

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

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

and

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

Respondents

and

THOSE CORPORATIONS LISTED ON SCHEDULE B HERETO, TO BE
BOUND BY THE RESULT 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

**AMENDED NOTICE OF MOTION
(RETURNABLE ON A DATE TO BE DETERMINED)**

The Applicants will make a Motion to the Honourable Justice Newbould of the
Commercial List at 330 University Avenue, Toronto on a date to be determined by the Court.

PROPOSED METHOD OF HEARING: The Motion and Application are to be heard orally.

THE MOTION IS FOR:

1. The Applicants, DBDC Spadina Ltd. and those Corporations listed on Schedule A to the Notice of Application, make a Motion for:
 - (a) An order granting leave to issue and serve the Third Fresh as Amended Notice of Application (the “Notice of Application”);
 - (b) An order, if necessary, validating and/or dispensing with service on some or all of the responding or other parties;
 - (c) An order lifting the stay of proceedings referred to in the Order of Justice Newbould, dated November 5, 2013 to permit the Applicants to add the Schedule C Company Respondents (as defined in further detail below) as Respondents to the Application;
 - (d) An order lifting the stay of proceedings referred to in the Order of Justice Newbould, dated September 8, 2013, to permit the Applicants to add the Schedule C Company Respondents (as defined in further detail below) as Respondents to the Application;
 - (e) An order if necessary granting leave to add the Schedule C Company Respondents (as defined below) as Respondents to the Application;
 - (f) An order awarding the Applicants damages in the amount of \$72.1 million against the Respondents;

- (g) An order awarding the Applicants damages in the amount of \$22.6 million jointly and severally against the Schedule C Company Respondents (as defined below); and
- (h) In the alternative, an order awarding the Applicants damages against the following Schedule C Company Respondents in the following amounts:
 - (i) 1780355 Ontario Inc.: \$1,611,359;
 - (ii) 6195 Cedar Street Ltd.: \$556,135;
 - (iii) Atala Investments Ltd.: \$139,139;
 - (iv) Bible Hill Holdings Inc.: \$172,050;
 - (v) Cecil Lighthouse Ltd.: \$776,050;
 - (vi) The Old Apothecary Building: \$1,285,721; and
 - (vii) United Empire Lands Ltd.: \$337,600;
- (i) A declaration that the Applicants' damages, pursuant to paragraphs (f) and (g) above and the other Orders made by this Court against the Respondents, were caused by the fraud and/or misappropriation of the Respondents while acting in their capacities as fiduciaries, pursuant to s. 175(1)(d) and (e) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3;
- (j) The costs of this Motion on a substantial indemnity basis; and
- (k) Such further and other relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION AND APPLICATION ARE:

The Parties

- (a) The Applicants, DBDC Spadina Ltd. and those Corporations listed on Schedule A to the Notice of Application, are all corporations incorporated pursuant to the laws of Ontario. They are beneficially owned by Dr. Stanley Bernstein (“Dr. Bernstein”);
- (b) Norma Walton (“Ms. Walton”) is a lawyer and a member of the Law Society of Upper Canada. She was a co-founder, along with her husband, Ronauld Walton, of The Rose & Thistle Group Ltd. (“Rose & Thistle”) and President of its subsidiary, Rose & Thistle Properties. Ms. Walton was a principal of Walton Advocates, an in-house law firm and trade mark agent that provided litigation, corporate and real estate legal services to the Rose & Thistle group of companies. Ms. Walton is currently suspended from the practice of law;
- (c) Ronauld Walton (“Mr. Walton”) is a lawyer and a member of the Law Society of Upper Canada. He was a co-founder, along with Ms. Walton (collectively, the “Waltons”), of Rose & Thistle and President of its subsidiary, Rose & Thistle Properties. Mr. Walton was a principal of Walton Advocates, an in-house law firm and trade mark agent that provided litigation, corporate and real estate legal services to the Rose & Thistle group of companies. Mr. Walton is currently suspended from the practice of law;
- (d) Rose & Thistle is a holding company incorporated pursuant to the laws of Ontario. It and its various subsidiaries were engaged *inter alia* in the development,

management and construction of real estate. It is owned, to the knowledge of the Applicants, by the Waltons;

- (e) Eglinton Castle Inc. is a corporation incorporated pursuant to the laws of Ontario. It is owned, to the knowledge of the Applicants, by Waltons (collectively, the Waltons, The Rose & Thistle Group Ltd. and Eglinton Castle Inc. are referred to as the “Respondents”);
- (f) The Corporations listed on Schedule B to the Notice of Application are all corporations incorporated pursuant to the laws of Ontario (collectively, the “Schedule B Companies”). They were each intended to be owned 50% by Dr. Bernstein (or one of the Corporations listed on Schedule A to the Notice of Application) and 50% by the Waltons (or Eglinton Castle Inc.) as described below;
- (g) The Schedule B Companies were incorporated for the purpose of purchasing and/or holding commercial real estate properties jointly between Dr. Bernstein and the Waltons (collectively, the “Schedule B Properties”);
- (h) The properties listed at Schedule C to the Notice of Application are properties that are currently or were previously owned directly or indirectly by the Waltons and, in some cases, other investors (collectively, the “Schedule C Properties”);
- (i) The Respondent companies listed at Schedule C to the Notice of Application (collectively, the “Schedule C Company Respondents”) are a group of companies controlled and/or owned by the Waltons. The Schedule C Company Respondents were incorporated to hold the Schedule C Properties;

- (j) The Schedule C Investors are shareholders who claim to have invested with the Waltons by purchasing shares in various Schedule C Companies;
- (k) Christine and Michael DeJong and their related entities (collectively, the “DeJongs”) are Schedule C Investors;
- (l) The DeJongs have brought an application with respect to, *inter alia*, their entitlement to the proceeds of sale of four Schedule C Properties: 324 Prince Edward Drive; 777 St. Clarens Avenue; 260 Emerson Avenue and 3270 American Drive;

The Applicants’ Investments

- (m) Beginning in 2008, Dr. Bernstein acted as the lender/mortgagee of several commercial real estate properties owned by the Respondents, either through their company Rose & Thistle or through other corporations of which the Respondents are the direct or indirect beneficial owners;
- (n) Following several financings, Dr. Bernstein and the Waltons agreed to invest jointly in various commercial real estate projects;
- (o) From 2010 to 2013, Dr. Bernstein through his corporations advanced approximately \$111 million into 31 projects, structured as equity of \$81.6 million and mortgages and loans of \$29.5 million;

- (p) In connection with the equity contributions, Dr. Bernstein and the Waltons entered into separate agreements for each project (collectively, the “Agreements”), each of which provided as follows:
- (i) A new Schedule B Company would be incorporated for each project;
 - (ii) Dr. Bernstein (through a company incorporated for this purpose) would hold 50% of the shares of the Schedule B Company;
 - (iii) The Waltons (either directly or through a company incorporated for this purpose) would hold the other 50% of the shares of the Schedule B Company;
 - (iv) Each of Dr. Bernstein and The Waltons would contribute an equal amount of equity to the purchase and development of the Schedule B Property (the “Project”);
 - (v) The Waltons would manage, supervise and complete the Project for an additional fee;
 - (vi) The Waltons were to be responsible for the finances, bookkeeping, accounting and filing of tax returns, among other things, of the Schedule B Company;
 - (vii) Each Schedule B Company was to have a separate bank account;
 - (viii) Dr. Bernstein would not be required to play an active role in completing the Project, but his approval would be required for:

- (1) Any decisions concerning the selling or refinancing of the Schedule B Property;
 - (2) Any decisions concerning the increase in the total amount of equity required to complete Project; and
 - (3) Any cheque or transfer over \$50,000;
- (ix) The Waltons would provide Dr. Bernstein with:
- (1) Ongoing reports on at least a monthly basis detailing all items related to the Schedule B Property;
 - (2) Copies of invoices for work completed on the Project monthly;
 - (3) Bank statements monthly; and
 - (4) Listing of all cheques monthly;
- (x) Dr. Bernstein and Ms. Walton were to be the sole directors of the Schedule B Company;
- (q) Each agreement provided that the Schedule B Company would only be used to purchase, complete and refinance the Schedule B Property or such other matters solely relating to that particular Project and Schedule B Property;

These Proceedings

- (r) A review in June 2013 of Dr. Bernstein's equity investments in the Projects revealed that:

- (i) The Waltons were not making their portion of the equity investments into the Properties;
 - (ii) The Waltons appeared to be taking on third party investors in the Projects;
 - (iii) The Waltons were engaged in significant related party transactions in respect of the Projects;
 - (iv) Dr. Bernstein's approval was not being sought for any the matters set out in subparagraph (p)(viii) above; and
 - (v) Dr. Bernstein was not receiving any of the required reporting, as set out in paragraph subparagraph (p)(ix) above;
- (s) On September 20, 2013, Dr. Bernstein appointed Schonfeld, Inc. to gather information related to the Schedule B Properties and the Schedule B Companies. However, even then the Waltons did not grant Schonfeld complete access to the documents related to 22 of 31 projects;
- (t) In light of this conduct, the Applicants commenced an application on October 1, 2013, for various relief, including the appointment of an Inspector over the Schedule B Companies;
- (u) On October 4, 2013, Justice Newbould found that the Waltons had engaged in conduct that was oppressive and unfairly prejudicial to the Applicants' interests. Justice Newbould appointed Schonfeld Inc. as Inspector over the Schedule B Companies;

- (v) The Order empowered Schonfeld to conduct a thorough investigation of the Schedule B Companies. The Order also required that Ms. Walton fully cooperate with the Inspector;

- (w) Since this proceeding was commenced and the Inspector/Manager appointed, the Respondents have:
 - (i) Failed to cooperate, including to provide the information and documentation requested by the Inspector in a timely manner;

 - (ii) Refused to provide an accounting, as requested by the Order of Justice Newbould, dated October 25, 2013; and

 - (iii) Organized their affairs to defeat the claims of Dr. Bernstein in favour of themselves and various so-called “preferred-shareholders” and other creditors, most of whom have no genuine claim to the status that they now assert. Many are related to the Respondents and their business;

- (x) On July 16-18, 2014, the Honourable Justice D.M. Brown heard a motion brought by the Applicants for various relief, including claims for damages against the Respondents, for constructive trusts over various Schedule C Properties and other relief;

- (y) By Order dated August 12, 2014, Justice Brown ordered:

- (i) That the Applicants be granted leave to issue and serve a Fresh as Amended Notice of Application, in the form attached to the Applicants' Consolidated Notice of Motion, dated June 13, 2014;
- (ii) Constructive trusts with respect to eight of the Schedule C Properties in the total amount of \$8.2 million;
- (iii) A tracing of the funds contributed by the Applicants to the Schedule B Companies;
- (iv) Cancellation of the Respondents' shares in the Schedule B Companies in which they had not contributed shareholder equity;
- (v) An expansion of the manager's mandate to include the Schedule C Properties and the Schedule C Companies;
- (vi) A number of ancillary heads of relief, including the appointment of a Receiver over the personal affairs of the Waltons;
- (vii) Damages in the amount of \$1,518,750 in respect of the mortgages that the Respondents discharged from title of the property at 232 Galloway Road;
and
- (viii) Costs in the amount of \$472,639.51;
- (z) In his reasons released on August 12, 2014, Justice Brown was not prepared at the time to grant the Applicants' relief with respect to the \$78 million damages claim

because he was not satisfied that adequate argument was placed before the Court on the issue;

- (aa) Justice Brown also found in his reasons that the Applicants had demonstrated a strong *prima facie* case of unjust enrichment, up to a possible claim of \$22.6 million, against the Waltons in respect of their diversion of the Applicants' funds into the Schedule C Properties and/or Companies;
- (bb) The Manager currently holds proceeds from the sale of properties owned by certain Schedule B Companies and proceeds from the sale of properties owned by certain Schedule C Companies;
- (cc) To date, the Applicants have recovered approximately \$9.5 million from the manager of the \$81.6 million they invested. Other Schedule B Properties have been sold at a loss, and without excess funds for distribution to the Applicants. Many others have been determined not to be worth the Manager's costs to maintain and sell and have been taken over by the mortgagees or otherwise discharged;

Unjust Enrichment

- (dd) Monies forwarded by the Applicants have been traced from Schedule B Companies to the Waltons' home and various companies, including the Schedule C Company Respondents and/or Schedule C Properties;
- (ee) The Waltons transferred funds from the Schedule B Companies through Rose & Thistle to the Schedule C Company Respondents and/or Schedule C Properties;

- (ff) Various Walton owned companies, including the Schedule C Company Respondents and/or Schedule C Properties were net beneficiaries of approximately \$22.6 million of the Applicants' funds;
- (gg) The Waltons diverted funds from the Schedule B Companies to fund the purchase, refinancing and/or other costs and/or obligations of various Walton owned companies, including the Schedule C Company Respondents and/or the Schedule C Properties;
- (hh) Various Walton owned companies, including the Schedule C Company Respondents and/or the Schedule C Properties were net beneficiaries (to the detriment of the Applicants) of the Waltons' fraud;
- (ii) Use of funds outside of the property for which they were intended was in breach of the various Agreements between the Applicants and the Waltons;
- (jj) The Waltons concealed their actions from the Applicants. The funds were transferred without the Applicants' knowledge or consent;
- (kk) The Respondents' misappropriation of those funds was fraudulent, in breach of the Agreements, and in breach of the Respondents' fiduciary duties;
- (ll) As a result of the transfers, the Respondents and various Walton owned companies, including the Schedule C Company Respondents were enriched, and the Applicants have been correspondingly deprived;

- (mm) There was no juristic reason for the enrichment of the Respondents and various Walton owned companies, including the Schedule C Company Respondents and the corresponding deprivation of the Applicants;
- (nn) Various Walton owned companies, including the Schedule C Company Respondents were knowing recipients of funds obtained as a result of a breach of fiduciary duty committed by the Respondents against the Applicants and Dr. Bernstein;
- (oo) The following Schedule C Company Respondents were unjustly enriched in the manner described in detail above by the following amounts:
- (i) 1780355 Ontario Inc.: \$1,611,359;
 - (ii) 6195 Cedar Street Ltd.: \$556,135;
 - (iii) Atala Investments Ltd.: \$139,139;
 - (iv) Bible Hill Holdings Inc.: \$172,050;
 - (v) Cecil Lighthouse Ltd.: \$776,050;
 - (vi) The Old Apothecary Building: \$1,285,721; and
 - (vii) United Empire Lands Ltd.: \$337,600;

Knowing Assistance

- (pp) The Schedule C Company Respondents are liable to the Applicants for knowing assistance;

- (qq) Ms. Walton was at all relevant times a director and officer or a de-facto director and officer of all the Schedule C Company Respondents;
- (rr) Mr. Walton was at all relevant times a director and officer of the majority of the Schedule C Company Respondents;
- (ss) In any event, none of the Schedule C Company Respondents were at arms-length from the Waltons;
- (tt) The Waltons were specifically tasked with responsibility for the day to day management, supervision and budgeting of the Respondent Schedule C Companies' projects;
- (uu) The Schedule C Company Respondents had actual knowledge of, or were reckless or wilfully blind to, the Waltons' breach of their fiduciary duties and breach of trust owed to the Applicants;
- (vv) The Schedule C Company Respondents jointly assisted the Waltons' in breaching their fiduciary duties and duties of trust owed to the Applicants, thereby being known parties to these breaches of duty;
- (ww) The Schedule C Company Respondents had actual knowledge of and jointly assisted in the Waltons' fraud of the Applicants and Dr. Bernstein;
- (xx) The Schedule C Company Respondents knowingly assisted in a dishonest and fraudulent design on the part of the Waltons;

- (yy) The Schedule C Company Respondents received property from the Applicants as a result of the Waltons' breach of their fiduciary duties owed to the Applicants;
- (zz) The Schedule C Company Respondents each received this property from the Applicants having knowledge that the property was transferred in breach of a fiduciary duty;

Breach of Fiduciary Duty

- (aaa) Ms. Walton was at all times a director and officer of the Schedule B Companies;
- (bbb) Mr. Walton was at all relevant times a director and officer of the majority of the Schedule B Companies;
- (ccc) Ms. Walton was responsible for the day-to-day management, supervision and budgeting of the Projects;
- (ddd) Ms. Walton handled the Applicants' equity contributions and was responsible for ensuring that the Applicants' funds were used for the proper purposes;
- (eee) The Waltons owed fiduciary duties to the Schedule B Companies, the Applicants, and Dr. Bernstein;
- (fff) These obligations required Ms. Walton (among other things) to:
 - (i) Act in the best interests of the Schedule B Companies, the Applicants and Dr. Bernstein;
 - (ii) Avoid conflicts of interest and duty;

- (iii) Use her energy, ability and imagination in the best interests of the Applicants and Dr. Bernstein; and
- (iv) Not conceal any information from the Applicants and Dr. Bernstein;
- (ggg) As a result of the Waltons' conduct described herein, the Waltons breached the fiduciary duties they owed to the Schedule B Companies, the Applicants and Dr. Bernstein;

Fraudulent Misappropriation

- (hhh) The Waltons made multiple false representations of fact to Dr. Bernstein. Specifically:
 - (i) The Waltons represented to Dr. Bernstein that they intended that his funds would only be used in respect of the real property owned by the Schedule B Company, and that they would in fact be so used;
 - (ii) The Agreements, drafted by the Waltons, required and represented that any funds that were advanced by the parties be deposited into separate accounts opened for each Schedule B Company;
 - (iii) Ms. Walton repeatedly represented in various emails that the funds that were advanced for a particular Schedule B Company would be used in connection with that Schedule B Company;
 - (iv) The Waltons did not intend to, and did not in fact, use the funds advanced by the Applicants in the manner in which they represented that they would;

- (v) Indeed, in the majority of cases, as soon as Dr. Bernstein's funds were advanced to a Schedule B Company, the Waltons transferred the funds almost immediately to the Rose & Thistle account or other company account;
- (vi) The Waltons also represented that they would provide 50% of the equity to the Schedule B Companies, as required under the Agreements;
- (vii) The Waltons made few equity contributions to the Schedule B Companies;
- (viii) The contributions that the Waltons did make were with the Applicants' funds and, it appears, to a much smaller extent the Schedule C Investor funds;
- (iii) The Waltons made the false representations with the intent that Dr. Bernstein and the Applicants would rely and act upon the false representations;
- (jjj) Dr. Bernstein and the Applicants relied on the Respondents' representations in the Agreements and in emails and representations that the Respondents made orally in making their equity contributions to the Schedule B Companies;
- (kkk) Dr. Bernstein and the Applicants relied on the Waltons' false representations to their detriment;
- (lll) The Waltons made the false representations knowingly, or without believing them to be true, or recklessly without care to their truth or falsity; and
- (mmm) The Waltons never intended to abide by their representations;

- (nnn) As a result of the Waltons' misrepresentations, the Applicants have suffered damages in the amount of \$72.1 million in respect of Dr. Bernstein's equity investments in the Schedule B Companies;
- (ooo) Rules 3 and 56 of the *Rules of Civil Procedure*, R.R.O., 1990 Reg 194 and
- (ppp) Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion and Return of Application:

- (a) Motion Record of the Applicants, dated June 26, 2014;
- (b) Reply Motion Record of the Applicants, dated July 3, 2014
- (c) Motion Record of the Manager, Schonfeld Inc., dated June 26, 2014;
- (d) Supplementary Motion Record of the Manager, Schonfeld Inc., dated June 26, 2014;
- (e) Brief of Relevant Inspector/Manager Reports;
- (f) Motion Record of the Respondents, dated June 26, 2014;
- (g) Reply Motion Record of the Respondents, dated July 3, 2014;
- (h) Cross-Motion Record of Christine DeJong, returnable July 16, 2014;
- (i) Motion Record of the Applicants, dated August 4, 2015;
- (j) Supplemental Motion Record of the Applicants, dated October 23, 2015; and

- (k) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

November 26, 2015

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TO: **SERVICE LIST**

DBDC SPADINA LTD., and those corporations listed on Schedule A -and- NORMA WALTON et al. Court File No. CV13-10280-00CL
hereto Respondents
Applicants

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

**NOTICE OF MOTION
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