



Ontario Judgments

Ontario Superior Court of Justice

H.J. Wilton-Siegel J.

Heard: January 6, 2016.

Judgment: March 24, 2016.

Court File No.: CV-15-11187-00-CL

Case Summary

Motion by the applicant for the return of shares of five corporations held by the respondent. The parties were initially each 50 per cent shareholders, and the applicant was to advance monies for a development project. However, following reports of the applicant's family being involved in fraud in Iran, the applicant was unable to provide the financing, so the respondent agreed he would borrow from private lenders. In order to do so, the parties agreed the applicant would transfer his shares to the respondent, so the respondent had 100 per cent control, and they would not be transferred back to the applicant until the projects were completed and liabilities paid. A trust agreement was executed with respect to the share transfer. Litigation had arisen between the parties. Notwithstanding the developments were not completed, the applicant had applied for the return of his shares, and argued the respondent held them in trust for him.

HELD: Motion dismissed.

The agreement between the parties made business sense as the respondent had to have control in order to negotiate with lenders, and the trust agreement was developed in implementation of this. Addendum two under the trust agreement restricted the right of the applicant to require the transfer of shares on demand. The trust agreement used the language of a trust, but the substance of the agreement as amended by two addendums, did not establish a trust. In form and substance, this was a contractual arrangement. There was no settlor, disposition of trust property or express declaration of trust. The agreement contained references to consideration in the form of mutual covenants, included successors and assigns clause, and was executed by both parties and amended by both. The document comprised of a set of covenants by both parties and the central provision giving the respondent 100 per cent control effectively negated any beneficial interest. The respondent was able to prevent the re-transfer of shares, the indemnity provided was a personal guarantee by the applicant, and the respondent had no separate interest as a trustee. In fact, if he did, it would create a conflict of interest. The parties also did not treat the agreements as giving rise to a bare trust in their dealings with third parties. There was no trust, which defeated the motion.

Counsel

David W. Foulds, Tudor Carsten and Kate Southwell, for the Moving Party, Khashayar Khavari.

Lawrence E. Thacker, Nadia Campion and Chris Kinnear-Hunter, for the Respondent, Mizrahi Enterprises Inc.

Alex Fidler-Wener, for Mahmoud Reza Khavari.

ENDORSEMENT

H.J. WILTON-SIEGEL J.

1 On this motion, the moving party, Khashayar Khavari (the "applicant" or "Khash"), seeks the return of

the shares of five corporations held by the respondent, Mizrahi Enterprises Inc. (the "respondent" or "MEI").

Statement of Facts

2 The parties have agreed that, for the purposes of this motion only, the facts alleged in certain affidavits of Sam Mizrahi ("Mizrahi") and Amanda Brown ("Brown"), referred to below, and of Joel Bowers, all which have been filed in the various proceedings described below, are deemed to be true.

3 The following facts taken from these affidavits are relevant to the issues on this motion and the determinations of the Court.

The Parties

4 MEI is a company incorporated pursuant to the laws of the Province of Ontario. It holds and controls 100% of the issued and outstanding shares of the Project Companies (as defined below) holding title to the lands upon which the Developments (as defined below) are built.

5 Mizrahi is the sole director and officer of MEI. He owns and controls 100% of the shares of that corporation.

6 Khash is a resident of the City of Toronto. He is the son of Mahmoud Reza Khavari ("Khavari"). Khavari currently resides in the City of North York. He is the former chairman of Bank Meli in Iran.

The Developments

7 This litigation originally concerned two real estate development projects, which consist of the following two mid-rise, luxury condominium developments:

- (a) the first development, located at 133 Hazelton Avenue (the "133 Hazelton Residences Project"), consists of 35 custom designed condominium units and three town-homes; and
- (b) the second development, located at 181 Davenport Road (the "181 Davenport Project"), consists of 68 high-end units with multiple penthouse suites.

8 The 133 Hazelton Residences Project was completed and registered as a condominium corporation in March 2015. All units have been sold and the condominium is partially occupied. The 181 Davenport Project is expected to be completed, with occupancy, by June 30, 2016.

9 In this Endorsement, the 133 Hazelton Residences Project and the 181 Davenport Project are collectively referred to as the "Developments".

10 When Mizrahi and Khash, on behalf of his family, first embarked on the Developments in 2010, they agreed that:

- (a) Khash, with the assistance of his family, would contribute the equity required to purchase the lands for development, as well as the necessary construction financing to develop the lands;
- (b) Mizrahi would identify the lands for development and arrange to have the lands rezoned;
- (c) Mizrahi would develop the lands, design and build the condominiums, and undertake the marketing and sale of the condominiums; and
- (d) Mizrahi and Khash would split the profits from the sale of the Developments on a 50/50 basis, after all debts, costs, expenses and interest in respect of the Developments (collectively, the "Liabilities") have been satisfied.

11 Khash, with the assistance of his family and Khavari in particular, advanced approximately \$14.2 million. These funds were used to purchase the property at 131 Hazelton Avenue, 195 Davenport Road and part of 145 Davenport Road. For reasons discussed below, Mizrahi obtained the financing to complete the purchase of 145 Davenport Road, and later 185 Davenport Road, from private lenders.

12 MEI controls 100% of the issued and outstanding shares of various companies holding title to the lands upon which the Developments are located. These companies, which are collectively referred to herein as the "Project Companies", comprise the following corporations: Soaring Mizrahi Developments Inc., 1834369 Ontario Inc., Mizrahi Soaring Developments Inc., 133 Hazelton Inc. and Mizrahi Development Group (185 Davenport) Inc.

13 Up until October and December 2011, Khash, on behalf of his family, and Mizrahi were each 50% shareholders in the Project Companies. Mizrahi held his shares through MEI.

14 The parties incorporated certain other companies, being Mizrahi Development Group (133 Hazelton) Inc., Mizrahi Development Group (131 Hazelton) Inc. and Mizrahi Development Group (145 Davenport) Inc., to hold legal title to the properties upon which the Developments are built as bare trustees for the Project Companies.

The Agreement

15 In September and October 2011, the Toronto Star and the Globe and Mail reported that Khavari was alleged to have participated in one of the largest fraud and embezzlement schemes in Iran. Based on information in the media, it is understood that:

- (a) Khavari fled from Iran to Canada on September 27, 2011;
- (b) shortly thereafter, he transferred ownership of a \$3 million house into the name of his daughter;
- (c) Iran's attempts to extradite Khavari have failed; and
- (d) there is currently an outstanding warrant issued by Interpol for Khavari's arrest in connection with the alleged scheme.

16 Following these reports, Khash advised Mizrahi that the Khavari family's assets had been frozen by the Toronto-Dominion Bank. As a result, Khash could not provide the agreed financing for the Projects.

17 At the behest of the Khavari family, Mizrahi agreed to borrow funds from private lenders in lieu of the funds that were supposed to have been supplied by the Khavaris to proceed with the Projects. In exchange, Khash and his family reconfirmed that all Liabilities would be repaid out of the proceeds of sale from the Developments prior to any distributions to the Khavari family.

18 Khash and Mizrahi agreed that:

- (a) Mizrahi would become the sole director and officer of the Project Companies and would have sole signing authority in respect of these companies, as well as the Developments in general. Khash would transfer his 50% share interest in each of the Project Companies (collectively, the "Shares") to MEI, and thus Mizrahi, through MEI, would retain 100% control over the Project Companies ("Control"); and
- (b) the Shares would not be transferred back to Khash until the Projects were completed and all Liabilities had been fully satisfied.

19 The foregoing agreement is herein referred to as the "Agreement".

20 On October 11, 2011, the parties signed a document styled "Trust Agreement" reflecting the transfer of the Shares.

21 Mizrahi retaining Control was a *sine qua non* of the Agreement. The Khavari family understood that it could not have any Control over the Project Companies because, for the purpose of obtaining construction financing for the Developments, Mizrahi would be making representations to banks and other lenders on the strength of, and in reliance upon, the Agreement that MEI owned and controlled the Project Companies.

22 The Trust Agreement was drafted by the Khavaris' lawyer, Nicholas Tyacke ("Tyacke"). Mizrahi had no input into the language of the Trust Agreement nor opportunity to propose alternative language. Mizrahi signed the Trust Agreement as it was presented to him by the Khavaris. He was under significant stress at the time and feared for his safety and that of his family.

The Financing of the Developments

23 Following execution of the Trust Agreement, Mizrahi secured more than \$88 million in financing on the basis of, among other things:

(a) MEI having Control;

(b) personal and corporate guarantees of the loans and financing, amounting to over \$40 million; and

(c) the security granted to lenders in respect of the loans in the form of charges and mortgages registered on title to the lands.

24 The lenders' security interests include a pledge of certain of the Shares. The Khavaris are aware that, in the event of a change of control (as defined in the relevant loan documents), the banks and lenders may call their loans and exercise their security in respect of the loans.

The Amendments to the Trust Agreement

25 In November 2011, the Khavaris wanted to remove the name "Khalili" from the Project Companies and all of the marketing and development materials. "Khalili" was an assumed name that the Khavaris had adopted to conceal their true identity and their father's alleged role in the embezzlement scheme in Iran. In addition, the Project Companies were reorganized and new companies were incorporated to hold the development lands in trust.

26 In connection with this reorganization, Khash and Mizrahi executed an addendum to the Trust Agreement dated December 5, 2011 ("Addendum #1"). Among other things, Addendum #1 expressly authorized the loan agreements which Mizrahi had arranged to finance the Developments. The last paragraph of the Addendum states:

In addition, the beneficiary authorizes the trustee to proceed for working capital requirements and construction financing for the projects to proceed with the execution and signing of the trustees guarantees both corporate and personal for the necessary loans and registration requirements.

27 In March or April 2012, the parties created and executed a further addendum to the Trust Agreement to:

- (a) correct the Trust Agreement's mistaken reference to an entity, Northern Citadel Capital Inc., as the source of the funding necessary to purchase the properties and carry out the Developments;
- (b) confirm the removal of the "Khalili" name from all corporations and marketing materials related to the Developments; and
- (c) confirm that Mizrahi, through MEI, would have Control of all of the Project Companies and that the Shares would not be returned to Khash until the Developments are complete and all Liabilities have been fully satisfied.

The addendum to the Trust Agreement giving effect to these provisions was signed by Khash and Mizrahi, with Khavari's son-in-law as the witness. A copy of the addendum cannot be located by Mizrahi. The missing document is herein referred to as ("Addendum #2"). In this Endorsement, a reference to the "Trust Agreement" refers to the Trust Agreement as amended by Addendum #1 and Addendum #2, except where the context otherwise specifically requires.

Status of the Projects

28 Due to inclement weather, environmental soil problems and other issues, the Developments experi-

enced significant delays. As a result of the delays, the parties requested a loan extension from one of the project lenders.

29 In support of the request for the extension, a detailed summary of the anticipated profits and expenses in respect of the Developments was provided to the lender. The summary demonstrated that, while there are sufficient funds to repay the principal and interest owing on the loan, there would be little to no equity left in the Developments once all the Liabilities have been paid, due to the cost of the construction delays and the high rate of interest payable to various other project lenders.

The Consolidated Proceedings

30 Notwithstanding the fact that the Developments are not yet completed, on July 24, 2015, Khash issued a notice of application against MEI seeking the transfer to him of the Shares (the "Khavari Application").

31 On August 27, 2015, MEI issued a cross-application (the "Mizrahi Application") and filed responding affidavits from Mizrahi and Brown, the MEI office manager, in the Khavari Application. In its application, MEI seeks, among other things:

- (a) a declaration and an order restraining the transfer of any shares in the Project Companies, pursuant to the Trust Agreement, until such time as the Developments are complete and all Liabilities have been satisfied;

- (b) an injunction restraining the Khavaris from removing or attempting to remove any cash, equity or other assets belonging to the Developments or aiding or facilitating such removal until further order of the court or as specifically authorized by MEI;
- (c) an order requiring the Khavaris and/or their agents to deliver to the lawyers for the Mizrahi parties an affidavit providing a full accounting of \$7 million removed from the Developments and deposited in the trust account of their lawyer, Tyacke, in April 2015;
- (d) an order requiring the Khavaris to return all property, information and documents taken by them and/or members of their family from the offices at 126 Hazelton Avenue that do not otherwise belong to the Khavaris; and
- (e) an order consolidating the applications and converting them into an action.

32 On November 20, 2015, the Khavaris commenced an action (the "Khavari Action") involving all of the other condominium developments owned and operated by the Mizrahi group of companies, including, among others, 1 Bloor West, 128 Hazelton Avenue, and a development in Ottawa. The Khavaris neither invested in, nor have an interest in, any of these additional developments.

33 It is my understanding that the Khavari Application, the Mizrahi Application and the Khavari Action have now been consolidated and are to be tried together.

Issues on the Motion

34 There are two principal issues on this motion:

(1) Does the Trust Agreement create a trust?

(2) If the Trust Agreement creates a trust, is Khash entitled to the return of the Shares on the application of the principle in *Saunders v. Vautier* (1841), 41 E.R. 482 (Eng. Ch. Div.)?

35 I will address each issue in turn after first dealing with two preliminary matters — a procedural matter for greater clarity and an observation that informs the determinations herein.

Preliminary Matters

Procedural Issue

36 As mentioned, the parties agreed in a case conference that, for the purposes of this motion only, the facts set out in certain affidavits would be deemed to be true. The applicant proceeded on the basis that this meant that the only issue on the motion would be the availability of the principle in *Saunders v. Vautier* on the assumption that the Trust Agreement created a trust. The respondent's factum, however, raised the issue of whether a trust existed on the assumed facts.

37 The applicant argues that the pleading in the MEI Application that stated that "...pursuant to a basic trust agreement, Khash transferred ownership of his 50% share interest in the Project Companies" constituted an admission for which leave to withdraw the admission was required.

38 I do not agree. The pleading is a mere reference to the Trust Agreement, not a legal conclusion. In any event, the Court is not bound by a pleading on a matter of law. Further, while the parties may not have discussed this issue prior to the hearing, the understanding of the parties regarding the motion was that the respondent could raise any defences based on the assumed facts. If the rule in *Saunders v. Vautier* is being asserted, this necessarily includes the defence that the rule is not applicable in the absence of a trust. Most importantly, to assume the existence of a trust in circumstances where the facts contradict the assumption would render a coherent decision impossible.

39 Accordingly, I have rejected this submission of the applicant. However, for clarity, I confirm the understanding of the parties that the Court's determination on the issue of the existence of a trust is based on, and limited to, the facts assumed for the purposes of this motion.

The Agreement

40 Before addressing the issues on this motion, I wish to clarify the nature of the Agreement and the relationship of the Trust Agreement to the Agreement.

41 The assumed facts constitute an acknowledgement that the parties agreed that Khash would transfer to MEI possession of, and control over, the Shares to be held by MEI until such time as the Developments were completed and all the Liabilities had been fully satisfied. In this connection, it was agreed that Mizrahi would become the sole director and officer, and the sole signing authority, of the Project Companies. More directly, his control over the Shares and the Project Companies was essentially absolute, subject to the qualification that such control must be exercised to further the Developments.

42 I pause to note that the Agreement makes business sense. Without the ability to negotiate with potential lenders to the Developments on the basis that Mizrahi had full control over the Shares, the parties could not have obtained the remaining financing necessary to complete the Developments after the freezing of the Khavari bank accounts. Moreover, the need for Mizrahi to be able to represent in the loan

agreements to be obtained to finance the Developments that Mizrahi or MEI owned or controlled all the shares of the Project Companies was known to Khash as a matter of fact.

43 It is significant that the Trust Agreement was delivered in implementation of this Agreement. It was not delivered in a vacuum. As such, its terms must be interpreted against this commercial background as discussed below. Similarly, the exercise of the Court's discretion should be considered against this commercial background, as is also addressed below.

Does the Trust Agreement Create a Trust?

44 The applicant says the Trust Agreement creates a trust. The respondent says it is merely a contractual agreement under which the Shares are transferred to MEI to be held, and dealt with, by MEI under its complete control, subject to a contractual obligation to return them after all Liabilities are satisfied.

45 The traditional analysis regarding the existence of a trust involves consideration of the three "certainties". In this case, there is no issue that the objects of the arrangement are the Shares. There is also no dispute that the purpose of the arrangement was to allow Mizrahi to present himself to potential lenders to the Developments as the sole owner of the Project Companies and to put him in a position to deal with the Shares, by way of security or otherwise, in connection with any project financing of the Developments. The principal issue for the Court is whether the parties intended to create a trust.

46 As mentioned, the Trust Agreement must be read and interpreted against the commercial backdrop of the Agreement, which it was intended to implement. The provisions of the Trust Agreement must therefore be read to give effect to the Agreement rather than to contradict it. In particular, any ambiguity in the interpretation of its provisions should be resolved in favour of the interpretation that gives effect to the Agreement. Moreover, as Addendum #2 is the last document in the chain, its provisions should govern to the extent there is any conflict between the provisions of the Trust Agreement, as originally executed, and Addendum #2 that is relevant to the issue of the intended arrangement between the parties. In this regard, it is important to note that Addendum #2 restricts the right of Khash under paragraph 12 of the Trust Agreement to require an assignment, transfer and conveyance of the Shares to him upon demand. If this were not the case, the applicant would not have sought to achieve the same result in reliance on the principle in *Saunders v. Vautier*.

47 In paragraphs 2 and 3, the Trust Agreement uses the language of a trust in describing MEI as the trustee and Khash as the beneficiary of a bare trust whose trust property comprises the Shares which are beneficially owned by Khash. However, the substance of the Trust Agreement, as amended by Addendum #1 and Addendum #2, is otherwise. When more closely analysed, the Trust Agreement, as so amended, does not establish "a bare trust" as paragraph 2 thereof suggests. It constitutes, in form and in substance, a contractual arrangement between MEI and Khash. In this regard, the following considerations are relevant.

48 First, in form, the document is clearly not a declaration of trust. There is no settlor, no disposition of trust property from a settlor to a trustee, and no express declaration of trust by a trustee. Instead, it is an agreement between MEI and Khash, who is alleged to be a party in his capacity as a beneficiary, i.e. it is a document that gives effect to an agreement between the parties respecting the Shares that have previously been delivered to MEI pursuant to the Agreement. Moreover, it contains a reference to consideration in

the form of mutual covenants, includes a successors and assigns clause, and was executed by both MEI and Khash. These are not usual provisions of a declaration of trust by a trustee in respect of a bare trust.

49 Further, the parties amended the Trust Agreement on two occasions by means of an amendment signed in writing by each of them. This is highly suggestive of a contractual arrangement. If the Trust Agreement had established a trust, any such amendment would have been effected by a unilateral amendment of the settlor, in this case Khash, pursuant to a power of revocation or amendment reserved in the Trust Agreement. While the applicant says that the Court should infer that Khash reserved a power of revocation, that argument misses the point. The salient feature of the two Addenda for this purpose is that they were executed by both parties in the manner of an amendment to an agreement, rather than by Khash alone as a settlor of a trust pursuant to the alleged express power reserved in his favour under the Trust Agreement.

50 In addition, the applicant's submission that Addendum #1 and Addendum #2 are ineffective if there is no right of revocation or amendment in the Trust Agreement is rejected for the reason that both parties signed the Trust Agreement. Given such circumstances, I cannot see how the same parties could not amend the Trust Agreement. The applicant's submission, which is intended to deal with the defect in Khash's position presented by Addendum #2, merely reinforces the absence of a trust in the first place.

51 Second, in substance, the document comprises a set of covenants between the parties, including, in particular, covenants from Khash to MEI. The central provision of the Trust Agreement effectively negates the existence of any beneficial right in the Shares in favour of Khash during the currency of the arrangement between the parties, notwithstanding language to the contrary. Under that provision, Mizrahi, through MEI, had 100% control over the Project Companies. While this arrangement was perhaps only implied into the Trust Agreement at the time of its execution by virtue of the Agreement, it was subsequently explicitly incorporated into the Trust Agreement pursuant to the specific provisions of Addendum #2. By virtue of these arrangements, MEI received, in effect, the absolute ownership rights in the Shares for a defined period of time.

52 In addition to the right to vote the Shares in its discretion to further the purpose of the Developments, the Trust Agreement, as supplemented by Addendum #2, also gave MEI the right to retain the Shares until all Liabilities had been fully satisfied. Implicit in the arrangements is also a power of MEI to prevent any dividends or other distributions in respect of the Shares pending satisfaction of the Liabilities. In addition, as mentioned, MEI had the right to prevent any transfer of the Shares until such time as all Liabilities have been satisfied. In this regard, as a matter of contractual interpretation, Addendum #2 must be interpreted to grant MEI the right to prevent a transfer to a third party as well as a re-transfer to Khash to give effect to the intention of the parties. Such rights are inconsistent with a mere trustee relationship. Viewing these arrangements in their entirety, I conclude that there is no property in the hands of Khash that can be the subject of the alleged bare trust. Khash has transferred all of his rights of ownership in the Shares to MEI. What remains under the Trust Agreement is essentially no more than a contractual obligation on the part of MEI to re-transfer the Shares at a future point in time. Conversely, Khash has no right with respect to the Shares, other than the right to compel their return after all Liabilities have been satisfied.

53 Fourth, MEI was both the alleged trustee of the trust and the other 50% shareholder in the Project Companies. An important feature of the alleged trust arrangement is that it contains rights in favour of MEI against Khash that pertain to MEI's capacity as a shareholder of the Project Companies, rather than as a trustee. Specifically, MEI received the right to prevent a re-transfer of the Shares until all Liabilities had been paid, not just until all administrative costs of the trustee had been paid. This right protects MEI as a 50% shareholder against the possibility of bearing more than 50% of the Liabilities, rather than as a trustee in respect of unpaid trusteeship expenses. Similarly, the indemnification provisions in the Trust Agreement extended beyond matters pertaining to MEI's costs of administration as a trustee and related, instead, to any Liabilities incurred by MEI as Khash's joint venture partner in respect of the Developments. Moreover, the indemnity provided was a personal guarantee of Khash, rather than a right to be indemnified out of the assets of the trust. These are not provisions of a bare trust agreement. They are, instead, provisions pertaining to the joint venture arrangements between the parties.

54 Fifth, as a related matter, in suggesting that MEI, as the alleged trustee, cannot enforce the covenant in Addendum #2 preventing re-transfer until satisfaction of all the Liabilities, Khash is mischaracterizing the nature of that covenant and its significance for the present issue. Insofar as this covenant was given initially to MEI pursuant to the Agreement, it was given to MEI in its capacity as Khash's joint venture partner. However, Khash also subsequently gave the covenant to MEI in Addendum #2. MEI is therefore entitled to enforce the covenant pursuant to both the Agreement and the Trust Agreement. However, to the extent that MEI has been granted the right to enforce this covenant under either document, it can only be for the purpose of protecting its own interest as a joint venture partner. It has no separate interest in enforcing this covenant as a trustee. Indeed, any exercise of this right by MEI in its capacity as a trustee would raise a conflict of interest. This demonstrates the reality that MEI was not acting as a trustee when it received the Shares and the benefit of the covenant in Addendum #2. Put another way, the arrangements are fundamentally incompatible with a trust arrangement.

55 Lastly, I would also observe that the parties did not treat the arrangements as giving rise to a bare trust in their dealings with third parties. If Khash regarded the alleged trust as a bare trust as he now claims, any pledge of the trustee's interest would have been insufficient to pledge the beneficial ownership in the Shares. An effective pledge of the Shares would have required a companion pledge of the beneficial interest by Khash.

56 Accordingly, I conclude that the Trust Agreement constitutes a contractual agreement between the parties rather than a trust by virtue of the absence of any demonstrated intention of the parties to establish a bare trust. As it is not suggested on this motion that Khash would be entitled to a re-transfer of the Shares as a matter of contract between the parties, the applicant's motion must therefore be dismissed.

Application of the Rule in *Saunders v. Vautier*

57 The applicant also alleges that it is entitled to collapse the alleged trust created under the Trust Agreement based on application of the rule in *Saunders v. Vautier*. I am also satisfied, however, that, for a number of reasons, *Saunders v. Vautier* would not apply in the present circumstances even if a trust were held to exist. I have set out my conclusions on this issue below in case I have erred in reaching my conclusion in the preceding section that no trust exists.

58 The rule in *Saunders v. Vautier* has been most recently addressed by the Supreme Court in *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, [2006] 1 S.C.R. 973 (S.C.C.), at para. 21, as follows:

The common law rule in *Saunders v. Vautier* can be concisely stated as allowing beneficiaries of a trust to depart from the settlor's original intentions provided that they are of full legal capacity and are together entitled to all the rights of beneficial ownership in the trust property. More formally, the rule is stated as follows in *Underhill and Hayton Law Relating to Trusts and Trustees* (14th ed. 1987), at p. 628:

If there is only one beneficiary, or if there are several (whether entitled concurrently or successively) and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or the trustees.

According to D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 1175, the rule was developed in the 19th century and originated as an implicit understanding of Chancery judges that the significance of property lay in the right of enjoyment. The idea was that, since the beneficiaries of a trust would eventually receive the property, they should decide how they intended to enjoy it.

59 In my view, there are at least four reasons why the rule is inapplicable in the present circumstances, even if it were held that the Trust Agreement created a trust of the Shares.

60 First, the fundamental principle of the rule in *Saunders v. Vautier* is that the settlor of a trust cannot any fetter a beneficiary's enjoyment of property to the extent the beneficiary has an absolute, non-contingent right to the use and enjoyment of the property. Accordingly, the rule in *Saunders v. Vautier* operates only in the very limited circumstances in which the beneficiary or beneficiaries are entitled to all the rights of beneficial ownership in the trust property. In the present circumstances, it cannot be said that Khash is entitled to all the rights of beneficial ownership in the Shares.

61 In the case of three of the Project Companies, the Shares have been pledged to the lenders under one of the project loans outstanding to finance the 181 Davenport Project. More significantly, even if MEI's rights in the Shares are not considered to constitute absolute rights of ownership, MEI has the extensive rights of control over the Shares described above that are intended to survive until all Liabilities are fully satisfied, including the power to prevent any dividends or other distributions on the Shares. Such rights of control in favour of MEI necessarily diminish the beneficial rights of Khash in the Shares. They are sufficient to exclude the operation of the rule in *Saunders v. Vautier*.

62 As a related matter, in his factum, the applicant argues that the restriction on re-transfer pending payment of all Liabilities is the functional equivalent of the age restriction in *Saunders v. Vautier*. I do not agree. In *Saunders v. Vautier*, the beneficiary was entitled beneficially to all income from the trust property pending satisfaction of the age condition, which would necessarily occur by the mere passage of time. In the present circumstances, there is no certainty that all the Liabilities will ever be satisfied. There is, therefore, no certainty that Khash will be entitled to a re-transfer of the Shares.

63 Second, the principle in *Saunders v. Vautier* operates in the circumstances in which a settlor has made an absolute transfer of property to a trustee to be held in trust for a third party beneficiary pending the satisfaction of certain conditions. If, however, the settlor and the beneficiary of a trust are the same

party, the issue becomes a simple matter of the contractual interpretation of the agreement that governs the relationship between the settlor/beneficiary and the trustee. If the settlor/beneficiary reserved a power of revocation, courts will enforce it. If the settlor/beneficiary failed to do so, there is no element of unfairness that compels a court of equity to intervene. Indeed, doing so would re-write the trust agreement to the potential prejudice of the trustee.

64 In this case, the terms of the arrangements between the parties, if characterized as a trust, did not permit revocation of the trust. There is no express right of revocation or amendment in favour of Khash as the settlor of the alleged trust. While there is a right in favour of Khash, as beneficiary, to cause MEI to assign, transfer or convey the Shares to Khash or as he may otherwise direct, this is subject to the provisions of Addendum #2. MEI is therefore not obligated to assign, transfer or convey the Shares until all Liabilities are satisfied. Moreover, as mentioned, the terms of the Trust Agreement were amended by agreement between the parties, rather than by a unilateral document executed by Khash, which would have been the appropriate means of amendment if he had reserved a right of revocation or amendment in his favour.

65 Third, as a related matter, it is conceptually incorrect to separate the roles of settlor and beneficiary as Khash seeks to do in asserting the rule in *Saunders v. Vautier*. In effect, Khash seeks to avoid the absence of an express right of revocation in his favour in his capacity as the settlor of the alleged trust by asserting that he has a separate right as a beneficiary. In his factum, Khash makes a similar argument in suggesting that, as the beneficiary of the alleged trust, he is entitled to disregard the intentions of the settlor even if he is the settlor. I do not think this is possible as a matter of law. There is, in the end, only one relationship at issue — the relationship between MEI and Khash.

66 Khash does not seek an order that an independent, third party beneficiary of the trust is entitled to receive the Shares. He seeks an order that the Shares be re-transferred to himself as the settlor of the alleged trust. Accordingly, either Khash has the right to revoke the trust and have the Shares re-transferred to himself or he does not. In this case, he not only failed to provide for an express right of revocation even though Tyacke drafted the Trust Agreement and Mizrahi had no input into the language of the Agreement, but he also agreed in Addendum #2 that the Shares would not be returned to him until the Developments are completed and all Liabilities have been fully satisfied.

67 Lastly, enforcement of rights in respect of a trust, including the invocation of the rule in *Saunders v. Vautier*, engages the equitable jurisdiction of the Court. In this case, to the extent Khash is otherwise entitled to an order under *Saunders v. Vautier*, the Court would decline to exercise its discretion to direct the return of the Shares for the following reasons.

68 As mentioned above, representations have been made to the lenders under the two existing project loans that, in the case of one of the loan agreements, Mizrahi is the indirect owner and MEI is the direct owner of all of the shares of three of the Project Companies, and, that, in the case of the other loan agreement, MEI is the sole shareholder of such Project Companies. Further, Mizrahi has guaranteed these loans personally and has caused MEI to pledge the Shares of the three Project Companies in support of one of these loans. All of this was done with the full and admitted knowledge of Khash.

69 There is no doubt that a return of the Shares to Khash would create events of default under such loan agreements. The potential consequences for other loan agreements to which MEI or Mizrahi is a party cannot be assessed on this motion. Moreover, the effect of an order granting the relief sought by Khash would be to allow Khash to resile from the Agreement after MEI and Mizrahi have relied on the existence of the Agreement in their dealings with the lenders to the Developments, with the full knowledge and acquiescence of Khash. Given the foregoing circumstances, such a result would, in my view, be unconscionable.

Conclusion

70 Based on the foregoing the applicant's motion is dismissed. The respondent seeks costs in the range of \$20,000 to \$40,000 on a partial indemnity basis. If successful, the applicant would have sought costs of \$20,000. Given the importance of the matter to the parties, which would have decided a significant issue in the litigation between the parties if the applicant had succeeded, the level of seniority of counsel, and the complexity of the issues, I find fair and reasonable costs to be \$30,000 on an all-inclusive basis.

Conclusion

70 Based on the foregoing the applicant's motion is dismissed. The respondent seeks costs in the range of \$20,000 to \$40,000 on a partial indemnity basis. If successful, the applicant would have sought costs of \$20,000. Given the importance of the matter to the parties, which would have decided a significant issue in the litigation between the parties if the applicant had succeeded, the level of seniority of counsel, and the complexity of the issues, I find fair and reasonable costs to be \$30,000 on an all-inclusive basis.

H.J. WILTON-SIEGEL J.

End of Document