COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Jer v. Society of Notaries Public of British Columbia,* 2015 BCCA 257

Date: 20150605
Docket: CA42163

Between:

Lawrence Brian Jer, Jun Jer and Janette Scott

Respondents
(Plaintiffs)

And

Society of Notaries Public of British Columbia

Appellants
(Defendants)

And

Rashida Samji, Rashida Samji Notary Corporation, Samji & Assoc. Holdings Inc.

Respondents
(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court, dated August 26, 2014 (*Jer v. Samji*, 2014 BCSC 1629, Vancouver Docket S121627).

Counsel for the Appellant:	C. Harvey, Q.C. B.C. Poston
Counsel for Lawrence Jer, Jun Jer and Janette Scott:	P.R. Bennett R.M. Mogerman
Place and Date of Hearing:	Vancouver, British Columbia May 1, 2015
Place and Date of Judgment:	Vancouver, British Columbia June 5, 2015

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Savage

Summary:

Trial judge held that a notary was acting "in her capacity as a notary" while operating a fraudulent Ponzi scheme, thus triggering the Society's obligations in respect of the "special fund" for victims of fraud set out in s. 20 of the Notaries Act. The fact that plaintiffs' investment funds would be placed in a notary's trust account was held to have been important to inducing plaintiffs into the scheme. On appeal, Society submits the fact that the funds were placed in a notary's trust account was not sufficient to establish that notary was acting in her capacity as a notary, and that a notary only acts in such a capacity if he or she engages in the conduct described in s. 18 of the Notaries Act.

Held: Appeal Dismissed. Whether a notary was engaged in one of the activities listed in s. 18 of the Act is not determinative of whether a person is acting in his or her capacity as a notary, nor is the fact that funds were placed into notary's trust account. However, in the case at bar, assuring plaintiffs that funds would be placed in notary's trust account and that the account would be monitored by the Society was an important factor in inducing plaintiffs to invest. Since notary's status was integral to the success of the fraudulent scheme, trial judge did not err in determining that she was acting in her capacity as a notary.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] The discrete but difficult issue before us arises in the context of a large class action brought by the plaintiffs against various defendants. The plaintiffs were the victims of a 'Ponzi' scheme which was promoted and facilitated by, *inter alia*, the defendant Ms. Samji. Through her professional corporation, Samji & Associates Ltd., she practiced as a notary public at all material times. Various common issues were certified in the action, but by the time of the trial in June 2014, the only contested common issue was, in the trial judge's words, "whether or not the funds invested by the class members were entrusted to and received by Ms. Samji in her capacity as a notary public." The underlined phrase tracks the wording of s. 20 of the *Notaries Act*, R.S.B.C. 1996, c. 334, which deals with the availability of compensation from a special fund maintained by the defendant Society.

[2] The trial judge answered this question (number 4) in the affirmative, writing that:

> … whether the funds were entrusted to a member of the society *in the person's capacity as a notary public* must be answered from the perspective of the person providing the funds. It is not a question of whether the notary was acting within the strict confines of s. 18 of the *Notaries Act*. Rather it is a question of whether the person was providing the funds to the notary public to be held in trust and the funds were received by the notary public on that basis. In this case, the evidence clearly establishes that the funds were advanced and received on that basis. [At para. 60; emphasis added.]

[3] On appeal, the only error in judgment advanced by the defendant Society in its factum is that the trial judge "erred in law in ruling common issue number 4 in the affirmative". It is seldom helpful for an appellant simply to assert that the court below erred in reaching the result it did. However, at the hearing of the appeal, Mr. Harvey on behalf of the Society seemed to make two principle arguments of law, namely that (a) the trial judge erred in allowing the subjective intentions of one party to the investment transaction, i.e., the victims of the fraudulent scheme, to overpower the "objective" facts surrounding each plaintiff's investment; and (b) the trial judge erred in construing the *Notaries Act*, by failing to give effect to the limitations it places on the kinds of "activities" a notary is authorized to carry out.

Factual Background

[4] The facts of the case are not in dispute. They are set forth at paras. 9–27 of the trial judge's reasons, and I will try not to repeat them here. I do note the wording contained in a "summary" of the (false) "investment opportunity" which Ms. Samji prepared for prospective investors and which was presumably given to the plaintiffs herein. The document stated:

> A brief summary is outlined herewith for interested Investors in a secure Investment Opportunity managed through a Trust Fund operated and managed by a Notary Public, duly commissioned in and subject to the laws of British Colombia, Canada.
>
> 1. The Investor deposits funds into the Notary's Trust Account – Based on this deposit, the Notary provides a "Comfort Letter" to certain Companies dealing in the Wine business in South America and South Africa. Of particular note is that this is NOT A GUARANTEE OR A LETTER OF CREDIT. It is a COMFORT LETTER, which cannot be called upon, but has been sufficient for the Companies to then obtain their facilities to carry out their business. Since it saves the Companies utilizing their own funds for this, a fee is paid to the Investor for putting their funds "In Trust".
> 2. The funds are placed in the Notary's Trust Account, which is the security for the Investor for the following reason:
>
>   Notary's Trust Account is monitored and audited by the Society of Notaries Public of B.C. – same as the Law Society of B.C. and each Investor provides a specific Letter of Direction (drawn up by the Notary and executed by both the Investor and the Notary), which is binding upon the Notary with regards to the amount and term of the Investment. It is incumbent upon the Notary to adhere to the terms of this Letter of Direction and provides the Security for the Investor.
> 3. The funds are deposited for a minimum term of six months and at the end of six months, the Investor has the option to withdraw his funds from the Investment or renew it for a further six months, in which case another Letter of Direction is drawn up to reflect this.
> 4. For a six month term, the Investor receives a fee of six percent (6%), which equates to a return of twelve percent (12%) per annum. The fee is paid to the Investor within three weeks of the Investment and not at the end of the term.
> 5. The minimum amount required for the Investment is $100,000 for which the fee to be paid within three weeks of the Investment is $6,000 into the account or name of the party as directed by the Investor.
> 6. All Investment funds are held "In Trust" in Canadian dollars and all returns are paid in Canadian dollars. Details on how funds are placed into the Trust Account will be specified to the interested Investor at the

> time of Investment. Any further details required can also be provided upon request. [Emphasis added.]

[5] I gather from Ms. Samji's testimony and from the reasons of the B.C. Securities Commission in a proceeding against Ms. Samji and her companies (2014 BCSECCOM 286), that prospective investors were referred to her by Mr. Patel, an investment advisor at Coast Capital Savings, or by friends or relatives of existing investors. Counsel confirmed to us that the victims of the scheme were not pre-existing clients of Ms. Samji's notary practice, but were referred to her as someone who would advise and assist them in making the investment suggested by Mr. Patel.

[6] Ms. Samji had been a notary since 1988. She practiced through her corporation, the defendant Rashida Samji Notary Corporation, dba Samji & Associates. Until 2005, she carried on a private notarial practice from an office in Vancouver, but in 2005 she sold her practice and became a "roving notary"– a kind of 'locum' for other notaries. The trial judge found at para. 20 that Ms. Samji did not have a trust account from the time she became a roving notary, although Ms. Samji testified that she did not close her trust account until March 2006. She did this to avoid an audit by the defendant Society.

[7] From 2003, Ms. Samji began promoting the false investments, supposedly in the Mark Anthony Group, an international wine distributor. As the summary indicates, she told investors that their money would be held by her in her trust account, would not be at risk and would not leave her account without their consent and instructions. In return, they would receive a return of 6% every six months. They could decide whether to collapse their investments or invest the funds again for another six months on the same terms. She did not purport to charge them a fee, but testified that she received payment from the funds held in trust.

[8] Ms. Samji provided the investors with a very brief letter of direction for their signature, recording their instructions to place their funds in trust for six months. In her testimony at trial, she acknowledged that she gave the same assurances to all of the investors, and that she gave them to the plaintiffs Mr. and Mrs. Jer:

> … Ms. Samji agrees she told the Jers she would hold the funds in her notary trust account. As well, Ms. Samji agreed that she advised the Jers that there was no risk to the funds they were investing, and that the funds would not leave the trust account except on their instructions.
>
> Ms. Samji also testified that she told the Jers her trust account was monitored by the Society. She explained to the Jers the trust funds would allow a comfort letter to be issued to foreign subsidiaries of the Mark Anthony Group. In return, the Mark Anthony Group would pay a fee to the Jers of 6% for six months. They would have the option to withdraw the funds after six months or leave them in the account for another six months in return for an additional 6%.
>
> Ms. Samji testified that she made the statements to the Jers and other investors about the fact she was a notary public because she wanted the investors to believe she was receiving their funds and directions as a notary public. Ms. Samji placed her seal on the Letters of Directions the investors signed to further provide them with assurance they were dealing with a notary public, and their funds were safe with her. She also agreed the fact she was a notary public was integral to being able to get people to invest in the scheme she was promoting. [At paras. 23-25; emphasis added.]

[9] The trial judge found that Ms. Samji represented to investors that their letters of direction (which referred expressly to "Samji & Associates") obligated her as a notary to hold the funds in trust in her notary's trust account, which was subject to review and audit by the Society. Further, the trial judge observed, Ms. Samji "reinforced to the investors that she was receiving the funds as a Notary Public by impressing the Letters of Direction with her notary seal." (Para. 31.) Ms. Samji acknowledged at trial that she knew that as a notary public, she could not offer investment advice or act as an investment broker, and knew the funds "were not for the provision of notary services." (Para. 27.)

[10] The fraudulent scheme was uncovered at some point prior to March 2012, when the plaintiffs filed their Notice of Civil Claim under the *Class Proceedings Act*. We were not provided with any details as to how the scheme was uncovered.

[11] This proceeding was limited to the plaintiffs' claim for the recovery of their pecuniary loss from the "special fund" maintained by the Society under s. 20 of the *Notaries Act*. Section 20 provides in material part:

> 20 (1) The directors must continue the special fund for the purpose of reimbursing, in the cases and to the extent in each case, as they think advisable, of pecuniary losses sustained by a person because of the misappropriation or wrongful conversion by a member or former member of

> money or other property that was entrusted to or received by that person in the person's capacity as a member.
>
> …
>
> (9) If a complaint in writing is made to the society, alleging that a person has sustained pecuniary loss for the reasons described in subsection (1), the directors may cause an inquiry to be made into the complaint.
>
> (10) If as a result of an inquiry the directors are satisfied that the person has sustained the pecuniary loss because of the action of a member or former member, they may
>
> > (a) with or without terms, pay out of the special fund to the person entitled the whole or a part of the loss, or
> >
> > (b) decide that in the circumstances no payment is to be made. [Emphasis added.]

[12] The Act does not purport to define the phrase "capacity as a member". The trial judge found that ss. 17 and 18 of the Act were relevant to this issue. They provide in material part:

> 17 (1) A person acts as a notary public if the person, for or in expectation of a fee, gain or reward, direct or indirect,
>
> > (a) draws, prepares, issues or revises a document that is intended, permitted or required to be registered, recorded or filed in a registry or other public office or that is a will or testamentary instrument, or
> >
> > (b) holds himself or herself out as qualified to draw, prepare, issue or revise a document referred to in paragraph (a).
>
> (2) Subsection (1) does not apply
>
> > (a) if, by the provisions of a statute, the document in question is required or permitted to be drawn, prepared, issued or revised by that person or the class of persons or profession of which the person is a member, or
> >
> > (b) if the person is an employee acting in the course of the person's employment, and the employer may lawfully do the act.
>
> 18 A member enrolled and in good standing may do the following:
>
> > (a) draw instruments relating to property which are intended, permitted or required to be registered, recorded or filed in a registry or other public office, contracts, charter parties and other mercantile instruments in British Columbia;
> >
> > (b) draw and supervise the execution of wills….
> >
> > (c) attest or protest all commercial or other instruments brought before the member for attestation or public protestation;
> >
> > (d) draw affidavits, affirmations or statutory declarations that may or are required to be administered, sworn, affirmed or made by

> the law of British Columbia, another province of Canada, Canada or another country;
>
> . . .
>
> (f) perform the duties authorized by an Act. [Emphasis added.]

The Trial Judge's Analysis

[13] In her legal analysis, the trial judge referred to three cases. The first was *Hellenic Import Co. (c.o.b. Dino's of Granville Island Public Market Hellenic Import Export Co.) v. Society of Notaries Public of British Columbia* [1993] B.C.J. No. 789 (S.C.) It involved a person who had acted as the personal accountant of the petitioner. The accountant was also a notary. He approached the petitioner with an investment opportunity to provide short-term financing to another supposed client, in connection with the purchase of an apartment building. The financing was to be secured by a mortgage to be obtained before the accountant/notary could release the funds from trust. He converted the funds to his own use and the petitioner sued the Society for compensation from the fund. The directors of the Society rejected the claim on the basis that the transaction between the petitioner and the accountant/notary had not involved a "notarial function" and that the notary "may as well have been an investment broker or an accountant as a notary." (Para. 8.)

[14] The petitioner applied for judicial review of the directors' decision. The Court, *per* Lowry J. (as he then was), found the decision to be unreasonable. Lowry J. found it was "beyond question" that the petitioner had entrusted its funds:

> … to a notary public to be held in trust and that it was received on that basis. That is the way the petitioner's cheque was drawn. The money was paid to [the notary] on the basis that a second mortgage would be given as security and it was understood that the mortgage would be put in place before the funds were disbursed. That was inherent in the creation of the trust. [At para. 9.]

At para. 10, he added that it could not be said the notary had received the petitioner's money "other than in his capacity as a notary and member of the Society." The question of the extent to which the Society would reimburse the petitioner was remitted to the directors.

[15] The second case considered by the trial judge in the case at bar was *Giguère v. Chambres des notaires du Québec*, 2004 SCC 1. Its facts were considerably less difficult than the facts with which we are concerned. A Québec notary had regularly looked after the legal affairs of an elderly woman who had begun to decline mentally. He took advantage of her condition by having her sign documents, which he prepared, to transfer her house to him for $1. As the trial judge noted, the notary was ordered to reimburse the woman, but he was bankrupt. Thus the client advanced her claim against the indemnity fund of the Chambre. Under its legislation, the fund was to be used "to reimburse the sums of money or other securities used by a notary for purposes other than those for which they had been delivered to him in the practice of his profession". The Chambre denied the claim on the basis that the transaction had been "personal" rather than professional in nature.

[16] The Supreme Court rejected that characterization. Gonthier J. stated for the Court:

> Any characterization of the Hamel-Filiatrault transaction as personal rather than professional must also be considered in the light of the purposes of the indemnity fund. As I have explained, one of those purposes is to protect clients from misdeeds by notaries that, due to their intentional nature, will not be covered by professional liability insurance. The case at bar is a perfect example: the Indemnity Committee acknowledged the unrefuted evidence of Mr. Filiatrault's numerous false representations to Mrs. Hamel. Yet by characterizing the transaction as personal, the two Committees took Mr. Filiatrault's fraud outside the scope of the fund, thus revoking the very protection the fund is intended to give. This decision opens a gap between notaries' ethical obligations, as set out in s. 4.02.01(*b*) of the Code, and the remedy for breach of those obligations, which is supposed to be provided, in the last resort, by the indemnity fund. Not only is Mrs. Hamel left unprotected, but the purpose of the fund itself is frustrated. [At para. 27; emphasis added.]

In the result, the Chambre was required to reimburse the plaintiff.

[17] The third case referred to by the trial judge was the decision of the Ontario Court of Appeal in *Cassels Brock & Blackwell v. Lawpro* 2007 ONCA 122. It concerned the scope and meaning of a professional liability insurance policy under which the plaintiff law firm was insured. A claim arose under the policy when a client of the firm sought advice from one of the firm's lawyers "to determine the soundness and safety (in the sense of return of capital and income thereon)" of an investment

scheme. In the policy, the insurer had agreed to cover all damages arising out of a claim "provided the liability of the insured is the result of an error, omission or negligent act in the performance of or the failure to perform Professional Services for others." The term "Professional Services" was defined to mean:

> the practice of the Law of Canada … and specifically, those services performed, or which ought to have been performed, by or on behalf of an insured in such insured's capacity as a lawyer and as a member of the Law Society of Upper Canada … and … include … those services for which the insured is responsible as a lawyer arising out of such insured's activity as a trustee …[At para. 2.]

The policy excluded, however:

> … any claim in any way arising out of an insured providing investment advice and/or services, including without limitation, investment advice and/or services relating to or arising out of a business, commercial or real property investment unless as a direct consequence of the performance of Professional Services. [At para. 3.]

[18] The Court of Appeal affirmed the judgment of the application judge that the plaintiff's claim fell within the exclusion relating to the provision of investment advice or services. The Court rejected the notion that the fact the firm's trust account had been used, changed the services provided to the plaintiff from investment services to something else. In the words of the Court's endorsement:

> … the trust account was merely a vehicle for receipt and distribution of the funds to be invested. <u>In our view, the fact that a law firm's trust account is used as an investment vehicle does not of itself amount to the performance of Professional Services; nor does it make misuse of the investment vehicle a "direct consequence of the performance of Professional Services</u>". Accordingly, based on the claim as pleaded use of the trust account fell within the investment services exclusion in the policy. [At para. 7; emphasis added.]

[19] Having reviewed these cases, the trial judge in the case at bar turned at para. 48 to consider how the law applied to the facts before her. She noted the Society's submission that in order to find that Ms. Samji had received the funds in her capacity as a notary, she must have received them from a client "as a part of the performance of a statutorily authorized notarial act for that client". This was said to explain the Court's finding in *Hellenic*, where the plaintiff's money had been entrusted to the notary "as a part of a mortgage transaction".

[20] The trial judge did not agree: she noted that in *Hellenic*, the notary had purported to promote an investment opportunity on behalf of an undisclosed client, just as Ms. Samji had been promoting an opportunity on behalf of the "Mark Anthony Group". The fact the notary in *Hellenic* was promoting an investment opportunity did not, the trial judge said, justify the Society's conclusion that the funds provided to the notary in trust were not received by him in his capacity as a notary. She also disagreed with the Society's argument that *Hellenic* was distinguishable because the notary in that instance had undertaken to prepare a second mortgage before the funds were released. In the trial judge's analysis:

> … that is not the basis for the decision. The Court clearly stated the reason for the decision was that the petitioner entrusted its investment to a notary public to be held in trust, and that the funds were received on that basis. The fact that a second mortgage would be put in place was inherent in the trust.
>
> In this case, investors were entrusting their funds to Ms. Samji on the basis that she would hold the monies in her notary trust and not release them without the investors' permission. Ms. Samji drafted and provided "Letters of Direction", upon which she placed her notary seal in connection with the investment. [At paras. 51-2; emphasis added.]

[21] The Society argued that *Cassels Brock* represented a "sensible approach" in that it ensured that the misappropriation of funds by someone who merely happens to be a notary is not treated in the same way as the misappropriation of funds by someone *while performing his or her duties as a notary public*. (Para. 49.) The trial judge found, however, that *Cassels Brock* was not helpful because it concerned the meaning of a specific exclusion clause in an insurance policy, rather than the statutory requirements of the Law Society to maintain the special fund.

[22] The judge also found that *Giguère* was of limited assistance given the differences between the statutory schemes governing notaries in Québec and British Columbia. (Para. 56.) However, she continued, the policy reasoning at paras. 27–8 of *Giguère* (see above) did have application. In her analysis:

> … characterizing Ms. Samji's conduct as personal as opposed to professional is contrary to the decision in *Giguère* because it would negate the purpose of s. 20 of the *Notaries Act*, which is to protect the public.
>
> The purpose of the special fund is to provide a remedy, as a last resort, to persons who are victims of an intentional misuse by a notary of money or property provided to a notary in trust, as these misdeeds will not be covered

> by the notary's professional liability insurance because of their intentional nature.
>
> Here, Ms. Samji's status as a notary public, and the representations that the investors' funds would not be at risk because they would be held in her trust account, were integral to the fraud carried out by her, in clear breach of her ethical obligations as a notary public. As in *Giguère,* it would create a gap between Ms. Samji's ethical obligations as a notary and the remedy that the special fund is intended to provide as a last resort for the breach of those obligations, if the argument that Ms. Samji did not receive investors' funds in her capacity as a notary public when they were paid to her with the express direction that the funds be held in her notary's trust account was accepted. If that argument is accepted, then the public would be left unprotected and the purpose for which the special fund was established would be frustrated. [At paras. 57-9; emphasis added.]

[23] In the result, the judge concluded that the question before her was not whether the notary had been acting within the strict confines of s. 18 of the Act, but whether the funds had been entrusted to her in her capacity as a notary. If the investment had been a 'real' investment opportunity, she observed, the drawing of the letters of direction and the holding of funds in Ms. Samji's trust account "would have been within her rights and powers as a notary under s. 18(a) of the *Notaries Act*". It followed in the judge's analysis that the plaintiffs' funds had been received by and entrusted to Ms. Samji in her capacity as a notary. (Para. 55.) Finally, the Court stated:

> In my view, in order to promote the purpose behind s. 20 of the Notaries Act, the question of whether the funds were entrusted to a member of the Society in the person's capacity as a notary public must be answered from the perspective of the person providing the funds. It is not a question of whether the notary was acting within the strict confines of s. 18 of the Notaries Act. Rather, it is a question of whether the person was providing the funds to the notary public to be held in trust and the funds were received by the notary public on that basis. In this case, the evidence clearly establishes that the funds were advanced and received on that basis. [At para. 60; emphasis added.]

In the result, the Court answered the common question in the affirmative.

On Appeal

[24] In this court, Mr. Harvey on behalf of the Society began his argument by challenging the trial judge's conclusion, which she had drawn from *Giguère,* that a court should judge the question of capacity "from the perspective of the person

providing the funds." Instead, he submitted, the question must be answered on an objective basis that focuses on the functions and responsibilities of notaries under the *Notaries Act* and the relationship between the notary and each investor.

[25] Counsel referred us to ss. 17 and 18 of the Act, quoted above at para. 12. He submitted that none of the plaintiffs had retained Ms. Samji to draw or prepare a document that was to be used in a registry or other public office or to do any of the things listed in s. 18. Mr. Harvey also noted s. 23(2), which states that money received for or on behalf of a "client" is "trust money" and must be deposited in a trust account and identified as such in the records of the member and the relevant savings institution. In the same vein, s. 54(1) requires a notary to deposit money received from or held for or on behalf of "the member's clients generally" in an interest-bearing trust account.

[26] All of these provisions, the Society contended, are simply not applicable to this case. Ms. Samji was not performing the services of a notary contemplated by the Act; she did not receive a fee for doing so; rather, she was acting as an investment advisor contrary to the provisions of the *Securities Act* (and has been found by the Securities Commission to have committed a prohibited act: see 2014 BCSECCOM 286 at para. 40.) She used her trust account, but various professionals can have trust accounts – indeed any person can. Counsel cited the example of a lawyer who acts as a treasurer of his child's hockey team and uses his firm's trust account for that purpose. In such circumstances, the lawyer would not be regarded as acting in his capacity as such; any loss of funds from his trust account would not be covered by the (former) special compensation fund under the *Legal Profession Act*.

[27] On this point, Mr. Harvey referred to *Hazelwood v. Travelers Indemnity Company of Canada* [1978] 1 W.W.R. 93 (B.C.S.C.). Mr. Hazelwood was a lawyer who received and disbursed investment money on behalf of a syndicate for which he was to be paid a percentage of the monthly interest earned on the money. The syndicate was defrauded by an agent to whom he paid the money, and the syndicate obtained a judgment against Mr. Hazelwood. He then claimed specific

performance of a contract of insurance which covered acts or omissions arising out of his services to others in his "capacity as a lawyer".

[28] The Court held that in rendering the services he had to the syndicate, Mr. Hazelwood had not been acting in his capacity as a lawyer. In the words of Mr. Justice Munroe:

> At the trial of this action none of the members of the syndicate testified nor did I have the benefit of hearing evidence from any member of the legal profession (other than the plaintiff) as to whether or not the services rendered by the plaintiff to the syndicate are of a character customarily rendered by a member of the legal profession in his capacity as a lawyer. It is, of course, common knowledge that some conveyancing solicitors do assist their clients to place or to borrow moneys upon the security of land, but was this a transaction of similar character? Was this a transaction of the type contemplated by the insurer and by the insured when the contract of insurance was entered into? I think not. Having regard to the immensity of the fee to be received by the plaintiff – far exceeding that which he could have taxed for solicitor's services – and the manner in which such fee was calculated, I am of opinion that in rendering such services to the syndicate, the plaintiff was acting as a commission agent or broker, "one employed as a middleman to transact business or negotiate bargains" and not in his capacity as a lawyer. Accordingly, this action must be and is dismissed. [At 96; emphasis added.]

[29] The Society in the case at bar also submitted that the trial judge had erred in finding *Hellenic* and *Giguère* to be analogous to this case: in *Hellenic*, the notary had, counsel suggested, been bound to prepare the second mortgage to secure the fictitious loan and not to disburse the funds until the mortgage was registered; in *Giguère*, there was a pre-existing relationship between client and notary, and the notary had prepared transfer deeds conveying the client's property to himself. In this case, in contrast, there was no deed drawn or "activity" to be carried out by the notary that could be characterized as coming within the kinds of activities listed in s. 18 of the Act. Nor did Ms. Samji have an existing 'client-notary' relationship with any of the plaintiffs before they contacted her concerning the investment they had been told about by others.

[30] For their part, the plaintiffs emphasized the Court's findings of fact that Ms. Samji's status as a notary public and her representations that the plaintiffs' funds would be held in her trust account had been "integral to the fraud carried out

by her". (Para. 59.) (Counsel also referred us to para. 32 of the trial judge's reasons, but as I read that paragraph, it was a statement of the plaintiffs' position and not of the judge's conclusions.) The plaintiffs submitted that Ms. Samji's preparation of the letter of direction was a "notarial function" and could be regarded as falling under s. 18(d) of the Act – i.e., a contract or "mercantile instrument" required to give effect to a commercial transaction.

[31] The plaintiffs also contended that the Court's conclusion in *Hellenic* did not turn on the fact that the investment was connected to a real estate transaction. Rather, Lowry J. had emphasized that the petitioner had "entrusted its investment to a notary public to be held in trust and that it was received on that basis." (At para. 9.) Similarly here, the plaintiffs gave their funds to Ms. Samji to be held in her notary's trust account in accordance with the letter of direction she had prepared. It may be inferred (although the judge did not find expressly) that the plaintiffs trusted her to hold the funds at least in part because she was a notary and the Society is known to regulate notaries' trust accounts. (See Ms. Samji's summary of the scheme quoted earlier.) Mr. Bennett submitted that, if the investment scheme had been real, the receipt and holding of the funds in trust in furtherance of the transaction would have been "part of her notary practice," and indeed would have been mandatory under Rules 4.01 and 4.05 of the Society.

[32] While counsel for the Society argued that "dressing up" the plaintiffs' investments with the use of a notarial seal and notary's trust account could not transform the investments into transactions falling within s. 18 of the Act, the plaintiffs contended that it was because Ms. Samji reinforced her apparent trustworthiness by these means, that compensation should be made by the Society from the special fund. Mr. Bennett was asked whether the same argument would apply to a person who simply pretended she was a notary, used a seal, and took an investor's money – would a defrauded investor be entitled to compensation from the fund? Mr. Bennett answered 'no'. The fraudulent actor would have to be a lawyer or notary so that it could be said the investor's funds were received by a member of the professional society. After all, the purpose of the fund is to provide a kind of

insurance against defalcation by a member. On this point, the plaintiffs relied heavily on *Giguère* in their factum:

> [*Giguère*] properly focuses the inquiry on the nature of the relationship between the notary and the victim of the notary's fraud, the duties of notaries and the nature of the statutory indemnity fund; *Giguère,* para. 13. The fund is intended to provide a remedy to victims of a rogue notary public who has abused the trust imposed in the office of a notary public to receive funds paid to the notary in trust and then misappropriated those funds. The fact that the rogue notary may not have been acting strictly within the confines of s. 18 of the *Notaries Act* should not preclude the victim of the rogue notary from claiming compensation, where the funds are provided to the notary public as such to hold in the notary's trust account.

[33] Interestingly, counsel for the plaintiffs did not urge upon us the proposition that, as stated by the trial judge at para. 60 of her reasons, the question of a person's capacity should be answered "from the perspective of the person providing the funds" – a proposition I find to be doubtful. Mr. Bennett did urge us, however, to look at this case through the "lens" of protection of the public, which is the object of the fund. Yet even this does not resolve the central issue in this case, since the Act purports to protect the public from conduct carried out by the fraudster only in her capacity as a notary public.

[34] At the end of the day, there is in my view no single factor, nor any one principle, that can be stated as determinative of the question of capacity in a case such as this. I agree with the plaintiffs that whether the notary's conduct is tied strictly to one of the enumerated activities in s. 18 of the Act is not determinative, i.e., that ancillary services normally carried out by a notary might be sufficient – although this may not always be so. I also agree that the use of a notary's trust account does not by itself lead to the conclusion he or she was acting in his or her capacity as a notary, as *Cassels Brock* and *Hazelwood* demonstrate. In my view, what is left in cases where a notary–client relationship does not otherwise exist, is a factual inquiry into whether the fraudster's status and/or capabilities as a notary played a significant role in the perpetration of the fraud or in causing the loss for which compensation is sought. Where this is found to have occurred, it seems to me that the fraudster has acted or purported to act in her capacity as a notary, and that the fund is intended to provide compensation.

[35] In the case at bar, I am persuaded that Ms. Samji's status as a notary and as a member of the defendant Society did play a significant role in her perpetration of the fraud. This was not only a "subjective" perception of the investors. It was an impression Ms. Samji worked to create. As we have seen, the "summary" she prepared for prospective investors emphasized that her trust fund was "operated and managed by a Notary Public duly commissioned in and subject to the laws of British Columbia" and that her trust account was "monitored and audited by the Society of Notaries Public of B.C." in the same manner as the former special compensation fund of the Law Society. She told the plaintiffs she was a notary public because she wanted them to believe she was receiving their funds and directions as such, and she acknowledged at trial that the fact she was a notary was "integral" to her success in persuading people to invest in the scheme.

[36] Although this case is 'close to the line', then, I conclude the trial judge correctly answered common issue number 4 in the affirmative.

[37] With thanks to counsel for their able arguments, I would dismiss this appeal.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Savage"