# COURT OF APPEAL FOR ONTARIO

CITATION: DBDC Spadina Ltd. v. Walton, 2014 ONCA 428
DATE: 20140526
DOCKET: C58024 and C58804

Doherty, Simmons and Tulloch JJ.A.

BETWEEN

DBDC Spadina Ltd., and Those Corporations Listed on Schedule A Hereto

Applicants (Respondents in Appeal)

and

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

Respondents (Appellants)

and

Those Corporations Listed on Schedule B Hereto, To Be Bound by the Result

Norma Walton, appearing in person

Howard C. Cohen, for the respondents (appellants)

Peter H. Griffin and P.E. Veel, for the applicants (respondents)

Heard and released orally: May 21, 2014

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice, dated November 5, 2013.

ENDORSEMENT

[1] Ms. Walton represented herself on the appeal. She is obviously very knowledgeable about the matters underlying this appeal. Mr. Cohen represented the other appellants. Not surprisingly, Ms. Walton's arguments differed to some degree from those her former counsel had advanced in their factum. We will address the arguments made by Ms. Walton. Mr. Cohen, for the other appellants, joined in and to some extent augmented Ms. Walton's arguments.

**Issue #1 – Did the application judge err in failing to require that secured creditors be given notice of the motion to appoint a Receiver Manager?**

[2] Ms. Walton argues that the mortgagees should have been given notice of the application to appoint a Receiver Manager in light of the potential impact of that appointment on the properties and their security in the properties. Ms. Walton notes for example that the appointment of a Receiver Manager would automatically put the mortgages into default under the terms of those mortgages.

[3] Ms. Walton correctly, in our view, does not argue that the application judge had no jurisdiction to make the order absent notice to the secured creditors. She does argue that the application judge should have exercised discretion in favour of requiring notice to them.

[4] The application judge was not asked to require that notice be given to the secured creditors and specifically the mortgagees. Ms. Walton and the other

appellants were certainly aware of the potential impact of the appointment of a Receiver Manager on the status of the mortgages. They were well positioned to ask the application judge to give the necessary notification if they thought it prudent or necessary to a proper hearing. Ms. Walton and the other appellants were all represented by counsel on the application. No such request was made by anyone. We cannot say that the motion judge erred in principle or acted unreasonably in failing to make an order he was never asked to make.

[5] We also note that no attempt has been made by any secured creditor to intervene on the appeal and take up the argument that the secured creditors should have received notice of the application.

[6] We are told that some mortgagees have participated in some of the many proceedings that have been taken since the appointment of the Receiver Manager. The nature of those proceedings and the positions advanced on behalf of some of the mortgagees in respect of either the appointment of the Receiver Manager or the conduct of the Receiver Manager since its appointment are not before this court and are not germane to the appeal. As Mr. Griffin put it, this appeal is about the appointment of the Receiver Manager not the conduct of the Receiver Manager since the appointment.

**Issue #2 – Did the application judge improperly exercise his discretion in favour of the appointment of a Receiver Manager?**

[7] Ms. Walton forthrightly accepts that on the material before the application judge, a finding of oppression under the *Ontario Business Corporations Act* was open to the application judge. We agree with that concession. Ms. Walton submits, however, that the application judge was still required to consider the competing interests of Dr. Bernstein, the Waltons and the other creditors in deciding whether the appointment of a Receiver Manager was the appropriate order. She maintains that the appointment of a Receiver Manager is an extreme remedy to be granted sparingly. She further argues that the appointment of the inspector about a month earlier was enough to fully protect Dr. Bernstein's interests and that the application judge should have simply continued that order perhaps with modifications as needed to meet specific issues.

[8] Ms. Walton points to two specific errors which she claims taint the exercise of the application judge's discretion. First, she says he failed to take into account the inevitable and disastrous consequences to the business affairs of the named companies that would flow from the appointment of a Receiver Manager. Second, she says that the application judge mischaracterized her conduct in relation to two of the properties as "theft" or "having the appearance of theft". Ms. Walton submits that this mischaracterization led the application judge to the "overkill" remedy of a Receiver Manager.

[9] We have reviewed the application judge's reasons. He accurately set out the legal principles relevant to the appointment of a Receiver Manager under either the *Courts of Justice Act* or the *Ontario Business Corporations Act*: see paras. 41-44. The application judge considered whether an order continuing the inspectorship would suffice to protect Dr. Bernstein's interests: see para. 52. The application judge determined that given the difficulties the inspector had encountered in the month since his appointment and given the problems the inspector had identified in respect of the records of the corporations, the appointment of the Receiver Manager was necessary in that Dr. Bernstein's interests could not be adequately protected by a simple continuation of the inspectorship. We see no misapprehension of the relevant evidence. Indeed the evidence relating to the conduct of the inspectorship was unchallenged. Nor can we characterize the application judge's assessment of that evidence as unreasonable. That is as far as our review goes. It is not for this court to engage in a *de novo* review of the material.

[10] The application judge also addressed the potential commercial implications of the appointment of a Receiver Manager: see paras. 49-51. We were told in the course of oral submissions that the order has had serious financial repercussions for the Waltons and the companies. What may have happened after the order appointing a Receiver Manager was made and perhaps, more importantly, why those events happened are not before this court. If the

application judge did not err in the exercise of his discretion based on the record before him, it cannot be that subsequent events render the exercise of that discretion improper. Problems that may have arisen in the course of the receivership or changes in circumstances subsequent to the appointment of the Receiver Manager are matters that are properly addressed in the context of the court's ongoing supervision of the Receiver Manager and are not matters to be addressed in an appeal which challenges the appointment of the Receiver Manager.

[11] We also note that no stay of the application judge's order was sought. The applicants chose to accept the appointment of the Receiver Manager pending the outcome of this appeal. That position seems inconsistent with an argument that the appointment of the Receiver Manager would inevitably lead to dire consequences for the corporations. Were that the position one would have expected an effort to stay the order pending a challenge of the receivership.

[12] We also do not accept that the application judge's use of the word "theft" is necessarily a mischaracterization of some of the conduct of Ms. Walton. However, even if the word "theft" is considered inappropriate given its criminal connotation, Ms. Walton's own affidavit acknowledges a knowing misappropriation of funds in respect of at least one property. Whatever one might choose to call that conduct, it provided powerful evidence that Dr. Bernstein's interests in the property were being unfairly prejudiced by the

conduct of the Waltons. The application judge's use of the word "theft" does not, in our view, taint his factual findings or the manner in which he exercised his discretion.

[13] We have also reviewed the various features of the management of the affairs of the companies relied on by the application judge to support his findings and his order appointing the Receiver Manager. In our view, all of his findings are supported by the record before the application judge and justify the conclusion that Dr. Bernstein's interests in the companies were significantly prejudiced by the ongoing activities of the Waltons. The remedy ordered by the application judge, while undoubtedly one that should not be easily granted, was, in our view, fully justified in these circumstances.

[14] The appeal is dismissed. A number of related appeals that were transferred to this court from the Divisional Court on the order of Strathy J.A. are also dismissed.

[15] The respondents are entitled to costs in the amount of $20,000, inclusive of relevant taxes and disbursements.