COURT OF APPEAL FOR ONTARIO

CITATION: Alyousef v. Alyousef, 2026 ONCA 78
DATE: 20260206
DOCKET: COA-23-CV-1075

Roberts, Trotter and Dawe JJ.A.

BETWEEN

Abdul Razak Alyousef

Plaintiff (Respondent)

and

Anes Alyousef, Zainab Almelli, 2390247 Ontario Inc., Alyousef Brother's 2296411 Ontario Inc. and John Doe

Defendants (Appellants)

Omer S. Chaudhry, for the appellants

Abdul Razak Alyousef, acting in person

Heard: January 5, 2026

On appeal from the judgment of Justice Michael T. Doi of the Superior Court of Justice dated August 28, 2023, with amended reasons released January 13, 2025, reported at 2023 ONSC 4899.

L.B. Roberts J.A.:

Overview

[1] The appellants challenge the trial judge's judgment, in which he found that the parties had entered into an oral partnership agreement to pursue a business opportunity to deliver milk during a five-year period. They dispute the trial judge's award of damages, ordered as an oppression remedy under s. 248 of the

Ontario Business Corporations Act, R.S.O. 1990, c. B.16 ("OBCA"); for breach of contract, breach of fiduciary duty and duty of loyalty; and for unjust enrichment. They also dispute the calculation of prejudgment interest and costs.

[2] The respondent did not serve or file a notice of cross-appeal. However, in his factum, he challenged some of the trial judge's findings regarding liability and damages on different grounds than those raised by the appellants and sought leave to raise them on the hearing of the appeal, to which I return below.

[3] For the reasons that follow, I would dismiss the appeal and the cross-appeal, excepting, subject to further submissions, one issue related to the calculation of the respondent's damages. Specifically, I would require the parties to address the issue of whether income taxes should have been deducted from the amounts that the trial judge ordered should be included into 2390247 Ontario Inc.'s income, as I detail below in paragraphs 9 to 12, as well as from 2296411 Ontario Inc.'s net income, and the $63,000 in business income attributed to the respondent.

Background

[4] Abdul Razak Alyousef ("Abdul") and Anes Alyousef ("Anes") are brothers[1]. The trial judge found that the brothers agreed to jointly pursue a lucrative business opportunity to deliver milk for a large dairy distributor, The Milkman Inc. ("the Milkman"), pursuant to an oral partnership agreement to be carried out through the

[1] I refer to the brothers by their first names for ease of reference and mean no disrespect to them by doing so.

appellant, 2390247 Ontario Inc. (“239”). The trial judge found that the brothers each had an equal one-half interest in the business, and thus agreed to equally share net profits and losses after tax that were earned by 239 and to manage 239 by consensus. He determined that as part of their partnership agreement, the brothers agreed to contribute their respective businesses, which were operating prior to and during the Milkman contract, by “rolling them in” to 239.

[5] The contract with the Milkman began in October 2013. As part of the Milkman contract, 239 was to provide trucks and take over truck leases to transport the milk products for the Milkman. The business was essentially operated on a cash basis: delivery services rendered would be recorded in a delivery receivables ledger and invoiced after payment by the Milkman.

[6] After an argument on November 30, 2013, Anes locked his brother out of their business premises and carried on the business without him through the numbered company appellants. As noted, the trial judge found that Anes had rolled 2296411 Ontario Inc. (“229”) into 239, to which 229 assigned trucks and leases. Anes, his wife Zainab Almelli, who also appeals the judgment, and their sons, were paid large salaries by the business. Their personal expenses for items such as travel, jewelry and sports equipment were also taken out of the profits of the business, from which the respondent was excluded.

[7] To calculate damages, the trial judge relied on the August 21, 2017 expert report prepared by Fuller Landau Group Inc., the inspector appointed by the court, at the respondent's request, under s. 161 of the OBCA to "investigate and report on the business and financial affairs of [2390247 Ontario Inc.]": see: *Alyousef v. Alyousef*, 2017 ONSC 2106, at para. 38.

[8] The trial judge determined that the respondent was entitled to a 50% allocation of the net after tax profits and losses that 239 had earned between October 2013, the inception of the business, and December 2017, the end of the Milkman contract[2] (the "contract period"). As Anes did not separate 229's expenses from 239's expenses, the trial judge found that Anes would also not have distinguished between the profits earned by 229 and 239, and 229's net income (before tax) was also included in the calculation.

[9] The trial judge started his damages calculation with 239's after tax profit figure of $429,622 for the contract period. From this amount, he deducted the $154,845 net loss that 239 incurred in 2017, arriving at a net profit of $274,777[3]. He included 229's net income of $67,251 for the contract period and deducted the $63,000 in other business income that the respondent had earned during the contract period.

[2] Although the Milkman contract was supposed to run for five years, with possible renewals, the delivery work for 239 came to an end by December 2017 because the Milkman lost a major client and no longer needed 239's services.
[3] There is a typographical error in the reasons: $274,776 should be $274,777.

[10] Following the inspector's recommendation in its August 21, 2017 report, the trial judge added back in and considered as part of 239's income for the contract period the amount of $669,219, broken down as follows:

(i) $130,000 of the amounts paid to Zainab Almelli and the parties' sons as salary and wages, which the trial judge determined were overpayments;

(ii) ii. $60,600 paid by 239 to cover the family's personal expenses in the sample highlighted by the inspector;

(iii) iii. $18,492 of unreconciled cash that had not been deposited to 239's bank account;

(iv) $60,127 withdrawn and owed by Anes to 239 as a shareholder receivable;

(v) $400,000 in unbilled and unpaid accounts receivables for services rendered to the Milkman that should have been recorded as part of 239's income.

[11] The above figures reflect the trial judge's January 13, 2025 endorsement, in which he corrected certain calculation errors made in his August 28, 2023 judgment. These errors were brought to his attention by the appellants, as part of written submissions invited from the parties by the trial judge with respect to the issues of the calculation of damages, prejudgment interest, and costs. Specifically,

the trial judge corrected the damages calculation by a) deducting the taxes paid by 239 for the contract period in calculating 239's total net after tax income, b) excluding 239's retained earnings, and c) correcting a mathematical error and thereby increasing the business earnings deduction to arrive at the net profit figure of $274,777. He rejected the appellants' request that income taxes paid on 229's net income be deducted for the contract period because he found that "no records were led at trial to substantiate any of their proposed tax offset amounts."

[12] The below chart summarizes the trial judge's calculation of total net profit for the contract period and the respondent's 50% share of that total net profit for the contract period.

Amount	Description
$274,777.00	239's net profits (as described in para. 9)
$67,251.00	229's net profits (as described in para. 9)
$130,000.00	Diverted wages (as described in para. 10(i))
$60,600.00	Personal credit card charges (as described in para. 10(ii))
$18,492.00	Unreconciled cash (as described in para. 10(iii))
$60,127.00	Shareholder receivables for 239 (as described in para. 10(iv))
$400,000.00	Arrears of delivery invoices (as described in para. 10(v))
- $63,000.00	Respondent's business earnings for the contract period (as described in para. 9)
$948,246.00	Total (Net Profit)
$474.123.00	**The respondent's 50% share**

[13] The trial judge also awarded the respondent prejudgment interest from the date the action commenced and costs in the amount of $15,820.

Appeal

[14] The appellants raise the following grounds of appeal:

(2) Did the trial judge err by ruling the parties agreed to enter into an oral partnership agreement to jointly operate a venture by consensus to provide milk delivery services to the Milkman?

(3) Did the trial judge err by failing to conduct a credibility analysis and/or articulate how the court resolved credibility concerns?

(4) Did the trial judge err by awarding prejudgment interest owed from the date the action commenced?

(5) Did the trial judge appear to be biased in arriving at his decision?

(6) Did the trial judge err in his award of costs?

Analysis

Assessment of the evidence and oral partnership agreement

[15] The first two interrelated grounds of appeal can be considered together. They are a thinly veiled attempt to challenge the factual findings made by the trial judge based on his assessment of the witnesses and the record before him. The trial judge preferred the respondent's evidence where it conflicted with the appellants' evidence. He was entitled to make that assessment. I see no reversible error that would permit for appellate intervention.

[16] Nor do the trial judge's reasons reveal any misapplication of the governing principles for the formation of a partnership.

[17] Section 2 of the *Partnerships Act*, R.S.O. 1990, Ch. P.5, defines partnership as "the relation that subsists between persons carrying on a business in common with a view to profit". In analyzing the meaning of s. 2 of the *Partnerships Act*, the Supreme Court in *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298, noted at para. 23 of its reasons that "[t]he existence of a partnership is dependent on the facts and circumstances of each particular case" and reiterated the following indicia of partnership that have been judicially recognized, at para. 24:

> The *Partnerships Act* does not set out the criteria for determining when a partnership exists. But since most of the case law dealing with partnerships results from disputes where one of the parties claims that a partnership does not exist, a number of criteria that indicate the existence of a partnership have been judicially recognized. The indicia of a partnership include the contribution by the parties of money, property, effort, knowledge, skill or other assets to a common undertaking, a joint property interest in the subject-matter of the adventure, the sharing of profits and losses, a mutual right of control or management of the enterprise, the filing of income tax returns as a partnership and joint bank accounts. [Emphasis added.]

[18] Applying the above-cited indicia, the trial judge's findings amply support the existence of a partnership agreement between the brothers. They include the parties' contribution to the common undertaking of the Milkman business opportunity, the shared beneficial ownership of 239, the sharing of profits and

losses, and a mutual right of control or management of 239. That there was no finding of filing of income tax returns as a partnership or joint bank accounts flows from Anes' expulsion of his brother from the operation of 239 and his denial of the existence of the partnership. The absence of these findings does not undermine the trial judge's other findings that substantiate the existence of a partnership agreement.

[19] I would dismiss these grounds of appeal.

There is no error in the determination of prejudgment interest

[20] As for the question of prejudgment interest, the provisions of s. 130(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, permit the trial judge a wide discretion to allow prejudgment interest as he saw fit, including under (c) to "allow interest for a period other than that provided in [s. 128]". Absent reversible error, the trial judge's calculation of prejudgment interest is entitled to substantial deference on appeal.

[21] The appellants argue that the trial judge erred by deviating from his acceptance of their position, as indicated in his endorsements of February 8, 2024 and July 9, 2024, that prejudgment interest "cannot attach to profits before they existed". They submit that the trial judge should not have allowed prejudgment interest from the date the action commenced but instead calculated it on a rolling

basis for each year of the respondent's entitlement to net after tax profits from 239 for the contract period.

[22] I am not persuaded that the trial judge made any error.

[23] First, taken in the context of all his endorsements on the issue of prejudgment interest, it is clear that the trial judge was not making a final determination on the issue of prejudgment interest; indeed, his endorsements indicate that further submissions were required.

[24] Second, the trial judge's determination that prejudgment interest would run from the date the action was commenced was fair and reasonable in the circumstances of this case, including the nature of the damages awarded. The trial judge expressly stated that he was not calculating damages for each successful claim but awarding damages for all the respondent's successful claims.

[25] The trial judge awarded damages informed by the partners' equal allocation of profits and loss over the entirety of the contract period and not merely for one particular year. In other words, the trial judge calculated damages by looking at the net resulting amount owing to the respondent, after deducting 239's 2017 loss and the respondent's business earnings during the contract period from January 2014 to June 2017. As such, it would not be reasonable to calculate the prejudgment interest for each year of the contract period.

[26] An example will assist in making this point clearer: for the purpose of calculating the prejudgment interest figure running from fiscal 2013 of the contract period, what figure would be used for net profit for fiscal 2013? How would the deductions of the 2017 loss and the respondent's business income up to 2018 factor into the net profit calculation for fiscal 2013? These calculations are impossible to perform.

[27] Using a global figure, the trial judge reasonably averaged the potential prejudgment interest period. Although s. 128 of the CJA provides that prejudgment interest runs from the date the cause of action arose, which in this case was October 2013, the trial judge chose 2015, or the date the action was commenced, as the starting point. This averaging mitigated the effect of allowing prejudgment interest on future profits.

[28] Accordingly, I would dismiss this ground of appeal.

There was no judicial bias

[29] Although not pursued in oral argument, the appellants raised the issue of bias in their factum. I see absolutely no evidence of judicial bias in the record. The appellants have failed to meet the high threshold to displace the presumption of judicial integrity and impartiality: *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, [2013] 2 S.C.R. 357, at paras. 14 to 20.

Trial costs

[30] The appellants seek leave to appeal the trial costs awarded to the respondent. They repeat the argument, rejected by the trial judge, that the respondent was not entitled to costs because he did not come to court with clean hands, having misrepresented the income he was receiving from other business activities during the contract period.

[31] I see no error in the trial judge's exercise of his discretion. He was not persuaded that the respondent's misstatements rose to the level of the kind of improper conduct that justified no award of costs. That was his call to make.

[32] I would dismiss this ground of appeal.

Cross-appeal

[33] The respondent did not file and serve a notice of cross-appeal. However, in his factum, he raised the following grounds of cross-appeal that were not raised by the appellants:

(1) Did the trial judge err by relying on the Fuller Landau report, prepared without the respondent's participation in contravention of a prior court order, to reduce or deny compensation?

(2) Did the attempts to transfer assets to the appellant, Zainab Almelli, and related parties constitute a fraudulent conveyance to defeat

enforcement and did the trial judge therefore err in dismissing the action against her?

(3) Did the trial judge err by issuing a post-judgment amendment after 17 months, which was procedurally invalid and contrary to the principle of finality?

Should the respondent be permitted to raise these issues?

[34] Further to the letter sent by this court's executive legal officer on December 29, 2025, we requested that the parties be prepared to address the question of whether the respondent should be permitted to raise the above issues.

[35] The appellants do not object to the respondent raising the third ground of the cross-appeal but submit that he should not be permitted to argue the first two grounds.

[36] At the conclusion of the submissions on this threshold issue on the cross-appeal, we advised the parties that, for reasons to follow, we would not permit the respondent to advance the first two grounds of the cross-appeal but that he could rely on the third ground. These are the reasons for our decision.

[37] The three grounds of the cross-appeal do not arise out of the issues raised by the appellants. As a result, the respondent must advance them by way of cross-appeal and therefore must obtain an extension of time in which to assert a cross-appeal. The overarching consideration is whether the justice of the case warrants

the extension even at this late date. Informing that consideration are the following factors: 1) a timely intention to cross-appeal within the deadline prescribed by the rules; 2) the length of and explanation for the delay; 3) any prejudice by the delay to the appellants; 4) the merits of the cross-appeal: *Richardson v. Arsenov*, 2022 ONCA 137, at para. 6.

[38] The first two factors can be considered together. Rule 61.07(1) of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, requires a respondent to file a notice of cross-appeal within 15 days of being served with the appellant's notice of appeal. In the present case, the appellant's amended notice of appeal is dated March 14, 2025. The respondent's notice of cross-appeal should therefore have been filed by March 29, 2025.

[39] The respondent did serve a notice of cross-appeal dated February 8, 2025 but failed to file it. In his notice of cross-appeal, he only raised the third ground. The respondent has not adequately explained why he did not raise the first two grounds before now.

[40] In any event, the respondent's extension request falters with respect to the first two proposed grounds of cross-appeal on the factors of prejudice and lack of merit.

[41] In terms of prejudice, the appellants have not had the opportunity to respond to the respondent's cross-appeal in writing, although the respondent's factum

made them aware of the issues that the respondent wished to raise. The real prejudice, however, is that there is no appeal record for the cross-appeal. As a result, some of the exhibits that the parties will need to argue the first two grounds of the cross-appeal are absent.

[42] The absence of the necessary cross-appeal record also informs the merits factor with respect to the first two grounds of the proposed cross-appeal. First, the first ground is undermined by the trial judge's statement in his reasons that the respondent was prepared to accept the Fuller Landau report; if there was an order prohibiting this reliance, it is not before us. Second, the trial judge's reasons dismissing the action against Zainab Almelli appear to be firmly grounded in the record; if there is evidence undermining the trial judge's conclusion in this respect, again, it is not before us. These grounds therefore appear doomed to failure.

[43] In addition to the unexplained delay, the factors of prejudice and merits weigh against allowing the requested extension with respect to the first two proposed grounds of cross-appeal. We concluded that it was not in the interests of justice at this late date to permit the respondent to raise these grounds of appeal.

[44] We did not reach the same conclusion with respect to the third ground of appeal. The figures on which the damages calculation was based are canvassed in detail in the trial judge's reasons and in the appeal record already filed. It is a discrete issue that the appellants can adequately address on the appeal.

Moreover, for the reasons that follow, we concluded that the question of whether the trial judge erred in the damages calculation has merit. Accordingly, we allowed the respondent to address the third proposed ground in cross-appeal.

Did the trial judge err by amending his calculation of damages?

[45] The respondent argues that the trial judge erred by amending his calculation of damages seventeen months after the release of his August 28, 2023 judgment.

[46] Except as noted below in para. 49, I do not agree that the trial judge erred by amending his judgment in relation to the damages calculation.

[47] In his January 13, 2025 endorsement, the trial judge corrected certain calculation errors made in the August 28, 2023 judgment: he had erroneously used the wrong figure for net profits and included retained earnings as part of 239's income; failed to account for income taxes paid by 239 to arrive at a net after tax profit figure; and mistakenly deducted only $45,000 rather than the correct figure of $63,000 for the respondent's business income during the contract period. These errors were brought to his attention by the appellants, as part of written submissions invited from the parties by the trial judge with respect to the issues of the calculation of damages, prejudgment interest, and costs.

[48] Specifically, the trial judge corrected the damages calculation by using 239's net after tax income figure for the contract period, deleting 239's retained earnings, and increasing the deduction for income taxes and the respondent's business

income to arrive at a net after tax profit figure of $274,777. He added to $274,777 the amount of $669,219, to arrive at a net profit figure of $948,246 for the contract period. He determined that the respondent's 50% share for the contract period was $474,123.

[49] However, the trial judge appears to have repeated the same error about not accounting for income taxes paid, and thus using net profit figures rather than net after tax profit figures with respect to: 1) the $669,219 of additional amounts included into 239's income; 2) 229's income; and 3) the respondent's $63,000 business income.

[50] First, all the figures noted above in paragraph 10 of these reasons should have been net of the income tax that would have been payable had the amounts originally been included in 239's income when the financial statements for 239 were initially prepared by 239's accountants.

[51] Further, the trial judge erred in rejecting the appellants' evidence about the taxes paid on 229's income for the contract period. As he indicated in the January 13, 2025 endorsement, he was not *functus officio* and could reconsider the calculation of damages. The appellants provided concrete amounts paid for income taxes for 229. The amounts paid for income taxes should have been considered in determining what 229's net after tax profit was, consistent with the net after tax profit amount for 239.

[52] Finally, it is not clear from the record whether the $63,000 attributed to the respondent as his business income during the contract period was net of any income taxes paid on that business income.

[53] In order to properly determine the amount of damages payable to the respondent, I would require further submissions from the parties on the issue of whether, to determine the amounts payable as net after tax profits to the respondent, income taxes are to be deducted from each year of the net profits of 239 once the new figures are included in its income, as well as with respect to 229 and the $63,000 of the respondent's business income.

Disposition

[54] Accordingly, I would dismiss the appeal and the cross-appeal, except with respect to the question set out in the next paragraph on which I would request the parties' further written submissions.

[55] I would request that the parties make written submissions on whether, to arrive at a net after tax profit figure for each year from 2013 to 2017, further income taxes should be deducted from the net profit figures of 239 once the amounts noted in paragraph 10 above are included in 239's income, as well as from the net profit figures of 229, and the respondent's $63,000 of business income for the contract period. I would require the parties to provide their written submissions of no more than five pages, plus revised calculations of net profits after tax, as follows: the

appellants shall provide their written submissions within two weeks of the release of these reasons; the respondent shall provide his written submissions within two weeks of the receipt of the appellant's written submissions.

[56] If the parties cannot otherwise agree, once the tax calculations are determined, I would seek the parties' costs submissions.

Released: February 6, 2026 "L.B.R."

"L.B. Roberts J.A."
"I agree. Gary Trotter J.A."
"I agree. J. Dawe J.A."