COURT OF APPEAL FOR ONTARIO

CITATION: Macpherson v. Wyszatko Estate, 2025 ONCA 576
DATE: 20250805
DOCKET: COA-23-CV-0878

Copeland, Wilson and Rahman JJ.A.

BETWEEN

Julia Macpherson

Applicant
(Respondent)

and

The Estate of Nadia Wyszatko, deceased,
Richard Wyszatko*, Irene Winter, Albert's Marina, Sail'er Inn
Marine*, Marsh Canada Ltd and Claimspro

Respondents
(Appellants*)

S. Steven Sands, for the appellants

David A.S. Mills and Adnan Subzwari, for the respondent

Heard: June 27, 2025

On appeal from the judgment of Justice Suzan E. Fraser of the Superior Court of Justice dated June 30, 2023.

REASONS FOR DECISION

I. OVERVIEW

[1] In 1963, Nadia and Albert Wyszatko bought a piece of property in East Gwillimbury and built two marinas on it: Albert's Marina and Sail'er Inn. Nadia and Albert had five children: Teddy; Julia; Richard; Irene; and Edmund. When Albert died in 1990, his will left 50% of his interest in the business to Teddy. Nadia and Teddy lived on the property in a house. In 2010, Nadia had a dispute with Teddy, and he sued her and his other siblings, except for Julia. In 2011, Nadia executed a will which left the marina business to Richard and divided the residue of her estate in various proportions between her children, except Teddy. Nadia died in 2012 and named three of her children as her estate trustees: Julia, Richard, and Irene.

[2] In June 2014, the litigation brought by Teddy against his mother and siblings was settled for $485,000 and he released all claims to the business and the land on which the marinas stood. Richard took over the marina operations and the business, registering it in his own name. Richard asked Julia and Irene to pay him $100,000 each so the settlement payments arising from the litigation could be made to Teddy, which they did.

[3] When the money was not repaid and there was no agreement on the management of their mother's estate, Julia commenced an application for directions on twelve issues. Following an 11-day hearing, the application judge

determined the issues essentially in Julia's favour and ordered costs on a partial indemnity scale fixed in the sum of $104,722.39 payable by Richard and Irene to Julia.

[4] Richard appeals. He argues that the application judge made palpable and overriding errors in her determination of the facts and that she failed to give proper weight to certain evidence. Further, the appellant submits that the application judge exercised her discretion improperly and made errors in her determination of the costs. The appellant asks that the matter be sent back for a new hearing and that the costs order be set aside.

[5] With one exception, we do not accept the appellant's arguments. They amount to a request for a redetermination of the facts, which is not the function of this court. The standard of review for findings of fact is that of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 1. The appellants have failed to identify any errors made by the application judge and the appeal must be dismissed. However, we would vary paragraphs 1 and 2 of the order to reflect that only the estate is liable for repayment of the loan, legal fees and interest, consistent with the application judge's reasons.

II. ANALYSIS

[6] The application judge was asked to determine twelve issues. She provided careful and balanced reasons for her findings. It is unnecessary to go through each

issue because, essentially, the appellant complains that the application judge accepted Julia's evidence over his when the latter's should have been preferred. The application judge set out the evidence on each issue she was asked to determine and explained how she arrived at her conclusions. She made no errors in her approach.

[7] Two issues merit some commentary: the issue of Julia's loan to Richard and whether he is personally responsible for repayment; and the occupation rent that the application judge found must be paid by Richard.

(1) Julia's Loan to Richard

[8] At the hearing, Richard did not dispute that Julia loaned him $100,000 at his request to enable the settlement with Teddy to be paid. However, he denies that he is personally liable for repayment. He further submits that Julia is not entitled to repayment for the fees she paid to lawyers or the interest she paid on the loan. We do not accept the submissions concerning the lawyers' fees or the interest. As the application judge correctly noted, Julia was not party to the litigation with Teddy and had no obligation to fund the settlement, all of which was corroborated by emails exchanged at the time of these events. On the same basis, the application judge found Julia was entitled to repayment for the legal fees and pre-judgment interest. In addition, the application judge calculated ongoing interest at a *per diem* rate.

[9] The application judge noted that repayment of the of the loan, interest, and fees was sought by Julia against both Richard personally and the estate. While finding the loan was made to the estate, and payable to Julia by the estate, in the formal judgment that was taken out, paragraphs 1 and 2 include judgment against both the estate and Richard for payment. That is perplexing given that counsel for Richard must have approved the draft judgment, yet argues that his client is not responsible for payment of the loan personally. While the application judge found that Richard's evidence on the loan was not credible, she made a specific finding that the loan was to the estate. As a result, we do not find that Richard is personally liable to pay the loan, legal fees, and interest to Julia. Instead, it is payable by the estate. The order should be varied accordingly.

(2) The Occupancy Rent

[10] Richard denied that he was responsible for paying occupancy rent for running the business on the property owned by the estate after his mother's death until the time of trial. The application judge found otherwise because Richard had operated the two marinas on the property owned by the estate without the estate's permission. In doing so, he derived a benefit and treated the estate's assets as his own. The application judge fixed the occupancy rent commencing June 3, 2014, the date when the litigation with Teddy was settled and Richard took over the businesses, until such time as Richard stops running his businesses from the property.

[11] The application judge was not provided with evidence on the proper quantum of rent for the property. The application judge ordered that Richard pay the estate occupation rent in the sum of $2,000 monthly. She directed that if there was a dispute about the quantum of the rent, there was to be an appraisal to set an appropriate figure. No rent has been paid and neither party has arranged for an appraisal. We were advised that no estate trustee has been appointed following the release of the application judge's reasons.

[12] The appellant argues that the application judge erred in ordering occupation rent when there was no evidence before her on this issue. We do not agree. It was open to the application judge to order occupancy rent: she found that he ran the marinas for his own benefit, not on behalf of the estate, and that finding was available to her on the evidence. She made no error in ordering that the appellant pay rent to the estate. She established a process to deal with the quantum of rent he owed and it has not been followed because Richard takes the position he does not owe rent. We reject his submission.

[13] The appellant is to comply with his obligation to pay rent, and the parties are directed to follow the appraisal procedure set out by the application judge. If there is a dispute about the occupancy rent that the parties cannot resolve and no estate trustee has been appointed, they are to seek an appointment before the application judge to deal with these issues.

III. COSTS

[14] The appellant seeks leave to appeal the costs order. He says that the application judge made errors and exercised her discretion improperly in ordering costs fixed in the sum of $104,722.39 payable by him and Irene. We do not accept this submission. The fixing of costs is a discretionary function and trial judges are in the best position to determine both entitlement to costs and the quantum thereof. Leave to appeal costs is granted sparingly and an appellate court will only intervene if the judge made an error when determining costs or if the quantum of costs is unreasonable or wrong: *100 Bloor Street West Corporation v. Barry's Bootcamp Canada Inc.*, 2025 ONCA 447, at para. 70. The respondent was successful and is presumptively entitled to costs. The application judge considered the appellant's offer to settle and gave cogent reasons for finding that it did not comply with r. 49.10(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. We see no error in her reasoning.

[15] The appellant is asking this court to determine anew the appropriate amount of costs, but that is not our function. The application judge considered the submissions of counsel and gave careful reasons for her determination of the scale and quantum of costs. Her findings are rooted in the evidence and are entitled to deference. We see no error in her exercise of discretion, and we deny leave to appeal her costs order.

IV. DISPOSITION

[16] The appeal is dismissed except to the extent that paragraphs 1 and 2 of the final order should be varied to remove Richard as being liable for the loan, legal fees, and interest. If the parties cannot agree on costs, the appellants are to deliver short submissions within five days of the release of these reasons and the respondent is to deliver submissions within five days thereafter.

"J. Copeland J.A."
"D.A. Wilson J.A."
"M. Rahman J.A."