

THE PAUL PENNA ESTATE: SUMMARY JUDGMENT APPEALED

Introduction

In an earlier edition of *Deadbeat*,¹ I wrote a case comment on the decision of Greer J. granting partial summary judgment in the Estate of Paul Penna.² The decision was appealed. As recently reported in the Ontario Reports, the Court of Appeal (“C.A.”) dismissed the appeal.³ What follows is a consideration of the C.A.’s decision.

The C.A. wrote a crisp and clear decision and I borrow heavily from the text of MacPherson J.A. who wrote the decision.

Facts

The appellant, Pauline Landen, was married to Barry Landen (“**Landen**”), an accountant by training. In administering the estate of his business partner and friend, Landen misappropriated several million dollars from the Penna estate. Once Landen’s misconduct was discovered, an estate trustee during litigation was appointed. The respondents, the estate trustee during litigation and various charities that were beneficiaries under Paul Penna’s will, tried to recover some of the money from Landen.

Greer J. granted partial summary judgment against Landen. She further declared that Pauline Landen had no beneficial interest in the current matrimonial home as the money used to purchase and renovate the home had come from funds that Landen had taken from the Penna estate. While Pauline Landen had hoped to sell the matrimonial home herself, Greer J. refused to discharge a certificate of pending litigation from the title of the matrimonial home. Pauline Landen appealed (her husband did not).

The C.A. summarized Pauline Landen’s appeal as follows:

... the effect of the motion judge’s decision was to ensnare a large portion of her own money, approximately \$565,000, in her husband’s wrongful conduct relating to the Penna estate. Accordingly, she seeks modification of the motion judge’s order to permit recovery of the amount from the imminent sale of the matrimonial home.

The C.A. described the basic facts of the case as “outrageous” and “sad”. Paul Penna (“**Penna**”) died in August 1996. His estate was valued at approximately \$24 million. Penna was a successful businessman who made a name for himself in the mining industry. From 1981 to 2004, Landen worked for Agnico-Eagle, a company owned by Penna. Landen described his relationship with Penna as one of father/son.

In his Will, Penna bequeathed \$100,000 to Landen and appointed him as one of his three estate trustees along with his wife, Lorraine Penna, as well as a business associate, Charles Langston (who I represent).

In its decision, the C.A. noted as follows:

¹ Fall 2007

² [2007] O.J. No 3667 (S.C.J.)

³ (2008) 90 O.R. (3d) 673

Almost immediately, Landen managed to shunt the other two executors to the sidelines. He started to loot the estate. His misconduct was not discovered until 2004...

In 2007, Landen admitted to having taken \$2,668,486 from the Penna estate. It appears that several million additional dollars are also missing and unaccounted for.

It became clear that in administering the Penna estate, Landen had used estate funds to purchase and renovate a "luxury residence" in Forest Hill in 1997. The purchase price was \$1,185,000 and renovations cost \$942,054.

Landen put title to the house in his wife's name. The C.A. held that the money to fund the purchase price and renovations came directly or indirectly from the Estate -- money which was supposed to go to many "worthy charities".

Landen also donated approximately \$1,000,000 to the United Jewish Appeal ("UJA") even though the UJA was not named as a beneficiary in the Will. Not surprisingly, the C.A. labelled Landen's misconduct "egregious".

In her decision, Greer J. granting partial summary judgment against Landen in the amount of \$3,733,455.20 based on Landen's own admissions. Greer, J. also declared that Pauline Landen had no beneficial interest in Forest Hill matrimonial home. She further declared that the home was held on a constructive trust by Landen for the Estate and made a vesting order of title in favour of the Penna estate. The home ultimately sold for \$3,250,000.

Pauline Landen appealed principally with respect to Greer J.'s treatment of the matrimonial home. The issues before the C.A. were as follows:

1. Did Greer J. err by imposing a constructive trust on the matrimonial home in favour of the Penna estate?
2. Did Greer J. err by making an order vesting title to the matrimonial home in the Penna estate?
3. Did Greer J. err by not recognizing and making proper allowance for the money Pauline Landen had contributed to the matrimonial home?

Constructive Trust

The C.A. did not accept the submission of Pauline Landen. The C.A. agreed with the reasoning of Greer, J. that the Forest Hill home did not belong to Pauline Landen. According to the C.A., neither Pauline Landen nor her husband paid anything towards the purchase and/or renovations of the home, which totalled more than \$2,000,000. As such, the C.A. agreed with Greer J. that since the money came from Landen in his capacity as a fiduciary, a constructive trust or express trust flowed from him and the money could be traced from him to the house purchase and renovations. Pauline Landen therefore had no legal or beneficial interest in the house.

Vesting Order

Pauline Landen contended that Greer J. erred by making an order vesting title in the Forest Hill home in the Penna estate. Pauline Landen submitted that the respondents did not seek this

relief in their Notice of Motion. The C.A. disagreed and relied on section 100 of the *Courts of Justice Act* which states:

A Court may by order vest in any person an interest in the real or personal property that the Court has authority to order be disposed of, encumbered or conveyed.

The C.A. noted that a vesting order is a discretionary remedy. As such, Greer J. exercised her discretion and vested the Forest Hill home in the Penna estate. In a case where the relief sought and granted was an order for sale of the property with the proceeds of the sale being paid to the Penna estate in partial satisfaction for the money taken from the estate by Landen, both the constructive trust and vesting order were only logical and even necessary precursors to the orderly sale of the property.

Money in the Matrimonial Home

The C.A. recognized that this issue was at the heart of the appeal. Pauline Landen contended that even if a constructive trust and vesting order were appropriate in the circumstances, they failed to recognize and take into account the fact that she had contributed some of her own money to the Forest Hill matrimonial home over the years.

The C.A. was not swayed by this argument:

Any notional entitlement the Appellant might have to reimbursement for personal money directed towards the Forest Hill home is rendered nugatory by the financial benefits she has enjoyed during a decade of living in the home.

Pauline Landen further contended that she should recover her share of the net proceeds that came from the sale of the family's previous matrimonial home in Thornhill, which was not acquired through her husband's misconduct. The total amount was said to be \$443,000. The C.A. held that there was no link between the money from the Thornhill and Forest Hill matrimonial homes. Firstly, Landen admitted that all of the money used to purchase and renovate the Forest Hill home came from the money he misappropriated from the Penna estate. Secondly, the matrimonial home was not sold until 18 months after the Forest Hill home was purchased. As such, the C.A. held that Greer, J. did not err by failing to allocate some of the projected proceeds of the pending sale of the Forest Hill home to reimburse Pauline Landen for her share from the Thornhill matrimonial home.

Finally, Pauline Landen maintained that part of the proceeds of the sale of the Thornhill home had been used to repay some of the monies taken from the Penna estate and could not be traced to the Forest Hill home. However, as the C.A. noted, if this was indeed the case, Pauline Landen could pursue a claim against her husband or the estate for reimbursement of this amount.

Given the issues still outstanding regarding the administration of this estate, including an appeal of a limitation defence, I am confident we have not heard the last of the Penna estate.