CITATION: DBDC Spadina Ltd. v. Walton, 2014 ONSC 3052
COURT FILE NO.: CV-13-10280-00CL
DATE: 20140520

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, in person

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

C. Lax, Q.C. and P. Fruitman, for 2313798 Ontario (14 College St.; 66 Gerrard St. East)

D. Brooker, for Collins Barrow (Toronto) Limited, court-appointed receiver of Global Mills Inc.

A. Zweig, for Abaco Glass, a 65 Front Street East lien claimant

HEARD: May 6 and 16, 2014

REASONS FOR DECISION

I. SUMMARY OF THE MOTIONS

[1] These motions by the applicants and respondents deal with further issues in the on-going litigation between Dr. Bernstein and the respondents, Norma and Ronauld Walton (and their companies), concerning their accounting for funds invested by Dr. Bernstein and his companies with them.

[2] In a separate, handwritten endorsement I gave directions for the scheduling of sale approval motions by the Manager, Schonfeld Inc., and a lift stay motion by a mortgagee of 1485 Dupont Street, Toronto.

[3] Three motions were brought by the applicants and respondents.

[4] First, on March 21, 2014, Newbould J. made an order that any proceeds from the sale of 14 College Street, Toronto (the "College Street Property"), be paid to the Manager "net of mortgage payments". When the sale approval motion came before me, the applicants raised an issue about the validity of the third mortgage on the College Street Property held by 2313778 Ontario Ltd. ("231"). By approval and vesting order made April 2, 2014, I authorized the closing of the sale transaction, but deferred the issue of the payment of the 231 Mortgage until the return of Newbould J. Part of the sales proceeds were placed into the hands of the Manager.

[5] That issue ultimately has come back before me for disposition, and the applicants have moved for orders that the mortgages held by 231 on the College Street Property and 66 Gerrard Street East, Toronto (the "Gerrard Street Property"), "did not constitute charges on the properties and are not in priority to the interests claimed by the Applicants". As well, the applicants have sought: (i) to have the remaining proceeds from the sale of College Street to continue to be held in trust by the Manager until the hearing of the applicants' broader motions in mid-July; and, (ii) to discharge the 231 mortgage from the Gerrard Street Property, with the sale of that property to proceed.

[6] 231 submitted that the applicants' motion should be dismissed, with payment of its substantial indemnity costs, together with 15% interest on its mortgage over 14 College Street from April 2, 2014 until the date the funds from that mortgage are paid to 231.

[7] Second, the respondent, Norma Walton (hereafter "Walton"), has moved for an order approving the sale of 66 Gerrard Street East, together with ancillary orders as follows:

(i) an order preventing the Manager from taking steps to collect the remainder of monies due to it under this Court's costs order of November 5, 2014, pending the sale of the Gerrard Street Property;

(ii) an order preventing 231, the second mortgagee on the Gerrard Street Property, from moving to power of sale the property because the monies due to it under the mortgage have been paid to the Manager from the closing proceeds from the sale of the College Street Property; and,

(iii) an order that the monies held in trust by the Manager from the sale of the College Street Property be paid in full to 231, the third mortgagee of the College Street Property, and the third mortgage then be discharged.

[8] Third, Walton has moved for the approval of the sale of the property at 65 Front Street East or, more specifically, the distribution of the proceeds of that sale.

II. THE APPLICANTS' CHALLENGE TO 231'S MORTGAGES

A. The properties in question

[9] Ronauld and Norma Walton own all the issued and outstanding shares in College Lane Ltd., which owned the property at 14 College Street, Toronto, and in Gerrard Church 2006 Inc., which owns the property at 66 Gerrard Street East.

[10] College Lane Ltd. acquired the College Street Property on July 5, 2011 for $5.6 million. Three mortgages were registered against the property: (i) Rocco Marcello ($5 million); (ii) Stephen Handelman ($750,000); and, (iii) 231 ($1.35 million). Walton deposed that they purchased the property in 2011 without any funding from the Bernstein Group and no monies from the Don Mills Mortgages were used for the property.

[11] Gerrard Church 2006 Inc. owns the Gerrard Street Property. The Waltons acquired the property in late 2009 using a company called The Old Apothecary Building Inc. through a share purchase from the registered owner. Penmor holds a first mortgage of approximately $4.25 million, and 231 a collateral second mortgage of $1.35 million. Walton deposed that the purchase had been made without Bernstein Group involvement, except as mortgagee, and that mortgage had been paid off.

B. The issue in dispute

[12] On November 26, 2014, College Lane and Gerrard Church 2006 granted collateral debentures to 231 in the amount of $1.35 million each which were registered against title to both the College and Gerrard Street Properties.

[13] The applicants took the position that by seeking to enforce the collateral mortgages, 231 and the Waltons were attempting "to make 14 College Street and 66 Gerrard liable for mortgages that were granted without consideration to the corporate owners", and the applicants sought to declare both charges void as against them and others pursuant to section 2 of the *Fraudulent Conveyances Act.*[1]

[14] The larger context in which that claim by the applicants was made can be found in their Amended Amended Notice of Application dated December 17, 2013, where the applicants pleaded that the respondents owned the College and Gerrard Street Properties and numerous "Other Properties", and went on to allege that the respondents had diverted $22 million in proceeds from the Schedule B Companies in which the applicants had invested into the Other Properties. The applicants seek certificates of pending litigation and blanket charges over all of the Other Properties, a motion which will be heard in July. As set out in their factum, the applicants seek a tracing of their funds into the College and Gerrard Street Properties and constructive trusts in respect of both properties in their favour.

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[1] R.S.O. 1990, c. F.29

[15] 231 submitted that there was no evidence that by granting the two mortgages the Waltons had intended to delay or defraud the applicants. Further, there was a legitimate business purpose for the transaction and valuable consideration was provided. Moreover, 231 had no knowledge of the applicants' claims in respect of the two charged properties at the time the encumbrances were granted.

C. The legal framework in which to analyze the dispute

[16] Section 2 of the *Fraudulent Conveyances Act* (the "*FCA*") provides:

> 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.

Sections 3, 4 and 7(2) of the *FCA* deal with circumstances where the conveyance was made upon consideration:

> 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.
>
> 4. Section 2 applies to every conveyance executed with the intent set forth in that section despite the fact that it was executed upon a valuable consideration and with the intention, as between the parties to it, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless it is protected under section 3 by reason of good faith and want of notice or knowledge on the part of the purchaser.
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> ...
>
> 7(2) No lawful mortgage made in good faith, and without fraud or covin,[2] and upon good consideration shall be impeached or impaired by force of this Act, but it has the like force and effect as if this Act had not been passed.

[17] As put by Sedgwick J. in *Dapper Apper Holdings Limited v. 895453 Ontario Limited (c.o.b. Dunn's Famous Delicatessen)*:

> If the court is satisfied that a conveyance is made with intent on the part of the grantor to defeat, hinder, delay or defraud creditors and others, the parties to the conveyance (the grantor and the grantees) must show that it was made for good consideration and good faith and to a person (or persons) who was (or were) without notice or knowledge of the

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[2] "Covin" is not a word often seen these days, but traces its legal pedigree back to the 1360 Statute of Labourers. It referred to a secret agreement to cheat and defraud, or what today we would refer to as a conspiracy or collusion to cheat and defraud.

> grantor's fraudulent intent. *Bank* of *Montreal v. Jory* (1981), 39 C.B.R. (N.S.) 30 (B.C. S.C.). Otherwise, the conveyance is void against creditors of the grantor.[3]

In *Canadian Imperial Bank of Commerce v. Graat*[4] the trial judge stated:

> In a fraudulent conveyance action there must be proof of fraudulent intent. If the conveyance is made for nominal or no consideration the Court need only consider if there is fraudulent intent on the part of the transferor whereas if there is consideration the transaction can be found to be fraudulent if there is fraudulent intent on the part of both the transferor and transferee.

[18] The presence or absence of "good consideration" in a conveyance, such as the granting of a mortgage, determines whether the court examines only the intention of the transferor, or that of both the transferor and transferee. In their factum and at the hearing the applicants advanced the argument that neither collateral charge granted to 231 was supported by consideration, so one need only examine the intention of the transferor, effectively Walton. Applicants' counsel acknowledged that should the court find the existence of "good consideration", it would be a difficult task to establish that 231 was not a good faith purchaser with want of notice of any impermissible intention by the transferor.

[19] Given the centrality of the issue of "good consideration" to the challenge to the two charges, I intend to first review the law on "good consideration" within the context of the *Fraudulent Conveyances Act*. Since the issue of consideration must be looked at within the entire context of any commercial transaction, I will then review the evidence about the transaction which led up to the granting of the two charges. Finally, I will determine whether the two charges were supported by "good consideration" within the meaning of the *FCA*.

D. The law concerning "good consideration" under the *Fraudulent Conveyances Act*

[20] A fulsome discussion of the meaning of "good consideration" within the context of the *Fraudulent Conveyances Act* was given by Belobaba J. in *Feher v. Healey*:

> The law of consideration, as it applies to fraudulent conveyances, can be summarized as follows. "Good consideration" means valuable consideration. It has to be more than just natural love and affection. Normally, courts are not concerned with the adequacy of consideration, only that there is some consideration for the agreement to be binding. Thus, binding agreements are often made for a consideration of one dollar.
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> Where, however, a transaction is attacked as a fraudulent conveyance, the court is required to examine the adequacy of the consideration. Although the courts do not weigh the adequacy of consideration "in too nice scales", nominal or grossly inadequate

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[3] 1996 CanLII 8253 (ON SC), para. 57.
[4] (1992), 5 B.L.R. (2d) 271 (Ont. Gen. Div.), para. 43; affirmed (1997), 44 C.B.R. (3d) 161 (Ont. C.A.). See also *Cybernetic Exchange, Inc. v. J.C.N. Equities Ltd.*, [2003] O.J. No. 4947 (S.C.J.), para. 220.

> consideration is not sufficient and can be an indication or badge of fraud. The court's examination of adequacy is thus an attempt to ensure that there is a *bona fide* exchange and a reasonable *quid pro quo* for the impugned transfer of property: see generally Springman, Stewart and MacNaughton, *Fraudulent Conveyances and Preferences* (1994) at pages 14-22 to 14-29, and *Re Dougmor Realty Holdings Ltd.*, [1967] 1 O.R. 66 (Ont. H.C.J.)
>
> Counsel for Paloma submits that the "good consideration" requirement is easily satisfied because Paloma agreed to waive any future claims for child or spousal support. The case law is clear that the settlement of a matrimonial dispute or the giving up of a claim for spousal or child support can constitute good and valuable consideration for the transfer of a matrimonial home: *Austin Marshall Ltd. v. Bennie,* [1985] O.J. No. 1736 (Ont. H.C.J.); *Caldwell and Cowney v. Simms and Simms,* (1995) 11 R.F.L. (4th) 28 (B.C.S.C.); and Springman et al., *supra*, at 14-25, note 62, and cases cited therein.[5]

[21] Other cases have spoken in terms of "valuable and more than nominal" consideration,[6] and in *Waxman v. Waxman* Farley J. observed that "good consideration must be interpreted as more than 'consideration' but rather something which is arguably in the range of fair market value". [7] That comment was made in the context of additional findings by Farley J. that the transfer in question had lacked any good faith and one person had acted on both sides of the transaction.

[22] Another theme can be found in the jurisprudence about consideration, albeit not specifically in the context of the *FCA*. In *Fred T. Brooks Ltd. v. Claude Neon General Advertising Ltd.* the Ontario Court of Appeal, in considering whether consideration supported an agreement, stated that "consideration need not be a benefit to the promisor":

> It is sufficient if the promisee does some act from which a third person benefits and which he would not have done but for the promise or some act which is a detriment to the promisee".[8]

Professor Waddams picked up on this point in the Sixth Edition of his text, *The Law of Contracts*, when discussing the concept of consideration: "the exchanged act or promise need not, however, be of benefit to the promisor", and he proceeded to give the example of the promise of a guarantee.[9]

[23] Perhaps it would be useful to put this discussion about "good consideration" in the larger context of the purpose of fraudulent conveyance statutes. Springman, Stewart and Morrison, in

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[5] [2006] O.J. No. 3450 (S.C.J.), paras. 44 to 46.
[6] Salna v. Hie (2007), 88 O.R. (3d) 202 (S.C.J.), para. 36, affirmed 2008 ONCA 677.
[7] (2005), 10 B.L.R. (4th) 315 (Ont. S.C.J.), para. 22.
[8] [1932] 2 D.L.R. 45 (Ont. C.A.), para. 8.
[9] S.M. Waddams, *The Law of Contracts, Sixth Edition* (Toronto: Carswell, 2010), §122.

their text, *Frauds on Creditors: Fraudulent Conveyances and Preferences*,[10] when talking about the linkage between the consideration given, the transferee's fraud and the invalidity of the transaction, quoted from a late 19th Century American text to set out the rationale behind the principle governing the legislation's safe-harbour provision:

> The proviso is general. It exempts any conveyance upon good consideration and *bona fide* to any person not having notice of the fraud or collusion from the effect of the statute. Its benefits therefore extend to any *bona fide* purchaser for valuable consideration, whether he purchases from the fraudulent grantor or the fraudulent grantee. The great object of the law is to afford certainty and repose to titles honestly acquired. It is of no public utility to destroy titles so acquired on account of the taint of a prior secret fraud, which may be unsuspected and unknown, and which, probably, no diligence could detect. A purchaser who pays a fair price for an ostensibly fair title without notice of any latent fraud in any previous link of the title has a higher equity than the creditors.[11]

E. The evidence regarding the transactions in which impugned mortgages were granted

[24] Against that background, let me review in detail the transactions which gave rise to the two impugned charges. The first in time involved the October 21, 2013 closing of a share purchase transaction, which I will refer to as the "October Transaction". The second, a few weeks later, concerned November 26 amendments to that transaction, which I will call the "November Amending Transaction".

E.1 The October Transaction: the contemporaneous closings of the Yonge Street Property purchase and the Carport share purchase

[25] The genesis of the impugned mortgages lay in dealings concerning another property, 1027 Yonge Street (the "Yonge Street Property"). According to Eric Silverberg, the President of 231, on July 5, 2013, Carport Realty Holdings Inc., a single-purpose entity incorporated by Silverberg, had entered into an agreement of purchase and sale with 1110359 Ontario Limited to purchase the Yonge Street Property for $9 million. The due diligence period had commenced on July 5 and was set to expire 45 days later. A subsequent amendment to the APS set the closing for 60 days after the expiry of the due diligence period, or at around October 19, 2013.

[26] Ms. Walton approached Silverberg about the Yonge Street APS, and in a September 17, 2013 letter of intent offered to purchase the shares of Carport for $2.2 million. The Yonge Street APS was an asset of Carport. Under the LOI, the buyer of the Carport shares would be The Rose and Thistle Group Ltd. – a Walton company - in trust for a company to be incorporated. According to the LOI, the objective of the transaction would be to acquire the shares contemporaneously with the closing of the Yonge Street APS. Rose and Thistle would be

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[10] M.A. Springman, G.R. Stewart and J.J. Morrison, *Frauds on Creditors: Fraudulent Conveyances and Preferences* (Toronto: Carswell, loose-leaf).
[11] *Ibid.*, p. 14-2.

responsible for payment of 100% of the purchase price of the Yonge Street Property. Silverberg accepted and signed back the LOI on September 18, 2013.

[27] Silverberg deposed that although the LOI initially contemplated that Rose and Thistle would acquire the shares of 231 - the company to which the Yonge Street APS would be assigned - he received accounting advice that the most tax-efficient method would be to have Rose and Thistle acquire the Carport shares, not the 231 shares. He asked Walton to so change the structure of the transaction. She agreed, on two conditions: (i) the granting of an indemnity by 231 in respect of a potential third party claim over the Yonge Street Property; and (ii) allowing $1 million of the $2.2 million share purchase price to be paid in three installments over two years. Silverberg recalled that he had initially proposed the deferral of a million dollars of the purchase price.[12]

[28] In the result, the closing of the sale of the Yonge Street Property occurred simultaneously with the transfer of Carport's shares on October 21, 2013. On the closing McCarthy Tétrault acted for 231/Carport, and Devry Smith Frank LLP acted for The Rose & Thistle and the Waltons.

[29] The share purchase was structured such that 231, as the owner of all Carport shares, sold those shares to The Rose & Thistle under an October 21, 2013 Share Purchase Agreement, and The Rose & Thistle assigned all of its interest in the Share Purchase Agreement to Ronauld and Norma Walton.

[30] Silverberg deposed that prior to the closing he had been provided with a net worth statement of the Waltons which showed them having $217 million in equity.

[31] An October 21, 2013 Indemnity and Arrangement Agreement ("IAA") amongst 231, Carport and the Waltons set out the supplemental terms for the share purchase, including the indemnity from 231 against any "litigation claim".

[32] Also, the IAA amended the share purchase price payment terms. The SPA had required the payment of $500,000 prior to closing, and the balance of $1.7 million on closing. The IAA amended the term dealing with the amount due on closing, so that the Waltons were required to pay $1 million in three tranches over the next two years, with the first payment due 45 days following closing, or about December 5, 2013. The Waltons, as purchasers, were to deliver a promissory note in the amount of $1 million as well as a share pledge agreement for the Carport shares. Section 3.4 of the IAA concluded by stating:

> The Note shall contain a provision whereby it shall become due and payable upon the sale of the Real Property [i.e. the Yonge Street Property] or any part thereof.

[33] Some correspondence had passed between the parties and their counsel prior to the closing about the nature of the security for the obligation to pay the balance of the share purchase

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[12] Transcript of the cross-examination of Eric Silverberg conducted May 4, 2014, Q. 50.

price. The vendor, 231, wanted a pledge of all the Carport shares, to which the Waltons agreed. The Waltons had offered a second mortgage on another property instead of the share pledge. Walton's email of October 20 suggested closing on the basis of the share pledge "and that after closing [Jamie] look at whether he wants to exchange that security with the second mortgage we have offered on 252 Carlton..." The next day, October 21, her counsel, Todd Holmes, wrote to Silverberg's counsel at McCarthys stating:

> We will not agree to either of your "wants". We have agreed to your request for a pledge of all 100 common shares. We have offered you a second mortgage instead of a pledge. We are done. It's the day of closing.
>
> Following closing, you and Eric can decide whether you wish to exchange the pledge for a second mortgage on 252 Carlton Street. Norma is listing the property for sale for $3.5 million this week with Colliers. The property has an existing first mortgage with Equitable Trust with about $1.7 million outstanding under it. We can arrange the second mortgage after closing which offers security superior to the pledge. We await your early reply.

[34] In the result, Norma and Ronauld Walton executed a Share Pledge Agreement dated October 25, 2013 in favour of 231 under which they granted a security interest in the Carport shares. However, the IAA which the parties had executed, specifically contemplated, in Section 3.5(f), the future exchange of security:

> 3.5(f) The Purchasers [i.e. the Waltons] shall have the right to substitute other security as security for the payment of the Note, provided such substituted security is satisfactory to the Vendor [i.e. 231] in its sole, subjective and absolute discretion.

[35] The events of default contained in the Share Pledge Agreement included the "due on sale" provisions in the promissory note accelerating payment of the debt upon the sale of the Yonge Street Property.

E.2 The November Amending Transaction

[36] On November 5, 2013, Newbould J. had released his decision appointing the Manager over the Schedule B Properties in which the applicants had invested.

[37] On November 6, Walton emailed Silverberg proposing a change in the payments due under the SPA:

> We are proposing to change the timing of the share escrow for hopefully mutual benefit. We anticipate we will be quite flush at the beginning of February 2014. We have also made our own enquiries and are comfortable with the ongoing risk of litigation.[13] Hence we propose to pay you the full $1 million all at once on February 1, 2014, thus delaying

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[13] That is, the litigation in respect of which 231 had given its indemnity.

> the payment from December 5th to February 1st but paying the full amount on February 1st. Let me know if agreeable and we'll have the lawyers amend the documents accordingly.

[38] Shortly thereafter Silverberg was informed by his counsel that an error had occurred in the statement of adjustments for the October 21 closing and, in fact, an additional $350,000 was owed to 231 by the Waltons under the SPA. That brought the total amount outstanding for the Carport shares to $1.35 million. Silverberg asked for payment of the $350,000; he deposed that Walton advised she would prefer to add the additional $350,000 to the repapered security. Walton did not tell him that she lacked the money to pay him the additional amount at that time.[14] On this point the following exchange occurred during the cross-examination of Silverberg:

> 119. Q. All right, and you say there was no discussion about whether they had the ability to pay you at that time?
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> A. No, they had already indicated a strong preference. They were contemplating closing two properties as I recall. I believe the numbers, if you combine the two, were somewhere close to 20 million dollars. So they were trying to put off this debt in order to do those deals, and I, you know, with the expedited payout, was happy to say yes.
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> 120. Q. Was the idea that they had a couple of deals coming up, that they would be flush, as I think Ms. Walton puts it in her email to you, and therefore, you could expect the money down the road?
>
> A. She indicated to me that she was doing...closing deals in the near term, at this time, November, December, and then, yes, would have...I think the word was "flush" come early new year.

[39] Silverberg agreed to this proposal, deposing:

> I agreed to Ms. Walton's proposal as it meant relief from the indemnity and recovery of the entire balance owing within a couple of months rather than a couple of years.

As Silverberg put it on his cross-examination: "I was going to get the...$1,350,000...in about two months rather than two years".[15]

[40] The details of the negotiations which fleshed out the share purchase amending agreement were as follows. On November 16 Silverberg emailed Walton: "I will agree to the terms requested below [in the November 6 email] if you will post security in the form of a 1st or 2nd property mortgage that comes due concurrently with the $1 million payment in February".[16] On

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[14] Silverberg CX, QQ. 106-109.
[15] Silverberg CX, Q. 130.
[16] At that point of time Walton had negotiated a conditional sale of the College Street Property which was scheduled to close at the end of January, 2014.

November 17 Walton responded: "That would work assuming the mortgage replaced the share pledge". Walton proposed putting a second mortgage on property they owned at 252 Carlton. Silverberg replied:

> Mortgage can replace the share pledge. I don't know the debt/equity structure of any of 30 & 30A Hazelton, 32 Atlantic or Front and Church but for obvious reasons I like the dirt. Would any of these work in substitute for Carlton?

[41] Then, in a November 19 email entitled "proposed change to share escrow", Silverberg informed Walton that he was prepared to accept a second mortgage on 66 Gerrard as security for the $1 million owed in February, 2014 subject to his counsel's "approval on terms and diligence". That day Orzech, Silverberg's lawyer, emailed Walton: "I assume this is not one of the assets where you have a partner and the partner's consent is needed for the 2nd charge. What is the approach with the first lender vis a vis getting or not getting consent for the second mtg." Walton emailed her lawyer, copying Silverberg's, the following regarding 66 Gerrard:

> Let [Silverberg's counsel] know that the first mortgage lender will likely not consent to the second so he'll need to just register the second mortgage knowing that. Also let [Silverberg's counsel] know this is not subject to the partnership but is our asset alone.
>
> The property is currently listed for sale with Noah Rechtsman and we anticipate it will be under conditional contract of sale sometime in the next three weeks, with closing to occur in February.

[42] On November 20 Silverberg's counsel informed Walton that they required a simple limited recourse guarantee by the owner of Gerrard Street guaranteeing the liabilities of the Waltons under the $1 million note with a "plain vanilla collateral mtg" securing the obligations of the guarantor. Walton responded: "Works for me", subject to her counsel's comments.

[43] On November 21, Silverberg's counsel circulated a draft amending agreement, the purpose of which was "to update the arrangement agreement to: (i) remove the litigation indemnity; (ii) replace the share pledge with the new mortgage/guarantee and (iii) update the Note language to reflect the Feb 2014 payout; (iv) terminate the share pledge agreement and related escrow agreement". As well, counsel sent around a "limited recourse guarantee by Gerrard Church 2006 Inc." and proposed sending a collateral charge later that day.

[44] Further discussions ensued, with Silverberg advising his counsel on November 22 that he had spoken with Walton and had come to the following resolution:

> 1) if Norma can pay out the $350,000 missing from the closing she will…as soon as the funds are available (in advance of February 1st)
>
> 2) we will do a collateral 2nd mortgage for $1,350,000 on each of Gerrard and Norma's property on College. College has been sold conditionally, and you get the pin etc. from [Walton's counsel]

At the same time Silverberg was advised by Walton that the conditional sale of the College Street Property was scheduled to close on January 31 "assuming it firms up", with a sale price of

$8 million and total debt registered against the property of $5.75 million. Silverberg replied that he had presumed his mortgage on College Street would be a second, and he requested from Walton information about leases, the first and second mortgages, and environmental matters. Walton provided that information on November 23.

[45] On November 25 Walton's counsel advised Silverberg's that the 1027 Yonge Street draft documents were fine, with the exception of a small change to the proposed amending agreement.

[46] The November Amending Transaction closed on November 26, 2013. It was papered by 231, Carport and the Waltons entering into an Amending Agreement made as of November 17, 2013, signed on November 25 and 26, and stated to be effective as of October 25, 2013, under which the amount of the Promissory Note was increased to $1.35 million (the "Second Note")[17]. Section 3.5 of the IAA, which dealt with the security to be given for the outstanding amount, was amended to read as follows:

> To secure the obligations of the Purchasers under the Note, they shall cause Gerrard Church 2006 Inc. and College Lane Ltd. to respectively deliver a limited recourse guarantee of the purchaser's obligations under the Note and each guarantee shall be secured by a collateral debenture, each in the amount of $1,350,000 on the properties municipally known as 66 Gerrard Street, Toronto, Ontario and 14 College Street, Toronto, Ontario...

As well, section 3 of the Amending Agreement declared the Share Pledge Agreement to be "null and void, of no further force or effect, and no party thereunder shall have liability to another party under such agreements following the date hereof. All shares of the Corporation delivered under such agreement shall be returned to the Purchasers concurrent with the execution and delivery of this Agreement."

[47] The Second Note stated that the entire principal amount would become due and payable upon the occurrence of any "event of default" as defined in the two collateral debentures, both of which referred to "events of default" as "such term is defined in the Guarantee". The replacement of the First Note by the Second Note and the cancellation of the Share Pledge Agreement meant that the sale of 1027 Yonge Street by the Waltons would not trigger any obligation by them to pay 231 the entire amount of the indebtedness prior to February 1, 2014.

[48] Collateral demand debentures were executed by both College Lane Ltd. and Gerrard Church 2006 Inc. in the amounts of $1.35 million. Charges in that amount were registered on both properties on November 26, 2013. The consent of the prior mortgagees was not obtained before registration, but according to Silverberg's transaction counsel, when they were advised about the subsequent registrations they raised no issues.

[49] Walton provided a December 4, 2013 resolution of the Carport directors approving the issuance of the October 25, 2013 Second Note for $1.35 million in favour of 231.

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[17] Executed and delivered on October 25, 2013.

[50] The Waltons did not pay the remaining $1.35 million under the Share Purchase Agreement on February 1, 2014. 231 made formal demand on the Second Note on February 6, 2014 and on February 27 informed College Lane Ltd. that it would initiate mortgage enforcement proceedings unless payment in full was made by February 28, which it was not. A notice of power of sale was served.

E.3 Subsequent dealings with the Yonge Street Property by Carport/the Waltons

[51] After the closing, Carport changed its name to Roxborough Properties Ltd. By agreement of purchase and sale dated December 11, 2013, Roxborough agreed to sell the Yonge Street Property to Old Stonehenge Urban Properties Inc. for $15 million, an amount reduced on January 30, 2014 to $14.25 million. After acquiring the Yonge Street Property, Roxborough registered debt of $12.115 million against title. The sale to Old Stonehenge closed around February 4, 2014. The debt the Waltons owed to 231 was not satisfied out of the closing proceeds.

F. Analysis of the "good consideration" issue

[52] The applicants contended that the granting of the collateral charges on the College and Gerrard Street Properties was not supported by "good consideration" because neither of the companies which granted the charges had benefited from the November Amending Transaction. I do not accept that submission.

[53] The applicants acknowledged, quite properly, that they could not attack the *bona fides* of the first, October Transaction. There is no doubt that the October Transaction was an arm's-length transaction between two parties for good and valuable consideration.

[54] The applicants, in effect, wished to draw a line after the October Transaction and to examine the November Amending Transaction on a stand-alone basis. In my view such an approach would do violence to the commercial context in which that latter transaction took place. Any analysis of a transfer or conveyance, such as a mortgage, under the *Fraudulent Conveyances Act* must be undertaken by looking at the entire commercial context in which the impugned transaction arose.

[55] In the present case, prior to the closing of the October Transaction the parties had discussed the possibility of exchanging the share pledge security granted to 231 for a mortgage on a property owned by the Waltons. That discussion was reduced to a formal contractual entitlement enjoyed by the Waltons, as reflected in Section 3.5(f) of the IAA:

> 3.5(f) The Purchasers [i.e. the Waltons] shall have the right to substitute other security as security for the payment of the Note, provided such substituted security is satisfactory to the Vendor [i.e. 231] in its sole, subjective and absolute discretion.

[56] Several issues between the parties arose following the closing of the October Transaction. As a result, the parties negotiated a multi-faceted amendment to their agreement and the adequacy of the consideration for the charges must be assessed in light of that entire package of amendments. Specifically, under the Amending Agreement:

(i) The obligations of the Waltons to 231 increased by $350,000 as a result of the adjustment error on the October closing;

(ii) The Waltons gained greater flexibility in dealing with the acquired Yonge Street Property because 231 was prepared to untether the obligation to pay the amount under the Note from the sale of that property;

(iii) But, in return for the deferral of the December payment under the Note and the greater flexibility they gained to deal with the Yonge Street Property, the Waltons agreed to accelerate the payment of the entire debt, with the Second Note requiring payment in full by February 1, 2014; and,

(iv) 231 exchanged the security for the outstanding debt from the pledge of the Carport shares to the two collateral debentures charged against the College and Gerrard Street Properties. The obligations of the Waltons under the Second Note to pay 231 the debt of $1.35 million thereby became secured by the collateral debentures granted by the two companies which owned those properties. Looked at another way, 231 released the security it enjoyed over the Yonge Street Property through the Share Pledge Agreement in favour of faster repayment of the debt secured by mortgages over the College and Gerrard Street Properties.

[57] Silverberg described the effect of the Amending Agreement on 231 as follows:

> As a result of the Amending Agreement, 231 Ontario was in no better position than it was at Closing. The original intention was for 231 Ontario to have received $1.2 million in cash and a $1 million receivable secured by mortgages and a promissory note bearing a 15 percent annual interest rate. However, because of the error on the Statement of Adjustments, $350,000 of the $1.2 million that was to have been paid at Closing was now secured along with the $1 million receivable. The real benefit to 231 Ontario from the Amending Agreement was the acceleration of the repayment schedule, from two years to two months.
>
> ...
>
> I agreed to the Amending Agreement because it meant getting paid in two months rather than two years. I agreed at the same time to change the security over the Walton's debt to reflect the parties' original intention at the time of the IAA of securing that debt with mortgages.

[58] The grant of the collateral debentures to 231 was linked contractually to the un-impugned October Transaction – the Waltons exercised the right specifically granted to them under the IAA to exchange security post-closing. They did so by substituting one asset group which they wholly controlled – the assets owned by College Lane and Gerrard Church 2006 – for another – the shares of Carport, and they did so as part of an amending agreement in which both sides – the Waltons and 231 - received benefits.

[59] Looking at the issue of consideration from a technical point of view, Professor Waddams has written that "the exchanged act or promise need not, however, be of benefit to the promisor".[18] Nor does *FCA* s. 3 stipulate that the consideration be exchanged only with the transferor.

[60] But a technical examination of the issue of consideration should not be the starting point. Instead, the examination of the presence or absence of consideration for any conveyance must be alive to the commercial realities of the specific context. Here, the owners of the two property-owing corporations – the Waltons – caused their corporations to grant the charges because they saw benefit in the November Amending Transaction to the overall portfolio of real estate companies of which they were the owners and which they were managing as a collective. That is hardly surprising commercial conduct for a group of closely-held companies directed by common minds, so the mere fact that the specific entity which granted the mortgage did not receive a direct benefit is not sufficient reason, in and of itself, to find that no consideration supported the transaction. To examine the issue of consideration simply at the corporate level of College Lane and Gerrard Church 2006 would ignore the commercial reality in which the October and November Amending Transactions took place and, in my view, would result in a distorted legal analysis.

[61] The applicants' counter-parties under their investment contracts were the Waltons personally. While the applicants enjoy rights as shareholders of the Schedule B Companies which they co-own with the Waltons, the applicants have framed their claims against the Waltons for recovery in respect of those investments as ones against the Walton's share of the "equity" in the Schedule B Companies and against the Walton's other assets, including their "equity" in the Schedule C Companies/Properties which they own. Although the applicants are asserting tracing and constructive trust claims against the Schedule C Companies/Properties, they do so, in large part, in order to satisfy their contractual claim against the Waltons. Put another way, the applicants did not invest directly in the Schedule C Companies/Properties – they are not direct creditors of them. Instead, the applicants now attempt to trace some of their investment funds through the Waltons to the Schedule C Companies/Properties owned by the Waltons. In those circumstances, the analysis of the exchange of benefits, or consideration, must take into account how the Waltons were using their "equity" in various companies/properties vis-à-vis their creditors, rather than focusing exclusively at the lower level of the specific-purpose corporate vehicles used to hold each property. In the case of the October and November Amending Transactions, the Waltons simply substituted one un-impugned charge on their "equity" in certain assets for another charge of equivalent value on other assets. That does not strike me as an unfair exchange from the perspective of their non-231 creditors, or one unsupported by consideration.

[62] Finally, this was not a case where 231 was concerned that the value of the initial security it had taken – the pledge of the Carport shares – would be insufficient to cover the Walton's debt obligation. 231 was not under-secured following the closing of the October Transaction,

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[18] S.M. Waddams, *The Law of Contracts, Sixth Edition* (Toronto: Carswell, 2010), §122.

deciding later to "trade up"; it was covered adequately by the first security and remained so by the replacement second security.

[63] In sum, I find that the grant of the collateral debentures to 231 in the November Amending Transaction was supported by "good consideration" within the meaning of the *Fraudulent Conveyances Act*.

[64] That being the case, as Spence J. observed in *Cybernetic Exchange*, "applying the concept of fraudulent conveyance to a mortgage for valuable consideration from an unrelated party is an exercise that requires great care".[19] With that admonition in mind, let me turn now to the issue of intent under the *Fraudulent Conveyances Act*.

G. The legal principles concerning the issue of intent

[65] The general approach to ascertaining intention in respect of a transfer or conveyance was summarized by Rouleau J., as he then was, in *Conte (Executrix and trustee of) v. Alessandro*:[20]

> In this type of case it is unusual to find direct proof of intent to defeat, hinder or delay creditors. It is more common to find evidence of suspicious facts or circumstances from which the court infers a fraudulent intent.
>
> These suspicious facts or circumstances are sometimes referred to as the "badges of fraud." These badges of fraud are evidentiary indicators of fraudulent intent and their presence can form the *prima facie* case needed to raise a presumption of fraud...
>
> The presence of one or more of the badges of fraud raises the presumption of fraud. Once there is a presumption, the burden of explaining the circumstantial evidence of fraudulent intent falls on the parties to the conveyance. The persuasive burden of proof stays with the plaintiff; it is only the evidentiary burden that shifts to the defendants.

[66] The decision of Anderson J. in *Re Fancy*[21] often is referred to as a classic enumeration of the badges of fraud. In the 1988 decision of *Ricchetti v. Mastrogiovanni* this Court dealt with *Re Fancy* as follows:

> The law on the subject of fraudulent conveyances is accurately stated by Mr. Justice Anderson in *Re Fancy* (1984), 51 C.B.R. (N.S.) 29 ....
>
> > The plaintiff must prove that the conveyance was made with the intent defined in that section [i.e. section 2 of the *Fraudulent Conveyances Act*]. Whether the intent exists is a question of fact to be determined from all of the circumstances as they existed at the time of the conveyance. Although the primary burden of proving his

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[19] *Cybernetic Exchange, supra.*, para. 217.
[20] 2002 CanLII 20177 (ON SC), paras. 20-22.
[21] (1984), 51 C.B.R. (N.S.) 29 (Ont. H.C.J.)

> case on a reasonable balance of probabilities remains with the plaintiff, the existence of one or more of the traditional "badges of fraud" may give rise to an inference of intent to defraud in the absence of an explanation from the defendant. In such circumstances there is an onus on the defendant to adduce evidence showing an absence of fraudulent intent. Where the impugned transaction was, as here, between close relatives under suspicious circumstances, it is prudent for the court to require that the debtor's evidence on bona fides be corroborated by reliable independent evidence.

The "badges of fraud" referred to by Mr. Justice Anderson are those et [*sic*] out in *Re Dougmor Realty Holdings Ltd.,* (1966), 59 D.L.R. (2d) 432:

> (1) Secrecy
>
> (2) Generality of Conveyance
>
> (3) Continuance in possession by debtor
>
> (4) Some benefit retained under the settlement to the settlor.

The above passages set out the test to be applied. The badges of fraud alleged by the plaintiff are established.[22]

[67] The case law[23] has identified the following circumstances as constituting "badges of fraud" for purposes of ascertaining the intention of a debtor: (i) the transferor has few remaining assets after the transfer; (ii) the transfer was made to a non-arm's length person; (iii) there were actual or potential liabilities facing the transferor, he was insolvent, or he was about to enter upon a risky undertaking; (iv) the consideration for the transaction was grossly inadequate; (v) the transferor remained in possession or occupation of the property for his own use after the transfer; (vi) the deed of transfer contained a self-serving and unusual provision; (vii) the transfer was effected with unusual haste; or, (viii) the transaction was made in the face of an outstanding judgment against the debtor. As well, the effect of a transaction on creditors may provide evidence of the debtor's intent. For example, if the effect of a conveyance without adequate consideration is to defeat, hinder or delay creditors, then that effect may well justify an inference that, in making the conveyance, there was such an intention. The inference can be rebutted by cogent evidence that there was no such intention, but that the conveyance was made for an honest purpose.[24]

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[22] [1988] O.J. No. 2569 (H.C.J.), pp. 4 and 5.
[23] *Conte, supra.*, para. 43; *Boudreau v. Marler*, 2004 CanLII 19333 (ON CA), para. 70.
[24] See the discussion in *Cybernetic Exchange, Inc. v. J.C.N. Equities Ltd.*, [2003] O.J. No. 4947 (S.C.J.), paras. 211 to 213.

H. The intention of the transferee, 231

[68] Given my finding that the granting of the two charges to 231 was supported by "good consideration", it makes sense to deal first with the intention of the transferee, 231, because if it is found that the charges were made in good faith to 231 and at the time of the conveyance 231 did not have notice or knowledge of any fraudulent intent of the transferor within the meaning of *FCA* s. 2, then 231 would enjoy the benefit of the safe-harbour provisions in *FCA* s. 3, and the applicants motion would fail.

[69] Although applicants' counsel acknowledged that a finding of "good consideration" would make it difficult for the applicants to establish that 231 was not a good faith transferee of the mortgages, the applicants did not concede the issue of good faith or want of notice.

[70] However, in my view the evidence clearly supports a finding that at the time of the granting of the two collateral debentures on the College and Gerrard Street Properties, 231 was a good faith transferee without notice or knowledge of any wrongful intention which might have existed on the part of the Waltons. There was no evidence that 231 knew the Waltons were acting with the intent to defeat their creditors or that it was wilfully blind to the point of dishonesty and refusing to ask obvious questions.[25]

[71] First, as already discussed, the grant of the collateral debenture charges formed part of the overall transaction between 231 and the Waltons for the Carport shares and, indirectly, the Yonge Street Property. That was an arm's-length commercial real estate transaction supported by good consideration, with commercial good faith written all over it.

[72] Second, as to the issue of notice, the evidence disclosed that 231's principal, Silverberg, was generally aware of an on-going dispute between the Waltons and Dr. Bernstein. Silverberg deposed that at the time he had heard about "tensions" in the relationship between Walton and Dr. Bernstein and he did not want to take a mortgage "in any property in which a disgruntled business partner had an ownership interest". He therefore instructed his legal counsel to search title to the Gerrard and College Street properties, which was done on November 20, 2013. He also arranged for his counsel to conduct various corporate and *PPSA* searches against College Lane Ltd. and Gerrard Church 2006 Inc., which were done during the last week of November, 2013. Also, section 2(e) of the Amending Agreement specifically amended the SPA to include the following new section 4.3(e) as a purchaser's representation and warranty:

> **Ownership of the Properties.** Neither of the Properties is owned directly or indirectly by Dr. Bernstein Diet & Health Clinics and/or any affiliate of Dr. Bernstein Diet & Health Clinics, or any natural person who controls directly or indirectly any of Dr. Bernstein Diet & Health Clinics and/or any affiliate of Dr. Bernstein Diet & Health Clinics.

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[25] *Bank Leu AG v. Gaming Lottery Corp.* (2003), 231 D.L.R. (4th) 251 (Ont. C.A.), para. 38.

[73] Silverberg testified on cross-examination that as part of the November Amending Transaction he had asked Walton whether she was having a dispute with Dr. Bernstein:

> 174. Q. And what did she tell you?
>
> A. She told me that they were having some sort of a partnership dispute, but she downplayed it as something that would be resolved quite shortly, and also that it didn't apply to anything...any of the properties I was looking at.
>
> 175. Q. Did she tell you that there was anything litigation going on between she and Dr. Bernstein?
>
> A. Never.
>
> 176. Q. Did you ask her that question?
>
> A. I don't recall asking specifically.

[74] On cross-examination Silverberg testified that he learned about the substantial allegations Dr. Bernstein was making against the Waltons in a December 8, 2013 National Post newspaper article. Silverberg deposed that he had no knowledge of any possible claim by Dr. Bernstein in either the College or Gerrard Street Properties until served on December 13, 2013 with the applicants' notice of motion seeking certificates of litigation and "a blanket charge" over both properties, nor did his counsel know about the Bernstein/Walton litigation before the November amending agreement was signed.[26] The applicants' notice of application was amended on December 17, 2013 to seek such relief.

[75] That evidence supports a finding that the receipt of the collateral debentures by 231 was done by it in good faith and without notice of any wrongful intention which the Waltons might have had, and I so find. 231 had conducted reasonable due diligence in the public records to ensure the applicants did not have an ownership interest in the properties over which they were taking security. In other words, whatever the intention of the Waltons might have been, 231 enjoys the protection of *FCA* s. 3. As a result, the applicants' motion to invalidate the two charges must fail.

[76] Although that is sufficient to dispose of the applicants' motion, let me continue by stating that were it necessary to make a specific finding about the intent of the transferors, specifically Norma Walton, regarding the two collateral debentures granted to 231, I would have found that Walton did not cause the two companies owned by her husband and herself to grant those charges "with the intent to defeat, hinder, delay or defraud creditors or other of their just and lawful actions, suits, debts..."

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[26] Mr. James Reitan, in his December 10, 2013 affidavit, at paragraph 25, deposed that it was "reasonable to believe that the $22 million in proceeds diverted from the Schedule "B" Companies have been diverted into the properties listed at paragraph 22 above", which included the College and Gerrard Street Properties.

[77] I accept the submission of 231 that the evidence disclosed the Walton's purpose in causing the grant of the two charges in exchange for the cancellation of the earlier share pledge agreement was to unencumber the Yonge Street Property to enable them to complete a profitable sale. How the Waltons ended up using those sale proceeds does not, in my view, inform the analysis of the validity of the collateral mortgages taken by 231. As noted, the debt owed to 231 by the Waltons was not paid out of the Yonge Street Property sale proceeds.

[78] Further, the applicants conceded the validity of the October Transaction. The evidence specifically showed that (i) the exchange of security which formed part of the November Amending Transaction was expressly contemplated by Section 3.5(f) of the IAA, (ii) 231 was not attempting to remedy a situation of under-securitization, and (iii) 231 simply ended up with security over assets ultimately controlled by the Waltons which offered equivalent protection as the initial security taken under the un-impugned October Transaction. Under those circumstances, it is very difficult to see how the intent by Walton could have changed from the October Transaction to the November Amending Transaction.

I. Summary on the applicants' motion challenging 231's mortgage security

[79] For the reasons set out above, I dismiss the applicants' motion for orders that the mortgages granted to 231 over the College and Gerrard Street Properties are unenforceable, void or inoperative as against any interest of the applicants in those properties.

[80] By order made April 2, 2014, I approved the sale of 14 College Street and ordered that "the proceeds for discharge of the third mortgage (estimated at $1,385,000.00) are to be paid on closing to Schonfeld Inc. in trust" pending further order of the Court. The applicants submitted that in the event their motion was dismissed, I should direct that the 231 mortgages be discharged out of the proceeds of sale from the Gerrard Street Property, not College Street, because the applicants appeared to enjoy a better tracing claim against College Street than they did against Gerrard Street. 231 did not agree with that alternative submission, contending that the further running of interest and the incurrence of legal costs might well mean that proceeds from the sale of both properties would need to be accessed to pay off 231's mortgages.

[81] I am not prepared to vary my order of April 2, 2014. By 10 a.m. tomorrow, Wednesday, May 21, 2014, 231 shall submit to Schonfeld Inc., in its capacity as court-appointed Manager, a discharge statement for its mortgage as of May 20, 2014 which includes its claim for legal fees, as well as serve copies of that statement on the applicants and respondents. If any party disputes the amount claimed, it must serve and file a brief written objection (no more than 3 pages) to my attention through the Commercial List Office by 10 a.m. on Thursday, May 22, 2014, and I will conduct an oral, summary hearing to determine the dispute at 1 p.m. on Thursday, May 22. Payment of the 231 mortgage shall first be made out of the proceeds of the sale of 14 College Street presently in the hands of the Manager, with any shortfall to be paid out of the proceeds of the sale of 66 Gerrard Street East, the property to which I now turn.

III. DISTRIBUTION OF THE PROCEEDS FROM THE SALE OF THE 66 GERRARD STREET PROPERTY

A. The issues in dispute

[82] By order made December 18, 2013, Newbould J. ordered that the respondents "provide reasonable advance written notice to the Applicants and the Manager of any dealing with the following properties, so as to permit the Applicants and/or Manager to seek further relief of this Court in a timely manner...(xv) 66 Gerrard Street East...(xvii) 14 College Street...out of the ordinary course of business, including encumbering or selling the properties".

[83] On March 21, 2014, Newbould J. amended that portion of his December 18 Order to read that the respondents "shall not deal with the following properties out of the ordinary course, including any transactions involving the equity of the legal or beneficial owner of the lands, without further Order of this Court...(xv) 66 Gerrard Street East...(xvii) 14 College Street..."

[84] Walton sought approval of the sale of the Gerrard Street Property by Gerrard Church 2006 Inc. to Topp Properties Ltd. pursuant to an agreement of purchase and sale accepted February 7, 2014. The applicants did not oppose the sale itself.

[85] The dispute between the parties concerned the distribution of the $6 million proceeds of sale. In her April 23, 2014 affidavit Walton deposed that the proceeds would be used to pay off the first mortgage ($4.1 million), with the second mortgage in favour of 231 discharged upon the payment to it of the proceeds in the Manager's hands from the sale of the College Street Property. Standard closing adjustments – property tax arrears, utility arrears, etc., real estate commission, and vendor's legal fees and disbursements - would then consume $323,400. Next, Walton proposed paying $50,000 to trade creditors related to the property. Thereafter she would look to disburse the balance of about $1.526 million (the "Remaining Balance") to satisfy some of the respondents' debts, including litigation-related debts.

[86] At the hearing Walton proposed a new distribution of the proceeds. Payments to the first mortgagee, to trades and for standard closing adjustments would remain the same, but Walton now proposed to disburse the Remaining Balance of the proceeds as follows:

(i) $140,000, as payment to the Manager and its counsel to satisfy an outstanding cost order against the respondents;

(ii) $60,000, as payment to Cohen Sabsay LLP, counsel for the respondents other than Walton - $16,000 due for services until the end of April, with the balance for the July motions;

(iii) $90,000, as payment to Forese Forensics, a forensic accountant retained by the respondents – $45,000 billed, but unpaid, with the balance for future work relating to the July motions;

(iv) $90,000, as payment to BTY Cost Consultants who have been retained by the respondents – to cover $20,000 already paid, $37,000 to release prepared cost consultant reports, with the balance due to BTY some 30 days later;

(v) $15,000, which was paid to Intrepid Quantity Surveying; and,

(vi) $200,000 to Rose and Thistle Properties Ltd. to cover payroll for staff whom Walton stated were assisting the respondents in preparing for the July motions.

Items (i) through (vi) total $595,500. The balance would be paid to Schonfeld Inc., in trust, pending further order of this Court. Assuming that the Remaining Balance in fact amounts to $1.526 million, that would mean a payment to the Manager, in trust, of about $931,000 (the "Surplus Trust Payment").

B. Positions of the parties

[87] The applicants submitted that the March 21 Order was in the nature of a proprietary injunction granted to preserve an asset in the possession of the respondents which the applicants contended belonged to them or was subject to a trust in their favour. As a result, the court had to consider any request by the respondents to use the applicants' money for the purpose of attempting to defeat their claim in light of the factors described in *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business and Technology*:

> (i) Has the defendant established on the evidence that he has no other assets available to pay his expenses other than those frozen by the injunction?
>
> (ii) If so, has the defendant shown on the evidence that there are assets caught by the injunction that are from a source other than the plaintiff, i.e. assets that are subject to a Mareva injunction, but not a proprietary claim?
>
> (iii) The defendant is entitled to the use of non-proprietary assets frozen by the *Mareva* injunction to pay his reasonable living expenses, debts and legal costs. Those assets must be exhausted before the defendant is entitled to look to the assets subject to the proprietary claim.
>
> (v) If the defendant has met the previous three tests and still requires funds for legitimate living expenses and to fund his defence, the court must balance the competing interests of the plaintiff in not permitting the defendant to use the plaintiff's money for his own purposes and of the defendant in ensuring that he has a proper opportunity to present his defence before assets in his name are removed from him without a trial. In weighing the interests of the parties, it is relevant for the court to consider the strength of the plaintiff's case, as well as the extent to which the defendant has put forward an arguable case to rebut the plaintiff's claim.[27]

I accept that this is the governing legal framework.

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[27] [2003] O.J. No. 40 (S.C.J.), para. 26, as cited with approval by the Court of Appeal in *Waxman v. Waxman*, 2007 ONCA 326, paras. 36 and 37.

[88] While the applicants did not object to the payments to the Manager and its counsel, they submitted that the respondents had not adduced evidence to support the necessity or quantum of the other proposed distributions.

[89] The applicants submitted that the respondents had not satisfied the threshold requirement of establishing, on the evidence, that they lacked other assets from which to pay their legal and expert expenses. As well, they submitted that Walton had not filed evidence of the amounts actually owed to her experts needed to obtain the reports upon which she intends to rely at the July hearing. Finally, they argued that the respondents had not put forward a defence to the applicants' claim of fraud against them.

[90] Walton submitted that the respondents required access to funds in order to prepare their response for the July hearing of the competing motions to expand the relief against the Schedule C Properties or to enable the respondents to deal more freely with them.

[91] Before considering the specific factors concerning Walton's requested distributions, let me voice my frustration at how the court process has unfolded for the proposed sales of both this property and the one at 65 Front Street East. For both properties Walton seeks court approval of sales, given the restraining orders previously made against them. In the ordinary course, the person seeking court approval of a sale usually comes to Court with all the "I's dotted and T's crossed", in the sense of an absence of deal-related loose-ends and, as well, files cogent evidence to support any disputed distributions. Walton has not done that. Although a lawyer, Walton's experience rests in negotiating real estate deals. It was apparent from her submissions that she thought court approval could be secured with many loose ends remaining, confident in her ability to tie them up prior to closing. While that might be the dynamic of a typical private real estate deal, that is not how a court sales approval process works.

C. Analysis

[92] Turning, then, to the substantive analysis of Walton's claim for approval of the distribution of sale proceeds, in my view four factors must be balanced in the analysis.

C.1 The quantum of the applicants' claim against 66 Gerrard Street East

[93] First, although the applicants are asserting tracing and constructive trust claims against the Gerrard Street Property, as the evidence presently stands the amount of those claims would not consume the proceeds of sale remaining after paying the registered encumbrances, standard closing adjustments and trade claims. As mentioned, the Remaining Balance is estimated at $1.526 million (recognizing that the proceeds might have to cover part of 231's outstanding mortgages), and the amount proposed to be paid to the Manager in trust would be around $931,000.

[94] The present evidence of the amount of the applicants' proprietary tracing and constructive trust claims against the Gerrard Street Property reveals a much smaller sum. The applicants' Chief Financial Officer, Mr. James Reitan, deposed that of a $987,165 equity contribution Dr. Bernstein made to a Schedule B Company, Fraser Properties Corporation, on July 31, 2012, about $215,000 found its way to the account of 66 Gerrard Street East on August 1, 2012 through the bank account of Rose & Thistle.

[95] The Inspector did not include in its Fourth Report any narrative report of a tracing analysis in respect of the Gerrard Street Property. Appendix "B" to the Report showed net transfers from Rose & Thistle to The Old Apothecary Building (i.e. 66 Gerrard Street East) of $1.258 million. However, the Inspector did not include 66 Gerrard Street East in its more detailed tracing analysis which used the 53 largest advances made by the applicants to the Schedule B Companies. Consequently, Reitan's evidence appears to be the most specific filed to date about the potential quantum of a tracing/constructive trust claim by the applicants against the Gerrard Street Property.

[96] Accordingly, as the evidence presently stands, the amount of the applicants' proprietary claim against 66 Gerrard Street East is much less than the Remaining Balance, and much less than the amount proposed to be paid to the Manager, in trust. To freeze the entire Remaining Balance would result, in effect, to granting the applicants execution before judgment akin to the making of a *Mareva* injunction. As a result, some consideration must be given to Walton's request concerning the proposed distributions.

C.2 The lack of an accounting from the respondents

[97] 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".

[98] 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.

[99] 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.

[100] 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.

C.3 The lack of cogent evidence about the respondents' current assets and liabilities

[101] The respondents have not filed a current statement of their assets or net worth and have not filed cogent evidence to demonstrate they lack other assets from which to fund their proposed litigation-related expenses.

[102] The Inspector examined Walton on April 11, 2014. Walton brought no documents to that examination, although directed to do so by the notice of examination.[28] At that time Walton testified that:

(i) She did not have any income which provided her "with a surplus of funds";[29]

(ii) The income generated by the Schedule C Properties comprising the Walton Group which were not subject to the receivership order were generating revenues which fell short of expenses by about $230,000 per month – income of $370,000 vs. expenses of $600,000;[30]

(iii) Walton and her husband use part of that $370,000 rental income stream "to pay for groceries, children's hockey expenses, those sorts of things".[31] As well, they use that income stream to cover the minimum monthly payment requirements on their credit card debts of about $120,000;[32]

(iv) Walton only received income from her activities with the Rose & Thistle Group of companies;[33] the law practice of Walton and her husband was not generating income.[34]

[103] In her proposed Direction for the sale proceeds, Walton sought payment of $90,000 to BTY in order to release cost reports. Yet, on her April 11 examination by the Inspector, Walton

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[28] Transcript of the examination of Norma Walton conducted April 11, 2014, Q. 6.
[29] *Ibid.*, Q. 12.
[30] *Ibid.*, Q. 130.
[31] *Ibid.*, Q. 215.
[32] *Ibid.*, Q. 211.
[33] *Ibid.*, Q. 227.
[34] *Ibid.*, Q. 233.

testified that the respondents required $37,000 to pay BTY so that 20 cost reports would be released.[35] Walton undertook to produce the invoices from Intrepid and BTY with respect to the quantity surveying and cost consulting work they were performing.[36] At the start of the May 16 hearing I asked counsel for the Inspector whether Walton had complied with that undertaking; he advised that she had not. That prompted Walton, over the lunch break, to bring some invoices to Court for filing. While I accepted the invoices, I expressed frustration over that course of conduct. Walton explained she thought she had 60 days from my earlier scheduling order to answer undertakings which meant, in her mind, that she did not have to produce those invoices to support her May 16 request for the release of funds to pay them. With respect, that was not a reasonable position for a trained lawyer to take. Courts operate on a very simple, common sense basis: if a party requests court approval for the release of funds to pay certain accounts, the requesting party has to file evidence that those accounts in fact exist and are due for payment. With respect, that principle should have been self-evident to a trained lawyer, and I do not accept Walton's explanation for failing to provide those invoices earlier.

C.4 Procedural fairness

[104] The final factor involves procedural fairness. As set out in my May 2, 2014 Reasons, the hearing in mid-July involves issues of great importance to both parties. On their part, the applicants' motion seeks: (i) leave to issue the Fresh as Amended Notice of Application; (ii) the cancellation of the respondents' shares in certain Schedule B companies; (iii) declarations of trust interests in Schedule C Properties and 44 Park Lane Circle, the Walton's residence; and, (iv) the appointment of Schonfeld Inc. as Manager for the purposes of selling 44 Park Lane Circle and the Schedule C Properties. On her part Walton, supported by the other respondents, will seek to set aside the March 21, 2014 Properties Freezing Order or to remove several properties from the ambit of that order, and will seek authorization from the Court to sell certain of the Schedule C Properties.

[105] Walton submitted that she required access to some of the Remaining Balance from the sale of 66 Gerrard Street East to fund the work necessary to present her case at the July hearings.

C.5 Conclusion

[106] Walton's failure to comply with this Court's order to provide a full accounting, her failure to provide a current net worth statement, and her failure to comply with undertakings concerning documents necessary to support her distribution claims weigh heavily against her. On the other hand, the determination of the issues at the mid-July hearings will significantly affect the rights of both parties and the estimated Remaining Balance and Surplus Trust Payment appear to exceed the amount of the tracing/constructive trust claim of the applicants against this property. As a result, I am persuaded that procedural fairness dictates the release of some funds to enable Walton and the other respondents to prepare for the important July hearing, however I intend to impose certain terms.

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[35] *Ibid.*, Q. 192.
[36] *Ibid.*, Q. 194.

[107] I authorize the sale by Gerrard Church 2006 Inc. to Topp Properties Ltd. pursuant to an agreement of purchase and sale accepted February 7, 2014 for the gross sales price of $6 million, subject to the following terms and conditions:

(i) The sale proceeds shall be paid and applied in the following order:

a. Payment in full of the first mortgage and the balance due to the second mortgagee, 231, if any shortfall existed in respect of the College Street Property Funds;

b. Payments for adjustments for property taxes, standard amounts in the statements of adjustments, and vendor's legal fees of up to $120,000;

c. Payment of realty commissions to Cushman Wakefield LePage of up to $203,400;

d. Payments to property-specific creditors, suppliers and trades of up to $50,000;

e. Payment of $90,000 to Schonfeld Associates Inc. and $50,000 to its counsel, Goodmans LLP;

f. Payment of $60,000 to Cohen Sabsay LLP;

g. Payment of $90,000 directly to Froese Forensics;

h. Payment of $90,000 directly to BTY Cost Consultants;

i. Payment of $15,000 directly to Intrepid Quantity Surveying;

j. I am not prepared to authorize payment of $200,000 to Rose and Thistle Properties Ltd. given the absence of any supporting documentation;

k. The balance of the sale proceeds must be paid on closing to the Manager, Schonfeld Inc., to be held in trust pending further order of this Court; and,

(ii) ***I will not entertain any further request by the respondents for the release of funds prior to the July hearings.*** The respondents had ample opportunity to put their best foot forward on this motion; they did not do so. Given the frailty of the evidence they filed on this motion, the order now made is quite generous to the respondents and they will have to make do with the amounts which they have requested for their counsel and experts.

IV. DISTRIBUTION OF THE PROCEEDS OF THE SALE OF 65 FRONT STREET EAST

A. The remaining issues and the positions of the parties

[108] By order made January 27, 2014, Wilton-Siegel J. ordered that "the Walton Group and Front Church Properties Limited be permitted to negotiate an offer acceptable to them to complete the sale of 65 Front Street East in accordance with the details and price range set out in

paragraphs 9 to 12 of the Affidavit of Mark Goldberg sworn January 27, 2014" and that "*the proceeds of any sale be paid as directed by the further order of this Court*".

[109] Newbould J. ordered, on March 21, 2014, that "the proceeds from the sale of the property at 65 Front Street East, net of items 1-5, 7 and 8 on the attached Direction, be remitted to Schonfeld Inc. to be held pending further Order of this Court or written agreement of the Manager". One of the items ordered paid – Item 4 – was to "pay to CRA the amount to discharge their HST lien ($203,000 est.)".

[110] Both parties subsequently sought to vary the list of authorized distributions identified in the March 21 Order. After further discussions the parties came close to reaching agreement on a list of sale proceeds distributions, but could not agree on the treatment of the CRA HST lien claim. Walton wanted that lien claim paid from the sale proceeds; the applicants wanted $274,500 from the sale proceeds to be paid to the Manager to be held in trust pending a determination of the priority of CRA's lien claim.

[111] On May 1, 2014, counsel for the CRA advised that it would discharge its lien should a closing of the sale of 65 Front Street East occur, but CRA reserved the right to file a proof of claim with the Manager should the Court approve a claims process in respect of the sales proceeds.

[112] Walton filed a May 15 affidavit which attached signed settlements with all but one construction lien claimants. That one, Abaco Glass, objected to any compromise of its claim while some other lien claimants received payment in full.

[113] Further, Collins Barrow (Toronto) Limited, the court-appointed receiver over Global Mills Inc., the title holder of 1450 Don Mills Road, filed an affidavit explaining that it had filed a notice on title of a $361,750 claim against the property because Walton had deposed she had diverted that amount out of an advance by lenders to Global Mills to the Front Street Property. Collins Barrow stated that:

> [T]he veracity and legitimacy of the lien claims that have been registered on the Front Street East property have also not been proven, including whether or not the alleged amounts are accurate, that the services alleged to be provided were for the property in question and whether or not there may be issues with holdback and if the owner of the said property is liable only for deficiency in holdback as opposed to the total amount of the lien claim. In general, there has been no evidence provided by Ms. Walton as to the legitimacy of the lien claims, the purported deficiency to pay the Global Mills claim to Schonfeld Inc., and payout or any issues whatsoever except for her own bald statements.

B. Analysis

[114] Under the proposed sale, gross proceeds would amount to $10 million. Payments of the first mortgage ($5,887,500), second mortgage ($2,720,000), outstanding property taxes ($190,000), standard adjustments ($150,000) and vendor's legal fees ($30,000) would total $8,977,500 (collectively the "Primary Payments"), leaving a Remaining Balance of $1,022,500. Against that Remaining Balance are the following claims totaling $1,489,100 consisting of:

(i) CRA HST lien claim: $274,500;

(ii) Settled construction lien claims: $454,260;

(iii) Unsettled construction lien claim: $49,420;

(iv) Collins Barrow Receiver's notice of claim: $361,750;

(v) Commission payment to Cushman Wakefield LePage: $349,170 (although Walton thought she could further negotiate the amount),

(collectively the "Secondary Payments"). A shortfall therefore exists.

[115] The applicants opposed the direct payment to CRA sought by Walton, and CRA was content to lift its lien in order to facilitate the closing, leaving the adjudication of its claim to part of the sales proceeds to another day. While in *Trang v. Nguyen*[37] the Court of Appeal rejected the argument that sections 223(5)(b) and 223(6) of the *Income Tax Act* created a charge on land within the meaning of section 93(3) of the *Land Titles Act*, that Court observed that arguments had not been made on all aspects of the priority-creation language contained in *ITA* ss. 223(b). Notwithstanding the HST lien claimant's willingness to defer that issue to a later day, Walton wanted the CRA claim paid.

[116] While most construction lien claimants were prepared to settle with Walton, a court-appointed receiver, Collins Barrow, opposed any payment out to those claimants absent a determination of the validity of their claims.

[117] Given that the claims asserted against or in respect of the 65 Front Street East property exceed the gross sales price and given the dispute amongst claimants about the validity of certain claims to the Remaining Balance, I am prepared to authorize the proposed sale of 65 Front Street East property, but only on the basis that the Primary Payments, as defined above, are paid on closing out of the sale proceeds, with the entire Remaining Balance to be paid to the Manager, Schonfeld Inc., to be held in trust pending the conduct of a claims process by those seeking Secondary Payments, and the Remaining Balance would stand in the place of the property to satisfy any such claims.

[118] If the respondents wish to close on that basis, they may submit a formal approval and vesting order to that effect, approved as to form and content by all affected parties, to my attention for signature. I will not entertain any further "re-negotiated distribution deals" unless they are accompanied by a comprehensive formal order with signed consents from all affected parties.

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[37] 2012 ONCA 885.

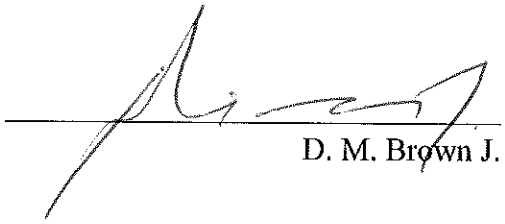
V. Summary

[119] By way of summary, I dispose of the three motions before me as follows:

(i) I dismiss the applicants' motion to invalidate the security held by 231, and I direct payments to satisfy that security in accordance with paragraph 81 above;

(ii) I authorize the sale of the property at 66 Gerrard Street East with the payment out of the sales proceeds in accordance with paragraph 107 above; and,

(iii) I authorize the sale of the property at 65 Front Street East with the payment out of the sales proceeds in accordance with paragraphs 117 and 118 above.



D. M. Brown J.

Date: May 20, 2014