S.C.C. 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 PREOFESSIONAL CORPORATION

APPELLANT
(Respondent)

- and-

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

RESPONDENTS
(Appellants)

-and-

SCHONFELD INC., IN ITS CAPACITY AS THE COURT-APPOINTED MANAGER OF THOSE COMPANIES LISTED IN SCHEDULE B AND THOSE PROPERTIES LISTED IN SCHEDULE C HERETO

INTERVENER

-and-

CANADIAN CHAMBER OF COMMERCE

INTERVENER

FACTUM ON BEHALF OF THE RESPONDENTS, DBDC SPADINA LTD. and THOSE CORPORATIONS LISTED ON SCHEDULE A HERETO

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW AND FACTS

OVERVIEW

1. The Respondents are the largest victims of a multi-corporation fraud perpetrated by lawyers turned real-estate investors, Norma and Ronauld Walton. The fraud perpetrated by the Waltons was a massive Ponzi-scheme, requiring ever-escalating amounts of money to circulate amongst over 50 companies (the "Project Companies") to keep their ill-fated real estate empire afloat. The Appellant and the Respondents were all victims of the Ponzi scheme. In this appeal, the Appellant seeks a preferential share of the funds remaining in the corporate wreckage created by the Waltons. The Court of Appeal was right to reject this claim to preferential treatment.

2. The essence of the Waltons' scheme was this: despite agreements that required funds advanced by investors (including both the Appellant and Respondents) to be segregated and used only for a particular Project Company in which they invested,[1] the Waltons transferred investor monies from the Project Companies and co-mingled those funds for use by the Waltons across their portfolio of Project Companies as they deemed fit.[2] In some cases, the Waltons stole the money for personal use.[3] In other cases, they used funds from one company to support another company's operations or to pay off different investors.[4] Mostly it was impossible to know as the Waltons ignored any segregation and the money travelled wherever they wished. This was a classic Ponzi scheme operated in flagrant breach of the Waltons' fiduciary duties.[5]

3. The Respondent Bernstein Companies invested approximately $110 million with the Waltons.[6] Receivership proceedings were instituted by the Bernstein Companies over the real-

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[1] *DBDC Spadina Ltd v Walton*, 2013 ONSC 6833 at para 7 ("Endorsement of Justice Newbould dated October 7, 2013"), Appellant's Record ("AR"), Vol III, Tab 21, p 112.
[2] *DBDC Spadina Ltd v Walton*, 2013 ONSC 6833 at paras 23-24 ("Endorsement of Justice Newbould dated November 5, 2013"), AR, Vol III, Tab 23 at p 133; *DBDC Spadina Ltd v Walton*, 2014 ONSC 4644 at paras 15, 181 ("Reasons of Justice Brown"), AR, Vol IV, Tab 32 at pp 82, 135; *DBDC Spadina Ltd v Walton*, 2018 ONCA 60 at para 66(d) ("Reasons of the Court of Appeal"), AR, Vol II, Tab 7 at pp 31-32.
[3] Reasons of Justice Brown at paras 10, 15, 204, 273, AR, Vol IV, Tab 32 at pp 79-82, 142-143, 163.
[4] Reasons of Justice Brown at paras 15, 148, 269, AR, Vol IV, Tab 32 at pp 82, 126, 162.
[5] Reasons of Justice Brown at paras 186, 264, AR, Vol IV, Tab 32 at pp 137, 161; *DBDC Spadina Ltd v Walton*, 2016 ONSC 6018 at para 36 ("Reasons of Justice Newbould dated September 23, 2016"), AR, Vol I, Tab 4 at p 79; Reasons of the Court of Appeal at para 45, AR, Vol II, Tab 7 at pp 20-21.
[6] Endorsement of Justice Newbould dated October 7, 2013 at para 6, AR, Vol III, Tab 21 at p 112; Reasons of Justice Brown at para 1, AR, Vol IV, Tab 32 at p 75; Reasons of the Court of Appeal at para 4, AR, Vol II, Tab 7 at p 3.

estate enterprise and over the Waltons personally to preserve assets.[7] At the end of a five-year Court-managed process, the Bernstein Companies obtained a judgment in fraud against the Waltons personally in the amount of approximately $66 million.[8] So far, the personal judgment against the Waltons has not yielded any recovery.[9]

4. Christine DeJong Medicine Professional Corporation invested approximately $4 million in certain companies described in this proceeding as the Walton Schedule C Companies.[10] DeJong never sought relief against the Waltons. It claimed against the Walton Schedule C Companies, but, unlike the Bernstein Companies, never pursued claims against the Waltons or any Project Companies or performed any tracing of the funds that it advanced to the Walton Schedule C Companies.[11]

5. DeJong now contends that this appeal implicates only the four Walton Schedule C Companies in which it invested. DeJong persists in tunnel vision to claim that the Walton Schedule C Companies either did not individually benefit or that their participation was not strictly necessary to the Waltons' fraud.

6. In taking these positions, DeJong distorts the nature of the overall fraud and fault-based accessory liability generally. The Walton's fraud must be viewed as a whole, because a Ponzi scheme requires a network of entities into which funds can be deposited or shifted as circumstances require. Every Walton Schedule C Company—including all of those in which the Appellant invested and which are at issue on this appeal—was such an entity controlled and operated by the Waltons as part of a Ponzi scheme, with funds circulated by the Waltons to keep their real estate fraud afloat. The Appellant's attempted "watertight compartments" approach to their investments is self-serving but entirely unrealistic and at odds with how the Waltons actually operated their Ponzi scheme.

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[7] Third Fresh as Amended Notice of Application dated November 22, 2015, AR, Vol III, Tab 13 at pp 1-36.
[8] Reasons of Justice Newbould dated September 23, 2016 at para 32, AR, Vol I, Tab 4 at p 78.
[9] Endorsement of Justice Epstein dated February 28, 2017 at para 34, Responding Record ("RR"), Tab 1, p 11.
[10] Reasons of Justice Newbould dated September 23, 2016 at para 60, AR, Vol I, Tab 4 at p 87.
[11] DeJong Notice of Application dated February 11, 2015 at paras 1(e) and (i), AR, Vol III, Tab 17 at pp 78-79; Fortieth Report of the Manager dated March 2, 2016 at para 56(a), AR, Vol XVI, Tab 80 at p 59; Reasons of Justice Newbould dated September 23, 2016 at para 60, AR, Vol I, Tab 4 at p 87.

7. The Bernstein Companies and DeJong are fellow victims of the Waltons' Ponzi scheme. Yet DeJong seeks by this appeal to leap-frog over other victims of the Waltons' fraud and obtain the full benefit of moneys in corporations that happened (fortuitously or by design of the Waltons) to hold monies when the music stopped on the Waltons' Ponzi scheme.[12] Victims of fraud who are similarly situated should recover *pari passu* based on their losses, not based on the serendipitous arrangement of stolen monies at the moment that the fraudulent scheme ended. The Bernstein Companies and DeJong should be treated equitably as fellow victims of the Waltons' fraud.

8. The equitable doctrine of knowing assistance provides the legal path to that fair outcome, amply supported by the Notice of Application. The Project Companies incorporated by the Waltons to purchase the real-estate properties, in which DeJong and the Bernstein Companies invested, were operated as part and parcel of the Waltons' fraud and should be faulted accordingly. From the outset, the Waltons misused investor funds to support the common enterprise of their fraudulent scheme.[13] The Project Companies were knowing and necessary participants in the Waltons' shell game. They contributed and received funds in the Waltons' attempts to keep attracting investors and expanding their real estate holdings.[14] As the Courts below found, the Project Companies were entirely controlled by Norma Walton.[15] This is not disputed by any of the parties to this appeal, none of whom lays any claim to have controlled any of the Project Companies.

9. In the final result, the Waltons moved more than $64 million among the Project Companies, culminating in a net transfer from the Dr. Bernstein Project Companies to the other Project Companies of $22,680,852.[16] The Project Companies are all collectively liable for their

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[12] Reasons of the Court of Appeal at para 147, AR, Vol II, Tab 7 at p 66.
[13] Endorsement of Justice Newbould dated November 5, 2013, at paras 23-24, AR, Vol III, Tab 23 at p 133; Reasons of Justice Brown at paras 15, 181, AR, Vol IV, Tab 32 at pp 82, 135; Reasons of the Court of Appeal at para 66(d), AR, Vol II, Tab 7 at pp 31-32.
[14] Second Supplemental Report to the Twenty-Second Report of the Manager, dated November 5, 2013 at para 17 ("Second Supplemental Report to the Twenty-Second Report"), RR, Tab 5, p 237 .
[15] Reasons of Justice Brown at paras 1, 187, AR, Vol IV, Tab 32 at pp 75, 137; Reasons of Justice Newbould dated September 23, 2016 at para 28, AR, Vol I, Tab 4 at p 76; Reasons of the Court of Appeal at para 66, AR, Vol II, Tab 7 at pp 30-32.
[16] Fourth Interim Report of the Inspector, dated April 23, 2014 at paras 12-13 ("Fourth Interim Report"), AR, Vol XIV, Tab 68 at p 132; Reasons of Justice Brown at para 269, AR, Vol IV, Tab 32 at p 162.

knowing assistance in the Waltons' fraud, and the Appellant and Respondents should all receive an equitable recovery proportional to their lost investments.

10. The appeal should be dismissed.

STATEMENT OF FACTS

The Parties

(i) The Respondents

11. The Respondents (the "Bernstein Companies") are companies beneficially owned and controlled by Dr. Stanley Bernstein. They invested along with the Waltons in various single-purpose companies for the purpose of purchasing and/or holding commercial real estate properties jointly between Dr. Bernstein and the Waltons. The Bernstein Companies invested approximately $110 million with the Waltons.[17]

(ii) The Appellant

12. The Appellant, Christine DeJong Medicine Professional Corporation ("DeJong"), is owned beneficially by Dr. Christine DeJong and her husband. Starting in 2013, DeJong invested with the Waltons in the same way as the Bernstein Companies did in various Project Companies.[18]

(iii) The Waltons

13. Norma and Ronald Walton (together, the "Waltons") are the co-founders of the Rose & Thistle Group Ltd. ("Rose & Thistle") and the counter-parties to the real-estate investments entered into by the Bernstein Companies, DeJong, and others.[19] Until their disbarment, they were

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[17] Endorsement of Justice Newbould dated October 7, 2013 at para 6, AR, Vol III, Tab 21 at p 112; Reasons of Justice Brown at para 1, AR, Vol IV, Tab 32 at p 75; Reasons of the Court of Appeal at para 4, AR, Vol II, Tab 7 at p 3.

[18] Reasons of Justice Brown at para 282, AR, Vol IV, Tab 32 at p 167; Reasons of the Court of Appeal at para 5, AR, Vol II, Tab 7 at pp 3-4.

[19] Endorsement of Justice Newbould dated October 7, 2013 at paras 4-7, AR, Vol III, Tab 21 at pp 111-112; Reasons of Justice Brown at paras 5-7, AR, Vol IV, Tab 32 at pp 75-78.

also the principals of Walton Advocates and offered legal services to the Bernstein Companies and others in connection with the investments.[20]

14. In contravention of the Project Company agreements, the Waltons co-mingled and pooled funds of the Project Companies into a "clearing-house account" at Rose & Thistle and used those monies as they saw fit across the Project Companies.[21] They have been found liable in fraud to the Bernstein Companies in the amount of approximately $66 million. All of their appeals in the civil proceeding have been exhausted.[22]

(iv) The Project Companies

15. The Project Companies in which the Bernstein Companies invested are listed on Schedule B. They are called the "Walton Schedule B Companies" or "WSB Companies".

16. The properties listed at Schedule C are properties that were owned directly or indirectly by the Waltons, sometimes with other investors (collectively, the "Walton Schedule C Properties" or "WSC Properties").[23] Individual companies were incorporated by the Waltons for the purpose of purchasing and/or holding the WSC Properties (the "Walton Schedule C Companies" or "WSC Companies").[24] DeJong invested in certain WSC Companies, including the four at issue on this Appeal.[25]

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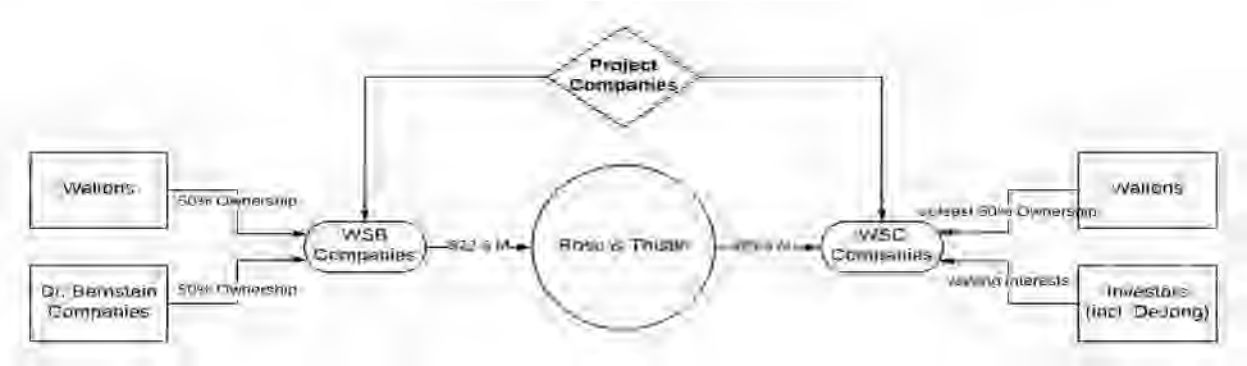
[20] Endorsement of Justice Newbould dated November 5, 2013, at para 46(1), AR, Vol III, Tab 23 at p 140; Reasons of Justice Brown at para 5, AR, Vol IV, Tab 32 at p 75.
[21] Affidavit of Norma Walton sworn June 26, 2014 at para 10, AR, Vol XI, Tab 57 at pp 79-80; Reasons of Justice Brown at para 181, AR, Vol IV, Tab 32 at p 135; Reasons of the Court of Appeal at para 66(d), AR, Vol II, Tab 7 at pp 31-32; Norma Walton Response to Jim Reitan dated June 13, 2013, AR, Vol X, Tab 50M at p 5.
[22] *DBDC Spadina Ltd v Walton*, 2014 ONCA 428 ("Endorsement of the Court of Appeal dismissing Walton Appeal from Order of Justice Newbould dated November 5, 2013"), AR, Vol IV, Tab 29 at pp 31-37; *DBDC Spadina Ltd v Walton*, 2015 ONCA 624 ("Endorsement of the Court of Appeal dismissing Walton Appeal of the Order of Justice Brown dated August 12, 2014"), AR, Vol V, Tab 42 at pp 61-65; Reasons of the Court of Appeal, AR, Vol II, Tab 7 at pp 1-118; Order of the Court of Appeal dated March 20, 2017 dismissing the Walton Appeal of the Order of Justice Newbould dated September 23, 2016, RR. Tab 2.
[23] Reasons of the Court of Appeal at para 5, AR, Vol II, Tab 7 at pp 3-4.
[24] Reasons of Justice Brown at para 1, AR, Vol IV, Tab 32 at p 75; Reasons of the Court of Appeal at para 5, AR, Vol II, Tab 7 at pp 3-4.
[25] Affidavit of Christine DeJong sworn July 8, 2014 at paras 4-5("DeJong Affidavit sworn July 8, 2014"), AR, Vol V, Tab 47 at p 91; Affidavit of Christine DeJong sworn February 11, 2015 at paras 4-5 ("DeJong Affidavit sworn February 11, 2015"), AR, Vol VI, Tab 48 at pp 18; Reasons of Justice Brown at para 3, AR, Vol IV, Tab 32 at p 75; Reasons of Justice Newbould dated September 23, 2016 at para 60, AR, Vol I, Tab 4 at p 87.

17. The WSB and WSC Companies together made up the Project Companies:



18. In the first sentence of DeJong's factum, it asserts a theme repeated throughout that "[one] set of victims has sued the other for knowingly assisting in the fraud."[26] DeJong is wrong.

19. This is a claim by the Bernstein Companies against the WSC Companies, not against third-party investors such as DeJong.[27] DeJong ignores the distinction between itself and the WSC Companies. DeJong was an investor in the WSC Companies (and the Bernstein Companies in the WSB Companies), but the WSB and WSC Companies were controlled by Norma Walton. DeJong ignores this separate legal personality yet, ironically, asserts it elsewhere to support its attempt to obtain priority over the Bernstein Companies.

20. That Norma Walton controlled the WSC Companies is uncontestable:

(a) Ms. Walton was a director of each of the WSC Companies and, from all accounts, the only active director and officer;[28]

(b) Norma Walton presented herself to the Court as the person in charge of the entire portfolio, including the WSB Companies, Rose & Thistle, and the WSC Companies;[29]

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[26] DeJong Factum at para 1.
[27] Third Fresh as Amended Notice of Application dated November 22, 2015 at para 2, AR, Vol III, Tab 13 at p 10.
[28] Reasons of Justice Brown at paras 262-264, AR, Vol IV, Tab 32, p 160; Reasons of Justice Newbould dated September 23, 2016 at para 71, AR, Vol I, Tab 4 at p 90; Reasons of the Court of Appeal at paras 63, 66(a), AR, Vol II, Tab 7 at pp 29-30.

(c) The shareholder agreements respecting the WSB and WSC Companies all provided that the Waltons were to be responsible for the management, supervision, and renovation of the projects.[30] Beyond that, Ms. Walton "simply did as she saw fit irrespective of her legal obligations" and "ignored the contractual language that bound her";[31]

(d) Ms. Walton deposed that she used Rose & Thistle "as a clearing house account to smooth cash flow across the portfolio," including both the WSB and WSC Companies.[32] The Schedule C investors—including DeJong—were unaware this was occurring and provided no direction or input in these actions;[33] and

(e) Repeatedly the Courts below held that the WSC Companies were "controlled" by the Waltons.[34] No one else has stepped forward to suggest that they controlled the Project Companies.[35]

21. There is no identity between DeJong and any WSC Company. DeJong insists on the corporate distinction to succeed. DeJong initially sought (and initially obtained before Justice

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[29] Affidavit of Norma Walton sworn October 31, 2013 at para 9(c), AR, Vol X, Tab 53 at p 126; Reasons of Justice Newbould dated September 23, 2016 at para 28, AR, Vol I, Tab 4 at p 76; Reasons of Justice Brown at paras 1, 96, 187, AR, Vol IV, Tab 32 at pp 75, 112, 137; Reasons of the Court of Appeal at para 66(b) and (e), AR, Vol II, Tab 7 at pp 31-32.

[30] Agreement between DBDC Global Mills Ltd, the Waltons, and Global Mills Inc., AR, Vol IX, Tab 50F, pp 122-130; Agreement respecting UEL dated February 2013, AR, Vol V at Tab 47D, pp 122-124; Endorsement of Justice Newbould dated October 7, 2013 at paras 7, 11, AR, Vol III, Tab 21, at pp 112-114; Third Interim Report of the Inspector dated January 15, 2014 at paras 9-10, AR, Vol XIV, Tab 67, at pp 109-110; Reasons of the Court of Appeal at para 66(c), AR, Vol II, Tab 7 at p 31.

[31] Reasons of Justice Brown at para 180, AR, Vol IV, Tab 32, p 135; Reasons of Justice Newbould dated September 23, 2016 at para 10, AR, Vol I, Tab 4 at p 70; Reasons of the Court of Appeal at para 66(b), AR, Vol II, Tab 7 at p 31.

[32] Affidavit of Norma Walton sworn June 26, 2014 at paras 6, 10, AR, Vol XI, Tab 57 at pp 77-80; Reasons of Justice Brown at paras 181, AR, Vol IV, Tab 32 at pp 135-136; Reasons of the Court of Appeal at para 66(d), AR, Vol II, Tab 7 at pp 31-32; Norma Walton Response to Jim Reitan dated June 13, 2013, AR, Vol X, Tab 50M at p 5; First Interim Report of the Inspector dated October 21, 2013 at para 27 ("First Interim Report"), AR, Vol XIV, Tab 64 at p 57.

[33] DeJong Reply Affidavit at para 2, AR, Vol VIII, Tab 49, p 190; Reasons of the Court of Appeal at para 66(d), AR, Vol II, Tab 7 at pp 31-32.

[34] Reasons of Justice Newbould dated September 23, 2016 at para 28, AR, Vol I, Tab 4 at p 76; Reasons of Justice Brown at paras 1, 187, AR, Vol IV, Tab 32 at pp 75, 137; Reasons of the Court of Appeal, at para 66(e), AR, Vol II, Tab 7 at p 32.

[35] DeJong Reply Affidavit at para 23, AR, Vol VIII, Tab 49, p 190.

Newbould) a constructive trust over the funds in certain WSC Companies.[36] That DeJong asserted such a claim confirms that even DeJong views the WSC Companies as a separate wrongdoer, and not as a mere extension of DeJong.

(v) The Inspector/Manager

22. Schonfeld Inc. ("Schonfeld") was appointed by the Court in October 2013 as an Inspector of the WSB Companies.[37] Following Schonfeld's initial work, Schonfeld was appointed Manager of the WSB Companies in November 2013.[38]

23. As the Inspector/Manager's work unfolded, the Inspector/Manager began to catch up to the Waltons' other Project Companies. As that work progressed in the fall of 2013 and the winter of 2014, the Waltons strategically moved many of their other investors from Project Company to Project Company, to stay ahead of the Inspector/Manager and to follow surplus funds.[39] In August 2014, the Manager was appointed over the WSC Properties, but not the WSC Companies themselves.[40]

24. The Manager has overseen the sale of the real estate properties and has managed the distribution of proceeds through a claims process, akin to an insolvency proceeding.[41]

The Discovery of the Fraud and the Commencement of Proceedings

25. On October 1, 2013, the Bernstein Companies brought an Application against the Waltons.[42] On October 7, 2013, Justice Newbould found that the Waltons' conduct was

[36] DeJong Notice of Application dated February 11, 2015 at para 1(d), AR, Vol III, Tab 17 at p 78; Reasons of Justice Newbould dated September 23, 2016 at paras 73, 81, 89, AR, Vol I, Tab 4 at pp 90-92, 94.
[37] Endorsement of Justice Newbould dated October 7, 2013 at para 32, AR, Vol III, Tab 21 at p 119.
[38] Endorsement of Justice Newbould dated November 5, 2013 at para 53, AR, Vol III, Tab 23 at p 143.
[39] DeJong Affidavit sworn July 8, 2014 at para 15, AR, Vol V, Tab 47 at p 94; DeJong Affidavit sworn February 11, 2015 at paras 11, 12 and 15, AR, Vol VI, Tab 48 at pp 19-20; Affidavit of Dennis Condos sworn January 25, 2016 at paras 5-8, RR, Tab 3, pp 23-24; Affidavit of Gideon and Irene Levytam affirmed January 26, 2016 at paras 13, 22, RR, Tab 4, p 78 and p 81.
[40] Reasons of Justice Brown at para 271, AR, Vol IV, Tab 32 at p 163.
[41] Order of Justice Brown dated June 18, 2014, AR, Vol IV, Tab 31 at pp 38-66.
[42] Notice of Application of the Bernstein Companies, AR, Vol II, Tab 7 at pp 121-130.

oppressive and unfairly prejudicial to the Bernstein Companies' interests, and appointed Schonfeld as Inspector over the WSB Companies.[43]

26. On November 5, 2013, Justice Newbould found that the Waltons had engaged in oppressive conduct and theft and appointed Schonfeld as the Manager of the WSB Companies and the Schedule B Properties.[44] This took control of the WSB Companies away from the Waltons.

27. The Inspector/Manager's investigations revealed that:

(a) The Bernstein Companies' funds that were deposited into WSB Company accounts were routinely transferred to the general Rose & Thistle Account.[45] Funds were both transferred from the WSB Companies to Rose & Thistle and from Rose & Thistle to the WSB Companies;[46]

(b) Co-mingling in the Rose & Thistle account made it difficult in many cases to trace precise transfers and determine how each dollar was used;[47]

(c) In the aggregate, Rose & Thistle received a net transfer of $23,680,852 from the WSB Companies;[48]

(d) The WSC Companies also routinely transferred funds to, and received transfers from, the Rose & Thistle account.[49] In the aggregate, the WSC Companies received a net transfer of $25,464,492 from Rose & Thistle;[50] and

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[43] Endorsement of Justice Newbould dated October 7, 2013 at paras 27, 32, AR, Vol III, Tab 21 at pp 118-119; Reasons of the Court of Appeal at para 9, AR, Vol II, Tab 7 at p 5.
[44] Endorsement of Justice Newbould dated November 5, 2013 at para 3, AR, Vol III, Tab 23 at p 127; Reasons of the Court of Appeal at para 10, AR, Vol II, Tab 7 at p 5. The Walton Respondents belatedly appealed the November 5, 2013 appointment of the Inspector/Manager. The appeal was dismissed from the bench with oral reasons on May 21, 2014: Endorsement of the Court of Appeal dismissing Walton Appeal from Order of Justice Newbould dated November 5, 2013, AR, Vol IV, Tab 29 at p 37.
[45] First Interim Report at para 23, AR, Vol XIV, Tab 64 at p 57; Fourth Interim Report at para 13, AR, Vol XIV at pp 132-133.
[46] First Interim Report at para 26, AR, Vol XIV, Tab 64 at p 57; Fourth Interim Report at para 13, AR, Vol XIV at pp 132-133.
[47] First Interim Report at para 29, AR ,Vol XIV, Tab 64 at pp 57-58; Second Supplemental Report to the Twenty-Second Report at para 15, RR, Tab 5, p 236-237; Fourth Supplemental Report to the Twenty-Second Report of the Manager dated January 27, 2015 at para 10, Vol XVI, Tab 78 at pp 15-16.
[48] Fourth Interim Report at para 12, AR, Vol XIV at p 132.

(e) The net transfer amounts had an upwards trajectory, increasing in amounts through 2013 as Dr. Bernstein closed in on the Waltons' wrongdoing.[51] The Inspector/Manager created a chart which demonstrates the increasing net transfers from the WSB Companies from October 2010 until December 2013:[52]

28. The Inspector/Manager found that funds transferred to the Rose & Thistle account were transferred to the WSC Companies, transferred to other WSB Companies, or used to make payments directly out of the Rose & Thistle account.[53]

29. As Dr. Bernstein asked more questions of Norma Walton in 2013 and closed in on her fraud,[54] she became more desperate to keep her scheme afloat. Besides the steady upwards trend of monies moving from the WSB Companies, Norma Walton:

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[49] Fourth Interim Report at para 13, AR, Vol XIV at pp 132-133.
[50] Fourth Interim Report at paras 12-13, AR, Vol XIV at pp 132-133; Reasons of Justice Brown at para 23, AR, Vol IV, Tab 32 at p 86.
[51] Fifth Interim Report of the Inspector dated July 1, 2014 at paras 60- 62 ("Fifth Interim Report"), AR, Vol XV, Tab 71 at pp 91-92; Appendix L to the Fifth Interim Report, AR, Vol XV, Tab 71L at pp 108-109; Reasons of Justice Brown at paras 162-163, AR, Vol IV, Tab 32 at pp 130-131.
[52] Fifth Interim Report at para 62, AR, Vol XV, Tab 71 at pp 91-92; Appendix L to the Fifth Interim Report, AR, Vol XV, Tab 71L at pp 108-109; Reasons of Justice Brown at paras 162-163, AR, Vol IV, Tab 32 at pp 130-131.
[53] Fourth Interim Report at para 17, AR, Vol XIV at pp 133-134; Reasons of Justice Brown at para 18, AR, Vol IV, Tab 32 at p 83. To illustrate the flow of funds between the WSB Companies, Rose & Thistle and the WSC Companies, the Inspector/Manager prepared a series of flow of funds charts summarizing the use of the Bernstein Companies' 53 largest advances paid to the WSB Companies: Fourth Interim Report at para 18, AR, Vol XIV at p 134; Appendix F to the Fourth Interim Report, AR, Vol XV, Tab 68F at pp 1-55. The Inspector/Manager also produced a spreadsheet, detailing thousands of individual transactions between the WSB Companies and Rose & Thistle and Rose & Thistle and the WSC Companies and a summary of the transactions in the spreadsheet: Appendix A to the Fourth Interim Report, AR, Vol XIV, Tab 68A at pp 148-158; Appendix B to the Fourth Interim Report, AR, Vol XIV, Tab 68B at pp 159-160.
[54] Email and Letter sent by J. Reitan to N. Walton dated June 7, 2013, AR, Vol IX, Tab 50L a pp 172-187; Endorsement of Justice Newbould dated October 7, 2013 at para 23, AR, Vol III, Tab 21 at p 116.

(a) Surreptitiously increased mortgages on two properties in which she invested with Dr. Bernstein by $6,000,000;[55]

(b) Increased her efforts with other investors to obtain funds;[56]

(c) "Moved" investors (including DeJong) from Project Company to Project Company, chasing available funds as the Managership progressed and properties were seized;[57]

(d) Attributed "value" to investors (including DeJong) to soak up those funds;[58] and

(e) Sought to sell property over which she still had control to pay off favoured investors, other than Dr. Bernstein, such as DeJong.[59]

30. Norma Walton admitted that she had been indiscriminately transferring funds between various Project Companies using the Rose & Thistle "clearing house" account in contravention of her agreements with investors.[60]

Justice Brown's Decision

(i) The Claims for Relief

31. Based on the Inspector/Manager's findings, the Bernstein Companies brought a Motion and Application returnable July 16-18, 2014 before Justice D.M. Brown (as he then was), for various relief, including: constructive trusts, where the Bernstein Companies' funds could be traced directly into the purchase or the discharge of an encumbrance with respect to a WSC

[55] Endorsement of Justice Newbould dated November 5, 2013 at para 10-13, AR, Vol III, Tab 23 at pp 128-129.
[56] Affidavit of Dennis Condos sworn January 25, 2016 at para 8, RR, Tab 3, p 24; DeJong Affidavit sworn February 11, 2015 at paras 18, 22, Vol VI, Tab 48 at pp 21-22.
[57] Reasons of Justice Brown at paras 148, 285, AR, Vol IV, Tab 32 at pp 126, 167; DeJong Affidavit, sworn July 8, 2014 at para 15, AR, Vol V, Tab 47 at p 94; DeJong Affidavit, sworn February 11, 2015 at paras 11-12, AR, Vol VI, Tab 48 at pp 19-20; Affidavit of Dennis Condo sworn January 25, 2016 at paras 5-8, RR, Tab 3, pp 23-24; Affidavit of Gideon and Irene Levytam affirmed January 26, 2016 at paras 13, 22, RR, Tab 4, p 78 and 81.
[58] DeJong Affidavit, sworn July 8. 2014 at paras 5, 19, AR, Vol V, Tab 47 at pp 91, 95; Reasons of Justice Brown at paras 166, 283, AR, Vol IV, Tab 32 at pp 131, 167.
[59] Reasons of Justice Brown at paras 148, 273, AR, Vol IV, Tab 32 at pp 126, 163-164.
[60] Norma Walton Response to Jim Reitan dated June 13, 2013, AR, Vol X, Tab 50M at p 5; Affidavit of Norma Walton sworn June 26, 2014 at para 10, AR, Vol XI, Tab 57 at pp 79-80; Reasons of Justice Brown at para 181, AR, Vol IV, Tab 32 at p 135; Reasons of the Court of Appeal at para 66(d), AR, Vol II, Tab 7 at pp 31-32.

Property; a $23.6 million damages award against the WSC Companies for unjust enrichment;[61] and the extension of the Managership to the WSC Companies and the Waltons personally.

32. DeJong brought a cross-motion for approval of a preferential settlement it had reached with the Waltons regarding Academy Lands Ltd., a WSC Company.[62] DeJong claimed that Waltons had "exchanged" its investment in Lesliebrook Holdings Ltd. (a WSB Company) for shares in Academy Lands Ltd. in January 2014.[63]

33. DeJong opposed the Bernstein Companies' constructive trust claim against 3270 American Drive, a property owned by United Empire Lands Ltd., another WSC Company.[64] DeJong's investment in this company was partly by way of "roll-over" from an investment in another WSC Company.[65]

34. The Waltons opposed the relief sought by the Bernstein Companies as against the WSC Companies because they wished to prefer the interests of the Schedule C Investors over that of Dr. Bernstein.[66] The other investors in the WSC Companies supported the Waltons in opposing the appointment of the Manager and the relief sought by the Bernstein Companies.[67] Ms. Walton had been busy marketing the properties owned by the WSC Companies following the appointment of the Inspector/Manager in order to have the proceeds available to distribute to her "preferred" shareholders.[68]

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[61] Reasons of Justice Brown at para 12, AR, Vol IV, Tab 32 at p 81.
[62] DeJong Notice of Cross-Motion dated July 8, 2014 ("DeJong Notice of Cross-Motion"), AR, Vol III, Tab 16 at pp 63-75.
[63] DeJong Affidavit sworn July 8, 2014 at para 15, AR, Vol V, Tab 47 at p 94; DeJong Affidavit sworn February 11, 2015 at paras 11-12, AR, Vol VI, Tab 48 at pp 19-20. The Waltons breached their contract with DBDC Leslie Investments Ltd (a Dr. Bernstein Company) by accepting DeJong's equity investment in Lesliebrook Holdings Ltd: see Endorsement of Justice Newbould dated October 7, 2013 at para 21, AR, Vol III, Tab 21 at p 116; Endorsement of Justice Newbould dated November 5, 2013, at para 40, AR, Vol III, Tab 23 at p 138.
[64] DeJong Notice of Cross-Motion, AR, Vol III, Tab 16 at pp 63-75; Reasons of Justice Brown at para 281, AR, Vol IV, Tab 32 at pp 166-167.
[65] DeJong Affidavit sworn July 8, 2014 at para 12, AR, Vol V, Tab 47 at p 93; Reasons of Justice Brown at para 284, AR, Vol IV, Tab 32 at p 167.
[66] Affidavit of Norma Walton sworn June 26, 2014 at para 3(b), AR, Vol XI, Tab 57 at p 75; Reasons of Justice Brown at paras 148, 273, AR, Vol IV, Tab 32 at pp 126, 163-164.
[67] See eg Affidavit of John Condos sworn June 16, 2014 at para 14, AR, Vol XIV, Tab 60 at p 17; Affidavit of Gideon and Irene Levytam sworn June 20, 2014 at para 13, AR, Vol XVI, Tab 61 at p 25.
[68] Affidavit of Norma Walton sworn June 26, 2014 at para 54, AR, Vol XI, Tab 57 at p 133; Reasons of Justice Brown at para 273, AR, Vol IV, Tab 32 at pp 163-164.

(ii) Findings of Justice Brown

35. In comprehensive reasons dated August 12, 2014, Justice Brown adopted the results of the investigation of the Inspector/Manager that funds had been pooled and that WSB Companies' funds were used to fund Rose & Thistle and WSC Companies' operations.[69] Justice Brown held that "on a net basis, there was a transfer of $23.6 million from the [WSB] Companies to Rose & Thistle and a transfer of more than $25 million from Rose & Thistle to the [WSC] Companies."[70]

36. The fact of the Waltons' exclusive control of the WSC Companies was uncontroverted and accepted by all parties. In his reasons, Justice Brown referred to the WSC Companies as "controlled by the Waltons",[71] "Walton-owned",[72] and "the Waltons' Schedule C Companies".[73] His Honour also held that:

> Throughout these proceedings Norma Walton has presented herself to the Court, through her affidavits and through her submissions, as the person who was in charge of the entire enterprise, whether it be the operation of [WSB] Companies, Rose & Thistle or the [WSC] Companies…[74]
>
> The Waltons deliberately did not tell the Applicants that they were using funds advanced by the Applicants to [WSB] Companies for their own personal purposes and benefit and for the benefit of the [WSC] Companies which they owned or controlled.[75] [emphasis added]

37. Justice Brown concluded that the Waltons had "mis-used and mis-appropriated" most of the funds advanced by the Bernstein Companies "to their own personal benefit and the benefit of their [WSC] Companies" in contravention of their agreements.[76]

38. Justice Brown granted constructive trusts with respect to the Bernstein Companies' funds that could be traced directly into the purchase of or the discharge of an encumbrance of a WSC Property.[77]

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[69] Reasons of Justice Brown at paras 17, 269, AR, Vol IV, Tab 32 at pp 83, 162.
[70] Supplemental Report to the Fifth Interim Report of the Inspector dated July 9, 2014 at para 66, AR, Vol XV, Tab 72 at p 124; Reasons of Justice Brown at paras 26, 161(i), AR, Vol IV, Tab 32 at pp 88, 129.
[71] Reasons of Justice Brown at para 1, AR, Vol IV, Tab 32 at p 75.
[72] Reasons of Justice Brown at para 16, AR, Vol IV, Tab 32 at p 82.
[73] Reasons of Justice Brown at para 40, AR, Vol IV, Tab 32 at p 93.
[74] Reasons of Justice Brown at para 96, AR, Vol IV, Tab 32 at p 112.
[75] Reasons of Justice Brown at para 186, AR, Vol IV, Tab 32 at p 137.
[76] Reasons of Justice Brown at para 15, AR, Vol IV, Tab 32 at p 82.

39. Justice Brown ordered that the Bernstein Companies be permitted to trace funds into the WSC Companies, "if possible".[78] He recognized that this would be a difficult task as the funds had been pooled and co-mingled in the Rose & Thistle account and moved around various Project Companies:

> The pooling of the [Bernstein Company] Applicants' funds with others by the [Walton] Respondents has caused significant difficulties in ascertaining precisely what happened with all of the funds advanced by the [Bernstein Company] Applicants. That difficulty was caused by the [Walton] Respondents systematically ignoring their contractual obligations. The [Walton] Respondents had complete control over all of the funds. The co-mingling of the [Bernstein Company] Applicants' funds with other was a problem solely of the Waltons' making.[79]

40. Justice Brown required further argument before he would decide the issue of the damages to be awarded to the Bernstein Companies as against the Waltons and the Bernstein Companies' unjust enrichment claim against the WSC Companies.[80]

41. Justice Brown ordered the Manager, Schonfeld, appointed over the WSC Properties,[81] appointed a receiver over the Waltons personally,[82] and rejected the Walton Respondents' settlement agreement with DeJong as an unjust preference.[83]

(iii) Appeal of Justice Brown's Decision

42. DeJong and the Waltons appealed Justice Brown's decision on the basis that the Inspector/Manager's tracing analysis was flawed.[84] The unanimous Court of Appeal dismissed these appeals. It rejected DeJong's position. [85]

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[77] Reasons of Justice Brown at para 267, AR, Vol IV, Tab 32 at p 162.
[78] Reasons of Justice Brown at para 278, AR, Vol IV, Tab 32 at p 165.
[79] Reasons of Justice Brown at para 161(ii), AR, Vol IV, Tab 32 at p 129.
[80] Reasons of Justice Brown at paras 227, 268, AR, Vol IV, Tab 32 at pp 149, 162.
[81] Reasons of Justice Brown at para 278, AR, Vol IV, Tab 32 at p 165.
[82] Reasons of Justice Brown at para 233, AR, Vol IV, Tab 32 at p 151.
[83] Reasons of Justice Brown at paras 289-290, AR, Vol IV, Tab 32 at pp 168-169.
[84] Endorsement of the Court of Appeal dismissing Walton Appeal of the Order of Justice Brown dated August 12, 2014 at para 6, AR, Vol V, Tab 42 at pp 61-65; *DBDC Spadina Ltd v Walton*, 2015 ONCA 628 ("Endorsement of the Court of Appeal dismissing DeJong appeal of the Order of Justice Brown dated August 12, 2014"), AR, Vol V, Tab 43 at pp 66-75.
[85] Endorsement of the Court of Appeal dismissing DeJong appeal of the Order of Justice Brown dated August 12, 2014 at para 19, AR, Vol V, Tab 43 at p 71; Endorsement of the Court of Appeal dismissing Walton Appeal of the Order of Justice Brown dated August 12, 2014 at para 6, AR, Vol V, Tab 42 at p 63.

43. The Court of Appeal held that DeJong was entitled to "take such steps as are necessary to assert their rights in the [claims] process",[86] including by conducting its own tracing analysis. Despite its complaints that the Bernstein Companies have not undertaken further tracing, DeJong has never attempted any tracing analysis with respect to its funds.[87]

44. Tellingly, the Court of Appeal concluded that "the intent and effect of the proposed settlement agreement was to prefer the interests of [DeJong] over other creditors…the Bernstein Applicants were unquestionably creditors of the Waltons; and, the DeJong Appellants knew, or ought to have known, that the Waltons were insolvent or on the eve of insolvency."[88]

The Decision Below

(i) Justice Newbould's Decision at First Instance

45. Based on the developing information of the Waltons' fraudulent scheme revealed in the Inspector/Manager's reports, the Bernstein Companies amended their claim to seek an award of damages against the Waltons personally for $66.9 million.[89] The Bernstein Companies also sought relief against the WSC Companies for knowing assistance in the breach of the Waltons' fiduciary duties.

46. DeJong opposed the relief sought by the Bernstein Companies in respect of the WSC Companies, and advanced claims for constructive trusts over certain properties held by the WSC Companies in which DeJong was a shareholder and to which DeJong said it made shareholder loans. DeJong did not pursue a claim against the Waltons or any other Project Company.[90]

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[86] Endorsement of the Court of Appeal dismissing DeJong appeal of the Order of Justice Brown dated August 12, 2014 at para 15, AR, Vol V, Tab 43 at p 70.
[87] Fortieth Report of the Manager dated March 2, 2016 at para 56(a), AR, Vol XVI, Tab 80 at p 59.
[88] Endorsement of the Court of Appeal dismissing DeJong appeal of the Order of Justice Brown dated August 12, 2014 at para 21, AR, Vol V, Tab 43 at p 72.
[89] Third Fresh as Amended Notice of Application dated November 22, 2015, AR, Vol III, Tab 13 at pp 1-36.
[90] DeJong Notice of Application, dated February 11, 2015 AR, Vol III, Tab 17 at pp 76-82; Reasons of Justice Newbould dated September 23, 2016 at para 60, AR, Vol I, Tab 4 at p 87.

47. The hearing proceeded on the basis of the evidence that was before Justice Brown.[91] No party performed any additional tracing analysis or otherwise called into question the findings made by the Inspector/Manager.

48. On September 23, 2016, Justice Newbould issued his reasons for judgment.[92] Justice Newbould awarded damages to the Bernstein Companies in the amount of $66,951,021.85, plus interest, against the Waltons for fraudulent misrepresentation, deceit and breach of fiduciary duty, and declared that this award would survive bankruptcy.[93]

49. Justice Newbould rejected the Bernstein Companies' claim for damages against the WSC Companies for knowing assistance or knowing receipt, on the basis that Norma Walton's knowledge could not be attributed to the WSC Companies.[94] He reached this conclusion by looking solely at the terms of an agreement between the Waltons and DeJong, and without considering the factual record and unchallenged findings of Justice Brown relating to the Waltons' control of the WSC Companies.[95] He made no findings with respect to the participation of the WSC Companies in the Waltons' breach of fiduciary duties to the Bernstein Companies.

50. Justice Newbould granted DeJong constructive trusts in the aggregate amount of $2,075,085.99 against four properties owned by WSC Companies.[96] He cancelled the Waltons' shares in the DeJong Companies and declared that the DeJong investments were shareholder loans, rendering DeJong an unsecured creditor in the companies in which it invested.[97]

(ii) The Decision of the Court of Appeal for Ontario

51. The Court of Appeal unanimously allowed the appeal of the Bernstein Companies and rejected DeJong's claim for constructive trusts over the properties owned by the WSC Companies as an attempt to "leapfrog over other creditors in its capacity as a lender by obtaining

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[91] Reasons of Justice Newbould dated September 23, 2016 at para 8, AR, Vol I, Tab 4 at pp 69-70.
[92] Reasons of Justice Newbould dated September 23, 2016, AR, Vol I, Tab 4 at pp 67-96.
[93] Reasons of Justice Newbould dated September 23, 2016 at para 35, AR, Vol I, Tab 4 at p 79.
[94] Reasons of Justice Newbould dated September 23, 2016 at paras 50-51, AR, Vol I, Tab 4 at p 85.
[95] Reasons of Justice Newbould dated September 23, 2016 at para 53, AR, Vol I, Tab 4 at p 85.
[96] Reasons of Justice Newbould dated September 23, 2016 at paras 73, 81, 89, AR, Vol I, Tab 4 at pp 90, 92, 94.
[97] Reasons of Justice Newbould dated September 23, 2016 at paras 74, 82-83, 90-91, AR, Vol I, Tab 4 at pp 91, 93, 94-95.

a proprietary remedy not available to other creditors."[98] It concluded that in the insolvency context of this proceeding, the interests of other creditors should not be prejudiced by the granting of a proprietary remedy which would see DeJong recovering more than 50% of its losses, while other victims of the fraudulent scheme recovered a much smaller fraction.[99]

52. A majority of the Court allowed the Bernstein Companies' appeal on their knowing assistance claim. The majority decision was written by Justice Blair, a highly experienced insolvency judge who has presided over some of the largest insolvencies in Canada, with Justice Cronk concurring. Justice Blair found Norma Walton's knowledge and conduct should be attributed to the WSC Companies because she was the directing mind of those corporations.

> [O]n any view of the evidence in these proceedings – including, it seems, even her own – Ms. Walton was the directing and controlling mind of the [WSC] Companies for the purposes of the acquisition, construction, renovation, financing and management of the [WSC] Properties held by the [WSC] Companies… [I]t is not open on the record to hold that Ms. Walton was not the alter ego and directing and controlling mind of the [WSC] Companies.[100]
>
> …Ms. Walton exercised complete management and control over all relevant actions executed by the [WSC] Companies. To paraphrase from *El Ajou*, for these purposes her mind was their mind; her intention, their intention; her knowledge, their knowledge. She was the person through whom the corporations acted, spoke and thought for these purposes. In short, her perpetration of the scheme was their participation in the scheme.[101]

53. Norma Walton's complete and exclusive control over the WSC Companies was not vitiated by the fact that DeJong was also a victim of her overall fraudulent scheme. This would "conflate the Companies with their investors and preferred shareholders."[102]

54. Justice Blair concluded that the WSC Companies had participated in the "fraudulent and dishonest scheme to divert monies out of the WSC Companies' accounts" by assisting in the

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[98] Reasons of the Court of Appeal at para 147, AR, Vol II, Tab 7 at p 66.
[99] Reasons of the Court of Appeal at paras 134, 149, AR, Vol II, Tab 7 at pp 59, 67; DeJong is incorrect that Dr. Bernstein has recovered 40% of his losses. In fact, he has recovered only $18,695,763 (23%) out of the $81,059,495 in equity invested with the Waltons: Reasons of Justice Brown at para 1, AR, Vol. IV, Tab 32 at p 75.
[100] Reasons of the Court of Appeal at para 64, AR, Vol II, Tab 7at pp 29-30.
[101] Reasons of the Court of Appeal at para 68, AR, Vol II, Tab 7at pp 32-36.
[102] Reasons of the Court of Appeal at para 104, AR, Vol II, Tab 7at pp 46-47.

"shell game" by which the investors' funds "were fraudulently co-mingled and moved amongst the entire portfolio of properties and projects."[103]

55. Justice Blair concluded that the WSC Companies were jointly and severally liable with the Waltons in the amount of $22.6 million, being the amount transferred out of the WSB Companies and co-mingled in Rose & Thistle.[104]

56. Justice Van Rensburg, in dissent, was of the view that the WSC Companies were not liable for knowingly assisting the Waltons' breach of fiduciary duties. Despite recognizing that the WSC Companies were "all Walton-controlled accounts" and part of the "number of corporate entities [used] to perpetrate [the Waltons'] fraud on the [Bernstein Company] appellants and the [WSC Company] respondents"[105] by "participating in the "shell game" to co-mingle investor funds",[106] Justice Van Rensburg held that tracing evidence of a specific benefit to each individual company was required to ground liability in knowing assistance.[107]

57. Justice Van Rensburg held that Norma Walton's knowledge and conduct should not be attributed to the WSC Companies because "[t]he investors in the Listed Schedule C Companies did not themselves know about or cause the companies to participate in Ms. Walton's breach of fiduciary duty."[108]

PART II: STATEMENT OF QUESTIONS IN ISSUE

58. The question on this appeal is whether the WSC Companies are liable to the Bernstein Companies for knowing assistance. The answer is yes.

PART III: STATEMENT OF ARGUMENT

59. This memorandum:

(a) Sets out the basic principles of accessory liability and knowing assistance;

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[103] Reasons of the Court of Appeal at paras 104-105, AR, Vol II, Tab 7 at pp 46-47.
[104] Reasons of the Court of Appeal at para 152(a), AR, Vol II, Tab 7 at p 68.
[105] Reasons of the Court of Appeal at para 199, AR, Vol II, Tab 7 at p 89.
[106] Reasons of the Court of Appeal at para 231, AR, Vol II, Tab 7 at p 103.
[107] Reasons of the Court of Appeal at paras 202, 204, 223, AR, Vol II, Tab 7 at pp 90-92, 99.
[108] Reasons of the Court of Appeal at para 237, AR, Vol II, Tab 7 at pp 105-106.

(b) Summarizes the primary wrong committed by the Waltons. Although not under attack in this appeal, the primary wrong provides context for the analysis;

(c) Addresses the conduct element, explaining how the WSC Companies participated in the Waltons' fraud. The use of the WSC Companies allowed Norma Walton to continue her "shell game" and keep the Ponzi scheme going;

(d) Addresses the mental element. Because Norma Walton was the directing mind of the WSC Companies, the only person's knowledge that can be imputed to the WSC Companies is hers;

(e) Responds to DeJong's equitable considerations argument; and

(f) Finally, addresses remedy. Where knowing assistance is made out, joint and several liability follows.

60. The arguments below apply to all of the Project Companies equally. However, only the Bernstein Companies advanced claims against the WSC Companies. DeJong never asserted any claims against the WSB Companies. By DeJong's choice, this appeal is only about the WSC Companies.

THE STANDARD OF REVIEW

61. The standard of review analysis is the conventional one set out in *Housen v Nikolaisen*.[109] Justice Newbould focused only on the underlying agreements and made no factual findings about the Waltons' control or the WSC Companies' participation. The Court of Appeal made incontestable factual findings and findings of mixed fact and law, none of which amount to palpable and overriding error.[110]

ACCESSORY LIABILITY

62. Knowing assistance is a form of accessory liability for equitable claims. Accessory liability has long been recognized in both criminal law and civil law. To be liable, "it must be

[109] *Housen v Nikolaisen*, 2002 SCC 33.
[110] See eg *St-Jean v Mercier*, 2002 SCC 15 at para 37.

shown that the accessory did something in relation to the primary wrong (the conduct element) and was at fault in some way (the mental element)."[111]

The Policy Rationale for Accessory Liability

63. Trust and fiduciary obligations are more likely to be respected and maintained if third parties cannot interfere in them or participate in their breach without fear of liability.[112] Accessory liability supports trust and fiduciary obligations in several ways:

(a) Deterrence of wrongdoing—affording a remedy to a victim against a knowing participant has the effect of "imposing a liability which will discourage others from behaving in a similar fashion;"[113]

(b) Making wrongful conduct more difficult—holding knowing assistants liable (be they professional advisors, employees or corporate entities) restricts the opportunities for wrongdoing by trustees and fiduciaries;[114] and

(c) Compensation to victims—accessory liability allows victims to seek restitution from a broader range of persons who participated in the harm against her.[115]

64. A broad doctrine of knowing assistance helps to ensure fair compensation as between the victims of a fraud. It allows creditors of a Ponzi scheme to assert claims against all of the participants involved in perpetrating the fraud. That yields an appropriate outcome: victims of a fraud should, where the law allows and where tracing to particular assets cannot be achieved, recover proportionately to their loss on a *pari passu* basis. This is consistent with the principles

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[111] Paul S. Davies, *Accessory Liability* (Oxford: Hart Publishing, 2015) at p 1, Respondents' Book of Authorities ("RBOA"), Tab 6. [Davies]
[112] Davies at p 124, RBOA, Tab 6; Paul M. Perell, "Intermeddlers of Strangers to the Breach of Trust on Fiduciary Duty" (1998) 21 Adv Q 94 at 106, RBOA, Tab 5.
[113] *Royal Brunei Airlines v Tan*, [1995] UKPC 4, at p 7; Tanya Shankar, "The Place of the Dishonest and Fraudulent Design Requirement in Accessorial Liability for Assisting in a Breach of Trust or Fiduciary Duty" (2014) 40 Monash UL Rev 793 at 797, RBOA, Tab 10.
[114] Pauline Ridge, "Justifying the Remedies for Dishonest Assistance" (2008) 124 Law Q Rev 445 at 446, RBOA, Tab 7.
[115] See Davies pp 123-126, RBOA, Tab 6.

of insolvency, where like creditors in like circumstances recover according to their loss, not their good or bad fortune.[116]

65. DeJong's theory is that each victim should recover based on the state of play when the music stopped. Where the fraudster demonstrated an intention to prefer some victims over others and took steps to stay ahead of one victim while benefitting others, DeJong says that the favoured victims (DeJong) should be entitled to the monies that ended up in the hands of companies in which they had directly invested and fortuitously held money when the scheme ended. As a matter of policy, that cannot be right.

The Doctrine of Knowing Assistance

66. Knowing assistance is an equitable remedy that imparts liability to third parties who knowingly interfere in equitable relationships. Knowing assistance is similar to joint or party liability claims in other areas of the law.[117] The elements of knowing assistance are:

(a) The existence of a fiduciary duty;

(b) The fiduciary must have breached that duty fraudulently and dishonestly;

(c) The stranger to the fiduciary has knowledge (either actual knowledge or was willfully blind or reckless) of the fiduciary relationship and fiduciary's fraudulent and dishonest conduct; and

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[116] The principle of *pari passu* distribution of available assets to claimants in proportion to outstanding claims is a fundamental principle of modern insolvency law, which informs the *Bankruptcy and Insolvency Act*, RSC, 1985, c. B-3 (see *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453 at para 9; *Re Pinestone Resort & Conference Centre Inc* (1999), 171 DLR (4th) 426 (Ont CA) at para 5), the *Winding Up And Restructuring Act*, RSC, 1985, c. W-11 (See *Canada Deposit Insurance Corp v Commonwealth Trust Co*, 2009 BCSC 1493 at para 11), and, outside of formal bankruptcy proceedings, applicable creditors' relief legislation (see for example *Creditors' Relief Act*, 2010, SO 2010, c 16, Sch 4, subs. 4(2)). This method of distribution is fair because it distributes losses proportionately and not on the basis of arbitrary accidents of timing: *Law Society of Upper Canada v Toronto Dominion Bank* (1998), 169 DLR (4th) 353 (Ont CA) at paras 51-54).

[117] For example, inducing breach of contract imparts liability to third parties who intentionally interfere in contractual relationships, even if the interference is not the primary objective of the conduct*; Royal Brunei v Tan*, [1995] UKPC 4 at pp 4-5*; Homelife Realty Services Inc v Homelife Performance Realty Inc.*, 2007 CarswellOnt 8011 at paras 211 and 222. Similarly, the tort of conspiracy holds that persons who act in concert to cause harm to another person are jointly and severally liable for any damages that result from their scheme: see *Cruise Connections Canada v Szeto*, 2015 BCCA 363 at para 45. Some courts have even considered knowing assistance to be a third branch of conspiracy: see *D'Agnone v D'Agnone*, 2017 ABCA 35 at paras 23-25.

(d) The stranger participated in or assisted the fiduciary's fraudulent and dishonest conduct.[118]

67. Here, DeJong concedes that the first two elements of the test are met, but challenges:

(a) The knowledge of the WSC Companies under the corporate identification doctrine; and

(b) That the WSC Companies assisted in the fraud perpetrated by the Waltons.

THE PRIMARY WRONG

68. The wrong committed by the Waltons—as found by Justice D.M. Brown[119] and Justice Newbould[120] and upheld (three times) by the Court of Appeal for Ontario[121]—was the Waltons' breach of their fiduciary duty by defying the Project Company agreements and treating all the Project Companies and the related properties as theirs. The Waltons siphoned investor monies from the Project Companies and co-mingled and pooled those funds to be used by the Waltons as they wished.[122]

69. The Project Company agreements provided that each single-purpose Project Company was to have its own bank account, where the funds associated with the real property in which the individual Project Company invested were to be held.[123] The Waltons flagrantly stole the invested funds, sometimes on the very day that funds were deposited by investors into the Project

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[118] *Air Canada v M & L Travel Ltd*, [1993] 3 SCR 787 at para 38; *Gold v Rosenberg*, [1997] 3 SCR 767 at para 34; *Enbridge Gas Distribution Inc v Marinaccio*, 2012 ONCA 650 at para 23; *Harris v Leiken Group Inc*, 2011 ONCA 790 at para 8.
[119] Reasons of Justice Brown at para 186-187, AR, Vol IV, Tab 32 at p 137.
[120] Endorsement of Justice Newbould dated November 5, 2013 at paras 11-12, 23-25, 46, AR, Vol III, Tab 23 at pp 129, 133, 140-141; Reasons of Justice Newbould dated September 23, 2016 at paras 24-26, AR, Vol I, Tab 4 at p 75.
[121] Endorsement of the Court of Appeal dismissing Walton Appeal from Order of Justice Newbould dated November 5, 2013, AR, Vol IV, Tab 29 at pp 31-37; Endorsement of the Court of Appeal dismissing Walton Appeal of the Order of Justice Brown dated August 12, 2014, AR, Vol V, Tab 42 at pp 61-65; Reasons of the Court of Appeal, AR, Vol II, Tab 7 at pp 1-118.
[122] Endorsement of Justice Newbould dated November 5, 2013 at paras 23-24, AR, Vol III, Tab 23 at p 133; Reasons of Justice Brown at paras 15, 181, AR, Vol IV, Tab 32 at pp 82, 135; Reasons of the Court of Appeal at para 66(d), AR, Vol II, Tab 7 at pp 31-32; Fourth Interim Report at paras 12-13, AR, Vol XIV at pp 132-133; Fifth Interim Report, at paras 9, 58-69, AR, Vol XV, Tab 71 at pp 79, 91-93.
[123] See eg Agreement between DBDC Global Mills Ltd, the Waltons, and Global Mills Inc., AR, Vol IX, Tab 50F, pp 122-130; Agreement respecting UEL dated February 2013, AR, Vol V at Tab 47D, pp 122-124.

Company's account.[124] New monies into the Ponzi scheme were moved to pay obligations where they came due across the portfolio.[125]

70. As the Court-appointed Inspector/Manager caught up to Norma Walton, she tried to keep her other investors a step ahead by moving them into Project Companies where she anticipated funds would remain, soliciting new investments, and attempting to sell properties to pay creditors by way of her own system of preference.[126] The WSC Companies were an integral part of Norma Walton's fraud in expanding the real estate empire and inflating its value, all without using any of her own monies.[127]

THE ASSISTANCE ELEMENT: THE WSC COMPANIES PARTICIPATED IN THE FRAUD

71. DeJong contends that the WSC Companies did not assist or participate in Ms. Walton's fraudulent scheme. This is wrong.

The Participation Element

72. The threshold for participation in the breach of fiduciary duty is a low one. The aid provided must not be *de minimis* or of "minimal importance."[128] Given the wide scope of possible breaches of equitable duties and the centrality of knowledge for establishing culpability,

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[124] See eg Fourth Interim Report at paras 21-38, AR, Vol XIV at pp 135-141; Fifth Interim Report at paras 9, 58-69, AR, Vol XV, Tab 71 at pp 79, 91-93.
[125] Fifth Interim Report at paras 9, AR, Vol XV, Tab 71 at pp 79.
[126] Affidavit of Dennis Condos sworn January 25, 2016, at para 8, RR, Tab 3, p 24; DeJong Affidavit sworn February 11, 2015 at paras 18, 22, Vol VI, Tab 48 at pp 21-22; Reasons of Justice Brown at para 148, 285, AR, Vol IV, Tab 32 at pp 126, 167; DeJong Affidavit, sworn July 8, 2014 at para 15, AR, Vol V, Tab 47 at p 94; DeJong Affidavit, sworn February 11, 2015 at paras 11-12, AR, Vol VI, Tab 48 at pp 19-20; Affidavit of Dennis Condo sworn January 25, 2016 at paras 5-8, RR, Tab 3, pp 23-24; Levytam Affidavit affirmed January 26, 2016 at paras 13, 22, RR, Tab 4, p 78 and 81; Reasons of Justice Brown at paras 148, 273, AR, Vol IV, Tab 32 at pp 126, 163-164.
[127] Second Supplemental Report to the Twenty-Second Report of the Manager at para 17, RR, Tab 5, p 237.
[128] *Baden v Société Générale pour Favoriser le Developpement du Commerce et de l'Industrie en France* [1993] WLR 509 (ChD) at para 246, Appellant's Book of Authorities ("ABOA"), Tab 1, aff'd, [1985] BCLC 258 (Eng. C.A.) (QL); David Salmons, "Dishonest Assistance and Accessory Liability" (2017) 80 Mod L Rev 133 at 136-137, RBOA, Tab 1. On the point more generally in the context of joint tortfeasors, see Lee Pey Woan, "Accessory Liability in Tort and Equity" (2015) 27 Sing Ac LJ 853 at 860-861, RBOA, Tab 4; *Sea Shepherd UK v Fish & Fish Ltd*, [2015] 2 WLR 694 at para 49.

the nature of the participation required to ground liability is context-specific and flexible.[129] "'Assistance' has been interpreted very widely," particularly in the civil context.[130]

73. In some cases, the participation threshold has been framed by whether the accessory's conduct "made the commission of the breach easier than it otherwise would have been."[131] Even meeting that test will not be necessary in all circumstances: an individual can be liable for knowing assistance where their only participation was after the breach of the fiduciary duty, for example, by laundering the funds.[132]

74. In the criminal context,[133] accessory liability for aiding and abetting can be established in a variety of ways, including "encouragement of the principal offender; an act which facilitates the commission of the offence, such as keeping watch or enticing the victim away, or an act which tends to prevent or hinder interference with accomplishment of the criminal act, such as preventing the intended victim from escaping or being ready to assist the prime culprit."[134] The criminal requirements are more stringent in some ways: for example, in the criminal context, the conduct must occur before or during the crime to constitute aiding and abetting,[135] while this is not a requirement to establish knowing assistance. If "an act which facilities the commission of the offence", as minor as "keeping watch", can expose an individual to criminal liability in the same way as the party who actually committed the offence, the civil standard of participation for knowing assistance should be no higher.

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[129] Davies at p 123, RBOA, Tab 6.
[130] Davies at p 106, RBOA, Tab 6; Joachim Dietrich, "Liability of Accessories under Statutes, in Equity, and in Criminal Law: Some Common Problems and (Perhaps) Common Solutions" (2010) 34 Melbourne UL Rev 106 at 116-118, RBOA, Tab 3.
[131] Steven B. Elliott and C. Mitchell, "Remedies for Dishonest Assistance" (2004) 67 Mod L Rev 16 at 20, RBOA, Tab 9.
[132] *Twinsectra Ltd v Yardley*, [2002] UKHL 12, at para 107, per Lord Millet. See eg *Bank of China v Fan*, 2015 BCSC 590, at para 114 (where covering up fraud and dispersing and laundering fraudulently obtained funds were held to be sufficient participation to ground a claim for knowing assistance); *Agip (Africa) Ltd v Kingsley & Ors*, [1990] EWCA Civ 2 (where accountants were found liable in knowing assistance for authorizing the receipt and disbursement of funds diverted pursuant to a forged payment order).
[133] *Criminal Code*, RSC, 1985, c C-46, s 21.
[134] *Dunlop and Sylvester v The Queen*, [1979] 2 SCR 881 at 891.
[135] *R v Dooley*, 2009 ONCA 910 at para 123.

But For Causation is Not Required to Establish Liability

75. At paragraphs 79-88 of its factum, DeJong contends that the knowing assistance must have a "causative impact" in order to ground liability.[136] DeJong is wrong. What is required is some form of participation or assistance in the breach of fiduciary duty, either before or after the breach. Once that is established, the accessory is liable for losses caused by the fiduciary's breach; there is no separate requirement to show a causal relationship between the participation and the losses suffered that by the victims. There are several reasons for this.

76. First, our law has consistently avoided a causal requirement as an element of liability for knowing assistance. The elements of knowing assistance have been framed by Canadian Courts as including participation in the fiduciary's fraudulent and dishonest conduct.[137] The causation element is established between the fiduciary's breach of duty and the loss.[138] Knowing assistance has been described as "an exception to the normal causation rule."[139]

77. That the breach of fiduciary duty would have occurred even without the assistor's participation does not relieve the assistor of liability.[140] None of the common law regimes require the claimant to establish that either their loss or the wrongdoer's breach would not have occurred "but for" the assistant's conduct.[141] It is often the case that a participant is held liable for knowing assistance even where the fiduciary "had already resolved to commit the primary wrong, and that wrong would somehow have happened in any event."[142]

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[136] DeJong Factum at paras 79-88.
[137] *Air Canada v M & L Travel Ltd*, [1993] 3 SCR 787 at para 38; *Gold v Rosenberg*, [1997] 3 SCR 767 at para 34; *Enbridge Gas Distribution Inc v Marinaccio*, 2012 ONCA 650, at para 23; *Harris v Leiken Group Inc.* 2011 ONCA 790 at para 8.
[138] *Imperial Parking Canada Corp v Anderson*, 2016 BCSC 468 at para 26; *Bronson v Hewitt*, 2010 BCSC 169 at para 500; *Casio Computer Co Ltd v Sayo and Others*, [2001] EWCA Civ 661 at para 15; *Grupo Torras v Al Sabah* [2000] EWCA Civ 273 at para 119; Joachim Dietrich, "Liability of Accessories under Statutes, in Equity, and in Criminal Law: Some Common Problems and (Perhaps) Common Solutions" (2010) 34 Melbourne UL Rev 106 at 118, 124, RBOA, Tab 3.
[139] *Imperial Parking Canada Corp v Anderson*, 2016 BCSC 468 at para 26; *Bronson v Hewitt*, 2010 BCSC 169 at para 500.
[140] *Bronson v Hewitt*, 2010 BCSC 169 at para 500; Davies at p 108, RBOA, Tab 6.
[141] See above. In addition, in Australia, the Victoria Court of Appeal recognized that assistance may be found where the third party has facilitated a breach of fiduciary duty that would have occurred in any event; see *Harstedt Pty Ltd v Tomanek*, [2018] VSCA 84 at para 118.
[142] Davies at p 36, RBOA, Tab 6.

78. As the House of Lords held in *Twinsectra Ltd v Yardley*, liability for knowing assistance "extends to everyone who consciously assists in the continuing diversion of the money. Most of the cases have been concerned, not with assisting in the original breach, but in covering it up afterwards by helping to launder the money."[143] Acts that post-date the original breach cannot have been causative of the original breach, yet can still give rise to liability for knowing assistance.

79. Second, to return to the criminal context, aiding and abetting liability does not require a causative relationship to the offence. Justice Doherty of the Ontario Court of Appeal put it most clearly in *R v Dooley*: "Any act or omission that occurs before or during the commission of the crime, and which somehow and to some extent furthers, facilitates, promotes, assists or encourages the perpetrator in the commission of the crime will suffice, irrespective of any causative role in the commission of the crime."[144] [emphasis added] Again, it cannot be the case that the standard for accessory liability is higher in the civil context than in the criminal context.

80. Third, a party liable for knowing assistance is jointly and severally liable for the entire loss caused by fiduciary. The very concept of joint and several liability for such a loss precludes any attempt to distinguish between the causal effects of the fiduciary's breach and the causal effects of the assistant's breach. That such joint and several liability arises with no attempt to parse out precise causal effects is not anomalous; rather, it is the rule with respect to joint conduct resulting in harm.[145]

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[143] *Twinsectra Ltd v Yardley*, [2002] UKHL 12 at para 107. See eg *Bank of China v Fan*, 2015 BCSC 590 at para 114 (where covering up fraud and dispersing and laundering fraudulently obtained funds were held to be sufficient participation to ground a claim for knowing assistance); *Agip (Africa) Ltd v Kingsley & Ors*, [1990] EWCA Civ 2 (where accountants were found liable in knowing assistance for authorizing the receipt and disbursement of funds diverted pursuant to a forged payment order).

[144] *R v Dooley*, 2009 ONCA 910 at para 123.

[145] There is nothing novel or exceptional about fastening liability upon a defendant for participating in a common design that is intended to harm the plaintiff, even where the defendant's conduct did not cause the plaintiff's losses. See eg *Cruise Connections Canada v Szeto*, 2015 BCCA 363 at para 43; *Botiuk v Toronto Free Press Publications Ltd*, [1995] 3 SCR 3 at paras 73-77; *Rutman v Rabinowitz*, 2018 ONCA 80 at paras 30-38; *Osborne v Pavlick* 2000 BCCA 12 at para 23; *Kashi v Gratsos* 790 F.2d 1050 (2d Cir, 1985) at p 1054-55; *Beltz Travel Service, Inc v International Air Transport Asso.*, 620 F.2d 1360 at pp 1366-1367.

A Benefit is Not Required to Establish Liability

81. At paragraphs 90-101 of its factum, DeJong argues that there was no tracing of funds advanced by the Bernstein Companies into the WSC Companies.[146] On that basis, DeJong says the knowing assistance claim fails. This is incorrect. It mischaracterizes the Bernstein Companies' claim.

82. It is not an element of knowing assistance that the defendant benefited from the breach of duty.[147] Knowing assistance is a fault-based wrong, rather than a receipt-based wrong. [148] If a benefit were required to establish knowing assistance, there would be no difference between knowing assistance and knowing receipt. Knowing receipt is based on the equitable principle of unjust enrichment. Knowing assistance depends upon the stranger aiding the fiduciary's fraudulent breach, but does not require that the stranger benefit herself.[149]

83. Contrary to what DeJong argues, the Bernstein Companies' claim as pleaded does not depend on a precise tracing of funds in the WSC Companies at issue. The Notice of Application pleaded both a multitude of facts relating to the Waltons' fraud and that the WSC Companies participated in the Waltons' fraud. The pleading was not limited to receipt of funds by WSC Companies.[150]

The WSC Companies Participated in the Fraud

84. The WSC Companies participated in the Waltons' breach of fiduciary duty through their role in the Waltons' overall Ponzi scheme. By focusing solely on lack of direct transfer to the particular Schedule C Companies at issue, DeJong misses the other forms of participation that were established on the evidence and which the Court of Appeal accepted.

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[146] DeJong Factum at paras 90-101.
[147] *Royal Brunei Airlines v Tan*, [1995] UKPC 4, at pp 100-101; Paul M. Perell, "Intermeddlers of Strangers to the Breach of Trust on Fiduciary Duty" (1998) 21 Adv Q 94 at 107, RBOA, Tab 5.
[148] *Citadel General Assurance Co. v Lloyds Bank Canada*, [1997] 3 SCR 805 at paras 46-47.
[149] For that reason, the two causes of action also have very different remedies: (i) in knowing receipt, the liability of the accessory is limited to the amount received (unjust enrichment); but (ii) under knowing assistance, the accessory may be liable on a joint and several basis with the fiduciary for the total harm caused to the victim.
[150] Third Fresh as Amended Notice of Application dated November 22, 2015 at para 3(kkk)-(sss), AR, Vol III, Tab 13 at pp 25-26.

(i) Participation in the Shell Game

85. The WSC Companies' conduct was part and parcel of the overall fraudulent scheme perpetrated by the Waltons. As Justice Blair reasoned:

> It is the overall fraudulent scheme, and the [WSC] Companies' knowing assistance in the perpetration of that "shell game" that provides the prism through which liability for this claim must be determined.[151]

86. The Waltons' fraudulent conduct was not just the misuse of funds in any one investment: it was the continual circulation of money without regard for the Waltons' fiduciary or contractual obligations.[152] For this "shell game" to continue, the Waltons' Ponzi scheme needed additional companies and investments to both provide and receive funds.[153]

87. All of the WSC Companies actively participated in the flow of funds that allowed the Waltons to continue to perpetrate their Ponzi scheme. As Justice Blair held:

> With two possible exceptions, the record shows that each of the [WSC] Companies either received monies directly from or transferred monies directly to Rose & Thistle during the relevant period, and were therefore engaged as corporate actors in an arrangement that, at the end of the day, resulted in a net transfer of over $23 million from the [Bernstein Companies] and a net transfer of over $25 million to the [WSC] Companies.[154]

88. The "two possible exceptions" referred to by Justice Blair in the decision below are St. Clarens Holdings Ltd. and Emerson Developments Ltd. These companies were involved in a single transaction to take title to two pieces of land in Toronto. The Waltons appropriated $225,000 of funds that had been advanced to those properties for their own benefit.

89. As Justice Blair found, this transaction "illustrates yet another way in which Ms. Walton engaged the [WSC Companies] as actors in her overall fraudulent undertaking in breach of her

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[151] Reasons of the Court of Appeal at para 105, AR, Vol II, Tab 7 at p 47.
[152] Reasons of Justice Brown at para 278, AR, Vol IV, Tab 32 at p 165; Fourth Supplement to the Twenty-Second Report of the Manager at para 11, AR, Vol XVI, Tab 78 at p 16.
[153] Fifth Interim Report at paras 58-69, AR, Vol XV, Tab 71 at pp 91-93; Appendix L to the Fifth Interim Report, AR, Vol XV, Tab 71L at pp 108-109. See also the description of Ponzi schemes at *Titan Investments Ltd Partnership (Re)*, 2005 ABQB 637 at para 8; *Millard v North George Capital Management Ltd* (2006), 26 BLR (4th) 231 (Ont Sup Ct) at para 11.

fiduciary obligations to both the [Bernstein Companies] and DeJong."[155] It was a continuation of the Waltons' scheme; those funds were a further source of funds to the Waltons as the Inspector/Manager caught up and other sources of funding dried up.

90. DeJong argues that it is a victim of the Waltons' fraud, and that such participation cannot constitute participation in their fraud.

91. The Bernstein Companies' claim was never against DeJong, but against fraudulent companies that were entirely controlled by Norma Walton, that were part of an overall Ponzi scheme, and that unquestionably engaged in improper conduct. DeJong may also have a *pari passu* claim, by virtue of its shareholder loans, but not priority over other creditors.

(ii) Increasing the Difficulty of Recovery for the Bernstein Companies

92. Independent of their participation as part of the overall "shell game" that kept the funds going, the WSC Companies participated by making it more difficult for the Bernstein Companies to trace their funds and ultimately recover.

93. The number, complexity, and expansion of the WSC Companies made it easier than it otherwise would have been for the Waltons to hide the Bernstein Companies' funds.

94. Despite extensive efforts, in most cases the Inspector/Manager was unable to trace the funds misappropriated from the Bernstein Companies through Rose & Thistle and into specific Project Companies because of the co-mingling of WSC and WSC Company funds.[156] Justice Blair recognized this when he held that the Waltons' conduct, from which DeJong seeks to benefit, had made a perfect tracing of funds impossible:

> My colleague's approach, in effect, incorporates a tracing requirement into the knowing assistance claim, collapsing the distinction between knowing assistance and knowing receipt where corporate actors are used to assist in breach of fiduciary duty. To do so would mean that justice could not properly be done in many cases of massive, multi-corporation, multi-party fraud because – as this case demonstrates – the fraudulent co-

[155] Reasons of the Court of Appeal, at para 95, AR, Vol II, Tab 7 at p 4.
[156] First Interim Report at para 29, AR ,Vol XIV, Tab 64 at pp 57-58; Second Supplemental Report to the Twenty-Second Report of the Manager, at para 15, RR, Tab 5, p 236-237; Fourth Supplemental Report to the Twenty-Second Report of the Manager dated January 27, 2015 at para 10, Vol XVI, Tab 78 at pp 15-16.

> mingling of funds renders it impossible to accomplish that task with the degree of precision required for knowing receipt, unjust enrichment or constructive trust.[157]

THE MENTAL ELEMENT: THE WSC COMPANIES HAD ACTUAL KNOWLEDGE OF THE FRAUD AND BREACH OF FIDUCIARY DUTY

95. For knowing assistance, knowledge required by an accessory is actual knowledge, willful blindness, or recklessness.[158] This ensures that innocent, unwitting, or even negligent participants will not be held liable for knowing assistance.

96. DeJong argues that the WSC Companies did not have that level of knowledge. DeJong relies on the doctrine of corporate identification to suggest that the WSC Companies in which it invested did not have the requisite knowledge to be found civilly liable. DeJong is incorrect.

97. As the Courts below repeatedly found, the WSC Companies were entirely controlled by Norma Walton.[159] There was, for practical purposes, no difference between Norma Walton and the WSC Companies. They were the tools of her fraud.

Corporate Identification

98. A corporation is a distinct legal entity.[160] It is also, however, a construct:

> My lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.[161]

99. In *Canadian Dredge*, this Court reviewed the criminal and civil development of corporate liability. The corporate identification doctrine in criminal law was a creature of statute and has evolved over time because of the difficulty of imputing *mens rea* to a corporation. However, at common law, the Courts had no such difficulty in imposing corporate liability, "even though the

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[157] Reasons of the Court of Appeal at para 81, AR, Vol II, Tab 7 at p 38.
[158] *Harris v Leiken Group Inc.*, 2011 ONCA 790 at para 8.
[159] Reasons of Justice Brown at paras 1, 187, AR, Vol IV, Tab 32 at pp 75, 137; Reasons of Justice Newbould dated September 23, 2016 at para 28, AR, Vol I, Tab 4 at p 76; Reasons of the Court of Appeal at para 66, AR, Vol II, Tab 7 at pp 30-32.
[160] *Solomon v Solomon*, [1896] UKHL 1.
[161] *Lennard's Carrying Company, Limited v Asiatic Petroleum Company, Limited*, [1915] AC 705 at p 713.

state of mind of the corporation was established by imputing to that corporation the intentions and the conduct of its servants and agents."[162]

100. The will and intention of the corporation is identified with that of its directing mind(s).[163] The directing mind is the person with management, control and decision-making power in relation to the act or omission at issue.[164]

101. Here, there is no doubt that Norma Walton was the operative mind of the WSC Companies. Justice Blair's reasons at paragraph 66 cannot be improved on:

> (a) Ms. Walton was a director of each of the Schedule C Companies and, from all accounts, the only active director and officer.
>
> (b) As found by Brown J. in the earlier portion of these same proceedings:
>
> > (i) The [WSC] Companies were owned and controlled by the Waltons;
> >
> > (ii) Norma Walton presented herself to the court, through her affidavits and through her submissions, as the person who was in charge of the entire enterprise, whether it be the operation of the [WSB] Companies, Rose & Thistle or the [WSC] Companies;
> >
> > (iii) Neither Ronauld Walton nor the Chief Financial Officer of Rose & Thistle had come forward to say that the improper transfers of monies out of the [WSB] Companies were the result of directions or orders given by someone other than Norma Walton (from which he inferred that they were not); and
> >
> > (iv) Ms. Walton "simply did as she saw fit irrespective of her legal obligations" and "ignored the contractual language that bound her".
>
> (c) The shareholder agreements respecting the [WSB] Companies (in which the [Bernstein Companies] were involved) and the [WSC] Companies (in which the Respondents were involved) all provided that the Waltons were to be responsible for the management, supervision and renovation of the projects.
>
> (d) Ms. Walton deposed before Brown J. that she was managing the jointly-owned portfolio of the companies, and that she used Rose &

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[162] *Canadian Dredge & Dock Co v The Queen*, [1985] 1 SCR 662 at paras 32-34. [*Canadian Dredge*]
[163] *El Ajou v Dollar Land Holdings Ltd*, [1994] 2 All ER 685 4 at pp 695. [*El Ajou*]
[164] *El Ajou* at p 696; *Rhone v Peter A B Widener*, [1993] 1 SCR 497 at p 521.

> Thistle "as a clearing house account to smooth cash flow across the portfolio".
>
> While the specific reference to "the jointly-owned portfolio of companies" was to the [WSB] Companies in which the Waltons and Dr. Bernstein each held a 50% interest, Ms. Walton also acknowledged that the funds Dr. Bernstein was advancing to the [WSB] Companies were being pooled amongst those companies, then transferred to Rose & Thistle and also to the [WSC] Companies.
>
> The [WSC] investors – including the DeJongs, the Condos and the Levytams – were unaware this was occurring and did not provide any direction or input in these actions.
>
> (e) The Application Judge himself accepted the findings of Brown J., including the finding that in many cases the funds invested by the [Bernstein Companies] had been transferred to the Schedule C Companies and that the [WSC] Companies were "controlled" by the Waltons.
>
> (f) The Application Judge noted that he could not determine into which companies [WSB] money went, "[i]n light of the way in which Ms. Walton transferred money around" between the [WSB and WSC] corporations.[165]

102. DeJong, relying on *Canadian Dredge*, asserts that the knowledge of a principal cannot be imputed to a corporation where the acts of the principal were: (a) outside the scope of her authority; (b) in total fraud of the corporation or for her own benefit (as opposed to the benefit of the corporation); and (c) not for the direct benefit of the corporation.

103. The *Canadian Dredge* test is met: Norma Walton's knowledge must be imputed to the WSC Companies. However, before addressing each of those three elements, two points are worth keeping in mind.

104. As held by the majority of the Court of Appeal, the elements of the corporate identification doctrine can be relaxed in civil cases.[166] Where Norma Walton was so plainly the

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[165] Reasons of the Court of Appeal at para 66, AR, Vol II, Tab 7at pp 30-32.
[166] Reasons of the Court of Appeal at paras 70-73, AR, Vol II, Tab 7 at pp 33-35; Ernest Lim, "Attribution in Company Law" (2014) 77:5 Mod L Rev 780 at 800-802, RBOA, Tab 2; Peter Watts, "Imputed knowledge in agency law – excising the fraud exception" (2001) 117 Law Q Rev 300 at 332-333, RBOA, Tab 8.

directing mind of the WSC Companies, any application of the *Canadian Dredge* test that would hold that she was not challenges reality.[167]

105. This Court told us in *Deloitte & Touche v Livent* that the *Canadian Dredge* test is a sufficient one for corporation responsibility, not a necessary one.[168] A Court should not apply it where it is not in the public interest to do so.[169]

106. Second, *Canadian Dredge* is well-suited to situations where the goal is to identify whether the conduct of a particular person can be attributed to a large corporation with a vast array of different stakeholders. Where the corporation is a small, private corporation controlled by a single person, the only plausible result is that that person's knowledge is imputed to the corporation.[170]

107. If Norma Walton was not the controlling mind of the WSC Companies, who was?

(a) Corporations must act through people:[171] they are not mindless;

(b) The controlling mind of the WSC Companies was never DeJong.[172]

1. The Conduct was within the Scope of Norma Walton's Corporate Authority

108. DeJong contends that the fraudulent conduct was not within the scope of her authority over the WSC Companies. This is wrong. The co-mingling of funds and control of Project Company finances was squarely within Norma Walton's authority over the corporations.[173]

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[167] Where an individual is clearly the directing mind of a corporation, Courts have routinely found corporate identification without considering the *Canadian Dredge* test. See eg *AI Enterprises Ltd v Bram Enterprises Ltd*, [2014] 1 SCR 117 at para 105; *0738827 BC Ltd v CPI Crown Properties International Corp*, 2013 ABQB 499 at para 69.
[168] *Deloitte & Touche v Livent Inc. (Receiver of)*, 2017 SCC 63 at para 104. [*Livent*]
[169] *Livent* at para 104; Reasons of the Court of Appeal at para 81, AR, Vol II, Tab 7 at p 38.
[170] See *373409 Alberta Ltd (Receiver of) v Bank of Montreal*, 2002 SCC 81 at paras 19-20.
[171] *Lennard's Carrying Company, Limited v Asiatic Petroleum Company, Limited*, [1915] AC 705 at pp 713-714. Ernest Lim, "Attribution in Company Law" (2014) 77:5 Mod L Rev 780 at 800-802, RBOA, Tab 2.
[172] DeJong Reply Affidavit at para 23, AR, Vol VIII, Tab 49, p 190; Reasons of the Court of Appeal at para 66(d), AR, Vol II, Tab 7 at pp 31-32.
[173] See eg Agreement between DBDC Global Mills Ltd, the Waltons, and Global Mills Inc., AR, Vol IX, Tab 50F, pp 122-130; Agreement respecting UEL dated February 2013, AR, Vol V at Tab 47D, pp 122-124; DeJong Reply Affidavit at para 23, AR, Vol VIII, Tab 49, p 190.

109. *Canadian Dredge* requires that the individual be acting within "reference to the field of operations delegated to the directing mind," or "within the scope of the area of the work assigned to him [or her]."[174] The scope of the authority is broadly construed and is not easily limited.

110. An individual does not exceed the scope of their authority merely because they do something illegal or otherwise unlawful.[175] If that were the case, then an individual's unlawful conduct could never be imputed to the corporation. As this Court held:

> It is no defence to the application of this doctrine that a criminal act by a corporate employee cannot be within the scope of his authority unless expressly ordered to do the act in question. Such a condition would reduce the rule to virtually nothing.[176]

111. Imputing the will of the directing mind to the corporation where, as a consequence, a corporation (and therefore its stakeholders) may suffer an economic penalty is a risk associated with the privilege of operating through a corporate vehicle.[177]

112. If a principal is the directing mind of a corporation, the failure of other stakeholders to confer express authority on her in respect of the specific act is irrelevant, as are specific instructions prohibiting the act in question:

> Acts of the ego of a corporation taken within the assigned managerial area may give rise to corporate criminal responsibility, whether or not there be formal delegation; whether or not there be awareness of the activity in the board of directors or the officers of the company; and […] whether or not there be express prohibition.[178]

113. That the other fiduciaries of or stakeholders in the company were not privy to the knowledge imputed to the corporation by the directing mind is irrelevant. In *El Ajou*, Dollar Land Holdings plc ("DLH") was held liable for the actions of one of the nominee directors, Sylvain Ferdman, where his sphere of authority was very limited. The Court held that Mr. Ferdman was the directing mind of DLH for the limited purpose of receiving funds that he knew

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[174] *Canadian Dredge* at para 39.
[175] *Hart Building Supplies Ltd v Deloitte & Touche*, 2004 BCSC 55 at para 32.
[176] *Canadian Dredge* at para 35.
[177] *Canadian Dredge* at para 50; *El Ajou* at p 706 (per Hoffman LJ).
[178] *Canadian Dredge* at paras 35, 60, 67.

had been obtained in fraud. The authorized manager knew nothing of the fraud. Nonetheless, the corporation was liable:

> The formal position, as regulated by the company's articles of association, service contracts and so forth, though highly relevant, may not be decisive. Millett J. adopted a pragmatic approach [which was adopted by the Court of Appeal].[179]

114. A corporation will not be held liable only where all of its principals and stakeholders act as co-conspirators.[180] This Court rejected in *Livent* the conflation of a corporation with its stakeholders.[181]

2. The Conduct was not a Total Fraud on the WSC Companies and the "Benefit to the Corporation" Requirement

115. The second and third requirements will be addressed together, given their overlapping considerations, consistent with the reasons of the Court of Appeal.

116. At paragraph 120 of its factum, DeJong again conflates itself with the WSC Companies.[182] Norma Walton's conduct was undoubtedly a fraud on the investors, including the Bernstein Companies and DeJong. But it was not a fraud on the Schedule WSC Companies: they were the instruments of her fraud and were totally within her control.

117. DeJong argues that Norma Walton's conduct in respect of the WSC Companies was in fraud of those corporations and solely for her own benefit. The record does not support that conclusion. The test is met.

118. For DeJong to succeed, the conduct must be in total fraud of the corporation with no benefit of any kind to the corporation:

> Where the criminal act is totally in fraud of the corporate employer and where the act is intended to and does result in a benefit exclusively to the employee-manager, the employee-directing mind, from the outset of the design and execution of the criminal plan, ceases to be a directing mind

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[179] *El Ajou* at p 696.
[180] *Enbridge* at para 31.
[181] *Livent* at para 71.
[182] DeJong Factum at para 120.

> of the corporation and consequently his acts should not be attributed to the corporation under the identification doctrine.[183] [emphasis added]

119. A directing mind may act for her own benefit, but where, either by design or effect, she does not act in total fraud of the corporation, the doctrine of corporate identification cannot be escaped. In *Livent*, this Court did not go so far as to say that the stakeholders could not hold the company liable for the acts of Drabinsky and Gottlieb. The company was held liable through the process of its insolvency.

120. "Benefit" does not necessarily mean strict economic benefit in this analysis.[184] Whether a corporation benefitted from conduct is directly related to the nature of the business and its intended purpose. Given that a corporation is a legal fiction through which individuals act, actions by the directing mind of the corporation within the overall scope of his or her authority that in some way further the purposes of the corporation can be to the corporation's benefit.

121. The facts of this case are not unlike *Canadian Dredge*. As did DeJong here, the corporation argued that they were victims of the fraud perpetrated by the principals rather than the perpetrators. They argued that they did not profit as they might have by being the winning bid. They also argued that the principals took some of the funds circulating as part of the scheme for themselves. This Court held that these arguments did not negate the attribution of the principals' conduct to the companies:

> The law does not require that the court conduct a detailed inquiry into the minutiae of inter-conspirators' accounts in order to ascertain whether the contracts and subcontracts were profitable to the member of the conspiracy in question.[185]

122. DeJong frames the fraud as one perpetrated by the Waltons solely for their own personal benefit. That is not correct.

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[183] *Canadian Dredge* at para 85.
[184] *373409 Alberta Ltd (Receiver of) v Bank of Montreal*, 2002 SCC 81 at para 22.
[185] *Canadian Dredge* at para 87.

123. The majority of the Court of Appeal rightly concluded that the WSC Companies did in fact benefit, including by acquiring properties as part of the overall fraud and by receiving transfers of funds.[186] There is no basis to disturb this conclusion:

> Although some of their investors' monies were misapplied and misused in breach of Ms. Walton's fiduciary duties – as were the investments of the [Bernstein Companies] – the [WSC] Companies nevertheless acquired properties, as they were intended to do and as part of the investment arrangements. As a result of Ms. Walton's net transfer of at least $23.6 million from the [WSB] Companies to Rose & Thistle and the net transfer of $25.4 million from Rose & Thistle to the [WSC] Companies, the latter acquired funding necessary for their ongoing operations; Brown J. accepted the Inspector's conclusion that the [Bernstein Companies'] investments in the [WSB] Companies "[were] a major source of funds for the [WSC] Companies". The record shows that each of the [WSC] Companies either received from or transferred to Rose & Thistle monies or monies-worth, during the relevant period. Given the co-mingling of funds, it is not possible to trace the complete path of all these transactions; however, Ms. Walton herself acknowledged that Rose & Thistle was the "clearing house" for the movement of funds as between the [WSB] Companies, Rose & Thistle, and the [WSC] Companies.[187]

124. The Waltons' conduct also benefited the Project Companies by allowing the shell game to continue. As the Waltons' fraud progressed, the number of Project Companies expanded.[188] They also escalated the theft from the Bernstein Companies.[189] The Waltons had found a deep-pocketed victim in Dr. Bernstein, and they exploited him to the benefit of their interests and the interests of the Project Companies as a whole.[190]

125. The WSC Companies in which DeJong invested in 2013 were by then an integral part of the Waltons' fraudulent scheme. The intended purpose of those companies was to continue to perpetrate the taking of monies from investors to keep the overall scheme afloat.[191] The Project

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[186] Reasons of the Court of Appeal at para 80, AR, Vol II, Tab 7 at p 37.
[187] Reasons of the Court of Appeal at para 80, AR, Vol II, Tab 7 at p 37.
[188] Affidavit of Norma Walton sworn October 31, 2013 at paras 16-39, AR, Vol, X, Tab 53, pp 131-141.
[189] Fifth Interim Report dated July 1, 2014 at para 62, AR, Vol XV, Tab 71 at pp 91-92; Appendix L to the Fifth Interim Report, AR, Vol XV, Tab 71L at pp 108-109; Reasons of Justice Brown at paras 162-163, AR, Vol IV, Tab 32 at pp 130-131.
[190] Reasons of Justice Brown at para 15, AR, Vol IV, Tab 32 at p 82.
[191] Affidavit of Norma Walton dated June 26, 2014 at para 6, AR, Vol XI, Tab 57 at p 77; Endorsement of Justice Newbould dated November 5, 2013, at paras 23-24, AR, Vol III, Tab 23 at p 133; Reasons of Justice Brown at paras 15, 181, AR, Vol IV, Tab 32 at pp 82, 135; Reasons of the Court of Appeal at para 66(d), AR, Vol II, Tab 7 at pp

Companies were all part of the intensifying Ponzi scheme, and they all benefited from its continued operation. Why? Because when the music stopped and the fraud was ended, the Project Companies stopped serving any purpose, and were doomed to be shut down.

EQUITABLE CONSIDERATIONS

126. Beginning at paragraph 131 of its factum, DeJong argues that even if the requirements of knowing assistance are made out, it would inequitable to deny it recovery from the happy coincidence that the corporations in which it is a stakeholder retain funds.[192] DeJong rests this argument on the implicit assumption that the funds in the WSC Companies in which it invested are its property and that, as a stakeholder, it should have a priority claim over those funds. DeJong is wrong.

127. DeJong (and the Bernstein Companies) set up, with the Waltons, individual single-purpose corporate vehicle to hold a single real-estate investment. This was done, no doubt, to insulate the beneficial owners, the DeJongs, from any liabilities associated with any individual commercial real estate property. There is nothing wrong with that. But having accepted separate corporate identification for one purpose, DeJong must accept it for all. In a concurring decision in *El Ajou*, Hoffman LJ held:

> I do not regard [corporate liability] as an unsatisfactory outcome. If the persons beneficially interested in a company prefer for tax or other reasons to allow that company to be for all legal purposes run by […] fiduciaries, they must accept that [the company] may incur liabilities by reason of the acts or knowledge of those fiduciaries.[193]

128. Having chosen to invest their funds in a corporation controlled by Norma Walton, DeJong took the risk that other creditors would advance claims to those funds if Norma Walton caused the companies to incur liabilities, as she did. DeJong has a claim to funds in the WSC Companies in which they invested, but its claim can be no better than the claims of any other creditors of those companies.

31-32; Fourth Interim Report at paras 12-13, AR, Vol XIV at pp 132-133; Fifth Interim Report, at paras 9, 58-69, AR, Vol XV, Tab 71 at pp 79, 91-93.

[192] DeJong Factum at paras 131-135.

[193] *El Ajou* at p 707.

129. Contrary to what DeJong argues, the result sought by the Bernstein Companies, and accepted by the Court of Appeal, is just and equitable. All investors who suffered losses will recover on a *pari passu* basis. It makes good policy sense that where corporations are used to perpetrate a massive fraud, the corporations are held liable to the victims in knowing assistance on a joint and several basis with the fraudster, such that recovery of their stakeholders is *pari passu* to their loss. This is particularly so where fraudulent co-mingling makes tracing impossible. It is it not unfair to DeJong, who would otherwise benefit from the arbitrary accident that the company in which it invested happened to be flush with cash when the music stopped.

THE REMEDY

130. Accessories in knowing assistance are held liable with the principal wrongdoer on a joint and several basis for the full extent of the loss caused by the wrong-doer.[194] The measure of damages does not depend on any benefit earned by the accessory: such a remedy sounds in a receipt-based proprietary claim. Knowing assistance attracts fault-based liability and therefore harm-based damages.

131. Here, the Bernstein Companies limited their claim against the other Project Companies to the amount determined by the Inspector/Manager's net transfer analysis, being $22.6 million. Under the doctrine of knowing assistance, it was open to the Bernstein Companies to claim the full $66 million in respect of which it obtained a judgment against the Waltons in fraud.

132. In light of the absence of any competing claim by any other investors (including DeJong) against the Waltons or the other Project Companies, the Bernstein Companies determined only to seek the lesser amount that appeared to flow from the 31 Project Companies in which they were invested (the WSB Companies) to the other Project Companies (the WSC Companies). On a practical basis, the Bernstein Companies also sought only a judgment against the WSC Companies in which there was available monies, as the Bernstein Companies sought neither (i) to pierce the corporate veil to seek a remedy against investors like DeJong; nor (ii) a pyrrhic victory against corporations with no assets.

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[194] See *Ultraframe UK Ltd v Fielding* [2005] EWCA 1638 (Ch).

133. The Bernstein Companies are criticized by DeJong for both of these decisions. Common sense in disputes is to be encouraged, not derided.

PART IV: SUBMISSIONS ON COSTS

134. The Bernstein Companies respectfully request their costs of this appeal and of the proceedings before the Applications Judge and the Court of Appeal on a partial indemnity basis.

PART V: ORDER REQUESTED

135. The Bernstein Companies respectfully request that the appeal be dismissed, and an Order made that the Bernstein Companies' award of damages for $22.6 million (less any amount recovered from the Constructive Trusts granted by Justice Brown) ranks *pari passu* with that of any other proven unsecured creditor claims against the WSC Companies.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of April, 2019.

For: **PETER H. GRIFFIN**

For: **SHARA N. ROY**

For: **PAUL-ERIK VEEL**

For: **MADISON ROBINS**

PART VI: NOT APPLICABLE

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SCHEDULE A – RESPONDENTS – THE "BERNSTEIN COMPANIES"

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investments Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen's Corner Inc.
14. DBDC Queen's Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Industrial Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

SCHEDULE B - LIST OF WALTON SCHEDULE B COMPANIES
("WSB COMPANIES")

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline
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 WALTON SCHEDULE C PROPERTIES
("WSC PROPERTIES")

1. 3270 American Drive, Mississauga, Ontario
2. 0 Luttrell Ave., Toronto, Ontario
3. 2 Kelvin Avenue, Toronto, Ontario
4. 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario
5. 1 William Morgan Drive, Toronto, Ontario
6. 324 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