Court File No. CV-15-10879-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION

Applicant

and

NORMA WALTON, RONAULD WALTON, and THE ROSE & THISTLE GROUP LTD., PRINCE EDWARD PROPERTIES LTD., ST. CLARENS HOLDINGS LTD., AND EMERSON DEVELOPMENTS LTD.

Respondents

FACTUM OF THE APPLICANT, CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION

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TO THE SERVICE LIST

Contents

Part I: INTRODUCTION

1. This Application requests the adjudication of the rights of the Applicant, Christine DeJong Medicine Professional Corporation ("CDJ Inc."), as an owner and creditor of Prince Edward Properties Ltd. ("**Prince Edward**"), St. Clarens Holdings Inc. ("**St. Clarens**") and Emerson Developments Ltd. ("**Emerson**") and as an owner of United Empire Lands Limited ("**UEL**").

2. The Applicant made investments with Norma Walton and Ronauld Walton in a number of real estate projects. The Applicant's principal, Dr. Christine DeJong is married to Michael DeJong whom also made investments with the Walton Respondents through his corporations. The Applicant has shares in, inter alia, Prince Edward, St. Clarens, Emerson, Academy Lands Ltd. and UEL. The Applicant advanced loans to all but UEL. The investments made by the Applicant and the corporations of Michael DeJong total approximately $4,000,000.

3. Norma and Ronauld Walton ("the Waltons") are the co-founders of The Rose & Thistle Group Ltd. ("Rose & Thistle"): they are both lawyers. In or about 2004, Dr Christine DeJong and her husband, Michael DeJong invested in several real estate projects with the Waltons through corporations incorporated for the purpose of ownership and management of the real estate project. In some instances, the DeJong corporations were also lenders. Each investment involved an Investment Agreement wherein a new company would be incorporated for the project to own said property, ("Holdco"). The Waltons and the DeJong

corporation would each hold 50% of the shares of the Holdco. Each of the DeJong corporations and the Waltons were to contribute an equal amount of equity or, in some instances, fund the Holdco with shareholder advances.

4. As is well detailed in the Order of Mr. Justice Brown dated August 12, 2014 in Court File No. CV-13-10280-00CL, the Waltons entered into numerous transactions with corporations controlled by Dr. Bernstein, the founder of a number of diet and health clinics involving significant amounts and wherein Dr. Bernstein also entered into numerous separate Investment Agreements with the Waltons for the purpose of owning, financing and managing real estate projects.

5. It was found by Justice Newbould in an Endorsement and Order dated October 7, 2013 to be appropriate to appoint an Inspector pursuant to the provisions of the OBCA as a consequence of serious concerns relative to the Waltons' management of the projects. In addition, Dr. Bernstein commenced proceedings seeking, amongst other things, Certificates of Pending Litigation, blanket Charges, declarations of constructive trust, tracing, seizure and sale, cancellation of shares and restitution. The CV-13-10280-00CL proceedings were commenced by DBDC Spadina Ltd. and those corporations listed on Schedule A to the said Application ("the Bernstein Applicants").

6. The foregoing proceedings were not brought on notice to the Applicant herein or the DeJongs or any of their corporations. Moreover, investors in the "Schedule C Properties", (see paragraph 11 herein), were not made parties and were not given notice of the aforesaid proceedings. The fact of same became

known to this Applicant herein and various other Schedule C Investors over time but subsequent to the making of some twenty Orders.

Part II: RELEVANT FACTS

7. Christine DeJong is the sole officer, director and shareholder of Christine DeJong Medicine Professional Corporation ("CDJ Inc.") and her husband, Michael DeJong is the sole officer, director and shareholder of C2M2S Holding Corp. ("C2M2S") and DeJong Homes Inc. ("DeJong Homes"). Christine DeJong and Michael DeJong have, through their respective corporations, been investing with the Waltons for approximately a decade.

Affidavit of Christine DeJong, sworn February 11, 2015, paras. 1 and 3

8. CDJ Inc. entered into Agreements with the Waltons in respect of Lesliebrook Holdings Ltd. in April of 2012, Prince Edward, UEL in January of 2013 and St. Clarens and Emerson in December of 2013.

Affidavit of Christine DeJong, sworn February 11, 2015, para. 4

9. **CDJ INC.'S HOLDINGS are particularized as follows:**

Corporation	**# of Shares**	**Amount Invested**
United Empire Lands Ltd.	716,906 Common	$716,906, plus rollover **for shares**
Prince Edward Properties Ltd.	100 Common	$816,019 **as a shareholder's loan**
St. Clarens Holdings Ltd. /Emerson Developments Ltd.	100 Common 100 Common	$665,507 **as a shareholder's loan**
Lesliebrook Holdings Ltd.	500,000 Preferred	$500,000 for **shares**
Academy Lands Ltd.	500,000 Preferred	$716,906 for **shares**

10. CDJ Inc. received share certificates in respect of each of the investments.

All of the above-noted properties are included in Schedule C to Court File No. CV-13-10280-00CL, ("DBDC Spadina Ltd. et. al. and Walton et. al."). They are hereinafter referred to as "Schedule C Properties".

Affidavit of Christine DeJong, sworn February 11, 2015, para. 6

11. Michael DeJong through C2M2 and DeJong Homes entered into similar joint ownership agreements with the Waltons primarily relative to 65 Front Street E.

Affidavit of Christine DeJong, sworn February 11, 2015, para. 7

ISSUES WITH THE INVESTMENTS

12. Christine DeJong first became aware of issues with the investments in November of 2013 when CDJ Inc. was advised by Norma Walton that November draws ought not to be cashed and draw cheques ceased in December of that year. The DeJongs met with Norma Walton in January of 2014 whereupon they were advised that Norma Walton had legal issues with Dr. Stanley Bernstein.

Affidavit of Christine DeJong, sworn February 11, 2015, paras. 9 and 10

UNITED EMPIRE LANDS

13. As noted in the chart found at paragraph 10, CDJ Inc. owns 50% of the shares in UEL and the Waltons purported to own the other 50%. UEL owns 3270 American Drive, Mississauga, Ontario. CDJ Inc. injected $716,906 into UEL's credit union account on January 28, 2013 and the sum of $274,864 comprised of a rollover from an existing investment.

Affidavit of Christine DeJong, sworn February 11, 2015
paras. 13 and 15 and Exhibit D

14. UEL's bank statement for the period ending January 31, 2013 shows CDJ Inc.'s investment of $716,906; however, said records do not show similar equity contribution by the Waltons into UEL and specifically the $992,750 referenced on the Capital Required Document. In response to enquires, Norma Walton stated her money was not required to match CDJ Inc.'s capital because of a second position vendor takeback mortgage in the amount of $670,000. Said vendor takeback mortgage was not referenced on the Capital Required Document. The Waltons breached the Investment Agreement of February 2013 in that they neither injected funds to acquire shares in the corporation nor made any capital contribution. The Waltons have no interest in UEL.

Affidavit of Christine DeJong, sworn February 11, 2015, paras. 15, 16 and 17

324 PRINCE EDWARD DRIVE, TORONTO

15. In September 2013, CDJ Inc. entered into an agreement with the Waltons and Prince Edward Properties Ltd. relative to the purchase of 324 Prince Edward Drive. The Investment Agreement provided that CDJ Inc. would acquire 100 shares in the company and the Waltons would acquire the other 100. Each of the Waltons and CDJ Inc. were to provide $816,019 to the corporation as a Shareholder's Loan for the purpose of purchasing, renovating, completing leasehold improvements and occupying the property. On September 10, 2013, CDJ Inc. advanced $816,019 to Prince Edward.

Affidavit of Christine DeJong, sworn February 11, 2015, para. 22 and Exhibit K (Investment Agreement) and Exhibit L (Bank Wire Information)

16. The Investment Agreement entered into between CDJ Inc. and the

Waltons states that the Waltons were to provide an $80,000 deposit, $60,000 in due diligence fees and the remaining $676,019 as a Shareholder's Loan. 324 Prince Edward was acquired for the sum of $1,850,000 with a vendor takeback mortgage of $1,480,000 on September 13, 2013, (a difference of $370,000).

Affidavit of Christine DeJong, sworn February 11, 2015, para. 23, 24 and Exhibits N (Transfer) and O (Mortgage)

17. The Prince Edward bank statements indicate an opening balance of zero. Thereafter it is overdrawn in respect of transaction fees. The September 30, 2013 statement shows a deposit from CDJ Inc. of $816,019 and a transfer in of $100 from Rose & Thistle, (not the Waltons). Once the CDJ Inc. funds are received, $309,000 goes out to Rose & Thistle on September 11, 2013 followed by the sum of $346,314.89 being wired to Devry Smith (the real estate solicitors) on September 12, 2013 for the closing of 324 Prince Edward. The remaining balance of $160,764.11 is transferred out, almost in its entirety, over the next two days to Rose & Thistle's Meridian Credit Union account.

Affidavit of Christine DeJong, sworn February 11, 2015 paras. 25 and Exhibit P (Bank Statements)

18. There is no evidence of the Waltons having paid for their shares and quite clearly they did not advance the shareholder loan as mandated by the Investment Agreement. The Walton's have no interest in the company or its' asset. CDJ Inc. alone funded the purchase of the property.

777 ST. CLARENS AVENUE/260 EMERSON AVENUE

19. On November 18, 2013 CDJ Inc. entered into an Investment Agreement

with the Waltons relative to the purchase of 777 St. Clarens Avenue and 260 Emerson Avenue in Toronto. The Agreement provided that CDJ. Inc. would acquire 100 shares and the Waltons would acquire the other 100 shares in each company. Each of the Waltons and CDJ Inc. were to provide the sum of $665,307 to the companies as Shareholder's Loans for the purpose of purchasing, renovating, completing leasehold improvements and occupying the property. CDJ Inc. wired the required funds on March 19, 2013 from its account at CIBC in Burlington.

Affidavit of Christine DeJong, sworn February 11, 2015
para. 18 and Exhibit F (Investment Agreement)

20. The reporting letter of Devry Smith of December 11, 2013 indicates that the St. Clarens and Emerson properties were purchased for the sum of $1,665,000 with a vendor takeback mortgage of $1,332,000. The balance due on closing after factoring in the vendor takeback mortgage and closing costs was the sum of $252,397.91, clearly far less than the $665,307 invested by CDJ Inc. The Agreement of Purchase and Sale in respect of the Emerson property also references an assignment fee related to the assignment of the Agreement of Purchase and Sale in the amount of $225,000. In any event, the monies invested by CDJ Inc., more than covered both the balance due on closing and the purported assignment fee.

Affidavit of Christine DeJong, sworn February 11, 2015
paras. 19, 20 and 21 and Exhibits H (Reporting Letter) and
Exhibit I (Assignment Agreement)

21. The Investment Agreement provides, as stated, that CDJ Inc. and the Waltons would each own 100 shares in consideration for $200 and the advance

of Shareholder Loans. The Agreement further references the Agreement of Purchase and Sale entered into and that upon closing, the property would be placed in the name of the companies, St. Clarens and Emerson. Shareholder Loans were to be repaid at the time of the project refinancing, sale or completion and prior to the distribution of any profits. The Waltons were to be responsible for completing the renovations, supervision, construction management, bookkeeping, administration, accounting and tax filing. CDJ Inc. was to have access to all records pertaining to the project and had the right to approve decision making in respect of selling, refinancing or further injection of funds at the purchase price referenced on the Capital Required Document is the sum of $1,665,000.

Affidavit of Christine DeJong, sworn February 11, 2015
Exhibit F (Investment Agreement)

22. CDJ Inc. advanced $665,307, which covered the balance due on closing ($252,397.91), the assignment fee ($225,000) and the deposit ($80,000).

23. There is no evidence of the Waltons having paid for shares in St. Clarens or Emerson with their own money, or at all.

Affidavit of Christine DeJong, sworn February 11, 2015
Exhibit J (General Ledgers of St. Clarens/Emerson as at December 31, 2013)

24. Cancellation of the Waltons' shares was relief sought by the Bernstein Applicants in July of 2014 and same was granted. "As noted in the Twenty-Second Report, the August 12 Order required that the Waltons' shareholdings be recalculated in accordance with the Agreements, that the Waltons were only entitled to the shares that they had paid for and that the balance of the Walton

shares were to be cancelled."

Fourth Supplemental Report to the Twenty-Second Report of the Manager, Schonfeld Inc., p. 2, para. D.6, (Brief of Relevant Inspector Manager Reports), p. 269 of the Bernstein Applicant's Record

SALE OF PROPERTIES

25. 777 St. Clarens and 260 Emerson have been sold by the mortgagee, Martha Sorger. The Manager was reappointed relative to the aforesaid property after said sale and consequent to the Order of September 8, 2015. The Manager now holds the net proceeds in the amount of $704,435.73.

Affidavit of Christine DeJong, sworn, February 11, 2015, para. 31 and Order of Justice Newbould dated September 8, 2015

26. 324 Prince Edward has been sold by the Court Appointed Manager in the DBDC Spadina Ltd. et. al. proceedings. A claims process has been run by the Manager and the claim of CDJ Inc accepted in its entirety. There are surplus proceeds $741,501.97 after payment of the secured creditors and the Manager was prepared to pay said funds in the amount of $741,501.97 to CDJ Inc. until the Bernstein Applicants objected to same. The monies remain with the Manager.

Order of Justice Newbould dated May 25, 2015
Consolidated Notice of Motion,
Affidavit of Bart Sarsh, sworn October 2, 2015, Exhibit B

CLAIMS PROCESS

27. None of 324 Prince Edward, 777 S. Clarens or 260 Emerson are subject to constructive trusts emanating from Orders made in CV-13-10280-00CL.

Reasons of Justice Brown dated August 12, 2014, para 263
Bernstein Application, Exhibit 5 of Tab C, Vol. 2

28. 3270 American Drive was sold by the mortgagee on February 23, 2015 for

the sum of $7,800,000. After the payment of commission, legal fees and mortgages, the mortgagee transferred the sum of $1,813,930 to the Manager. The only claimants to those funds are CDJ Inc. and the Bernstein Applicants. There are no other creditors or claimants of UEL.

Manager's Schedule of Properties and Proceeds, (Schedule C Properties)

29. The receipt of funds by Prince Edward, St. Clarens/Emerson and UEL from CDJ Inc. has been evidenced. CDJ Inc. advanced real money and the claims have no less validity than those advanced by the Bernstein Applicants. Clearly, the Walton Respondents relied on monies being advanced by both the Schedule C Investors and Dr. Bernstein. The same conduct complained of by Dr. Bernstein was visited upon CDJ Inc.: misappropriation, unauthorized mortgages and misrepresentations relative to the amount of monies required to acquire the properties. Upon what basis can Dr. Bernstein recover losses from a similarly victimized investor where said investor actually put monies into the subject property?

Reply Affidavit of Christine DeJong, sworn October 7, 2015, paras. 8, 9, 18 and 20

30. Relative to UEL and 3270 American Drive, not only were funds in excess of $700,000 misappropriated from CDJ Inc. which resulted in a finding of constructive trust against the American Drive property, those monies, according to the forensic accounting report of Froese Forensic Partners Ltd. dated May 23, 2014 in large part made their way to Schedule B corporations. Mr. Froese states that the CDJ Inc. monies were transferred out of the corporations' account and

thereafter co-mingled with $230,850 from Schedule B companies and $25,610 from other sources. According to Mr. Froese:

> "Of these co-mingled funds, $746,775 was transferred to Schedule B companies. Assuming that deposits from Schedule B companies were used to fund disbursements to Schedule B companies, which is consistent with the timing of deposits and disbursements through the Rose & Thistle account, approximately $515,000 of the DeJong funds were transferred to Schedule B companies and the balance to Walton related companies."

Mr. Froese identifies the primary schedule B recipients as Skyway Holdings, Twin Dragons $154,250 and Royal Agincourt $68,500.

Reply Affidavit of Christine DeJong, sworn October 7, 2015, para. 21 and Exhibit B (Froese Report)

31. Although the transfer analysis methodology favoured by Froese was rejected by Brown J., the findings of Froese in respect of the foregoing misappropriations were uncontradicted.

Reply Affidavit of Christine DeJong, sworn October 7, 2015, para. 22

32. In respect of the investments made by CDJ Inc., the Agreement was that the Applicant was injecting equity and/or debt, as the case may be, in consideration for the acquisition of a property. Moreover, the investor was to become a director of the corporation, (which did not occur). The Investment Agreements did not authorize co-mingling of funds, unauthorized mortgages or transfers.

Reply Affidavit of Christine DeJong, sworn October 7, 2015, para. 23

Part III: ISSUES

33. This Applicant submits that there is no legal basis upon which the Waltons

could claim to be shareholders in Prince Edward, St. Clarens/Emerson or UEL having never paid for shares.

34. If the Waltons yet purport to hold shares in any of the subject Schedule C Holdcos they ought to be cancelled as a consequence of their oppressive conduct.

35. It is the position of this Applicant that as a creditor of Prince Edward and as a creditor of St. Clarens and Emerson, it ought to be paid the surplus proceeds arising from the sale of properties controlled by those companies as would any other creditor in the claims process.

36. Specifically in respect of the UEL surplus proceeds, it is the positon of this Applicant that same ought to be subject to a remedial trust in favour of CDJ Inc. given the misappropriation of CDJ Inc.'s funds.

37. It is the position of this Applicant that there is a legal basis for Judgment against the Walton Respondents and UEL for misappriation.

38. It is the position of this Applicant that any debt found to be owed by the Walton Respondents to the Applicant ought not to be released by any Order of discharge pursuant to s. 178(1)(d)&(e) of the *Bankruptcy and Insolvency Act*.

39. It is the position of this Applicant that there is no legal basis for a Judgment against the Schedule C Corporations and in particular the Holdcos at issue herein in favour of the Bernstein Applicants for the sum of $22,600,000 jointly and severally with the Walton Respondents in the present circumstances.

40. Adjunct to the above, it is the position of this Applicant that account should be taken for monies received by Schedule B Corporations from CDJ Inc.

Part IV: LAW

CANCELLATION OF WALTON SHARES IN HOLDCOS

41. The Applicant's position is: The Waltons were fiduciaries of the Holdco's and breached that duty. The conduct of the Waltons was oppressive. The Waltons neither paid for their shares in the Holdco's nor made the Shareholder Loans contracted for. They utilized the funds of the Applicant herein, misappropriated those funds to their own uses, misrepresented the use of those funds and unjustly enriched themselves correspondingly depriving the Applicant.

42. It is submitted in the first instance that the Waltons do not own shares in the subject Holdcos **having paid no monies** and this Court is respectfully requested to declare same. Moreover, this relief has already been granted to Dr. Bernstein on the same facts.

43. It is respectfully submitted that the Walton's have no interest in any of these companies, their properties or the proceeds of same and therefore it flows from the foregoing that any creditors of the Waltons cannot seek to attach these proceeds on the basis of any Judgment.

44. It is submitted in addition that it is appropriate to cancel the shares of the Waltons in the Holdcos as a consequence of the oppressive conduct of the Waltons.

s. 248(3)(d)&(k) Business Corporations Act, R.S.O 1990, c.B-16

45. CDJ Inc. submits in respect of the first and second issues identified herein that the Waltons' shares ought to be cancelled in all of the subject Schedule C Holdcos at issue herein.

CLEAR ENTITLEMENT AS A LENDER

46. It is submitted that CDJ Inc. as a lender to 324 Prince Edward and St. Clarens and Emerson ought to be treated as any other creditor in the claims process and thus has priority to any claim of the Bernstein Applicants to the funds emanating from the sale of those properties. CDJ Inc. advanced monies to fund the purchase of the properties and those funds should be repaid.

PROPERTY PROCEEDS SUBJECT TO A TRUST

47. In any event, it is the position of the Applicant that the sale proceeds ought to be the subject of a trust in favour of CDJ Inc. as a remedial device in the circumstances of the Waltons' breach of fiduciary duty, unjust enrichment and/or fraud where funds belonging to the Applicant have been wrongfully converted. This is patently so in the case of UEL where CDJ Inc.'s funds were misappropriated and largely distributed to Schedule B Corporations.

s. 248(3)(j) Business Corporations Act, R.S.O 1990, c.B-16

RESTITUTION AND REPAYMENT

48. It is respectfully submitted that CDJ Inc. has demonstrated the loss of $2,198,232 as a consequence of breach of contract, misappropriation and unjust

enrichment by the Waltons. Moreover, UEL was in receipt of the Applicant's funds, wrongfully released those funds to, inter alia, Schedule B Corporations and has impaired and prejudiced the rights of the Applicant relative to its interest in UEL. Accordingly, CDJ Inc. submits that UEL and the Walton Respondents are liable for restitution and repayment to it in the amount of $2,198,232.

THE WALTON RESPONDENTS HAVE BEEN UNJUSTLY ENRICHED

49. The Waltons have been unjustly enriched. Unjust enrichment requires a claimant to establish: (a) an enrichment; (b) a corresponding deprivation; and (c) an absence of juristic reason for the enrichment.

Kerr v. Baranow, [2011] S.C.J. No. 10, at para. 32
Applicant's BOA Tab 1

50. The Waltons' benefit corresponds directly with the Applicants' deprivation.

Kerr, supra at para. 39
Applicant's BOA Tab 1

51. There is no juristic reason for the Waltons' retention of the benefit conferred by the Applicant. The Respondents wilfully breached the joint venture agreement and their fiduciary duty of loyalty by misappropriating the Applicant's funds.

Garland v. Consumers Gas Co. [2004] SCJ No. 21 at paras 30, 40 & 44
Applicant's BOA Tab 2

52. The agreements entered into between the Applicants and the Waltons do not provide a juristic reason for the diversion of the Applicant's funds. The agreements do not permit co-intermingling or inter-company lending of the Applicant's funds to the Rose & Thistle account or any other entity related to the Waltons.

53. To the contrary, the agreements specifically provide that the Holdco's be used solely for the purposes of the property for which they were incorporated.

54. The Waltons breached their fiduciary duty and acted oppressively towards the Applicant's interests when they diverted the funds from the Holdco's to the Rose & Thistle account.

55. The Waltons were directors of each of the Holdco's. The Waltons managed the day-to-day affairs of those companies. The Applicant's investments in the Holdco's were under the complete control of the Waltons. There is no doubt that the Waltons owed fiduciary duties to the Applicant.

Frame v. Smith, [1987] 2 S.C.R. 1999, para. 38-45
Applicant's BOA, Tab 3

56. The diversion of funds from the Holdco's for Ms. Walton's own purposes was oppressive to the Applicant's interests. A creditor, (as defined therein) or shareholder has standing under s. 248 of the *OBCA* to seek an order rectifying oppressive conduct that consists of a director's breach of his or her fiduciary duty to the Holdco's.

Malata Group (HK) Ltd. v. Jung (2008), 89 O.R. (93rd) 36 (Ont. CA), paras. 31-32
Applicant's BOA, Tab 4

DAMAGES AND COSTS

57. The Applicant is entitled to be made whole for all amounts advanced to the Waltons, the Holdco's (as loans and contributions for shares) and to other properties. The Walton Respondents, UEL and other recipients are jointly and severally liable for that loss.

JUDGMENT SHOULD SURVIVE BANKRUPTCY

58. It is respectfully submitted that the conduct of the Walton Respondents and the liability stemming from same constitutes a liability arising out of fraud, and/or misappropriation while acting in a fiduciary capacity and further a liability resulting from obtaining property by fraudulent misrepresentation such that the liability ought to survive bankruptcy.

s. 178(1)(d)&(e) of the Bankruptcy and Insolvency Act, RSC 1985 c. B-3 as amended

SCHEDULE C CORPORATIONS NOT LIABLE TO DR. BERNSTEIN

59. The Bernstein Applicants seek damages in the amount of $22,600,000 jointly and severally against the Walton Respondents and those Corporations listed at Schedule C of the Application, (the "Schedule C Companies"). On the assumption that the Waltons have no interest in the Schedule C Companies, properties or proceeds, what is the basis for a Judgment against the Schedule C Companies? Any Schedule B monies traceable to the Schedule C Companies resulted in a finding of constructive trust. Respectfully, beyond the foregoing, there is no substantive evidence of receipt of funds by the Schedule C Companies and most particularly Prince Edward, St. Clarens/Emerson or UEL. It is further respectfully submitted that the relief requested by the Bernstein Applicants in respect of unjust enrichment and the diversion of funds is properly claimable against the Waltons only. Justice Brown was of the view that the Applicants had a strong prima facie case of unjust enrichment *against the Waltons* not the Schedule C Companies.

Reasons of Justice Brown dated August 12, 2014, para 263
Bernstein Application, Exhibit 5 of Tab C, Vol. 2
November/15 Motion Record

60. It is respectfully submitted that to obtain a Judgment against the Schedule C Companies, which Judgment would prejudice the Schedule C Investors, has to be based on concrete evidence of the receipt of funds. Specifically, the Bernstein Applicants need to demonstrate the receipt of Bernstein funds by Prince Edward, St. Clarens, Emerson and/or UEL, (beyond the UEL constructive trust finding). The doctrine of "Knowing Receipt" is founded, at its core, upon receipt.

KNOWING RECEIPT AND KNOWING ASSISTANCE

61.

> The mere fact that the Plaintiff establishes a claim to a constructive trust over certain of the Defendant's assets does not mean that there is a corresponding entitlement with respect to the general assets of the Defendant or any other particular asset. The claim must be assessed on a case by case basis.

McGuiness: Halsbury's Laws of Canada-Restitution, p. 1HRE -130
Applicant's BOA, Tab 5

62. Aside from a capacity as a trustee (*de son tort)*, Halsbury's notes two other ways in which a stranger to a trust can be held liable as a constructive trustee for breach of trust: knowing receipt and knowing assistance. Halsbury's states:

> A stranger to a trust can be liable for breach of trust by knowingly assisting in a fraudulent and dishonest design on the part of the trustees. Only actual knowledge, recklessness, or wilful blindness will render a stranger liable for participating in the breach of trust. Constructive knowledge or notice cannot render a stranger liable under the "knowing assistance" category of constructive trusteeship.

Halsbury's, Ibid. p. 1HRE -130
Applicant's BOA, Tab 5

63. In the first instance, CDJ Inc. submits that the Bernstein Applicants cannot show receipt of Bernstein funds by Prince Edward, St. Clarens or Emerson. The evidence is clear that the funds utilized to purchase the real property were advanced by CDJ Inc. The evidence is that CDJ Inc. funded the acquisition of the corresponding properties without assistance from the Waltons or the Bernstein Applicants. In respect of UEL, clearly CDJ Inc. advanced monies in accordance with its obligations under the contract. Those monies were removed by the Waltons and, to a significant extent appropriated to Schedule B Corporations ($515,000). Other than the extant constructive trust finding relative to UEL, there is no specific evidence of further funds of the Bernstein Applicants making their way into UEL, (or any other Schedule C Corporation), and thus no basis to find that the Bernstein Applicants are entitled to a Judgment exigible against the Schedule C Holdco(s).

64. Respectfully, any enrichment to the Schedule C corporations has already been recognized in the form of constructive trust findings.

65. The Bernstein Applicants allege that the Schedule C Corporations had actual knowledge of the Walton's breach of fiduciary duty, jointly assisted the Waltons in that breach and had actual knowledge and jointly assisted in the Waltons' fraud. Moreover, it is alleged that the Schedule C Corporations received property from the Bernstein Applicants while having knowledge that it was received

in breach of a fiduciary duty. It is respectfully submitted that that argument only works insofar as circumstances **where it can be demonstrated that** the Schedule C Corporations received money that originated from the Bernstein Applicants to purchase a property. In those instances, there has already been a finding of constructive trust.

66. Leaving aside for the moment UEL, the argument is not valid where CDJ Inc. advanced the monies to purchase the property. There can be no demonstration of receipt where the property was purchased by the relevant Schedule C Corporation utilizing monies from CDJ Inc.

67. A finding of knowing receipt, should not be valid based upon an amorphous "net transfer analysis". There must be specificity. This is an equitable remedy meant to address circumstances where the fraudster has converted property and placed it beyond the reach of the innocent claimant. The net transfer analysis argument is that the Bernstein entities, having invested such significant sums with the Waltons must have funded, to some extent, the acquisition of the Schedule C properties. Again, however, without specifying the investment on a property by property basis, (as was done where constructive trusts were found), any Judgment in favour of the Bernstein Applicants to that effect would be unduly prejudicial to innocent Schedule C Investors. But here the recipient, (where such receipt can be shown) is a corporation in which the Waltons have no interest, put in no money and paid no consideration for their shares. They are using the Schedule C Corporations which corporations are owned by innocent investors who placed their money and trust in the Waltons.

68. Respectfully, it is not appropriate to invoke equity at the expense of an innocent. This is not a circumstance where the wrongdoer is holding the fruits of its wrongdoing: the Waltons have no interest in these proceeds. The following passage is from the Supreme Court of Canada's Decision in *Soulos v. Korkontilas.* In that case, the Court held that in addition to circumstances of unjust enrichment, a constructive trust will be imposed where an agent breached the duties he or she owes to the principal and the principal has suffered a corresponding loss. The test for such a constructive trust requires the Plaintiff to prove the following:

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

Soulos v. Korkontilas, 1997 CarswellOnt 1489 (SCC), at para. 45
Applicant's BOA Tab 6

69. The amount claimed against the Schedule C Corporations is nebulous being without specificity in respect of the alleged receipt by each corporation.

70. In the case of UEL, CDJ Inc. advanced the funds to purchase the property. The Waltons misappropriated those funds and then replaced them with funds from

The West Mall resulting in the finding of constructive trust in the amount of $1,032,000. That is the extent of the Bernstein Applicants' claim relative to UEL. CDJ Inc. paid for its shares and its funds were misappropriated to the benefit of Schedule B Corporations to the extent of $515,000. There are surplus proceeds in UEL of approximately $780,000. Dr. Bernstein still acquired The West Mall. The post-trust proceeds ought to be paid to CDJ Inc. in restitution for the misappropriation of its funds. In the alternative there must be an accounting as between funds received by the Schedule B Corporations from CDJ Inc.

Part IV: ORDER REQUESTED

71. The Court Orders that: UEL be added as a party to the within Application; the Walton shares in Prince Edward, St. Clarens/Emerson and UEL be cancelled and that the Manager is authorized to make immediate distribution of proceeds in its possession relative to 324 Prince Edward, 777 St. Clarens, 260 Emerson and 3270 American Drive, (the latter being net of priority claims) to CDJ Inc. and; further, that there be Judgment against the Waltons and UEL in the amount of $2,198,232 and that said Judgment survives bankruptcy.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: March 4, 2016

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Lawyers for the Applicants

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 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. Royal Gate Nominee Inc.
29. Royal Gate (Land) Nominee Inc.
30. Dewhurst Development Ltd.
31. Eddystone Place 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 Prince 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 Lane Circle, Toronto, Ontario
16. 19 Tennis Crescent, Toronto, Ontario
17. 646 Broadview Avenue, Toronto, Ontario

SCHEDULE "D": AUTHORITIES CITED

Cases:	Tab
Kerr v. Baranow, [2011] S.C.J. No. 10 at paras. 32 and 39	1
Garland v. Consumers Gas Co. [2004] SCJ No. 21 at paras 30, 40 & 44	2
Frame v. Smith, [1987] 2 S.C.R. 1999	*3*
Malata Group (HK) Ltd. v. Jung (2008), 89 O.R. 93rd) 36 (Ont. CA)	4
McGuiness: Halsbury's Laws of Canada-Restitution, p. 1HRE -130	5
Soulos v. Korkontilas, 1997 CarswellOnt 1489 (SCC), at para. 45	6

SCHEDULE "E": STATUTORY AUTHORITIES CITED

s. 248(3)(d)&(j)(k) Business Corporations Act, R.S.O 1990, c.B-16

Court order

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 250;

(l) an order winding up the corporation under section 207;

(m) an order directing an investigation under Part XIII be made; and

(n) an order requiring the trial of any issue. R.S.O. 1990, c. B.16, s. 248 (3).

s. 178(1)(d)&(e) of the Bankruptcy and Insolvency Act, RSC 1985 c. B-3 as amended

Debts not released by order of discharge

- **178 (1)** An order of discharge does not release the bankrupt from
    - **(a)** any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;
    - (a.1) any award of damages by a court in civil proceedings in respect of
        - **(i)** bodily harm intentionally inflicted, or sexual assault, or
        - **(ii)** wrongful death resulting therefrom;
    - **(b)** any debt or liability for alimony or alimentary pension;
    - **(c)** any debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt;
    - **(d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;**
    - **(e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;**
    - **(f)** liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim;
    - **(g)** any debt or obligation in respect of a loan made under the *Canada Student Loans Act*, the *Canada Student Financial Assistance Act* or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred

- **(i)** before the date on which the bankrupt ceased to be a full- or part-time student, as the case may be, under the applicable Act or enactment, or
- **(ii)** within seven years after the date on which the bankrupt ceased to be a full- or part-time student;

- **(g.1)** any debt or obligation in respect of a loan made under the *Apprentice Loans Act* where the date of bankruptcy of the bankrupt occurred
  - **(i)** before the date on which the bankrupt ceased, under that Act, to be an eligible apprentice within the meaning of that Act, or
  - **(ii)** within seven years after the date on which the bankrupt ceased to be an eligible apprentice; or
- **(h)** any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (g.1).

CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION

-and- NORMA WALTON et al.

Applicant

Respondents

Court File No. CV-15-10879-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE APPLICANT, CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION

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