

SUPREME COURT OF QUEENSLAND

CITATION: *Aronis & Anor v Aronis* [2020] QCA 147

PARTIES: **THEODORA LOULA ARONIS AS EXECUTOR OF THE ESTATE OF PETER GEORGE ARONIS (DECEASED)**
(first appellant)
THEODORA LOULA ARONIS
(second appellant)
v
MATTY ARONIS AS EXECUTOR OF THE ESTATE OF MARIA ARONIS (DECEASED)
(respondent)

FILE NO/S: Appeal No 10524 of 2019
SC No 12875 of 2015

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – unreported, 2 September 2019 (Jackson J)

DELIVERED ON: Date of Orders: 19 February 2020
Date of Publication of Reasons: 7 July 2020

DELIVERED AT: Brisbane

HEARING DATE: 19 February 2020

JUDGES: Sofronoff P and Fraser and Mullins JJA

ORDERS: **Orders made 19 February 2020:**

- 1. Appeal dismissed.**
- 2. The appellant to pay the respondent's costs on a standard basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COURT SUPERVISION – AMENDMENT – GENERALLY – where the appellant in a proceeding commenced in 2015 claims declarations for constructive trusts over various properties as a result of alleged breaches by her husband’s parents of oral agreements and representations made in 1979, 1991 and 1993 and the conduct of her husband and her in reliance on those agreements and representations – where her mother-in-law swore an affidavit in relation to the purchases of the properties and responding to the statement of claim – where the mother-in-law died and her daughter as her executor was substituted as the defendant in the proceeding – where almost four years after the proceeding commenced, the appellant

applied for leave to amend the claim and the statement of claim to include claims for resulting trusts over the properties that were the subject of the constructive trust claims and a property that was purchased in 1979 in the respondent's name – whether there was potential prejudice to the respondent in not being able to obtain the deceased's evidence relevant to the resulting trust claims – whether the primary judge erred in not granting leave to amend

Uniform Civil Procedure Rules 1999 (Qld), r 5

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170; [1981] HCA 39, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited

COUNSEL: G R Allan for the appellant
 S J Webster for the respondent

SOLICITORS: Walt Allan for the appellant
 Cooper Grace Ward for respondent

[1] **SOFRONOFF P:** I agree with the reasons of Mullins JA.

[2] **FRASER JA:** I agree with the reasons for judgment of Mullins JA.

[3] **MULLINS JA:** The appellant who sues as the executor of her late husband's estate and in her personal capacity is the plaintiff in Supreme Court proceeding number 12875 of 2015. The appellant was granted leave on 2 September 2019 by the learned primary judge to amend the amended claim and amended statement of claim in accordance with the reasons for the decision given on the same date.

[4] As the leave did not extend to all amendments sought to be made by the appellant, she appeals against that part of the order that had the effect of disallowing proposed amendments to the amended claim and the amended statement of claim.

[5] At the hearing of the appeal, the court dismissed the appeal and ordered the appellant to pay the respondent's costs on a standard basis. These are my reasons for the making of those orders.

Background to the dispute

[6] The background to the dispute between family members is common ground. It is set out in paragraphs 5 and 6 of the appellant's amended outline of argument as follows:

“5. Between 1959 and July 1989, George Aronis (**George**) and Maria Aronis (**Maria**) acquired seven (7) properties in Brisbane. George died on 25 September 1993. A number of the properties are used for retail or commercial purposes and have periodically been leased for reward to third parties since they were acquired. When George died, Maria became the registered owner of the properties. After Maria died on 29 October 2016, the respondent, Matina Aronis (**Matina**, also known as '**Matty**'), was granted probate as sole executor and

trustee of a will executed by Maria on 5 September 2016 (**Maria's 2016 will**) and the properties vested in her. Matina is the sole residuary beneficiary under Maria's 2016 will.

6. Theodora Aronis (**Theodora**) sues the respondent in two (2) capacities, as executor of her late husband's estate, and in her personal capacity. Theodora is Matina's sister-in-law. Theodora was married to Peter Aronis (**Peter**) from March 1979 until his death on 5 August 2015. On 9 December 2015, Theodora was granted probate as sole executor and trustee of Peter's last will dated 30 May 1991." (*footnotes omitted*)

- [7] Where appropriate, I will refer to the parties by their given names for ease of reference.
- [8] The amended claim and amended statement of claim filed on 23 December 2016 was before the primary judge. The appellant claims declarations for constructive trusts over the seven properties based on alleged breaches of oral agreements or representations reached or made in 1979, 1991 and 1993 and the conduct of Peter and her in reliance on those agreements or representations.

The proceeding

- [9] The appellant commenced this proceeding on 18 December 2015, when Maria was still alive and she was named as the defendant. Maria was then 92 years old. She swore an affidavit on 1 July 2016 (Maria's affidavit) that responded to the allegations in the statement of claim. The proceeding was placed on the Case Flow Review list. On 6 October 2016 directions were made about requests for particulars, disclosure and filing and serving of amended pleadings. Directions were also made in relation to expert evidence. By order made on 21 December 2016, Matty in her capacity as executor of Maria's estate was substituted as the defendant in the proceeding and the timetable for requests for particulars, disclosure, amended pleadings and expert evidence was amended. The appellant filed the amended claim and amended statement of claim on 23 December 2016 that incorporated the change in the defendant, but otherwise did not make any substantial changes to the causes of action.
- [10] On 10 May 2017, the appellant's solicitors advised the respondent's solicitors that the appellant did not intend to obtain expert evidence. The appellant's solicitors sent a further letter on 18 May 2017 advising the appellant did not intend to amend the statement of claim. The appellant's solicitors confirmed by email on 7 August 2017 that the appellant did not require expert evidence for the purpose of the proceeding and any expert evidence would be in response to the respondent's expert evidence "presumably for the counterclaim". Orders were made on 23 August 2017 that set a timetable for further steps in the proceeding, including a mediation, and for the respondent to deliver to the appellant her expert evidence by 31 October 2017 and for the appellant to deliver to the respondent her expert evidence limited to issues raised by the respondent's counterclaim by 28 November 2017.
- [11] The respondent proceeded to obtain an expert forensic accounting report after the mediation. Correspondence then ensued between the solicitors about disclosure of bank records. An application was filed by the respondent on 8 March 2018 seeking disclosure from the appellant of material that had been requested in her solicitors'

letter dated 12 December 2017. The parties agreed on consent orders. An affidavit from the appellant sworn on 27 April 2018 dealt with the requests for further disclosure. The appellant changed solicitors in June 2018 then again in October 2018, when the appellant's current solicitor Mr van der Walt was engaged. On 2 November 2018 the respondent's expert report was served on the appellant's solicitors. The report recorded the funds that had been deposited into, and withdrawn from, two bank accounts in the names of George and Maria, one bank account in the name of the appellant trading as Aronis Investments Trust and one bank account in the names of George, Maria and the appellant during the financial years ended 30 June 1979 to 30 June 2016 and consolidated the entries into a cashbook.

- [12] The application seeking to amend the claim and statement of claim and the supporting affidavit of the appellant's solicitor were filed on 16 July 2019. The application was heard for three hours by the primary judge on 2 September 2019. After adjourning for lunch and hearing some further short submissions, the primary judge gave extensive *ex tempore* reasons to dispose of the application.

The disallowed amendments

- [13] The appellant is seeking to add claims for declarations for resulting trusts in respect of four properties referred to in the statement of claim as 99 Burn Street, Lots 5 and 6/17 Hayling Street and 74 Vulture Street. These are alternative claims to the existing claims in respect of those properties for declarations of constructive trusts based on the alleged oral agreements or representations. In addition, the appellant sought to add alternative claims of equitable charges in her favour over the properties of 99 Burn Street and 74 Vulture Street. The appellant also sought to add a claim in respect of a property that is not the subject of the constructive trust claim. This property referred to as the Whittaker Street property is registered in the respondent's name as the owner of the estate in fee simple in her personal capacity and was purchased in 1979.

The primary judge's decision

- [14] The primary judge identified six categories of amendments sought by the appellant. The primary judge allowed the amendments that fell within the first and second categories.
- [15] The third category encompassed the resulting trust and equitable charges claims in respect of the properties that were already the subject of the statement of claim. The claim in respect of Whittaker Street was included in the fourth category. The primary judge refused leave to make the amendments in the third category and in the fourth category relating to Whittaker Street. The primary judge did allow the claim included in the fourth category in respect of the property at 24 Selhurst Street that was in a different category. The Selhurst Street property had been rented and the claim was based on co-ownership between Maria and the appellant and seeking an adjustment between the parties for alleged overpayment of net rent to Maria of \$26,355.84.
- [16] The primary judge refused leave to make the amendments in the fifth category that were referable to the disallowed claims in respect of resulting trusts, but did give leave to the appellant to replead in respect of any allegations of material fact that

were included in the fifth category that supported the allegation of constructive trust. The sixth category concerned an additional claim for an account in relation to income from properties that was based on allegations already pleaded in the statement of claim and the amendments were allowed.

- [17] After reciting the history of the proceeding, the primary judge noted that the application was brought in circumstances where the reason for the proposed amendments was only briefly explained by the appellant's solicitor in terms of considering the possibility of including a claim for declarations of resulting trusts and/or other equitable relief after taking possession of the appellant's original disclosed documents and completing the task of scanning them by 5 April 2019. (Mr van der Walt deposed in his affidavit filed on 16 July 2019 to instructing counsel in April 2019 to consider amending the claim and statement of claim to include a claim for declarations of resulting trusts and/or other equitable relief.) The primary judge observed in the reasons:

“As I was informed by the [appellant] through counsel's submissions in the course of this hearing, the claims for resulting trusts are based on compilation of the documents that form the [appellant's] original disclosure of documents in the proceeding, not otherwise. Nevertheless, as will become apparent, the claims for resulting trusts, which are proposed to be added, in large measure relate to dealings that occurred before 1979, which is the earliest date to which the [respondent's] present expert evidence has been directed.”

- [18] The primary judge noted the application of r 5 of the *Uniform Civil Procedure Rules* 1999 (Qld) and the exposition of the relevant considerations in the decisions of the High Court in *AON Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [92]-[106], *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at [51] and *UBS AG v Tyne* (2018) 265 CLR 77 at [38]. The primary judge focused on the emphasis in these decisions that a decision in an interlocutory proceeding concerned with achieving the just, timely and cost effective resolution of a dispute affects not only the parties to the dispute, but wider public interests.
- [19] The appellant's submission to the primary judge was that the proposed amendments would result in no material prejudice to the respondent, as the resulting trust claims were based on documentary evidence and limited additional disclosure would be required. The respondent relied on the timing of the application in the context of the previous advice from the appellant's solicitors that the appellant did not intend to amend the statement of claim or adduce expert evidence and that the substantial nature of the amendments would significantly delay a trial. The respondent relied on the facts that she was 72 years old and had contributed over \$200,000 of her own money to meet the costs of the litigation and further costs would be a burden. The respondent's expert report as to payments and deposits to relevant accounts which were the subject of the amended statement of claim from 1979 onwards cost the respondent in excess of \$100,000 which may prove to be wasted or partly wasted if the amendments were allowed. In addition, the respondent would suffer prejudice in not being able to obtain evidence from Maria to address the new allegations. The primary judge commented specifically on this ground of objection based on prejudice:

“Most importantly, though, in my view, on this ground of objection, the [respondent] relies upon the circumstance that a resulting trust case is not merely documentary because it depends on the parties’ intention and that, if asked, Maria may have been able to give evidence to speak specifically to what her intentions were and also about what may have been said by George that might have been receivable as to his state of mind, depending upon the circumstances. Those matters are no longer things which can be obtained. In my view, this is a significant reason why there is potential prejudice to the [respondent] in allowing the allegations of resulting trust to go forward.”

- [20] The primary judge otherwise did not accept the materials relied upon by the respondent to oppose the amendments in their entirety. After identifying the respects in which the primary judge considered the respondent’s material may have overstated the prejudice caused by the proposed amendments, the primary judge stated:

“Notwithstanding my rejection of that evidence in those respects, however, it seems to me that it should be accepted that the proposed amendments will significantly add to the burden of the case for the [respondent], or for both parties. There is little doubt, in my view, that they would include or expand the disputed factual area of the case into many of the events that occurred within the family in the years leading up to 1979 as to what the relevant intentions were at the time of the acquisition of the relevant properties.

In my view, the point has been reached in this litigation, bearing in mind the age of the litigants and the difficulties that delay has created, where that significant burden should be given a significant weight in resolving the discretionary question of which of the amendments, if any, should be allowed.”

- [21] The reason the primary judge disallowed the amendments in respect of the third category and in the fourth category relating to Whittaker Street was “on the basis that the addition of both the evidence as to the contributions, even if that may not be such a great factor, and the question of what the intentions were at the time are factual matters that should not be allowed, so as to expand the dispute.”

Grounds of appeal

- [22] The grounds of appeal can be summarised as:

- (1) the primary judge erred in failing to infer from Maria’s affidavit that she would have not been able to, or it is unlikely that she would have been able to, give further instructions or provide additional evidence on the resulting trust claims;
- (2) the primary judge erred in finding that the resulting trust claims would expand the disputed factual area into events in the years leading up to 1979 and that added to the burden of the case for the respondent or both parties;
- (3) as a result of the errors in grounds 1 and 2, the primary judge erred in the exercise of the discretion in considering whether to allow the amendments;

- (4) the primary judge erred in failing to attach any weight to the matters that a request for trial date had not been tendered and trial dates had not been allocated;
- (5) the primary judge erred in the exercise of the discretion in relation to the resulting trust amendments in respect of the Whittaker Street property;
- (6) general discretionary errors were made by the primary judge in respect of the right of the appellant (equally with the respondent) to receive a fair trial.

Nature of the appeal

- [23] Before dealing with the substantive arguments of the appellant, it is appropriate to record the approach that is taken on an appeal from an interlocutory decision involving the exercise of discretion in a matter relating to practice and procedure. The principles to be applied are those set out in *House v The King* (1936) 55 CLR 499, 504-505 and *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170, 177. In the latter case, it was emphasised that appellate courts exercise “particular caution in reviewing decisions pertaining to practice and procedure”.

Ground 1

- [24] The nub of the appellant’s submissions was that the primary judge had failed to refer expressly to the paragraphs of Maria’s affidavit where she set out her recollection of the purchases of the relevant properties and the appellant’s argument set out in the written outline before the primary judge in which it was asserted that, from those paragraphs in Maria’s affidavit, it could reasonably be inferred that Maria would not have been able to provide any further instruction as to the respective contributions to the purchase price of each of the relevant properties.
- [25] The identified paragraphs in Maria’s affidavit relate to the purchase of 74 Vulture Street about which Maria did have some recollection and the purchase of Lots 5 and 6/17 Hailing Street in 1983 and 99 Burn Street in 1999 about which she did not remember much. The resulting trust claims depend on the identification of the sources of the funds for these purchases and any arrangements in relation to the contribution of funds to the bank accounts from which the purchase prices were sourced. The appellant’s submissions in relation to this ground overlook the basis on which the primary judge dealt with the potential prejudice arising from the inability of the respondent to seek Maria’s assistance in respect of the resulting trust claims. As the primary judge explained, the inclusion of the resulting trust claims would have the consequence of putting in issue the intention of the relevant parties at the time when contributions to the purchase prices of the properties were made. The question of the parties’ intentions was not part of, or relevant to the constructive trust claims, when Maria’s affidavit was prepared in response to the allegations in the statement of claim. Maria’s affidavit therefore did not deal with the intention of the parties in relation to the contributions to the purchase prices of the properties for the contributions made to relevant bank accounts from which purchase moneys were taken. That is why the primary judge identified potential prejudice to the respondent in allowing the allegations of resulting trust to go forward without the respondent having the benefit of obtaining Maria’s recollection on what her intentions were at the relevant time and what may have been said to her by her husband from which his intentions may have been able to be inferred. The

appellant's submission before the primary judge on the identified paragraphs in Maria's affidavit did not grapple with the significance of the issue relating to intention that was relevant to the resulting trust claims, but not relevant to the constructive trust claims.

- [26] The appellant's focus on one aspect of the evidence before the primary judge as indicating the primary judge failed to take into account relevant evidence does not give due regard to the reasoning of the primary judge for reaching the conclusion that there was potential prejudice to the respondent in refusing to allow the resulting trust claims that had not been raised prior to Maria's death to proceed. That reasoning made irrelevant the submission based on the existing paragraphs of Maria's affidavit that did not take into account the significance of the issue to the resulting trust claims of the intention of the parties before or at the time of the purchases. There was no error of the primary judge discernible from the lack of express reference in the reasons to these paragraphs of Maria's affidavit.
- [27] During the hearing of the appeal, it was apparent there were deficiencies in the pleading of the facts on which the resulting trust claims were based. In view of the conclusion that was reached that the appeal should be dismissed, it is unnecessary to deal with the pleading deficiencies.

Ground 2

- [28] There was no mistake in the primary judge's conclusion that the resulting trust claims related to dealings that occurred before 1979, as the appellant's proposed amendments to the statement of claim highlighted that Peter's opportunities to contribute funds for the purchase of properties by depositing his funds into the various bank accounts in the names of his parents or his father arose from his employment and receipt of income that mainly occurred prior to 1979, as he retired from the police force in 1974 and was engaged in casual employment until 1978. To the extent that the appellant relies on her contribution to the purchase of any of the properties, she set out in the proposed amendments to the statement of claim that she earned income as a receptionist in 1971 and was employed in the Public Service between 1971 to about 1986. The Vulture Street property was purchased in 1974. The Whittaker Street property was purchased in late 1979.

Ground 3

- [29] As neither grounds 1 nor 2 were established, it follows that ground 3 which was dependent on grounds 1 and 2 could not succeed.

Grounds 4 and 6

- [30] It is convenient to deal with the discretionary considerations that are raised by grounds 4 and 6 together. In respect of ground 4, the appellant focused on two milestones in litigation that had not been reached when the proceeding was before the primary judge – the tendering of a request for trial date by the respondent and the allocation of trial dates. The appellant's submissions therefore concern future events that had not been reached. The primary judge focused on the progress of the litigation and that it had been ongoing for a number of years and was at the stage where a number of steps had taken place in anticipation that no further amendments would be made to the statement of claim, but the appellant wished to make significant amendments and introduce resulting trust claims for the first time. It

would be an unfair characterisation of the primary judge's reasons to suggest that his Honour was unaware of the stage of the proceeding. The focus of the primary judge, in the light of the requirement of r 5 of the *UCPR*, was on the delays in the proceeding to date (to which the appellant had contributed) and the need to achieve a just, timely and cost effective resolution of the dispute. It was not necessary for the decision for the primary judge to refer to the facts that the request for trial date had not been tendered or trial dates not yet allocated, when the primary judge expressly took into account the stage at which the proceeding had reached and the parties' responsibilities in relation to the progress of the proceeding. It cannot be said to be an error that the primary judge did not refer to the specific milestones referred to in ground 4, when the primary judge's decision was made in the context of the progress of the proceeding.

- [31] In respect of ground 6, the appellant relies on an error made by the primary judge in relation to the right of the appellant to receive a fair trial, but that was a matter that was implicit in the considerations that the primary judge weighed up, in deciding whether or not to refuse the amendments in relation to the resulting trust claims. When it is apparent from the comprehensive reasons that the primary judge weighed up carefully the relevant considerations, there is no basis for the review of the exercise of the discretion to refuse those amendments.

Ground 5

- [32] The appellant challenges the primary judge's exercise of the discretion in refusing to allow the resulting trust amendments in respect of the Whittaker Street property. The reasons for the primary judge's decision in that respect were the same as for refusing the amendments to add the resulting trust claims in respect of the properties which were already subject to constructive trust claims in the statement of claim. The fact that the claim against the respondent in her personal capacity in respect of the Whittaker property was a new claim that was not the subject of any limitation period and could have been the subject of a separate proceeding did not preclude the refusal of the amendment to include a resulting trust claim in respect of the Whittaker Street property. The appellant was seeking to join that claim into the existing proceeding brought against the respondent as the executor of Maria's estate which had been commenced some four years previously and for which no explanation was given by the appellant, as to why the claim in respect of Whittaker Street had not previously been raised. The reasons for the primary judge's refusal to allow the resulting trust amendments for any of the properties, as well as the Whittaker Street property, supported the exercise of the discretion against the appellant.

Conclusion

- [33] None of the grounds relied on by the appellant succeeded.