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Docket: CI 09-01-60043
(Winnipeg Centre)
Indexed as: India Association of Manitoba Inc. et al. v.
India School of Dance, Music & Theatre Inc.
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

INDIA ASSOCIATION OF MANITOBA INC.,) COUNSEL:
WEST INDIAN INDO CANADIAN CULTURAL)
ORGANIZATION OF MANITOBA INC., THE	) <u>David S. Miles</u>
MALAYALI ASSOCIATION OF MANITOBA INC.	) for India Association of
and INDO CANADIAN ARTS AND CULTURAL	) Manitoba Inc., West Indian
CENTRE INC.,	) Indo Canadian Cultural
	) Organization of Manitoba
	) Inc., The Malayali Association
	) of Manitoba Inc.
)
	) <u>William S. Gange</u>
	) for Indo Canadian Arts and
	) Cultural Centre Inc.
)
	) <u>Ralph D. Neuman</u>
	) for the defendant
)
	) JUDGMENT DELIVERED:
	) November 30, 2011

PERLMUTTER J.

Introduction

[1] The plaintiffs claim beneficial ownership of a portion of the property at 479 St. Mary's Road, in Winnipeg and the grant money received with respect to

this property. Title to the property is in the name of the defendant India School of Dance, Music & Theatre Inc. (the "School"). The building on the property is occupied by the School and is named Indo-Canadian Arts and Cultural Centre.

[2] The plaintiffs allege that the property was purchased in part with money contributed by the plaintiffs Indian Association of Manitoba Inc. ("IAM"), West Indian Indo Canadian Cultural Organization of Manitoba Inc. ("WIICCOM"), and The Malayali Association of Manitoba Inc. ("MAM"). The plaintiffs claim a resulting trust with a minimum $2/9^{\text{th}}$ interest in the property to each of IAM and WIICCOM and a minimum $1/9^{\text{th}}$ interest to MAM. The plaintiffs also claim that a grant from Canadian Heritage and two grants from the City of Winnipeg received by the School are subject to an express trust in their favour. Other than declaratory relief, the plaintiffs are not seeking a remedy at this stage. If successful, they will try to work out a further remedy with the School.

[3] The School alleges that the plaintiffs represented to it that title to the property would remain in its name until the resolution of certain unresolved issues. The School's position is that the claim ought to have been for unjust enrichment, but nevertheless the School will repay the plaintiffs their contributions with interest. Furthermore, the School's position is that if a trust case is made out, equitable principles dictate that no trust be imposed. In the alternative, the School says that if a trust is imposed, it ought to be limited to the funds, but no beneficial interest in the property. If a trust is imposed with

respect to the property (and not just the funds), the School says the remedy should still be limited to repayment of the funds.

Background

[4] By way of background, IAM's main purpose is to preserve, promote, and integrate the Indian culture and heritage in Manitoba. WIICCOM is an umbrella organization for groups of people from the Caribbean of Indian descent. These groups are Sanatan Dharma Maha Sabha, Rama Krishna Mandir, Guyanese Association of Manitoba, Manitoba Arya Samaj, and Manitoba Hindu Dharmik Sabha. MAM represents the people of Kerala, India. From 1980 to 1983, the School was IAM's performing arts wing. In 1983, the School was incorporated and in 1986, it acquired a dance studio at 567 St. Mary's Road (the "old building"), where it remained until 2009, when it moved to the property at issue.

[5] The plaintiff Indo Canadian Arts and Cultural Centre Inc. ("ICACC") was incorporated on March 5, 2008. Prior to its incorporation, for the most part, the incorporators of ICACC were part of a "task force". This task force consisted of two representatives from each of IAM, WIICCOM, MAM, and the School.

Issues

[6] The issues are:

1. Have IAM, WIICCOM, and MAM established a resulting trust in their favour with respect to the property and if so, in what proportions?
2. Have the plaintiffs established that the School received the grant money in trust for them?
3. If questions one and/or two are answered in favour of the plaintiffs, should the trusts be denied by reason of other equitable principles?

4. If a trust is declared, is it limited to the money advanced by the plaintiffs or does it apply to the property which was purchased in part with that money?
5. If a trust is declared with respect to the property, should these plaintiffs' recovery be limited to repayment of their contributions?

Evidence

[7] As witnesses, the plaintiffs called Hollis Singh as the representative of ICACC, Varghese Cherian as the representative of MAM, and Madukar Gupta as the representative of IAM. The School called its representatives Pamela Rebello and Muni Mysore, Nigel Mohammed from the Assiniboine Credit Union ("ACU"), and Poorany William who is a School dance instructor.

[8] There is little evidence in dispute. The parties are at odds as to what evidence is relevant, the applicable law, and the application of this law to the evidence.

[9] In early 2003, the community began to discuss a cultural centre. A facilitator assisted in preparing a Memorandum of Agreement (the "MOA"), which was signed on December 15, 2004, by representatives of each of IAM, the School, and MAM. In the MOA preamble, they agreed to the enumerated matters in their effort to create a common cultural centre. The "clauses" include:

- A new non-profit corporation will be founded which will own the assets associated with the cultural centre;
- The three organizations will be the initial shareholders of the new corporation;
- Share price will be set at \$5,000 each. A minimum investment of \$30,000 or six shares is required to become a shareholder;

- Ownership of the corporation will be based on the level of investment of each shareholder;
- The preference is to build a new facility rather than purchase an existing building;
- The shareholders will appoint the board of directors;
- Investors would appoint a maximum of 3 directors;
- The intent of the three organizations is to have commercial income to pay the operating costs, but to the extent that this does not occur operating costs will be shared by the three organizations according to usage;
- A six person task force, consisting of two members of each of the three organizations, will continue to negotiate the outstanding issues and organize a series of key activities and events.
- A unanimous shareholders agreement ("USA") has to be negotiated.

[10] An addendum to the MOA contemplates creating a set of by-laws.

[11] There are unresolved steps in the MOA, including the establishment of a governance model and a USA.

[12] Dr. Mysore was the chair of the task force from when it formed in 2003, up to the last meeting in 2008. On March 21, 2007, at a meeting of WIICCOM and the task force, Dr. Mysore informed WIICCOM of the cultural centre idea, with everybody as partners, and asked WIICCOM to join. On cross-examination, Dr. Mysore agreed that she was saying to WIICCOM put in \$30,000, and you will be an owner of this asset. Mr. Singh, the WIICCOM representative, understood that for \$30,000, WIICCOM would have a share and for \$60,000, WIICCOM would have two members on the board. Although WIICCOM never signed the

MOA, Mr. Singh testified that at the task force meeting the MOA was referred to as the project framework.

[13] In July 2007, Ms Rebello saw an advertisement to sell the property and asked Mr. Cherian to go see it. Community open houses were held and when the decision was made to purchase the property, things moved quickly. Mr. Cherian and Ms Rebello were particularly involved in the purchase, including the offer to purchase, meeting with the ACU to obtain a mortgage, and communicating with the lawyer handling the transaction.

[14] On August 20, 2007, at a task force meeting, the question of who would own the building was raised. Dr. Mysore testified that it was discussed that only the School could hold title because it has charitable status, can waive land transfer fees, has a record of owning the old building, has the ability to apply for grants, and was the only one that could get a bank loan. The question of who would own the building three to five years later was raised. It was discussed that ICACC had to be developed as a charitable organization with its own by-laws and governance. They had not yet discussed cost sharing, space sharing, or ICACC membership at large. To allow for this to happen would take three to five years at which point the School and the partners would jointly hold title. It was agreed that they would make an opening bid of one million dollars with an initial deposit of \$30,000. In her testimony, Dr. Mysore confirmed that this offer was made in the name of the School but on behalf of the task force.

[15] Ms Rebello testified that the offer to purchase was in name of the School since it was doing the due diligence and offered the deposit. Ms Rebello testified that the purchase was to be financed from contributions by property users, interest free loans to the School, and donations. At the time, there was no government funding. IAM contributed \$60,000, MAM was to contribute \$30,000, and WIICCOM contributed \$60,000. The School was to contribute \$120,000. Ultimately, the \$30,000 deposit is all that the School paid towards the purchase price. The balance of the purchase price came from a mortgage with ACU, in the School's name.

[16] Contrary to the evidence of Dr. Mysore, Mr. Cherian denied that at the August 20, 2007 meeting, the School suggested it needed assurance that it would have title to take on the risk of purchasing the property. Rather, the task force decided that the School would hold title until it was transferred to ICACC due to the School's charitable status and to avoid the land transfer tax.

[17] On August 23, 2007, WIICCOM decided to join as a partner and ultimately contributed \$60,000. On August 28, 2007, at a task force meeting, Dr. Mysore read a letter from WIICCOM stating its "intention to join as partners sharing the privileges and burden of joint partnership with a full and hopeful resolution of the governance model in due time". In her testimony, Dr. Mysore confirmed that WIICCOM was saying we are full partners and that was what she wanted them to do. Dr. Mysore expected that IAM and MAM would behave the same.

[18] On September 30, 2007, an open house was held, where "Frequently Asked Questions", prepared by Mr. Cherian, was available and included:

11. Who will own the building at the present time?

The [School] will hold the title as the main applicant. The [School] is a registered, charitable, non-profit organization with the ability to provide donation receipts. Being charitable organization (sic), there would not be any land transfer tax (which could be approximately \$20,000), when the property is purchased in [the School's] name. Also the legal framework for the shared facility is not in place.

12. Who will own the building three to five years from now?

The [School] and the partners jointly under the Indo-Canadian Arts and Cultural Centre or agreed upon consortium.

[19] Dr. Mysore testified that these paragraphs reflected the School's position.

When questioned, Mr. Singh accepted that the School was to hold title to the property and that after three to five years, there would be joint ownership between the School, ICACC, and the partners.

[20] On October 9, 2007, at a task force meeting, transferring title from the School to the proposed consortium was brought up. It was determined that this issue would be revisited a year later which, according to Dr. Mysore, was to determine if there were any developments.

[21] On November 2, 2007, one day after the closing date, Dr. Mysore emailed, amongst others, Dr. Gupta, Mr. Cherian, and Mr. Singh that "we now own the building". Dr. Gupta and Mr. Singh testified that different building committees were then formed.

[22] On February 5, 2008, Dr. Mysore attended the IAM annual general meeting where a report prepared by Dr. Gupta and others recommended that the legal name to the property be transferred to all four partners as soon as possible. Dr. Mysore testified that she and Ms Rebello were accused of being untrustworthy, although Mr. Cherian and Dr. Gupta deny this.

[23] Mr. Singh prepared the ICACC incorporation documents and as noted on March 5, 2008, ICACC was incorporated. Dr. Mysore was of the view that at this time things were going along not too badly. There was a discussion about what would happen if things did not work out, which resulted in the articles of incorporation providing that upon dissolution or wind-up, the funds and assets remaining after satisfaction of the debts and liabilities of ICACC are to revert back to IAM, the School, MAM, and WIICCOM and any other non-profit partner in a manner directly in proportion to their financial partnership contribution.

[24] According to Mr. Singh, a notice of meeting of the ICACC board was sent, which was attended by all except Dr. Mysore and Ms Rebello. This meeting was adjourned to a later date, but Dr. Mysore and Ms Rebello did not attend and elections of officers took place.

[25] On April 8, 2008, an ICACC meeting was held. According to Dr. Mysore, intimidating criticism was made of the School. Dr. Gupta introduced a resolution that the property be transferred. In his testimony, Dr. Gupta explained he was concerned that they were putting in much volunteer time and there had to be

transparency and accountability. He felt decisions were made unilaterally by Ms Rebello. The School said that it had no obligation to transfer the property.

[26] On April 15, 2008, the presidents of IAM, WIICCOM, and MAM sent a letter to the School president Sudhir Sandhu requesting that title to the property be transferred to ICACC, all funds received by the School for ICACC be deposited to the ICACC bank account, and the School submit all ICACC financial documents to the ICACC board. This letter also indicated that if these preconditions were not met by the date indicated, all levels of government would be informed. On cross-examination, Messrs. Singh and Cherian denied that this was a threat.

[27] On April 16, 2008, Mr. Sandhu's reply stated that the School remained "unequivocally committed to the principles adopted by the founding partners and any perception that the [School] has any interest in continuing to be the sole title holder is wholly inaccurate and badly held" and that "the membership of the [School] adopted a resolution...that the Founding Partners make all necessary arrangements to facilitate an expeditious transfer of the title...". Mr. Sandhu further wrote that "I cannot possibly put greater emphasis on asserting that the [School] has no intent, expressed or implied, to make any effort towards remaining or becoming the sole title holder of the new facility".

Analysis

- 1. Have IAM, WIICCOM, and MAM established a resulting trust in their favour with respect to the property and if so, in what proportions?***

[28] The parties agree that the MOA is unenforceable because it is an agreement to agree. It is the plaintiffs' position that, like an express trust that fails, given that the MOA failed, the trustee (the School) cannot take beneficially. Rather, there is a resulting trust in favour of IAM, WIICCOM, and MAM. Furthermore, it is the plaintiffs' position that because IAM, WIICCOM, and MAM contributed to the purchase price there is a resulting trust in their favour with respect to the property. The plaintiffs have described their interests in the property as "minimums" because they say it is unclear that the School contributed more than \$30,000 towards the purchase price.

[29] The School says that there was no expressed intention of what would happen if matters failed and that with the failure of the MOA, the plaintiffs have an unjust enrichment claim, for which the remedy is the return of their funds. It is the School's position that it would be abhorrent for the plaintiffs to be granted a beneficial interest in the property without fulfilling the MOA prerequisites.

[30] Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 3d ed. (Toronto: Thomson Carswell, 2005) provides the following explanation of a resulting trust:

Broadly speaking, a resulting trust arises whenever legal or equitable title to property is in one party's name, but that party, because he is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner, or to the person who *did* give value for it. (p. 362)

... The view is held that this resulting trust, like all resulting trust situations, arises by operation of law. Such an explanation can clearly be given of the resulting trust which arises when, for any reason, the objects of an express trust fail. Since the trustee cannot take beneficially, the property results to the settlor or his estate. ... (p. 363)

... The distinction between resulting and constructive trusts is perhaps best put in this way – while constructive trusts have nothing to do with intention, express or implied, resulting trusts can be explained either on the basis of intention or imposition of law. ... (p. 364)

[31] *Waters'* provides at p. 364 "if property is purchased by A, and conveyance or transfer is taken in the name of B, or in the names of both A and B, B becomes a resulting trustee of his interest for A". *Waters'* continues, at p. 365:

[An]... essential characteristic is that the claimant (the would-be resulting trust beneficiary) must have "provided the property or equitable interest vested in the person bound by the trust," as Morrison J. said in *Baird v. Columbia Trust Co.* This means that either the claimant originally transferred the property in question to the alleged resulting trustee, **or that the claimant supplied the whole or part of the purchase price when the property was bought from a third party and transferred into the alleged resulting trustee's name.** ... [Emphasis added]

[32] In *Goodfriend v. Goodfriend*, [1972] S.C.R. 640 at 646, the Supreme Court of Canada describes as trite law the principle in *Dyer v. Dyer* (1788), 30 E.R. 42 (Ch.), which is described in *Waters'* as follows at pp. 367-68:

The principle has been established since the early eighteenth century that if one person buys property, but has it conveyed into another's name, or into the joint names of himself and another, that other becomes a resulting trustee for the purchaser of all the interest taken by that other. The best-known statement of the principle, cited and quoted in many Canadian cases, is that of Chief Baron Eyre in *Dyer v. Dyer*:

The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase-money.

[33] *Waters'* deals with multiple contributors at p. 370, as follows:

What is the position if two persons advance the money for the purchase of certain property, which is taken in the name of one of them? **If the amount subscribed by each is determinable, it is clear that the**

transferee holds on a proportionate resulting trust. [Emphasis added]

[34] In addition, at p. 376, *Waters'* discusses admissible evidence, as follows:

Evidence introduced to support the resulting trust or to rebut it may only concern the intention of the parties at the date of the purchase or transfer. ... As Viscount Simonds put it in *Shephard v. Cartwright*, quoting *Snell's Principles of Equity*:

The acts and declarations of the parties before or at the time of the purchase [or of the voluntary transfer], or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration. ... But subsequent declarations are admissible as evidence only against the party who made them, and not in his favour.

[35] Hon. Eileen E. Gillese & Martha Milczynski, *The Law of Trusts*, 2d ed. (Toronto: Irwin Law, 2005), also comments on evidence that is relevant to the determination of a resulting trust, at p. 110:

... The fact that the presumption is out of step with modern thought explains the courts' new approach to such cases, which is to look at all the evidence with an open mind and attempt to determine intention on that basis. If that were the end of the matter, we could say that the presumption of resulting trust had been eradicated. Unfortunately, the courts have not gone that far, and the presumption will operate where the evidence is unclear.

[36] The MOA, the task force meetings prior to the closing date of November 1, 2007, numerous pre-November 1, 2007 documents, and the payments by IAM, WIICCOM, and MAM all establish that these plaintiffs were acting as purchasers. There is no evidence post-November 1, 2007 regarding these plaintiffs which in my view can be taken as contrary to this position. It is undisputed that IAM and WIICCOM each paid \$60,000. MAM paid \$21,000, and was to be given credit of \$9,000 for a business plan prepared by Mr. Cherian. Mr. Singh, Mr. Cherian, and Dr. Gupta all gave evidence that these funds were

contributed as purchasers. There is no evidence that the School ever took the position that the money was a loan or a gift. In fact, Dr. Mysore confirmed on cross examination that the task force's intention from the signing of the MOA until April 2008 was always that the ultimate owner of the property would be the groups that paid their share of the project. She also confirmed that the offer to purchase was made in the name of the School but on behalf of the task force.

[37] The documents are replete with examples indicating that at the material time the parties' intentions were that the contributions by IAM, WIICCOM, and MAM would result in the School holding the property for the benefit of these plaintiffs and the School:

- The MOA, while not a valid contract, nevertheless reflects the parties' intention that the property be owned by a new non-profit corporation that would be founded with the parties as the owners based on their levels of investment.
- On July 5, 2007, Dr. Mysore emailed a City representative indicating that "The India Cultural Centre Task Force has been actively looking for suitable facilities for the centre".
- The minutes from August 20, 2007 task force meeting record the question of who will own the building for the present time. The answer is the School will hold the title as the main applicant who is a registered, charitable, non-profit organization with the ability to provide donation receipts. These minutes also record the question

who will own the building three to five years from now and the answer is the School and the partners jointly under the Indo-Canadian Arts and Cultural Centre or agreed upon consortium.

- Similarly, in the Frequently Asked Questions, paragraph 12 responds to the question "Who will own the building three to five years from now?" with "The India School and the partners jointly under the Indo-Canadian Arts and Cultural Centre or agreed upon consortium".
- In an August 29, 2007 letter, Dr. Mysore referred to the School, MAM, IAM, and WIICCOM as being "in the process of acquiring a new building".
- The documentation submitted with the October 29, 2007 grant application said "Currently there are four partners that are involved in this venture – [IAM, the School, MAM, and WIICCOM]".
- In Dr. Mysore's email, the day after the closing date, she wrote to representatives of all of the parties that "we now own the building".

[38] There was no consensus as to exactly when title would pass. The Frequently Asked Questions prepared by Mr. Cherian and Mr. Singh's trial evidence support the School's evidence that title was not to pass immediately and that the School was to hold title for three to five years. The evidence from all of the parties is that certain tasks were to be completed before title would pass. The MOA provides for certain steps to occur prior to title transfer.

[39] It is my view that unenforceable terms in the MOA and the other ideas at various times as to when title would pass and why, do not contradict the resulting trust. None of this evidence detracts from the admission by Dr. Mysore that the intention was always that the ultimate owner of the property would be the groups that paid their share.

[40] The undisputed evidence is that the money was advanced by IAM, WIICCOM, and MAM for the purpose of acquiring the property and that these funds were used to purchase the property. This along with the foregoing evidence as to the intentions of the parties before, at the time of purchase, and immediately after it so as to constitute part of the transaction establish a resulting trust. There is no other logical explanation as to these plaintiffs' intentions in advancing this money.

[41] The amounts subscribed to each of the plaintiffs who advanced money for the property purchase are determinable. The plaintiffs' contributions coincided with the ownership formula in the MOA. The MOA provided that "A minimum investment of \$30,000 or six shares is required to become a shareholder". In WIICCOM's case, it was conducting itself by reference to the MOA. Dr. Mysore's comments at the March 21, 2007 meeting with WIICCOM were consistent with this as was the evidence of Mr. Singh that at the task force meeting the MOA was referred to as the project framework. The MOA provides that "Ownership of the corporation will be based on the level of investment of each shareholder".

While the MOA is an unenforceable contract, it is evidence of the parties' intentions as to their interests in the property.

[42] Regardless of the MOA, at the time of the purchase, IAM and WIICCOM each contributed \$60,000, MAM was to contribute \$30,000, and the School was to contribute \$120,000. Based on these contributions, Dr. Gupta and Mr. Singh testified that ownership of the property would be $\frac{2}{9}$ th to each of IAM and WIICCOM, $\frac{1}{9}$ th to MAM, and $\frac{4}{9}$ th to the School. In my view, these plaintiffs have established that their interests in the property are a minimum of $\frac{2}{9}$ th to each of IAM and WIICCOM and a minimum $\frac{1}{9}$ th to MAM. Should further evidence become available in subsequent proceedings, it may be determined whether the School's interest is $\frac{4}{9}$ th.

[43] In summary, I have concluded that IAM, WIICCOM, and MAM have established that the School holds title to the property on a proportionate resulting trust in their favour with a minimum of $\frac{2}{9}$ th to each of IAM and WIICCOM and a minimum $\frac{1}{9}$ th to MAM.

2. Have the plaintiffs established that the School received the grant money in trust for them?

[44] It is the plaintiffs' position that because the grants from the City and Heritage Canada were applied for on their behalf and the School, the money received was to be held in trust for all parties. The School's position is that only the grant providers have standing to complain about the use of the grant money.

[45] *Waters'* provides at pp. 132-34:

For a trust to come into existence, it must have three essential characteristics. ... (1) the language of the alleged settlor must be imperative; (2) the subject-matter or trust property must be certain; (3) the objects of the trust must be certain.

.....

... Equity is concerned with discovering the intention to create a trust; provided it can be established that the transferor had such an intention, a trust is set up. ...

A trust may be construed from conduct alone, but it is unlikely that such evidence will conclusively reveal the necessary intention. Words do show that intention, and they must either appear in a document which the maker regarded as final or be orally communicated to another. ...

[46] At trial, the evidence focused on the Canadian Heritage grant. This grant application is in the name of the School, but the plaintiffs are referenced therein. The contribution agreement between the federal minister and the School references IAM, MAM, and WIICCOM as housed in the building and provides that ownership will remain under the School until the ICACC is incorporated and has developed its governance structure.

[47] In my view, there is insufficient evidence that a trust was imposed by the grant providers such that the School was to hold the funds in the plaintiffs' favour. Nobody was called from the grant providers to give testimony as to their intentions. To the extent that evidence was tendered, it establishes that the grant providers' intentions were that the monies be used for this project, as opposed to benefit the plaintiffs. For example, Heritage Canada's advice to the School on January 4, 2010, was that notwithstanding the challenges experienced by the School in its relations with its founding project partners, the School is

allowed to retain the funds already received for the project "given the acquisition of the building and, thus, the partial achievement of project results".

[48] Nevertheless, I expect that as part of any accounting, the purpose for which these grant funds were used will become apparent. If these funds were used to improve the property, given the plaintiffs' beneficial interest in the property, they will no doubt benefit. Further, while it would have been useful for the School to have counterclaimed for property related expenses, I expect that any accounting will reveal the expenses incurred by the School and will canvass the plaintiffs' legal liability, if any, for these amounts.

[49] In summary, I have concluded that the plaintiffs have not established that the School received the grant money in trust for them.

3. If questions one and/or two are answered in favour of the plaintiffs, should the trusts be denied by reason of other equitable principles?

[50] The School says that by demanding title transfer without fulfilling the MOA terms and because of their other conduct, based on equitable principles the plaintiffs ought to be denied relief.

[51] *The Law of Trusts* provides at pp. 13-14:

One important feature of equitable remedies is that they are discretionary. This means that even if a plaintiff proves that a defendant has breached an equitable cause of action, no remedy is automatically forthcoming. ... **Equity**, on the other hand, is more flexible in its approach to granting relief. It **considers the conduct of the plaintiff, for example, in determining whether to grant relief**. Whereas at common law, conduct and motive are irrelevant, in equity the conduct of the parties is always relevant. ... **In equity**, however, **the plaintiff's actions are highly relevant**. ... The factors that the court will consider

in determining whether to exercise its discretion can be found in the equitable maxims. [Emphasis added]

[52] The MOA is not enforceable and in my view, the non-fulfillment of certain of its parts cannot logically be used to contradict the resulting trust. As to the issue of equity, it would be equally inequitable to find that IAM, WIICCOM, and MAM have no interest in the property notwithstanding that they advanced funds as purchasers and it was all parties' intentions that the ultimate owners of the property would include them.

[53] In argument, the focus was on the maxim that he who comes into equity must come with clean hands. The doctrine of unclean hands was summarized in *School of Dance (Ottawa) Pre-Professional Programme Inc. v. Crichton Cultural Community Centre*, [2009] O.J. No. 1164 (Ont. Sup. Ct. J.), at para. 134, by reference to *Taylor v. Guindon*, [2005] O.T.C. 653, as follows:

In *Taylor v. Guindon...*, the court considered the principle that "he who comes to equity must come with clean hands." The court commented at para. 48 that

[a] plaintiff cannot seek equitable relief if the party has violated the principle of good faith ... [However] [o]nly conduct that is immediately and necessarily related to the claim in question will bar a claim in equity. If both parties have "unclean hands" the court should consider only those of the plaintiff and need not balance the misconduct of one against that of the other ...

The court then considered jurisprudence denying equitable relief to those with unclean hands. Notably, in such cases, **unsuccessful plaintiffs typically attempted to base their entitlement to relief on conduct that the court then found to involve some deceit, fraud, or concealment of information for their personal benefit.** [Emphasis added]

[54] The School says that the plaintiffs took an unnecessarily aggressive approach with it. The School argues that examples are the accusations of

wrongdoing against Dr. Mysore and Ms Rebello, the plaintiffs' July 2008 letter to the building architects to stop construction, IAM and WIICCOM paying the Folk Arts Council instead of the School for use of the property for Folklorama 2008, and not listening to Ms Williams' safety concerns. The School says that the plaintiffs knew it could not meet the demand to transfer title given its obligations to lenders. Also, the School says that the April 15, 2008 letter to Mr. Sandhu demanding title transfer was sent without previously voicing any complaints.

[55] However, Mr. Cherian testified that in December 2007, he raised his concern that the School was acting without the task force. For example, the School hired people without consulting the task force and the School never provided a proper accounting. He raised the lack of an election of the chair of the building committee. Dr. Gupta complained that he was told by Ms Rebello that the contract with the architect was confidential. Dr. Gupta was chair of the finance committee, but did not receive banking documents.

[56] It is the plaintiffs' position that the maxims of equity do not apply because a resulting trust arises by operation law. However, I need not determine this question because I have concluded that the plaintiffs' conduct does not establish deceit, fraud, or concealment of information for the plaintiffs' personal benefit, and thus does not meet the unclean hands test.

[57] The School argued that it was because of its assets and its relationship with the grant providers and the ACU that the property could be purchased. The School chose to participate in this property purchase with these plaintiffs and in

my view, the School cannot now deny a resulting trust because the property might not have been purchased but for its involvement.

[58] In summary, I have concluded that the resulting trust is not to be denied because of the plaintiffs' conduct or any other equitable principles.

4. If a trust is declared, is it limited to the money advanced by the plaintiffs or does it apply to the property which was purchased in part with that money?

[59] The School referred to the following quotation from P.V. Baker & P. St. J. Langan, *Snell's Equity*, 29th ed. (London: Sweet & Maxwell, 1990) at 178, to say that any resulting trust attaches to the money advanced as opposed to the property:

Several purchasers. The doctrine is not confined to purchases with money provided by one person only. It also applies where two or more persons advance purchase-money jointly and the purchase is taken in the name of one only, in which case there is a resulting trust in favour of the other or others as to so much of the money as he or they advanced.

[60] In support of this quotation, the authors cite *Wray v. Steele* (1814) 2 V. & B. 388 and write that "[t]he sentence in the text was cited with approval in *Gissing v. Gissing* [1971] A.C. 886 at 902".

[61] However, *Wray* does not support the School's interpretation of the statement in *Snell's Equity*. In *Wray*, at p. 390, the Court referred to *Dyer, supra*, and the rule that "where one Man advances the Money to purchase an Estate, but the Purchase is made in the Name of another, a Trust arises for him, who paid the Money". The Court noted that it was being said that "the Case has never yet occurred of a joint Advance...", which were the facts in *Wray*, to which

the Court answered with the rhetorical question "What is there applicable to an Advance by a single Individual, that is not equally applicable to a joint Advance under similar Circumstances?" (p. 390).

[62] In *Gissing*, the issue was whether one spouse was entitled to a partial beneficial interest up to one-half in the matrimonial home held in the name of the other spouse. No resulting trust was found, however, the issue under consideration was whether there was a beneficial interest in the home itself.

[63] Other case law considering *Wray* came to the same interpretation. For example, *re Plummer*, [1900] 2 Q.B. 790 (C.A.), relied on *Wray* to state "Here the father contributed to the purchase in the name of his son, and, therefore, there is at any rate a resulting trust of a corresponding **part of the property** for the father, as in the case of a purchase of property in the name of one person by means of a joint advance" [Emphasis added].

[64] Thus, the law does not treat a resulting trust differently based on the number of contributors to the purchase price of the property. The authorities are conclusive that a resulting trust is created with respect to the property purchased and not just with respect to the funds used for its purchase.

[65] Moreover, the evidence as to the parties' intentions was that IAM, WIICCOM, and MAM would have an ownership interest in the property itself.

[66] In summary, I have concluded that the resulting trust is not limited to the money advanced.

5. If a trust is declared with respect to the property, should these plaintiffs' recovery be limited to repayment of their contributions?

[67] By analogy to *School of Dance (Ottawa) Pre-Professional Programme Inc.*, *supra*, the School says that the plaintiffs ought to be limited to recovery of their contributions. In the *School of Dance (Ottawa) Pre-Professional Programme Inc.* case, the Court found an unjust enrichment of a property owner and the issue was whether a monetary award or a constructive trust was the remedy.

[68] In my view, the reasoning that applies to a constructive trust does not apply to a resulting trust. A constructive trust is an available remedy for unjust enrichment. A resulting trust is not an alternative remedy. A resulting trust arises by operation of law and is based on the parties' intentions as to the interest in property of the party or parties who advanced the purchase money. No authority was cited to say that monetary compensation can be an adequate remedy and in fact, this is contrary to the very concept of a resulting trust which is to give a purchaser an interest in the property.

[69] As such, I have concluded that these plaintiffs' recovery is not limited to repayment of their contributions.

Conclusion

[70] I am declaring that each of IAM and WIICCOM are a minimum of 2/9th beneficial owner and MAM is a minimum 1/9th beneficial owner of the property. I am not satisfied that a trust has been established regarding the grant money.

[71] If the parties cannot agree on costs, they may be spoken to.

Shirley Palotta J.