IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jer v. Samji,*
2014 BCSC 1629

Date: 20140826
Docket: S121627
Registry: Vancouver

Between:

Lawrence Brian Jer, Jun Jer and Janette Scott

Plaintiffs

And

Rashida Samji, Rashida Samji Notary Corporation, Samji & Assoc. Holdings Inc. and Society of Notaries Public of British Columbia

Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

Counsel for the Plaintiffs:	P.R. Bennett M.P. Good R.M. Mogerman N.J. Kovak
Counsel for Society of Notaries Public of British Columbia	B.C. Poston I. Knapp
Counsel for the Samji Defendants:	H.R. Anderson O. Ahmed
Place and Date of Trial:	Vancouver, B.C. June 23 and 24, 2014
Place and Date of Judgment:	Vancouver, B.C. August 26, 2014

Introduction

[1] The trial of the common issues in a class action between the representative plaintiffs, the Jers and Janette Scott, and the defendants, Rashida Samji, Rashida Samji Notary Corporation, Samji & Assoc. Holdings Inc., and the Society of Notaries Public of British Columbia (the "Society"), occurred on June 23 and 24, 2014.

[2] This action arises out of a fraudulent investment scheme promoted by Ms. Samji. The only contested issue at the common issue trial was 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.

[3] The plaintiffs assert claims of fraud, breach of trust and conversion against Ms. Samji, Rashida Samji Notary Corporation, the professional corporation she carried on practice in as "Samji and Associates", and Samji & Assoc. Holdings Inc., a company she owned and controlled.

[4] The claims arise because an investment opportunity, known as the "Mark Anthony Investment", being promoted by Ms. Samji, did not exist. Rather, Ms. Samji was promoting a fraudulent operation in which returns were paid to the investors from their own money or the money paid by subsequent investors, and not from profit earned by an individual or organization running a legitimate business. This type of fraudulent operation is known as a Ponzi scheme.

[5] The claims are brought by the representative plaintiffs on behalf of the following class (the "Class"):

> All persons, other than the Defendants, who have provided funds to invest in the "Mark Anthony Investment" scheme promoted by Samji and who have received payments from the scheme which are lesser in total amount than the total principal amount they invested.

Common Issues

[6] A number of the defendants have settled with the Class. There remain nine Common Issues for determination:

1. Did Ms. Samji make false statements to the Class members regarding the “Mark Anthony Investment” scheme, knowing those statements were false, and provide the Class members with Letters of Direction for execution regarding the “Mark Anthony Investment”, knowing that the terms of those Letters would not be followed, with the intention to deceive the Class members?

2. Were the false statements made by Ms. Samji concerning the “Mark Anthony Investment” scheme, and the false pretense of the Letters of Direction, material misstatements designed by Ms. Samji to induce the Class members to provide Ms. Samji with funds to invest in the “Mark Anthony Investment” scheme?

3. Did Ms. Samji and Samji Holdings knowingly receive funds for investment in the “Mark Anthony Investment” scheme from the Class members under false pretense?

4. Were the funds that the Class members paid to Ms. Samji for investment in the scheme entrusted to and received by Ms. Samji in her capacity as a member of the Society of Notaries Public of British Columbia?

5. Was Ms. Samji a trustee of the funds obtained from the Class members for investment in the “Mark Anthony Investment” scheme?

6. If the answer to Question 5 is yes, did Ms. Samji breach her obligation as a trustee with respect to the funds provided to her by the Class members?

7. If the answer to Question 6 is yes, did Samji Holdings knowingly assist Ms. Samji in the breach of her obligations as a trustee?

8. If the answers to Questions 5 and 6 are yes, are the funds received by Ms. Samji and Samji Holdings in breach of trust subject to a constructive trust and an accounting?

9. Did Ms. Samji and Samji Holdings wrongfully convert or misappropriate the funds which were provided by the Class members to Ms. Samji for investment in the "Mark Anthony Investment" scheme?

[7] None of the defendants contested the answers to Common Issues 1-3, and 5-9 were yes. Ms. Samji agreed she operated the fraudulent investment scheme using the "Mark Anthony Group" name between 2003 and 2012, and that the plaintiffs were investors in the scheme.

[8] As stated above, the only issue contested in this common issues trial is number 4, which is whether the funds the Class members paid for investment in the Mark Anthony Investment scheme were entrusted to and received by Ms. Samji in her capacity as a notary public.

Factual background

[9] Two of the representative plaintiffs, Lawrence Jer and Janette Scott, as well as Ms. Samji testified at the common issues trial.

[10] Ms. Scott's evidence was that she learned about the investment scheme from her sister-in-law. She and her sister-in-law met with Ms. Samji, and Ms. Samji explained the investment scheme to them. Ms. Samji produced a Letter of Direction, and explained that the funds would be put into her notary trust account and not moved without Ms. Scott's approval. Ms. Scott testified that she believed Ms. Samji was a notary public because the seal was an official seal. Ms. Samji told Ms. Scott the rate of return would be 6% for six months per $100,000.

[11] The Letter of Direction Ms. Samji had Ms. Scott sign indicates the funds are to be placed "in trust" and returned by a specific date to her. The Letter of Direction provides:

> These funds are to remain "In Trust" and not to be paid out to any party without specific direction from the undersigned.

[12] Ms. Scott's evidence was that Ms. Samji told her to put the Letter of Direction with her important papers. Ms. Scott assumed a notary public could run an

investment scheme. Ms. Scott believed she was investing in the Mark Anthony Group. She thought the investment was also through a financial institution, Coast Capital Savings. Ms. Scott believed Ms. Samji was somehow associated with both the Mark Anthony Group and Coast Capital Savings.

[13] Mr. Jer's evidence was that he went to meet Ms. Samji with Arvin Patel, his investment advisor at Coast Capital Savings. He understood Ms. Samji was a long-time friend of Mr. Patel, and a notary public.

[14] Mr. Jer understood as a result of the meeting that the investment was an alcohol producing company, the Mark Anthony Group, which was operating in Chile. The funds were to be held in Ms. Samji's notary public trust account and would be used as financial backing for the company. He understood that he and his wife would receive a return of 6% for six months, or 12% per annum on their investment. Mr. Jer also understood that the funds they were investing would be held in trust and could only be accessed by the Jers.

[15] Mr. Jer testified that he signed a number of Letters of Direction, as a new one was signed for each new term. Mr. Jer saw Ms. Samji put her notary seal on the first Letter of Direction he signed, and the rest came through Mr. Patel. Mr. Jer's evidence was that he relied on Ms. Samji's notary seal for a measure of safety.

[16] The Letter of Direction executed by Mr. Jer is similar to the one executed by Ms. Scott, and contains the same provisions that the funds were to be held "in trust" for the Jers and not paid out to any party without specific direction from them.

[17] Mr. Jer's evidence was that he had no prior experience with notaries public or trust accounts. Ms. Samji advised him that her role was as a go-between between the Mark Anthony Group and the investors.

[18] Ms. Samji testified pursuant to a subpoena and notices of intention to call her as an adverse party served on her by the plaintiffs and the Society.

[19] Ms. Samji practised as a notary public for approximately 20 years until the Ponzi scheme was discovered in February 2012. She was suspended by the Society in February 2012, and resigned from the Society in March 2012.

[20] Ms. Samji commenced operating the scheme in 2003. When she started promoting the scheme, Ms. Samji was operating a notary corporation. In 2005, Ms. Samji sold her practice and became a roving notary. As a roving notary, she did not have a trust account. Ms. Samji agreed that the reason she became a roving notary was because she was concerned the trust account of her notary corporation would be audited and the scheme would be exposed.

[21] She continued to practise as a roving notary from 2005 to 2012. While she was practising as a roving notary, she would be retained by the Society from time to time to attend other notaries' offices and inspect their practice, and report to the Society as to how their practices were being conducted.

[22] Ms. Samji conceded that starting in 2003, she made false statements to investors regarding the Mark Anthony Investment, and provided them with Letters of Direction, knowing the terms of the Letters would not be followed. Ms. Samji conceded that her intention was to deceive the potential investors, and her statements to them were designed to induce them to invest with her. The Letter of Direction she had investors sign was a standard form letter she developed for the fraudulent scheme she was promoting. The Letters provided investors were authorizing her notary company, "Samji & Associates", to place the funds in trust and return them to the investor by a specific date unless directed otherwise by the investor.

[23] Ms. Samji testified she met with the Jers and Arvin Patel, an investment advisor at Coast Capital Savings, and identified the Letter of Direction executed by the Jers. Ms. Samji acknowledged she would have explained the investment to the Jers in the same manner she did to all of the investors. 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.

[24] 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%.

[25] 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.

[26] Ms. Samji's evidence is that she met with Janette Scott, the other representative plaintiff, and her sister-in-law, to explain the investment. She made similar false statements to the ones she made to the Jers and other investors.

[27] Ms. Samji agreed that although she wanted investors to believe they were giving her directions as a notary public, she knew as a notary public she could not offer investment advice or act as an investment broker. As well, she agreed that when she received funds from the Jers and Ms. Scott, as well as the other investors, she knew the funds were not for the provision of notary services.

Plaintiffs' Position

[28] The plaintiffs say that the evidence clearly establishes the answer to all of the Common Issues to be determined is yes. They point to the fact that none of the defendants contested Common Issues 1-3 and 5-9. Ms. Samji conceded that she operated a fraudulent scheme using the Mark Anthony Group name between 2003 and January 2012, when the scheme was exposed.

[29] The plaintiffs take the position in regards Common Issue 4 that the funds were advanced by the Class members to Ms. Samji as a notary public to hold in her notary trust account.

[30] The evidence is unequivocal that the Class members' funds were provided to Ms. Samji pursuant to Letters of Direction to "Samji & Associates", which was the company name under which Ms. Samji carried on her notary practice. Ms. Samji represented to investors that this Letter of Direction imposed upon her the obligation as a notary to hold the funds provided to her in trust in her notary trust account.

[31] The evidence is also unequivocal that Ms. Samji told investors that the funds provided to her would be safe because they would be held by her in her notary trust account, which was subject to review and audit by the Society. Further, Ms. Samji deliberately reinforced to the investors that she was receiving the funds as a notary public by impressing the Letters of Direction with her notary seal.

[32] This evidence compels the conclusion that the funds were paid by the Class members to Ms. Samji as a notary public to be held in her notary trust account. This conclusion in turn compels the finding that Ms. Samji received the funds in her capacity as a notary public. It does not matter that Ms. Samji received the funds in that capacity as part of an alleged investment opportunity, and not for the provision of notarial services.

[33] As a result, the answer to Common Issue 4 should also be yes.

The Society's Position

[34] The Society takes no position on the plaintiffs' submission that Ms. Samji committed fraud against the plaintiffs. The Society admits that at all material times Ms. Samji was a member of the Society and had the rights and powers afforded to members, including the capacity to perform the activities listed in s. 18 of *the Notaries Act*, R.S.B.C.1996, c. 334. The Society also admits that Ms. Samji was able to act in the capacity of a notary public at all material times.

[35] However, the Society takes the position that Ms. Samji was not acting in her capacity as a notary public when she was promoting the fraudulent investment scheme and receiving funds from investors. None of the activities she engaged in as part of promoting the fraudulent scheme fell within the scope of a notary public's authorized rights and powers.

[36] For Ms. Samji to have been entrusted with and received funds from the plaintiffs in her capacity as a member of the Society for investment in the Mark Anthony Investment scheme, Ms. Samji would have had to have been, for or in expectation of a fee, performing notarial acts, as authorized by law, for the plaintiffs.

[37] The monies paid to Ms. Samji by the plaintiffs for the Mark Anthony Investment scheme were given to her to purchase, what the plaintiffs believed was, a form of investment that Ms. Samji was selling and/or managing. In this regard, Ms. Samji was acting as an investment broker, or a "middleman to transact business or negotiate bargains", rather than a notary public.

[38] The Society concedes that Ms. Samji perpetrated a fraud on the plaintiffs by taking money from them as a part of an investment scheme she promoted for over 10 years. The Society agrees that during this time she likely used her status a notary public to lend herself credibility during negotiations.

[39] However, the Society submits that the fact she happened to be a notary public at the time does not, in any way, change the fact that she performed no notarial services for the plaintiffs in connection with the investment the plaintiffs believed they were purchasing. As a result, when the plaintiffs gave Ms. Samji their money, they did so on the basis of a client and broker/investment dealer relationship, and not as a part of a notarial transaction which they retained Ms. Samji to perform. Ms Samji thus cannot be said to have received the monies from the plaintiffs in her capacity as a notary public.

[40] As a result, the answer to Common Issue 4 should be no.

Relevant Law

[41] The relevant sections of the *Notaries Act*, provide:

> 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
>
> (i) by which the will-maker directs the will-maker's estate to be distributed immediately on death,
>
> (ii) that provide that if the beneficiaries named in the will predecease the will-maker, there is a gift over to alternative beneficiaries vesting immediately on the death of the will-maker, or
>
> (iii) that provide for the assets of the deceased to vest in the beneficiary or beneficiaries as members of a class not later than the date when the beneficiary or beneficiaries or the youngest of the class attains majority;
>
> I 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;
>
> I administer oaths;
>
> (e.1) draw instruments for the purposes of the *Representation Agreement Act*;

> (e.2) draw instruments relating to health care for the purposes of making advance directives, as defined in the *Health Care (Consent) and Care Facility (Admission) Act*;
>
> (e.3) draw instruments for the purposes of the *Power of Attorney Act*;
>
> (f) perform the duties authorized by an Act.
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> …
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> Special fund
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> 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.
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> …
>
> (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.
>
> …

[42] The term "the person's capacity as a member" used in s. 20 is not an explicitly defined term in the *Notaries Act*.

[43] In *Hellenic Import Export 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.), the petitioner sought review of a decision of the directors of the Society rejecting its claim for compensation under the special fund. In *Hellenic*, a notary public who had been the personal accountant of the principal of the petitioner approached the petitioner with an investment opportunity. The petitioner was to provide short-term financing to an undisclosed client of the notary in connection with the purchase of an apartment building, in exchange for a handsome return on the investment. The petitioner advanced monies to the notary "in trust" in exchange for two cheques post-dated one month later, one for the return of the principal and

another for the return on the investment. The notary undertook to provide second mortgage security for the advance before the funds were released from trust. The notary subsequently converted the funds to his own use. The petitioner sought compensation from the special fund maintained by the Society. The directors of the Society rejected the petitioner's claim on the basis that the transaction between the petitioner and the notary was an investment, and did not involve a notarial function.

[44] In that case, the Society was relying on s. 17 (now s. 20) of the *Notaries Act*, in taking the position the notary was not performing a notarial function when he accepted the funds for investment purposes. The court found the Society's conclusion that the notary had not received the funds from the petitioner "in his capacity as a member" was unreasonable, stating:

> [7] It is not at all clear to me why the committee considered the fact that the petitioner was making an investment in a real estate acquisition rendered the function performed by Mr. Beris other than notarial. The committee appears to have completely overlooked the fact that the money was paid to him in trust and that the petitioner was to receive a second mortgage on the property to secure the investment. The trust was breached when Mr. Beris converted the money to his own use.
>
> [8] There is now no suggestion that the directors' decision is to be supported on the basis that the complainant was not believed. Rather, counsel for the Society contends that there was nothing peculiarly notarial about the transaction; Mr. Beris may as well have been an investment broker or an accountant as a notary. Counsel says the fact that the monies were advance[d] to Mr. Beris in trust does not alter the fundamental character of the transaction: Mr. Beris did not receive the money in his capacity as a member of the Society. I disagree.
>
> [9] It is, in my view, beyond question that the petitioner entrusted its investment 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 Mr. Beris 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.
>
> [10] I consider the directors' interpretation of what constitutes the receipt of money by one of the Society's members, in his capacity as a member, under the legislation, to have been unreasonable. It cannot be said that Mr. Beris received the petitioner's money other than in his capacity as a notary and member of the Society.

[45] In *Giguère v. Chambre des notaires du Québec*, 2004 SCC 1, a notary in Quebec had looked after the legal affairs of an elderly woman, who began to decline mentally. The notary took advantage of the woman's condition and defrauded her by having her sell her house to him for $1. The notary was ordered to reimburse the woman, but at that point he was bankrupt.

[46] A claim was made against the indemnity fund the Chambre was statutorily required to establish. Under the regulation establishing the fund, 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" (at para. 13). The Chambre denied the claim on the basis that the transaction was personal and not professional in nature. The Court found that characterization of the relationship was in error, stating:

> [27] 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.
>
> [28] To conclude, the transaction by which Mrs. Hamel unwittingly sold her home to her notary for the derisory sum of $1 cannot in any sense be reasonably characterized as personal rather than professional. In accepting the Indemnity Committee's conclusion that Mr. Filiatrault's acts were personal rather than professional, and were therefore beyond the scope of the indemnity fund, the Administrative Committee made a fundamental error. One might object that it is a legal error and is shielded by the privative clause in Regulation s. 4.03. But it is so gross an error, predicated on such a basic misunderstanding of the professional responsibilities of notaries in Quebec law, the relationship between Mrs. Hamel and Mr. Filiatrault, and the purposes of the indemnity fund that this Court cannot permit it to stand. It is a patently unreasonable result.

[47] *Cassels Brock & Blackwell v. Lawpro*, 2007 ONCA 122, dealt with an exclusionary clause in a errors and omissions policy of insurance for a lawyer. The policy contained a clause excluding claims arising out of the provision of investment advice and/or services, unless as a direct consequence of the performance of professional services which was defined as the "practice of law". The insured law firm appealed the dismissal of its application for a declaration that the insurer had a duty to defend it. The court dismissed the appeal, stating that in the circumstances of the case, the fact that a law firm's trust account was used as an investment vehicle does not of itself amount to the performance of professional services, and therefore the claim was excluded.

Application of the Law to the Facts

[48] The Society argues that in order to find Ms. Samji received the funds *in her capacity as a notary public*, then, she must have received those funds from a client as a part of the performance of a statutorily authorized notarial act for that client. An example of such a situation would be a real estate conveyance or transaction. The Society argues this was the case in *Hellenic*, where the court, overturning the directors of the Society in similar circumstances, found that the directors erred in solely considering the fact that the notary was selling an investment. Rather, the court noted that the applicant's money had been paid to the notary in his capacity as such, as a part of a mortgage transaction.

[49] The Society argues the analysis conducted in *Cassels Brock & Blackwell* is the sensible approach. It ensures that misappropriations of funds by someone who merely *happens to be a notary public*, are not treated the same as misappropriations of funds by someone *while performing their duties as a notary public*. However, in my view, *Cassels Brock & Blackwell* does not provide assistance as it was dealing with a specific exclusion clause in an insurance policy, and not the statutory requirements of a Society to maintain the special fund.

[50] I do not agree with the Society that the *Hellenic* case is distinguishable on its facts. In *Hellenic*, the notary was purportedly promoting an investment opportunity

on behalf of an undisclosed client, just as Ms. Samji was purportedly promoting an investment opportunity on behalf of the "Mark Anthony Group". The fact that the notary in *Hellenic* was promoting an investment opportunity did not justify the Society's conclusion that the investment funds provided to the notary in trust were not entrusted to or received by the notary *in his capacity as a notary*.

[51] The Society argues that *Hellenic* is distinguishable because Ms. Samji was not performing a notarial function in receiving investors' funds in connection with the "Mark Anthony Investment" scheme, whereas the notary in *Hellenic* was to prepare a second mortgage before the funds were released. However, on my reading of the case, 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.

[52] 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.

[53] Section 18(a) of the *Notaries Act* provides that notaries can draw "contracts … and other mercantile instruments in British Columbia". This empowers notaries to draw instruments necessary to implement or facilitate a commercial transaction: *Re Powers of Notaries Public in British Columbia*, [1969] B.C.J. No. 444 (C.A.) at paras. 8-9; *Harris Co. Ltd. v. Rur. Mun. Bjorkdale*, [1929] 2 D.L.R. 507 at 512; *Pearse & Edworthy Bros. v. Rur. Mun. Bjorkdale*, [1929] 2 D.L.R. 537 at paras. 12-16.

[54] Ms. Samji prepared the Letters of Direction to implement what was represented to be a commercial transaction between the investors and the "Mark Anthony Group". The Letters of Direction were instruments necessary to give effect to that transaction. It is no different than if Ms. Samji had prepared a promissory note

purportedly signed by the "Mark Anthony Group" for the interest payments the investors were to receive.

[55] I agree with the plaintiffs that if the "Mark Anthony Investment" had been a real investment opportunity, the drawing of the Letters of Direction and the holding of the funds in Ms. Samji's trust account pursuant to the Letter of Direction would have been within her rights and powers as a notary under s. 18(a) of the *Notaries Act*. Accordingly, I am of the opinion that the reasoning in *Hellenic* applies in the circumstances of this case. As a result, I conclude that the investors' funds were received by and entrusted to Ms. Samji *in her capacity as a notary public*.

[56] The Society submits the *Giguère* case has no application because the statutory schemes governing notaries differ between Quebec and British Columbia. I agree that given the statutory difference between Quebec and British Columbia, the *Giguère* case provides limited assistance in determining what constitutes a notary acting within his or her capacity as a notary public in British Columbia.

[57] However, I am of the view the policy reasoning in *Giguère* at paras. 27-28 is applicable to this case. I agree with the plaintiffs that the argument advanced by the Society 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.

[58] 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.

[59] 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 e78thical 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.

[60] 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.

[61] For the reasons set out, I have concluded the answer to Common Issue 4, i.e. "did Ms. Samji receive the funds in her capacity as a notary public" is yes.

Conclusion

[62] The answers to Common Issues 1 - 9 are yes.

"Gerow J."