SUPREME COURT OF QUEENSLAND

CITATION:	*Salmi & Anor v Sinivuori & Anor* [2008] QSC 321
PARTIES:	**JACK RAFAEL SALMI** and **MAIJA MIRIAM MOORE** (as personal representatives of the estate of **JOHN ERIC SALMI** also known as **JUHANI ERICK RAFAEL SALMI** (deceased) pursuant to grant of Letters of Administration with the Will dated 18 February 2008) (Applicants) **v** **PENTTI UNTO SINIVUORI** and **SARI SUSANNA SINIVUORI** (Respondents)
FILE NO:	No 11336 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 December 2008
DELIVERED AT:	Brisbane
HEARING DATE:	27 November 2008
JUDGE:	Lyons J
ORDER:	**1. The administrators are authorised to defend the claim on the estate's behalf.** **2. The administrators are not to be indemnified out of the estate in relation to costs in defending the claim.** **3. The applicants are to pay the respondent's costs of and incidental to this application on the standard basis.**
CATCHWORDS:	EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO THE COURT FOR ADVICE AND AUTHORITY – PETITION OR SUMMONS FOR ADVICE – application to obtain directions from the Court as to whether the trustee should litigate on behalf of the trust – whether the applicants, as administrators, can defend the claim by the respondents SUCCESSION – EXECUTORS AND ADMINISTRATORS – whether the applicants are to be indemnified out of the estate as against the costs of resisting the plaintiff's claim

Application of Macedonian Orthodox Community Church St Petka Inc (No 3) [2006] NSWSC 1247, cited
Evans v Evans [1985] 3 All ER 289, applied
Gray v Guardian Trust Australia Ltd [2003] NSWSC 704, cited
In re Eaton, Deceased [1964] 1 WLR 1269, cited
Re Beddoe; Downes v Cottam [1893] 1 Ch 547, applied
Re Dallaway [1982] 1 WLR 756, cited

COUNSEL: RD Peterson for the applicant
PA Looney for the respondent

SOLICITORS: Cronin Litigation Lawyers for the applicant
McCarthy Durie Ryan Neil for the respondent

The background

[1] Ben Sinivuori was 23 years old when his mother Astrid, married the deceased in 1983. The deceased had five children from a prior marriage at the time. In 1992 Mr Sinivuori and his wife Sari ("the respondents") purchased a farm at Thornlands ("the property") with Astrid and the deceased. From the time the property was acquired a poultry farm has operated on the property by virtue of a family trust of which the respondents, the deceased, and Astrid were all beneficiaries.

[2] The respondents assert in substance that there was an agreement reached between them at the time the property was purchased that Astrid and the deceased's interest in the property would pass to the respondents on their death.

[3] Within three months after the property was acquired, the deceased and Astrid each made Wills in which they left the whole of their estate to each other and then to Ben Sinivuori, their stepson and son respectively. Astrid died in 1995 and her interest in the property passed to the deceased.

[4] It appears that in January 2006, the deceased (then aged 80 or 81) made a new Will in which neither of the respondents were named as beneficiaries. The Will left three legacies of $75,000 each to a step-daughter, a stepson's former wife, and a sister's granddaughter and the residue of his estate to his other children from his prior marriage. He then made a further Will in identical terms on 29 August 2007. The deceased died on 31 October 2007.

[5] The only asset of any substance in the estate consists of the estate's interest in the property at Thornlands.

[6] Two of the deceased's children sought and were appointed administrators of the estate after the named executors chose not to act. The administrators are named beneficiaries in the Will of the estate.

The trust proceedings

[7] In proceedings commenced by Originating Application on 31 July 2008 Ben and Sari Sinivuori (the respondents in the current proceedings) seek a declaration of a constructive trust ("the trust proceedings") in relation to the deceased's half interest

in the property at Thornlands. Alternatively, Ben Sinivuori seeks orders for provision out of the deceased's estate.

[8] The applicants in this proceeding are the defendants in the trust proceedings in their capacity as administrators and are actively defending those proceedings. The trust proceedings are at a preliminary stage and no pleadings having yet been filed. There are, however, directions orders in place in relation to pleadings and other interlocutory steps.

[9] It appears that in the trust proceedings the respondents will rely on the agreement alleged to have been made at the time the property was acquired and the events which occurred subsequently to support their claim for a constructive trust over the estate's interest in the property.

This application

[10] In this application, which was filed on 10 November 2008, the applicants are seeking orders that:

1. The court authorise the applicants as administrators to defend the claim filed on 31 July 2008 by the respondents, on the estate's behalf;
2. The applicants be indemnified out of the estate as against:
   (a) their own costs on a solicitor and client basis of resisting the plaintiff's claim; and
   (b) any costs which they may be ordered to pay another party to the plaintiff's claim.

The Beddoe application

[11] The current application is commonly referred to as a *Re Beddoe* application and such an application takes its name from an 1893 English decision[1] which allowed a trustee to obtain directions from the court about whether the trustee should litigate on behalf of his trust. In that decision Bowen LJ held:[2]

> "If a trustee is doubtful as to the wisdom of prosecuting or defending a lawsuit, he is provided by the law with an inexpensive method of solving his doubts in the interest of the trust. He has only to take out an originating summons, state the point under discussion, and ask the Court whether the point is one which should be fought out or abandoned. To embark in a lawsuit at the risk of the fund without this salutary precaution might often be to speculate in law with money that belongs to other people."

[12] A trustee who litigates without the court's sanction clearly does so at his own risk as regard to costs and as Austin J held in *Gray v Guardian Trust Australia Ltd*:[3]

> "The Court will assist the personal representatives, upon application, to overcome their difficulty by giving advice and direction, thereby removing the risk that the Court may exercise its discretion to refuse recovery of costs out of the estate, provided that they followed the Court's directions … The form of advice and direction given by the

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1 *Re Beddoe; Downes v Cottam* [1893] 1 Ch 547.
2 *Re Beddoe; Downes v Cottam* [1893] 1 Ch 547, 562.
3 [2003] NSWSC 704 at [9].

> Court is commonly referred to as a Re Beddoe order … Additionally if, in the circumstances, a personal representative is under a duty to litigate, the Court may give him or her and (sic) indemnity out of the estate for the costs of the litigation."

[13] What a *Re Beddoe* order determines is clearly a potential issue between the trustee and the beneficiaries as to whether the costs of the main action should be recoverable by the trustee as expenses of the trust. It is clearly not a predetermination as to the issue of costs as between the trustee and the other party to the main action. A trustee thereby protects his right of indemnity out of the trust assets in respect of the costs, charges and expenses he incurs litigating, including any costs which he may be ordered to pay to another party to the litigation by obtaining the authority to litigate.

The practice and procedure on Beddoe applications

[14] An application for a *Re Beddoe* order must be made separately from the litigation in which the trustee is engaged and before a different judge. The applications are usually supported by advice from a qualified lawyer as to the prospects of success as well as a costs estimate and evidence as to the value of the estate.[4]

[15] The practice in Australia follows the English procedure which is that whilst the beneficiaries are served with a claim, neither the beneficiary against whom the trustees propose to litigate, nor those representing him, would normally be allowed to be present when the merits of the main action are discussed between the trustee's counsel and the judge because they might hear something that they should not, given that it is about the strength or weakness of the trustee's case. Whilst the beneficiary and his counsel are allowed into the hearing to address any arguments they may wish, they must then withdraw while the matter is discussed between the trustee's counsel and the judge. The beneficiary's counsel are then readmitted to be informed of the court's decision.[5] The basic principles of natural justice mean that material placed before the judge should be kept to a minimum. In this regard, the respondents to the current application had the opportunity to put affidavit material before the court.

[16] On the hearing of a Beddoe application the court acts essentially in an "administrative capacity"[6] and has simply to determine whether or not the proceedings should be taken. It is not the function of the court to investigate the evidence and make a finding whether or not the trustees will be successful in the litigation.

[17] Having considered the applicant's affidavit material, I am satisfied that an order should be made authorising the administrators to defend the action by the plaintiffs commenced by claim which was lodged on 30 July 2008. Counsel for the plaintiffs were advised of this order during the course of the hearing.

[18] The question which now arises is whether the costs orders sought by the applicants should be made.

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4 Edward Williams, *Williams, Mortimer and Sunnucks on executors, administrators and probate*, (2008) pars [60]-[10].

5 John Mowbray et al (eds), *Lewin on Trusts*, (2008), 600.

6 *In re Eaton, Deceased* [1964] 1 WLR 1269, 1270.

The costs application

[19] The next question is whether the court should make the costs order sought by the applicants. Ultimately, this question is a matter of discretion and will depend on the facts in the particular case. Difficulties of course inevitably arise when the executors or administrators are also beneficiaries.

[20] The respondents rely in particular on the decision by Palmer J in *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)*.[7] The reasons of Palmer J were ultimately approved by the High Court on the appeal. In the primary decision there was an extensive analysis of a number of the relevant authorities, particularly the decision of *Re Dallaway*[8] where one of 10 beneficiaries of a testamentary estate claimed the whole of the estate and the other beneficiaries requested the executor to resist the claim. The executor was faced with the choice of taking the risk of having to pay the costs of the litigation himself or refusing to defend the claim. Palmer J discussed whether the executor was justified in defending the claim and whether he should make a further order that, even if the claim was successful, it was appropriate to take its costs of the litigation out of the estate. Palmer J referred to Sir Robert Megarry's direction that the executor was justified in defending the claim where he had ordered:[9]

> "…subject to any order made by the trial judge, the bank will be entitled to be indemnified out of the estate for all costs for which it is liable, even if the defence or the counterclaim, or both, are unsuccessful."

[21] Justice Palmer observed that the facts in *Re Dallaway* were close to those in the decision of *Evans v Evans*[10] where one of the testator's beneficiaries claimed the whole of the estate and the remaining beneficiaries wanted the administrator to defend the claim. The administrator sought orders of the kind that had been made in *Re Dallaway* and the judge at first instance made the orders. The matter, however, was successfully appealed to the Court of Appeal, who determined that any defence would have to be funded by the beneficiaries. Justice Palmer held:[11]

> "The Court of Appeal did not quite say that *Re Dallaway* was wrongly decided; however, it distinguished the case on three grounds. First, the Court of Appeal said that *Re Dallaway* was a decision on its own facts; second, the Court noted that in *Re Dallaway* Megarry VC had serious reservations about the prospects of the claimant's success against the estate; third, the Court of Appeal observed that in *Re Dallaway* the alternative to an order that the executor have its costs out of the estate was that the other beneficiaries indemnify the executor for the costs of the litigation, which was 'clearly unworkable', whereas in *Evans* the other beneficiaries could be joined as defendants, which was, apparently, a practicable means of providing for the claimant's costs if the claimant were successful.

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7 [2006] NSWSC 1247.
8 [1982] 1 WLR 756.
9 *Re Dallaway* [1982] 1 WLR 756, 761-762.
10 [1985] 3 All ER 289.
11 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [59]-[62].

At p. 293e, Nourse LJ said:

> 'In my view, in a case where the beneficiaries are all adult and sui juris and can make up their own minds 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. The position might be entirely different if, for example, one of the beneficiaries was under age.'

In *Alsop Wilkinson (a firm) v Neary* [1996] 1 WLR 1220, Lightman J went further than the Court of Appeal in *Evans* in qualifying, perhaps to the point of disapproving, the course followed in *Re Dallaway*. At 1225, his Lordship said:

> 'In a case where the dispute is between rivals 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 …) offer to submit to the Court's directions, leaving it to the rivals to fight their battles.'

See also *Re Schroder's Wills Trusts* [2004] 1 NZLR 695, at paras 39-44, per Nicholson J.

I think that the development of the law in this area has now reached the point where I may state the following proposition.

> Where a trustee seeks an order that it is justified in defending a claim against the trust estate by recourse to the trust assets for the costs of the litigation, the question will be whether it is more practical, and fairer, to leave the competing claimants to the beneficial interest in the trust estate to fight the litigation out amongst themselves, at their own risk as to costs and leaving the trustee as a necessary but inactive party in the proceedings, or whether it is more practical, and fairer, that the trustee be the active litigant with recourse to the trust fund for the costs of the litigation. What is 'practical and fair' will depend on the particular circumstances of each case and will include:
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> – whether the beneficiaries of the trust estate have a substantial financial interest in defending the claim;
> – what are the financial means of the beneficiaries to fund the defence;
> – the merits and strengths of the claim against the trust estate;

> – the extent to which recourse to the trust estate for defence costs would deprive the successful claimant of the fruits of the litigation;
> – if the trust is a charitable trust rather than a private trust, what, if any, are; the considerations of public interest."

Conclusion

[22] Having considered the affidavit material, in the circumstances of this case I do not consider that an order should be made that the defence be funded by the estate. In this case I consider it is more practical, and fairer, to leave the competing claimants to the beneficial interest in the trust estate to fight the litigation out amongst themselves, at their own risk as to costs. In particular, it is clear that the beneficiaries under the Will have a substantial financial interest in defending the trust proceedings. Secondly, one of the beneficiaries does not wish to defend those proceedings. In addition, the affidavit of Ms Moore[12] indicates that she and her fellow administrator have the capacity to raise funds to pay for the legal proceedings.

[23] Furthermore, the affidavit material indicates that as the evidence presently stands there is a prima facie case that the respondents have a strong claim. In this regard, I have considered the affidavits of Matti Salmi, Pentti Sinivuori and Sari Sinivuori. There is also material to indicate, that if the respondents are ultimately successful, there is a risk that they could be forced to sell the property as a consequence of the order and a requirement to meet the costs of the applicants. Ultimately, I endorse the view of Nourse LJ in *Evans v Evans*[13] where his Honour stated:

> "In my view, in a case where the beneficiaries are all adult and sui juris and can make up their own minds 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."

[24] In all the circumstances then, I consider whilst an order should be made that the administrators are authorised to defend the claim on the estate's behalf, I do not consider that they should be indemnified out of the estate in relation to costs in defending that claim.

Orders

[25] The administrators are authorised to defend the claim on the estate's behalf.

[26] The administrators are not to be indemnified out of the estate in relation to costs in defending the claim.

[27] The applicants are to pay the respondent's costs of and incidental to this application on the standard basis.

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12 Affidavit of Maija Miriam Moore, filed with leave 27 November 2008.

13 [1985] 3 All ER 289, 293.