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

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.

Respondents

- and -

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

MOTION RECORD OF THE MANAGER, SCHONFELD INC.

(Motion for approval and vesting order with respect to 346 Jarvis, Unit B)

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TO: **SERVICE LIST**

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

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and EGLINTON CASTLE INC.

Respondents

- and -

THOSE CORPORATIONS LISTED IN SCHEDULE B, TO BE
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SERVICE LIST
(Updated March 17, 2015)

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I N D E X

TAB NO.	
1.	Notice of Motion dated April 27, 2015
2.	Thirtieth Report of the Manager, Schonfeld Inc. dated April 23, 2015
A.	Appendix “1” – Endorsement of Justice Newbould dated November 5, 2013
B.	Appendix “2” – Order of Justice Newbould dated November 5, 2013
C.	Appendix “3” – Reasons of Justice Brown dated August 12, 2014
D.	Appendix “4” – Judgement and Order of Justice Brown dated August 12, 2014
E.	Appendix “5” – Certificate of pending litigation dated February 6, 2015
F.	Appendix “6” – Statement of Claim dated January 28, 2014

1

Court File No.: CV-13-1 0280-00CL

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.

Respondents

- and -

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

NOTICE OF MOTION
(Motion for approval and vesting order with respect to 346 Jarvis St., Unit B)

Schonfeld Inc., in its capacity as manager (the "**Manager**") of (i) certain companies listed in Schedule "B" to the Order of Justice Newbould dated November 5, 2013 (the "**Schedule B Companies**"), together with the real estate properties owned by the Companies (the **Schedule B Properties**"), as amended by Order of Justice Newbould dated January 16, 2014, and (ii) the properties listed at Schedule "C" to the Order of Justice Brown dated August 12, 2014 (the "**Schedule C Properties**", together with the Schedule B Properties, the "**Properties**") will make a motion to a judge presiding on the Commercial List on April 28, 2015 at 9:30 a.m. at 330 University Avenue, Toronto.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. an Order:

   (a) approving the sale transaction (the **"Transaction"**) contemplated by the Agreement of Purchase and Sale between the Manager and Lee Weiss and Andrew Maurizio Fata (collectively, the **"Purchasers"**) dated March 30, 2015 and accepted March 31, 2015, as extended by email dated April 8, 2015, and as amended by waiver dated April 13, 2015 (collectively, the **"Jarvis Unit B Agreement"**), in respect of the Property known municipally as 346 Jarvis Street, Unit B, Toronto, Ontario (the **"Jarvis Unit B Property"**).

   (b) permitting the confidential appendices (the "**Confidential Appendices**") to the Thirtieth Report of the Manager (the "**Thirtieth Report**") to be filed under seal without being served on the Service List.

THE GROUNDS FOR THE MOTION ARE:

I. Background

1. The Schedule B Companies are a group of real estate development corporations incorporated as part of a series of joint ventures between Dr. Stanley Bernstein and companies that he controls (the "**Bernstein Group**") and Norma and Ronauld Walton and entities that they control (the "**Walton Group**"). Most of the Schedule B Companies were incorporated to purchase and develop a particular Schedule B Property.

2. In the summer and fall of 2013, the relationship between the Walton Group and the Bernstein Group broke down amid allegations that the Walton Group had, among other things, placed mortgages on jointly-held properties without the Bernstein Group's consent and failed to provide reporting required by the agreements that govern the joint venture.

3. Pursuant to the Order of Justice Newbould dated November 5, 2013 (the "**November 5 Order**"), the Manager was appointed to provide independent management of the Schedule B Companies and the Schedule B Properties for the benefit of all stakeholders.

4. The Manager's mandate was further expanded to include certain other real estate properties owned by the Walton Group, being the Schedule C Properties, pursuant to the Reasons of Justice Brown dated August 12, 2014, and the Judgment and Order of Justice Brown dated August 12, 2014.

II. The Transaction

A. The Interested Parties

5. The Jarvis Unit B Property is one of the Schedule "C" Properties owned by the Waltons.

6. A mortgage in the amount of $592,000 (the **"Mortgage"**) in favour of The Bank of Nova Scotia (the **"Mortgagee"**) is registered on title to the Jarvis Unit B Property. A Notice of Assignment of Rents General is also registered on title to the Jarvis Unit B Property in favour of the Mortgagee (as of November 14, 2011).

7. 781526 Ontario Inc. (**"781"**) has commenced proceedings against the Waltons seeking a declaration that 781 owns a 50% beneficial interest title in the Jarvis Unit B Property, among other relief. 781 obtained a registered Certificate of Pending Litigation in the Jarvis Unit B Property.

8. The Manager has asked its counsel, Goodmans LLP ("Goodmans"), to conduct a security review of the Mortgage and has been advised that the Mortgage is properly registered. However, the Manager recently learned of potential *Planning Act* issues that may affect the validity of the mortgage registered on 346 Jarvis, as well as the validity of mortgages registered against other properties at 346 Jarvis. The Manager has instructed Goodmans to conduct a further review of the *Planning Act* issues and their effect on, among other things, the validity of the Mortgage.

9. In the circumstances, it is unlikely that issues relating to the validity of the Mortgage will be definitively resolved before the scheduled closing date of April 30, 2015. Accordingly, the Manager respectfully recommends that the Transaction be approved and completed and that the Manager hold the proceeds in trust pending further Order of the Court following resolution of any issues relating to the validity of the Mortgage.

B. The Marketing Process

11. The Manager retained Chestnut Park Real Estate Limited (**"Chestnut Park"**) to market the Jarvis Unit B Property, along with other Units at 346 Jarvis Street.

12. The marketing process for the Jarvis Unit B Property initially commenced in July 2014, when qualified purchasers were introduced through showings of other units listed on MLS.

13. Jarvis Unit B Property was first listed by Chestnut Park on MLS on March 10, 2015. MLS Listings were advertised on www.Realtor.ca. Listings were also advertised on www.ChestnutPark.com. In addition to these advertisements, Chestnut Park sent mass emails to its client database and featured the property on the website at www.346JarvisStreet.info. Sixteen showings were booked to view the Jarvis Unit B Property.

14. On March 30, 2015, as a result of the marketing program, the Jarvis Unit B Property received an offer. On March 31, 2015, based on the sold data on the other units, the buyer accepted the offer and was offered 10 days due diligence. The due diligence date was thereafter extended until April 13, 2015. The due diligence condition was waived by the buyer's lawyer on April 13, 2015. After negotiations between the parties, the Manager and the Purchaser firmed up their agreement on April 13, 2015.

C. Timing of the Transaction

15. The Transaction is scheduled to close on April 30, 2015.

D. Stakeholder Approval

16. The receiver of the Waltons in their personal capacity, Ira Smith Inc., the Applicants, 781, and the Mortgagee have all been advised of the Transaction. The Manager is not aware of any opposition to the Transaction.

E. Proposed Distribution of Sale Proceeds

17. The Manager recommends that sale proceeds, net of closing costs and payment of the Mortgage, be held in trust by the Manager or its counsel pending further Order of the Court on notice to all affected stakeholders.

18. As set out above, the Transaction is the result of a transparent and competitive marketing process. Accordingly, the Manager respectfully submits that it be granted the relief sought herein.

III. Confidential Appendices

19. Disclosure of the information contained in the Confidential Appendices to the Thirtieth Report included in confidential appendix briefs would negatively impact the Manager's ability to carry out its mandate by, among other things, interfering with the integrity of any subsequent sales process in respect of the Jarvis Property Unit B if the Transaction is not completed. In particular, and without limiting the generality of the foregoing, it would impair the Manager's ability to maximize realization of the Jarvis Unit B Property were any information to be made public concerning any discussions of sale process or value of the Jarvis Unit B Property among the Manager, the parties or any of their advisers and/or any possible bidders for the Weston Property or any of the Properties.

20. Further, with respect to the Jarvis Unit B Property, any disclosure of the information contained in the Confidential Appendix to the Thirtieth Report would interfere with the integrity of any subsequent sales process in respect of the Jarvis Unit B Property, and may impair the Mortgagee's ability to maximize realization of the Jarvis Unit B Property were any information to be made public concerning any past discussions of sales process or value of the Jarvis Unit B Property.

IV. Miscellaneous

21. Rules 2.03, 3.02, 16 and 37 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

22. Such further and other grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE MOTION:

23. The Thirtieth Report of the Manager dated April 23, 2015; and

24. Such further and other material as counsel may advise and this Honourable Court may permit.

Date: April 27, 2015

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4. DBDC Investments Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen's Corner Ltd.
14. DBDC Queen's Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Lands Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

SCHEDULE "B" COMPANIES

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline – 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Ltd.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Corp.
14. Fraser Lands Ltd.
15. Queen's Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Royal Gate Nominee Inc.
29. Royal Gate (Land) Nominee Inc.
30. Dewhurst Development Ltd.
31. Eddystone Place Inc.

32. Richmond Row Holdings Ltd.
33. El-Ad (1500 Don Mills) Limited
34. 165 Bathurst Inc.

DBDC SPADINA LTD. ET AL	**NORMA WALTON ET AL**	Court File No: CV-13-10280-00CL
Applicants	and Respondents	

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at TORONTO

NOTICE OF MOTION
(Motion for approval and vesting order with respect to 346 Jarvis St., Unit B)

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

B E T W E E N:

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and THOSE CORPORATIONS LISTED ON SCHEDULE "A" HERETO

Applicants

- and -

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

Respondents

- and -

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

THIRTIETH REPORT OF THE MANAGER, SCHONFELD INC.
(Motion for approval and vesting order with respect to 346 Jarvis, Unit B)

Contents

I. INTRODUCTION

1. This is the Thirtieth Report of Schonfeld Inc. (the "**Manager**") in its capacity as Manager of (i) certain companies listed at Schedule "B" to the Order of Justice Newbould dated November 5, 2013 (the "**Schedule B Companies**"),[1] together with the real estate properties owned by those companies (the "**Schedule B Properties**"); and (ii) the properties listed at Schedule "C" to the Judgment and Order of Justice Brown dated August 12, 2014 (the "**Schedule C Properties**" and together with the Schedule B Properties, the "**Properties**").

A. Purpose of this Report

2. This Manager has brought a motion for, among other things:

   (a) an approval and vesting order in respect of the sale transaction (the **"Transaction"**) contemplated by the Agreement of Purchase and Sale between the Manager and Lee Weiss and Andrew Maurizio Fata (collectively, the "**Purchasers**") dated March 30, 2015 and accepted March 31, 2015, as extended by email dated April 8, 2015, and as amended by waiver dated April 13, 2015 (collectively, the **"Jarvis Unit B Agreement"**), in respect of the Property known municipally as 346 Jarvis Street, Unit B, Toronto, Ontario (the **"Jarvis Unit B Property"**). A copy of the Jarvis Agreement is attached as Confidential **Appendix "A"**; and

   (b) an Order permitting the confidential appendices to this Report (the **"Confidential Appendices"**) to be filed under seal without being served on the Service List.

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[1] Schedule "B" was amended by Order dated January 16, 2014.

3. This Report provides a summary of the Transaction and a recommendation that this Honourable Court grant the relief described in the Manager's Notice of Motion.

B. Terms of reference

4. Based on its review and interaction with the parties to date, nothing has come to the Manager's attention that would cause it to question the reasonableness of the information presented herein. However, the Manager has not audited, or otherwise attempted to independently verify, the accuracy or completeness of any financial information of the Schedule B Companies or of the companies that own the Schedule C Properties (collectively, the "**Companies**"). The Manager therefore expresses no opinion or other form of assurance in respect of any of the Companies' financial information that may be in this Report.

C. Confidentiality

5. In the Manager's judgment, disclosure of some of the documents appended to this Report would negatively impact the Manager's ability to carry out its mandate by, among other things, interfering with the integrity of any subsequent sales process in respect of the Jarvis Unit B Property if the Transaction is not completed. In particular, and without limiting the generality of the foregoing, it is the Manager's judgment that it would impair the Manager's ability to maximize realization of the Jarvis Unit B Property were any information to be made public concerning any discussions of sale process or value of the Jarvis Unit B Property among the Manager, the parties or any of the Properties. Accordingly, a number of appendices to this Report have been identified as Confidential Appendices and will be filed in a separate confidential appendix brief (the **"Confidential Appendix Brief"**). The Manager respectfully requests an Order authorizing it to file the Confidential Appendices under seal without serving the Confidential Appendix Brief on the Service List.

D. Background

6. The Schedule B Companies are a group of real estate development corporations incorporated as part of a series of joint ventures between Dr. Stanley Bernstein and companies that he controls (the "**Bernstein Group**") and Norma and Ronauld Walton and entities that they control (the "**Walton Group**"). Most of the Schedule B Companies were incorporated to purchase and develop a particular Schedule B Property.

7. In the summer and fall of 2013, the relationship between the Walton Group and the Bernstein Group broke down amid allegations that the Walton Group had, among other things, placed mortgages on jointly-held properties without the Bernstein Group's consent and failed to provide reporting required by the agreements that govern the joint venture. The dispute between the Walton Group and Bernstein Group is described in more detail in the Endorsement of Justice Newbould dated November 5, 2013, which is attached as **Appendix "A".**

8. Pursuant to the Order of Justice Newbould dated November 5, 2013 (the "**November 5 Order**"), which is attached as **Appendix "B",** the Manager was appointed to provide independent management of the Schedule B Companies and the Schedule B Properties for the benefit of all stakeholders.

9. The Manager's mandate was further expanded to include certain other real estate properties owned by the Walton Group, being the Schedule C Properties, pursuant to the Reasons of Justice Brown dated August 12, 2014, which are attached as **Appendix "C",** and the Judgment and Order of Justice Brown dated August 12, 2014, which is attached as **Appendix "D".**

II. THE TRANSACTION

A. Interested Parties

10. The Jarvis Unit B Property is one of the Schedule "C" Properties owned by the Waltons.

11. A mortgage in the amount of $592,000 (the "Mortgage") in favour of The Bank of Nova Scotia (the "Mortgagee") is registered on title to the Jarvis Unit B Property.

12. A Notice of Assignment of Rents General is also registered on title to the Jarvis Unit B Property in favour of the Mortgagee (as of November 14, 2011).

13. 781526 Ontario Inc. (**"781"**) has commenced proceedings against the Waltons seeking a declaration that 781 owns a 50% beneficial interest in title in the Jarvis Unit B Property, among other relief. 781 obtained a registered Certificate of Pending Litigation in respect of the Jarvis Unit B Property. A copy of the Certificate dated February 6, 2015 (and signed by the Registrar on February 7, 2015) and the Statement of Claim dated January 28, 2014 are attached at **Appendix "E"** and **Appendix "F"**, respectively.

14. The Manager has asked its counsel, Goodmans LLP ("Goodmans"), to conduct a security review of the Mortgage and has been advised that the Mortgage is properly registered. However, the Manager recently learned of potential *Planning Act* issues that may affect the validity of the mortgage registered on 346 Jarvis, as well as the validity of mortgages registered against other properties at 346 Jarvis. The Manager has instructed Goodmans to conduct a further review of the *Planning Act* issues and their effect on, among other things, the validity of the Mortgage.

15. In the circumstances, it is unlikely that issues relating to the validity of the Mortgage will be definitively resolved before the scheduled closing date of April 30, 2015. Accordingly, the

Manager respectfully submits that the Transaction be approved and completed and that the Manager hold the proceeds in trust pending further Order of the Court following resolution of any issues relating to the validity of the Mortgage.

B. The Marketing Process

16. The Manager retained Chestnut Park Real Estate Limited (**"Chestnut Park"**) to market the Jarvis Unit B Property, along with other Units at 346 Jarvis Street.

17. The marketing process for the Jarvis Unit B Property initially commenced in July 2014, when qualified purchasers were introduced through showings of other units listed on MLS.

18. Jarvis Unit B Property was first listed by Chestnut Park on MLS on March 10, 2015. MLS Listings were advertised on www.Realtor.ca. Listings were also advertised on www.ChestnutPark.com. In addition to these advertisements, Chestnut Park sent mass emails to its client database and featured the property on the website at www.346JarvisStreet.info. Sixteen showings were booked to view the Jarvis Unit B Property.

19. On March 30, 2015, as a result of the marketing program, the Jarvis Unit B Property received an offer. On March 31, 2015, based on the sold data on the other units, the buyer accepted the offer and was offered 10 days due diligence. The due diligence date was thereafter extended until April 13, 2015. The due diligence condition was waived by the buyer's lawyer on April 13, 2015. After negotiations between the parties, the Manager and the Purchaser firmed up their agreement on April 13, 2015.

20. A more detailed description of the marketing process is set out in the Chestnut Park's marking report (the **"Chestnut Park Report"**), which is attached as Confidential **Appendix "B".** Chestnut Park recommends proceeding with the Transaction.

C. Timing of the Transaction

21. The Transaction is scheduled to close on April 30, 2015.

D. Stakeholder Approval

22. The receiver of the Waltons in their personal capacity, Ira Smith Inc., the Applicants and 781 have all been advised of the Transaction. The Manager is not aware of any opposition to the Transaction. As noted above, there may be issues with the planning act as it relates to the validity of the Mortgage.

E. Proposed Distribution of Sale Proceeds

23. Numerous stakeholders, including 781, the creditors of the Vendor, the Applicants and the Respondents, may assert an entitlement to the proceeds from the sale of the Jarvis Unit B Property. The Manager recommends that sale proceeds, net of closing costs, be held in trust by the Manager or its counsel pending further Order of the Court on notice to all affected stakeholders.

III. CONCLUSION AND RECOMMENDATIONS

24. As set out above, the Transaction is the result of a transparent and competitive marketing process. Accordingly, for the reasons set out in the above report, the Manager respectfully recommends that this Honourable Court grant the relief sought in the Manager's Notice of Motion.

All of which is respectfully submitted this 23rd day of April, 2015.

SCHONFELD INC.

In its capacity as Manager pursuant to the Order of Newbould, J. dated November 5, 2013 and the Judgment and Order of Brown, J. dated August 12, 2014

Per: _____
Harlan Schonfeld CPA, CIRP

SCHEDULE "A" COMPANIES

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investments Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen's Corner Ltd.
14. DBDC Queen's Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Lands Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

SCHEDULE "B" COMPANIES

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline – 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Ltd.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Corp.
14. Fraser Lands Ltd.
15. Queen's Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Royal Gate Nominee Inc.
29. Royal Gate (Land) Nominee Inc.
30. Dewhurst Development Ltd.
31. Eddystone Place Inc.

32. Richmond Row Holdings Ltd.

33. El-Ad (1500 Don Mills) Limited

34. 165 Bathurst Inc.

6442361

Tab A

CITATION: DBCD Spadina Ltd et al v. Norma Walton et al, 2013 ONSC 6833
COURT FILE NO.: CV-13-10280-00CL
DATE: 20131105

SUPERIOR COURT OF JUSTICE – ONTARIO
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. and EGLINTON CASTLE INC,

Respondents

AND

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

BEFORE: Newbould J.

COUNSEL: *Peter H. Griffin and Shara N. Roy*, for the Applicants

John A. Campton, Emmeline Morse and Guillermo Schible, for the Respondents

Fred Myers and Mark S. Dunn, for the Inspector

HEARD: November 1, 2013

ENDORSEMENT

[1] On October 4, 2013, Schonfeld Inc. was appointed as inspector of all of the companies in schedule B. On October 24, 2013 a motion by the applicants to have Schonfeld Inc. appointed as a manager of those corporations and related corporation was adjourned to November 1, 2013 and

interim relief was granted, including giving the applicants access to and joint control over all bank accounts.

[2] The applicants now move for the appointment of the Inspector as receiver/manager over the schedule B corporations and certain other properties that are mortgaged to Dr. Bernstein under mortgages which have expired. It is resisted by the respondents who maintain that the appointment would be an interim appointment pending a trial of the issues that should be ordered and that the applicants have sufficient protection from the order of October 24, 2013 that the respondents will not attack.

[3] For the reasons that follow, Schonfeld Inc. is appointed as receiver/manager of the 31 schedule B corporations.

Background

[4] Dr. Bernstein is the founder of very successful diet and health clinics. Norma Walton is a lawyer and co-founder with her husband Ronauld Walton of Rose & Thistle. She is a principal of Walton Advocates, an in-house law firm providing legal services to the Rose & Thistle group of companies. Ronauld Walton is also a lawyer and co-founder of Rose & Thistle and a principal of Walton Advocates

[5] Beginning in 2008, Dr. Bernstein acted as the lender/mortgagee of several commercial real estate properties owned by the Waltons either through Rose & Thistle or through other corporations of which they are the beneficial owners.

[6] Following several financings, Dr. Bernstein and the Waltons agreed to invest jointly in 31 various commercial real estate projects. Each is a 50% shareholder of each corporation set up to hold each property.

[7] The known facts and concerns of the applicants giving rise to the appointment of the Inspector are set out in my endorsement of October 7, 2013 and were contained in affidavits of James Reitan, director of accounting and finance at Dr. Bernstein Diet and Health Clinics. Since

then, there has been further affidavit material from both sides and the Inspector has delivered two interim reports and a supplement to the first. The most recent affidavit from the applicants' side is an affidavit of Mr. Reitan sworn October 24, 2013. The most recent from the respondents' side is an affidavit of Norma Walton sworn October 31, 2013 on the day before this motion was heard. There has been no cross-examination on any affidavits. The first interim report of the Inspector is dated October 21, 2013, the supplement to it is dated October 24, 2013 and the second interim report is dated October 31, 2013. I have not permitted any cross-examination of the Inspector but the respondents have been free to make reasonable requests for information from the Inspector and they have availed themselves of that opportunity.

[8] To date, Dr. Bernstein through his corporations has advanced approximately $105 million into the 31 projects (net of mortgages previously repaid), structured as equity of $2.57 million, debt of $78.5 million and mortgages of $23.34 million.

[9] According to the ledgers provided to the Inspector, the Waltons have contributed approximately $6 million. $352,900 is recorded as equity, which I assume is cash, $1.78 million is recorded as debt and $3.9 million is recorded in the intercompany accounts said to be owing to Rose & Thistle and is net of (i) amounts invoiced by Rose & Thistle but not yet paid; (ii) amounts paid by Rose & Thistle on behalf of the companies such as down-payments; and (iii) less amounts paid by DBDC directly to Rose & Thistle on behalf of the companies and (iv) other accounting adjustments.

Concerns of the applicants

(i) $6 million mortgage

[10] This was a matter raised at the outset and was one of the basis for my finding of oppression leading to the appointment of the Inspector. Mr. Reitan learned as a result of a title search on all properties obtained by him that mortgages of $3 million each were placed on 1450 Don Mills Road and 1500 Don Mills Road on July 31, 2013 and August 1, 2013. Dr. Bernstein had no knowledge of them and did not approve them as required by the agreements for those properties. At a meeting on September 27, 2013, Ms. Walton informed Mr. Reitan and Mr.

Schonfeld that the Waltons were in control of the $6 million of mortgage proceeds (rather than the money being in the control of the owner companies), but refused to provide evidence of the existence of the $6 million. Ms. Walton stated that she would only provide further information regarding the two mortgages in a without prejudice mediation process. That statement alone indicates that Ms. Walton knew there was something untoward about these mortgages.

[11] In his first interim report, Mr. Schonfeld reported that the proceeds of the Don Mills mortgages were deposited into the Rose & Thistle account. Rose & Thistle transferred $3,330,000 to 28 of the 31 companies. The balance of the proceeds of the Don Mills mortgages totalling $2,161,172, were used for other purposes including the following:

1. $98,900 was paid to the Receiver General in respect of payroll tax;

2. $460,000 was deposited into Ms. Walton's personal account;

3. $353,000 was apparently used to repay a loan owed by Rose & Thistle in relation to Richmond Row Holdings Ltd.; and,

4. $154,600 was transferred electronically to an entity named Plexor Plastics Corp. and $181,950 transferred electronically to Rose and Thistle Properties Ltd. Ms. Walton advised the Inspector that she owns these entities with her husband.

[12] In her affidavit of October 31, 2013, Ms. Walton admits that $2.1 million was "diverted" and used outside the 31 projects. She admits it should not have been done without Dr. Bernstein's consent. She offers excuses that do not justify what she did. What happened here, not to put too fine a point on it, was theft. It is little wonder that when first confronted with this situation, Ms. Walton said she would only talk about it in a without prejudice mediation.

[13] In her affidavit of October 4, 2013, Ms. Walton said she had made arrangements to discharge the $3 million mortgage on 1500 Don Mills Rd on October 21, 2013 and to wire money obtained from the mortgage on 1450 Don Mills Road into the Global Mills account (one of the 31 companies) by the same date. Why the money would not be put into the 1450 Don

Mills account was not explained. In any event, no repayment of any of the diverted funds has occurred.

(ii) Tisdale Mews

[14] Tisdale Mews is a rezoning for 35 townhomes near Victoria Park Avenue and Eglinton Avenue East. Mr. Reitan states in his affidavit that Dr. Bernstein made his equity contribution to Tisdale Mews December 2011 in the amount of $1,480,000. The bank statements for December 2011 for Tisdale Mews have not been made available. The forwarded balance on the bank statements available for Tisdale Mews from January 2012 is $96,989.91, indicating that most if not all of Dr. Bernstein's money went elsewhere. Ms. Walton states in her affidavit that the project "was purchased by Dr. Bernstein on January 11, 2012" and he invested $1.7 million in equity. How it was that Dr. Bernstein purchased the property is not explained and seems contrary to the affidavit of Mr. Reitan. The bank account statements for the property show no deposits of any consequence in January 2012 or later.

[15] In any event, Mr. Reitan was able to review bank records and other documents. Invoices and cheques written from Tisdale Mews' bank account show that a total of $268,104.57 from Tisdale Mews has been used for work done at 44 Park Lane Circle, the personal residence of the Waltons in the Bridle Path area of Toronto.

[16] Ms. Walton in her affidavit acknowledges that the money was used to pay renovation costs on her residence. She says, however, that Rose & Thistle funded 100% of the $268,104.57 purchases before any cheques were sent out of the Tisdale Mews account. How this was funded was not disclosed, although she did say that overall, Rose & Thistle has a positive net transfer to the Tisdale Mews account of $2,208,964 "as per Exhibit G to the Inspector's first interim report". Exhibit G to that report has nothing to do with Tisdale Mews. Exhibit D to that report, being the property profile report of the Inspector for the 31 properties, contains no information for Tisdale Mews because information had not yet been provided to the Inspector. The Inspector's updated profile prepared after information was obtained from Rose & Thistle shows $1,274,487 owing from Tisdale Mews to Rose & Thistle, but whether this is legitimate cannot be

determined until back-up documents sought by the Inspector are provided. It is no indication that cash was put into Tisdale Mews by Rose & Thistle.

[17] The statement of Ms. Walton that Rose & Thistle funded 100% of the $268,104.57 purchases on her residence before any cheques were sent out of the Tisdale Mews account makes little sense. There would be no reason for Rose & Thistle to transfer funds into the Tisdale Mews account to pay personal expenses of Ms. Walton for her residence. Again, it has all the appearances of another case of theft.

(iii) Steps to impede a proper inspection

[18] It is quite evident that from the moment the order was made appointing the Inspector, Ms. Walton took various steps to hinder the Inspector. That order was made on October 4, a Friday, and permitted the Inspector to go to the offices of Rose & Thistle during normal business hours and on that evening and throughout the week-end. Mr. Reitan swears in his affidavit that when he arrived at the Rose & Thistle offices at 3:33 p.m. on the direction of the Inspector, which was shortly after the order was made, he saw Ms. Walton locking the door to the premises and she waved to him as she walked away from the doors. He was informed by Angela Romanova that Ms. Walton had told all employees to leave the premises once the order was granted at approximately 3 pm. He observed one employee who left with a server and one or more computers. After a discussion with the employee and Steven Williams, VP of operations at Rose & Thistle, these were taken back into the building. I received an e-mail from Mr. Griffin early in the evening alerting me to the problem and I was asked to be available if necessary. Mr. Reitan states that after several hours, and following Mr. Walton's arrival, Mr. Schonfeld, Mr. Merryweather and he were allowed into the premises.

[19] Ms. Walton in her affidavit states that a laptop "that was about to be removed" from the Rose & Thistle offices was 13 years old and they were disposing of it. One of her occasional workers asked if he could have it and they agreed. She states that the timing was unfortunate. She states that there are eight server towers permanently affixed to the premises. What she does not answer is Mr. Reitan's statement that she locked the doors and told her employees to leave, that whatever was taken from the premises was returned after discussions with the employee and

Mr. Williams, the VP of operations, and that it took several hours before the Inspector and Mr. Reitan were permitted on the premises. The order appointing the Inspector required Ms. Walton to fully co-operate with the Inspector.

[20] The order also permitted the Inspector to appoint persons as considered necessary, including Mr. Reitan. Ms. Walton however took the position that Mr. Reitan should not be on the premises, which was contrary to the order, and that the Inspector should not discuss with the applicants or their lawyers any information he obtained before making his first report to the court. Mr. Reitan was the accounting person for Dr. Bernstein most familiar with the investments and not having him available to the Inspector, either on the Rose & Thistle premises or not, would not be helpful to the Inspector. On October 9, 2013 I made a further order, which should not have been necessary, permitting Mr. Reitan to be on the premises when Mr. Schonfeld or his staff were present. I also ordered that Mr. Schonfeld was entitled, but not required, to discuss his investigation with the parties or their representatives.

[21] Ms. Walton informed the Inspector that the books and record of the companies were last brought current in 2011. Since August or September, 2013, after Mr. Reitan became involved in seeking information, Rose & Thistle employees have been inputting expense information into ledgers relating to the period January 2012 and August 2013. They have also issued a number of invoices for services rendered or expenses incurred by Rose & Thistle during the period January 2012 to August 2013. On October 17, 2013, Mr. Schonfeld convened a meeting with the parties and their counsel to orally present his findings. Prior to that meeting, Ms. Walton would only provide the Inspector with access to general ledgers for individual companies once she and Rose & Thistle had completed their exercise of updating the ledgers and issuing invoices from Rose & Thistle to each company. At the meeting, Ms. Walton agreed to provide the Inspector with access to ledgers for the remaining companies in their current state. These were eventually provided.

[22] Ms. Walton instituted a procedure under which no information could be provided by Rose & Thistle employees to the Inspector only after Ms. Walton had vetted it, which was causing considerable difficulties for the Inspector. On October 18, counsel for the Inspector wrote to counsel to the respondents and asked that the respondents provide immediate unfettered access to the books and records and end the insistence that all information be provided through

Ms. Walton. During the week of October 21, Ms. Walton said she could not meet because she was involved in preparing responding material in the litigation and that her staff was unavailable. By October 24, 2013 no substantive response to the Inspector's request was made, and on that date I made an order requiring Ms. Walton not to interfere with Rose & Thistle employees providing information to the Inspector. This should not have been necessary in light of the terms of the original order of October 4, 2013 appointing the Inspector.

(iv) Improper use of bank accounts

[23] The agreements for each project require that each project has a separate bank account. The Inspector reports, however, that there has been extensive co-mingling of bank accounts and that funds were routinely transferred between the company accounts and the Rose & Thistle account. From the date of each agreement to September 30, 2013, approximately $77 million was transferred from the companies' accounts to Rose & Thistle and Rose & Thistle transferred approximately $53 million to the various company accounts meaning that Rose & Thistle had retained approximately $24 million transferred to it from the various companies.

[24] Ms. Walton confirmed to the Inspector that equity contributions to, and income received by, the companies were centralized and co-mingled in the Rose & Thistle account, which she described as a "clearing house". This practice continued in September 2013 and the Inspector reported it was difficult to trace how transfers from the companies were used because the funds were also co-mingled with funds transferred to the Rose & Thistle account by other Walton companies not making up the 31 companies in which Dr. Bernstein has his 50% interest. It is clear that the Waltons did not treat each company separately as was required in the agreements for each company.

[25] To alleviate the problem of the co-mingling of funds and the payments out to Rose & Thistle, the order of October 25 provided for the payment of deposits to be made to the bank accounts of the 31 companies and that no payment out could be made without the written consent of the applicants or someone they may nominate.

(v) Receivables of Rose & Thistle from the 31 companies

[26] The agreements for the 31 properties state that Dr. Bernstein and the Waltons are to provide 50% of the equity required. They do not provide that the Walton's equity is to be provided in services. They state that each of Dr. Bernstein and the Waltons will put in amounts of money. In her lengthy affidavit of October 31, 2013, Ms. Walton went to the trouble of describing each of the 31 projects, including stating how much equity Dr. Bernstein had put into each property. Tellingly, however, she made no statement at all of how much equity she or her husband had put into any of the properties, and gave no explanation for not doing so. This may be an indication that Ms. Walton is not able to say what equity has been put into each property, hardly surprising as the books and records were two years out of date at the time the Inspector was appointed.

[27] In his first interim report, Mr. Schonfeld reported that based on invoices and general ledger entries provided to October 18, 2013, Rose & Thistle appeared to have charged the companies approximately $27 million for various fees and HST on the fees. On October 17, the date of his meeting with the parties, he had circulated a version of his chart regarding this which identified $2.68 million that had been transferred to Rose & Thistle that could not be reconciled to any invoice issued by Rose & Thistle. On the following day on October 18, Rose & Thistle provided additional invoices to the companies for $5.6 million so that the total amount invoiced exceeded the amounts transferred by Rose & Thistle to the companies by $2.9 million. In his supplement to his first report, Mr. Schonfeld reported that the respondents had produced further invoices from Rose & Thistle dated between January 2012 and September 2013 to the companies for a total of $34.6 million, being $10.6 million more than it had received from the companies. Mr. Schonfeld identified approximately $3.9 million recorded on the ledgers of Rose & Thistle as owing from the companies to Rose & Thistle. This amount is part of the $6 million recorded in the books as being the contribution by the Waltons to the companies.

(vi) Documentation to support Rose & Thistle invoices

[28] The Inspector has sought unsuccessfully so far to obtain documentation underlying Rose & Thistle's invoices of some $34.6 million to the companies, including construction budgets for

the various projects. This is of considerable importance in understanding the claim for equity put into the properties by the Waltons, because by far the largest amount of equity now claimed to have been put in by the Waltons are the fees for services said to have been provided by the Waltons to the various companies.

[29] The information that has been obtained regarding the invoices issued to some of the companies by Rose & Thistle is troubling and gives little confidence in what Ms. Walton and Rose & Thistle have done.

[30] Riverdale Mansion Inc. is one of the 31 projects. It is the owner of a historic mansion on Pape Avenue. Riverdale transferred $1,759,800 to Rose & Thistle and received from Rose & Thistle $785,250. Thus Rose & Thistle retained $974,550 transferred to it by Riverdale.

[31] Rose & Thistle provided the Inspector with invoices addressed to Riverdale for construction management fees totaling $1,183,981 plus HST and maintenance fees of $60,000, including $275,000 for "deposits for materials", $103,863 for "project management services", $295,000 for "site plan deposits and application" and $67,890 for "steel bar ordered and installed". At the October 17 meeting, the Inspector asked for documentation, including third party invoices, to support the amounts invoiced to Riverdale. Ms. Walton said that Rose & Thistle did not have third party invoices for many of the invoiced expenses because Rose & Thistle performed much of the work itself (it has a construction company) and that some of the expenses had not yet been incurred. In response, the Inspector requested documents such as material invoices and payroll records to validate the cost of work done by Rose & Thistle and invoiced to Riverdale. None were provided.

[32] On the following day, October 18, the Inspector received a credit note from Rose & Thistle which showed that the invoice form Rose & Thistle to Riverdale had been reversed except for $257,065.62 for work performed in 2011. The credit note is dated December 31, 2011.

[33] In her affidavit of October 31, 2013, Ms. Walton gave an explanation for the Riverdale reversal, an explanation that has problems. She said that considerable work was done to prepare the site for construction of townhouses and condominiums. As the work was proceeding, the

project changed and the mansion will be rebuilt and become used for a woman's shelter. Rose & Thistle was owed "certain monies" for its work and the invoice for $1,291,025 inclusive of HST was rendered by Rose & Thistle to Riverdale. She states that "the Inspector thought the amount claimed was too high" and so she issued a credit note and submitted a lower invoice for $257,065.62 "that reflected the value of the work done by Rose & Thistle". She says she merely forgot to re-do the invoice after the plans changed.

[34] The applicants have had no chance to cross-examine Ms. Walton on her affidavit. I have considerable doubts that the Inspector told Ms. Walton that the invoice was too high, as he has had no back-up documentation to consider the validity of the invoice and was asking for it to be produced. However, even assuming that the Inspector told her the invoice was too high, which is not what the Inspector reported, one may ask why, if the new invoice of some $257,000 reflected the work that was done, an earlier invoice had been sent for some $1.2 million. That earlier invoice appears to have been highly improper.

[35] Dupont Developments Ltd. is one of the 31 projects. It is a contaminated industrial building and the plan according to Ms. Walton is to "gut renovate" the building and remediate the contaminated site. The Inspector requested the construction budget for it and it was provided by Mr. Goldberg, who said he was responsible for the construction project. Mr. Goldberg told Mr. Schonfeld that the budget documents were out of date. They indicate that Dupont spent $385,000 on construction and $20,000 on environmental renovation. The Inspector had previously been provided with an invoice issued by Rose & Thistle to Dupont for $565, 339.34 which includes an entry for construction management services of $175,300.30, said in the invoice to be "10% of hard costs", implying that Rose & Thistle had supervised construction that cost approximately $1.75 million. The updated general ledger for Dupont received by the Inspector on October 24 showed capitalized expenses of approximately $248,000, construction in progress of $36,000 and various consulting fees of approximately $563,000. All of these documents show different construction expenditures, none nowhere near the implied cost of $1.75 million.

[36] This Dupont budget was the only budget for any of the projects provided to the Inspector by the time of his last report dated October 31, 2013, one day before this motion was heard. The

Inspector concludes that it appears that Rose & Thistle is not maintaining project budgets on an ongoing basis to track expenses and measure construction costs against the pro forma statement prepared when the property was purchased.

[37] Fraser Properties owns property at 30 Fraser Avenue and Fraser Lands owns abutting property purchased in October 2012. Dr. Bernstein made an equity contribution of approximately $16 million, Fraser Properties transferred $10,281,050 to Rose & Thistle and received back $1,215,100. Thus Rose & Thistle retained $9,065,950. In his first report, Mr. Schonfeld said he had inspected the property and saw no construction work or evidence of recent construction work. In his supplement to his first report, after he had received the general ledger and invoices from Rose & Thistle to Fraser Properties, he reported that the invoices to Fraser Properties were approximately $1.6 million. Assuming the invoices can be supported, that would mean that Rose & Thistle has received approximately $7.4 million more from Fraser Properties than it invoiced to Fraser Properties. It is to be noted that at the time of the Inspector's first report, the books and records showed an intercompany receivable due to Rose & Thistle from the companies of approximately $9.9 million. By the time of the first supplement to the Inspector's report three days later, after the invoices and general ledger had been received and reviewed, this amount was reduced to approximately $3.9 million, due to a new debit showing as being owed by Rose & Thistle to Fraser Properties of approximately $6.45 million.

[38] On October 31, 2013 Mr. Campion on behalf of the respondents wrote to counsel to the applicants and to the Inspector and referred to the Inspector asking which filing cabinet he could review to obtain the documents requested, such as third party invoices, contracts, payroll records or other contemporaneous documents. Mr. Campion said that the information sought can only be obtained through discussion with the staff as all documentation is on computer and not in a filing cabinet. This is troubling to the Inspector. It would mean that there is no paper of any kind in existence for $35 million of costs said to have been incurred, or that it has all been scanned and thrown out. It would be unusual to scan it and throw it out, and questionable that it was all scanned when Rose & Thistle was two years late in their bookkeeping and according to Ms. Walton had an outdated software system.

[39] Since the Inspector was appointed, Rose & Thistle has been preparing invoices for work done going back to January 2012, and one may question where the information is coming from to do that. Mr. Campion was undoubtedly passing on what he was told by Ms. Walton, but what he was told raises concerns.

(vii) Other equity investors

[40] The agreements provided that the only shares to be issued were to Dr. Bernstein's corporations or to the Walton's corporations and neither could transfer shares to another party without the consent of the other party. However, in his prior affidavit, Mr. Reitan provided documentary evidence that disclosed that the Waltons have taken on new equity investors in at least one project, without the agreement of Dr. Bernstein. This issue was not answered by Ms. Walton in her affidavit of October 31, 2013, the failure of which is compounded in that Ms. Walton did not disclose, as previously discussed, what equity contributions have been made by the Waltons for any of the properties.

Legal principles and analysis

[41] Section 101 of the *Courts of Justice Act* provides for the appointment of a receiver/manager where it appears to a judge to be just and convenient to do so. In *Royal Bank of Canada v. Chongsim Investment Ltd.* (1997), 32 O.R. (3d) 565, Epstein J. (as she then was) discussed what should be considered in deciding whether to make such an order. She stated:

> The jurisdiction to order a receiver is found in s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. This section provides that a receiver may be appointed where it appears to be just and convenient. The appointment of a receiver is particularly intrusive. It is therefore relief that should only be granted sparingly. The law is clear that in the exercise of its discretion, the court should consider the effect of such an order on the parties. As well, since it is an equitable remedy, the conduct of the parties is a relevant factor.

[42] Section 248 of the OBCA also provides for the appointment of a receiver manager if there has been oppression as contained in section 248(2). Under section 248(2) a court may make an order to rectify the matters complained of and section 248(3) provides:

> (3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
>
> [...]
>
> (b) an order appointing a receiver or receiver-manager;

[43] Various cases other than the *Chongsim Investment* case have discussed the principles to be taken into account. See *Anderson v. Hunking*, [2010] O.J. No. 3042 and *Bank of Montreal v. Carnival Leasing Limited* (2011), 74 C.B.R. (5th) 300 and the authorities referred to in those cases.

[44] In my view this is not a case in which the applicants are seeking an interim order appointing a receiver/manager. They do not seek an interim order. They seek the appointment on the basis of evidence that is largely uncontested by Ms. Walton. I would agree with the respondents that if the evidence relied on by the applicants for the order sought was largely contested, the relief should be considered on the basis that it is interim relief. However, that is not the case. In any event, even if the *RJR MacDonald* tri-part test were applicable, that would not be materially different in this case from the test articulated by Epstein J. in *Chongsim Investment* that requires a consideration of the effect of the order sought on the parties and their conduct.

[45] In my reasons when the Inspector was appointed on October 4, 2013, I found oppression had occurred as follows:

> [27] In my view, on the record before me Dr. Bernstein has met the test required for an investigation to be ordered. To put on two mortgages for $6 million without the required agreement of Dr. Bernstein and then refuse to disclose what happened to the money except in a without prejudice mediation meets the higher test of oppression, let alone the lesser test of unfairly disregarding the interests of Dr. Bernstein. The other examples of the evidence I have referred, as well as the failure to provide monthly reports on the projects to Dr. Bernstein, are clearly instances of the Waltons unfairly being prejudicial to and unfairly disregarding the interests of Dr. Bernstein, a 50% shareholder of each of the owner corporations.

[46] I do not see the picture as now being less clear. To the contrary, it seems much clearer. I have referred to the concerns above in some detail. They include the following:

1. $2.1 million was improperly taken from the proceeds of the $6 million mortgages that never had Dr. Bernstein's approval, $400,000 of which was taken by Ms. Walton into her personal bank account. Ms. Walton was well aware that this was wrong. She is a lawyer and the agreements were drawn in her office. Her initial reaction when confronted about the mortgages by Mr. Reitan, who at the time did not know what had happened to the mortgage proceeds, that she would only discuss it in a without prejudice mediation is a clear indication she knew what she did was wrong and contrary to Dr. Bernstein's interests.

2. $268,104.57 was improperly paid from the Tisdale Mews account to pay for renovations to the Waltons' residence. No reasonable explanation has been provided.

3. The co-mingling of accounts and the cash sweep into the Rose & Thistle accounts was a breach of agreement and unfairly prejudicial to Dr. Bernstein and a disregard of his interests. This is particularly the case in light of the lack of current books and records that should have been prepared and available rather than requiring an Inspector to try to get to the bottom of what has occurred. A lack of records is in itself unfairly disregarding the interests of Dr. Bernstein, particularly taken the size of his investment. Blaming it on outdated computer software is hardly an answer. That should have been taken care of long ago.

4. The frenzied attempts in the past month since the Inspector was appointed to update ledgers and manufacture invoices should never have been necessary and in light of the evidence, obviously casts doubt on what is now being done to update the records. Dr. Bernstein should never have had to face this prejudicial situation.

5. The Waltons have not provided equal payments of money into any of the 31 properties. The claim that their equity was provided by way of set-off for fees and

work, even if that were permissible under the agreements, is unsupported by any available documents to the Inspector. What little has been provided raises serious issues, as discussed above. As well, taking in new equity partners is not at all what Dr. Bernstein signed up for, and indicative of a lack of ability of the Waltons to fund their equity in accordance with the agreements.

6. Dr. Bernstein was entitled to monthly reports. It is now quite evident why that has not occurred.

[47] Mr. Campion contended that a receiver/manager could not be ordered over any particular property without a finding of oppressive conduct regarding that property. I am not at all sure that such a proposition in this case is correct, but in any event there has been oppressive conduct regarding each property. The co-mingling of funds and the sweep of cash from each property's account into Rose & Thistle was oppressive in these circumstances in which there were no contemporaneous books and records kept that would permit Dr. Bernstein, or now the Inspector, to fully understand what occurred to the money from each property. The setting up of alleged fees owing to Rose & Thistle for the properties to substantiate the Waltons' equity contributions, even if permissible, without readily available documentation to substantiate the validity of the fees, was oppressive. The lack of records and reports for each property was oppressive.

[48] It is contended on behalf of the respondents that they have the contractual right to manage the projects and thus no receiver/manager should be appointed. The difficulty with this argument is that the contracts have been breached and the Waltons have certainly not shown themselves to be capable managers. A basic lack of record keeping, compounded by co-mingling of funds and transferring them to Rose & Thistle, belies any notion of proper professional management. Ms. Walton acknowledges that accounting and other issues "have plainly caused him [Dr. Bernstein] to lose confidence in my management". That is a fundamental change to the relationship.

[49] It is contended that the business will be harmed if a receiver/manager is appointed. Ms. Walton states in her affidavit that she believes that the dynamic nature of this portfolio will suffer and in the end suffer unnecessary losses. What is meant by the dynamic nature is not clear.

I recognize that a receiver/manager can in certain circumstances have negative implications in the marketplace, particularly if it means that unsold properties will have to be put up for sale at less than market prices or be sold quickly. There is no indication that is the plan here at all and there is no court ordered sale being requested.

[50] It is also to be recognized that a receiver/manager can bring stability to a situation, which in this case appears to be a requirement to protect the interests of Dr. Bernstein.

[51] Dr. Bernstein with his $100 million plus investment has a huge financial interest in this portfolio of properties. It is hardly in his interest to have the properties dealt with in less than a sound commercial way. He suffers the same risk as the Waltons, and depending on what real equity the Waltons have put in, perhaps far more. The Waltons contend that they have huge financial risk in that they have guaranteed mortgages to the tune of some $206 million. They have not offered any evidence that there is any likelihood of being called upon on their guarantees, and to the contrary Ms. Walton says that all of the projects except perhaps one or two of them are or expected to be profitable. There is no reason why an experienced receiver/manager with capable property managers cannot continue with the success of the ventures.

[52] The respondents contend that with the controls over the bank accounts and the other provisions of the two orders made to date, there is plenty of protection for Dr. Bernstein. There may be something in this argument, but it ignores one of the basic problems caused by the way the business has been run. There is no clear evidence yet what exactly has been put into the properties by the Waltons, and that is crucial to understanding what both Dr. Bernstein and the Waltons are entitled to. In the month since the Inspector was appointed, Ms. Walton has caused back dated invoices to be prepared for past work said to have been done. What they have been prepared from is not at all clear. With some of the troubling things about changing records that have become apparent as a result of digging by Mr. Reitan and the Inspector, discussed above, and the diversion of money that has taken place, there is reason to be concerned exactly what Ms. Walton is doing to shore up her position. The Inspector is not in a position to know what is being prepared on an *ex post facto* basis or from what, and Dr. Bernstein should not have to rely

on a hope that something untoward will no longer be done. The present situation is causing considerable harm to Dr. Bernstein.

Conclusion

[53] Schonfeld Inc. is appointed as manager/receiver of all of the properties in schedule B, effective immediately. I was provided with a draft order that is based on the model order in use in our Court and approved by the Users' Committee. It appears satisfactory but there were no submissions as to its terms. If the respondents have any submissions with respect to the draft order, they are to be made in writing within three days and the applicants or Schonfeld Inc. shall have until Wednesday of next week to respond. In the meantime, the appointment of Schonfeld Inc. as manager/receiver is not to be delayed and Schonfeld Inc. shall immediately have the powers contained in the draft order pending any objection to it by the respondents.

[54] The applicants have applied to have Schonfeld Inc. appointed as receiver over four properties mortgaged to Dr. Bernstein with expired mortgages that are not schedule B corporations. Ms. Walton has stated in her affidavit that funds are being raised that will see these mortgages paid in full by the end of November, 2013. In light of that statement, this application is adjourned *sine die*. It can be brought on after the end of November in the event that the mortgages have not been paid in full.

[55] The applicants have also requested a certificate of pending litigation over 44 Park Lane Circle, the residence of the Waltons in light of the evidence that money from one of the 31 schedule Dr. Bernstein corporations was used to pay for renovations to the residence. I was advised by counsel for Ms. Walton during the hearing of the motion that the money would be repaid that day. Based on that statement, the request for a certificate of pending litigation is adjourned *sine die* and can be brought back on in the event that evidence of the payment is not provided to the applicants and Schonfeld Inc.

[56] The Inspector moved for approval of his interim reports and the actions taken as disclosed in the reports, and approval for his fees and disbursements and those of his counsel. No one opposed the request although Mr. Campion said that the respondents were not consenting to

them. In my view, the actions taken by the Inspector have been entirely proper in difficult circumstances and in her affidavit Ms. Walton acknowledges that the Inspector was necessary because of her issues. The fees and disbursements also appear reasonable. At the conclusion of the hearing I granted the order sought.

[57] The applicants are entitled to their costs from the respondents. If costs cannot be agreed, brief written submissions along with a proper cost outline may be made within 10 days and brief written reply submissions may be made within a further 10 days.

Newbould J.

Date: November 5, 2013

Tab B

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	FRIDAY, THE 5th DAY
	)	
	)	
JUSTICE NEWBOULD	)	OF NOVEMBER, 2013

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.

Respondents

and

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

ORDER

THIS MOTION made by the Applicants, DBDC Spadina Ltd. and those Corporations Listed on Schedule "A" hereto for an Order appointing Schonfeld Inc. Receivers + Trustees, as manager (in such capacities, the **"Manager"**) without security, of all of the assets, undertakings and properties of the Schedule "B" Corporations, or for other relief, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Affidavits of Jim Reitan sworn October 1, October 3 and October 24, 2013 and the Exhibits thereto, the Affidavit of Susan Lyons and the Exhibits hereto, the Affidavit of Lorna Groves and the Exhibits thereto, the First Interim Report of the Inspector,

Schonfeld Inc., the Supplemental Report to the First Interim Report of the Inspector and the Exhibits thereto, the Second Interim Report of the Inspector and the Exhibits thereto, the Affidavits of Norma Walton sworn October 3 and 31, 2013 and the Exhibits thereto and on hearing the submissions of counsel for the Applicants, counsel for the Inspector and counsel for the Respondents,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record is hereby abridged so that this motion is properly returnable today and hereby dispenses with further service thereof.

CONTINUING ORDERS

2. THIS COURT ORDERS that the Orders of the Honourable Justice Newbould dated October 4, 2013 and October 25, 2013 continue in full force and effect except as modified by this Order.

APPOINTMENT

3. THIS COURT ORDERS that the Manager is hereby appointed Manager, without security, of all of the real property owned by the Schedule "B" Companies hereto (the "**Real Estate**") and all of the current and future assets, undertakings and property, real and personal, of the Schedule "B" Corporations of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (collectively with the Real Estate, the "**Property**") effective upon the granting of this Order.

MANAGER'S POWERS

4. THIS COURT ORDERS that the Manager shall have the powers of the Inspector granted pursuant to the Order of the Honourable Justice Newbould dated October 4, 2013, including but not limited to access to the premises and books and records of the Respondent The Rose & Thistle Group Ltd.

5. THIS COURT ORDERS that the Manager is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Manager is hereby expressly empowered and authorized to do any of the following where the Manager considers it necessary or desirable:

   (a) to undertake sole and exclusive authority to manage and control the Property and any and all proceeds, receipts and disbursements arising out

of or from the Property, wheresoever located, and any and all proceeds, receipts and disbursements arising out of or from the Property, and for greater certainty, the Manager shall have sole and exclusive right and control of the Schedule "B" Corporations' bank accounts wherever located in accordance with this Order;

(b) to open bank accounts at any banking institution acceptable to the Applicant to transfer funds from the current bank accounts of the Schedule "B" Companies, as necessary~~, with prior notice to the Parties~~;

(c) to receive, preserve, and protect and maintain control of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(d) to manage, operate, and carry on the business of the Schedule "B" Corporations, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business ~~upon prior notice to the Parties~~, or cease to perform any contracts of any of the Schedule "B" Corporations ~~upon prior notice to the Parties~~;

(e) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the powers and duties conferred by this order including but not limited to a property manager, including but not limited to:

(i) DMS Properties;

(ii) Briarlane Property Rental Management Inc.; and

(iii) Sterling Karamar;

(f) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Schedule "B" Corporations or any part or parts thereof;

(g) to receive and collect all monies and accounts now owed or hereafter owing to the Schedule "B" Corporations and to exercise all remedies of the Schedule "B" Corporations in collecting such monies, including, without limitation, to enforce any security held by any of the Schedule "B" Corporations; ~~provided that the Manager shall give prior notice to the Parties of any enforcement of security~~;

(h) subject to paragraph 4 below, to settle, extend or compromise any indebtedness owing to any of the Schedule "B" Corporations; ~~provided that the Manager shall give prior notice to the Parties of the settlement of any material indebtedness~~;

(i) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Manager's name or in the name and on behalf of the Schedule "B" Corporations, for any purpose pursuant to this Order;

(j) to undertake environmental investigations, assessments, engineering and building condition or other examinations of the Real Estate;

(k) subject to paragraph 12 below, to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Schedule "B" Corporations, the Property or the Manager, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(l) subject to paragraph 13 below, to market the Property and in particular the Real Estate, including advertising and soliciting offers in respect of the Property and negotiating such terms and conditions of sale as the Manager in its discretion may deem appropriate;

(m) to enter into agreements and to sell, convey, transfer, or assign the Property or any part or parts thereof of the Schedule "B" Corporations' business, with the prior approval of this Court in respect of any transaction, and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, shall not be required, and in each case the Ontario *Bulk Sales Act* shall not apply;

(n) to have on-line and electronic as well as hard copy access to the bank accounts of the Rose & Thistle Group Ltd. to review all receipts and disbursements total from such accounts and to request and receive on a timely basis from the Respondents particulars of all receipts and disbursements sufficient for the Inspector to identify such transfers, the parties involved and the reasons therefore;

(o) upon notice to all parties and affected registered encumbrances, to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(p) to report to, meet with and discuss with such affected Persons (as defined below) as the Manager considers appropriate on all matters relating to the Property, and to share information, subject to such terms as to confidentiality as the Manager deems advisable;

(q) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Manager, in the name of the Schedule "B" Corporations;

(r) to do all acts and execute, in the name and on behalf of the Schedule "B" Corporations, all documents, and for that purpose use the seal of the corporation, if any; and

(s) to take any steps reasonably incidental to the exercise of these powers.

and in each case where the Manager takes any such actions or steps, it shall, subject to paragraph 4 below, be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Schedule "B" Corporations, and without interference from any other Person. For greater certainty, nothing in this Management Order or to the Manager's exercise of its powers hereunder shall cause the Manager to be, or deemed to be, a receiver within the meaning of the *Bankruptcy and Insolvency Act*.

~~6. The Manager shall take reasonable steps to provide the Parties with an accounting on a monthly basis of any collections referred to in subparagraphs 5(g) above.~~

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MANAGER

7. THIS COURT ORDERS that (i) the Schedule "B" Corporations and The Rose & Thistle Group Inc., (ii) all of their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, including but not limited to the Respondents and all others having notice of this Order; (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order; and (iv) Meridian Credit Union; and (v) without limiting the generality of the foregoing, Norma Walton, Ronauld Walton, anyone acting under the instructions of anyone listed in this paragraph; and (vi) anyone with notice of this order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Manager of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Manager, and shall deliver all such Property to the Manager upon the Manager's request, and in any event no later than 36 hours following the Manager's request.

8. THIS COURT ORDERS that all Persons shall forthwith advise the Manager of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Schedule "B" Corporations, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Manager or permit the Manager to make, retain and take away copies thereof and grant to the Manager unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this

paragraph 9 or in paragraph 11 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Manager due to the privilege attaching to solicitor-client communication or litigation work product belong to a Shareholder or a director of a Schedule "B" Corporations personally or due to statutory provisions prohibiting such disclosure.

9. THIS COURT ORDERS that the Records shall, upon reasonable notice to the Manager and during normal business hours of the Manager, be open to examination by each of the parties and their respective legal counsel, and that a copy of these Records be provided by the Manager of the parties upon request, the reasonable costs associated with such access and copies to be determined by the Manager, and invoiced to and paid by the requesting party to the Manager forthwith.

10. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Manager for the purpose of allowing the Manager to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Manager in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Manager. Further, for the purposes of this paragraph, all Persons shall provide the Manager with all such assistance in gaining immediate access to the information in the Records as the Manager may in its discretion require including providing the Manager with instructions on the use of any computer or other system and providing the Manager with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE MANAGER

11. THIS COURT ORDERS that, except as may be provided herein, no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Manager except with the written consent of the Manager or with leave of this Court.

NO PROCEEDINGS AGAINST THE SCHEDULE "B" CORPORATIONS OR THE PROPERTY

12. THIS COURT ORDERS that no Proceeding against or in respect of any of the Schedule "B" Corporations or the Property shall be commenced or continued except with the written consent of the Manager or with leave of this Court and any and all Proceedings currently under way against or in respect of the Schedule "B" Corporations or the Property, with the exception of the proceedings referred to in paragraph 7, are hereby stayed and suspended pending further Order of this Court. Notwithstanding any other provision in this Order, the parties shall not be precluded from taking any steps or from commencing or continuing any proceedings in Ontario Superior Court of Justice, Court File No. CV-13-10280-00CL (Commercial List), and in such circumstances the Manager

shall not be obliged to defend or participate on behalf of the Schedule "B" Corporations and the Manager shall not be liable for any costs, damages or awards related to any such proceedings.

NO EXERCISE OF RIGHTS OR REMEDIES

13. THIS COURT ORDERS that, except as may be provided herein, all rights and remedies against the Schedule "B" Corporations, the Manager, or affecting the Property, are hereby stayed and suspended except with the written consent of the Manager or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Manager or the Schedule "B" Corporations to carry on any business which the Schedule "B" Corporations is not lawfully entitled to carry on, (ii) exempt the Manager or the Schedule "B" Corporations from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE MANAGER

14. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Schedule "B" Corporations, without written consent of the Manager or leave of this Court.

CONTINUATION OF SERVICES

15. THIS COURT ORDERS that all Persons having oral or written agreements with the Schedule "B" Corporations or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Schedule "B" Corporations are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Manager, and that the Manager shall be entitled to the continued use of the Schedule "B" Corporations' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Manager in accordance with normal payment practices of the Schedule "B" Corporations or such other practices as may be agreed upon by the supplier or service provider and the Manager, or as may be ordered by this Court.

16. THIS COURT ORDERS that Respondents are enjoined from canceling or failing to renew any insurance policies or other coverage in respect of to the Rose & Thistle Group Ltd. and/or the Schedule B Companies or any property owned by them, except with the express written approval of the Manager.

17. THIS COURT ORDERS that the Inspector shall be added as a named insured to any existing insurance policies or other coverage in respect of to the Rose & Thistle Group Ltd. and/or the Schedule B Companies or any property owned by them.

MANAGER TO HOLD FUNDS

18. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Manager from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into either the existing bank accounts held by Schedule "B" Corporations' or one or more new accounts to be opened by the Manager, at the Manager's discretion, as the Manager may reasonably decide and the monies standing to the credit of such accounts from time to time, net of any disbursements provided for herein, shall be held by the Manager to be paid in accordance with the terms of this Order or any further Order of this Court.

LIMITATION ON ENVIRONMENTAL LIABILITIES

19. THIS COURT ORDERS that nothing herein contained shall require the Manager to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Manager from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Manager shall not, as a result of this Order or anything done in pursuance of the Manager's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation.

LIMITATION ON THE MANAGER'S LIABILITY

20. THIS COURT ORDERS that the Manager shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part as so found by a court of competent jurisdiction. The Manager shall further enjoy the protections from liability as would otherwise be afforded to a trustee in bankruptcy under section 14.06 of the *Bankruptcy and Insolvency Act* or under any other similar legislation applicable to trustees and receivers.

MANAGER'S ACCOUNTS

21. THIS COURT ORDERS that any expenditures or liability which shall properly be made or incurred by the Manager including the fees and disbursements of the Manager and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of

the Manager and its counsel, shall be allowed to it in passing its accounts and shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person (the "**Manager's Charge**").

22. THIS COURT ORDERS that the Manager and its legal counsel, if any, shall pass their accounts from time to time, and for this purpose the accounts of the Manager and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

23. THIS COURT ORDERS that prior to the passing of its accounts, the Manager shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Manager or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE MANAGERSHIP

24. THIS COURT ORDERS that the Manager be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $5 million (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Manager by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Manager's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Manager's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

25. THIS COURT ORDERS that neither the Manager's Borrowings Charge nor any other security granted by the Manager in connection with its borrowings under this Order shall be enforced without leave of this Court.

26. THIS COURT ORDERS that the Manager is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "Manager's Certificates") for any amount borrowed by it pursuant to this Order.

27. THIS COURT ORDERS that the monies from time to time borrowed by the Manager pursuant to this Order or any further order of this Court and any and all Manager's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Manager's Certificates.

GENERAL

28. THIS COURT ORDERS that the Manager may from time to time apply to this Honourable Court for advice and directions in the discharge of the Manager's powers and duties hereunder.

29. THIS COURT ORDERS that nothing in this Order shall prevent the Manager from acting as receiver, interim receiver or trustee in bankruptcy of the Schedule "B" Companies.

30. THIS COURT HEREBY REQUESTS that aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada to give effect to this Order and to assist the Manager and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Manager, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Manager and its agents in carrying out the terms of this Order.

31. THIS COURT ORDERS that the Manager be at liberty and is hereby authorized and empowered to apply to any court, tribunal regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

32. THIS COURT ORDERS that any interested party may apply to this Court to seek the advice and direction of the Court in respect of this Order or the Manager's activities on not less than seven (7) days' notice to the Manager and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

33. THIS COURT ORDERS that any court materials in these proceeds may be served by emailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:
NOV 18 2013
NB

SCHEDULE "A" COMPANIES

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investment Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen's Corner Inc.
14. DBDC Queen's Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Industrial Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.

25. DBDC West Mall Holdings Ltd.

26. DBDC Royal Gate Holdings Ltd.

27. DBDC Dewhurst Developments Ltd.

28. DBDC Eddystone Place Ltd.

29. DBDC Richmond Row Holdings Ltd.

SCHEDULE "B" COMPANIES

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline – 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Inc.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Corp.
14. Fraser Lands Ltd.
15. Queen's Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.

25. Skyway Holdings Ltd.

26. West Mall Holdings Ltd.

27. Royal Gate Holdings Ltd.

28. Dewhurst Developments Ltd.

29. Eddystone Place Inc.

30. Richmond Row Holdings Ltd.

31. El-Ad Limited

32. 165 Bathurst Inc.

SCHEDULE "C"

MANAGER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that [MANAGER'S NAME], the Manager (the "Manager") of the assets, undertakings and properties [DEBTOR'S NAME] acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the _____ of MONTH, 20YR (the "Order") made in an action having Court file number _____-CL-_____, has received as such Manager from the holder of this certificate (the "Lender") the principal sum of $_____, being part of the total principal sum of $_____ which the Manager is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Manager pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Manager to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Manager to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Manager to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Manager does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 20_____.

[MANAGER'S NAME], solely in its capacity as Manager of the Property, and not in its personal capacity

Per: _____

Name:

Title:

DBDC SPADINA LTD., and those corporations listed on Schedule A hereto
Plaintiffs

-and-

NORMA WALTON et al.
Defendants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

ORDER

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Tab C

CITATION: DBDC Spadina Ltd. v. Walton, 2014 ONSC 4644
COURT FILE NO.: CV-13-10280-00CL
DATE: 20140812

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: 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., Respondents

AND:

Those Corporations Listed on Schedule B Hereto, To Be Bound by the Result

BEFORE: D. M. Brown J.

COUNSEL: P. Griffin and S. Roy, for the Applicants

N. Walton, Respondent in person

H. Cohen, for the remaining Respondents, Ronauld Walton, The Rose & Thistle Group Ltd. and Eglinton Castle Inc.

M. Dunn and J. LaBine, for Schonfeld Inc., Manager and Inspector

J. Simpson, for Harbour Mortgage

D. Jackson and R. Fisher, for Christine DeJong, Michael DeJong, Christine DeJong Medical Professional Corporation, C2M2S Holding Corp. and DeJong Homes Inc.

L. Wallach, for the Handelman/Sorga mortgagees

G. Benchetrit, for the Business Development Bank of Canada

D. Michaud, for Equitable Bank

A. Jackson, for Home Trust Company

J. Marshall, for Firm Capital Credit Corp.

HEARD: July 16, 17 and 18, 2014, with subsequent written submissions filed July 30, 2014 by the Applicants, Respondents and Inspector.

REASONS FOR DECISION

I. Overview of the Motions and Return of Application

[1] Between September, 2010 and June, 2013, Dr. Bernstein, through his Applicant companies, invested in a portfolio of 31 properties in Toronto with the Respondents, Norma and Ronauld Walton. Each property was held by a corporation – the "Schedule B Companies" – jointly owned by Dr. Bernstein and the Waltons. The Applicants contributed to the Schedule B Companies $2,568,694 by way of equity, $78,490,801 by way of equity advances converted into debt, largely shareholder loans, and they advanced $23,340,000 under mortgages.[1] Dr. Bernstein advanced mortgage funds against both Schedule B Companies and what the parties have called "Schedule C Properties", which were owned by companies – Schedule C Companies – controlled by the Waltons in which Dr. Bernstein did not have an ownership interest.[2]

[2] These motions by the Applicants and Respondents, and the return of the Applicants' application, deal with further issues in the on-going litigation between Dr. Bernstein and the Waltons concerning the need for the Respondents to account for funds, and to be held accountable for funds, invested by Dr. Bernstein and his companies with them.

[3] As well, Christine DeJong Medical Professional Corporation, C2M2S Holding Corp. and DeJong Homes Inc., other investors with the Waltons, brought a cross-motion seeking relief in respect of one Schedule C Property, 3270 American Drive, Mississauga.

[4] In a separate, handwritten endorsement made at the end of the hearing on July 18, 2014, I made an Interim Order restraining any further dealings with the Schedule C Properties in dispute until the release of these Reasons.

II. Background

[5] Dr. Bernstein is the founder of diet and health clinics. Norma Walton is a lawyer and co-founder with her husband, Ronauld Walton, of the Respondent, The Rose and Thistle Group Ltd. (the "Rose & Thistle"). Called to the Bar in 1995, Ms. Walton was a principal of Walton Advocates, an in-house law firm providing legal services to the Rose & Thistle group of companies. By Decision dated May 16, 2014, the Law Society of Upper Canada's Hearing Division suspended Ms. Walton's licence for 18 months starting on July 1, 2014; the Law Society has appealed that Decision as too lenient.

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[1] Second Report of the Inspector, Appendix B. James Reitan, the CFO of Dr. Bernstein Diet and Health Clinics, put the amounts advanced at approximately $78.8 million in equity and $27.6 million in mortgages.

[2] The terms of five of the mortgages have expired and they remain unpaid. The terms of the other four mortgages will expire between July and December, 2014.

[6] Ronauld Walton is also a lawyer, a principal of Walton Advocates and a co-founder of Rose & Thistle.

[7] Newbould J., in his Reasons of October 7, 2013 appointing Schonfeld Inc. as Inspector of the Schedule B Companies,[3] set out many of the background events to this dispute:

> [5] Beginning in 2008, Dr. Bernstein acted as the lender/mortgagee of several commercial real estate properties owned by the Waltons either through Rose & Thistle or through other corporations of which they are the beneficial owners.
>
> [6] Following several financings, Dr. Bernstein and the Waltons agreed to invest jointly in various commercial real estate projects. To date, Dr. Bernstein has invested approximately $110,000,000 into 31 projects...
>
> ...
>
> [7] Dr. Bernstein and the Waltons entered into separate agreements which provided as follows:
>
> a. A new company would be incorporated for each project (the "Owner Company");
>
> b. Dr. Bernstein (through a company incorporated for this purpose) would hold 50% of the shares of the Owner Company;
>
> c. The Waltons (either directly or through a company incorporated for this purpose) would hold the other 50% of the shares of the Owner Company;
>
> d. Each of Dr. Bernstein and the Waltons would contribute an equal amount of equity to each project;
>
> e. The Waltons would manage, supervise and complete each project for an additional fee through Rose & Thistle. Rose & Thistle is not a party to the agreements;
>
> f. The Waltons also agreed to be responsible for the finances, bookkeeping, accounting and filing of tax returns, among other things, of the Owner Company;
>
> g. Each Owner Company was to have a separate bank account;
>
> h. Dr. Bernstein would not be required to play an active role in completing each project, but his approval would be required for:

---

[3] 2013 ONSC 6251

i. Any decisions concerning the selling or refinancing of each property;

ii. Any decisions concerning the increase in the total amount of equity required to complete each project; and

iii. Any cheque or transfer over $50,000.

i. The Waltons agreed to provide Dr. Bernstein with:

i. Ongoing reports on at least a monthly basis detailing all items related to each property;

ii. Copies of invoices for work completed each project monthly;

iii. Bank statements monthly; and

iv. Listing of all cheques monthly;

j. Upon sale of a property, Dr. Bernstein and the Waltons would receive back their capital contribution plus a division of profits; and

k. The agreements generally provided that Dr. Bernstein and Norma Walton were to be the sole directors of the Owner Company.

[8] A review by James Reitan, director of accounting and finance at Dr. Bernstein Diet and Health Clinics, in the early summer of 2013 and into early September 2013 revealed that:

a. The Waltons were not making their portion of the equity investments into the properties;

b. The Waltons appeared to be taking on third party investors in the projects;

c. The Waltons were engaged in significant related party transactions in respect of the projects through and using Rose & Thistle;

d. Dr. Bernstein's approval was not being sought for any of the matters set out in subparagraph 7(h) above;

e. Dr. Bernstein was not receiving any of the required reporting, set out in subparagraph 7(i) above;

f. The mortgage payment for August 2013 for 1450 Don Mills did not go to the mortgagee, Trez Capital, but to Rose & Thistle. No documentation has been provided to confirm that the payment was made from Rose & Thistle to Trez Capital. There is no legitimate purpose for the payment going through Rose & Thistle;

g. Additional mortgages of $3 million each were placed on 1450 Don Mills Road and 1500 Don Mills Road on July 31, 2013 and August 1, 2013 respectively, of which Dr. Bernstein had no knowledge and which he did not approve;

h. It appears that there has been extensive co-mingling of the Owner Companies' funds with and into the bank accounts of Rose & Thistle;

i. Rose & Thistle has removed funds from the Owner Companies, which have been recorded as intercompany amounts owing from Rose & Thistle to the Owner Companies;

j. Rose & Thistle has rendered invoices to the Owner Companies, which in some cases have the effect only of reducing the intercompany amount owed by Rose & Thistle, for work and services that have yet to be performed;

k. The Waltons have entered into a series of transactions which have the result of reversing equity contributions made by them and immediately removing equity contributions by the Applicants; and

l. The Owner Companies have incurred significant interest and penalty charges for late penalties of utilities, without explanation.

[9] On September 20, 2013, Dr. Bernstein appointed Schonfeld Inc. on behalf of the applicants to gather information related to the Owner Companies, the projects and the properties. Schonfeld Inc. has not been granted complete access to the documents (including bank statements, invoices and other documentation) related to 22 of 31 projects. Ms. Walton has indicated that she requires a further matter of weeks to make available the documents for the remainder of the projects.

[8] Most of the Applicants' equity contributions were advanced directly to Schedule B Companies, but some were paid to a Walton company, Rose & Thistle, for transfer to a Schedule B Company, and some were paid directly to a real estate agent for the purpose of acquiring a Schedule B Property.[4]

[9] By order made October 7, 2013, Newbould J. appointed Schonfeld Inc. as Inspector of the Schedule B Companies pursuant to section 161(2) of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16. In making that appointment, Newbould J. concluded:

[27] In my view, on the record before me Dr. Bernstein has met the test required for an investigation to be ordered. To put on two mortgages for $6 million without the required

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[4] Aide Memoire to Reply Argument of the Applicants, Schedule E.

> agreement of Dr. Bernstein and then refuse to disclose what happened to the money except in a without prejudice mediation meets the higher test of oppression, let alone the lesser test of unfairly disregarding the interests of Dr. Bernstein. The other examples of the evidence I have referred, as well as the failure to provide monthly reports on the projects to Dr. Bernstein, are clearly instances of the Waltons unfairly being prejudicial to and unfairly disregarding the interests of Dr. Bernstein, a 50% shareholder of each of the owner corporations.
>
> [28] Ms. Walton contends in her affidavit that the appointment of an inspector would likely preclude the respondents from further discharging their accounting and reporting functions. I fail to see how this could be the case, and in any event the evidence is clear that the Waltons have failed to properly provide monthly reports.[5]

[10] About one month later, on November 5, 2013, Newbould J. granted the Applicants' request to appoint Schonfeld Inc. as the receiver – or what the parties styled as the Manager - of the Schedule B Companies. That order was affirmed by the Court of Appeal on May 21, 2014.[6] I will return to the November 5 Reasons at various points in this decision, but for purposes of this background narrative I need only highlight the key findings of fact made by Newbould J. which led him to appoint the Manager:

> [46] I do not see the picture as now being less clear [than on October 7]. To the contrary, it seems much clearer. I have referred to the concerns above in some detail. They include the following:
>
> > 1. $2.1 million was improperly taken from the proceeds of the $6 million mortgages that never had Dr. Bernstein's approval, $400,000 of which was taken by Ms. Walton into her personal bank account. Ms. Walton was well aware that this was wrong. She is a lawyer and the agreements were drawn in her office. Her initial reaction when confronted about the mortgages by Mr. Reitan, who at the time did not know what had happened to the mortgage proceeds, that she would only discuss it in a without prejudice mediation is a clear indication she knew what she did was wrong and contrary to Dr. Bernstein's interests.
> >
> > 2. $268,104.57 was improperly paid from the Tisdale Mews account to pay for renovations to the Waltons' residence. No reasonable explanation has been provided.
> >
> > 3. The co-mingling of accounts and the cash sweep into the Rose & Thistle accounts was a breach of agreement and unfairly prejudicial to Dr. Bernstein and a disregard of his interests. This is particularly the case in light of the lack of current books and records that should have been prepared and available rather

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[5] *Ibid.*, paras. 27 and 28.
[6] 2014 ONCA 428

than requiring an Inspector to try to get to the bottom of what has occurred. A lack of records is in itself unfairly disregarding the interests of Dr. Bernstein, particularly taken the size of his investment. Blaming it on outdated computer software is hardly an answer. That should have been taken care of long ago.

4. The frenzied attempts in the past month since the Inspector was appointed to update ledgers and manufacture invoices should never have been necessary and in light of the evidence, obviously casts doubt on what is now being done to update the records. Dr. Bernstein should never have had to face this prejudicial situation.

5. The Waltons have not provided equal payments of money into any of the 31 properties. The claim that their equity was provided by way of set-off for fees and work, even if that were permissible under the agreements, is unsupported by any available documents to the Inspector. What little has been provided raises serious issues, as discussed above. As well, taking in new equity partners is not at all what Dr. Bernstein signed up for, and indicative of a lack of ability of the Waltons to fund their equity in accordance with the agreements.

6. Dr. Bernstein was entitled to monthly reports. It is now quite evident why that has not occurred.

[47] Mr. Campion contended that a receiver/manager could not be ordered over any particular property without a finding of oppressive conduct regarding that property. I am not at all sure that such a proposition in this case is correct, but in any event there has been oppressive conduct regarding each property. The co-mingling of funds and the sweep of cash from each property's account into Rose & Thistle was oppressive in these circumstances in which there were no contemporaneous books and records kept that would permit Dr. Bernstein, or now the Inspector, to fully understand what occurred to the money from each property. The setting up of alleged fees owing to Rose & Thistle for the properties to substantiate the Waltons' equity contributions, even if permissible, without readily available documentation to substantiate the validity of the fees, was oppressive. The lack of records and reports for each property was oppressive.

[48] It is contended on behalf of the respondents that they have the contractual right to manage the projects and thus no receiver/manager should be appointed. The difficulty with this argument is that the contracts have been breached and the Waltons have certainly not shown themselves to be capable managers. A basic lack of record keeping, compounded by co-mingling of funds and transferring them to Rose & Thistle, belies any notion of proper professional management. Ms. Walton acknowledges that accounting and other issues "have plainly caused him [Dr. Bernstein] to lose confidence in my management". That is a fundamental change to the relationship.

[49] It is contended that the business will be harmed if a receiver/manager is appointed. Ms. Walton states in her affidavit that she believes that the dynamic nature of this portfolio will suffer and in the end suffer unnecessary losses. What is meant by the dynamic nature is not clear. I recognize that a receiver/manager can in certain

circumstances have negative implications in the marketplace, particularly if it means that unsold properties will have to be put up for sale at less than market prices or be sold quickly. There is no indication that is the plan here at all and there is no court ordered sale being requested.

[11] As of the July hearing of these motions and application, the Manager had sold 12 of the Schedule B Properties over which it had been appointed for purchase prices totaling $127.013 million. After the payment of existing mortgages, those sales had netted $18.908 million. As of July 9, 2014, the total value of the construction liens registered against the sold properties was $1.228 million.

III. The positions of the parties and the relief requested

A. The Applicants

[12] Later in these Reasons I shall deal at length with the relief sought by each side. By way of summary of the issues engaged by these motions, the Applicants advanced the following positions:

(i) The Respondents had unjustly enriched themselves by improperly diverting funds from the Schedule B Companies to Rose & Thistle and the Schedule C Companies, and the diverted funds should be made subject to a constructive trust to be re-conveyed to the Schedule B Companies. The diverted funds can be traced into the Schedule C Properties and the Court should declare a constructive trust over 44 Park Lane Circle and the Schedule C Properties in favour of the Schedule B Companies in the total amount of $23.6 million;

(ii) The Waltons were fiduciaries of the Schedule B Companies and breached their fiduciary duty when they diverted the funds. That conduct also was oppressive conduct and should be remedied by granting the proprietary interest of a constructive trust in Schedule C Companies/Properties;

(iii) The Waltons' shares in the Schedule B Companies should be cancelled and any entitlement to any finds flowing therefrom disallowed; and,

(iv) A damages award in the amount of $78,420,418 should be made in any event against the Respondents, together with certain ancillary relief including the appointment of a receiver over the property of the Waltons.

B. Norma Walton

[13] Norma Walton advanced three basic positions at the hearing: (i) the Respondents had accounted for the monies advanced to them by the Applicants; (ii) the jointly-owned Schedule B

Companies actually owed the Waltons' Rose & Thistle money, not the other way around; and, (iii) the restrictions placed on the Waltons' ability to deal with their Schedule C Properties by previous Court orders should be removed and they should be entitled to sell those properties in order to satisfy the claims of all their creditors and investors, except for Dr. Bernstein.

IV. Structure of these Reasons

[14] At the heart of these motions, cross-motions and return of application lie two issues: (i) Did the Waltons use the funds advanced to them by the Applicants as their contracts required? (ii) If they did not, did the Waltons use some or all of the funds advanced by the Applicants to their own personal benefit, including the benefit of their Schedule C Companies/Properties?

[15] For the reasons set out below, I conclude that the Waltons did not use the funds advanced to them by the Applicants as their contracts required but, instead, the Waltons mis-used and mis-appropriated most of the funds advanced to them, diverting some of the funds to their own personal benefit and the benefit of their Schedule C Companies. I further conclude that the Waltons have not provided the full accounting of how they in fact used those funds, notwithstanding the October 25, 2013 Order of this Court that they do so.

[16] The Inspector conducted an extensive, but not exhaustive, analysis tracing how the Waltons used the funds advanced to them by the Applicants. The Inspector presented its findings on the amount of the "net transfer" of funds between the jointly-owned Schedule B Companies and Rose & Thistle, and the amount of the "net transfer" of funds between Rose & Thistle and the Walton-owned Schedule C Companies and Properties. Those net transfer analyses formed the focal point of the arguments by both parties, with the Applicants contending that the Waltons had not explained the net transfers out of the Schedule B Companies to Rose & Thistle, and with Norma Walton taking the position that she had. In light of that structure to the evidence and the parties' arguments, I plan to review the evidence in the following manner:

(i) First, I shall examine the evidence about how the funds advanced by the Applicants were used by the Respondents, in particular the evidence of the "net transfer" of funds from the Schedule B Companies to Rose & Thistle and the net transfer of funds from Rose & Thistle to the Schedule C Companies;

(ii) Second, I will examine the evidence concerning the costs of construction actually incurred on behalf of the Schedule B Company projects, focusing on the Respondents' contention that the construction fees charged by Rose & Thistle to the Schedule B Companies were legitimate and explained much of the apparent net transfer of funds to Rose & Thistle;

(iii) Next, I will examine the evidence of the tracing which the Inspector conducted of the Applicants' funds into Schedule C Companies and Properties; and,

(iv) Finally, I will consider the evidence relating to the arguments made by the Respondents explaining their use of the Applicants' funds.

V. The use of the Applicants' funds: the "net transfer" analysis

A. The reports of the Inspector

[17] The Inspector conducted a tracing analysis of some of the funds advanced by the Applicants to the Schedule B Companies. The scope of its analysis was described in the Inspector's Fourth Interim Report (April 23, 2014). The Inspector identified the largest 53 advances by the Applicants to the Schedule B Companies and then examined the activity in the relevant Schedule B Company bank account immediately following each advance. The Inspector then looked for any contemporaneous transfer of funds from the relevant Schedule B Company account to the Rose & Thistle bank account and, finally, examined the Rose & Thistle bank account to ascertain what activity occurred following the receipt of the funds transferred in from the Schedule B Company account, in particular whether there was any contemporaneous transfer of funds from the Rose & Thistle account to a Schedule C Company's account.

[18] In its Fourth Report the Inspector set out the following findings:

> In all but two cases reviewed to date, a portion of those funds provided by the Applicants and deposited to the [Schedule B] Company Accounts were immediately (on the same day and/or during the next few days) transferred from the relevant Company Account to the Rose & Thistle account. In the two exceptions, all of the funds provided by the Applicants to the Company Account were used by the [Schedule B] Company immediately.
>
> Funds transferred into the Rose & Thistle Account were then used in one or more of the following ways: (a) transferred to a Walton Account; (b) transferred to other [Schedule B] Company Accounts; and (c) used to make payments directly out of the Rose & Thistle Account. The accuracy with which a specific dollar contributed by the Applicants can be matched to a specific use depends primarily on the opening balance and the level of activity in the Rose & Thistle Account when the funds were transferred. When funds contributed to a Company were transferred into the Rose & Thistle Account, funds were also transferred into and/or out of the Rose & Thistle Account by or to other Companies or Walton [Schedule C] Companies. In such cases, it is possible to trace funds out of the Rose & Thistle Account into accounts held by the Companies or the Walton Companies but it is not possible to match exactly the funds transferred out of the Rose & Thistle bank account to the funds transferred in as the funds have been co-mingled.

In support of those observations, the Inspector attached as Exhibit F to its Fourth Report a series of flowcharts which summarized the use of funds advanced by the Applicants to various Schedule B Companies.

[19] In its Fifth Report dated July 1, 2014, the Inspector reported that it had continued its tracing analysis and recorded the following further findings:

The Inspector's analysis to date supports the following conclusions:

(a) The Respondents directed transfers of $23.6 million (net) from the [Schedule B] Company Accounts to a bank account belonging to the Rose & Thistle Group Limited (the "Rose & Thistle Account") during the period from October 2010 to October 2013. These transfers occurred on a regular and ongoing basis during the period examined;

(b) During the same period, the Respondents directed transfers of $25.4 million (net) from the Rose & Thistle Account to companies that they own without the Applicants (the "Walton Companies" [or Schedule C Companies]). These transfers also occurred on a regular and ongoing basis during the period examined;

(c) In almost all cases, some or all of the amounts advanced to the Companies by the Applicants were transferred almost immediately to the Rose & Thistle account;

(d) In seven instances identified by the Inspector, all of the following occurred in a brief period of time:

(i) funds were transferred from one or more Company Accounts;

(ii) funds were then transferred to a Walton Company; and,

(iii) the relevant Walton Company purchased a property.

Based on the foregoing analysis, and the analysis set out below, the Inspector has concluded that the Respondents used new equity invested in, and mortgage amounts advanced to, the Companies by the Applicants to fund the ongoing operations of other Companies and the Walton Companies. Almost every time the Applicants advanced funds to one of the Companies, a significant portion of those funds was transferred to Rose & Thistle. In some instances, funds could be traced directly into a Walton Company. In other instances, funds could not be traced directly because the Applicants' funds were co-mingled with other funds in the Rose & Thistle Account. However, the Inspector has concluded that the Applicants' investment in the Companies was a major source of funds for the Walton Companies.

The Respondents have sought to justify the movement of funds from the Companies to Rose & Thistle on the basis that these transfers were payments for services rendered by the Respondents to the Companies. To date, the Respondents have not provided evidence to substantiate the majority of the alleged fees and the Inspector has found evidence that is not consistent with this explanation. In particular:

(a) the transfer of funds observed by the Inspector is more consistent with funds being taken as needed to fund obligations in the other Companies and the Walton Companies than funds being taken as payment for services rendered. In some cases, funds were transferred by Companies immediately after those companies acquired

Properties and/or invoices were rendered for the exact amount transferred from a particular Company during the preceding period;

(b) there is no evidence that the Respondents possessed sufficient funds to pay for both the construction activity that they alleged to have carried out and the transfers observed to the Walton Companies; and,

(c) in some cases funds have been transferred from Companies, and the Respondents have delivered invoices for construction work, where little or no work had been done on the relevant Property. Moreover, the various Companies owned Properties in different stages of construction and development but none of the Companies retained any substantial cash reserve from the Applicants' initial investment to fund future construction costs.

[20] In her Factum Ms. Walton accepted the Inspector's finding that the net amount of $23,680,852 had been transferred by the Schedule B Companies to Rose & Thistle.[7]

[21] However, Ms. Walton disputed the Inspector's view that the Respondents lacked sufficient funds to pay for both the construction activity they alleged they carried out and the transfers observed to the Schedule C Companies. Ms. Walton deposed that every dollar transferred from the Schedule B Companies to Rose & Thistle was for legitimate work completed and amounts owed to it. As well, Ms. Walton took the position that Schedule B Companies currently owed the Rose & Thistle additional sums for services rendered, but not yet paid. In its Supplement to its Fifth Report the Inspector responded:

> In general terms, the Inspector agrees that construction and development work occurred at the properties identified by Ms. Walton. The Inspector has never asserted that Rose & Thistle did not perform any construction or development work. The Inspector is of the view, however, that Rose & Thistle has failed to provide documents to substantiate a level of construction and development work commensurate with the funds transferred to it from the Companies. In the Inspector's view, construction and development work on the scale alleged by the Respondents would be supported by a significant volume of relevant records including invoices from subcontractors, consultants and suppliers, timesheets, payroll records, progress draws and other similar documents. The supporting documents are (with limited exceptions) notably absent from the materials provided to the Inspector and the court...

B. The Froese Forensics limited critique report

[22] Ms. Walton retained Mr. Ken Froese, of Froese Forensic Partners ("Froese"), to prepare a response to the first Four Reports of the Inspector. Froese prepared a Forensic Accounting

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[7] Factum of the Respondent Norma Walton, para. 49.

Report dated June 25, 2014 in the nature of a limited critique report. That report did not contain a statement of the expert's qualifications as required by Rule 53.03(2.1)(2) of the *Rules of Civil Procedure*.[8] An acknowledgment of expert's duty form was filed only when Ms. Walton filed her reply factum. Although Froese did not swear an affidavit through which to tender his report, thereby rendering the report hearsay, in the result the Applicants cross-examined him on his report. Under those circumstances, I am prepared to overlook those deficiencies in the Froese Report, and I will accept it as an expert's report properly tendered under Rule 53.03.

[23] The first area dealt with by Froese concerned the tracing analysis performed by the Inspector. Froese had written to the Inspector on May 30, 2014 requesting certain information. The Inspector met with Froese on June 3 and 10, 2014. Froese made the following observations about the Inspector's tracing analysis:

(a) Although the Inspector stated that the tracing analysis was based on the 53 largest advances by the Applicants, Froese identified four other mortgage advances made by the Applicants which were larger in amount;

(b) In respect of the 53 advances traced by the Inspector, Froese stated that $35.2 million of the $55.8 million was transferred from Schedule B Companies to the Rose & Thistle Account; "Our conclusion in reviewing the Inspector's tracing of the 53 Advances is that many of the advances are co-mingled in the Rose & Thistle clearing account and thus cannot be directly traced to Schedule C Companies";

(c) The net transfer from Rose & Thistle to Walton-owned Schedule C Companies identified by the Inspector as amounting to $25,464,492 should be reduced by $1 million to take into account certain unrecorded deposits;

(d) The net amount owing from Schedule C Companies to Rose & Thistle does not represent a direct tracing of the Applicants' funds to Schedule C Companies or an amount owing by Schedule C Companies to Schedule B Companies.

[24] Froese's general conclusion about the Inspector's tracing analysis was as follows:

> Although we concluded that there are very few examples of a direct tracing of advances from Dr. Bernstein to Schedule B Companies that traced to the Rose & Thistle clearing account and then to Schedule C Companies without co-mingling with other sources of funds, *this does not negate the fact that, over all, net funds flowed to Schedule C Companies from Rose & Thistle, and that net funds flowed to Rose & Thistle from Schedule B Companies*. Rather,

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[8] Mr. Froese's CV and retainer letters were produced and marked as exhibits on his July 8, 2014 cross-examination.

in our view it means that each Schedule C Company needs to be evaluated from the perspective of:

1) the tracing analysis performed by the Inspector, in conjunction with our comments on the tracing for particular advances; and,

2) the *overall* net transfer position of each Schedule C Company, as reflected in the net transfers schedule prepared by the Inspector, as adjusted for additional relevant information. (emphasis added)

Froese commented specifically on the Inspector's tracing analysis for seven of the properties owned by Schedule C Companies. Froese did not offer any other analysis of the overall net transfer position of each Schedule C Company, no doubt because he was not asked to do so by the Respondents as part of his retainer.

[25] Froese also commented on the accuracy of the overall cash transfer analysis performed by the Inspector found in Appendix B to the Inspector's Fourth Report. Froese stated:

> The Inspector's Cash Transfer Analysis includes transactions from September 1, 2010 to December 31, 2013 for Schedule C Companies and from October 1, 2010 to December 31, 2013 for Schedule B Companies. *It is a helpful analysis in that it provides an overall perspective on net transfers between these periods, and on amounts potentially owing from Schedule C Companies to Rose & Thistle.*
>
> We have the following comments on the Inspector's Cash Transfer Analysis:
>
> 1) The Cash Transfer Analysis does not include all transactions between Rose & Thistle and the Schedule B and C Companies, such as proceeds on sale or refinancing of a property where funds are deposited directly to the Rose & Thistle clearing account from a source other than a bank transfer. For example, $341,189 was deposited to Rose & Thistle in relation to 620 Richmond Street, a property we understand was beneficially owned by Richmond Row Holdings, a Schedule B Company;
>
> 2) Some deposits are not included in the Cash Transfer Analysis, including $909,950 of deposits to Rose & Thistle from Norma Walton (see Schedule 2); and,
>
> 3) There may be other transactions relevant to evaluating amounts owing between the Schedule C Companies and Rose & Thistle, such as unpaid costs for services provided between the companies.
>
> As we have not reconciled Rose & Thistle's bank account to the Cash Transfer Analysis, there may be deposits or transfers that are missing or mis-categorized in the analysis. (emphasis added)

Presumably Froese did not perform such a reconciliation because the Respondents did not ask him to as part of the retainer. Froese testified that in preparing his report he received no audited

financial statements or any form of prepared financial statements for the Schedule B Companies, Rose & Thistle or the Schedule C Companies.

[26] In the Supplement to its Fifth Report (July 9, 2014) the Inspector commented on this portion of the Froese Report:

> The Inspector and Froese both acknowledged that, in some cases, funds could be traced directly from the [Schedule B] Companies to the Walton [Schedule C]Companies. The Inspector and Froese also agreed that, on a net basis, there was a transfer of $23.8 million from the Companies to Rose & Thistle and a transfer of more than $25 million from Rose & Thistle to the Walton Companies.
>
> ...
>
> Some transfers are possible to trace to specific funds (as is evidenced numerous times in the tracing of specific amounts to Walton Company property acquisitions which is acknowledged in the Froese Report) and some are not.
>
> In all, Froese and the Inspector agree that some funds can be traced directly from the Companies to the Walton Companies immediately before the Walton Companies purchased a Property. Froese asserts that the amount that can be traced into some Walton Companies is lower than the Inspector...

The Inspector also commented:

> Froese states that the $23.8 million does not represent a direct tracing to Walton Companies from Companies, but does not offer an explanation as to where else the Walton Companies received funds from, except in a few instances. This is generally consistent with the Inspector's analysis.

C. Disputes over the transfers in and out of specific Schedule B Companies

C.1 Certain transfers

[27] Froese commented on the Inspector's treatment of several advances (or groups of advances) on which the Inspector did not offer a specific response:

(a) Froese acknowledged that an $808,250 mortgage advance from Dr. Bernstein to Tisdale was transferred to the Rose & Thistle clearing account, but contended that because this transfer predated the agreement between Bernstein and the Waltons for that company, it should not be treated as a transfer from a Schedule B Company to Rose & Thistle;

(b) Although Froese acknowledged that 15 mortgage advances involved funds transferred from a Schedule B Company to Rose & Thistle which were co-mingled with other funds, Froese observed that 13 of the advances related to mortgagess which subsequently were fully repaid;

(c) With respect to Dr. Bernstein funds deposited to Liberty Village and Queen's Corner which Froese acknowledged were transferred to Rose & Thistle, Froese stated that there was substantially more co-mingling between Schedule B and Schedule C Companies than disclosed in the Inspector's analysis or, in the case of Queen's Corner, the advances did not trace to Schedule C Companies.

C.2 Twin Dragons (241 Spadina)

[28] In its analysis the Inspector traced $251,350 of an October 18, 2010 Applicants' advance of $1,120,500 from Twin Dragons – the Schedule B Company which owned 241 Spadina - to Rose & Thistle over the period October 25 to 29, 2010. The Inspector also commented that transfers into the Rose & Thistle account from Schedule C Companies during that period amounted to $32,050, while transfers out to Schedule C Companies amounted to $114,780.

[29] Froese stated that the Inspector's analysis did not include transfers in the same time frame from Rose & Thistle back to a second Twin Dragons bank account and deposits of non-Bernstein funds to Twin Dragons. Froese stated that transfers to/from Twin Dragons and Rose & Thistle in the five-day period under review netted to $350, or "essentially that almost none of the funds traced to a Schedule C Company."

[30] In its report the Inspector made two comments in response to the Froese analysis. First, the Inspector stated:

> Regarding Twin Dragons (Chart 1 of Appendix F) the $1,120,500 provided by the Applicants and deposited to the Twin Dragons bank account on October 18, 2010, most of the funds appear to have been used to close the acquisition of the Property. However, an amount of $150,000 from these funds was transferred from the Twin Dragons bank account to the Rose & Thistle bank account and was used to fund a cheque to Pointmark Real Estate in the amount of $150,000. *According to Froese, this cheque relates to a deposit on the Property at 18 Wynford, which is owned by Wynford Professional Center Limited (one of the [Schedule B] Companies). The Inspector agrees with this aspect of the Froese analysis.* (emphasis added)

Accordingly, this was an instance where funds advanced by the Applicants to one Schedule B Company for its use were diverted by the Waltons to another Schedule B Company in breach of the Waltons' agreements with Dr. Bernstein.

[31] The second comment of the Inspector concerned the Froese observations made in a chart he provided to the Inspector that third parties had deposited share subscription amounts into a second Twin Dragons bank account between October 27 and 29, 2010. On September 24, 2010 Dr. Bernstein Diet Clinics Ltd. entered into an agreement with the Waltons and Twin Dragons Corporation in respect of the intended purchase and development of 241 Spadina Avenue, Toronto. That agreement stipulated that the ownership of Twin Dragons would be 50% to Dr.

Bernstein and 50% to Ron and Norma Walton. Section 13 stated: "The only shares to be issued in the company will be as set out above, and neither party may transfer his or her shares to another party without the consent of all the other parties, which consent may be unreasonably withheld." As can be seen, the agreement contemplated that there would be no third party investors in the Schedule B Company or Property.

[32] Froese provided the Inspector with a chart which recorded share subscriptions totaling $250,000 received on October 27 and 29, 2010, from third parties - Teresa and Joe Memme and Duncan Coopland.[9] The Inspector filed copies of the cheques for both investments: one was dated October 26 and the other October 27, 2010. Both were made out to Twin Dragons Corporation. Both were dated approximately one month *after* Dr. Bernstein had concluded his agreement with the Waltons in respect of Twin Dragons.

[33] Froese testified that he subsequently realized that the third party investors had been removed from Twin Dragons, and he corrected his analysis on that point.[10]

[34] Back on June 7, 2013, Mr. Reitan, on behalf of the Applicants, had written to Norma Walton complaining that the records disclosed third-party equity contributions into Twin Dragons following the execution of the agreement with Bernstein. Ms. Walton responded on June 13, 2013 with a very aggressive letter in which she stated:

> We do not have outside investors in the properties we jointly owned with Dr. Bernstein. As Mario explained, before Dr. Bernstein became a 50% owner of Spadina and Highway 7, we had attracted investment from third parties. The moment he became an investor, we shifted all of those responsibilities over to the Rose & Thistle Group Ltd. and that is where they currently remain...

[35] That was not an accurate statement by Ms. Walton. As noted, both the Memmes and Coopland wrote share subscription cheques to Twin Dragons one month *after* the execution of the agreement with the Applicants. One can only conclude that they did so at the direction of Norma Walton. In its Fifth Report the Inspector stated:

> The contract between the Applicants and the Respondents prohibits any third party investors in Twin Dragons and the Respondents assert that the third-party investments were deposited into the Twin Dragons bank account in error
>
> ...

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[9] Both appear on Appendix "B" to these Reasons.
[10] Transcript of the cross-examination of Ken Froese conducted July 8, 2014, QQ. 111-112.

> In all, the documents reviewed and accounting treatment of the foregoing investments is not consistent with an erroneous investment in the wrong company as alleged by Ms. Walton.

[36] I accept that analysis by the Inspector. The statement made by Ms. Walton in her June 13, 2013 letter to Reitan regarding third party investors in Twin Dragons was not only inaccurate, it was misleading.

C.2 Bannockburn Lands Inc. (1185 Eglinton Avenue East)

[37] Froese stated that the Inspector's analysis of the tracing of a mortgage advance to Bannockburn Lands Inc. – the Schedule B Company which owned 1185 Eglinton Avenue East - omitted a deposit on March 28, 2011 into the Rose & Thistle clearing account from a Schedule C Company, 1780355 Ontario Inc.: "Accordingly, there was more co-mingling between Schedule B and Schedule C Companies than disclosed in the Inspector's analysis."

[38] In its Fifth Report the Inspector provided a detailed response to the comments made by Froese. The Inspector reported that after Froese had raised questions concerning Bannockburn, the Inspector conducted a further review of the banking and accounting records of Bannockburn and Rose & Thistle. The Inspector made the following points:

(a) In dealing with Froese's questioning of how the Inspector could be certain that the funds transferred to Rose & Thistle were the Applicants' funds, the Inspector stated:

> Froese indicated that their review had identified another mortgage as part of the Bannockburn transaction and suggested that the mortgage could have possibly been a source of funds for the transfer. However, this is not correct. As is set out below, the mortgage in question is a vendor take-back mortgage and no funds were advanced;

(b) The Inspector reported that the Applicants had advanced their funds for the property by a cheque made payable to the Waltons' law firm, Walton Advocates. After dealing with closing adjustments on the acquisition of the Eglinton Avenue property, Walton Advocates transferred a net amount of $628,630.52 to Rose & Thistle on December 17, 2010. The Inspector stated:

> As the mortgage referred to on the closing adjustments schedule was a vendor take-back mortgage, no cash was provided from this mortgage. Therefore, the funds of $628,630 transferred from Walton Advocates to Rose & Thistle can be directly traced to funds provided by the Applicants and this is consistent with the recording of the transaction in the accounting records of Bannockburn.

On cross-examination Froese agreed with that analysis by the Inspector;[11]

(c) Although a few weeks following the acquisition of the property Rose & Thistle rendered an invoice to Bannockburn for "work completed" in respect of the property, the Inspector observed that the quantum of the invoice exactly matched the "excess" cash provided by the Applicants not required on closing in the amount of $628,632.52. The Inspector stated:

> It appears, therefore, that the amounts on the invoice were calculated based on eliminating the intercompany receivable account between Bannockburn and Rose & Thistle which arose largely because of the cash transfers made from Bannockburn to Rose & Thistle.

(d) The Inspector stated that "a major use of funds by Rose & Thistle around the time of the $628,630 transfer from Walton Advocates was for payments to 364808 Ontario Ltd. totaling $484,349". 364808 Ontario was a Walton-owned Schedule C Company which owned a Davenport Road property purchased on July 5, 2002 by Norma and Ron Walton. Based upon the Inspector's review of the small balance in the Rose & Thistle bank account prior to the transfer from Walton Advocates, the Inspector concluded that "the Applicants' funds can be traced through to Rose & Thistle and were used to fund these payments to this Walton Company."

D. Summary of conclusions on the "net transfer" analysis

[39] The evidence set out above disclosed a substantial agreement between the Inspector and Froese on the overall amounts of the net transfers from (i) Schedule B Companies to Rose & Thistle and (ii) from Rose & Thistle to Schedule C Companies. The analysis performed by the Inspector was more comprehensive than the limited critique Froese was retained to perform. Both the Inspector (in respect of Twin Dragons) and Froese (in respect of Bannockburn) accepted certain criticisms made by the other of aspects of their respective analysis. On balance, I do not regard the specific critiques made by Froese to alter, in a material way, the findings made by the Inspector on the quantum of the net transfers. Consequently, I make the following findings of fact about the "net transfer" analysis of the movement of funds from Schedule B Companies to Rose & Thistle and from Rose & Thistle to Schedule C Companies:

(l) The Waltons directed the transfer of $23.6 million (net) from the Schedule B Company Accounts to a bank account belonging to Rose & Thistle during the period from October 2010 to October 2013;

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[11] *Ibid.*, QQ. 137-144.

(ii) During the same period, the Waltons directed transfers of $25.4 million (net) from the Rose & Thistle Account to companies that they owned without the Applicants – the Schedule C Companies; and,

(iii) In almost all cases, some or all of the amounts advanced to the Schedule B Companies by the Applicants were transferred almost immediately to the Rose & Thistle Account.

I further find that those transfers of funds from Schedule B Companies to Rose & Thistle constituted breaches of the agreements between the Applicants and the Respondents which required that each Schedule B Company, and the funds advanced to it, be used only to purchase, renovate and refinance the specific property owned by the Schedule B Company.

[40] Froese opined that the co-mingling of Schedule B Company funds and other funds in the Rose & Thistle account prevented, in most cases, the tracing of the Applicants' funds through Schedule B Companies to Schedule C Companies. For reasons which I will discuss in **Section VI below**, I do not accept Froese's opinion on that point. I also accept the point made by the Inspector that Froese did not offer an explanation of where the Waltons' Schedule C Companies otherwise sourced their funds, no doubt because he was not retained to express such an opinion. However, as will be discussed later in these Reasons, Ms. Walton has not provided a satisfactory answer to that most basic of questions.

V. Issues concerning the use of funds for Schedule B Properties

[41] From the evidence filed there is no doubt that the Respondents caused funds, including funds advanced by the Applicants, to be used to develop, renovate or construct several of the Schedule B Properties. The question raised by the evidence was: how much did the Respondents spend in the way of legitimate costs on the Schedule B Properties? As I will explain below, the Respondents have never provided a satisfactory answer to that question, notwithstanding an October, 2013 Order of this Court that they do so. Although the Respondents contended that a significant part of the funds advanced by the Applicants were used to pay invoices rendered by Rose & Thistle to Schedule B Companies for legitimate construction costs, as the following review of the evidence will disclose the Respondents have not provided concrete evidence to support the validity of the construction costs billed by Rose & Thistle despite repeated requests by the Inspector.

A. The invoices for construction costs and management fees charged by Rose & Thistle to Schedule B Companies

A.1 Overview

[42] The Respondents relied heavily on invoices rendered by Rose & Thistle to the Schedule B Companies to provide an explanation for $12,264,158[12] of the $23.680 million net transfer of funds from the Schedule B Companies to Rose & Thistle. In her April 28, 2014 affidavit Ms. Walton deposed:

> In my opinion, the only basis upon which the Applicants can advance a claim against my non-Bernstein assets is if I am unable to back up the invoices Rose and Thistle charged to the joint portfolio.

Because of the centrality of those invoices to the Respondents' defence, I intend to spend some time reviewing how this issue has unfolded since October, 2013.

[43] From the early stages of this proceeding the Inspector expressed concern that the Rose & Thistle invoices were not rendered on a regular basis and, instead, a significant number of invoices had been rendered just prior to and following its appointment. In his November 5 Reasons Newbould J. commented:

> The frenzied attempts in the past month since the Inspector was appointed to update ledgers and manufacture invoices should never have been necessary and in light of the evidence, obviously casts doubt on what is now being done to update the records.

In her Factum Ms. Walton acknowledged, in her own way, the frailty of the Rose & Thistle invoices:

> When the Inspector was appointed by the court, Walton was forced to rush through a number of invoices for work Rose and Thistle had performed for the Schedule B properties and the joint portfolio. As a result of the rush to account for all the work provided to the joint portfolio, Walton is not sure that all work done has been invoiced and Walton made mistakes in some of the invoices provided.[13]

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[12] $8,500,853 by way of invoiced construction work; $1,183,013 for property management fees; and $2,580,292 in the way of property maintenance fees.
[13] Walton Factum, para. 96.

A.2 The failure of the Respondents to provide back-up documentation for the Rose & Thistle invoices

[44] Before reviewing the evidence concerning the Inspector's efforts to secure back-up documentation for the invoices rendered by Rose & Thistle to the Schedule B Companies, mention should be made of the Inspector's comments on the state of the accounting system maintained by the Respondents for their construction projects. In its First Report (October 21, 2013), the Inspector stated:

> Ms. Walton has advised the Inspector that the books and records of the Companies are not current. Ms. Walton also advised the Inspector that, before her recent attempt to update the books and records of the Companies, they were last brought current in 2011.
>
> The Inspector understands that Ms. Walton and Rose & Thistle have been working to bring the Companies' books and records up to date. As part of this process, Rose & Thistle has been inputting expense information into the ledgers in or around August and September 2013 relating to the period between January 2012 and August 2013. Rose & Thistle has also issued a number of invoices dated August and September 2013 for services rendered or expenses incurred by Rose & Thistle during the period from January 2012 to August 2013.
>
> In this regard, the Inspector notes that the Companies' books and records are kept using QuickBooks accounting software. QuickBooks is a basic accounting package that is primarily marketed to small businesses. The Companies do not have any:
>
> (a) comprehensive financial accounting and reporting system;
>
> (b) cash flow forecasting, budgeting or reporting system; or,
>
> (c) systematic cash controls.
>
> Prior to the October 17 all-hands meeting hosted by the Inspector, Ms. Walton would only provide the Inspector with access to general ledgers for individual Companies once she and Rose & Thistle had completed their exercise of updating the ledger and issuing invoices from Rose & Thistle to such Company. At the October 17 meeting, Ms. Walton agreed to provide the Inspector with access to the ledgers for the remaining 11 Companies in their current state. That evening, the Inspector was provided with access to seven of the remaining 11 ledgers.

[45] Turning then to the issue of the Rose & Thistle invoices to Schedule B Companies, as early as October 21, 2013 - the date of the Inspector's First Report - the Respondents had provided invoices issued by Rose & Thistle to 27 of the Schedule B Companies for which the general ledgers had been provided for an aggregate amount in excess of $32 million. At that time the Inspector requested "back-up documentation for the Rose & Thistle invoices that have been provided to date". The Inspector stated:

> The Inspector has requested, but not yet received, documentation to substantiate the invoiced amounts. Once these documents are provided, further due diligence is required to confirm that the invoices from Rose & Thistle relate to services provided to, or expenses incurred on behalf of, the [Schedule B] Companies.

By October 24, 2013, the Inspector was reporting that the amount of the invoices rendered by Rose & Thistle to the Schedule B Companies had risen to $34.6 million, or $10.6 million more than Rose & Thistle had received from the Schedule B Companies.

[46] In its First Report the Inspector gave an example of the difficulties it was encountering in securing from the Respondents documents to support the invoices rendered by Rose & Thistle to Schedule B Companies. The property at 458 Pape Avenue was owned by Riverdale Mansion Inc. Rose & Thistle provided the Inspector with invoices addressed to Riverdale for construction management fees of slightly more than $1.18 million for expenses which included "deposits for materials", "project management services", "site plan deposits and applications", and "steel rebar ordered and installed". When the Inspector asked for documentation, including third party invoices, to support the amounts invoiced:

> Ms. Walton advised the Inspector that Rose & Thistle did not have third-party invoices for many of the invoiced expenses because Rose & Thistle performed much of the work itself and some of the expenses have not yet been incurred. In response, the Inspector requested that documents, such as material invoices and payroll records, be provided to validate the cost of work performed by Rose & Thistle and invoiced to Riverdale. As of the date of this report, no such documentation has been provided.
>
> On October 18, 2013, the Inspector received a Credit Note from Rose & Thistle which showed that the invoice to Riverdale had been reversed except for $257,065.62 charged for work performed in 2011.

[47] Subsequent reports of the Inspector disclosed not only the continuing difficulties in obtaining backup documentation to support the amounts claimed in the Rose & Thistle invoices, but also questioned the accuracy of the invoices. For example, in the Inspector's Second Report (October 31, 2013), it reported that it had been provided with an invoice issued by Rose & Thistle to Dupont Developments Ltd. (1485 Dupont Street) which included an entry for construction management services in the amount of $175,300.30. The invoice stated that the construction management fee was "10% of hard costs". From that the Inspector reasonably assumed that Rose & Thistle had supervised construction which had cost approximately $1.75 million. However, Rose & Thistle staff provided the Inspector with project budgets that indicated Dupont Developments had spent only $385,000 on construction. The Inspector reported:

> The Inspector also received a general ledger for Dupont Developments on October 24, 2013. The general ledger shows capitalized expenses of approximately $248,000,

> construction in progress of $36,000 and various consulting fees of approximately $563,000.
>
> Based on the foregoing, it appears that Dupont Developments' construction budget (which is out of date), its general ledger (which was updated before being provided to the Inspector) and invoice from Rose & Thistle all show different construction expenditures in respect of the Dupont Project.
>
> It also does not appear that Rose & Thistle is maintaining project budgets on an ongoing basis to track expenses and measure construction costs against the *pro forma* statement prepared when the property at 1485 Dupont was purchased.

[48] The difficulties encountered in obtaining proper accounting information from the Respondents were exemplified by the correspondence from the Respondent's former counsel, John Campion, to Applicant's counsel on October 31, 2013, in response to a request for "information about an accounting". On behalf of his client Mr. Campion responded: "I do not know what that reference is meant to encompass." Based no doubt on information provided by his clients, Mr. Campion wrote:

> The Inspector has stated that they have not been provided with third-party invoices, contracts, payroll records or other contemporaneous documents. My client instructs me that other than the budgets that are being provided by Ms. Liu over the next three days, she is not aware of any request made that has not been fulfilled, as best it can be.
>
> The Inspector keeps asking which filing cabinets he can review to obtain this information. The information he seeks can only be obtained through discussions with the staff mentioned above as all documentation is on computer and not contained in a filing cabinet.
>
> As a result of the above, we believe that the Inspector has been given the kind of access to the Rose and Thistle documents that is available and reasonable under the order of Justice Newbould. Without wishing to criticize the Inspector, I am informed that he expects to have "physical copies of documents produced to him from a filing cabinet". This is not the way that Rose and Thistle stores its information. Upon request being made in an orderly manner, the Inspector has and will receive information and documentation as soon as it can be retrieved and ordered in a manner that meets his request.

[49] Again, no doubt based upon information provided by his clients, Mr. Campion wrote:

> The Inspector has also met with Yvonne Liu, Project Manager, Construction and has provided to them information that has been requested, along with one construction budget. She is sending to the Inspector over the next three days all remaining budgets. The Inspector has spoken with and met with Mario Bucci, CFO of the Rose and Thistle Group, and Mr. Bucci has provided to the Inspector all information requested. Ms. Walton has offered to the Inspector to arrange a meeting with Carlos Carreiro, former Director of Construction of Rose and Thistle but the Inspector has not done so. Steve

Williams, VP of Operations as also met with the Inspector and provided what the Inspector requested.

[50] As will be seen from the subsequent reports of the Inspector which are set out below, the Inspector never received the information it requested. As the Inspector stated in the Supplement to its Fifth Report (July 9, 2014): "Neither construction budgets nor any significant volume of third-party documentation has been provided to the Inspector."

[51] The Inspector submitted its Third Report on January 15, 2014 in which it dealt at some length with the issue of the Rose & Thistle invoices:

> The Inspector previously reported that Rose & Thistle Group Ltd. (Rose & Thistle) transferred approximately $24.2 million (net) from the Schedule B Companies to itself between September 2010 and October 2013. In support of these transactions, Rose & Thistle provided the Inspector invoices totaling approximately $30.6 million (plus HST) for management fees, maintenance fees and construction and project management. The Inspector's current analysis of these billings is outlined below.
>
> **Construction and project management billings**
>
> Of the total $30.6 million charged by Rose & Thistle, approximately $27.6 million was purportedly charged for construction supervision, project management and other project costs. Included in this amount is $6.6 million that is explained below in the "contributed equity" section, leaving support required for $21 million. *Despite the Inspector's request, Rose & Thistle has still not provided evidence to support these billings. Therefore, the Inspector is still unable to comment on the validity of these billings at this time.*
>
> As Rose & Thistle has yet to provide evidence to substantiate more than $20 million of billings for construction and project related costs, the Inspector is expanding its work to include an analysis of funds transferred from Rose & Thistle to other non-Schedule B companies where those funds appear to have initially originated from Schedule B companies. This Inspector will report on this work as soon as it is able to do so.
>
> **Management fees**
>
> Rose & Thistle charged a management fee to Schedule B Companies based upon 4% of the gross revenues of individual properties that generated revenue. The agreements between the Applicant and the Respondents do not specifically state that the fee is to be charged. However, the agreements generally state that Walton (as defined in each agreement) is responsible for managing the properties, including all finance, bookkeeping, office administration, accounting, information technology provision. The Inspector has no comment on the legal issue of whether Rose & Thistle is entitled to charge for those services under the terms of the various agreements as they may be duly interpreted. *The Inspector is of the opinion that a fee of 4% is a reasonable amount and is consistent with rates charged in the marketplace for similar services. Further, the Inspector worked with Rose & Thistle to reconcile the management fees charged on*

revenue producing properties. These fees amount to approximately $1 million in the aggregate.

Maintenance fees

Rose & Thistle charged maintenance fees to the Schedule B companies based upon a fixed monthly amount per property. This fee is purportedly charged to reimburse Rose & Thistle for the cost of providing maintenance employees to certain of the properties. The Inspector has no comment on the legal issue of whether Rose & Thistle is entitled to levy these charges under the terms of the various agreements as they may be duly interpreted. *The Inspector is of the view that it can be appropriate for a real estate management service provider to seek reimbursement for costs that are not covered under its management fees when utilizing outside property management. However, the Inspector has not been able to verify or reconcile records of the fees charged to costs actually incurred by Rose & Thistle or for any set markup on such costs. These fees amount to approximately $2 million in the aggregate.* (emphasis added)

[52] In its Fourth Report (April 23, 2014), the Inspector stated that Rose & Thistle had withdrawn some of the invoices which made up its original $30.6 million claim against the Schedule B Companies, and now was alleging that it had invoiced those companies for $27,292,722. The Inspector reported that as a result of the failure of Rose & Thistle to provide evidence to support the majority of those billings, it had expanded its work to include an analysis of the funds transferred from Rose & Thistle to bank accounts controlled by the Waltons (the "Walton Accounts"). The Inspector reported:

> On February 21, 2014, counsel to the Inspector circulated a document prepared by the Inspector outlining the Inspector's analysis of funds flowing to and from the [Schedule B] Company Accounts to the Rose & Thistle Account and from the Rose & Thistle Account to the Walton Accounts.
>
> The spreadsheet, which is referred to below as the "Cash Transfer Analysis", was circulated subject to the limitations noted in counsel's email...A summary version of the Cash Transfer Analysis, which shows the total amounts transferred to and from the Rose & Thistle Account to each Company Account and each Walton Account is attached as Appendix "B".
>
> Neither the Applicants nor the Respondents have challenged the accuracy of the Cash Transfer Analysis...
>
> In all, Rose & Thistle received approximately $23.6 million more from the [Schedule B] Companies than it transferred to the Companies...
>
> ... In total, the Walton Accounts received transfers totaling $64,712,258 from the Rose & Thistle account and transferred $39,247,766 to the Rose & Thistle account during the period examined. The Walton Accounts received a net transfer of $25,464,492 from Rose

& Thistle. That is, Rose & Thistle transferred approximately $25 million more to the Walton Accounts than it received from the Walton Accounts during the period examined.

[53] By the time of its Fifth Report (July 1, 2014) the Inspector was still reporting the failure by the Respondents to provide appropriate backup documentation for the Rose & Thistle construction expense invoices:

> The Inspector's analysis is impaired by the fact that the Respondents have not provided back-up documentation, including third party invoices, proof of payment and progress draws relating to the majority of the alleged construction expenses. *Accordingly, the Inspector cannot perform a detailed reconciliation of the alleged construction expenses to the cash transfers to determine whether these transfers related to construction work that had been performed.* The Respondents have instead provided reports from third-party quantity surveyors which will be addressed in a supplemental report.
>
> ...
>
> Rose & Thistle provided the Inspector with invoices addressed to Riverdale (a Schedule B Company) totaling $1.18 million. The invoices listed, among other things, expenses related to "deposits for materials", "project management services", "site plan deposits and applications" and "steel rebar ordered and installed".
>
> The Inspector asked for documentation, including third party invoices, to support the amounts invoiced to Riverdale. Ms. Walton advised the Inspector that Rose & Thistle did not have third-party invoices for many of the invoiced expenses because Rose & Thistle performed much of the work itself and some of the expenses have not yet been incurred. This would appear to be inconsistent with her statement that transfers from the Companies to Rose & Thistle were in the nature of payments for services that have been provided but not yet invoiced. The Inspector requested that documents, such as material invoices and payroll records, be provided to validate the cost of work performed by Rose & Thistle and invoiced to Riverdale. No such documentation has been provided. (emphasis added)

A.3 The Inspector's observations on the Rose & Thistle invoices

[54] In its Fifth Report the Inspector made several comments about the invoices which Rose & Thistle had rendered to the Schedule B Companies:

(a) There was no apparent co-relation between the amount of construction work performed on a Schedule B Property and the volume of funds transferred from that property. For example, in respect of the property at Fraser Avenue, the two Fraser companies made net transfers of approximately $9.2 million to Rose & Thistle, but little or no construction work was completed on the Fraser Properties before the Manager was appointed. By contrast, Twin Dragons successfully renovated and leased 241 Spadina and received a net transfer from Rose & Thistle of approximately $1.3 million. The Fraser property is dealt with further in **Section V.A.5** below;

(b) The Inspector observed a pattern whereby the amounts invoiced by Rose & Thistle to the Schedule B Companies appeared to match the amount of cash previously transferred from the Schedule B Company to Rose & Thistle. For example, the Inspector reported that it appeared that the amounts invoiced from Rose & Thistle to Bannockburn (1185 Eglinton East) in 2010 and 2011 were calculated to match the net cash transferred from Bannockburn to Rose & Thistle during those years. The Inspector pointed to Wynford and Riverdale Mansion as other Schedule B Companies in respect of which a similar matching-invoice practice by Rose & Thistle took place. Those invoices had the effect of essentially eliminating the inter-company debt owed by Rose & Thistle to the Schedule B Company;[14] and,

(c) In respect of the Schedule B Company, Riverdale Mansion, the Inspector reported that it had received a credit note from Rose & Thistle which showed the invoices to Riverdale had been reversed except for $257,065.62 charged for work performed in 2011. The Inspector stated: "The Credit Note was not accompanied by any return of funds. This would appear to reinforce the Inspector's conclusion that invoices rendered by Rose & Thistle to the Companies were calculated based on the net cash transferred from the Companies to Rose & Thistle rather than on the value of actual work, if any, performed by Rose & Thistle."

[55] In its report Froese stated that any further analysis of the net unsupported or unexplained transfers from Schedule B Companies to Rose & Thistle would require an evaluation of the quantity surveyor reports related to the Schedule B Properties to address further work performed by Rose & Thistle for those properties. Froese noted that the quantity surveyor reports were not made available to it in sufficient time to address them.

A.4 The cost consultant reports filed by Ms. Walton

[56] Ms. Walton filed reports from two cost consultants commenting on work performed by Rose & Thistle for Schedule B Properties. Intrepid Quantity Surveying Inc. prepared three reports dealing with 32 Atlantic Avenue, 241 Spadina Avenue and 18 Wynford Drive. The work on the Atlantic and Spadina properties had been fully completed; the building at 18 Wynford had been partially renovated.

[57] BTY Group prepared a set of 21 reports entitled "Audit Report On Incurred Cost To Date" for the following properties: (i) 1185 Eglinton East (Bannockburn); (ii) Cityview Drive (Cityview Industrial); (iii) 14 Dewhurst (Dewhurst Developments); (iv) 1500 Don Mills Road

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[14] At paragraphs 66 through 69 of his affidavit sworn June 26, 2014, James Reitan provided other examples of this practice.

(Donalda Developments); (v) 65 Heward (Double Rose Developments); (vi) 1485 DuPont (DuPont Developments); (vii) 153 Eddystone (Eddystone Place); (viii) Fraser Avenue (Fraser Lands/Fraser Properties); (ix) 1450 Don Mills Road (Global Mills); (x) 14 Trent (Hidden Gem Developments); (xi) Lesliebrooke Holdings and Lesliebrooke Lands; (xii) 47 Jefferson (Liberty Village Lands); (xiii) 140 Queens Plate Crescent (Northern Dancer Lands); (xiv) 1003 Queen Street East (Queen's Corner Corp.); (xv) 875 Queen Street East (Red Door Developments); (xvi) 450 Pape (Riverdale Mansion); (xvii) Highway 7 (Royal Agincourt); (xviii) 1 Royal Gate Boulevard (Royal Gate Holdings); (xix) Skyway Drive (Skyway Holdings); (xx) 295 The West Mall (West Mall Holdings); and, (xxi) 355 Weston Road (Weston Lands).

[58] The BTY Group were not independent experts. The record disclosed that they had acted as cost consultants for progress draws on some Schedule B Properties during the course of demolition and construction work on them – 241 Spadina; 1185 Eglinton;[15] and 18 Wynford.[16]

[59] The authors of the cost consultant reports all purported to express opinions in their reports. Opinion evidence in civil cases must comply not only with the general rules of evidence, but also with Rule 53.03 of the *Rules of Civil Procedure*. Rule 53.03(2.1) mandates that any report of an expert witness must contain seven categories of information. In the case of the reports prepared by Intrepid Quantity Surveying they lacked the following mandatory information: area of expertise; qualifications; instructions provided to the expert; and, an acknowledgment of the expert's duty signed by the expert. Those constituted material omissions of mandated information for expert reports and, in my view, rendered the reports prepared by Intrepid Quantity Surveying inadmissible as expert evidence.

[60] As to the reports prepared by BTY Group, they also suffered from the same omissions of material mandated information. As well, they did not disclose the name of the expert who had prepared the reports – a singular omission which I have never seen before. By reason of those failures to include information mandated by Rule 53.03(2.1), I conclude that the cost consultant reports prepared by BTY Group are inadmissible as expert evidence.

[61] Even had I admitted the reports prepared by Intrepid Quantity Surveying and BTY Group as expert evidence, for the reasons set out below their probative value in respect of the issues in dispute on these motions would have been quite minimal.

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[15] Norma Walton Motion Record, Vol. 1, pp. 207 and 212; Vol. 2, p. 380.

[16] Bernstein CX, Exhibit 5. It appeared from Exhibit 5 that in issuing their progress payment reports the BTY Group had relied heavily on the invoices from the Rose & Thistle Group, rather than examining the underlying supporting documentation for such invoices.

The reports prepared by Intrepid Quantity Surveying

[62] The three Intrepid Quantity Surveying ("IQS") reports possessed a similar structure, so let me use the March 10, 2014 report on 32 Atlantic Avenue as an example of the limited probative value of the opinions expressed in those reports. First, it was difficult to discern the purpose of the report. Rule 53.03(2.1)(3) requires a report to contain "the instructions provided to the expert in relation to the preceding"; none appeared in the body of the report. Rule 53.03(2.1)(4) requires a report to contain "the nature of the opinion being sought and each issue in the proceeding to which the opinion relates"; none was provided in the report.

[63] From the report it appears that Ms. Walton had asked IQS to review the budget for the 32 Atlantic Avenue project. IQS reported that they had reviewed the file and had "provided our comments here for your reference." At the end of the report, IQS stated:

> In our opinion, we believe the work in place for the construction work is reasonable based on information and invoices received to substantiate the cost to date.

[64] The IQS report focused on two aspects of the project's budget: construction costs of $3,045 million and management fees of approximately $150,000.

[65] The IQS review of the construction costs was based upon an undated Vendor Transaction List provided by the Respondents. IQS requested copies of invoices to substantiate the items booked to the accounting system. Although it was provided with 89% of the overall hard costs booked to the Respondents' accounting system, it was not provided with the Rose & Thistle construction invoice for $216,330.57.

[66] The Vendor Transaction document attached to the IQS report recorded amounts incurred for various types of work from various suppliers. The legend for that document identified which invoices had been reviewed (presumably by the Rose & Thistle management) and which invoices remained outstanding. In its report for the Atlantic Avenue property, IQS noted that it had only been provided with proof of 20% expended by way of an invoice and that it was relying primarily on the accounting summaries prepared by the Respondents' accounting system, not on the actual underlying invoices.

[67] IQS reported that the Respondents had provided timesheets which confirmed 20% of the Rose & Thistle construction fees of $216,330.57, but it identified significant limits placed on its review of those Rose & Thistle construction fees. In particular, IQS could only rely upon "accounting summaries" provided by the Respondents when reviewing the Rose & Thistle construction fees. Although the accounting summaries confirmed 88% of the $216,330.57, IQS reported:

> These costs may have been incurred by [Rose & Thistle Properties] and entered into their accounts system, but we only have proof of 20% expended by way of an invoice.

> We have been provided with partial bank account records and cancelled cheques. A full review to ensure that the amounts booked have cleared the [Rose & Thistle Properties] bank account was not part of the IQS scope of work.

The IQS report made clear that it lacked adequate backup documentation for most of the $216,333.57 in construction fees charged by Rose & Thistle. In my view, those limitations identified by IQS severely limited the utility of their reports in verifying the amounts Rose & Thistle was recorded as charging the Schedule B Company which owned the project, Liberty Village.

[68] IQS reported that the budget identified management fees charged by Rose & Thistle of approximately $150,000. IQS stated:

> We have not reviewed backup invoices to date, however we have been provided a summary breakdown of the fees.
>
> These costs may have been incurred by [Rose & Thistle Properties], but we do not have proof of the expenditure by way of an invoice.
>
> The management fee is for time spent by [Rose & Thistle Properties] employees to coordinate the construction activities and the consultants.

IQS also noted in respect of the management fees that it had not been provided with timesheets or accounting backup. IQS calculated that the management fee charged had amounted to 4.5% of the total hard construction costs for the project which appeared to be reasonable based on the scope of work and a standard industry range of 2.5% to 4.5% for management fees.

[69] Similar limitations were contained in the other two IQS reports. IQS' report on the Twin Dragons project - 241 Spadina[17] - noted that it had not been asked to review construction costs, so it had not reviewed copies of invoices to substantiate the items booked to the Respondents' accounting system "as this was outside our scope of work. Costs booked to the vendor transaction list *are assumed* to be valid." IQS also observed, regarding the $133,209 management fee charged, that it had not reviewed the internal Rose & Thistle Properties back-up for the fee. The only opinion expressed by IQS in respect of the 241 Spadina budget was that the management fee of 3.47% was reasonable based upon the scope of work and industry practices.[18]

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[17] Dr. Bernstein acknowledged on his cross-examination that following the completion of the renovation of 241 Spadina, he began to receive equity distribution cheques from Twin Dragons: Transcript of the cross-examination of Dr. Bernstein conducted July 9, 2014, QQ. 295; 456-8.

[18] Carlos Carreiro filed an affidavit in support of the Respondents, his former employer, attesting, in a descriptive way, to the work his company had performed for Rose & Thistle at 241 Spadina, 32 Atlantic Avenue and 450 Pape. No documentation supporting the work performed or invoiced was attached to his affidavit. Yvonne Liu filed a

[70] In its report concerning 18 Wynford Drive, IQS noted that it had been provided with two invoices for construction costs from Rose & Thistle totaling $3,55 million, but IQS stated:

> Both of the above two invoices can be traced back to the vendor transaction list. *However the co-relation is not indicative of actual costs incurred as further details to substantiate actual backup to the costs incurred are not available.*[19]

[71] As to the management fee of $355,000 charged by Rose & Thistle for 18 Wynford, IQS opined that the management fee of 6.95% was "in a higher range of what is expected based on the scope of work and industry standards". IQS ventured that industry standards of between 2.5% and 4.5% "would be more reasonable".

[72] In sum, the IQS reports did not assist the Respondents in explaining or justifying the construction costs invoiced by Rose & Thistle to the examined Schedule B Companies. The reports did not fill in the evidentiary gap identified by the Inspector. Instead, they highlighted the unwillingness of the Respondents to produce the back-up documentation needed to test and verify the amounts charged by Rose & Thistle to Schedule B Companies for both construction costs and management fees.

The reports prepared by BTY Group

[73] The BTY Group reports disclosed that Rose & Thistle had asked it to provide an opinion on the validity of the hard construction, soft construction and Rose & Thistle management costs for a number of properties "in comparison to other projects". Although the reports were styled as "audit reports", they disclosed that the information provided by Rose & Thistle to BTY Group consisted of the budgets, ledgers and summary of management fees for each project. The BTY Group relied on those Rose & Thistle accounting documents and summaries. BTY Group did not review any invoices or cancelled cheques to substantiate the payments noted in the accounting records of Rose & Thistle.

[74] In the case of its analysis of the management fees charged by Rose & Thistle to the projects, BTY Group recorded their understanding that no accounting records existed to substantiate the information provided by Rose & Thistle with respect to the management fees incurred on a project. As a result, the opinions of the BTY Group about the reasonableness of the management fees were based solely on its review of the summary of management costs

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similar type of affidavit describing work her personal company had performed for Rose & Thistle at 32 Atlantic, 241 Spadina, 1485 Dupont, 153 Eddystone, 450 Pape Avenue, 18 Wynford, 14 Dewhurst, Highway7 West, 1 Royal Gate, 3765 St. Clair Avenue East, and 1003 Queen Street East.

[19] Emphasis added. In the Supplemental Report to its Fifth Report (July 9, 2014), the Inspector noted that not all of the amounts spent by Rose & Thistle on construction at 18 Wynford were relevant to the tracing analysis because some of them may have been funded by Rose & Thistle drawing on 18 Wynford's condominium reserve fund.

provided by Rose & Thistle for a project as a percentage of the project budget. For example, as noted in its report of the management fee review for the 1185 Eglinton East (Bannockburns) project:

> We have not been privy to the calculation of the costs noted in this section and we acknowledge that there are no accounting records in place to justify the costs noted as being incurred on the project. Our opinion as to the reasonableness of the costs incurred to date is based on our experience of working on projects of a similar type and nature across several provinces in Canada.

The BTY Group, using its knowledge of other similar projects in the market, performed a comparative analysis which ranked each category of costs identified in the project's accounting summaries as either "not in line with", "in line with", or "below" current market conditions for those types of costs.

[75] As can be seen, the BTY Group reports did not examine whether costs recorded in the Respondents' accounting records for a project were in fact incurred, including whether costs included in invoices from Rose & Thistle to a Schedule B Company had been incurred. Put another way, the BTY Group reports assumed the accuracy of the accounting records of Rose & Thistle and the Schedule B Companies.

[76] In the Supplement to its Fifth Report, the Inspector offered the following comments on the cost consultant reports prepared by the BTY Group:

> [T]he fundamental question relating to the Rose & Thistle Invoices is whether Rose & Thistle actually performed the invoiced work and is entitled to the claimed payment. All but one of the cost consultant reports offered by the Respondents does not address this issue at all. The exception relates to the property at 32 Atlantic...
>
> In particular, the BTY reports essentially compared the costs in Rose & Thistle's budget and accounting ledgers to the work that Rose & Thistle said it performed. BTY appears to have assumed that Rose & Thistle performed the relevant work and incurred the costs associated with it...
>
> Since all of BTY's information appears to originate in the books and records of Rose & Thistle, the BTY reports do not contribute anything meaningful to the analysis of whether those books and records are accurate. BTY compares the assumed cost of the work against its understanding of market rates for the same work but it does not assess whether the work was actually performed. As a result, in the Inspector's view, the BTY reports do not assist the Inspector's analysis of what work Rose & Thistle performed on each property and what payment it is entitled to for that work.

[77] Based upon my review of the reports prepared by the BTY Group, I accept the Inspector's conclusion that the reports do not contribute anything meaningful to the analysis of whether the books and records of Rose & Thistle are accurate nor do they contribute anything

meaningful to the inquiry into the accuracy, validity or reasonableness of the invoices rendered by Rose & Thistle to the Schedule B Companies. As was the case with the IQS reports, the BTY Group reports did not fill in the evidentiary gap noted by the Inspector. That rendered the BTY Group reports of little probative value to the issues in dispute.

A.5 Issues raised in cost consultant reports on specific Schedule B Properties

[78] The frailty and unreliability of the invoices rendered by Rose & Thistle were illustrated by the analysis of the invoices rendered for three specific Schedule B Properties.

Bannockburn (1185 Eglinton)

[79] Bannockburn acquired the property at 1185 Eglinton Avenue East on December 17, 2010. The Bannockburn development was intended to consist of two residential condominium towers with a block of townhouses. Demolition of the previous property on the site was performed, but no other work took place.

[80] BTY Group reviewed the Rose & Thistle accounting ledger for hard construction costs on the project. The Inspector reported that on December 31, 2010 Rose & Thistle issued an invoice to Bannockburn in the amount of $467,719.60 for services provided between December 7 and 31, 2010 – i.e. the invoice included the 10 day period prior to the acquisition of the property. The Rose & Thistle invoice included items for demolition disposal, development approval expenses and project management fees. In the Supplement to its Fifth Report the Inspector stated:

> The amount of this invoice matched exactly the amount transferred to Rose & Thistle from Bannockburn. Moreover, Bannockburn did not purchase 1185 Eglinton Avenue until December 17, 2010, ten days after the invoice shows that work commenced. In her email commenting on the Fifth Report, Ms. Walton explained that Rose & Thistle engaged consultants and began work on a property before the purchase of that property closed.
>
> The amounts listed on the December 31, 2010 invoice from Rose & Thistle to Bannockburn cannot be reconciled to the transaction list appended to the [BTY Group] Bannockburn Report. In particular, there are no demolition costs and less than $25,000 in development costs recorded on the ledger provided to BTY for the period prior to December 31, 2010.

30 Fraser Avenue; 7-15 Fraser Avenue

[81] Fraser Properties Corp. owned land located at 30 Fraser Avenue in Toronto; Fraser Lands Ltd. owned the adjacent property at 7-15 Fraser Avenue. Dr. Bernstein made an equity contribution of $16,024,960 to Fraser Properties. As early as its First Report, the Inspector had reported:

> Fraser Properties transferred $10,281,050 to Rose & Thistle and received transfers of $1,215,100 from Rose & Thistle. Rose & Thistle retained $9,065,950 paid by Fraser Properties.

[82] In its report the BTY Group stated that the Fraser Avenue properties housed existing one and two story buildings, with the plan being to renovate the existing buildings and construct two new commercial buildings. The BTY Group reviewed and reported on the accounting ledgers of Rose & Thistle. In the Supplement to its Fifth Report the Inspector stated:

> Rose & Thistle provided the Inspector with invoices to Fraser Lands Ltd. totaling $300,896 and invoices to Fraser Properties Ltd. totaling $1,598,580...
>
> It appears that the ledger provided by Rose & Thistle to BTY does not support the amounts invoiced to Fraser...
>
> Rose & Thistle received transfers of $9,080,850 from the Companies that own the Fraser Property, issued invoices totaling $1,899,477 with respect to alleged work performed on the Fraser Property and provided BTY with records showing that it had actually incurred expenses totaling $395,532 in respect of the Fraser property.

1485 Dupont

[83] In its report on the property at 1485 Dupont (Dupont Developments) the BTY Group stated that the accounting ledgers provided by Rose & Thistle showed hard construction cost bill payments to contractors of $805,036.20 and soft construction costs payments to contractors of $113,383.91. As was the case in all of its reports, the BTY Group stated that it had not undertaken a review of invoices or cancelled cheques to substantiate the payments noted in the ledger as paid. In the Supplement to its Fifth Report the Inspector stated:

> The Inspector also notes that Ms. Walton's construction cost figure does not appear to account for amounts that are owed to contractors but not paid. For example, the Respondents delivered an affidavit of Yvonne Liu stating that Rose & Thistle completed various construction work on the property at 1485 Dupont Avenue ("the DuPont Property"). Construction liens in the aggregate amount of $821,297 have been registered against the DuPont Property. The Inspector has not evaluated the validity of these lien claims. However, the existence of substantial lien claims in respect of DuPont undermines the assertion that funds transferred to Rose & Thistle from the [Schedule B] Companies were used to pay for construction at DuPont.

A.6 Ms. Walton's comments on the cost consultant reports

[84] In her June 21, 2014 affidavit, Ms. Walton commented on each of the reports prepared by the cost consultants and she gave general descriptions of the work performed on each property. Notwithstanding that Ms. Walton spent extensive time in her affidavit dealing with each property, she did not append to her affidavit the back-up documentation to support the amounts

charged by Rose & Thistle to each project which the Inspector had been requesting since last October.

A.7 Conclusion on the Rose & Thistle invoices

[85] Ms. Walton deposed that "as confirmed by the third party cost consulting reports, the value of all work completed by Rose and Thistle has been confirmed". In her Factum she pointed to the cost consultant reports as establishing that Rose & Thistle had spent specific amounts on construction costs. The IQS and BTY Group cost consultant reports do not allow any such conclusion to be drawn – they dealt only with the amounts which were recorded in the books and records provided by Rose & Thistle to the cost consultants without providing any independent audit or verification of the accuracy or validity of those amounts.

[86] In paragraph 10 of the October 25, 2013 Order of Newbould J. the Respondents were required to "provide forthwith a full accounting of ***all monies*** received, disbursed, owed to and owed from the Schedule B Corporations and The Rose & Thistle Group Ltd. since September, 2010 to the present." That order required the Respondents to account for all monies owed by Schedule B Companies pursuant to invoices rendered by Rose & Thistle. The Waltons have failed to do so. The Waltons have left unanswered the repeated demands of the Inspector for documentation to back-up and support those invoices, and Ms. Walton has filed cost consultant reports which assumed the accuracy of those invoices, instead of providing an independent audit of their accuracy.

[87] Rose & Thistle no doubt provided some construction and maintenance work for the Schedule B Companies, but the Waltons bore the burden of establishing the validity and accuracy of the invoices which Rose & Thistle rendered for those services. Not only have they failed to do so, but one can only conclude from the refusal of the Waltons over the past nine months to provide back-up for the Rose & Thistle invoices – both to the Inspector and to their own cost consultants - that back-up for the full amounts of those invoices simply does not exist.

[88] I therefore accept the view of the Inspector expressed in its Fifth Report, and I find that the Respondents have not produced the documentation needed to perform a detailed reconciliation of the alleged construction and maintenance expenses to the cash transfers to determine whether those transfers related to construction and maintenance work that Rose & Thistle actually performed for Schedule B Companies.

[89] I make a similar finding in respect of the management fees charged by Rose & Thistle. Those fees were charged as a percentage of the construction costs incurred. Without an accounting of the accuracy of the construction costs actually incurred, an assessment of the reasonableness of the management fees is not possible. However, I will accept the reconciliation of management fees in the amount of $1 million reached by the Inspector with the Respondents for revenue-producing properties as reported in the Inspector's Third Report.

[90] Taken together, those two findings mean that of the $30.6 million in invoices rendered by Rose & Thistle to the Schedule B Companies, the Respondents have established the validity and reasonableness of only $1 million of them – i.e the reconciliation relating to management fees for revenue-producing properties. The Respondents have failed to prove, on the balance of probabilities, that the remaining invoices covered work or services actually performed by Rose & Thistle for Schedule B Companies, notwithstanding that the information needed to do so remained in the possession and control of the Respondents.

B. Placing two mortgages on the Don Mills Road Schedule B Properties without the Applicants' consent

[91] On July 31 and August 1, 2013, two mortgages of $3 million each were registered against the Schedule B Properties at 1450 Don Mills Road and 1500 Don Mills Road. Notwithstanding that the agreements between the parties for these properties required that any decisions concerning the refinancing of the properties required the approval of Dr. Bernstein, Norma Walton did not tell Dr. Bernstein that the mortgages were placed on the properties. In his November 5 Reasons appointing a receiver, Newbould J. dealt with those mortgages:

> [10] This was a matter raised at the outset and was one of the basis for my finding of oppression leading to the appointment of the Inspector. Mr. Reitan learned as a result of a title search on all properties obtained by him that mortgages of $3 million each were placed on 1450 Don Mills Road and 1500 Don Mills Road on July 31, 2013 and August 1, 2013. Dr. Bernstein had no knowledge of them and did not approve them as required by the agreements for those properties. At a meeting on September 27, 2013, Ms. Walton informed Mr. Reitan and Mr. Schonfeld that the Waltons were in control of the $6 million of mortgage proceeds (rather than the money being in the control of the owner companies), but refused to provide evidence of the existence of the $6 million. Ms. Walton stated that she would only provide further information regarding the two mortgages in a without prejudice mediation process. That statement alone indicates that Ms. Walton knew there was something untoward about these mortgages.
>
> [11] In his first interim report, Mr. Schonfeld reported that the proceeds of the Don Mills mortgages were deposited into the Rose & Thistle account. Rose & Thistle transferred $3,330,000 to 28 of the 31 companies. The balance of the proceeds of the Don Mills mortgages totalling $2,161,172, were used for other purposes including the following:
>
> 1. $98,900 was paid to the Receiver General in respect of payroll tax;
>
> 2. $460,000 was deposited into Ms. Walton's personal account;
>
> 3. $353,000 was apparently used to repay a loan owed by Rose & Thistle in relation to Richmond Row Holdings Ltd.; and,

> 4. $154,600 was transferred electronically to an entity named Plexor Plastics Corp. and $181,950 transferred electronically to Rose and Thistle Properties Ltd. Ms. Walton advised the Inspector that she owns these entities with her husband.

[12] In her affidavit of October 31, 2013, Ms. Walton admits that $2.1 million was "diverted" and used outside the 31 projects. She admits it should not have been done without Dr. Bernstein's consent. She offers excuses that do not justify what she did. What happened here, not to put too fine a point on it, was theft. It is little wonder that when first confronted with this situation, Ms. Walton said she would only talk about it in a without prejudice mediation.

[13] In her affidavit of October 4, 2013, Ms. Walton said she had made arrangements to discharge the $3 million mortgage on 1500 Don Mills Rd on October 21, 2013 and to wire money obtained from the mortgage on 1450 Don Mills Road into the Global Mills account (one of the 31 companies) by the same date. Why the money would not be put into the 1450 Don Mills account was not explained. In any event, no repayment of any of the diverted funds has occurred.

...

[46] I do not see the picture as now being less clear. To the contrary, it seems much clearer. I have referred to the concerns above in some detail. They include the following:

> 1. $2.1 million was improperly taken from the proceeds of the $6 million mortgages that never had Dr. Bernstein's approval, $400,000 of which was taken by Ms. Walton into her personal bank account. Ms. Walton was well aware that this was wrong. She is a lawyer and the agreements were drawn in her office. Her initial reaction when confronted about the mortgages by Mr. Reitan, who at the time did not know what had happened to the mortgage proceeds, that she would only discuss it in a without prejudice mediation is a clear indication she knew what she did was wrong and contrary to Dr. Bernstein's interests.

[92] The Respondents appealed the November 5 Order to the Court of Appeal; Norma Walton represented herself on the appeal. She submitted to the Court of Appeal that Newbould J. had erred in describing her involvement in the two unauthorized Don Mills mortgages as "theft". In rejecting that argument the Court of Appeal stated:

> We also do not accept that the application judge's use of the word "theft" is necessarily a mischaracterization of some of the conduct of Ms. Walton. However, even if the word "theft" is considered inappropriate given its criminal connotation, Ms. Walton's own affidavit acknowledges a knowing misappropriation of funds in respect of at least one property. Whatever one might choose to call that conduct, it provided powerful evidence

> that Dr. Bernstein's interests in the property were being unfairly prejudiced by the conduct of the Waltons. The application judge's use of the word "theft" does not, in our view, taint his factual findings or the manner in which he exercised his discretion.[20]

[93] In her Factum on these motions Ms. Walton stated that "there is no question that the borrowing of $6 million from the Don Mills properties was contrary to the contracts between Walton and Bernstein". However, she filed an affidavit in which she sought to correct "a fundamental misconception that has pervaded this litigation from the beginning concerning my knowledge of the payment of funds from the $6 million of mortgages." Ms. Walton deposed:

> What I want to make clear, though, is that I never knew the sum of $2,161,172 had been ultimately paid out to me and my companies from that $6 million until after the Inspector completed his work. That complete lack of knowledge or intention was not made clear in the October 31 affidavit I filed and as such I am correcting that now...

In her affidavit Ms. Walton blamed the inadequacy of the Respondents' accounting software at the time, and she contended that at the time of the Don Mills Road mortgages she made "the assumption that the Bernstein-Walton properties were funding the Bernstein-Walton properties and the non-Bernstein properties were funding the non-Bernstein properties."

[94] For several reasons I do not accept Ms. Walton's explanation.

[95] First, Ms. Walton offered no new evidence on the point that was not before Newbould J. or the Court of Appeal, apart from her denial that she knew about the payments out.

[96] Second, Ms. Walton's contention that she had assumed the Bernstein properties were only funding Bernstein properties flies in the face of the overwhelming evidence presented by the Inspector that when most funds were advanced into the Schedule B Companies by the Applicants, the Respondents immediately transferred them out to Rose & Thistle and, in many cases, to Schedule C Companies. Throughout these proceedings Norma Walton has presented herself to the Court, through her affidavits and through her submissions, as the person who was in charge of the entire enterprise, whether it be the operation of Schedule B Companies, Rose & Thistle or the Schedule C Companies. In paragraph 38 of her June 21, 2014 affidavit, Ms. Walton clearly acknowledged that she was the one who had managed the jointly owned portfolio of Schedule B Properties. On her cross-examination Ms. Walton admitted that she had authorized the transfer of monies out of the Schedule B Companies to Rose & Thistle, including by getting on the computer and making electronic transfers herself.[21]

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[20] 2014 ONCA 428, para. 12.
[21] Cross-examination of Norma Walton conducted July 8, 2014, QQ. 95-96.

[97] Her husband, Ronauld Walton, did not file an affidavit in these proceedings, nor did the Chief Financial Officer of the Rose & Thistle group of companies, Mario Bucci.[22] Their failure to file evidence is most significant, and I infer from that failure that neither Ronauld Walton nor Mario Bucci could offer evidence which would assist the Respondents in establishing a defence to the Applicants' allegations. Nor have they stepped forward to contend that the improper transfers of monies out of the Schedule B Companies were the result of directions or orders given by someone other than Norma Walton.

[98] Third, on her July 8, 2014 cross-examination Ms. Walton admitted that she was the one who had provided the Devry Smith Frank law firm with instructions on the two Don Mills Road mortgage transactions,[23] including directing that the proceeds from the Don Mills mortgages be paid into the Rose & Thistle bank account.[24] Those admissions support a finding, which I make, that Ms. Walton knowingly directed the proceeds from the two Don Mills mortgages to be paid into the Rose & Thistle bank account and that she did so knowing that such payments would be in breach of the obligations of the Waltons to Dr. Bernstein.

[99] Fourth, Ms. Walton failed to appreciate that in her efforts to remove the moniker of "theft" from her conduct in respect of the two $3 million mortgages, she only compounded the difficulty of her legal position vis-à-vis the Applicants. In her affidavit Ms. Walton deposed that "every single day transfers between our companies were occurring and there was no visibility with our accounting software as to each company's position vis-à-vis the transfers of funds". Yet, over the course of three years from September 24, 2010 until June 27, 2013, Ron and Norma Walton entered into a series of agreements with the Applicants which contained provisions representing that (i) monthly reports would be made - which implied that the accounting systems used by the Schedule B Companies would be adequate to provide accurate, detailed monthly accountings of the funds advanced to the Schedule B Companies -- and (ii) that the Schedule B Company would only be used to purchase, renovate, lease, and refinance the specified property. Also, on an ongoing basis, Norma Walton was representing to Dr. Bernstein that she was able to calculate his financial position in Schedule B Property projects. For example, her April 15, 2012 email to Dr. Bernstein represented that "Spadina will net you $6.66 million plus accrued interest to repay your mortgages; plus $1.12 million to repay your capital; plus $754,000 to pay your profits, for a total of $8.534 million."

[100] If, as Ms. Walton now deposed, the Respondents' accounting system was inadequate to ascertain the position of each Schedule B Company vis-à-vis the transfers of funds, then by entering into a series of agreements with the Applicants containing those representations, and by

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[22] As of Ms. Walton's cross-examination on July 8, 2014, Mr. Bucci remained the CFO of Rose & Thistle: Q. 45.
[23] Walton CX, QQ. 72-73.
[24] *Ibid.*, QQ. 74-83.

making such specific representations about financial returns in her periodic updates to Dr. Bernstein, Norma Walton would have engaged in a pattern of deceitful misrepresentation leading the Applicants to believe that the Respondents knew what was happening with the monies advanced, when they did not because of the lack of visibility within their accounting system. In trying to concoct an implausible excuse for her conduct concerning the two Don Mills mortgages, Norma Walton ended up damning her own position.

[101] Fifth, as part of the Don Mills Road mortgage transaction documents Ms. Walton falsely certified that only she and her husband were the shareholders of Global Mills Inc. In fact Dr. Bernstein's company, DBDC Global Mills Ltd., was a 50% shareholder. Ms. Walton testified that Dr. Bernstein had instructed her not to disclose his shareholding interest in Schedule B Companies.[25] Ms. Walton produced no documents to support that allegation,[26] and I reject it.

[102] Sixth, in paragraph 101 of her Factum Ms. Walton submitted, in respect of the two $3 million Don Mills mortgages, that "there was no attempt to hide this and everything was completely transparent on the books and records of our companies. The Inspector found it easy to trace exactly what had happened to this money given that transparency." That was a breathtaking statement by Ms. Walton, and it demonstrated her continued willingness to distort the truth. In fact, Ms. Walton had given no prior notice to Dr. Bernstein about her intention to place the two mortgages on the Don Mills properties. She hid that transaction from Dr. Bernstein. There was no transparency. The transaction only came to light as a result of Mr. Reitan's searches of title as part of a larger concern by the Applicants over the Respondents' lack of transparency about what they were doing with the Applicants' funds. Even then, the true facts about the two mortgage transactions did not emerge until Ms. Walton was compelled to disclose them in the early stages of this proceeding. For Ms. Walton to now attempt to spin those facts in her favour shows her complete lack of understanding about what it means to tell the truth. There really is no other way to put the matter.

[103] Her distortion of the facts in respect of the Don Mills Road mortgages echoed her conduct which I described in a June 20, 2014 decision regarding the dispute between two mortgagees on 875 and 887 Queen Street East. I found that Norma Walton had materially misrepresented the true state of affairs to one of the mortgagees, RioCan:

> Norma Walton's representation that the lender had deposited the certified cheque - a representation which was re-transmitted to RioCan with the intention that RioCan rely upon it - was misleading in a very material respect. Why? Because the lender,

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[25] *Ibid.*, Q. 87

[26] Walton did produce a February 25, 2013 email in which she requested Dr. Bernstein to resign as a director for Wynford, Spadina and Eglinton: Walton Motion Record, Vol. 1, p. 123.

> Woodgreen, which had deposited the cheque, had immediately returned the funds to Red Door Lands, ostensibly taking the position that its deposit of the cheque had not constituted an acceptance of payment against principal of the mortgage. That sequence of events can be gleaned from the communications which had flowed back and forth between Walton and Kesten about which RioCan knew nothing.[27]

[104] In sum, I do not accept Ms. Walton's continued protestations that she had a complete lack of knowledge that funds from the two $3 million mortgages on the Don Mills Road properties had been misappropriated to the use of Walton and her companies. The voluminous evidence placed before me on this motion leads me to have absolutely no doubt that Norma Walton not only knew, in detail, what was taking place with the transfer of funds from those two mortgages, but that those transfers took place at the direction of, and under the control of, Norma Walton. Norma Walton knowingly put in place the two Don Mills Road mortgages of $3 million each without the required approval of Dr. Bernstein and she knowingly misappropriated some of the proceeds of those mortgages to her own personal use and the use of companies which she owned, but in which Dr. Bernstein had no ownership interest.

[105] Unfortunately, Ms. Walton's continued efforts to repair her reputation in respect of the Don Mills Road mortgage transactions by distorting the truth makes it clear to me that it will never be possible to secure from her a true accounting of what happened to the funds advanced by the Applicants.

VI. Issues concerning the Waltons using the Applicants' funds for Schedule C Properties

[106] The Applicants seek relief against what are called the Schedule C Properties - i.e. properties owned by, or controlled by, Ron and Norma Walton, usually through a company in which Dr. Bernstein had no ownership interest. At the hearing the Respondents disputed including some of the properties in the Applicants' list of Schedule C Properties, contending that they did not own them. I will address that issue in **Section XI.B** of these Reasons. Suffice it to say, at this point of time, that the reason the Applicants included a property in the list of Schedule C Properties against which they sought relief was because the Rose & Thistle website represented that the property was owned by the Waltons or Rose & Thistle.

[107] In its Fourth Report the Inspector identified seven properties owned by Walton Schedule C Companies for which it could ascertain that funds transferred from a Schedule B Company to Rose & Thistle were transferred, in turn, to the Schedule C Company to acquire the property. Froese addressed the Inspector's findings in his report. Froese's high level comment was:

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[27] 2014 ONSC 3732, para. 21.

> We reviewed the tracing performed by the Inspector and agree that some funds from the applicants can be traced through the Rose & Thistle clearing account to Schedule C Companies and that these funds were used for the purchase of properties. However, the tracing performed by the Inspector does not address other funds received by the Schedule C Companies and transferred to Rose & Thistle or transferred through Rose & Thistle to Schedule B Companies.
>
> ...
>
> The net result is that, in relation to the seven properties, approximately $2 million of funds flowed from Dr. Bernstein through the Rose & Thistle clearing account to the Schedule C Company account, where the funds were available at the time the properties were purchased. It should be noted that no funds trace to the purchase of the properties owned by Academy Lands and Front Church, and that less funds trace to the College Lane property than are determined by the Inspector as a result of co-mingling of funds.

I shall consider Froese's comments on the analysis performed by the Inspector for specific properties below.

[108] Mr. Reitan, in his affidavit sworn June 26, 2014, deposed that the following amounts of the Applicants' funds were used to purchase or refinance some of the Schedule C Properties:

(i) $330,750 for the purchase of 14 College Street and $987,165 for the refinancing of 14 College Street;

(ii) $1,032 million for the purchase of 3270 American Drive;

(iii) $1.6 million for the purchase of 2454 Bayview Avenue;

(iv) $937,000 for the purchase of 346E Jarvis Street[28] and the repayment of Dr. Bernstein's mortgage on 346F Jarvis Street;

(v) $2.337 million for the purchase of 44 Park Lane Circle, the personal mansion of Norma and Ronauld Walton;

(vi) $221,000 for the purchase of 2 Kelvin Street and $115,950 for the purchase of 0 Luttrell Avenue; and,

(vii) $371,200 for the purchase of 26 Gerrard Street East.

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[28] That is, the unit bearing PIN 21105-0166, the parcel register for which is found at the Inspector's Fourth Report, Tab J.

A. 14 College Street

Inspector

[109] College Lane Ltd. was a Walton Schedule C Company. On July 5, 2011, College Lane purchased 14 College Street, Toronto, for $5.6 million, financed largely by a mortgage in the amount of $5.5 million. The Inspector conducted two tracing analyses on this property: the first focused on the acquisition of the property in July, 2011, and the second dealt with the discharge of a mortgage on July 4, 2012.

[110] In its Fourth Report the Inspector reported that on June 30, 2011, five days prior to the acquisition of 14 College Street, the opening balance in the Rose & Thistle account was $18,266. The Inspector reported that the Applicants made equity or mortgage advances to several Schedule B Companies shortly before that date which were quickly followed by transfers from the Schedule B Companies' accounts to the Rose & Thistle account: (i) $220,650 on June 30 from Bannockburn; (ii) $223,150 on June 30 from Twin Dragons; (iii) $91,350 from Riverdale; and (iv) $56,550 from Wynford Professional Center Limited. The Inspector also noted that on June 30, 2011, $216,250 was transferred from two Walton Companies to Rose & Thistle, and on June 30, 2011, several transfers out occurred to various Schedule B Companies and Walton Companies from Rose & Thistle. The Inspector reported that it had traced $330,750 of the Applicants funds into the purchase of the College Lane property on July 5, 2011.

[111] In its April 25 Supplement to the Fourth Report the Inspector reported on its further analysis for this property which led it to conclude that approximately $983,475, primarily sourced from funds paid to Schedule B Companies by the Applicants (Donalda Developments Ltd. and Fraser Properties Corp.), were transferred to Rose & Thistle and then forwarded to College Lane which, in turn, used the funds to discharge a mortgage which had been granted to Windsor Bancorp on July 4, 2012.

Froese

[112] In respect of Inspector's report that it had traced $330,750 of the Applicants funds into the purchase of the College Lane property, Froese stated:

> The co-mingling of Schedule C Company funds and Schedule B Company funds does not permit a direct tracing of the $330,750 to College Lane, *although a portion is traceable*, depending on the assumptions applied to the tracing. (emphasis added)

I accept the Inspector's analysis on this issue. Although there was co-mingling in Rose & Thistle at the time of funds from Schedule B and C Companies, the vast majority of the funds had originated with Schedule B Companies which the Inspector could trace to specific advances of the Applicants' funds.

[113] Froese stated, in respect of the Inspector's report that $983,475 of Applicants' funds had been transferred to College Lane, that a third-party financing of $715,650 partially offset that amount and that further post-acquisition (July 5, 2011) transfers between College Lane and Rose & Thistle resulted in a net balance of $1,070,536 owing from College Lane to Rose & Thistle as at December 31, 2013:

> In our view the $1,070,536 net amount is the appropriate amount owing to Rose & Thistle from Academy Lands (sic). This includes funds co-mingled in the Rose & Thistle clearing account, some of which were funds deposited from Dr. Bernstein to Schedule B Companies.

As I will discuss below, I do not accept giving precedence to the post-acquisition net transfer state of accounts advocated by Froese.

B. 3270 American Drive (United Empire Lands)

Inspector

[114] On March 11, 2013, United Empire Lands, a Walton Schedule C Company, purchased 3270 American Drive, Toronto, for $6.7 million, with mortgages totaling $5.67 million registered against title.

[115] The Inspector reported that funds totaling approximately $1.032 million, primarily sourced from funds advanced by the Applicants to a Schedule B Company – West Mall Holdings Ltd. - were transferred to the Rose & Thistle account on March 8, 2013 and, that same day, transferred to United Empire Lands. Those funds could be tied to a $1.649 million March 7 Applicants' equity investment in West Mall which was transferred in three installments on March 7 and 8 to the Rose & Thistle account. One of those installments was the $1.032 million transferred on March 8 from Rose & Thistle to United Empire Lands.

Froese

[116] In his report Froese stated:

> The Inspector identified a March 8, 2013 transfer of $1,032,000 from West Mall Holdings Ltd. to Rose & Thistle that he concluded was sourced from the Applicants funds. On the same day, a transfer of $1,032,000 of funds from Rose & Thistle to United Empire Lands Ltd. provided the funds to United Empire to close the purchase of the 3270 American Drive property on March 11, 2013.
>
> *We do not disagree with this analysis.* However, it does not take into account funds received from Christine DeJong Medical Professional Corporation for an investment in United Empire that were used in part to fund Schedule B Companies and which were being repaid to United Empire through the $1,032,000 transfer. (emphasis added)

Christine DeJong brought her own cross-motion and filed an affidavit. She deposed that she thought the payments she was making to United Empire Lands would be used to acquire the American Drive property.

[117] Froese also stated in his report:

> Based on the above information, United Empire funds of $706,850 were transferred to Rose & Thistle and used in part to fund Schedule B Companies. Schedule B funds of $1,046,000 were transferred through Rose & Thistle to United Empire, in part as repayment of the $706,850.

C. 2454 Bayview Drive (Academy Lands Ltd.)

Inspector

[118] Academy Lands Ltd., a Walton Schedule C Company, purchased property at 2454 Bayview Avenue, Toronto, on December 21, 2011 for $8 million, with a charge in the amount of $6.2 million registered in favour of Business Development Bank of Canada. Accordingly, $1.8 million had to be otherwise financed in order to acquire the Bayview property.

[119] The Inspector reported that on December 12, 2011, the amount of $1.6 million was transferred from the Rose & Thistle Account to Academy Lands.

[120] A week earlier, on December 6, 2011, the closing balance in the Rose & Thistle Account had been only $97,880. The Inspector reported that on December 5, 2011, the Applicants paid into the account of Royal Agincourt Company, a Schedule B Company, an equity investment in the amount of $1.782 million. Between December 5 and December 13, 2011, the amount of $1.73 million was transferred out of that account into the Rose & Thistle bank account. On December 8, 2011, the Applicants made a mortgage advance of $706,050 to Tisdale Mews Inc., another Schedule B Company, which, on the same day, was transferred from that bank account to the Rose & Thistle bank account.

[121] The Inspector expressed the view that the transfers from the Royal Agincourt account and the mortgage advance from the Tisdale Mews account to Rose & Thistle were the primary sources of the funds for the transfer of $1.6 million to Academy Lands on December 12 which, in turn, funded the acquisition of 2454 Bayview on December 21, 2011.

Froese

[122] Froese made several comments about the Inspector's analysis. First, Froese stated:

> *We agree that $1.6 million and $110,350 traced to Academy Lands.* However, these funds were fully returned to Rose & Thistle during the period of the Inspector's analysis in the following two days. This is an example of a "snapshot" tracing being accurate in

> and of itself but not reflecting relevant transactions within several days of the period selected by the Inspector. (emphasis added)

Froese concluded: "Accordingly Academy Lands did not retain any funds from Dr. Bernstein in December 2011 when it purchased 2454 Bayview."

[123] I am not prepared to accept that statement. Gaps in the evidence do not permit the making of such a forceful assertion. Let me explain why.

[124] A review of the Academy Lands bank account statement for the month of December, 2011 certainly shows that the December 12 "transfer in" of $1.6 million from Rose & Thistle was the main source of the $1.986 million balance which existed on December 20, the day before the acquisition of the Bayview property. The $1.986 million was withdrawn by way of a certified cheque on December 20. The next day – the day of closing - an identical amount was deposited "at the counter" back into the Academy Lands account. The identity of amounts of the December 20 withdrawal and December 21 deposit back-in would support an inference, which I draw, that the same money withdrawn on December 20 was re-deposited the following day into the Academy Lands account.

[125] On December 21 – the day of closing - there was a transfer of $322,800 from the Academy Lands account to the Rose & Thistle account. Unfortunately, neither the Inspector's report nor the Froese report investigated the specific use of those funds. The Froese Report did attach the Rose & Thistle bank statement which showed that the $322,800 deposit was the source for over a dozen payments of various amounts over the course of that day which reduced the account's balance to just slightly more than $30,000. I was not pointed to evidence which would explain those various transfers out of the Rose & Thistle account, specifically whether they had anything to do with payments made on the closing of the purchase of the Bayview property.

[126] Froese also stated that they had been informed that the vendor of the Bayview property, Dibri Inc., had provided $1.75 million of financing to Academy Lands in an unregistered vendor take-back mortgage that was not registered until 2014: "As a result, little or no funds were required to close the purchase of the property." On this point, I have reviewed Exhibit 2 to the Froese Report. It does not contain a statement of adjustments for the closing of the acquisition of Academy Lands and the copy of the charge is obviously a mere draft. The other closing documents contained in Exhibit 2 did not refer to a vendor take back mortgage.

D. 346 Jarvis, Unit E (1780355 Ontario Inc.)

Inspector

[127] The tracing analysis performed by the Inspector in its Fourth Report traced parts of two April 15, 2013 advances by the Applicants – $1.286 million into Dewhurst and $1.452 million into Eddystone – into the bank account of Rose & Thistle ($641,500 and $866,700 respectively).

The Inspector reported that transfers to Schedule C Companies and Ms. Walton from Rose & Thistle around that time amounted to $1.194 million consisting of $937,000 to 1780355 Ontario, $111,550 to Plexor Plastics (a Walton company) and $110,000 to Norma Walton.

[128] The Inspector reported that shortly after the transfers totaling $937,000, Norma and Ron Walton purchased a property at 346E Jarvis, Toronto, using 1780355 Ontario Inc.

Froese

[129] Froese stated that he agreed with the Inspector that $937,000 traced through the Rose & Thistle clearing account to 1780355 Ontario. Froese stated that as of December 31, 2013 the net amount owing to Rose & Thistle by 1780355 Ontario was $496,897. That led Froese to state:

> *In summary, we agree with the Inspector's tracing of $937,000 of Dr. Bernstein's funds through Schedule B Company accounts to the Rose & Thistle clearing account and to 178 Inc.* In our view, however, the $496,897 net amount owing from 178 Inc. to Rose & Thistle is the appropriate amount to consider owing to Rose & Thistle from 178 Inc. (emphasis added)

E. 44 Park Lane Circle

Inspector

[130] The Waltons own a large mansion in the Bridle Path area of Toronto on 44 Park Lane Circle which they acquired on June 26, 2012 for $10.5 million. Two mortgages totaling $8 million were registered against title that day.

[131] On June 25, 2012, Rose & Thistle transferred $2,584,850 into Ms. Walton's personal account and that day she transferred $2.5 million to acquire 44 Park Lane Circle. The $2,584,850 transfer was largely sourced from (i) a June 15 equity investment by the Applicants of $2,320,963 into Red Door Developments (875 Queen St. East) which was transferred that same day to Rose & Thistle and (ii) a June 25 $675,000 equity investment made by the Applicants in respect of 1450 Don Mills which was deposited directly into the Rose & Thistle account.[29]

Froese

[132] Froese did not dispute the Inspector's analysis concerning the use of the Applicants' advance to Red Door Developments; Froese did not address the advance to 1450 Don Mills.

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[29] On June 25, 2012, two of the deposits made into the Rose & Thistle bank account were for $675,000 and $1.662 million; they were followed immediately by a transfer out of $2.337 million.

Evidence of Ms. Walton about the acquisition of the property

[133] In her June 21, 2014 affidavit, Ms. Walton explained how she and her husband came to own the property at 44 Park Lane Circle. She deposed:

> We purchased the 6.2 acre property at 44 Park Lane Circle in June 2012 for $10.5 million with the intention of making money on the property, similar to our last house we bought at 92 Truman[30] and similar to the commercial properties we purchase on a regular basis. It was never our intention to remain in the residence long-term, and we lived there with our four children through major renovations to save living costs and expenses.

Looking at the marketing brochure prepared by a realtor retained by the Respondents for a potential sale of 44 Park Lane Circle – Exhibit SS to Ms. Walton's June 21, 2014 affidavit – it is difficult to be moved by Ms. Walton's protestations of the hardship of living through renovations. The pictures of the house show a palatial mansion finished to the highest standards with only the best of luxury amenities.

[134] Ms. Walton candidly admitted that she and her husband had used some of the money provided by Dr. Bernstein for the 875 Queen Street East property to acquire their residence at 44 Park Lane Circle:

> We used the proceeds of sale provided by Dr. Bernstein to us when he bought into our 875 Queen Street property. We had a cost base of $6.65 million and he bought in at a price of $9.5 million. The $2.215 million he invested to purchase 50% of the shares in 875 Queen Street East was used by us to fund the purchase of 44 Park Lane Circle, as this money was due to us, such money representing the equity we had created in the property and disclosed to Dr. Bernstein prior to his purchase. This money was not to be used to complete the Queen Street project as it was part of the purchase price for Dr. Bernstein to buy in.

As Ms. Walton clarified in her July 3, 2014 affidavit, they had invited Dr. Bernstein to buy into that project "many months after we had contracted to buy" the property, not after they had actually bought the property. In fact, as her June 8, 2012 email to Dr. Bernstein disclosed, Ms. Walton only had the property under "conditional contract" at the time she solicited an investment from him.

[135] In its Third Report dated January 15, 2014, the Inspector set out the explanation it had received from Walton for the 875/887 Queen Street East transaction:

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[30] The Waltons sold their 92 Truman house about a year after they had acquired the Park Lane Circle.

> From June 15 to 25, 2012, Rose & Thistle transferred the $2.3 million paid by Dr. Bernstein to itself and established an inter-company receivable due from Rose & Thistle to Red Door in that amount. Ms. Walton subsequently delivered an invoice dated June 30, 2012... that purported to charge fees to Red Door in the amount of approximately $2.1 million effectively offsetting the inter-company debt. Ms. Walton subsequently advised the Inspector that the purpose of the transaction was to adjust her equity to draw and the agreed-upon increase in value between the time she purchased the company and Dr. Bernstein's buy-in. An adjustment to Ms. Walton's equity account on the books of the company has been recommended by the company's external accountant. The Inspector questioned the propriety of Rose & Thistle delivering an invoice purportedly charging fees as a mechanism to reflect a distribution of equity to a shareholder. Upon being challenged by the Inspector, Ms. Walton reversed the invoice and reinstated the receivable due from Rose & Thistle. In addition, an increase was recorded to Ms. Walton's equity on the balance sheet adding approximately $2.2 million as a fair market value adjustment. The Inspector notes that paragraph 13 of the agreement between the parties provides that equity is to be distributed to the shareholders only after the property is developed and sold. The receivable due from Rose & Thistle remains outstanding and Ms. Walton has yet to explain the basis upon which Rose & Thistle removed cash from this company to create the receivable in the first place.

[136] I do not accept Ms. Walton's contention that they were entitled to use Dr. Bernstein's equity contribution to 875 Queen Street East to fund the acquisition of their Park Lane Circle residence. Her explanation does not accord with the representations which were made in the June 25, 2012 agreement between Norma Walton and Ron Walton, on the one part, and Dr. Bernstein, on the other, for the Queen Street East properties. Attached to that June 25, 2012 agreement was a table setting out the capital required for the project. The table recorded total capital required of $11.64 million. Included in that required capital was $2.215 million for "development monies invested to date". The chart represented that three sources of funds would be used to satisfy the required capital: (i) a $7 million mortgage; (ii) $2.32 million from Dr. Bernstein; and, (iii) $2.32 million from Ron and Norma Walton.

[137] In her evidence, Ms. Walton seemed to suggest that the reference to the required capital of $2.215 million for "development monies invested to date" somehow signaled to Dr. Bernstein that when he signed the agreement he knew, or should have known, that the Waltons would extract some "earned equity" from the project. Ms. Walton canvassed this point with Dr. Bernstein on her cross-examination of him which led to the following exchange:

> Q. 1811. Ms. Walton: I'm going to suggest to you that this email, coupled with this statement, shows that your buy-in to the Queen Street property was at a price that was higher than the cost base because of the work that the Walton Group had done on the property in the two years prior that they had it under contract?
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> A. Dr. Bernstein: My agreement to purchase in was at the cost of purchasing the properties and the cost out-of-pocket of monies spent or to be spent to get to the closing. That is what it was for.

Q. 1812: Dr. Bernstein, I know you're saying that now, but did you ever say, "Norma, I like the project, but I want to be in at the purchase price and I don't want to pay any development monies of 2.215 million?"

A: No, because I took this to say that you spent $2.215 million in bringing the property to where it was.

Q. 1813: Did you do any due diligence on that 2.215 million?

A: I trusted you and your comments and your documentation that you spent that money.

Q. 1814: Okay, but you...

A: Did I ask you to verify it? No. Did I trust you? Yes, I did.

Q. 1815: So you bought into the property understanding that there was already $2.215 million of value inherent in the purchase price?

A. Absolutely not. I bought into the property because it says here you spent $2.215 million to that point or that will have been spent with the closing, along with legal fees and land transfer tax, municipal and Ontario land transfer tax and other fees and disbursements of $65,000. That's what I bought into.

...

Q. 1817: Let me rephrase. Are you unhappy that you agreed to buy in at nine and a half million dollars?

A: If the circumstances are all in place... Are you asking me about today?

Q. 1818: Yes

A: From my understanding today, you didn't spend $2.215 million. From my understanding today, you did not secure Red Door to do anything and move value. From my understanding today, what you told me here is not true.

[138] Dr. Bernstein testified that when he invested in the Queen Street East project he was not aware that he was not buying in at the original cost base of the property, as contended by Ms. Walton.[31]

[139] Section 4 of the Queen Street East agreement provided that Dr. Bernstein wished to own 50% of the shares in the companies, Red Door Developments Inc. and Red Door Lands Ltd., in exchange for providing 50% of "the equity required to complete the project". Section 4

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[31] Bernstein CX, QQ. 1752-3; 1811.

stipulated that "[T]he company will issue sufficient shares such that Bernstein has 2,320,963 and Walton has 2,320,963 voting shares of the same class". Section 4 stipulated that Dr. Bernstein would receive shares issued from the company's treasury, not acquire shares from the Waltons which were already issued and outstanding. Both Ron and Norma Walton are lawyers; I have no doubt that they understand the basics of corporate law.

[140] Section 7 of the agreement dealt with the equity contributions - Dr. Bernstein was required to provide his by June 20, 2012, and the Waltons were required to provide theirs "in a timely manner as required as the project is completed".

[141] Section 15 of the agreement specifically dealt with the use of funds advanced to the Red Door Companies:

> The Company will only be used to purchase, renovate and refinance the property at 875 and 887 Queen Street East, Toronto, Ontario or such other matters solely relating to the Project and the Property.

[142] As to the ability of the parties to extract their capital from the Queen Street East project, Section 13 stated:

> Once the Project is substantially completed to the point that all of the Property has been sold, both parties will be paid out their capital plus profits and Walton will retain the company for potential future use.

[143] Norma Walton deposed in paragraph 51 of her June 21, 2014 affidavit that the money she and her husband had extracted out of the Red Door Companies following Dr. Bernstein's advance of equity was money which "was due to us, such money representing the equity we had created in the property and disclosed to Dr. Bernstein prior to his purchase". In her July 3, 2004 affidavit she contended that "the increase in value from the time we contracted to purchase to the time we invited Dr. Bernstein to partner with us was ours alone as we were the sole owners of the company at that time." Those assertions are flatly contradicted by the plain language of the agreement with Dr. Bernstein to which Ron and Norma Walton put their signatures. Also, the plain language of the agreement flatly contradicted her statement that Dr. Bernstein's "money was not to be used to complete the Queen Street project as it was part of the purchase price for Dr. Bernstein to buy in."

[144] Moreover, in her June 8, 2012 email to Dr. Bernstein soliciting his investment in the property, Norma Walton made no mention of her intention to use his investment to fund the Waltons' "extraction of equity" so that they could buy a home on Park Lane Circle.

[145] Based upon Norma Walton's June 21, 2014 evidence, I can only conclude that when Norma and Ron Walton signed the June 25, 2012 agreement with Dr. Bernstein for the 875/887 Queen Street East project, they fully intended to use the funds advanced by Dr. Bernstein to

fund, in part, their own acquisition that day of their 44 Park Lane Circle personal residence. They did not disclose to Dr. Bernstein their intended use of his funds. To the contrary, in the agreement they signed with him on June 25, 2012, they led Dr. Bernstein to believe that the funds he advanced would be used solely for the project at 875/887 Queen Street East and that neither he nor his co-venturers, Norma and Ron Walton, would be able to withdraw their capital from that project until it had been sold. By signing the agreement with Dr. Bernstein on June 25, 2012, and then proceeding immediately to appropriate the funds he advanced to their own use later that day to acquire their mansion at 44 Park Circle Park Lane Circle, Norma and Ron Walton deceived Dr. Bernstein and unlawfully misappropriated Dr. Bernstein's funds to their own personal use. In short, the Waltons defrauded Dr. Bernstein.

Evidence of Norma Walton about the ownership interests of others in 44 Park Lane Circle

[146] Ms. Walton deposed that she and her husband currently were in the process of severing the 44 Park Lane Circle property into two separate parcels. In her December 17, 2013 affidavit Ms. Walton deposed that the property was owned by her husband and herself and that no shareholders owned an interest in the property. However, on the net worth statement attached as Exhibit "MM" to her June 26, 2014 affidavit, Ms. Walton had divided the property into two parts – 44a and 44b – and listed $5.77 million in preferred shares invested in "44b" Park Lane Circle. On December 18, 2013 Newbould J. ordered that the Respondents could not deal with 44 Park Lane Circle without further order of the Court.

[147] Mr. Reitan deposed that Ms. Walton must have sworn false evidence on December 17, 2013, or the Waltons were in breach of Justice Newbould's order of December 18, 2013 or Exhibit MM to Ms. Walton's June 26, 2014 affidavit was false.

[148] Based upon a review of the entire record, I think the answer lies in a fourth explanation. In her evidence and at the hearing Ms. Walton went to considerable pains to state that she intended to take care of all of her creditors – except Dr. Bernstein – because she had promised to make good on their investments as preferred shareholders in various Schedule C Companies which no longer possessed any equity to pay their shareholders. Many of the affidavits and statements filed by the preferred shareholders stated that they had agreed with Ms. Walton that she could pay them from the proceeds of sale from other Walton properties, even though the Schedule C Corporations in which they had invested lacked any equity to pay them out as preferred shareholders. I conclude that Ms. Walton's reference in her net worth statement to $5.77 million of preferred shareholders in "44b" Park Lane Circle was her way of saying to the preferred shareholders that she would protect them out of the proceeds of the severed "44b" portion of the Park Lane Circle property once it was sold. That evidence demonstrates that if Ms. Walton thinks it fit to pay a creditor, she will work to do so; if she does not, she won't. In Ms. Walton's worldview, her discretion is absolute, and her creditors must abide by the exercise of her discretion and the preferences she accords certain creditors.

Renovations to 44 Park Lane Circle

[149] The evidence also disclosed that funds originating in a Schedule B Company, Tisdale Mews, were used to fund $268,104.57 in renovations to the Waltons' 44 Park Lane Circle home. Ms. Walton justified the use of those funds by stating that "Rose & Thistle funded 100% of the $268,104.57 purchases before any cheques were sent out of the Tisdale Mews account" and, overall, Rose & Thistle transferred more money to Tisdale Mews than it had received from that Schedule B Company. In his November 5 Reasons Newbould J. considered that evidence from Ms. Walton and concluded that "no reasonable explanation has been provided" for the use of the Tisdale Mews funds.

F. 2 Kelvin Street and 0 Luttrell Avenue

Inspector

[150] 6195 Cedar Street Ltd., a Walton Schedule C Company, purchased 2 Kelvin Street, Toronto, on April 17, 2012, for $1.8 million, with a mortgage in the amount of $1.44 million registered against title.

[151] The Inspector reported that funds totaling approximately $221,000, primarily sourced from funds paid by the Applicants to a Schedule B Company, were transferred to the Rose & Thistle account on April 17, 2012 and, in turn, transferred that day to Cedar. The opening balance in the Rose & Thistle account on April 17 was $10,285. A $700,000 equity investment made by the Applicants to Fraser Lands Ltd. that day was transferred out of that Schedule B Company's account to the Rose & Thistle account.

Froese

[152] Froese stated: "We agree with the Inspector that $221,000 traces through the Rose & Thistle clearing account to 6195 Cedar, with a limited amount of co-mingling in the clearing account in or around April 17, 2012."

Applicants' evidence

[153] Mr. Reitan deposed that the property at 0 Luttrell was adjacent to the one at 2 Kelvin Street. A Walton company, Bible Hill Holdings Ltd., purchased the Luttrell property on November 15, 2012. Norma Walton did not disclose the Respondents' ownership interest in that property in her affidavit sworn December 17, 2013; she only later admitted that ownership interest as a result of inquiries from Applicant's counsel. Mr. Reitan also deposed, in paragraph 164 of his June 26, 2014 affidavit, that up to $152,950 of a $318,392 November 13, 2012 contribution by Dr. Bernstein to Salmon River Properties Ltd. in respect of 0 Trent Avenue was transferred through the Rose & Thistle account to Bible Hill Holdings Ltd. to finance the

acquisition of 0 Luttrell. Having reviewed the supporting documents filed by Reitan to reach that conclusion, I accept his analysis.

G. 26 Gerrard Street (Gerrard House Inc.)

Inspector

[154] Gerrard House Inc., a Schedule C Company, purchased 26 Gerrard Street, Toronto, on December 20, 2011, for $5.5 million, at which time two charges were registered totaling $4.95 million.

[155] The Inspector reported that it appeared that funds totaling approximately $371,200, primarily sourced from funds paid by the Applicants to the Schedule B Companies, were transferred to the Rose & Thistle account on December 20, 2011 and, that same day, were transferred to Gerrard House.

[156] The opening balance in the Rose & Thistle account on December 20 was $40,369. Most of three mortgage advances made by the Applicants that day to three Schedule B Companies were transferred to the Rose & Thistle account: $278,200 from Liberty Village Properties Ltd.; $39,900 from Riverdale; and, $120,400 from Wynford.

Froese

[157] Froese agreed with the Inspector that "$371,200 traces through the Rose & Thistle clearing account to Gerrard House, with a very limited amount of co-mingling in the clearing account on December 19 and 20, 2011."

H. The Froese critique of the Inspector's "snapshot" approach

[158] In its report Froese criticized the Inspector's tracing analysis because it was a "snapshot" tracing which, while accurate in and of itself, did not reflect the history of other transfers into and out of Rose & Thistle and a Schedule C Company. Froese expressed the view that the determination of the amount owing to or from Rose & Thistle to a Schedule C Company should be based upon the net amount owing as at December 31, 2013.

[159] The Inspector responded to this criticism in its Fifth Report emphasizing that "the tracing charts at Appendix F are intended to provide a snapshot of activity at a particular point of time. Funds transferred to or from the relevant company outside of the time period are not captured."

[160] Let me comment on two principles which guided Froese's analysis – one implied; the other stated. First, Froese made no comment on the propriety of the Respondents' pooling funds advanced by the Applicants with other Schedule B Company funds, Rose & Thistle funds, Schedule C Company funds, and amounts advanced by third party investors in respect of

Schedule C Companies. Second, Froese was of the view that the appropriate way to approach the issue of who owed whom what involved looking at the state of the various net balance accounts amongst the Schedule B Companies, Rose & Thistle and Schedule C Companies at a particular point of time. In his report Froese frequently used December 31, 2013 as that point of time.

[161] While I understand the technical reasons why Froeses followed those principles when conducting his analysis, the principles did not take into account the critical feature of the context surrounding all of those inter-company transfers of the Applicants' funds – they should never have happened. The contracts between the Applicants and the Respondents contained provisions designed to ensure that funds advanced by the Applicants to a Schedule B Company did not leak out from that company's account and that third-party investment funds did not leak into the Schedule B Companies. The Waltons utterly ignored those contractual obligations, with several consequences:

(i) Funds advanced by the Applicants to Schedule B Companies in fact ended up going to Walton-owned Schedule C Companies, a fact acknowledged by Froese;

(ii) The pooling of the Applicants' funds with others by the Respondents has caused significant difficulties in ascertaining precisely what happened with all of the funds advanced by the Applicants. That difficulty was caused by the Respondents systematically ignoring their contractual obligations. The Respondents had complete control over all of the funds. The co-mingling of the Applicants' funds with others was a problem solely of the Waltons' making; and,

(iii) To contend that one should look at the net balances owed between Rose & Thistle and a Schedule C Company at a more recent point of time, rather than focusing on transfers which made available Applicants' funds for Schedule C Companies to acquire properties, ignored the fact that the transfer of Schedule B Company funds to Schedule C Companies at times when a Schedule C property was acquired should never have happened in the first place and that "but for" the transfer of Applicants' funds to Schedule C Companies, the latter would not have been able to acquire the Schedule C Property.

In my view, for the Respondents to use an expert's report to argue that the Inspector's analysis of the tracing of Applicants' funds into Schedule C Companies lacked absolute precision does not help the Respondents' case at all. It amounted to nothing more than chipping away at the edges of inter-company transfers which the Waltons should never have made. It also reinforced the utter failure of the Waltons to discharge the onus on them of explaining precisely what had happened with the Applicants' funds. For the Waltons to be able to rely on net inter-company balances at, say December 31, 2013, in opposition to the Applicants' claims for relief against Schedule C Companies, they would have to demonstrate that all of the Applicants' funds which

were transferred at an earlier point of time into a Schedule C Company to fund its acquisition of a property ultimately found their way back into the Schedule B Company from which they originated and were used only by that Schedule B Company. That the Respondents have not done, or even tried to do. As a result, I do not accept the opinion proffered by Froese that the better way of assessing transfers to Schedule C Companies is to ascertain the net balance owing by or to a Schedule C Company at some point of time long after the Applicants' funds had been made available to the Schedule C Company to acquire a property – a benefit to the Waltons and a detriment to Dr. Bernstein.

I. The "trending up" of transfers to the Schedule C Companies

[162] The Inspector performed an overall analysis of the net amounts transferred from Schedule B Companies to Rose & Thistle and from Rose & Thistle to Schedule C Companies during the period October, 2010 to December, 2013. The net amount transferred from Schedule B Companies to Rose & Thistle was $23.68 million and the net amount transferred from Rose & Thistle to Schedule C Companies was $25.37 million. The Inspector stated, in its Fifth Report:

> The Inspector's analysis shows a consistently increasing net transfer from the [Schedule B] Companies to Rose & Thistle. In other words, even if some amounts were transferred to the Companies by Rose & Thistle, these returns did not keep pace with the steady flow of funds from the Companies to Rose & Thistle and from Rose & Thistle to the Walton Companies.

[163] In its Fifth Report the Inspector included a chart and graph which compared the net amount of transfers from the Schedule B Companies to Rose & Thistle with the net amount of transfers from Rose & Thistle to Walton Companies for each month from October, 2010, when the Applicants made their first investment, to December, 2013. The Inspector reported:

> The graph depicts the net amount transferred as at the end of each month. The graph indicates a steady trend upwards. That is, the net amount transferred from [Schedule B] Companies increased, on a month over month basis for most months. The transfers from Rose & Thistle to Walton Companies increased in most months in a similar ratio....
>
> The timing and quantum of the transfers described above is not consistent with the Respondents' contention that the transfers to Rose & Thistle represent payment for, among other things, more than $20 million worth of construction work performed by or on behalf of Rose & Thistle for the benefit of the Companies.
>
> If the transfers had been related to construction work, a substantial portion of the funds taken from the Companies would have to have been used to pay construction costs, including contractors (if the work was subcontracted) or suppliers and labor (if the work was performed by Rose & Thistle). Only the profit earned by Rose & Thistle on the construction would have been available for transfer to the Walton Companies. However, throughout the period examined, the amount transferred to the Walton Companies and the amount transferred from the Companies increased at approximately the same pace. In

every month examined, the amounts transferred to the Walton Companies represented a significant percentage of the amount transferred from the Companies. There is no evidence that the Respondents had sufficient resources to fund both the transfers to the Walton Companies and the work shown on the invoices that they have proffered to justify those transfers.

J. Preferred Shareholders of some Schedule C Companies

[164] What evidence was filed on these motions to explain the sources of funding available to the Schedule C Companies other than the funds of the Applicants which were transferred by the Waltons out of the Schedule B Companies? Ms. Walton deposed that there was $14,107,876 of 42 "innocent third party investors' money" in the Schedule C Companies consisting of preferred shareholders, common shareholders and debtors. A chart summarizing those investments - Exhibit MM to her June 21, 2014 affidavit - only recorded $7.7 million in investments and it did not provide any back-up documentation to verify the investments.

[165] Ms. Walton also filed affidavits or statements from 30 preferred shareholders in five Schedule C Companies: Front Church Properties, Academy Lands, The Rose & Thistle Group, Cecil Lighthouse and 1793530 Ontario. Each shareholder deposed to the "value" of his or her preferred shares (or in some cases loans) in Schedule C Companies. The particulars are set out in Appendix "B" to these Reasons.

[166] I am not prepared to accept that the "value" each shareholder attributed to his or her shares reflected that actual amount invested by the shareholder. Some of the affidavits strongly suggested that shareholders were including capital appreciation and accrued dividends or distributions in the "value" of their investments. For example, Christine DeJong deposed that she had advanced $716,906 to United Empire, a Schedule C Company, in January, 2013, and stated that the value of her shares, according to the Respondents, was now $992,750. However, taking that "value" evidence from preferred shareholders at its highest, it disclosed a "value" of $8,780,817 attributed by those shareholders to their investments in the five Schedule C Companies.

K. Summary of findings on transfers of funds to Schedule C Companies

[167] . I accept, in large part, the tracing analysis performed by the Inspector on the Schedule C Companies described above. I find that in the instances identified by the Inspector, in a brief period of time the Waltons directed the transfer of funds advanced by the Applicants from a Schedule B Company to a Walton-owned Schedule C Company, through Rose & Thistle, and the Schedule C Company used those funds to purchase a property. In the result, I find that the following amounts of the Applicants' funds were used to purchase or discharge encumbrances on Schedule C Properties:

(i) 14 College Street: $1,314,225 ($330,750 + $983,475);

(ii) 3270 American Drive: $1.032 million;

(iii) 2454 Bayview: $1.6 million;

(iv) 346E Jarvis St.: $937,000;

(v) 44 Park Lane Circle: $2.5 million;

(vi) 2 Kelvin Street: $221,000;

(vii) 0 Trent: $152,900; and,

(viii) 26 Gerrard Street: $371,200.

[168] I also accept the following conclusion of the Inspector:

> [T]he Inspector has concluded that the Respondents used new equity invested in, and mortgage amounts advanced to, the [Schedule B] Companies by the Applicants to fund the ongoing operations of other Companies and the Walton Companies. Almost every time the Applicants advanced funds to one of the Companies, a significant portion of those funds was transferred to Rose & Thistle. In some instances, funds could be traced directly into a Walton Company. In other instances, funds could not be traced directly because the Applicants' funds were co-mingled with other funds in the Rose & Thistle account. However, the Inspector has concluded that the Applicants' investment in the Companies was a major source of funds for the Walton Companies.

C. Other issues concerning Schedule C Properties

C.1 Galloway Road

[169] Highland Creek Townes Inc., a Walton company, owned the property at 232 Galloway Road, Toronto. On May 18, 2011, Dr. Bernstein, through his company 368230 Ontario limited, advanced a mortgage loan to Highland Creek. The principal amount of the mortgage was $4.05 million, advanced in two tranches. The mortgage matured on June 30, 2012. It was guaranteed by Norma and Ron Walton.

[170] Mr. Reitan deposed that his review of the title for the property disclosed that Ms. Walton had caused the discharge of Dr. Bernstein's mortgage in August, 2012 notwithstanding that the full amount of the principal had not been repaid. There was no dispute that the discharge was done without Dr. Bernstein's knowledge, consent or approval. When this discharge was discovered, Dr. Bernstein pressed Ms. Walton to pay out his mortgage on Galloway. Dr. Bernstein emailed Ms. Walton on October 1, 2013, asking what she had done with the $6 million in mortgages on the Don Mills Road properties and he continued:

> You promised to pay out the Galloway mortgage by September 30. I do require, and I did expect the funds. When can this be paid out?

[171] Ms. Walton's email response of the same date ignored that question and, instead, pressed Dr. Bernstein to stop his public litigation and move their dispute into "a private setting immediately". That prompted the following response from Dr. Bernstein:

> Dear Norma;
>
> And the $6M is located ____ ?? ____
>
> And the Galloway mortgage is being paid out on ____ ?? ____
>
> I cannot get answers asking you directly – what other options do I have?

[172] On his July 9, 2014 cross-examination Dr. Bernstein testified that he still had not been paid out on the Galloway mortgage.[32]

[173] Ms. Walton's unilateral discharge of Dr. Bernstein's mortgage on the Galloway property without the payment in full of the amount due under the mortgage provided another example of Ms. Walton's pattern of breaching her contracts with Dr. Bernstein, as well as a pattern of oppressive conduct by Norma and Ronauld Walton, as directors and officers of corporations, against the interests of Dr. Bernstein as a corporate creditor.

C.2 30/30A Hazelton

[174] The Respondents seek court approval to sell 30 Hazelton, a Schedule C Property, to 1659770 Ontario Inc., the corporate profile for which lists Jennifer Coppin as the director and officer. George Crossman, a lawyer at Beard Winter LLP, deposed that in 2009 he had been involved in a real estate transaction in which Jennifer Coppin offered to purchase his client's condominium unit through 1659770 Ontario Inc. Ms. Coppin was charged criminally in respect of that transaction, it being alleged that she had altered the agreement of purchase and sale to inflate the purchase price to secure higher financing. Mr. Crossman deposed that he understood it was a term of Ms. Coppin's probation that she not engage in any further real estate dealings.

VII. Explanations Proffered by Ms. Walton for the Use of the Applicants' Funds

[175] Ms. Walton proffered several explanations for the Respondents' use of the Applicants' funds, some of which I have already considered. Nonetheless, this section will summarize and consider each proffered justification.

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[32] Bernstein CX, Q. 1198.

A. Dr. Bernstein was a silent partner and did not insist on the strict observance of the agreements

[176] A major theme of Ms. Walton's affidavits was that Dr. Bernstein wanted to be a silent partner with the result that over the years he did not insist upon strict compliance with the agreements' reporting obligations. That led Ms. Walton to contend in her factum: "Bernstein acquiesced to Walton managing the portfolio in Walton's sole discretion".

[177] The evidence did disclose that during the initial two years of the parties' business relationship, Dr. Bernstein appeared to be content with receiving only periodic reports from Ms. Walton or answers to specific questions which his accountants posed. As Dr. Bernstein stated on his cross-examination, "I just assumed you were following protocols for our agreements..."[33]

[178] By September, 2012 Dr. Bernstein and his accountants were beginning to ask more pointed questions, including requesting financial statements for the Schedule B Companies. By March, 2013, Dr. Bernstein was requiring the Respondents to secure his approval for payments over $50,000 from Schedule B Companies as stipulated by the agreements. In June, 2013 Mr. Reitan requested detailed information about Dr. Bernstein's investments and raised specific concerns with Ms. Walton. Although this course of conduct would prevent Dr. Bernstein from relying on the Respondents' failure to provide monthly reports in the early part of their relationship as an event of default under the agreements, Dr. Bernstein most certainly did not waive his entitlement to receive any reports under the agreements. When Dr. Bernstein began to request them, he was entitled to receive them.

[179] The evidence also disclosed that even in September, 2013, as the relationship between the parties was breaking down and Dr. Bernstein was becoming quite vocal in his demand for a proper accounting of his money, Norma Walton was not prepared to adhere to the terms of her agreements with Dr. Bernstein. Those agreements stipulated that no refinancing of a property would take place without his approval. On September 20, 2013, Ms. Walton emailed Dr. Bernstein advising that the $3.27 million mortgage on 140/150 Queen's Plate Drive was coming due at the end of the month and that she had arranged a new mortgage for $3.35 million which would close in early October. Ms. Walton had signed the term sheet for the replacement mortgage on September 18, 2013, without first securing Dr. Bernstein's approval. Dr. Bernstein emailed her on September 23 insisting that she comply with the terms of their agreement and obtain his approval for any decisions regarding refinancing before they were made. Ms. Walton's response was telling because it revealed her complete unwillingness to follow the contractual terms which bound her:

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[33] *Ibid.*, Q. 1318.

> We are up against a deadline such that if we do not refinance, Carevest will call our loan. I have been working hard to arrange refinancing and initially we tried to get BDC on board but they won't provide funds without site plan approval. Hence I arranged for Stephen to provide the mortgage. I would assume that is agreeable given the alternative is calling the loan, no?

Even when Dr. Bernstein subsequently agreed to refinance on the basis of a new $3.27 million mortgage, Ms. Walton proceeded to put in place a mortgage for an increased amount, $3.35 million.[34]

[180] From this I conclude that Ms. Walton was prepared to ignore not only the contractual language which bound her, but also the express instructions of her co-investor. Instead, Ms. Walton simply did as she saw fit irrespective of her legal obligations.

B. The pooling of funds was permissible or at least not wrongful

[181] Ms. Walton deposed that when she was managing the jointly-owned portfolio of companies, she used Rose & Thistle "as a clearinghouse account to smooth cash flow across the portfolio." In its First Report the Inspector recorded the explanation Ms. Walton had provided for the pooling of funds:

> Ms. Walton confirmed to the Inspector that equity contributions to, and income received by, the [Schedule B] Companies were centralized and co-mingled in the Rose & Thistle account, which Ms. Walton described as a "clearing house". Ms. Walton provided the following explanations for this practice:
>
> (a) Since the Properties are at various stages of development, some are cash flow positive and others cash flow negative. The transfers to and from the Rose & Thistle account "smooth out" the cash flow of the companies; and,
>
> (b) Rose & Thistle does not bill for services that it provides on a regular basis and some transfers were in the nature of payments for services that have been provided but not yet invoiced.

[182] In its Fifth Report (July 1, 2014) the Inspector reported:

> The Respondents provided the Applicants with a pro forma setting out the anticipated cost of completing planned development and/or construction on each project. The Applicants invested 50% of the budget shown on the pro forma but these funds were dispersed among the [Schedule B] Companies and Walton Companies. Accordingly, the

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[34] See the email exchanges at Motion Record of the Applicants, Volume 3, Tab 119.

> funds invested by the Applicants in a Company did not remain available to that Company.
>
> Since the Companies did not retain the amounts that the Applicants invested, almost every Company required outside funding in order to complete the work shown on the relevant pro forma. These funds appear to have been drawn in some cases (including those illustrated in Appendix F to the Fourth Report) from new equity investments and mortgage advances by the Applicants. In other words, new advances to one Company appear to have been used to fund the existing obligations of other Companies or Walton Companies.

[183] On his cross-examination Froese stated that the companies managed by the Respondents did not have any controls in place designed to prevent the co-mingling of funds or the movement of funds from Schedule B Companies to Rose & Thistle and on to Schedule C Companies. Froese stated that depending on the arrangement between the parties and the companies, you would expect controls to be in place if the arrangements called for that.[35]

[184] In its Fifth Report the Inspector discussed the consequences of the pooling or co-mingling of funds advanced to the Schedule B Companies by the Applicants:

> The Inspector notes that the Respondents' position that they are owed funds by the [Schedule B] Companies is premised on the assumption that every Company is responsible for every other Company's debts to Rose & Thistle. The Respondents assert that if Company A owed Rose & Thistle $1 million and Company B had $1 million in its bank account, they were entitled to take payment from Company B for the debt owed by Company A. This is significant since the contract governing investment into each Company provided that the Respondents were to provide equity funding once the Applicants' equity investment was exhausted. *The co-mingling of funds therefore had two important consequences: (i) the Applicants' equity investments were exhausted much more quickly because they were used to fund alleged obligations across the portfolio and not only to fund one Company; (ii) the Respondents were able to delay their own equity contributions by transferring funds from other Companies instead of injecting new equity into the relevant Company.* (emphasis added)

[185] Notwithstanding the voluminous email correspondence from Ms. Walton to Dr. Bernstein reporting on the progress of projects, it was not until June 13, 2013 that she told him that the funds he was advancing to the Schedule B Companies were being pooled amongst those companies, transferred to Rose & Thistle and also transferred to Schedule C Companies, when she responded to Mr. Reitan's June 7, 2013 complaint letter.

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[35] Froese CX, QQ. 91-96.

[186] The pooling or co-mingling of funds was a critical breach of the obligations which Norma and Ron Walton owed to Dr. Bernstein under their agreements. In her factum Ms. Walton submitted: "It never occurred to Walton that Bernstein would object to the pooling of funds". I completely reject that submission; it is not in the least credible. One would have thought that the "specific-purpose" clauses contained in each of the agreements for the Schedule B Companies which the Waltons – both lawyers – had signed over the course of three years would have provided Ms. Walton with good reason to think that Dr. Bernstein would object to the pooling of funds since such pooling contravened those agreements. Ms. Walton's protestation of innocent, but mistaken, belief on this issue simply was not credible.

[187] In addition, based on the evidence adduced I find that:

(i) The Applicants were not aware that the Respondents were withdrawing funds from the Schedule B Companies' bank accounts for any purpose other than the costs of the associated property;

(ii) The Applicants did not know that funds from Schedule B Companies were transferred or diverted to the Rose & Thistle "clearing house" bank account because the Respondents, in particular Ms. Walton, deliberately hid those transfers from the Applicants; and,

(iii) The Waltons deliberately did not tell the Applicants that they were using funds advanced by the Applicants to Schedule B Companies for their own personal purposes and benefit and for the benefit of the Schedule C Companies which they owned or controlled.

C. Production of the general ledgers of the Schedule B Companies

[188] As an exhibit to her June 21, 2014 affidavit Ms. Walton produced the detailed general ledgers for each of the Schedule B Companies. She viewed the production of the general ledgers as amounting to a full accounting of the Applicants' funds as previously ordered by this Court. It was not. Those general ledgers had been produced to the Inspector last October. They did not enable an analysis of the Applicants' funds transferred from the Schedule B Companies to Rose & Thistle, and then to the Schedule C Companies, so they did not satisfy the Respondents' obligation to provide a full accounting of how the Respondents had used the Applicants' funds.

D. The Respondents previously had provided a full accounting

[189] Ms. Walton submitted that the Respondents had provided a full accounting of the use of the Applicants' funds and sought a declaration to that effect. This was an argument which Ms. Walton had made on several other occasions, as summarized in my Reasons of May 20, 2014:

To date the respondents have failed to comply with orders of this Court requiring them to provide an accounting of monies received from the applicants. The trail starts with the October 25, 2013 order of Newbould J. where, at paragraph 10, he ordered "that the Respondents shall provide forthwith a full accounting of ***all monies*** received, disbursed, owed to and owed from the Schedule "B" Corporations and The Rose & Thistle Group Ltd. since September, 2010 to the present".

In her affidavit sworn December 17, 2013, Walton deposed, in response to the applicants' allegation that she had failed to provide a full accounting, that "I have provided all information/documentation to the Receiver/Manager", and she proceeded to give some details, concluding: "The Receiver/Manager is in possession and control of all financial documents held by the Walton Group in relation to the Schedule B Companies, and all documents related to the Rose and Thistle Group have been provided to him." In his endorsement made January 20, 2014, Newbould J. rejected Walton's contention that the respondents had provided a full accounting. He concluded they had not, and he ordered:

> Ms. Walton is to provide the accounting ordered in paragraph 10 of the order of October 25, 2013 no later than January 31, 2014. Delivering records to the Manager is not an accounting.

Notwithstanding that clear finding and further order by Newbould J., in her notice of motion dated March 31, 2014, Walton sought an order that the applicants "clarify what is meant by the term 'a full accounting of all monies received, disbursed, owed to and owed from Schedule 'B' Corporations and The Rose and Thistle Group Ltd. since September 2010 to the present' as found in the October 25, 2013 Order." In her affidavit of that date Walton deposed:

> I have heard the Applicants complain a number of times to the Court that I have not provided an accounting as ordered on October 25, 2013. I have sworn an affidavit wherein I explain what I provided by October 28, 2013 to fulfill this requirement.

As noted, back on January 31 Newbould J. held that the respondents had not delivered the ordered accounting and directed them to do so. They have not done so. Moreover, it is not for the applicants to explain the meaning of an order of this Court; that job falls to the judges of this Court. When Walton raised this point at a recent hearing before me, I informed her that a full accounting would involve explaining what had happened to every penny of the money invested by Dr. Bernstein with the respondents. That has not occurred, and that most serious failure by the respondents weighs heavily in considering what part, if any, of the net proceeds of the sale from the Gerrard Street Property should be made available to them for their personal use or benefit.[36]

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[36] 2014 ONSC 3052, paras. 97-100.

As I have found above, and will discuss further below, the Respondents still have not provided the ordered accounting.

[190] Finally, on this point, in his order dated November 1, 2014, Newbould J. directed the Respondents to pay the Inspector's fees. They failed to do so. In a March 21, 2014 Order Newbould J. directed the Inspector to examine the Respondents about their non-payment of fees. The Inspector commenced his examination of Norma Walton on April 11, 2014. Prior to the examination Ms. Walton had not produced documentation relating to her financial situation; at the examination Ms. Walton gave numerous undertakings to produce such documentation. As of the date of the Inspector's Fifth Report (July 1, 2014), Ms. Walton had fulfilled or partially fulfilled 8 of the 39 undertakings given at her examination. According to the Inspector, the remaining 31 undertakings remained entirely unsatisfied, including the important undertaking to provide copies of bank statements relating to the Walton Schedule C Companies. In its Fifth Report the Inspector stated that Ms. Walton had advised she would answer the balance of her undertakings once she had filed her evidence for the July 16 hearing. At the hearing I inquired whether Ms. Walton had delivered those outstanding undertaking answers. She had not.

E. The charts attached to the June 21, 2014 Norma Walton affidavit

[191] In paragraphs 10 through to 14 of her June 21, 2014 affidavit, Norma Walton attempted to account for the $23.68 million in net transfers from Schedule B Companies to the Rose & Thistle Group, and in paragraph 49(l) of her Factum Ms. Walton argued that "everything that was transferred from the jointly owned properties to Rose and Thistle had been accounted for as monies used by Rose and Thistle to purchase, renovate or manage the joint portfolio."

E.1 Construction work billed by Rose & Thistle

[192] The chart contained in paragraphs 11 and 13 of her affidavit, as well as Tab A to her Factum (which I will call the "Reconciliation Chart"), recorded that $8.5 million of construction work had been performed by Rose & Thistle for Schedule B Companies between January, 2011 and February, 2012, specifically for the Spadina, Eglinton, Wynford and Atlantic properties. Ms. Walton stated that she had prepared the Reconciliation Chart with the assistance of Mr. Bucci, the CFO of Rose & Thistle; she did not explain why Mr. Bucci had failed to provide any evidence in this proceeding, especially evidence which would provide an accounting of the Applicants' funds.

[193] Ms. Walton deposed that she was unable to complete the analysis for the construction work performed on projects after February, 2012 because she was still awaiting the reports prepared by her cost consultants. That explanation made no sense and I do not accept it. As described above, the cost consultants simply relied upon accounting summaries provided to them by Rose & Thistle. Put another way, the cost consultants merely used information already in the possession of Rose & Thistle to prepare their reports. It therefore makes no sense that Rose &

Thistle would be unable to use information already in its possession to explain the total amount of construction costs which it contended it had incurred on behalf of the Schedule B Companies.

[194] In her Factum Ms. Walton argued that Rose & Thistle was entitled to up to an additional $17.070 million for construction costs based on the cost consulting reports.[37] I give no credence whatsoever to that argument. On the contrary, I found earlier in these Reasons that the Respondents had failed to account for and to justify the amount of the construction costs invoiced by Rose & Thistle to the Schedule B Companies.

E.2 Management fees

[195] Ms. Walton explained that $1.183 million of the net transfer could be explained by management fees which Rose & Thistle had billed to the Schedule B Companies. Earlier in these Reasons I accepted the reconciliation between the Inspector and the Respondents of $1 million in management fees.

E.3 Property maintenance costs

[196] Ms. Walton's Reconciliation Chart also recorded $2.58 million in property maintenance costs performed by Rose & Thistle. In the Supplement to its Fifth Report the Inspector stated:

> Ms. Walton's chart includes property maintenance fees charged to the Properties. The Inspector understands that these costs represent costs incurred by Rose & Thistle on behalf of the [Schedule B] Companies with respect to maintenance of the various Properties. The Inspector has not been provided with back-up documentation in respect of these fees.

I find that the Respondents have not established, on a balance of probabilities, that they incurred such maintenance costs on behalf of Schedule B Companies.

E.4 Deposits paid by Rose & Thistle for Schedule B Properties

[197] The Reconciliation Chart also recorded $6.657 million in deposits paid by Rose & Thistle for the purchase of Schedule B Properties. The Inspector, in the Supplement to its Fifth Report, stated:

> The Inspector understands that in some cases Dr. Bernstein funded the deposits by payments directly into the Rose & Thistle account. Accordingly, Ms. Walton appears to state that the Waltons funded their share of deposits on some properties by drawing funds out of other [Schedule B] Companies. These transfers do not appear to represent payment

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[37] Walton Factum, paras. 49 (f), (g) and (i).

> for services rendered by R&T because all such services appeared to be shown elsewhere on Ms. Walton's chart.
>
> Put simply, Ms. Walton's chart, if correct, appears to indicate that Dr. Bernstein funded his share of the listed deposits directly and the Walton's share of those deposits indirectly (since the Waltons used funds that Dr. Bernstein had previously contributed to another company).[38]

[198] Let me express my profound displeasure and frustration at the way the Waltons' "evidence" on this point was developed. Last year the Waltons were ordered to provide a full accounting of the funds advanced by Dr. Bernstein. They failed to do so, as was found by both Newbould J. and myself in earlier reasons. Yet, in her June 26, 2014 Affidavit and her Factum filed July 15, 2014, Ms. Walton, for the first time, argued, through her Reconciliation Chart that Rose & Thistle had paid for $6.657 million in deposits for Schedule B Properties for which accounting recognition previously had not been given. That spawned a flurry of responding submissions from other parties on the point, both before and after the hearing, ultimately culminating with Ms. Walton massaging a reply chart put in by the Applicants (Mr. Reitan's Schedule "E") to contend that the Waltons in fact had injected $8.933 million in equity into the Schedule B Companies, an assertion for which the Waltons had adduced no concrete, forensically verifiable evidence!

[199] That is no way in which to perform an accounting.

[200] Since last October the Waltons have been subject to an order of this Court requiring them to account. For eight months they ignored that order. Frankly, what appears on Ms. Walton's Reconciliation Chart should have been put before the Inspector last October so that proper consideration could have been given to the arguments set out in it. I am thoroughly unimpressed by Ms. Walton's last minute effort to "jam through" an accounting. Her breach of the previous accounting order, together with the last minute nature of her accounting attempt, combine to justify a high degree of skepticism towards the arguments embedded in the Reconciliation Chart.

[201] Returning to the property purchase deposits, I would observe that the "back-up" Ms. Walton provided for these deposits at Exhibit B to her June 26, 2014 affidavit in large part consisted of Rose & Thistle bank account statements, certain entries on which bore handwritten asterisks, unaccompanied by any other explanation. I infer that the asterisked entries corresponded with the deposits recorded on Schedule A to her Factum. Her Exhibit B also contained copies of a number of Rose & Thistle cheques, only some of which seemed to have anything to do with deposits for purchases of land. However, Ms. Walton failed to show how

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[38] Ms. Walton understood that all monies provided by Dr. Bernstein to the Schedule B Companies, whether directly or through Rose & Thistle, would be included in the $78.48 million "transferred to Rose & Thistle" total.

those payments made by Rose & Thistle were recorded on the books and records of Rose & Thistle and the relevant Schedule B Company, a most material omission in her argument.

[202] In any event, I do not accept Ms. Walton's argument on this point. In Appendix E to its Fourth Report the Inspector reported that for the period under review it had identified $78.42 million in transfers from Schedule B Companies to Rose & Thistle and $54.739 million in transfers from Rose & Thistle to Schedule B Companies, for a net transfer of $23.68 million from Schedule B Companies to Rose & Thistle. Ms. Walton contended, in her July 15, 2014 Factum, that the $23.68 million in net transfers from Schedule B Companies should be reduced by, or could be partially accounted for by, $6.657 million in deposits made by Rose & Thistle in respect of Schedule B Properties. According to her Reconciliation Chart, those deposits spanned the period from September, 2010 (Eglinton) to April, 2013 (620 Richmond). Had Rose & Thistle transferred to Schedule B Companies funds for deposits on Schedule B Properties – whether Bernstein funds or non-Bernstein funds - one reasonably would expect that those deposits would have been taken into account in the transfers from Rose & Thistle to Schedule B previously reported by the Inspector because the books and records of Rose & Thistle would have recorded such inter-company transfers. To take them into account again, as Ms. Walton seemed to argue, would amount to double-counting or, as put by the Inspector in the Supplement to his Fifth Report, it would mean that "Dr. Bernstein funded his share of the listed deposits directly and the Walton's share of those deposits indirectly (since the Waltons used funds that Dr. Bernstein had previously contributed to another company)". In sum, I do not accept Ms. Walton's submission that deposits of $6.657 million should be recognized to reduce the net transfer amount due from Rose & Thistle to the Schedule B Companies as found by the Inspector.

E.5 Equity withdrawals

[203] The Reconciliation Chart also recorded $3.615 million representing a December 2011 and June, 2012 "Dr. Bernstein purchase from Walton in the schedule B" [Tisdale and 875 Queen Street East] of $1.4 million and $2.215 million respectively. Ms. Walton deposed that those amounts related to Dr. Bernstein "buying into a company after we had already owned the company for a period of time". That "earned equity", according to Ms. Walton, further reduced the net transfers from Schedule B Companies to Rose & Thistle. I do not accept Ms. Walton's submission on that point. I will turn now to the Respondents' "earned equity" argument in which two properties figured prominently – the property at 875/887 Queen Street East held by Red Door Developments Inc. and Red Door Lands Inc. (which I discussed earlier in the context of 44 Park Lane Circle), as well as the Tisdale Mews property at 78 Tisdale Avenue.

875/887 Queen Street East

[204] In Section VI.E of these Reasons I rejected Ms. Walton's argument that she had been entitled to withdraw $2.32 million in "earned equity" from funds advanced by Dr. Bernstein for

875/887 Queen Street East and, instead, found that the Waltons had misappropriated to their own personal use on June 25, 2012 funds advanced by Dr. Bernstein to acquire their personal residence at 44 Park Circle Park Lane Circle and, by so doing, Norma and Ron Walton had deceived Dr. Bernstein and engaged in fraud.

78 Tisdale Avenue

[205] In his Third Report dated January 15, 2014, the Inspector set out the explanation it received from Ms. Walton for the Tisdale transaction:

> In the case of Tisdale, Ms. Walton purchased the property for approximately $1.4 million. Rose & Thistle performed development work on the property before Dr. Bernstein invested in it. In the relevant agreement between the parties dated January 11, 2012... Dr. Bernstein bought 50% of the shares of Tisdale based on an agreed-upon value of approximately $6.7 million. Ms. Walton therefore had one half of that amount, approximately $3.35 million in equity in Tisdale immediately after Dr. Bernstein's investment. Rose & Thistle delivered an invoice to Tisdale dated January 1, 2012... that purported to charge fees to Tisdale in the amount of approximately $4.4 million. Ms. Walton subsequently advised the Inspector that the purpose of the transaction was to effectively adjust her equity to draw out the increase in value between the time she purchased the company and Dr. Bernstein's buy-in. An adjustment to Ms. Walton's equity account on the books of the company has been recommended by the company's external accountant. The Inspector questioned the propriety of Rose & Thistle delivering an invoice purportedly charging fees as a mechanism to reflect a distribution of equity to a shareholder. Upon being challenged by the Inspector, Ms. Walton reversed the invoice and an increase was recorded to Ms. Walton's equity on the balance sheet adding approximately $4.4 million as a fair market value adjustment. The Inspector understands that Ms. Walton relies upon this increase in her equity account as a basis to explain several expenses that she caused Tisdale to pay. The Inspector notes the paragraph 13 of the agreement between the parties provides that equity is to be distributed to the shareholders only after the property is developed and sold.

[206] I do not accept Ms. Walton's explanation that she was entitled to treat funds advanced by Dr. Bernstein for Tisdale as a return of equity to her. Again, the agreement the Waltons signed with Dr. Bernstein did not permit such conduct. Section 7(a) stated that Dr. Bernstein would provide $1.48 million of his 50% share of the joint $3.342 million equity investment upon signing, while section 7(b) stated that "Walton has already provided the bulk of their equity and they will provide another $191,000 in a timely manner as required as the Project is completed". Section 13 did not permit the payment out of capital until the project was "substantially completed". Consequently, the Waltons' extraction of some of the funds advanced by Dr. Bernstein on the basis that they were entitled to a return of capital or payment out of their equity was in breach of their clear contractual obligations to Dr. Bernstein. They had no right to do so.

[207] Further, as in the case of 875/887 Queen Street East, the Waltons did not inform Dr. Bernstein that they intended to treat some of his equity injection as a return of capital to them.[39] By failing to so inform Dr. Bernstein, at a time when they represented to Dr. Bernstein that no capital would be withdrawn until the substantial completion of the project, the Waltons deceived and defrauded Dr. Bernstein.

Comments by Froese on equity contributions

[208] In its report Froese stated:

> Based on information attached to each Agreement, over the period from 2010 to 2013, expected funding available at the date of purchase of the Bernstein properties exceeded the funds required to purchase the properties by approximately $55.5 million. That is, the pro forma information showed that there was significant excess funding available to commence work on the projects. As well, Walton was to initially advance approximately $14.5 million as compared to the $75.2 million to be advanced by Dr. Bernstein as an equity investment (plus mortgage financing for certain properties).
>
> The co-mingling of funds through the Rose & Thistle clearing account resulted in a portion of the $55.5 million of excess funding at the date of purchase to carry the properties without further funding requests of the shareholders, and also without the immediate need for Walton contributions.

As previously noted, the agreements between Dr. Bernstein and the Waltons contained clauses which provided that the Schedule B Company would "only be used to purchase, renovate and construct, and sell" the specified property or "such other matters solely relating to the Project and the Property." While Froese's comments about the co-mingling of funds reflected a theoretical view about how funds could be used, they ignored the specific provisions in each of the agreements between Bernstein and the Waltons about how the funds had to be used.

[209] Froese also stated:

> This analysis supports the position of Norma Walton that Dr. Bernstein expected, or reasonably should have expected, there to be a significant disparity in the initial investment in the Bernstein properties, with Walton to fund future costs required to complete each project.

With respect, such an assertion fell outside the proper scope of the opinions which Froese was in a position to express, especially because there was no evidence to support such an assertion.

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[39] Norma Walton's email of December 27, 2011 made no mention of the Waltons extracting equity from Tisdale: CX Bernstein, Ex. 18.

E.6 Conclusion

[210] In conclusion, I find that the Reconciliation Chart filed by Ms. Walton did not assist her in accounting for the net transfers from the Schedule B Companies to Rose & Thistle. At the end of the day, the Respondents have only justified an adjustment of $1 million to the Inspector's net transfer figure based upon the reconciliation of management fees reached with the Inspector.

F. It was the receivership which caused the Applicants financial harm

[211] On several occasions during this proceeding Ms. Walton has contended that it was the Applicants' decision to seek the appointment of receiver which caused them financial harm. She argued that had the Applicants allowed the Waltons to deal with the portfolio, everyone would have been financially happy. In her June 21, 2014 affidavit, Ms. Walton again stated that a valuation of the portfolio of Schedule B Properties the Respondents had commissioned from Colliers right after the receivership order was made showed an appraised value of the portfolio of $328.34 million. That appraisal was not placed before me in evidence; I am unable to comment upon it.

[212] Moreover, Ms. Walton's submission on this point ignored the simple fact that it was the conduct of the Respondents in breaching the agreements by co-mingling funds and applying some of the Applicants' funds for unintended purposes, including self-dealing in favour of the Respondents' personal interests, that lies at the root of the current situation. The receivership order was designed to mitigate the harm caused by the Respondents' wrongful conduct.

VIII. Analysis: Overview

[213] I intend to proceed with the analysis of the parties' claims by considering the groups or packages of relief sought by them. The relief sought by the Applicants has evolved since the service of their initial February Notice of Motion. Much of the relief requested by the Applicants at the July hearing originated in their Consolidated Notice of Cross-Motion/Notice of Motion dated February 14, 2014, which was originally returnable on March 5, 2014. For a variety of reasons that hearing was adjourned until this past July. In their June 13, 2014 Fresh as Amended Consolidated Notice of Motion, Notice of Cross-Motion and Notice of Return of Application the Applicants expanded the scope of the relief to include some not requested by the Applicants in their initial February Notice of Motion. .

[214] At the hearing the Applicants amended and expanded the relief sought in two further respects. First, the Applicants advised that they had reached an understanding with the mortgagees of some of the Schedule C Properties, as a result of which they were amending the relief requested in respect of those properties. Second, the Applicants submitted a form of draft order which went through three iterations during the course of the hearing and which further

expanded the relief they sought. Ms. Walton took issue with what she described as the "creeping" amendments the Applicants sought to make to their claims.

IX. Motion to amend the Notice of Application

[215] The Applicants sought an order granting them leave to issue and serve the Fresh as Amended Notice of Application attached to their June 13, 2014 Consolidated Notice of Motion. Ms. Walton submitted that it was inappropriate for Dr. Bernstein to continually seek to amend his application to claim ever-expanding relief. She submitted that apart from any "ancillary matters" flowing from the orders last year appointing the Inspector and the Manager, Dr. Bernstein should not be entitled to assert additional claims. Ms. Walton submitted:

> This is Bernstein's seventh proposed amendment to the application. He is not entitled to continue to amend the application every time he decides he wants something further from Walton. The proper route for him now is to come back through the receivership for anything he wants within the receivership, and to launch a statement of claim if he intends to sue for damages after the Schedule B accounting is completed. It is improper form to claim damages through the seventh amendment to an application when the relief originally sought has been finally determined.

[216] I do not accept Ms. Walton's submission. The Respondents have ignored the October, 2013 Order to account. As a result, the Inspector had to expand the scope of its work, and only through the Inspector's investigations did a clearer – albeit still incomplete - picture emerge about how the Respondents had dealt with the Applicants' funds.

[217] As I read the Applicants' proposed Fresh as Amended Notice of Application, they are making the amendments in light of the evidence which has emerged through the Inspector's reports. That is a proper basis upon which to amend, and I therefore grant the Applicants leave to issue and serve their proposed Fresh as Amended Notice of Application.

X. Analysis: Relief involving Schedule B Companies/Properties and the Individual Respondents

A. The relief sought

The Applicants

[218] Both the Applicants and Ms. Walton sought relief in respect of the Schedule B Companies and Properties. On their part, the Applicants sought the following relief in their Notice of Motion in respect of the Schedule B Companies and against the Individual Respondents:

(i) An order that the issued and outstanding shares in the Schedule "B" Companies held by the Waltons be cancelled where shareholder equity had not been contributed by them;

(ii) An order for restitution and repayment to the Applicants by the Respondents in the amount of $78,420,418 for breach of contract, unlawful misappropriation and unjust enrichment;

(iii) An order for restitution and repayment by the Respondents to the Applicants and/or the Schedule B Companies, as appropriate, in respect of the fees of Schonfeld Inc., in its capacity as Inspector and Manager in this proceeding, and of its counsel Goodmans LLP;

(iv) An interim order directing the Respondents to disclose any agreements not heretofore disclosed to cross-collateralize any obligations of the Schedule B Companies, the Schedule C Properties or 44 Park Lane Circle, Toronto, Ontario; and,

(v) An order that Schonfeld Inc. be appointed as Receiver over the Respondents, Norma Walton and Ronauld Walton, for the purpose of ensuring payment in accordance with any judgment of the Court in this proceeding.

[219] In the third iteration of the draft judgment and order filed by the Applicants at the July hearing, they sought orders granting the following additional relief:

(i) the continuation of the Orders of Newbould J dated October 4, 2013, October 25, 2013, November 5, 2013, December 18, 2013 and March 21, 2014, except as modified by any order made by these Reasons;

(ii) holding the Respondents jointly and severally liable for restitution payable to the Applicants in the amount of $78,420,418 for all funds diverted from the Schedule B Companies and payment to the Applicants of the balance of those funds not otherwise recovered by the Applicants from the sale of the Schedule B Properties;

(iii) indemnification by the Respondents of the Schedule B Companies and Applicants for all principal amounts, plus interest, costs and penalties incurred by or on behalf of the Schedule B Companies, in respect of unauthorized mortgages registered on the Properties, with that amount to be fixed;

(iv) indemnification by the Respondents of the Schedule B Companies and Applicants for all amounts due and owing to creditors and lien claimants of the Schedule B Properties and Companies, including costs, penalties and interest, of the Schedule B Companies, with that amount to be fixed;

(v) declaring that the Applicants had priority over any unauthorized interests in the Schedule B Companies; and,

(vi) allowing the Applicants to elect to treat funds advanced by them to the Schedule B Companies, or any of them, as shareholder loans for the purposes of enforcement of their remedies.

Ms. Walton

[220] On her part, Ms. Walton requested orders containing the following relief:

(i) a declaration that the Respondents had provided a full accounting of Dr. Bernstein's invested funds in the Schedule B Companies in full satisfaction of the October 25, 2013 Order;

(ii) removal of The Rose and Thistle Group Ltd. from the operation of paragraphs 3(b) and (c) of the October 25, 2013 Order; and,

(iii) a determination by the Court, by way of the trial of an issue, of the amount of money due from the Schedule B Companies to The Rose and Thistle Group Ltd. for work done and not yet paid and an Order that the amount due be paid from sale proceeds of the Schedule B properties.

B. Analysis

B.1 Accounting

[221] I have found above that the Respondents have not provided the accounting mandated by this Court's October 25, 2013 Order.

[222] Ms. Walton sought to remove from the ambit of the October 25 Order the Respondent, The Rose & Thistle Group Ltd., on the basis that the company was owned jointly by her husband and herself and "no longer has any banking relationship with the Bernstein-Walton portfolio of properties." Since the Respondents have failed to provide the Court-ordered accounting, and since Rose & Thistle was the conduit through which funds of the Applicants were directed by the Waltons from the Schedule B Companies to Schedule C Companies, there is no basis to remove Rose & Thistle from the operation of paragraphs 3(b) and (c) of the October 25, 2013 Order. On the contrary, it is necessary that Rose & Thistle remain subject to that order so that tracing efforts can continue.

[223] Accordingly, I dismiss those portions of Ms. Walton's motion.

[224] The Applicants' request for an order that the Respondents disclose any cross-collateralization agreements not already disclosed is necessary for the proper performance of the accounting order, and I grant it.

B.2 Transfers between Rose & Thistle and Schedule B Companies

[225] I have found that of the $23.6 million in net transfers from Schedule B Companies to Rose & Thistle identified by the Inspector, the Respondents had only justified a reduction of $1 million in that number by reason of management fees billed. It follows that I dismsss Ms. Walton's audacious – but forensically unsupported – request for a trial of an issue of the amount of money the Schedule B Companies owed to Rose & Thistle. While in sports the best defence sometimes might be a good offence, that strategy does not work when parties who are subject to a court accounting order fail to comply with it. Ms. Walton seems to fail to appreciate the gravity of the situation in which she and her husband find themselves.

B.3 Restitution and damages

[226] The Applicants sought an order for restitution and repayment to them by the Respondents in the amount of $78,420,418 for breach of contract, unlawful misappropriation and unjust enrichment, which they translated in their draft order into a request for an order that the Respondents were jointly and severally liable for restitution payable to the Applicants in the amount of $78,420,418 for all funds diverted from the Schedule B Companies and that they pay to the Applicants the balance of those funds not otherwise recovered by the Applicants from the sale of the Schedule B Properties

[227] I am not prepared to grant such an order at this time because I am not satisfied that adequate argument was placed before the Court on this issue. Applying the different measures of damages for breach of contract, unlawful misappropriation and unjust enrichment could result in quite different damage awards on the facts of this case. I think the Court requires more assistance on this point than was provided by the parties at this hearing, and I therefore defer to a later date consideration of this part of the Applicants' claim. For the same reason I am not prepared to grant, at this time, the Applicants' related request for an order that the Respondents indemnify the Schedule B Companies and the Applicants for all amounts due and owing to creditors and lien claimants of the Schedule B Properties and Companies, with that amount to be fixed.

[228] However, I think the evidence justifies granting two forms of relief which relate to the entitlement as between the parties to sale proceeds.

[229] First, the Applicants sought an order that the issued and outstanding shares in the Schedule B Companies held by the Respondents be cancelled where they had not contributed shareholder equity. Ms. Walton submitted that the Respondents had paid $100 for their shares in

the Schedule B Companies,[40] as a result of which, she contended that the Waltons were entitled to an accounting of monies from the joint portfolio in the same way that Dr. Bernstein was.[41] Ms. Walton further submitted that Dr. Bernstein's claim to cancel the shares owned by the Waltons in Schedule B Companies was premature because the Inspector had not yet provided confirmation of the equity invested in the Schedule B Companies by Ms. Walton. Accordingly, Ms. Walton submitted that there was no basis for the cancellation of the shares.

[230] I reject Ms. Walton's argument. The various agreements Dr. Bernstein entered into with the Waltons stipulated that shares in a Schedule B Company would be issued on the basis of one share for each dollar of equity invested. For example, the October 4, 2012 agreement concerning Fraser Properties Corp. and Fraser Lands Ltd. (7-15 and 30 Fraser Avenue) provided that 16,572,063 shares would be issued to each of Dr. Bernstein and the Waltons, with Section 7 stating that the $33,144,124 of equity would be paid at stipulated times, with the Waltons' $14,107,062 payable "to the Company in a timely manner as required as the Project is completed". The payment of $100 by the Waltons to the Fraser companies would not support the issuance to them of 16,572,063 shares in those companies, but only the issuance of 100 shares. I therefore order that the Waltons' shareholder interests in each of the Schedule B Companies be calculated by reference to the equity contribution provisions contained in each Schedule B Company agreement and that the shares issued to the Waltons be limited to those for which they have actually paid; any other shares should be cancelled. From the evidence filed to date, that will result in *de minimis* shareholdings of the Waltons in most Schedule B Companies and therefore limit – quite properly – their ability to participate in any distributions from those companies once all creditors have been paid.

[231] Second, I grant the Applicants' request for an order appointing Schonfeld Inc. as Receiver over the Respondents, Norma Walton and Ronauld Walton, but with a somewhat different scope than that requested. The net worth statement filed by Ms. Walton on these motions represented that the only source of net worth available to the Waltons consisted of their equity in Schedule B and C Properties and Companies. Ms. Walton made it quite clear in her evidence that she wished to dispose of the Schedule C Properties in order to prefer her non-Bernstein creditors. In Section XI.D below I find that the Applicants have demonstrated a strong *prima facie* claim of unjust enrichment against the Waltons in respect of certain Schedule C Properties up to a possible claim of $22.6 million. Until proper consideration can be given to those claims and the respective interests of all creditors of the Waltons, it is necessary to ensure

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[40] Walton Factum, para. 72.

[41] In its Third Report the Inspector described Rose & Thistle invoices of $6.6 million to Tisdale and Red Door purportedly for the distribution to the Waltons of their portion of the equity in those companies. I rejected Ms. Walton's "earned equity" argument.

that the Waltons cannot dispose of their Schedule C Property. A receiver is required for that purpose.

[232] The Waltons have not complied with this Court's accounting order and, as I noted earlier in these Reasons, Ms. Walton failed to answer key undertakings about her personal finances, including failing to provide copies of her bank account statements. It is necessary to appoint a receiver over the books and records of the Waltons both to preserve information about their financial affairs and to make such information available to their creditors for tracing purposes who are faced with sorting out the mess created by the Waltons.

[233] Consequently, I appoint Schonfeld Inc. as receiver of all the property of the Waltons, of whatever kind, as well as of their books and records. However, the appointment of Schonfeld shall be on an interim basis only. In my view, a court officer, such as a receiver, should only be allowed to wear so many hats, otherwise unworkable conflicts of interest inevitably arise. Dr. Bernstein is not the only creditor of the Waltons. Accordingly, I order that Schonfeld Inc. be replaced as receiver of the Waltons within 120 days of the date of this order but, until then, Schonfeld Inc. can exercise the full powers of such a receiver.

B.5 Unauthorized mortgages indemnification request

[234] In respect of the Applicants' request for orders requiring the Respondents to indemnify them and the Schedule B Companies in respect of "unauthorized mortgages", insufficient specific evidence and argument was provided on this point to enable its consideration.

B.6 Priority of claims/shareholder loans

[235] I am not prepared to grant, at this point of time, the Applicants' request for an order that they have priority over "any unauthorized interests in the Schedule B Companies". The request was too vague, and the evidence and argument on this point was not adequately developed. As well, it was not clear whether any person who might be claiming such an "unauthorized interest" had been given notice of the motion.

[236] The Applicants sought an order that they be permitted to elect to treat funds advanced by them to the Schedule B Companies as shareholder loans for the purposes of enforcement of their remedies. Again, this point was not adequately developed. There were references in the evidence to the Applicants already having converted their equity advances into shareholder loans. If that in fact occurred, the need for a Court order is not apparent. In any event, the relief sought might affect the priority of claims by creditors of Schedule B Companies, and that issue is better left to the claims process administered by the Manager.

B.7 Inspector's fees

[237] Previous orders of this Court required the Waltons to pay for the costs of the Inspector. Save for a partial payment from the proceeds of the recent sale of one Schedule C Property, the Waltons have failed to do so. The Applicants have been left to fund the activities of the Inspector, a position they should not have been put in. Accordingly, I grant an order for restitution and repayment by the Respondents to the Applicants and/or the Schedule B Companies, as appropriate, in respect of the fees of Schonfeld Inc., in its capacity as Inspector in this proceeding, and of its counsel Goodmans LLP.

[238] As to the Applicants' request for a similar order in respect of the fees of the Manager and its counsel, I see no need to vary the terms of the Appointment Order at this time. The Applicants may renew their request, if the need arises, as the realization process conducted by the Manager comes closer to completion.

B.8 Continuation of prior orders of this Court

[239] Finally, for the sake of clarity, the Orders of Newbould J. dated October 4, 2013, October 25, 2013, November 5, 2013, December 18, 2013 and March 21, 2014 shall continue in full force and effect, except as otherwise modified by the specific orders made in these Reasons.

XI. Analysis: Relief involving Schedule C Companies and Properties

A. The relief sought

Applicants

[240] In their Notice of Motion the Applicants sought the following relief in respect of Schedule C Properties:

(i) An order that the Orders of this Court dated December 18, 2013 and March 21, 2014 be amended to add all the properties listed in Schedule C of the Notice of Motion;

(ii) An interim Certificate of Pending Litigation and a blanket charge respecting the property municipally known as 44 Park Lane Circle, Toronto, Ontario and the Schedule C Properties in which the Respondents have an interest;

(iii) A declaration that the property at 44 Park Lane Circle, Toronto, Ontario and the Schedule C Properties in which the Respondents have an interest and/or the proceeds from the sale of 44 Park Lane Circle, Toronto, Ontario and/or the Schedule C Properties in which the Respondents have an interest are subject to a constructive and/or resulting trust from the date of purchase in favour of the Applicants;

(iv) An order tracing the funds from the Applicants to and through the accounts of the Schedule B Companies, the accounts of Rose & Thistle, the personal accounts of Norma and Ronauld Walton, the trust account of Walton Advocates, the trust account of Devry Smith Frank LLP, former real estate counsel for the Waltons, and otherwise into 44 Park Lane Circle, Toronto, Ontario and the Schedule C Properties;

(v) An order declaring 44 Park Lane Circle, Toronto, Ontario and the Schedule C Properties in which the Respondents have an interest as the proceeds of the funds from the Applicants;

(vi) An order that the Applicants may seize and sell 44 Park Lane Circle, Toronto, Ontario and the Schedule C Properties in which the Respondents have an interest, subject to the enforceable rights of prior registered charges and liens on the properties;

(vii) An order that Schonfeld Inc. be appointed as Manager of the Schedule C Properties in which the Respondents have an interest for the purposes of the relief sought; and,

(viii) An order that the Respondents are jointly and severally liable for restitution in the amount of $1,518,750, plus interest at the rate set out in the relevant mortgage documents and costs on a full indemnity basis as set out in the relevant mortgage documents, in respect of the mortgage discharge from title of the property at 232 Galloway Road and payment of that amount to the Applicants

[241] In the third iteration of the draft judgment and order submitted by the Applicants at the July hearing, the Applicants requested the following additional relief:

(i) The amendment of the Orders of this Court dated December 18, 2013 and March 21, 2014 *nunc pro tunc* to include 26 specified Schedule C Properties, save and except those properties that have been sold pursuant to an order of this Court;

(ii) a declaration that the Respondents had not transferred the following Schedule C Properties to arm's-length third parties, but had retained an interest in 346C and D Jarvis Street, 14/17 Monterest, 19 Tennis Crescent and 646 Broadview Avenue;

(iii) an order specifying that in respect of any Schedule C Property for which leave is granted to issue a certificate of pending litigation, a charge would be registered on title to those properties in favor of the Applicants, in subsequent priority to any security interests, trusts, liens, charges and encumbrances, statutory or otherwise in favor of any person validly registered on title as of the date of the order;

(iv) an order that the certificates of pending litigation and charges sought did not apply to ten Schedule C Properties in respect of which the Applicants had reached an understanding with the mortgagees of those properties;

(v) the imposition of a constructive trust on the following Schedule C Properties in favour of the applicants as at the date of purchase of the properties for the proportionate share of the purchase price that the following amounts represented and for any proportionate share of the increase in value to the date of realization:

a. 2454 Bayview Avenue: $1.6 million

b. 346E Jarvis Street: $937,000

c. 14 College Street: $1,314,225

d. 26 Gerrard Street: $371,200

e. 2 Kelvin Avenue: $221,000

f. 3270 American Drive: $1,032,000; and,

g. 44 Park Lane Circle: $2,337,850,

save and except those properties which had been sold pursuant to court order, and that the constructive trust so ordered in favour of the Applicants was subordinate only to *bona fide* secured creditors with valid registered security interests on title of the property;

(vi) the Respondents and the Schedule C Companies/Properties in which the Respondents had any interest as at July 16, 2014, the date of the hearing, were jointly and severally liable for all losses suffered by the Applicants in respect of funds advanced by the Applicants to the Schedule B Companies;

(vii) the Respondents and the Schedule C Companies/Properties in which the Respondents currently have an interest are jointly and severally liable in the amount of $23,680,852 for net proceeds diverted from the Schedule B Companies and received by the Schedule C Companies/Properties and shall pay to the Applicants the balance of those funds not otherwise recovered by the Applicants from the sale of the Schedule B Properties.

[242] As mentioned, at the July hearing the Applicants advised they were amending the relief sought in respect of certain Schedule C Properties based upon an understanding they had reached with the mortgagees of those properties: 19 Tennis Crescent; 1 William Morgan Drive; 44 Park Lane Circle; 346 Jarvis Street, Unit 2; 346E Jarvis Street; 777 St. Clarens Avenue; 260 Emerson Avenue; 3270 American Drive; 2454 Bayview Avenue; and, 30 and 30A Hazelton Avenue. Under the agreement, the Applicants would not pursue against those properties their requests for (i) certificates of pending litigation, (ii) the power to seize and sell those properties, and (iii) the

appointment of Schonfeld Inc. as Manager of those properties. In return, the draft provisions stipulated that the mortgagees would provide written notice to the Applicants forthwith upon receiving from the owner of the property a letter of intent, agreement of purchase and sale or a request to deliver a discharge statement of any applicable mortgages. The proceeds of the sale of any property sold by the owner and approved by the Court first would be paid to the mortgagee in such amounts necessary to satisfy all claims that the mortgagee might have on the property pursuant to the terms of the mortgage, with the balance to be paid to the Manager to be held in trust pending further order of the Court. Where a mortgagee sold the property, the proceeds would be paid out to satisfy any encumbrances, usual costs and expenses of the sale and all claims of the mortgagee, with the balance of the net proceeds of sale to be paid to the Manager.

Respondents

[243] Norma Walton sought orders containing the following relief in respect of the Schedule C Properties:

(i) The vacating of the second Order of March 21, 2014, in its entirety, and the Order of December 18, 2013, as they related to any restrictions being placed on the Respondents' ability to sell their Schedule C Properties;

(ii) in the alternative, an order approving the sales of the following Schedule C Properties in accordance with the agreements of purchase and sale attached to Ms. Walton's motion record: 2 Kelvin Avenue; 24 Cecil Street; 66 Gerrard Street East; 2454 Bayview Avenue; 3270 American Drive; 30 Hazelton Avenue; and 30A Hazelton Avenue;

(iii) payment of the net proceeds from sale of those Schedule C Properties to the shareholders of the Respondents and the creditors of the Respondents, as the Respondents may direct, until those shareholders and creditors are paid in full;

(iv) if the Court considered it to be helpful, an order that Froese Forensic Partners Ltd. be appointed as Monitor to review the Schedule C Properties and to provide oversight of the sales process on behalf of the Court, with its costs to be paid by the Respondents from sale proceeds; and,

(v) an order amending Schedule "C" in this proceeding *nunc pro tunc* to remove from Schedule "C" the following properties: 620 Richmond Street West; 875 Queen Street East; 3775 St. Clair Ave. E.; 14/17 Montcrest; 185 Davenport Road; 1246 Yonge Street; 17 Yorkville; 19 Tennis Crescent; 646 Broadview Avenue; 3 Post Road; and 2 Park Lane.

B. Which properties fall into the category of "Schedule C Properties"?

[244] The Applicants sought relief against properties in which they alleged the Waltons had an interest based on the Respondents' representation that those properties were Rose & Thistle projects on the website of that company. Disputes arose as to whether the Waltons had interests in certain properties. Before proceeding with the analysis of the requests for substantive relief in respect of Schedule C Properties, an identification of the properties against which relief should be granted must first be made.

B.1 Properties in respect of which there is no dispute

[245] In their initial February Notice of Motion the Applicants sought relief against 25 Schedule C Properties. Three of those properties were sold pursuant to Court order: 65 Front Street East; 26 Gerrard Street East; and 14 College Street. The Waltons were permitted by Court order to refinance 66 Gerrard Street East.

[246] There was no dispute that the Respondents possessed an interest in the following unsold Schedule C Properties: 3270 American Drive, Mississauga; 2 Kelvin Avenue; 346 Jarvis Street, Suites A, B and E; 1 William Morgan Drive; 324 Prince Edward Drive; 24 Cecil Street; 30 and 30A Hazelton Avenue; 777 St. Clarens Avenue; 252 Carlton Street and 478 Parliament Street; 66 Gerrard Street East; 2454 Bayview Avenue; 319-321 Carlaw; 0 Luttrell Ave.; 260 Emerson Avenue; and, 44 Park Lane Circle.

B.2 Removal of 16 Montcrest Blvd. and 346D Jarvis Street from the Applicants' request

[247] By letter dated July 25, 2014, counsel advised that the Applicants would not be pursuing relief against 16 Montcrest Blvd. and 346D Jarvis Street: the Applicants had agreed to discharge the certificates of pending litigation registered against those properties pursuant to my Interim Order.

B.3 No evidence of Walton interest in property

[248] At the hearing the Applicants advised that to date they had not discovered any interest held by the Waltons in the following properties which had been identified by them as Schedule C Properties: 3775 St. Clair Avenue East; 185 Davenport Road; 1246 Yonge Street; 17 Yorkville; 3 Post Road; and 2 Park Lane Circle Road.

B.4 Disputed properties

[249] The Applicants sought relief against the following three Schedule C Properties in respect of which disputes existed as to whether the Waltons continued to possess an interest in them: 346 Jarvis Street, Unit C; 646 Broadview Avenue; and 19 Tennis Crescent.

19 Tennis Crescent

[250] The title register for 19 Tennis Crescent listed 1673883 Ontario Inc. as the owner, as a result of a May 22, 2009 transfer of title from the Waltons and Carreiros. The corporate profile for 1673883 Ontario Inc. showed Ron Walton as a director and officer. Although it appears that he was the first director at the time of incorporation in September, 2005, Ron Walton has continued as a director and officer notwithstanding the subsequent appointment of other directors in 2011.

[251] Ms. Walton deposed that in 2011 they sold the holding company which owned that property and "if the purchasers have not changed the corporate records to remove my husband as a Director, that is news to me. Neither of us has had any ownership or management of that property since it was sold." That assertion is very difficult to reconcile with the inclusion of the 19 Tennis Crescent property on the December, 2013 list of "Our Investment Portfolio" shown on the Rose & Thistle website.

646 Broadview Inc.

[252] 646 Broadview Inc. is shown as the registered owner of 646 Broadview Avenue as a result of an April 29, 2014 transfer from 1636483 Ontario Inc. I accept the evidence of Mr. Reitan that the Waltons enjoyed functional control over 1636483 Ontario,[42] but I have no evidence that they continued to possess an interest in the property following the April, 2014 sale.

346 Jarvis Street, Unit C

[253] The parcel register for 346 Jarvis Street, Unit C, lists Carlos and Colette Carreiro as owners. Carlos Carreiro worked for Rose & Thistle for a period of time and was a co-director with Ms. Walton in a few companies – Urban Amish Interiors Inc., Loft Raum Inc. and Carcol. Mr. Carreiro filed an affidavit in support of the Respondents on these motion in which he listed his place of residence as 18 Sword Street, Toronto.

[254] In his affidavit Mr. Carreiro did not address the issue of the ownership of 346 Jarvis Street, Unit C. The parcel registers showed that the Carreiros acquired the unit on November 5, 2010 from the Waltons' company, 1780355 Ontario Inc., for the consideration of $666,514. A charge was then registered against title that same day in favor of the Equitable Trust Company in the amount of $559,872. On her cross-examination Ms. Walton undertook to produce any document showing the consideration paid for 346C Jarvis.[43] She did not fulfill that undertaking,

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[42] Reitan June 26, 2014 affidavit, paras. 98 to 101.
[43] Walton CX, Q. 218.

merely stating that "I have produced all documentation regarding that purchase evidencing the monies paid."

Order regarding disputed properties

[255] The evidence concerning these three properties disclosed that the Waltons at one point owned or controlled the properties and it was unclear whether the properties subsequently were transferred to *bona fide* arm's-length purchasers for value. I therefore intend to include the three properties within the ambit of the orders I make below concerning "Schedule C Properties", but I direct the Manager to give notice of this Order to the registered owners of those three properties within 15 days of the date of this Order. If, within 60 days of the date of this Order, the registered owner of a property provides the Manager with evidence that it acquired the properties from the Waltons for fair market value and that the Waltons no longer have any kind of interest in the property, then the property shall be released from the operation of this Order.

B.5 Conclusion

[256] For the balance of these Reasons, any reference to "Schedule C Properties" means those properties which are listed on Appendix "A" to these Reasons. As set out below, I will grant relief against those Schedule C Properties. As well, I vary the Orders of this Court made December 18, 2013 and March 21, 2014 to include all such Schedule C Properties.

C. Specific constructive trust claims

C.1 Governing legal principles

[257] Unjust enrichment claims have three elements: (i) an enrichment of the defendant; (ii) a corresponding deprivation of the plaintiff; and, (iii) the absence of a juristic reason for the enrichment. Enrichment involves the conferral of a tangible benefit – a payment or an avoidance of an expense – on the defendant. In *Garland v. Consumer Gas Co.* the Supreme Court of Canada set down a two-part approach to considering the element of want of juristic reason. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. The established categories which can constitute juristic reasons include a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations. If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis. The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. Here, the court can look to all of the circumstances of the transaction in order to

determine whether there is another reason to deny recovery. Courts generally have regard to two factors: the reasonable expectations of the parties and public policy considerations.[44]

[258] The constructive trust is a remedial device available where an unjust enrichment has occurred and also as a remedy for oppressive conduct.[45] The remedial constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property. In nature it is a proprietary remedy; 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. The claimant 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. The primary focus is on whether the contributions have a "clear proprietary relationship". The plaintiff must also establish that a monetary award would be insufficient in the circumstances, and in this regard the court may take into account the probability of recovery, as well as whether there is a reason to grant the plaintiff the additional rights that flow from the recognition of property rights. The extent of the constructive trust interest should be proportionate to the claimant's contributions.[46]

[259] Tracing is an identification process which can assist in ascertaining property over which a constructive trust may be imposed or property which represents the proceeds of other property subject to a constructive trust. Tracing is the process by which the plaintiff traces what has happened to his property, identifies the persons who have handled or received it, and justifies his claim that the money which they handled or received can properly be regarded as representing his property.[47] Accordingly, a claimant must demonstrate that the assets being sought in the hands of the recipient are either the very assets in which the claimant asserts a proprietary right or a substitute for them.[48] If there is confusion in the tracing, the onus is on the fiduciary to identify his own funds.[49]

[260] Finally, a remedial constructive trust is a discretionary remedy. Two consequences flow from that. First, a constructive trust will not be imposed where an alternative, simpler remedy is available and effective. Second, a constructive trust will not be imposed without taking into account the interests of others who may be affected by the granting of the remedy. On this point,

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[44] 2004 SCC 25, paras. 44 to 46.
[45] *C.I. Covington Fund Inc. v. White* (2000), 10 B.L.R. (3d) 173 (Ont. S.C.), para. 48.
[46] *Kerr v. Baranow*, 2011 SCC 10, paras. 50 to 53.
[47] *Boscawen v. Bajwa*, [1995] 4 All E.R. 769 (C.A.), p. 776.
[48] *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 14, para. 75.
[49] See the tracing principles summarized in *Re Kolari* (1982), 36 O.R. (2d) 473 (D.C.J.), para. 33.

it is well-established that the beneficiary of a constructive trust cannot assert its proprietary interest against a person who came into possession of the property *bona fide* and for value.[50]

C.2 Application to the facts

[261] The Applicants rested their claim for the imposition of constructive trusts on two main grounds. First, the Applicants submitted that the Respondents had received benefits from the diversion of the Applicants' equity contributions by acquiring value in 44 Park Lane Circle and the Schedule C Properties without contributing their own funds. According to the Applicants, the Respondents' benefits corresponded directly with the Applicants' deprivation and no juristic reason existed for the Respondents' retention of the benefits conferred by the Applicants.

[262] Second, the Applicants submitted that the Waltons were directors of each of the Schedule B Companies, managed those companies' day-to-day affairs and exercised complete control over the funds invested by the Applicants in the Schedule B Companies. Under such circumstances, according to the Applicants, the Waltons owed fiduciary duties to the Schedule B Corporations to use the funds invested by the Applicants in the best interests of the corporations. Since those were closely-held, specific-purpose corporations, their best interests were shaped, in large part, by the terms of the agreements between the Applicants and Respondents. According to the Applicants, the diversion of funds out of the Schedule B Company by the Waltons for their own purposes was a breach of their fiduciary duties and constituted conduct which was oppressive to the Applicants' interests as shareholders.

[263] Ms. Walton opposed this part of the Applicants' claim on several grounds. First, Ms. Walton submitted that before the Applicants could seek such relief against the Schedule C Properties, including 44 Park Lane Circle, they should name as parties the companies which owned those properties and serve the companies' shareholders, mortgagees and lien holders. I disagree. The Waltons own or control the companies which own the Schedule C Properties, save perhaps for three properties for which I have made special provision in Section X1.B.4. So, the companies are on notice. The Applicants do not seek to prime existing interests registered against title to the Schedule C Properties. As to the preferred shareholders, many obviously have had notice of these motions since they filed affidavits and statements in support of the Waltons and the DeJongs made submissions opposing the relief sought by the Applicants. More importantly, I regard the issue of the priority of claims against a specific Schedule C Property as an issue for determination in the receivership which I intend to order over those properties.

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[50] *Tracy (Representative ad litem of) v. Instaloans Financial Solutions Centers (B.C.) Ltd.*, 2010 BCCA 357, para. 28.

[264] I accept the arguments made by the Applicants. The Waltons breached their contractual obligations to Dr. Bernstein and their fiduciary duties to the Schedule B Companies by pooling the funds advanced by the Applicants to the Schedule B Companies with Rose & Thistle and Schedule C Company funds. I have accepted, in large part, the tracing analysis performed by the Inspector and I have found that in the instances identified by the Inspector, in a brief period of time the Waltons directed the transfer of funds advanced by the Applicants from a Schedule B Company to a Walton-owned Schedule C Company, through Rose & Thistle, and the Schedule C Company used those funds in respect of a Schedule C Property. I specifically found that the following amounts of the Applicants' funds were used to purchase or discharge encumbrances on Schedule C Properties:

(i)	14 College Street:	$1,314,225;
(ii)	3270 American Drive:	$1.032 million;
(iii)	2454 Bayview:	$1.6 million;
(iv)	346E Jarvis St.:	$937,000;
(v)	44 Park Lane Circle:	$2.5 million;
(vi)	2 Kelvin Street:	$221,000;
(vii)	0 Trent:	$152,900; and,
(viii)	26 Gerrard Street:	$371,200.

The use by the Waltons of those funds of the Applicants to acquire those Schedule C Properties or to discharge registered encumbrances resulted in the unjust enrichment of the Waltons. There was absolutely no juristic reason for that use of the Applicants' funds. On the contrary, such use of the funds breached the Waltons' contractual obligations to the Applicants; in some cases I have found it amounted to fraud.

[265] The DeJongs argued that Dr. Bernstein did not suffer any detriment in respect of his funds used to acquire 3270 American Drive because in return for advancing those funds to a Schedule B Company – West Mall Holdings – Dr. Bernstein got what he had bargained for – issued shares of West Mall Holdings with its property encumbered as represented in the capital requirements terms of his agreement with the Waltons. I do not accept that submission. Dr. Bernstein did not get what he bargained for, which was the obligation of the Waltons only to use those funds for the development of the West Mall Holdings property. Instead of so doing, the Waltons stripped the funds out of West Mall Holdings to acquire 3270 American Drive, an unauthorized use of the funds which benefitted them.

[266] The DeJongs also opposed the granting of a constructive trust over 3270 American Drive on the basis that they were *bona fide* purchasers without notice of Dr. Bernstein's claim. I do not accept that submission. In January, 2013, the DeJongs advanced funds to United Empire Lands to purchase commons shares in the company. The Waltons transferred the Applicants' funds to United Empire Lands after the DeJongs had acquired their shares in United Empire Lands and just three days before that company acquired 3270 American Drive, with the result that the Applicants' constructive trust interest in the property arose after, not before, the DeJongs purchased their shares in United Empire Lands.

[267] Consequently, I grant constructive trusts in favour of the Applicants in respect of each of the Schedule C Properties listed above for the proportionate share of the purchase price that those amounts represented as at the date of purchase of the properties and for any proportionate share of the increase in value to the date of realization, except that no such trust shall attach to a property already sold and where no proceeds of sale remain in the hands of the Manager. I do not consider any other remedy to afford an effective alternative in the circumstances; the evidence disclosed that the potentially exigible assets of the Waltons were limited to their interests in the Schedule C Companies and related properties.

D. Claims for a receivership order and certificates of pending litigation

[268] The state of the evidence at this point of time does not permit the making of constructive trust orders for fixed amounts in respect of other Schedule C Properties. The Inspector's tracing analysis was limited to the properties above. However, two aspects of the evidence support making a finding, which I do, that the Applicants have demonstrated a strong *prima facie* case of unjust enrichment of up to a possible claim of $22.6 million against the Waltons in respect of the other Schedule C Properties.

[269] The first aspect of the evidence consists of the Inspector's findings, which I accepted, that during the period from October 2010 to October 2013 the Waltons directed the transfer of $23.6 million (net) from the Schedule B Company Accounts to a bank account belonging to Rose & Thistle and transfers of $25.4 million (net) from the Rose & Thistle Account to companies that they owned without the Applicants – the companies which owned the Schedule C Properties. The second aspect is the Inspector's conclusion, which I accepted, that the Waltons used new equity invested in, and mortgage amounts advanced to, the Schedule B Companies by the Applicants to fund the ongoing operations of Rose & Thistle and the Schedule C Companies and that the Applicants' investment in the Schedule B Companies was a major source of funds for the Walton Schedule C Properties/Companies.

[270] That evidence is sufficient to support an order, which I make, granting leave to the Applicants to issue certificates of pending litigation against all Schedule C Properties. Under section 103 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, a certificate of pending litigation may be issued by the court where a proceeding is commenced in which an interest in land is in

question. A court must exercise its discretion by looking at all of the relevant matters between the parties in determining whether or not to issue the certificate. If reasonable claims are put forward in an action for a constructive trust in respect of a property, a certificate of pending litigation may issue pending trial. The party seeking the certificate need not prove its case at this point. The test is met where there is sufficient evidence to establish a reasonable claim to an interest in the land based upon the facts and on which the plaintiff could succeed at trial.[51] The Applicants have met that test.

[271] As well, that evidence is sufficient to support an order, which I make, appointing Schonfeld Inc. as receiver – or "Manager", as in the case of Schedule B Properties – over all Schedule C Properties. While at this point of time the tracing analysis has not progressed to the stage to enable the granting of specific, fixed amount constructive trusts over the other Schedule C Properties, the evidence justifies the appointment of a receiver over all Schedule C Properties in order to sell them and deal with the competing claims against the proceeds of sale, including the Applicants' strong claims of constructive trusts over the remaining Schedule C Properties.

[272] Ms. Walton opposed the appointment of a receiver over the Schedule C Companies in part arguing that the money of innocent third parties, the preferred shareholders of the Schedule C Companies, should be protected by other means. Ms. Walton submitted that it was clear from the affidavits and statements filed by the preferred shareholders that "those 34 people are due money from the Waltons and those 34 people are trusting the Court not to permit Bernstein to take their money". Ms. Walton continued:

> None of those 34 people nor the DeJongs are supportive of the receivership over the Walton properties. All of those 36 people are familiar with the Waltons' real estate expertise, being investors with the Waltons. All of them have indicated they want the Waltons to be able to sell their properties themselves to garner from the properties maximum value to increase the amount of money available to pay them back their monies. The Waltons have already negotiated sales of a number of their properties, pending court approval for those transactions.

Ms. Walton also opposed the appointment of receiver over, or the issuance of a certificate of pending litigation against, any Schedule C Property because that could trigger a default in mortgages registered against those properties.

[273] I do not accept those arguments. The Waltons caused the current problems by ignoring their contractual obligations with, and fiduciary duties owed to, investors by co-mingling investment funds and appropriating some of the funds to their own benefit. The task now facing the Court is, in part, to put in place a process which will minimize the damage caused by the

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[51] *Transmaris Farms Ltd. v. Sieber*, [1999] O.J. No. 300, para. 62.

Waltons unlawful conduct and which will deal fairly with all competing interests. Ms. Walton, in her evidence, disclosed her intention to prefer improperly the interests of other creditors over those of Dr. Bernstein, for it was her position that the claims of preferred shareholders and debtors of Schedule C Companies should rank first in priority over any claim which Dr. Bernstein might have in the proceeds of sale from any Schedule C Property. As Ms. Walton put it, Dr. Bernstein should not be "permitted to leapfrog over the claims of the innocent third party investors". In paragraph 86 of her Factum Ms. Walton also stated that she intended to apply all proceeds of sale from the severed Park Lane Circle properties to pay her "investors and debtors", except for Dr. Bernstein. Further, quite unnecessary problems arose when Ms. Walton arranged the sale of the Gerrard Street and Front Street properties earlier this year; those problems resulted in parties incurring unnecessary expenses. In light of those circumstances, I see no basis upon which to allow Ms. Walton to exercise any control over the future operation of the Schedule C Properties. She and her husband must be removed from dealing with Schedule C Properties and that task put in the hands of a court-appointed receiver who will take into account the interests of all claimants against the properties.

[274] It follows from that conclusion that I do not grant that part of Ms. Walton's motion seeking court approval of contracts for the sale of the following Schedule C Properties: 24 Cecil; 66 Gerrard; 2 Kelvin Avenue; 2454 Bayview Avenue; and 30A Hazelton. The power to list and sell those properties now is placed in the hands of the Manager, Schonfeld Inc.

[275] The Applicants also seek an order tracing their funds through the accounts of the Schedule B Companies, the accounts of Rose & Thistle, the personal accounts of Norma and Ronauld Walton, the trust account of Walton Advocates, the trust account of Devry Smith Frank LLP concerning transactions involving the Waltons, and otherwise into 44 Park Lane Circle and the other Schedule C Properties.

[276] Ms. Walton opposed that request for several reasons. First, she submitted that Dr. Bernstein lacked the standing to bring a tracing claim on behalf of the Schedule B Companies because he was merely a shareholder in those companies. In her submission, only the Manager had such authority on behalf of the jointly owned companies. Second, Ms. Walton submitted:

> Dr. Bernstein's companies provided money to buy into the jointly owned properties in accordance with the pro forma and deal terms on offer. In exchange he received 50% of the equity and a shareholders loan back. He got what he bargained for. His shareholdings in the Schedule B Companies and properties have not yet been accounted for.
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> ...
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> Bernstein's tracing claim appears to assert that the jointly owned companies did not get what they bargained for and that they are entitled to their money back from the Waltons. That is not a claim he can bring on their behalf because he does not control those companies; the Receiver does.

I reject those submissions. Dr. Bernstein advanced the funds to the Schedule B Companies; he is entitled to know what happened to his money which the evidence showed the Waltons had mis-used and mis-appropriated.

[277] Ms. Walton advanced a third ground in opposition to the granting of a tracing order, drawing upon the analysis of Froese. Ms. Walton submitted that one should look at the totality of the inter-company transfers, rather than one point in time, because often within a few weeks of certain transfers there were transfers back which eliminated any debt or tracing claim over all. Ms. Walton submitted that the analysis performed by Froese disclosed that, at most, the maximum amount of the tracing claim available to the Applicants was $1.968 million. She proposed that that sum could be paid into Court from the sale Schedule C Properties pending a trial of the issue. Ms. Walton continued:

> Walton submits that the best way to address these tracing issues is to prepare an accounting once all Schedule B Properties are sold showing what if anything is due from any of those companies to Rose and Thistle and vice versa. At that time monies due from Schedule B Companies to Rose and Thistle can be used to satisfy monies due from Rose and Thistle to other Schedule B Companies. Otherwise the risk of double counting and double recovery is significant. If Bernstein receives money from Walton's properties and then receives the same money back from the Schedule B Properties when the accounting is completed, that provides him with a double recovery.

I reject that argument. I have accepted, in large part, the tracing analysis performed by the Inspector and I have not accepted the criticism made by Froese of the Inspector's "snapshot" tracing analysis. Further, it was always open to the Waltons to provide the accounting directed by this Court last October, yet they failed to do so. Their failure to do so requires the granting of further relief.

[278] I conclude that it is necessary to grant the tracing order sought by the Applicants in order to gain, if possible, a better understanding of how the Waltons used the Applicants' funds. I therefore grant the order sought. To which I add that the order appointing Schonfeld Inc. as Manager of the Schedule C Properties shall also include a specific provision that the Schedule C Companies which own those properties provide to the Manager, within 15 days of the date of this Order, full access to all their books and records. That will ensure that all entities which were part of the system created by the Waltons to circulate and mis-use the Applicants' funds are subject to an obligation to make full disclosure of all their books and records so that a full tracing of the Applicants' funds can occur.

[279] Finally, as noted above, the Applicants reached an understanding at the hearing with the mortgagees of certain Schedule C Properties, identified in paragraph 3 of the draft order submitted to the Court on July 18, 2014. Although I have appointed a receiver over all those properties, I will give effect to part of the understanding reached by ordering that the standard stay of proceedings shall be lifted as against the mortgagees of those properties in respect of

which the understanding was reached – and any other mortgagee in respect of which a similar understanding may be reached hereafter - but only on the basis that the net proceeds of the sale of any such Schedule C Property sold by a mortgagee, or a private receiver appointed by a mortgagee pursuant to the rights available to it under its respective mortgage, shall be paid out as follows:

(i) to discharge any valid encumbrance, including any liens or other mortgages, registered in priority to any mortgage held by a mortgagee that is registered against the property;

(ii) to satisfy all usual costs and expenses of the sale of the property, including but not limited to real estate commissions and legal fees;

(iii) to any mortgagee on that property in such amounts as are necessary in order to satisfy all claims that such mortgagee may have on that property pursuant to the terms of their respective mortgages; and,

(iv) the balance of the net proceeds of sale of any property shall be paid to the Manger, to be held in trust, pending further order of the Court.

Lifting the stay of proceedings on those terms should enable those mortgagees which are prepared to co-operate with the Manager to exercise their rights under their mortgages, while ensuring an orderly and fair realization of those properties.

E. The discharged Galloway mortgage

[280] There is no dispute that the Waltons discharged the Applicants' mortgage on the Galloway property without paying it off in full. Up until the eve of this litigation Ms. Walton was assuring Dr. Bernstein that she would pay the balance of the mortgage. She never did. Consequently, the Applicants are entitled to an order that the Respondents are jointly and severally liable for restitution in the amount of $1,518,750, plus interest at the rate set out in the relevant mortgage documents and costs on a full indemnity basis as set out in the relevant mortgage documents, in respect of the mortgage discharged from the title of the property at 232 Galloway Road, and the Respondents shall pay that amount to the Applicants.

F. The cross-motion by the DeJongs

F.1 Background and relief sought

[281] Christine DeJong Medical Professional Corporation ("CDJ"), C2M2S Holding Corp. ("C2M2S") and DeJong Homes Inc. brought a cross-motion for an order that the issued and outstanding shares of the Waltons in United Empire Lands (3270 American Drive, Mississauga), in which CDJ was a co-owner, be canceled because the Waltons had not contributed shareholder

equity or, alternatively, an order approving the transfer of the Waltons' interest in United Empire Lands to the DeJongs, free and clear of any claim by the Applicants, in accordance with a June, 2014 settlement agreement reached with the Waltons.

[282] Christine DeJong is an obstetrician and gynecologist whose practice is operated through CDJ. She and her husband, Michael DeJong, through their respective corporations, have been investing with the Waltons for the better part of a decade. Like Dr. Bernstein, CDJ had entered into agreements with the Waltons which contemplated equal shareholdings in corporations incorporated for the specific purpose of holding a particular piece of property. According to Ms. DeJong, CDJ holds common shares in United Empire Lands Ltd., Prince Edward Properties Ltd. and St. Clarens Holdings Ltd./Emerson Developments Ltd., as well as preferred shares in Lesliebrook Holdings Ltd. and Academy Lands Ltd. Ms. DeJong deposed that the value of the CDJ investments, based upon information provided by the Waltons, totaled $3.691 million. Ms. DeJong attached the share certificates issued to CDJ; she did not attach copies of the cheques or wire transfers recording her investment in the companies (save for a deposit receipt for an investment in United Empire Lands).

[283] Michael DeJong, through a February 25, 2013 cheque from C2M2S to Front Church Properties Ltd., invested with the Waltons and received, in return, preference shares in Academy Lands issued to C2M2S and DeJong Homes. According to information provided by the Waltons, the "value" of the original $617,000 investment was now $786,776.47.

[284] According to Ms. DeJong, in January, 2013, CDJ made a capital contribution of $992,750 to United Empire Lands to obtain 50% of the common shares in the corporation, the sole asset of which was to be the property at 3270 American Drive, Mississauga. CDJ infused $716,906 in new capital and, according to Ms. DeJong, transferred $275,844 from an existing investment in a Walton company which owned 2 Park Lane Circle and 3 Post Road. Evidence of the deposit of the $716,906 CDJ cheque into United Empire Lands' bank account was adduced. CDJ had entered into a February, 2013 agreement with the Waltons concerning that investment which was substantially similar in form and content to the agreements the Waltons used for Dr. Bernstein's investments. Christine and Michael DeJong became officers and directors of United Empire Lands on December 20, 2013.

[285] Ms. DeJong deposed that in January, 2014, Norma Walton, without consulting the DeJongs, exchanged the preferred shares held by CDJ in Lesliebrook Holdings (1131 and 1131A Leslie Road) for preferred shares in Academy Lands (2454 Bayview Avenue) and exchanged shares held by C2M2S and DeJong Homes in Front Church Properties (54 Front Street East) for shares in Academy Lands.

[286] Ms. DeJong deposed that in May, 2014, Mario Bucci, the CFO of the Rose & Thistle Group, provided her with bank statements for United Empire Lands which showed that no sooner had her investment of $716,906 been deposited into the United Empire Lands bank

account, than it was transferred out to the Rose & Thistle Group over the course of three days. Ms. DeJong complained that the Waltons had breached their agreement concerning the United Empire Lands because the Waltons had failed to make the capital contribution stipulated in that agreement. For that reason, Ms. DeJong sought the cancellation of the Waltons' shares in United Empire Lands.

[287] In May, 2014, the DeJong's counsel pressed Ms. Walton for an explanation about the use of the funds invested in United Empire Lands. Ms. Walton commissioned Froese Forensic Partners to prepare a May 23, 2014 report which reviewed the use of funds received from CDJ for investment in United Empire Lands. In the summary portion of its report Froese stated:

> DeJong proceeds of $716,906 were deposited to United Empire's credit union account on January 28, 2013 and $706,850 was transferred from that account to Rose & Thistle over the four-day period from January 28 to 31, 2013... The use of these funds by Rose & Thistle is summarized in Schedule 1. In summary, these funds were co-mingled with $230,850 from Schedule B Companies (companies owned jointly by Dr. Bernstein and the Waltons) and $25,610 from other sources. Of these co-mingled funds, $746,775 was transferred to Schedule B Companies.
>
> Assuming that deposits from Schedule B Companies were used to fund disbursements to Schedule B Companies, which is consistent with the timing of deposits and disbursements through the Rose & Thistle account, approximately $515,000 of the DeJong funds were transferred to Schedule B Companies and the balance to Walton-related companies.[52]

[288] The Waltons have offered to transfer their shares in the capital of United Empire Lands to the DeJongs in exchange for a release of the DeJongs' claims respecting the property at 3270 American Drive, Mississauga. The DeJongs have sought court approval for that June 20, 2014 settlement agreement. The DeJongs are concerned that should the settlement not be approved, the mortgagee of the property may exercise power of sale rights which would severely prejudice the interest of the DeJongs and their corporations. The DeJongs have completed an application to obtain takeout financing from Manulife.

F.2 Analysis

[289] I am not prepared to grant the relief sought by the DeJongs. The proposed settlement agreement would prefer the DeJongs' interests as creditors of the Waltons over other creditors in respect of 3270 American Drive and, in the circumstances, I conclude that such a preference would be unfair to other creditors including, but not limited to, Dr. Bernstein. The legal

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[52] I would note that this report prepared by Froese was not properly adduced as an expert's report in accordance with the *Rules of Civil Procedure*.

entitlement, if any, of the DeJongs, as preferred shareholders, to the proceeds from the sale of 3270 American Drive should be dealt with in the claims process for that property.

[290] Although I dismiss the DeJongs' motion, I will not order any costs against them. Like others, they stand at the receiving end of the Waltons' misconduct.

XII. Other relief sought

[291] Finally, the Applicants sought an order that the application commenced in Court File No. CV-14-501600 be transferred to the Commercial List and combined with the within application. Details of the application were not provided, save that the Notice of Motion described it as a "companion" application. Nevertheless, all proceedings as between Dr. Bernstein and the Waltons, and their respective companies, as well as any litigation involving Schedule B Companies/Properties and Schedule C Companies/Properties, should be managed together by one judge on the Commercial List. I therefore transfer Court File No. CV-14-501600 to the Commercial List and direct that steps be taken to transfer any other such kind of proceeding to the Commercial List. The parties should contact Newbould J. for the appointment of a new case management judge.

XIII. Conclusion

[292] For the reasons set out above, I have granted, in large part, the motions brought by the Applicants, and I have dismissed the motion brought by Ms. Walton. I have also dismissed the DeJongs' motion.

[293] I will not be returning to my office until September 3, 2014. However, I am prepared to review and issue the order implementing these Reasons before that date. Counsel and the parties shall consult on the form of order and send an electronic copy for my consideration through Mr. DiPietro at the Commercial List Office. If the parties are unable to settle the order, I am prepared to hold a brief telephone conference call to deal with the matter.

[294] Since the Applicants substantially succeeded on these motions, they may serve and file, to my attention through Judges' Administration, 361 University Avenue, written cost submissions by Wednesday, August 20, 2014. Ms. Walton may serve and file responding written cost submissions by Friday, August 29, 2014. The cost submissions shall not exceed 10 pages in length, excluding Bills of Costs.

[295] Finally, I wish to thank the parties for providing electronic copies of all materials filed on these motions. I cannot overstate the assistance which electronic copies bring to the judgment writing process, including the portability of the materials.

(original signed by)
D. M. Brown J.

Date: August 12, 2014

Appendix "A"

List of Schedule C Properties against which relief is granted

1. 3270 American Drive, Mississauga
2. 0 Luttrell Ave.
3. 2 Kelvin Avenue
4. 346 Jarvis Street, Suites A, B, C and E
5. 1 William Morgan Drive
6. 324 Prince Edward Drive
7. 24 Cecil Street
8. 30 and 30A Hazelton Avenue
9. 777 St. Clarens Avenue
10. 252 Carlton Street and 478 Parliament Street
11. 66 Gerrard Street East
12. 2454 Bayview Avenue
13. 319-321 Carlaw
14. 260 Emerson Avenue
15. 44 Park Lane Circle
16. 19 Tennis Crescent
17. 646 Broadview Inc.

Appendix "B"

Evidence or Statements from Preferred Shareholders in Schedule C Companies

	Name of Shareholder	Schedule C Company	Amount
1.	Phil Aber	Front Church Properties	$100,000 "value"[53]
2.	John and Myrne Rawlings (parents of Norma Walton)	Not identified	$395,000 loans
3.	John and Myrne Rawlings	Front Church Properties	$165,500 "value"
4.	Maria and Joseph Memme	Academy Lands Ltd.	$281,000 "value"
5.	Maria and Joseph Memme	Rose & Thistle	$100,000 loan
6.	Saul Spears	1793530 Ontario Inc.	$67,648 "value"
7.	Peggy Condos	Cecil Lighthouse Ltd.	$10,000 "value"
8.	Dennis Condos	Front Church Properties and Cecil Lighthouse	$350,000 "value"
9.	Ange Boudle	Front Church Properties and Academy Lands	$400,960 "value"
10.	Triane Boudle	Front Church Properties	$125,000 "value"
11.	Mark Goldberg	Academy Lands	$150,000 "value"
12.	John Geikins	Rose & Thistle Group Ltd.	$50,000 "value"
13.	Vane Plesse	Cecil Lighthouse	$117,675 "value"
14.	Michelle Tessaro	Front Church Properties	$154,864 "value"
15.	Carlos Carreiro	Academy Lands	$285,000 "value"
16.	Howard Beck	1793530 Ontario Inc.	$101,472 "value"

[53] Some shareholders deposed to the "value" of their shares. They did not identify the amount which they had initially invested or provide evidence of that investment. They used the term "value" in a way which suggested that they were including anticipated capital appreciation and dividends promised or accrued in the amount of the "value".

17.	Danny Servos	Front Church Properties	$356,907 "value"
18.	Ken and Grace Bugg	Front Church Properties and Academy Lands	$650,000 "value"
19.	Gideon and Irene Levytam	Front Church Properties and Cecil Lighthouse	$730,000 "value"
20.	Michele Peng	Cecil Lighthouse	$62,800 "value"
21.	Sheila Korchynski	Front Church Properties	$52,525 "value"
22.	John and Sheila Korchynski	Front Church Properties	$105,000 "value"
23.	Cary Silber	1793530 Ontario Inc.	$16,912 "value"
24.	Duncan Coopland	Front Church Properties and Cecil Lighthouse	$721,500 "value"
25.	Barbara Naglie	Front Church Properties and 1793530 Ontario	$117,778 "value"
26.	Harvey Naglie	Front Church Properties	$225,788 "value"
27.	Carmen and Paul Duffy	The Rose & Thistle Group Ltd., 1793530 Ontario and Front Church Properties	$409,599 "value"
28.	Dian Cohen	Academy Lands	$100,000 "value"
29.	Jill Penny	Front Church Properties	$165,000 "value"
30.	Gerry Gotfrit[54]	Front Church Properties; 1793530 Ontario	$172,639 "value"
31.	Fareed Ansari	Atala Investments Inc., 30A Hazelton Inc.;[55] William Morgan Lands	$2.040 million "value"
	TOTAL "VALUE"		**$8,780,817**

[54] Two affidavits were filed by Mr. Gotfrit, with some overlap in the numbers. I have only included the information in the affidavit containing the highest "value".

[55] I would observe that in paragraphs 20(l) and (m) of her December 17, 2013 affidavit, Norma Walton made no mention of any other shareholders in this company apart from her husband and herself.

Tab D

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

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List

THE HONOURABLE	)	TUESDAY, THE 12th
	)	
JUSTICE D.M. BROWN	)	DAY OF AUGUST, 2014

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.

Respondents

and

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

JUDGMENT AND ORDER

THIS RETURN OF APPLICATION, MOTION AND CROSS-MOTION, brought by the Applicants for various heads of relief, was heard on July 16-18, 2014 at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Return of Application, Motion and Cross-Motion and the proposed Fresh as Amended Notice of Application of the Applicants, the Notice of Motion of the Respondent Norma Walton, the Affidavit of James Reitan sworn June 26, 2014 and the Exhibits

thereto, the Affidavit of Norma Walton sworn June 26, 2014 and the Exhibits thereto, the Affidavits of various shareholders in companies controlling the Schedule C Properties and the Exhibits thereto, the Affidavit of James Reitan sworn July 3, 2014 and the Exhibits thereto, the Affidavit of Norma Walton sworn July 3, 2014 and the Exhibits thereto, the Affidavit of Carlos Carreiro sworn July 3, 2014 and the Exhibits thereto, the Affidavit of Yvonne Lui sworn July 3, 2014 and the Exhibits thereto, the Affidavit of Steven Williams sworn July 3, 2014 and the Exhibits thereto, the Affidavit of Talea Coghlin sworn July 4, 2014 and the Exhibits thereto, the Affidavit of George Crossman sworn July 4, 2014 and the Exhibits thereto, the Reports of the Inspector Schonfeld Inc. and the Affidavit of Christine Dejong sworn July 8, 2014 and upon hearing from counsel for the Applicants, the Respondents, the Inspector, the Dejongs, certain of the Schedule C Mortgagees and from Norma Walton, counsel for the Respondents Ronauld Walton, the Rose & Thistle Group Ltd. and Eglinton Castle Inc. appearing but making no submissions, and for reasons for decision released this day,

1. THIS COURT ORDERS that the time for service of the notice of motion and motion record is hereby abridged so that this motion was properly returnable on July 16-18, 2014, and hereby dispenses with further service.

CONTINUATION OF ORDERS

2. THIS COURT ORDERS that the Orders of the Court dated October 4, 2013, October 25, 2013, November 5, 2013, December 18, 2013 and March 21, 2014 continue in full force and effect, except as modified by this Order.

FRESH AS AMENDED NOTICE OF APPLICATION

3. THIS COURT ORDERS that the Applicants are 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.

COMBINATION OF APPLICATIONS

4. THIS COURT ORDERS that the application commenced in Court File No. CV-14-501600 be transferred to the Commercial List and combined with the within application, to be heard at a time to be determined by this Court.

THE RESPONDENTS' ACCOUNTING

5. THIS COURT ORDERS that the Respondents shall disclose forthwith any agreement to cross-collateralize any obligation of the Schedule B Companies or the Schedule C Properties.

SHAREHOLDINGS IN THE SCHEDULE B COMPANIES

6. THIS COURT ORDERS that the Waltons' shareholder interests in each of the Schedule B Companies be calculated by reference to the equity contribution provisions contained in each Schedule B Company agreement and that the shares issued to the Waltons be limited to those for which they have actually paid and that any other shares be cancelled.

THE SCHEDULE C PROPERTIES

7. THIS COURT ORDERS that the Orders of this Court dated December 18, 2013 and March 21, 2014 be amended to apply to all the properties at the following municipal addresses (collectively, the "Schedule C Properties"):

(a) 3270 American Drive, Mississauga, Ontario;

(b) 0 Luttrell Ave., Toronto, Ontario;

(c) 2 Kelvin Avenue, Toronto, Ontario;

(d) 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario;

(e) 1 William Morgan Drive, Toronto, Ontario;

(f) 324 Prince Edward Drive, Toronto, Ontario;

(g) 24 Cecil Street, Toronto, Ontario;

(h) 30 and 30A Hazelton Avenue, Toronto, Ontario;

(i) 777 St. Clarens Avenue, Toronto, Ontario;

(j) 252 Carlton Street and 478 Parliament Street, Toronto, Ontario;

(k) 66 Gerrard Street East, Toronto, Ontario;

(l) 2454 Bayview Avenue, Toronto, Ontario;

(m) 319-321 Carlaw, Toronto, Ontario;

(n) 260 Emerson Ave., Toronto, Ontario;

(o) 44 Park Lane Circle, Toronto, Ontario;

(p) 19 Tennis Crescent, Toronto, Ontario; and

(q) 646 Broadview Avenue, Toronto, Ontario.

8. THIS COURT ORDERS that the following properties are removed from all restrictions imposed on dealings with those properties pursuant to the Order of this Court dated July 18, 2014:

(a) 3775 St. Clair Avenue East, Toronto, Ontario;

(b) 185 Davenport Road, Toronto, Ontario;

(c) 1246 Yonge Street, Toronto, Ontario;

(d) 17 Yorkville, Toronto, Ontario;

(e) 3 Post Road, Toronto, Ontario;

(f) 2 Park Lane Circle Road, Toronto, Ontario;

(g) 14/16/17 Montcrest Boulevard, Toronto, Ontario; and

(h) 346 Jarvis Street, Suite D, Toronto, Ontario;

9. THIS COURT ORDERS that, for greater certainty, any restriction imposed on any person from dealing with any of the properties listed in paragraph 8 of this Order, pursuant to the Order of this Court dated July 18, 2014, is vacated.

10. THIS COURT ORDERS that Schonfeld Inc. shall, within 15 days of the date of this Order, give notice of this Order to the registered owners of the following properties (the "Disputed Properties"):

(a) 19 Tennis Crescent, Toronto, Ontario;

(b) 646 Broadview Avenue, Toronto, Ontario;

(c) 346 Jarvis Street, Suite C, Toronto, Ontario; and

(d) 252 Carlton Street and 478 Parliament Street, Toronto, Ontario.

11. THIS COURT ORDERS that if, within 60 days of the date of this Order, a registered owner of a Disputed Property provides evidence to Schonfeld Inc., to the satisfaction of Schonfeld Inc., that it acquired that Disputed Property for fair market value and that the Waltons no longer hold any interest of any kind in that Disputed Property, that Disputed Property shall be released from the other terms of this Order, and that paragraphs 8 and 9 of this Order shall apply to that Disputed Property.

CONSTRUCTIVE TRUSTS AND TRACING

12. THIS COURT ORDERS constructive trusts in favour of the Applicants in respect of each of the Schedule C Properties listed below for the proportionate share of the purchase price that those amounts represented as at the date of purchase of the properties and for any proportionate share of the increase in value to the date of realization:

(a) 14 College Street – $1,314,225;

(b) 3270 American Drive – $1,032,000;

(c) 2454 Bayview Avenue – $1,600,000;

(d) 346 Jarvis Street, Suite E – $937,000;

(e) 44 Park Lane Circle – $2,500,000;

(f) 2 Kelvin Street – $221,000;

(g) 0 Luttrell Avenue – $152,900; and

(h) 26 Gerrard Street – $371,200,

except that no such trust will attach to any such property already sold pursuant to an Order of this Court and where there are no proceeds held in trust by Schonfeld Inc.

13. THIS COURT ORDERS that the Applicants shall be permitted to trace funds provided by the Applicants into and through the accounts of the Schedule B Companies, the accounts of the Respondent the Rose & Thistle Group Ltd., the personal accounts of the Respondents Norma and/or Ronauld Walton, the trust account of Walton Advocates and/or the trust account of Devry Smith Frank LLP, and otherwise into the companies which own the Schedule C Properties.

APPOINTMENT OF SCHONFELD AS RECEIVER/MANAGER OF THE SCHEDULE C PROPERTIES

14. THIS COURT ORDERS that Schonfeld Inc. is appointed as receiver/manager (the "Manager"), without security, of the Schedule C Properties, all proceeds thereof and revenue derived therefrom and the bank accounts of the companies which own or control the Schedule C Properties (the "Schedule C Companies"), save and except any Schedule C Property already sold pursuant to an Order of this Court and where there are no proceeds held or to be held by Schonfeld Inc.

15. THIS COURT ORDERS that, except as modified by this Order, the terms of the Order of this Court dated November 5, 2013 shall apply *mutatis mutandis* to Schonfeld's appointment as Manager pursuant to paragraph 14 of this Order.

16. THIS COURT ORDERS that the Manager's Borrowing Charge and the Manager's Charge in respect of the Schedule C Properties shall rank in subsequent priority to any all security interests, trusts, liens, charges, mortgages and encumbrances, statutory or otherwise, in favour of a mortgagee or any other Person validly registered on title of the Property. The Manager's Borrowing Charge and the Manager's Charge shall not be registered on title to the Property and shall not, if no stay is in place pursuant paragraph 18 hereof, otherwise impair a mortgagee's ability to sell or lease the Property.

17. THIS COURT ORDERS that, without limiting the generality of the terms governing the appointment of Schonfeld Inc. as Manager of the Schedule C Properties, the Waltons, and any person acting at their instruction, shall, within 15 days of the date of this Order, provide full access to all of the books and records of Schedule C Companies to Schonfeld Inc.

18. THIS COURT ORDERS that the stay of proceedings contained in paragraph 12 of the November 5, 2013 Order of this Court does not apply to stay any proceedings that may be brought by the following mortgagees on the following properties (the "Schedule C Carve-Out Properties") to enforce the terms of their mortgages, including to exercise a power of sale or to appoint a receiver in respect of those properties as those mortgagees may be entitled to, subject to the terms of this Order:

Mortgagee	**Property**
The Equitable Trust Company, now Equitable Bank	19 Tennis Crescent, Toronto, Ontario PIN: 21065-0069 (LT)
The Equitable Trust Company, now Equitable Bank B & M Handelman Investments Ltd. E. Manson Investments Limited	1 William Morgan Drive, Toronto, Ontario PIN: 10369-0019 (LT)

Mortgagee	Property
Bamburgh Holdings Ltd. 4055845 Canada Inc. Paul Herbert Professional Corporation 558678 Ontario Ltd. Gertner, Jeffrey Handelman, Robert	
Home Trust Company B & M Handelman Investments Ltd. Barry Alan Spiegel Trust Orenbach, Joanna Orenbach, Jonathan Bamburg Holdings Ltd. Lizrose Holdings Ltd. 1391739 Ontario ltd. Natme Holdings Inc. E. Manson Investments Ltd. 558678 Ontario Ltd.	44 Park Lane Circle, Toronto, Ontario
The Equitable Trust Company, now Equitable Bank	346 Jarvis Street, #2, Toronto, Ontario PIN: 21105-0162 (LT)
B. & M. Handelman Investments Limited Bamburgh Holdings Ltd Paul Herbert Yerusha Investments Inc. Eroll Gordon Scotiatrust ITF SDRSP 491-02252-0 (Weingarten)	346 E Jarvis Street, Toronto, Ontario
Martha Sorger 1363557 Ontario Limited	777 St. Clarens Avenue, Toronto, Ontario
Martha Sorger 1363557 Ontario Limited	260 Emerson Avenue, Toronto, Ontario

Mortgagee	Property
Equitable Trust Company, now the Equitable Bank, c/o Harbour Mortgage Corp.	3270 American Dr., Mississauga Ontario
Business Development Bank of Canada	2454 Bayview Avenue, Toronto, Ontario
Firm Capital Credit Corporation	30 and 30A Hazelton Avenue, Toronto, Ontario

or any other mortgagee or Schedule C Property which the Applicants agree or the Court orders be added to this list.

19. In the event that any mortgagee on any Schedule C Carve-Out Property sells or otherwise realizes value from a disposition of the Schedule C Carve-Out Property, the net proceeds of such a sale or disposition shall be applied as follows:

(a) to discharge any valid encumbrance, including any liens or other mortgages, registered in priority to any mortgage held by a mortgagee that is registered against that property;

(b) to satisfy all usual costs and expenses of the sale of the property, including but not limited to real estate commissions and legal fees;

(c) to any mortgagee on that property in such amounts as are necessary in order to satisfy all claims that such mortgagee may have on that property pursuant to the terms of their respective mortgages; and

(d) the balance of the net proceeds of sale or disposition of any property shall be paid to the Manager, to be held in trust, pending further order of the Court.

COSTS OF THE INSPECTOR

20. THIS COURT ORDERS restitution and repayment by the Respondents to the Applicants and/or the Schedule B Companies in respect of all funds and to be paid by the Applicants and/or the Schedule B Companies, as appropriate, in respect of the fees and disbursements of Schonfeld Inc., in its capacity as Inspector in this proceeding, and of its counsel Goodmans LLP.

232 GALLOWAY ROAD

21. THIS COURT ORDERS that the Respondents are jointly and severally liable to the Applicants for restitution in the amount of $1,518,750 plus interest at the rate set out in the relevant mortgage documents and costs on a full indemnity basis as set out in the relevant mortgage documents in respect of the mortgage discharged from title of the property at 232 Galloway Road, and shall pay that amount to the Applicants.

OTHER RELIEF SOUGHT BY THE APPLICANTS

22. THIS COURT ORDERS that the Applicants' motion for an order that the Respondents are jointly and severally liable for restitution payable to the Applicants in the amount of $78,420,418 for all funds diverted from the Schedule B Companies and that they pay to the Applicants the balance of those funds not otherwise recovered by the Applicants from the sale of the Schedule B Properties is adjourned to a date to be scheduled.

23. THIS COURT ORDERS that the Applicants' motion for an order that the Respondents indemnify the Schedule B Companies and the Applicants for all amounts due and owing to creditors and lien claimants of the Schedule B Properties and Companies, with that amount to be fixed, is adjourned to a date to be scheduled by this Court.

24. THIS COURT ORDERS that the Applicants' motions for an Order that the Applicants' claims to the Schedule B Companies have priority over any unauthorized interests in the Schedule B Companies is dismissed, without prejudice to the Applicants' right to seek such relief in relation to any particular unauthorized interest.

25. THIS COURT ORDERS that the Applicants' motion for an Order that the Applicants be permitted to elect to treat funds advanced by the Applicants to the Schedule B Companies as shareholder loans for the purposes of enforcement of their remedies is dismissed, with the issue of the characterization of such funds to be left to the claims process administered by the Manager.

26. THIS COURT ORDERS that the Applicants may deliver costs submissions of no more than 10 pages (excluding Bill of Costs) by August 20, 2014 and the Respondents may deliver responding costs submissions of no more than 10 pages (excluding Bill of Costs) by August 29, 2014.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

SEP 0 8 2014

SCHEDULE "A" COMPANIES

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investment Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen's Corner Inc.
14. DBDC Queen's Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Industrial Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

SCHEDULE "B" COMPANIES

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline – 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Ltd.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Corp.
14. Fraser Lands Ltd.
15. Queen's Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Royal Gate Nominee Inc.
29. Royal Gate (Land) Nominee Inc.
30. Dewhurst Development Ltd.
31. Eddystone Place Inc.
32. Richmond Row Holdings Ltd.

33. El-Ad (1500 Don Mills) Limited

34. 165 Bathurst Inc.

SCHEDULE "C" PROPERTIES

1. 3270 American Drive, Mississauga, Ontario
2. 0 Luttrell Ave., Toronto, Ontario
3. 2 Kelvin Avenue, Toronto, Ontario
4. 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario
5. 1 William Morgan Drive, Toronto, Ontario
6. 324 Prince Edward Drive, Toronto, Ontario
7. 24 Cecil Street, Toronto, Ontario
8. 30 and 30A Hazelton Avenue, Toronto, Ontario
9. 777 St. Clarens Avenue, Toronto, Ontario
10. 252 Carlton Street and 478 Parliament Street, Toronto, Ontario
11. 66 Gerrard Street East, Toronto, Ontario
12. 2454 Bayview Avenue, Toronto, Ontario
13. 319-321 Carlaw, Toronto, Ontario
14. 260 Emerson Ave., Toronto, Ontario
15. 44 Park Lane Circle, Toronto, Ontario
16. 19 Tennis Crescent, Toronto, Ontario
17. 646 Broadview Avenue, Toronto, Ontario

DBDC SPADINA LTD., and those corporations listed on Schedule A hereto
Applicants

-and-

NORMA WALTON et al.
Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

JUDGMENT AND ORDER

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Email: sroy@litigate.com

Lawyers for the Applicants

Tab E

Court File no. CV-14-497318

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

781526 ONTARIO INC.

Plaintiff

- and -

NORMA WALTON, RONAULD WALTON, THE ROSE AND THE THISTLE GROUP LTD. and 1780355 ONTARIO INC.

Defendants

CERTIFICATE OF PENDING LITIGATION

I CERTIFY that in this proceeding an interest in the following lands is in question:

PIN:	21105-0160 (LT)
DESCRIPTION:	PT LT 2 PL D17 TORONTO, DESIGNATED AS PTS 1 & 13 PL 66R24790 T/W EASEMENT OVER PT 15 PL 66R24790 AS IN CA494127; S/T EASEMENT IN FAVOUR OF ROGERS CABLE COMMUNICATIONS INC. AS IN AT2265539; S/T EASEMENT IN FAVOUR OF ENBRIDGE GAS DISTRIBUTION INC. AS IN AT2300088; S/T EASEMENT OVER PT 13 IN FAVOUR OF PTS 2, 3, 4, 5, & 6 PL 66R24790 AS IN AT2387831; T/W EASEMENT OVER PTS 9, 10, 11 & 12 PL 66R24790 AS IN AT2387831 T/W AN UNDIVIDED COMMON INTEREST IN TORONTO COMMON ELEMENTS CONDOMINIUM CORPORATION NO. 2091; CITY OF TORONTO
LRO:	#80
REGISTERED OWNERSHIP:	NORMA WALTON AND RONAULD WALTON
MUNICIPAL ADDRESS:	346A JARVIS STREET, TORONTO

And

PIN:	21105-0161 (LT)
DESCRIPTION:	PT LT 2 PL D17 TORONTO, DESIGNATED AS PTS 2 & 12 PL 66R24790, T/W EASEMENT OVER PT 15 PL 66R24790 AS IN CA494127; S/T EASEMENT IN FAVOUR OF ROGERS CABLE COMMUNICATIONS INC. AS IN AT2265539; S/T EASEMENT IN FAVOUR OF ENBRIDGE GAS DISTRIBUTION INC. AS IN AT2300088; S/T EASEMENT OVER PT 12 IN FAVOUR OF PTS 1, 3, 4, 5 & 6 PL 66R24790 AS IN AT2387831; T/W EASEMENT OVER PTS 9, 10, 11 & 13 PL 66R24790 AS IN AT2387831 T/W AN UNDIVIDED COMMON INTEREST IN TORONTO COMMON ELEMENTS CONDOMINIUM CORPORATION NO. 2091; CITY OF TORONTO
LRO:	#80
REGISTERED OWNERSHIP:	NORMA WALTON AND RONAULD WALTON
MUNICIPAL ADDRESS:	346B JARVIS STREET, TORONTO

This certificate is issued under an order of the court made on February 6, 2014.

Date... February 7, 2014 Issued by.....
Local Registrar

Address of Court Office:

393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E6

781526 ONTARIO INC.

and

NORMA WALTON at el.

PLAINTIFF (s)

DEFENDANT (s)

(Short title of proceeding)

Court File No.CV-14-497318

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at
Toronto

CERTIFICATE OF PENDING LITIGATION

SHERMAN BROWN DRYER KAROL
GOLD LEBOW
Barristers & Solicitors
Suite 900
5075 Yonge Street
Toronto, Ontario
M2N 6C6

Alan B. Dryer
Tel: (416) 222-0344
Fax: (416) 222-3091
Law Society Reg. # 26882N
Lawyer for the Plaintiff

Tab F

Court File no. CV-14-497318

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

781526 ONTARIO INC.

Plaintiff

- and -

NORMA WALTON, RONAULD WALTON, THE ROSE AND THE THISTLE GROUP LTD. and 1780355 ONTARIO INC.

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF(S) CLAIM, and $1,000.00 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff(s) claim and $400.00 for costs and have the costs assessed by the court.

Date January 28/14

Issued by Christina Irwin
Registrar, Superior Court of Justice
Local Registrar

Address of Court Office:

393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E6

TO: NORMA WALTON
30 Hazelton Avenue
Toronto, Ontario
M5R 2E2

AND TO: RONAULD WALTON
30 Hazelton Avenue
Toronto, Ontario
M5R 2E2

AND TO: 1780355 ONTARIO INC.
30 Hazelton Avenue
Toronto, Ontario
M5R 2E2

AND TO: THE ROSE AND THE THISTLE GROUP LTD.
30 Hazelton Avenue
Toronto, Ontario
M5R 2E2

CLAIM

1. The Plaintiff claims:

   (a) A Declaration that the Plaintiff owns a 50% beneficial interest in title to each of the Subject Properties as more particularly described below and in Schedules "A" and "B" hereto, that title in the Subject Properties remains held subject to the trusts in the Plaintiff's favour described below, and an Order that such interests be registered and that title be amended accordingly;

   (b) An Order setting aside the Transfer as more particularly described below;

   (c) In addition or in the alternative, an accounting in relation to the Subject Properties, payment of all monies owing under the Joint Venture Agreement, and payment of all damages, losses and expenses resulting from the Transfer described below;

   (d) An Order for Leave to register a Certificate of Pending Litigation against title to the Subject Properties, as described in Schedule "A" and "B" hereto;

   (e) Punitive damages in the amount of $50,000.00;

   (f) Pre-Judgment and Post-Judgment interest in accordance with the Courts of Justice Act;

   (g) Costs on a substantial indemnity scale; and

   (h) Such further and other relief as this Honourable Court shall deem just.

2. The Plaintiff is a corporation incorporated under the laws of the Province of Ontario.

3. The Defendants Ronauld Walton ("Ronauld") and Norma Walton ("Norma") are individuals residing in the Province of Ontario. They are lawyers licensed to practice in the Province of Ontario, who practise law together, and who are spouses of each other.

4. The Defendant 1780355 Ontario Inc. ("1780355") is a corporation incorporated under the laws of the Province of Ontario.

5. The Defendant The Rose and Thistle Group Ltd. ("Rose") is a corporation incorporated under the laws of the Province of Ontario.

6. Ronauld and Norma were at all material times the officers, directors, shareholders and controlling minds of 1780355 and of Rose.

7. On November 25, 2008, 1780355 acquired title to various parcels of land situated at 346 Jarvis Street in Toronto for the purpose of redeveloping those lands and constructing thereon a project consisting of six townhouses (the "Project").

8. The Project included the following two townhouse properties:

   (a) 346A Jarvis Street, Toronto, the legal description of which is set out in Schedule "A" attached hereto; and

   (b) 346B Jarvis Street, Toronto, the legal description of which is set out in Schedule "B" attached hereto (collectively, the "Subject Properties").

9. The Plaintiff, as an Investor, entered into a Joint Venture Agreement dated October 22, 2008 with 1780355 as Owner and Rose as Manager (the "Joint Venture Agreement").

10. The purpose of the Joint Venture Agreement was for Rose to develop and construct the Project, for 1780355 to hold title as bare trustee, and for the Investors listed therein to provide the financing and share the profits.

11. The provisions of the Joint Venture Agreement included the following:

"3.3 Title. The Owner shall hold title to the Joint Venture Lands in trust for the benefit of the Investors hereto in accordance with the Participating Interests.

4.2 The Investors will be repaid their contributions as set out in Schedule A before any Net Profits are distributed. Net Profits will then be distributed in accordance with ownership interests as set-out in Schedule A."

12. Schedule A to the Joint Venture Agreement listed Norma and Ronauld as one group of Investors holding a 50% interest in the Project for the amount of $413,613.00, and the

Plaintiff as the other Investor, holding the other 50% interest for the amount of $413,613.00.

13. The Plaintiff honoured and fully performed its obligations as an Investor under the terms of the Joint Venture Agreement.

14. The Project was completed and four of the townhouse properties, being those known municipally as 346C, 346D, 346E and 346F Jarvis Street in Toronto, were sold by 1780355 to third parties with the knowledge and consent of the Plaintiff, and there is no dispute concerning those units.

15. Thereafter, it was the understanding of the Plaintiff at all material times that the Subject Properties remained under the ownership of 1780355 as bare trustee, with 1780355 continuing to hold 50% of that interest in trust for the Plaintiff, in accordance with the Joint Venture Agreement.

16. However, in or about November of 2013, it came to the attention of the Plaintiff that Norma, Ronauld, and various corporations related to them, had been sued by one Dr. Stanley Bernstein, an investor in their various other real estate projects, and that, in those proceedings, findings in Court had been made against the Waltons, including improper use of investor funds, improper payments, oppression of investors and various other improprieties. Those proceedings were publicized in the press.

17. As a result of those reports, the Plaintiff caused investigations to be made as to the status of the title to the Subject Properties. Upon doing so, the Plaintiff discovered for the first time that, on November 8, 2011, title to the Subject Properties had been transferred (the "Transfer") from 1780355 to Norma and Ronauld without the knowledge or consent of the Plaintiff, without any notice to the Plaintiff, and in a manner which was contrary to the terms of the Joint Venture Agreement, including the trust obligation set out therein.

18. After learning of the Transfer, the Plaintiff registered a Caution against title to the Subject Properties as instrument number AT3481178 on December 17, 2013.

19. The Plaintiff states that the Transfer constitutes a fraud made by the Defendants, with the

knowledge and intent, and for the purpose, of wrongfully depriving the Plaintiff of the benefit of its interest in the Subject Properties, and for the purpose of the Defendants taking same for themselves.

20. The Plaintiff states that the Transfer constitutes a breach of trust by 1780355, and that Rose, Norma and Ronauld knowingly and intentionally were parties to same, and are accordingly liable for same as *Trustees de son tort*.

21. The Plaintiff further states that the Transfer constitutes a breach of the Joint Venture Agreement.

22. The Plaintiff claims that title to the Subject Properties remains held subject to a trust in the Plaintiff's favour to the extent of a 50% beneficial interest, and that it is entitled to have the Transfer set aside, and to be registered on title as the owner of a 50% beneficial interest in the Subject Properties.

23. In addition, or in the alternative, the Plaintiff claims an accounting in connection with Subject Properties, and a declaration of entitlement to payment of, or payment of, any all monies which it is entitled to receive under the Joint Venture Agreement, including the repayment of its investment, its share of profits upon sale and its damages, losses and expense resulting from the Transfer.

24. The Plaintiff states that the Defendants have been unjustly enriched by virtue of the Transfer, that the Plaintiff has suffered a corresponding deprivation, and that there is no juristic reason for same.

25. The Plaintiff states that the conduct of the Defendants described above was arrogant, high-handed, and demonstrated a shocking and contumelious disregard for the Plaintiff's legal rights.

26. The Plaintiff proposes that this action be tried at Toronto.

Date: January 28, 2014 SHERMAN BROWN DRYER KAROL

GOLD LEBOW
Barristers & Solicitors
5075 Yonge Street
Suite 900
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M2N 6C6

Alan B. Dryer
Tel: (416) 222-0344
Fax: (416) 222-3091
Lawyers for the Plaintiff
Law Society Registration # 26882N

SCHEDULE "A"

PIN:	21105-0160 (LT)
DESCRIPTION:	PT LT 2 PL D17 TORONTO, DESIGNATED AS PTS 1 & 13 PL 66R24790 T/W EASEMENT OVER PT 15 PL 66R24790 AS IN CA494127; S/T EASEMENT IN FAVOUR OF ROGERS CABLE COMMUNICATIONS INC. AS IN AT2265539; S/T EASEMENT IN FAVOUR OF ENBRIDGE GAS DISTRIBUTION INC. AS IN AT2300088; S/T EASEMENT OVER PT 13 IN FAVOUR OF PTS 2, 3, 4, 5, & 6 PL 66R24790 AS IN AT2387831; T/W EASEMENT OVER PTS 9, 10, 11 & 12 PL 66R24790 AS IN AT2387831 T/W AN UNDIVIDED COMMON INTEREST IN TORONTO COMMON ELEMENTS CONDOMINIUM CORPORATION NO. 2091; CITY OF TORONTO
LRO:	#80

SCHEDULE "B"

PIN:	21105-0161 (LT)
DESCRIPTION:	PT LT 2 PL D17 TORONTO, DESIGNATED AS PTS 2 & 12 PL 66R24790, T/W EASEMENT OVER PT 15 PL 66R24790 AS IN CA494127; S/T EASEMENT IN FAVOUR OF ROGERS CABLE COMMUNICATIONS INC. AS IN AT2265539; S/T EASEMENT IN FAVOUR OF ENBRIDGE GAS DISTRIBUTION INC. AS IN AT2300088; S/T EASEMENT OVER PT 12 IN FAVOUR OF PTS 1, 3, 4, 5 & 6 PL 66R24790 AS IN AT2387831; T/W EASEMENT OVER PTS 9, 10, 11 & 13 PL 66R24790 AS IN AT2387831 T/W AN UNDIVIDED COMMON INTEREST IN TORONTO COMMON ELEMENTS CONDOMINIUM CORPORATION NO. 2091; CITY OF TORONTO
LRO:	#80

781526 ONTARIO INC.

and

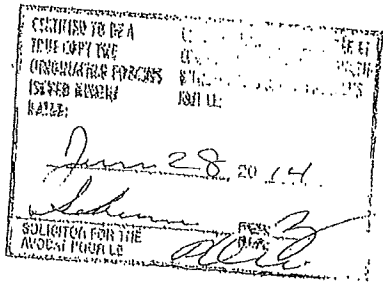
NORMA WALTON at el.

PLAINTIFF (s)

DEFENDANT (s)

(Short title of proceeding)

Court File No. CV-14-497318



ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at
Toronto

STATEMENT OF CLAIM

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Lawyer for the Plaintiff

DBDC SPADINA LTD., et al Applicants	NORMA WALTON, et al Respondents	Court File No. CV-13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List

Proceeding commenced at Toronto

MOTION RECORD OF THE MANAGER, SCHONFELD INC.

(Motion for approval and vesting order with respect to 346 Jarvis, Unit B)

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Toronto, Canada M5H 2S7

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Lawyers for The Manager

File No. 14-0074

6446925