

# COURT OF APPEAL FOR ONTARIO

CITATION: DeJong v. DBDC Spadina Ltd., 2015 ONCA 628

DATE: 20150917

DOCKET: C59822

Gillese, Lauwers and Benotto JJ.A.

BETWEEN

DBDC Spadina Ltd. and those corporations listed on Schedule A hereto

Applicants (Respondents)

and

Norma Walton, Ronauld Walton, The Rose & Thistle Group Ltd. and Eglinton  
Castle Inc.

Respondents

and

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

Rosemary A. Fisher, for the appellants Christine DeJong, Michael DeJong,  
Christine DeJong Medical Professional Corporation, C2M2S Holding Corp. and  
DeJong Homes Inc.

Peter H. Griffin and Danielle Glatt, for the respondents DBDC Spadina Ltd. and  
those corporations listed on Schedule A hereto

Mark Dunn, for Schonfeld Inc., Manager and Inspector

Heard: September 10, 2015

On appeal from the judgment of Justice David M. Brown of the Superior Court of  
Justice, dated August 12, 2014.

## ENDORSEMENT

### OVERVIEW

[1] This appeal is part of a complex, multi-party insolvency proceeding.

[2] DBDC Spadina Ltd. and those corporations listed on Schedule A (the “Bernstein applicants”) are in ongoing litigation in which Norma Walton, Ronauld Walton, The Rose & Thistle Group Ltd., and Eglinton Castle Inc. (the “Waltons”), among others, are the respondents. Within this litigation, the Bernstein applicants brought a motion seeking an order for, among other things, a constructive trust over certain properties and the cancellation of the Waltons’ shares in certain corporations.

[3] Christine DeJong, Michael DeJong and related entities (the “DeJong appellants”) brought a cross-motion that was heard at the same time as the Bernstein applicants’ motion. In their cross-motion, the DeJong appellants alleged that they were similarly situated to the Bernstein applicants – they, too, had invested funds with the Waltons which the Waltons had wrongfully diverted. The DeJong appellants contended that some of their monies had been diverted into properties over which the Bernstein applicants sought constructive trusts.

[4] The DeJong appellants sought, among other things, an order cancelling the Waltons’ shares in United Empire Lands Ltd. (“UEL”). In the alternative, the DeJong appellants sought an order approving a proposed settlement agreement

between them and the Waltons, in which the Waltons agreed to transfer a property ("3270 American Drive") to them.

[5] Based on tracing principles, the motions judge ordered constructive trusts over certain properties, including 3270 American Drive, in favour of the Bernstein applicants. By order dated August 12, 2014 (the "Order"), he dismissed the DeJong appellants' cross-motion.

[6] The DeJong appellants appeal.

[7] For the reasons that follow, the appeal is dismissed.

## THE ISSUES

[8] The DeJong appellants raise a number of grounds of appeal which can be summarized as follows. They submit that the motions judge erred by failing:

1. to adjudicate on their requested relief that the Waltons' shares in UEL be cancelled and on their request for directions on their tracing rights;
2. to correctly apply the test for a constructive trust and in finding that the Bernstein applicants were entitled to constructive trusts over certain properties; and
3. to apply the correct legal test when finding that the settlement agreement constituted a preference under the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33.

[9] The court called on counsel for the respondents only in respect of one aspect of the second issue, namely, the allegation that the tracing relied on by the motions judge when he ordered the constructive trusts was flawed.

## ANALYSIS

**Issue #1 Did the motions judge err by failing to adjudicate on the DeJong appellants' requested relief that the Waltons' shares in UEL be cancelled and on their request for directions on their tracing rights?**

[10] The DeJong appellants acknowledge that the motions judge referred to their request for an order cancelling the Waltons' shares in UEL. They submit, however, that although the motions judge dismissed their cross-motion, he failed to adjudicate this head of relief.

[11] We do not accept this submission. We see no error in the motions judge's result or reasoning on this matter.

[12] At para. 281 of his reasons, the motions judge notes the DeJong appellants' request that the Waltons' shares in UEL be cancelled. At para. 289 he deals with that request, stating:

I am not prepared to grant the relief sought by the [DeJong appellants]. The proposed settlement agreement would prefer the [DeJong appellants'] interests as creditors of the Waltons over other creditors in respect of 3270 American Drive and, in the circumstances, I conclude that such a preference would be unfair to other creditors including, but not limited to, Dr. Bernstein. The legal entitlement, if any, of the [DeJong appellants], as preferred shareholders, to the proceeds from the sale of 3270 American Drive should be dealt with in the claims process for that property.

[13] Read in context, in para. 289 the motions judge addressed both the DeJong appellants' request for cancellation of the Waltons' shares in UEL and

their request in relation to the proposed settlement agreement. In respect of both, the motions judge refused to grant the relief requested because he was concerned that it would prefer the DeJong appellants over other claimants. In his view, the claims process was the appropriate mechanism for determination of the DeJongs appellants' claims.

[14] The DeJong appellants' complaint about the motions judge's failure to give directions on their tracing rights is related to the work of the Inspector. They contend that the Inspector was obliged to do a full tracing of all monies, as opposed to focusing on tracing the Bernstein applicants' funds.

[15] The Bernstein applicants are paying for the Inspector. He is tracing their funds. Of course, in fulfilling his obligations, the Inspector must be mindful that he was appointed by the court. However, those obligations do not require the Inspector to trace the monies of all parties into and out of the various companies and properties. As the motions judge indicated, the DeJong appellants can assert their rights in the claims process. It is up to them to take such steps as are necessary to assert their rights in that process.

**Issue #2 Did the motions judge fail to correctly apply the test for a constructive trust or in finding that the Bernstein applicants were entitled to constructive trusts over certain properties?**

[16] The essence of the DeJong appellants' submission on this issue is that the Bernstein applicants "got what they bargained for", therefore, they suffered no

deprivation and the court could not grant a constructive trust based on unjust enrichment.

[17] We do not accept this submission.

[18] In rejecting this same submission, the motions judge found, at para. 265 of his reasons, that the Bernstein applicants and the Waltons agreed that the funds invested by the Bernstein applicants in a given property would be used only for the development of that property. He found that, contrary to their contractual obligations, the Waltons took the Bernstein applicants' funds and used them in an unauthorized fashion which benefitted the Waltons. On the record, this finding is unassailable.

[19] We also reject the submission that the motions judge erred in his tracing analysis. The motions judge was entitled to accept the Inspector's analysis and prefer it over that of Mr. Froese, the Waltons' expert. Moreover, the motions judge made no error in terms of commingling. As we explain in the companion appeal *DBDC Spadina Ltd. v. Walton*, 2015 ONCA 624, at para. 6, in which a similar attack was made on tracing accepted by the motions judge, the motions judge imposed constructive trusts on only those properties in which commingling was not an issue.

**Issue #3 Did the motions judge fail to apply the correct legal test when finding that the settlement agreement constituted a preference under the *Assignments and Preferences Act*?**

[20] As we have explained in relation to the first issue, the motions judge was concerned that enforcement of the proposed settlement agreement between the DeJong appellants and the Waltons would constitute a preference over the interests of other creditors in respect of 3270 American Drive. Although the motions judge did not explicitly refer to the *Assignments and Preferences Act*, that omission “could have had no appreciable influence on the result” that he reached: *Canadian Broadcasting Corp. Pension Plan v. BF Realty Holdings Ltd.* (2002), 214 D.L.R. (4th) 121 (Ont. C.A.), at para. 64. The motions judge’s reasons are sufficient to permit the parties (and this, the reviewing court) to know why he found that the proposed settlement agreement would constitute a preference within the meaning of that Act.

[21] It appears incontrovertible that the intent and effect of the proposed settlement agreement was to prefer the interests of the DeJong appellants over other creditors. When the proposed settlement agreement was reached, the DeJong appellants had notice that the Bernstein applicants were seeking a certificate of pending litigation and a blanket charge over 3270 American Drive; the Bernstein applicants were unquestionably creditors of the Waltons; and, the DeJong appellants knew, or ought to have known, that the Waltons were insolvent or on the eve of insolvency.

**DISPOSITION**

[22] For these reasons, the appeal is dismissed. If the parties are unable to agree on costs, they may make written submissions to a maximum of two pages in length, such submissions to be filed with the court no later than 10 days from the date of the release of this endorsement.

*J. Giese JA*

*Plam JA*

*M.L. Benotto 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 Inc.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Corp.
14. Fraser Lands Ltd.
15. Queen’s Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Dewhurst Developments Ltd.
29. Eddystone Place Inc.
30. Richmond Row Holdings Ltd.
31. El-Ad Limited
32. 165 Bathurst Inc.