CITATION: DBCD Spadina Ltd et al v. Norma Walton et al, 2016 ONSC 6018
COURT FILE NO.: CV-13-10280-00CL
DATE: 20160923

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

B E T W E E N:

DBDC SPADINA LTD.,
and THOSE CORPORATIONS LISTED ON SCHEDULE A HERETO

Applicants

and

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP LTD. and EGLINTON CASTLE INC. and THOSE CORPORATIONS LISTED ON SCHEDULE C HERETO

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

BEFORE: Newbould J.

COUNSEL: *Peter H. Griffin, Shara N. Roy and Danielle Glatt* for the Applicants

Howard C. Cohen and Jessica S. Parise, for the Respondents Norma Walton, Ronauld Walton, The Rose & Thistle Group Ltd. and Eglinton Castle Inc.

Mark S. Dunn and Carlie Fox, for the Manager

Rosemary R. Fisher, for Christine DeJong Medicine Professional Corporation

Aaron A. Blumenfeld, for Gideon and Irene Levytam

Jeffrey Claydon, for the Attorney General of Ontario

HEARD: June 3, 2016

REASONS FOR DECISION

[1] The applicants move for judgment (i) against the Respondents Norma Walton, Ronauld Walton, the Rose and Thistle Group Ltd. and Eglinton Castle Inc. for judgment in the amount of $66.9 million representing the balance of the applicants' investment lost to the Waltons; (ii) against certain Schedule C Company respondents jointly and severally in the amount of $22.6 million, representing the portion of the applicants' $78.8 million which the Schedule C Company respondents knowingly assisted the Waltons in diverting to the benefit of the Schedule C Companies; (iii) in the alternative damages against certain of the Schedule C Company respondents in separate amounts for each company; and (iv) a finding of fraud against the Waltons which will survive bankruptcy.

[2] The Waltons bring a counter-application in which a number of heads of relief are requested, including (i) a judgment against Dr. Bernstein and the Schedule B Companies in the amount of $27 million for unjust enrichment; (ii) a judgment against Dr. Bernstein and the Schedule B Companies in the amount of $52 million for breach of contract; (iii) a declaration that Dr. Bernstein and the Schedule B Companies owe to the Schedule C property investors $14 million; (iv) a declaration that Dr. Bernstein and the Schedule B Companies are severally and jointly liable to pay specific amounts to certain companies and liable to pay to the respondents or respondent companies certain amounts and (v) an order dismissing the request of the applicants for a finding of fraud. The Waltons have also brought a cross-motion for a trial of the fraud issue.

[3] Christine DeJong Medicine Professional Corporation ("DeJong") and the Levytams request relief regarding their investments in certain of the schedule C properties.

[4] The background facts have been extensively set out in several previous endorsements, including my endorsements appointing Schonfeld Inc. as an inspector and later as manager of the Schedule B Companies and the Reasons for Decision of Justice Brown (as he then was) dated August 12, 2014. There is little to be gained by a further discussion of the background facts of this sorry saga.

Need for a trial

[5] The request by the Waltons for a trial on the fraud issue appears rooted in the fact that they have now been charged criminally with fraud. They contend that it would be grossly unjust and unfair to the Waltons if there were a finding of fraud in these civil proceedings on the basis of affidavit evidence. They contend that a finding of that nature could cause serious prejudice and unfairness in the criminal matter, especially having regard to the potential to prejudice a potential jury. Certainly, they say, it would be very difficult for a potential juror to sufficiently appreciate the impact of a finding of fraud, in the context of an application, and be an unbiased juror in a criminal prosecution.

[6] There is no motion to stay the civil proceedings. The issue is whether, as asserted by the applicants, there is enough evidence on the record or previous findings made in these proceedings justifying a declaration of fraud that would survive any bankruptcy of the Waltons. If there is not, a trial will be required.

[7] What may affect the criminal case is not before me. It is argued that that the affidavits filed in the civil matter can be used against the Waltons in the criminal matter which would be a violation of their right to remain silent. Whether or not that is so, Norma Walton has already filed extensive affidavits already in these proceedings and it is that evidence that is before me.

[8] Brown J. did not finish the matters before him. For example, he put off for further argument the issue of the amount of damages to be awarded to the applicants. Extensive evidence was before him, including affidavit evidence from Ms. Walton. Because Brown J. was elevated to the Court of Appeal, he could not complete the task that was before him. Ms. Walton has now filed further affidavit evidence in support of her claim that she is entitled to a trial to

determine whether she and her husband are liable for fraud. These new affidavits and the arguments made on her behalf ignore the findings made in this proceeding by Brown J. However, it is not open to them to challenge the findings of fact made by Brown J.

[9] In his reasons for decision, Brown J. held that the Waltons deceived and defrauded Dr. Bernstein of funds that were invested in properties at 875/887 Queen St. East and 78 Tisdale Avenue. It is now argued on behalf of the Waltons that Ms. Walton is confident that once she is given an opportunity at a trial to explain these transactions that any notion of fraud will be eliminated. However, the issue of fraud with respect to these properties is now *res judicata*. The findings were not some interlocutory finding that does not continue at a trial. Each side moved for relief on a final basis and the findings stand. Ms. Walton tried to establish before Brown J. that there was no fraud in connection with these properties but failed. Her appeal to the Court of Appeal was dismissed.

[10] The Waltons now argue that they acted in accordance with the agreements made with Dr. Bernstein. This too is contradicted by the findings of fact made by Brown J. who stated:

> **39** ...I further find that those transfers of funds from Schedule B Companies to Rose & Thistle constituted breaches of the agreements between the Applicants and the Respondents which 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.
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> **180** From this I conclude that Ms. Walton was prepared to ignore not only the contractual language which bound her, but also the express instructions of her co-investor. Instead, Ms. Walton simply did as she saw fit irrespective of her legal obligations.

[11] It is argued that Ms. Walton kept Dr. Bernstein fully apprised of all matters relating to the development of the properties. This is an astonishing assertion. The findings of Brown J. on the 875/887 Queen St. East and 78 Tisdale Avenue transactions are to the contrary.

[12] Moreover, on the two $3 million mortgages on the two Don Mills property, Ms. Walton admitted in her affidavit filed at the earlier hearing to appoint a manager that she "diverted" $2.1

million and should not have done so without Dr. Bernstein's consent. $400,000 of this money went into her personal bank account. The evidence at that time was that when confronted about the mortgages when they were discovered by a title search, Ms. Walton said that she would only provide information regarding them in a without prejudice mediation process. She continued however to assert before Brown J. that there was no attempt to hide the two $3 million mortgages. Brown J. did not agree and stated:

> **102** Sixth, in paragraph 101 of her Factum Ms. Walton submitted, in respect of the two $3 million Don Mills mortgages, that "there was no attempt to hide this and everything was completely transparent on the books and records of our companies. The Inspector found it easy to trace exactly what had happened to this money given that transparency." That was a breathtaking statement by Ms. Walton, and it demonstrated her continued willingness to distort the truth. In fact, Ms. Walton had given no prior notice to Dr. Bernstein about her intention to place the two mortgages on the Don Mills properties. She hid that transaction from Dr. Bernstein. There was no transparency. The transaction only came to light as a result of Mr. Reitan's searches of title as part of a larger concern by the Applicants over the Respondents' lack of transparency about what they were doing with the Applicants' funds. Even then, the true facts about the two mortgage transactions did not emerge until Ms. Walton was compelled to disclose them in the early stages of this proceeding. For Ms. Walton to now attempt to spin those facts in her favour shows her complete lack of understanding about what it means to tell the truth. There really is no other way to put the matter.

[13] In her new affidavit, Ms. Walton asserts that she had a colour of right to place the two Don Mills mortgages, that she and her husband were effectively borrowing against their equity in the properties and that they used the majority of the money in an easily traceable manner. It is not open, however, now for Ms. Walton to make these assertions in light of her earlier evidence and the findings made by Brown J. The Waltons admitted in their factum filed with Brown J. that the borrowing of the $6 million from the Don Mills properties was contrary to the contracts with Dr. Bernstein but Ms. Walton asserted in her affidavit that she did not know the $2.1 million had been paid out to her and her companies until after the inspector did his work. Brown J. rejected that assertion and held that it was Ms. Walton who had directed the proceeds of the mortgages to be paid to the Rose & Thistle bank account knowing that such payments would be in breach of the obligation of the Waltons to Dr. Bernstein. Ms. Walton had falsely certified on the mortgage

documentation that she and her husband were the only shareholders of the borrowing company whereas Dr. Bernstein was a 50% shareholder. She testified that Dr. Bernstein had instructed her not to disclose his shareholding interest in the Schedule B Companies. Brown J. rejected that evidence.

[14] The Waltons contend that a trial is required to determine the appropriate level of damages, if any, to be awarded to the applicants and that the Inspector/Manager did not give the Waltons credit for work done on the properties and no meaningful analysis of the evidence of the work done was undertaken. I do not agree.

[15] This issue was squarely before Justice Brown in the July, 2014 hearings held over three days. He dealt with this issue quite extensively in his reasons for decision at paras. 42 to 90 and was very critical of the evidence filed on behalf of the Waltons to substantiate the work they said they had done on the Schedule B Company properties. He concluded that the Waltons had proven only $1 million worth of work done. He stated:

> **90** Taken together, those two findings mean that of the $30.6 million in invoices rendered by Rose & Thistle to the Schedule B Companies, the Respondents have established the validity and reasonableness of only $1 million of them - i.e the reconciliation relating to management fees for revenue-producing properties. The Respondents have failed to prove, on the balance of probabilities, that the remaining invoices covered work or services actually performed by Rose & Thistle for Schedule B Companies, notwithstanding that the information needed to do so remained in the possession and control of the Respondents.

[16] The Waltons requested Justice Brown to order a trial of an issue of the amount of money the Schedule B Companies owed to their company Rose & Thistle, i.e. how much work had been done on the Schedule B Companies. He stated:

> **225** I have found that of the $23.6 million in net transfers from Schedule B Companies to Rose & Thistle identified by the Inspector, the Respondents had only justified a reduction of $1 million in that number by reason of management fees billed. It follows that I dismiss Ms. Walton's audacious - but forensically unsupported - request for a trial of an issue of the amount of money the Schedule B Companies owed to Rose & Thistle.

> While in sports the best defence sometimes might be a good offence, that strategy does not work when parties who are subject to a court accounting order fail to comply with it. Ms. Walton seems to fail to appreciate the gravity of the situation in which she and her husband find themselves.

[17] The matter is now *res judicata*. There is no room for a rehearing of this issue or the filing of further evidence that could have been filed before Justice Brown.

[18] As will be seen, I am satisfied that there are sufficient findings of fact already made and other evidence to make findings and that a trial of issues regarding the fraud allegations is not needed.

Applicants claim for damages

[19] The applicants invested a total of approximately $111 million into 31 projects structured as $29.5 million in mortgages and loans and $81.6 million as investments. Dr. Bernstein's corporations made equity investments of approximately $81.6 million. These corporations received approximately $2.99 million as a return of equity from Rose & Thistle. Since the appointment of the Manager, the applicants have now recovered a further approximately $11.6 million in equity payments and received approximately $160,000 from the sale of 44 Park Lane Circle. The outstanding net loss suffered by the applicants on their equity investment is thus $66,951,021.85 which is the damage award they seek with respect to their actual losses occasioned by the Waltons' fraudulent misrepresentation.

[20] In the July 2014 hearing before Brown J., the applicants requested judgment against the Waltons for approximately $78 million (they have since received more funds from the Manager as a return of equity). Brown J. felt he needed more argument on the issue of the damages to be awarded and stated:

> **226** The Applicants sought an order for restitution and repayment to them by the Respondents in the amount of $78,420,418 for breach of contract, unlawful misappropriation and unjust enrichment, which they translated in their draft order into a request for an order that the Respondents were jointly and severally liable for restitution payable to the

> Applicants in the amount of $78,420,418 for all funds diverted from the Schedule B Companies and that they pay to the Applicants the balance of those funds not otherwise recovered by the Applicants from the sale of the Schedule B Properties.
>
> **227** I am not prepared to grant such an order at this time because I am not satisfied that adequate argument was placed before the Court on this issue. Applying the different measures of damages for breach of contract, unlawful misappropriation and unjust enrichment could result in quite different damage awards on the facts of this case. I think the Court requires more assistance on this point than was provided by the parties at this hearing, and I therefore defer to a later date consideration of this part of the Applicants' claim…

[21] On this motion the applicants rely on the tort of deceit or civil fraud. The elements of that tort are well known. There must be (i) a false representation of fact to the plaintiff; (ii) the defendant made the false representation knowingly, or without believing it to be true, or recklessly without care to its truth or falsity; (iii) the false representation caused the plaintiff to act; and (iv) the plaintiff's actions resulted in a loss. See *Hryniak v. Mauldin*, 2014 SCC 17 at para. 87.

[22] The applicants also rely on the tort of false representation, which is really the same tort as civil fraud. Fraud is a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it: see *Parna v. G. & S. Properties Ltd.,* [1971] S.C.R. 306.

[23] The elements of the tort of fraudulent misrepresentation can be distilled to five criteria which a plaintiff must demonstrate in order to establish a defendant's liability:

> (a) The defendant made a false statement;
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> (b) the defendant knew that the statement was false or was indifferent to its truth or falsity;
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> (c) the defendant had the intention to deceive the plaintiff;

> (d) the false statement was material in that it induced the plaintiff to act; and
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> (e) the plaintiff suffered damages as a result of so acting.

[24] In each of the agreements made by Dr. Bernstein with the Waltons covering each property in which Dr. Bernstein invested, it was made clear that the funds invested by Dr. Bernstein were to be kept in a separate bank account for each property and to be used for the development of each property. That was a representation made in each case. As well, Dr. Bernstein swore in his affidavit that apart from the agreements, the Waltons made various representations to him in person and via email that caused him to believe that his funds would only be used in respect of a particular project. At no time did the Waltons advise that they would be withdrawing money from the Schedule B Companies' bank accounts for any purpose other than the needs of the associated property. I accept this evidence.

[25] These representations were false. Brown J. found as he stated:

> **15** For the reasons set out below, I conclude that the Waltons did not use the funds advanced to them by the 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.

[26] The Waltons had to know that the representations in the agreements as to the use of the funds and the fact that they were to be kept in separate bank accounts for each project were false. The money in almost all cases advanced by Dr. Bernstein's companies was immediately transferred out the account to the Rose & Thistle account. The conclusion of the inspector and found by Brown J. at paras. 39 and 96 of his reasons was that in almost all cases, some or all of the amounts advanced to the Schedule B Companies by the applicants were transferred almost immediately to the Rose & Thistle account and in many cases to Schedule C Companies.

[27] It was argued by Ms. Walton before Brown J. that it never occurred to her that Dr. Bernstein would object to the pooling of funds. This was rejected as unbelievable by Brown J. he stated:

> **186** The pooling or co-mingling of funds was a critical breach of the obligations which Norma and Ron Walton owed to Dr. Bernstein under their agreements. In her factum Ms. Walton submitted: "It never occurred to Walton that Bernstein would object to the pooling of funds". I completely reject that submission; it is not in the least credible. One would have thought that the "specific-purpose" clauses contained in each of the agreements for the Schedule B Companies which the Waltons - both lawyers - had signed over the course of three years would have provided Ms. Walton with good reason to think that Dr. Bernstein would object to the pooling of funds since such pooling contravened those agreements. Ms. Walton's protestation of innocent, but mistaken, belief on this issue simply was not credible.

[28] The Waltons had no basis to think that what they did was acceptable to Dr. Bernstein. They knew it was contrary to the representations that had been made to him. Brown J. further found that the actions of the Waltons were deliberate. He stated:

> **187** In addition, based on the evidence adduced I find that:
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> (i) The Applicants were not aware that the Respondents were withdrawing funds from the Schedule B Companies' bank accounts for any purpose other than the costs of the associated property;
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> (ii) The Applicants did not know that funds from Schedule B Companies were transferred or diverted to the Rose & Thistle "clearing house" bank account because the Respondents, in particular Ms. Walton, deliberately hid those transfers from the Applicants; and,
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> (iii) The Waltons deliberately did not tell the Applicants that they were using funds advanced by the Applicants to Schedule B Companies for their own personal purposes and benefit and for the benefit of the Schedule C Companies which they owned or controlled.

[29] Dr. Bernstein has sworn that if not for the representations made by the Waltons as to the use of his funds, he would not have invested his money in the Schedule B Companies and/or the

Properties. This is hardly surprising evidence and I accept it. Had he known that the money was not kept for each project but transferred out to Rose & Thistle and used for projects he had no interest in and in some cases for the Waltons personal use, it is obvious he would not have invested the money he did. This misuse of funds is compounded with the realization after the fact that the Waltons kept no proper records of what they were doing and failed to contribute 50% of the equity that they were obliged to contribute under the agreements made with Dr. Bernstein.

[30] The Waltons argue that Dr. Bernstein caused his losses by litigating and recklessly pursuing a receivership in the face of evidence that a receivership would decimate the value of the properties. It is not open to the Waltons to argue this point. It was argued before Brown J and rejected. It is a matter of *res judicata*. Brown J. stated:

> **211** On several occasions during this proceeding Ms. Walton has contended that it was the Applicants' decision to seek the appointment of receiver which caused them financial harm. She argued that had the Applicants allowed the Waltons to deal with the portfolio, everyone would have been financially happy. In her June 21, 2014 affidavit, Ms. Walton again stated that a valuation of the portfolio of Schedule B Properties the Respondents had commissioned from Colliers right after the receivership order was made showed an appraised value of the portfolio of $328.34 million. That appraisal was not placed before me in evidence; I am unable to comment upon it.
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> **212** Moreover, Ms. Walton's submission on this point ignored the simple fact that it was the conduct of the Respondents in breaching the agreements by co-mingling funds and applying some of the Applicants' funds for unintended purposes, including self-dealing in favour of the Respondents' personal interests, that lies at the root of the current situation. The receivership order was designed to mitigate the harm caused by the Respondents' wrongful conduct.

[31] The Waltons argue that Dr. Bernstein has already been fully compensated for $22.6 million that he claims. They refer however to mortgages and loans that were repaid to the applicants over several years. However, the claim by the applicants is for the lost equity investments suffered by Dr. Bernstein. It has nothing to do with the mortgages and loans that were repaid.

[32] The evidence establishes clearly that the Waltons committed the tort of civil fraud and fraudulent misrepresentation that caused Dr. Bernstein to invest his funds into the Schedule B Companies. His damage claim is the unrecovered amount of $66,951,021.85. The applicants are entitled to judgment against the Waltons, The Rose & Thistle Group Ltd. and Eglinton Castle Inc. in that amount plus interest[1]. What the amount of interest should be and whether or not compounded was not argued and if the applicants seek interest of more than simple interest, further submissions may be made.

Survival of the claim if a bankruptcy

[33] The applicants seek a declaration pursuant to s. 178(1)(d) and (e) of the *Bankruptcy and Insolvency Act* that the judgment for $66,951,021.85 is not to be released because of any bankruptcy of the respondent judgment debtors. The BIA provides:

> 178. (1) An order of discharge does not release the bankrupt from …
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> (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;
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> (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;

[34] For s. 178(1)(d) to apply, it must be established that the Waltons acted in a fiduciary capacity. Before Brown J., the applicants contended that the Waltons were directors of each of the Schedule B Companies, managed those companies' day-to-day affairs and exercised complete control over the funds invested by the applicants in the Schedule B Companies. Thus the Waltons owed fiduciary duties to the Schedule B Corporations to use the funds invested by

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[1] Any further equity distributions to the applicant corporations from the Schedule B Companies or from any Schedule C Company will reduce the amount of damages payable to the applicant corporations.

the applicants in the best interests of the corporations. Since those were closely-held, specific-purpose corporations, their best interests were shaped, in large part, by the terms of the agreements between the applicants and respondents. The applicants contended that the diversion of funds out of the Schedule B Company by the Waltons for their own purposes was a breach of their fiduciary duties. Brown J. agreed and stated:

> **264** I accept the arguments made by the Applicants. The Waltons breached their contractual obligations to Dr. Bernstein and their fiduciary duties to the Schedule B Companies by pooling the funds advanced by the Applicants to the Schedule B Companies with Rose& Thistle and Schedule C Company funds. ..
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> **273** ... The Waltons caused the current problems by ignoring their contractual obligations with, and fiduciary duties owed to, investors by co-mingling investment funds and appropriating some of the funds to their own benefit.

[35] As the liability of the Waltons arose from their fraud while acting in a fiduciary duty to Dr. Bernstein, it is appropriate and is declared that their liability to the applicants for $66,951,021.85 plus interest will survive any bankruptcy of the Waltons under section 178(1)(d) of the BIA.

[36] With respect to section 178(1)(e), the liability of the Waltons arose from their fraudulent misrepresentation that caused them to obtain property, in this case the funds of the applicants, either directly or through the Schedule B and C Companies. Thus it is also appropriate and is declared that the Waltons' liability to the applicants for $66,951,021.85 plus interest will survive any bankruptcy of them under section 178(1)(e) of the BIA.

The Waltons' counter-application for damages

[37] In my view the counter-application and the claims asserted in the factum of the Waltons are frivolous and vexatious and an abuse of the process of the Court.

[38] The Waltons claim large amounts in their factum totalling some $12,200,000 for various heads of work said to have been by Rose & Thistle for the Schedule B Company properties. They assert that no damages award should be granted to Dr. Bernstein until the work the Waltons did and the deposits the Waltons paid are quantified and that their work dramatically increased the appraised value of the portfolio for which they received no credit for any of that work. They assert that to award damages without first quantifying the work done would result in tremendous injustice.

[39] This issue was before Brown J. He held that the Waltons had established only $1 million owed and dismissed the claim for a trial to value what was owed by the Schedule B Companies. This was after a great deal of evidence had been filed by the Waltons that Brown J. rejected in favour of the analysis done by the Manager. I have referred to Brown J.'s findings in paragraphs 15 and 16 above in these reasons. The issue is *res judicata*.

[40] The Waltons also claim damages as against Dr. Bernstein personally for $52 million, being $26 million of their equity from the Schedule B portfolio that he destroyed and $26 million of their equity from the Schedule C portfolio that he destroyed. They also claim that the Schedule B Companies and Dr. Bernstein owe $14,106,536 "to compensate the Schedule C investors for wantonly destroying the equity in their properties".

[41] The substance of the complaint is that Dr. Bernstein caused these losses by reason of applying to Court to have a Manager appointed that destroyed the value of the properties. There is no basis for this argument to be made in light of the following:

(i) There can be no liability for making an application to a Court. It is up to the Court to decide whether a Manager should be appointed or later to make orders on the application of a party. The fact that a Manager is appointed by a Court cannot be the basis of liability on the applicant resulting from the order or the things done by the Manager pursuant to its appointment.

(ii) The sales of property conducted by the Manager were all approved by the Court. There is no basis to now contend that the properties were sold at an improvident

value. To do so would be to make an impermissible collateral attack on those orders. In the counter-application it is asserted that the appointment of the Manager substantially diminished the value of the properties and that the properties "in control of the Court were improvidently liquidated". They claim that because they were excluded from discussions with prospective purchasers under a Court order precluding them from doing so, the value of the portfolio was reduced significantly.

(iii) The issue is *res judicata* in light of the same arguments made by the Waltons before me and in the hearing before Brown J. and the findings dismissing the argument. Brown J's findings at paras 211 and 212 of his decision are set out above at paragraph 30 of these reasons. In my endorsement dated February 9, 2015 dismissing a motion that challenged the priority of the Manager's charge on the basis that, *inter alia*, the Manager's appointment was not necessary, I stated:

> [25] Moreover, the receiver was necessary to preserve and realize the property of all of the schedule B corporations ... for the benefit of all interested parties, including secured creditors. All of the properties were in chaos at the time the Manager was appointed and the subject of wrongful conduct, including co-mingling of funds, a lack of records and unauthorized use of funds. If the Waltons had been left unchecked, the adverse effects would undoubtedly have been worse.

(iv) The order appointing the Manager as manager of the Schedule C Companies was made by Brown J. over the objections of Ms. Walton. She argued that she should be able to sell the properties. Brown J. rejected the arguments, stating:

> **273** I do not accept those arguments. The Waltons caused the current problems by ignoring their contractual obligations with, and fiduciary duties owed to, investors by co-mingling investment funds and appropriating some of the funds to their own benefit. The task now facing the Court is, in part, to put in place a process which will minimize the damage caused by the Waltons unlawful conduct and which will deal fairly with all competing interests. Ms. Walton, in her evidence, disclosed her intention to prefer improperly the interests of other creditors over those of Dr. Bernstein, for it was her position that the claims of preferred

> shareholders and debtors of Schedule C Companies should rank first in priority over any claim which Dr. Bernstein might have in the proceeds of sale from any Schedule C Property. As Ms. Walton put it, Dr. Bernstein should not be "permitted to leapfrog over the claims of the innocent third party investors". In paragraph 86 of her Factum Ms. Walton also stated that she intended to apply all proceeds of sale from the severed Park Lane Circle properties to pay her "investors and debtors", except for Dr. Bernstein. Further, quite unnecessary problems arose when Ms. Walton arranged the sale of the Gerrard Street and Front Street properties earlier this year; those problems resulted in parties incurring unnecessary expenses. In light of those circumstances, I see no basis upon which to allow Ms. Walton to exercise any control over the future operation of the Schedule C Properties. She and her husband must be removed from dealing with Schedule C Properties and that task put in the hands of a court-appointed receiver who will take into account the interests of all claimants against the properties.

[42] In the circumstances, the counter-application by the Waltons, Rose & Thistle and Eglinton Castle Inc. is struck without leave to amend.

Applicants claims against the Schedule C Companies

[43] The applicants claim damages of $22,680,852 jointly and severally against the Schedule C Companies. The Manager holds proceeds of approximately $4.65 million from the sale of eleven Schedule C Company properties.

[44] The claim is based on an alleged knowing assistance provided by the Schedule C Companies to the transfer out of the Schedule B Companies of a net of $23,680,852 million to Rose & Thistle that was found by Brown J. to have occurred. After a deduction is made for $1 million, being a reconciliation of management fees, the balance is $22,680,852. Brown J. also held that Rose & Thistle transferred a net amount of $25.4 million to the Schedule C Companies. He stated that the Applicants have demonstrated a strong *prima facie* case of unjust enrichment of up to a possible claim of $22.6 million against the Waltons in respect of the Schedule C Properties against which a constructive trust remedy was not ordered.

[45] The theory of the claim is that the Waltons were the controlling minds of the Schedule C Companies and used them to further their fraudulent activity and breach of their fiduciary duties owed to the applicants. Thus it is contended that the Schedule C Companies are liable for knowingly assisting Ms. Walton to breach her fiduciary duties to the applicants.

[46] The constituent elements of the tort of knowing assistance in breach of fiduciary duty are well known: (1) there must be a fiduciary duty; (2) the fiduciary must have breached that duty fraudulently and dishonestly; (3) the stranger to the fiduciary relationship must have had actual knowledge of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct; and (4) the stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct. The knowledge requirement for liability based on this tort is actual knowledge. See *Enbridge Gas Distribution Inc. v Marinaccio*, 2012 ONCA 650 at para 23. The type of behaviour captured by the phrase fraudulent and dishonest conduct is the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take. See *Enbridge* at para. 27 and *Air Canada v M & L Travel Ltd.*, [1993] 3 SCR 787 at para. 59.

[47] There is no question but that Ms. Walton knowingly breached her fiduciary obligations to the 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.

[48] A century ago, Lord Haldane stated that a corporation is an abstraction with no mind of its own and that its active and directing will must consequently be sought in the person of somebody who the directing mind and will of the corporation, the very *alter ego* and centre of the personality of the corporation. See *El Ajou v Dollar Land Holdings plc*, [1994] 2 All ER 685 at p. 695-696(CA) in which Nourse L.J. stated at p. 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 *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.* (1915) AC 705, 713:
>
> "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 Mr Justice Millett, at p.740J:
>
> "Their minds are its mind; their intention its intention; their knowledge its knowledge."

[49] This principle is applicable to civil torts cases, as stated by Nourse J.A. in *El Ajou.* It has been recognized in Canada. See *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal,* [2002] 4 SCR 312 in which Major J. stated:

> **19** There can be no doubt that Lakusta's act of directing the Bank to deposit the proceeds of the cheque into Legacy's account can be attributed to and considered authorized by 373409. See *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, [1915] A.C. 705 (H.L.), *per* Viscount Haldane L.C., at p. 713:
>
> ... 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. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself... .
>
> **20** Here, Lakusta was the sole shareholder, director, and officer of 373409. He was the only person capable of acting as the corporation's directing mind, and he formed the entire "ego" and "personality" of the corporation.

[50] It is argued that Ms. Walton was the directing mind of each of the Schedule C Companies and thus her knowledge is taken to be the knowledge of those corporations for the purpose of the tort of knowing assistance. I have difficulty with this argument taken the investor agreements for the Schedule C properties. All of the Schedule C investor agreements in the record contain the same provisions. The Waltons and the investor were each to be 50% owners of the shares and each hold 50% of the board of directors' positions. The company into which the investments were to be made was to be used solely for the property to be purchased. Any significant decisions that differed from the project plan required more than 50% shareholder approval. If the parties disagreed on how to manage, supervise and complete construction of the project, there was to be mandatory mediation and arbitration.

[51] 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.

[52] This issue raised by the 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.

[53] 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 applicants for knowing assistance.

[54] The applicants also make a claim against the Schedule C Companies for which the Manager is holding proceeds of sales on the basis of knowing receipt of trust money. Liability for knowing receipt of trust property requires a lower threshold of knowledge than liability for knowing assistance and constructive knowledge (that is knowledge of sufficient facts to put a reasonable person on notice or inquiry) will suffice as a basis of restitutionary liability. See *Citadel General Insurance Co. v. Lloyd's Bank Canada,* [1997] 3 S.C.R. 805 at para. 48.

[55] However, for the same reason that pertains to the claim of knowing assistance, I cannot find that the Schedule C Companies are liable for knowing receipt of trust money. There is no evidence that the investors were put on sufficient notice to make enquiry as to what Ms. Walton was up to.

[56] There is another reason why the knowing receipt of trust money claim has not been proven. Reliance by the applicants is put on a schedule to the fourth interim report of the Inspector as to cash transferred from Schedule B and C Companies to Rose & Thistle and from Rose & Thistle back to the Schedule B and C Companies. The schedule is as of December 31, 2013.

[57] For example, for 6195 Cedar Street Ltd. it shows transfers from that company to Rose & Thistle totalling $134,200 and transfers from Rose & Thistle to that company of $690,335 for a net transfer from Rose & Thistle as of December 31, 2013 of $556,135. As 6195 Cedar Street Ltd. is a Schedule C Company, the applicants claim $556,135 on a knowing receipt of trust money claim. 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.

[58] 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.

[59] 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.

DeJong claims of a constructive trust over Schedule C Companies properties

[60] Christine DeJong Medicine Professional Corporation ("DeJong") makes a constructive trust claim with respect to four properties owned by Schedule C Companies. Investments or loans were made to several Schedule C Companies by Christine DeJong and her husband of approximately $4 million.

[61] The basis for a constructive trust based on unjust enrichment was discussed by Brown J. in his decision at para. 258 to 260. He summarized the need to establish that the funds wrongfully acquired by unjust enrichment were used for the property over which a constructive trust is sought in para. 258, which in part stated:

> **258** The constructive trust is a remedial device available where an unjust enrichment has occurred and also as a remedy for oppressive conduct. The remedial constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property. In nature it is a proprietary remedy: where a claimant can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour. The claimant must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust. The primary focus is on whether the contributions have a "clear proprietary relationship".

[62] Thus in order for a constructive trust based on unjust enrichment, DeJong must demonstrate a link or causal connection between its contributions and the acquisition, preservation, maintenance or improvement of the disputed property.

[63] However, a constructive trust remedy is not restricted to a remedy for unjust enrichment. In *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 McLachlin J. (as she then was) made clear that the remedy is not restricted to claims of unjust enrichment and is available to cases in which constructive remedies were available under English law, including cases of a breach of fiduciary obligations. She stated in part:

> **16** The appellants argue that this Court has adopted a view of constructive trust based exclusively on unjust enrichment in cases such as *Pettkus v. Becker*, [1980] 2 S.C.R. 834. Therefore, they argue, a constructive trust cannot be imposed in cases like this where the plaintiff can demonstrate no deprivation and corresponding enrichment of the defendant.
>
> **17** The history of the law of constructive trust does not support this view. Rather, it suggests that the constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but 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....
>
> **19** The situations in which a constructive trust was recognized in England include constructive trusts arising on breach of a fiduciary relationship,...
>
> **25** I conclude that the law of constructive trust in the common law provinces of Canada embraces the situations in which English courts of equity traditionally found a constructive trust as well as the situations of unjust enrichment recognized in recent Canadian jurisprudence.

[64] I will deal with each property in issue.

(a) United Empire Lands Ltd.

[65] The investment agreement signed by DeJong with the Waltons dated February, 2013 provided that DeJong and the Waltons would each possess 50% of the shares of United Empire Lands Ltd. ("UEL"). It stated that DeJong had already paid $716,906 into the company. The total contribution required by each side was $992,750. DeJong paid that total amount but the Waltons paid nothing.

[66] Funds totalling $706,850 were transferred out of UEL to the Rose & Thistle account between January 28 and 31, 2013.

[67] On March 11, 2013 UEL closed the purchase of the UEL property at 3270 American Drive. Brown J. held that $1,032,000 came from the Rose & Thistle account to purchase the property. He accepted the analysis of the Inspector that this money came from money invested by the applicants in West Mall Holdings, a Schedule B Company, and held that the applicants were entitled to a constructive trust over the 3270 American Drive property for $1,032,000.

[68] It was argued based on the Froese report filed by the Waltons that $706,850 of the funds in the UEL account paid by DeJong were transferred to Rose & Thistle and that these funds were being repaid to UEL through the $1,032,000 transfer from Rose & Thistle to UEL. Brown J. did not accept the Froese report conclusion that the $1,032,000 from Rose & Thistle was in part a repayment of funds advanced by DeJong to UEL and concluded that the $1,032,000 was from Dr. Bernstein's funds invested in West Mall Holdings.

[69] The purchase price for the property was $6.7 million, financed by mortgages of $5.67 million and $1.032 million from Rose & Thistle, which was held to be Dr. Bernstein's money. DeJong invested a total of $992,750. It is known that $706,850 was transferred to Rose & Thistle. $10,000 was used as a deposit on the purchase of the property according to the report of Mr. Ken Froese of May 23, 2014. There has been no evidence led as to what happened to the balance of the investment made by DeJong, being $275,900, but it is clear that it was not put into the property as required by the agreement of DeJong with the Waltons.

[70] The only DeJong money that ended up in the property was the $10,000 deposit. This can be no basis for a constructive trust based on unjust enrichment because there was no unjust enrichment with respect to that deposit. That money was used as agreed. Thus DeJong is not entitled to a constructive trust based on unjust enrichment.

[71] However, there is no doubt that the Waltons owed fiduciary duties to DeJong to apply the money as agreed and not to transfer money out of UEL to Rose & Thistle, just the same as the fiduciary duties owed by the Waltons to Dr. Bernstein and his companies were breached. The Waltons were directors and Ms. Walton managed the day to day affairs of the business. The investment of DeJong was under the complete control of the Waltons. They owed a duty to act in the best interests of the company, which included a duty to invest as required by the agreement made with DeJong.

[72] The Waltons breached those fiduciary duties by transferring to Rose & Thistle money invested by DeJong in UEL. Only $10,000 invested by DeJong in UEL was invested in the property. The Waltons further breached their fiduciary duty to DeJong to properly manage the business. They failed in this by using Dr. Bernstein's money to purchase 3270 American Drive, which has led to Dr. Bernstein having a constructive trust against the property, instead of investing their own money which they were obliged to do. Moreover, the Waltons did not provide all of the capital required under the agreement with the Waltons. Ms. DeJong swears, which I accept, that in response to enquiries, Norma Walton stated her money was not required to match DeJong's capital because of a second position vendor take-back mortgage in the amount of $670,000. That makes no sense as even if there was a vendor take-back mortgage, that would not amount to any capital provided by the Waltons which they had agreed to provide. Failure to provide the funds as agreed was a breach of their fiduciary obligations to act in the best interests of UEL. Had the Waltons acted properly under the agreement, including keeping proper records, there would have been no reason to appoint a Manager.

[73] In my view the breach of fiduciary duties by the Waltons has led to the loss by DeJong of its investment of $992,750. The Manager holds $1,801,543.60 from the sale of the 3270 American Drive property. Brown J. has already ordered a constructive trust in favour of Dr. Bernstein's company of $1,032,000. The appropriate remedy for DeJong is to grant it a

constructive trust against the property and its proceeds for the balance of the proceeds of sale after taking into account the constructive trust in favour of Dr. Bernstein's company, being $769,543.60 plus accrued interest, and I so order.

[74] As the Waltons invested nothing in this project, they are not entitled to any interest in UEL and the shares issued to them are cancelled.

(b) 324 Prince Edward Drive

[75] DeJong entered into an agreement with the Waltons dated September , 2013 to deal with the purchase of 324 Prince Edward Drive to be put in the name of Prince Edward Properties Ltd. The agreement provided that DeJong would acquire 100 shares in the company and the Waltons would acquire 100 shares. The agreement provided that each of the Waltons and DeJong were to provide $816,019 to the corporation as a shareholder loan for the purpose of purchasing, renovating, completing leasehold improvements and occupying the property. On September 10, 2013, DeJong advanced $816,019 to the corporation which was put in its bank account.

[76] The sale closed on September 13, 2014. The purchase price was $1,850,000 with a vendor take-back mortgage of $1,480,000. $370,000 in cash was required to complete the purchase.

[77] The bank records indicate that $100 was deposited on September 3, 2013 from Rose & Thistle leaving a balance that day of $95. The only deposit after that before the closing was the deposit from DeJong on September 10, 2013 of $816,019. $346,314.89 was wired on September 12, 2013 to the real estate solicitors acting on the purchase for the closing of the property. Where the other funds came from to close is not in the record. However, on September 11, 2013 $309,000 of the funds deposited by DeJong were transferred out to Rose & Thistle's account and it is possible that the balance to close came from these funds. The balance of the deposit from DeJong was transferred out of the account to Rose & Thistle four days after the closing on September 17, 2013.

[78] Although the agreement between the Waltons and DeJong stated that the Waltons had provided the initial $80,000 deposit, that clearly could not have taken place as $346,314.89 of the cash portion of $370,000 came from DeJong. The bank record does not disclose any deposit of that amount to the account. The agreement also stated that the Waltons had provided "due diligence fees of approximately $60,000 related to the purchase of the Property". There is nothing in the record to show what due diligence was done. The agreement provided that the Waltons would provide the remaining $676,019 in a timely manner. The bank records indicate there were some deposits made to the account from time to time before the property was sold, but nowhere near what the Waltons agreed to provide, and there is no evidence that those deposits were made from funds other than the money invested by DeJong that was improperly transferred to Rose & Thistle.

[79] It is apparent that $346,314.89 of the money invested by DeJong in Prince Edward Properties Ltd. was used to purchase the property at 324 Prince Edward Drive. I do not see this as unjust enrichment of the Waltons as the money was used to purchase the property that the agreement between the Waltons and DeJong contemplated.

[80] However, like the other Schedule C properties in which DeJong invested money, the Waltons owed a fiduciary duty to DeJong. They breached their duties by transferring to Rose & Thistle $507,019 of the loan made by DeJong to the corporation. This was done immediately after the funds were advanced by DeJong and was fraudulent, just as the actions of the Waltons were with respect to Dr. Bernstein. The Waltons also failed to provide financing as required in breach of their fiduciary obligations to act in the best interests of the company. Had the Waltons acted properly under the agreement, including keeping proper records, there would have been no reason to appoint a Manager.

[81] In my view the breach of fiduciary duties by the Waltons has led to the loss by DeJong of its investment. The Manager has accepted the loss of DeJong filed in the claims process of $741,501.97. There are proceeds from the sale of the property of $640,812.73. The appropriate remedy for DeJong is to grant it a constructive trust against the property and its proceeds, being $640,812.73 plus accrued interest, and I so order.

[82] Had I not held that DeJong was entitled to a constructive trust against the property, I would have declared that the $741,501.97 invested by DeJong was by way of a shareholder loan, as provided for in the agreement with the Waltons and that DeJong would be entitled to be a creditor for that amount against the corporation. I would not accept the argument made on behalf of the applicants that the investment was an equity investment for the shares of the corporation. The agreement said otherwise and there is no basis to change that.

[83] There is no evidence that the Waltons invested anything in this property except perhaps $100 and the shares issued to them in Prince Edward Properties Ltd. are cancelled.

(c) 777 St. Clarens Ave./260 Emerson Ave.

[84] On 18 November, 2013 the Waltons and DeJong entered into an agreement with the Waltons to deal with the purchase of 777 St. Clarens Ave./260 Emerson Ave. to be put in the names of St. Clarens Holdings Limited and Emerson Developments Ltd. The agreement provided that DeJong would acquire 100 shares in each company and the Waltons would acquire the 100 shares in each company. The agreement provided that each of the Waltons and DeJong were to provide $665,307 to the companies as a shareholder loan for the purpose of purchasing, renovating, completing leasehold improvements and occupying the property. It provided that the Waltons had paid a deposit of $80,000 "along with due diligence fees of approximately $50,000 related to the purchase of the property" and that the Waltons would provide the remaining $535,307 in a timely manner. On November 19, 2013, DeJong advanced $665,000 to the bank account of St. Clarens Holdings Limited.

[85] The agreement to purchase the properties was made on July 20, 2013 by St. Clarens Holdings Limited. The purchase price was $1,665,000 with a vendor take-back mortgage of $1,332,000. The purchase closed on November 26, 2013. It appears from the reporting letter from the solicitors for the purchaser that a deposit of $80,000 was made by the Waltons. The balance on closing was $$252,397.91.

[86] In fact the deposit was not made at the time of the agreement by St. Clarens Holdings Limited. It was made on a prior purchase agreement by a numbered company of the Waltons

which was assigned to Rose & Thistle in trust for a company to be incorporated and for which the Waltons' numbered company charged an assignment fee of $225,000. A Capital Required document in connection with the purchase referred to a "Purchaser agency fee" of $225,000 as a purchase cost. It is not in the record when that document was provided to DeJong, but it did not disclose that the money was being paid to a Walton numbered company. The $665,000 advanced by DeJong as a shareholder loan covered 50% of the $225,000 to be paid to the Waltons. Ms. DeJong swore in her affidavit that the fee to the Waltons was never discussed with her nor disclosed. She was not cross-examined on her affidavit and I accept that evidence. The payment to the Waltons of the $225,000 was clearly deceitful and in breach of the fiduciary duties owed by them to DeJong.

[87] There is no evidence that apart from the $80,000 deposit that the Waltons made any further payments on the project. The two properties were sold by the mortgagee, after which the Manager was provided the balance of the funds. The mortgage was to be serviced by the loan made by DeJong and to be made by the Waltons, and as DeJong made its loan as agreed, the failure of the mortgage to be serviced was clearly the fault of the Waltons in failing to properly act in the best interests of the corporations.

[88] Like the other Schedule C Companies in which DeJong invested money, the Waltons owed a fiduciary duty to DeJong. They breached their duties by having DeJong pay 50% of an undisclosed assignment fee. They also breached their fiduciary duty to act in the best interest of the company by failing to provide financing as required. DeJong has lost its shareholder loan of $665,000, and the Manager has accepted that as a valid claim against the two companies. Had the Waltons acted properly under the agreement there would have been no reason for the mortgagee to sell the properties as the carrying costs of the mortgage were provided for in the Capital Required calculations.

[89] In my view the breach of fiduciary duties by the Waltons has led to the loss by DeJong of its investment of $665,000. The Manager holds $200,533.77 from the proceeds of sale of the Emerson property and $464,195.89 from the sale of the St. Clarens property, for a total of $664,729.66. The appropriate remedy for DeJong is to grant it a constructive trust against the properties and their proceeds, being $664,729.66 plus accrued interest, and I so order.

[90] Had I not held that DeJong was entitled to a constructive trust against the two properties, I would have declared that the $665,000 invested by DeJong was by way of a shareholder loan, as provided for in the agreement with the Waltons and that DeJong would be entitled to be a creditor for that amount against the two companies. I would not accept the argument made on behalf of the applicants that the investment was an equity investment for the shares of the corporations. The agreement said otherwise and there is no basis to change that.

[91] Regarding the shares held by the Waltons in the two corporations St. Clarens Holdings Limited and Emerson Developments Ltd., the evidence is that the Waltons paid a deposit of $80,000 and thus their shares should not be cancelled in their entirety. I would limit the share of the Waltons to the percentage of the deposit to the contributions they were required to make, which is what Brown J. did regarding the Waltons' shareholdings in the schedule B corporations. That percentage as I make it is approximately 12% and so I order that 88 of the 100 shares acquired by the Waltons in each corporation be cancelled.

Conclusion

[92] The applicants are entitled to the relief against the respondents other than the Schedule C Companies as indicated in this decision. They are not entitled to any of the relief claimed against the Schedule C Companies. DeJong is entitled to the relief against the Schedule C Companies as indicated in this decision. The counter-application of the Waltons, Rose & Thistle and Eglington Castle Investments Ltd. is struck without leave to amend.

[93] The applicants are entitled to their costs against the respondents other than the Schedule C Companies. DeJong, the Condos and the Levytams are entitled to their costs against the applicants. If costs are not agreed, brief written submissions not exceeding 10 pages supporting the cost claims along with proper cost outlines may be made within two weeks and brief written responding cost submissions not exceeding 10 pages may be made within a further two weeks.

Newbould J.

Date: September 23, 2016