

THE COMEUPPANCE OF AN ESTATE TRUSTEE – THE CONTINUING SAGA OF THE PAUL PENNA ESTATE

Introduction

The Estate of Paul Penna continues to attract attention and judicial comment. As the assigned case management judge, Greer J. recently granted partial summary judgment against Barry Landen (“**Landen**”), a former estate trustee, and his wife Pauline Landen (“**Pauline**”). At the same time, Greer J. dismissed Pauline’s motion to remove a certificate of pending litigation on the title of a house in her name in Toronto’s exclusive Forest Hill neighbourhood.

Greer J.’s decision and reasons should remind estate counsel that with the right facts, a motion for summary judgment is a powerful tool that can bring about a quick resolution to an estate. Too often, counsel sit back and wait for the trustees to pass their accounts or otherwise account for their malfeasance.

Facts

The late Paul Penna (“**Penna**”) died in August 1996. He was a successful businessman who made a name for himself in the mining industry.

Penna’s Will appointed his wife, Lorraine Penna (“**Lorraine**”), Landen, and his good friend Charles Langston (“**Langston**”)¹, as his executors and trustees. The value of the estate was substantial. Lorraine played a somewhat limited role in the administration of the estate, as she ultimately succumbed to the ravages of dementia.

According to Greer J., Landen operated the estate, including a wholly owned corporation, “as if the assets of the estate were his own” and never maintained proper estate accounts. Greer J. also noted that there had been a number of previous motions before her (the most interesting of which dealt with limitation periods²) and noted that Landen’s disclosure had been less than “forthright”.

The estate trustee during litigation, supported by 9 charities named as beneficiaries under the estate, moved for partial summary judgment against Landen based on a series of admissions Landen made on cross-examination and elsewhere regarding transfers of estate funds to himself, indirectly to his wife, and to a charity not named as a beneficiary. The transfers were significant. Landen also admitted that the estate had never paid Lorraine the \$1,000,000 bequest that she was entitled to under the Will, all the while enriching himself.

On his cross-examination, Landen admitted that he took various monies from the estate over the years, including approximately \$1,200,000 in 1998 to purchase the Forest Hill house in the name of his wife. He did not tell his co-trustee, Langston, as he knew that Langston would have never agreed to what Greer J. recognized as a “breach of trust”. In fact, Landen used a stamp, which had Langston’s signature on it, to affect this breach. Landen then arrange for a line of credit secured on the Forest Hill house to fund extensive renovations. As Greer J. wrote:

When the renovations were finished, Landen brazenly moved into this property [Forest Hill house] with his family. Landen did not have legal title to the home and had not invested one cent of money in it (nor had his wife). They lived in the

¹ In the interests of full disclosure, Justin de Vries is counsel for Langston

² Appeal pending

lap of luxury on the money Landen had been entrusted to administer under the terms of the deceased's Will.

According to Greer J., the sum of \$2,127,054.75 could be directly traced from the estate into the Forest Hill house. Moreover, Landen leased expensive vehicles, charged various expenses to the estate, including Maple Leaf hockey tickets, and transferred or sold 7000 shares of Agnico Eagle Gold Mines, owned by the estate, for his own use.

Constructive Trust

The estate trustee during litigation took the position that although the Forest Hill house was in the name of his wife, Landen "masterminded" the whole purchase and renovation of the house as well as borrowings against it. Landen did so for his personal benefit and for the use of his family. The Forest Hill house was therefore held on a constructive trust for the benefit of the estate. According to the estate trustee during litigation, the title of the house should be vested in the estate and the house quickly sold.

On yet another front, after being approached by the United Jewish Appeal ("UJA"), Landen agreed to donate \$1,000,000 of the estate's money. Landen ultimately became a honorary member of the UJA Board of Trustees. According to Greer J., the UJA transfer was totally unauthorized and a breach of trust. The UJA was not a named charity under the Will and Landen was, as characterized by Greer J., on a "frolic of his own". Landen had no defence to having improperly transferred monies to the UJA. Summary judgment was therefore sought by the estate trustee during litigation and ultimately granted against Landen regarding the unauthorized donation.

While Landen tried to argue that he made some repayments to the estate, Greer J. would have none of it. Simply put, Her Honour stated there were millions of dollars unaccounted for and missing from the estate, over which Landen had sole actual control. There was nothing to support Landen's position that any monies he repaid should be credited against monies he owed to the estate. All of the money that went into the Forest Hill house came from the estate. While the Landens may have made mortgage payments or paid down the line of credit secured against the house, these loans were originally secured by Landen improperly taking money from the estate.

In her decision and reasons, Greer J. held that Landen had a double fiduciary obligation both as an executor and as a director of a corporation, which was the estate's main asset. It is trite law that a fiduciary cannot profit from his wrongdoing. Greer J. wrote that Landen was in breach of trust when he took the "first cent" from the estate for purposes other than that set out in the Will. The beneficiaries were therefore entitled to recover the funds which Landen misappropriated from the estate - funds which flowed from Landen by way of a constructive trust or express trust to the house purchase and renovation. Greer J. also stated in no uncertain terms that Pauline had no beneficial interest in the house and contributed nothing to its purchase or renovation.

Therefore, the Forest Hill house was held on a constructive trust by Landen for the estate. Moreover, any increase in the value of the house belonged to the estate and not the Landens. In the end, Greer J. found that Landen was under an equitable obligation to protect the estate assets and administer the estate in accordance with the Will; Landen had simply failed to do so. Landen had also breached his equitable obligations as estate trustee. As such, the estate trustee during litigation was entitled to trace the funds to the Forest Hill house. There was no reason not to impose a constructive trust and damages were not an appropriate remedy in the circumstances.

Summary Judgment

Greer J. held that there was no genuine issue for trial regarding the amount Landen owed to the estate. Landen's own admissions essentially did him in. According to Greer J., "he cannot now complain that I have found, on uncontradicted evidence, that he misappropriated the amounts in question..." from the estate.

Greer J. therefore ordered that legal title to the Forest Hill house vest in the name of the estate trustee during litigation with the corresponding right to sell the house. The certificate of pending litigation was vacated in order to facilitate a sale. Greer J. ordered summary judgment against Landen in the approximate amount of \$3,400,000.

Pauline's Motion

Finally, in turning her judicial gaze to Pauline, Greer J. could not accept that Pauline was an "innocent party" as she now claimed in the proceedings. Greer J. could not believe that Pauline would not have marvelled and wondered at their vastly improved circumstances. Moreover, as joint owners of their shared bank account, Pauline had access to the large sums of money that flowed through their account. In the end, the estate trustee during litigation had a reasonable interest in the land and proceeded with reasonable diligence. Greer J. therefore dismissed Pauline's motion to discharge the certificate of pending litigation so that she could have clear title to the Forest Hill house³.

Unfortunately, with this and other decisions, Penna has now left his mark on more than the mining industry. I am sure we have not heard the last of the Penna estate.

³ Pauline Landen has now appealed the decision of Greer J.