CITATION: *DBDC Spadina Ltd. et al. v. Norma Walton et al.*
COURT FILE NO.: CV-13-10280-00CL
DATE: 2021-05-04

SUPERIOR COURT OF JUSTICE - ONTARIO

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

Applicants

AND:

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

Respondents

AND:

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

BEFORE: Koehnen J.

COUNSEL: *Mark Dunn and Carlie Fox*, counsel for the Court-Appointed Manager, Schonfeld Inc.

Shara Roy and Christopher Yung, counsel for the Applicants, DBDC Spadina Ltd. et al

Norma Walton, self-represented

Dominique Michaud, counsel for Trez Capital Limited Partnership et al.

Rosemary Fisher and Bart Sarsh, counsel for Christine DeJong Medicine Professional Corporation and Dennis and Peggy Condos

Danny Nunes, counsel for Celicia Van Plesse

Duncan Coopland, self-represented

John Rocha and Michele Peng, self-represented

HEARD: April 26, 2021

ENDORSEMENT

[1] This is an application for directions by Schonfeld Inc., the Manager of a number of corporate entities to distribute approximately $567,970 and to have its fees and

disbursements approved. The distribution of funds relating to two entities, 1780355 Ontario Inc. and the Old Apothecary Building Inc. is not contested and is approved.

[2] Distribution of $501,392 in respect of a property formerly owned by Cecil Lighthouse Ltd. is contested as is the allocation of fees and expenses.

[3] For the reasons set out below, I allow distribution of amounts owing on account of preferred shares in Cecil Lighthouse to Dennis and Peggy Condos, John Rocha and Michelle Peng and to Celicia Vane Plesse. Duncan Coopland has not established the validity of an investment in Cecil Lighthouse as a result of which no distribution to him is authorized. I allow the Manager's proposed allocation of fees without adjustment.

I. The Cecil Lighthouse Distribution

[4] The applicants are investment vehicles of Dr. Stanley Bernstein. Dr. Bernstein invested approximately $110 million in a real estate fraud orchestrated by Norma Walton and her husband Ronauld Walton. He holds a judgment in the amount of $66.95 million against Ms. Walton and against what have been referred to in argument as the Schedule B corporations. Schedule B corporations are ones into which Dr. Bernstein or his investment vehicles made direct investments. In June 2019, Ms. Walton was convicted on two counts of theft over $5,000 on related facts and sentenced to three years imprisonment. The judgment is under appeal.

[5] Cecil Lighthouse is not a Schedule B corporation. Cecil Lighthouse is what the parties referred to in argument as a Schedule C corporation. Schedule C corporations are ones in

which Dr. Bernstein did not invest but which are controlled by Ms. Walton and in which other, smaller investors put their money.

[6] The distinction is significant because, at trial, Justice Newbould gave Dr. Bernstein judgment against the Schedule B companies. On appeal, a majority of the Court of Appeal panel expanded the judgment to include a $22 million judgment against the Schedule C companies with Justice van Rensburg dissenting. On further appeal, the Supreme Court of Canada adopted the dissenting reasons of van Rensburg J.A. as their own and set aside the judgment against the Schedule C companies.

[7] As a result, Dr. Bernstein does not have a judgment against the Schedule C companies or against Cecil Lighthouse. Instead, he has a judgment against Ms. Walton. He has issued a notice of garnishment against her pursuant to that judgment. Ms. Walton owns the common shares of Cecil Lighthouse. On this application, Dr. Bernstein asks the court to order that any monies remaining in Cecil Lighthouse be notionally paid to Ms. Walton either as a dividend or as a return of capital and that he be permitted to seize those funds pursuant to his notice of garnishment.

[8] Dr. Bernstein's request is opposed by Dennis and Peggy Condos, John Rocha, Michelle Peng, Celicia Vane Plesse and Duncan Coopland, all of whom claim to hold preferred shares in Cecil Lighthouse. Preferred shareholders would have to have their interests paid out before a common shareholder like Ms. Walton could be paid a dividend that empties the corporation of assets or before she could have her capital returned.

[9] Dr. Bernstein submits that the preferred shares were issued improperly and amount to a fraudulent conveyance or fraudulent preference.

[10] None of the Preferred Shareholders appear to have initially invested in Cecil Lighthouse. Instead, they invested in other corporations. On December 12, 2013, however, Ms. Walton sent an email to a law clerk she employed and instructed him to issue preferred shares in Cecil Lighthouse to a number of individuals. The email also indicated the date as of which the share issuance was to be effective and if recipients of the preferred shares were to have investments in other Walton run corporations cancelled.

[11] The applicants note that this email was sent the day after Ms. Walton was served with a notice of motion that sought a certificate of pending litigation on a long list of properties owned by Walton companies, including the Cecil Lighthouse property, and which sought to preclude the Walton group of companies (knowns as the Rose & Thistle Group) from disposing of or encumbering any assets held by it without further order of the court.

[12] The applicants also note that in her instructing email, Ms. Walton directed that the preferred share be backdated to various earlier effective dates. The applicants submit that the dates were selected to make the issuance look legitimate and to make it look as if the preferred shares were issued before the dispute with Dr. Bernstein arose.

[13] On December 18, 2013, Justice Newbold issued an order prohibiting the respondents from dealing with two particular properties and requiring the respondents to provide notice to Dr. Bernstein if they proposed to deal with 21 other enumerated properties among which was the Cecil Lighthouse property.

[14] The Preferred Shareholders were not parties to the action and received no notice of the motion.

[15] Dr. Bernstein also notes that the preferred shares are not recorded in the Cecil Lighthouse general ledger and that there is no record in Cecil Lighthouse's bank statements of any funds invested by the Preferred Shareholders actually being transferred to Cecil Lighthouse. Instead, it appears that like with most investments in the larger group, funds were transferred into a general Rose & Thistle bank account which was used as a clearing account to make payments to a myriad of other corporations.

[16] The Preferred Shareholders characterize this application as a second attempt by Dr. Bernstein to achieve a priority over Cecil Lighthouse and other Schedule C companies, the first being his attempt to obtain judgment directly against them.

[17] The extent to which the applicants are given relief against Schedule C companies should be viewed with caution and restraint. Dr. Bernstein began his claim against the Walton's with respect to schedule B companies in which he invested. The 2013 orders appointing an Inspector and Manager did not extend the Manager's powers to the Schedule C companies. It was only in July 2014 that Justice D. M. Brown expanded the Manager's powers to include the Schedule C companies. None of the Schedule C companies or Schedule C investors (other than potentially the Walton's) were parties to the proceedings at that point.[1] Justice Brown's reasons envisaged relief against Schedule C companies only if Dr. Bernstein could trace his funds into them. As van Rensburg J.A. noted at paragraph 177 of her dissenting reasons, instead of quantifying his unjust enrichment claim by tracing his funds into Schedule C companies as Brown J. had envisaged, Dr. Bernstein simply added

[1] Dissenting reasons of van Rensburg J.A., *DBDC Spadina Ltd. v. Walton*, 2018 ONCA 60 para. 169

the Schedule C companies as respondents to the proceedings. That did not, however, make the Preferred Shareholders parties to the proceeding.

[18] On numerous occasions in argument, the applicant suggested that the issuance of preference shares to the Preferred Shareholders was an improper preference. They did not press the point nor did they refer to the *Assignments and Preferences Act*.[2] Preferences analysis would not come into play in any event because there is no evidence before me to suggest that Cecil Lighthouse is insolvent. Preferences only apply if the conveyance is made within a certain period of time before insolvency.

[19] The applicants rely more heavily on the concept of a fraudulent conveyance. The relevant provisions of the *Fraudulent Conveyances Act*[3] read as follows:

> 2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.
>
> Where s. 2 does not apply
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> 3. Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent set forth in that section.

[20] In most cases here, the preferred shareholder was able to demonstrate that they advanced consideration for the preferred shares. Although the consideration was advanced initially in respect of other companies, the companies in respect of which the Preferred

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[2] *Assignments and Preferences Act, RSO 1990, c A.33*
[3] *Fraudulent Conveyances Act, RSO 1990, c F.29*

Shareholders advanced funds did not purchase real estate. As a result, Ms. Walton issued shares in a company that had purchased real estate. From the perspective of the Preferred Shareholders, they had provided good consideration for their preferred shares. They received the preferred shares in good faith without being aware of even the suggestion that the shares were being issued for the purpose of defeating the claims of creditors. On the contrary, from the perspective of the Preferred Shareholders, the shares were being issued not to defeat their claims but to fulfil the bargain they had made.

[21] Moreover, at the time of the share issuance, Dr. Bernstein was not a creditor of Cecil Lighthouse nor was Cecil Lighthouse even a defendant in the action he was pursuing. Even today, Dr. Bernstein is not a creditor of Cecil Lighthouse.

[22] As van Rensburg J.A. noted in paragraph 183 of her reasons:

> "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 the proceeds of properties in which they have been unable to trace their own funds is as unsecured judgement 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."

[23] She went on to note in para. 197 of her reasons that without proper tracing, no particular Schedule C company account could be said to have received the benefit of Schedule B monies.[4]

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[4] *Ibid.* at paragraph 197.

[24] As noted, the Supreme Court of Canada set aside the judgment against the Schedule C companies for knowing assistance or knowing receipt and there is no tracing analysis to show that Dr. Bernstein's funds went into Cecil Lighthouse or any other Schedule C company. In those circumstances I see nothing wrong with allowing Preferred Shareholders in Cecil Lighthouse to have their shares redeemed before the assets of the company are subject to any other claims.

[25] The issue then becomes whether those who claim to be Preferred Shareholders have established their right to the shares. The Manager set up a proof of claim process for preferred shareholders. I turn now to the proofs of claim for each claimant.

(i) The Condos

[26] The Condos submit that they have 160,000 shares in Cecil Lighthouse. They initially invested in Richmond East Properties Limited. Richmond East had not, however, acquired any real estate. Ms. Walton asked them whether she could move their investment into Cecil Lighthouse because it had a property that was being redeveloped. They agreed. There is no evidence before me that the Condos had any inclination that the transfer of their funds into Cecil Lighthouse was a fraudulent conveyance. From their perspective, they were simply getting what they bargained for, an investment in a company that owned real estate.

[27] Van Rensburg JA noted in paragraph 183 of her reasons:

> "The Condos invested in the company that acquired the Cecil Street property."

[28] As noted, her reasons were adopted in their entirety by the Supreme Court of Canada when it reversed the majority judgment of the Court of Appeal. Her finding that the Condos invested in Cecil Lighthouse is therefore *res judicata*.

[29] Quite apart from that, the Condos filed a detailed proof of claim file with the Manager which discloses detailed support for their investment. The Manager agrees that the Condos invested hard cash into the Rose & Thistle group which was ultimately reflected in preferred shares of Cecil Lighthouse.

[30] In those circumstances I am satisfied that the Condos have made out a valid claim for 160,000 preferred shares.

(ii) Duncan Coopland

[31] Duncan Coopland submits that he holds 121,000 shares in Cecil Lighthouse. He has produced a preferred share certificate to this effect.

[32] Each preferred shareholder was required to file a proof of claim with the Manager. Mr. Coopland's proof of claim is thin to say the least. It is based solely on the preferred share certificate. The proof of claim asserts that he provided cash consideration of $121,500 for the preferred shares. Beneath the heading "Nature of Consideration," the proof of claim form requires the claimant to:

> Give full particulars of the consideration, the date on which the consideration was given and the value at which you assess the security, and attach a copy of the security documents. If the equity interest was acquired in exchange for another equity interest, provide full particulars of that equity interest and the consideration given in exchange for it.

[33] Mr. Coopland provides no particulars on his proof of claim form.

[34] There is a further heading in Section E of the proof of claim form entitled "Particulars of Claim." It provides:

> Other than as already set out herein the particulars of the undersigned's total Claim are attached.
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> Provide all particulars of the Claim and supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to the Claim.

[35] Mr. Coopland has provided no particulars. Although Mr. Coopland swore an affidavit in support of his claim for this hearing, the affidavit does not provide any particulars of the alleged investment in Cecil Lighthouse either, nor does it provide an explanation for the absence of any particulars.

[36] The email that Ms. Walton wrote on December 12, 2013 instructing the law clerk to issue preferred shares contained an instruction in respect of each shareholder to issue a particular number of shares followed by an instruction to cancel shares issued to that shareholder in another company. Beside the instructions for Mr. Coopland's preferred shares, Ms. Walton wrote: "nothing to cancel". This suggests that there was no other investment that was being cancelled in exchange for Mr. Coopland's preferred shares.

[37] In the foregoing circumstances, I am not satisfied that Mr. Coopland has established a valid claim for preferred shares. He has known for some time that the issuance of the shares was controversial. It was up to him to establish a valid claim for the shares. A bald assertion that he is entitled to shares based solely on the presence of a share certificate does not create a valid claim when the legitimacy of the share certificate is the very thing at issue.

[38] The Manager's 57th Report notes that Mr. Coopland had explained orally to the Manager that he had lost all of his financial records and related documentation in a house fire and was therefore unable to provide correspondence related to the purported investment. Mr. Coopland did not repeat that statement in either his proof of claim or his affidavit. Even if Mr. Coopland had been the victim of a house fire, there should be other ways of establishing an investment of $121,500. One might expect there to be bank records, records of a party who prepared Mr. Coopland's tax returns or at a minimum, an explanation of why Mr. Coopland was unable to obtain such records from third party sources. Information about the house fire, like an insurance claim, may also have helped. Finally, there is no explanation for why Mr. Coopland was able to find the preferred share certificate despite the house fire when no other document could be found.

[39] In the circumstances, I am not satisfied that Mr. Coopland has made out a valid claim for shares and deny his claim.

(iii) John and Michelle Rocha

[40] John and Michelle Rocha assert that they have 62,800 preferred shares in Cecil Lighthouse. The Manager's review of the records demonstrates that the Rochas did make an initial investment of $50,000 which accumulated interest of $12,800 and was then transferred into Royal Agincourt. Ms. Walton then directed that amount to be transferred into Cecil Lighthouse in her email of December 12, 2013.

[41] In those circumstances, I am satisfied that the Rochas are valid holders of 62,800 preferred shares. The issue for the Manager was not the validity of the investment but the legitimacy of the transfer into Cecil Lighthouse.

(iv) Cecilia Van Plesse

[42] Ms. Van Plesse filed a claim for $117,765 in respect of referred shares of Cecil Lighthouse. The Manager was satisfied that she invested $100,000 into Richmond East which was then transferred to Cecil Lighthouse. Ms. Van Plesse was represented by counsel on the application. She filed no materials. Neither he her proof of claim nor her counsel provided any explanation for the difference between the 100,000 preferred shares she was issued and the $117,765 claim in her proof of claim. In those circumstances I find that Ms. Van Plesse has made out a claim for preferred shares with a value of $100,000, not $117,765.

II. The Cost Allocation Motion

[43] The Condos and CDG Inc. challenge the allocation by which the Manager attributed its fees to individual corporations. By way of general overview, the Manager assigned to a particular corporation any fee in respect of which the docket entry referred to the particular corporation. Docket entries that did not refer to particular corporations were spread evenly over all corporations that the Manager worked on.

[44] The principles governing the allocation of fees in insolvency proceedings, were summarized by Justice D.M Brown in *Royal Bank of Canada v. Atlas Block Co*.[5], as follows:

> (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;

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[5] *Royal Bank of Canada v. Atlas Block Co.,* 2014 ONSC 1531 at para. 43

(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.

[45] 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. [6]

[46] Three categories of fees are subject to challenge.

[47] The first concerns a docket entry of five hours with a value of approximately $4,000 which the Condos and CDG challenge because it is ostensibly on account of an allocation of fees among various corporations. The docket entry, however, describes the task more broadly than that. That time also included work on a factum. I make no adjustment on account of this docket. Work on a factum is fair to allocate more broadly. In my view, the Manager's

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[6] *Hunjan International Inc. Re*, 2006 CanLII 63716 (ONSC) at paras. 4-5, 55, 57, 71-72 *Royal Bank of Canada* , at para. 43

time spent on allocating work amongst corporations is also valid time for which the manager should be compensated, and which could fairly be spread across all corporations.

[48] The second category concerns the Manager's fees of $6,550 on account of its involvement in criminal proceedings against Ms. Walton. The Condos and CDG submit that the criminal proceedings were solely for the benefit of corporations in which Dr. Bernstein invested. The Condos and CDG also submit that Dr. Bernstein was behind the criminal charges. I make no reallocation of fees in that regard.

[49] Justice Code described the origin of the criminal proceedings in the course of reasons in Ms. Walton's criminal trial. They do not suggest that Dr. Bernstein was behind the charges. They indicate that the Crown asked the Manager for information and for explanations of various items. The Manager, could not responsibly resist those requests.

[50] The third category concerns the Manager's fees of $39,000 on account of its participation in the Supreme Court of Canada appeal of the $22.5 million judgment against the Schedule C companies. The Condos and CDG submit that this was solely for the benefit of Dr. Bernstein.

[51] I make no adjustment in respect of that fee allocation either. The Manager had participated in all court proceedings that to date, including the trial and of the Court of Appeal. It was appropriate for the Manager to continue its involvement in the proceeding before the Supreme Court of Canada. I was not pointed to anything to suggest that the Manager was acting as anything but an even-handed court officer in the Supreme Court proceedings.

[52] As noted earlier, there is no one perfect way to allocate fees. It is a matter of discretion for the Manager and of fairness. I am not satisfied that the Condos or CDG has pointed to anything that makes the fee allocation unfair. In addition, I do not think it is an advisable use of party or court resource to undertake microscopic investigations of isolated $4,000 or $6,000 fee items unless the collective amount of such challenged dockets is more material.

III. Disposition and Costs

[53] For the reasons set out above, I order as follows:

(i) The Manager's proposed distributions from the assets of 1780355 Ontario Inc. and the Old Apothecary Building Inc. are approved.

(ii) The Manager shall pay the following amounts to the following individuals on account of their preferred shares in Cecil Lighthouse:

a. Dennis Condos $160,000;

b. Peggy Condos, $10,000;

c. John Rocha, $62,800; and,

d. Celicia Vane Plesse, $100,000.

(iii) Duncan Coopland's claim for the redemption of 121,500 preferred shares in Cecil Lighthouse is dismissed.

(iv) The balance any funds remaining in Cecil Lighthouse will be notionally treated as a repayment of capital to Ms. Walton. I note that the Manager is indifferent about repaying the balance as a dividend or as a return of capital. CRA had notice of the application but did not appear.

(v) Rather than having the funds referred to in sub-paragraph (iii) paid to Ms. Walton, the Manager may pay any residue directly to holders of a notice of garnishment against Ms. Walton.

(vi) The Condos and CDG motion to re-allocate fees of the Manager is dismissed.

[54] With respect to the motion for payment of the value of the preferred shares, the Condos seek costs on a partial indemnity scale of $20,295.84. In my view, partial indemnity is the appropriate scale of indemnity. There was a live issue at play.

[55] The applicants' partial indemnity fees for both motions were $25,014. While that included work on the fee allocation motion, the bulk of the applicants' factum and oral submissions were devoted to the preferred share issue. Without getting into microscopic analysis of dockets, the costs claimed by each side for the preferred share issue is relatively similar and strikes me as reasonable. The Condos are therefore entitled to costs of the preferred share motion which I fix at $20,295.84 on a partial indemnity scale.

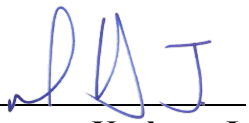
[56] I am advised by counsel for the DeJongs that there was a settlement offer extended in respect of the fee allocation motion. I do not know by whom, when it was extended or what the terms of the offer were.

[57] The DeJong's seek costs of $19,706 .81 on a partial indemnity scale for the fee allocation motion and costs of $29,535.99 on a full indemnity scale.

[58] In the absence of any submissions about the settlement offer I would fix costs at $5,000 payable by the DeJongs to Dr. Bernstein in respect of the fee allocation motion. I make that finding in the absence of submissions on the point in the hope of saving the parties from spending further time and energy on a relatively small monetary amount. If either party wishes to make further submissions on the point, they are free to do so.

[59] The DeJongs and the Condos seek costs arising out of steps they took to be paid a costs award issued by Justice Newbould which was set aside by the Court of Appeal and

reinstated by the Supreme Court of Canada. The costs the DeJongs incurred come to $2,200.11 on a partial indemnity scale. The applicants have not responded to that cost request. I therefore fix costs payable by the applicants to the DeJongs and the Condos in the amount of $2,200.11 on a partial indemnity scale.



Koehnen J.

Date: May 4, 2021