

CANADA / JUDGMENT

Vickram v. Samji

2019 BCSC 594

COURT

Supreme Court of British Columbia

DECIDED

17 April 2019

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2019 BCSC 594 Vickram v. Samji IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Vickram v. Samji, 2019 BCSC 594 Date: 20190417 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: The Honourable Mr. Justice McEwan On appeal from: An order of the Supreme Court of British Columbia, dated October 25, 2018 (Vickram v. Samji, 2018 BCSC 1848, S140587) Reasons for Judgment Counsel for Plaintiffs: D. Sutherland, Q.C. Counsel for the Defendants, Kanester Johal, Kanester Johal Holdings Ltd., Narinder S. Johal and Satpal S. Johal: R. Darby Counsel for the Defendant, the Toronto- Dominion Bank: J. Yates Counsel for the Defendant, Royal Bank of Canada: S. Strukoff, Q.C. Place and Date of Trial/Hearing: Vancouver, B.C. January 11, 2019 Place and Date of Judgment: Vancouver, B.C. April 17, 2019

- [1] This is an appeal from the decision of a Master striking a jury notice.
- [2] The Master set out the underlying facts as follows: 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. The plaintiffs are certain persons who allege having invested in the Mark Anthony Investment scheme with certain millions of dollars, either individually, or collectively. 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.

- [3] The trial of this action is set for 19 days, commencing June 3, 2019. On February 19, 2018, the plaintiffs filed a notice requiring trial by jury.
- [4] On October 20, 2018, the defendants, Royal Bank of Canada, Toronto-Dominion Bank, Kanester Johal, Kanester Johal Holdings Ltd., Narinder S. Johal, and Satpal S. Johal obtained an order from the Master that the action be heard by judge alone.
- [5] The arguments before the Master centered on whether the action relates to the execution of a trust. Rule 12-6(2)(e) of the Supreme Court Civil Rules reads:
 - (2) A trial must be heard by the court without a jury if the trial relates to
 - (e) the execution of trusts.
- [6] Before the Master, the plaintiffs took the position that, although the Ponzi scheme necessarily involved misrepresentation and misappropriation of the assets of others, which does involve trust obligation, those facts are not controversial, and the existence of trust will not be an issue at trial.
- [7] The plaintiffs argued that Samji's conduct is only the background for the central issue at trial: whether the defendants 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. According to the plaintiffs, the central issue is not equity, but a matter of fact and law involving application of the "neighbour principle".
- [8] The defendants maintains that the core of the plaintiffs' pleadings explicitly relate to the execution of a trust.
- [9] After reviewing the authorities and the pleadings, the Master concluded: 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. 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 that both the Royal Bank and Toronto-Dominion Canada Trust "knowingly assisted Samji in breaching her trust obligation to the plaintiff and that the defendant banks had actual knowledge of Samji's breach of trust, but failed to prevent their facilities from being used for fraudulent purposes. Issues on Appeal
- [10] The plaintiffs allege that:
 - (a) the Master erred in concluding that this case falls within Rule 12-6(2)(e) of the Rules, and

- (b) the Master erred in concluding that the main or central issue in this case related to the "execution of trusts" instead of merely "creation of trust," which the plaintiffs say does not fall within Rule 12-6(2)(e). Standard of Review
- [11] The plaintiffs refer to the following statement from *Abermin Corp. v. Granges Exploration Ltd.* (1990) 45 B.C.L.R. (2d) 188 (B.C.S.C.) to support their position that the standard of review is correctness, leaving the reviewing judge unfettered: An appeal from a master's order in a purely interlocutory matter should not be entertained unless the order was clearly wrong. However, where the ruling of the master raises questions which are vital to the final issue in the case, or results in one of those final orders which a master is permitted to make, a rehearing is the appropriate form of appeal. Unless an order for the production of fresh evidence is made, that rehearing will proceed on the basis of the material which was before the master. In those latter situations, even where the exercise of discretion is involved the judge appealed to may quite properly substitute his own view for that of the master.
- [12] The plaintiffs say the issues on appeal are questions of law. Once those issues are decided, the application of Rule 12-6(2)(e) or not is automatic. Therefore the standard should be correctness.
- [13] In the alternative, if the decision is one of mixed fact and law, the Master was clearly wrong, and as the interlocutory ruling raises questions vital to the final issue of the case, a rehearing in which the judge appealed to may substitute his own discretion for that of the master is appropriate (*Stoicevski v. Casement*, 1983 CanLII 1679 (Ont. CA)).
- [14] The defendants each submitted separate arguments, but all take the standard of review to determine whether the Master was clearly wrong. An application to strike a jury notice is an interlocutory matter, and absent a material error of law or fact, a Master's decision in an interlocutory matter is to be accorded deference (*Raj v. Khosravi*, 2015 BCCA 49; *Liszkay v. Robinson*, 1999 Carswell BC 2105; *Speers v. Drake*, 2001 BCSC 146). *Stoicevski v. Casement*, relied on by the plaintiffs, specifically mentioned decisions respecting jury notices as subject to the "clearly wrong" test. Positions of the Parties on Appeal
- [15] The plaintiffs refer to cases referred to in *Han v. Cho*, (2008) 87 BCLR (4th) 132, the decision referred to by the Master, as breaking down into two categories: those where the main or central issue was found to be "execution of trust", and those where that was not found to be the main or central issue.
- [16] The plaintiffs repeat the arguments set out by the Master: the issue in this case is not "execution of trust". The existence of the trust will not be an issue at trial. It is mere background to the issues between the plaintiffs and the banks and accountants. The issues at trial will be based on the causes of action of knowing assistance in breach of trust, negligent failure to investigate, and negligence.

- [17] The defendants have each filed separate arguments, but their positions are similar. They assert that the issue of the execution of a trust will not be mere background. The trier of fact will have to consider it. The pleadings contain reference to "breaches of a trust relationship". That must involve consideration of the execution of a trust.
- [18] The trier of fact will have to go beyond merely deciding if a trust exists. It will have to apply the test for knowing assistance in breach of trust, which is:
- (a) there must be a trust;
 - (b) the trust was breached fraudulently and dishonestly;
 - (c) the stranger to the trust relations (i.e. the banks in this case) had actual knowledge of the breach of trust; and
 - (d) the stranger to the trust relationship participated in or assisted the breach of trust. *Gold v. Rosenberg*, [1997] 3 SCR 767 (CanLII), at para. 34; *PricewaterhouseCoopers Inc. v. Flash & The Boys, LLC*, 2014 BCSC 1093, at para. 11.
- [19] The defendants say the trier of fact will necessarily be required to consider the execution of a trust in order to determine whether Ms. Samji breached a trust and, in particular, whether the banks' actions or inaction can be said to constitute participation in or assistance of that breach. Those issues are central, not collateral or peripheral.
- [20] The plaintiffs seek to distinguish *Hiscott v. Canaccord Capital Corporation* (2010) 295 BCAC 162, relied on by the Master, and by the respondents to this appeal. The plaintiffs say that case was about a contractual issue concerning a trust agreement. Here, the trust agreement between the plaintiffs and the Samji defendants does not affect the issues between the plaintiffs and the banks and accountants. While the existence of the trust is in issue, the execution of the trust is not. Discussion
- [21] Whether the test is "clearly wrong" or correctness, in my view, the Master's decision should stand.
- [22] The mere complexity of the arguments put forward and the voluminous materials in support of this appeal show how nuanced and subtle the issues are. It may only become clear during trial exactly where the emphasis should be placed, and what issues are crucial. To be half way through a jury trial and discover that, indeed, the execution of the trust is indeed a central issue would be very unfortunate.
- [23] The appeal is dismissed. "McEwan J."

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