

COURT OF APPEAL FOR ONTARIO

CITATION: Bensen v. Bensen, 2026 ONCA 234

DATE: 20260401

DOCKET: COA-25-CV-0488

Sossin, Gomery and Osborne J.J.A.

BETWEEN

Lyndsay Bensen, Lyndsay Bensen as Trustee of the WJ and Family Trust,
Lyndsay Bensen Family Holdings Inc.

Applicants (Appellants)

and

Robert Bensen*, The WJ and Family Trust*, Robert Bensen Family Holdings
Inc.*, William James Bensen, Jack Robert Bensen, The Charlton Centre for
Specialized Treatment Inc.*, Charlton Health Inc.*, Ajisa Kawalecki nee
Rozajac*, Leptir Specialty Services Inc., Leptir Inc., Sam Cipolla*, Carolyn
Whiskin*, Whisken Trust and John Doe Corporation #1 to #10

Respondents (Respondents*)

Melvyn L. Solmon and Nancy J. Tourgis, for the appellants

H. Michael Rosenberg and Ljiljana Stanic, for the respondents, Robert Bensen,
Robert Bensen Family Holdings Inc., The Charlton Centre for Specialized
Treatment Inc., and Charlton Health Inc.

Andrew Porter and Lauren Paparousis, for the respondents, Sam Cipolla and
Carolyn Whiskin¹

Dennis Touesnard, for the respondent, Ajisa Kawalecki nee Rozajac

Heard: March 11, 2026

¹ The application judge noted in his decision that Carolyn Whiskin was incorrectly named as Carolyn Whisken.

On appeal from the order of Justice Kenneth G. Hood of the Superior Court of Justice, dated February 28, 2025.

REASONS FOR DECISION

I. OVERVIEW

[1] The appellants, Lyndsay Bensen in her personal capacity and as trustee of the WJ and Family Trust (the “Trust”), and Lyndsay Bensen Family Holdings Inc. (“LBFHI”), sought in 2021 to challenge certain employment related agreements entered into by the respondent, Ajisa Kawalecki, and the respondent, The Charlton Centre for Specialized Treatment Inc. (the “Charlton Centre”), which runs infusion clinics.

[2] Lyndsay Bensen had separated from her spouse, the respondent, Robert Bensen, the president and sole director of the Charlton Centre. Robert Bensen was in a relationship with Ms. Kawalecki, and the appellants alleged, in part, that the agreements with Ms. Kawalecki were motivated by their romantic relationship and not the commercial interests of the Charlton Centre.

[3] The application judge rejected the appellants’ arguments impugning the agreements between the Charlton Centre and Ms. Kawalecki.

[4] The appellants argue that the application judge made legal errors in declining to find that Robert had breached an undertaking made to Lyndsay and in rejecting their claim for an oppression remedy under s. 248 of Ontario’s *Business*

Corporations Act, R.S.O. 1990, c. B.16. The appellants also appeal the application judge's decision not to remove Robert as a trustee of the Trust.

[5] For the reasons that follow, we dismiss the appeal.

II. BACKGROUND

[6] Robert and Lyndsay married in 2007. They have two children. They separated in January 2021, after Robert began a romantic relationship with Ms. Kawalecki, who had been an employee of the Charlton Centre since August 2015.

[7] Charlton Health Inc. ("Charlton Health") is a pharmacy that provides biologics to the Charlton Centre. Carolyn Whiskin is a pharmacist who manages Charlton Health's pharmacy operations. She holds 51% of the common shares of Charlton Health. The balance of the shares are held by the Trust.

[8] Sam Cipolla is a CPA and vice-president of finance for Charlton Centre and Charlton Health. He was also the accountant for both LBFHI and Robert Bensen Family Holdings Inc. ("RBFHI").

[9] The Trust was created in May 2015 as part of an estate freeze. The trustees are Robert and Lyndsay with the beneficiaries being Robert, Lyndsay, their children, and RBFHI. LBFHI was not a beneficiary. After the estate freeze, the Trust and RBFHI had voting rights in Charlton Centre, with RBFHI having control, holding two thirds of the voting shares. LBFHI's shares in Charlton Centre had no

voting rights and were redeemable by Charlton Centre. The parties disagreed on whether its shares had in fact been redeemed in 2016/17.

III. THE UNDERTAKING & IMPUGNED AGREEMENTS

[10] Following separation, Robert and Lyndsay executed a mutual undertaking dated January 25, 2021, pledging not to sell, dispose, or encumber assets, make commitments on behalf of their respective holding companies, or operate Charlton Centre outside the normal course of business, without the advance notice and consent of the other party, until April 19, 2021.

[11] On February 1, 2021, Lyndsay issued a family court application; Robert issued his answer on February 26, 2021. On April 15, 2021, Robert and Lyndsay entered into an arbitration agreement. The arbitrator was to determine various family law issues, including division of property.

[12] On April 30, 2021, Ms. Kawalecki and Charlton Centre entered into three agreements: the "Settlement Agreement", the "Retainer Agreement", and the "Independent Contractor Agreement" (together, the "Agreements"). These Agreements replaced Ms. Kawalecki's August 2015 employment agreement with Charlton Centre.

IV. THE APPLICATION

[13] The appellants brought an application, complaining about the Agreements, claiming that (1) Robert breached the undertaking, and this breach was

oppressive; (2) the Agreements should be set aside because they are also oppressive; and (3) Robert should be removed as trustee of the Trust and any money paid to Ms. Kawalecki under the Agreements should be paid back.

V. DECISION BELOW

[14] The application judge found that (1) there was no breach of the undertaking; (2) the entering into of the Agreements was not oppressive, unfairly prejudicial to or something which discarded any interests of the applicants, the Trust, or its beneficiaries; and (3) there was no basis to remove Robert as trustee.

1. The application judge found no breach of the undertaking

[15] The application judge concluded there was no breach of the undertaking: the undertaking expired on April 19, 2021, while the Agreements were not signed until April 30, 2021. The application judge found that no commitments were made, no new business arrangements were entered into, no steps related to the operation of the business took place and no expenses were incurred until the Agreements were executed. Furthermore, he failed to see how any negotiations leading to the Agreements, or the fact that agreements were reached, could be a breach of the undertaking.

2. The application judge found no oppression

[16] The application judge did not find the negotiations leading up to the Agreements to be oppressive as they were not secretive and “[if] Lyndsay had a

reasonable expectation of being informed and being part of the process, it certainly was met.” He observed that:

There was nothing secretive about the negotiations that were taking place. The applicants and their counsel were asked on numerous occasions as to whether they wished to be informed of or participate in the negotiations. A variety of suggestions as to their participation and ways to carry out the negotiations were proffered. The applicants declined any suggestions, ultimately taking the position that Lyndsay had nothing useful to offer and that she expected Robert to discharge his obligations appropriately

[17] The application judge also found that the Agreements themselves were not oppressive and he did not agree with Lyndsay’s submission that they were a “sham”. In considering whether the directors acted in the best interests of the corporation, he found that Lyndsay had failed to show that there was a clearly available and better transaction for Robert and the Charlton companies in its negotiations with Ms. Kawalecki. Robert’s uncontradicted evidence was that the Agreements have since been beneficial to the Charlton companies. Through Ms. Kawalecki’s efforts, Charlton Centre’s business grew dramatically, and the Agreements, among other things, contained a better non-competition agreement than what was in the previous employment agreement. The application judge found that, while the Agreements increased Ms. Kawalecki’s salary, they removed her entitlement to a share of any sale of Charlton Centre and settled what she was owed for her accrued profit-share.

[18] Given these findings, the claims against the respondents Mr. Cipolla, Ms. Kawalecki, and Ms. Whiskin (also part of the management team at the Charlton Centre, and Charlton Health) were also not made out.

3. The application judge found no basis to remove Robert as trustee

[19] Having found that Robert did not act oppressively or inappropriately, and that his actions benefited the Trust, the application judge did not see any basis to remove him as trustee. That there may be friction between Lyndsay and Robert as co-trustees and beneficiaries was not a basis for Robert's removal.

VI. ISSUES ON APPEAL

- (1) Did the application judge err in declining to set aside the Agreements?
- (2) Did the application judge err in failing to remove Robert as trustee?

VII. ANALYSIS

[20] The lion's share of submissions on the appeal related to the first issue on whether the Agreements should be set aside.

[21] In our view, this ground of appeal turns on the application judge's specific findings of fact made and findings of mixed fact and law, which are entitled to deference absent a palpable and overriding error.

[22] Those findings include:

- The undertaking expired on April 19, 2021. The Agreements were not signed until April 30, 2021. The application judge found no commitments were made, no new business arrangements were entered into, no steps on the operation of the business took place and no expenses were incurred until the agreements were executed.
- There was nothing oppressive in Robert and the Charlton companies openly conducting negotiations with Ms. Kawalecki to create a new working relationship.
- If Lyndsay had a reasonable expectation of being informed and being part of the process, that expectation was met.

[23] Much of the appellants' argument attempts to relitigate factual questions. The appellants allege, for example, that there were ongoing negotiations between the respondents prior to the expiry of the undertaking and that the appellants were not permitted to see prior drafts of the Agreements to substantiate this allegation. They submit the failure of the respondents to disclose these earlier drafts of the Agreements, on the basis of settlement privilege, should have given rise to an adverse inference on the part of the application judge.

[24] In our view, while the appellants clearly take a different view of the evidence, they have pointed to no reversible error by the application judge with respect to his

factual findings, which were clearly open to him on the record. He was under no obligation to draw adverse inferences from issues that arose in discoveries and the onus to show a breach of the Undertaking was on the appellants.

[25] Further, the appellants argue that the application judge, in his oppression analysis, did not consider Robert's conflict between his personal relationship with Ms. Kawalecki and his duties to Charlton Health and Charlton Centre. While the application judge did not directly refer to the relationship between Robert and Ms. Kawalecki in his oppression analysis, he was clearly alive to it and to its implications. Regardless, he found that the directors "exercised their business judgment in a responsible way."

[26] In addition, he found that the evidence, in the form of LBFHI's financial statements and tax returns, supported the submission of the respondents that LBFHI had redeemed its shares such that it was no longer a shareholder of Charlton Centre. If it were still a shareholder, it never had any voting rights anyway. To the extent that it also alleged oppression as a creditor, he found that there was no evidence that any of the actions of the Charlton Centre or Robert have compromised LBFHI's ability to collect on its debt.

[27] We see no basis to disturb these findings.

[28] The appellants also argue that the application judge erred in finding that the issues in the application, including Robert's alleged oppressive conduct, could have been dealt with in the family law arbitration rather than in the court.

[29] The application judge made no such finding. He observed that the issue of Robert's alleged oppressive conduct could have been a matter for the arbitrator rather than the court and in that sense the application was "unnecessary", but he proceeded to deal with all the issues before him regardless of this observation.

[30] We see no error with this aspect of the application judge's analysis.

[31] Further, with respect to the application judge's decision not to remove Robert as a trustee of the Trust, the appellants argue the application judge erred by not considering the evidence that Robert was acting in his self-interest rather than the interest of the Trust.

[32] We see no merit to this ground of appeal.

[33] Whether to remove a trustee is a discretionary decision entitled to deference on appeal. Appellate intervention is warranted only for a clearly identifiable error in the application of the law, a material misapprehension of the evidence, or a result that is clearly wrong: *Kasanda v. Sartarelli*, 2025 ONCA 27, at para. 11.

[34] Based on the application judge's factual findings, which again are entitled to deference, he concluded that Robert's actions had benefited, rather than endangered, the Trust. The application judge also correctly concluded that

tensions between Robert and Lyndsay as trustees was not a basis for the removal of Robert as a trustee.

[35] Moreover, the application judge found, and we agree, that any interest that Lyndsay may have had in the Charlton Centre or Charlton Health through the Trust was as a beneficiary under an absolute discretionary trust. She has no interest in either the net income or the capital of the Trust unless and until so declared by the trustees, which decision must be unanimous. Again, LBFHI was not a beneficiary at all.

[36] Accordingly, there is no basis to interfere with the application judge's decision not to remove Robert as a trustee.

VIII. DISPOSITION

[37] For these reasons, the appeal is dismissed.

[38] The respondents are entitled to costs, in the agreed upon quantum of \$40,000 to Robert Bensen, Robert Bensen Family Holdings Inc., The Charlton Centre for Specialized Treatment Inc., and Charlton Health Inc.; \$15,000 to Sam Cipolla and Carolyn Whiskin; and \$5,000 to Ajisa Kawalecki, all inclusive.

“L. Sossin J.A.”
“S. Gomery J.A.”
“P.J. Osborne J.A.”