

CITATION: DBDC Spadina Ltd. v. Walton, 2014 ONSC 3145
COURT FILE NO.: CV-13-10280-00CL
DATE: 20140522

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

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)

HEARD: May 22, 2014

SUPPLEMENTARY REASONS FOR DECISION

[1] By Reasons dated May 20, 2014 (2014 ONSC 3052) I dismissed the applicants' motion for orders that the mortgages granted to 231 over the College and Gerrard Street Properties were unenforceable, void or inoperative as against any interest of the applicants in those properties. I directed 231 to submit to Schonfeld Inc., in its capacity as court-appointed Manager, a discharge statement for its mortgage as of May 20, 2014 which included its claim for legal fees, as well as serve copies of that statement on the applicants and respondents.

[2] 231 did so. One item on the discharge statement was disputed – legal costs.

[3] Section 14 of the Collateral Debenture dated October 25, 2013 granted by College Lane Ltd. to 231 dealt with “expenses”, in part, as follows:

The Debtor shall pay to the Lender forthwith upon demand all costs, charges and expenses (including, without limitation, legal fees on a substantial indemnity) incurred by the Lender...in connection with the recovery or enforcement of payment of any of the moneys owing hereunder...

[4] As a general principle, the contractual agreement on costs of proceedings negotiated by sophisticated parties should govern the Court's analysis, absent evidence of inequitable conduct or overall unfairness, of which there was none in respect of 231's charge.¹

[5] I see no reason to depart from the language of section 14 of the Collateral Debenture and fix 231's costs only a partial indemnity basis as urged by the applicants. Whether the issues which called for determination on the motion were novel or not, the "substantial indemnity" language found in section 14 established the reasonable expectations of the parties for purposes of any litigation concerning 231's efforts to enforce its security. 231 is entitled to legal fees calculated on a substantial indemnity basis.

[6] At present no cost grid exists under the *Rules of Civil Procedure*, but Rule 1.03 defines "substantial indemnity costs" as "costs awarded in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A..." Recent jurisprudence emerging from the Toronto Region Commercial List has calculated substantial indemnity costs by awarding partial indemnity costs "at 60% of the time charged", then multiplied by 1.5 to arrive at 90% of time charged for an award of substantial indemnity costs.² I adopt and shall apply that method of calculating the substantial indemnity costs 213 is entitled to under section 14 of the Collateral Debenture.

[7] The applicants did not take issue with the hours claimed by 231 for the work performed by its three law firms. The dispute between the applicants and 231 lay in the approach to the hourly rate.

[8] 231 submitted that one should start with the total fees billed on an actual billing rate basis, and then take 90% of that to derive the substantial indemnity costs. By contrast, the applicants contended that one should establish the partial indemnity hourly rates and then multiply them by 1.5 to establish the substantial indemnity hourly rates to apply against the hours worked. In my view, the approach proposed by the applicants is the one most consistent with the definition of "substantial indemnity costs" found in Rule 1.03, and I shall apply that approach. I would observe that earlier in this proceeding Newbould J. used that level of hourly rates in his December 9, 2013 cost Reasons: 2013 ONSC 7572, para. 7.

[9] I therefore accept the calculation of substantial indemnity costs found at Tabs 8, 9 and 10 of the Applicants' most helpful compendium: Lax O'Sullivan (\$100,498.12); McCague Borlack

¹ *All-Mar Development Ltd. v. HSBC Bank Canada*, [2009] O.J. No. 4452 (S.C.J.), para. 5; *Greenwin Property Management Inc. v. Greenwin Tennis Courts Inc.*, 2010 ONSC 1116, para. 4.

² *Stetson Oil & Gas Ltd. v. Stifel Nicolaus Canada Inc.*, 2013 ONSC 5213, para. 25; *George Bozikis/Plasman Investors' Limited Partnership v. APP Holdings Limited Partnership*, 2013 ONSC 6401, paras. 14 and 15.

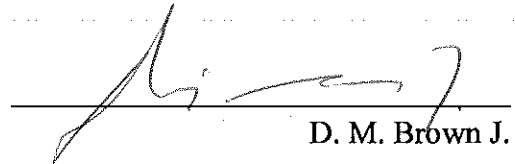
(\$5,194.38); and, McCarthy Tétrault (\$25,003.45), for a total of \$130,695.95. I therefore order that for purposes of the Discharge Statement in respect of the funds presently held by the Manager from the sale of the College Street Property, the legal fees payable to 231 shall be \$130,695.95.

[10] Ms. Walton submitted that since the fight on the motion was between the applicants and 231, the applicants should be the ones to pay 231's legal costs. From the information provided by Manager's counsel, it appears that the College Street Property funds presently held by the Manager likely will only cover the payment to 231 of its principal and interest, and one would have to look to any proceeds from the sale of 66 Gerrard Street East to fund 231's legal fees.

[11] I understand the position advanced by Ms. Walton. At this point of time, the priority is to arrange the pay-out of 231. I therefore will not alter paragraph 81 of the May 20 Reasons which stated:

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...

However, I do so without prejudice to the right of the applicants or respondents to argue, at the time of the July motions before me, that one side or the other should bear full or partial responsibility for the legal fees of 231 which I have fixed.


D. M. Brown J.

Date: May 22, 2014