

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

DBDC SPADINA LTD.,  
and THOSE CORPORATIONS LISTED ON SCHEDULE A HERETO  
Applicants

and

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP LTD.  
and EGLINTON CASTLE INC., and THOSE CORPORATIONS LISTED ON  
SCHEDULE C HERETO  
Respondents

and

THOSE CORPORATIONS LISTED ON SCHEDULE B HERETO AND THE REAL  
PROPERTY LISTED ON SCHEDULE C HERETO, TO BE BOUND BY THE  
RESULT

and

SUCH OTHER RESPONDENTS FROM TIME TO TIME AS ARE ON NOTICE  
OF THESE PROCEEDINGS AND ARE NECESSARY TO EFFECT THE RELIEF  
SOUGHT

**APPLICANTS' RESPONDING FACTUM**

*(Motion for approval of Manager's fee allocation methodology for the period  
December 1, 2014 to January 1, 2016)*

Returnable May 3, 2016

April 25, 2016

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**APPLICANTS' RESPONDING FACTUM**

*(Motion for approval of a fee allocation methodology for the period December 1, 2014 to  
January 1, 2016 returnable May 3, 2016)*

**OVERVIEW**

1. The Manager moves for approval of a fee allocation methodology for the period December 1, 2014 to January 1, 2016 (the "Second Methodology").

2. The Second Methodology allocates (where possible) fees related to a specific property to that property and allocates general fees (where reference to a specific property is not possible) on a *pro rata* basis amongst the portfolio of properties.

3. The Manager has proposed a variation of the Second Methodology for costs incurred by the Manager and its counsel relating to motions brought by two groups of stakeholders, the Cityview Lien Claimants and the Dupont Mortgagees.<sup>1</sup> The proposed variation to the Second Methodology allocates the majority of the costs relating to the Cityview Lien Claimants and the Dupont Mortgagees' motions between all the properties, even though the fees with respect to those motions are specific to the Cityview Property and the Dupont Property (as defined below)

4. It has been a principle of the relief that the Applicants have sought in this proceeding that properties/companies bear their own costs. The Waltons' pooling of funds led to findings of oppression and the appointment of the Manager. While the Applicants are sympathetic to the Cityview Lien Claimants and the Dupont Mortgagees, their actions caused the Manager to incur significant expenses directly and solely over their properties. Other creditors of the other properties, of whom the Applicants are just one, should not be required to bear that burden.

5. The Applicants support the Second Methodology, subject to this proposed variation to the Second Methodology.

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<sup>1</sup> As defined in the 41<sup>st</sup> Report of the Manager, Schonfeld Inc., dated March 29, 2016

## BACKGROUND

6. A methodology for the fees incurred by the Manager and its counsel from November 5, 2013 to November 30, 2014 was approved by the Order of Justice Newbould dated April 20, 2015 (the “First Methodology”).

7. The Cityview Lien Claimants were unsuccessful in opposing the approval of the Manager’s fees in accordance with the First Methodology, for 1 and 9-11 Cityview Dr. (the “Cityview Property”).

8. The Dupont Mortgagees were unsuccessful in challenging the priority of the Manager’s Charge and Manager’s Borrowing Charge on 1485 Dupont St. (the “Dupont Property”). The Dupont Mortgagees subsequently appealed. The appeal was dismissed by the Court of Appeal, from the bench, without calling upon counsel for the Manager.

9. The Manager and its counsel incurred significant costs dealing with the motions and appeal.

10. The Manager now seeks to have the Second Methodology approved by this Court. The Second Methodology is described in detail in the 41<sup>st</sup> Report of the Manager, Schonfeld Inc., dated March 29, 2016.

11. In broad terms, the Second Methodology allocates (where possible) fees related to a specific property to that property and allocates general fees (where reference to a specific property is not possible) on a *pro rata* basis amongst the portfolio of properties.

12. There are sufficient surplus funds being held by the Manager from the sales of the Cityview Property and the Dupont Property to pay the fees allocated to the Cityview Property and the Dupont Property pursuant to the Second Methodology incurred specifically as a result of the ill-advised challenges by the Cityview Lien Claimants and Dupont Mortgagee.

13. As applying the Second Methodology in this way will result in little if any funds being available to the Cityview Lien Claimants or the Dupont mortgagee, the Manager has proposed that the Second Methodology be altered as it applies to its fees with respect the Cityview Property and the Dupont Property.

14. The proposed variation has the practical effect of allocating costs incurred by the Cityview Lien Claimants and the Dupont Mortgagees to other stakeholders in other properties.

#### **THE APPLICANTS' POSITION AND ARGUMENT**

15. The Manager's proposal with respect to the Cityview Lien Claimants and the Dupont Mortgagee is a kindness to them. But it comes with a cost. The Manager's fees will be paid. The question is by whom. The Applicants submit that it is not fair or reasonable for other stakeholders to bear the financial consequences of the Cityview Lien Claimants' and the Dupont Mortgagees' actions.

16. A manger/receiver's fees should be allocated in a "fair and equitable" manner. The obligation upon a receiver/manager in allocating costs from an insolvency proceeding is to exercise its discretion in an equitable manner that does not readjust the priorities between creditors. That is even more important in this proceeding, where the pooling of funds and preference of creditors is the very misconduct being remedied.

17. In the words of the Manager's counsel, the Manager was appointed to:

Ensure that all interested parties are treated fairly and to establish and execute a fair process to deal with the Companies' assets...The Manager's mandate is to, among other things, carry out the management, preservation and disposition of the Companies' property in a transparent and accountable manner.<sup>2</sup>

18. The Manager devoted substantial resources in dealing with what were ultimately found to be meritless attacks on the Manager. The Cityview Lien Claimants and the Dupont Mortgagees were aware when they pursued their motions and appeal that the Manager's fee allocation methodology assigned higher values to properties that required more management and/or legal work on the part of the Manager and its counsel.

19. It was or should have been obvious to the Cityview Lien Claimants and the Dupont Mortgagees that fees incurred from an attempt to challenge the Manager would be allocated to their respective properties (and ultimately affect their recovery).

20. The Cityview Lien Claimants and the Dupont Mortgagees should not be indemnified for their own actions, at the expense of other stakeholders, including, but not limited to, the Applicants.

### **ORDER REQUESTED**

21. The Manager got it right the first time. The Applicants support the Second Methodology, which sees the properties and portfolio treated equitably.

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<sup>2</sup> Letter from Mark Dunn to Florence Leaseholds Limited et al dated November 22, 2013

22. The Applicants respectfully request that this Court approve the Second Methodology without the proposed variation to the fees relating to the Cityview Property and the Dupont Property.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 25<sup>th</sup> day of April, 2016.




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Shara N. Roy




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Court File No. CV13-10280-00CL

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PROCEEDING COMMENCED AT TORONTO

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