COURT OF APPEAL FOR ONTARIO

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

Cronk, Blair and van Rensburg JJ.A.

BETWEEN

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

Applicants (Appellants)

and

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

Respondents (Respondents)

and

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

and

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

AND BETWEEN

Christine DeJong Medicine Professional Corporation

Applicant (Respondent)

and

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

Respondents (Respondents)

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

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

Mark Dunn, for Schonfeld Inc., Inspector/Manager

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

Heard: June 2, 2017

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

R.A. Blair J.A.:

BACKGROUND

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

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

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

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

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

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

---

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

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

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

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

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

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

Appointment of the Inspector

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

Appointment of the Inspector as Manager

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

The Proceedings Before D.M. Brown J.

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

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

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

[12] The application was opposed by the Waltons.

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

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

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

> [T]he Waltons did not use the funds advanced to them by the [DBDC] Applicants as their contracts required but, instead, the Waltons mis-used and mis-appropriated most of the funds advanced to them, diverting some of the funds to their own personal benefit and the benefit of their Schedule C Companies. [Emphasis added.]

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

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

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

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

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

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

(iv) those transfers of funds from the Schedule B Companies to Rose & Thistle constituted breaches of the agreements between the DBDC Applicants and the Waltons. These agreements required that each Schedule B Company, and the funds advanced to it, be used only to purchase, renovate and refinance the specific property owned by the Schedule B Company.

---

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

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

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

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

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

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

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

(v) throughout the proceedings, Norma Walton "presented herself to the Court, through her affidavits and through her submissions, as the person who was in charge of the entire enterprise, whether it be the operation of the Schedule B Companies, Rose & Thistle or the Schedule C Companies" (emphasis added).

[19] In the result, Brown J.:

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

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

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

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

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

The Decision Under Appeal

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

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

---

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

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

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

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

The Schedule C Companies at Issue on Appeal

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

---

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

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

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

THE ISSUES ON APPEAL

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

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

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

(c) in awarding costs against the DBDC Applicants.

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

ANALYSIS

A. KNOWING RECEIPT

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

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

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

B. KNOWING ASSISTANCE

(1) General Considerations

[40] A stranger to a trust or fiduciary obligation may also be liable in equity on the basis of "knowing assistance" where the stranger, with actual knowledge,

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

[41] Knowing assistance and knowing receipt are both doctrines arising in equity. However, there is a fundamental difference between the two types of liability. Knowing receipt liability is restitution-based and falls within the law of restitution; its essence is unjust enrichment. Knowing assistance, however – sometimes referred to as "accessory liability" – is fault-based and is concerned about correcting matters related to the furtherance of fraud: see *Gold v. Rosenberg*, at para. 41; *Citadel General*, at paras. 46-48. I shall return to this distinction later in these reasons.

---

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

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

(i) there must be a fiduciary duty;

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

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

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

(2) The Issues In Applying The Criteria

[43] In determining whether the foregoing criteria have been met and whether the Listed Schedule C Companies are to be held jointly and severally liable for damages arising from knowing assistance in the breach by Ms. Walton of her fiduciary duties to the DBDC Applicants, there are three overarching questions to be answered:

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

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

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

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

(3) Application of the Criteria

(a) Fiduciary Considerations

[45] As the Application Judge concluded, there is no issue in the present case that Ms. Walton owed a fiduciary duty to the DBDC Applicants and Dr. Bernstein,

or that she fraudulently breached that duty. At para. 47 of his reasons, he found that:

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

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

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

[48] A contractual relationship does not necessarily give rise to fiduciary duties, obviously, but it may, depending on the nature of the relationship and the overall relationship between the parties. In *Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc.*, 2015 ONCA 465, 126 O.R. (3d) 81, at para. 74, this Court reiterated the criteria for a fiduciary relationship, as set out by the Supreme Court of Canada in *Frame v. Smith*, [1987] 2 S.C.R. 99, at p. 136, *Hodgkinson v. Simms*,

[1994] 3 S.C.R. 377, at p. 462, and *Galambos v. Perez,* 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 66: (i) the fiduciary has scope for the exercise of some discretion or power; (ii) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; (iii) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power; and (iv) there exists an express or implied undertaking by the fiduciary to act in accordance with the duty of loyalty reposed in him or her.

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

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

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

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

(b) The Application Judge's Decision

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Investments Ltd. v. Canadian Imperial Bank of Commerce (1985), 52 O.R. (2d) 473 (C.A.), at para. 55, leave to appeal refused, [1986] S.C.C.A. No. 29.

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

> This doctrine, sometimes known as the alter ego doctrine, has been developed, with no divergence of approach, in both criminal and civil jurisdictions, the authorities in each being cited indifferently in the other. A company having no mind or will of its own, the need for it arises because the criminal law often requires mens rea as a constituent of the crime, and the civil law intention or knowledge as an ingredient of the cause of action or defence. In the oft-quoted words of Viscount Haldane LC in *Lennards Carrying Co. Ltd v. Asiatic Petroleum Co Ltd*:
>
> > 'My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.'
>
> The doctrine attributes to the company the mind and will of the natural person or persons who manage and control its actions. At that point, in the words of Millett J:[9] 'Their minds are its mind; their intention its intention; their knowledge its knowledge.' It is important to emphasize that management and control is not something to be

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

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

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

[62] This omission appears to have led the Application Judge to accept the "formal position" set out in the terms of the Schedule C Company shareholder agreements as dispositive of whether Ms. Walton was the controlling and directing

mind of those corporations. The passage from his reasons, cited in para. 54 above, confirms that to be the case.

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

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

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

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

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

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

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

> (i) The Schedule C Companies were owned and controlled by the Waltons;
>
> (ii) Norma Walton presented herself to the court, through her affidavits and through her submissions, as the person who was in charge of the entire enterprise, whether it be the operation of the Schedule B companies, Rose & Thistle or the Schedule C Companies [emphasis added];
>
> (iii) Neither Ronauld Walton nor the Chief Financial Officer of Rose & Thistle had come forward to say that the improper transfers of monies out of the Schedule B Companies were the result of directions or orders given by someone other than Norma Walton (from which he inferred that they were not); and
>
> (iv) Ms. Walton "simply did as she saw fit irrespective of her legal obligations" and "ignored the contractual language that bound her".

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

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

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

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

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

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

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

(d) Application of the *Canadian Dredge* Criteria

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

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

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

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

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

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

[73] In my view, policy considerations support a more flexible approach in complex and large, multi-corporation, multi-party fraud cases such as the present one, for the reasons I set out below. I do not think, in these circumstances, that it

matters whether the flexibility is applied at the criteria-application phase or the overall-equitable consideration stage of the analysis.

(i) Acting Within the Assigned Field of Operation

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

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

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

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

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

(ii) Fraud/Benefit of the Corporation

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

a broader fashion in circumstances such as these, than would be the case in a criminal law context.

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

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

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

[82] My colleague's approach is also influenced by her view that the Listed Schedule C Companies are, themselves, victims of the fraud. If that were the case, it may be a consideration in determining whether liability may be avoided on overall "equity" grounds, discussed further below. However, I do not think it has much bearing on the "directing and controlling mind" analysis or on the analysis of whether the Listed Schedule C Companies in fact assisted and participated in the fraudulent breach of fiduciary duty. In addition, as I shall explain later, I do not view

the Listed Schedule C Companies as being "victims" of the fraud; rather, their investors are the victims of the fraud.

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

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

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

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

[86] Ms. Walton utilized the Schedule C Companies as actors in the process of orchestrating her shell game through the Rose & Thistle "clearing house" account. Funds were co-mingled, when they were supposed to be kept project-specific.

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

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

---

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

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

Participation by St. Clarens/Emerson

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

[90] On November 18, 2013, the Waltons and DeJong entered into the standard type of 50/50 shareholder/management agreement described earlier in these reasons with respect to the St. Clarens/Emerson properties. That agreement stated that the Waltons had previously entered into an agreement of purchase and sale regarding the properties, and had previously provided an $80,000 deposit along with due diligence fees of approximately $50,000 related to the purchase. A "Capital Required" document associated with the purchase indicated that there was a "Purchaser agency fee" of $225,000 included as part of the purchase costs.

Dr. DeJong swore that this fee was never discussed with or disclosed to her. The Application Judge accepted this evidence.

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

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

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

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

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

[96] Improper as they were, each of these transactions – together with all the other in-and-out transactions – required a corporate act of one form or another. As the directing mind of the Listed Schedule C Companies for these purposes, Ms. Walton's acts were their acts, and the Companies accordingly participated in or assisted Ms. Walton in her breach of fiduciary duties to the DBDC Applicants.

Additional Arguments Raised Against Finding Participation/Knowledge

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

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

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

[100] First, as I have emphasized, they conflate knowing assistance with knowing receipt. If it were necessary to demonstrate the receipt of funds by the defendant in order to establish a claim for knowing assistance, there would be no need for the knowing assistance remedy. The claim of "knowing assistance" is designed to

capture circumstances where "knowing receipt", unjust enrichment, or a constructive trust on some other basis cannot be established, but where a fault-based remedy is appropriate to compensate for the defendant's knowing assistance in the perpetration of a fraudulent and dishonest breach of fiduciary duty. This is one of those cases. In addition, as mentioned above, there are sound policy reasons for not importing a tracing requirement as a necessary component of the knowing assistance claim.

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

[102] Nor do I share the view that the Listed Schedule C Companies were not participants in Ms. Walton's fraudulent breach because they were victims of the same fraudulent scheme and were merely used by Ms. Walton as "conduits" or "pawns" in the perpetration of that scheme, without the demonstration of receiving any benefit themselves.

[103] My colleague acknowledges that "the Listed Schedule C Companies may have participated in Ms. Walton's overall fraudulent scheme, in the sense that they were used by her in the 'shell game' to co-mingle investor funds, and to avoid

making her own contributions" (at para. 231). She acknowledges that "knowing assistance does not require a defendant to have received a benefit" for these purposes (at para. 234). Yet, she concludes that "the net transfer analysis does not provide the evidence that they participated in her breach of fiduciary duty to the DBDC Applicants so as to attract personal liability for knowing assistance" (at para. 231), and that "the issue of benefit is relevant here because Ms. Walton's conduct was in fraud of the very entities sought to be made liable for knowing assistance" (at para. 234).

[104] This approach conflates the Companies with their investors and preferred shareholders, however. It also overlooks the finding that Ms. Walton was the controlling and directing mind of the companies and that her intentions and conduct were theirs. The Listed Schedule C Companies are not defrauded victims of Ms. Walton's fraudulent scheme; their investors and preferred shareholders are the defrauded victims. And, as noted above, they did "benefit" generally from the perpetration of the overall fraud. The Companies acquired the properties they were created to acquire. They received the funds enabling them to do so. As Brown J. found, the DBDC Applicants' investments were used to fund their ongoing operations and provided "a major source of funds for the Walton Schedule C Properties/Companies" (at para. 269). It was the way in which the investors' funds (the DBDC Applicants', as well as those of DeJong and others) were fraudulently co-mingled and moved amongst the entire portfolio of properties and projects that

constituted the fraud. However, it was fraud perpetrated on the investors, not on the Listed Schedule C Companies.

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

[106] It is not an answer to say that a similar claim for joint and several damages might be asserted against the Schedule B Companies on the same basis. No one is asserting such a claim in these proceedings. And, although the Schedule C investors were also victimized in the scheme, it must be remembered – as found

by Brown J., and accepted by the Application Judge – that net funds of $23.6 million *flowed out of the Schedule B Companies* into Rose & Thistle, and net funds of $25.4 million *flowed out of Rose & Thistle into the Schedule C Companies.* It is the DBDC Applicants, not the Schedule C Companies, that suffered the net losses.

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

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

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

> Acts of the ego of a corporation taken within the assigned managerial area may give rise to corporate criminal

> responsibility, whether or not there be formal delegation; whether or not there be awareness of the activity in the board of directors or the officers of the company; and, as discussed below, whether or not there be express prohibition. [Emphasis added.]

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

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

[112] The Respondents seek to distinguish *El Ajou* on the basis that it applied "knowing receipt" as opposed to "knowing assistance", and that constructive knowledge is sufficient to ground liability for the former while actual knowledge is required for the latter. In my view, *El Ajou* is not distinguishable on that basis. There is nothing to suggest that the knowledge the court was attributing to the corporation in that case was constructive knowledge. Rather, what was imputed to the corporation was the *actual* knowledge of the directing mind. As Nourse L.J. noted,

at p. 695, the person found to be the directing mind of the corporation (a Mr. Ferdman) "freely admitted that he knew [of the fraudulent transactions in question]" (emphasis added). This is the language of actual knowledge, not that of constructive knowledge. Constructive knowledge arises when a person has knowledge of circumstances that would indicate certain facts to a reasonable person, or knowledge of circumstances that would put an honest and reasonable person on inquiry: see *Air Canada,* at p. 812*; Citadel General*, at para. 22. It was the actual knowledge of Mr. Ferdman that was attributed to the corporation as its knowledge.

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

[113] For all these reasons, I am satisfied that the DBDC Applicants have established the necessary components for a claim of knowing assistance in a breach of fiduciary duty: (i) Ms. Walton owed a fiduciary duty to the DBDC Applicants; (ii) she breached that duty; (iii) the Listed Schedule C Companies, as strangers to the fiduciary relationship, had actual knowledge of both the fiduciary relationship and the fraudulent and dishonest conduct of the fiduciary, because in the circumstances Ms. Walton's mind was their mind, her intent their intent, and her knowledge their knowledge; and (iv) for similar reasons, the Listed Schedule C Companies participated in or assisted Ms. Walton's fraudulent and dishonest conduct.

C. JOINT AND SEVERAL LIABILITY FOR DAMAGES

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

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

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

[116] Brown J. granted the DBDC Applicants a tracing order against the Listed Schedule C Companies to further the evidence available to support their claim for unjust enrichment. By the time the issue came before the Application Judge, however, the DBDC Applicants had decided to forego the tracing exercise and any claim to a proprietary interest in the Schedule C Properties held by those

companies. Instead, they asserted only their claim for damages on a joint and several basis for knowing assistance and/or receipt.

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

[118] La Forest J. addressed this dichotomy in *Citadel General*, underscoring the importance of distinguishing between the knowing assistance and knowing receipt claims, and their underpinnings. After referring to a passage from the judgment of Millett J., the judge of first instance in the *Agip (Africa) Ltd.* case, La Forest J. said, at paras. 46-47:

> In other words, the distinction between the two categories of liability is fundamental: whereas the accessory's liability is "fault-based", the recipient's liability is "receipt-based". In an extrajudicial opinion, Millett J. described the distinction as follows:
>
> > ... the liability of the accessory is limited to the case where the breach of trust in question was fraudulent and dishonest; the

> liability of the recipient is not so limited. In truth, however, the distinction is fundamental; there is no similarity between the two categories. The accessory is a person who either never received the property at all, or who received it in circumstances where his receipt was irrelevant. His liability cannot be receipt-based. It is necessarily fault-based, and is imposed on him not in the context of the law of competing priorities to property, but in the application of the law which is concerned with the furtherance of fraud. [Footnotes omitted.]
>
> "Tracing the Proceeds of "Fraud" [(1991), 107 L.Q.R. 71], *supra*, at p. 83.

The same view was expressed by the Privy Council in *Royal Brunei Airlines Sdn. Bhd. v. Tan*, [1995] 3 W.L.R. 64, at p. 70: "Different considerations apply to the two heads of liability. Recipient liability is restitution-based; accessory liability is not." These comments are also cited with approval by Iacobucci J. in *Gold*, *supra*, at para. 41. [Emphasis added.]

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

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

[120] The Respondents argue that they were innocent investors who had no knowledge of Ms. Walton's fraudulent and dishonest ways, and that in the contest

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

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

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

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

[123] While I need not go so far as to say that a court may never exercise a discretion to decline a remedy where the four criteria for establishing liability for knowing assistance have been met, I find it hard to conceive of a case where – in the face of a defendant's participation or assistance in a fraudulent and dishonest scheme perpetrated by a fiduciary and with actual knowledge of both the fiduciary relationship and the fraudulent and dishonest scheme – a court would do so. It is the role of equity and the courts to guard against such an outcome and not to sanction such conduct.

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

significant net beneficiaries in the flow of funds emanating from the pooling and co-mingling of the various investors' monies.

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

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

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

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

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

[129] Once it is established that the Listed Schedule C Companies are each liable for knowingly assisting Ms. Walton in the global scheme in breach of her fiduciary obligations to the DBDC Applicants, it follows in the circumstances that the Listed Schedule C Companies are jointly and severally liable for the losses sustained: see *Enbridge Gas*, at para. 31. In that case, this Court upheld the trial judge's finding that the defendants were jointly and severally liable for the full extent of the losses sustained by Enbridge even though the defendants played different roles in

assisting in the fraud and received unequal portions of the misappropriated funds. I see no basis for departing from that same line of reasoning.

[130] While the DBDC Applicants are entitled to an award of damages in the amount of $22.6 million against the Listed Schedule C Companies, they are not entitled to make a double recovery. The net transfer analysis was prepared in relation to the Schedule B and Schedule C Companies. Brown J. awarded constructive trusts in favour of the DBDC Applicants against eight Schedule C Properties, for a total of $8,128,325 (of which, we are advised, the amount of $1,192,150 has been recovered). The constructive trusts were awarded in cases where the Inspector was able to trace funds from a Schedule B Company, through Rose & Thistle, and into a Schedule C Company, and the Schedule C Company used those funds in respect of a Schedule C Property. Those funds were necessarily part of the larger $23.6 million (less a $1 million reduction for management fees) that was transferred out of the Schedule B Companies.

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

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

D. THE DEJONG CLAIM FOR CONSTRUCTIVE TRUSTS

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

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

[134] These properties have since been sold, and the Manager holds the proceeds from their sale. The DeJong constructive trust against 3270 American Drive ranks subsequent to the constructive trust earlier granted by Brown J. in favour of the DBDC Applicants. It exhausts the funds currently held by the Manager from the sale of that property. The amounts granted as constructive trusts in favour of DeJong respecting the remaining three properties also exhaust the funds available from their sale. On that basis, the DeJongs would thus recover more than 50% of their lost investments.[11]

---

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

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

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

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

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

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

[136] The Application Judge did not grant constructive trusts over the properties owned by the DeJong Companies on the basis of unjust enrichment. In the case of 3270 American Drive, this was because the equity funds advanced by DeJong for the purchase of that property were diverted elsewhere and not used for that purpose (it was Dr. Bernstein's investments that were improperly diverted and used to purchase 3270 American Drive, leading to the granting of a constructive

trust in the DBDC Applicants' favour over the property). In the case of 324 Prince Edward Drive, 260 Emerson Avenue and 777 St. Clarens Avenue, the DeJong monies were utilized, in part, for the purchase of the respective properties, but this did not constitute an unjust enrichment because the funds were intended to be used for that purpose.

[137] Instead, the Application Judge granted constructive trusts in favour of DeJong against the foregoing properties as a remedy for breach of fiduciary duty. In doing so, he relied upon the well-accepted principle that a constructive trust remedy is not restricted to circumstances in which there has been an unjust enrichment, but may be imposed as well "to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in 'good conscience' they should not be permitted to retain", and can "aris[e] on breach of a fiduciary relationship": *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at paras. 17 and 19.

[138] However, in *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271, the Supreme Court of Canada revisited the factors to be taken into account by a court when imposing a constructive trust as a remedy for breach of fiduciary duty. Speaking for the majority on this point, Cromwell J. held at para. 227 that "a remedial constructive trust for a breach of fiduciary duty is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the

wrongdoer (or sometimes a third party) to retain."[12] Concurring on this point, Deschamps J. affirmed, at para. 78, that "[i]t is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property."

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

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

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

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of

---

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

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

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

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

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

connection" between them and "the process" through which the wrongdoing took place.

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

(2) The Application Judge Failed to Consider the Circumstances

[144] The DBDC Applicants submit as well that in an insolvency context (as is the case here) the availability of other remedies and the adverse impact of imposing a proprietary remedy on other creditors and parties need to be taken into account in

determining whether to impose a constructive trust. The Application Judge did not do so, they argue.

[145] There are other creditors in the proceedings. A summary of the proposed payments accepted to date in the Claims Process indicates that the Receiver/Manager has accepted approximately $60,000 in secured claims (principally from the Canada Revenue Agency) and approximately $205,000 in unsecured claims.[13] These claims are dwarfed by the claims at issue in these proceedings: Dr. Bernstein and the DBDC Applicants claim approximately $66 million against the Waltons and an included $22.6 million against the Listed Schedule C Companies; approximately $4 million is claimed by DeJong; and $160,000 by the Condos.[14] The claims by Dr. Bernstein and the DBDC Applicants themselves similarly dwarf the DeJong and Condos claims.

[146] It is significant that DeJong and the Condos did not advance their funds directly on the acquisition of the properties. They advanced their monies to the Schedule C Companies, either as equity investments (the Condos in Cecil Lighthouse; DeJong in United Empire Ltd.), or as shareholder loans (DeJong in

---

[13] This is excluding the DeJong claims accepted against St. Clarens Holdings and Emerson Development.
[14] The claim of the Levytams has been resolved.

respect of Prince Edward Properties, St. Clarens Holdings and Emerson Developments).[15] They each have remedies in those respective capacities.

[147] With a minor exception concerning the St. Clarens and Emerson companies, the Waltons' shares in the DeJong Companies have been cancelled, leaving DeJong as the overwhelming majority shareholder of United Empire, Prince Edward Properties, St. Clarens and Emerson. Those corporations owned the Schedule C Properties against which DeJong is claiming constructive trusts, and whose proceeds from sale are currently being held by the Manager. DeJong remains an unsecured creditor on the basis of its shareholder loans, and may well have a personal remedy against the Waltons. Granting a constructive trust over the properties, as a remedy for breach of fiduciary duty, would enable DeJong to leapfrog over other creditors in its capacity as a lender by obtaining a proprietary remedy not available to other creditors.

[148] Although the Application Judge did not refer specifically to the relevance of other creditors or other remedies available to DeJong, I am not prepared to assume that he ignored them, experienced Commercial List judge that he was. Indeed, I suspect that these factors were the very ones driving his decision. He would well have recognized that the claims of the DBDC Applicants would

---

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

overwhelm those of DeJong in an insolvency competition. Although the DBDC Applicants' outstanding losses exceed $66 million and their recovery has been limited to only approximately $13 million, they have nonetheless made *some* recovery. DeJong will recover very little in a priorities contest among creditors.

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

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

E. THE COSTS AWARD

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

DISPOSITION

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

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

(b) the respondent Christine DeJong Medicine Professional Corporation is not entitled to constructive trusts over the properties known as 3270 American Drive, Mississauga, Ontario; 324 Prince Edward Drive, Toronto,

Ontario; 777 St. Clarens Avenue, Toronto, Ontario; and 260 Emerson Avenue, Toronto, Ontario; and

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

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

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

R.A. Blair J.A.

I agree. S.A. Cronk J.A.

van Rensburg J.A. (Dissenting):

OVERVIEW

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

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

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

[158] In my opinion, liability for knowing assistance in this case cannot be made out. It accepts, as evidence of both the Listed Schedule C Companies' participation in Ms. Walton's breach of fiduciary duty, and the measure of the appellants' damages, the "net transfer analysis", a summary of cash transfers that was performed by the Inspector at an earlier stage in the oppression proceedings against the Waltons, for an entirely different purpose. It equates a Listed Schedule

C Company's participation as a victim in Ms. Walton's "shell game" to participation in a breach of fiduciary duty. It imputes to the Listed Schedule C Companies Ms. Walton's conduct and intent, where her actions defrauded them, and were for her own personal benefit. And it uses as a measure of damages the sum of $22.6 million, which does not correspond with any proven benefit to or harm caused by any Listed Schedule C Company, but is simply the net amount transferred in a three-year period from the Schedule B Companies to Rose & Thistle (without regard for its source or whether any of the funds ended up in a Listed Schedule C Company).

[159] A judgment for $22.6 million against the Listed Schedule C Companies would enable the DBDC Applicants to share as unsecured creditors in the proceeds of sale of each of ten Schedule C Properties, after satisfying the constructive trust claims they have made out against some of the properties. This judgment, which purports to reflect the collective losses of the 29 DBDC Applicants, will overwhelm the claims of the investors in the ten Listed Schedule C Companies, who were victims of the Waltons in the same way as the appellants. As my colleague notes, this is a "priorities dispute", however, the effect of a judgment for damages in their favour is that the DBDC Applicants will receive the lion's share of the net proceeds of sale of properties to which, except for the funds that have been traced and in respect of which they have already been awarded constructive trusts, they made no contribution.

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

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

OUTLINE OF THESE REASONS

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

[163] First, the knowing receipt and knowing assistance claims were late-breaking add-ons to the oppression proceedings against the Waltons. I do not agree that they were, as the DBDC Applicants contend, part of the "deferred relief" that was already before Brown J. It is important to recall what was at issue and determined in the earlier proceedings to ensure that the Listed Schedule C Companies are not simply carried along as part of the collective wrong of the Waltons against the DBDC Applicants, and so that the focus, as it should be, is on whether any or all

of the Listed Schedule C Companies was a knowing participant in Ms. Walton's breaches of the fiduciary duties she owed to the DBDC Applicants. As such, I find it necessary to review the proceedings leading up to the decision under appeal.

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

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

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

[166] The point of departure is that the DBDC Applicants and the Listed Schedule C Companies (and their investors) were all victims of the fraud perpetrated by the

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

[167] As my colleague describes the scheme, at para. 3, instead of investing their required 50% in the investment companies, the Waltons moved money among the accounts of the investment companies and their personal accounts, using as a clearing house the bank account of their wholly-owned company Rose & Thistle, in "a shell game designed to avoid their obligations and to further their own personal interests".

[168] The contest throughout the proceedings, except for the recent chapter that is the subject of this appeal, was exclusively between the DBDC Applicants and

---

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

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

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

[169] When the case came before Brown J. in July 2014 (with reasons released August 12, 2014), it was a chapter in the "on-going litigation between Dr. Bernstein and the Waltons concerning the need for the respondents to account for funds, and to be held accountable for funds, invested by Dr. Bernstein and his companies with them" (Brown J. Reasons, at para. 2). None of the Schedule C Companies

were parties to the proceedings at this point,[18] although the court considered a motion by Dr. DeJong's corporations seeking relief in respect of one Schedule C Property, 3270 American Drive, Mississauga, in which they had invested, including seeking approval of a settlement agreement with the Waltons.

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

[171] Brown J. also granted constructive trusts in respect of eight Schedule C Properties into which the Inspector had traced money from the DBDC Applicants. This relief was opposed by the Waltons, who filed and relied on the affidavits and statements of Dr. DeJong and 30 other investors, attesting to the value of their investments in five Schedule C Properties.[19] Brown J. appointed the Inspector as

---

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

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

Receiver or Manager with power to sell the Schedule B Properties and the Schedule C Properties. At para. 271 he stated:

> ...While at this point of time the tracing analysis has not progressed to the stage to enable the granting of specific, fixed amount constructive trusts over the other Schedule C Properties, the evidence justifies the appointment of a receiver over all Schedule C Properties in order to sell them and deal with the competing claims against the proceeds of sale, including the Applicants' strong claims of constructive trusts over the remaining Schedule C Properties.

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

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

[174] Brown J. anticipated that the DBDC Applicants, armed with the Receiver's additional powers, would seek to trace their funds into additional Schedule C Properties, apart from the ones in which constructive trusts were already awarded, and that the Receiver, after selling the properties, would deal with the claims. He

left the issue of priority of claims between creditors in respect of the proceeds of disposition of a Schedule C Property to be addressed in the claims process *for that Property*. He refused to enforce the settlement agreement between the Waltons and the DeJongs and concluded that "the legal entitlement, if any, of the DeJongs, as preferred shareholders, to the proceeds from the sale of 3270 American Drive should be dealt with in the claims process for that property" (at paras. 263, 271 and 289).

[175] The DBDC Applicants contend that the attendance before Newbould J. in June 2016 was for "deferred relief". This is true, but only in the sense that Brown J. had deferred the determination of the DBDC Applicants' damages against the Waltons. There was no deferred relief in respect of the Listed Schedule C Companies, because they were not yet parties to the litigation and no claims for damages had been asserted against them when the matter was before Brown J. While Brown J. granted a motion to amend the Notice of Application, it was not until the Notice of Application was amended by Newbould J. that the Listed Schedule C Companies were joined as parties, a cause of action was pleaded, and damages were claimed against them.[20]

---

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

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

[177] As for their remedy in relation to the Schedule C Properties, instead of quantifying their unjust enrichment claim against the Waltons by conducting a further tracing as Brown J. had envisaged, the DBDC Applicants sought to add the Listed Schedule C Companies as respondents to the proceedings, and to advance claims for damages against them based on knowing receipt and knowing assistance in the Waltons' breach of fiduciary duty.

[178] The claims against the Listed Schedule C Companies were not pursued in the conventional manner through an action, with pleadings and documentary and

---

amount of money by the DBDC Applicants against the Schedule C Companies, or to an amendment of the application to permit such a claim to be made.

oral discovery. Rather, the claims were added to the oppression proceedings, and set out in a proposed Third Fresh as Amended Notice of Application (at paras. 1(jj), 2 and 3(rr) to (ccc) and (kkk) to (uuu)). The amendments allege, under "Unjust Enrichment," that the Waltons, in breach of their fiduciary duties, diverted and misappropriated the DBDC Applicants' funds, and that "various Walton-owned companies", including the Listed Schedule C Companies, were knowing recipients of funds obtained as a result of the Waltons' breaches of fiduciary duty against them".

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

[180] The claim is for $22.6 million jointly and severally against the Walton respondents and the Listed Schedule C Companies, or in the alternative for an

order awarding specific damages against each of seven of the Listed Schedule C Companies.[21]

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

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

---

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

3270 American Drive, owned by United Empire Lands Ltd.: $656,362 (after full payment of the DBDC Applicants' constructive trust claim);

324 Prince Edward Drive, owned by Prince Edward Properties Ltd.: $580,623;

777 St. Clarens Avenue, owned by St. Clarens Holdings Ltd.: $431,603;

260 Emerson Avenue, owned by Emerson Developments Ltd.: $172,376;

24 Cecil Street, owned by Cecil Lighthouse Ltd.: $812,510;

0 Luttrell Avenue, owned by Bible Hill Holdings Inc.: $6,235 (subject to a DBDC Applicants' constructive trust);

2 Kelvin Avenue, owned by 6195 Cedar Street Ltd.: $11,497 (subject to a DBDC Applicants' constructive trust);

30 and 30A Hazelton Ave., owned by Atala Investments Inc.: $17,942;

66 Gerrard Street East, owned by The Old Apothecary Building Inc.: $86,480; and

346 Jarvis Street, Suite F, owned by 1780355 Ontario Inc.: $0 (already subject to a DBDC Applicants' constructive trust).

[183] This chapter of the proceedings is, as my colleague points out, a priorities dispute. The DeJongs were investors in the Schedule C Companies that acquired the first four properties listed above. The Condos invested in the company that acquired the Cecil Street property. The DBDC Applicants are unable to trace their funds into these properties, so they are seeking damages against the individual companies. The only way they can share in the proceeds of properties in which they have been unable to trace their own funds is as unsecured judgment creditors

of the Listed Schedule C Companies, which requires that they establish liability for knowing receipt or knowing assistance. Both causes of action, for their success, depend almost entirely on the court's acceptance of the net transfer analysis, to which I now turn.

THE NET TRANSFER ANALYSIS

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

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

[186] The net transfer analysis is based on a summary of cash transfers between Schedule B Company accounts and Rose & Thistle that was attached as a schedule to the Inspector's fourth interim report. The analysis is dated December

31, 2013 and covers transactions between September 2010 and October 2013. The Inspector acknowledged that it was not intended to account for all of the dealings between the various accounts from inception, and stated in his fifth report that "the tracing charts...[were] intended to provide a snapshot of activity at a particular point of time" and "funds transferred to or from the relevant company outside of the time period [were] not captured" (Brown J., at para. 159).

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

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

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

companies set up by the Waltons (other than the Schedule B Companies), including the accounts of eight of the ten Listed Schedule C Companies.[22]

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

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

---

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

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

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

> (i) the Waltons directed the transfer of a net $23.6 million from the Schedule B Company accounts to a bank account belonging to Rose & Thistle during the period from October 2010 to October 2013;
>
> (ii) during the same period, the Waltons directed transfers of a net $25.4 million from the Rose & Thistle account to the Schedule C Companies;
>
> (iii) in almost all cases, some or all of the amounts advanced to the Schedule B Companies by the

---

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

DBDC Applicants were transferred almost immediately to the Rose & Thistle account; and

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

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

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

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

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

[198] My colleague states, at para. 80, that as a result of these net transfers, the Schedule C Companies acquired funding necessary for their ongoing operations and he refers to Brown J. accepting the Inspector's conclusion that "the [DBDC] Applicants' investment in the Companies was a major source of funds for the Walton Companies." At the time this finding was made by Brown J., however, the Inspector did not yet have access to the Schedule C Company accounts, and therefore did not consider the funds invested by others, such as the DeJongs and the Condos, into the Schedule C Properties, transfers between the Schedule C Company accounts, and the movement of funds between such accounts and Rose & Thistle. Even if it could be said that the Walton or Schedule C Companies as a whole acquired funding for their operations, this tells us nothing about what was happening in the account of any specific Schedule C Company, including all of the

Listed Schedule C Companies (which of course had also received funds from their investors).

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

[200] My colleague, at para. 106, considers it significant "that net funds of $23.6 million *flowed out of the Schedule B Companies* into Rose & Thistle, and net funds of $25.4 million *flowed out of Rose & Thistle into the Schedule C Companies.*" He concludes that "it is the DBDC Applicants, not the Schedule C Companies, that suffered the net losses".

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

[202] The DBDC Applicants invoke the net transfer analysis as a measure of their collective losses against the Listed Schedule C Companies as a subset of the 54 Schedule C Companies. In fact, the net transfer analysis shows that, when the DBDC Applicants' Schedule B Companies are considered individually, at least nine of them were *net beneficiaries* of transfers from Rose & Thistle.[24] And, when the Schedule C Companies are considered individually, an amount going into a Schedule C Company account could as easily have been money from another

---

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

Schedule C Company account. The money cannot be traced from a Schedule B Company account.

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

> [Referring to the example of 6195 Cedar Street Ltd.], there is no proof where Rose & Thistle obtained the money that was transferred to 6195 Cedar Street Ltd. It may have come from one of Dr. Bernstein's companies. It may not have. It may have come from investors in the Schedule C Companies whose money was transferred to Rose & Thistle. The report does not state where the money came from. The same can be said for all of the Schedule C Companies that the applicants seek a judgment against for knowing receipt of trust funds. Moreover, the schedule was as of a point in time and whether the balance changed over time is not known as no analysis was done.
>
> What happened to the money transferred to the Schedule B and C Companies by Rose & Thistle is not in evidence. On the hearing before Brown J., the applicants were able to establish that Dr. Bernstein's funds went into several Schedule C Properties and a constructive trust was ordered in favour of the applicants in respect of those properties. No constructive trust was ordered with respect to the property of the Schedule C Companies that the applicants now seek a judgment against, which I take to be recognition that the applicants did not have evidence that their money went into those properties. In paragraph 13 of his formal judgment of August 12, 2014, Brown J. ordered that the applicants were permitted to trace funds provided by the applicants into and through the accounts of the Schedule B Companies into the Schedule C Companies. However the applicants did not undertake any such tracing. *The applicants have not established that it was the applicants' money that was received by the Schedule C Companies in question.*

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

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

A. THE KNOWING RECEIPT CLAIM

[205] My colleague concludes, and I agree, that the DBDC Applicants have failed to make out a claim for knowing receipt. "Knowing receipt" here refers to the receipt by the Listed Schedule C Companies of monies belonging to the DBDC Applicants that were entrusted to Ms. Walton's control, and diverted in breach of her fiduciary duties.

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

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

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

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

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

B. THE KNOWING ASSISTANCE CLAIM

(1) Elements of the Equitable Wrong

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

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

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

[213] The Application Judge accepted, at para. 34, that the diversion of funds out of the Schedule B Companies by the Waltons for their own purposes was in breach of their fiduciary duties, and, at para. 47, that when she knowingly took a risk with the money belonging to the Schedule B Companies that she had no right to take, Ms. Walton's activity was fraudulent and dishonest. My colleague has explained how the duties would have been owed by Ms. Walton to the DBDC Applicants, notwithstanding that the relationship was contractual, an analysis I am prepared to

accept.[25] The existence and dishonest breaches of the fiduciary duties owed by Ms. Walton to the DBDC Applicants are not contested on appeal.

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

[215] My colleague's analysis of what the Listed Schedule C Companies are alleged to have done as "participants" focuses on their involvement in the overall fraudulent scheme, including as victims of that scheme. This leads him to conclude, at para. 68, that Ms. Walton's "perpetration of the scheme was their

---

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

participation in the scheme." In order for the Listed Schedule C Companies to be liable as accessories to that breach, they must have done something to participate in the breach of fiduciary duty which is, as the DBDC Applicants have pleaded, and the Application Judge found, the diversion of their funds out of the Schedule B Companies for the Waltons' personal use. It is to the element of participation that I now turn.

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

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

[217] All of the knowing assistance cases cited by the parties involved specific harmful conduct by the "stranger" that assisted in the breach of fiduciary duty or breach of trust. In *Air Canada v. M & L Travel Ltd.*, the accessory stopped payment of trust funds, opened an account and attempted to transfer the funds into the new account. In *Enbridge Gas Distribution Inc. v. Marinaccio*, the accessories prepared invoices, opened bank accounts, arranged for wire transfers and accepted cash. In *Agip (Africa) Ltd. v. Jackson et al.*, the accessory concealed a self-interested

transaction, and played the role of a disinterested arms' length vendor. And in *Locking v. McCow*an, 2016 ONCA 88 (a pleadings case), the accessory was alleged to have set up company structures and controlled the fraudulent movement of money out of the payee companies.

[218] By contrast here, the DBDC Applicants do not point to any conduct by any or all of the Listed Schedule C Companies as their participation in the Walton breach of fiduciary duty – except to repeat the same allegation as in respect of knowing receipt: "the Schedule C Company Respondents received property from the Applicants as a result of the Waltons' breach of their fiduciary duties owed to the Applicants", and that they "each received this property from the Applicants having knowledge that the property was transferred in breach of a fiduciary duty": Third Fresh as Amended Notice of Application, at paras. 3(ttt) and (uuu).[26]

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

[220] First, as I have already noted, my colleague's focus is on the overall fraud, and not the diversion of the DBDC Applicants' funds to the Waltons' personal use.

---

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

At para. 57 of his reasons, he characterizes the pertinent question as whether Ms. Walton "caused the Schedule C Companies to participate in her fraudulent dealings". He answers the "participation" question at para. 86, by saying that Ms. Walton "*utilized the Schedule C Companies as actors* in the process of orchestrating her shell game through the Rose & Thistle "clearing house" account", and he then describes how she co-mingled and diverted the funds of both the DBDC Applicants and the Listed Schedule C Companies, using various pretexts. Again, at para. 95, he refers to the Listed Schedule C Companies as actors in Ms. Walton's "overall fraudulent undertaking in breach of her fiduciary obligations to both the DBDC Applicants and DeJong".

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

[222] Second, in finding participation, my colleague relies on the net transfer analysis to point to the collective benefit of the Waltons' arrangement to the Schedule C Companies. In his view, the Schedule C Companies were "significant net beneficiaries", they acquired properties as intended and they "benefitted at least partly from Ms. Walton's actions" (at paras. 79, 80 and 124). He states, at para. 80, that, based on the net transfers of monies from the Schedule B Companies to Rose & Thistle and from Rose & Thistle to the Schedule C Companies, "the latter acquired funding necessary for their ongoing operations" and he refers to Brown J.'s acceptance of the conclusion that the DBDC Applicants' investments in the Schedule B Companies "[were] a major source of funds for the [Schedule C] Companies" (which as I have noted was a finding made without reference to the Schedule C Company accounts).

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

analysis demonstrate that any Listed Schedule C Company participated in Ms. Walton's diversion of the DBDC Applicants' funds.

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

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

[226] The two exceptions referred to by my colleague are St. Clarens Holdings Ltd. and Emerson Developments Ltd., where there is no evidence of *any* transfer

of funds between their accounts and Rose & Thistle account, let alone any evidence of a transfer of the DBDC Applicants' funds into these entities. In fact, as the respondents point out, since the Schedule C Properties, 777 St. Clarens Avenue and 260 Emerson Avenue, were acquired after the Inspector was appointed, and the Waltons had no access to the DBDC Applicants' funds, no DBDC Applicant monies could have found their way into these Schedule C Companies, or been used to acquire their properties.

[227] My colleague acknowledges that there is no evidence of any transfer between Rose & Thistle and these companies, and, at paras. 90 to 93, he describes how they were defrauded by Ms. Walton. He concludes that Ms. Walton's acts in defrauding these Listed Schedule C Companies "engaged the Listed Schedule C Companies as actors in her overall fraudulent undertaking", that "each of these transactions" required a corporate act, and that "Ms. Walton's acts were their acts, and the Companies accordingly participated in or assisted Ms. Walton in her breach of fiduciary duties to the DBDC Applicants" (at para. 96). With respect, I disagree that participation is made out here. It would mean that being a defrauded entity, as part of a larger fraud, can constitute knowing assistance in the fraudster's breach of fiduciary duty to another fraud victim.

[228] Even in the case of the seven Listed Schedule C Companies where the net transfer analysis shows a net transfer of monies from Rose & Thistle to their individual accounts during the relevant period (United Empire Lands Ltd., Bible Hill

Holdings Ltd., 6195 Cedar Street Ltd., Cecil Lighthouse Ltd. and The Old Apothecary Building Inc., Atala investments Inc. and 1780355 Ontario Inc.), this is not evidence of that company benefiting from, or in any other way participating in, Ms. Walton's breach of fiduciary duty, which is her diversion of funds from the DBDC Applicants. As we have seen, the net transfer analysis does not take into account monies that were invested directly from the Schedule C Company investors, including the investors in the Listed Schedule C Companies, or transfers between Schedule C Company accounts.

[229] The only benefit that is demonstrated here is a "net benefit" to the Schedule C Companies as a collective, from the transfer of Rose & Thistle monies. I have already identified what I view as the limits of the net transfer analysis. Even if more money flowed from Rose & Thistle into a Listed Schedule C Company than what that company paid to Rose & Thistle, this is not evidence that the Listed Schedule C Company benefited from or participated in the specific breach of fiduciary duty, which was the diversion of the DBDC Applicants' funds from their intended purpose.

[230] The actions my colleague relies on for the Listed Schedule C Companies' participation, are that the Listed Schedule C Companies received and paid monies to Rose & Thistle (and in some cases were simply defrauded by the Waltons). In my view, this conduct does not rise to the level of knowing assistance by the Listed Schedule C Companies in a breach of a fiduciary duty any more than it would

engage the Schedule B Companies in such a breach. They were not participants acting in their own right to further a breach of fiduciary duty. They were *used by* the Waltons as part of a fraudulent scheme. In this regard the Schedule B companies and the innocent investor Schedule C Companies are on an equal footing.

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

(4) The Knowledge Element

[232] As the authorities such as *El Ajou* instruct, "it is necessary to identify the natural person or persons having management and control *in relation to the act or omission in point*" (at p. 695). Here, the determination of whether Ms. Walton's fraudulent intent is to be attributed to a Listed Schedule C Company depends on the wrongful act the company committed. Because of my conclusion on the participation issue, I do not propose to say anything about my colleague's discussion of the knowledge element, except to indicate that I take issue with two

points: the result of applying the three *Canadian Dredge* criteria for the corporate identification doctrine in this case, and my colleague's suggestion that the second and third criteria should be approached "in a less demanding fashion".

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

[234] My colleague's analysis shows that there are difficulties meeting these requirements in this case (even if the alleged wrong was participation in Ms. Walton's overall fraud) because the scheme was for the Waltons' personal benefit and defrauded the Listed Schedule C Companies, and because the evidence of each company's individual benefit from the scheme is questionable. While it is true, as my colleague notes, that knowing assistance does not require a defendant to have received a benefit, the issue of benefit is relevant here because Ms. Walton's conduct was in fraud of the very entities sought to be made liable for knowing assistance, and there is no other act of participation alleged. And, the overall "net"

benefit to the Schedule C Companies is central to the DBDC Applicants' claim. Without a tracing of Schedule B Company money into their accounts, there is no evidence that any of the Listed Schedule C companies benefited from the diversion of the DBDC Applicants' funds by Ms. Walton.

[235] My colleague suggests, at para. 70, that the second and third criteria of *Canadian Dredge* should be approached in a less demanding fashion, because this is a civil case, where the burden of proof is less onerous, and because of the nature of the case (a complex multi-real estate transaction investment fraud, perpetrated over an extended period of time, and implicating numerous corporate actors (operating at the instance of the fraudster) and numerous victims).

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

[237] I do not accept that the adoption of a less demanding standard is warranted here. As I see it, neither the civil burden of proof nor the nature and extent of the fraud would justify a less rigorous approach if the Listed Schedule C Companies

are to be fixed with responsibility for the conduct of their director, Ms. Walton.[27] Knowing assistance in the breach of a fiduciary duty is a serious wrong that requires actual and not constructive knowledge by the participant. The investors in the Listed Schedule C Companies did not themselves know about or cause the companies to participate in Ms. Walton's breach of fiduciary duty. The rationale for the claim is that the participant's actual knowledge of and assistance in the fraudulent conduct is sufficient to "bind the stranger's conscience so as to give rise to personal liability": *Air Canada v. M & L Travel Ltd.*, at p. 812. I see no justification in the circumstances of this case to lessen the requirement for knowledge before one victim of a fraud is tagged with the conduct of a fraudster. The conduct here was in fraud of the Schedule B Companies and their investors, the DBDC Applicants, *and* the Listed Schedule C Companies and their investors, and was for the personal benefit of the Waltons.

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

[238] Finally I turn to the question of damages. I disagree with my colleague's conclusion that the measure of damages for knowing assistance in this case is

---

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

$22.6 million, and that the Listed Schedule C Companies are liable jointly and severally for this amount.

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

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

[241] In my view, the $22.6 million amount, which is based on the net transfer analysis, is not a true measure of the damages for which the Listed Schedule C Companies could be liable to the DBDC Applicants for knowing assistance. It does

not correspond with the loss caused by the actions of the fiduciary, or even with the loss caused by, or benefit to, some or all of the Schedule C Companies. It is simply the net amount transferred between the Schedule B Company accounts and Rose & Thistle (less $1 million credited to the Waltons).

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

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

[244] Finally, if the net amount transferred from the DBDC Applicants to Rose & Thistle to the Schedule C Companies could be a proper measure of damages, the $22.6 million figure includes and therefore double counts the amounts the DBDC Applicants were awarded for their constructive trust claims (a total of $8,128,325: Brown J. at para. 264). The constructive trusts resulted from a tracing of DBDC

Applicants' funds into specific Schedule C Properties with reference to the transfers shown on the net transfer analysis. These diversions of funds into specific Schedule C Properties have already been accounted for, and would need to be deducted from the $22.6 million damages award.[28] I say this, not because I view the $22.6 million amount as a proper measure of the DBDC Applicants' damages against the Listed Schedule C Companies, individually or as a collective, but to further emphasize that it is an arbitrary and purely convenient number that emerges from the net transfer analysis, an analysis that was never intended to inform a claim for knowing assistance.

(6) Equity Does Not Support the Knowing Assistance Claim

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

[246] First, the Listed Schedule C Companies would be subject to an award of damages that is based on equitable grounds when they themselves are victims of the same fraudulent conduct. The liability of the stranger in a knowing assistance

---

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

claim is fault-based. To the extent that any "fault" could be found here, it results from being caught up in or used as part of the wrongdoer's fraudulent scheme.

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

[248] Finally, I conclude that the knowing assistance remedy should not be utilized in these exceptional circumstances – where one group of defrauded investors

seeks to obtain judgment sounding in knowing assistance against another group that has been defrauded in a similar manner. The DBDC Applicants were able to trace certain funds into the purchase of Schedule C Properties, including five of the Listed Schedule C Company properties and to obtain a constructive trust that gives them priority over the proceeds of sale of such properties. I agree with my colleague that the remedy of constructive trust, as argued by DeJong, is not available as a matter of law, and that the Application Judge erred in giving DeJong priority over the proceeds of four properties on that basis. That said, there is no question that DeJong's money went into the purchase of these properties (and indeed the Application Judge found, and my colleague accepts, that its advances were as shareholder loans, and that it is a creditor for the full amounts it claims). In my view, it would be unfair for DeJong's claims to its advances, which can be traced, but not in a way that would justify a constructive trust, to be obliterated by a damages claim of $22.6 million by the DBDC Applicants, without any evidence that their funds were used in any way (except where a tracing has occurred) to acquire these properties. This result alone is such that the equitable claim of knowing assistance should be denied in this case.

CONCLUSION

[249] For these reasons, I would dismiss the appeal of the DBDC Applicants with respect to the knowing receipt and knowing assistance claims. I would allow their appeal of the DeJong constructive trust awards essentially for the reasons outlined

by my colleague. In the circumstances, however, my proposed disposition would result in the priorities over the Listed Schedule C Properties being determined by the Receiver without regard to any claim to such proceeds by the DBDC Applicants, except to the extent of their constructive trusts.

Released: JAN 2 5 2018

K. van Rensburg J.A.

SCHEDULE "A" COMPANIES

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investment Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen's Corner Inc.
14. DBDC Queen's Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Industrial Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.

27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

SCHEDULE "B" COMPANIES

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline – 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Ltd.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Developments Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Group
14. Fraser Lands Ltd.
15. Queen's Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.

26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Royal Gate Nominee Inc.
29. Royal Gate (Land) Nominee Inc.
30. Dewhurst Development Ltd.
31. Eddystone Place Inc.
32. Richmond Row Holdings Ltd.
33. El-Ad (1500 Don Mills) Limited
34. 165 Bathurst Inc.

SCHEDULE "C" PROPERTIES

1. 3270 American Drive, Mississauga, Ontario
2. 0 Luttrell Ave., Toronto, Ontario
3. 2 Kelvin Avenue, Toronto, Ontario
4. 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario
5. 1 William Morgan Drive, Toronto, Ontario
6. 324 Price Edward Drive, Toronto, Ontario
7. 24 Cecil Street, Toronto, Ontario
8. 30 and 30A Hazelton Avenue, Toronto, Ontario
9. 777 St. Clarens Avenue, Toronto, Ontario
10. 252 Carlton Street and 478 Parliament Street, Toronto, Ontario
11. 66 Gerrard Street East, Toronto, Ontario
12. 2454 Bayview Avenue, Toronto, Ontario
13. 319-321 Carlaw, Toronto, Ontario
14. 260 Emerson Ave., Toronto, Ontario
15. 44 Park Lawn Circle, Toronto, Ontario
16. 19 Tennis Crescent, Toronto, Ontario
17. 646 Broadview Avenue, Toronto, Ontario

Annexe "A"

Listed Schedule C Companies/Properties

	Schedule C Company	Corresponding Schedule C Property
1.	United Empire Lands Ltd.	3270 American Drive, Mississauga, Ontario
2.	Bible Hill Holdings Inc.	0 Luttrell Ave., Toronto, Ontario
3.	6195 Cedar Street Ltd.	2 Kelvin Avenue, Toronto, Ontario
4.	Prince Edward Properties Ltd.	324 Prince Edward Drive, Toronto, Ontario
5.	Cecil Lighthouse Ltd.	24 Cecil Street, Toronto, Ontario
6.	Atala Investments Ltd.	30 and 30A Hazelton Avenue, Toronto, Ontario
7.	St. Clarens Holdings Ltd.	777 St. Clarens Avenue, Toronto, Ontario
8.	The Old Apothecary Building Inc.	66 Gerrard Street East, Toronto, Ontario
9.	1780355 Ontario Inc.	346 Jarvis Street, Suite F, Toronto, Ontario
10.	Emerson Developments Ltd.	260 Emerson Ave., Toronto, Ontario