SCC File No. 38051

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION

APPELLANT
(Respondent)

- and -

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

RESPONDENTS
(Appellants)

[style of cause continued on Schedule A]

FACTUM OF THE APPELLANT, CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION

(Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

Torys LLP
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, ON M5K 1N2
Fax: 416.865.7380

Jeremy Opolsky
Tel: 416.865.8117
Email: jopolsky@torys.com

Jonathan Silver
Tel: 416.865.8198
Email: jsilver@torys.com

Alicja Puchta
Tel: 416.865.8156
Email: apuchta@torys.com

Power Law
1103 – 130 Albert St.
Ottawa, ON K1P 5G4
Tel/Fax: 613.702.5573

Maxine Vincelette
Email: mvinceletter@powerlaw.ca

Agent for the Appellant,
Christine DeJong Medicine Professional Corporation

Simpson Wigle LAW LLP
1006 Skyview Drive
Suite 103
Burlington, ON L7P 0V1
Fax: 905.528.9008

Rosemary A. Fisher
Tel: 905.639.1052, ext. 239
Email: fisherr@simpsonwigle.com

Counsel for the Appellant,
Christine DeJong Medicine Professional Corporation

Lenczner Slaght Royce Smith Griffin LLP
Barristers and Solicitors
130 Adelaide St. W.
Suite 2600
Toronto, ON M5H 3P5
Fax: 416.865.9010

Peter H. Griffin
Tel: 416.865.2921
Email: pgriffin@litigate.com

Shara N. Roy
Tel: 416.865.2942
Email: sroy@litigate.com

Counsel for the Respondents,
DBDC Spadina Ltd. and Those Corporations Listed on Schedule A Hereto

Dentons Canada LLP
Barristers and Solicitors
99 Bank St.
Suite 1420
Ottawa, ON K1P 1H4
Fax: 416.865.9010

David Elliot
Tel: 613.783.9699
Email: david.elliot@dentons.com

Agent for the Respondents, DBDC Spadina Ltd. and Those Corporations Listed on Schedule A Hereto

TABLE OF CONTENTS

Page

PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. This appeal is a contest between two sets of victims of the same fraudulent scheme. One set of victims has sued the other for knowingly assisting in the fraud.

2. The question on this appeal is whether the act of being defrauded can make victims culpable for the very fraud that victimized them. The answer must be an emphatic **no**.

3. Dr. Christine DeJong and her husband, through investment companies, invested over $3.8 million with the Waltons in several project-specific real estate ventures. The DeJongs and Waltons each agreed to contribute half of the capital in each project. The DeJongs did. The Waltons did not, because they were running a fraud. The Waltons did not invest the DeJongs' funds. Rather, they took them almost immediately for their own purposes.

4. To date, the DeJongs have recovered no money back from their investments. They were the sole investors in four companies (the "DeJong Companies") that have funds remaining. The DeJongs want those funds back to recover some of their losses.

5. Dr. Bernstein, through his investment companies, also invested with the Waltons and was also defrauded. But he was the first to discover the fraud and has already recovered a significant portion of his investment. To recover even more, he brought an application to collect $22.6 million against the DeJong Companies, alleging that they committed knowing assistance in the fraud. If he succeeds, the DeJongs' chance of any recovery will be wiped out.

6. But there is nothing connecting Dr. Bernstein's investments to the money left in the DeJong Companies. He undertook a tracing analysis and received constructive trusts over money that the tracing could support. Although the court invited him to conduct further tracing, he declined to do so. Instead, he claimed knowing assistance against the DeJong Companies, on the basis that Ms. Walton, who was a director of those companies, committed the fraud.

7. The application judge rejected Dr. Bernstein's claim of knowing assistance. Despite the lack of evidence connecting Dr. Bernstein's investments to the DeJong Companies, a majority of the Court of Appeal reversed. The DeJongs appeal on three issues.

8. First, the DeJong Companies did not assist or participate in the Waltons' fraud on Dr. Bernstein. Nothing the DeJong Companies did facilitated the fraud. Nor did they benefit from it: the DeJong Companies lost significant sums to the Waltons. Two of the four DeJong Companies *did not even exist* during the period of the Bernstein fraud, and the other two played no role in the fraud on Dr. Bernstein.

9. The Court of Appeal nonetheless found that the DeJong Companies participated in the fraud on Dr. Bernstein because the Waltons took money *from* the DeJong Companies to further their larger fraudulent scheme. But being the victim of a larger fraud does not make one complicit in the fraud of other victims. Culpability for knowingly assisting a fraud cannot arise from the act of being defrauded.

10. Second, liability for knowing assistance requires that the DeJong Companies had knowledge of Ms. Walton's wrongs against Dr. Bernstein and his companies. The Court of Appeal attributed the knowledge of the fraudsters to the DeJong Companies by concluding that Ms. Walton was their directing mind. But corporations cannot be imputed with the acts or knowledge of a principal who is acting solely for her own benefit and defrauding the corporation. Where a fraudster abuses her position to harm and defraud a corporation, she ceases to act on its behalf. The corporation cannot be both the perpetrator and victim of the same fraud. When Ms. Walton used her position in the DeJong Companies to carry out her fraud, she was acting as their adversary, not their agent. Her knowledge of the fraud cannot fairly be imputed to the same corporations she was defrauding.

11. Third, this is an extraordinary use of the doctrine of knowing assistance, by one victim of a fraud against other innocent investor hurt by the same fraud. All equitable remedies are discretionary and this Court should not award a remedy for knowing assistance where, as here, it works an unjust result. There is no reason to prefer Dr. Bernstein's interests over the other victims merely because he discovered the fraud and started a lawsuit before they did.

The parties

12. The appellant, Christine DeJong Medicine Professional Corporation ("DeJong PC"), is the professional corporation of Dr. Christine DeJong, a community obstetrician and gynecologist. Through DeJong PC, Dr. DeJong and her husband, Michael DeJong, a

homebuilder, invested in a number of commercial real estate projects with Norma and Ronauld Walton. Mr. DeJong also invested with the Waltons through his own companies.[1]

13. The respondents, DBDC Spadina Ltd. and the Schedule A Corporations (the "DBDC Applicants") are investment companies owned and controlled by Dr. Stanley K. Bernstein, the founder of a successful weight loss clinic empire spanning over 60 locations in Canada. Through the DBDC Applicants, Dr. Bernstein also invested with the Waltons.[2]

14. Norma and Ronauld Walton are married. Both are lawyers. They created the Rose & Thistle Group Ltd. ("Rose & Thistle") in 2001. The Waltons promoted Rose & Thistle as a legitimate real property investment company formed to acquire, develop, and manage commercial real estate properties in the Greater Toronto area.[3] In reality, Rose & Thistle was at the heart of a complex investment fraud perpetrated by the Waltons.

15. For greater clarity, a glossary of the identity of the parties and other entities and terms relevant to this appeal is appended as Schedule D to this factum. The glossary includes a comparison of how similar terms were defined in the decisions below.

The Waltons' fraudulent scheme

16. At the peak of their scheme, the Waltons had managed to convince dozens of innocent investors—including the DeJongs and Dr. Bernstein—to invest more than $100 million in some 50 single-purpose corporations created to finance individual commercial real estate projects.[4] In

---

[1] Reasons of the Application Judge, dated July 16, 2016 ("Application Judge's Reasons"), para. 60, Appeal Record ("AR"), Vol. I, Tab 4, p. 87; Reasons of Brown J., August 12, 2014 ("Brown J. Reasons"), paras. 281-282, AR, Vol. IV, Tab 32, pp. 281-282.

[2] Endorsement of Newbould J., dated November 5, 2013 ("Newbould J. November 5, 2013 Reasons"), paras. 4-6, AR, Vol. III, Tab 23, p. 127; Affidavit of Norma Walton, sworn October 31, 2013 ("Walton October 31, 2013 Affidavit"), paras. 4-5, AR, Vol. X, Tab 53, pp. 123-124.

[3] Brown J. Reasons, paras. 5-6, AR, Vol. IV, Tab 32, pp. 75-76; Print-out from Rose & Thistle Website, Exhibit "125", Affidavit of Jim Reitan, sworn June 26, 2014 ("Reitan Affidavit"), AR, Vol. X, Tab 50N, p. 8; Walton October 31, 2013 Affidavit, paras. 3-8, AR, Vol. X, Tab 53, pp. 123-125.

[4] Walton October 31, 2013 Affidavit, paras. 9, 14-40, AR, Vol. X, Tab 53, pp. 125-142; Affidavit of Norma Walton, sworn December 17, 2013 ("Walton December 17, 2013 Affidavit"), paras. 16-20, AR, Vol. XI, Tab 54, pp. 8-32.

many of these projects, the Waltons promised to invest an equal amount of equity. In reality, they contributed little, if anything, to the projects.[5]

17. Instead, the Waltons treated their investors' funds as their own, spreading the funds out across a complex web of over 50 bank accounts, sometimes using them to fund their obligations to creditors in certain projects, sometimes using them to line their own pockets. The Waltons misappropriated the investors' money to benefit themselves by:

(1) using the money to purchase and renovate their personal residence at 44 Park Lane Circle, a palatial mansion in Toronto's affluent Bridle Path neighborhood;

(2) transferring the money to entities owned solely by them;

(3) transferring the money into Ms. Walton's personal bank account and using it for their "own personal use"; and

(4) using the money to repay loans they owed and to satisfy financial obligations they owed to other investors.[6]

18. Rose & Thistle was at the centre of the scheme. Although the Waltons represented that investment funds would remain in project-specific entities, this was rarely true in practice. Soon after investor funds were deposited in the entity's account, the Waltons would move the funds to Rose & Thistle. From there, the Waltons could direct the money into their personal bank accounts or into one of the many other project-specific accounts in their scheme. Ms. Walton described Rose & Thistle as a central "clearing house" through which she "smoothed out" the flow of investor funds.[7]

---

[5] Application Judge's Reasons, paras. 29, 71-72, 80, 88, AR, Vol. I, Tab 4, pp. 76-77, 90, 92, 94.

[6] Application Judge's Reasons, paras. 12, 72, AR, Vol. I, Tab 4, pp. 69, 90; Brown J. Reasons, paras. 104, 130-131, 145, 149, AR, Vol. IV, Tab 32, pp. 115, 121, 125-127; Newbould J. November 5, 2013 Reasons, para. 11, 46, AR, Vol. III, Tab 23, pp. 129, 140-141; Reasons of the Court of Appeal, dated January 25, 2018 ("Court of Appeal Reasons"), para. 247, AR, Vol. II, Tab 7, p. 110.

[7] Brown J. Reasons, para. 181, AR, Vol. IV, Tab 32, p. 135.

The DeJongs' investments with the Waltons

19. In 2004, the DeJongs began investing with the Waltons. Their investments were initially structured as share purchases in real property holding companies. In 2012, the DeJongs started participating in project-specific companies as equal shareholders with the Waltons.[8]

20. Between April 2012 and November 2013, the DeJongs entered into shareholder agreements (the "Shareholder Agreements") with the Waltons in respect of six such companies, including the following four involved in this appeal (the "DeJong Companies"):

(1) **United Empire Lands Ltd. ("United Empire")**, into which DeJong PC agreed to invest in February 2013, advancing $992,750;[9]

(2) **Prince Edward Properties Ltd. ("Prince Edward")**, into which DeJong PC agreed to invest in September 2013, advancing $816,019;[10] and

(3) **St. Clarens Holdings Ltd. ("St. Clarens")** and **Emerson Developments Ltd. ("Emerson")**, into which DeJong PC agreed to invest in November 2013, advancing $665,307.[11]

21. The Shareholder Agreements set out the scope of each project and the nature of each real estate investment, stipulating that:

(1) the Waltons would contribute equity equal to that invested by DeJong PC;

(2) in exchange for their equity contributions, the DeJongs and Waltons would each have a 50% ownership of a project-specific holding company and would be named as its directors;

(3) the equity investments would be used solely for acquiring, renovating, and managing a project-specific property;

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

---

[8] Affidavit of Christine DeJong, sworn July 8, 2014 ("DeJong July 8, 2014 Affidavit"), para. 3, AR, Vol. V, Tab 47, p. 91.

[9] Application Judge's Reasons, para. 65, AR, Vol. I, Tab 4, p. 89.

[10] Application Judge's Reasons, para. 75, AR, Vol. I, Tab 4, p. 91.

[11] Application Judge's Reasons, para. 84, AR, Vol. I, Tab 4, p. 93.

(5) the Waltons would keep proper records of the company's dealings and provide the DeJongs with access to those records.[12]

22. Unbeknownst to the DeJongs, the Waltons repeatedly breached the Shareholder Agreements and their fiduciary duties by: (1) failing to inject their share of the promised capital, and in most cases any capital at all, into the DeJong Companies; (2) using the DeJongs' money as the Waltons saw fit instead of acquiring or developing the property it was earmarked for; (3) for one company, using money taken from other investors to fund the Waltons' own financial obligations; (4) charging the companies for undisclosed fees and work that was never carried out; and (5) failing to keep an accurate accounting of records.[13] These breaches were the cause of the DeJongs' loss of their investments.[14] Examining the Waltons' conduct in respect of each individual DeJong Company reveals the extent of their fraud.

23. ***United Empire***. The Shareholder Agreement required the DeJongs and Waltons to each contribute $992,750. The DeJongs paid that amount. The Waltons paid nothing. All of the DeJongs' money was supposed to be used to purchase a property at 3270 American Drive. But only $10,000 was used for that purpose.[15] At least $706,850 was transferred out to Rose & Thistle almost immediately after the DeJongs invested. Around $515,000 of those funds were then transferred to companies in which the DBDC Applicants had invested with the Waltons as equal shareholders (the "DBDC Companies" referred to below as the "Schedule B Companies").[16] Instead of contributing their share of equity, the Waltons advanced funds taken

---

[12] Agreement respecting UEL dated February 2013, Capital Request Documents and Cash Flow Statement, Exhibit "D", DeJong July 8, 2014 Affidavit, AR, Vol. V, Tab 47D, pp. 122-126; Agreement and Capital Required Document respecting 324 Prince Edward Drive, Toronto, Exhibit "K", Affidavit of Christine DeJong, sworn February 11, 2015 ("DeJong February 11, 2015 Affidavit"), AR, Vol. VII, Tab 48K, pp. 104-107; Agreement respecting 777 St. Clarens Avenue/260 Emerson Avenue, Toronto and Capital Request Documents, Exhibit "F", DeJong February 11, 2015 Affidavit, AR, Vol. VII, Tab 48F, pp. 56-59.

[13] Application Judge's Reasons, paras. 71-72, 80, 88, AR, Vol. I, Tab 4, pp. 90, 92, 94.

[14] Application Judge's Reasons, paras. 73, 81, 89, AR, Vol. I, Tab 4, pp. 90-92, 94.

[15] Application Judge's Reasons, paras. 65-72, AR, Vol. I, Tab 4, pp. 89-90.

[16] Brown J. Reasons, para. 287, AR, Vol. IV, Tab 32, p. 168; Affidavit of Christine DeJong, sworn October 7, 2015 ("DeJong October 7, 2015 Affidavit"), paras. 21-22, AR, Vol. VIII, Tab 49, pp. 189-190; Froese Forensic Report, para. 2.63-2.65, Exhibit "J", Affidavit of Norma Walton, sworn July 4, 2014 ("Walton July 4, 2014 Affidavit"), AR, Vol. XII, Tab 58J, p. 20.

from the DBDC Companies into the purchase of American Drive. As a result of the Waltons' wrongdoing, the DBDC Applicants were able to obtain a constructive trust for $1,032,000, subordinating the DeJongs' interest in the assets of United Empire.[17]

24. ***Prince Edward***. The DeJongs and Waltons were supposed to each advance $816,019 into the corporation. The DeJongs advanced their share. The Waltons advanced, at most, $100. Almost immediately after the DeJongs invested, the Waltons moved most of these funds out to Rose & Thistle. They used part of the funds ($346,314.89) to purchase project-specific property, with the remainder unaccounted for. The Waltons charged Prince Edward for $60,000 of due diligence that was never done and claimed they had provided $80,000 that was, in fact, never advanced.[18]

25. ***St. Clarens and Emerson***. The DeJongs and Waltons were supposed to each advance $665,307. The DeJongs advanced their share. The Waltons only advanced $80,000. They charged the corporations for $50,000 of due diligence that was never done and $225,000 for an assignment fee that was never disclosed or agreed to. The two properties owned by St. Clarens and Emerson were sold by the mortgagee after the Waltons failed to service the mortgage.[19]

26. The DeJongs also invested $500,000 and $617,000, respectively, into two other companies that are not at issue in this appeal: Lesliebrook Holdings and Front Church Properties.[20] These companies were also structured as single-purpose companies jointly owned by the Waltons and the DeJongs. Without consulting the DeJongs, and in breach of their agreements, Ms. Walton exchanged the DeJongs' shares in Lesliebrook and Front Church for shares in another company, Academy Lands.[21] The DeJongs cannot recover any of their lost investments from Lesliebrook, Front Church, or Academy Lands because the assets of these

---

[17] Application Judge's Reasons, paras. 67-69, 71-73, AR, Vol. I, Tab 4, pp. 89-91.
[18] Application Judge's Reasons, paras. 75-80, AR, Vol. I, Tab 4, pp. 91-92.
[19] Application Judge's Reasons, paras. 84-88, AR, Vol. I, Tab 4, pp. 93-94.
[20] DeJong July 8, 2014 Affidavit, para. 15, AR, Vol. V, Tab 47, p. 94; Cheque and Share Certificates related to Academy Lands Ltd., Exhibit "B", DeJong July 8, 2014 Affidavit, AR, Vol. V, Tab 47B, pp. 111-113.
[21] Brown J. Reasons, paras. 282-285, AR, Vol. IV, Tab 32, p. 167; DeJong July 8, 2014 Affidavit, para. 15, AR, Vol. V, Tab 47, p. 94.

companies were either distributed without the DeJongs' knowledge[22] or have been swept up by Dr. Bernstein's claims.[23]

27. By the time the DeJongs learned of the Waltons' fraud, their investments with the Waltons totaled over $3.8 million.[24]

The DBDC Applicants' investments with the Waltons

28. After participating in their real estate acquisition scheme for numerous years as a mortgagee, Dr. Bernstein began investing with the Waltons in 2010 through the DBDC Applicants.[25] The DBDC Applicants, like DeJong PC, invested as equal shareholders with the Waltons in single-purpose companies formed to acquire, develop, and manage specific commercial real estate projects. In this arrangement, the Waltons were responsible for managing and supervising the projects, and arranging financing.[26]

29. Although the DBDC Applicants' investments were much larger than the DeJongs'—totaling approximately $110 million invested across 31 projects—the investments were structured in much the same way as the DeJong investments, and were governed by agreements similar to those that governed the DeJong investments.[27] The Waltons similarly breached those agreements by: (1) failing to contribute their promised capital; (2) using the DBDC Applicants' funds outside the earmarked projects; (3) using other investors' money to fund their own obligations; and (4) not managing project-specific corporations properly or keeping proper

---

[22] DeJong July 8, 2014 Affidavit, paras. 15, 18, AR, Vol. V, Tab 47, pp. 94-95.

[23] DeJong October 7, 2015 Affidavit, para. 19, AR, Vol. VII, Tab 49, pp. 188-189; Brown J. Reasons, paras. 264, 267, AR, Vol. IV, Tab 32, pp. 161-162; Twenty-Fifth Report of the Manager, dated March 6, 2015, paras. 7, 10, AR, Vol. XVI, Tab 83, pp. 99-101.

[24] Application Judge's Reasons, para. 60, AR, Vol. I, Tab 4, p. 87; DeJong July 8, 2014 Affidavit, para. 11, AR, Vol. V, Tab 47, p. 92.

[25] Brown J. Reasons, para. 1, AR, Vol. IV, Tab 32, p. 75; Affidavit of Stanley Bernstein, sworn August 4, 2015 ("Bernstein Affidavit"), paras. 5-9, AR, Vol. X, Tab 51, pp. 99-100.

[26] Endorsement of Newbould J., dated October 7, 2013 ("Newbould J. October 7, 2013 Reasons"), para. 7, AR, Vol. III, Tab 21, p. 121; Bernstein Affidavit, paras. 10-11, AR, Vol. X, Tab 51, pp. 100-101.

[27] Brown J. Reasons, paras. 1, 5-7, 282, AR, Vol. IV, Tab 32, pp. 75-76, 167; Application Judge's Reasons, paras. 50-51, AR, Vol. I, Tab 4, p. 85.

records.[28] As the DBDC Applicants conceded before the court below, the DBDC Companies and the DeJong Companies were "operated exactly the same way by the Waltons."[29]

30. There are two key differences between Dr. Bernstein and the DeJongs. First, unlike the DeJongs, Dr. Bernstein directed the Waltons to keep his involvement in the DBDC Companies secret. He did so to avoid having to personally guarantee the mortgages of properties owned by the DBDC Companies, as required by institutional lenders.[30] Dr. Bernstein even temporarily resigned as a director of the DBDC Companies to further this deception. These institutional lenders have since brought claims for fraud, conspiracy, and oppression against Dr. Bernstein.[31]

31. Second, Dr. Bernstein has recovered around 40% of his investments with the Waltons and has obtained numerous constructive trusts.[32] In contrast, the DeJongs have recovered nothing to date and can only recover from the four DeJong Companies. If Dr. Bernstein's $22.6 million claim for knowing assistance against the DeJong Companies is upheld, it will overwhelm the DeJongs' claims and they would stand to recoup little to nothing at all.

The DBDC Applicants' application against the Waltons

32. Dr. Bernstein was the first investor to learn of, and sue on, the Waltons' fraud. Within six months of suspecting the Waltons, Dr. Bernstein had an Inspector investigating the status of his investments,[33] a Manager overseeing the DBDC Companies,[34] and an application pending

---

[28] Newbould J. November 5, 2013 Reasons, para. 46, AR, Vol. III, Tab 23, pp. 140-141; Application Judge's Reasons, paras. 71-72, 80, 88, AR, Vol. I, Tab 4, pp. 90, 92, 94.

[29] DBDC Applicants' Factum before the Court of Appeal, dated December 6, 2016, para. 5(b)(i), AR, Vol. XVI, Tab 83, p. 111.

[30] Trez Capital Limited Partnership v. Bernstein – Reasons for Decision of the Court of Appeal dated February 6, 2018, paras. 4-6, 30, Exhibit "E", Affidavit of Norma Walton sworn February 12, 2016 ("Walton February 12, 2016 Affidavit"), AR, Vol. XIV, Tab 59E, pp. 2-3, 12-13.

[31] Trez Capital Limited Partnership v. Bernstein, Amended Statement of Claim, Court File No. CV-15-11147-00CL, para. 1(a), Exhibit "A", Walton February 12, 2016 Affidavit, AR, Vol. XIII, Tab 59A, p. 111.

[32] Application Judge's Reasons, paras. 19, 58, AR, Vol. I, Tab 4, pp. 73, 86-87.

[33] Newbould J. October 7, 2013 Reasons, paras. 2-3, 33, AR, Vol. III, Tab 21, pp. 2-3, 119.

[34] Newbould J. November 5, 2013 Reasons, paras. 2-3, 11, AR, Vol. III, Tab 23, pp. 127, 129.

against several properties, some of which innocent investors had ownership interests in.[35] All the while, the DeJongs were unaware that any investor was going after the Waltons.[36]

33. Dr. Bernstein first learned of issues with his Walton investments in June 2013, when the CFO of his diet clinics reviewed the investments and raised concerns.[37] In October 2013, Dr. Bernstein commenced an oppression application on behalf of the DBDC Applicants. The original respondents were the Waltons, Rose & Thistle, and another company they owned, Eglinton Castle Inc. (the "Walton Respondents"). The DBDC Companies were named as respondents in order to be bound by the result.[38]

34. Initially, the DBDC Applicants merely sought an accounting of their investments from the Walton Respondents.[39] No other parties were named or involved. But what began as a simple oppression application eventually sprawled into complex proceedings that ended up catching innocent investors, including the DeJongs, in its wake.

35. Soon after they brought their initial application in October 2013, the DBDC Applicants obtained a court order appointing an Inspector to investigate the Walton Respondents.[40] In November 2013, after the Inspector uncovered evidence of the Waltons' mishandling of the DBDC Applicants' investments, its mandate was expanded to include the role of Manager over the DBDC Companies.[41]

36. Based on the Inspector's findings, the DBDC Applicants amended their application in December 2013 to assert allegations of fraud against the Waltons. The amendment also identified

---

[35] DBDC Applicants' Amended Amended Notice of Application, dated December 17, 2013 ("December 17, 2013 Notice of Application"), para. 1(o), AR, Vol. II, Tab 12, pp. 174-175.
[36] DeJong July 8, 2014 Affidavit, para. 17, AR, Vol. V, Tab 47, p. 94.
[37] Newbould J. October 7, 2013 Reasons, para. 8, AR, Vol. III, Tab 21, pp. 113-114; Reitan Affidavit, paras. 23-31, AR, Vol. IX, Tab 50, pp. 25-27.
[38] Court of Appeal Reasons, para. 168, AR, Vol. II, Tab 7, pp. 74-75; DBDC Applicants' Notice of Application dated October 1, 2013 ("October 1, 2013 Notice of Application"), AR, Vol. II, Tab 10, pp. 131-147.
[39] October 1, 2013 Notice of Application, paras. 1(c)-1(k), AR, Vol. II, Tab 10, pp. 133-135.
[40] Newbould J. October 7, 2013 Reasons, paras. 2-3, 32, AR, Vol. III, Tab 21, pp. 119.
[41] Newbould J. November 5, 2013 Reasons, paras. 2-3, 53, AR, Vol. III, Tab 23, pp. 127, 143.

over 20 properties into which the DBDC Applicants alleged the Waltons had diverted their investments. Some of these properties belonged to companies owned solely by the Waltons ("Walton Companies"), while others belonged to companies in which innocent investors, including the DeJongs, had an interest ("Innocent Investor Companies").[42] Despite this, the DeJongs would not become involved in the proceeding until six months later.[43]

The Net Transfer Analysis

37. The DBDC Applicants' claim against the DeJong Companies has its roots in a single piece of evidence: the Net Transfer Analysis.[44] This analysis examined the transfer of funds between the Rose & Thistle "clearing house" account and two groups of accounts: (1) those of DBDC Companies, and (2) all other accounts to which the Waltons had access.[45] The latter accounts were grouped together solely on the basis that they were not DBDC Company accounts (the "non-DBDC Accounts" and the "non-DBDC Companies")—regardless of whether they belonged to Innocent Investor Companies or the fraudsters themselves. The analysis looked at the flow of funds between Rose & Thistle and these two groups, showing the Waltons directed:

- a net transfer of $22.6 million dollars from the DBDC Companies to Rose & Thistle (after accounting for $1 million of legitimate management fees[46]),
- a net transfer of $25.4 million dollars from Rose & Thistle to the 54[47] non-DBDC Accounts the Waltons had access to.[48]

---

[42] December 17, 2013 Notice of Application, para. 1(o), AR, Vol. II, Tab 12, pp. 174-175.

[43] Brown J. Reasons, paras. 3, 281, AR, Vol. IV, Tab 32, pp. 75, 166-167; Court of Appeal Reasons, paras. 168-169, AR, Vol. II, Tab 7, pp. 74-76.

[44] Cash Transfer Analysis of the Inspector, circulated February 21, 2014, ("Net Transfer Analysis"), Exhibit "A", Fourth Interim Report of the Inspector, dated April 23, 2014 ("Inspector's Fourth Report"), AR, Vol. XIV, Tab 68A, pp. 148-158.

[45] Brown J. Reasons, paras. 17-20, AR, Vol. IV, Tab 32, pp. 83-85.

[46] Brown J. Reasons, para. 225, AR, Vol. IV, Tab 32, p. 149.

[47] The Net Transfer Analysis looked at 50 non-DBDC Company Accounts, but, a summary document included 54 accounts. *See* Summary of the Cash Transfer Analysis (Net Transfer Summary), Exhibit "B", Inspector's Fourth Report, AR, Vol. XIV, Tab 68B, p. 160.

[48] Brown J. Reasons, para. 39, AR, Vol. IV, Tab 32, pp. 92-93; Inspector's Fourth Report, paras. 12-13, AR, Vol. XIV, Tab 68, pp. 132-133.

38. The Net Transfer Analysis was a blunt tool designed to provide an overview of the flow of DBDC Applicants' funds, to justify subsequent, "more detailed", property-specific tracing of those funds. The usefulness of the Net Transfer Analysis is restricted to this purpose.[49]

39. The Net Transfer Analysis gave no regard to any investors' ownership interests other than those of the DBDC Applicants. Because it focused on the DBDC Applicants' investments, the analysis obscured whether other companies, like the DeJong Companies, suffered a net loss relative to Rose & Thistle. Instead, the analysis indiscriminately pooled the accounts belonging to Innocent Investor Companies together with accounts solely owned by the Waltons, including Ms. Walton's personal bank account and the accounts of corporate entities the Waltons owned.[50]

40. In effect, the Net Transfer Analysis treated the accounts of the fraudsters and their victims (other than the DBDC Applicants) as the same.[51] By grouping the accounts of Walton Companies and the Innocent Investor Companies together, the Net Transfer Analysis also obscured the fact that the Innocent Investor Companies saw little of the money from Rose & Thistle. Of the 54 non-DBDC Accounts examined in the Net Transfer Analysis, 11 received disproportionately large net transfers from Rose & Thistle totalling $1 million or more.[52] There

---

[49] Inspector's Fourth Report, para. 14, AR, Vol. XIV, Tab 68, p. 133; Court of Appeal Reasons, paras. 185, 194-204, AR, Vol. II, Tab 7, pp. 83, 87-92.

[50] Walton December 17, 2013 Affidavit, paras. 20(d), 20(h), 20(l) 20(m), 20(s), 20(u), 20(v), 20(z), AR, Vol. XI, Tab 54, pp. 12, 15-16, 18-20, 24-28, 30-31; Newbould J. November 5, 2013 Reasons, para. 46, AR, Vol. III, Tab 23, pp. 140-141; Court of Appeal Reasons, para. 189, AR, Vol. II, Tab 7, pp. 84-85.

[51] Court of Appeal Reasons, para. 199, AR, Vol. II, Tab 7, p. 89; Net Transfer Analysis, Exhibit "A", Inspector's Fourth Report, AR, Vol. XIV, Tab 68A, pp. 148-158.

[52] The following 11 accounts had net receipts of $1 million or more: 1) Ms. Walton's personal account ($5.5 million); 2) Rose and Thistle Properties ($3.2 million); 3) Plexor Plastics Corp. ($2.8 million); 4) Rose & Thistle Construction Inc. ($2.4 million); 5) Due from Shareholders ($1.9 million); 6) Urban Amish Interiors ($1.8 million); 7) 1780355 Ontario Inc. ($1.6 million); 8) Walton Advocates ($1.6 million); 9) Old Apothecary Building (66 Gerard) ($1.3 million); 10) Gerard House Inc. ($1.2 million); and 11) College Lane Ltd. ($1.1 million). Net Transfer Summary, Exhibit "B", Inspector's Fourth Report, AR, Vol. XIV, Tab 68B, p. 160.

is no evidence that any innocent investors had any interest in these accounts, except for maybe one (1780355 Ontario Inc.).[53] As a whole, the transfers out from Rose & Thistle and into those 11 accounts—none of which belonged to the DeJong Companies—totaled $24.4 million, more than the net $22.6 million transferred out from DBDC Companies. The largest net transfer recorded, $5.5 million, was made to Ms. Walton's personal bank account.

The Net Transfer Analysis is ill-suited for imposing liability on the DeJong Companies

41. In this application, the Net Transfer Analysis is the DBDC Applicants' only evidence of liability against the non-DBDC Companies, including the DeJong Companies. The Net Transfer Analysis was not designed for this purpose and is ill-suited to it.

42. First, while there are four DeJong Companies, the Net Transfer Analysis only includes *half* of them, Prince Edward and United Empire, and shows that:

(1) ***Prince Edward*** lost more than it gained, experiencing a net transfer to Rose & Thistle of $520,850. Indeed, only $100 was transferred the other way.[54]

(2) ***United Empire*** had a net transfer in of $336,600 from Rose & Thistle. But its holdings became the subject of a constructive trust in favour of the DBDC Applicants in the amount of $1,032,000.[55] Any money United Empire gained from Rose & Thistle was offset more than threefold by this constructive trust.

43. The remaining two DeJong Companies, St. Clarens and Emerson, were created in mid-November 2013. The Net Transfer Analysis does not consider these companies *at all* because the date this analysis ended, October 2013, was before the companies even existed. Moreover, neither company received any funds from the DBDC Companies because they were created *after*

---

[53] Walton December 17, 2013 Affidavit, para. 20(e), AR, Vol. XI, Tab 54, p. 13.

[54] Application Judge's Reasons, paras. 77, 80, AR, Vol. I, Tab 4, pp. 91-92; Court of Appeal Reasons, para. 225, AR, Vol. II, Tab 7, p. 100.

[55] Brown J. Reasons, paras. 264, 267, AR, Vol. IV, Tab 32, pp. 161-162; DeJong October 7, 2015 Affidavit, paras. 11-13, AR, Vol. VIII, Tab 49, pp. 186-187.

the accounts of the DBDC Companies were frozen on October 4, 2013 and *after* a Manager was installed over the Companies on November 5, 2018.[56]

44. The Net Transfer Analysis' treatment of the DeJong Companies is summarized here:

Company	Property Owned	Transfer In from Rose & Thistle	Transfer Out to Rose & Thistle	Net Transfer
United Empire	3270 American Dr.	$1,185,050	$847,450	$337,600
Prince Edward	324 Prince Edward Dr.	$100	$520,950	$(520,850)
St. Clarens	777 St. Clarens Ave.	Not in analysis		N/A
Emerson	260 Emerson Ave.	Not in analysis		N/A

Return of application and motions before Justice Brown

45. When they commenced this application in 2013, the DBDC Applicants focused on the Walton Respondents and a specific list of properties. The DBDC Applicants did not implicate the DeJong Companies. The DeJongs and the DeJong Companies were not put on notice.[57]

46. By the time the DeJongs first learned about this application in January 2014, 20 orders had already been made in the proceedings.[58] Even at this time, the remedies sought by the DBDC Applicants only implicated the Walton Respondents. The twice-amended notice of application referenced only some of the properties owned by DeJong Companies. But none of the DeJong Companies were parties to the application.[59]

---

[56] Newbould J. October 7, 2013 Reasons, para. 33, AR, Vol. III, Tab 21, p. 119; Newbould J. November 5, 2013 Reasons, para. 53, AR, Vol. III, Tab 23, p. 143; Court of Appeal Reasons, paras. 226-227, AR, Vol. II, Tab 7, pp. 100-101.

[57] Brown J. Reasons, paras. 2, 12, AR, Vol. IV, Tab 32, pp. 75, 81; Court of Appeal Reasons, paras. 168, 175, AR, Vol. II, Tab 7, pp. 74-75, 78.

[58] DeJong July 8, 2014 Affidavit, para. 17, AR, Vol. V, Tab 47, p. 94; Court of Appeal Reasons, para. 169, footnote 18, AR, Vol. II, Tab 7, pp. 75-76.

[59] December 17, 2013 Notice of Application, para. 2(aa), AR, Vol. II, Tab 12, pp. 184-185.

47. The DeJongs did not begin participating in these proceedings until July 2014. In motions before Justice Brown, the DBDC Applicants sought to establish that the Walton Respondents had breached their fiduciary duties and had been unjustly enriched at the DBDC Applicants' expense. The main relief touching the DeJong Companies was the constructive trust claimed against the property owned by United Empire, 3270 American Drive. The DeJongs brought a cross-motion to resist that relief, seeking the approval of a settlement agreement in respect of the property with the goal of avoiding a forced sale, in order to preserve the property's value.[60] In exchange for receiving the Waltons' shares in United Empire, the DeJongs offered to forgo pursuing the $515,000 that had been traced into the DBDC Companies.[61] Justice Brown did not approve the settlement agreement, concluding that the proceeds of sale should instead be addressed in the claims process for 3270 American Drive. However, he declined to grant costs against the DeJongs, because they "st[oo]d at the receiving end of the Waltons' misconduct."[62]

48. The DBDC Applications sought an award of $78.4 million against the Walton Respondents. While Justice Brown held that the Walton Respondents were liable for breach of contract, unlawful misappropriation, and unjust enrichment, he deferred the assessment of the quantum of the remedy to hear arguments with respect to each cause of action.[63]

49. As a remedy for unjust enrichment, Justice Brown granted constructive trusts only where the DBDC Applicants were able to trace their funds to a specific property and only to the extent of the quantum traced. This included the $1.1 million constructive trust over 3270 American Drive. Nevertheless, the "state of the evidence," including the Net Transfer Analysis, did "not permit" the granting of any additional proprietary remedies.[64]

50. To address this evidentiary deficiency, Justice Brown granted an order tracing the DBDC Applicants' funds in order to provide "if possible, a better understanding of how the Waltons

---

[60] Brown J. Reasons, paras. 3, 167, AR, Vol. IV, Tab 32, pp. 75, 131.
[61] DeJong July 8, 2014 Affidavit, paras. 29-32, AR, Vol. V, Tab 47, pp. 98-99.
[62] Brown J. Reasons, paras. 289-290, AR, AR, Vol. IV, Tab 32, pp. 168-169.
[63] Brown J. Reasons, paras. 226-227, AR, Vol. IV, Tab 32, p. 149.
[64] Brown J. Reasons, paras. 267-268, AR, Vol. IV, Tab 32, p. 162.

used" those funds[65] and to address the competing claims of creditors like the DeJongs who were "faced with sorting out the mess created by the Waltons."[66] Justice Brown anticipated that the DBDC Applicants would do exactly as he had ordered: complete the tracing analysis in order to resolve the creditors' claims. But the DBDC Applicants never undertook the tracing.[67]

51. Justice Brown made no finding of unjust enrichment or any misconduct against the Innocent Investor Companies, including the DeJong Companies. There was no deferred relief, or any other ruling, with respect to these companies—none of these companies were yet parties to the proceedings. Their alleged role in the Waltons' scheme would not be pleaded by the DBDC Applicants until well over a year later.[68]

Allegations of knowing participation against Innocent Investor Companies

52. The DBDC Applicants chose to forgo the tracing analysis that would have given finality to their proprietary remedies. Instead, in late November 2015, the DBDC Applicants amended their application to substantially expand their claim. They claimed against ten additional entities (the "Respondent Companies"), referred to as the "listed Schedule C Companies" in the courts below. Six of the Respondent Companies were Innocent Investor Companies, including the four DeJong Companies.[69] It was the first time any Innocent Investor Company was either named as a party or accused of any wrongdoing.[70]

---

[65] Brown J. Reasons, paras. 275, 278, AR, Vol. IV, Tab 32, pp. 164-165.

[66] Brown J. Reasons, para. 232, AR, Vol. IV, Tab 32, p. 151.

[67] Court of Appeal Reasons, para. 174, AR, Vol. II, Tab 7, pp. 77-78; Application Judge's Reasons, para. 58, AR, Vol. I, Tab 4, pp. 86-87.

[68] Court of Appeal Reasons, para. 175, AR, Vol. II, Tab 7, p. 78; DBDC Applicants' Third Fresh as Amended Notice of Application, dated November 22, 2016 ("November 22, 2015 Notice of Application"), AR, Vol. III, Tab 13, p. 1.

[69] Affidavit of Dennis John Condos, sworn June 16, 2014, paras. 2-8, AR, Vol. XIV, Tab 60, pp. 15-16; Affidavit of Gideon and Irene Levytam, sworn June 20, 2014, paras. 2-7, AR, Vol. XIV, Tab 61, pp. 24-25; DeJong July 8, 2014 Affidavit, paras. 3-11, AR, Vol. V, Tab 47, pp. 91-92.

[70] Court of Appeal Reasons, paras. 168-169, 175, 177-180, AR, Vol. II, Tab 7, pp. 75-76, 78-81; November 22, 2015 Notice of Application, paras. 2(a), 3(rr)-3(ccc), 3(kkk)-3(uuu), AR, Vol. III, Tab 13, pp. 10, 23-26.

53. It was also the first time that the DBDC Applicants raised claims of knowing receipt and knowing assistance. The amended notice of application alleged that all of the Respondent Companies "knowingly assisted in a dishonest and fraudulent design on the part of the Waltons." The only form of assistance alleged is that the Respondent Companies "received property from the [DBDC] Applicants as a result of the Waltons' breach of their fiduciary duties."[71]

54. The DBDC Applicants did not advance any new evidence to support these claims; the Net Transfer Analysis was the central evidence that the Respondent Companies had "assisted" the Waltons' fraud by receiving funds from Rose & Thistle.[72]

55. The DBDC Applicants claimed $22.6 million in damages, the amount the Net Transfer Analysis showed was transferred from the DBDC Companies to Rose & Thistle.[73] The DBDC Applicants sought to hold the ten Respondent Companies jointly and severally liable, even though these ten companies' accounts represented less than 20% of the non-DBDC Accounts considered by the Net Transfer Analysis. Moreover, the Net Transfer Analysis showed that a net total of only $4.37 million (or 19% of the $22.6 million claimed) had been transferred into those ten companies from Rose & Thistle.[74]

Decisions below

The application judge finds no knowing receipt and no knowing assistance

56. In June 2016, the DBDC Applicants successfully moved for judgment against the Waltons before Justice Newbould for $66.9 million, the unrecovered balance of the DBDC Applicants' $110 million dollar investment with the Waltons (para. 1). The application judge found that the Waltons were liable for civil fraud and fraudulent misrepresentations, which caused Dr. Bernstein to invest with the Waltons (paras. 19-32).

---

[71] November 22, 2015 Notice of Application, paras. 3(kkk)-3(uuu), AR, Vol. III, Tab 13, pp. 25-26; Court of Appeal Reasons, paras. 178-180, AR, Vol. II, Tab 7, pp. 79-81.
[72] Application Judge's Reasons, paras. 56-58, AR, Vol. I, Tab 4, pp. 86-87; Court of Appeal Reasons, paras. 181-182, AR, Vol. II, Tab 7, pp. 81-82.
[73] November 22, 2015 Notice of Application, paras. 1(jj), 2(a), AR, Vol. III, Tab 13, pp. 9-10.
[74] Court of Appeal Reasons, para. 243, AR, Vol. II, Tab 7, p. 108; Net Transfer Summary, Exhibit "B", Inspector's Fourth Report, AR, Vol. XIV, Tab 68B, p. 160.

57. The application judge fully dismissed the DBDC Applicants' $22.6 million claims for knowing receipt and knowing assistance against the ten Respondent Companies, including the DeJong Companies (paras. 43-59). While acknowledging that the Waltons were the ultimate wrongdoer, these claims were "not a contest between Dr. Bernstein and the Waltons." Instead, they were "a contest between Dr. Bernstein and the investors in the [Respondent] Companies who suffered from the same misconduct as did Dr. Bernstein" (para. 52) [emphasis added]. Just as she had done to the DBDC Applicants, Ms. Walton had "knowingly breached her fiduciary obligations to the [Respondent] Companies" (para. 52).

58. The claim of knowing receipt failed because there was no evidence of receipt of the DBDC Applicants' money. The Net Transfer Analysis could not show what happened to the money transferred from the DBDC Companies to Rose & Thistle, let alone that this money had wound up in the Respondent Companies (paras. 57):

> 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 [Respondent 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 [Respondent Companies] that the applicants seek a judgment against for knowing receipt of trust funds. [Emphasis added.]

59. The application judge criticized the DBDC Applicants for choosing not to undertake the tracing ordered by Justice Brown. The application judge took the lack of tracing as "recognition that the [DBDC Applicants] did not have evidence that their money went into those properties." (para. 58). Without the tracing, "the [DBDC Applicants] have not established that it was the[ir] money that was received by the [Respondent] Companies in question" (para. 58).

60. The claims of knowing assistance were similarly dismissed. Ms. Walton's knowledge of her own fraud could not be imputed onto the Respondent Companies (para. 51).

61. The application judge also granted affirmative relief in favour of the DeJongs. First, consistent with relief ordered for the DBDC Companies,[75] Justice Newbould cancelled the

---

[75] Brown J. Reasons, paras. 229-230, AR, Vol. IV, Tab 32, pp. 149-150.

Waltons' shares in the DeJong Companies because they had failed to invest their promised equity (except for Emerson and St. Clarens where 88% of their shares were cancelled) (paras. 74, 83, 90). Second, Justice Newbould granted DeJong PC constructive trusts in assets held by the DeJong Companies reflecting the funds DeJong PC had invested (paras. 71-73, 80-81, 88-89).

The majority of the Court of Appeal allowed the appeal

62. The Court of Appeal for Ontario allowed the DBDC Applicants' appeal. Justice Blair, writing for himself and Justice Cronk, upheld the finding on knowing receipt but reversed the application judge's findings on knowing assistance and constructive trusts. The Respondent Companies were held jointly and severally liable for approximately $22.6 million.

63. ***Knowing receipt.*** The majority confirmed that there was no claim for knowing receipt. The DBDC Applicants had chosen not to pursue their rights under the tracing order granted by Justice Brown and were unable to demonstrate the receipt of any DBDC funds by any particular Respondent Company, other than the funds with respect to which Justice Brown had already granted constructive trusts (para. 38).

64. ***Knowing assistance.*** The majority held that the Respondent Companies assisted the Waltons' fraud because Ms. Walton "utilized" them "as actors in the process of orchestrating her shell game through the Rose & Thistle 'clearing house' account" (paras. 84-88). Specifically, all but two Respondent Companies (St. Clarens and Emerson) "received … or transferred monies" to Rose & Thistle (paras. 86-87). This was sufficient to constitute assistance. This assistance was given with knowledge of the fraud because Ms. Walton's knowledge could be attributed to the Respondent Companies (para. 68). The majority summarily dismissed arguments that the Respondent Companies should not be imputed with Ms. Walton's mental state because she was not acting within the scope of her authority or for the benefit of the corporations, and had instead defrauded them.

65. Although the DeJongs and other investors were victims of the Waltons' fraud, Justice Blair refused to find that the Respondent Companies were victims (paras. 82, 125). These companies benefitted from the scheme because they "acquired the properties they were created to acquire" and "received the funds enabling them to do so" (para. 104.) He held that it was "not important" that the Respondent Companies suffered the same fraud or breaches of fiduciary duty

as the DBDC Companies (para. 105). Ultimately, what mattered was that the Respondent Companies were "significant net beneficiaries in the flow of funds from the pooling and co-mingling of the various investors' money" (para. 124). He never considered the companies individually, nor that the DeJong Companies lost significantly from this very flow of funds.

The dissent held that the DeJong Companies were victims, not assistants

66. Justice van Rensburg dissented on the issue of knowing assistance and the award of damages against the Respondent Companies.

67. Liability for knowing assistance could not be made out against the Respondent Companies (para. 158). The majority had not identified any evidence of the Respondent Companies' participation or assistance in the specific fraud alleged: the breach of fiduciary duty to the DBDC Applicants (para. 224). Nor did the Net Transfer Analysis demonstrate that the Respondent Companies participated in Ms. Walton's diversion of the DBDC Companies' funds: the analysis only showed that the collective 54 non-DBDC Accounts benefitted from the Waltons' fraud, not that any of the Respondent Companies in particular received any benefit or assistance from the funds (para. 223). The Respondent Companies' receipt and payment of monies to Rose & Thistle made them no more liable for a breach of fiduciary duty than the same acts would make the DBDC Companies liable (para. 230):

> They were not participants acting in their own right to further a breach of fiduciary duty. They were used by the Waltons as part of a fraudulent scheme. In this regard the [DBDC Companies] and the innocent investor [Respondent] Companies are on an equal footing. [Emphasis added.]

68. Justice van Rensburg also held that there could be no attribution of Ms. Walton's knowledge to the Respondent Companies "because the scheme was for the Waltons' personal benefit and defrauded the [Respondent] Companies, and because the evidence of each company's individual benefit from the scheme is questionable" (para. 234).

69. Finally, Justice van Rensburg held that equity cannot support the knowing assistance claim. A remedy for knowing assistance should not be used "in these exceptional circumstances" where "one group of defrauded investors" seeks judgment "against another group that has been defrauded in a similar manner" (para. 248). To allow the DBDC Applicants to overwhelm the claims for the losses of the investors, like the DeJongs, "would be an unjust result" (para. 247).

PART II – THE ISSUES

70. The issue on appeal is whether the DBDC Applicants' claim for knowing assistance against the DeJong Companies is made out. It is not. The Court of Appeal made three errors:

(1) finding that the DeJong Companies participated in the Waltons' fraud;

(2) holding that the corporate attribution doctrine applied to the DeJong Companies such that Ms. Walton's knowledge of her fraud was attributed to them; and

(3) making one victim of a fraud liable for the losses of other victims of the same fraud.

71. Each error is sufficient to restore the order of the application judge.

PART III – STATEMENT OF ARGUMENT

Standard of review

72. The application judge, an experienced Commercial List judge, was the only judge at first instance to hear and decide the knowing assistance claim. His findings of fact and mixed fact and law are owed deference.

73. To the extent the DBDC Applicants relied on findings of Justice Brown to make out their claim against the DeJong Companies, these findings were not binding on the application judge. None of the DeJong Companies were parties before Justice Brown. Nor had the claim for knowing assistance been pleaded. In any event, Justice Brown's findings only relate to the non-DBDC Companies in general, and do not related to any individual DeJong Company.

Knowing assistance and knowing receipt

74. There are two equitable causes of action for accessory liability for a breach of fiduciary duty: knowing receipt and knowing assistance. A defendant is liable for knowing receipt where the stranger receives property from a fiduciary that was obtained in breach of that fiduciary duty. Liability is based on the receipt of the property itself and will be imposed so long as the stranger had at least constructive knowledge that the property came from a breach of fiduciary duty.[76]

---

[76] *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, para. 48.

75. In contrast, knowing assistance is "fault-based."[77] Culpability is at the core of knowing assistance and the indicia of fault must be sufficient "to bind the stranger's conscience."[78] Liability is imposed only in reference to a fraudulent and dishonest breach of fiduciary duty that the defendant assisted in brokering.[79] Knowing assistance also requires a higher threshold of knowledge than knowing receipt: actual knowledge must be shown because knowing assistance is "concerned with the furtherance of fraud."[80]

76. Where a fiduciary has perpetrated a dishonest and fraudulent breach of her duty, a stranger to the fiduciary relationship is liable for knowing assistance if the stranger, (i) participates in the breach; and (ii) has actual knowledge of the fiduciary relationship and the dishonest breach.[81] Neither element is met in this case.

The DeJong Companies did not assist in Ms. Walton's breach of fiduciary duty

77. The DeJong Companies did not assist Ms. Walton in breaching her fiduciary duties to the DBDC Applicants. To bear culpability for knowing assistance, an accessory's act must assist and causatively impact the fiduciary's breach of her duty.

78. There is no such act here. The DeJong Companies did not receive DBDC Company funds (other than those already impressed with a constructive trust in favour of the DBDC Applicants). Nor did the DeJong Companies benefit at all from the fraud. And the fact that the Waltons took money out of the DeJong Companies does not constitute a participatory act; being victimized by a fraud does not make the victim liable for the fraudsters' other bad acts. In sum, nothing the DeJong Companies did caused Ms. Walton's breach of her fiduciary duty on the DBDC Applicants or made that breach easier.

---

[77] *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, para. 46; *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, para. 33.
[78] *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, para. 41 (WL).
[79] Leonard I. Rotman, *Fiduciary Law*, (Toronto: Thomson Canada Ltd, 2005), p. 677, Appellant's Book of Authorities, ("ABOA"), Tab 11; *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, para. 58 (WL).
[80] *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, para. 46.
[81] *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, para. 34.

The law of knowing assistance: assistance must have a causative impact

79. Liability for knowing assistance requires that the stranger to the fiduciary relationship commit a wrongful act in "furtherance of fraud".[82] A wrongful act by itself is inadequate. Rather, the wrongful act must be "sufficiently connected to the trustee's or fiduciary's dishonest and fraudulent scheme."[83]

80. Causation is a key factor in establishing the "sufficient connection" is met. A participatory act is sufficient only if it has "some causative impact on facilitating the [fiduciary's] breach of duty."[84] If the defendant has not furthered the fraud, he should not be liable for the breach or the claimant's loss.[85] Otherwise, there is no basis in equity to bind the accessory's conscience: "if there is no causative effect and therefore no assistance given by [the accessory] ... I cannot see that the requirements of conscience require any remedy at all."[86]

81. The requirement of causal impact is consistent with other "action[s] in equity," which require proof of causation.[87] Indeed, the cause of action for breach of fiduciary duty itself "engages questions of causation."[88] It would be strange if knowing assistance, as an ancillary action to a breach of fiduciary duty, did not also require an element of causation.

82. While Canadian courts have not consistently articulated the causative impact standard, in practice, courts have required a causative act. In *Air Canada v. M & L Travel Ltd.*, the accessory

---

[82] *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, para. 48.

[83] Paul M. Perell, "Intermeddlers of Strangers to the Breach of Trust on Fiduciary Duty" (1998) 21 Advoc. Q. 94, p. 106 (HeinOnline); *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, para. 58 (WL).

[84] John McGhee, ed., *Snell's Equity*, (London: Sweet & Maxwell, 2015), p. 800, ABOA, Tab 10; *see also* Paul S. Davies, *Accessory Liability* (Oxford: Hart Publishing, 2015), p. 32, ABOA, Tab 12.

[85] Paul S. Davies, *Accessory Liability* (Oxford: Hart Publishing, 2015), p. 31, ABOA, Tab 12.

[86] *Brown v. Bennett* [1999] B.C.C. 525, p. 533 (Eng. C.A.) (WL), ABOA, Tab 3; *see also* S. Elliott and C. Mitchell "Remedies for Dishonest Assistance" (2004) 67 Mod. L. Rev. 16, pp. 17-20, (HeinOnline).

[87] *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, para. 90.

[88] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, para. 48; *see also Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534.

had stopped the payment of trust funds, opened a new account, attempted to transfer the funds into that account, and thus "directly caused" the breach of trust.[89] In other cases, the accessory: (i) prepared invoices, opened bank accounts, arranged for wire transfers, and accepted cash, all of which were required for the fraud;[90] (ii) covered up the fraud and dispersed and laundered the money fraudulently taken;[91] and (iii) entered into shadow purchases and sales of properties that "assisted the trustees in the carrying out of their dishonest and fraudulent design to misstate the financial position of the Bank."[92]

83. In contrast, courts have declined to find parties liable for knowing assistance without a causal link between the accessory's act and the breach of fiduciary duty. A defendant was not liable for assisting in his wife's embezzlement of money when he failed to report her activities because he did not commit "any act which had the effect of assisting" her breach.[93] Similarly, a former director and investor of a company was found not to have participated because he was not involved in the impugned transaction and only acted as a "silent partner" in the company.[94] And where the directors of a company received benefits from a fraudulent breach, but did not individually participate in the breach, they were not held liable.[95] Courts in British Columbia and Saskatchewan have recognized that the accessory's participation must be "active participation in

---

[89] *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, para. 62 (WL); *see also A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, para. 105; *Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group Inc*. (2002), 61 O.R. (3d) 296, para. 72 (C.A.); *HSBC Bank Canada v. Lourenco*, 2012 ABQB 380, para. 70.

[90] *Enbridge Gas Distribution Inc. v. Marinaccio*, 2012 ONCA 650, paras. 26-27; *see also 864401 Ontario Ltd. v. McGill*, 2018 ONSC 6440, paras. 68-70; *Locking v. McCowan*, 2016 ONCA 88, para. 18.

[91] *Bank of China v. Fan*, 2015 BCSC 590, paras. 114, 118.

[92] *Northland Bank v. Willson*, 1999 ABQB 659, para. 77, var'd on other grounds 2001 ABCA 137.

[93] *Treaty Group Inc. v. Simpson*, 2001 CarswellOnt 617, para. 15 (Sup. Ct.) (WL).

[94] *4 Star Courier & Logistics Inc. v. Domino's Pizza Canadian Distribution ULC* (2012), 6 B.L.R. (5th) 132, para. 28 (Ont. Sm. Cl. Ct.).

[95] *Bare Land Condominium Plan 8820814 (Owners) v. Birchwood Village Greens Ltd.*, 1998 ABQB 1023, para. 60.

causing" the fiduciary's breach or "at least ... have made the fiduciary's breach of duty easier than it would otherwise have been."[96]

84. Consistent with these decisions, other common law jurisdictions require a causative link between the accessory's act and the fraud.

85. ***United Kingdom.*** The doctrine of knowing assistance originated in the U.K. There, a defendant is only liable if her participation is "sufficient," *i.e.* has a causal connection to the breach of fiduciary duty.[97] A claimant "must show that the defendant's action or omissions have had *some* causative significance"[98] such that the participatory act itself "must not be of minimal importance."[99] For example, a woman who accompanied her husband on trips to Switzerland where he laundered misappropriated funds was not liable for knowing assistance, despite the fact that her presence may have lent an appearance of legitimacy to the trips. A more meaningful act was required.[100]

86. ***Australia.*** As in the U.K., the Australian courts have recognized that participation must be "facilitative conduct" that "makes a difference."[101] "Mere passive acquiescence in the breach" cannot establish liability. Participation must take the form of some activity "over and above mere knowledge of the fiduciary's breaches"[102] and the assistance must have some non-minimal causal

---

[96] *101082401 Saskatchewan Ltd. v. Tunnels of Little Chicago Association Inc.*, 2018 SKQB 271, para. 94; *Imperial Parking Canada Corp. v. Anderson*, 2016 BCSC 468, para. 26; *Bronson v. Hewitt*, 2010 BCSC 169, paras. 498-500, var'd on other grounds, 2013 BCCA 367; *Richards v. Air India Ltd.*, 2011 BCSC 1171, para. 56.

[97] *OBG Ltd. v. Allan*, [2007] UKHL 21, para. 36.

[98] David J. Hayton, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 16th ed. (London: Butterworths LexisNexis, 2003), p. 959, ABOA, Tab 8.

[99] *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* (1983), [1992] 4 All ER 161, p. 234 (Eng. Ch.), ABOA, Tab 1, aff'd, [1985] BCLC 258 (Eng. C.A.) (QL); *see also* Paul S. Davies, *Accessory Liability* (Oxford: Hart Publishing, 2015), pp. 33, 37-39, ABOA, Tab 12; *JD Wetherspoon plc v. Van de Berg & Co Ltd*, [2009] EWHC 639 (Ch), para. 518; S. Elliott and C. Mitchell "Remedies for Dishonest Assistance" (2004) 67 Mod. L. Rev. 16, p. 37 (HeinOnline).

[100] *Brinks Ltd. v. Abu-Saleh (No. 3)*, [1996] C.L.C. 133, pp. 148-149 (Eng. Ch.) (WL), ABOA, Tab 2; *Brown v. Bennett* [1999] B.C.C. 525, p. 533 (Eng. C.A.) (WL), ABOA, Tab 3.

[101] *Re-Engine Pty Ltd. v. Fergusson*, [2007] VSC 57, paras. 117, 120.

[102] *Re-Engine Pty Ltd. v. Fergusson*, [2007] VSC 57, para. 120.

significance.[103] A company wholly owned and controlled by a director and his family was not liable for knowing assistance of the director's breach of fiduciary duty merely because the company was likely to benefit indirectly from the wrongdoing. The court considered it "manifestly untenable" that the fiduciary's control of the company justified an inference that the company was engaged in the breaches of duty.[104] Those facts are directly analogous here.

87. ***United States.*** The U.S. parallel to knowing assistance—the tort of substantial assistance in breach of a fiduciary duty—requires an even more substantial contribution than U.K. and Australian law. The stranger's assistance must be a "substantial factor in causing the resulting tort"[105] or otherwise have "proximately caused the harm on which the primary liability is predicated."[106] This excludes "minimal or slight conduct."[107] On this basis, a court has concluded that even though a Ponzi scheme was only possible because the defendant over-extended margin credit to the fraudster, this was not sufficient. The defendant's "conduct was not a proximate cause of the Ponzi scheme" and therefore did not attract liability.[108]

88. In other words, other than the Court of Appeal in this case, common law courts have not found knowing assistance on the basis of passive participation in a breach of trust or fraud. Passive acquiescence alone, even with knowledge of the fraud, is not enough.

---

[103] *Re-Engine Pty Ltd. v. Fergusson*, [2007] VSC 57, para. 124.

[104] *Tableau Holdings Pty Ltd. v. Joyce*, [1999] WASCA 49, para. 35.

[105] *Restatement (Second) of Torts* § 876, comment, clause (b) (2018), ABOA, Tab 13; *see Neilson v. Union Bank of California, N.A.*, 290 F. Supp. 2d 110, p. 1135 (C.D. Cal. 2003) (WL), ABOA, Tab 5.

[106] *SPV Osus Ltd. v. UBS AG*, 882 F. 3d 333, p. 345 (2d. Cir. 2018) (WL), ABOA, Tab 6; Deborah A. Demott, "Accessory Disloyalty: Comparative Perspectives on Substantial Assistance to Fiduciary Breach" in Paul S. Davies & James Penner, eds., *Equity, Trusts and Commerce* (Oxford: Hart Publishing, 2017) 253, p. 260, ABOA, Tab 9.

[107] Deborah A. Demott, "Accessory Disloyalty: Comparative Perspectives on Substantial Assistance to Fiduciary Breach" in Paul S. Davies & James Penner, eds., *Equity, Trusts and Commerce* (Oxford: Hart Publishing, 2017) 253, p. 260, ABOA, Tab 9; *Restatement (Second) of Torts* § 876, comment, clause (b) (2018), ABOA, Tab 13.

[108] *Cromer Finance Ltd. v. Berger*, 137 F. Supp. 2d 452, pp. 470-472 (S.D. N.Y. 2001) (WL), ABOA, Tab 4.

The DeJong Companies committed no assisting act, let alone one with a causative link

89. To succeed in the claim, the DBDC Applicants must show that the DeJong Companies undertook an act that assisted Ms. Walton's breach of her fiduciary duties to the DBDC Applicants. But here, there is no evidence of any assisting act—and certainly no act that facilitated Ms. Walton's breaches or made them easier than they would have otherwise been.

The case of knowing assistance, as pleaded, fails on the evidence

90. The analysis of assistance is focused on the act of assistance itself, *i.e.* "on what the [accessory] actually does."[109] The difficulty here is that the DBDC Applicants cannot point to *any act* committed by the DeJong Companies that assisted Ms. Walton in breaching her duties.

91. The DBDC Applicants have pleaded that the DeJong Companies committed only a single act of assistance, the receipt of DBDC Company money.[110] But this claim fails on the evidence.

92. As the motion judge found, there is no evidence that the DeJong Companies received anything from the DBDC Companies. The DBDC Applicants had limited tracing evidence that led to limited constructive trust orders by Justice Brown. But, beyond that, there was no evidence showing that the Respondent Companies, or specifically the DeJong Companies, held any DBDC money. The Net Transfer Analysis, which was the only evidence before the application judge, was not created with a view to determining whether any of the Respondent Companies received any DBDC money: "It may have come from one of Dr. Bernstein's companies. It may not have. It may have come from investors in the [non-DBDC] Companies whose money was transferred to Rose & Thistle. The [Net Transfer Analysis] does not state where the money came from."[111] The inability to prove receipt was upheld at the Court of Appeal.

93. The only way to obtain evidence of receipt would have been a tracing analysis.[112] The DBDC Applicants had every opportunity to adduce this evidence, including express

---

[109] Paul S. Davies, *Accessory Liability* (Oxford: Hart Publishing, 2015) p. 33, ABOA, Tab 12.
[110] November 22, 2015 Notice of Application, paras. 3(kkk)-3(uuu), AR, Vol. III, Tab 13, pp. 25-26; Court of Appeal Reasons, paras. 178-180, AR, Vol. II, Tab 7, pp. 79-81.
[111] Application Judge's Reasons, para. 57, AR, Vol. I, Tab 4, p. 86.
[112] Application Judge's Reasons, para. 59, AR, Vol. I, Tab 4, p. 87.

authorization from Justice Brown to trace DBDC funds into and through the non-DBDC Companies. They chose not to do so. The DBDC Applicants should not be permitted to now bootstrap their case and rely on knowing assistance to compensate for their evidentiary failures.

94. Justice Blair side-stepped the DBDC Applicants' inability to prove receipt by concluding that proof of receipt was not necessary to establish a claim for knowing assistance.[113] But even if receipt is not sufficient by itself, receipt can be part of a claim of knowing assistance if, as here, that is how the applicants decide to frame their case.[114] Where a party pleads and relies on receipt as the sole act of assistance, it cannot succeed without proving it. Pleadings define the issues in a case[115] and a court cannot grant relief on a different theory of assistance than the one pleaded.[116]

The DeJong Companies did not receive funds from Rose & Thistle

95. To overcome the lack of evidence showing that the DeJong Companies received the DBDC Applicants' funds, Justice Blair relied on a different, but flawed, theory of liability. He artificially included the DeJong Companies within the pool of non-DBDC Companies that had experienced a "net gain" from Rose & Thistle under the Net Transfer Analysis. He then relied on these net gains to establish that the DeJong Companies assisted Ms. Walton in diverting funds from the DBDC Companies.[117]

96. But the question in this appeal is not whether a pool of non-DBDC Companies were implicated in the fraud. The question is whether the *DeJong Companies*—St. Clarens, Emerson, Prince Edward, and United Empire—committed an act that assisted Ms. Walton's breach of her fiduciary duties to the DBDC Applicants. Aside from money already accounted for by a constructive trust, there is no evidence that the DeJong Companies received money from Rose & Thistle at all. Without receiving funds to divert, shelter, or hide, the DeJong Companies could play no role in Ms. Walton breaching her fiduciary duties to the DBDC Applicants.

---

[113] Court of Appeal Reasons, para. 100, AR, Vol. II, Tab 7, pp. 44-45.
[114] *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, para. 26.
[115] *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, para. 43.
[116] *Rodaro v. Royal Bank* (2002), 59 O.R. (3d) 74, paras. 60-63 (C.A.).
[117] Court of Appeal Reasons, paras. 87, 101, AR, Vol. II, Tab 7, pp. 40, 45.

97. This issue, like much in this case, stems from unwarranted aggregation. The Net Transfer Analysis as a whole shows a net transfer out of the DBDC Companies to Rose & Thistle of $22.6 million and a net transfer of $25.4 million from Rose & Thistle to the 54 non-DBDC Accounts. But when the DeJong Companies are separated out from all the other non-DBDC Companies, it becomes clear that the DeJong Companies did not play a role in transferring funds away from the DBDC Companies. The Net Transfer Analysis, despite its limitations, shows that the DeJong Companies lost more money to Rose & Thistle than they received. On a net basis, the DeJong Companies lost at least $184,000 to Rose & Thistle as a result of Ms. Walton's fraud.

98. ***St. Clarens and Emerson*** could not have assisted in Ms. Walton's fraud on the DBDC Applicants. They did not exist until after Dr. Bernstein had discovered the fraud and the Waltons no longer had access to the DBDC Companies' funds. St. Clarens and Emerson were not included in the Net Transfer Analysis. In any event, the application judge found that almost all of the money put into these companies or into the properties they owned came from the DeJongs' investments.[118]

99. ***Prince Edward*** lost a net amount of $520,850 to Rose & Thistle. Indeed, the only money that flowed into Prince Edward was invested by the DeJongs, "except perhaps $100."[119]

100. ***United Empire*** is the only DeJong Company that the Net Transfer Analysis suggests received more funds from Rose & Thistle than it transferred out (at a net of $336,600). United Empire is also the only DeJong Company to which the DBDC Applicants have traced any of their funds, resulting in a $1.1 million constructive trust over United Empire's property. Because of that constructive trust, United Empire has already accounted to the DBDC Applicants for three times the amount of the net transfer from Rose & Thistle, leaving no funds behind that could be linked to DBDC Companies. The DBDC Applicants should not be permitted to double count transfers to impute added liability to United Empire.[120]

---

[118] Application Judge's Reasons, paras. 84-91, AR, Vol. I, Tab 4, pp. 93-95; Court of Appeal Reasons, para. 91, AR, Vol. II, Tab 7, p. 42.

[119] Application Judge's Reasons, para. 83, AR, Vol. I, Tab 4, p. 93.

[120] Court of Appeal Reasons, para. 244, AR, Vol. II, Tab 7, pp. 108-109.

101. Justice Blair conflated the separate corporate identities of St. Clarens, Emerson, Prince Edward, and United Empire with all 54 non-DBDC Companies and non-DBDC Accounts. Had Justice Blair not done so, he would have recognized that these companies had lost, not gained, and therefore could not have participated by benefiting from the scheme.

The DeJong Companies did not assist in a global fraud against the DBDC Applicants

102. As illustrated above, the DeJong Companies did not receive either funds or benefits from the DBDC Companies. But to be held culpable for knowing assistance, each DeJong Company must have done something else to facilitate the fraud against the DBDC Applicants. As Justice van Rensburg stated, "***they must have done something*** to participate in the breach of fiduciary duty."[121] The Bernstein Applicants have not articulated what that "something" is.

103. Justice Blair's reasons describe the participatory act as the Respondent Companies' transfers to and from Rose & Thistle. But, with respect to the DeJong Companies, there is no receipt of transfers *from* Rose & Thistle (except as already accounted for by the constructive trust on United Empire). What remains are the DeJong Companies' transfers *to* Rose and Thistle.

104. At its heart, this theory makes the DeJong Companies' participatory act the Waltons' taking of the DeJong Companies' money without the knowledge or permission of the DeJongs, *i.e.* the Waltons' perpetration of a fraud on the DeJong Companies. This is not sufficient for liability under knowing assistance for three separate reasons.

105. First, the DBDC Applicants' claim is not about the Waltons' overall fraudulent scheme; it relates only to the Waltons' breach of fiduciary duty to the DBDC Applicants, namely the diversion of DBDC funds for the Waltons' personal use. There is no connection between more funds flowing from the DeJong Companies to Rose & Thistle—some used for the Waltons' personal enrichment—and the diversion of DBDC funds.

106. Second, there is no evidence that the Waltons' fraud on the DeJongs and the DeJong Companies had any causal impact on the breach of the Waltons' fiduciary duty to the DBDC

---

[121] Court of Appeal Reasons, para. 215, AR, Vol. II, Tab 7, pp. 95-96 [emphasis added].

Applicants. Nor is there generally any evidence that any act of the DeJong Companies made the diversion of funds from the DBDC Companies to Rose & Thistle any easier.

107. Third, it must be remembered that the DeJong Companies' transfers to Rose & Thistle were instruments of fraud; the transfers were the means by which Ms. Walton breached her fiduciary duty to the DeJong Companies. To consider these same transfers as an element of knowing assistance is to implicate the DeJong Companies *because they were defrauded.* This "would mean that being a defrauded entity, as part of a larger fraud, can constitute knowing assistance in the fraudster's breach of fiduciary duty to another fraud victim."[122] For example, a victim of a Ponzi scheme would be deemed to assist in the scheme because her stolen funds prolonged the fraud by allowing earlier investors to be paid out. This cannot be right. Being a victim of fraud carries none of the culpability required for knowing assistance.

108. St. Clarens and Emerson best illustrate the problems with Justice Blair's analysis. The chronology of these companies makes it factually impossible for St. Clarens and Emerson to have received any DBDC funds at all.[123] Yet Justice Blair found that they "participated in or assisted Ms. Walton in her breach of fiduciary duties to the DBDC Applicants."[124]

109. The sole basis for this finding was that Ms. Walton deceitfully caused St. Clarens and Emerson to pay a $225,000 "assignment fee" to a Walton company and thus "skim off the $225,000 unbeknownst to DeJong."[125] In essence, St. Clarens' and Emerson's participatory act was allowing the Waltons to steal from them and the DeJongs.

110. This conclusion makes no sense. It cannot follow that, because St. Clarens and Emerson are victims of Ms. Walton's breach of her fiduciary duties, they are now liable for knowingly assisting in a breach of her fiduciary duty to completely unrelated entities, the DBDC Applicants.

---

[122] Court of Appeal Reasons, para. 227, AR, Vol. II, Tab 7, p. 101.

[123] *See Brown v. Bennett*, [1999] B.C.C. 525, p. 533 (Eng. C.A.) (WL), ABOA, Tab 3; David J. Hayton, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 16th ed. (London: Butterworths LexisNexis, 2003), p. 959, ABOA, Tab 8.

[124] Court of Appeal Reasons, para. 96, AR, Vol. II, Tab 7, p. 43.

[125] Court of Appeal Reasons, para. 95, AR, Vol. II, Tab 7, p. 43; Application Judge's Reasons, para. 86, AR, Vol. I, Tab 4, pp. 93-94.

What can be said for St. Clarens and Emerson holds true for each of the DeJong Companies. All are victims of the Waltons' fraud and breach of fiduciary duties.[126]

The DeJong Companies had no knowledge of the fraud

111. This Court has emphasized that the highest proof of knowledge is required to bind a stranger's conscience so as to give rise to personal liability for knowing assistance.[127] The DBDC Applicants argue that Ms. Walton's knowledge of her own fraud should be attributed to the DeJong Companies under the corporate attribution doctrine from *Canadian Dredge*. Developed as a judicial device to provide a mechanism to assess the *mens rea* of corporations for criminal offences, the doctrine applies in civil cases as well.[128] In either context, the doctrine has the effect of merging the corporation with its directing mind.[129]

112. But this cannot be done on an arbitrary or *ad hoc* basis. Attributing the mental state of a directing mind to a corporation is justified only where "there is a community interest" between the two.[130] As Prof. MacPherson explains:

> Human nature being what it is, a fiduciary can forget his or her duties to the corporation and victimize the corporation in order to serve his or her personal goals. When this happens, the connection and community of interest between the senior officer as fiduciary on the one hand, and the corporation as beneficiary on the other, is lost. This connection is essential to the application of the identification doctrine.[131] [Emphasis added.]

---

[126] Application Judge's Reasons, paras. 72-73, 80-81, 88-89, AR, Vol. I, Tab 4, pp. 90-92, 94.
[127] *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, para. 41 (WL).
[128] *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, para. 101.
[129] Darcy L. MacPherson, "Reforming the doctrine of attribution: a Canadian solution to British concerns?" in Stephen Tully, ed., *Research Handbook on Corporate Legal Responsibility* (Cheltenham, UK: Edward Elgar Publishing Limited, 2005) 194, p. 201, ABOA, Tab 7.
[130] Darcy L. MacPherson, "Emaciating the Statutory Audit – A Comment on *Hart Building Supplies Ltd. v. Deloitte & Touche*" (2005) 41 Can. Bus. L. J. 471, p. 483 (HeinOnline).
[131] Darcy L. MacPherson, "The Civil and Criminal Applications of the Identification Doctrine: Arguments for Harmonization" (2007) 45 Alta. L. Rev. 171, p. 187 (HeinOnline).

113. Because a corporation is "vulnerable to abuse by other people (those who have effective control of corporate operations),"[132] this Court has developed limits around the corporate attribution doctrine.[133] There can be no attribution where the directing mind has ceased to act in the interests of the corporation by acting: (a) outside the scope of authority assigned to her; (b) in fraud of the corporation; or (c) not for the benefit of the company.[134] These limits recognize that applying a directing mind's knowledge of her bad acts cannot be used "to condemn a corporation" for the conduct of someone who is not "acting not in any real sense as its directing mind but rather as its arch enemy."[135]

114. This case is the perfect illustration of why limits to the corporate attribution doctrine exist. Ms. Walton abused her authority over the DeJong Companies and breached the fiduciary duties she owed to them to perpetrate a fraud solely for her own benefit. Holding the DeJong Companies responsible for the actions of the person who hijacked them for her own fraudulent scheme would be akin to blaming a hostage for the actions of its captor. As a matter of policy, "the actions of the rogue should not be attributed to the corporation."[136]

(a) Ms. Walton acted outside the scope of her authority

115. It is not enough for Ms. Walton to be a directing mind of the DeJong Companies. Her fraudulent acts must also be within the scope of her authority at the DeJong Companies. They clearly are not.

116. For a corporation to be impressed with the knowledge of Ms. Walton's breach of fiduciary duty, those actions must relate to the business of the corporation and her role in

---

[132] Darcy L. MacPherson, "The Civil and Criminal Applications of the Identification Doctrine: Arguments for Harmonization" (2007) 45 Alta. L. Rev. 171, p. 186, footnote 82 (HeinOnline).
[133] *Canadian Dredge and Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, paras. 70, 84 (WL).
[134] *Canadian Dredge and Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, paras. 84-85, 95 (WL); *Eastern Chrysler Plymouth Inc. v. Manitoba Public Insurance Corp.*, 2000 MBQB 66, para. 4 aff'd 2000 MBCA 128, para. 8; Darcy L. MacPherson, "The Civil and Criminal Applications of the Identification Doctrine: Arguments for Harmonization" (2007) 45 Alta. L. Rev. 171, p. 175 (HeinOnline).
[135] *Canadian Dredge and Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, para. 95 (WL).
[136] Darcy L. MacPherson, "Emaciating the Statutory Audit – A Comment on *Hart Building Supplies Ltd. v. Deloitte & Touche*" (2005) 41 Can. Bus. L. J. 471, pp. 483-484 (HeinOnline).

carrying out the business.[137] Where a directing mind is acting for her "own individual purposes," the identity of interests between her and the corporation is broken.[138] In such instances, she cannot be said to be acting within the ambit of her authority as an officer and director and therefore no longer acts on behalf of the corporation.[139]

117. In this case, Ms. Walton had twisted the purpose of the DeJong Companies, using them as tools to steal from the DeJongs instead of as real estate acquisition vehicles. Courts have considered instances where a directing mind uses a corporation or its assets for her own illicit aims, including operating a marijuana grow-op,[140] burning down the business,[141] or driving a company car while intoxicated.[142] In these cases, the directing mind was acting outside her function and the acts were not attributed to the business.

118. It is no different here. The Shareholder Agreements established the DeJong Companies as single-purpose entities created to acquire, develop, and manage single properties. If Ms. Walton caused the DeJong Companies to participate in the fraud on Dr. Bernstein—and they did not—her actions were far beyond the scope of her authority. Instead, she surreptitiously abused the discretion given to her by the DeJong Companies to advance her own large-scale fraud. The application judge rightly held that this was insufficient justification to hold the DeJong Companies liable for Ms. Walton's deceit.

119. Moreover, even the limited authority delegated to Ms. Walton under the Shareholder Agreements was itself illusory and obtained by fraud. The Shareholder Agreements delegate authority to the Waltons under the express assumption that they were equal shareholders. But they were not. The Waltons deceived the DeJongs by advancing little to no equity in the DeJong Companies. Consequently, the Waltons should have had little to no shareholdings in, and no

---

[137] *Canadian Dredge and Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, para. 39 (WL); *Austeville Properties Ltd. v. Josan*, 2016 BCSC 1963, para. 42.
[138] *Austeville Properties Ltd. v. Josan*, 2016 BCSC 1963, para. 43.
[139] *Austeville Properties Ltd. v. Josan*, 2016 BCSC 1963, para. 42; *R. v. Fercan Developments*, 2013 ONCJ 826, para. 316, aff'd 2016 ONCA 269.
[140] *R. v. Fercan Developments*, 2013 ONCJ 826, paras. 310, 315-317.
[141] *Austeville Properties Ltd. v. Josan*, 2016 BCSC 1963, paras. 45-49.
[142] *Eastern Chrysler Plymouth Inc. v. Manitoba Public Insurance Corp.*, 2000 MBQB 66, para. 4.

control over, the DeJong Companies.[143] It is true that the Waltons exercised control over the DeJong Companies, but this authority was seized through fraud. On this basis, it is questionable whether Ms. Walton was even a directing mind of the DeJong Companies at all.

(b) Ms. Walton acted in fraud of the DeJong Companies

120. Ms. Walton perpetrated a fraud on the DeJong Companies. She conceived, designed, and executed a plan intentionally embezzling from and impoverishing them. She contributed little to the companies, fraudulently induced investments by the DeJongs, siphoned off the DeJong Companies' money, and charged the companies for undisclosed fees and work never done. Ms. Walton was held to have knowingly breached her fiduciary obligations to the DeJong Companies.[144] This finding is uncontested.

121. Where a directing mind "conceives and designs a plan and then executes it whereby the corporation is intentionally defrauded," it is "unrealistic in the extreme" to attribute her conduct to the DeJong Corporations.[145] If the mental state of a directing mind is ever to be attributed to the corporation, then "surely that mental state should not be one of an individual who is stealing from the corporation."[146]

122. Justice Blair did not think that whether the DeJong Companies were victims of fraud had "much bearing" on the *Canadian Dredge* analysis, noting only offhand that it was the DeJongs, not the companies they invested in, that were victims.[147] This is doubly wrong.

123. First, Ms. Walton breached her fiduciary duties to the DBDC Companies in much the same manner that she breached her fiduciary duties to the DeJong Companies.[148] And just as the DBDC Companies were defrauded by the Waltons' conduct, so too were the DeJong

---

[143] Application Judge's Reasons, paras. 74, 83, 91, AR, Vol. I, Tab 4, pp. 91, 93, 95.
[144] Application Judge's Reasons, para. 52, AR, Vol. I, Tab 4, p. 85.
[145] *Canadian Dredge and Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, para. 84 (WL).
[146] Darcy L. MacPherson, "The Civil and Criminal Applications of the Identification Doctrine: Arguments for Harmonization" (2007) 45 Alta. L. Rev. 171, p. 187 (HeinOnline).
[147] Court of Appeal Reasons, para. 82, AR, Vol. II, Tab 7, pp. 38-39.
[148] Application Judge's Reasons, paras. 52, 72-73, 80-81, 88-89, AR, Vol. I, Tab 4, pp. 85, 90-92, 94.

Companies.[149] Distinguishing between these frauds and imputing Ms. Walton's knowledge of her fraud of the DBDC Companies onto the DeJong Companies—the other companies she was actively defrauding—is illogical.[150] To find that the DeJong Companies were not victims is to wish away the findings of the application judge.

124. Second, Justice Blair refused to recognize the DeJong Companies as victims because Ms. Walton's fraud purportedly entailed the corporate acts of the companies.[151] But this is the very reason that limits on the corporate attribution doctrine exist. If a directing mind commits a fraud on the corporation, her interests no longer overlap with those of the corporation and the corporate acts taken at her behest can *no longer be attributed to the corporation*. As one commentator notes, "one person cannot be both perpetrator and victim of the crime"—to suggest otherwise requires "Olympic-calibre mental gymnastics."[152]

(c) Ms. Walton's actions were not to the benefit of the DeJong Companies

125. Where a directing mind is acting wholly for her own benefit and "simply using the corporation as a means to that end" without an intent to benefit the corporation, the corporate attribution doctrine will also not apply.[153] Enriching oneself by using a company as "tool or vehicle" to defraud third parties—for example by using the company to execute a Ponzi scheme—provides no benefit to the company and leaves no room for the attribution doctrine to operate.[154]

---

[149] Court of Appeal Reasons, paras. 166, 246, AR, Vol. II, Tab 7, pp. 73-74, 109-110.
[150] *Golden Oaks Enterprises Inc. (Trustee of) v. Lalonde*, 2016 ONSC 5313, para. 130.
[151] Court of Appeal Reasons, paras. 102-104, AR, Vol. II, Tab 7, pp. 45-47.
[152] Darcy L. MacPherson, "Reforming the doctrine of attribution: a Canadian solution to British concerns?" in Stephen Tully, ed., *Research Handbook on Corporate Legal Responsibility* (Cheltenham, UK: Edward Elgar Publishing Limited, 2005) 194, p. 201, ABOA, Tab 7.
[153] Darcy L. MacPherson, "Reforming the doctrine of attribution: a Canadian solution to British concerns?" in Stephen Tully, ed., *Research Handbook on Corporate Legal Responsibility* (Cheltenham, UK: Edward Elgar Publishing Limited, 2005) 194, p. 201, ABOA, Tab 7; *Canadian Dredge and Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, para. 84 (WL).
[154] *Oger v. Chiefscope Inc.* (1996), 29 O.R. (3d) 215, para. 23 (Gen. Div.) (WL), aff'd (1998) 113 O.A.C. 373 (C.A.); *Golden Oaks Enterprises Inc. (Trustee of) v. Lalonde*, 2016 ONSC 5313, para. 129.

126. Ms. Walton's activities were clearly taken solely for her benefit. Both Justice Newbould and Justice Brown found that the root of the fraud was the Waltons' desire to further their own interests.[155] Ms. Walton used investor funds to buy and renovate her personal mansion and fill her bank account and those of her personal companies. The $225,000 "assignment" fee she fraudulently levied on St. Clarens and Emerson is only one example of how she used the DeJong Companies as a personal piggy bank.

127. Justice Blair strangely found that the DeJong Companies benefited from Ms. Walton's fraud because they acquired the necessary funding and properties for their ongoing operations.[156] But this finding confused the ongoing viability of the DeJong Companies with a benefit received from Ms. Walton's fraudulent scheme. The DeJong Companies were only able to function because the DeJongs poured their own money into those companies. The "success" of the DeJong Companies was not *because* of the Waltons' fraud, but *in spite* of it.

Applying* Canadian Dredge *is not warranted

128. In the alternative, this Court should decline to attribute Ms. Walton's knowledge to the DeJong Companies. As this Court explained in *Deloitte & Touche v. Livent Inc.*, the attribution doctrine allows courts to fix a corporation with knowledge, but does not require it: "courts retain the discretion to refrain from applying it."[157] The Court must ask whether "the circumstances before the court justify this attribution," or whether doing so would be "unjust"? [158] Where the doctrine would not protect an interest in the community or "advantage society by advancing law and order," the rationale for its application "fades away".[159] There is no policy reason to apply the doctrine where, as here, doing so would only hurt the innocent investors and defrauded companies ensnared in a fraudster's scheme.

---

[155] Brown J. Reasons, paras. 212, 265, 273, AR, Vol. IV, Tab 28, pp. 145, 161, 163-164; Application Judge's Reasons, paras. 29, 34, 36, AR, Vol. I, Tab 4, pp. 76-79.
[156] Court of Appeal Reasons, para. 80, AR, Vol. II, Tab 7, p. 37.
[157] *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, para. 104.
[158] Darcy L. MacPherson, "Emaciating the Statutory Audit – A Comment on *Hart Building Supplies Ltd. v. Deloitte & Touche*" (2005) 41 Can. Bus. L. J. 471, pp. 481-483 (HeinOnline).
[159] *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, para. 103.

129. By ignoring the limits to the corporate attribution doctrine and applying the mental state of a fraudster to the corporations at a significant cost to innocent investors, Justice Blair turned *Livent* on its head. In *Livent*, this Court did not suggest, as Justice Blair did, that the doctrine should be relaxed in the civil context. Quite the opposite: it refused to apply the doctrine—even though none of the limits applied—because applying it would hurt innocent stakeholders by taking away an avenue of civil redress for fraud committed against a corporation by its directing minds.[160] The same innocent stakeholders, here the DeJongs, require this Court's protection.

130. Justice Blair's insistence on holding the DeJong Companies liable for Ms. Walton's fraud would have absurd consequences. If the DeJong Companies were deemed culpable for Ms. Walton's fraud, the companies would be barred by the doctrine of *ex turpi causa* from suing Ms. Walton, the very fraudster who breached her fiduciary duties to them.[161] This would be fundamentally unjust: "[i]t would be a remarkable paradox if the mere breach of [fiduciary] duties by doing an illegal act adverse to the company's interest was enough to make the duty unenforceable at the suit of the company to whom it is owed."[162] Moreover, the DBDC Companies are in no different position; Ms. Walton played the same role in respect to the DBDC Companies as she did the DeJong Companies, breaching the same fiduciary duties, all in pursuit of the Waltons' larger fraudulent scheme. If the DeJong Companies are impressed with Ms. Walton's knowledge, so too must the DBDC Companies, who would then be barred from suing Ms. Walton, the fiduciary who stole from them. This cannot be the result equity intends.

The effect on innocent third parties makes the Court of Appeal's remedy unjust

131. In the alternative, if, as Justice Blair held, the nature of their corporate acts requires the DeJong Companies be held liable for knowing assistance, then the Court of Appeal erred by not exercising its discretion and refusing to award a remedy. Remedies for equitable wrongs are always discretionary and a "court can withhold them in the interests of fairness."[163] In past cases,

---

[160] *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, paras. 98-105.
[161] *British Columbia v. Zastowny*, 2008 SCC 4, para. 15.
[162] *Jetivia SA v. Bilta (UK) Limited (in liquidation)*, [2015] UKSC 23, para. 89.
[163] *Wewaykum Indian Band v. Canada*, 2002 SCC 79, paras. 107-108; *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, para. 74.

this Court has refused to grant equitable remedies where they would be "grossly disproportionate" and an "unjust response" to the breach of fiduciary duty alleged.[164]

132. The $22.6 million awarded against the DeJong Companies is both unjust *and* grossly disproportionate. Its sole effect is to punish innocent investors, the DeJongs. The Waltons will be unaffected because they have no remaining economic interest in the DeJong Companies. It is the DeJongs who will be doubly harmed: first by the fraud itself and the destructive effect of Ms. Walton's breach of fiduciary duty on the DeJong Companies, and second by those same companies being branded as knowing participants in the very fraud that victimized them.

133. A comparison between the treatment of Dr. Bernstein and the DeJongs is striking. Both were victims of the Waltons' fraud and breach of fiduciary duty. Both the DBDC Companies and the DeJong Companies had net outflows to Rose & Thistle in the Net Transfer Analysis (even before including the losses of Emerson and St. Clarens, which post-dated the analysis), and both traced a portion of their defrauded monies to the other.[165] The major difference between them is that Dr. Bernstein had unclean hands, working with the Waltons to deceive third party lenders.[166] Nonetheless, Dr. Bernstein has recovered 40% of his investments,[167] obtained various constructive trusts, and now has a $22.6 million claim against each of the DeJong Companies. These claims would "overwhelm[ ] the claims for losses of the investors" and the DeJongs would get nothing—the very definition of an "unjust result."[168]

134. Moreover, the measure of damages is disproportionate. The DBDC Applicants seek to use the Net Transfer Analysis to hold the Respondent Companies responsible for transfers made to *all* the non-DBDC Companies ($22.6 million), when the Respondent Companies received only $4,367,204 and the DeJong Companies together received nothing at all. If "equity is not so rigid

---

[164] *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, paras. 239-240.

[165] Brown J. Reasons, para. 287, AR, Vol. IV, Tab 32, p. 168; DeJong October 7, 2015 Affidavit, paras. 21-22, AR, Vol. VIII, Tab 49, pp. 189-190; Froese Forensic Report, para. 2.63-2.64, Exhibit "J", Walton July 4, 2014 Affidavit, AR, Vol. XII, Tab 58J, p. 20.

[166] *See* para. 30, above.

[167] Application Judge's Reasons, para. 19, AR, Vol. I, Tab 4, p. 73.

[168] Court of Appeal Reasons, para. 247, AR, Vol. II, Tab 7, p. 110.

as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behavior," [169] then the DeJong Companies should only be liable for the amount they actually received, after accounting for the constructive trust: *nil*.

135. In sum, the damages award does not reflect the culpability of the DeJong Companies. It does not reflect their fault or their wrongdoing. Indeed, "[t]o the extent that any 'fault' could be found here, it results from being caught up in … the wrongdoer's fraudulent scheme."[170] There is no need here to punish or deter the innocent investors for being duped. As Justice van Rensburg held, these are "exceptional circumstances – where one group of defrauded investors seeks to obtain judgment sounding in knowing assistance against another group that has been defrauded in a similar manner."[171] The Court need not encourage such litigation. It should hold that a remedy for the claim of knowing participation has no place here.

PART IV – COSTS

136. DeJong PC requests its costs on this appeal and in the proceedings below.

PART V – ORDER SOUGHT

137. DeJong PC requests an order allowing this appeal, setting aside the judgment of the Court of Appeal for Ontario, and granting DeJong PC costs in this appeal and the proceedings below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

pour Jeremy R. Opolsky

pour Jonathan Silver

pour Alicja Puchta

pour Rosemary A. Fisher

Counsel for the Appellant,
Christine DeJong Medicine Professional Corporation

---

[169] *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, para. 81 (WL).
[170] Court of Appeal Reasons, para. 246, AR, Vol. II, Tab 7, pp. 109-110.
[171] Court of Appeal Reasons, para. 248, AR, Vol. II, Tab 7, pp. 110-111.

PART VI – TABLE OF AUTHORITIES

Authority		Paragraph(s)
CASES		
1	*101082401 Saskatchewan Ltd. v. Tunnels of Little Chicago Association Inc.*, 2018 SKQB 271	83
2	*4 Star Courier & Logistics Inc. v. Domino's Pizza Canadian Distribution ULC* (2012), 6 B.L.R. (5th) 132 (Ont. Sm. Cl. Ct.)	83
3	*864401 Ontario Ltd. v. McGill*, 2018 ONSC 6440	82
4	*A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12	82
5	*Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 (WL)	75, 79, 82, 111
6	*Austeville Properties Ltd. v. Josan*, 2016 BCSC 1963	116, 117
7	*Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* (1983), [1992] 4 All ER 161 (Eng. Ch.), ABOA, Tab 1, aff'd, [1985] BCLC 258 (Eng. C.A.) (QL)	85
8	*Bank of China v. Fan*, 2015 BCSC 590	82
9	*Bare Land Condominium Plan 8820814 (Owners) v. Birchwood Village Greens Ltd.*, 1998 ABQB 1023	83
10	*BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69	81
11	*Brinks Ltd. v. Abu-Saleh (No. 3)*, [1996] C.L.C. 133 (Eng. Ch.) (WL), ABOA, Tab 2	85
12	*British Columbia v. Zastowny*, 2008 SCC 4	130
13	*Bronson v. Hewitt*, 2010 BCSC 169, var'd on other grounds, 2013 BCCA 367	83
14	*Brown v. Bennett* [1999] B.C.C. 525 (Eng. C.A.) (WL), ABOA, Tab 3	80, 85, 108
15	*Canadian Dredge and Dock Co. v. The Queen*, [1985] 1 S.C.R. 662 (WL)	113, 116, 121, 125
16	*Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534	81
17	*Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805	75, 79, 94
18	*Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group Inc.* (2002), 61 O.R. (3d) 296 (C.A.)	82
19	*Cromer Finance Ltd. v. Berger*, 137 F. Supp. 2d 452 (S.D. N.Y. 2001) (WL), ABOA, Tab 4	87

20	*Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63	111, 128, 129
21	*Eastern Chrysler Plymouth Inc. v. Manitoba Public Insurance Corp.*, 2000 MBQB 66, aff'd 2000 MBCA 128	113, 117
22	*Enbridge Gas Distribution Inc. v. Marinaccio*, 2012 ONCA 650	82
23	*Gold v. Rosenberg*, [1997] 3 S.C.R. 767	75, 76
24	*Golden Oaks Enterprises Inc. (Trustee of) v. Lalonde*, 2016 ONSC 5313	123, 125
25	*Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (WL)	134
26	*HSBC Bank Canada v. Lourenco*, 2012 ABQB 380	82
27	*Imperial Parking Canada Corp. v. Anderson*, 2016 BCSC 468	83
28	*JD Wetherspoon plc v. Van de Berg & Co Ltd*, [2009] EWHC 639 (Ch)	85
29	*Jetivia SA v. Bilta (UK) Limited (in liquidation)*, [2015] UKSC 23	130
30	*Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56	94
31	*Locking v. McCowan*, 2016 ONCA 88	82
32	*Neilson v. Union Bank of California, N.A.*, 290 F. Supp. 2d 110 (C.D. Cal. 2003) (WL), ABOA, Tab 5	87
33	*Northland Bank v. Willson*, 1999 ABQB 659, var'd on other grounds, 2001 ABCA 137	82
34	*OBG Ltd. v. Allan*, [2007] UKHL 21	85
35	*Oger v. Chiefscope Inc.* (1996), 29 O.R. (3d) 215 (Gen. Div.) (WL), aff'd (1998), 113 O.A.C. 373	125
36	*R. v. Fercan Developments*, 2013 ONCJ 826, aff'd 2016 ONCA 269	117
37	*Re-Engine Pty Ltd. v. Fergusson*, [2007] VSC 57	86
38	*Richards v. Air India Ltd.*, 2011 BCSC 1171	83
39	*Rodaro v. Royal Bank* (2002), 59 O.R. (3d) 74 (C.A.)	94
40	*SPV Osus Ltd. v. UBS AG*, 882 F. 3d 333 (2d. Cir. 2018) (WL), ABOA, Tab 6	87
41	*Strother v. 3464920 Canada Inc.*, 2007 SCC 24	131
42	*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6	131
43	*Tableau Holdings Pty Ltd. v. Joyce*, [1999] WASCA 49	86

44	*Treaty Group Inc. v. Simpson*, 2001 CarswellOnt 617 (Sup. Ct.) (WL)	83
45	*Wewaykum Indian Band v. Canada*, 2002 SCC 79	131
46	*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4	81
	SECONDARY SOURCES	
47	Darcy L. MacPherson, "Emaciating the Statutory Audit – A Comment on *Hart Building Supplies Ltd. v. Deloitte & Touche*", (2005) 41 Can. Bus. L. J. 471 (HeinOnline)	112, 114, 128
48	Darcy L. MacPherson, "Reforming the doctrine of attribution: a Canadian solution to British concerns?", in Stephen Tully, ed., *Research Handbook on Corporate Legal Responsibility* (Cheltenham, UK: Edward Elgar Publishing Limited, 2005) 194, ABOA, Tab 7	111, 124, 125
49	Darcy L. MacPherson, "The Civil and Criminal Applications of the Identification Doctrine: Arguments for Harmonization" (2007) 45 Alta. L. Rev. 171 (HeinOnline)	112, 113, 121
50	David J. Hayton, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 16th ed. (London: Butterworths LexisNexis, 2003), ABOA, Tab 8	108
51	Deborah A. Demott, "Accessory Disloyalty: Comparative Perspectives on Substantial Assistance to Fiduciary Breach" in Paul S. Davies & James Penner, eds., *Equity, Trusts and Commerce* (Oxford: Hart Publishing, 2017) 253, ABOA, Tab 9	87
52	John McGhee, ed., *Snell's Equity*, (London: Sweet & Maxwell, 2015), ABOA, Tab 10	80
53	Leonard I. Rotman, *Fiduciary Law*, (Toronto: Thomson Canada Ltd, 2005), ABOA, Tab 11	75
54	Paul M. Perell, "Intermeddlers of Strangers to the Breach of Trust on Fiduciary Duty" (1998) 21 Advoc. Q. 94 (HeinOnline)	79
55	Paul S. Davies, *Accessory Liability* (Oxford: Hart Publishing, 2015), ABOA, Tab 12	80, 85, 90
56	*Restatement (Second) of Torts* § 876 (2018), ABOA, Tab 13	87
57	S. Elliott and C. Mitchell "Remedies for Dishonest Assistance" (2004) 67 Mod. L. Rev. 16 (HeinOnline)	80, 85

SCHEDULE A – LIST OF RESPONDENTS (APPELLANTS)*

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.

---

* Companies are numbered in accordance with the Schedule A to the Reasons of the Court of Appeal for Ontario, dated January 25, 2018.

SCHEDULE B – LIST OF SCHEDULE "B" COMPANIES

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

32. Richmond Row Holdings Ltd.
33. El-Ad (1500 Don Mills) Limited
34. 165 Bathurst Inc.

SCHEDULE C – LIST OF SCHEDULE "C" COMPANIES

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

SCHEDULE D – GLOSSARY OF TERMS IN APPELLANT'S FACTUM

Term used in factum	Term used in courts below	Definition
DeJong Companies	N/A	4 project-specific companies in which DeJong had invested with the Waltons as equal shareholders: (1) United Empire Lands Ltd. (2) Prince Edward Properties Ltd. (3) St. Clarens Holdings Ltd. (4) Emerson Developments Ltd.
DBDC Applicants	DBDC Applicants	Investment companies owned and controlled by Dr. Bernstein, through which he invested with the Waltons. These are DBDC Spadina Ltd. and the companies listed on Schedule A to this factum.
DBDC Companies	Schedule B Companies	Project-specific companies in which the DBDC Applicants had invested with the Waltons as equal shareholders. These companies are listed on Schedule B to this factum.
Non-DBDC Companies	Schedule C Companies	Companies included in the Net Transfer Analysis in which the DBDC Applicants had no interest. These are included in Schedule C to this factum.
Non-DBDC Accounts	N/A	Accounts belonging to the Non-DBDC Companies, as considered by the Net Transfer Analysis.
Innocent Investor Companies	N/A	Companies in which both the Waltons and innocent investors had an interest.
Walton Companies	N/A	Companies solely owned by the Waltons, in which no innocent investors had any interest.
Walton Respondents	Walton Respondents	The respondents named in the DBDC Applicants' original application in these proceedings: Norma Walton, Ronauld Walton, Rose & Thistle Group Ltd., and Eglinton Castle Inc.
Respondent Companies	Listed Schedule C Companies	10 project-specific companies that the DBDC Applicants named in their Third Fresh as Amended Application and against which they advanced claims of knowing assistance and knowing receipt. These include the 4 DeJong Companies and are listed at Schedule C to this factum.