

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

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

Applicants

and

NORMA WALTON, RONALD WALTON, THE ROSE & THISTLE GROUP
LTD. and EGLINTON CASTLE INC.

Respondents

and

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

**FACTUM OF THE RESPONDENT APPLICANTS TO THE MOTION OF
NORMA WALTON AND RONALD WALTON
RETURNABLE JANUARY 16, 2014**

January 15, 2014

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FACTUM OF THE RESPONDENT APPLICANTS

PART I - INTRODUCTION

1. This motion should be dismissed;

- (a) The Waltons entered into a mortgage commitment in breach of paragraphs 3(a) and (b) of the Order of the Honourable Justice Newbould dated December 18, 2013.

They agreed to the terms of a mortgage commitment to refinance a second mortgage at 44 Park Lane Circle, Toronto without authority of the Court;

- (b) In any event:

- (i) All of the equity necessary to purchase the home was money improperly taken from commercial investments made by the Applicants. It is their equity which the Waltons now seek to harness;
- (ii) The mortgage application is replete with misrepresentations;
- (iii) Most glaringly, the Waltons say that they each have annual income of \$250,000 yet propose to support a mortgages in which the annual interest is well in excess of their combined income even before taxes;
- (iv) The mortgage commitment provides that the mortgage will be in default if the Mortgagor commits an act of bankruptcy or insolvency, proceedings are taken with respect to a compromise or arrangement with creditors, the Mortgagor's interest in the property has taken possession of or if distress or similar process is levied against the property. There is here an inevitable default;
- (v) The cost of the transaction is excessive;
- (vi) In effect the Waltons are buying, with the Applicants' money, some breathing room. The Waltons propose to pay off \$2.5 million of secure mortgaging with the Applicants money and to benefit themselves, and pay legal fees and other obligations, in the amount of \$4.2 million dollars;
- (vii) The Applicants make no provision for, and have not paid the following:
 - (1) Costs owing to the Applicants;

(2) The fees and disbursements of the Inspector notwithstanding a Court Order obliging them to pay those amounts;

(3) The \$268,000 in renovation costs paid for from the Tisdale Mews equity of the Applicants.

(viii) In effect the Waltons want to use the Applicants money to finance their home, lifestyle and legal fees;

(c) The motion should be dismissed and the cross motion granted.

2. Small wonder that the Waltons refused to perform the accounting ordered by the Court on October 24, 2013. To have done so would have revealed what is now obvious – that they have no interest in 44 Park Lane Circle as the funds utilized to purchase it were those of the Applicants improperly taken.

44 Park Lane Circle was Purchased with the Applicants' Money

3. Dr. Bernstein's contributions to Schedule "B" Corporation projects was diverted by Ms. Walton to fund the purchase price for 44 Park Lane Circle on June 25, 2012:

(a) Dr. Bernstein contributed \$675,000 in respect of 1450 Don Mills, which was immediately transferred to the Rose & Thistle Group account and then to Ms. Walton's personal account; and

(b) Dr. Bernstein contributed \$1,662,850 in respect of 885 and 887 Queen Street W., which was immediately transferred to the Rose & Thistle Group account and then to Ms. Walton's personal account.

Reference Affidavit of Jim Reitan sworn January 13, 2014, Applicants' Cross-Motion Record, Tab 2, paras 14-19

4. Ms. Walton states in her most recent affidavit that she had the right to purported increased value in 885 and 887 Queen Street W. from the time the Schedule "B" Companies contracted to buy the property to the purchase date, purported to be one to two years.

Reference Affidavit of Norma Walton sworn December 17, 2013, paras 24-25

5. Ms. Walton represented to Dr. Bernstein at the time of his investment in 885 and 887 Queen Street W., that the purchase price of the property was \$6,645,000 and that development monies of \$2,215,000 had been invested to date.

Reference Affidavit of Jim Reitan sworn January 13, 2014, Applicants' Cross-Motion Record, Tab 2A, Exhibit A

6. The represented purchase price of \$6,645,000 is approximately \$2 million higher than the purchase price Ms. Walton swears to in her most recent affidavit (there stated to be \$4.5 million) and approximately \$1 million higher than actual purchase price reflected in the parcel register for the properties (\$5.45 million).

Reference Affidavit of Norma Walton sworn January 10, 2014, para 4(a) and Affidavit of Norma Walton sworn December 17, 2013, para 24

Affidavit of Jim Reitan sworn January 13, 2014, Applicants' Cross-Motion Record, Tab 2, paras 5-9 Exhibits A and C

7. Dr. Bernstein never agreed that Ms. Walton could withdraw "equity" from the projects at 885 and 887 Queen Street W. She represented to him that she had made cash contributions to the project of \$2,215,000, which it appears now may simply represent her assessment of some notional

increase in value of the property. She also represented that \$2.9 million was needed to complete the project, of which he contributed \$2.32 million.

Reference Affidavit of Norma Walton sworn December 17, 2013, paras 24 and 25

Affidavit of Jim Reitan sworn January 13, 2014, Applicants' Cross-Motion Record, Tab 2, paras 5-9 Exhibits A and C

8. Immediately following Dr. Bernstein's contribution to Red Door Developments Inc. and Red Door Lands Ltd. in mid-June 2012, the owners of 885 and 887 Queen Street W., Ms. Walton transferred the total amount to the Rose & Thistle's account in a series of transactions, including the transfer detailed at paragraph 3 above. That amount, along with the amount of \$615,000 intended for 1450 Don Mills by the Applicants was transferred to Norma and Ronauld Walton's personal account at Meridian Financial, for a total of \$2,337,850.

Reference Affidavit of Jim Reitan sworn January 13, 2014, Applicants' Cross-Motion Record, Tab 2, paras 5-9

9. On June 25, 2013, Norma Walton and Ronauld Walton provided their solicitor, Todd Holmes, with a certified cheque from Meridian Financial for the amount of \$2,623,674.40, representing the amount to close the purchase of 44 Park Lane Circle.

Reference Applicants' compendium, Exhibit 2 to the examination of Todd Holmes held on January 15, 2014 - Devry, Smith, Frank LLP closing file, page 50, Tab 3 and Exhibit 3 to the examination of Todd Holmes held on January 15, 2014 - Certified Cheque from Norma Walton to Devry, Smith, Frank LLP dated June 25, 2012, Tab 6

10. The certified cheque appears to bear the main transit account number of Meridian Financial, although it was clearly drawn on another account belonging to Ms. Walton.

11. The Applicants have requested a copy of the original cheque, prior to the overlay of the main transit account number, as well as a copy of the bank statement for account number 7870017 (the Walton's personal account) from the Respondents. As at the time of this factum, it had not been provided.

12. The overwhelming evidence shows that the Applicants' monies were used to purchase 44 Park Lane Circle.

The Benefits to the Applicants

13. As can be seen from the chart below, the effect of the transaction proposed by the Waltons is to:

- (a) Use the Applicants funds to pay the obligation to the Applicants at 65 Front Street, Toronto;
- (b) Pay \$187,231 in fees, costs and disbursements on placing the mortgage;
- (c) Support four months of pre-paid interest;
- (d) Pay off the current obligation to Mr. Handleman;
- (e) Satisfy an HST lien unrelated to the Applicants;
- (f) Transfer a mere \$390,500 to 65 Front Street and pay \$170,000 to Fasken Martineau.

	44 Park Lane	65 Front	Total
New Mortgage	\$ 4,100,000	\$ 2,600,000	\$ 6,700,000
Benefits Waltons			
Legal fees, costs, processing and disbursements on placing the mortgage	\$ (187,231)	\$ (55,000)	\$ (242,231)
Prepaid interest (4 months)	\$ (164,000)		\$ (164,000)
Current mortgage payoff	\$ (3,000,000)		\$ (3,000,000)
Interest on current mortgage	\$ (15,000)	\$ (34,375)	\$ (49,375)
HST Lien & interest	\$ (174,391)	\$ (222,122)	\$ (396,513)
Transfer	\$ (390,500)	\$ 390,500	\$ -
Fasken Martineau	\$ (168,878)		\$ (168,878)
Property Taxes		\$ (179,000)	\$ (179,000)
Total Benefit to Waltons	\$ (4,100,000)	\$ (99,997)	\$ (4,199,997)
Benefits Dr Bernstein			
Payoff of Dr Bernstein mortgage	\$ -	\$ (2,500,000)	\$ (2,500,000)
	\$ -	\$ 2,500,000	\$ 2,500,000

14. The costs of the mortgage is extraordinary given the amount being borrowed.
- (a) The interest rate is 12% compounded monthly;
 - (b) There is a one-time processing fee of \$164,000;
 - (c) There are monthly payments of \$41,000, or \$492,000 per annum. This, when added to the monthly payments of \$29,000 on the first mortgage comes to \$840,000, \$340,000 more than their reported combined income of the Waltons as disclosed to the proposed new second mortgagee;
 - (d) The mortgage is doomed to failure given the provisions of the commitment which in paragraph 17 provides for a default in the event that:
 - (i) The mortgagor commits an act of bankruptcy, becomes insolvent or makes an assignment for the benefit of its creditors;

- (ii) If any proceeding is taken with respect to a compromise or arrangement with creditors, in respect of any portion of the Property, or to have the Mortgagor declared bankrupt, or if an encumbrance [sic] takes possession of the mortgagors' interest in the Property or any part thereof; or
- (iii) If a distress, execution or similar process be levied or enforced against the Mortgagor's interest in the Property or any part thereof.

Reference Mortgage Commitment, Walton Motion Record, Tab A, pages 10 and 14.

15. By their own admission, the Waltons intend to incur debts and servicing costs that would render them insolvent from the moment that the new second mortgage was placed. The mortgage is doomed to default.

Non-compliance with the October 24, 2013 Order of this Honourable Court

16. By its Order of October 24, 2013 this Honourable Court ordered that there be no dealings with respect to 44 Park Lane Circle by the Waltons without further of the Court.

Reference October 24, 2013 Order of the Honourable Justice Newbould, paragraphs 3(a) and (b).

17. Notwithstanding this, the Waltons have executed a commitment for new second mortgage financing on 44 Park Lane Circle.

18. They are in breach of the October 24, 2013 Order, the next in a long litany of ignoring Orders of this Honourable Court.

19. Just last week another incident occurred since the endorsement of the Honourable Newbould made on January 7, 2014.

Misrepresentations in the Mortgage Application

20. The mortgage application is riddled with misrepresentations:

- (a) Time at residence – 3 years but the property was purchased in June of 2012;
- (b) Annual income said to be \$250,000 to each of the two Waltons;
- (c) Expenses in operating 44 Park Lane Circle \$3,600 per year including \$100 per month to heat a 12,500 square foot home;
- (d) Mortgage entered into on first mortgage said to be 4.1% when it is 5.99%. Mortgage interest rate on the mortgage to be replaced is said to be 9.5% when it is 10%;
- (e) Taxes said to be \$42,000 when they are \$54,774.60.

Constructive Trust as at June 2012

21. The Applicants' monies were used to purchase the property at 44 Park Lane Circle. The Applicants are entitled to a constructive or resulting trust from the date of purchase, being June 26, 2012, and any increase in value of the property since that time.

PART II - THE LAW

22. A constructive trust may be ordered as a remedial device where there has been a breach of fiduciary duty (including between parties to a joint venture), unjust enrichment or fraud, among other things, where funds belonging to the claimant have been converted. A claimant is entitled to call on the doctrine of equitable tracing to identify the substitute for the original asset, other than into the hands of a *bona fide* third party purchaser for value.

Reference: The Law of Restitution, Looseleaf, Peter Maddaugh and John McCamus, 5.100, page 5-3

Kerr v. Baranow, [2011] S.C.J. No. 10, paras 50-52

Bikur Cholim Jewish Volunteer Services v. Langston, 2008 ONCA 321, paras 21-23

Central Capital Corp. v. Clausi (1994), 13 O.R. (3d) 335 (Gen. Div.), aff'd (1994), 21 O.R. (3d) 95 (C.A.), paras 12-13

Nuforest Watson Bancorp Ltd. v. Prenor Trust Co. of Canada (1994), 21 O.R.(3d) 328 (Gen. Div.), paras 31-46

23. Where a claimant can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour:

“[T]he plaintiff must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust (*Peter*, at pp. 988, 997 and 999; *Pettkus* at p. 852; *Sorochan*, at pp. 47-50; *Rathwell*, at p. 454). A minor or indirect contribution will not suffice (*Peter*, at p. 997). As Dickson C.J. put it in *Sorochan*, the primary focus is on whether the contributions have a "clear proprietary relationship" (p. 50, citing Professor McLeod's annotation of *Herman v. Smith* (1984), 42 R.F.L. (2d) 154, at p. 156). Indirect contributions of money and direct contributions of labour may suffice, provided that a connection is established between the plaintiff's deprivation and the acquisition, preservation, maintenance, or improvement of the property (*Sorochan*, at p. 50; *Pettkus*, at p. 852).”

Reference: *Kerr v. Baranow*, [2011] S.C.J. No. 10, paras 50-51

24. The doctrine of equitable tracing may be called upon to demonstrate the direct and indirect contributions of money and other contributions.

Reference: The Law of Restitution, Looseleaf, Peter Maddaugh and John McCamus, 5.100, page 5-3

25. Where monies can be traced in the purchase and/or improvement of a property, a constructive trust over the home, and any attendant increase in value, may be the subject of a constructive trust in favour of the claimant.

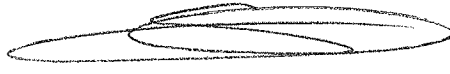
Reference: *Bikur Cholim Jewish Volunteer Services v. Langston*, 2008 ONCA 321, paras 21-23

PART III - ORDER REQUESTED


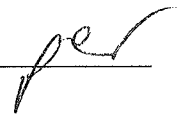
26. Applicants request an order:

- (a) dismissing the Respondents' motion to place another mortgage on 44 Park Lane Circle;
- (b) tracing the proceeds from the Applicants intended for 1450 Don Mills Road and 885 and 887 Queen Street West into the property at 44 Park Lane Circle;
- (c) declaring a constructive or resulting trust in favour of the Applicants in respect of 44 Park Lane Circle;;
- (d) providing that the Applicants may seize and sell the property at 44 Park Lane Circle, subject to the enforceable rights of registered charges and liens on the property;
- (e) the costs of this cross-motion; and
- (f) such further and other relief as to this Honourable Court may seem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of January, 2014.



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SCHEDULE "A"

LIST OF AUTHORITIES

1. The Law of Restitution, Looseleaf, Peter Maddaugh and John McCamus
2. *Kerr v. Baranow*, [2011] S.C.J. No. 10
3. *Bikur Cholim Jewish Volunteer Services v. Langston*, 2008 ONCA 321
4. *Central Capital Corp. v. Clausi* (1994), 13 O.R. (3d) 335 (Gen. Div.), aff'd (1994), 21 O.R. (3d) 95 (C.A.)
5. *Nuforest Watson Bancorp Ltd. v. Prenor Trust Co. of Canada* (1994), 21 O.R.(3d) 328 (Gen. Div.)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

DBDC SPADINA LTD., and those corporations listed on Schedule A -and- NORMA WALTON et al.
hereto
Applicants

Respondents

Court File No. CV-13-10280-00CL

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PROCEEDING COMMENCED AT TORONTO

FACTUM

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