

CANADA / JUDGMENT

Vickram v. Samji

2018 BCSC 1848

COURT

Supreme Court of British Columbia

DECIDED

25 October 2018

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2018 BCSC 1848 Vickram v. Samji

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vickram v. Samji,

2018 BCSC 1848

Date: 20181025

Docket: S140587

Registry: Vancouver

Between:

Parminder Vickram, Cameron Vickram,

Mohinder Singh Sandhu and Atul K. Mehra

Plaintiffs

And

Rashida Samji, Rashida Samji Notary Corporation, Samji & Assoc. Holdings Inc., Toronto
Dominion Bank, Royal Bank of Canada, Society of Notaries Public of British Columbia, Kanester
Johal, Kanester Johal Holdings Ltd., Narinder S. Johal and Satpal S. Johal, Ahluwalia, Arbitrust Ag
- Jessani, Bharwani, Cardiff, Chan, Chatur, Cumberland Ltd. - Manek, Dhanani, Dharamshi
(Chagani), Dhesi, Ebrahim - Babaee, Hackett, Jajam Holdings Inc.

- Jamal, Nurdin Jesani, Mirza and Shahnaz Jesani, Jiwa, Kainth, Kambo, Keshvani and Grewal,
Kilburn, King, Mayo, Mayo Group, Parkinton Corp. Ltd. - Kassam, Arvindbhai B. Patel, Rai,
Samji, Schonberger, Shams, Sicherman, Ujagir and Malkit Singh, Sinha, Soorani,
Stockbrugger, Tang, Kusta (Gus) Teng, Thaker, Vohora, Walker, Whitmore, Shivji, Kelly Teng,
Thobani, Varpaul

Defendants

Before: Master Taylor

Reasons for Judgment

Counsel for the Plaintiffs:

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Counsel for the Defendant Royal Bank of Canada:

S. Strukoff, Q.C.

Counsel for the Defendant Toronto-Dominion Bank:

J. Yates

Counsel for the Defendants Kanester Johal, Kanester Johal Holdings Ltd., Narinder S. Johal and Satpal S. Johal

R. Darby

Place and Date of Trial/Hearing:

Vancouver, B.C.

August 22, 2018

Place and Date of Judgment:

Vancouver, B.C.

October 25, 2018

Introduction

- [1] The first-named defendant in this action, Rashida Samji, was a member of the Society of Notaries Public of British Columbia from June 9, 1988, until sometime in early 2012. It is alleged that she operated a Ponzi scheme by taking money from clients with the promise to hold their monies in trust and to invest the funds into an investment vehicle called the Mark Anthony Investment, with a promise of returns greater than most banks or investment plans could produce.
- [2] The plaintiffs are certain persons who allege having invested in the Mark Anthony Investment scheme with certain millions of dollars, either individually, or collectively.
- [3] On September 10, 2013, Madam Justice Gerow certified a class action against Ms. Samji and other defendants on behalf of all investors in the Ponzi scheme. The plaintiffs in the instant action opted out of the class action.

- [4] On January 24, 2014, the plaintiffs in this action issued a notice of civil claim against the defendants. The plaintiffs filed an amended notice of civil claim on October 17, 2016.
- [5] On February 13, 2018, the plaintiffs filed a notice of trial setting the action down for a 19-day trial to commence on June 3, 2019.
- [6] On February 19, 2018, the plaintiffs filed a notice requiring trial by Jury (the "Jury Notice"). By consent, the deadline for the defendants to challenge the Jury Notice was extended.
- [7] The applications before the court are the applications of the defendants Royal Bank of Canada, the Toronto-Dominion Bank, Kanester Johal, Kanester Johal Holdings Ltd., Narinder S. Johal, and Satpal S. Johal, in which all the applicants seek an order that the trial in this action be heard by the court without a jury. Each applicant has filed a reply to the other applicants' applications, and each consent to the others' applications.
- [8] The Kanester Johal defendants are a chartered accountancy firm in private practice which, the plaintiffs allege, kept the books of the Samji defendants, recorded transactions, prepared general ledgers and financial statements.

Discussion

- [9] All applicants begin the legal basis of their applications by saying that the trial of this action must be heard without a jury because it relates to the execution of a trust, and cite Rule 12-6(2)(e) of the Supreme Court Civil Rules as authority for this proposition.
- [10] Rule 12-6(2)(3) read as follows:
 - (2) A trial must be heard by the court without a jury if the trial relates to
 - (e) the execution of trusts,
- [11] In contrast, the plaintiffs say that the trial is not about trusts. Indeed, the plaintiffs say, in their response to the applications, that while the facts of the case concern operation by the Samji defendants of a fraudulent Ponzi scheme, which necessarily involved misrepresentation and misappropriation of the assets of others, and which undoubtedly gave rise, consequently, to trust obligations, those facts are not controversial, and trust is, by no means, the only area of law engaged and the existence of trust will not be an issue at trial.
- [12] The plaintiffs submit that the conduct of Samji (whether viewed as breach of trust, theft, fraud, or breach of the Competition Act, R.S.C., 1985, c. C-34) is the background for the issues at the trial. The plaintiffs maintain that the causes of action are negligence on the part of the banks, knowing assistance in breach of trust on the part of the banks, and negligent failure to investigate by the banks and the accountants. Thus, say the plaintiffs, whether or not there is a breach of trust, the central issue in the trial is whether the defendants in the instant application knew or ought to have known of a risk of loss from operation of the Ponzi scheme and whether that knowledge gave rise to a duty to investigate, or a duty to warn, owed to "investors".

- [13] The plaintiffs have defined the central issue as not a question of equity, but rather a matter of fact and law involving application (or not) of the "neighbour principle".
- [14] In the submissions of the defendants, this simplifies the issues and the trial far too much, for the defendants maintain that the core of the plaintiffs' pleadings explicitly relate to the execution of a trust.
- [15] The defendants suggest that in order to determine whether or not Rule 12-6(2)(e) applies, courts focus on the substance of the claim, rather than its form. Hence, the main or central issue in the case relates to the execution of a trust. So, if the relationship of the parties was one of trust, the allegations against the defendants, and thus the issues to be tried relate to the execution of that trust. The defendants rely on the decision of the British Columbia Court of Appeal in *Hiscott v. Canaccord Capital Corporation*, 2010 BCCA 402 at paras. 14-15 in support of this proposition.
- [16] In *Hiscott*, the amended statement of claim alleged that the defendant financial advisor, who was employed by the defendant brokerage house, held investment funds in trust for the plaintiff client, and that the client had suffered a loss as a result of the financial advisor's negligent management of the investment funds and the failure of the brokerage house to properly supervise the financial advisor. In chambers, the court found that the trial of the action related to the execution of trusts, and must be heard by the court without a jury. On appeal, the Court of Appeal (*supra*) said this at paras. 13-14:

13 I agree with the Court in *Han v Cho* that the existence of a collateral issue involving trust does not by itself bring an action within the prohibition of para. (25)(e) of Rule 39; nor does the fact that the plaintiff may be seeking a constructive trust. (On this point see also *C.I.B.C. v. Wedeene River Contracting Co.* (1992), 7 C.P.C. (3d) 402 (B.C.S.C.)) The Court in *Han v. Cho* concluded, correctly in my view, that the case was not about the management or execution of a trust but was about fraudulent misrepresentation. The fact the plaintiffs were seeking to follow the proceeds of the fraud into another property was important only to remedy. The jury notice was permitted to stand.

14 I do not agree, however, that the case at bar is governed by *Han v. Cho*. Neither the wording of the Rule nor the authorities require that the cause of action be one of breach of trust, nor that an equitable remedy be sought. The question is whether the main or central issue in the case relates to the execution of a trust. Here, although the parties signed a contract and obviously have contractual rights and obligations, that very contract confirms that their relationship is one of trust. The defendants were allegedly to manage a fund belonging to and held in trust for the plaintiff and Mr. Hackett. The complaint is that they did so improperly or negligently. [Emphasis in original.]

- [17] Relying on Hiscott the defendants say that in the instant case, the central issue in the case relates to the execution of a trust and show, by example, references to the execution of a trust by Ms. Samji and breach of such trust by her and her companies as set out in the amended notice of civil claim as follows:

Part 1: Statement of Facts

25. . . The Plaintiffs delivered monies to Samji with the express intention that those monies be held in a trust account pursuant to s. 23(2) of the Notaries Act (RSBC 1996) c. 334 and not otherwise dealt with, other than to be returned to the Plaintiffs upon request.
27. The Defendants represented to the Plaintiffs, among other things, that:
- b. the monies would be held in Samji's Notary Public trust account and would not be transferred from that trust account without the express permission of the Plaintiffs;
46. At all material times, Samji knew that the funds received by her from the Plaintiffs were trust monies, both expressly and pursuant to their designation as trust monies by s. 23(2) of the Notaries Act.
47. At all material times, Samji was required by s. 23(2) of the Notaries Act to deposit the monies received from the Plaintiffs in a trust account designated as a trust account in both the records of Samji's notary practice and the records of the Financial Institutions.
48. Samji deliberately deposited the monies received from the Plaintiffs into non-trust accounts of Samji and Samji Holdings, as set out herein, knowingly in breach of s. 23(2) of the Notaries Act and the express and implied terms of trust upon which Samji received the funds from the Plaintiffs. ...

Part 3: Legal Basis

1. In her capacity as a Notary Public, under ss. 23 and 54(1) of the Notaries Act, and according to the standard terms of the "Letter of Direction", Samji is a trustee and the Plaintiffs are beneficiaries with respect to funds placed with Samji. ...
3. Samji breached her duties as trustee and her fiduciary duty to the Plaintiffs when she intentionally failed to deposit the Plaintiffs' monies into a trust account. Samji further breached her duties as trustee and her fiduciary duty to the Plaintiffs when she paid out these monies without specific direction from the Plaintiffs.
- [18] The defendants submit that it is Ms. Samji's execution and breach of a trust that is the original and underlying cause of the plaintiff's loss, and her execution and breach of a trust constitutes both the factual and legal foundation for the action and the plaintiff's claims against all of the defendants.

- [19] The plaintiffs have a completely different view of the matter. As the plaintiffs set out in their response to the three notices of application, they take the position that the existence of trust will not be an issue at trial, for there is no claim that will be advanced at trial against Rashida Samji or either of her two corporations for the following reasons:
- a) All three defendants are undischarged Bankrupts and their assets continue to be distributed by the trustee in bankruptcy to the plaintiffs and others;
 - b) Matters of assets held by the Samji defendants in trust for any other persons have been and are being administered by the trustee and the bankruptcy court in the bankruptcy action, which process has decided the plaintiff's claims to trust entitlements from the Samji defendants, all of which were considered and rejected; and
 - c) All actions against the Samji defendants are stayed by operation of the Bankruptcy and Insolvency Act, RSC 1985, c. B-3, section 69 and other sections absent court order which has not been sought or obtained.
- [20] The plaintiffs also say that they will not be advancing a claim against the Society of Notaries Public (the "Society") as they have entered into a B.C. Ferries settlement with the Society. Nor will a claim be advanced against the net profiteers as, since the commencement of this action, the trustee in bankruptcy has made claims against the net profiteers and distributed the proceeds to creditors, including the plaintiffs. Due to these actions by the trustee, the plaintiffs have not served any of the net profiteers named in the style of cause, and, as a result, the action against them has expired.
- [21] The plaintiffs maintain that courts have drawn a distinction between the existence of a trust as opposed to the execution or management of a trust, and cite *Canadian Imperial Bank of Commerce v. Wedeene Contracting Co.* (1992), 7 C.P.C. (3d) 402 (B.C.S.C.); and *Han v. Cho*, 2008 BCSC 1192 at para. 47, to make the point that where "execution" is susceptible of two meanings, in light of the importance of the right to a jury, the more narrow meaning which preserves the right to a jury should be applied.
- [22] With the greatest respect to the plaintiffs, the issue isn't the narrow interpretation of the rule. In this case, as in *Hiscott* (supra) the issue is whether the main or central issue in the case relates to the execution of a trust.
- [23] In *Coodin v. Hodgkinson* (1983), 49 B.C.L.R. 359 (S.C.), the plaintiff sought a jury trial where a stockbroker mismanaged the plaintiff's funds, after the plaintiff turned over to the defendant a large sum of money to be invested through a discretionary account. The plaintiff's pleadings, inter alia, suggested that the plaintiff and defendants were in a fiduciary relationship in which the defendants sought, obtained and enjoyed the trust of the plaintiff, and the plaintiff sought restitution of the funds which had been entrusted to the defendant. Justice Ruttan held that the claim comes within the ambit of Rule 39(18)(e), i.e., "the execution of trusts", since the chief issue in the case was related to a management of a trust fund.

[24] In the case at bar, I am satisfied that the main or central issue relates to the execution of a trust, and that *Han v. Cho*, 2008 BCSC 1192 is distinguishable on the basis that that case was not about the management or execution of a trust, but was about fraudulent misrepresentation. Rather, the allegations against the defendants is that both the Royal Bank and Toronto-Dominion Canada Trust "knowingly assisted Samji in breaching her trust obligations to the plaintiff and that the defendant banks had actual knowledge of Samji's breaches of trust, but failed to prevent their facilities from being used for fraudulent purposes".

Decision regarding the Jury Notice

[25] Having reached the conclusion that the main or central issue in this case relates to the execution of a trust, I determine that this case falls within R. 12-6(2)(e) which prohibits jury trials when the main issue in the action is "the execution of trust". Accordingly, the defendants' notices of application are allowed, and the trial of this action is to be heard without a jury.

[26] Since costs follow the event, the defendants are entitled to their costs.

"Master Taylor"

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