

**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

RESPONDING FACTUM OF THE MANAGER, SCHONFELD INC.

(Motion by Certain Schedule C Investors to Reallocate Fees of the Manager,
returnable April 26, 2021)

GOODMANS LLP

333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Brian Empey LSO No. 30640G
bempey@goodmans.ca

Mark S. Dunn LSO No. 55510L
mdunn@goodmans.ca

Carlie Fox LSO No. 68414W
cfox@goodmans.ca

Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for the Manager, Schonfeld Inc.

Table of Contents

I.	OVERVIEW	1
II.	FACTS	3
A.	The DeJongs and Condos Seek to Reallocate \$50,927.05 in fees.....	3
(i)	The moving parties' motion	3
(ii)	The moving parties' late-breaking challenge to the Manager's fees.....	5
(iii)	The fees associated with the Reallocation Activities.....	8
B.	The Reallocation Activities	9
(i)	The Manager's Participation in the DeJong's appeal to the Supreme Court of Canada.....	9
(ii)	The Criminal Investigation and Trial.....	11
(iii)	The Motion for contingent authorization to distribute Schedule C funds to the Applicants.....	14
III.	ISSUES	15
IV.	LAW AND ARGUMENT	15
A.	The Manager's fee allocations were reasonable and there are no grounds to disturb them.....	15
(i)	The Reallocation Activities are within the Manager's Mandate.....	15
(ii)	The Allocation of Fees to the Subject Properties is Reasonable.....	18
(iii)	The Manager's fees are reasonable	20
V.	CONCLUSION.....	21

I. OVERVIEW

1. This factum is filed by 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 Schedule “B” 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**”).

2. The lengthy history of this matter is detailed in paragraphs 9-47 of the Fifty-Seventh Report of the Manager dated September 7, 2020 (the “**57th Report**”), which has been filed in connection with the Manager’s motion also returnable April 26, 2021.

3. The Manager files this factum in response to the motion filed by Christine DeJong Medicine Professional Corporation (the “**DeJongs**”) and Dennis and Peggy Condos (the “**Condos**”) for an order, among other things, reallocating certain professional fees previously allocated to and paid from the proceeds of sale of Schedule C Properties in which the DeJongs and/or the Condos either have or assert an interest (the “**Fee Reallocation Motion**”).

4. The Fee Reallocation Motion is a dispute over approximately \$50,000. The Manager has encouraged the parties with an economic interest in this amount, being the Applicants and the moving parties, to resolve the dispute to avoid any further expenditure. Unfortunately, no settlement was reached.

5. This motion rests on the moving parties’ assertion that no fees should be allocated to properties that they invested in unless the fees relate to an activity that conferred a specific benefit on them. This is not how fees have been allocated over the long history of this proceeding, and it

is not how the law requires that fees be allocated. The Manager has allocated fees relating to its overall mandate across all of the companies and properties that are part of its mandate. This Court has repeatedly approved the Manager's allocation methodology, without requiring proof of a specific benefit to each company or property. This is a reasonable and practical solution, since a detailed analysis of who benefited from each of the Manager's activities is neither necessary nor appropriate.

6. The moving parties seek to change the previously-approved allocations for three activities. Each of the activities attacked by the moving parties is addressed below.

7. **The Manager's cooperation with police.** The Manager provided information requested by the Toronto Police Service in connection with the investigation into the conduct of the Respondents, Norma and Ronauld Walton (the "**Waltons**"), and a representative of the Manager ultimately testified at the Waltons' criminal trial pursuant to a subpoena. The Manager, as a court officer, was obliged to cooperate with an investigation that was so closely related to its mandate.

8. The moving parties do not seem to dispute this. They allege, however, that the Manager did more than simply respond to questions, and was actively involved in the case against the Waltons. They say that these fees should be allocated to the Applicants, because the Applicants directed the Manager's activities. This is not what happened. There is no evidence to support the moving parties' theory, and the Manager's uncontradicted evidence refutes it.

9. **The Manager's intervention at the Supreme Court of Canada.** In May 2019, the DeJongs appealed successfully to the Supreme Court of Canada. The Manager sought, and was granted, leave to intervene in these proceedings. The DeJongs argued aggressively against the

Manager's motion for leave to intervene, and claimed that the Manager's participation was unnecessary and outside its mandate. This argument failed before the Supreme Court of Canada. It should also be rejected by this Court. The order appointing the Manager specifically authorized it to participate in all proceedings relating to this matter, including appeals. The Manager's work was the evidentiary basis for the arguments made by both the Appellants and the Respondents before the Supreme Court. The Manager's intervention was entirely appropriate.

10. **Contingent distribution motion.** The moving parties also seek to reallocate fees totalling less than \$5,000 for a motion to distribute funds in the event that the DeJongs' application for leave to appeal to the Supreme Court was dismissed, or leave was granted but the appeal was dismissed. The motion was granted at the time, because it was a reasonable step to move this matter forward. The moving parties' attack on the motion is driven by hindsight, and there is no basis for reallocation.

11. Finally, the moving parties say that they seek to set aside this Court's approval of the Manager's fees. But they have not advanced any specific complaint about those fees. This aspect of the motion should also be dismissed.

II. FACTS

A. The DeJongs and Condos Seek to Reallocate \$50,927.05 in fees

(i) The moving parties' motion

12. The DeJongs and Condos object to certain of the Manager's fees and those of its counsel having been allocated to and paid by the following Schedule C Companies in which the Condos

and the DeJongs either claim an interest or have been found to have an interest (collectively, the **“Subject Companies”**):

- (a) Cecil Lighthouse Ltd.;
- (b) Emerson Developments Ltd.;
- (c) Prince Edward Properties Ltd.;
- (d) St. Clarens Holdings Ltd.; and
- (e) United Empire Lands Ltd.

Fifty-Eighth Report of the Manager dated March 29, 2021 (**“58th Report”**),
Responding Motion Record of the Manager (**“RMR”**) at para. 6, pp. 2-3
[PDF pp. 6-7]

13. The Condos claim an equity interest in Cecil Lighthouse Ltd. (**“Cecil”**). The Applicants dispute the Condos’ interest. As described in its Fifty-Seventh Report dated September 7, 2020, the Manager is seeking the direction of this Court on whether the Condos’ claim is valid. In the event the Court finds that the Condos’ claim against Cecil is not valid, then the Condos would not be affected by any fees allocated to Cecil.

58th Report at para. 7, RMR, Tab 1, p. 3 **[PDF p. 7]**

14. The DeJongs were found to have interests in each of the other Subject Companies (being Emerson Developments Ltd., Prince Edward Properties Ltd., St. Clarens Holdings Ltd., and United Empire Lands Ltd.) in the judgment of Justice Newbould dated September 23, 2016.

58th Report at para. 8, RMR, Tab 1, p. 3 **[PDF p. 7]**

15. The Condos and DeJongs object to any allocation to the Subject Companies of fees relating to three activities:

- (a) The Manager's participation in the Toronto Police Services' ("TPS") criminal investigation of the Walton and its subsequent attendance pursuant to a subpoena as a witness in the criminal trial at which Ms. Walton was convicted by a jury of two counts of theft over in relation to transactions that are the subject of these proceedings;
- (b) The Manager's application to and subsequent attendance at the Supreme Court of Canada on May 14, 2019; and
- (c) The Manager's motion returnable June 28, 2018 for contingent authorization to distribute fees to the Applicants (collectively, the "**Reallocation Activities**").

58th Report at para. 9, RMR, Tab 1, p. 3 [PDF p. 7]

16. The fees associated with the Reallocation Activities have already been approved, without prejudice to the moving parties' right to move for an order setting aside that approval.

Order of Justice Hainey dated July 27, 2018, Order of Justice Deitrich dated January 28, 2019 and Order of Justice Hainey dated July 3, 2019, being Exhibits A, B and C to the Affidavit of C. DeJong sworn October 20, 2020, Motion Record of the DeJongs and Condos, Tab 2.1, 2.B and 2.C, pp. 27-57 [PDF pp. 36-66]

(ii) *The moving parties' late-breaking challenge to the Manager's fees*

17. The moving parties' Notice of Motion seeks an order "deducting the grand total of \$50,927.05 in fees ... from the sale proceeds" of the Subject Companies. The Manager therefore understood that the moving parties objected only to fees associated with the Reallocation Activities *being allocated* to the Subject Companies. The moving parties had not previously raised any

concerns about the quantum of the fees, nor had they expressed a basis for setting aside this Court's previous approval of those fees.

Moving Parties' Notice of Motion at para. (a)(i), Motion Record of the DeJongs and Condos, Tab 1 **[PDF p. 5]**

18. In an affidavit served on Friday, April 16, 2021 (one day after the deadline for the moving parties' factum), Mr. Condos stated for the first time that he is objecting to the *quantum* of the Manager's fees.

Supplementary and Reply Affidavit of D. Condos sworn April 15, 2021
("Second Condos Affidavit") at para. 25

19. Both the Manager and its counsel filed fee affidavits when the fees were originally approved. The moving parties have therefore had detailed docket entries showing exactly what the Manager and its counsel charged fees for. They did not cross-examine on the fee affidavits, or seek further information in writing.

20. Mr. Condos' affidavit refers to exactly *one* docket that the moving parties claim to oppose. Mr. Condos alleges that this docket shows "5 hours spent, *inter alia*, reallocating fees which had been previously allocated."

Second Condos Affidavit at para. 5

21. Mr. Condos refers, apparently, to a docket that refers to time spent *both* allocating fees and drafting a factum that is not at issue in this motion. The moving parties' suggestion that five hours was spent re-allocating dockets is not correct.

Invoice dated July 31, 2019, being Exhibit B to the Fee Affidavit of B.
Empey sworn January 27, 2020, being Appendix AA to the 57th Report of the

Manager, Motion Record of the Manager dated January 29, 2021, Vol. 2, Tab AA, p. 611 [PDF p. 275]

22. Moreover, the re-allocation occurred in response to a request *from the moving parties*. In other words, Mr. Condos' lawyer *asked* the Manager to reallocate certain fees and Mr. Condos now *complains* that the Manager charged fees for the required analysis.

23. Later, on May 4, 2020, counsel to the DeJongs and the Condos wrote to the Manager's counsel and requested an analysis of the fees that had been allocated to each of the Subject Companies in respect of the Reallocation Activities.

24. The Manager's counsel responded on May 6, 2020 that it did not have the break out requested but would look into the matter. In a further email dated May 12, 2020, counsel to the DeJongs and Condos confirmed that she was specifically requesting:

...how much is claimed from the proceeds of the properties of the DeJongs and Condos. Can you, in the first instance, **let me know the total number for each relevant property** to ensure I am properly capturing what is referenced in your reports – I have tried to do that myself by am not sure if I have done it correctly. **Then it can be further clarified by a break-down (roughly) as between the motion, the SCC and the criminal investigation.** [emphasis added]

Email from R. Fisher dated May 12, 2020, Appendix B to the 58th Report of the Manager, Motion Record of the Manager ("MR"), Vol. 1, Tab 1.B, p. 17 [PDF p. 23]

25. In response to this request, the Manager and its counsel reviewed all of the docket entries relevant to the Reallocation Activities and prepared a summary of the fees allocated to each of the Subject Companies in respect of the Reallocation Activities. The Manager provided to the DeJongs and Condos a summary of its fee allocation analysis as well as the detailed docket entries

of the Manager and its counsel. The DeJongs and Condos did not request any further information or analysis about the Reallocation Activities or associated fees.

Email from R. Fisher dated May 12, 2020, Appendix B to the 58th Report of the Manager, MR, Vol. 1, Tab 1.B, pp. 19-34 [**PDF p. 26-43**]

26. A total of \$50,927.05 was allocated to the Subject Companies in respect of the Reallocation Activities.

58th Report at para. 12, RMR, Tab 1, p. 4 [**PDF p. 8**]

(iii) The fees associated with the Reallocation Activities

27. In preparing its 58th Report to this Court, the Manager prepared a further analysis that indicates the amount of fees allocated to each Subject Company in respect of each of the Reallocation Activities. A summary of the fees incurred in respect of each Reallocation Activity and the amounts allocated to each of the Subject Companies is reproduced below:

	Cecil Lighthouse	Emerson	Prince Edward	St. Clarens	United Empire	Total
Proposed Schedule C Distribution	\$1,223.85	\$882.87	\$882.87	\$882.87	\$882.87	\$4,755.33
Criminal Investigation and Trial	\$1,323.47	\$1,300.92	\$1,300.92	\$1,300.92	\$1,323.47	\$6,549.70
Supreme Court of Canada	\$6,551.45	\$8,331.21	\$8,331.21	\$8,331.21	\$8,076.96	\$39,622.04
	\$9,098.77	\$10,515.00	\$10,515.00	\$10,515.00	\$10,283.30	\$50,927.07

Appendix C to the 58th Report, Responding Motion Record of the Manager, Tab 1.C, p. 35 [**PDF p. 45**]

28. The difference between this analysis and the version previously provided to the moving parties' counsel is that this analysis shows the fees allocated in respect of each of the Reallocation Activities, whereas the earlier analysis showed the fees allocated to each Subject Company.

29. Dr. DeJong states at paragraph 30 of her affidavit that she is unable to verify "whether all of the preparation time relative [*sic*] to the 3 fee approval Motions are addressed" in the fee analysis that the Manager provided to Dr. DeJong's counsel. But dockets showing how much time was spent preparing for the fee approval motions were served on all parties, including the moving parties.

Fee Affidavit of B. Empey sworn January 27, 2020, being Appendix AA to the 57th Report of the Manager, Motion Record of the Manager dated January 29, 2021, Vol. 2, Tab AA, p. 602-622 [**PDF p. 264-291**]

30. The fees associated with the fee allocation and approval motions were, in any event, allocated across all companies and properties and are not reflected in the chart above. The Manager's view, as set out in its prior fee approval reports, is that fee allocation and approval is part of its general mandate that ought not to be borne by any one company or property but is reasonably shared by all of the entities within the Manager's mandate.

58th Report at para. 14, RMR, p. 4 [**PDF p. 8**]

B. The Reallocation Activities

(i) *The Manager's Participation in the DeJong's appeal to the Supreme Court of Canada*

31. The DeJongs and Condos assert that the Manager's application for leave to intervene and its subsequent intervention in the DeJongs' appeal to the Supreme Court of Canada did not fall

within the Manager's mandate because the activity was "substantially for the benefit for, at the behest of," the Applicants. The Manager disagrees with this assertion.

Factum of the DeJongs and Condos at para. 78

32. By way of context, the appeal to the Supreme Court related to the Applicants' claim against the Schedule C Companies. The Manager's analysis was the evidentiary basis for the claim, and the Manager participated both in the hearing at first instance before Justice Newbould and before the Ontario Court of Appeal.

33. The Manager took no position on the merits of the claim, and limited its participation to explaining its analysis. Before the Court of Appeal, the Manager's counsel spent significant time making submissions in response to questions from the Court.

34. Once the Supreme Court of Canada granted the DeJongs leave to appeal, the Manager decided that it would be appropriate to bring a motion for leave to be added as a party or, alternatively, as an intervener, so that it could provide the same assistance to the Supreme Court that it had provided to the Court of Appeal.

58th Report at para. 22(a), RMR, Tab 1, p. 6 [PDF p. 10]

35. The goal of the Manager's motion was to offer assistance to the Supreme Court, if the Supreme Court determined that it would be useful.

Notice of Motion of the Manager dated March 21, 2019, Appendix G to the 58th Report, RMR, Tab 1.G, p. 78 [PDF p. 92]

36. The DeJongs vigorously opposed the Manager's motion for leave to intervene. They argued that intervention was neither necessary nor appropriate, asserted that the Manager's role in

the proceedings was “DBDC-centric,” and argued that the Manager’s motion should be dismissed because its participation in the appeal would generate costs to be borne by the DeJongs.

DeJongs’ Memorandum of Argument dated March 29, 2019 at para. 6,
Appendix J to the 58th Report, RMR, Tab 1.J, p. 155 **[PDF p. 172]**

37. Notwithstanding the DeJongs’ opposition, the Supreme Court of Canada granted the Manager leave to intervene.

Order of Justice Côté dated April 10, 2019, Appendix L to the 58th Report,
RMR, Tab 1.L, p. 188 **[PDF p. 207]**

38. In their current motion materials, the DeJongs and Condos raise substantially the same objections to the Manager’s participation before the Supreme Court of Canada that the DeJongs raised in response to the Manager’s motion for leave to intervene.

(ii) The Criminal Investigation and Trial

39. The Manager and its counsel incurred a total of \$6,549.70 in fees in connection with its cooperation in the criminal investigation of the Waltons and subsequent criminal trial.

58th Report at para. 30, RMR, Tab 1, p. 8 **[PDF p. 12]**

40. The DeJongs and Condos assert in their Notice of Motion, and in each of their affidavits, that they object to fees being allocated to the Subject Companies because such fees relate to “the Manager compiling documentation to support Dr. Bernstein laying criminal charges against the Waltons.” But this is not what happened.

DeJongs and Condos Notice of Motion at para. t(i), DeJongs and Condos MR,
Tab 1, p. 8 **[PDF p. 16]**

DeJong Affidavit at para. 46, DeJongs and Condos MR, Tab 2, p. 24 **[PDF p.**

33]

First Condos Affidavit at para. 48, DeJongs and Condos MR, Tab 3, p. 93
[PDF p. 103]

41. The moving parties' argument echoes a narrative advanced by Ms. Walton unsuccessfully in the course of these proceedings, and prior to her criminal trial. Ms. Walton argued then, and the moving parties argue now, that the Manager helped bring about the criminal proceedings against her at the behest of Dr. Bernstein.

42. This narrative is false. It was found to be false in the decision of Code, J. that included extensive factual findings about how the charges against Ms. Walton developed.

Reasons for Judgment of Justice Code dated February 6, 2019 at paras. 16-21,
Exhibit X to the Affidavit of Julia Flood, Responding Motion Record of the
Applicants, Tab X, p. 430-432

43. The Manager has reported all of its interactions with the police and the Crown to this Court and the service list in this proceeding. The moving parties have *never* challenged that reporting, or even asked questions about it. But they now claim that important parts of the narrative are false. Dr. DeJong asserts, for example:

Relative [*sic*] to the Manager's position that there was an obligation to cooperate with the Toronto Police Services and the Crown Law Office in connection with the criminal proceedings against the Waltons, **my counsel advised me of her understanding from the Manager that the charges were initiated by Dr. Bernstein personally upon an information package prepared at Dr. Bernstein's behest.** [Emphasis added.]

Affidavit of C. DeJong sworn October 26, 2020 at para. 46, DeJongs and Condos Motion Record, Tab 2, p. 22 [PDF p. 27]

44. The evidentiary foundation for the moving parties' position is astonishingly thin. Dr. DeJong says her information comes from "her counsel" who is, in turn, alleged to have received an "understanding from the Manager." The evidence is inadmissible double-hearsay that should not even be before the Court. More importantly, however, Dr. DeJong claims the source of her information is, ultimately, the Manager. The Manager has said, specifically and repeatedly, that it had no involvement in preparing materials for, or in the decision to, lay criminal charges against the Waltons. Rather, the Manager has reported that it learned about the criminal charges *from* a Toronto police detective after the investigation was already underway.

58th Report at paras. 32-36, pp. 8-9 [**PDF p. 12-13**]

45. The Manager's reports about its involvement in the criminal investigation and subsequent criminal trial against the Waltons have all been served on the service list, including the DeJongs and Condos, and were never challenged.

46. Additionally, all of the information provided to the police was publicly filed with the court, and all but a few documents were publicly posted on a website maintained by the Manager at <http://www.schonfeldinc.com/walton.html>.

58th Report at para. 33, RMR, Tab 1, pp. 8-9 [**PDF pp. 12-13**]

47. Other than Ms. Walton (as described in the Supplement to the Fortieth Report and in the Fifty-Second Report), no party has ever objected to the Manager's cooperation with the police and the Crown.

58th Report at para. 37, RMR, Tab 1, p. 9 [**PDF p. 13**]

(iii) The Motion for contingent authorization to distribute Schedule C funds to the Applicants

48. The Manager and its counsel incurred professional fees of \$4,755.33 in connection with its motion heard August 24, 2018 for contingent authorization to distribute to the Applicants funds held in respect of certain Schedule “C” Companies.

58th Report at para. 15, RMR, Tab 1, p. 5 [PDF p. 9]

49. The authorization to distribute funds to the Applicants depended on whether the DeJongs’ application for leave to appeal to the Supreme Court of Canada was successful, and whether any subsequent appeal was successful. If the DeJongs were unsuccessful in their appeal to the Supreme Court of Canada, then funds would be paid to the Applicants.

Order of Justice Hailey dated August 24, 2018 at para. 1, Appendix “D” to the 58th Report, RMR, Tab 1D, p. 37 [PDF p. 48]

50. The Manager’s motion was granted by this Court.

Order of Justice Hailey dated August 24, 2018 at para. 1, Appendix “D” to the 58th Report, RMR, Tab 1D, p. 37 [PDF p. 48]

51. As described in the Manager’s Fifty-Third Report dated June 19, 2018, given the time that had passed since the sale of the Schedule C Properties, and the additional time that would be required by the DeJongs’ leave to appeal application, the Manager determined it was reasonable and appropriate at that time to seek contingent authorization to distribute the funds it held in an effort to conclude its mandate as quickly as possible.

58th Report at para. 17, RMR, Tab 1, p. 5 [PDF p. 9]

III. ISSUES

52. The DeJongs and Condos assert that the Reallocation Activities either did not fall within the Manager's mandate, or did not benefit the DeJongs and Condos. On these grounds, the DeJongs and Condos say they should not incur any of the Manager's fees in connection with the Reallocation Activities.

53. As detailed below, all of the Reallocation Activities fell squarely within the Manager's mandate and were undertaken reasonably and in the interests of all stakeholders based on the information known to the Manager at the time it acted.

IV. LAW AND ARGUMENT

A. The Manager's fee allocations were reasonable and there are no grounds to disturb them

(i) The Reallocation Activities are within the Manager's Mandate

54. By Order of Justice Newbould dated November 5, 2013 (the "**Appointment Order**"), Schonfeld Inc. was appointed Manager of all of the property then owned by the Schedule B Companies and all proceeds thereof. Paragraph 5(k) of the Appointment Order specifically confers on the Manager authority to participate in "all proceedings" with respect to the companies within its mandate, including appeals.

Appointment Order of Justice Newbould dated November 5, 2013 at paras. 3 and 5(k), Appendix F to the 58th Report, RMR, Tab 1.D, pp. 61 and 63 [**PDF pp. 74 and 76**]

55. The Manager's mandate was extended to the Schedule C Properties, including the funds now held by the Subject Companies, by Judgment of Justice Brown dated August 12, 2014 (the

“**2014 Judgment**”). The 2014 Judgment incorporated the terms of the Appointment Order to the Manager’s mandate in respect of the Schedule C Properties.

Judgment of Justice Brown dated August 12, 2014 at paras. 14 and 15,
Appendix E to the 58th Report, RMR, Tab 1.E, p. 50 [**PDF p. 62**]

56. The Reallocation Activities were all within the Manager’s mandate as set out in the Appointment Order and the 2014 Judgment, as described below.

57. **Participation in Supreme Court Appeal.** The Manager chose to exercise its authority to participate in the Supreme Court appeal for the following reasons.

- (a) First, the Manager’s evidence and investigation provided the factual basis for both the decision of Justice Newbould at first instance and the decisions (both majority and dissent) of the Court of Appeal. Before the Court of Appeal, the Manager took no position on the outcome or the legal issues, but its counsel spent significant time answering questions from the Court about the Manager’s analysis. The Manager explained this in its Notice of Motion for leave to be added as a party or intervener and offered similar assistance to the Supreme Court.

Notice of Motion dated March 21, 2019, Appendix G to the 58th Report,
RMR, Tab 1.G, p. 78 [**PDF p. 92**]

- (b) Second, the DeJong’s appeal factum dated March 1, 2019 and filed with the Supreme Court, unfairly criticized the Manager’s conduct. The DeJongs accused the Manager of having acted improperly, and alleged it should have conducted further tracing analysis to see how the funds invested in the Schedule C Companies had been used. However, the Court of Appeal had specifically determined that the Manager was not required to conduct this analysis unless investors in the Schedule C Companies were prepared to pay for it. In this context, it was important to the Manager to ensure that its mandate and activities were accurately described.

Factum of the DeJongs dated March 1, 2019 at paras. 37-44, Appendix H to the 58th Report, RMR, Tab 1.H, p. 102-105 [**PDF p. 117-120**]

Reasons for Decision of the Court of Appeal dated September 17, 2015 at paras. 14-15, Appendix I to the 58th Report, RMR, Tab 1.I, p. 144 [**PDF p. 160**]

58. **Criminal Investigation and Trial.** The Manager is of the view that, as an officer of the Court, it was obliged to cooperate with the investigation of TPS and the Crown into matters closely related to the Manager's mandate. The Manager's testimony, given under subpoena, in the criminal proceedings related solely to its mandate as inspector and receiver/manager of the companies and properties that are the subject of this proceeding.

58th Report at para. 41, RMR, Tab 1, p. 10 [**PDF p. 14**]

59. **Motion for Contingent Authority to Distribute Funds.** In order to discharge its mandate, the Manager is required to distribute to stakeholders the funds it manages in respect of the Schedule B Companies and the Schedule C Properties. In order to discharge this mandate as efficiently as possible—for the benefit of all stakeholders—the Manager sought authority to distribute funds to the Applicants in accordance with the decision of the Court of Appeal in the event the DeJongs' motion for leave to the Supreme Court was dismissed or if their appeal was ultimately unsuccessful.

60. At the time, the Manager reported to the court that it was reasonable in the circumstances to seek contingent authority to make the distribution, and this Court agreed.

Order of Justice Hainey dated August 24, 2018 at para. 1, Appendix D to the 58th Report, RMR, p. 37 [**PDF p. 48**]

61. As stated by the DeJongs and Condos at paragraph 67 of their factum on this motion:

Courts are reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver... ([*Royal Bank v. Soundair Corp.*](#), 1991 CanLII 2727 (Ont. C.A.))

62. Indeed, a hindsight-driven approach to determining whether a court-appointed officer's activities and fees are reasonable is inappropriate. Rather, the court should consider the conduct of the Manager in light of the information it had when it acted.

BT-PR Realty Holdings Inc. v. Coopers & Lybrand, [1997 CarswellOnt 1246](#) at para. 22 per Farley J.

63. This is a well-established principle, and an answer to the moving parties' complaint. The Manager exercised its judgment and determined that the motion was a reasonable step required to complete its mandate. The motion, which cost less than \$5,000 to prepare and argue, was granted.

64. The DeJongs and Condos argue, with the benefit of hindsight, that the motion was unreasonable because the Supreme Court agreed to hear their appeal and then granted it. But this could not have been known at the time.

(ii) *The Allocation of Fees to the Subject Properties is Reasonable*

65. As detailed in the Manager's factum dated April 15, 2021 and filed in connection with the Manager's motion also returnable April 26, 2021, Canadian courts recognize that the allocation of professional fees in insolvency proceedings is a flexible, discretionary exercise. Rather, fees are to be allocated on a case-by-case basis at the receiver or manager's discretion.

Royal Bank of Canada v. Atlas Block Co., 2014 ONSC 1531 [*Royal Bank of Canada*] [at para. 43](#), (Sup. Ct. [Commercial List])

Hunjan International Inc., Re, 2006 CanLII 63716 (Sup. Ct.) [*Hunjan International Inc.*] [at paras. 4-5](#), [55](#) and [57](#), (Sup. Ct.), BOA, Tab 1

Winnipeg Motor Express Inc., Re, 2009 MBQB 204 [at paras. 41](#) and [52](#)

66. The principles governing the allocation of fees in insolvency proceedings, as summarized by Justice D.M Brown in *Royal Bank of Canada v. Atlas Block Co.*, 2014 ONSC 1531 is set out at paragraph 71 of the DeJongs' and Condos' factum and is reproduced below:

- (i) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;
- (ii) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;
- (iii) A strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost effective and would drive up the overall cost of the receivership;
- (iv) A creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery;
- (v) An allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a *pro rata* basis;
- (vi) Where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.

Royal Bank of Canada, supra, at para. 43

67. Canadian courts also recognize that it is unlikely that any particular allocation method will result in absolute fairness to all parties. Each creditor will have a view, from its own perspective, of what is or is not fair in terms of allocation.

Hunjan International Inc., supra, at paras. 4-5, 55, 57, 71-72

Royal Bank of Canada, supra, at para. 43

68. This is the case here. The DeJongs and Condos have their own view about what is fair and reasonable. They take the position that the Reallocation Activities have not “benefited” them. But this is not the right question. The issue is whether the overall allocation is fair. Given the scope of the fees, and the fact that the activities in question related to the Manager’s mandate as a whole, the Manager does not believe that a re-allocation is necessary or appropriate.

(iii) The Manager’s fees are reasonable

69. The moving parties also, apparently, challenge this Court’s approval of the Manager’s fees. It is difficult to address this challenge, however, because the moving parties have not articulated any specific complaint about the fees.

70. The principles applicable to fee approval are well-established. The standard of review of a court-appointed receiver or manager is whether the amounts claimed are fair and reasonable. In general, a court-appointed receiver is entitled to recover its actual costs and only in *extraordinary* circumstances will the court reduce its costs.

Confectionately Yours Inc., Re (2002), 2002 CanLII 45059 (Ont. C.A.) [at paras. 35-36](#)

Sub-Prime Mortgage Corp. v. Phoenix Apartments Ltd., 2010 ONSC 6535 [at para. 17](#)

Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc., 1996 CanLII 1437 (B.C. C.A.) [at paras. 24-25](#)

71. No such “extraordinary circumstances” have been raised by the DeJongs or Condos on their motion. Rather, the Manager’s fees for the Reallocation Activities were reasonable. Indeed, the same fee structure has been approved multiple times by this Court.

V. CONCLUSION

72. In light of all of the foregoing, the Manager respectfully submits that the Manager's previous recommendations with respect to its fees and the allocation of them, including to the Subject Companies, are fair and reasonable such that the previous orders of this Court ought not to be disturbed.

73. The Manager respectfully submits that the Fee Reallocation Motion should be dismissed.

All of which is respectfully submitted this 22nd day of April, 2021.



Goodmans LLP

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 Luttrell 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. Luttrell 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

SCHEDULE “D”
RELEVANT AUTHORITIES

1. *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997 CarswellOnt 1246](#)
2. *Royal Bank of Canada v. Atlas Block Co.*, [2014 ONSC 1531](#) [Commercial List]
3. *Hunjan International Inc., Re*, [2006 CanLII 63716](#) (Sup. Ct.)
4. *Winnipeg Motor Express Inc., Re*, [2009 MBQB 204](#)
5. *Confectionately Yours Inc., Re*, [2002 CanLII 45059](#) (Ont. C.A.)
6. *Sub-Prime Mortgage Corp. v. Phoenix Apartments Ltd.*, [2010 ONSC 6535](#)
7. *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.*, [1996 CanLII 1437](#) (B.C. C.A.)
8. *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#)

DBDC SPADINA LTD., *et al.*
Applicants

NORMA WALTON, *et al.*
Respondents

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

Responding Factum of the Manager, Schonfeld Inc.
(Motion by Certain Schedule C Investors,
returnable April 26, 2021)

GOODMANS LLP
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Brian Empey LSO No. 30640G
bempey@goodmans.ca
Mark S. Dunn LSO No. 55510L
mdunn@goodmans.ca
Carlie Fox LSO No. 68414W
cfox@goodmans.ca

Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for the Manager, Schonfeld Inc.