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 returnable on a date to be fixed*)

VOLUME 1 OF 2

September 8, 2020

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Lawyers for the Manager, Schonfeld Inc.

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I N D E X

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NOTICE OF MOTION
(Motion returnable April 1, 2020)

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 1, 2020 at 330 University Avenue, Toronto.

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

THE MOTION IS FOR AN ORDER:

1. approving the fee allocation methodology proposed by the Manager (the "**Fee Allocation Methodology**") in respect of the fees of the Manager and its counsel, Goodmans LLP, applicable to the Schedule B Companies and the Schedule C Properties;

2. approving the fees of the Manager and those of its counsel, Goodmans LLP ("**Goodmans**") for the period from June 1, 2019 to December 31, 2019 (the "**Eighth Period**");

3. approving the Manager's activities during the Eighth Period;

4. authorizing the Manager to distribute funds from the proceeds of sale of certain Schedule C Properties to equity holders in the Schedule C Companies with proven claims therein;

5. providing the Manager with advice and directions with respect to the appropriate recipient(s) of funds held by the Schedule C Company, Cecil Lighthouse Ltd. ("**Cecil Lighthouse**"); and

6. such further and other relief as this Court deems just.

THE GROUNDS FOR THE MOTION ARE:

A. Fee Approval

7. The Manager seeks approval for its fees and disbursements, as well as those of its counsel. The Manager incurred fees totalling $44,097.91, including HST and disbursements, during the Eighth Period. The Manager's counsel, Goodmans, incurred fees of $78,163.28 inclusive of HST and disbursements, during the Eighth Period. These fees are fair and reasonable, having regard to the nature of the Manager's mandate and the work required.

B. Fee Allocation

8. The Manager has applied the methodology previously used and approved by this Court on five previous occasions to allocate professional fees and disbursements among the companies and properties under its control.

9. Based on this methodology, a total of 67% of the fees incurred by the Manager and its counsel were allocated to specific properties.

C. Schedule C Distributions

10. The Manager has now conducted a claims process under the Equity Claims Procedure Order granted by the Honourable Mr. Justice Hainey on July 3, 2019 in respect of the following Schedule C Companies:

(a) United Empire Lands Ltd. ("**United Empire**");

(b) The Old Apothecary Building Inc. ("**Old Apothecary**") ;

(c) 1780355 Ontario Inc. ("**178 Ontario**"); and

(d) Cecil Lighthouse Ltd. ("**Cecil Lighthouse**").

11. Based on the claims received, the Manager has recommended distributions of funds from each of United Empire, Old Apothecary and 178 Ontario. The claims processes run in respect of United Empire, Old Apothecary and 178 Ontario, and the Manager's resulting distribution recommendations are described below.

a. United Empire

12. As reported in the Manager's Fifty-Sixth Report dated June 25, 2019, the Manager recommended that, unless equity claims were received against United Empire by parties other than the DeJongs, the Manager be authorized to distribute all amounts it held in respect of United Empire (less allocated professional fees) to the DeJongs. The Manager was authorized to do so pursuant to the Order of Justice Hainey dated July 3, 2019.

13. The Manager did not receive any claims against United Empire prior to the Claims Bar Date (as defined in the Equity Claims Procedure Order). Accordingly, the Manager issued a cheque in the amount of $767,934 to the DeJongs' counsel in trust on August 20, 2019.

b. Old Apothecary

14. The Manager received a claim against Old Apothecary only from the Applicants. The Applicants assert that Norma and Ronauld Walton are the sole equity holders in Old Apothecary, and they claim against the company in their capacity as judgment debtor (in the amount of

approximately $66 million) of the Waltons and pursuant to Notices of Garnishment against each of them.

15. Although the Waltons did not file claims against Old Apothecary, the Manager has reported its view that the Waltons would be the appropriate recipients of the funds held in respect of Old Apothecary's property, as according to the books and records of Old Apothecary, Norma and Ronauld are indeed the sole equity holders (each owing 50 common shares).

16. The issue to be determined is whether the Notices of Garnishment, which apply to a "debt" owed to the Waltons, operate to garnish the funds held by the Manager.

17. As set out in the Fifty-Seventh Report, the funds to be distributed constitute a return of capital, which is not the repayment of a debt. However, given the Manager's view that the funds held in respect of Old Apothecary ought to be distributed to the Applicants in partial satisfaction of their judgment obtained in these proceedings against the Waltons, the Manager has recommended that it be authorized to declare a dividend in the amount of $44,178 and be authorized to pay that dividend to the Applicants pursuant to the Notices of Garnishment.

c. 178 Ontario

18. The Manager received a claim against 178 Ontario only from the Applicants. As is the case for Old Apothecary, described above, the Applicants claim against 178 Ontario on the basis of their judgment and Notices of Garnishment against the Waltons and on the basis that the Waltons are the sole equity holders in 178 Ontario.

19. The books and records of 178 Ontario show that the Waltons own 50% of the issued shares in 178 Ontario, and that the other 50% are owned by 781526 Ontario Inc. ("**781 Ontario**"). The Applicants state in their claim that they have reached an agreement with 781 Ontario, and that 781 Ontario does not oppose the proceeds of 178 Ontario being distributed to the Applicants. The Manager's counsel has confirmed this with counsel to 781 Ontario.

20. As no party other than the Applicants have filed a claim against 178 Ontario, the Manager is of the view that the funds held in respect of 178 Ontario ought to be distributed to the Applicants in partial satisfaction of their judgment obtained in these proceedings against the Waltons.

21. In order to effect this distribution, and for the same reasons articulated above with respect to Old Apothecary, the Manager is seeking authorization to declare a dividend in the amount of $41,131 (being the amount held in respect of 178 Ontario less allocated professional fees) and authorization to pay that dividend to the Applicants pursuant to the Notices of Garnishment in respect of Norma Walton and Ronauld Walton.

d. Cecil Lighthouse

22. With respect to Cecil Lighthouse, the Manager seeks advice and direction from this Honourable Court with respect to how funds should be distributed. As described in greater specificity in the Manager's Fifty-Seventh Report, while the general ledger of Cecil Lighthouse lists only Norma and Ronauld Walton as shareholders of Cecil Lighthouse, the Manager has received various claims from parties purporting to be holders of preferred shares in Cecil Lighthouse. While Ms. Walton did purport to issue the preferred shares as claimed by the claimants, there is no record that any of the funds originally invested by the claimants was transferred to Cecil Lighthouse in consideration for the preferred shares.

II. Miscellaneous

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

24. 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:

25. The Fifty-Seventh Report of the Manager;

26. The Affidavit of Harlan Schonfeld sworn March 16, 2020;

27. The Affidavit of Brian Empey sworn January 27, 2020; and

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

Date: March 16, 2020

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Lawyers for the Manager

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.

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, Toronto, Ontario

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

NOTICE OF MOTION
(Motion returnable April 1, 2020)

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

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Respondents

- and -

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

FIFTY-SEVENTH REPORT OF THE MANAGER, SCHONFELD INC.
(Motion by the Manager for Advice and Directions and
Authorization to Distribute Schedule "C" Funds
originally returnable April 1, 2020)

TABLE OF CONTENTS

I. Introduction

A. Overview and Relevant Background

1. This is the Fifty-Seventh Report of Schonfeld Inc. in its capacity as Manager of certain companies listed at Schedule "B" to the Order of Justice Newbould dated November 5, 2013[1] and attached as Schedule "B" (the "**Schedule B Companies**"),[2] together with the properties owned by the Schedule "B" Companies (the "**Schedule B Properties**")[3] and of the Properties listed at Schedule "C" to the Order of Justice Brown dated August 12, 2014 and attached as Schedule "C" (the "**Schedule C Properties**").

B. Purpose of this Report

2. The Manager has brought a motion for various relief, including an Order:

(a) approving the fee allocation methodology proposed by the Manager (the "**Fee Allocation Methodology**") in respect of the fees of the Manager and its counsel, Goodmans LLP, applicable to the Schedule B Companies and the Schedule C Properties;

(b) approving the fees of the Manager and those of its counsel, Goodmans LLP ("**Goodmans**"), for the period from June 1, 2019 to December 31, 2019; and

(c) authorizing the Manager to distribute funds from the proceeds of sale of certain Schedule C Properties to stakeholders of certain Schedule C Companies (as defined below) with proven claims therein.

3. Pursuant to the Schedule C Equity Claims Procedure Order granted on July 3, 2019, the Manager has now conducted a claims process in respect of certain Schedule C Companies. Based

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1 The Waltons (as defined below) appealed the November 5, 2013 order. The Court of Appeal dismissed that appeal.

2 Schedule "B" was amended by Order dated January 16, 2014.

3 The Manager was discharged from certain responsibilities with respect to certain of the Properties pursuant to an Order dated April 1, 2014.

on the claims process, the Manager recommends making certain distributions to shareholders with proven claims. The Manager is not aware of any opposition to these distributions.

4. Additionally, the Manager seeks advice and direction from this Honourable Court with respect to payment of funds held by the Schedule C Company, Cecil Lighthouse Ltd. ("**Cecil Lighthouse**"). As described in greater specificity below, while the general ledger of Cecil Lighthouse lists only Norma and Ronauld Walton as shareholders of Cecil Lighthouse, the Manager has received claims from individuals who received preferred shares in Cecil Lighthouse from the Waltons (the "**Cecil Lighthouse Claimants**"). While Ms. Walton did purport to issue the preferred shares to the Cecil Lighthouse Claimants, there is no evidence that funds invested by the claimants were paid to Cecil Lighthouse in consideration for the preferred shares.

5. If the Cecil Lighthouse Claimants' shares are invalid, and the Waltons are the sole shareholders of Cecil Lighthouse, then funds available from Cecil Lighthouse would likely be paid to the Applicants in partial satisfaction of their judgment against the Waltons. The Applicants oppose payment to the Cecil Lighthouse Claimants.

6. The Manager seeks direction from this Honourable Court with respect to the validity of the Cecil Lighthouse Claimants' shares and their entitlement (if any) to distributions.

7. This Fifty-Seventh Report contains a summary of the facts relevant to the Manager's motion and a recommendation that the relief sought by the Manager in its Notice of Motion be granted.

C. Terms of Reference

8. 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 (the "**Schedule C Companies**", and collectively with the Schedule B Companies, 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.

D. Background and History of this Proceeding

(i) The appointment of the Manager

9. This proceeding was commenced in October 2013. Since that time, the parties have appeared before this Court more than 200 times. More than 200 orders and endorsements have been granted. The lengthy history of this matter has been summarized below, to the extent that it is relevant to the relief sought by this motion. The facts set out below are all based on the findings of this Court.

10. This proceeding began with a business relationship between Dr. Stanley Bernstein and Norma and Ronauld Walton (the "**Waltons**"). Dr. Bernstein is the owner of a chain of diet clinics. The Waltons were trained as lawyers and were members of the Law Society of Upper Canada but, during the period relevant to this proceeding, they were operating as real estate developers. The Waltons operated their business through numerous corporate vehicles, but the primary operating entity was The Rose & Thistle Group Ltd. ("**Rose & Thistle**").

11. Pursuant to a series of joint venture agreements (the "**Agreements**"), Dr. Bernstein and the Waltons were to each hold a 50% interest in the Schedule B Companies. Dr. Bernstein's interest was held through a series of single purpose holding companies (collectively, "**Bernstein**" or the "**Applicants**"). Each of the Schedule B Companies was to own one Schedule B Property". Between 2010 and 2013, Dr. Bernstein invested approximately $110 million in 34 Schedule B Companies through the Applicants.

12. The Agreements required that each Schedule B Company be used solely for matters related to the Property it owned. Before Dr. Bernstein invested in any Schedule B Property, he was provided with a *pro forma* statement that showed the funds that would be required to purchase and, in some cases, redevelop and/or renovate the Property. Dr. Bernstein provided his share of the anticipated budget when the Agreement was executed and the Waltons agreed to provide the balance of the funding once Dr. Bernstein's funds were exhausted.

13. In addition to the Schedule B Properties, the Waltons were the beneficial owners of a separate portfolio of properties, the Schedule C Properties, in which Dr. Bernstein did not invest. The Waltons issued shares in the companies that owned the Schedule C Properties (the "**Schedule**

C Companies") to various individuals and entities (the "**Schedule C Investors**"). The Cecil Lighthouse Claimants are Schedule C Investors.

14. The Waltons were responsible for operating the Schedule B Properties. As a result, they controlled the Schedule B Companies' bank accounts (the "**Schedule "B" Accounts**"). But they did not manage the Schedule B Companies' financial affairs in the manner required by the Agreements. Instead, they transferred Dr. Bernstein's investment in the Schedule B Companies, and any revenue derived from those companies, into Rose & Thistle's bank account (the "**Rose & Thistle Account**"). From there, funds were transferred to other Schedule B Companies, Schedule C Companies and the Waltons' personal accounts.

15. This proceeding was commenced in October 2013, when the Manager was appointed Inspector pursuant to the OBCA and authorized to investigate the affairs of the Schedule B Companies. The Inspector discovered the co-mingling of funds described above, as well as several other issues relating to the management of the Schedule B Companies. These findings are described in detail in the Endorsement of Justice Newbould dated November 5, 2013 (the "**November 5 Endorsement**"), which is attached as **Appendix "A"**.

(ii) Further investigation of the Schedule B Companies

16. By Order of Justice Newbould dated November 5, 2013 (the "**November 5 Order**"), the Manager was appointed to provide independent management to the Schedule B Companies in the interest of all stakeholders. The November 5 Order is attached as **Appendix "B"**. The Waltons' appeal of the November 5 Order was dismissed by reasons for decision dated May 21, 2014, which are attached as **Appendix "C"**.

(iii) Sale of Schedule B Properties and Continued Investigation of the Schedule B Companies

17. When the Manager was appointed, the Schedule B Properties were in various stages of development. Some properties had appreciated in value since they were purchased and were sold for amounts significantly higher than the debt secured by them. Other properties, however, suffered from very substantial issues. Significant construction and development work would have been required to recover Dr. Bernstein's investment in these properties. No funds were available to conduct this work and, in any event, recovery might have been impossible.

18. After its appointment, the Manager, with assistance from N. Barry Lyons Consultants Limited ("**Lyons**", a leading real-estate consulting firm) and CBRE (a leading real estate brokerage)[4] developed a plan to market and sell the Schedule B Properties.

19. The Manager ultimately sold 20 Schedule B Properties. Each of these sales was approved by the Court, on notice to affected stakeholders. The remaining Schedule B Properties were sold in enforcement proceedings commenced by mortgagees. Some of these sales generated proceeds in excess of what was owed on the relevant mortgage. In such cases, the excess proceeds were paid to the Manager.

20. During the period from November 5, 2013 to July 16, 2014, the Manager (in its capacity as Inspector) undertook a further investigation into the Schedule B Companies' affairs. The results of this investigation confirmed the Inspector's initial conclusions. The Inspector concluded that almost every time Dr. Bernstein invested funds into one Schedule B Company, the Waltons transferred such funds to the Rose & Thistle Account. From the Rose & Thistle Account, Dr. Bernstein's funds were disbursed into various Schedule B Companies, Schedule C Companies and other accounts controlled by the Waltons.

21. Throughout the period examined by the Manager (in its capacity as Inspector), there was a constant transfer of funds between the Schedule B Companies, the Schedule C Companies and the Rose & Thistle Account. However, there was a consistent pattern of the Schedule C Companies receiving more from Rose & Thistle than they paid to Rose & Thistle. Conversely, there was a consistent pattern of the Schedule B Companies paying more to Rose & Thistle than they received from Rose & Thistle.

22. In all, the Inspector concluded that the Schedule B Companies suffered a net transfer out of approximately $23 million as a result of transactions with Rose & Thistle, and the Schedule C Companies received a net benefit of approximately $25 million as a result of such transactions. These conclusions were accepted by Justice D.M. Brown (as he then was) in Reasons for Decision dated August 12, 2014 (the "**August 12 Reasons**").

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[4] Before selecting CBRE, the Manager conducted a competitive tender process.

(iv) Appointment of the Manager in respect of the Schedule C Companies

23. The August 12 Reasons, which are attached as **Appendix "D"**, were an important step in the litigation between the Applicants and the Respondents. Justice Brown concluded that the Waltons had breached their contracts with Dr. Bernstein and acted oppressively by co-mingling funds and failing to make the equity contributions required of them by the Agreements. The Waltons were, therefore, not entitled to the 50% interest they claimed to own in each Schedule B Company. Instead, Justice Brown ordered that the Waltons were entitled to "one share for each dollar invested,"[5] and ordered that:

> the Waltons' shareholder interests in each of the Schedule B Companies be calculated by reference to the 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.

24. In addition, as part of the August 12 Judgment, Justice Brown also ordered that the Manager's mandate be extended to include the Schedule C Properties.

25. This relief was incorporated into the Judgment of Justice Brown dated August 12, 2014 (the "**August 12 Judgment**"), a copy of which is attached as **Appendix "E"**. The August 12 Judgment was upheld by the Court of Appeal on September 17, 2015, pursuant to reasons attached as **Appendix "F"**.

(v) The Applicants' Claim against the Schedule C Companies

26. Following its appointment, the Manager sold a number of Schedule C Properties and, where appropriate, conducted claims processes to identify creditors of the Schedule C Company that owned each property. The Manager then sought and obtained approval to distribute funds to creditors with valid claims against the Schedule C Companies.

27. The Applicants' claim for, among other things, damages from the Waltons and the Schedule C Companies was the subject of an application before Justice Newbould heard June 3,

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[5] August 12 Reasons, para. 230.

2016. By Reasons for Decision dated September 23, 2016 (the "**September 2016 Decision**"), a copy of which is attached as **Appendix "G"**, Justice Newbould found that:

(a) the Waltons were liable to Dr. Bernstein for damages in the amount of $66,951,021.85 for fraudulent misrepresentation;

(b) the Waltons' liability to Dr. Bernstein would survive bankruptcy, if the Waltons declared bankruptcy;

(c) the Schedule C Companies were not liable to Dr. Bernstein for knowing assistance in breach of fiduciary duty and knowing receipt of trust money.

28. These findings were reflected in the Order of Justice Newbould dated September 23, 2016 (the "**September 23 Order**").

29. The Waltons and Bernstein both appealed the September 23 Order. The Waltons did not perfect their appeal on time and it was dismissed.

30. The Applicants' appeal was heard June 2, 2017. By Reasons for Decision dated January 25, 2018 (the "**Appeal Reasons**"), which are attached as **Appendix "H"**, Blair and Cronk, J.J.A. set aside parts of the September 23 Order and found that certain Schedule C Companies were jointly and severally liable to the Applicants in the amount of $22,680,852, less any amounts recovered on account of the constructive trusts granted pursuant to the August 12 Judgment. The constructive trusts awarded to the Schedule C Investors, Christine and Michael DeJong (together, the "**DeJongs**"), in the September 23 Order were also set aside.

31. Justice van Rensburg, writing in dissent, found that the Applicants' appeal should be dismissed as it related to the damages claim, but agreed that the constructive trusts awarded to the DeJongs should be set aside.

32. The findings set out in the Appeal Reasons were incorporated into an Order dated January 25, 2018, which is attached as **Appendix "I"**.

33. On March 22, 2018, the DeJongs served a Notice of Application for leave to appeal to the Supreme Court. The Applicants opposed the DeJongs' application, and the Manager obtained leave to intervene in the appeal though it did not take a position on the legal issue.

34. The Supreme Court of Canada heard and unanimously allowed the DeJongs' appeal on May 14, 2019. In reasons published on May 17, 2019, and attached hereto as **Appendix "J"**, Justice Brown agreed with Justice van Rensburg that Bernstein's claim for knowing assistance against the Schedule C Companies must fail, and the Court adopted the dissenting reasons of Justice van Rensburg.

(vi) Criminal proceedings against Norma and Ronauld Walton

35. Ms. Walton was tried on an indictment alleging two counts of theft over and one count of fraud over. Mr. Walton was jointly charged on the two counts of theft over. The Waltons stood trial before a jury for four weeks in May and June 2019.

36. On June 8, 2019, Ms. Walton was convicted of the two counts of theft over. Mr. Walton was acquitted of both counts of theft over, and Ms. Walton was acquitted on the count of fraud. On September 19, 2019, Ms. Walton was sentenced to three years imprisonment and a fine of $220,286 in lieu of forfeiture (with five years to pay the fine after release from prison, and with two years in prison in default of payment of the fine).

37. James Merryweather of Schonfeld Inc. was called as a Crown witness and gave evidence on May 22, 2019 regarding the Manager's tracing analysis performed in these proceedings. Justice Code referenced Mr. Merryweather's testimony in his Reasons for Sentence, which are attached as **Appendix "K"**.

38. The Manager understands that Ms. Walton has appealed her conviction and sentence.

(vii) The Manager's Communications with the Crown and the Police

39. On August 12, 2019, following Ms. Walton's conviction and prior to Ms. Walton's sentencing hearing, the Crown prosecutor, Craig Power, contacted Mr. Merryweather and requested information relating to documents that Ms. Walton had provided that appeared to suggest she had repaid some of the funds she had been convicted of taking. Mr. Merryweather responded with the requested information. Copies of the correspondence between Mr. Power and Mr. Merryweather are attached as **Appendices "L"** and **"M"**, respectively.

(viii) Completed Claims Procedures

40. As noted, all of the Schedule B Properties were sold and some of these sales resulted in net proceeds following payment of transaction costs and repayment of any valid mortgages. The Manager held these proceeds in trust pending completion of a Claims Process in respect of each such Schedule B Property. Since each Schedule B Company has its own creditors, a separate Claims Process was required for each Schedule B Company.

41. By Order dated June 18, 2014, a copy of which is attached as **Appendix "N"**, the Court authorized the Manager to commence and conduct a Claims Process following the completion of the sale of a Schedule B Company's Property, without further Order of the Court, upon determination by the Manager that such a Claims Process is appropriate in the circumstances (the "**Creditor Claims Procedure Order**").

42. The form of claims process approved pursuant to the Creditor Claims Procedure Order was designed as a template so that a specific Claims Process can be run for any Schedule B Company in respect of which the sale of its Schedule B Property generates, or has generated, net proceeds available for potential distribution to creditors.

43. The Creditor Claims Procedure Order sets out procedures for, among other things, (i) providing notice to creditors; (ii) distributing Proof of Claim forms and related materials to creditors; (iii) reviewing Proofs of Claim submitted by creditors and determining creditors' claims (including claims to priority); (iv) resolving any disputes in respect of creditors' claims; and (v) establishing a claims bar date for filing claims against a particular Company. The Creditor Claims Procedure Order also includes forms of notices, proofs of claim and related materials to be used for each Claims Process. The distribution of any proceeds to creditors following the determination of their claims pursuant to the Creditor Claims Procedure Order is subject to further Order of this Court.

44. Since the issuance of the Creditor Claims Procedure Order, the Manager has completed a separate Claims Process in respect of 17 Schedule B Companies.

45. The Manager determined that a Claims Process was not required in respect of the balance of the Schedule B Companies because the sales of their respective Properties did not result in any

net proceeds following payment of transaction costs, repayment of valid mortgages and Court-approved professional fees.

46. The Manager has also completed a separate Claims Process for creditors of each of the following Schedule C Companies:

(a) 30A Hazelton Inc.;

(b) 6195 Cedar Street Ltd.;

(c) 1780355 Ontario Inc.;

(d) Atala Investments Inc.;

(e) Bible Hill Holdings Ltd.;

(f) Cecil Lighthouse Ltd.;

(g) Emerson Developments Ltd.;

(h) Prince Edward Properties Ltd.;

(i) St. Clarens Holdings Ltd.;

(j) The Old Apothecary Building Inc.; and

(k) United Empire Lands Ltd.

47. The Creditor Claims Procedure Order is explicitly limited to creditor claims. Prior to the Supreme Court's ruling, the Manager did not conduct, or have authority to conduct, a claims process for equity claims.

II. Schedule C Equity Claims Process

48. The effect of the Supreme Court decision described above was to finally resolve the long running dispute between Bernstein and the Schedule C Companies with respect to Bernstein's entitlement to funds held by the Manager in respect of the Schedule C Properties (the "**Schedule C Funds**"). Since creditors of the Schedule C Companies with sufficient funds had already been

paid as part of the creditor claims processes described above, the Schedule C Funds were available for distribution to shareholders of certain Schedule C Companies.

49. In order to distribute funds to shareholders of the Schedule C Companies, the Manager had to first identify the shareholders. In order to provide order and certainty to the identification process, the Manager obtained authorization to conduct a claims process for equity claims relating to the Schedule C Companies pursuant to the Schedule "C" Company Equity Claims Procedure Order of Justice Hainey dated July 3, 2019, a copy of which is attached as **Appendix "O"** (the "**Equity Claims Procedure Order**").

50. Pursuant to the Equity Claims Procedure Order, on July 17, 2019, the Manager issued Notices to Claimants in respect of four Schedule C Companies, which each set a claims bar date of August 16, 2019. The Notice to Claimants, together with an instruction letter and proof of claim form, was provided to all parties listed as equity holders in the books and records of the Schedule C Properties with funds available for distribution and claims processes and to parties that had filed equity claims in the creditors' claims process. The notice was also published in the National Post.

51. The Manager has now conducted a claims process under the Equity Claims Procedure Order in respect of the proceeds of sale of the Properties formerly owned by each of the following Schedule C Companies:

(a) United Empire Lands Ltd.;

(b) The Old Apothecary Building Inc.;

(c) 1780355 Ontario Inc.; and

(d) Cecil Lighthouse Ltd.

52. Each of these claims processes, and the Manager's resulting recommendations, is described below.

A. <u>United Empire Lands Ltd. ("UEL")</u>

53. UEL owned a Schedule C Property known municipally as 3270 American Drive, Mississauga, Ontario ("**American Drive**"). The American Drive property has been sold, creditors

with valid claims have been paid and sale proceeds of $779,849 remained for distribution to equity holders as at the date the Manager launched the Equity Claims Process.

54. The DeJongs originally agreed with the Waltons that each of the DeJongs and the Waltons would own 50% of the shares of UEL. However, the Waltons' shares in UEL were cancelled pursuant to the Order of Justice Newbould dated September 23, 2016. Accordingly, when the Equity Claims Process began, the Manager believed (but had not yet confirmed) that the DeJongs were the sole shareholders of UEL.

55. Although a claims process was required to eliminate the possibility that other parties were (or claimed to be) shareholders in UEL, the Manager did not want to unduly delay payment to the DeJongs. Accordingly, in its Fifty-Sixth Report dated June 25, 2019, the Manager recommended that unless equity claims were received against UEL by parties other than the DeJongs, the Manager be authorized to distribute all amounts it held in respect of UEL (less allocated professional fees) to the DeJongs. The Manager was authorized to do so pursuant to the Order of Justice Hainey dated July 3, 2019, a copy of which is attached as **Appendix "P"**.

56. The Manager did not receive any claims against UEL prior to the Claims Bar Date (as defined in the Equity Claims Procedure Order). Accordingly, the Manager issued a cheque in the amount of $767,934 to the DeJongs' counsel in trust on August 20, 2019.

57. The professional fees that the Manager is seeking to allocate to American Drive exceed the funds on hand. Accordingly, once American Drive pays its share of professional fees, the Manager will have distributed all sale proceeds relating to American Drive. It will have completed its mandate with respect to American Drive.

58. In light of the foregoing, the Manager respectfully recommends that it be discharged from any responsibilities it may have had relating to American Drive and that American Drive be excluded from the receivership/managership proceedings pursuant to the November Order and the August 2014 Judgment.

B. <u>The Old Apothecary Building Inc. ("Old Apothecary")</u>

59. Old Apothecary owned a Schedule C Property known municipally as 66 Gerrard Street East. The 66 Gerrard Street East property has been sold, creditors with valid claims have been

paid and sale proceeds of $47,500 remain for distribution to equity holders, subject to payment of allocated professional fees. Additionally, the Manager is holding $9,350 in respect of a related holding company, Gerrard Church 2006 Inc.

60. For the reasons described below, the Manager has concluded that the Waltons are the sole shareholders of Old Apothecary. It recommends that the funds available in respect of Old Apothecary be paid to the Applicants in partial satisfaction of their judgment against the Waltons.

(i) The Applicants' claim

61. The Manager received a claim against Old Apothecary only from the Applicants. The Applicants assert that Norma and Ronauld Walton are the sole equity holders in Old Apothecary, and they claim against the company in their capacity as judgment creditor (in the amount of approximately $66 million) of Norma and Ronauld Walton and pursuant to Notices of Garnishment against each of Norma and Ronauld Walton, copies of which are attached hereto as **Appendix "Q"**.

62. Based on the information available, the Manager is satisfied that Norma and Ronauld Walton are the sole shareholders of Old Apothecary. They would (all else being equal) be entitled to payment of funds held in respect of Old Apothecary

63. The Manager notes that, despite being served with the relevant notice and claim documents by email on July 17, 2019, the Waltons did not themselves file a claim in respect of Old Apothecary. The Manager does not recommend that the Applicants' claim relating to Old Apothecary be disallowed on this basis. The fundamental purpose of the Equity Claims Process is to identify parties who are (or may be) shareholders of the relevant companies. The Applicants' claim provides the information required to make this determination.

64. In addition, given the quantum of the judgment against them, the Waltons had (and have) no incentive to participate in the Equity Claims Process. It would be unfair if the Waltons' inaction prevented the Applicants from collecting funds available to partially satisfy the judgment debt owed by the Waltons.

(ii) Other claims against the Waltons

65. The Manager is not aware of any other judgments against the Waltons, and has not been served with a Notice of Garnishment by any party other than the Applicants.

66. Out of an abundance of caution, the Manager intends to serve this Report on the following parties that have previously claimed that the Waltons owe them debts:

(a) Trez Capital Limited Partnership;

(b) 295 The West Mall Portfolio Ltd.; and

(c) The Department of Justice.

67. The Manager has not conducted, and does not have the authority to conduct, a claims process to assess debts that are or may be owed by the Waltons. Despite the number and quantum of the claims against them, neither Norma Walton nor Ronauld Walton are the subject of proceedings pursuant to the *Bankruptcy and Insolvency Act*.

(iii) The Notice of Garnishment

68. The Notice of Garnishment requires that the Manager pay any "debt" owed to the Waltons to the Applicants in partial satisfaction of the Applicants' judgment. The Manager has received advice from its legal counsel, Goodmans LLP ("**Goodmans**") with respect to whether an equity distribution would be captured by the Notice of Garnishment.

69. From an accounting perspective, an equity distribution would typically be treated as a return on capital. As a result, the fact that the Waltons may be entitled to payment of equity amounts held by the Manager does not necessarily mean that the Manager owes the Waltons a debt that is (or might be) captured by the Notice of Garnishment.

70. That said, if funds are paid to the Waltons, then the Applicants would be entitled to exercise their rights as judgment creditors to seize those funds. For example, if funds were paid into a bank account held by the Waltons, the Applicants could seize the funds from the bank account. There is a risk, however, that funds paid to the Waltons would be dissipated before these rights could be exercised.

71. In light of the foregoing, and the history of this proceeding, the Manager does not recommend any payment to the Waltons. In addition to the risk of dissipation, such a payment would result in additional enforcement steps (and related costs) without conferring any benefit.

72. The Manager's mandate does not include Old Apothecary (a Schedule C Company); rather it includes only the Property formerly owned by Old Apothecary, all proceeds thereof and revenue derived therefrom and from the bank accounts. Accordingly, the Manager is not currently authorized to declare a dividend.

73. In the Manager's view, the simplest solution to this issue is to authorize the Manager to declare a dividend in respect of Old Apothecary. The Manager has been advised by its counsel that a dividend, if declared, would be a debt subject to the Notice of Garnishment. Alternatively, the Manager could be authorized to make a return of capital, payable by a note. The note would similarly be a debt subject to the Notice of Garnishment. The Manager understands that either approach could have tax consequences for the Waltons. Accordingly, on March 9, 2020, the Manager's counsel wrote to the Waltons' counsel to seek input on the Waltons preferred approach. A copy of that correspondence is attached as **Appendix "BB"**. As of the date of this report, the Waltons' counsel has not responded.

74. As neither the Waltons nor any party other than the Applicants have filed a claim against Old Apothecary, the Manager is of the view that the funds held in respect of Old Apothecary, less allocated professional fees, ought to be distributed to the Applicants in partial satisfaction of their judgment obtained in these proceedings against the Waltons. In order to effect this distribution, the Manager is seeking authorization to declare a dividend in the amount of $44,178 and authorization to pay that dividend to the Applicants pursuant to the Notices of Garnishment in respect of Norma Walton and Ronauld Walton.

(iv) Discharge

75. Once the Manager distributes the above described funds to the Applicants, or as otherwise directed by the Court, and pays its professional fees, the Manager will have distributed all proceeds relating to Old Apothecary. Its mandate related to Old Apothecary will then be completed.

76. In light of the foregoing, the Manager respectfully recommends that it be discharged from any responsibilities it may have had relating to Old Apothecary and that Old Apothecary be

excluded from the receivership/managership proceedings pursuant to the November Order and the August 2014 Judgment.

C. 1780355 Ontario Inc. ("178 Ontario")

77. The Manager received a claim against 178 Ontario only from the Applicants. As is the case for Old Apothecary, described above, the Applicants claim against 178 Ontario on the basis of their judgment and Notices of Garnishment against the Waltons and on the basis that the Waltons are the sole equity holders in 178 Ontario.

78. The books and records of 178 Ontario show that the Waltons own 50% of the issued shares in 178 Ontario, and that the other 50% are owned by 781526 Ontario Inc. ("**781 Ontario**"). The Applicants state in their claim that they have reached an agreement with 781 Ontario, and that 781 Ontario does not oppose the proceeds of 178 Ontario being distributed to the Applicants. The Manager's counsel has confirmed this with counsel to 781 Ontario.

79. As neither the Waltons nor any party other than the Applicants have filed a claim against 178 Ontario, the Manager is of the view that the funds held in respect of 178 Ontario ought to be distributed to the Applicants in partial satisfaction of their judgment obtained in these proceedings against the Waltons.

80. In order to effect this distribution, and for the same reasons articulated above with respect to Old Apothecary, the Manager is seeking authorization to declare a dividend in the amount of $43,131 (being the amount held in respect of 178 Ontario less allocated professional fees) and authorization to pay that dividend to the Applicants pursuant to the Notices of Garnishment in respect of Norma Walton and Ronauld Walton.

D. Cecil Lighthouse

81. As reported in the Manager's Fifty-Third Report dated June 19, 2018, according to the books and records of the company, the Waltons own all of the outstanding common shares in Cecil Lighthouse. The Waltons did not file a claim against Cecil Lighthouse.

82. On December 13, 2013, before the Manager was appointed Manager of the Property formerly owned by Cecil Lighthouse, but one day after Ms. Walton was served with a motion by the Applicants for an order restraining the Waltons from dealing with the Schedule C Companies,

which motion is attached as **Appendix "R"**, Ms. Walton purported to issue 1,039,300 preferred shares in Cecil Lighthouse (the "**Cecil Transactions**").[6] On December 18, 2013, an Order was issued requiring the Waltons to provide written notice to the Applicants and the Manager of any dealings with the Schedule C Properties. A copy of the December 18, 2013 Order is attached as **Appendix "S"**.

83. An e-mail from Ms. Walton to a law clerk employed by Rose & Thistle, which describes the various Cecil Transactions, is attached as **Appendix "T"**. A summary of the preferred shares (the "**Cecil Preferred Shares"**) to be issued as referenced in Ms. Walton's e-mail are set out below.

Name	**Preferred Shares**
John Rocha Michele Peng	62,800
Duncan Coopland	150,000
Duncan Coopland	121,500
Dennis Condos	150,000
Peggy Condos	10,000
Vane Plesse	100,000
Gideon and Irene Levytam	199,000
Gideon and Irene Levytam	46,000
Gideon and Irene Levytam	200,000[7]
Total Preferred Shares Issued	1,039,300

84. Dennis Condos and Peggy Condos (the "**Condos**") advised the Manager that they agreed to cancel their shares in other Schedule C Companies in exchange for shares of Cecil Lighthouse. Other than Duncan Coopland, whose claim is described below, the other Cecil Lighthouse Claimants have not contacted the Manager.

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[6] 42% of the preferred shares were purportedly issued to Irene and Gideon Levytam. The Levytam's assigned their right to claim against Cecil Lighthouse to the Applicants, and the Applicants received a distribution of $359,814.50 in respect of Cecil Lighthouse pursuant to the Order of Justice Hainey dated July 27, 2018.

[7] Distributions have already been made on account of the shares issued to the Levytams.

85. The Cecil Preferred Shares are not recorded in Cecil Lighthouse's general ledger. The Manager is not aware of any evidence, apart from the statements made to the Manager by the Condos, that the Cecil Lighthouse Claimants agreed to cancel their shares in other Schedule C Companies and receive Cecil Preferred Shares in exchange.

86. Given the timing of the Cecil Transactions, and the apparent lack of any business reason for them, it is possible that they were part of an effort to maximize recovery for Schedule C Investors at the expense of the Applicants.

87. In this regard, the Manager notes that Justice Brown found in the August 12 Reasons that Ms. Walton sought to prefer her "non-Bernstein" creditors by disposing of Schedule C Properties before the Manager's appointment (see **Appendix "D"** at paragraph 231) and entering into a settlement agreement with the DeJongs that would prefer their interests over the interests of other creditors, including the Applicants.

88. As noted above, the Waltons own the common shares in Cecil Lighthouse. If the Cecil Preferred Shares had not been granted, the Waltons' personal creditors could garnish any amounts paid to the Waltons in their capacity as shareholders of Cecil Lighthouse. The Applicants were, when the Cecil Preferred Shares were granted, contingent creditors of the Waltons who had served a motion to prevent the Waltons from dealing with the Schedule C Companies.

89. In other words, the ultimate effect of the Cecil Preferred Shares being issued was an increased likelihood that certain Schedule C Investors could recover funds before other stakeholders, including the Applicants.

90. The Manager has received the following claims against Cecil Lighthouse:

Claimant	Amount
DBDC Spadina Applicants	Unspecified
Dennis Condos and Peggy Condos	$160,000
Duncan Coopland	$150,000
Duncan Coopland	$121,500
John Rocha and Michele Rocha	$62,800
Celicia Vane Plesse	$188,000

91. Other than the Applicants (whose claim is made as creditors of the Waltons), each of the claimants claim to hold Cecil Preferred Shares.

92. As described below, there is no record in Cecil Lighthouse's bank statements that any of the funds invested by the Cecil Lighthouse Claimants were actually transferred to Cecil Lighthouse. Instead, it appears that funds were transferred to the Rose & Thistle Account, comingled with other funds, and used by Rose & Thistle.

93. The Manager seeks advice and direction from the Court with respect to the appropriate distributions to be made from Cecil Lighthouse. Each claim is described below, and a summary of each claim is set out in the Equity Claims Summary attached hereto as **Appendix "U"**.

94. **The Applicants.** The Applicants claim against Cecil Lighthouse in their capacity as judgment creditor (in the amount of approximately $66 million) of Norma and Ronauld Walton and pursuant to Notices of Garnishment against each of Norma and Ronauld Walton, copies of which are attached hereto as **Appendix "Q"**. The Applicants assert that the common shares listed in the general ledger as being owned by the Waltons are the only shares of Cecil Lighthouse and that, accordingly, the Applicants are entitled to the remaining funds held by the Manager in respect of Cecil Lighthouse.

95. **Dennis and Peggy Condos.** Mr. and Mrs. Condos (the "**Condos**") claim to own 160,000 preferred shares in Cecil Lighthouse. The Condos claim to have invested $160,000 on or about October 15, 2013 in a company called Richmond East Properties, which was controlled by the Waltons. The Condos claim that Ms. Walton advised them that their investment would be safer in Cecil Lighthouse, and they agreed their investment could me moved there. Ms. Walton then issued certificates for 160,000 preferred shares to the Condos.

96. Despite Ms. Walton's correspondence, and the preferred share certificates she issued, the bank statements examined by the Manager do not evidence any transfer of the Condos' investments into Cecil Lighthouse. The bank records examined by the Manager show the following:

(a) $50,000 of the Condos' funds were deposited into the bank account of College Lane Ltd. (a company controlled by the Waltons and which owned a property at 14

College Street) on April 21, 2011 (these were the only funds in the account at this time);

(b) $11,200 of the Condos' funds were transferred to the Rose & Thistle Account on April 21, 2011;

(c) $38,700 of the Condos' funds were transferred to the Rose & Thistle Account on April 25, 2011, leaving a balance of $100;

(d) $105,000 of the Condos' funds were deposited into Richmond East Properties' bank account on October 11, 2013 (the previous balance was $100);

(e) $3,877.50 was subsequently transferred from Richmond East Properties' bank account to another Schedule C Investor on October 11, 2013;

(f) $101,100 was transferred from Richmond East Properties' bank account to the Rose & Thistle Account on October 13, 2013, leaving a balance of $122.50.

97. Based on these bank records, it appears that the Condos' investments were either transferred to the Rose & Thistle Account (which was controlled by the Waltons) or distributed to another Schedule C Investor. There is no record of the Condos' funds having been transferred to Cecil Lighthouse.

98. **Duncan Coopland.** Mr. Coopland filed two claims against Cecil Lighthouse. The first claims $150,000 in respect of 150,000 preferred shares in Cecil Lighthouse, for which Mr. Coopland was issued a share certificate dated April 15, 2011.

99. Mr. Coopland previously deposed that he did not consent to exchange his shares of Twin Dragons Corporation ("**Twin Dragons**") for preferred shares in Cecil Lighthouse. This evidence was accepted and, by Order dated March 7, 2018, which is attached as **Appendix "V"**, Mr. Coopland received a distribution of $150,000 from Twin Dragons. Mr. Coopland's claim as a shareholder of Twin Dragons was predicated on the transfer of his investment to Cecil Lighthouse being invalid. That claim was successful. Since the transfer of his investment to Cecil Lighthouse was invalid, the Manager has concluded that his shares of Cecil Lighthouse must also be invalid.

100. Mr. Coopland's second claim seeks $121,500 in respect of 121,500 preferred shares in Cecil Lighthouse, for which Mr. Coopland was issued a share certificate dated October 7, 2013. Mr. Coopland has advised the Manager orally that he lost all of his financial records and related documentation in a house fire and has therefore been unable to provide the correspondence related to this purported investment.

101. The Manager has been unable to trace any investment by Mr. Coopland into Cecil Lighthouse.

102. **John Rocha and Michele Rocha.** John and Michele Rocha (the "**Rochas**") filed a claim against Cecil Lighthouse in the creditor claims process in December 2014. Because the Rochas' claim was for $62,800 in respect of preferred shares in Cecil Lighthouse, the claim was disallowed in the creditor claims process, but was considered by the Manager in this equity claims process.

103. Ms. Walton issued to the Rochas a share certificate for 62,800 preferred shares in Cecil Lighthouse on December 31, 2011. Based on the Manager's review of the relevant bank records, it appears that the Rocha's initial investment of $50,000 was made in June 2008 in 1780355 Ontario Inc. The offsetting debit was to "Due from R&T", which means that the Rochas' cheque was either deposited into the Rose & Thistle Account or transferred to another account. The books and records of 1780355 Ontario Inc. record that the Rochas' investment accumulated $12,800 in interest and that all of their funds (i.e. $62,800) was transferred to Royal Agincourt. Ms. Walton's December 2, 2013 email directs that the Rochas' investment be moved to Cecil Lighthouse. There are no records of these transactions in the companies' bank records.

104. The Manager seeks direction with respect to whether the Rochas are entitled to recover from Cecil Lighthouse in these circumstances.

105. **Celicia Vane Plesse.** Celicia Plesse filed a claim against Cecil Lighthouse in the creditor claims process in January 2015. Because Ms. Plesse's claim was for $117,675 in respect of preferred shares in Cecil Lighthouse, the claim was disallowed in the creditor claims process, but was considered by the Manager in this equity claims process. On November 18, 2011, Ms. Plesse's cheque for $100,000 was deposited into the Rose & Thistle Account. On October 21, 2013, Ms. Walton issued to Ms. Plesse a share certificate for 100,000 preferred shares in Cecil Lighthouse.

There is nothing in Cecil Lighthouse's records to indicate the Ms. Plesse's funds were ever transferred to Cecil Lighthouse.

106. The Manager seeks direction with respect to whether Ms. Plesse is entitled to recover from Cecil Lighthouse in these circumstances.

III. Fee Allocation Methodology

107. A methodology for the allocation of fees incurred by the Manager and its counsel from the Manager's appointment on November 5, 2013 to November 30, 2014 (the "**First Period**") was approved by Order dated April 20, 2015 (the "**First Methodology**"). A methodology for the allocation of fees incurred by the Manager and its counsel from December 1, 2014 to December 31, 2015 (the "**Second Period**") was approved by Order dated September 16, 2016 (the "**Second Methodology**"). The Second Methodology was utilized by the Manager for the allocation of fees relating to the period from January 1, 2016 to December 31, 2016 (the "**Third Period**"), and was approved by Order dated April 12, 2017; for the allocation of fees relating to the period from January 1, 2017 to August 31, 2017 (the "**Fourth Period**"), and was approved by Order dated November 16, 2017; for the allocation of fees relating to the period from September 1, 2017 to May 31, 2018 (the "**Fifth Period**") and was approved by Order dated July 27, 2018; for the period from June 1, 2018 to December 31, 2018 (the "**Sixth Period**") by Order dated January 28, 2019; and for the period from January 1, 2019 to May 31, 2019 (the "**Seventh Period**") by Order dated July 3, 2019. This Report relates to the allocation of the Manager's fees and those of its counsel, Goodmans relating to the period from June 1, 2019 to December 31, 2019 (the "**Eighth Period**"), for which the Manager proposes using the Second Methodology.

108. The fee allocation for the Second Period, which used the Second Methodology, was approved by Order dated September 16, 2016, which is attached as **Appendix "W"**. No stakeholder opposed the Second Methodology at the hearing.[8] The Second Methodology was also approved for the Third, Fourth, Fifth, Sixth and Seventh Periods by Orders dated April 12, 2017,

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[8] Two groups of stakeholders did raise concerns about the Second Methodology and obtained an adjournment of the original return date to investigate these concerns. These concerns were addressed before the ultimate return date for the motion.

November 16, 2017, July 27, 2018, January 28, 2019 and July 3, 2019, respectively, which Orders are attached collectively as **Appendix "X"**.

109. In light of the foregoing, and similarities between the Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth periods, the Manager determined that the Second Methodology should be used to allocate fees incurred during the Eighth Period.

110. The allocation process began with the Manager and its counsel, Goodmans, each conducting a review of the docket descriptions entered in respect of fees incurred during the Eighth Period, as they had done in respect of fees incurred during the Second to Seventh Periods. Based on this review, the Manager determined that it was feasible to allocate a significant portion of the time spent based on docket descriptions.

111. This allocation was performed in accordance with the following principles:

(a) As a general rule, where dockets referenced multiple properties, the relevant time was divided evenly among the properties unless either the docket itself or contemporaneous notes or correspondence indicated that time should be divided unevenly among the properties.

(b) Where a docket did not relate to any particular property, the relevant docket was categorized as "general". General allocations are spread evenly over all Companies that the Manager worked on during the Eighth period.[9]

112. The allocation described above is summarized in Appendix **"Y"**.

113. Based on this methodology, a total of 67% of the fees incurred by the Manager and its counsel were allocated to specific properties.

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[9] The Manager's management of the general allocation properties consisted of, among other things, addressing accounting issues, preparing and filing tax returns, addressing any remaining disputes relating to some Companies, distribution of available funds after seeking court approval for same, responding to various requests for information from the Applicants and the Waltons in connection with the criminal proceedings against the Waltons and a potential appeal in respect of the judgments in respect thereof. The Manager's activities are described herein and in the other reports filed in this matter.

IV. Fee Approval

114. Attached hereto as **Appendix "Z"** is the Affidavit of Harlan Schonfeld sworn March 16, 2020 (the "**Schonfeld Affidavit**"), attesting to the fees and disbursements of the Manager for the Eighth Period in the amount of $44,097.91 inclusive of HST and disbursements.

115. Attached hereto as **Appendix "AA"** is the Affidavit of Brian Empey, a partner at Goodmans, sworn January 27, 2020 (the "**Empey Affidavit**"), attesting to the fees and disbursements of Goodmans acting on behalf of the Manager for the Eighth Period in the amount of $78,163.28 inclusive of HST. The Manager has received and reviewed Goodmans' invoices and concluded that (i) the fees and disbursements set out in Goodmans' invoices relate to advice sought by the Manager; and (ii) in the Manager's view, Goodmans' fees and disbursements are reasonable.

V. Steps Remaining in the Manager's Mandate

116. The Manager's mandate is nearly complete and it expects to be in a position to seek a full discharge this year. The Manager expects the following steps to be necessary in order to complete its mandate:

(a) Perform distributions and fee allocation as recommended in this Fifty-Seventh Report;

(b) Obtain approval of and complete final fee allocation, reallocation and funding of same;

(c) Obtain approval of and perform final distributions to the Applicants in respect of Schedule B Companies and close bank accounts of Schedule B Companies;

(d) Transition Schedule B Companies to Applicants, including finalizing accounting and filing tax materials;

(e) Transition Schedule C Companies, including filing final tax returns, in accordance with the directions of the Court; and

(f) Provide notices to Canada Revenue Agency regarding the Manager's discharge, close Manager's tax accounts, and file final GST returns.

117. Once these steps, and perhaps others, are completed, the Manager will be in a position to seek a discharge in respect of all companies and proceeds under its mandate.

VI. Conclusions and Recommendations

118. For the reasons set out in this Fifty-Seventh Report, the Manager respectfully recommends granting the relief sought in its Notice of Motion, and respectfully requests the advice and directions of this court as requested herein.

All of which is respectfully submitted this 7th day of September, 2020.

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

Dr. Bernstein Diet Clinics Ltd.
2272551 Ontario Limited
DBDC Investments Atlantic Ltd.
DBDC Investments Pape Ltd.
DBDC Investments Highway 7 Ltd.
DBDC Investments Trent Ltd.
DBDC Investments St. Clair Ltd.
DBDC Investments Tisdale Ltd.
DBDC Investments Leslie Ltd.
DBDC Investments Lesliebrook Ltd.
DBDC Fraser Properties Ltd.
DBDC Fraser Lands Ltd.
DBDC Queen's Corner Ltd.
DBDC Queen's Plate Holdings Inc.
DBDC Dupont Developments Ltd.
DBDC Red Door Developments Inc.
DBDC Red Door Lands Inc.
DBDC Global Mills Ltd.
DBDC Donalda Developments Ltd.
DBDC Salmon River Properties Ltd.
DBDC Cityview Lands Ltd.
DBDC Weston Lands Ltd.
DBDC Double Rose Developments Ltd.
DBDC Skyway Holdings Ltd.
DBDC West Mall Holdings Ltd.
DBDC Royal Gate Holdings Ltd.
DBDC Dewhurst Developments Ltd.
DBDC Eddystone Place Ltd.
DBDC Richmond Row Holdings Ltd.

SCHEDULE "B"

COMPANIES

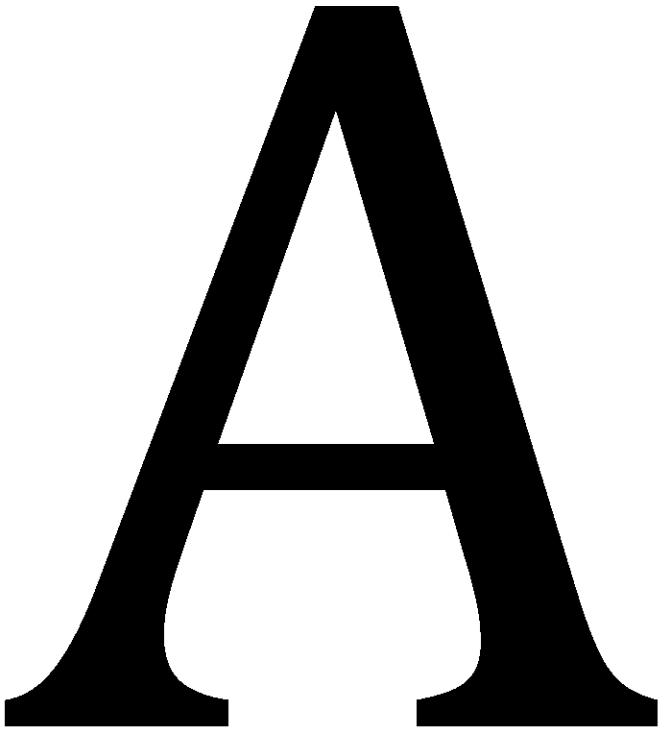
1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline – 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Ltd.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. 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, Toronto, Ontario



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. Campion, 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

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.~~ 2nd

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

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
Barristers
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COURT OF APPEAL FOR ONTARIO

CITATION: DBDC Spadina Ltd. v. Walton, 2014 ONCA 428
DATE: 20140526
DOCKET: C58024 and C58804

Doherty, Simmons and Tulloch JJ.A.

BETWEEN

DBDC Spadina Ltd., and Those Corporations Listed on Schedule A Hereto

Applicants (Respondents in Appeal)

and

Norma Walton, Ronauld Walton, The Rose & Thistle Group Ltd., and Eglinton Castle Inc.

Respondents (Appellants)

and

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

Norma Walton, appearing in person

Howard C. Cohen, for the respondents (appellants)

Peter H. Griffin and P.E. Veel, for the applicants (respondents)

Heard and released orally: May 21, 2014

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice, dated November 5, 2013.

ENDORSEMENT

[1] Ms. Walton represented herself on the appeal. She is obviously very knowledgeable about the matters underlying this appeal. Mr. Cohen represented the other appellants. Not surprisingly, Ms. Walton's arguments differed to some degree from those her former counsel had advanced in their factum. We will address the arguments made by Ms. Walton. Mr. Cohen, for the other appellants, joined in and to some extent augmented Ms. Walton's arguments.

Issue #1 – Did the application judge err in failing to require that secured creditors be given notice of the motion to appoint a Receiver Manager?

[2] Ms. Walton argues that the mortgagees should have been given notice of the application to appoint a Receiver Manager in light of the potential impact of that appointment on the properties and their security in the properties. Ms. Walton notes for example that the appointment of a Receiver Manager would automatically put the mortgages into default under the terms of those mortgages.

[3] Ms. Walton correctly, in our view, does not argue that the application judge had no jurisdiction to make the order absent notice to the secured creditors. She does argue that the application judge should have exercised discretion in favour of requiring notice to them.

[4] The application judge was not asked to require that notice be given to the secured creditors and specifically the mortgagees. Ms. Walton and the other

appellants were certainly aware of the potential impact of the appointment of a Receiver Manager on the status of the mortgages. They were well positioned to ask the application judge to give the necessary notification if they thought it prudent or necessary to a proper hearing. Ms. Walton and the other appellants were all represented by counsel on the application. No such request was made by anyone. We cannot say that the motion judge erred in principle or acted unreasonably in failing to make an order he was never asked to make.

[5] We also note that no attempt has been made by any secured creditor to intervene on the appeal and take up the argument that the secured creditors should have received notice of the application.

[6] We are told that some mortgagees have participated in some of the many proceedings that have been taken since the appointment of the Receiver Manager. The nature of those proceedings and the positions advanced on behalf of some of the mortgagees in respect of either the appointment of the Receiver Manager or the conduct of the Receiver Manager since its appointment are not before this court and are not germane to the appeal. As Mr. Griffin put it, this appeal is about the appointment of the Receiver Manager not the conduct of the Receiver Manager since the appointment.

Issue #2 – Did the application judge improperly exercise his discretion in favour of the appointment of a Receiver Manager?

[7] Ms. Walton forthrightly accepts that on the material before the application judge, a finding of oppression under the *Ontario Business Corporations Act* was open to the application judge. We agree with that concession. Ms. Walton submits, however, that the application judge was still required to consider the competing interests of Dr. Bernstein, the Waltons and the other creditors in deciding whether the appointment of a Receiver Manager was the appropriate order. She maintains that the appointment of a Receiver Manager is an extreme remedy to be granted sparingly. She further argues that the appointment of the inspector about a month earlier was enough to fully protect Dr. Bernstein's interests and that the application judge should have simply continued that order perhaps with modifications as needed to meet specific issues.

[8] Ms. Walton points to two specific errors which she claims taint the exercise of the application judge's discretion. First, she says he failed to take into account the inevitable and disastrous consequences to the business affairs of the named companies that would flow from the appointment of a Receiver Manager. Second, she says that the application judge mischaracterized her conduct in relation to two of the properties as "theft" or "having the appearance of theft". Ms. Walton submits that this mischaracterization led the application judge to the "overkill" remedy of a Receiver Manager.

[9] We have reviewed the application judge's reasons. He accurately set out the legal principles relevant to the appointment of a Receiver Manager under either the *Courts of Justice Act* or the *Ontario Business Corporations Act*: see paras. 41-44. The application judge considered whether an order continuing the inspectorship would suffice to protect Dr. Bernstein's interests: see para. 52. The application judge determined that given the difficulties the inspector had encountered in the month since his appointment and given the problems the inspector had identified in respect of the records of the corporations, the appointment of the Receiver Manager was necessary in that Dr. Bernstein's interests could not be adequately protected by a simple continuation of the inspectorship. We see no misapprehension of the relevant evidence. Indeed the evidence relating to the conduct of the inspectorship was unchallenged. Nor can we characterize the application judge's assessment of that evidence as unreasonable. That is as far as our review goes. It is not for this court to engage in a *de novo* review of the material.

[10] The application judge also addressed the potential commercial implications of the appointment of a Receiver Manager: see paras. 49-51. We were told in the course of oral submissions that the order has had serious financial repercussions for the Waltons and the companies. What may have happened after the order appointing a Receiver Manager was made and perhaps, more importantly, why those events happened are not before this court. If the

application judge did not err in the exercise of his discretion based on the record before him, it cannot be that subsequent events render the exercise of that discretion improper. Problems that may have arisen in the course of the receivership or changes in circumstances subsequent to the appointment of the Receiver Manager are matters that are properly addressed in the context of the court's ongoing supervision of the Receiver Manager and are not matters to be addressed in an appeal which challenges the appointment of the Receiver Manager.

[11] We also note that no stay of the application judge's order was sought. The applicants chose to accept the appointment of the Receiver Manager pending the outcome of this appeal. That position seems inconsistent with an argument that the appointment of the Receiver Manager would inevitably lead to dire consequences for the corporations. Were that the position one would have expected an effort to stay the order pending a challenge of the receivership.

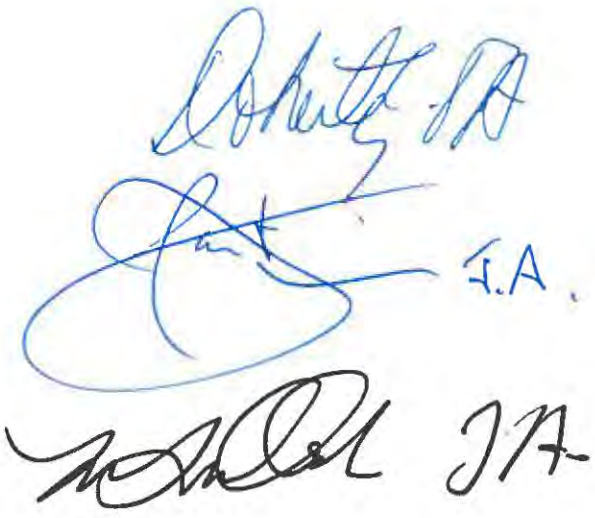
[12] We also do not accept that the application judge's use of the word "theft" is necessarily a mischaracterization of some of the conduct of Ms. Walton. However, even if the word "theft" is considered inappropriate given its criminal connotation, Ms. Walton's own affidavit acknowledges a knowing misappropriation 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.

[13] We have also reviewed the various features of the management of the affairs of the companies relied on by the application judge to support his findings and his order appointing the Receiver Manager. In our view, all of his findings are supported by the record before the application judge and justify the conclusion that Dr. Bernstein's interests in the companies were significantly prejudiced by the ongoing activities of the Waltons. The remedy ordered by the application judge, while undoubtedly one that should not be easily granted, was, in our view, fully justified in these circumstances.

[14] The appeal is dismissed. A number of related appeals that were transferred to this court from the Divisional Court on the order of Strathy J.A. are also dismissed.

[15] The respondents are entitled to costs in the amount of $20,000, inclusive of relevant taxes and disbursements.



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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:

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[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:

(i) 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

[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 Newboud 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 Montcrest, 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. Barranow*, 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.

E

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 À 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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F

COURT OF APPEAL FOR ONTARIO

CITATION: DBDC Spadina Ltd. v. Walton, 2015 ONCA 624
DATE: 20150917
DOCKET: C59434

Gillese, Lauwers and Benotto JJ.A.

BETWEEN

DBDC Spadina Ltd. and those corporations listed on Schedule A hereto

Applicants (Respondents)

and

Norma Walton, Ronauld Walton, The Rose & Thistle Group Ltd. and Eglinton Castle Inc.

Respondents (Appellants)

and

Those corporations listed on Schedule B hereto, to be bound by the result

Norma Walton, acting in person

Peter H. Griffin and Danielle Glatt, for the respondents DBDC Spadina Ltd. and those corporations listed on Schedule A hereto

Mark Dunn, for Schonfeld Inc., Manager and Inspector

Heard: September 10, 2015

On appeal from the judgment of Justice David M. Brown of the Superior Court of Justice, dated August 12, 2014.

ENDORSEMENT

[1] Ms. Walton appeals the judgment and order of Brown J. dated August 12, 2014 (the "Judgment"). At para. 12 of the Judgment, the motions judge ordered constructive trusts over certain properties.

[2] At the oral hearing of this appeal, Ms. Walton advised the court that she would pursue only the issues she had raised in respect of the constructive trusts. She asked that para. 12 of the Judgment be set aside and that the constructive trust matter be remitted for trial of an issue. Her wide-ranging attack on the validity of the constructive trusts included the submissions that the matter was too complex to be decided without the benefit of hearing oral evidence and that the motion judge erred by accepting the Inspector's report because he failed to understand that the methodology in that report created the potential for double recovery on the part of the Bernstein applicants. She spoke of the commingling of funds and the failure to properly trace monies in and out of the various properties.

[3] We do not accept these submissions.

[4] The motions judge correctly articulated the applicable legal principles in respect of constructive trusts. He imposed them based on the conduct of the Waltons and their companies, namely, their fraud, deceit and misappropriation of the Bernstein applicants' funds for their own personal use and in contravention of their agreements.

[5] We wholly reject the suggestion that the motions judge failed to appreciate the evidence. His reasons are a hundred pages in length. They are cogent and thorough. In them, the motions judge demonstrates a full appreciation of the issues, relevant legal principles and extensive evidentiary record.

[6] In respect of the attack on tracing, we begin by observing that the motion judge was entitled to prefer the Inspector's report and its methodology over that of Mr. Froese, the Waltons' expert. Further, it is important to note that the motion judge imposed constructive trusts over only those properties in which the Bernstein applicants' monies could be traced and commingling was not an issue.

[7] The claims process provides a mechanism to prevent double recovery, as both counsel for the Inspector and for the Bernstein applicants acknowledged.

[8] For these reasons, the appeal is dismissed with costs to the respondent fixed at $35,000, inclusive of applicable taxes and disbursements.

"E.E. Gillese J.A."
"P. Lauwers J.A."
"M.L. Benotto J.A."

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.

G

CITATION: DBDC Spadina Ltd et al v. Norma Walton et al, 2016 ONSC 6018
COURT FILE NO.: CV-13-10280-00CL
DATE: 20160923

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

B E T W E E N:

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

Applicants

and

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

Respondents

and

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

and

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

BEFORE: Newbould J.

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

Howard C. Cohen and Jessica S. Parise, for the Respondents Norma Walton, Ronauld Walton, The Rose & Thistle Group Ltd. and Eglinton Castle Inc.

Mark S. Dunn and Carlie Fox, for the Manager

Rosemary R. Fisher, for Christine DeJong Medicine Professional Corporation

Aaron A. Blumenfeld, for Gideon and Irene Levytam

Jeffrey Claydon, for the Attorney General of Ontario

HEARD: June 3, 2016

REASONS FOR DECISION

[1] The applicants move for judgment (i) against the Respondents Norma Walton, Ronauld Walton, the Rose and Thistle Group Ltd. and Eglinton Castle Inc. for judgment in the amount of $66.9 million representing the balance of the applicants' investment lost to the Waltons; (ii) against certain Schedule C Company respondents jointly and severally in the amount of $22.6 million, representing the portion of the applicants' $78.8 million which the Schedule C Company respondents knowingly assisted the Waltons in diverting to the benefit of the Schedule C Companies; (iii) in the alternative damages against certain of the Schedule C Company respondents in separate amounts for each company; and (iv) a finding of fraud against the Waltons which will survive bankruptcy.

[2] The Waltons bring a counter-application in which a number of heads of relief are requested, including (i) a judgment against Dr. Bernstein and the Schedule B Companies in the amount of $27 million for unjust enrichment; (ii) a judgment against Dr. Bernstein and the Schedule B Companies in the amount of $52 million for breach of contract; (iii) a declaration that Dr. Bernstein and the Schedule B Companies owe to the Schedule C property investors $14 million; (iv) a declaration that Dr. Bernstein and the Schedule B Companies are severally and jointly liable to pay specific amounts to certain companies and liable to pay to the respondents or respondent companies certain amounts and (v) an order dismissing the request of the applicants for a finding of fraud. The Waltons have also brought a cross-motion for a trial of the fraud issue.

[3] Christine DeJong Medicine Professional Corporation ("DeJong") and the Levytams request relief regarding their investments in certain of the schedule C properties.

[4] The background facts have been extensively set out in several previous endorsements, including my endorsements appointing Schonfeld Inc. as an inspector and later as manager of the Schedule B Companies and the Reasons for Decision of Justice Brown (as he then was) dated August 12, 2014. There is little to be gained by a further discussion of the background facts of this sorry saga.

Need for a trial

[5] The request by the Waltons for a trial on the fraud issue appears rooted in the fact that they have now been charged criminally with fraud. They contend that it would be grossly unjust and unfair to the Waltons if there were a finding of fraud in these civil proceedings on the basis of affidavit evidence. They contend that a finding of that nature could cause serious prejudice and unfairness in the criminal matter, especially having regard to the potential to prejudice a potential jury. Certainly, they say, it would be very difficult for a potential juror to sufficiently appreciate the impact of a finding of fraud, in the context of an application, and be an unbiased juror in a criminal prosecution.

[6] There is no motion to stay the civil proceedings. The issue is whether, as asserted by the applicants, there is enough evidence on the record or previous findings made in these proceedings justifying a declaration of fraud that would survive any bankruptcy of the Waltons. If there is not, a trial will be required.

[7] What may affect the criminal case is not before me. It is argued that that the affidavits filed in the civil matter can be used against the Waltons in the criminal matter which would be a violation of their right to remain silent. Whether or not that is so, Norma Walton has already filed extensive affidavits already in these proceedings and it is that evidence that is before me.

[8] Brown J. did not finish the matters before him. For example, he put off for further argument the issue of the amount of damages to be awarded to the applicants. Extensive evidence was before him, including affidavit evidence from Ms. Walton. Because Brown J. was elevated to the Court of Appeal, he could not complete the task that was before him. Ms. Walton has now filed further affidavit evidence in support of her claim that she is entitled to a trial to

determine whether she and her husband are liable for fraud. These new affidavits and the arguments made on her behalf ignore the findings made in this proceeding by Brown J. However, it is not open to them to challenge the findings of fact made by Brown J.

[9] In his reasons for decision, Brown J. held that the Waltons deceived and defrauded Dr. Bernstein of funds that were invested in properties at 875/887 Queen St. East and 78 Tisdale Avenue. It is now argued on behalf of the Waltons that Ms. Walton is confident that once she is given an opportunity at a trial to explain these transactions that any notion of fraud will be eliminated. However, the issue of fraud with respect to these properties is now *res judicata*. The findings were not some interlocutory finding that does not continue at a trial. Each side moved for relief on a final basis and the findings stand. Ms. Walton tried to establish before Brown J. that there was no fraud in connection with these properties but failed. Her appeal to the Court of Appeal was dismissed.

[10] The Waltons now argue that they acted in accordance with the agreements made with Dr. Bernstein. This too is contradicted by the findings of fact made by Brown J. who stated:

> **39** …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.
>
> **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.

[11] It is argued that Ms. Walton kept Dr. Bernstein fully apprised of all matters relating to the development of the properties. This is an astonishing assertion. The findings of Brown J. on the 875/887 Queen St. East and 78 Tisdale Avenue transactions are to the contrary.

[12] Moreover, on the two $3 million mortgages on the two Don Mills property, Ms. Walton admitted in her affidavit filed at the earlier hearing to appoint a manager that she “diverted” $2.1

million and should not have done so without Dr. Bernstein's consent. $400,000 of this money went into her personal bank account. The evidence at that time was that when confronted about the mortgages when they were discovered by a title search, Ms. Walton said that she would only provide information regarding them in a without prejudice mediation process. She continued however to assert before Brown J. that there was no attempt to hide the two $3 million mortgages. Brown J. did not agree and stated:

> **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.

[13] In her new affidavit, Ms. Walton asserts that she had a colour of right to place the two Don Mills mortgages, that she and her husband were effectively borrowing against their equity in the properties and that they used the majority of the money in an easily traceable manner. It is not open, however, now for Ms. Walton to make these assertions in light of her earlier evidence and the findings made by Brown J. The Waltons admitted in their factum filed with Brown J. that the borrowing of the $6 million from the Don Mills properties was contrary to the contracts with Dr. Bernstein but Ms. Walton asserted in her affidavit that she did not know the $2.1 million had been paid out to her and her companies until after the inspector did his work. Brown J. rejected that assertion and held that it was Ms. Walton who had directed the proceeds of the mortgages to be paid to the Rose & Thistle bank account knowing that such payments would be in breach of the obligation of the Waltons to Dr. Bernstein. Ms. Walton had falsely certified on the mortgage

documentation that she and her husband were the only shareholders of the borrowing company whereas Dr. Bernstein was a 50% shareholder. She testified that Dr. Bernstein had instructed her not to disclose his shareholding interest in the Schedule B Companies. Brown J. rejected that evidence.

[14] The Waltons contend that a trial is required to determine the appropriate level of damages, if any, to be awarded to the applicants and that the Inspector/Manager did not give the Waltons credit for work done on the properties and no meaningful analysis of the evidence of the work done was undertaken. I do not agree.

[15] This issue was squarely before Justice Brown in the July, 2014 hearings held over three days. He dealt with this issue quite extensively in his reasons for decision at paras. 42 to 90 and was very critical of the evidence filed on behalf of the Waltons to substantiate the work they said they had done on the Schedule B Company properties. He concluded that the Waltons had proven only $1 million worth of work done. He stated:

> **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.

[16] The Waltons requested Justice Brown to order a trial of an issue of the amount of money the Schedule B Companies owed to their company Rose & Thistle, i.e. how much work had been done on the Schedule B Companies. He stated:

> **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 dismiss 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.

[17] The matter is now *res judicata*. There is no room for a rehearing of this issue or the filing of further evidence that could have been filed before Justice Brown.

[18] As will be seen, I am satisfied that there are sufficient findings of fact already made and other evidence to make findings and that a trial of issues regarding the fraud allegations is not needed.

Applicants claim for damages

[19] The applicants invested a total of approximately $111 million into 31 projects structured as $29.5 million in mortgages and loans and $81.6 million as investments. Dr. Bernstein's corporations made equity investments of approximately $81.6 million. These corporations received approximately $2.99 million as a return of equity from Rose & Thistle. Since the appointment of the Manager, the applicants have now recovered a further approximately $11.6 million in equity payments and received approximately $160,000 from the sale of 44 Park Lane Circle. The outstanding net loss suffered by the applicants on their equity investment is thus $66,951,021.85 which is the damage award they seek with respect to their actual losses occasioned by the Waltons' fraudulent misrepresentation.

[20] In the July 2014 hearing before Brown J., the applicants requested judgment against the Waltons for approximately $78 million (they have since received more funds from the Manager as a return of equity). Brown J. felt he needed more argument on the issue of the damages to be awarded and stated:

> **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…

[21] On this motion the applicants rely on the tort of deceit or civil fraud. The elements of that tort are well known. There must be (i) a false representation of fact to the plaintiff; (ii) the defendant made the false representation knowingly, or without believing it to be true, or recklessly without care to its truth or falsity; (iii) the false representation caused the plaintiff to act; and (iv) the plaintiff's actions resulted in a loss. See *Hryniak v. Mauldin*, 2014 SCC 17 at para. 87.

[22] The applicants also rely on the tort of false representation, which is really the same tort as civil fraud. Fraud is a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it: see *Parna v. G. & S. Properties Ltd.*, [1971] S.C.R. 306.

[23] The elements of the tort of fraudulent misrepresentation can be distilled to five criteria which a plaintiff must demonstrate in order to establish a defendant's liability:

> (a) The defendant made a false statement;
>
> (b) the defendant knew that the statement was false or was indifferent to its truth or falsity;
>
> (c) the defendant had the intention to deceive the plaintiff;

> (d) the false statement was material in that it induced the plaintiff to act; and
>
> (e) the plaintiff suffered damages as a result of so acting.

[24] In each of the agreements made by Dr. Bernstein with the Waltons covering each property in which Dr. Bernstein invested, it was made clear that the funds invested by Dr. Bernstein were to be kept in a separate bank account for each property and to be used for the development of each property. That was a representation made in each case. As well, Dr. Bernstein swore in his affidavit that apart from the agreements, the Waltons made various representations to him in person and via email that caused him to believe that his funds would only be used in respect of a particular project. At no time did the Waltons advise that they would be withdrawing money from the Schedule B Companies' bank accounts for any purpose other than the needs of the associated property. I accept this evidence.

[25] These representations were false. Brown J. found as he stated:

> **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.

[26] The Waltons had to know that the representations in the agreements as to the use of the funds and the fact that they were to be kept in separate bank accounts for each project were false. The money in almost all cases advanced by Dr. Bernstein's companies was immediately transferred out the account to the Rose & Thistle account. The conclusion of the inspector and found by Brown J. at paras. 39 and 96 of his reasons was that 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 and in many cases to Schedule C Companies.

[27] It was argued by Ms. Walton before Brown J. that it never occurred to her that Dr. Bernstein would object to the pooling of funds. This was rejected as unbelievable by Brown J. he stated:

> **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.

[28] The Waltons had no basis to think that what they did was acceptable to Dr. Bernstein. They knew it was contrary to the representations that had been made to him. Brown J. further found that the actions of the Waltons were deliberate. He stated:

> **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.

[29] Dr. Bernstein has sworn that if not for the representations made by the Waltons as to the use of his funds, he would not have invested his money in the Schedule B Companies and/or the

Properties. This is hardly surprising evidence and I accept it. Had he known that the money was not kept for each project but transferred out to Rose & Thistle and used for projects he had no interest in and in some cases for the Waltons personal use, it is obvious he would not have invested the money he did. This misuse of funds is compounded with the realization after the fact that the Waltons kept no proper records of what they were doing and failed to contribute 50% of the equity that they were obliged to contribute under the agreements made with Dr. Bernstein.

[30] The Waltons argue that Dr. Bernstein caused his losses by litigating and recklessly pursuing a receivership in the face of evidence that a receivership would decimate the value of the properties. It is not open to the Waltons to argue this point. It was argued before Brown J and rejected. It is a matter of *res judicata*. Brown J. stated:

> **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.

[31] The Waltons argue that Dr. Bernstein has already been fully compensated for $22.6 million that he claims. They refer however to mortgages and loans that were repaid to the applicants over several years. However, the claim by the applicants is for the lost equity investments suffered by Dr. Bernstein. It has nothing to do with the mortgages and loans that were repaid.

[32] The evidence establishes clearly that the Waltons committed the tort of civil fraud and fraudulent misrepresentation that caused Dr. Bernstein to invest his funds into the Schedule B Companies. His damage claim is the unrecovered amount of $66,951,021.85. The applicants are entitled to judgment against the Waltons, The Rose & Thistle Group Ltd. and Eglinton Castle Inc. in that amount plus interest[1]. What the amount of interest should be and whether or not compounded was not argued and if the applicants seek interest of more than simple interest, further submissions may be made.

Survival of the claim if a bankruptcy

[33] The applicants seek a declaration pursuant to s. 178(1)(d) and (e) of the *Bankruptcy and Insolvency Act* that the judgment for $66,951,021.85 is not to be released because of any bankruptcy of the respondent judgment debtors. The BIA provides:

> 178. (1) An order of discharge does not release the bankrupt from …
>
> (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;
>
> (e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;

[34] For s. 178(1)(d) to apply, it must be established that the Waltons acted in a fiduciary capacity. Before Brown J., the applicants contended 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. Thus the Waltons owed fiduciary duties to the Schedule B Corporations to use the funds invested by

[1] Any further equity distributions to the applicant corporations from the Schedule B Companies or from any Schedule C Company will reduce the amount of damages payable to the applicant corporations.

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. The applicants contended that the diversion of funds out of the Schedule B Company by the Waltons for their own purposes was a breach of their fiduciary duties. Brown J. agreed and stated:

> **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. ..
>
> **273** ... 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.

[35] As the liability of the Waltons arose from their fraud while acting in a fiduciary duty to Dr. Bernstein, it is appropriate and is declared that their liability to the applicants for $66,951,021.85 plus interest will survive any bankruptcy of the Waltons under section 178(1)(d) of the BIA.

[36] With respect to section 178(1)(e), the liability of the Waltons arose from their fraudulent misrepresentation that caused them to obtain property, in this case the funds of the applicants, either directly or through the Schedule B and C Companies. Thus it is also appropriate and is declared that the Waltons' liability to the applicants for $66,951,021.85 plus interest will survive any bankruptcy of them under section 178(1)(e) of the BIA.

The Waltons' counter-application for damages

[37] In my view the counter-application and the claims asserted in the factum of the Waltons are frivolous and vexatious and an abuse of the process of the Court.

[38] The Waltons claim large amounts in their factum totalling some $12,200,000 for various heads of work said to have been by Rose & Thistle for the Schedule B Company properties. They assert that no damages award should be granted to Dr. Bernstein until the work the Waltons did and the deposits the Waltons paid are quantified and that their work dramatically increased the appraised value of the portfolio for which they received no credit for any of that work. They assert that to award damages without first quantifying the work done would result in tremendous injustice.

[39] This issue was before Brown J. He held that the Waltons had established only $1 million owed and dismissed the claim for a trial to value what was owed by the Schedule B Companies. This was after a great deal of evidence had been filed by the Waltons that Brown J. rejected in favour of the analysis done by the Manager. I have referred to Brown J.'s findings in paragraphs 15 and 16 above in these reasons. The issue is *res judicata*.

[40] The Waltons also claim damages as against Dr. Bernstein personally for $52 million, being $26 million of their equity from the Schedule B portfolio that he destroyed and $26 million of their equity from the Schedule C portfolio that he destroyed. They also claim that the Schedule B Companies and Dr. Bernstein owe $14,106,536 "to compensate the Schedule C investors for wantonly destroying the equity in their properties".

[41] The substance of the complaint is that Dr. Bernstein caused these losses by reason of applying to Court to have a Manager appointed that destroyed the value of the properties. There is no basis for this argument to be made in light of the following:

(i) There can be no liability for making an application to a Court. It is up to the Court to decide whether a Manager should be appointed or later to make orders on the application of a party. The fact that a Manager is appointed by a Court cannot be the basis of liability on the applicant resulting from the order or the things done by the Manager pursuant to its appointment.

(ii) The sales of property conducted by the Manager were all approved by the Court. There is no basis to now contend that the properties were sold at an improvident

value. To do so would be to make an impermissible collateral attack on those orders. In the counter-application it is asserted that the appointment of the Manager substantially diminished the value of the properties and that the properties "in control of the Court were improvidently liquidated". They claim that because they were excluded from discussions with prospective purchasers under a Court order precluding them from doing so, the value of the portfolio was reduced significantly.

(iii) The issue is *res judicata* in light of the same arguments made by the Waltons before me and in the hearing before Brown J. and the findings dismissing the argument. Brown J's findings at paras 211 and 212 of his decision are set out above at paragraph 30 of these reasons. In my endorsement dated February 9, 2015 dismissing a motion that challenged the priority of the Manager's charge on the basis that, *inter alia*, the Manager's appointment was not necessary, I stated:

> [25] Moreover, the receiver was necessary to preserve and realize the property of all of the schedule B corporations … for the benefit of all interested parties, including secured creditors. All of the properties were in chaos at the time the Manager was appointed and the subject of wrongful conduct, including co-mingling of funds, a lack of records and unauthorized use of funds. If the Waltons had been left unchecked, the adverse effects would undoubtedly have been worse.

(iv) The order appointing the Manager as manager of the Schedule C Companies was made by Brown J. over the objections of Ms. Walton. She argued that she should be able to sell the properties. Brown J. rejected the arguments, stating:

> **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 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.

[42] In the circumstances, the counter-application by the Waltons, Rose & Thistle and Eglinton Castle Inc. is struck without leave to amend.

Applicants claims against the Schedule C Companies

[43] The applicants claim damages of $22,680,852 jointly and severally against the Schedule C Companies. The Manager holds proceeds of approximately $4.65 million from the sale of eleven Schedule C Company properties.

[44] The claim is based on an alleged knowing assistance provided by the Schedule C Companies to the transfer out of the Schedule B Companies of a net of $23,680,852 million to Rose & Thistle that was found by Brown J. to have occurred. After a deduction is made for $1 million, being a reconciliation of management fees, the balance is $22,680,852. Brown J. also held that Rose & Thistle transferred a net amount of $25.4 million to the Schedule C Companies. He stated 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 Schedule C Properties against which a constructive trust remedy was not ordered.

[45] The theory of the claim is that the Waltons were the controlling minds of the Schedule C Companies and used them to further their fraudulent activity and breach of their fiduciary duties owed to the applicants. Thus it is contended that the Schedule C Companies are liable for knowingly assisting Ms. Walton to breach her fiduciary duties to the applicants.

[46] The constituent elements of the tort of knowing assistance in breach of fiduciary duty are well known: (1) there must be a fiduciary duty; (2) the fiduciary must have breached that duty fraudulently and dishonestly; (3) the stranger to the fiduciary relationship must have had actual knowledge of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct; and (4) the stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct. The knowledge requirement for liability based on this tort is actual knowledge. See *Enbridge Gas Distribution Inc. v Marinaccio*, 2012 ONCA 650 at para 23. The type of behaviour captured by the phrase fraudulent and dishonest conduct is the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take. See *Enbridge* at para. 27 and *Air Canada v M & L Travel Ltd*., [1993] 3 SCR 787 at para. 59.

[47] There is no question but that Ms. Walton knowingly breached her fiduciary obligations to the applicants and that she knowingly took a risk with the money belonging to the Schedule B Companies that she had no right to take. Her activity in so doing was fraudulent and dishonest.

[48] A century ago, Lord Haldane stated that a corporation is an abstraction with no mind of its own and that its active and directing will must consequently be sought in the person of somebody who the directing mind and will of the corporation, the very *alter ego* and centre of the personality of the corporation. See *El Ajou v Dollar Land Holdings plc*, [1994] 2 All ER 685 at p. 695-696(CA) in which Nourse L.J. stated at p. 696:

> This doctrine, sometimes known as the *alter ego* doctrine, has been developed, with no divergence of approach, in both criminal and civil jurisdictions, the authorities in each being cited indifferently in the other. A company having no mind or will of its own, the need for it arises because the criminal law often requires *mens rea* as a constituent of the crime, and the civil law intention or knowledge as an ingredient of the cause of action or defence. In the oft-quoted words of Viscount Haldane

> LC in *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd*. (1915) AC 705, 713:
>
> "My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation."
>
> The doctrine attributes to the company the mind and will of the natural person or persons who manage and control its actions. At that point, in the words of Mr Justice Millett, at p.740J:
>
> "Their minds are its mind; their intention its intention; their knowledge its knowledge."

[49] This principle is applicable to civil torts cases, as stated by Nourse J.A. in *El Ajou.* It has been recognized in Canada. See *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, [2002] 4 SCR 312 in which Major J. stated:

> **19** There can be no doubt that Lakusta's act of directing the Bank to deposit the proceeds of the cheque into Legacy's account can be attributed to and considered authorized by 373409. See *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, [1915] A.C. 705 (H.L.), *per* Viscount Haldane L.C., at p. 713:
>
> ... a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself... .
>
> **20** Here, Lakusta was the sole shareholder, director, and officer of 373409. He was the only person capable of acting as the corporation's directing mind, and he formed the entire "ego" and "personality" of the corporation.

[50] It is argued that Ms. Walton was the directing mind of each of the Schedule C Companies and thus her knowledge is taken to be the knowledge of those corporations for the purpose of the tort of knowing assistance. I have difficulty with this argument taken the investor agreements for the Schedule C properties. All of the Schedule C investor agreements in the record contain the same provisions. The Waltons and the investor were each to be 50% owners of the shares and each hold 50% of the board of directors' positions. The company into which the investments were to be made was to be used solely for the property to be purchased. Any significant decisions that differed from the project plan required more than 50% shareholder approval. If the parties disagreed on how to manage, supervise and complete construction of the project, there was to be mandatory mediation and arbitration.

[51] Thus, in so far as the Schedule C Companies are concerned and their investors, Ms. Walton may have acted as if she was the sole decision maker in the Schedule C Companies, but she was not. She and her husband were 50% owners with the right to exercise 50% of the significant decisions. There is no evidence that the other investors were aware of the fraudulent conduct of Ms. Walton.

[52] This issue raised by the applicants is not a contest between Dr. Bernstein and the Waltons. It is a contest between Dr. Bernstein and the investors in the Schedule C Companies who suffered from the same misconduct as did Dr. Bernstein. Ms. Walton knowingly breached her fiduciary obligations to the Schedule C Companies and the Schedule C investors.

[53] It would be contrary to the Schedule C investor agreements to hold that Ms. Walton could cause the Schedule C investors to be a party to her fraudulent dealings with Dr. Bernstein. Thus I cannot find that the Schedule C Companies are liable to the applicants for knowing assistance.

[54] The applicants also make a claim against the Schedule C Companies for which the Manager is holding proceeds of sales on the basis of knowing receipt of trust money. Liability for knowing receipt of trust property requires a lower threshold of knowledge than liability for knowing assistance and constructive knowledge (that is knowledge of sufficient facts to put a reasonable person on notice or inquiry) will suffice as a basis of restitutionary liability. See *Citadel General Insurance Co. v. Lloyd's Bank Canada*, [1997] 3 S.C.R. 805 at para. 48.

[55] However, for the same reason that pertains to the claim of knowing assistance, I cannot find that the Schedule C Companies are liable for knowing receipt of trust money. There is no evidence that the investors were put on sufficient notice to make enquiry as to what Ms. Walton was up to.

[56] There is another reason why the knowing receipt of trust money claim has not been proven. Reliance by the applicants is put on a schedule to the fourth interim report of the Inspector as to cash transferred from Schedule B and C Companies to Rose & Thistle and from Rose & Thistle back to the Schedule B and C Companies. The schedule is as of December 31, 2013.

[57] For example, for 6195 Cedar Street Ltd. it shows transfers from that company to Rose & Thistle totalling $134,200 and transfers from Rose & Thistle to that company of $690,335 for a net transfer from Rose & Thistle as of December 31, 2013 of $556,135. As 6195 Cedar Street Ltd. is a Schedule C Company, the applicants claim $556,135 on a knowing receipt of trust money claim. There is no proof where Rose & Thistle obtained the money that was transferred to 6195 Cedar Street Ltd. It may have come from one of Dr. Bernstein's companies. It may not have. It may have come from investors in the Schedule C Companies whose money was transferred to Rose & Thistle. The report does not state where the money came from. The same can be said for all of the Schedule C Companies that the applicants seek a judgment against for knowing receipt of trust funds. Moreover, the schedule was as of a point in time and whether the balance changed over time is not known as no analysis was done.

[58] What happened to the money transferred to the Schedule B and C Companies by Rose & Thistle is not in evidence. On the hearing before Brown J., the applicants were able to establish that Dr. Bernstein's funds went into several Schedule C Properties and a constructive trust was ordered in favour of the applicants in respect of those properties. No constructive trust was ordered with respect to the property of the Schedule C Companies that the applicants now seek a judgment against, which I take to be recognition that the applicants did not have evidence that their money went into those properties. In paragraph 13 of his formal judgment of August 12, 2014, Brown J. ordered that the applicants were permitted to trace funds provided by the applicants into and through the accounts of the Schedule B Companies into the Schedule C

Companies. However the applicants did not undertake any such tracing. The applicants have not established that it was the applicants' money that was received by the Schedule C Companies in question.

[59] In light of the way in which Ms. Walton transferred money around, I could not without a tracing analysis hold that Dr. Bernstein's money ended up in the Schedule C Companies against which the applicants now seek a judgment.

DeJong claims of a constructive trust over Schedule C Companies properties

[60] Christine DeJong Medicine Professional Corporation ("DeJong") makes a constructive trust claim with respect to four properties owned by Schedule C Companies. Investments or loans were made to several Schedule C Companies by Christine DeJong and her husband of approximately $4 million.

[61] The basis for a constructive trust based on unjust enrichment was discussed by Brown J. in his decision at para. 258 to 260. He summarized the need to establish that the funds wrongfully acquired by unjust enrichment were used for the property over which a constructive trust is sought in para. 258, which in part stated:

> **258** The constructive trust is a remedial device available where an unjust enrichment has occurred and also as a remedy for oppressive conduct. 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".

[62] Thus in order for a constructive trust based on unjust enrichment, DeJong must demonstrate a link or causal connection between its contributions and the acquisition, preservation, maintenance or improvement of the disputed property.

[63] However, a constructive trust remedy is not restricted to a remedy for unjust enrichment. In *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 McLachlin J. (as she then was) made clear that the remedy is not restricted to claims of unjust enrichment and is available to cases in which constructive remedies were available under English law, including cases of a breach of fiduciary obligations. She stated in part:

> **16** The appellants argue that this Court has adopted a view of constructive trust based exclusively on unjust enrichment in cases such as *Pettkus v. Becker*, [1980] 2 S.C.R. 834. Therefore, they argue, a constructive trust cannot be imposed in cases like this where the plaintiff can demonstrate no deprivation and corresponding enrichment of the defendant.
>
> **17** The history of the law of constructive trust does not support this view. Rather, it suggests that the constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain….
>
> **19** The situations in which a constructive trust was recognized in England include constructive trusts arising on breach of a fiduciary relationship,…
>
> **25** I conclude that the law of constructive trust in the common law provinces of Canada embraces the situations in which English courts of equity traditionally found a constructive trust as well as the situations of unjust enrichment recognized in recent Canadian jurisprudence.

[64] I will deal with each property in issue.

(a) United Empire Lands Ltd.

[65] The investment agreement signed by DeJong with the Waltons dated February, 2013 provided that DeJong and the Waltons would each possess 50% of the shares of United Empire Lands Ltd. ("UEL"). It stated that DeJong had already paid $716,906 into the company. The total contribution required by each side was $992,750. DeJong paid that total amount but the Waltons paid nothing.

[66] Funds totalling $706,850 were transferred out of UEL to the Rose & Thistle account between January 28 and 31, 2013.

[67] On March 11, 2013 UEL closed the purchase of the UEL property at 3270 American Drive. Brown J. held that $1,032,000 came from the Rose & Thistle account to purchase the property. He accepted the analysis of the Inspector that this money came from money invested by the applicants in West Mall Holdings, a Schedule B Company, and held that the applicants were entitled to a constructive trust over the 3270 American Drive property for $1,032,000.

[68] It was argued based on the Froese report filed by the Waltons that $706,850 of the funds in the UEL account paid by DeJong were transferred to Rose & Thistle and that these funds were being repaid to UEL through the $1,032,000 transfer from Rose & Thistle to UEL. Brown J. did not accept the Froese report conclusion that the $1,032,000 from Rose & Thistle was in part a repayment of funds advanced by DeJong to UEL and concluded that the $1,032,000 was from Dr. Bernstein's funds invested in West Mall Holdings.

[69] The purchase price for the property was $6.7 million, financed by mortgages of $5.67 million and $1.032 million from Rose & Thistle, which was held to be Dr. Bernstein's money. DeJong invested a total of $992,750. It is known that $706,850 was transferred to Rose & Thistle. $10,000 was used as a deposit on the purchase of the property according to the report of Mr. Ken Froese of May 23, 2014. There has been no evidence led as to what happened to the balance of the investment made by DeJong, being $275,900, but it is clear that it was not put into the property as required by the agreement of DeJong with the Waltons.

[70] The only DeJong money that ended up in the property was the $10,000 deposit. This can be no basis for a constructive trust based on unjust enrichment because there was no unjust enrichment with respect to that deposit. That money was used as agreed. Thus DeJong is not entitled to a constructive trust based on unjust enrichment.

[71] However, there is no doubt that the Waltons owed fiduciary duties to DeJong to apply the money as agreed and not to transfer money out of UEL to Rose & Thistle, just the same as the fiduciary duties owed by the Waltons to Dr. Bernstein and his companies were breached. The Waltons were directors and Ms. Walton managed the day to day affairs of the business. The investment of DeJong was under the complete control of the Waltons. They owed a duty to act in the best interests of the company, which included a duty to invest as required by the agreement made with DeJong.

[72] The Waltons breached those fiduciary duties by transferring to Rose & Thistle money invested by DeJong in UEL. Only $10,000 invested by DeJong in UEL was invested in the property. The Waltons further breached their fiduciary duty to DeJong to properly manage the business. They failed in this by using Dr. Bernstein's money to purchase 3270 American Drive, which has led to Dr. Bernstein having a constructive trust against the property, instead of investing their own money which they were obliged to do. Moreover, the Waltons did not provide all of the capital required under the agreement with the Waltons. Ms. DeJong swears, which I accept, that in response to enquiries, Norma Walton stated her money was not required to match DeJong's capital because of a second position vendor take-back mortgage in the amount of $670,000. That makes no sense as even if there was a vendor take-back mortgage, that would not amount to any capital provided by the Waltons which they had agreed to provide. Failure to provide the funds as agreed was a breach of their fiduciary obligations to act in the best interests of UEL. Had the Waltons acted properly under the agreement, including keeping proper records, there would have been no reason to appoint a Manager.

[73] In my view the breach of fiduciary duties by the Waltons has led to the loss by DeJong of its investment of $992,750. The Manager holds $1,801,543.60 from the sale of the 3270 American Drive property. Brown J. has already ordered a constructive trust in favour of Dr. Bernstein's company of $1,032,000. The appropriate remedy for DeJong is to grant it a

constructive trust against the property and its proceeds for the balance of the proceeds of sale after taking into account the constructive trust in favour of Dr. Bernstein's company, being $769,543.60 plus accrued interest, and I so order.

[74] As the Waltons invested nothing in this project, they are not entitled to any interest in UEL and the shares issued to them are cancelled.

(b) 324 Prince Edward Drive

[75] DeJong entered into an agreement with the Waltons dated September , 2013 to deal with the purchase of 324 Prince Edward Drive to be put in the name of Prince Edward Properties Ltd. The agreement provided that DeJong would acquire 100 shares in the company and the Waltons would acquire 100 shares. The agreement provided that each of the Waltons and DeJong were to provide $816,019 to the corporation as a shareholder loan for the purpose of purchasing, renovating, completing leasehold improvements and occupying the property. On September 10, 2013, DeJong advanced $816,019 to the corporation which was put in its bank account.

[76] The sale closed on September 13, 2014. The purchase price was $1,850,000 with a vendor take-back mortgage of $1,480,000. $370,000 in cash was required to complete the purchase.

[77] The bank records indicate that $100 was deposited on September 3, 2013 from Rose & Thistle leaving a balance that day of $95. The only deposit after that before the closing was the deposit from DeJong on September 10, 2013 of $816,019. $346,314.89 was wired on September 12, 2013 to the real estate solicitors acting on the purchase for the closing of the property. Where the other funds came from to close is not in the record. However, on September 11, 2013 $309,000 of the funds deposited by DeJong were transferred out to Rose & Thistle's account and it is possible that the balance to close came from these funds. The balance of the deposit from DeJong was transferred out of the account to Rose & Thistle four days after the closing on September 17, 2013.

[78] Although the agreement between the Waltons and DeJong stated that the Waltons had provided the initial $80,000 deposit, that clearly could not have taken place as $346,314.89 of the cash portion of $370,000 came from DeJong. The bank record does not disclose any deposit of that amount to the account. The agreement also stated that the Waltons had provided "due diligence fees of approximately $60,000 related to the purchase of the Property". There is nothing in the record to show what due diligence was done. The agreement provided that the Waltons would provide the remaining $676,019 in a timely manner. The bank records indicate there were some deposits made to the account from time to time before the property was sold, but nowhere near what the Waltons agreed to provide, and there is no evidence that those deposits were made from funds other than the money invested by DeJong that was improperly transferred to Rose & Thistle.

[79] It is apparent that $346,314.89 of the money invested by DeJong in Prince Edward Properties Ltd. was used to purchase the property at 324 Prince Edward Drive. I do not see this as unjust enrichment of the Waltons as the money was used to purchase the property that the agreement between the Waltons and DeJong contemplated.

[80] However, like the other Schedule C properties in which DeJong invested money, the Waltons owed a fiduciary duty to DeJong. They breached their duties by transferring to Rose & Thistle $507,019 of the loan made by DeJong to the corporation. This was done immediately after the funds were advanced by DeJong and was fraudulent, just as the actions of the Waltons were with respect to Dr. Bernstein. The Waltons also failed to provide financing as required in breach of their fiduciary obligations to act in the best interests of the company. Had the Waltons acted properly under the agreement, including keeping proper records, there would have been no reason to appoint a Manager.

[81] In my view the breach of fiduciary duties by the Waltons has led to the loss by DeJong of its investment. The Manager has accepted the loss of DeJong filed in the claims process of $741,501.97. There are proceeds from the sale of the property of $640,812.73. The appropriate remedy for DeJong is to grant it a constructive trust against the property and its proceeds, being $640,812.73 plus accrued interest, and I so order.

[82] Had I not held that DeJong was entitled to a constructive trust against the property, I would have declared that the $741,501.97 invested by DeJong was by way of a shareholder loan, as provided for in the agreement with the Waltons and that DeJong would be entitled to be a creditor for that amount against the corporation. I would not accept the argument made on behalf of the applicants that the investment was an equity investment for the shares of the corporation. The agreement said otherwise and there is no basis to change that.

[83] There is no evidence that the Waltons invested anything in this property except perhaps $100 and the shares issued to them in Prince Edward Properties Ltd. are cancelled.

(c) 777 St. Clarens Ave./260 Emerson Ave.

[84] On 18 November, 2013 the Waltons and DeJong entered into an agreement with the Waltons to deal with the purchase of 777 St. Clarens Ave./260 Emerson Ave. to be put in the names of St. Clarens Holdings Limited and Emerson Developments Ltd. The agreement provided that DeJong would acquire 100 shares in each company and the Waltons would acquire the 100 shares in each company. The agreement provided that each of the Waltons and DeJong were to provide $665,307 to the companies as a shareholder loan for the purpose of purchasing, renovating, completing leasehold improvements and occupying the property. It provided that the Waltons had paid a deposit of $80,000 “along with due diligence fees of approximately $50,000 related to the purchase of the property” and that the Waltons would provide the remaining $535,307 in a timely manner. On November 19, 2013, DeJong advanced $665,000 to the bank account of St. Clarens Holdings Limited.

[85] The agreement to purchase the properties was made on July 20, 2013 by St. Clarens Holdings Limited. The purchase price was $1,665,000 with a vendor take-back mortgage of $1,332,000. The purchase closed on November 26, 2013. It appears from the reporting letter from the solicitors for the purchaser that a deposit of $80,000 was made by the Waltons. The balance on closing was $$252,397.91.

[86] In fact the deposit was not made at the time of the agreement by St. Clarens Holdings Limited. It was made on a prior purchase agreement by a numbered company of the Waltons

which was assigned to Rose & Thistle in trust for a company to be incorporated and for which the Waltons' numbered company charged an assignment fee of $225,000. A Capital Required document in connection with the purchase referred to a "Purchaser agency fee" of $225,000 as a purchase cost. It is not in the record when that document was provided to DeJong, but it did not disclose that the money was being paid to a Walton numbered company. The $665,000 advanced by DeJong as a shareholder loan covered 50% of the $225,000 to be paid to the Waltons. Ms. DeJong swore in her affidavit that the fee to the Waltons was never discussed with her nor disclosed. She was not cross-examined on her affidavit and I accept that evidence. The payment to the Waltons of the $225,000 was clearly deceitful and in breach of the fiduciary duties owed by them to DeJong.

[87] There is no evidence that apart from the $80,000 deposit that the Waltons made any further payments on the project. The two properties were sold by the mortgagee, after which the Manager was provided the balance of the funds. The mortgage was to be serviced by the loan made by DeJong and to be made by the Waltons, and as DeJong made its loan as agreed, the failure of the mortgage to be serviced was clearly the fault of the Waltons in failing to properly act in the best interests of the corporations.

[88] Like the other Schedule C Companies in which DeJong invested money, the Waltons owed a fiduciary duty to DeJong. They breached their duties by having DeJong pay 50% of an undisclosed assignment fee. They also breached their fiduciary duty to act in the best interest of the company by failing to provide financing as required. DeJong has lost its shareholder loan of $665,000, and the Manager has accepted that as a valid claim against the two companies. Had the Waltons acted properly under the agreement there would have been no reason for the mortgagee to sell the properties as the carrying costs of the mortgage were provided for in the Capital Required calculations.

[89] In my view the breach of fiduciary duties by the Waltons has led to the loss by DeJong of its investment of $665,000. The Manager holds $200,533.77 from the proceeds of sale of the Emerson property and $464,195.89 from the sale of the St. Clarens property, for a total of $664,729.66. The appropriate remedy for DeJong is to grant it a constructive trust against the properties and their proceeds, being $664,729.66 plus accrued interest, and I so order.

[90] Had I not held that DeJong was entitled to a constructive trust against the two properties, I would have declared that the $665,000 invested by DeJong was by way of a shareholder loan, as provided for in the agreement with the Waltons and that DeJong would be entitled to be a creditor for that amount against the two companies. I would not accept the argument made on behalf of the applicants that the investment was an equity investment for the shares of the corporations. The agreement said otherwise and there is no basis to change that.

[91] Regarding the shares held by the Waltons in the two corporations St. Clarens Holdings Limited and Emerson Developments Ltd., the evidence is that the Waltons paid a deposit of $80,000 and thus their shares should not be cancelled in their entirety. I would limit the share of the Waltons to the percentage of the deposit to the contributions they were required to make, which is what Brown J. did regarding the Waltons' shareholdings in the schedule B corporations. That percentage as I make it is approximately 12% and so I order that 88 of the 100 shares acquired by the Waltons in each corporation be cancelled.

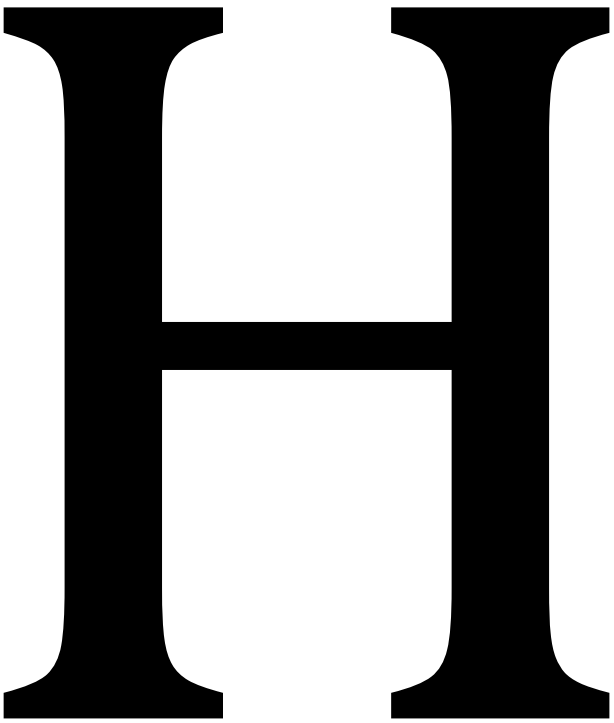
Conclusion

[92] The applicants are entitled to the relief against the respondents other than the Schedule C Companies as indicated in this decision. They are not entitled to any of the relief claimed against the Schedule C Companies. DeJong is entitled to the relief against the Schedule C Companies as indicated in this decision. The counter-application of the Waltons, Rose & Thistle and Eglington Castle Investments Ltd. is struck without leave to amend.

[93] The applicants are entitled to their costs against the respondents other than the Schedule C Companies. DeJong, the Condos and the Levytams are entitled to their costs against the applicants. If costs are not agreed, brief written submissions not exceeding 10 pages supporting the cost claims along with proper cost outlines may be made within two weeks and brief written responding cost submissions not exceeding 10 pages may be made within a further two weeks.

Newbould J.

Date: September 23, 2016



COURT OF APPEAL FOR ONTARIO

CITATION: DBDC Spadina Ltd. v. Walton, 2018 ONCA 60
DATE: 20180125
DOCKET: C62822

Cronk, Blair and van Rensburg JJ.A.

BETWEEN

DBDC Spadina Ltd., and
Those corporations listed on Schedule A hereto

Applicants (Appellants)

and

Norma Walton, Ronauld Walton, The Rose & Thistle Group Ltd., and Eglinton Castle Inc. and those corporations listed on Schedule C hereto

Respondents (Respondents)

and

Those corporations listed on Schedule B hereto,
to be bound by the result

and

Such other respondents from time to time as are on notice of these proceedings and are necessary to effect the relief sought

AND BETWEEN

Christine DeJong Medicine Professional Corporation

Applicant (Respondent)

and

Norma Walton, Ronauld Walton, and The Rose & Thistle Group Ltd., Prince Edward Properties Ltd., St. Clarens Holdings Ltd., and Emerson Developments Ltd.

Respondents (Respondents)

Peter H. Griffin and Shara N. Roy, for the appellants, DBDC Spadina Ltd. and those corporations listed on Schedule A hereto

Rosemary A. Fisher and B. Sarsh, for the respondents, Christine DeJong Medicine Professional Corporation and Dennis and Peggy Condos

Mark Dunn, for Schonfeld Inc., Inspector/Manager

A. Blumenfeld, for the respondents, Gideon and Irene Levytam

Heard: June 2, 2017

On appeal from the Judgments and Orders of Justice Frank Newbould of the Superior Court of Justice, dated September 23, 2016, with reasons reported at 2016 ONSC 6018, 40 C.B.R. (6th) 230, and the costs order dated November 28, 2016, with reasons reported at 2016 ONSC 7011.

R.A. Blair J.A.:

BACKGROUND

[1] This appeal arises out of a complex multi-million dollar commercial real estate fraud perpetrated by Norma and Ronauld Walton over the course of several years.

[2] The appellants and the respondents are all victims of the fraud. Underlying the issues on appeal is a contest between them over who ranks in priority to whom in claiming against the proceeds remaining from the sale of certain properties acquired as part of the fraudulent scheme.

[3] In substance, the fraudulent scheme worked in this fashion: the Waltons convinced the appellants and respondents, and others, to invest “equally” with them in equal-shareholder, specific-project corporations that would acquire, hold,

renovate and maintain commercial real estate properties in the Toronto area. Instead of investing any significant funds of their own, however, the Waltons moved their investors' monies in and out of the numerous corporations, through their own "clearing house" – Rose & Thistle Group Ltd. – in a shell game designed to avoid their obligations and to further their own personal interests.

[4] The appellant corporations, known as the DBDC Applicants, are owned and controlled by Dr. Stanley K. Bernstein. Through them, Dr. Bernstein invested approximately $111 million with the Waltons, in 31 projects, between September 2010 and June 2013. In each instance, the individual DBDC applicant entered into an equal shareholding agreement with the Waltons with respect to the specific-project corporation that was to acquire and hold the particular property. The corporations into which the DBDC Applicants' monies were to be invested are known as the "Schedule B Companies". These investments took the form of equity (approximately $2.6 million), shareholder loans ($78.5 million) and mortgages ($29.5 million).[1]

[5] The respondent, Christine DeJong Medicine Professional Corporation ("DeJong"), is owned and controlled by Dr. Christine DeJong. She and her husband, Michael DeJong, invested approximately $4 million with the Waltons – Dr. DeJong through DeJong, and Michael through his own corporations. Those

[1] The mortgages are not directly at issue in these proceedings.

investments were made in equal shareholder arrangements in substantially the same form as those entered into between the Waltons and the DBDC Applicants. The specific-project corporations established for the purposes of the DeJong investments are included in the group of companies known in the proceedings as the “Schedule C Companies”. The properties acquired by the Schedule C Companies are collectively known as the “Schedule C Properties”.

[6] The individual respondents, Dennis and Peggy Condos, and Gideon and Irene Levytam, made similar, but smaller investments in the same fashion. Their interests are also in relation to certain of the Schedule C Companies and the Schedule C Properties those companies acquired. The Condos’ claim is in relation to a $160,000 investment in one company. The Levytams claim a net investment of $337,000. Prior to the oral hearing of the appeal, the DBDC Applicants and the Levytams settled and the Levytams did not participate further in the appeal.

[7] None of the agreements contemplated third-party investors in the projects. None permitted the investors’ monies to be used for anything other than the purposes of the specific-project investment.

[8] The decision under appeal involves parts of Judgments and Orders made by Newbould J. on September 23, 2016. It comes at the back end of a lengthy and complex oppression remedy application commenced by the DBDC Applicants against the Waltons and Rose & Thistle, in October 2013, pursuant to

Ontario's *Business Corporations Act*, R.S.O. 1990, c. B. 16. Various Schedule C Companies were subsequently added as respondents.

Appointment of the Inspector

[9] In an endorsement dated October 7, 2013, Newbould J. concluded that the Waltons' conduct was oppressive and unfairly prejudicial to the DBDC Applicants' interests in the Schedule B Companies. He appointed Schonfeld Inc. as an Inspector over the Schedule B Companies.

Appointment of the Inspector as Manager

[10] After an initial review by the Inspector of the affairs of the Schedule B Companies and the conduct of the Waltons, Newbould J. confirmed his view that the Waltons' conduct had been oppressive, and on November 5, 2013 appointed Schonfeld Inc. as Manager of the Schedule B Companies (and the Schedule B Properties held by them), thereby taking control of the Schedule B Companies away from the Waltons.

The Proceedings Before D.M. Brown J.

[11] In July, 2014, after further review by the Inspector/Manager – referred to in more detail below – the DBDC Applicants applied to D.M. Brown J. (as he then was), at a hearing in the same proceedings, for various forms of relief. The range of relief claimed evolved over the course of the hearing. As Brown J. noted, this flowed from the clearer, but still incomplete, picture emerging from the expanded

scope of the Inspector's role following the October 2013 Order and its subsequent investigations (at paras. 213-217). By the end of the hearing – as outlined by Brown J. in his reasons (at paras. 214 and 240-243) – the relief sought by the DBDC Applicants included the following:

> (a) declarations that the DBDC Applicants were entitled to constructive trusts where their funds could be traced directly into the purchase of, or the discharge of an encumbrance, with respect to a Schedule C Property;
>
> (b) damages as against the Waltons personally for civil fraud and fraudulent misrepresentation;
>
> (c) damages against the Schedule C Companies, jointly and severally, for all losses suffered by the DBDC Applicants in respect of funds advanced to the Schedule B Companies; and
>
> (d) damages in the amount of $23.6 million against the Schedule C Companies, jointly and severally, for net proceeds diverted from the Schedule B Companies and received by the Schedule C Companies.

[12] The application was opposed by the Waltons.

[13] At the same time, DeJong (and other related companies controlled by the DeJongs) brought a cross-motion asking for the approval of a settlement it had reached with the Waltons, and opposing the DBDC Applicants' constructive trust claim with respect to 3270 American Drive, a Schedule C Property owned by the

Schedule C Company, United Empire Lands Ltd., in which DeJong had invested. Numerous Schedule C investors, including Dr. DeJong, Dennis Condos and the Levytams, filed affidavits in support of the Waltons' position and in opposition to the Applicants' claims.

[14] On August 12, 2014, Brown J. released his decision. He gave full and detailed reasons in the course of which he made findings of fact almost universally against the Waltons and in favour of the DBDC Applicants and Dr. Bernstein. In the end, he concluded, at para. 15, that:

> [T]he Waltons did not use the funds advanced to them by the [DBDC] 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. [Emphasis added.]

[15] It bears repeating that the Schedule C Companies were the specific-project corporations with respect to which the Waltons and other investors – including DeJong, the Condos and the Levytams – had entered into equal shareholder agreements in substantially the same form as those entered into between the DBDC Applicants and the Waltons with respect to the Schedule B Companies.

[16] The Inspector gave evidence at the hearing. Brown J. accepted the Inspector's evidence with respect to the "net transfer" of funds from Schedule B

Companies to Rose & Thistle and from Rose & Thistle to Schedule C Companies, and made the following findings of fact:[2]

(i) the Waltons directed the transfer of a net $23.6 million from the Schedule B Companies' accounts to a bank account belonging to Rose & Thistle during the period from October 2010 to October 2013;

(ii) during the same period, the Waltons directed transfers of a net $25.4 million from the Rose & Thistle account to the Schedule C Companies;

(iii) in almost all cases, some of or all the amounts advanced to the Schedule B Companies by the DBDC Applicants were transferred almost immediately to the Rose & Thistle account; and

(iv) those transfers of funds from the Schedule B Companies to Rose & Thistle constituted breaches of the agreements between the DBDC Applicants and the Waltons. These agreements 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.

[2] Brown J.'s findings remain operative because they were made in the same oppression remedy proceedings involving the same parties and the same issues; he had simply postponed a decision on the matters now under appeal, which were subsequently heard by Newbould J. following Brown J.'s appointment to this Court.

[17] Ms. Walton's expert witness at the hearing had criticized the net transfer analysis as unhelpful on the ground that it presented only a "snapshot" tracing which, while accurate in itself, did not reflect the history of transfers into and out of Rose & Thistle and any Schedule C Company, and therefore lacked precision. Brown J. rejected this evidence. He concluded that condemning the Inspector's tracing analysis on this basis "amounted to nothing more than chipping away at the edges of inter-company transfers which the Waltons should never have made [in the first place]" (at para. 161).

[18] In addition to his findings respecting the "net transfer" analysis, Brown J. also found, at paras. 96 and 186-187, that:

(i) the pooling or co-mingling of funds, as described above, was a critical breach of the contractual and fiduciary obligations which the Waltons owed to the DBDC Applicants and Dr. Bernstein;

(ii) the DBDC Applicants were not aware that the Waltons were withdrawing funds from the Schedule B Companies' bank accounts for any purpose other than the costs of the relevant associated properties;

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

(iv) the Waltons deliberately did not tell the DBDC Applicants that they were using funds advanced by the Applicants for their own personal purposes and benefit and for the benefit of the Schedule C Companies which they owned or controlled; and

(v) throughout the proceedings, Norma Walton "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 the Schedule B Companies, Rose & Thistle or the Schedule C Companies" (emphasis added).

[19] In the result, Brown J.:

- awarded the DBDC Applicants constructive trusts over eight Schedule C Properties into which the DBDC Applicants could trace Schedule B funds, including the property at 3270 American Drive (which was specifically opposed by DeJong);
- appointed Schonfeld Inc. as Receiver/Manager over the Schedule C Properties and any proceeds of sale thereof, and over the bank accounts of the Schedule C Companies;
- dismissed the DeJong request for approval of the settlement with the Waltons, finding in fact that the proposed settlement constituted an improper and unfair attempt to prefer DeJong over other creditors of the Waltons, including Dr. Bernstein;
- granted the DBDC Applicants a tracing order permitting them to trace their funds into and out of the various Schedule B Companies' accounts, the Rose & Thistle accounts, the Waltons' personal accounts, and others, and into the Schedule C Companies owning the Schedule C Properties;

- deferred the issues of the quantum of the DBDC Applicants' claim for damages as against the Waltons, and the DBDC Applicants' $22.6 million claim against the Waltons in respect of the Schedule C Companies for unjust enrichment, to be determined at a later time; and

- left undetermined the DBDC Applicants' claims for joint and several damages against the Schedule C Companies.

[20] Appeals by Ms. Walton and DeJong from Brown J.'s Judgment and Orders were dismissed by this Court on September 17, 2015.

[21] This brings us to the proceedings leading to the present appeal.

The Decision Under Appeal

[22] On June 3, 2016 Newbould J. (the "Application Judge")[3] heard the motion and application for deferred relief, as well as the claims for joint and several damages against the Listed Schedule C Companies, sought by the DBDC Applicants. The relief requested was framed at this point as: (i) a claim for damages against the Waltons personally, in the amount of $66,951,021.85, plus interest; and (ii) a claim for damages in the amount of $22,680,852 as against certain of the Schedule C Companies (the "Listed Schedule C Companies"), on a joint and several basis, based on the concepts of "knowing assistance" and "knowing receipt" in relation to a breach of fiduciary duty.

[3] Brown J. had been appointed to this Court in the interim.

[23] At the same time, the Application Judge heard: (i) a counter-application by the Waltons claiming damages as against Dr. Bernstein personally for diminishing the value of their equity in the Schedule B and C Companies by bringing the Inspector and Manager/Receiver motion; (ii) an application by DeJong for constructive trust claims in relation to certain Schedule C Companies and Properties (or the proceeds of sale of those properties) respecting which DeJong had made investments in the form of equity or shareholder loans; and (iii) an application by the Condos and Levytams for entitlement to sale proceeds as investors in one of the Schedule C Companies (Cecil Lighthouse Ltd.).

[24] On September 23, 2016, the Application Judge released the decision under appeal. He:

- awarded the DBDC Applicants damages in the amount of $66,951,021.85, plus interest, as against the Waltons personally, for fraudulent misrepresentation, deceit (civil fraud), and breach of fiduciary duty, and declared that the damage award would survive bankruptcy;
- dismissed the DBDC Applicants' claim for joint and several damages against the Listed Schedule C Companies, concluding that Norma Walton was not the controlling mind of the Listed Schedule C Companies and therefore, that they could not be liable for knowing assistance or knowing receipt arising out of her breach of fiduciary duty;
- granted DeJong constructive trusts in the aggregate amount of $2,176,045.57 against four properties owned by four of the Listed Schedule C Companies into which the DeJongs had invested;

- awarded costs against the DBDC Applicants in favour of DeJong, the Condos and the Levytams, further particularized in a Costs Endorsement dated November 28, 2016; and
- dismissed the Waltons' counter-application for damages.[4]

[25] The Application Judge did not determine the claims of the Condos or the Levytams, and he did not deal with the DBDC Applicants' claim for unjust enrichment as such.

[26] I have read the thorough dissenting reasons of my colleague, van Rensburg J.A., and will address her concerns from time to time throughout these reasons. I pause here, however, to touch briefly on one aspect of her reasons.

[27] My colleague devotes considerable time to developing what she characterizes as the DBDC Applicants' "late-breaking claims for damages against the Listed Schedule C Companies". As I understand it, she does so to emphasize that the record on which liability for damages is sought to be established was created in the context of oppression remedy proceedings in which the Listed Schedule C Companies were not parties and that there are no new or additional facts to support their participation in Ms. Walton's breach of fiduciary duty.

[28] Respectfully, for purposes of resolving the appeal, I do not think much turns on when or how the knowing receipt and knowing assistance claims arrived

[4] The Waltons filed a Notice of Appeal from the orders of the Application Judge. Their appeal was dismissed for delay on March 20, 2017.

to be dealt with by the Application Judge, and I do not propose to examine the record on this point in any more detail than I have done above. Suffice it to say, I take a different view of it than my colleague does, not only with regard to the extent of DeJong's participation in the proceedings prior to the hearing before the Application Judge, but also with respect to what issues were before Brown J. and either deferred or not dealt with by him and with respect to the need for the Listed Schedule C Companies to have been made parties (which Brown J. rejected) before they were.

[29] These differences have little significance for the outcome of the appeal, in my opinion. No one took the position before the Application Judge, or before this Court, that the DBDC Applicants' claim for joint and several damages against the Listed Schedule C Companies, based on knowing assistance and knowing receipt, was not properly raised at the hearing before him.[5] Nor has it been asserted that the evidence adduced before Brown J. and the findings of fact made by him could not be relied upon at the hearing. Indeed, the Application Judge himself relied upon them to a great extent.

[30] More importantly, much of what underlies our disagreement with respect to the outcome of the appeal are the differing approaches we take to the utility and

[5] These same observations apply with respect to the counter-application of DeJong for constructive trusts, which was asserted for the first time before the Application Judge.

sufficiency of what the net transfer analysis demonstrates and does not demonstrate, not the context in which it was developed.

[31] The net transfer analysis remains evidence for what it is. No one disputes it established a net transfer of $23.5 million out of the Schedule B Companies (both Brown J. and the Application Judge made that finding). I conclude this evidence is valuable in assessing the Listed Schedule C Companies' knowing assistance in Ms. Walton's breach of fiduciary duty and in establishing damages. My colleague takes a different view. I agree that the net transfer analysis was not intended to, and does not, establish the flow of Schedule B Companies' funds into any particular Listed Schedule C Company account.[6] My colleague concludes this is fatal to the knowing assistance claim. For the reasons set out below, I disagree.

[32] As I see it, the resolution of these differences does not depend on the history of the evolution of the DBDC Applicants' claims.

The Schedule C Companies at Issue on Appeal

[33] In referring to the "Listed Schedule C Companies" above, I am referring to a remaining subset of the Schedule C Companies against which the DBDC Applicants continue to pursue their claim for joint and several damages. The list includes some of, but not all, the Schedule C Companies that own Schedule C

[6] Other than those relating to Schedule C Properties against which constructive trusts were ordered.

Properties against which Brown J. awarded constructive trusts in favour of the DBDC Applicants. It also includes the Schedule C Companies that acquired the four Schedule C Properties over which the Application Judge granted constructive trusts in favour of DeJong. For ease of reference, I will refer to those four Schedule C Companies collectively, where appropriate, as “the DeJong Companies”.

[34] The Listed Schedule C Companies, and the Schedule C Properties they hold, are set out on Annexe A to these reasons.

THE ISSUES ON APPEAL

[35] The issues to be determined on the appeal are whether the Application Judge erred:

(a) in holding that the Listed Schedule C Companies are not jointly and severally liable to the DBDC Applicants on the basis of knowing assistance and/or knowing receipt;

(b) in granting DeJong constructive trusts over the Listed Schedule C Properties in question; and

(c) in awarding costs against the DBDC Applicants.

[36] For the reasons that follow, I would allow the appeal.

ANALYSIS

A. KNOWING RECEIPT

[37] A stranger to a trust or fiduciary relationship may be liable under the doctrine of "knowing receipt" if the stranger receives trust property in his or her own personal capacity with constructive knowledge of the breach of trust or fiduciary duty. It is a recipient-based claim arising under the law of restitution: see *Citadel General Assurance Co. v. Lloyds Bank Canada,* [1997] 3 S.C.R. 805, at para. 48.

[38] I agree with the Application Judge that a claim for knowing receipt cannot be made out here. The DBDC Applicants chose not to pursue their rights under the tracing order granted by Brown J. They are not able to – nor do they seek to – demonstrate the receipt of any particular funds by any particular Schedule C Company other than the funds with respect to which Brown J. previously granted constructive trusts.

[39] Accordingly, I will not conduct a separate analysis of the knowing receipt claim, but will refer to it, where appropriate, in the discussion about the claim for "knowing assistance".

B. KNOWING ASSISTANCE

(1) General Considerations

[40] A stranger to a trust or fiduciary obligation may also be liable in equity on the basis of "knowing assistance" where the stranger, with actual knowledge, participates in or assists a defaulting trustee or fiduciary in a fraudulent and dishonest scheme. The rationale underlying this category of liability is that actual knowledge of and assistance in the fraudulent conduct is sufficient to "bind the stranger's conscience so as to give rise to personal liability": see *Air Canada v. M & L Travel Ltd*., [1993] 3 S.C.R. 787, at p. 812. Fraudulent and dishonest conduct for these purposes means the taking of a risk by the trustee or fiduciary to the prejudice of the beneficiary where the risk is known to be one which there is no right to take: see *Air Canada*, at pp. 815, 826.[7]

[41] Knowing assistance and knowing receipt are both doctrines arising in equity. However, there is a fundamental difference between the two types of liability. Knowing receipt liability is restitution-based and falls within the law of restitution; its essence is unjust enrichment. Knowing assistance, however – sometimes referred to as "accessory liability" – is fault-based and is concerned about correcting matters related to the furtherance of fraud: see *Gold v.*

[7] Other Canadian and British authorities in which the principles relating to "knowing assistance" and "knowing receipt" are outlined and developed include the following: *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, at paras. 30-36, per Iacobucci J. (dissenting, but not on this point); *Citadel General*; *Barnes v. Addy* (1874), L.R. 9 Ch. App. 244; *Agip (Africa) Ltd. v. Jackson*, [1992] 4 All E.R. 451 (C.A.); *El Ajou v. Dollar Land Holdings plc,* (1993), [1994] 2 All E.R. 685 (C.A.).

Rosenberg, at para. 41; *Citadel General*, at paras. 46-48. I shall return to this distinction later in these reasons.

[42] The criteria for establishing a claim for knowing assistance in the breach of a fiduciary duty were summarized by this Court in *Harris v. Leikin Group Inc.*, 2011 ONCA 790, at para. 8, and again in *Enbridge Gas Distribution Inc. v. Marinaccio*, 2012 ONCA 650, 355 D.L.R. (4th) 333, at para. 23. They are the following:

(i) there must be a fiduciary duty;

(ii) the fiduciary – in this case, Ms. Walton – must have breached that duty fraudulently and dishonestly;

(iii) the stranger to the fiduciary relationship – in this case, the Listed Schedule C Companies – must have had actual knowledge of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct; and

(iv) the stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct.

(2) The Issues In Applying The Criteria

[43] In determining whether the foregoing criteria have been met and whether the Listed Schedule C Companies are to be held jointly and severally liable for damages arising from knowing assistance in the breach by Ms. Walton of her

fiduciary duties to the DBDC Applicants, there are three overarching questions to be answered:

(i) Was Norma Walton the directing and controlling mind of the Listed Schedule C Companies for purposes of the transactions through which her fraud was perpetrated, such that her knowledge and conduct in that regard may be attributed to the Companies as their knowledge and conduct?

(ii) If the answer to that question is "yes", does it follow that the knowledge and participation requirements for knowing assistance have been met with respect to those Listed Schedule C Companies utilized by Ms. Walton in the course of perpetrating her scheme?

(iii) If the answer to the foregoing question is "yes", are the Listed Schedule C Companies nonetheless able to avoid joint and several liability in damages on the basis that knowing assistance liability, having its roots as an equitable doctrine, ought not to apply here?

[44] My answer to the first and second questions is "Yes" and to the third is "No". I say that for the following reasons.

(3) Application of the Criteria

(a) Fiduciary Considerations

[45] As the Application Judge concluded, there is no issue in the present case that Ms. Walton owed a fiduciary duty to the DBDC Applicants and Dr. Bernstein, or that she fraudulently breached that duty. At para. 47 of his reasons, he found that:

> There is no question that Ms. Walton knowingly breached her fiduciary obligations to the [DBDC Applicants] and that she knowingly took a risk with the money belonging to the Schedule B Companies that she had no right to take. Her activity in so doing was fraudulent and dishonest.

[46] No one contests this finding. Indeed, at the hearing before the Application Judge, the Schedule C investors all relied upon the same submission, and the same type of relationship on their part. DeJong continues to do so in asserting its claim for a constructive trust in the Listed Schedule C Properties that were the subject of its cross-motion.

[47] The Application Judge's finding is well-supported on the evidence. Ms. Walton owed a fiduciary duty to Dr. Bernstein and the DBDC Applicants arising out of their contractual relationship, viewed in the context of their overall relationship and the manner in which the co-investments strategy was to be carried out.

[48] A contractual relationship does not necessarily give rise to fiduciary duties, obviously, but it may, depending on the nature of the relationship and the overall relationship between the parties. In *Korea Data Systems (USA), Inc. v. Aamazing*

Technologies Inc., 2015 ONCA 465, 126 O.R. (3d) 81, at para. 74, this Court reiterated the criteria for a fiduciary relationship, as set out by the Supreme Court of Canada in *Frame v. Smith*, [1987] 2 S.C.R. 99, at p. 136, *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 462, and *Galambos v. Perez,* 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 66: (i) the fiduciary has scope for the exercise of some discretion or power; (ii) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; (iii) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power; and (iv) there exists an express or implied undertaking by the fiduciary to act in accordance with the duty of loyalty reposed in him or her.

[49] Here, the nature of the responsibilities and duties (and opportunities) created by the contractual structure, together with the nature of the factual relationship as it developed, put Ms. Walton in that category. It was the discretion and power left to her under the contracts that created the opportunities for her to utilize the various corporations that she *de facto* or otherwise controlled and the vulnerability of the DBDC Applicants (and the DeJongs and others) to the very things that happened.

[50] It is true that Dr. Bernstein, through the DBDC Applicants, made his contributions directly to the Schedule B Companies (for the most part) rather than handing the money over to Ms. Walton, but given the contractual and corporate structuring of the investments program, it was tantamount to doing that very

thing. As Brown J. found, at para. 161, "The [Waltons] had complete control over all of the funds."[8]

[51] The liability of the Listed Schedule C Companies – the "strangers" to the fiduciary relationship in this scenario – therefore turns on a determination of the third and fourth requirements for knowing assistance: their actual knowledge of the fiduciary relationship and the fraudulent breach, and their participation or assistance in the breach itself. The resolution of those issues depends primarily on whether Ms. Walton acted as the directing and controlling mind of the Schedule C Companies in question, such that her actions may appropriately be attributed to them for these purposes.

(b) The Application Judge's Decision

[52] The Application Judge dismissed the DBDC Applicants' claim on the basis that Ms. Walton was not the directing and controlling mind of the Listed Schedule C Companies, and accordingly that her knowledge and conduct could not be taken to be their knowledge and conduct for the purpose of the knowing assistance claim. He did not focus, therefore, on the participation element.

---

[8] In general, my colleague accepts the foregoing analysis, but suggests there are difficulties in asserting a claim through the Schedule B Companies because their losses were caused by the fraudulent actions of an insider, Ms. Walton, and that the claim could be met with an *ex turpi causa* defence: see *Livent Inc. v. Deloitte & Touche*, 2017 SCC 63, varying 2016 ONCA 11. The DBDC Applicants are the claimants, however, and their controlling and directing mind is that of Dr. Bernstein. There is no fraud on the part of Dr. Bernstein to be attributed to the DBDC Applicants. In these circumstances, there is little likelihood an *ex turpi causa* defence would arise, in my opinion. Nor was it argued.

[53] The Application Judge arrived at this decision because of the provisions in the Schedule C shareholder/investment agreements entered into between the Waltons and the Schedule C investors. Under those agreements:

(a) the Waltons and the investors were each to be 50% owners of the shares and each held 50% of the positions on the board of directors;

(b) the company into which the investments were to be made was to be used solely for the property to be purchased;

(c) the Waltons were to be responsible for the management, supervision and renovation of the property, as well as finance, bookkeeping, and "all active roles required to complete the Project";

(d) any significant decisions that differed from the project plan required more than 50% shareholder approval; and

(e) if the parties disagreed on how to manage, supervise and complete construction of the project, there was to be mandatory mediation and arbitration.

[54] The Application Judge went on to conclude, at paras. 51-53:

> Thus, in so far as the Schedule C Companies are concerned and their investors, Ms. Walton may have acted as if she was the sole decision maker in the Schedule C Companies, but she was not. She and her husband were 50% owners with the right to exercise 50% of the significant decisions. There is no evidence

> that the other investors were aware of the fraudulent conduct of Ms. Walton.
>
> …
>
> It would be contrary to the Schedule C investor agreements to hold that Ms. Walton could cause the Schedule C investors to be a party to her fraudulent dealings with Dr. Bernstein. Thus I cannot find that the Schedule C Companies are liable to the [DBDC Applicants] for knowing assistance. [Emphasis added.]

[55] Respectfully, I do not think this conclusion is sustainable either in law or in fact on this record.

[56] The error of law arises in two respects. First, the Application Judge failed to recognize that, for purposes of attribution and determining whether a person is the controlling mind and will of a corporation with respect to a particular transaction or series of transactions, the formal governing structure established by the contractual and corporate documentation is not dispositive. What matters is the factual reality of the situation and whether Norma Walton was acting "within the field of operation assigned to [her]" and "carrying out [her] assigned function[s]" with respect to the corporations at the time she used them as vehicles to perpetrate her fraud: see *Canadian Dredge and Dock Company Limited v. R.*, [1985] 1 S.C.R. 662, at pp. 685, 714.

[57] Secondly, the Application Judge mistakenly focused on whether it was appropriate to hold that "Ms. Walton could cause the Schedule C investors to be a party to her fraudulent dealings with Dr. Bernstein." Respectfully, that was not

the right question. The pertinent question was whether Ms. Walton had caused the Schedule C Companies to participate in her fraudulent dealings.

[58] The errors of fact, or of mixed fact and law, consist of the Application Judge's failure to find, on this record: (i) that Ms. Walton's position as the sole active director, officer and manager of the Listed Schedule C Companies, for all practical purposes, and her conduct and knowledge with respect to them, met the legal test for the directing and controlling mind of those companies; and (ii) that the Listed Schedule C Companies participated in the fiduciary breach. I turn to these issues now.

(c) Norma Walton Was the Directing and Controlling Mind Of the Listed Schedule C Companies For These Purposes

[59] A corporation is an abstract legal entity and has no mind or will of its own. Consequently, for civil and criminal purposes, its mind or will is found in the natural person or persons acting as the directing mind or will of the corporation: the "ego" or "alter ego" of the corporation; the centre of the corporate personality. This theory of corporate "identification" or "attribution" was first developed by Viscount Haldane L.C. in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd*., [1915] A.C. 705, at pp. 713-714, a case involving civil fault and negligence. It was explored at length in the criminal context by Estey J. in *Canadian Dredge*, at pp. 677-685, and has been found to be "equally applicable in a civil action" in Canada: *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce*

(1985), 52 O.R. (2d) 473 (C.A.), at para. 55, leave to appeal refused, [1986] S.C.C.A. No. 29.

[60] The corporate identification doctrine was aptly summarized – in the civil context, but with the acknowledgement that the alter ego doctrine applies "with no divergence of approach" in civil and criminal matters – by Nourse L.J. in *El Ajou*, at pp. 695-696:

> This doctrine, sometimes known as the alter ego doctrine, has been developed, with no divergence of approach, in both criminal and civil jurisdictions, the authorities in each being cited indifferently in the other. A company having no mind or will of its own, the need for it arises because the criminal law often requires mens rea as a constituent of the crime, and the civil law intention or knowledge as an ingredient of the cause of action or defence. In the oft-quoted words of Viscount Haldane LC in *Lennards Carrying Co. Ltd v. Asiatic Petroleum Co Ltd*:
>
> > 'My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.'
>
> The doctrine attributes to the company the mind and will of the natural person or persons who manage and control its actions. At that point, in the words of Millett J:[9] 'Their minds are its mind; their intention its intention; their knowledge its knowledge.' It is important to

[9] The judge of first instance in *El Ajou*.

> emphasize that management and control is not something to be considered generally or in the round. It is necessary to identify the natural person or persons having management and control in relation to the act or omission in point…
>
> Decided cases show that, in regard to the requisite status and authority, the formal position, as regulated by the company's articles of association, service contracts and so forth, though highly relevant, may not be decisive. Here Millett J adopted a pragmatic approach. In my view he was right to do so. [Emphasis added; citations omitted.]

[61] The Application Judge quoted from the foregoing passage in *El Ajou*. However, he stopped at the words "Their minds are its mind; their intention its intention; their knowledge its knowledge." Significantly, he appears to have overlooked the emphasis placed by the court on the importance of identifying "the natural person or persons having management and control in relation to the act or omission in point" (emphasis added), and the recognition that "the formal position", as established in the corporate and other related documentation, "though highly relevant, may not be decisive" (emphasis added). As Iacobucci J. put it in *Rhône v. Peter A.B. Widener*, [1993] 1 S.C.R. 497, at p. 521, "[t]he courts must consider who has been left with the decision-making power in a relevant sphere of corporate activity". See also *Meridian Global Fund Management Asia Ltd. v. Securities Commission*, [1995] 2 A.C. 500, at p. 507.

[62] This omission appears to have led the Application Judge to accept the "formal position" set out in the terms of the Schedule C Company shareholder

agreements as dispositive of whether Ms. Walton was the controlling and directing mind of those corporations. The passage from his reasons, cited in para. 54 above, confirms that to be the case.

[63] In reality, however, no one other than Ms. Walton did anything or made any decisions respecting the flow of funds that were utilized for the acquisition, management, construction and financing of the Schedule C Properties. That under the formal corporate documentation and shareholder/investor agreements the investors were 50% shareholders and, with the Waltons, directors of the Listed Schedule C Companies, and were contractually entitled to be consulted on "significant decisions that differed from the project plan", is of little import when in the here and now the Waltons were fraudulently ignoring their obligations to the investors and were keeping them in the dark, and when the investors – based on their trust of the Waltons and the terms of their agreements – were leaving all management matters to the Waltons.

[64] Had the Application Judge not adopted the approach that he did, he would have appreciated that, on any view of the evidence in these proceedings – including, it seems, even her own – Ms. Walton was the directing and controlling mind of the Listed Schedule C Companies for purposes of the acquisition, construction, renovation, financing and management of the Schedule C Properties held by the Schedule C Companies and, more particularly, with respect to the transfer of source funds from the investors and, in some cases, the

re-casting of corporate shareholding structuring necessary to effect those purposes. Respectfully – "adopt[ing] a pragmatic approach", to borrow the expression employed in *El Ajou* – it is not open on this record to hold that Ms. Walton was not the alter ego and directing and controlling mind of the Listed Schedule C Companies, acting within "the field of operations delegated to her" and as the "primary representative … through whom [the corporation] act[ed], sp[oke] and [thought]" for these purposes: *Canadian Dredge*, at p. 682; *R. v. St. Lawrence Corp. Ltd.,* [1969] 2 O.R. 305 (C.A.), at p. 317.

[65] Even the Application Judge's own findings reflect his acknowledgement that, as a factual matter, Ms. Walton was acting as the sole decision-maker for the corporations. He found, at para. 51, that "Ms. Walton may have acted as if she was the sole decision maker in the Schedule C Companies, but she was not." Further, he noted, at para. 71, that Ms. Walton "managed the day to day affairs of the business" and that "the investment of DeJong was under the complete control of the Waltons."

[66] That Ms. Walton not only acted as if she were the sole decision maker in the Schedule C Companies but was in fact and reality that sole decision maker, is amply founded in the record, and in the previous findings in the same proceedings made by Brown J. and by the Application Judge himself:

> (a) Ms. Walton was a director of each of the Schedule C Companies and, from all accounts, the only active director and officer.

(b) As found by Brown J. in the earlier portion of these same proceedings:

> (i) The Schedule C Companies were owned and controlled by the Waltons;
>
> (ii) Norma Walton 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 the Schedule B companies, Rose & Thistle or the Schedule C Companies [emphasis added];
>
> (iii) Neither Ronauld Walton nor the Chief Financial Officer of Rose & Thistle had come forward to say 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 (from which he inferred that they were not); and
>
> (iv) Ms. Walton "simply did as she saw fit irrespective of her legal obligations" and "ignored the contractual language that bound her".

(c) The shareholder agreements respecting the Schedule B Companies (in which the DBDC Applicants were involved) and the Schedule C Companies (in which the Respondents were involved) all provided that the Waltons were to be responsible for the management, supervision and renovation of the projects.

(d) Ms. Walton deposed before Brown J. that she was managing the jointly-owned portfolio of the companies, and that she used Rose & Thistle "as a clearing house account to smooth cash flow across the portfolio".

While the specific reference to "the jointly-owned portfolio of companies" was to the Schedule B Companies in which the Waltons and Dr. Bernstein each held a 50% interest, Ms. Walton also acknowledged that the funds Dr. Bernstein was advancing to the

> Schedule B Companies were being pooled amongst those companies, then transferred to Rose & Thistle and also to the Schedule C Companies.
>
> The Schedule C investors – including the DeJongs, the Condos and the Levytams – were unaware this was occurring and did not provide any direction or input in these actions.
>
> (e) The Application Judge himself accepted the findings of Brown J., including the finding that in many cases the funds invested by the DBDC Applicants had been transferred to the Schedule C Companies and that the Schedule C Companies were "controlled" by the Waltons.
>
> (f) The Application Judge noted that he could not determine into which companies Schedule B money went, "[i]n light of the way in which Ms. Walton transferred money around" between the Schedule B and C corporations. [Emphasis added.]

[67] In the face of the foregoing, it was a palpable and overriding error on the part of the Application Judge, respectfully, to find that Ms. Walton was not in fact and reality the directing and controlling mind of the Schedule C Companies. The corporate documentation and contractual framework had little, if any, bearing on how the Schedule C Companies, and the Listed Schedule C Companies in particular, operated, except to provide Ms. Walton with her entrée to the corporate levers necessary to work the Waltons' scheme.

[68] In those circumstances, her knowledge and conduct can be attributed to the corporations. Ms. Walton exercised complete management and control over all relevant actions executed by the Schedule C Companies. To paraphrase from *El Ajou*, for these purposes her mind was their mind; her intention, their intention;

her knowledge, their knowledge. She was the person through whom the corporations acted, spoke and thought for these purposes: *Canadian Dredge,* at p. 682. In short, her perpetration of the scheme was their participation in the scheme.

(d) Application of the *Canadian Dredge* Criteria

[69] The Respondents argue that, even so, this is insufficient to fix the Listed Schedule C Companies with Ms. Walton's knowledge and fraudulent conduct for purposes of establishing civil responsibility, because the criteria set out in *Canadian Dredge* – albeit in the context of criminal responsibility – have not been met. At pp. 713-714 of that decision, Estey J. said:

> [I]n my view the identification doctrine only operates where the Crown demonstrates that the action taken by the directing mind (a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company.

[70] Before turning to these criteria, I think it is useful to recognize the setting in which they are being considered. The case law has applied *Canadian Dredge* in the criminal and civil contexts without discrimination. In my view, it does not follow, however, that the criteria need be applied in a rigid, identical, fashion in all circumstances. The burden of proof is less onerous in civil cases. This particular civil case involves a complex multi-real estate transaction investment fraud, perpetrated over an extended period of time, and implicating numerous corporate

actors (operating at the instance of the fraudster) and numerous victims. In these circumstances, it makes sense that, of the *Canadian Dredge* criteria, (b) and (c) at least may be approached in a less demanding fashion than would be the case were *mens rea* for purposes of establishing criminal responsibility in play.

[71] Contrary to the view expressed by my colleague, I do not think it is the case in such circumstances that the claimant must necessarily show "evidence of each company's individual benefit from the scheme" (at para. 234). As noted earlier, and as I shall explain more fully below, liability for knowing assistance is fault-based rather than receipt-based and does not require the defendant to have obtained a benefit from the defaulting fiduciary's breach. To apply criterion (c) of *Canadian Dredge* – "by design or result partly for the benefit of the company" – too strictly therefore makes little sense, as it would risk muddying the distinction between the two categories of claim.

[72] In addition, as I develop below, there are sound policy reasons for not adopting the narrower view favoured by my colleague. This is consistent with the approach recently taken by the Supreme Court of Canada in *Livent*. The Court declined to adopt a rigid application of the *Canadian Dredge* criteria in the context of a civil case, emphasizing that the corporate identification doctrine is one having its roots in policy considerations: see *Livent*, at paras. 100-104.

[73] In my view, policy considerations support a more flexible approach in complex and large, multi-corporation, multi-party fraud cases such as the present

one, for the reasons I set out below. I do not think, in these circumstances, that it matters whether the flexibility is applied at the criteria-application phase or the overall-equitable consideration stage of the analysis.

(i) Acting Within the Assigned Field of Operation

[74] *Canadian Dredge* confirms that the attribution of an employee/manager's conduct or knowledge to a corporation does not turn on whether the individual was acting "within the scope of his or her employment" or was "off on a frolic of their own" in the tortious sense of vicarious liability. The test is whether the directing mind "is acting within the scope of his [or her] authority…*in the sense of acting in the course of the corporation's business*", or with "*reference to the field of operations delegated to the directing mind*", or "*within the scope of the area of the work assigned to him [or her]*" (underlining in original; italics added): at pp. 684-685.

[75] Here, for all the reasons articulated earlier in this decision leading to the conclusion that Ms. Walton was the directing and controlling mind of the Listed Schedule C Companies, she falls squarely within that category of individual.

[76] In her capacity as the person "in charge of the entire enterprise", Ms. Walton was acting well within the field of operations delegated to her by the shareholder agreements of the Schedule B and C Companies, their corporate structures (she was a director and officer), and the conduct of the parties. It was

her responsibility to complete the transactions by which the Schedule C Properties were acquired by the Schedule C Companies, to manage the projects, and to arrange for the necessary financings and re-financings. That she breached the shareholder agreements by not obtaining the necessary consents from the investors and by not providing accurate and timely information, that she breached her fiduciary obligations to the DBDC Applicants and Dr. Bernstein by misusing and misappropriating the funds they invested in the Schedule B Companies, that she breached her obligations to the Respondents as well in relation to their investments in the Schedule C Companies, and that she perpetrated her fraud on both the Applicants and the Respondents by betraying their trust and exercising the corporate powers left to her – none of these considerations detracts from the reality that in fact and in law she was acting within the field of operations and the area of corporate management delegated and assigned to her. Her fraudulent actions in directing the flow of monies in and out of the various corporations were carried out within the framework of her delegated responsibilities.

[77] The first *Canadian Dredge* criterion is met.

(ii) Fraud/Benefit of the Corporation

[78] The second and third *Canadian Dredge* criteria may be considered together. They require that the action taken by the directing mind not be totally in fraud of the corporation and that, by design or result, it be partly for the benefit of

the corporation. In my view, as noted earlier, their application may be approached in a broader fashion in circumstances such as these, than would be the case in a criminal law context.

[79] That said, I am satisfied the actions of Ms. Walton do meet those requirements, nonetheless. The Listed Schedule C Companies were not totally defrauded and, indeed, benefitted at least partly from Ms. Walton's actions.

[80] Although some of their investors' monies were misapplied and misused in breach of Ms. Walton's fiduciary duties – as were the investments of the DBDC Applicants – the Listed Schedule C Companies nevertheless acquired properties, as they were intended to do and as part of the investment arrangements. As a result of Ms. Walton's net transfer of at least $23.6 million from the Schedule B Companies to Rose & Thistle and the net transfer of $25.4 million from Rose & Thistle to the Schedule C Companies, the latter acquired funding necessary for their ongoing operations; Brown J. accepted the Inspector's conclusion that the DBDC Applicants' investments in the Schedule B Companies "[were] a major source of funds for the [Schedule C] Companies". The record shows that each of the Listed Schedule C Companies either received from or transferred to Rose & Thistle monies or monies-worth, during the relevant period. Given the co-mingling of funds, it is not possible to trace the complete path of all these transactions; however, Ms. Walton herself acknowledged that Rose & Thistle

was the “clearing house” for the movement of funds as between the Schedule B Companies, Rose & Thistle, and the Schedule C Companies.

[81] My colleague suggests that a *specific* benefit flowing to each Listed Schedule C Company must be identified in order to affix the companies with Ms. Walton’s knowledge for purposes of knowing assistance. As I mentioned briefly earlier in these reasons, there are sound policy reasons, in my view, for not adopting a narrow approach on this, and other, issues relevant to this appeal. My colleague’s approach, in effect, incorporates a tracing requirement into the knowing assistance claim, collapsing the distinction between knowing assistance and knowing receipt where corporate actors are used to assist in breach of fiduciary duty. To do so would mean that justice could not properly be done in many cases of massive, multi-corporation, multi-party fraud because – as this case demonstrates – the fraudulent co-mingling of funds renders it impossible to accomplish that task with the degree of precision required for knowing receipt, unjust enrichment or constructive trust.

[82] My colleague’s approach is also influenced by her view that the Listed Schedule C Companies are, themselves, victims of the fraud. If that were the case, it may be a consideration in determining whether liability may be avoided on overall “equity” grounds, discussed further below. However, I do not think it has much bearing on the “directing and controlling mind” analysis or on the analysis of whether the Listed Schedule C Companies in fact assisted and

participated in the fraudulent breach of fiduciary duty. In addition, as I shall explain later, I do not view the Listed Schedule C Companies as being "victims" of the fraud; rather, their investors are the victims of the fraud.

[83] In my view, the foregoing factors are sufficient to meet the second and third *Canadian Dredge* criteria, for purposes of establishing that Ms. Walton was the directing and controlling mind of the Listed Schedule C Companies, in the circumstances of this civil fraud case.

(iii) The Listed Schedule C Companies Participated in or Assisted Ms. Walton's Fraudulent Conduct

[84] It flows from the foregoing that the participation/assistance requirement for the claim of knowing assistance has been met as well.

[85] Ms. Walton crafted and choreographed a scheme to enable her and her husband to stay ahead of their obligations to provide 50% of the funding for the acquisition of the properties and to otherwise enrich themselves personally at the expense of their investors. Focusing on Dr. Bernstein's circumstances, Brown J. described the fraud, at para. 278, as "the system created by the Waltons to circulate and mis-use the [DBDC] Applicants' funds". Unbeknownst to DeJong, the Condos and the Levytams, it was created to circulate and misuse their funds as well.

[86] Ms. Walton utilized the Schedule C Companies as actors in the process of orchestrating her shell game through the Rose & Thistle "clearing house"

account. Funds were co-mingled, when they were supposed to be kept project-specific. Investors' funds (of both the DBDC Applicants and the Respondents) were diverted from their intended project or projects to finance the acquisition or operations of other projects, or to benefit the Waltons personally. Sometimes this was done on the pretext that the Waltons had made their contributions through a phantom "equity" increase in the value of the property previously acquired by them. Sometimes it was done on the pretext that their contributions had been made in the form of assignment or purchaser agency fees, or management fees, or construction and maintenance costs.[10] On other occasions, Ms. Walton arranged for the investors to receive preferred shareholding positions in different corporations, purportedly in exchange for investments made in other investment projects (without revealing that those earlier investments had already been lost).

[87] With two possible exceptions, the record shows that each of the Listed Schedule C Companies either received monies directly from or transferred monies directly to Rose & Thistle during the relevant period, and were therefore engaged as corporate actors in an arrangement that, at the end of the day, resulted in a net transfer of over $23 million *from* the DBDC Applicants and a net transfer of over $25 million *to* the Schedule C Companies.

[10] Brown J. found that the Waltons had proved only $1 million in management fees and construction costs, out of a total $30 million they had claimed.

[88] The two possible exceptions are St. Clarens Holdings Ltd. and Emerson Developments Ltd., the owners of adjoining properties at 777 St. Clarens Ave. and 260 Emerson Ave. in Toronto. Nonetheless, the record demonstrates that these two corporations were also engaged as actors in the overall fraudulent scheme.

Participation by St. Clarens/Emerson

[89] Although title to the two properties was taken in the names of the two corporations, respectively, the purchase involved a single transaction. In July, 2013, a Walton numbered company entered into an agreement of purchase and sale with the owners of the two properties. It is said that an $80,000 deposit was paid at the time, although the source of those funds is not clear from the record. In October, 2013, the Walton numbered company assigned the agreement of purchase and sale to Rose & Thistle. Rose & Thistle agreed to pay an "assignment fee" of $225,000 and to reimburse the Walton company for the $80,000 deposit.

[90] On November 18, 2013, the Waltons and DeJong entered into the standard type of 50/50 shareholder/management agreement described earlier in these reasons with respect to the St. Clarens/Emerson properties. That agreement stated that the Waltons had previously entered into an agreement of purchase and sale regarding the properties, and had previously provided an $80,000 deposit along with due diligence fees of approximately $50,000 related

to the purchase. A “Capital Required” document associated with the purchase indicated that there was a “Purchaser agency fee” of $225,000 included as part of the purchase costs. Dr. DeJong swore that this fee was never discussed with or disclosed to her. The Application Judge accepted this evidence.

[91] The St. Clarens/Emerson transaction closed on November 26, 2013 with Rose & Thistle apparently assigning the original agreement of purchase and sale to the purchasing corporations. Apart from the possible $80,000 deposit provided initially by the Walton numbered company – whether those funds came from the Rose & Thistle clearing house account is not known – the Waltons made no further contributions to the $665,000 shareholder loan they were required to contribute. DeJong advanced its $665,000 to St. Clarens Holdings and those funds were used to pay the balance due on closing for both properties of $252,397.91.

[92] How the remainder of the DeJong advance was used is not known either. While it is not completely clear from the record whether Ms. Walton caused the $225,000 “Purchaser agency fee” – or, “assignment fee” as it was initially characterized in the assignment agreement – to be made in cash to Rose & Thistle or to the Walton numbered company, at the very least it is clear that St. Clarens Holdings assumed an accrued liability for the purchaser agency fee and accepted responsibility to reimburse the Waltons for the $80,000 deposit.

[93] The Application Judge found that "the payment of $225,000 was clearly deceitful and in breach of the fiduciary duties owed by them to DeJong." This finding was undoubtedly open to him on the record.

[94] The point of dwelling on the St. Clarens/Emerson transaction is not to analyse whether the corporations "benefitted" from the fraudulent scheme. Indirectly they benefitted because they acquired the properties in the course of the scheme. Perhaps they benefitted from the payment of the agency fee, which may or may not have represented a justifiable expense; we do not know. DeJong suffered a loss because, *vis-à-vis* DeJong, the undisclosed fee constituted a deceitful breach of the Waltons' fiduciary duties to it.

[95] The point of dwelling on the St. Clarens/Emerson transaction is to show that, even though the purchasing Listed Schedule C Companies may not have either received monies directly from or transferred monies directly to Rose & Thistle, the transaction permitted Ms. Walton to skim off the $225,000 unbeknownst to DeJong. It illustrates yet another way in which Ms. Walton engaged the Listed Schedule C Companies as actors in her overall fraudulent undertaking in breach of her fiduciary obligations to both the DBDC Applicants and DeJong.

[96] Improper as they were, each of these transactions – together with all the other in-and-out transactions – required a corporate act of one form or another. As the directing mind of the Listed Schedule C Companies for these purposes,

Ms. Walton's acts were their acts, and the Companies accordingly participated in or assisted Ms. Walton in her breach of fiduciary duties to the DBDC Applicants.

Additional Arguments Raised Against Finding Participation/Knowledge

[97] For purposes of the "participation" and "knowledge" analyses, it matters little, in my view, that the DBDC Applicants are unable to demonstrate the receipt of any *particular* Schedule B Company funds by any *particular* Listed Schedule C Company (other than the funds with respect to which Brown J. previously granted constructive trusts). It is therefore of little significance that the "net transfer analysis" was not intended to, and does not, establish such a connection.

[98] My colleague places considerable emphasis on these points. As she puts it, at para. 185 of her analysis, for example, the net transfer analysis was "never intended to be used for the purpose of establishing a claim by the DBDC Applicants against the property of other defrauded investors", and, at para. 195, "[t]he net transfer analysis does not show where the money went after it was transferred into Rose & Thistle, or that any of the 'net' money ended up in any particular Walton-controlled account (including any Listed Schedule C Company account)".

[99] Respectfully, these concerns are misplaced in the context of a claim for knowing assistance.

[100] First, as I have emphasized, they conflate knowing assistance with knowing receipt. If it were necessary to demonstrate the receipt of funds by the defendant in order to establish a claim for knowing assistance, there would be no need for the knowing assistance remedy. The claim of "knowing assistance" is designed to capture circumstances where "knowing receipt", unjust enrichment, or a constructive trust on some other basis cannot be established, but where a fault-based remedy is appropriate to compensate for the defendant's knowing assistance in the perpetration of a fraudulent and dishonest breach of fiduciary duty. This is one of those cases. In addition, as mentioned above, there are sound policy reasons for not importing a tracing requirement as a necessary component of the knowing assistance claim.

[101] Secondly, while the net transfer analysis may not have been suitable for purposes of tracing Schedule B Company funds into particular Listed Schedule C Company accounts, it clearly established a net outflow from the Schedule B Companies' accounts of $23.6 million. Both Brown J. and the Application Judge made that finding. This is relevant for all the various reasons recited above, as well as for the measure of the DBDC Applicants' damages.

[102] Nor do I share the view that the Listed Schedule C Companies were not participants in Ms. Walton's fraudulent breach because they were victims of the same fraudulent scheme and were merely used by Ms. Walton as "conduits" or

"pawns" in the perpetration of that scheme, without the demonstration of receiving any benefit themselves.

[103] My colleague acknowledges that "the Listed Schedule C Companies may have participated in Ms. Walton's overall fraudulent scheme, in the sense that they were used by her in the 'shell game' to co-mingle investor funds, and to avoid making her own contributions" (at para. 231). She acknowledges that "knowing assistance does not require a defendant to have received a benefit" for these purposes (at para. 234). Yet, she concludes that "the net transfer analysis does not provide the evidence that they participated in her breach of fiduciary duty to the DBDC Applicants so as to attract personal liability for knowing assistance" (at para. 231), and that "the issue of benefit is relevant here because Ms. Walton's conduct was in fraud of the very entities sought to be made liable for knowing assistance" (at para. 234).

[104] This approach conflates the Companies with their investors and preferred shareholders, however. It also overlooks the finding that Ms. Walton was the controlling and directing mind of the companies and that her intentions and conduct were theirs. The Listed Schedule C Companies are not defrauded victims of Ms. Walton's fraudulent scheme; their investors and preferred shareholders are the defrauded victims. And, as noted above, they did "benefit" generally from the perpetration of the overall fraud. The Companies acquired the properties they were created to acquire. They received the funds enabling them

to do so. As Brown J. found, the DBDC Applicants' investments were used to fund their ongoing operations and provided "a major source of funds for the Walton Schedule C Properties/Companies" (at para. 269). It was the way in which the investors' funds (the DBDC Applicants', as well as those of DeJong and others) were fraudulently co-mingled and moved amongst the entire portfolio of properties and projects that constituted the fraud. However, it was fraud perpetrated on the investors, not on the Listed Schedule C Companies.

[105] Ms. Walton's breach of fiduciary duty to the DBDC Applicants was to cause the funds they invested in the Schedule B Companies to be diverted out of those Companies for her own personal use. That the Schedule C investors or the Schedule C Companies were also the objects of a similar co-mingling and diversion of their funds, is not important for the "participation" and "knowledge" requirements of the knowing assistance analysis, in my view. For the Listed Schedule C Companies to be found liable on that basis, it need not be shown that they assisted directly in acts involving the diversion of Schedule B Companies' funds into the Listed Schedule C Companies' accounts. It need only be shown that they knowingly assisted in Ms. Walton's fraudulent and dishonest scheme to divert monies out of the Schedule B Companies' accounts. It is the overall fraudulent scheme, and the Listed Schedule C Companies' knowing assistance in the perpetration of that "shell game" that provides the prism through which liability for this claim must be determined. The policy considerations

respecting cases such as this, referred to above, support this analysis, in my view.

[106] It is not an answer to say that a similar claim for joint and several damages might be asserted against the Schedule B Companies on the same basis. No one is asserting such a claim in these proceedings. And, although the Schedule C investors were also victimized in the scheme, it must be remembered – as found by Brown J., and accepted by the Application Judge – that net funds of $23.6 million *flowed out of the Schedule B Companies* into Rose & Thistle, and net funds of $25.4 million *flowed out of Rose & Thistle into the Schedule C Companies*. It is the DBDC Applicants, not the Schedule C Companies, that suffered the net losses.

[107] DeJong and the other Respondents raise an additional argument. They submit that the fact they had no knowledge of the scheme or breaches personally, or in their capacities as lenders to or shareholders of the Schedule C Companies, shields the Listed Schedule C Companies from liability for knowing assistance. However, it is the knowledge of the *corporation* that is relevant to the establishment of liability, not the knowledge of the corporation's creditors, shareholders, or its directors or officers other than the directing mind. As noted above, the issue is not whether the co-investors were co-opted into participating in the scheme; the issue is whether the Schedule C Companies knowingly assisted Ms. Walton in carrying out the scheme.

[108] This principle is illustrated by both *Canadian Dredge* and *El Ajou*.

[109] In *Canadian Dredge*, the corporation was found to be criminally liable on the basis that the knowledge and conduct of its directing minds were attributed to it for that purpose, notwithstanding that innocent investors might be penalized: see p. 694. At p. 685, Estey J. noted that:

> Acts of the ego of a corporation taken within the assigned managerial area may give rise to corporate criminal responsibility, whether or not there be formal delegation; whether or not there be awareness of the activity in the board of directors or the officers of the company; and, as discussed below, whether or not there be express prohibition. [Emphasis added.]

[110] If the existence of an express prohibition forbidding a directing mind to do an act is not sufficient, by itself, to avoid corporate criminal responsibility, the breach of a shareholder agreement on the part of the directing mind cannot be sufficient to avoid corporate civil responsibility. The fact that Ms. Walton was carrying out the transactions for a corrupt purpose, and not advising her co-investors of the details, does not, in my view, affect the attribution of her intentions and actions to the Listed Schedule C Companies: see *Meridian Global*, at p. 511.

[111] In *El Ajou*, a civil case involving corporate liability for knowing receipt, the owners of the corporation were completely unaware of the fraud perpetrated by the director, who had *de facto* management and control in respect of the fraudulent transaction. Nonetheless, the corporation was found to be liable.

[112] The Respondents seek to distinguish *El Ajou* on the basis that it applied "knowing receipt" as opposed to "knowing assistance", and that constructive knowledge is sufficient to ground liability for the former while actual knowledge is required for the latter. In my view, *El Ajou* is not distinguishable on that basis. There is nothing to suggest that the knowledge the court was attributing to the corporation in that case was constructive knowledge. Rather, what was imputed to the corporation was the *actual* knowledge of the directing mind. As Nourse L.J. noted, at p. 695, the person found to be the directing mind of the corporation (a Mr. Ferdman) "freely admitted that he knew [of the fraudulent transactions in question]" (emphasis added). This is the language of actual knowledge, not that of constructive knowledge. Constructive knowledge arises when a person has knowledge of circumstances that would indicate certain facts to a reasonable person, or knowledge of circumstances that would put an honest and reasonable person on inquiry: see *Air Canada,* at p. 812*; Citadel General*, at para. 22. It was the actual knowledge of Mr. Ferdman that was attributed to the corporation as its knowledge.

(e) The Requirements for "Knowing Assistance" are Met Here

[113] For all these reasons, I am satisfied that the DBDC Applicants have established the necessary components for a claim of knowing assistance in a breach of fiduciary duty: (i) Ms. Walton owed a fiduciary duty to the DBDC Applicants; (ii) she breached that duty; (iii) the Listed Schedule C Companies, as

strangers to the fiduciary relationship, had actual knowledge of both the fiduciary relationship and the fraudulent and dishonest conduct of the fiduciary, because in the circumstances Ms. Walton's mind was their mind, her intent their intent, and her knowledge their knowledge; and (iv) for similar reasons, the Listed Schedule C Companies participated in or assisted Ms. Walton's fraudulent and dishonest conduct.

C. JOINT AND SEVERAL LIABILITY FOR DAMAGES

[114] The Respondents make an additional argument, based on equitable grounds. They submit that to give effect to the claim for damages based on knowing assistance in the circumstances of this case would be to:

> [Stretch] the bounds of equity in ways not contemplated by the goals of restitutionary proprietary remedies. That is particularly so in the face of investors that actually put funds into these particular Schedule C Companies.

[115] The argument is misconceived in this context, however. It conflates a claim for damages with a claim for a proprietary remedy and, in particular, the claim for knowing assistance with the claim for knowing receipt. As I shall explain more fully, "knowing assistance" is not a remedy grounded in the principles of restitution or proprietary remedies. The DBDC Applicants are not seeking, at this stage, a restitutionary or proprietary-based remedy in respect of any of the Schedule C Properties (over and above the constructive trusts earlier granted by

Brown J. with respect to certain of those Companies). They seek only a remedy in damages.

[116] Brown J. granted the DBDC Applicants a tracing order against the Listed Schedule C Companies to further the evidence available to support their claim for unjust enrichment. By the time the issue came before the Application Judge, however, the DBDC Applicants had decided to forego the tracing exercise and any claim to a proprietary interest in the Schedule C Properties held by those companies. Instead, they asserted only their claim for damages on a joint and several basis for knowing assistance and/or receipt.

[117] As noted earlier in these reasons, liability for knowing assistance – unlike knowing receipt – does not depend upon the receipt of property, and the measure of recovery does not depend upon the value of any property obtained by the stranger as a result of the breach of the fiduciary's obligations. Whereas the essence of liability for knowing receipt is unjust enrichment, the gravamen of liability for knowing assistance is simply knowing participation or assistance in the breach in furtherance of the defaulting trustee or fiduciary's fraudulent and dishonest conduct: *Gold v. Rosenberg*, at para. 41; *Citadel General*, at paras. 46-47.

[118] La Forest J. addressed this dichotomy in *Citadel General*, underscoring the importance of distinguishing between the knowing assistance and knowing receipt claims, and their underpinnings. After referring to a passage from the

judgment of Millett J., the judge of first instance in the *Agip (Africa) Ltd.* case, La Forest J. said, at paras. 46-47:

> In other words, the distinction between the two categories of liability is fundamental: whereas the accessory's liability is "fault-based", the recipient's liability is "receipt-based". In an extrajudicial opinion, Millett J. described the distinction as follows:
>
> > … the liability of the accessory is limited to the case where the breach of trust in question was fraudulent and dishonest; the liability of the recipient is not so limited. In truth, however, the distinction is fundamental; there is no similarity between the two categories. The accessory is a person who either never received the property at all, or who received it in circumstances where his receipt was irrelevant. His liability cannot be receipt-based. It is necessarily fault-based, and is imposed on him not in the context of the law of competing priorities to property, but in the application of the law which is concerned with the furtherance of fraud. [Footnotes omitted.]
> >
> > "Tracing the Proceeds of "Fraud" [(1991), 107 L.Q.R. 71], *supra*, at p. 83.
>
> The same view was expressed by the Privy Council in *Royal Brunei Airlines Sdn. Bhd. v. Tan*, [1995] 3 W.L.R. 64, at p. 70: "Different considerations apply to the two heads of liability. Recipient liability is restitution-based; accessory liability is not." These comments are also cited with approval by Iacobucci J. in *Gold*, *supra*, at para. 41. [Emphasis added.]

[119] In a scholarly article written prior to his appointment to the bench, "Intermeddlers or Strangers to the Breach of Trust or Fiduciary Duty" (1998) 21 Advocates' Q 94, at p. 107, Paul M. Perell put it this way:

> To be liable for knowing assistance, the stranger must have actual knowledge of the trustee's or fiduciary's dishonest or fraudulent act but, beyond being shown to have participated in that design, the third party … need not necessarily be shown to have acted in a fraudulent or dishonest fashion. And the stranger need not have taken or held any property. [Emphasis added.]

[120] The Respondents argue that they were innocent investors who had no knowledge of Ms. Walton's fraudulent and dishonest ways, and that in the contest between two sets of equally innocent victims of the Waltons' fraud it would not be equitable to grant an award of damages in favour of the DBDC Applicants, thereby placing Dr. Bernstein and his companies, as judgment creditors, in a more advantageous position over them as shareholders of the Listed Schedule C Companies or as creditors. The Application Judge appears to have accepted this contention, noting at para. 51 of his reasons that "[t]here is no evidence that the other investors were aware of the fraudulent conduct of Ms. Walton", and stating, at para. 52 that:

> The issue raised by the [DBDC Applicants] is not a contest between Dr. Bernstein and the Waltons. It is a contest between Dr. Bernstein and the investors in the Schedule C Companies who suffered from the same misconduct as did Dr. Bernstein. Ms. Walton knowingly breached her fiduciary obligations to the Schedule C Companies and the Schedule C investors.

[121] That is not the point, however. As noted earlier, it is the knowledge of the Listed Schedule C Companies – the "strangers" to the fiduciary relationship in this case – rather than the knowledge of their investors or shareholders that is relevant in assessing the claim for knowing assistance. And, to repeat the words of Millett J., cited with approval in *Citadel General*, at para. 46, liability for knowing assistance "is necessarily fault-based, and is imposed on [the knowing accessory] not in the context of the law of competing priorities to property, but in the application of the law which is concerned with the furtherance of fraud" (emphasis added).

[122] It is because of the distinction between the underpinnings of the knowing assistance and knowing receipt claims that the knowledge requirement is different – actual knowledge, for knowing assistance; constructive knowledge, for knowing receipt. But it is also for this reason, in my opinion, that discretionary considerations pertaining to the application of a trust-imposed proprietary remedy are of considerably less significance when the claim of the knowing assistance plaintiff arises, as it does here, in damages.

[123] While I need not go so far as to say that a court may never exercise a discretion to decline a remedy where the four criteria for establishing liability for knowing assistance have been met, I find it hard to conceive of a case where – in the face of a defendant's participation or assistance in a fraudulent and dishonest scheme perpetrated by a fiduciary and with actual knowledge of both the

fiduciary relationship and the fraudulent and dishonest scheme – a court would do so. It is the role of equity and the courts to guard against such an outcome and not to sanction such conduct.

[124] It is true here that the Schedule B Companies' money cannot be directly traced into the Listed Schedule C Companies (with the exception of those against which Brown J. awarded a constructive trust). However, these Listed Schedule C Companies transferred money to and from Rose & Thistle as a part of the scheme orchestrated by the Waltons or assumed liability in favour of Rose & Thistle as part of the scheme. As well, it is worth repeating that the Schedule C Companies were significant net beneficiaries in the flow of funds emanating from the pooling and co-mingling of the various investors' monies.

[125] Because I do not view the Listed Schedule C Companies as themselves victims of the fraud, I see no basis for excusing them from "fault" on the ground that they were simply caught up in, and used, as part of the wrongdoer's wrongful scheme. They remained, nonetheless, participants and actors in the perpetration of that scheme. Nor do I think it significant, as my colleague notes, that the DBDC Applicants have adopted the practical choice of pursuing only those Schedule C Companies that may have assets against which to recover. While reasons relating to the likelihood of recovery under a judgment or order may explain why proceedings are taken against certain parties, those reasons should not be confused with reasons underlying liability giving rise to the judgment. In

the result, I do not see any overriding "equitable" considerations that militate against application of the knowing assistance remedy in the circumstances of this case.

[126] For these reasons, I am satisfied that, once it is determined that the Listed Schedule C Companies knowingly participated in the fraudulent and dishonest breach of fiduciary duty by the Waltons, the DBDC Applicants are entitled to an award of damages against them as knowing accessories to the breach. As I have explained above, the Listed Schedule C Companies did so because Ms. Walton's knowledge and actions are to be attributed to them as their own.

[127] The appropriate measure of damages in the circumstances is the loss caused to the DBDC Applicants by the dishonest fiduciary's fraudulent scheme arising from the participation and assistance of the Listed Schedule C Companies in that scheme. That is because liability for knowing assistance is fault based and is measured by the loss flowing from the fault. As Perell summarized it in the article cited earlier in these reasons, at p. 113:

> One very significant difference arising from the different rationales is that the beneficiary's recovery from knowing receipt may be less than the recovery from knowing assistance. This follows because, under the doctrine of knowing receipt, the defendant's liability is measured by his unjust enrichment while, under the doctrine of knowing assistance, the defendant's liability is measured by the plaintiff's injury consequent to the trustee's misconduct. The plaintiff's injury may exceed the defendant's benefit. [Emphasis added.]

[128] In this case, the loss is measured by the net transfer to the Schedule C Companies, globally, of $22.6 million.

[129] Once it is established that the Listed Schedule C Companies are each liable for knowingly assisting Ms. Walton in the global scheme in breach of her fiduciary obligations to the DBDC Applicants, it follows in the circumstances that the Listed Schedule C Companies are jointly and severally liable for the losses sustained: see *Enbridge Gas*, at para. 31. In that case, this Court upheld the trial judge's finding that the defendants were jointly and severally liable for the full extent of the losses sustained by Enbridge even though the defendants played different roles in assisting in the fraud and received unequal portions of the misappropriated funds. I see no basis for departing from that same line of reasoning.

[130] While the DBDC Applicants are entitled to an award of damages in the amount of $22.6 million against the Listed Schedule C Companies, they are not entitled to make a double recovery. The net transfer analysis was prepared in relation to the Schedule B and Schedule C Companies. Brown J. awarded constructive trusts in favour of the DBDC Applicants against eight Schedule C Properties, for a total of $8,128,325 (of which, we are advised, the amount of $1,192,150 has been recovered). The constructive trusts were awarded in cases where the Inspector was able to trace funds from a Schedule B Company, through Rose & Thistle, and into a Schedule C Company, and the Schedule C

Company used those funds in respect of a Schedule C Property. Those funds were necessarily part of the larger $23.6 million (less a $1 million reduction for management fees) that was transferred out of the Schedule B Companies.

[131] It follows, therefore, that any amounts actually recovered by the DBDC Applicants pursuant to the constructive trusts awarded by Brown J. must be applied in reduction of the damage award. I understand the DBDC Applicants to accept that conclusion.

[132] In the result, I would give effect to the ground of appeal respecting the DBDC Applicants' claim for damages against the Listed Schedule C Companies on a joint and several basis, subject to the foregoing caveat.

D. THE DEJONG CLAIM FOR CONSTRUCTIVE TRUSTS

[133] The Application Judge granted constructive trusts in favour of DeJong over four Schedule C Properties owned by the four DeJong Companies in the following amounts:

3270 American Drive (United Empire Lands Ltd.)	$769,543.60
324 Prince Edward Drive (Prince Edward Properties)	$741,501.97
777 St. Clarens Avenue (St. Clarens Holdings Ltd.)/ 260 Emerson Avenue (Emerson Developments Ltd.)	$665,000.00
Total	$2,176,045.57

[134] These properties have since been sold, and the Manager holds the proceeds from their sale. The DeJong constructive trust against 3270 American

Drive ranks subsequent to the constructive trust earlier granted by Brown J. in favour of the DBDC Applicants. It exhausts the funds currently held by the Manager from the sale of that property. The amounts granted as constructive trusts in favour of DeJong respecting the remaining three properties also exhaust the funds available from their sale. On that basis, the DeJongs would thus recover more than 50% of their lost investments.[11]

[135] The DBDC Applicants contest these constructive trust dispositions. They submit that the Application Judge erred in granting the constructive trusts in favour of DeJong, arguing that:

(a) there was no unjust enrichment at the expense of the DeJong Companies resulting from the misappropriation of the DeJong investments;

(b) the diverted DeJong investments could not be linked to the acquisition, preservation, maintenance or improvement of any property owned by a DeJong Company;

(c) DeJong had other available remedies as against the Waltons and the DeJong Companies; and

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[11] Even with full recovery on the constructive trusts granted in their favour, the DBDC Applicants (and Dr. Bernstein) will have recovered about 28% of their $81.6 million in lost investments ($81.6 million, less $11.8 million recovered prior to the hearing before the Application Judge, less $2.99 million in equity already returned, less $8.1 million in constructive trusts, assuming no overlap).

(d) the interests of other creditors and third parties would be adversely affected by the award of a proprietary remedy in priority to all other claims.

[136] The Application Judge did not grant constructive trusts over the properties owned by the DeJong Companies on the basis of unjust enrichment. In the case of 3270 American Drive, this was because the equity funds advanced by DeJong for the purchase of that property were diverted elsewhere and not used for that purpose (it was Dr. Bernstein's investments that were improperly diverted and used to purchase 3270 American Drive, leading to the granting of a constructive trust in the DBDC Applicants' favour over the property). In the case of 324 Prince Edward Drive, 260 Emerson Avenue and 777 St. Clarens Avenue, the DeJong monies were utilized, in part, for the purchase of the respective properties, but this did not constitute an unjust enrichment because the funds were intended to be used for that purpose.

[137] Instead, the Application Judge granted constructive trusts in favour of DeJong against the foregoing properties as a remedy for breach of fiduciary duty. In doing so, he relied upon the well-accepted principle that a constructive trust remedy is not restricted to circumstances in which there has been an unjust enrichment, but may be imposed as well "to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in 'good conscience' they should not be permitted to retain", and can

"aris[e] on breach of a fiduciary relationship": *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at paras. 17 and 19.

[138] However, in *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271, the Supreme Court of Canada revisited the factors to be taken into account by a court when imposing a constructive trust as a remedy for breach of fiduciary duty. Speaking for the majority on this point, Cromwell J. held at para. 227 that "a remedial constructive trust for a breach of fiduciary duty is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain."[12] Concurring on this point, Deschamps J. affirmed, at para. 78, that "[i]t is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property."

[139] The decision whether to impose a constructive trust is discretionary, and there is no question that a judge of first instance is entitled to considerable appellate deference in the exercise of that discretion, absent an error in principle. Respectfully, I have come to the conclusion that the Application Judge erred in principle in two respects when he imposed a constructive trust in favour of DeJong in these circumstances: first, in his failure to apply the *Indalex* principle that the fiduciary's wrongful acts must give rise to an identifiable asset; secondly,

[12] McLachlin C.J. and Rothstein J. concurred with Cromwell J. In separate reasons, Deschamps J. (Moldaver J. concurring) agreed with Cromwell J.'s reasoning on this point. LeBel J. (Abella J. concurring) dissented.

in his failure to give effect or consideration to the interests of other creditors and third parties, and to the fact that DeJong had other remedies available to it.

(1) The Application Judge Failed to Apply *Indalex*

[140] Drawing upon the Court's earlier decision in *Soulos*, Cromwell J. in *Indalex*, at para. 228, reiterated the four conditions that must be present before a remedial constructive trust may be ordered for breach of fiduciary duty:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligations to the plaintiff;
>
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

[141] Referring to (2) above, Cromwell J. went on to add, at para. 230:

> To satisfy the second condition, it must be shown that the breach *resulted in* the assets being in [the wrongdoer's] hands, not simply…that there was a "connection" between the assets and "the process" in which [the wrongdoer] breached its fiduciary duty. [Underlining added; italics in original.]

[142] Here, the confusion arises because, while part of the DeJong investments were wrongfully diverted by Ms. Walton from the DeJong Companies to other uses (that could not be identified because of the pooling and co-mingling of funds), significant portions of the investments were used for precisely the purposes for which they were intended: they were utilized in the acquisition of the four DeJong Properties identified above. In short, the wrongdoing *vis-à-vis* DeJong did not give rise to the acquisition of those assets, although overall there may have been "a connection" between them and "the process" through which the wrongdoing took place.

[143] The Application Judge does not appear to have taken these considerations into account in arriving at his decision to impose a constructive trust in favour of DeJong, yet they posed a clear impediment to the court's ability to do so in the circumstances, in my view. It is not enough to say that DeJong monies were used in the acquisition of the properties (the monies were intended to be used for that purpose). Nor is it sufficient to say for purposes of imposing a proprietary remedy – as the Application Judge does – that Ms. Walton breached her fiduciary obligations to DeJong by wrongfully transferring monies *out of* the DeJong Companies (the wrongful transfer did not give rise to an identifiable asset); or that the Waltons failed to comply with their agreements to provide capital for the acquisitions (those failures, similarly, did not result in the acquisition of the properties); or that they failed to comply with their obligations to

manage the properties (a failure to manage would not generally give rise to a proprietary claim); or, simply, that the breach of fiduciary obligation led to the loss of the DeJong investments (the breach did not lead to the loss of the properties in question).

(2) The Application Judge Failed to Consider the Circumstances

[144] The DBDC Applicants submit as well that in an insolvency context (as is the case here) the availability of other remedies and the adverse impact of imposing a proprietary remedy on other creditors and parties need to be taken into account in determining whether to impose a constructive trust. The Application Judge did not do so, they argue.

[145] There are other creditors in the proceedings. A summary of the proposed payments accepted to date in the Claims Process indicates that the Receiver/Manager has accepted approximately $60,000 in secured claims (principally from the Canada Revenue Agency) and approximately $205,000 in unsecured claims.[13] These claims are dwarfed by the claims at issue in these proceedings: Dr. Bernstein and the DBDC Applicants claim approximately $66 million against the Waltons and an included $22.6 million against the Listed Schedule C Companies; approximately $4 million is claimed by DeJong; and

[13] This is excluding the DeJong claims accepted against St. Clarens Holdings and Emerson Development.

$160,000 by the Condos.[14] The claims by Dr. Bernstein and the DBDC Applicants themselves similarly dwarf the DeJong and Condos claims.

[146] It is significant that DeJong and the Condos did not advance their funds directly on the acquisition of the properties. They advanced their monies to the Schedule C Companies, either as equity investments (the Condos in Cecil Lighthouse; DeJong in United Empire Ltd.), or as shareholder loans (DeJong in respect of Prince Edward Properties, St. Clarens Holdings and Emerson Developments).[15] They each have remedies in those respective capacities.

[147] With a minor exception concerning the St. Clarens and Emerson companies, the Waltons' shares in the DeJong Companies have been cancelled, leaving DeJong as the overwhelming majority shareholder of United Empire, Prince Edward Properties, St. Clarens and Emerson. Those corporations owned the Schedule C Properties against which DeJong is claiming constructive trusts, and whose proceeds from sale are currently being held by the Manager. DeJong remains an unsecured creditor on the basis of its shareholder loans, and may well have a personal remedy against the Waltons. Granting a constructive trust over the properties, as a remedy for breach of fiduciary duty, would enable

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[14] The claim of the Levytams has been resolved.

[15] The Application Judge found that, if he had not granted constructive trusts, he would have held that the DeJong advances with respect to those companies were made by way of shareholder loans. That characterization is supported by the record, and I accept it.

DeJong to leapfrog over other creditors in its capacity as a lender by obtaining a proprietary remedy not available to other creditors.

[148] Although the Application Judge did not refer specifically to the relevance of other creditors or other remedies available to DeJong, I am not prepared to assume that he ignored them, experienced Commercial List judge that he was. Indeed, I suspect that these factors were the very ones driving his decision. He would well have recognized that the claims of the DBDC Applicants would overwhelm those of DeJong in an insolvency competition. Although the DBDC Applicants' outstanding losses exceed $66 million and their recovery has been limited to only approximately $13 million, they have nonetheless made *some* recovery. DeJong will recover very little in a priorities contest among creditors.

[149] In my view, however, it is not enough to say, simply, that, because different groups of investors have been victims of an overall fraudulent scheme involving the acquisition of various commercial properties, and one group of investors is entitled to a constructive trust against certain of those properties to which their funds can be traced, the other group of investors is in equity entitled to a proprietary remedy against those or other properties in order to achieve some similar recovery in an attempt to be equitable. I do not see the foregoing factors as justifying the imposition of a proprietary remedy, for the benefit of the latter group of investors/creditors and to the prejudice of others, where the fiduciary breach did not directly relate to the acquisition of the properties in question.

[150] For these reasons, I conclude that the granting of constructive trusts in favour of DeJong over the properties owned by the DeJong Companies cannot stand.

E. THE COSTS AWARD

[151] Given my conclusions with respect to the joint and several damages award and the constructive trust issues, it follows that the costs award below will need to be reconsidered.

DISPOSITION

[152] For the foregoing reasons, I would allow the appeal and set aside the parts of the Judgments and Orders of the Application Judge, dated September 23, 2016, holding that the Listed Schedule C Companies are not jointly and severally liable to the DBDC Applicants, granting constructive trusts in favour of DeJong, and awarding costs against the DBDC Applicants in favour of DeJong, the Condos and the Levytams. In their place I would order that:

(a) the Listed Schedule C Companies are jointly and severally liable to the DBDC Applicants in the amount of $22,680,852, subject to the provision that any amounts recovered by the DBDC Applicants on account of the constructive trusts ordered by Brown J. in relation to Schedule C Properties shall be applied in reduction of that amount;

(b) the respondent Christine DeJong Medicine Professional Corporation is not entitled to constructive trusts over the properties known as 3270 American Drive, Mississauga, Ontario; 324 Prince Edward Drive, Toronto, Ontario; 777 St. Clarens Avenue, Toronto, Ontario; and 260 Emerson Avenue, Toronto, Ontario; and

(c) leave be granted to appeal the costs portion of the Judgments and Orders and the costs order, and that the costs order be set aside and remitted for reconsideration in view of the foregoing dispositions.

[153] If the parties are unable to agree on the costs below, and because the Application Judge has since retired, the parties may make succinct written submissions to this Court respecting those costs within 30 days of the receipt of this decision.

[154] This has been a contest between innocent victims of a fraud. I do not think this is an appropriate case for costs on the appeal.

“R.A. Blair J.A.”

“I agree E.A. Cronk J.A.”

van Rensburg J.A. (Dissenting):

OVERVIEW

[155] I have had the opportunity to read the detailed and thoughtful reasons of my colleague, Blair J.A. With respect, and for the reasons that follow, I am unable to agree with his proposed disposition of the DBDC Applicants' appeal.

[156] I agree that Norma Walton was in breach of the fiduciary duties she owed to the DBDC Applicants, a point of departure that was not disputed by anyone on the appeal. And I agree with my colleague's conclusion, and that of the Application Judge, that the DBDC Applicants are unable to establish the liability of the Listed Schedule C Companies for knowing receipt.

[157] Where I part company with my colleague, is in his conclusion that the Listed Schedule C Companies participated in or assisted Ms. Walton in the breach of her fiduciary duties to the DBDC Applicants, and in awarding damages of $22.6 million against these ten companies.

[158] In my opinion, liability for knowing assistance in this case cannot be made out. It accepts, as evidence of both the Listed Schedule C Companies' participation in Ms. Walton's breach of fiduciary duty, and the measure of the

appellants' damages, the "net transfer analysis", a summary of cash transfers that was performed by the Inspector at an earlier stage in the oppression proceedings against the Waltons, for an entirely different purpose. It equates a Listed Schedule C Company's participation as a victim in Ms. Walton's "shell game" to participation in a breach of fiduciary duty. It imputes to the Listed Schedule C Companies Ms. Walton's conduct and intent, where her actions defrauded them, and were for her own personal benefit. And it uses as a measure of damages the sum of $22.6 million, which does not correspond with any proven benefit to or harm caused by any Listed Schedule C Company, but is simply the net amount transferred in a three-year period from the Schedule B Companies to Rose & Thistle (without regard for its source or whether any of the funds ended up in a Listed Schedule C Company).

[159] A judgment for $22.6 million against the Listed Schedule C Companies would enable the DBDC Applicants to share as unsecured creditors in the proceeds of sale of each of ten Schedule C Properties, after satisfying the constructive trust claims they have made out against some of the properties. This judgment, which purports to reflect the collective losses of the 29 DBDC Applicants, will overwhelm the claims of the investors in the ten Listed Schedule C Companies, who were victims of the Waltons in the same way as the appellants. As my colleague notes, this is a "priorities dispute", however, the effect of a judgment for damages in their favour is that the DBDC Applicants will

receive the lion's share of the net proceeds of sale of properties to which, except for the funds that have been traced and in respect of which they have already been awarded constructive trusts, they made no contribution.

[160] I cannot agree with this result. In my view, the "participation" element of the fault-based claim of knowing assistance is not made out on this record. And, in this case of first impression for our court - where a claim of knowing assistance in a breach of fiduciary duty is made by one group of defrauded investors against another similarly situated group - there is no reason to expand the equitable claim of knowing assistance beyond its proper bounds.

[161] I would therefore dismiss the DBDC Applicants' appeal after concluding that they are not entitled to judgment for $22,680,852 or for any amount against the Listed Schedule C Companies for knowing receipt or knowing assistance in Norma Walton's breaches of fiduciary duty to the DBDC Applicants.

OUTLINE OF THESE REASONS

[162] I will begin my discussion by identifying two general concerns that will serve to inform later parts of my analysis.

[163] First, the knowing receipt and knowing assistance claims were late-breaking add-ons to the oppression proceedings against the Waltons. I do not agree that they were, as the DBDC Applicants contend, part of the "deferred relief" that was already before Brown J. It is important to recall what was at issue

and determined in the earlier proceedings to ensure that the Listed Schedule C Companies are not simply carried along as part of the collective wrong of the Waltons against the DBDC Applicants, and so that the focus, as it should be, is on whether any or all of the Listed Schedule C Companies was a knowing participant in Ms. Walton's breaches of the fiduciary duties she owed to the DBDC Applicants. As such, I find it necessary to review the proceedings leading up to the decision under appeal.

[164] Second, since the DBDC Applicants' claims against the Listed Schedule C Companies depend on the court's acceptance of the "net transfer analysis", its purpose and limitations must be understood. The net transfer analysis served a specific function in the oppression proceedings, to demonstrate the Waltons' fraud on the DBDC Applicants. I will explain why it was never intended to serve as the basis for personal claims against the Listed Schedule C Companies, and why, in my view, it is ill-suited to this purpose.

[165] After addressing these two related contextual points, I will turn to the two claims on appeal. I will explain briefly why I agree with my colleague that the DBDC Applicants cannot succeed in their claim of knowing receipt. I will then turn to knowing assistance and explain why I am unable to agree that the Listed Schedule C Companies are liable for having knowingly assisted in Ms. Walton's breaches of the fiduciary duties she owed to the DBDC Applicants.

THE EVOLUTION OF THE DBDC APPLICANTS' CLAIMS AND THE LATE-BREAKING CLAIMS FOR DAMAGES AGAINST THE LISTED SCHEDULE C COMPANIES

[166] The point of departure is that the DBDC Applicants and the Listed Schedule C Companies (and their investors) were all victims of the fraud perpetrated by the Waltons.[16] The DBDC Applicants are 29 investment companies controlled by Dr. Bernstein that, in turn, invested in the 34 single-purpose Schedule B Companies, which were to acquire, hold and maintain commercial real estate properties. Dr. Christine DeJong and her husband, Michael, and Dennis and Peggy Condos and other investors did the same, through their personal investment companies, investing in the ten Listed Schedule C Companies.[17]

[167] As my colleague describes the scheme, at para. 3, instead of investing their required 50% in the investment companies, the Waltons moved money among the accounts of the investment companies and their personal accounts, using as a clearing house the bank account of their wholly-owned company Rose

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[16] My colleague suggests that, while the investors in the Schedule C Companies were victims of Ms. Walton's fraudulent scheme, the Schedule C Companies were not victims. I respectfully disagree. The Waltons were in breach of their fiduciary duties to the Schedule B Companies when they diverted funds from these specific-purpose corporations (Brown J., at paras. 261 and 264). To the extent they engaged in the same conduct in relation to the Listed Schedule C Companies, the Waltons were in breach of their fiduciary duties to these parties as well. As such, the investors, and the single-purpose investment companies they were investing in, were all victims of Ms. Walton's fraudulent scheme.

[17] Christine DeJong Medicine Professional Corporation invested in United Empire Lands Ltd., Prince Edward Properties Ltd., St. Clarens Holdings Ltd. and Emerson Development Ltd., while the Condos and the Levytams invested in Cecil Lighthouse Ltd. The other investors in the remaining Listed Schedule C Companies did not participate in the proceedings, which is not surprising considering the small amount of net proceeds generated by the sale of these Listed Schedule C Company properties.

& Thistle, in “a shell game designed to avoid their obligations and to further their own personal interests”.

[168] The contest throughout the proceedings, except for the recent chapter that is the subject of this appeal, was exclusively between the DBDC Applicants and the Waltons. The proceedings, commenced in 2013 as an oppression application, sought to establish the Waltons’ fraud and to obtain an accounting and recovery of the monies they advanced and lost. As such, the respondents were the Waltons, Rose & Thistle and Eglinton Castle Inc. (the “Walton respondents”). The Schedule B Companies (in which Dr. Bernstein, through the DBDC Applicants, invested with the Waltons) were listed in a schedule to the Notice of Application and named as respondents to be bound by the result (hence their definition as “Schedule B Companies”). And 16 properties into which the Waltons were alleged to have diverted the DBDC Applicants’ money (including their home on Park Lane Circle) were identified in a schedule to the Notice of Application (hence their definition as “Schedule C Properties”). Other parties who may have invested in those properties (including the DeJongs, the Condos and the Levytams) were not parties to the proceedings, as the DBDC Applicants only sought to trace their funds into the Waltons’ interests in such properties.

[169] When the case came before Brown J. in July 2014 (with reasons released August 12, 2014), it was a chapter 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" (Brown J. Reasons, at para. 2). None of the Schedule C Companies were parties to the proceedings at this point,[18] although the court considered a motion by Dr. DeJong's corporations seeking relief in respect of one Schedule C Property, 3270 American Drive, Mississauga, in which they had invested, including seeking approval of a settlement agreement with the Waltons.

[170] Brown J. considered the evidence, including the Inspector's reports and "net transfer analysis" (discussed below) and, after rejecting almost all of the Waltons' evidence contending that the DBDC Applicants' funds had been used for legitimate purposes, he concluded that the Waltons were liable to the DBDC Applicants for damages for breach of contract, "unlawful misappropriation" and unjust enrichment. Because the measure of damages for each cause of action would be different, Brown J. deferred the assessment of damages to another day for further argument.

[171] Brown J. also granted constructive trusts in respect of eight Schedule C Properties into which the Inspector had traced money from the DBDC Applicants. This relief was opposed by the Waltons, who filed and relied on the affidavits and statements of Dr. DeJong and 30 other investors, attesting to the value of their

[18] In fact, according to Dr. DeJong, the fact of the proceedings became known to the DeJongs and various other investors only after some 20 orders had already been made in the proceedings.

investments in five Schedule C Properties.[19] Brown J. appointed the Inspector as Receiver or Manager with power to sell the Schedule B Properties and the Schedule C Properties. At para. 271 he stated:

> …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.

[172] Brown J. ordered the Schedule C Companies that owned the Schedule C Properties to provide the manager with full access to their books and records, so that "a full tracing of the [DBDC Applicants'] funds [could] occur" (at para. 278). Until that point, the Inspector/Manager did not have access to any Schedule C Company accounts.

[173] Brown J. also appointed the Inspector as the Waltons' receiver noting, at para. 231, that the appointment was necessary to ensure that the Waltons could not dispose of their Schedule C property "until proper consideration [could] be given to [the DBDC applicants'] claims and the respective interests of all creditors of the Waltons."

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[19] The investors whose affidavits and statements were filed by the Waltons were not parties to the proceedings in their own right. Only DeJong participated in the proceedings, making submissions at the hearing before Brown J., seeking to uphold a settlement with the Waltons and opposing the relief sought in respect of the Schedule C Properties. See para. 263 of Brown J.'s reasons.

[174] Brown J. anticipated that the DBDC Applicants, armed with the Receiver's additional powers, would seek to trace their funds into additional Schedule C Properties, apart from the ones in which constructive trusts were already awarded, and that the Receiver, after selling the properties, would deal with the claims. He left the issue of priority of claims between creditors in respect of the proceeds of disposition of a Schedule C Property to be addressed in the claims process *for that Property.* He refused to enforce the settlement agreement between the Waltons and the DeJongs and concluded that "the legal 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" (at paras. 263, 271 and 289).

[175] The DBDC Applicants contend that the attendance before Newbould J. in June 2016 was for "deferred relief". This is true, but only in the sense that Brown J. had deferred the determination of the DBDC Applicants' damages against the Waltons. There was no deferred relief in respect of the Listed Schedule C Companies, because they were not yet parties to the litigation and no claims for damages had been asserted against them when the matter was before Brown J. While Brown J. granted a motion to amend the Notice of Application, it was not until the Notice of Application was amended by Newbould J. that the Listed

Schedule C Companies were joined as parties, a cause of action was pleaded, and damages were claimed against them.[20]

[176] In his reasons dated September 23, 2016, Newbould J. concluded, at para. 32, that the Waltons committed civil fraud and fraudulent misrepresentation that caused Dr. Bernstein to invest his funds into the Schedule B Companies. He awarded damages of $66,951,021.85 plus interest against the Walton respondents. In granting an order that the judgment would survive bankruptcy under ss. 178(1)(d) and (e) of the *Bankruptcy and Insolvency Act*, Newbould J., relying on certain of Brown J.'s earlier findings, concluded, at para. 35, that the "liability of the Waltons arose from their fraud while acting in a fiduciary duty to Dr. Bernstein", as well as from their fraudulent misrepresentation that caused them to obtain property (at para. 36).

[177] As for their remedy in relation to the Schedule C Properties, instead of quantifying their unjust enrichment claim against the Waltons by conducting a further tracing as Brown J. had envisaged, the DBDC Applicants sought to add the Listed Schedule C Companies as respondents to the proceedings, and to

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[20] See the Order of Newbould J. dated September 23, 2016, paras. 3,4, and 5 and Appendix A. I respectfully disagree with my colleague's summary (at para. 11) of the relief claimed by the DBDC Applicants when they were before Brown J. At para. 241 of his reasons, Brown J. referred to an amended draft judgment the DBDC Applicants put before the court containing several paragraphs of relief in relation to the Schedule C Properties, including the claims referred to by my colleague, which were for joint and several liability of the Walton respondents and the Schedule C Companies/Properties for net proceeds diverted from the Schedule B Companies. However, there is no other reference in Brown J.'s reasons to any claim for any amount of money by the DBDC Applicants against the Schedule C Companies, or to an amendment of the application to permit such a claim to be made.

advance claims for damages against them based on knowing receipt and knowing assistance in the Waltons' breach of fiduciary duty.

[178] The claims against the Listed Schedule C Companies were not pursued in the conventional manner through an action, with pleadings and documentary and oral discovery. Rather, the claims were added to the oppression proceedings, and set out in a proposed Third Fresh as Amended Notice of Application (at paras. 1(jj), 2 and 3(rr) to (ccc) and (kkk) to (uuu)). The amendments allege, under "Unjust Enrichment," that the Waltons, in breach of their fiduciary duties, diverted and misappropriated the DBDC Applicants' funds, and that "various Walton-owned companies", including the Listed Schedule C Companies, were knowing recipients of funds obtained as a result of the Waltons' breaches of fiduciary duty against them".

[179] Under the heading "Knowing Assistance", the DBDC Applicants allege that the Listed Schedule C Companies had actual knowledge of (or were reckless or wilfully blind to) the Waltons' breaches of fiduciary duty owed to the DBDC Applicants, and that they jointly assisted in the breaches. They assert, as part of their knowing assistance claim, that *each Listed Schedule C Company received property from the DBDC Applicants* as a result of the Waltons' breach of fiduciary duties, having knowledge that the property was transferred in breach of a fiduciary duty.

[180] The claim is for $22.6 million jointly and severally against the Walton respondents and the Listed Schedule C Companies, or in the alternative for an order awarding specific damages against each of seven of the Listed Schedule C Companies.[21]

[181] The record on which the DBDC Applicants seek to establish the Listed Schedule C Companies' liability for damages was created in the context of oppression proceedings involving the Waltons, at a time when the Listed Schedule C companies were not parties. The DBDC Applicants did not advance any new evidence to support the participation of these added respondents in Ms. Walton's breaches of her fiduciary duties, which is essential to any finding of knowing assistance. Rather, they relied on evidence already before the court about the Waltons' fraud, certain findings of Brown J., and especially the net transfer analysis.

[182] Thus, instead of pursuing the further tracing that Brown J. had anticipated would follow his appointment of the Waltons' receiver, the DBDC Applicants claimed damages against the ten Listed Schedule C Companies, with a view to sharing in the proceeds of sale of their ten properties. The net proceeds now in

[21] The specific claims are against 1780355 Ontario Inc., 6195 Cedar Street Ltd., Atala Investments Ltd., Bible Hill Holdings Inc., Cecil Lighthouse Ltd., The Old Apothecary Building and United Empire Lands Ltd., in amounts that correspond with the "net transfers" from Rose & Thistle to each company account between October 2010 and October 31, 2013, less any constructive trust amount already awarded.

the hands of the Receiver against which the DBDC Applicants seek to share as unsecured creditors are:

> 3270 American Drive, owned by United Empire Lands Ltd.: $656,362 (after full payment of the DBDC Applicants' constructive trust claim);
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> 324 Prince Edward Drive, owned by Prince Edward Properties Ltd.: $580,623;
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> 777 St. Clarens Avenue, owned by St. Clarens Holdings Ltd.: $431,603;
>
> 260 Emerson Avenue, owned by Emerson Developments Ltd.: $172,376;
>
> 24 Cecil Street, owned by Cecil Lighthouse Ltd.: $812,510;
>
> 0 Luttrell Avenue, owned by Bible Hill Holdings Inc.: $6,235 (subject to a DBDC Applicants' constructive trust);
>
> 2 Kelvin Avenue, owned by 6195 Cedar Street Ltd.: $11,497 (subject to a DBDC Applicants' constructive trust);
>
> 30 and 30A Hazelton Ave., owned by Atala Investments Inc.: $17,942;
>
> 66 Gerrard Street East, owned by The Old Apothecary Building Inc.: $86,480; and
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> 346 Jarvis Street, Suite F, owned by 1780355 Ontario Inc.: $0 (already subject to a DBDC Applicants' constructive trust).

[183] This chapter of the proceedings is, as my colleague points out, a priorities dispute. The DeJongs were investors in the Schedule C Companies that acquired the first four properties listed above. The Condos invested in the company that acquired the Cecil Street property. The DBDC Applicants are unable to trace their funds into these properties, so they are seeking damages

against the individual companies. The only way they can share in the proceeds of properties in which they have been unable to trace their own funds is as unsecured judgment creditors of the Listed Schedule C Companies, which requires that they establish liability for knowing receipt or knowing assistance. Both causes of action, for their success, depend almost entirely on the court's acceptance of the net transfer analysis, to which I now turn.

THE NET TRANSFER ANALYSIS

[184] The DBDC Applicants rely on the "net transfer analysis" as a cornerstone of their knowing assistance claim: both as evidence of the participation of the Listed Schedule C Companies in Ms. Walton's breaches of her fiduciary duties and for the amount of their damages. My colleague accepts the net transfer analysis in concluding that the *Canadian Dredge* test is met (at paras. 80 and 83), as the point of departure for determining the participation of the Listed Schedule C Companies in the fraudulent scheme (at paras. 84 and 87), and as the measure of the DBDC Applicants' damages for knowing assistance (at para. 128).

[185] As I will explain, the net transfer analysis was never intended to be used for the purpose of establishing a claim by the DBDC Applicants against the property of other defrauded investors and, as I see it, it does not provide the foundation for their claim for knowing assistance.

[186] The net transfer analysis is based on a summary of cash transfers between Schedule B Company accounts and Rose & Thistle that was attached as a schedule to the Inspector's fourth interim report. The analysis is dated December 31, 2013 and covers transactions between September 2010 and October 2013. The Inspector acknowledged that it was not intended to account for all of the dealings between the various accounts from inception, and stated in his fifth report that "the tracing charts…[were] intended to provide a snapshot of activity at a particular point of time" and "funds transferred to or from the relevant company outside of the time period [were] not captured" (Brown J., at para. 159).

[187] The cash transfer summary shows that, cumulatively, Rose & Thistle received $23.6 million more from the Schedule B Companies' accounts than it transferred to such accounts. This is the "net transfer" amount.

[188] The Inspector also looked at cash transfers between Rose & Thistle and all of the other Walton-controlled accounts other than Schedule B Company accounts. These 54 accounts the Inspector and Brown J. referred to as both "Walton Accounts" and "Schedule C Company Accounts".

[189] The Schedule C Company accounts included Norma Walton's personal account (into which the Inspector identified a net transfer of $5.4 million from Rose & Thistle), Walton Advocates (into which the Inspector traced a net transfer of $1.6 million from Rose & Thistle), and several Rose & Thistle accounts (into which the Inspector traced a net transfer of more than $6.4 million). The

Schedule C Company accounts also included those of the single-purpose investment companies set up by the Waltons (other than the Schedule B Companies), including the accounts of eight of the ten Listed Schedule C Companies.[22]

[190] The net transfer analysis showed that, during the same three-year period, cumulatively and on a net basis, the amount of $25.4 million was transferred into the Walton-controlled accounts (other than the Schedule B Company accounts) from Rose & Thistle.

[191] Taking the largest 53 advances by the DBDC Applicants to the Schedule B Companies, the Inspector examined the activity in the relevant Schedule B Company bank account immediately following the advance and looked for any contemporaneous transfer of funds from the relevant Schedule B Company account to the Rose & Thistle bank account. Then he examined the Rose & Thistle bank account to ascertain what activity occurred following the receipt of funds transferred in from the Schedule B account, and in particular, whether there was any contemporaneous transfer of funds from the Rose & Thistle account to a Schedule C Company account (Brown J., at para. 17). The Inspector noted that, while funds could be traced directly in seven instances to

[22] The Listed Schedule C Companies St. Clarens Holdings Ltd. and Emerson Developments Ltd. are not included in the net transfer analysis.

the purchase of specific Schedule C Properties, in most cases monies were intermingled.

[192] Before Brown J. the DBDC Applicants relied on the net transfer analysis to obtain proprietary remedies against certain Schedule C Properties. Brown J. recognized that the net transfer analysis supported the conclusion that the DBDC Applicants had a strong claim for unjust enrichment *against the Waltons in respect of the Schedule C Properties* (at paras. 227, 231, 264 and 268). He granted constructive trusts over those properties where the Inspector established that soon after the transfer of money from a Schedule B Company account, a Schedule C Property was purchased, that is, where the Schedule B monies were traced into a Schedule C Property.[23]

[193] Brown J.'s findings based on the net transfer analysis are summarized by my colleague at para. 16, as follows:

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

[23] Brown J. found that the following amounts of the DBDC Applicants' funds were used to purchase or discharge encumbrances on Schedule C Properties: 14 College St.: $1,314,225; 3270 American Drive: $1.032 million; 2454 Bayview: $1.6 million; 346E [346F] Jarvis St.: $937,000; 44 Park Lane Circle: $2.5 million; 2 Kelvin Street: $221,000; 0 Trent [0 Luttrell]: $152,900; and 26 Gerrard Street: $371,200. He granted constructive trusts in favour of the DBDC Applicants in respect of each of these properties for the proportionate share of the purchase price that these amounts represented at the date of purchase and for any proportionate share of the increase in value to the date of realization (at paras. 264-267).

(ii) during the same period, the Waltons directed transfers of a net $25.4 million from the Rose & Thistle account to the Schedule C Companies;

(iii) in almost all cases, some or all of the amounts advanced to the Schedule B Companies by the DBDC Applicants were transferred almost immediately to the Rose & Thistle account; and

(iv) those transfers of funds from the Schedule B Companies to Rose & Thistle constituted breaches of the agreements between the DBDC Applicants and the Waltons.

[194] The net transfer analysis does not, as the DBDC Applicants contend, "demonstrate that $22.6 million of the funds misappropriated from the DBDC Applicants were diverted to the use and benefit of the Schedule C Companies" (DBDC Applicants' Factum, at para. 57). There are a number of reasons why I conclude that the net transfer analysis does not support the claims against the Listed Schedule C Companies.

[195] First, the $22.6 million amount consists of the net amount transferred from Schedule B Company accounts to Rose & Thistle (less $1 million credited to the Waltons for proper expenses). Except as has been accounted for by constructive trust, the net transfer analysis does not show where the money went after it was transferred into Rose & Thistle, or that any of the "net" money ended up in any particular Walton-controlled account (including any Listed Schedule C Company account).

[196] Contrary to what is pleaded by the DBDC Applicants, the $22.6 million does not represent the extent to which any Schedule C Company or even the Schedule C Companies as a whole, were enriched by the DBDC Applicants' monies diverted from the Schedule B accounts.

[197] Second, although the net transfer analysis also indicates that Schedule C Company accounts received a net transfer of $25.4 million, this is simply the net amount that was transferred from Rose & Thistle to all 54 Walton-controlled accounts, other than the Schedule B Company accounts. It does not identify the source of the money coming from Rose & Thistle into a Schedule C Company Account. Without a proper tracing, no particular Schedule C Company account can be said to have received the benefit of Schedule B Company monies. Where a tracing has occurred, a constructive trust have been awarded.

[198] My colleague states, at para. 80, that as a result of these net transfers, the Schedule C Companies acquired funding necessary for their ongoing operations and he refers to Brown J. accepting the Inspector's conclusion that "the [DBDC] Applicants' investment in the Companies was a major source of funds for the Walton Companies." At the time this finding was made by Brown J., however, the Inspector did not yet have access to the Schedule C Company accounts, and therefore did not consider the funds invested by others, such as the DeJongs and the Condos, into the Schedule C Properties, transfers between the Schedule C Company accounts, and the movement of funds between such accounts and

Rose & Thistle. Even if it could be said that the Walton or Schedule C Companies as a whole acquired funding for their operations, this tells us nothing about what was happening in the account of any specific Schedule C Company, including all of the Listed Schedule C Companies (which of course had also received funds from their investors).

[199] As I see it, the central problem with using the net transfer analysis as a basis for a claim against the Listed Schedule C Companies, is that it treats all Walton-controlled accounts in the same way, and as a collective, when the investors in the Listed Schedule C Companies (which are only a subset of the Walton-controlled companies or accounts) were equally victims of the Waltons' fraud. The Waltons used a number of corporate entities to perpetrate their fraud on the appellants and the respondents – the corporate entities were the pawns in their "shell game." Some were entirely Walton-controlled, and others were investment companies set up in the same way as the DBDC Applicants' Schedule B Companies, to be co-owned by investors. The DBDC Applicants point to the net funds that were transferred from Rose & Thistle to all Schedule C Company accounts as a collective, but then target only ten such companies, the ones with valuable property and other defrauded investors, for the purpose of their knowing assistance claim.

[200] My colleague, at para. 106, considers it significant "that net funds of $23.6 million *flowed out of the Schedule B Companies* into Rose & Thistle, and net

funds of $25.4 million *flowed out of Rose & Thistle into the Schedule C Companies.*" He concludes that "it is the DBDC Applicants, not the Schedule C Companies, that suffered the net losses".

[201] In my view, the net transfers into and out of Rose & Thistle do not assist in establishing the liability of the Listed Schedule C Companies. Because it was designed to show the DBDC Applicants' losses, the net transfer analysis sets up, on one side of the ledger, the accounts of the DBDC Applicants' Schedule B Companies, and on the other, the 54 other Walton-controlled accounts. It stands to reason that the DBDC Applicants suffered the net losses, when compared to all of the Walton-controlled accounts. The DBDC Applicants invested much more than the Waltons and more than any other investor. If the Waltons failed to make their capital contributions and were siphoning money to their own personal accounts as well as moving investor money around, it follows that the amount transferred to Rose & Thistle by the Schedule B Companies would be more than the amount paid out by Rose & Thistle to such companies.

[202] The DBDC Applicants invoke the net transfer analysis as a measure of their collective losses against the Listed Schedule C Companies as a subset of the 54 Schedule C Companies. In fact, the net transfer analysis shows that, when the DBDC Applicants' Schedule B Companies are considered individually,

at least nine of them were *net beneficiaries* of transfers from Rose & Thistle.[24] And, when the Schedule C Companies are considered individually, an amount going into a Schedule C Company account could as easily have been money from another Schedule C Company account. The money cannot be traced from a Schedule B Company account.

[203] At paras. 57 to 59 of his reasons, the Application Judge identified the shortcomings in the net transfer analysis where he stated:

> [Referring to the example of 6195 Cedar Street Ltd.], there is no proof where Rose & Thistle obtained the money that was transferred to 6195 Cedar Street Ltd. It may have come from one of Dr. Bernstein's companies. It may not have. It may have come from investors in the Schedule C Companies whose money was transferred to Rose & Thistle. The report does not state where the money came from. The same can be said for all of the Schedule C Companies that the applicants seek a judgment against for knowing receipt of trust funds. Moreover, the schedule was as of a point in time and whether the balance changed over time is not known as no analysis was done.
>
> What happened to the money transferred to the Schedule B and C Companies by Rose & Thistle is not in evidence. On the hearing before Brown J., the applicants were able to establish that Dr. Bernstein's funds went into several Schedule C Properties and a constructive trust was ordered in favour of the applicants in respect of those properties. No constructive trust was ordered with respect to the property of the Schedule C Companies that the

[24] Bannockburn Lands Inc., Cityview Industrial Ltd., Dupont Developments Ltd., Leslie Lands, Liberty Land, Northern Dancer Lands Ltd., Queen's Corner Corp., Tisdale Mews Inc. and Twin Dragons Corporation.

> applicants now seek a judgment against, which I take to be recognition that the applicants did not have evidence that their money went into those properties. In paragraph 13 of his formal judgment of August 12, 2014, Brown J. ordered that the applicants were permitted to trace funds provided by the applicants into and through the accounts of the Schedule B Companies into the Schedule C Companies. However the applicants did not undertake any such tracing. *The applicants have not established that it was the applicants' money that was received by the Schedule C Companies in question.*
>
> In light of the way in which Ms. Walton transferred money around, I could not without a tracing analysis hold that Dr. Bernstein's money ended up in the Schedule C Companies against which the applicants now seek a judgment. [Emphasis added.]

[204] I agree entirely with these comments. In my opinion, not only does the net transfer analysis fail to establish the receipt by the Listed Schedule C Companies of DBDC Applicants' funds for the purpose of knowing receipt, it also cannot support the claim against them for knowing assistance. Yet, the DBDC Applicants rely on the net transfer analysis as evidence of the Listed Schedule C Companies' participation in Ms. Walton's breach of fiduciary duties and as the measure of their damages. I turn now to the substance of their claims.

A. THE KNOWING RECEIPT CLAIM

[205] My colleague concludes, and I agree, that the DBDC Applicants have failed to make out a claim for knowing receipt. "Knowing receipt" here refers to the receipt by the Listed Schedule C Companies of monies belonging to the

DBDC Applicants that were entrusted to Ms. Walton's control, and diverted in breach of her fiduciary duties.

[206] At paras. 56 to 59 of his reasons, the Application Judge rejected the knowing receipt claim after referring to and rejecting the net transfer analysis, which was relied on by the DBDC Applicants. Without a tracing analysis he could not find that the DBDC Applicants' money (other than what was already accounted for by constructive trust) ended up in the Listed Schedule C Companies.

[207] In their appeal to this court, the DBDC Applicants continue to assert that knowing receipt was made out. They contend that the Application Judge made a palpable and overriding error in concluding, on a balance of probabilities, that the Listed Schedule C Companies did not knowingly receive funds misappropriated from the DBDC Applicants. Importantly, they continue to rely on the net transfer analysis as providing such evidence (see paras. 65 to 71 of their factum).

[208] The rejection of the DBDC Applicants' knowing receipt claim recognizes that the net transfer analysis does not demonstrate the receipt of their funds by the Listed Schedule C Companies. As my colleague notes, the DBDC Applicants have been unable to demonstrate "the receipt of any particular funds by any particular Schedule C Company other than the funds with respect to which Brown J. previously granted constructive trusts" (at para. 38).

[209] In my opinion, just as the net transfer analysis cannot demonstrate receipt by a Schedule C Company of any DBDC Applicants' monies, it cannot provide support for the claim of knowing assistance. Yet, as I will explain, acceptance of the net transfer analysis is essential if the DBDC Applicants are to establish the "participation" and damages elements of this claim.

[210] I turn now to the knowing assistance claim.

B. THE KNOWING ASSISTANCE CLAIM

(1) Elements of the Equitable Wrong

[211] The elements of knowing assistance in a breach of fiduciary duty were described by this court in *Harris v. Leikin*, at para. 8, as: (1) a fiduciary duty; (2) a fraudulent and dishonest breach of the duty by the fiduciary; (3) actual knowledge by the stranger to the fiduciary relationship of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct; and (4) participation by or assistance of the stranger in the fiduciary's fraudulent and dishonest conduct.

(2) The Fraudulent and Dishonest Breach of Ms. Walton's Fiduciary Duties to the DBDC Applicants

[212] The point of departure in determining the liability of the Listed Schedule C Companies for knowing assistance is to identify the breaches of fiduciary duty in which they are alleged to have participated or assisted.

[213] The Application Judge accepted, at para. 34, that the diversion of funds out of the Schedule B Companies by the Waltons for their own purposes was in breach of their fiduciary duties, and, at para. 47, that when she knowingly took a risk with the money belonging to the Schedule B Companies that she had no right to take, Ms. Walton's activity was fraudulent and dishonest. My colleague has explained how the duties would have been owed by Ms. Walton to the DBDC Applicants, notwithstanding that the relationship was contractual, an analysis I am prepared to accept.[25] The existence and dishonest breaches of the fiduciary duties owed by Ms. Walton to the DBDC Applicants are not contested on appeal.

[214] It is particularly important in this case, where the alleged participants were also victims of the Waltons' fraud, to keep the focus on the specific breaches of fiduciary duty in which they are alleged to have participated, rather than the overall fraud in which the Waltons were engaged. The overall fraudulent scheme involved Ms. Walton's breaches of her fiduciary duties to *both* the DBDC Applicants and the respondents (as my colleague notes at paras. 76, 80, 85 and 95). For the purpose of the wrong of knowing assistance, however, the focus must be on the breach of fiduciary duties owed to the DBDC Applicants, otherwise the risk is that Ms. Walton's use of the Listed Schedule C Companies

[25] Brown J. found that Ms. Walton was in breach of the fiduciary duties she owed as a director of the Schedule B Companies. The problem with asserting a claim through these entities however is that because their losses were caused by the fraudulent actions of an insider, the claim could be met with a defence of *ex turpi causa.* See, for example, *Livent Inc. v. Deloitte & Touche*, 2016 ONCA 11, appeal allowed in part, 2017 SCC 63.

in the “shell game” will be considered sufficient to mark them as participants for the purpose of the knowing assistance claim.

[215] My colleague’s analysis of what the Listed Schedule C Companies are alleged to have done as “participants” focuses on their involvement in the overall fraudulent scheme, including as victims of that scheme. This leads him to conclude, at para. 68, that Ms. Walton’s “perpetration of the scheme was their participation in the scheme.” In order for the Listed Schedule C Companies to be liable as accessories to that breach, they must have done something to participate in the breach of fiduciary duty which is, as the DBDC Applicants have pleaded, and the Application Judge found, the diversion of their funds out of the Schedule B Companies for the Waltons’ personal use. It is to the element of participation that I now turn.

(3) The Listed Schedule C Companies Did Not “Participate” or “Assist” in Ms. Walton’s Breaches of Fiduciary Duty to the DBDC Applicants

[216] Liability for knowing assistance in a breach of fiduciary duty is fault-based. It requires an intentional wrongful act on the part of the “stranger” or accessory, to knowingly assist in the fraudulent and dishonest breach of fiduciary duty. Participation in a breach of fiduciary duty for the purpose of knowing assistance requires that the accessory “participated in or assisted the fiduciary's fraudulent and dishonest conduct”: *Enbridge Gas Distribution Inc. v. Marinaccio*, at para. 23.

[217] All of the knowing assistance cases cited by the parties involved specific harmful conduct by the "stranger" that assisted in the breach of fiduciary duty or breach of trust. In *Air Canada v. M & L Travel Ltd.*, the accessory stopped payment of trust funds, opened an account and attempted to transfer the funds into the new account. In *Enbridge Gas Distribution Inc. v. Marinaccio*, the accessories prepared invoices, opened bank accounts, arranged for wire transfers and accepted cash. In *Agip (Africa) Ltd. v. Jackson et al.*, the accessory concealed a self-interested transaction, and played the role of a disinterested arms' length vendor. And in *Locking v. McCow*an, 2016 ONCA 88 (a pleadings case), the accessory was alleged to have set up company structures and controlled the fraudulent movement of money out of the payee companies.

[218] By contrast here, the DBDC Applicants do not point to any conduct by any or all of the Listed Schedule C Companies as their participation in the Walton breach of fiduciary duty – except to repeat the same allegation as in respect of knowing receipt: "the Schedule C Company Respondents received property from the Applicants as a result of the Waltons' breach of their fiduciary duties owed to the Applicants", and that they "each received this property from the Applicants

having knowledge that the property was transferred in breach of a fiduciary duty": Third Fresh as Amended Notice of Application, at paras. 3(ttt) and (uuu).[26]

[219] While my colleague does not make the finding sought by the DBDC Applicants — that each Listed Schedule C Company received their property — he is nevertheless satisfied that participation is made out. With respect, I disagree.

[220] First, as I have already noted, my colleague's focus is on the overall fraud, and not the diversion of the DBDC Applicants' funds to the Waltons' personal use. At para. 57 of his reasons, he characterizes the pertinent question as whether Ms. Walton "caused the Schedule C Companies to participate in her fraudulent dealings". He answers the "participation" question at para. 86, by saying that Ms. Walton "*utilized the Schedule C Companies as actors* in the process of orchestrating her shell game through the Rose & Thistle "clearing house" account", and he then describes how she co-mingled and diverted the funds of both the DBDC Applicants and the Listed Schedule C Companies, using various pretexts. Again, at para. 95, he refers to the Listed Schedule C Companies as actors in Ms. Walton's "overall fraudulent undertaking in breach of her fiduciary obligations to both the DBDC Applicants and DeJong".

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[26] My colleague suggests that I have conflated knowing assistance with knowing receipt by requiring a benefit to have been received by a Listed Schedule C Company before knowing assistance is made out. While knowing assistance and knowing receipt are distinct wrongs, in this case the DBDC Applicants themselves rely on the same alleged fact – the diversion of their monies into the Listed Schedule C Properties – to support both claims. No other form of "participation" is alleged.

[221] The Listed Schedule C Companies may have "participated" in the general sense in the Waltons' fraudulent scheme or arrangement when money was moved to and from their accounts, in the same way money was moved to and from the Schedule B Company accounts. The actions of the Listed Schedule C Companies were the same as those of the Schedule B companies – they were conduits and used as part of the Waltons' shell game. All of the victims of Ms. Walton's fraud, including the Listed Schedule C Companies, may well have been *used by her* in the overall fraud, but, in my view, that does not equate to their participation in the dishonest breach of fiduciary duty to the DBDC Applicants so as to attract personal liability for damages.

[222] Second, in finding participation, my colleague relies on the net transfer analysis to point to the collective benefit of the Waltons' arrangement to the Schedule C Companies. In his view, the Schedule C Companies were "significant net beneficiaries", they acquired properties as intended and they "benefitted at least partly from Ms. Walton's actions" (at paras. 79, 80 and 124). He states, at para. 80, that, based on the net transfers of monies from the Schedule B Companies to Rose & Thistle and from Rose & Thistle to the Schedule C Companies, "the latter acquired funding necessary for their ongoing operations" and he refers to Brown J.'s acceptance of the conclusion that the DBDC Applicants' investments in the Schedule B Companies "[were] a major source of

funds for the [Schedule C] Companies" (which as I have noted was a finding made without reference to the Schedule C Company accounts).

[223] With respect, I disagree with the acceptance of the net transfer analysis to support a finding of participation. The net transfer analysis only establishes that the *collective* of the 54 Walton-controlled accounts (consisting of all accounts controlled by the Waltons other than those of the Schedule B Companies) benefitted from the Waltons' overall fraud, during the three-year period considered by the Inspector. It does not prove that any one or more of the ten Listed Schedule C Companies received a benefit or that this enabled them to acquire properties (except where constructive trusts were already imposed). Nor does the net transfer analysis demonstrate that any Listed Schedule C Company participated in Ms. Walton's diversion of the DBDC Applicants' funds.

[224] Third, even when my colleague considers the individual Listed Schedule C Companies (at paras. 87 to 96), he does not identify any evidence of their "participation" or "assistance" in the breach of fiduciary duty to the DBDC Applicants. Instead he refers to transfers from their accounts to and from Rose & Thistle, saying that, with two possible exceptions, each "either *received from or transferred to* Rose & Thistle monies or monies-worth during the relevant period", and that this both meets the test for the second and third elements of *Canadian Dredge* and for the participation/knowing assistance requirement (at paras. 80, 83, 84, 95 and 96). I respectfully disagree.

[225] Prince Edward Properties Ltd. is the Listed Schedule C Company in respect of which there was a net transfer from its account *to* Rose & Thistle of $520,850 during the three-year period covered by the net transfer analysis. Only $100 was transferred the other way. There is no evidence that it benefited from or participated in the diversion of the DBDC Applicants' funds (or even that it was a beneficiary of the Waltons' overall fraud). There is no evidence of net Schedule B Company monies being transferred into this Listed Schedule C Company account, or that they were used to acquire its property, 324 Prince Edward Drive.

[226] The two exceptions referred to by my colleague are St. Clarens Holdings Ltd. and Emerson Developments Ltd., where there is no evidence of *any* transfer of funds between their accounts and Rose & Thistle account, let alone any evidence of a transfer of the DBDC Applicants' funds into these entities. In fact, as the respondents point out, since the Schedule C Properties, 777 St. Clarens Avenue and 260 Emerson Avenue, were acquired after the Inspector was appointed, and the Waltons had no access to the DBDC Applicants' funds, no DBDC Applicant monies could have found their way into these Schedule C Companies, or been used to acquire their properties.

[227] My colleague acknowledges that there is no evidence of any transfer between Rose & Thistle and these companies, and, at paras. 90 to 93, he describes how they were defrauded by Ms. Walton. He concludes that Ms. Walton's acts in defrauding these Listed Schedule C Companies "engaged the

Listed Schedule C Companies as actors in her overall fraudulent undertaking", that "each of these transactions" required a corporate act, and that "Ms. Walton's acts were their acts, and the Companies accordingly participated in or assisted Ms. Walton in her breach of fiduciary duties to the DBDC Applicants" (at para. 96). With respect, I disagree that participation is made out here. It would mean that being a defrauded entity, as part of a larger fraud, can constitute knowing assistance in the fraudster's breach of fiduciary duty to another fraud victim.

[228] Even in the case of the seven Listed Schedule C Companies where the net transfer analysis shows a net transfer of monies from Rose & Thistle to their individual accounts during the relevant period (United Empire Lands Ltd., Bible Hill Holdings Ltd., 6195 Cedar Street Ltd., Cecil Lighthouse Ltd. and The Old Apothecary Building Inc., Atala investments Inc. and 1780355 Ontario Inc.), this is not evidence of that company benefiting from, or in any other way participating in, Ms. Walton's breach of fiduciary duty, which is her diversion of funds from the DBDC Applicants. As we have seen, the net transfer analysis does not take into account monies that were invested directly from the Schedule C Company investors, including the investors in the Listed Schedule C Companies, or transfers between Schedule C Company accounts.

[229] The only benefit that is demonstrated here is a "net benefit" to the Schedule C Companies as a collective, from the transfer of Rose & Thistle monies. I have already identified what I view as the limits of the net transfer

analysis. Even if more money flowed from Rose & Thistle into a Listed Schedule C Company than what that company paid to Rose & Thistle, this is not evidence that the Listed Schedule C Company benefited from or participated in the specific breach of fiduciary duty, which was the diversion of the DBDC Applicants' funds from their intended purpose.

[230] The actions my colleague relies on for the Listed Schedule C Companies' participation, are that the Listed Schedule C Companies received and paid monies to Rose & Thistle (and in some cases were simply defrauded by the Waltons). In my view, this conduct does not rise to the level of knowing assistance by the Listed Schedule C Companies in a breach of a fiduciary duty any more than it would engage the Schedule B Companies in such a breach. They were not participants acting in their own right to further a breach of fiduciary duty. They were *used by* the Waltons as part of a fraudulent scheme. In this regard the Schedule B companies and the innocent investor Schedule C Companies are on an equal footing.

[231] As such, while the Listed Schedule C Companies may have participated in Ms. Walton's overall fraudulent scheme, in the sense that they were used by her in the "shell game" to co-mingle investor funds, and to avoid making her own contributions, the net transfer analysis does not provide the evidence that they participated in her breach of fiduciary duty to the DBDC Applicants so as to attract personal liability for knowing assistance. Nor is there any other evidence

of their participation. In my opinion, the DBDC Applicants' claim against the Listed Schedule C Companies should fail for this reason alone.

(4) The Knowledge Element

[232] As the authorities such as *El Ajou* instruct, "it is necessary to identify the natural person or persons having management and control *in relation to the act or omission in point*" (at p. 695). Here, the determination of whether Ms. Walton's fraudulent intent is to be attributed to a Listed Schedule C Company depends on the wrongful act the company committed. Because of my conclusion on the participation issue, I do not propose to say anything about my colleague's discussion of the knowledge element, except to indicate that I take issue with two points: the result of applying the three *Canadian Dredge* criteria for the corporate identification doctrine in this case, and my colleague's suggestion that the second and third criteria should be approached "in a less demanding fashion".

[233] One of the reasons that my colleague specifically addresses whether each Listed Schedule C Company received a benefit is to meet the requirements of *Canadian Dredge* for attaching liability to a corporation for the fault of its directing mind. As he notes, at para. 69, *Canadian Dredge* instructs that where a corporation's alleged wrongdoing involves fraud by its directing mind, the court must be satisfied that (i) the directing mind was acting within her assigned field of operation, and that her actions (ii) were not totally in fraud of the Listed Schedule

C Company, and (iii) were by design or result partly for the benefit of the corporation.

[234] My colleague's analysis shows that there are difficulties meeting these requirements in this case (even if the alleged wrong was participation in Ms. Walton's overall fraud) because the scheme was for the Waltons' personal benefit and defrauded the Listed Schedule C Companies, and because the evidence of each company's individual benefit from the scheme is questionable. While it is true, as my colleague notes, that knowing assistance does not require a defendant to have received a benefit, the issue of benefit is relevant here because Ms. Walton's conduct was in fraud of the very entities sought to be made liable for knowing assistance, and there is no other act of participation alleged. And, the overall "net" benefit to the Schedule C Companies is central to the DBDC Applicants' claim. Without a tracing of Schedule B Company money into their accounts, there is no evidence that any of the Listed Schedule C companies benefited from the diversion of the DBDC Applicants' funds by Ms. Walton.

[235] My colleague suggests, at para. 70, that the second and third criteria of *Canadian Dredge* should be approached in a less demanding fashion, because this is a civil case, where the burden of proof is less onerous, and because of the nature of the case (a complex multi-real estate transaction investment fraud,

perpetrated over an extended period of time, and implicating numerous corporate actors (operating at the instance of the fraudster) and numerous victims).

[236] With respect, I disagree. When the *Canadian Dredge* criteria have been accepted and applied in civil cases, this has occurred without relaxing the criteria for finding a corporation is liable for a wrong, when its directing mind is acting fraudulently (see, for example, *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce*, at p. 493 and *Golden Oaks Enterprises Inc. (Trustee of) v. Lalonde*, 2016 ONSC 5313, 133 O.R. (3d) 513, at paras. 127-131).

[237] I do not accept that the adoption of a less demanding standard is warranted here. As I see it, neither the civil burden of proof nor the nature and extent of the fraud would justify a less rigorous approach if the Listed Schedule C Companies are to be fixed with responsibility for the conduct of their director, Ms. Walton.[27] Knowing assistance in the breach of a fiduciary duty is a serious wrong that requires actual and not constructive knowledge by the participant. The investors in the Listed Schedule C Companies did not themselves know about or cause the companies to participate in Ms. Walton's breach of fiduciary duty. The rationale for the claim is that the participant's actual knowledge of and assistance in the fraudulent conduct is sufficient to "bind the stranger's conscience so as to

[27] In *Livent,* in any event, the Supreme Court of Canada expressed the view that courts retain the discretion to refrain from applying the corporate identification doctrine where, in the circumstances of the case, it would not be in the public interest to do so (at para. 104). There is no policy reason for the corporate identification theory to apply to impose liability on the Listed Schedule C Companies for Ms. Walton's fraudulent breaches of fiduciary duty to the DBDC Applicants.

give rise to personal liability": *Air Canada v. M & L Travel Ltd*., at p. 812. I see no justification in the circumstances of this case to lessen the requirement for knowledge before one victim of a fraud is tagged with the conduct of a fraudster. The conduct here was in fraud of the Schedule B Companies and their investors, the DBDC Applicants, *and* the Listed Schedule C Companies and their investors, and was for the personal benefit of the Waltons.

(5) The Damages Award of $22.6 Million is Arbitrary and Not a True Measure of Damages for Knowing Assistance

[238] Finally I turn to the question of damages. I disagree with my colleague's conclusion that the measure of damages for knowing assistance in this case is $22.6 million, and that the Listed Schedule C Companies are liable jointly and severally for this amount.

[239] Under the doctrine of knowing assistance, "the defendants' liability is measured by the plaintiff's injury consequent to the trustee's misconduct": see the P. Perell article, cited by my colleague at paras. 119 and 127. This is because the wrong is in acting as an accessory to the principal breach, and the accessory is liable jointly and severally *with the principal wrongdoer.* This is why the accessories in the *Enbridge Gas* case acknowledged that, if liable, the damages would be the full amount paid by Enbridge as a result of the principal's scheme and not just their share of the profit (at para. 50).

[240] Here, instead of asserting that the Listed Schedule C Companies are liable together with the Waltons for the $66.9 million amount awarded as damages for breach of fiduciary duty, the DBDC Applicants claim $22.6 million, which they say is the portion of that amount "which the Schedule C Company respondents knowingly assisted the Waltons in diverting to the benefit of the Schedule C Companies". My colleague accepts this measure of damages when he states, at para. 128, that "the loss is measured by the net transfer to the Schedule C Companies, globally, of $22.6 million.

[241] In my view, the $22.6 million amount, which is based on the net transfer analysis, is not a true measure of the damages for which the Listed Schedule C Companies could be liable to the DBDC Applicants for knowing assistance. It does not correspond with the loss caused by the actions of the fiduciary, or even with the loss caused by, or benefit to, some or all of the Schedule C Companies. It is simply the net amount transferred between the Schedule B Company accounts and Rose & Thistle (less $1 million credited to the Waltons).

[242] And even if it could be assumed that all of the $22.6 million transferred to Rose & Thistle was a net gain to the Schedule C Companies, this is simply the amount by which all of the Walton-controlled accounts, other than the Schedule B Company accounts, would have benefited. As we have seen (at para. 189 above), it includes over $12 million of net transfers to Ms. Walton personally, to "Walton Advocates", and to other Rose & Thistle companies.

[243] Two of the Listed Schedule C Companies (Emerson and St. Clarens) received no funds from Rose & Thistle under the net transfer analysis, and one (Prince Edward) transferred considerably more money to Rose & Thistle than it received (see paras. 225 and 226). Even considered as a collective, the Listed Schedule C Companies received only the net amount of $4,367,204 from Rose & Thistle, according to the net transfer analysis.

[244] Finally, if the net amount transferred from the DBDC Applicants to Rose & Thistle to the Schedule C Companies could be a proper measure of damages, the $22.6 million figure includes and therefore double counts the amounts the DBDC Applicants were awarded for their constructive trust claims (a total of $8,128,325: Brown J. at para. 264). The constructive trusts resulted from a tracing of DBDC Applicants' funds into specific Schedule C Properties with reference to the transfers shown on the net transfer analysis. These diversions of funds into specific Schedule C Properties have already been accounted for, and would need to be deducted from the $22.6 million damages award.[28] I say this, not because I view the $22.6 million amount as a proper measure of the DBDC Applicants' damages against the Listed Schedule C Companies, individually or as a collective, but to further emphasize that it is an arbitrary and purely

[28] This is not a question of double recovery, which my colleague seeks to address at para. 130. Rather, the Listed Schedule C Companies could not have been the beneficiaries of amounts already accounted for by their tracing into specific properties in the constructive trust claims, and the inclusion of these amounts in their damages would double count such amounts.

convenient number that emerges from the net transfer analysis, an analysis that was never intended to inform a claim for knowing assistance.

(6) Equity Does Not Support the Knowing Assistance Claim

[245] My colleague recognizes that knowing assistance is an equitable doctrine, however he rejects the argument that equity should not intervene in this case. In my view, there are important equitable concerns here that should prevent the court from finding the Listed Schedule C Companies liable for damages for knowing assistance.

[246] First, the Listed Schedule C Companies would be subject to an award of damages that is based on equitable grounds when they themselves are victims of the same fraudulent conduct. The liability of the stranger in a knowing assistance claim is fault-based. To the extent that any "fault" could be found here, it results from being caught up in or used as part of the wrongdoer's fraudulent scheme.

[247] Second, the Listed Schedule C Companies are tagged with damages based on the full extent to which all of the Walton-controlled companies (that is all the Schedule C Companies) benefited. The DBDC Applicants have chosen to proceed only against the ten Listed Schedule Companies for the full amount of the "net transfer" from Rose & Thistle to all of the Walton-controlled or Schedule C Companies. The DBDC Applicants contend that they have limited their relief to

these companies “based on the work of the receiver/manager and for efficiency” (DBDC Applicants’ Factum, at para. 16). This is not a satisfactory explanation – the reality is that these are the only entities that have assets or proceeds worth pursuing. Even if the full $22.6 million could be accepted as a measure of their loss from the conduct of the Schedule C Companies (if it were assumed that all of the net monies flowing into the Schedule C Companies came from the DBDC Applicants, which as I stated earlier is not supported on the evidence), this includes over $12 million of net transfers to Ms. Walton personally, to “Walton Advocates”, or to other Rose & Thistle companies. To place the entire burden of the claim on the ten Listed Schedule C Companies, overwhelming the claims for losses of the investors in those companies, in my view, would be an unjust result.

[248] Finally, I conclude that the knowing assistance remedy should not be utilized in these exceptional circumstances – where one group of defrauded investors seeks to obtain judgment sounding in knowing assistance against another group that has been defrauded in a similar manner. The DBDC Applicants were able to trace certain funds into the purchase of Schedule C Properties, including five of the Listed Schedule C Company properties and to obtain a constructive trust that gives them priority over the proceeds of sale of such properties. I agree with my colleague that the remedy of constructive trust, as argued by DeJong, is not available as a matter of law, and that the Application Judge erred in giving DeJong priority over the proceeds of four properties on that

basis. That said, there is no question that DeJong's money went into the purchase of these properties (and indeed the Application Judge found, and my colleague accepts, that its advances were as shareholder loans, and that it is a creditor for the full amounts it claims). In my view, it would be unfair for DeJong's claims to its advances, which can be traced, but not in a way that would justify a constructive trust, to be obliterated by a damages claim of $22.6 million by the DBDC Applicants, without any evidence that their funds were used in any way (except where a tracing has occurred) to acquire these properties. This result alone is such that the equitable claim of knowing assistance should be denied in this case.

CONCLUSION

[249] For these reasons, I would dismiss the appeal of the DBDC Applicants with respect to the knowing receipt and knowing assistance claims. I would allow their appeal of the DeJong constructive trust awards essentially for the reasons outlined by my colleague. In the circumstances, however, my proposed disposition would result in the priorities over the Listed Schedule C Properties being determined by the Receiver without regard to any claim to such proceeds by the DBDC Applicants, except to the extent of their constructive trusts.

Released: January 25, 2018

"K. van Rensburg J.A."

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 Developments Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Group
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 Price 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 Lawn Circle, Toronto, Ontario
16. 19 Tennis Crescent, Toronto, Ontario
17. 646 Broadview Avenue, Toronto, Ontario

Annexe “A”

Listed Schedule C Companies/Properties

	Schedule C Company	Corresponding Schedule C Property
1.	United Empire Lands Ltd.	3270 American Drive, Mississauga, Ontario
2.	Bible Hill Holdings Inc.	0 Luttrell Ave., Toronto, Ontario
3.	6195 Cedar Street Ltd.	2 Kelvin Avenue, Toronto, Ontario
4.	Prince Edward Properties Ltd.	324 Prince Edward Drive, Toronto, Ontario
5.	Cecil Lighthouse Ltd.	24 Cecil Street, Toronto, Ontario
6.	Atala Investments Ltd.	30 and 30A Hazelton Avenue, Toronto, Ontario
7.	St. Clarens Holdings Ltd.	777 St. Clarens Avenue, Toronto, Ontario
8.	The Old Apothecary Building Inc.	66 Gerrard Street East, Toronto, Ontario
9.	1780355 Ontario Inc.	346 Jarvis Street, Suite F, Toronto, Ontario
10.	Emerson Developments Ltd.	260 Emerson Ave., Toronto, Ontario

I

Court of Appeal File No. C62822

COURT OF APPEAL FOR ONTARIO

BEFORE) THURSDAY, THE 25th
)
THE HONOURABLE JUSTICE CRONK) DAY OF JANUARY, 2018
THE HONOURABLE JUSTICE BLAIR
THE HONOURABLE JUSTICE van RENSBURG

B E T W E E N:

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

Applicants (Appellants)

and

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

Respondents (Respondents)

and

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

and

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

AND BETWEEN

CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION

Applicant (Respondent)

and

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP LTD. and PRINCE EDWARD PROPERTIES LTD., ST. CLARENS HOLDINGS LTS., AND EMERSON DEVELOPMENTS LTD.

Respondents (Respondents)

ORDER

THIS APPEAL by the Applicants (Appellants), DBDC Spadina Ltd. and THOSE CORPORATIONS LISTED ON SCHEDULE A HERETO (collectively, the "Appellants"), , from the Order of the Honourable Justice Newbould dated September 23, 2016, was heard June 2, 2017 at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

ON READING the Appeal Books and Compendium of the Appellants, the Joint Compendium of the Applicant (Respondent), Christine DeJong Medicine Professional Corporation ("CDJ") and the Respondents, Dennis and Peggy Condos (the "Condos") (collectively, the "Respondents"), the Consolidated Exhibit Books, the Factum and Brief of Authorities of the Appellants, the Facta of the Respondents, the Joint Compendium and Brief of Authorities of the Respondents and upon hearing the submissions of the counsel for the Appellants and the Respondents,

FOR WRITTEN REASONS delivered on January 25, 2018, this Court having reserved its decision;

1. **THIS COURT ORDERS** that the Appeal is granted and the following paragraphs of the Judgments and Orders of Justice Newbould dated September 23, 2016 are hereby set aside:

   (a) Paragraph 12 of the Order in respect of the Appellants' Application (Court File No. CV-13-10280-00CL), holding that the corporations listed on Schedule C hereto (the "Schedule C Companies") are not jointly and severally liable to the Appellants;

(b) Paragraph 1 of the Order in respect of CDJ's Application (Court File No. CV-15-10879-00CL), granting constructive trusts in favour of CDJ over the properties known municipally as 3270 American Drive, Mississauga, Ontario; 324 Prince Edward Drive, Toronto, Ontario; 777 St. Clarens Avenue, Toronto, Ontario; and 260 Emerson Avenue, Toronto, Ontario; and

(c) Paragraph 14 of the Order in respect of the Appellants' Application (Court File No. CV-13-10280-00CL) and Paragraph 4 of the Order in respect of CDJ's Application (Court File No. CV-15-10879-00CL), granting the Respondents their costs of their Application and Motion as against the Appellants.

2. **THIS COURT ORDERS AND DECLARES** that the Schedule C Companies are jointly and severally liable to the Appellants for damages payable in the amount of $22,680,852, less any amounts recovered by the Appellants on account of the constructive trusts in favour of the Appellants ordered by Brown, J. (as he then was) at Paragraph 12 of his Judgment and Order dated August 12, 2014 in relation to the Schedule C Properties.

3. **THIS COURT ORDERS AND DECLARES** that the Respondent CDJ is not entitled to constructive trusts over the properties known municipally as 3270 American Drive, Mississauga, Ontario; 324 Prince Edward Drive, Toronto, Ontario; 777 St. Clarens Avenue, Toronto, Ontario; and 260 Emerson Avenue, Toronto, Ontario.

4. **THIS COURT** grants leave to appeal the costs ordered against the Appellants in favour of the Respondents at Paragraph 14 of the Order of Justice Newbould dated September 23, 2016 in respect of the Appellants' Application (Court File No. CV-13-10280-00CL) and Paragraph 4 of

the Order of Justice Newbould dated September 23, 2016 in respect of CDJ's Application (Court File No. CV-15-10879-00CL).

5. **THIS COURT ORDERS** that the Appellants and Respondents be permitted to make succinct written submissions to this Court in respect of the costs of the Application and Motion appealed from within 30 days of the date of this Order.

THIS ORDER BEARS INTEREST at the rate of 3 percent per year commencing on January 25, 2018.

Daniel Murphy

~~(Signature of Judge)~~

D. MURPHY

REGISTRAR

COURT OF APPEAL FOR ONTARIO

ENTERED AT / INSCRIPT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

FEB 14 2018

PER / PAR:

DBDC SPADINA LTD. et al.
Applicants
(Appellants)

-and- NORMA WALTON et al.
Respondents

Court of Appeal File No. C62822

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

ORDER

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DBDC SPADINA LTD. *et al.*	and	**NORMA WALTON *et al.***
Applicants		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 returnable on a date to be fixed)

(Volume 1 of 2)

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