

CANADA / JUDGMENT

Debono v. JCD Property Ltd.

2026 ONCA 310

COURT

Court of Appeal for Ontario

DECIDED

30 April 2026

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Debono v. JCD Property Ltd.

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COA-25-CV-1093

Judges

van Rensburg, Katherine; Miller, Bradley; Coroza, Steve A.

Subject

Civil

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: Debono v. JCD Property Ltd., 2026 ONCA 310

DATE: 20260430

DOCKET: COA-25-CV-1093

van Rensburg, Miller and Coroza JJ.A.

IN THE ESTATE OF CARMEN DEBONO, deceased

BETWEEN

David Debono and Elizabeth Muscat

Plaintiffs/Responding Parties

(Appellants)

and

JCD Property Ltd. and JCD Inc. and Joseph Debono and

George Debono personally and in their capacities as Estate Trustees

of the Estate of Carmen Mary Debono, deceased

Defendants/Moving Parties

(Respondents)

AND BETWEEN

Joseph Debono and George Debono, in their capacity as the

Estate Trustees for the Estate of Carmen Debono, deceased,

JCD Inc., and JCD Property Ltd.

Plaintiffs/Moving Parties

(Respondents)

and

David Debono*, Elizabeth Muscat*, Jennifer Nesci

Defendants/Responding Parties

(Appellants*)

Spencer F. Toole, for the appellants

Ian M. Hull and Doreen Lok Yin So, for the respondents

Heard: March 4, 2026

On appeal from the order of Justice Frederick L. Myers of the Superior Court of Justice, dated July 11, 2025, with reasons reported at 2025 ONSC 4139.

van Rensburg J.A.:

- [1] This is an appeal from an order of Myers J. (the “motion judge”) striking the appellants’ statement of defence. The order under appeal arose out of a motion pursuant to rr. 60.11 and 60.12 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, brought by the respondents following the appellants’ alleged breach of an order of the motion judge dated January 22, 2025 (the “January 2025 Order”).
- [2] At the hearing of the appeal, the appeal was dismissed with reasons to follow. These are those reasons.

Brief Facts and Relevant Litigation History

- [3] The appellants David Debono (“David”) and Elizabeth Muscat (“Elizabeth”), and the respondents Joseph Debono and George Debono, are four of the six children of Carmen Debono (“Carmen”), who passed away on March 30, 2022. Prior to Carmen’s death, the appellants had been working for most of their adult lives as employees of the residential leasing business owned by their mother and late father. Their sister Jennifer Nesci (“Jennifer”) also worked in the business part-time between 2018 and 2020.
- [4] In March 2019, the respondents commenced proceedings to challenge the appellants’ appointment as substitute decision-makers for Carmen (the “Capacity Proceedings”). As part of those proceedings, the respondents also took issue with various loans and other transactions alleged to have been undertaken for the appellants’ and Jennifer’s personal benefit. In the course of the Capacity Proceedings, the respondents obtained a number of orders requiring production of financial records and other documents and an informal accounting. Counsel was also appointed pursuant to s. 3 of the Substitute Decisions Act, 1992, S.O. 1992, c. 30 (the “SDA”) to represent Carmen’s interests.[1] While there had not yet been a final determination of Carmen’s “capacity” within the meaning of the SDA at the time of her death, various physicians had expressed the opinion that she had dementia and was susceptible to paranoid delusions in respect of the respondents.
- [5] Upon Carmen’s death, the respondents were appointed estate trustees of Carmen’s estate (the “Estate”) pursuant to her wills. In this capacity, they became the sole directors and officers of the Estate corporations. The respondents required information and documents from the appellants and Jennifer to enable them to run the business and administer the Estate. In an endorsement dated October 12, 2022, Dietrich J. noted that the production orders that had been made by Gilmore J. in the Capacity Proceedings, which had been stayed as a result of Carmen’s death, did not extend to the additional information and documentation requested by the respondents.
- [6] Soon after taking over the business, the respondents terminated the appellants’ employment. In November 2022, the appellants commenced an action alleging wrongful dismissal (the “Employment Action”).

- [7] In April 2023, the respondents commenced an action against the appellants and Jennifer, for damages for conversion of money and assets of the business and other relief (the “Estate Action”). The Employment Action and the Estate Action proceeded together on the estates list.
1. The January 2025 Order [8] In January 2025, the motion judge heard competing motions brought by the parties. The respondents brought a motion in the Estate Action for a determination of the effect of an in terrorem clause in Carmen’s will, and for production of documents by the appellants and Jennifer. The appellants brought a motion in the Employment Action that the Estate pay their legal fees in both actions, and for an interim advance of their share of the Estate.
- [9] The motion judge made a number of findings in his January 22, 2025 endorsement (the “January 2025 Endorsement”, which is reported at 2025 ONSC 516). Among other things, he rejected the appellants’ evidence that they had no Estate property and none of the business’s records, and he found that the appellants had failed to comply with orders for production of similar documents in the Capacity Proceeding.
- [10] As a term of the dismissal of the motions, the motion judge made the January 2025 Order, which contained the following relevant provisions requiring the production of email account passwords and prohibiting the deletion of business emails:
- (a) [The appellants] and [Jennifer] shall immediately provide the [respondents] with all access credentials and passwords to the email account elizabethdebonojcd@gmail.com and all other email accounts used by [the appellants] and/or [Jennifer] for the business of Carmen Debono, deceased, which includes, but is not limited to, the operations of JCD Inc. and JCD Property Ltd. (collectively, the “Email Accounts”);
- (b) [The appellants], [Jennifer], and anyone acting on their joint or several instructions, on their joint or several behalf, or with knowledge of this Order, are prohibited and enjoined from making any alternations to or deleting any emails from these Email Accounts, save and except emails directly “to” and “from” [certain of their lawyers] (or anyone from their respective offices) which emails shall be moved to a separate database where they shall be maintained for listing and privilege review, if necessary...
2. The March 2025 Case Conference [11] On March 19, 2025, the respondents served a motion record seeking an order under r. 60.12 to strike the statement of defence of the appellants and Jennifer in the Estate Action and the statement of claim of the appellants in the Employment Action, and under r. 60.11 for an order finding the appellants and Jennifer in contempt of the January 2025 Order.

- [12] The following day an urgent case conference to schedule the motion was convened before the motion judge. At the case conference, the respondents also requested an interim order for the preservation of emails from the accounts referred to in the January 2025 Order, citing concerns that emails would be deleted and unrecoverable by the time the appellants complied with the order.
- [13] In his endorsement dated March 20, 2025 (the “March 2025 Endorsement”), the motion judge noted that the respondents’ evidence was that the business email account elizabethdebonojcd@gmail.com contained no emails from before the death of Carmen; that there had been 35 deletions from the account after the date of the January 2025 Order; and that the appellants had declined to produce the passwords for other email accounts in which they appeared to have received and sent business emails. The appellants’ counsel advised that he understood that the 35 deletions were all related to lawyer-client privilege as permitted by the January 2025 Order.
- [14] The motion judge rejected the respondents’ request for an interim preservation order. He observed that the January 2025 Order already required disclosure of passwords for email accounts used for the business and enjoined the appellants and Jennifer from making alterations and deletions of emails from those accounts. The motion judge noted that the January 2025 Order remained in full force and effect and had not been appealed. The motion judge also refused the appellants’ request for a new protocol for the review of the appellants’ email accounts, which would protect their private communications which were intermixed with business emails. Absent the consent of the parties, he was not prepared to change the January 2025 Order. The motion judge ordered a timetable for the delivery of materials, cross-examinations and a hearing date for the respondents’ r. 60 motion.
- [15] Two days before the hearing, the appellants delivered files containing business emails from their personal accounts which had been culled for privilege.
3. The July 2025 Order [16] The motion was heard on June 27, 2025. At the hearing, the respondents advised that they no longer sought an order striking Jennifer’s statement of defence in the Estate Action.
- [17] The motion judge refused to hold the appellants in contempt and refused to strike their pleadings in the Employment Action. He concluded that the appropriate sanction for the appellants’ breach of the January 2025 Order was to strike their statement of defence in the Estate Action.
- [18] The motion judge reviewed his finding in the January 2025 Endorsement that the appellants had not disclosed the business documents as they had previously been required to do, which underlay his specific order requiring the appellants to provide the respondents with all access credentials and passwords to the business’s email account elizabethdebonojcd@gmailcom and all other email accounts the appellants used for their mother’s business. He then stated:

I do not think that I could have been clearer [in the March 2025 Endorsement] in finding that the [January 2025 Order] did not allow [the appellants] and [Jennifer] to hold back the credentials for their personal accounts if they mixed business documents in them for reasons of privacy. At the hearing in January, they failed to provide transparent disclosure of the business documents of the estate needed to file taxes and to trace funds. I did not accept their evidence that they had none. They were ordered to produce the same business documents by Gilmore J. before their mother died and she held that they had violated her orders. I ordered delivery of email credentials expressly to take the culling process out of the [appellants' and Jennifer's] hands.

[19] The motion judge rejected the appellants' evidence that the business, which involved the ownership and management of properties with 200 rental units and generated about \$2.5 million a year in rent, did not use email before Carmen's death, and that they rarely used their personal emails for business. He found their last-minute disclosure of culled emails from their personal email accounts to be similarly "incredible and unacceptable". The motion judge found that the appellants had deliberately prevented the Estate from creating a proper set of books, and he did "not see any point in allowing [the appellants] to participate in the proceedings further."

Discussion of Issues on Appeal

[20] At the hearing of the appeal, the appellants did not challenge the finding that they had not complied with the January 2025 Order. Rather, they argued that the sanction – the striking of their statement of defence in the Estate Action – was an unwarranted response to their non-compliance. They asserted that, instead of striking their defence, the motion judge ought to have made a further order for production. They argued that the motion judge's decision was tainted by a series of errors, which, taken cumulatively, affected the ultimate decision to strike their defence.

[21] First, the appellants submitted that the motion judge erred in stating that Carmen was "incapacitated" while they were running her business, when there had been no determination of the issue of her capacity before her death.

[22] I disagree. It is not disputed that there was no finding before her death that Carmen lacked capacity within the meaning of the SDA in respect of the powers of attorney under which the appellants were acting. That said, the motion judge had aptly observed in his January 2025 Endorsement that there was "prima facie evidence, including evidence expected to be given by [Carmen's] former s. 3 counsel and doctors, that undue influence was exerted on the vulnerable mother to enter into extraordinary transactions by [the appellants]" and that there had been insufficient accounting for the proceeds of those transactions. The relevant point was that, in the years preceding Carmen's death, the appellants had been running the family business. Whether or not Carmen was in fact "incapacitated" was not in itself critical to the motion judge's decision to strike the appellants' defence.

- [23] Second, the appellants challenged a number of other findings of the motion judge, which they argued were made without evidence. As a related argument, the appellants submitted that the motion judge misapprehended the evidence about how the appellants managed their emails while they were running the business when he found that they routinely destroyed emails; that their position regarding their use of emails evolved; and that David's position that he did not use emails for business was inconsistent with his use of email to communicate with his lawyers. They argued that the motion judge misapprehended the evidence that was set out in the appellants' affidavits – which was that they typically did not use email, and that, when they received an email, they either forwarded it to someone in the business or printed out the email, brought a hard copy to the office, and deleted the email.
- [24] Contrary to the appellants' assertion, the motion judge's observations that their position with respect to the business emails had "evolved" and was inconsistent with their prior sworn evidence and the emails found in their accounts, were open to him and fully supported by the evidence. The motion judge explained why he did not find the appellants' evidence credible, and based on his findings, he was entitled to conclude that the appellants had selectively produced documents and that their culling of emails was "not to be trusted in the face of [their] clear and ongoing refusal ... to provide transparent accounting for the business and its assets."
- [25] Third, the appellants challenged certain findings of the motion judge that were made in the January 2025 Endorsement (and his costs endorsement) to the effect that the Estate had established a *prima facie* case for the appellants to account for missing funds, and they submitted that his use of these findings amounted to a reversal of the burden of proof. I agree with the respondents that the motion judge was entitled to rely on these findings that were made in the context of an order that was not appealed. In any event, there can be no dispute that the appellants, as Carmen's fiduciaries, and having been actively involved in the business before her death, had a duty to account to the estate trustees, which included full and transparent disclosure of their dealings.
- [26] Fourth, the appellants asserted that, while he was entitled to take into consideration their failure to comply with similar orders in the Capacity Proceedings, the motion judge assigned too much weight to the earlier defaults. Again, I disagree. The weight to be given to a particular factor or piece of evidence is a matter for the motion judge, and is not a basis for appeal. In any event, the appellants' earlier failure to provide the same or similar information and documents about the business and their dealings was highly relevant to the motion judge's conclusion that striking the appellants' statement of defence was appropriate and necessary in the circumstances.
- [27] Fifth, the appellants submitted that there was a breach of s. 7 of the Charter and that they were denied procedural fairness when the motion judge admitted the respondents' reply evidence, including a signed expert report. There is no merit to this argument, which was raised before the motion judge and rejected. The motion judge was correct in refusing to deal with the matter as a Charter issue, since he was not dealing with contempt of court, but

with the striking of the appellants' pleadings. And, as he observed, the reply evidence was properly submitted by the respondents to refute evidence put forward by the appellants in their May 2025 responding affidavits.

- [28] Nor is there any merit to the appellants' argument that it was procedurally unfair for the respondents to include in their reply materials a sworn version of the unsworn expert report they had submitted with their March 2025 evidence. The appellants argue that they were entitled to disregard the unsworn report because of its failure to comply with the rules. As the motion judge noted, the appellants could have objected before delivering their own evidence. It was "trial by ambush" for them to "lay in the weeds with an objection" and then "claim it [was] too late for the moving party to fix it."

Conclusion

- [29] There is no error in the motion judge's decision to strike the appellants' statement of defence. The order was warranted as a result of the repeated and continuous defaults by the appellants. The motion judge considered the relevant factors set out in *Falcon Lumber Limited v. 2480375 Ontario Inc.*, 2020 ONCA 310, with respect to striking pleadings due to a party's failure to produce documents. These factors include whether the party's failure is deliberate or inadvertent; whether the failure is clear and unequivocal; whether the defaulting party provides a reasonable explanation for its default and a credible commitment to cure the default quickly; whether the substance of the default is material or minimal; the extent to which the party remains in default at the time of the request to strike the pleading; and the impact of the default on the ability of the court to do justice in the particular case: at para. 51.
- [30] The motion judge concluded that this was an extreme case that met every one of the concerns or factors in *Falcon Lumber*. He noted that the Estate Action was the continuation of the Capacity Proceedings; that the appellants and Jennifer had ignored multiple orders and "made clear their refusal to disclose what they did with their mother's money"; that they had been told in the January 2025 Endorsement and the March 2025 Endorsement what they were required to do, and had been afforded time to comply; and that, while he did not believe all documents were gone, he was satisfied that if the appellants had some documents, they would not produce them.
- [31] A motion judge's decision to strike pleadings is entitled to deference on appeal when exercised on proper principles: *Rimon v. CBC Dragon Inc.*, 2024 ONCA 128, at para. 14. The parties agree that the motion judge was correct to apply the *Falcon Lumber* test. None of the matters raised in this appeal undercut the motion judge's conclusion that the appropriate remedy was to strike the appellants' defence in the Estate Action. As he observed, it was not fair or reasonable for them to defend the claims against them, while they were the ones who precluded a fair and proper accounting.

Disposition

[32] For these reasons, the appeal was dismissed. I would award costs of the appeal to the respondents fixed at \$60,000, inclusive of disbursements and applicable taxes.

Released: April 30, 2026 “K.M.v.R.”

“K. van Rensburg J.A.”

“I agree. B.W. Miller J.A.”

“I agree. S. Coroza J.A.”

[1] Clare Burns, who had been retained privately as Carmen’s counsel, was appointed as s. 3 counsel in January 2020. She withdrew as s. 3 counsel in June 2021, and Lorne Silver was appointed s. 3 counsel, which appointment continued until Carmen’s death.

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