustice to Maria

68. If Kevin succeeds in his claim, and Maria is not relieved from her personal liability for costs, then she alone will be liable for the total combined costs of about £230,000. She would therefore be burdened with the entire risk of the defence, even though Patrick (and Martin, notwithstanding his support for Kevin) would benefit from its success: in that the share of each of the beneficiaries in the residuary estate will not be diminished by the amount of the value of the Properties: £240,500, each beneficiary's share being £60,125. There is therefore a risk of injustice to Maria.

Risk of injustice to Kevin

69. If Kevin succeeds in his claim, he will recover assets worth £240,500. However, if he obtains the normal order that Maria, as the unsuccessful party, pay his costs of his claim, and her own costs are also paid from the estate, this will result in Kevin, notwithstanding his success, bearing one quarter of those costs: £57,500 (£230,000 ÷ 4) from his share of the residuary estate. This is a less unfavourable position than in *Re Evans*, where the whole estate was the subject of the main claim, but is nevertheless a significant amount.

70. There is therefore also a risk of injustice to Kevin in his being compelled to bear part of the costs of his own claim, even if he succeeds in it.

Managing the risk of injustice

71. In these circumstances, it remains to consider what could be done to reduce or remove the risk of injustice to both sides. I accept that in principle this is a dispute in which there are rival claimants: Kevin (possibly supported by Martin) on one side, and Maria (in her capacity as beneficiary) and Patrick on the other. Joinder of the beneficiaries in their capacity as such would make them formally clarify their position in the main claim, which they have not yet had to do.

72. In my judgment, the order that most appropriately manages the risk of injustice, as things now stand in the main claim, is one provides for Maria in her capacity as executor to be indemnified in respect of all costs of the claim, insofar as they are not recovered from or paid by any other party. If Kevin succeeds in joining the other beneficiaries (including Maria in her personal capacity) to the claim, such an order would not prevent him from seeking costs from them in their personal capacity, or seeking an order that the costs in respect of which Maria is indemnified should be paid from specific beneficiaries' shares of the residuary estate. That would be a matter for the trial judge.

73. If Kevin does not succeed in joinder, the position as to seeking costs from the beneficiaries may be less straightforward, but that would be a consequence of his own decision not to join them at an earlier stage.

Conclusion

74. For the reasons set out above, therefore, I will grant the relief sought in the application in the terms set out above.