

# SUPREME COURT OF QUEENSLAND

CITATION: *Aronis v Aronis & Anor; Aronis & Anor v Aronis* [2019] QSC 275

PARTIES: **In proceeding BS 11046/19:**

**MATINA ARONIS AS EXECUTOR OF THE ESTATE OF MARIA ARONIS (DECEASED)**  
(Applicant)

v

**THEODORA LOULA ARONIS AS EXECUTOR OF THE ESTATE OF PETER GEORGE ARONIS (DECEASED)**

(First Respondent)

**THEODORA LOULA ARONIS**

(Second Respondent)

**In proceeding BS 12875/15:**

**THEODORA LOULA ARONIS AS EXECUTOR OF THE ESTATE OF PETER GEORGE ARONIS (DECEASED)**

(First Plaintiff)

**THEODORA LOULA ARONIS**

(Second Plaintiff)

v

**MATINA ARONIS AS EXECUTOR OF THE ESTATE OF MARIA ARONIS (DECEASED)**  
(Defendant)

FILE NO/S: BS No 11046 of 2019; BS No 12875 of 2015

DIVISION: Trial Division

PROCEEDING: Applications

DELIVERED ON: 8 November 2019

DELIVERED AT: Brisbane

HEARING DATE: 29 October 2019

JUDGE: Bowskill J

ORDERS: **In proceeding BS 11046/19:**

**1. Caveat No. 711747946 over 95 Burn Street (Lot 143 on Registered plan 451586, County of Stanley, Parish of Bulimba, Title Reference 12833117) (95 Burn Street)**

**be removed subject to the following conditions:**

- (a) 95 Burn Street may be mortgaged, but not sold, provided that any mortgage loan funds are paid into a trust account operated by Cooper Grace Ward;**
- (b) any mortgage loan funds secured by 95 Burn Street:**
  - (i) must be dealt with in accordance with subparagraphs (b)(ii)-(v) of this order, or otherwise:**
    - (A) any further order of the Court; or**
    - (B) the written agreement of the plaintiffs;**
  - (ii) may be used for the administration, maintenance and repair of the estate properties and the payment of other outgoings;**
  - (iii) may be used for legal costs and disbursements in respect of proceeding BS 10436/19, and any subsequent application by Matty Aronis seeking probate of Maria's 2016 will in solemn form;**
  - (iv) may be used for legal costs and disbursements in respect of proceeding BS 12875/15 (the Constructive Trust Proceeding), this proceeding BS 11046/19 and appeal proceeding CA 10524/19;**
  - (v) may not be used to repay any of the money Matty Aronis, in her personal capacity, has loaned to the estate.**
- 2. The application filed on 10 October 2019 is otherwise adjourned to a date to be fixed.**
- 3. The parties' costs be costs in the Constructive Trust proceeding.**

**In proceeding BS 12875/15:**

- 1. The application filed 23 October 2019 is dismissed.**
- 2. The parties' costs be costs in the proceeding.**

**CATCHWORDS:** EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO COURT FOR ADVICE AND AUTHORITY – where the applicant executor applies for an order that the respondents' caveat over part of the estate property, the subject of a claim by the respondents against the estate for declarations the estate property is held on a constructive trust for the respondents, which proceedings were commenced against the deceased before her death, be removed so that the property can be sold and the proceeds used to pay for, among other

things, the costs incurred by the applicant as executor of the estate in defending the constructive trust proceeding and other probate proceedings – where the applicant applies for directions under s 96 of the *Trusts Act 1973* (Qld) that she is justified in selling the property and using the proceeds in that way, and in continuing to defend the constructive trust proceeding as executor – where the respondents contend that since the executor is the primary beneficiary under the deceased's will, she should fund the defence of the constructive trust proceeding at her own personal expense and risk as to costs – consideration of what is practical and fair, in determining directions to be given

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JOINDER OF CAUSES OF ACTION AND OF PARTIES – PARTIES GENERALLY – in the constructive trust proceeding, where the plaintiffs apply to join the executor as a second defendant in her personal capacity, as a beneficiary of the estate – whether she is a necessary party to the proceeding and should be joined

*Land Title Act 1994* (Qld) s 127  
*Trusts Act 1973* (Qld) s 96

*Glasscock v The Trust Company (Australia) Pty Ltd* [2012] QSC 15

*Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66

*Re Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247

*Salmi v Sinivuori* [2008] QSC 321

COUNSEL: S J Webster for the applicant in proceeding BS 11046/19 and the defendant in proceeding BS 12875/15  
 M P Van der Walt (*sol*) for the respondents in BS 11046/19 and the plaintiffs in proceeding BS 12875

SOLICITORS: Cooper Grace Ward for the applicant in proceeding BS 11046/19 and the defendant in proceeding BS 12875/15  
 Walt Allen for the respondents in BS 11046/19 and the plaintiffs in proceeding BS 12875

[1] These proceedings arise from an unfortunate dispute within a family; an all too common, yet regrettable, occurrence where money, property and wills are involved. It is all the more regrettable in this case, as the court has been informed that the parties have already incurred over \$1 million in legal fees between them,<sup>1</sup> and the dispute has

<sup>1</sup> See the affidavit of Theodora Aronis sworn 21 October 2019 (in proceeding 11046/19) at [85] where she

not yet reached a trial. It is a dispute which calls out for a sensible, practical, negotiated resolution, to avoid further unnecessary expenditure of resources, including both time and money.

- [2] In order to understand the context of the two applications I have to determine, it is necessary to set out some of the background.
- [3] George and Maria Aronis, and their two children, a daughter, Matina (referred to as Matty) (born in 1947) and a son, Peter (born in 1952), emigrated to Australia from Greece in 1955.<sup>2</sup> They moved to Brisbane in 1959, worked hard, saved their earnings, and over time acquired a number of properties. Peter married Theodora in 1977. Matty is unmarried.
- [4] Between about 1960 and 1990 George and Maria acquired seven properties. Another two properties were also purchased along the way, one at Chermside which was purchased in the name of Peter and Theodora (to which Theodora may have contributed money), and the other at Chermside West in the name of Matty. George and Maria lived in this house with Matty.<sup>3</sup> George passed away in 1993. After George's death, Maria became the sole registered owner of the seven properties. Maria continued to live with her daughter, Matty, at Matty's Chermside West home, until she passed away in October 2016. Theodora lives in one of the seven properties owned by Maria, describing it as her family home.
- [5] The only material assets comprising Maria's estate are the seven properties. They have a combined rateable value of just under \$2.2 million.<sup>4</sup>
- [6] George and Maria each made wills in 1984, in the same terms, leaving everything to one another and, after they died, to their children Matty and Peter in equal shares (with their respective shares to pass to their children, should Matty or Peter predecease them).<sup>5</sup> Peter and Theodora have four children; Matty does not have children.
- [7] Peter passed away in early August 2015.
- [8] In December 2015, Theodora commenced proceeding 12875/15 against her mother-in-law, Maria, claiming a beneficial entitlement to the seven properties in her own right and also as executor of the estate of Peter, on the basis that Maria held them on a

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says she has spent over \$500,000 of her own money on legal costs and disbursements in relation to proceeding 12875/15. See also the affidavit of Matty Aronis sworn 9 October 2019 (in proceeding 11046/2019) at [116] where she says her mother, Maria, had incurred \$488,368.15 in defending the proceedings and at [118] where Matty says that, since her mother's death, she has lent the estate about \$229,063 to continue to defend the proceedings.

<sup>2</sup> For ease of reference, I will refer to the people involved in this case by their first names, as they all share the same surname.

<sup>3</sup> See the affidavit of Maria Aronis, sworn 1 July 2016 (in proceeding 12875/15) at [18]-[57].

<sup>4</sup> See the affidavit of Matty Aronis, sworn 9 October 2019 (in proceeding 11046/19) at [58] (listing the properties) and at exhibits pp 133, 203, 215, 258 and 264 (rates notices).

<sup>5</sup> Affidavit of Maria Aronis, *ibid*, at [65]-[67].

constructive trust for Peter and Theodora. The interest is claimed to have arisen from alleged conversations between George, Peter, Maria and Theodora in 1979, 1991 and 1993, and a further conversation between Maria and Theodora in 1993, as a result of which it is alleged there was a “family agreement” that in return for work Peter (and Theodora) did in relation to the management of the seven properties over a number of years, the properties were considered to be theirs. Theodora has lodged caveats over each of the seven properties. This is referred to as the “constructive trust proceeding”.

- [9] Maria defended the constructive trust proceeding, with her defence originally filed in March 2016. Maria also swore an affidavit in July 2016, in which she denies the allegations made in the statement of claim. Maria says (at [68] of her affidavit) that “[i]t is true that Peter carried out most of the management of the properties from the 1980s until now...”, but says that she does not recall this ever being the subject of a specific agreement or specific conversation. Maria says that she never regarded the properties as belonging to Peter (for example, at [64], [73], [89], [92]); that they belonged to George and her and, after his death, they belonged to her. Maria also says that she does not recall signing a document appointing Peter as her power of attorney in 1991, nor making a will in 1991 in which she left the whole of her estate to Peter and Theodora, as alleged by Theodora, and that she has “never formed an intention to give Peter attorney over my affairs or to make a Will in those terms” (at [75]-[76] and [85]). Maria notes (at [77] and [78]) that in 1991 her husband, George, was still alive, and says that she would never have appointed anyone as attorney of her affairs other than George and, further, that she never would have made a will (as alleged in 1991) without George doing the same.
- [10] Maria passed away in late October 2016. Matty was appointed executor of Maria’s estate, under a will made by Maria in September 2016. Under this will, Maria gave \$50 to each of Theodora and the children of Peter and Theodora, and otherwise left the rest of her estate to Matty.<sup>6</sup> Following Maria’s death, Matty, as executor of Maria’s estate, was substituted as the defendant to the constructive trust proceeding.
- [11] Without delving into the lengthy procedural history, it is fair to say the constructive trust proceeding has not progressed in an efficient or timely way. The most recent interlocutory step was an application, made in July 2019, by Theodora to further amend the claim and statement of claim, inter alia, to join Matty as a party in her own right to the constructive trust proceeding, and to add claims that the seven properties are also (or alternatively) held on a resulting trust for Theodora and Peter’s estate *and* a claim that the West Chermside property, purchased in Matty’s name, is also held on a resulting trust for the benefit of Theodora and Peter’s estate. This application was determined by Jackson J on 2 September 2019.<sup>7</sup> His Honour allowed some of the amendments; but refused others (including the purported claims of resulting trust, both in relation to the seven properties already the subject of the proceeding and in relation

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<sup>6</sup> See exhibit MA-01 to the affidavit of Matty Aronis sworn 9 October 2019 (in proceeding 11046/19).

<sup>7</sup> A copy of the reasons appears at exhibit MA-13 to the affidavit of Matty Aronis, *ibid*.

to the addition of Matty's West Chermside property). The refusal was on the basis of potential prejudice to the defendant if the new allegations were allowed to go forward, given the lengthy period of time to which those allegations relate (dating back it seems to the late 1960s and early 1970s), the length of time the constructive trust proceeding has been on foot, the inability now to obtain evidence to address the proposed allegations, including from Maria who has passed away, the age of the litigants and the difficulties that the delay has caused for both sides. Theodora has lodged an appeal against this decision, which will be heard in February 2020. There was no order made for joinder of Matty.<sup>8</sup> I am unable to discern from the reasons of Jackson J any reference to this aspect of the application. It was not submitted by counsel for Matty that the joinder issue had already been substantively determined.

- [12] In addition to the constructive trust proceeding, in September 2019, one of the children of Peter and Theodora, Marietta Aronis, commenced a new proceeding in this court (proceeding 10436/19), seeking the return of the grant of probate in common form of the 2016 will, and a grant of probate in solemn form (essentially, challenging Maria's 2016 will on the basis that she lacked capacity, and seeking to prove the 1991 will). Counsel for Matty emphasises that this proceeding has been commenced over two and a half years after Matty obtained probate in common form of her mother's will (in February 2017).
- [13] That brings me to the applications presently before the court for determination.
- [14] The first is an originating application filed on 10 October 2019 (in proceeding 11046/19) by Matty in her capacity as executor of Maria's estate seeking orders:
1. first, pursuant to s 127 of the *Land Title Act* 1994 (Qld), for the removal of the caveat over one of the seven properties the subject of the constructive trust proceeding (the Vulture Street property), to enable that property to be sold, and for the proceeds of sale to be used to pay for:
    - (a) maintenance, repairs, rates, land tax and other charges in relation to the remaining six properties; and
    - (b) the costs incurred by Matty, as executor of her mother's estate, in the constructive trust proceeding, the appeal against Jackson J's orders in that proceeding, and the new probate proceeding; and
  2. second, pursuant to 96 of the *Trusts Act* 1973 (Qld) that she is justified in selling the property and using the proceeds in that way, and in continuing to defend the constructive trust proceeding.

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<sup>8</sup> See also the affidavit of Mr Van Der Walt, solicitor for Theodora, sworn 22 October 2019 (in proceeding 11046/19) at [13]-[14].

- [15] Matty is 72 years of age, is not employed, and her only source of income is the pension. She lives in the West Chermside home, as she has done since 1979, which is her only asset. She has already loaned her mother's estate just over \$229,000 to continue to defend the constructive trust proceeding, since her mother passed away.<sup>9</sup> She swears that neither she, nor the estate, has sufficient funds to pay the anticipated legal costs to continue to defend the constructive trust proceeding, the appeal or the new probate proceeding. Although there is a rental income from the properties (estimated at about \$85,851 net per year), that is said to be insufficient to meet ongoing authority charges and property maintenance costs, even apart from the anticipated further legal expenses.<sup>10</sup> It is for that reason that Matty seeks the orders for removal of the caveat.
- [16] The second is an application by Theodora, in the constructive trust proceeding, seeking to join Matty as a second defendant in her personal capacity.
- [17] Theodora opposes Matty's application, although not absolutely. She concedes that, given the evidence of the state of the estate accounts disclosed in Matty's affidavit, the balance of convenience favours the removal of the caveat from one of the estate properties. Theodora says this should be one of the Burn Street properties (95 Burn Street) not the Vulture Street property, and that this should be on the following conditions:
- (a) upon the removal of the caveat, the property may be mortgaged, but not sold; and
  - (b) any mortgage loan funds and rental income from the estate properties:
    - (i) may be used for the administration, maintenance and repair of the estate properties; and
    - (ii) may be used for legal costs and disbursements incurred by Matty as executor in respect of the new probate proceeding; but
    - (iii) may not be used for legal costs and disbursements in respect of the constructive trust proceeding or the appeal, and may not be used to repay any of the money Matty has loaned to the estate.
- [18] In putting forward proposed draft orders, Theodora also proposed that the caveat which she has lodged over Matty's West Chermside home (in connection with the amendment application referred to at [11] above) be removed, with any mortgage financing or sale proceeds of this home being able to be used by Matty to pay legal costs and disbursements in relation to the constructive trust proceeding and the appeal. That is, Theodora proposes that Matty sell (or mortgage) her home and only asset to fund these legal costs. On the evidence of Matty, there is doubt about whether she would qualify

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<sup>9</sup> Affidavit of Matty Aronis at [118].

<sup>10</sup> Affidavit of Matty Aronis at [110]-[120].

for a loan, secured by a mortgage against her home, as she has no employment income to service a loan.<sup>11</sup>

- [19] By the time of the hearing, Matty's position was that she would accept the removal of the caveat over 95 Burn Street, instead of the Vulture Street property; and agree to attempt to obtain a mortgage over the Burn Street property (as opposed to selling it), with her application otherwise being adjourned while steps are taken to ascertain if a bank will actually lend money secured by a mortgage over this property in the current lending environment. Matty continues to press for directions that she be permitted to use funds secured by any mortgage of the Burn Street property for purposes including to meet the legal costs of defending the constructive trust proceeding and the appeal. However, she is prepared to accept a restriction that she not use any such funds to repay the loan she has made to the estate to date, in her personal capacity (without further order of the court or agreement from Theodora).
- [20] Matty opposes Theodora's application, seeking to join her in her personal capacity as a second defendant to the constructive trust proceeding. She submits that she is not, in her personal capacity, a necessary party to the constructive trust proceeding since her legal rights (as opposed to the value of those rights) are not affected by that proceeding. That is, the constructive trust proceeding does not involve any challenge to Matty's right, as primary beneficiary under Maria's 2016 will, to receive the residue of the estate; rather, the challenge in those proceedings is to what comprises the estate (it is a challenge to the whole of the estate, as the relief sought in the constructive trust proceeding relates to all of the seven properties owned by Maria). Counsel for Matty submits the proper defendant to this proceeding is, therefore, plainly the executor, rather than the beneficiary(ies).
- [21] The narrowing of the dispute between the parties obviates the need to embark on any detailed consideration, or application, of the principles regarding removal of the caveat. For her part, Matty did not submit that Theodora does not have a prima facie arguable case in relation to the constructive trust proceeding; but did submit that it is "obviously a contestable claim which it is reasonable to defend". I accept that submission. For her part, Theodora did not argue against removal of the caveat, acknowledging that the balance of convenience does favour that outcome. It is the directions, in terms of what Matty may do with the loan funds obtained on the security of a mortgage over the relevant property (if one can be obtained) that remains in issue.
- [22] In that regard, in a practical sense, both the application by Matty (for directions) and the application by Theodora (for joinder of Matty in her personal capacity) really turn on the following question – whether it is appropriate for Matty, as executor of Maria's estate (rather than in her personal capacity, as beneficiary) to continue to defend the constructive trust proceedings and to use estate funds, including those which may be

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<sup>11</sup> Affidavit of Matty Aronis, filed by leave on 29 October 2019 (in proceeding 11046/19) at [20]-[21].

obtained by mortgaging the Burn Street property, to defend those proceedings (and the appeal).

- [23] As the High Court confirmed in *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66, the discretionary power conferred on the court by a provision such as s 96 of the *Trusts Act* is broad, unconstrained other than by the subject matter, scope and purpose of the provision (at [55]-[60]); the procedure contemplated is a summary one, designed to facilitate the court's administration of trusts in an efficient way (at [61]-[63]); the merits of any particular decision made under the section will depend upon the context and on the particular circumstances of the case (at [67] and [76]); and the purpose of such proceedings is not only directed to the personal protection of a trustee but also, importantly, the protection of the interests of the trust itself (at [72]-[73]). Further, the court's sole purpose in giving judicial advice is to determine what ought to be done in the best interests of the trust estate (at [104]-[107]).
- [24] In a case in which the trustee sought not only a direction about the reasonableness of continuing to defend a proceeding, but also a direction that it was entitled to do so by recourse to the trust property to pay its reasonable costs, the High Court also confirmed that the financial capacity of the relevant parties to the litigation is a relevant factor to what is practical and fair. In this regard, the plurality referred at [84], with approval, to the following statement from the reasons of Palmer J at first instance:<sup>12</sup>

“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:

- 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;

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<sup>12</sup> *Re Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [62].

- 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.”

- [25] I have no hesitation in concluding that Matty is justified in continuing to defend the constructive trust proceeding. Theodora’s claim in that proceeding is based upon oral conversations dating back to 1979, asserting a beneficial entitlement to all of the property owned by Maria. There are some concerning features, including the circumstances of the purported appointment of Peter as Maria’s power of attorney in 1991, and the 1991 will purportedly made by Maria. The proceeding was commenced against Maria as defendant during her lifetime; and defended by her personally, with the claims made by Theodora clearly and unequivocally refuted by Maria in her affidavit made in May 2016.
- [26] The question then is, how those proceedings should continue to be defended, following the death of Maria, as a matter of practicality and fairness – that is, whether Matty, in her capacity as executor of Maria’s estate, ought to be the active litigant, with recourse to the estate for the costs of the litigation, or whether Matty, as the beneficiary under the 2016 will made by Maria, should be joined to the proceeding in her own personal capacity, and be left to fight the litigation herself, at her own expense and risk as to costs.
- [27] In my view, it is significant that the relevant proceeding was commenced against Maria whilst she was still alive; and Maria made the decision to defend the proceeding while she was still alive. Matty’s role, in continuing to defend the proceeding to date, has been as executor of Maria’s estate. Her conduct in doing so is, firstly, consistent with Maria’s sworn evidence and defence; and, secondly, in the best interests of the estate, since the proceedings are a challenge to the whole of the property comprising the estate. This case is, in that sense, distinguishable from cases like *Glassock v The Trust Company (Australia) Pty Ltd* [2012] QSC 15 and *Salmi v Sinivuori* [2008] QSC 321.
- [28] As against that, as the beneficiary of her mother’s estate under the 2016 will, Matty does have a substantial financial interest in defending Theodora’s claim. But if the executor was an independent third party, Matty would have the benefit of that third party continuing to defend the constructive trust proceedings. In my view, the rhetorical question posed by counsel for Matty – why should Matty be required to defend those proceedings personally, and without recourse to estate funds, simply because she happens to be the executor as well as the beneficiary? – is a fair one. The answer, in my view, in the circumstances of this case, is that it would not be practical or fair to require her to do so.
- [29] Matty does not, on the evidence before the court, have the financial means to continue defending the claim, without recourse to the estate. She is 72 years of age, and in

receipt of the pension. She owns the home she lives in, but I do not accept that it is fair or practical to require that she sell her only asset to fund the continued defence of litigation, which started while Maria was still alive, and which it is plainly in the best interests of the estate to continue defending.

- [30] In terms of the merits or strengths of the constructive trust claim, on the basis of the material presently before the court I do not consider it could be said there is more than a 50/50 prospect of the constructive trust claim succeeding – based as the claim is on contested oral conversations going back many years, between people three of whom are no longer alive to give evidence about them, in the face of the contrary sworn evidence from Maria. Of course, Theodora has also provided sworn evidence attesting to the veracity of the allegations. It must be observed, however, that the extent to which the court can assess the strength or otherwise of a claim of this kind, on a summary application such as the present, is limited. As Lyons J (as her Honour then was) said in *Salmi v Sinivuori* [2008] QSC 321 at [16], in an application such as this “[i]t 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”. I have had regard to the written submissions on behalf of Theodora (at [41]), and the material referred to in that paragraph. The role of Peter in managing the properties over many years is acknowledged by Maria in her affidavit. But as counsel for Matty submitted, what the claim does not take account of is the question of Peter (and Theodora’s) receipt of rental income from the properties over the years; and on the other hand, the support provided by Maria, with whom George and Maria lived in each case until their death. At best, it seems to me this (the merits or strength of the claim) is a neutral factor.
- [31] It is also relevant to consider the extent to which permitting recourse to the trust estate for defence costs would deprive the claimant, if successful, of the fruits of the litigation. Essentially, by what is now proposed, one of the seven properties comprising the estate will be encumbered by a mortgage to secure a loan which will be used, in part, to pay the expenses of and maintain the properties and, otherwise, to pay the executor’s legal expenses of defending the constructive trust proceeding and the probate proceeding. So in a practical sense the value of the estate is diminished to that extent. The position is, however, no different from that which would have obtained if Maria were still alive and continuing to defend the proceeding in her own right, presumably using the property at her disposal to fund her legal costs. The diminution in value of the estate has the potential to affect both parties, depending on the outcome. If Theodora is not successful, it ultimately affects Matty (as the sole beneficiary under the 2016 will). If Theodora is successful, the value of the property recovered by her will be somewhat diminished. But having regard to all the circumstances, including the proportion of the affected property to the whole, in my view this is not a factor which militates against the direction sought by Matty.
- [32] In my view, in the circumstances of this particular case, it is neither practical nor fair to require that Matty, in her personal capacity, fund the constructive trust proceeding at

her own expense and risk as to costs generally. The substance of that dispute is between Theodora and Peter (by his executor, Theodora) and Maria (by her executor, Matty), as to who is entitled to beneficial ownership of the seven properties legally owned by Maria.

[33] It follows that I am not persuaded there is a basis to join Matty as a second defendant to the constructive trust proceeding, in her personal capacity. I accept the submission by counsel for Matty, that she is not a necessary party as the proceeding does not involve a challenge to her legal right, as beneficiary under the 2016 will, nor is it a dispute between beneficiaries. It is a challenge directed to the beneficial ownership of the whole of the property comprising Maria's estate, to which the appropriate defendant is the executor of Maria's estate.

[34] For the reasons set out above, I will make the following orders.

[35] In proceeding 11046/19, the orders will be (in terms of the draft annexed to the written submissions on behalf of Matty) as follows:

1. Caveat No. 711747946 over 95 Burn Street (Lot 143 on Registered plan 451586, County of Stanley, Parish of Bulimba, Title Reference 12833117) (95 Burn Street) be removed subject to the following conditions:
  - (a) 95 Burn Street may be mortgaged, but not sold, provided that any mortgage loan funds are paid into a trust account operated by Cooper Grace Ward;
  - (b) any mortgage loan funds secured by 95 Burn Street:
    - (i) must be dealt with in accordance with subparagraphs (b)(ii)-(v) of this order, or otherwise:
      - A. any further order of the Court; or
      - B. the written agreement of the plaintiffs;
    - (ii) may be used for the administration, maintenance and repair of the estate properties and the payment of other outgoings;
    - (iii) may be used for legal costs and disbursements in respect of proceeding BS 10436/19, and any subsequent application by Matty Aronis seeking probate of Maria's 2016 will in solemn form;
    - (iv) may be used for legal costs and disbursements in respect of proceeding BS 12875/15 (the Constructive Trust Proceeding), this proceeding BS 11046/19 and appeal proceeding CA 10524/19;
    - (v) may not be used to repay any of the money Matty Aronis, in her personal capacity, has loaned to the estate.

2. The application filed on 10 October 2019 is otherwise adjourned to a date to be fixed.
3. The parties' costs be costs in the Constructive Trust proceeding.

[36] In proceeding 12875/195, there will be orders that:

1. The application filed 23 October 2019 is dismissed.
2. The parties' costs be costs in the proceeding.

This costs order is appropriate, given the commonality of the issues to be determined between this application and the application for directions.

[37] Given the nature of the dispute, and the amount of time and, importantly, money that has been expended on these proceedings to date, these matters (including the new probate proceeding) should be closely case managed to ensure a timely and efficient resolution, consistent with the obligation under r 5 of the *Uniform Civil Procedure Rules* 1999. It is appropriate that this matter be removed from the case flow list, and placed on the wills and estates supervised list managed by Boddice J. Reiterating the observation made at the beginning of these reasons, I also urge the parties, and their legal representatives, to make concerted efforts to find a negotiated resolution to the whole of the dispute involving them.